

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA,)	
)	
)	
v.)	CRIMINAL No. 00-9-B-H
)	
DAVID BRENT COSTIGAN,)	
)	
DEFENDANT)	

**AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW
UNDER FED. R. CRIM. P. 23(c)**

This trial appears to be a case of first impression. The prosecution involves the relatively recent federal crime prohibiting gun possession by someone who assaulted the person he was living with but not married to. It requires me to grapple with what it means to “cohabit as a spouse.” Specifically, the defendant David Brent Costigan has been indicted under 18 U.S.C. § 922(g)(9) for possessing a firearm on October 4, 1999, in and affecting commerce, after having been twice convicted of misdemeanor crimes of domestic violence.

I. FINDINGS OF FACT

The following facts have been stipulated:

1. On October 5,¹ 1999, Defendant possessed a Savage .22 rifle, Model 954, serial number L222595.
2. At some time before Defendant’s possession of the Savage rifle on October 5, 1999, the rifle traveled in interstate commerce.

¹ At trial, the defendant agreed that there was no substantial variance between this date and the date (October 4, 1999) charged in the Indictment.

3. On February 15, 1996, Defendant was convicted of assault under 17-A M.R.S.A. § 207 against Maria Santos. The date of the offense giving rise to the conviction was December 15, 1995.
4. On September 26, 1996, Defendant was convicted of assault under 17-A M.R.S.A. § 207 against Maria Santos. The date of the offense giving rise to the conviction was June 7, 1996.
5. Assault under 17-A M.R.S.A. § 207 is a misdemeanor under the laws of the State of Maine and has, as an element, the use or attempted use of physical force.

The only remaining issue is whether the two assault convictions were for *domestic* violence within the meaning of section § 922(g)(9). In that connection, I make the following additional findings as proven beyond a reasonable doubt from the testimony presented on April 19, 2000.

6. Maria Santos has three children, two from a previous marriage with Merle Thompson and the third from a different marriage.

7. Santos met the defendant, David Costigan, in October or November of 1995, at a time when her marriage with Thompson was breaking up. She and Thompson were still living at the same address on Meadow Lane (the site of the December 15, 1995 assault) in Old Town, but when the defendant David Costigan moved in, Thompson moved out.

8. The defendant and Santos proceeded to live together and had intimate sexual relations. During this time, Costigan kept clothes in a newly purchased dresser at the Meadow Lane address.

9. The relationship was very stormy. Santos drank heavily, would from time to time instruct the bartender at the bar she frequented to tell Costigan she

was not there, regularly danced with other males and on occasion left the bar with them.² Costigan reacted angrily and was physically abusive to Santos. From time to time, he would leave Santos's residence and live in an apartment over his mother's garage.

10. After about six months (in about March of 1996), Santos, Costigan and the three children moved to Stillwater Avenue (the site of the June 7, 1996 assault) in Old Town. This move resulted from Costigan's initiative in locating the new residence in a newspaper advertisement. Costigan and Santos looked at the new residence together, then moved jointly, using Costigan's truck and the assistance of his friends.

11. Santos did Costigan's laundry when he was there and his mother did it when he went home. For the most part, however, the defendant lived at Santos's residence as a member of the family. Santos did all the cooking, and the two adults and three children ate together. Costigan built a fence at the new Stillwater address to provide protection for the youngest child while playing. Additionally, Costigan participated in the discipline of the children, played with them, gave them money to purchase incidentals, attended the children's school activities and formed a bond with them. (At the same time, the children maintained a regular

²The bartender, Robert J. Modery, was called as a defense witness in this case. The government sought to impeach his credibility by introducing a prior state conviction for receiving stolen property. Defendant objected under F.R.E. 609(a)(2), arguing that receipt of stolen property is not a crime involving "dishonesty or false statement." I now sustain the objection. See Weinstein's Federal Evidence § 609.04[2] (2nd ed. 2000). Moreover, even if Modery's conviction for receipt of stolen property under 17-A M.R.S.A. § 359 were a crime involving dishonesty or false statement and thereby admissible under Fed. R. Evid. 609(a)(2), its admission would not change my findings of fact in this case.

and frequent relationship with Thompson.) Tuesday evenings Santos and Costigan and the three children had “family night” (Santos’s term) when they would go out to a Pizza Hut for dinner. Costigan’s mother visited the couple regularly at Santos’s residence and considered that they were living together. Other relatives of Costigan also visited.

12. Santos and Costigan agreed that he should maintain his mother’s Milford post office box address so that they could say that they were not living together—so as to avoid losing certain Section 8 housing subsidies that Santos received.

13. Santos lied to the police at the time of the two assault prosecutions about her relationship with Costigan because she did not want to lose her eligibility for her Section 8 housing subsidy. Consequently, she told the police each time that Costigan was not living with her.

14. Costigan and Santos never married, although the subject came up from time to time. Costigan told one of his male friends that he would not marry Santos.

II. CONCLUSIONS OF LAW

The criminal statute in question, 18 U.S.C. § 922(g)(9), prohibits possession of a firearm by anyone “who has been convicted in any court of a misdemeanor crime of domestic violence.” Here, the parties have stipulated that the defendant has twice been convicted of assault, a misdemeanor crime of violence. The

remaining issue has to do with whether the misdemeanors were “domestic violence.”

As a matter of first impression, one might have expected the federal statute creating this crime to require proof that the underlying misdemeanor was charged and convicted as “domestic violence.” Certainly that is true of the “violence” part. A federal court will not examine a previous conviction for, say, trespass to see if, because of its underlying facts, it can meet the prerequisite of a crime of domestic violence. The previous crime must be *charged* as a crime of which violence was an element. See United States v. Meade, 175 F.3d 215, 218-20 (1st Cir. 1999). But the “domestic” part is different. Whether the earlier violence was “domestic,” the First Circuit has ruled, is an issue for the factfinder—at the later federal trial charging illegal possession of the firearm. See Meade, 175 F.3d at 221 n.1. The First Circuit reached this conclusion based upon the syntax of the statute and upon certain statements by the bill’s primary sponsor before enactment. See id. at 219-21. As a result, the “domestic” part of domestic violence need not be charged or proven in the underlying misdemeanor conviction.

But what is “domestic violence”? For our purposes, Congress has defined it as violence “committed by a current or former spouse . . . of the victim, by a person who is cohabiting with or has cohabited with the victim as a spouse . . . or by a person similarly situated to a spouse . . . of the victim.” 18 U.S.C. § 921(a)(33)(i). The parties agree that the only part of the definition that applies to the Costigan/Santos assault convictions is violence “by a person who is cohabiting with

or has cohabited with the victim as a spouse.” Id. Costigan claims that the government failed to prove that he did, in fact, cohabit with Santos “as a spouse.”

What then, does it mean to “cohabit . . . as a spouse”? In the same year that Congress created this new federal crime, Congress also declared that the term “spouse” when found in any federal statute “refers only to a person of the opposite sex who is a husband or wife.” 1 U.S.C. § 7. The dictionary defines “cohabit” as “to live together as husband and wife” or “to live together in a sexual relationship when not legally married.” American Heritage Dictionary 289 (2nd ed. 1991).³ Thus, the phrase, “as a spouse,” following “cohabit” appears somewhat redundant. See United States v. Barnette, Nos. 98-5, 98-11, 2000 WL 524799, at *7 (4th Cir. May 2, 2000) (construing the phrase “as a spouse” as used in the Violence Against Women Act, 18 U.S.C. § 2266, to require proof that the relationship was “‘like’ that of husband and wife”). But the context suggests that Congress was reaching broadly and was not limiting the prohibition to domestic violence occurring in legal or common law marriages. After all, the statute applies to a “former spouse” and even to one who is “similarly situated to a spouse” in addition to our phrase

³ Black’s Law Dictionary similarly defines “cohabitation” as “[t]o live together as husband and wife. The mutual assumption of those marital rights, duties, and obligations, which are usually manifested by married people, including but not necessarily dependent on sexual relations.” Black’s Law Dictionary 260 (6th ed. 1990).

of one who cohabits as a spouse.⁴ I conclude, therefore, that Congress intended to reach domestic relationships of all sorts—legal, common law or otherwise.

Although the intended reach may be broad, Costigan argues that, because the phrase “cohabit as a spouse” is not defined, the statute as so interpreted is so vague that it “does not give effective notice of the conduct it proscribes.” Reply Mem. in Supp. of Mot. to Dismiss at 1, 2. Specifically, he argues that, when a person is *not actually* a spouse, he or she “has no reasonable way of understanding, from the statute,” whether he or she is prohibited from possessing a firearm after a misdemeanor assault conviction. *Id.* In other words, Costigan says that he had no reasonable way of determining that his misdemeanor violence convictions satisfied the domestic definition. To avoid that vagueness, he argues that the phrase “cohabit as a spouse” should be limited to so-called common law marriages, a status not recognized in Maine. See Pierce v. Secretary of U.S. Dept. of Health,

⁴ The legislative history also supports a broad reading. According to the primary sponsor, Senator Lautenberg:

These crimes involve people who have a history together, and perhaps share a home or a child. These are not violent acts between strangers, and they do not arise from a chance meeting. Even after a split, the individuals involved, often by necessity, have *a continuing relationship of some sort.*

142 Cong. Rec. S10377-01, S10378 (Sept. 12, 1996) (emphasis added). Additionally, both Senator Lautenberg and Senator Wellstone made reference to the fact that this statute would apply to abuse among intimate partners. See id. (“That is what this amendment is all about. The facts speak for themselves. . . . [I]f you just pick up that newspaper . . . , you will read stories about violence, abuse, and murder within families and among intimates happening all the time”) (statement of Senator Wellstone); 142 Cong. Rec. S11872-01, S11877 (Sept. 30, 1996) (explaining how an amendment was withdrawn that would have limited the statute’s “application only to crimes against intimate partners”) (statement of Senator Lautenberg).

Education and Welfare, 254 A.2d 46, 47 (Me. 1969) (finding that common law marriages are not “valid for any purpose” and tracing the history of Maine’s statutory requirements for a valid marriage back to 1822).⁵

I will consider Costigan’s vagueness argument after I first determine what the government must prove to obtain a conviction under a statute like this.

Two lines of cases must be considered. In Staples v. United States, 511 U.S. 600 (1994), the United States Supreme Court dealt with a statute making criminal the possession of an unregistered automatic weapon. The Court held that the government must prove beyond a reasonable doubt not only that the defendant possessed an automatic firearm but also that he *knew* that the firearm he possessed was automatic; proof that he knew simply that he possessed a firearm was not enough. See id. at 602. The Court reached this conclusion in part by taking note of the fact that gun ownership is generally not illegal in this country, and that it would not lightly presume that Congress intended to make otherwise innocent conduct criminal. See id. at 608-12.

At the same time, there is a fairly long line of cases applying the federal statute making it a crime for a felon to possess a firearm. See 18 U.S.C. § 922(g)(1). In agreement with other courts, the First Circuit has made clear that under this statute the government need prove only that the defendant had previously been

⁵ Only eleven states and the District of Columbia currently recognize common law marriages. See Ellman, Kurtz and Scott, Family Law 65-66 (3rd ed. 1998) (listing Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah as the states currently recognizing common law marriages).

convicted of a felony and that he knew that he possessed a firearm. Specifically, the government does not have to prove that the defendant knew that he was not allowed to possess a firearm. See United States v. Smith, 940 F.2d 710, 713 (1st Cir. 1991).⁶

Sometimes these two lines of cases are explained as reflecting the difference between “mistake of fact” (the type of weapon in Staples) and “mistake of law” (the legal effect of the previous conviction in the felon-in-possession cases). Mistake of fact is a defense, but mistake of law is not, because ignorance of the law is said to be no defense to a criminal charge. See, e.g., Staples v. United States, 511 U.S. at 622 (Ginsburg, J., concurring); United States v. Capps, 77 F.3d 350, 353 (10th Cir. 1996), cert. denied, 518 U.S. 1027 (1996). Commentators have criticized the supposed distinction.⁷ Whether or not the distinction is valid, for a misdemeanor crime of domestic violence there are several layers of *both law and fact*, given Meade’s interpretation of the statute: (1) did this defendant know that he was prohibited from possessing a firearm? (law); (2) could a defendant tell, from

⁶ The caselaw goes farther and states that, although the government must prove the underlying felonies, it need not prove that the defendant knew that he had been convicted of a felony. See, e.g., United States v. Capps, 77 F.3d 350, 352 (10th Cir. 1996); United States v. Langley, 62 F.3d 602, 604 (4th Cir. 1995), cert. denied, 516 U.S. 1083 (1996). As a practical matter, of course, it is difficult to conceive of anyone being convicted of a felony and at the same time not knowing of the conviction. Indeed, the support these same courts give for the rule that no additional *mens rea* need be proven for the crime of felon-in-possession is the statement that felons should know that they are not allowed to possess weapons, see, e.g., Capps, 77 F.3d at 353; Langley, 62 F.3d at 605-06—knowledge that the defendants could not have if they did not know they were felons.

⁷ See John Shepard Wiley, Jr., Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation, 85 Va. L. Rev. 1021, 1045 (1999).

reading the statute, what conduct amounted to “domestic violence”? (law—the notice issue);⁸ (3) did this defendant and victim cohabit as a spouse? (fact); and, finally,(4) did this defendant realize that he was cohabiting as a spouse (fact) (and does the statute require such proof)?

With all respect, the two factual inquiries are not an easy task, as the Meade court suggested.⁹ What particular aspects of cohabiting or of a spousal relationship are required for unmarried people? Presumably a one-night sexual tryst would not qualify. But what about a week? A month? If two people explicitly say that they don’t want to be married, but they proceed to live together, are they cohabiting “as a spouse”? At what point in the relationship? What if one of them is separately maintaining a legal marriage with a third person? What about a long-term relationship where two people set up housekeeping together but the

⁸ Thus, the felon-in-possession cases are far easier because it is an easy matter to determine—conclusively—from court records whether a person has been charged with and convicted of a crime that is a felony. If the same were true for misdemeanor crimes of domestic violence, it would be easy to conclude that no *mens rea* was required and that the felon in possession and misdemeanant in possession provisions—appearing in the same statute—should be analyzed the same. But here, given the interpretation the First Circuit has put upon the statute in Meade, all that can be determined from the court records is that the defendant has previously been convicted of two misdemeanor crimes of violence. It remains a separate *factual* inquiry for this court to determine whether the previous crimes were crimes of domestic violence—in this case, whether that violence occurred between two people who were cohabiting “as a spouse.”

⁹ According to the First Circuit, the factual inquiry is an easy issue: “This shark has no teeth.” Meade, 175 F.3d at 221 n.1. “[T]he statute . . . contains no ambiguity either as to the persons to whom the prohibitions apply or as to what conduct is proscribed . . . It is, after all, fair to presume that a misdemeanant will know his relationship with his victim.” Id. at 223.

relationship is, or becomes, platonic? Gay partners?¹⁰ Is the answer different in a State like Hawaii where the Hawaii Supreme Court has recognized same-sex marriages and the State now allows same sex couples to register as “reciprocal beneficiaries”? See Haw. Rev. Stat. § 572C-4&5; Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff’d*, 950 P.2d 1234 (Haw. 1997). What about Vermont, which has recently enacted legislation that, although it does not recognize gay marriage, gives same-sex couples “all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage” through a “civil union”?¹¹ Act of April 26, 2000, ch. 23, 2000 Vermont Laws P.A. 91 (H. 847). And whose perspective is considered? Two people who are spending time together or even cohabiting may have decidedly different views as to whether they are doing so “as a spouse.” Is either one or both of their views determinative of, or relevant to, the outcome, or is the determination made by some kind of objective standard? If it is the latter, is the status to be determined

¹⁰ Through the passage of the Defense of Marriage Act (“DOMA”), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7), Congress has defined the term spouse to refer only to persons of the opposite sex. Thus, a gay partner is not a “spouse or former spouse.” However, Congress’ definition does not clearly foreclose the finding that a member of a same sex couple may be cohabiting “as a spouse.”

¹¹ Besides Hawaii and Vermont, other states and municipalities have also passed laws allowing for domestic partner registration of unmarried couples. See, e.g., Cal. Family Code §§ 297 & 299.6 (recognizing domestic partnerships established under local ordinances and allowing state wide domestic partner registration of same sex couples and older heterosexual couples as of July 1, 2000); Slattery v. New York, 266 A.D. 2d 24 (App. Div. 1st Dept. 1999) (upholding New York City’s Domestic Partnership Law, N.Y.C. Admin. Code § 3-240 et seq., which establishes a registry for unmarried homosexual and heterosexual couples that live together); Seattle, Wash. Ordinance No. 117244 (establishing domestic partner registrations for any unmarried couple); D.C. Code § 36-1402 (same); Minneapolis, Minn., Civil Rights Ordinance ch. 142 (same).

by the laws of the particular State where the relationship or the violence occurred (some states recognize common law marriages; some do not)¹² or is there some national definition of what it means to cohabit “as a spouse”?¹³

I conclude in this case that (1) as in a felon-in-possession case, the government was not required to prove that Costigan knew that he was prohibited from possessing a firearm (there was no such proof); (2) the government was not required to prove that Costigan knew that his misdemeanor convictions were for domestic violence (there was no such proof); (3) the government has proven that by the time of the second misdemeanor Costigan was cohabiting with Santos as a spouse;¹⁴ and (4) the government has proven that Costigan knew by the time of the

¹² See Trammel v. United States, 445 U.S. 40, 50 (1980) (explaining that “the laws of marriage and domestic relations are concerns traditionally reserved to the states”) (citing Sosna v. Iowa, 419 U.S. 393, 404 (1975)). For example, Maine does not recognize common law marriages, but the state will issue a protective order when the victim of a crime is a “family or household member” of the offender. The statutory definition of “family or household members” includes “individuals presently or formerly living as spouses” and states specifically that “[h]olding oneself out to be a spouse is not necessary to constitute ‘living as spouses.’” 15 M.R.S.A. § 321. Additionally, the Law Court endorsed a definition of “cohabits” in the context of an alimony decree, as “maintaining a relationship with another person that is the practical equivalent of marriage.” Jacobs v. Jacobs, 507 A.2d 596, 601 (Me. 1986).

¹³ The American Law Institute is grappling with the definition of “domestic partners” in today’s society in the process of dealing with “financial claims that may arise at the termination of certain stable, cohabiting relationships between two persons who do not marry.” See Principles of the Law of Family Dissolution: Analysis and Recommendations, Tentative Draft No. 4 p. xxxi, § 6.03 (April 10, 2000) (listing a number of factors that could be considered).

¹⁴ I have considered a number of factors in determining whether the relationship between Santos and Costigan can be described as “cohabiting as spouses.” Among the factors, I have considered are: length of the relationship; shared residence as indicated by spending the night and keeping one’s belongings at the residence; intimate relations; expectations of fidelity and monogamy; shared household duties; regularly sharing meals
(continued...)

second misdemeanor that he was cohabiting as a spouse (as I have interpreted the phrase) or was willfully blind to that fact. I also find that Costigan’s conduct was well within the definitional ambit of the statute—that a defendant reading the statute could tell that Costigan, after his second misdemeanor conviction, was prohibited from possessing a firearm.¹⁵ I therefore reject the defendant’s request that I limit the statute’s reach so as to include only legal and common law marriages because of vagueness and notice problems.¹⁶

I find the defendant David Brent Costigan **GUILTY** as charged.

But the problems I have outlined with the statute are considerable. Here, for example, because of the second misdemeanor, I have not had to determine the far

¹⁴ (...continued)

together; joint assumption of child care; providing financial support; moving as a family unit; joint recreation and socialization; and recognition of the live-in relationship by family and friends as indicated by visits to the residence. These factors, while by no means exhaustive, are strong indicators that a relationship has functioned like a marriage, thereby bringing the relationship within the ambit of section 921(a)(33)(a).

¹⁵ See Wiley, supra, for an argument that in some cases the Supreme Court has imposed a stricter *mens rea* requirement—if it could conceive of some “innocent” person who might otherwise fall within the criminal prohibition even though the defendant being tried was not “innocent”—and that it is not sufficient to rely on prosecutorial discretion to avoid unjust convictions. Judge Posner would apparently require a strict *mens rea* requirement for crimes like this. See United States v. Wilson, 159 F.3d 280, 293 (Posner, C.J., dissenting) (7th Cir. 1998) (court should require proof that defendant knew it was a crime to possess a firearm while subject to a domestic relations restraining order because the prohibition is not generally known), cert. denied, 527 U.S. 1024 (1999).

¹⁶ I also reject Costigan’s argument—asserted recently under an “Amended Motion Under F.R. Crim. P. 29”—that the statute is constitutionally defective as a result of United States v. Morrison, 120 S. Ct. 1740 (2000). There is an adequate interstate commerce nexus in the statutory requirement that the firearm traveled in interstate commerce. See 18 U.S.C. § 922(g) (making it unlawful for various numerated individuals to “possess in or affecting commerce, any firearm or ammunition”). In this case, Costigan and the Government stipulated that the Savage .22 rifle, Model 954 found in Costigan’s possession traveled in interstate commerce some time before October 5, 1999. See supra p.1.

more difficult question whether Costigan, who was intimate with Santos, had yet reached the level of “cohabiting as a spouse” by the time of the first misdemeanor, December 15, 1996, approximately one month after they met and her legal husband moved out. Such issues will not be resolved so easily in a jury trial, for there the judge must instruct the jury as to what the jury is required to find beyond a reasonable doubt. What standards will the judge give the jury to define “cohabit as a spouse”?¹⁷ Although the case law and commentary have developed

¹⁷ The Fourth Circuit has recently approved giving the jury *no* standards for the same phrase in a different criminal law context, 18 U.S.C. § 2261(a), letting the jurors decide for themselves what “as a spouse” means. See United States v. Barnette, Nos. 98-5, 98-11, 2000 WL 524799 (4th Cir. May 2, 2000). The court found the following evidence sufficient to prove that the relationship between the defendant and victim was “‘like’ husband and wife”: dating followed by moving in together into a new apartment; using the same car and providing transportation to and from work; sexual relations; male possessiveness; threats of a “break-up”; and professions of love even after the break-up. Id. at *7.

I have tried my own hand at jury instructions in preparation for the inevitable next case. The best I can do is:

The phrase “cohabit as a spouse” means to live together like a husband or wife although no valid marriage exists. Proof of cohabiting as spouses requires more than dating, spending the night or living together as platonic roommates. Intimate relations and sharing a residence do not necessarily establish proof that a victim and the defendant cohabited as spouses, but you may consider such factors. Similarly, no specific period of time together establishes that a couple was, in fact, living together as husband and wife. However, you may consider the length of the relationship and joint future plans as factors. Additionally, although a couple need not hold themselves out as husband and wife to “cohabit as spouses,” you may consider any evidence presented that tends to show how the relationship was presented to family, friends, or the community in making your determination. In addition to any factors I have just mentioned, you may consider any evidence that tends to prove or disprove that the defendant lived as a spouse with the victim of the proven misdemeanor.

I cannot think of another criminal jury instruction that is so open-ended and standardless. See First Circuit Pattern Jury Instructions: Criminal (West 1998) (passim).

a laundry list of factors to consider in a civil context (such as distribution of property upon termination of a relationship), they do not furnish the customary certainty of definition for a federal crime.¹⁸ I suspect that there are many people previously convicted of assault who are unable to tell from reading the statute whether their assault was “domestic violence” such that they can no longer possess firearms.¹⁹ And should a judge instruct the jury that the government must prove that the defendant knew that he was “cohabiting as a spouse”?²⁰ Perhaps the court of appeals will shed light on these issues when the case is appealed.

¹⁸ But see, State v. Williams, 683 N.E.2d 1126, 1127-28 (Ohio 1997) (adopting a multiple factor approach for Ohio’s domestic violence statute, which applies to “a person living as a spouse” of the offender and defines that phrase as including a person “cohabiting with the offender”). The Ohio court looked at the “wide ranging” definitions of cohabitation in other states in the context of domestic violence and ultimately concluded that “(1) sharing of familial and financial responsibilities and (2) consortium” were “the essential elements of ‘cohabitation.’” The court then laid out factors that could establish each element while noting that the factors would be “unique to each case.” The factors establishing shared familial or financial responsibilities included “provisions for shelter, food, clothing, utilities, and/or commingled assets.” The factors establishing consortium included “mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship and conjugal relations.” Id. at 1130.

¹⁹ If the statute is sufficiently ambiguous, the rule of lenity may also limit its scope. See Muscarello v. United States, 524 U.S. 125, 138-39 (1998) (explaining that “[t]he rule of lenity applies only if, ‘after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended.’”) (quoting United States v. Wells, 519 U.S. 482, 499 (1997)) (additional quotations and citations omitted).

²⁰ The penalty for violation of the statute, 18 U.S.C.A. § 924(a)(2), requires that a defendant violate the statute “knowingly.” According to the Supreme Court, “unless the text of the statute dictates a different result, the term ‘knowingly’ merely requires proof of knowledge of the facts that constitute the offense.” Bryan v. United States, 524 U.S. 184, 193 (1998). Since Meade has made the “domestic” element part of the factual case, it would appear that, to convict, a factfinder must find that the defendant knew factually all of the elements of his cohabitation that make it qualify “as a spouse.” See Meade, 175 F.3d at 221-23.

To recapitulate, I find that Costigan’s second assault on Santos occurred at a time when they were cohabiting as spouses under any definition of the phrase. But I also conclude that the phrase “cohabit . . . as a spouse”—although perhaps appropriate for assigning rights and responsibilities growing out of a failed relationship in a civil law context—ultimately has no certain definition that can meet criminal law notice requirements for all defendants. Of course, a court could prescribe a definition that would give the phrase certainty—for example, sharing the same residence and having sexual intimacy within two weeks of the assault—but that would be judicial legislating of the most direct sort.

SO ORDERED.

DATED THIS 16TH DAY OF JUNE, 2000.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

U.S. District Court
District of Maine (Bangor)
Criminal Docket for Case #: 00-cr-9

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