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On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission

Public Hearing on the Violence Against Women Reauthorization Act of 2013

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My name is Neil Fulton, Federal Defender for the Districts of North and South Dakota. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding how the guidelines should address the statutory changes set forth in the Violence Against Women Reauthorization Act of 2013 (VAWA).

I. The Purpose of VAWA and The Need for Caution

When considering whether and how to amend the guidelines in response to VAWA, Defenders urge the Commission to consider (1) the purpose of the law; (2) the new law enforcement tools that the Act itself provides, without any changes to the guideline; (3) the absence of evidence about how these new tools will be used by prosecutors, received by judges and impact the community; and (4) the potential for unintended consequences from potential amendments, such as further complicating the guidelines, disrupting settled practices in resolving charges of assault and sexual abuse that are not affected by VAWA, and increased sentence disparity.

The Department of Justice, in consultation with tribal authorities, sought legislation in three areas: (1) expanded tribal jurisdiction over certain offenses; (2) tribal court jurisdiction to issue and enforce civil protective orders; and (3) three amendments to the federal assault statutes. The amendments to the federal assault statutes were designed to cover situations where the prosecution could not seek a sentence in excess of six months under pre-VAWA 2013 law: (1) assaults by striking, beating, or wounding, which carried a maximum sentence of six months; (2) assaults against spouses and domestic partners resulting in substantial bodily injury, which were either capped at 6 months or not within federal jurisdiction if the perpetrator was an Indian; and (3) assaults by strangling or suffocating, which were capped at 6 months in situations where the victim suffered no external injury.[1] DOJ did not propose changes to the assault statutes as reflected in 18 U.S.C. § 113(a)(1) (assault with intent commit sexual abuse) and § 113(a)(2) (assault with intent to commit sexual abuse of a minor or ward or abusive sexual contact). Nor did the Department or others complain that the penalties for existing felony offenses were too lenient.

[1] *See* Letter of Ronald Weich, U.S. Dep't of Justice to the Honorable Joseph R. Biden, Jr. (July 21, 2011), http://www.justice.gov/tribal/docs/legislative-proposal-violence-against-native-women.pdf.

VAWA provides DOJ with the three new statutes they requested to prosecute domestic violence offenders. In addition, starting later this month, as authorized by VAWA, three tribes will begin to "exercise special criminal jurisdiction over certain crimes of domestic and dating violence, regardless of the defendant's Indian or non-Indian status."[2] In light of all that is not yet known about how these tools will be used and the effects they will have on violence against women in Indian country, we encourage the Commission to proceed cautiously. Specifically, we urge the Commission to avoid treating an assault with intent to commit sexual abuse or abusive sexual contact the same as a completed or attempted sexual abuse or abusive sexual contact offense and to avoid any amendments that would pile onto existing guidelines specific offense characteristics, which result in upward ratcheting, or additional cross-references, which confuse guideline calculations and have often been criticized as a source rather than a solution to unwarranted disparity.

II. 18 U.S.C. § 113(a)(1) Assault with Intent to Commit Aggravated Sexual Abuse and Sexual Abuse; and 18 U.S.C. § 113(a)(2) Assault with Intent to Commit Sexual Abuse of a Minor or Ward and Assault with Intent to Commit Abusive Sexual Contact

Defenders oppose the Commission's proposed amendment to reference convictions under 18 U.S.C. §§ 113(a)(1) and (a)(2) to Chapter 2A3 or to add specific offense characteristics or cross-references to §2A2.2. Instead, Defenders suggest that the Commission establish either (a) a new guideline for assault with intent to commit aggravated sexual abuse, sex abuse, sexual abuse of a minor or ward, or abusive sexual contact; or (b) separate base offense levels in §2A2.2 that would apply if the defendant was convicted under 18 U.S.C. § 113(a)(1) (assault with intent to commit a violation of section 2241 or 2242), or § 113(a)(2) (assault with intent to commit a violation of section 2243 or 2244). This approach would allow for proportionate punishment, greater than an aggravated assault, and lesser than that for actual or attempted sexual abuse or abusive sexual contact. Clarity of application is a critical consideration as well. Lack of clarity on the guideline calculation will lead to more trials and longer, more contested sentencing hearings.[3]

For several reasons, a new standalone guideline, like the Commission did with assault with intent to commit murder at §2A2.1, or alternative base offense levels in Chapter 2A2 are

[2] DOJ Press Release, *Justice Department Announces Three Tribes to Implement Special Domestic Violence Criminal Jurisdiction Under VAWA 2013* (Feb. 6, 2014), http://www.justice.gov/opa/pr/2014/February/14-ag-126.html.

[3] The percentage of sexual abuse cases that go to trial is already 336% greater than the average trial rate. *See* U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, Tbl. 11 (2012) (13.1% of sexual abuses went to trial in FY 2012 compared to 3% of all cases). The percentage of assault cases that go to trial is also higher than the average. *Id*. (8.1% v. 3%).

preferable to referencing the offenses to Chapter 2A3. First, the legislative history of § 113 and the sex offense provisions in Ch. 109A show that it would be a mistake to treat an assault with intent to commit any of the specified sex offenses the same as a completed or attempted sexual abuse or abusive sexual contact offense. Why Congress amended 18 U.S.C. § 113(a)(1) and (a)(2) to include assaults with intent to commit certain sex offenses is unclear. In seeking to amend the Federal Criminal Code as part of VAWA, DOJ did not identify any gap in the law with regard to assaults with intent to commit sex offenses. Nor does the Senate report accompanying the legislation explain the need for the amendment. The most that can be discerned from legislative history is that assault with intent to commit sexual abuse or abusive sexual contact is not the same as an attempt to commit sexual abuse or abusive sexual contact. When Congress enacted Pub. L. 99-654, the Sexual Abuse Act of 1986, it deleted from § 113 the reference to assault with intent to commit rape because the new chapter 109A proscribed attempt. At that time, Congress stated that an "assault with intent to commit rape will always constitute an attempt under new chapter 109A."[4] With VAWA, Congress decided otherwise, and decided to proscribe conduct that falls short of an attempted sexual abuse or abusive sexual contact. It will take some time for data to develop on what these offenses entail, but the elements and legislative history show it may punish conduct that does not result in any physical touching and that does not amount to a substantial step toward commission of the underlying sex offense. Hence, these new offenses should not be treated like a completed or attempted sex offense. Because Congress placed them in the general assault statute, they should be treated like assaults.

Second, treating these new offenses as assaults rather than sex offenses would account for aggravating conduct related to the nature of the assault that is not included in the sex offense guidelines (e.g., discharge of firearm, use of dangerous weapon, and seriousness of any injury). With the exception of §2A3.1(b)(4), none of the criminal sexual abuse guidelines contain enhancements for the degree of bodily injury resulting from the conduct because the base offense levels are predicated on there being an actual sexual act or sexual contact. [5]

Third, as the Issue for Comment 3(B)(1)-(6) illustrates, referring these new offenses to Chapter 2A3 would raise a number of significant and challenging questions. These questions are

[4] Sexual Abuse Act of 1986, H.R. Rep. 99-594, 1986 USSCAN 6196, 6200 (1986).

[5] Referring these new offenses to Chapter 2A2 would also avoid the significant disparity created by the cross-references set forth in §§2A3.2 and 2A3.4. Although cross-references were meant to ameliorate the effects of uneven plea bargaining, they have not done so. *See* United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 83 (2004). The application of cross-references often results in the equivalent of conviction without notice, jury trial, admissible evidence, or proof beyond a reasonable doubt. The Commission should cut back on the use of cross-references rather than amend the guidelines in a way that would increase their use. *See generally* American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Am. Crim L. Rev. 1463, 1488-95 (2001).

best addressed by treating the new assault offenses as assaults, rather than trying to merge them with the sex abuse guidelines.[6]

A new guideline or alternative base offense levels set forth in §2A2.1 and/or §2A2.2, are also preferable to adding a specific offense characteristic and/or cross-reference to §2A2.2. First and foremost to me, as a practitioner in federal court, is that either approach would be less disruptive to well-settled practice under §2A2.2, a guideline defense attorneys, prosecutors, and judges understand and are accustomed to using. In addition, if the Commission were to add a specific offense characteristic or cross-reference related to sexual intent, the defendant would not have to be convicted of a sex-related offense under § 113(a)(1) or (a)(2) for the enhancement or cross-reference to apply. Under those circumstances, many cases containing a hint of a sexual overtone would become much more complicated. An overly aggressive prosecutor or probation officer could take what would normally be considered an assault and make it into something worse based solely on the perceived state of mind of the defendant.

Take for example a case where the defendant was at a bar and sees his ex-girlfriend. They begin to argue. When she goes to the bathroom, he follows her, pushes her inside the bathroom, brandishes a broken beer bottle, and presses his body against hers. Another person walks into the bathroom and interrupts the encounter. Such an encounter is an assault with a dangerous weapon under 18 U.S.C. § 113(a)(3), but whether the defendant committed an assault with the intent to commit sex abuse or abusive sexual contact is in the eye of the beholder. Some prosecutors would charge it as both assault with a dangerous weapon and assault with intent to commit sexual abuse. Some would charge it as assault with a dangerous weapon. In either scenario, if the defendant entered a plea bargain to assault with a dangerous weapon, some probation officers would undermine the bargain by pushing for a sexual assault enhancement or cross-reference while others would not. Likewise, some judges would find evidence of intent and others would not. The net result is increased disparity in sentencing for similar conduct and more trials and contested sentencing hearings.[7]

To whatever guideline the Commission refers these new offenses, the base offense level for assault with intent to commit a violation of § 2241 or § 2242 under § 113(a) should be set at 16 and the base offense level for assault with intent to commit a violation of § 2241 or § 2242 should be set at 14. A base offense level of 16 would be 2 levels above the base for aggravated

[6] Because these new §§ 113(a)(1) and (a)(2) offenses should be treated as the assault offenses, none of the provisions set forth in the Issue for Comment 3(B)(1)-(6) should be amended.

[7] And, as we have often emphasized, cross-references based upon conduct that the defendant has not been convicted of undermine the protection of the Sixth Amendment. A prosecutor who knows they cannot prove assault with intent to commit sexual abuse can charge the offense as an assault with a dangerous weapon, but then push for higher penalty using a lower standard of proof.

assault and would account for the mental state of intent to commit sexual abuse. Two levels would be proportionate to the enhancement at §2D1.1(c)(1) (providing for 2-level enhancement under §3A1.1(b)(1) where "the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual"). A base offense level 14 for the other offenses would treat them the same as other aggravated assaults.

In no event should the base offense level for assault with the intent to commit aggravated sexual abuse or sexual abuse be higher than 20. Anything greater than 6 levels higher than the current base offense level under §2A2.2 would be grossly disproportionate to other offenses that contain enhancements for actual sexual conduct. For example, §2A2.1(b)(1) provides a 2-level increase for "serious bodily injury" as defined in §1B1.1. "Serious bodily injury" includes "conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2442." USSG §1B1.1, comment. (n.1(L)). *See also* §2A2.2(b)(3)(B) (5-level increase for "serious bodily injury" as defined in §1B1.1); §2A4.1(b)(5) (6-level increase "if the victim was sexually exploited"); §2B3.1(b)(3)(B) (4-level increase for serious bodily injury as defined in §1B1.1); §2B3.2(b)(4)(B) (4-level increase for serious bodily injury as defined in §1B1.1); §2E2.1(b)(2)(B) (4-level increase for serious bodily injury as defined in §1B1.1); §2H4.1(b)(1)(B) (2-level increase for serious bodily injury as defined in §1B1.1); §2H4.2(b)(1) (4-level increase for serious bodily injury as defined in §1B1.1); §2L1.1(b)(7)(B) (4-level increase for serious bodily injury as defined in §1B1.1); §2S1.1(b)(1)(B)(ii) (6-level increase for money laundering where funds were proceeds of, or intended to promote sexual exploitation of a minor).

III. General Observations About the Sentencing of Domestic Violence Offenders

As the Commission moves forward with these amendments and others related to domestic violence, it should reject the myth that incarceration is the solution to the problem of domestic violence. "There is no evidence that incarceration reduces recidivism among domestic violence offenders as a whole."[8] And in fact, offenders who are incarcerated have increased odds of committing another domestic violence offense as well as a greater chance of committing any type of offense.[9] To the extent that incarceration is effective for a subgroup of offenders, the studies show that jail sentences and probation slightly lower the odds of recidivism, but prison sentences do not.[10]

[8] Thomas George, Wash. State Center for Court Research, *Domestic Violence Sentencing Conditions and Recidivism* 4 (2010).

[9] *Id*. at 18.

[10] *Id*.

Also relevant to the Commission's decision is a 2010 review of domestic violence courts, which showed that imprisonment does not form the cornerstone of efforts to combat domestic violence. A review of "qualitative data suggested that use and enforcement of protection orders and post disposition monitoring of compliance figure prominently in conceptualization of accountability, whereas obtaining a conviction on the initial case or obtaining a sentence of incarceration were not so often linked to the concept."[11] "Only a very small percentage of courts (5%) often or always imposed a sentence of incarceration longer than one year. One-third usually imposed a sentence less than one year; and 2/3 imposed probation."[12]

The lesson from the states is that not all domestic violence offenders should be incarcerated. Native Americans, in particular, need services that will help them overcome the myriad problems on reservations that lead to violent behavior, including alcohol and drug abuse, unemployment, extreme poverty, and mental health conditions. Supervisory terms that help offenders get their lives in order would better serve this population than lengthy periods of incarceration that will only make reentry more difficult.

IV. 18 U.S.C. § 113(a)(4) Assault by Striking, Beating, or Wounding

The Commission proposes referencing 18 U.S.C. § 113(a)(4), which is now a one year rather than six month misdemeanor, to §2A2.3. Defenders have no objection to this proposal.

V. 18 U.S.C. § 113(a)(7) Assault Resulting in Substantial Bodily Injury to Spouse, Intimate Partner, or Dating Partner

The Commission sets forth two options that would broaden the scope of the 4-level enhancement at §2A2.3(b)(1)(B). Option 1, which would provide for an enhancement where the offense resulted in substantial injury to a spouse or intimate partner or dating partner, is more consistent with congressional intent than Option 2, which would expand the enhancement to all cases where an offense resulted in substantial bodily injury. When Congress amended § 113(a)(7) it meant to fill a narrow gap in existing law, which capped at six months the sentence for bodily injury falling short of serious bodily injury and which afforded no Federal jurisdiction over an Indian who committed such an offense against a spouse, intimate partner, or dating partner.[13] Had Congress intended an assault against these victims to be treated the same as one against any person who suffered an injury like a broken finger in a bar room brawl, it could have

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[11] Melissa Labriola, *A National Portrait of Domestic Violence Courts* 31 (2010), http://www.ncdsv.org/images/CenterCourtInnov_NatlPortraitDVCourts_12-2009.pdf.

[12] *Id*. at 46.

[13] DOJ, *Questions and Answers on Proposed Federal Legislation to Help Tribal Communities Combat Violence Against Native Women*, at 9, attached to Weich, *supra* note 1.

easily said so. In the absence of any empirical evidence showing a need to increase penalties for defendants who have committed a misdemeanor assault resulting in substantial bodily injury, the Commission should not expand the enhancement to cover any person other than spouses, intimate partners, or dating partners. If a case emerges that involves vulnerable victims other than those covered by § 113(a)(7), then §3A1.1 is available to enhance the sentence.

This offense should not be referenced to §2A6.2. Section 2A6.2 covers offenses that require a specific intent to kill, injure, harass, or intimidate or that involve intentional violations of protective orders. A person who acts with such specific intent is more culpable than one who commits a general intent assault crime. Moreover, referring a § 113(a)(7) offense that involves a spouse, intimate partner or dating partner to §2A6.2 while referring the same offense involving a minor child to §2A2.2 would result in disproportionate penalties. No legitimate reason exists to punish more harshly a person who pushed a spouse onto the floor and unintentionally dislocated the spouse's shoulder than one who committed the same act with the same resulting injury against a young child. [14]

VI. 18 U.S.C. § 113(a)(8) Assault of a Spouse, Intimate Partner, or Dating Partner by Strangling or Suffocating

The Commission proposes to reference § 113(a)(8) to §2A2.2 and to amend the commentary to §2A2.2 to provide that the term "aggravated assault" includes an assault involving strangulation, suffocation, or an attempt to strangle or suffocate. This option puts § 113(a)(8) on a par with the ten year felonies at § 113(a)(6) for assault resulting in serious bodily injury and at §113(a)(3) for assault with a dangerous weapon. While we agree that a reference to §2A2.2 is more appropriate than a reference to §2A2.3, we oppose the two proposed options to add an additional enhancement where the offense involved strangling, suffocating, or attempting to strangle or suffocate.

Defenders do not believe that either of the two options is appropriate because referencing § 113(a)(8) to §2A2.2 alone provides a sizable increase in the sentence that was available pre-VAWA 2013. Before the addition of § 113(a)(8) to the federal assault statute, prosecutors could only seek a six month sentence in cases involving strangling or suffocating where no serious bodily injury occurred. As a felony assault referenced to §2A2.2, a crime involving strangling or suffocating or an attempt to do so would carry a sentence more than twice that for simple assault – 10 to 16 months for a first offender who receives acceptance of responsibility (base offense level of 14 minus 2). In cases where the offense involved bodily injury, the offense level would increase anywhere from 3 to 7 levels depending upon the degree of injury.

[14] If the Commission were to reference the offense to §2A6.2, the base offense level should be set at 11, which would be consistent with the final offense level that would apply under §2A2.3 if the offense resulted in substantial bodily injury to a minor.

If the Commission wants to increase the sentence even more, then Option 1, with an enhancement of 3 levels, would be better than Option 2 because it would put strangling or suffocating that would not otherwise warrant an enhancement under subsection (b)(3) on par with the 3-level enhancement for bodily injury. To do any more than that would create a sizable unwarranted disparity because the guidelines would then treat an assault that may have involved recklessly impeding a person's breathing for a matter of seconds the same as an assault that resulted in a broken jaw that had to be wired shut. To lessen the disparity, although not eliminate it, it would be better to allow the existing enhancements in §2A2.2(b)(3) for the degree of bodily injury to apply to § 113(a)(8) cases that rise above the 3 levels for bodily injury.[15] To avoid disproportionate punishment from "factor creep," a cap should also be placed on the cumulative effect of the enhancements under §2A2.2(b)(2) and (3), just as currently exists in §2A2.2(b)(3).

We are gravely concerned about the potential for a greater enhancement or the proposal to reference § 113(a)(8) to §2A6.2, which carries a base offense level 4 levels higher than §2A2.2. Persons who commit crimes in Indian country or federal enclaves should not be punished more harshly than their state counterparts. DOJ itself recognized that the available sentences for crimes committed in Indian country should be in line with the types of sentences available in state court.[16] Over the past several years, numerous states have enacted laws directed at strangulation. Commentators have noted how "specialized strangulation laws are working and becoming a valuable law enforcement tool to address domestic violence cases, even when the identified offenses are charged as misdemeanors."[17] A New York study found that 2,300 charges were filed against perpetrators in New York in just fifteen weeks after the law passed. Of those, 83% were misdemeanor charges and 17% felonies. "Nevertheless, the study found that perpetrators who had previously avoided *any* punishment because of a lack of visible injuries were now facing criminal sanctions for their life-threatening behavior. Researchers concluded, as they have in many states, that the previous gap in the law, between no charges and

[15] If the Commission were to add an enhancement for strangulation or suffocation to §2A2.2, it should be limited to an assault committed against a spouse, domestic partner, or dating partner. Defenders see very few cases involving "strangulation," but chokeholds and strangleholds are used in martial arts, combat sports, self-defense, and military hand to hand combat applications. Wikipedia, *Chokehold*, n.wikipedia.org/wiki/Chokehold. If an assault involving a chokehold actually results in injury, then the guidelines have five levels of enhancements to account for those injuries. It would be a strange result for a person involved in a brawl to receive a greater sentence for using a chokehold that results in no bodily injury than a person who punches a person in the face and gives him a black eye.

[16] DOJ, *Questions and Answers on Proposed Federal Legislation to Help Tribal Communities Combat Violence Against Native Women*, at 9, attached to Weich, *supra* note 1.

[17] Gael Strack & Casey Gwinn, *On the Edge of Homicide: Strangulation as a Prelude* 4 (2011), http://www.familyjusticecenter.org/Strangulation/On%20Edge%20Of%20Homicide.pdf.

murder charges, was now being rectified by this innovative intervention tool."[18] The New York study shows that having a specialized law available to prosecute these cases is more important than the length of imprisonment.[19]

Minnesota's experience is also worth noting, particularly because Minnesota is a jurisdiction that also prosecutes crimes in Indian country. Minnesota has a felony domestic assault by strangulation statute. Minn. Stat. § 609.2247 (2008). Unlike the federal statute that only requires reckless conduct, the Minnesota statute requires that the defendant intentionally impede normal breathing or circulation of the blood. The maximum term of imprisonment in Minnesota is three years. *Id*. From 2010-2012, 826 offenders in Minnesota were sentenced for Domestic Assault by Strangulation.[20] Of those, 75 (9%) received a prison term, 686 (83%) received jail as a condition of probation, and 65 (8%) received a non-incarceration sentence.[21] For the offenders who received a jail term as a condition of probation, the terms ranged from 54 to 209.4 days, with an average term of 75.5 days. In contrast, the least onerous of the Commission's proposal – option 1 [base offense level of 14 plus 3] – would result in a final offense level of 14 for a first offender who pleads guilty and receives a 3-level reduction for acceptance of responsibility. That places the person in Zone D, with a guideline range of 15 to 21 months. No purpose of sentencing justifies a decision to subject primarily Native American federal defendants, who already face felony convictions, to significantly longer sentences than their state counterparts who face misdemeanor convictions and minimal jail time.[22]

VII. Length and Conditions of Supervision in Domestic Violence Cases

The Commission requests comment on whether the guidelines should provide additional guidance on the imposition of supervised release in domestic violence cases. As a threshold matter, we are concerned that the Commission's question seems to presuppose that all domestic violence offenders will be sentenced to a term of imprisonment and subject to supervised release.

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[18] *Id*.

[19] *See also* Archana Nath, *Survival or Suffocation: Can Minnesota's New Strangulation Law Overcome Implicit Biases in the Justice System?*, 25 Law & Ineq. 253, 273 (2007) (creation of a felony strangulation statute "increases the likelihood that actors in the legal system will at least inquire into the issue of strangulation, and perhaps even be convinced that training should be conducted in their offices, police stations and courtrooms").

[20] Minnesota Sentencing Guidelines Commission, *Domestic Assault by Strangulation: Sentenced 2010-2012* (2014) (attached as Exhibit A).

[21] *Id*.

[22] If the Commission were to refer this new strangulation offense to §2A6.2, it should set the base offense level at 14 if the defendant is convicted under § 113(a)(8).

We disagree with this premise. Probation should be considered an appropriate sentence for some of these cases.[23]

In any event, we do not believe that the Commission should set forth any special guidance for domestic violence cases because each offender has different needs that must be met during supervision, and each district has different resources available to meet those needs. Moreover, no consensus has emerged, even in domestic violence courts, as to the appropriate conditions of supervision.[24]

A recent study of sentencing conditions in domestic violence cases concluded that "[n]ot all forms of [supervision] may be equally effective, and [supervision] requirements and processes may need to be tailored to offenders' unique circumstances."[25] The research literature concludes that some individuals may respond to certain interventions while others will not. The response to interventions may depend upon the individual's motive to change and the strength of his or her social bonds.[26] In addition, the majority of domestic violence perpetrators "witnessed or experienced parental violence, community violence, or multiple traumas."[27] Abusive men also have higher incidences of head injury or traumatic brain injury than males in the general population.[28] Because each person has unique problems that contributed to commission of the offense, the treatment conditions must be tailored "to the differences in kinds of violence and underlying disorders."[29] We also see situations where both partners committed an assault against each other and were sentenced with conditions that helped both obtain needed services. Given these considerations, the decision to impose conditions must be case-specific and should be left up to the judge after considering the views of probation, the parties, and any relevant experts.

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[23] Research shows the most promising interventions with domestic violence offenders involve victim oriented treatment and a philosophical shift away from punishment. Victim oriented treatment is "designed to be emotional and engaging and change the focus from blame, judgment, and personal deficits of offenders to one in which the focus is on the harm caused to victims and society." George, *supra* note 8, at 23. "In addition, a change in philosophy from threats of punishment and frequent monitoring to one of reinforcing positive change. . . may be a necessary component of effective intervention." *Id*. at 24.

[24] Labriola, *supra* note 11, at 44.

[25] George, *supra* note 8, at 24.

[26] *Id*. at 22.

[27] Judith Siegel, *An Expanded Approach to Batterer Intervention Programs Incorporating Neuroscience Research*, 14 Trauma, Violence & Abuse 295 (2013).

[28] *Id*. at 297.

[29] *Id*. at 299.

VIII. The Major Crimes Act

Because we disagree with the proposal to reference any of the offenses under § 113 to §2A6.2, no amendment to the references in Appendix A for offenses under 18 U.S.C. § 1153 is necessary. If the Commission disagrees and decides to reference §§ 113(a)(7) or (a)(8) to §2A6.2, then the references for § 1153 should be corrected. As to the issue for comment on what Appendix references are appropriate for 18 U.S.C. § 1152, the answer is none. Section 1152 is a jurisdictional provision that does not define a crime. Its presence in the Appendix is unnecessary.

MINNESOTA SENTENCING GUIDELINES COMMISSION

Domestic Assault by Strangulation: Sentenced 2010-2012

Minnesota Sentencing Guidelines Commission (MSGC) monitoring data are offender-based, meaning cases represent offenders rather than individual charges. Offenders sentenced within the same county in a one-month period are generally counted only once, based on their most serious offense.

Information Requested: I'm interested in learning more about state sentences for DV strangulation. Since Minnesota is known for its statute, I'm particularly interested in MN sentences. Is there any way I could get data on the length of sentences in these cases for the last three years?

Note: For more information on assault offenses, see the MSGC annual Assault Offenses and Violations of Restraining Orders report.

History: In 2005, the Legislature made it a felony to assault a family member or household member by strangulation. Prior to the enactment of domestic assault by strangulation, this type of criminal behavior may have been categorized and charged under other felony assault offenses, such as domestic assault and third- and fifth-degree assault. The number of offenders sentenced for this offense quickly climbed to 315 offenders in 2007, then decreased and hovered around 260 offenders from 2009-2011. In 2012 the number sentenced increased to 298. Even the decrease in fifth-degree assault, for which we have seen the most dramatic decrease of 36 percent from 112 offenders in 2006 to 72 offenders in 2012, does not involve a large enough caseload to have contributed to the majority of the increase in domestic assault by strangulation offenses. Therefore, it is likely that these are primarily cases that would not have been felony offenses before the statutory change.

Analysis:

- Sentenced 2010-2012
- Domestic Assault by Strangulation under Minn. Stat. § 609.2247

From 2010-2012, 826 offenders were sentenced for Domestic Assault by Strangulation under Minn. Stat. § 609.2247. Domestic Assault by Strangulation is a Severity Level 4 offense, therefore the presumptive disposition for an offender with a criminal history score of 4 or more is commitment to the Commissioner of Corrections. Of the 826 offenders sentenced, 734 (89%) had a presumptive stayed sentence and 92 (11%) were presumptive commitments to the Commissioner of Corrections. Table 1 displays the dispositional departure rate for these offenders by criminal history score.

Table 1: Dispositional Departure Rates for Domestic Assault by Strangulation by Criminal History Score: Sentenced 2010-2012

Criminal History Score	Total Sentenced	Presumptive Disposition		Dispositional Departure (commitment only)		Dispositional Departure (stay only)	
		Stay	Commitment	None	Mitigated	None	Aggravated
0	400	400 (100%)	0 (0%)	--	--	399 (100%)	1 (0%)
1	157	157 (100%)	0 (0%)	--	--	156 (99%)	1 (1%)
2	119	119 (100%)	0 (0%)	--	--	114 (96%)	5 (4%)
3	58	58 (100%)	0 (0%)	--	--	53 (91%)	5 (9%)
4	32	0 (0%)	32 (100%)	18 (56%)	14 (44%)	--	--
5	29	0 (0%)	29 (100%)	21 (72%)	8 (28%)	--	--
6+	31	0 (0%)	31 (100%)	24 (77%)	7 (23%)	--	--
Total	**826**	**734 (89%)**	**92 (11%)**	**63 (69%)**	**29 (31%)**	**722 (98%)**	**12 (2%)**

Table 2 displays durational departure rates for Domestic Assault by Strangulation by criminal history score. Of the 75 offenders who received prison, 22 (29%) received a mitigated durational departure from the presumptive sentence. Only 2 (3%) received an aggravated durational departure.

Table 2: Durational Departure Rates for Domestic Assault by Strangulation by Criminal History Score: Sentenced 2010-2012

Criminal History Score	Executed Prison Sentence		Durational Departure (prison only)		
	No	Yes	None	Mitigated	Aggravated
0	399 (100%)	1 (0%)	0 (0%)	0 (0%)	1 (100%)
1	156 (99%)	1 (1%)	0 (0%)	1 (100%)	0 (0%)
2	114 (96%)	5 (4%)	2 (40%)	3 (60%)	0 (0%)
3	53 (91%)	5 (9%)	2 (40%)	3 (60%)	0 (0%)
4	14 (44%)	18 (56%)	13 (72%)	5 (28%)	0 (0%)
5	8 (28%)	21 (72%)	17 (81%)	3 (14%)	1 (5%)
6+	7 (23%)	24 (77%)	17 (71%)	7 (29%)	0 (0%)
Total	**751 (91%**	**75 (9%)**	**51 (68%)**	**22 (29%)**	**2 (3%)**

Table 3 displays the average pronounced prison sentence and average pronounced jail sentence where jail was a condition of probation, for this offense by criminal history score. In total, Domestic Assault by Strangulation had an average pronounced prison sentence of 23 months and an average pronounced jail term of 75 days.

Table 3: Avg. Pronounced Prison and Jail Sentence by Criminal History Score: Sentenced 2010-2012

Criminal History Score	Presumptive Duration (months)	Executed Prison Sentence		Jail as a Condition of Probation	
		Avg. Pronounced Sentence (months)	Number Sentenced	Avg. Pronounced Sentence (days)	Number Sentenced
0	12.03[1]	24.0	1	54.0	366
1	15	12.03[1]	1	80.0	144
2	18	15.6	5	93.2	99
3	21	16.2	5	111.6	49
4	24	20.3	18	172.9	13
5	27	24.7	21	178.9	8
6	30	27.5	24	209.4	7
Total	**--**	**23.2**	**75**	**74.5**	**686**

[1] 12.03= 12 months and 1 day