THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO **Plaintiff**	)	**CASE NO. CR 462510**
	)	**MEMORANDUM OF OPINION AND ORDER**
vs	)	
FREDERICK BURK **Defendant**	)	

FRIEDMAN, J.:

{¶1} On February 17, 2005, the grand jury returned an indictment charging the defendant with domestic violence, in violation of Ohio Revised Code §2919.25, a felony of the fourth degree. The single count in the indictment charges that, on January 6, 2005, and in Cuyahoga County, Ohio, he "unlawfully did knowingly cause or attempt to cause physical harm to Barbara Sanders, a family or household member…." The indictment further alleges that the defendant has a prior conviction for domestic violence, having been convicted of that offense in Erie County, Ohio, on December 3, 2002 (Case No. 2002-CR-181).

{¶2} Under Ohio law a first offense domestic violence charge is a first degree misdemeanor, with a potential jail sentence of up to six months and a fine of up to one thousand dollars. Where a defendant has a prior conviction for domestic violence or any of certain other specified offenses, a subsequent domestic violence charge is a fourth degree felony, with a possible prison term of six to twelve months and a fine of up to twenty-five hundred dollars. Yet another successive conviction becomes a third degree felony, with a potential prison term of one to five years and a fine of as much as $10,000.00. R.C. §2919.35(D), as amended effective January 8, 2004.

{¶3} The Court further notes that assault (Revised Code §2903.13) (commonly referred to as "simple assault") is a lesser included offense to a charge of domestic violence. *State v. Quiles* (Ohio App. 8 Dist.), 2005-Ohio-388, 2005 WL 273035. Assault consists of knowingly causing or attempting to cause physical harm to another. Unlike domestic violence, however, assault may not be ele-

vated to a felony, regardless of whether there is a prior conviction.[1] Thus, for the purposes of this case, the *only* distinction between the two offenses is whether the victim is "a family or household member." An assault upon a stranger, a friend, a co-worker is always a misdemeanor, while an assault upon a "family or household member" is a misdemeanor the first time and a felony thereafter.

{¶4} For the purpose of determining whether an assault may in fact constitute domestic violence, Ohio Revised Code §2919.25(F)(1) defines "family or household member" as:

> (a) Any of the following who is residing or has resided with the offender:
> (i) A spouse, a person living as a spouse, or a former spouse of the offender;
> (ii) A parent or a child of the offender, or another person related by consanguinity or affinity[2] to the offender;
> (iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.
> (b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.

{¶5} The statute further defines "person living as a spouse" as: "a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question." Revised Code §2919.25(F)(2).

{¶6} In the instant case the indictment fails to specify in what sense the victim was a "family or household member" of the defendant. Furthermore, by failing to address the nature of the relationship between the defendant and the victim, both the State and the defendant appear to be conceding that, at the time of the alleged incident, they were living together as family or household members within the meaning of R.C. §2919.25.

{¶7} Although the domestic violence statute has been amended several times since its original passage in 1979, its essence has remained unchanged, including its definition of "person living as a spouse." It may be noted that, although the statute refers to "common law marital relationship", that status was in most respects abolished in Ohio as of October 10, 1991.[3]

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[1] If an assault is committed with a deadly weapon or causes serious injury, it may be charged as a felonious assault, Ohio R. C. §2913.11; however, that issue is not relevant to the case now before this Court.

[2] Soltesz v. City of Sandusky (2002, 6th Circuit,) 49 Fed. Appx. 522, 525, 2002 WL 31371980: "Ohio courts have consistently defined 'affinity' as 'the relationship which arises by marriage *See* *Chinn v. State*, 47 Ohio St. 575, 26 N.E. 986, 987 (1890); *State v. Peine*, No. 8-202, 1982 WL 5837 at *1 (Ohio Ct.App. Mar. 1, 1982)."between one of the parties and the blood relations of the other' or as 'relationship by marriage.' *See* *Chinn v. State*, 47 Ohio St. 575, 26 N.E. 986, 987 (1890); *State v. Peine*, No. 8-202, 1982 WL 5837 at *1 (Ohio Ct.App. Mar. 1, 1982)."

[3] R.C. §3105.12(B) (1): On and after October 10, 1991, except as provided in divisions (B)(2) and (3) of this section, common law marriages are prohibited in this state, and the marriage of a man and woman may occur in this state only

{¶8} At the General Election held November 2, 2004, the voters of Ohio approved Issue 1, a constitutional amendment (Art. XV, Section 11) that was promoted as defending the institution of marriage by restricting it to the union of one man and one woman. That definition is in fact set forth in the first sentence of the provision. However, the second sentence further provides that: "This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."

{¶9} Before the Court at this time is the motion of the defendant to dismiss the indictment. It is his contention that, as applied to unmarried persons who are cohabiting, Ohio's domestic violence statute in essence recognizes a legal status for such relationships that in a crucial respect "intends to approximate the design, qualities, significance or effect of marriage." Defendant argues that, to the extent this is true, R.C. §2919.25 is in conflict with Art. XV, Section 11, of the Ohio Constitution, and thus is unenforceable.[4]

{¶10} The State contends that the defendant's reading of Art. XV, §11, is improperly broad, and that the amendment instead "…simply defines the legal scope of marriage in Ohio." Thus construed, the State argues, the amendment "…does not affect unrelated criminal statutes such as Ohio's law against domestic violence, which regulates and defines criminal conduct." This Court has read, and re-read Art. XV, §11, again and again, and must conclude that, based upon the specific language in the two measures and upon a consistent history of the relevant case law, in this respect the State's position simply cannot withstand serious scrutiny.

{¶11} On its face the definition of "the legal scope of marriage in Ohio" is fully and unambiguously set forth in the first sentence of the amendment; had the text ended there, this issue would not be before the Court. However, the text does not stop with the first sentence, but adds a further directive that: "The State and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." At this point Art. XV, §11, no longer is merely definitional, but rather im-

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if the marriage is solemnized by a person described in section 3101.08 of the Revised Code and only if the marriage otherwise is in compliance with Chapter 3101. of the Revised Code.

[4] The Court observes that the defendant has not complied with R.C. §2721.12, which requires that a party challenging the constitutionality of a statute serve the Attorney General with the complaint. However, as the Court of Appeals for Cuyahoga County held in *State v. Bradley*, (8th District, July 11, 2002), No. 79094, 2002 WL 1500464, 2002-Ohio-3540, this mandate applies only to actions in which declaratory relief is sought. As in that action, no such relief is requested in this case. "Moreover, no challenge to the constitutionality of the statute was identified in a complaint, as the statute envisioned. Thus the requirement that the attorney general be notified does not apply to the case at bar." *Id.*

poses a specific prohibition upon the State and all its political subdivisions. The power to define is the power to create, to limit, to expand, and to destroy. By mandating that the State deny any legal recognition "that intends to approximate the design, qualities, significance or effect of marriage" to relationships between unmarried individuals, the Ohio Constitution now appears to threaten the limited protections previously available to them by law.

{¶12} It may be argued that the intent of the second sentence was simply to preclude recognition by the State of so-called "domestic partnerships" or "civil unions" as a back-door means of sanctioning same-sex relationships. However, by its explicit terms Art. XV, §11, is not so limited, but clearly is worded as broadly as possible, so as to encompass any quasi-marital relationships—whether they be same-sex or opposite-sex.

{¶13} Thanks to the plain language of R. C. §2919.25(F), and to more than a quarter-century of case law construing that language, we know rather precisely who is subject to the protections afforded by Ohio's domestic violence law—not only persons related by blood or marriage (such as a current or former spouse, a parent or child, etc.) but also a defined class of individuals who reside with, or who have resided with the offender: "a person living as a spouse". As has been noted, the statute further defines, with great specificity, "person living as a spouse" as:

> a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.

As the State points out in its Brief, the Ohio Supreme Court considered this precise issue exhaustively in *State v. Williams* (1997) 79 Ohio St. 3d 459, 465. After reviewing cases from various courts in Ohio, California, and New Jersey, as well as numerous treatises and law review articles, the Court stated:

> [W]e conclude that the essential elements of 'cohabitation' are (1) sharing of familial or financial responsibilities and (2) consortium. R. C. 2919.25(E)(2) and related statutes. Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations. These factors are unique to each case and how much weight, if any, to give to each of these factors must be decided on a case-by-case basis by the trier of fact.

This Court must ask—if only rhetorically: what do these factors describe, if it not be elements of "the design, qualities, significance or effect of marriage" in the minds of the parties to such relation-

ships?[5] Such factors clearly exclude other arrangements under which people may share living quarters: college roommates or mere friends may share a house, or even a bedroom, but share none of the other attributes of "cohabitation" under the *Williams* analysis. Short term flings or other casual relationships do not entail the degree of commitment and shared familial or financial responsibilities. Note, in this regard, the proviso in *Williams*, at 465, that: "Short period of living together without mutual support and without regarding the situation as a husband/wife situation is not cohabitation."

{¶14} This was the conclusion of the Hamilton County Municipal Court in *State v. Linner* (1996), 77 Ohio Misc.2d 22, cited with approval in *Williams, supra.*, wherein it determined that "cohabiting" (which that court found may include same-sex couples) can be determined by such factors as:

a. living together under one roof;
b. sharing expenses and liabilities;
c. owning property together;
d. socializing together as a couple;
e. engaging in a sexual relationship;
f. exchanging vows of commitment;
g. parenting a child together; and/or
h. raising children together.

That court held that:

> The better-reasoned analysis of the law reflects that Ohio's domestic violence laws apply equally to all persons regardless of their gender. Any person of either sex who can prove that he or she 'otherwise is cohabiting' with another person of either sex as a 'family or household member' is a person who is entitled to the protection of Ohio's domestic violence laws.
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> Indeed, upon careful review, the statutory definitions do not require the person to be a spouse but merely to function like a spouse. Therefore, even if a person may not legally be a spouse, due to sex or current marital status, he or she is not precluded from proving that he or she is a person functioning like a spouse. Such a person is included within the statutory definition of a 'person living as a spouse."

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[5] Particularly telling in this respect is *Taylor v. Taylor* (1983, Hamilton Co.) 11 Ohio App. 3d 279, in which the Court considered the relationship between cohabitation and marriage, concluding (at FN 3):

> The functional equivalence of 'cohabitation' and 'marriage' is demonstrated by a number of lexicographers, among whom the following is typical: 'Cohabitation: Act or state of dwelling together, esp. as or as if husband and wife. * * *' Webster's Second New International Dictionary.

Cited, with approval, in Gillespie v. Gillespie, 1994 WL 317785, (Ohio App. 8 Dist. Jun 30, 1994) (No. 65518).

Again, that court also held that "Each case must be decided on its own particular evidence presented. *Id.*, at 28. To similar effect, the Franklin County Court of Appeals held, in *Fuller v. Fuller* (1983), 10 Ohio App. 3d 253, 253-4, that:

> We have defined the ordinary meaning of cohabitation as the acts of a man and woman living together, noting that isolated acts of sexual intercourse, unaccompanied by other aspects of living together, would not constitute cohabitation, but that, on the other hand, cohabitation can be based entirely upon acts of living together without sexual relations. Cohabitation requires some regularity of functioning as would a husband and wife, either sexually or otherwise. * * * Cohabitation, then, usually will be manifested by a man and woman living together in the same household and behaving as would a husband and wife, although there need not be an actual assertion of marriage.[6](Cites omitted.)

Finally, in *Taylor v. Taylor* (1983), 11 Ohio App. 3d 279, 280-81, the Court of Appeals for Hamilton County held that: "Virtually all of the reported cases dealing with the issue of the meaning of 'cohabiting' stress the importance of living together, discount the parties' legal status vis-à-vis marriage, and disavow heterosexual sexual relations as being the determinative consideration." In that case "…the germane issue before the trial court was whether the gentleman in question, by voluntarily undertaking certain aspects of a continuing relationship with the plaintiff, *thereby assumed obligations equivalent to those arising from a ceremonial marriage*[7]." (Emphasis added.) Relying upon *Taylor*, the Cuyahoga County Court of Appeals held, in Gillespie v. Gillespie**,**1994 WL 317785, that: "'Cohabitation' means to assume obligations *equivalent to marriage*, including support." (Emphasis added.) Numerous other cases could be cited, from Ohio and other jurisdictions; however, they would merely add bulk to what already is self-evident: cohabiting is a relationship that in all essential respects approximates the significance or effect of marriage.

{¶15} The State urges that, "Ohio's domestic violence statute merely prohibits specified conduct, and it does not confer any rights, obligations or privileges approximating marriage." This statement mischaracterizes both the specific language of R.C. §2919.25 and the prohibition in Art.

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6 The *Fuller* opinion defined "cohabitation" in terms of the relationship between a man and a woman, as the case before it was based upon such a relationship. The State argues that defendant's citation to *Fuller* was an attempt to "support his meritless argument that cohabitation is traditionally limited to an unmarried heterosexual couple living as 'man and wife." This Court emphasizes that the sexual orientation or the nature of any sexual relationship between the parties in the case *sub judice* is simply not relevant to the issues presented herein. See, in this regard, *State v. Linner*, *supra*. As previously noted, the defendant in the instant case is male and the alleged victim is female.

7 Footnote 3 in *Fuller* observed that:

> The functional equivalence of 'cohabitation' and 'marriage' is demonstrated by a number of lexicographers, among whom the following is typical:
> 'Cohabitation: Act of state of dwelling together, esp. as of as if husband and wife. * * *'
> Webster's Second New International Dictionary (1959)

XV, §11. It is undisputed that Ohio's domestic violence law does not itself confer any rights, obligations, or privileges upon anyone. However, while prohibiting specified conduct, it also defines those relationships that are subject to its purview. The issue raised by defendant thus is whether the definition of "family or household member" set forth in that statute implicitly "recognizes a relationship between unmarried persons." Furthermore, the defendant does not allege that such relationship is intended to approximate marriage in all its implications, but whether it impliedly approximates "the design, qualities, significance or effect of marriage." This is not merely a semantic distinction, but one that goes to the heart of the question before this Court.

{¶16} Considered in this context, the State's position flies in the face of the unambiguous language of the statute itself. The conduct prohibited by R. C. §2919.25(A) is precisely the same conduct that is prohibited by R. C. §2903.13(A): "cause or attempt to cause physical harm." The *only* difference between the two lies in the identification of the victim: in §2903.13(A) the victim is described as "another or … another's unborn," while in §2919.25(A) the victim is "a family or household member." As previously noted, where the victim is simply "another," the offense is a misdemeanor, while where the victim is "a family or household member," a first offense remains a first-degree misdemeanor, but a second conviction becomes a fourth-degree felony and any subsequent conviction is a third-degree felony. The only logical rationale to justify such a distinction is that the legislature intended to provide a greater degree of protection for family or household members, based *solely* upon that relationship and, it follows, the victims' increased vulnerability resulting from such relationship.

{¶17} In its Brief in Opposition the State cites defendant's brief, at ¶10, as stating:

> "[Issue 1] clearly says that the state of Ohio does not recognize any legal status for unmarried individuals that intends to approximate the effect of marriage" and '[t]herefore, under *Fuller*, an unmarried couple living in the same household living together as husband and wife" *cannot enjoy the protections of the criminal law*.

Emphasis added. This citation unfortunately distorts what defendant's brief in fact stated:

> Ohio Constitution Article XV, section 11 clearly says that the state of Ohio does not recognize any legal status for unmarried individuals that intends to approximate the effect of marriage. It is therefore impossible for an unmarried couple to live together as husband and wife, and *thus no person in an unmarried relationship could ever be subject to domestic violence for acts against their* [sic] *partner*.

(Emphasis added.) Even a cursory reading of the applicable law makes it obvious that, if the domestic violence statute should be found to be inapplicable as to a persons in an unmarried

relationship, an offender remains subject to prosecution for assault, the same as if he had committed the same act upon a stranger, a casual acquaintance, or a roommate.

{¶18} It is a cardinal principle of statutory or constitutional construction that provisions must be presumed to have been included for a purpose and furthermore that, where possible, all terms should be so construed as to give effect to their plain meanings; accordingly, of course, a reviewing court is bound to give full effect to the plain and unambiguous meaning of the language therein. With these principles in mind, this Court may not construe Art. XV, §11, so as to include only the first sentence and ignore the second. Having defined the legal scope of marriage in Ohio in the first sentence, the clear purpose of adding the second sentence is to restrict the legal recognition of other relationships between unmarried individuals—that is, to deny such relationships any legal status "that intends to approximate the design, qualities, significance or effect of marriage."

{¶19} As the State asserts, a statute passed by the General Assembly is entitled to a strong presumption of constitutionality, and a reviewing court is bound to avoid an unconstitutional construction if it can do so without torturing the language or the intent of either the statute or the constitution. In this regard, the Supreme Court held, in *State v. Renalist, Inc.* (1978) 56 Ohio St. 2d 276:

> …[I]t is well established that an Act of the General Assembly is entitled to a strong presumption of constitutionality. … The necessity for a court adhering to this time-honored presumption is that it prohibits one branch of state government from encroaching on the duties and prerogatives of another.
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> However, this strong presumption is rebuttable, but only by proving the existence of the constitutional infirmity 'beyond a reasonable doubt.'. …Furthermore, when an enactment under attack is a legislative exercise pursuant to the police power, a party opposing such action must demonstrate a clear and palpable abuse of that power in order for a reviewing court to substitute its own judgment for legislative discretion.
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> (*Cites omitted.)*

{¶20} The Court notes that the situation presented in this case is unique: in *Renalist, supra,* and indeed in every case cited by the State, a statute passed by the General Assembly was challenged as violating an existing provision of the Ohio Constitution. Here, to the contrary, we are faced with a statute that (with some modifications) has been in place since 1975, but which is alleged to be in conflict with a constitutional amendment passed a quarter-century later.

{¶21} Further distinguishing this case from the *Renalist* analysis is the fact that the source of the claimed conflict, Art. XV, §11, was presented to the electorate via an initiative petition. As a result, its terms were never subjected to the same formal scrutiny and analysis that would have been

required as part of the legislative process. Thus, it is not the "legislative discretion" that created the alleged conflict, but rather the subsequent and superceding constitutional provision.

{¶22} In its brief in opposition to defendant's motion, the State has expressed concern as to the potential Fourteenth Amendment equal protection consequences if the Court should find that R.C. §2919.25 is in conflict with Issue 1. As its brief notes:

> [Issue 1] would arbitrarily discriminate against a class of persons based on marital status and immediately deny them the protections afforded by Ohio's domestic violence law. There can be no rational relationship to a legitimate government interest if Issue 1 is construed to strip the protections of the domestic violence law from unmarried persons. Such an arbitrary and discriminatory outcome would therefore violate the Equal Protection Clause of the Federal Constitution.

The State cites specifically to *Romer v. Evans*, 517 U.S. 620 (1996), in which the Supreme Court held that:

> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Id., at 633. As the State further cites, the Colorado amendment *sub judice* in *Romer* was found to be:

> …a status-based enactment divorced from any factual context from which [the Court]j could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.

Id., at 635. Drawing the analogy to *Romer*, the State argues that, if the Court agrees with defendant that Issue 1 bars unmarried persons from the protection of the Ohio domestic violence law, "then issue 1 would violate federal guarantees of Equal Protection." The State goes on to claim that:

> Ohio's domestic violence law unambiguously aims to protect 'family or household members' from abuse. …Nowhere does defendant show a legitimate government interest for limiting the definition of 'family or household members' to only married persons.

The State expresses its concern that this would lead to a "conundrum" that "cannot be constitutionally solved. If Issue 1 applies, then such a classification is 'undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* The Court shares the State's concern as to the ultimate Fourteenth Amendment implications, but finds that these implications are not properly before the Court in the context of this case. The only parties to this action are the State of Ohio and the defendant, neither of which has standing to raise an equal protection claim of the sort envisioned by counsel. In this context, then, the State's

speculation of an equal protection claim stands exposed as nothing less than a red herring, injected into this case for the sole purpose of diverting attention from those issues that are properly *sub judice*.

{¶23} This Court is fully aware that judicial restraint compels it to avoid deciding constitutional issues "unless absolutely necessary." *In re Boggs* (1990) 50 Ohio St. 3d 217, 221; see also *State, ex rel. Clarke v. Cook* (1921) 103 Ohio St. 465: "It is an old and uniformly well-settled rule that questions involving the constitutionality of statutes will not be determined unless such determination is essential to the rendition of a proper judgment in the instant case." Consistent with that principle, the Court has sought to find a way that the definition of "family or household member" set forth in R. C. §2919.25, and refined through a quarter-century of case law, could be reconciled with the equally explicit language of Art. XV, §11, of the Ohio Constitution. It is, therefore, with the greatest reluctance that this Court must find that the two simply cannot be rendered compatible without distorting the plain meaning and clear intent of one or the other.

{¶24} The State argues, correctly, that "[n]owhere in the defendant's brief does he provide any evidence whatsoever that Issue 1's framers intended the amendment to apply to Ohio's domestic violence law." This is hardly surprising: inasmuch as Issue 1 was proposed pursuant to an initiative petition, there is no way to divine the intentions of those who drafted, proposed, supported, or voted for it. Moreover, it may be accepted that those intentions probably did not include stripping unmarried persons of the protection of R. C. ¶2919.25. Perhaps, in the end, this is simply an unfortunate example of the "law of unintended consequences" –one law which cannot be ignored or overridden, either by the General Assembly or by a vote of the people.

{¶25} In the absence of true substance to its arguments, the State in the end resorts to an attack upon the defendant's motion for the reason that it is the product of a law student whose motive was actually a pretext to make Issue 1 "not look so good." The State supports this claim by reference to a newspaper article, which—by the way—is quoted as evidence but not offered as an exhibit. The Court observes, *sua sponte*, that such citation falls outside the Ohio Rules of Evidence. Of course, even if the "author" (the State's term) of the defendant's motion devised these arguments "as a pretext" (again, the State's term) to advance a political or social agenda, it is defendant's counsel, not any purported "author", who signed that motion. The Court must presume that the defendant's attorney signed the motion for the legitimate purpose of defending his client by challenging the constitutionality of the statute under which he was indicted. This is further supported, of course, by the substance of the arguments put forth by defendant; had they been frivolous on their face,

then the counsel's motives in advancing such claims would be relevant as to possible sanctions for frivolous conduct.

{¶26} The Court is aware that other courts have this same issue before them and that still others will be confronted by it, pending a definitive ruling by the Ohio Supreme Court. In particular, the Court notes that the Hon. Ronald B. Adrine of the Cleveland Municipal Court recently rendered an opinion addressing the same challenge, in the case of *City of Cleveland v. Charles Knipp*, Case No. 2004 CRB 039103, in which he opined that Issue 1 and R.C. §2919.25 are not in conflict. While maintaining the utmost respect for Judge Adrine, this Court's analysis, as set forth above, compels the opposite conclusion.

{¶27} For the foregoing reasons, the Court finds, beyond a reasonable doubt, that Ohio R. C. §2919.25 is incompatible with Art. XV, §11, of the Ohio Constitution, insofar as it recognizes as a "family or household member" a person who is not married to the offender but is "living as a spouse." In all other respects, the constitutionality of R.C. §2919.25 is not challenged and thus is not affected by this ruling. Furthermore, this Court does not have before it related provisions, *viz*. R.C. §§2919.251, *et seq.*, concerning bail in certain domestic violence cases and motions for temporary protection orders; however, it is greatly concerned as to the impact of this decision in such matters. The Court further finds that, in lieu of the draconian step of dismissing the indictment in its entirety, the circumstances warrant its amendment, pursuant to Criminal Rule 7(D), so as to charge the lesser and included offense of assault, pursuant to Ohio R. C. §2903.13, a misdemeanor of the first degree. As previously noted, the elements of assault are identical to those of domestic violence, but for the additional factor of the relationship between the offender and the victim. The defendant's Motion to Dismiss based upon Unconstitutionality of the Statute, filed March 16, 2005, thus is granted in part and this case will proceed upon the single amended count of assault, a misdemeanor of the first degree, pursuant to R.C. §2903.13. With the indictment thus amended, the motion is otherwise overruled. The Court further orders that this decision be stayed for thirty days, in order that the State may have an opportunity to appeal, should it elect to do so.

IT IS SO ORDERED

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Judge Stuart A. Friedman

Dated: March 23, 2005