

STATEMENT OF

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AND

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DISTRICT OF MONTANA

- - -

BEFORE THE

UNITED STATES SENTENCING COMMISSION

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HEARING ON THE IMPLEMENTATION OF

THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013

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WASHINGTON, D.C.

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I. Introduction

Chief Judge Saris and members of the Sentencing Commission:

Thank you for the opportunity to provide the Justice Department's views on the implementation of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013). President Obama signed VAWA 2013 into law on March 7th, 2013, marking a historic day in our nation's effort to reduce domestic and sexual violence. The Act reauthorizes and expands successful programs that address violence against women across the country, includes important new law enforcement authorities, and through various provisions, defends the rights of all victims and survivors of domestic and sexual violence.

Because of the nature of federal jurisdiction, the federal criminal justice system's role in fighting violence against women is focused significantly in Indian Country.¹ Both Congress and the Justice Department recognize that violence against Native women has reached epidemic rates. Recently, a Centers for Disease Control and Prevention survey found that 46% of Native American women have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime. VAWA 2013 closes jurisdictional gaps that had long compromised American Indian women's safety and access to justice.

To give the Commission some context related to its work on the guidelines for domestic and sexual violence, we will first discuss the Department's ongoing efforts to ensure public safety in Indian Country and specifically to address domestic and sexual violence. We will then address the guideline issues facing the Commission in implementing the new law nationwide.

¹ "Indian Country" is the legal term used to describe reservations and other lands set aside for Indian use, such as Indian allotments and lands held in trust for Indians or Indian tribes. 18 U.S.C. § 1151.

II. Making Native America Safer

The Justice Department has long been concerned about the high rate of crime occurring in Indian Country – in particular the high rate of violence against women – and this Administration has launched focused initiatives alongside our tribal law enforcement partners to stem this tide. Since 2009, the Department has pursued an aggressive strategy consisting of law enforcement action, prosecution, grant funding, training, technical support, and collaboration with tribal partners that is showing some genuine success. For example, the Department’s renewed commitment to the vigorous prosecution of federal crimes in Indian Country has resulted in a more than 50 percent increase in the number of Indian Country prosecutions by United States Attorney’s Offices nationwide over the past four years. We recognize, though, that an increase in federal arrests and convictions alone cannot solve the public safety challenges on the reservations. That is why we have augmented our enhanced law enforcement focus with critical support for tribal criminal justice institutions.

A. Establishing Unprecedented Levels of Cooperation

Improving public safety in Indian Country poses unique challenges because of geography, varying tribal cultures, and many other factors. These challenges demand the use of all existing authorities to strengthen capacity at every level of the criminal justice system through close cooperative ties between federal, state, local, and tribal governments and between governments and the community.

Since taking office, Attorney General Holder has consistently emphasized that combating violent crime in Indian Country and fostering safe communities is a top priority of the

Department of Justice. In early 2010, each United States Attorney's Office with responsibilities in Indian Country was required to draft and implement a district-specific operational plan to formalize its strategy for consulting and working with tribal, state, and local law enforcement, prosecutors, and other leaders, to improve public safety in Indian Country. For example, beginning in 2010, United States Attorney for the District of Montana Mike Cotter began convening bi-monthly meetings with the federal prosecutors assigned to each reservation, the tribal prosecutors for the reservation, and tribal and federal law enforcement officers. During these meetings, cases arising on a particular reservation during the preceding two-week period are discussed, and a joint decision is made concerning which jurisdiction – federal or tribal or both – will prosecute a particular case. This close communication ensures that serious Indian Country crimes are appropriately investigated and that the decision as to whether a matter will be charged in federal court or tribal court is fully informed.

Nationwide, federal Indian Country caseloads have increased from 1,091 criminal cases filed in fiscal year (FY) 2009, to 1,138 in FY 2010, to 1,547 in FY 2011, and to 1,677 in FY 2012.² These results are the product of the Department's renewed focus on leveraging partnerships with tribal, local, state, and federal partners to address violent crime. In North Dakota, the operational plan and anti-violence strategy developed by United States Attorney Tim Purdon combine enhanced enforcement of federal criminal laws and greater collaboration with support for viable crime prevention programs and efforts to build a sustainable offender reentry program. The plan has been in place for almost three years and has resulted in unprecedented levels of communication and collaboration between the U.S. Attorney's Office and the tribes in

²See *Indian Country Investigation and Prosecution Report (ICIP) for Calendar Years (CYs) 2011 and 2012* at www.justice.gov/tribal/tloa-report-cy-2011-2012.pdf.

North Dakota as well as a large increase in the number of Indian Country prosecutions by the U.S. Attorney's Office.

Also contributing to the increase in prosecutions is the Department's enhanced Tribal Special Assistant U.S. Attorney (SAUSA) program. Tribal SAUSAs are tribal prosecutors who are "cross-deputized" and able to prosecute crimes in both tribal court and federal court as appropriate. These Tribal SAUSAs are able to strengthen tribal governments' role in fighting Indian Country crime and improve U.S. Attorney coordination with tribal law enforcement personnel.

In 2012, the Office on Violence Against Women (OVW) augmented the existing Tribal SAUSA program through awards to four tribes in Nebraska, New Mexico, Montana, North Dakota, and South Dakota. The goal of the Tribal SAUSA program is for every prosecutable crime of intimate partner violence to be pursued in federal court, tribal court, or both. This program has shown promising and tangible results.³

The work of Tribal SAUSAs can also help to accelerate implementation of the Tribal Law and Order Act of 2010 by addressing the broader need for skilled, committed prosecutors, be they AUSAs or Tribal SAUSAs, working on the ground in Indian Country. Recognizing the potential and importance of ensuring adequate staffing, Attorney General Holder announced in November the creation of a new fellowship within the Attorney General's Honors Program – the Attorney General's Indian Country Fellowship – to inspire and train the next generation of prosecutors to serve in Indian Country. This fellowship will create opportunities for highly

³ This past November in the District of North Dakota, non-Indian Tracy Peters was convicted of assaulting a Native woman with whom he had a relationship on the Standing Rock Sioux reservation. In *U.S. v. Marcus Flying Horse*, an enrolled member of the Standing Rock Sioux reservation and a repeat domestic-abuse offender was sentenced to two years and three months in federal prison, followed by three years of supervised release, for assault by a habitual offender. Both of these cases were prosecuted by a Tribal SAUSA working in partnership with the United States Attorney's Office.

qualified law school graduates to spend three years working on Indian Country cases, primarily in U.S. Attorneys' Offices, developing a pool of attorneys with deep experience in Federal Indian law, tribal law, and Indian Country issues.

Our efforts to increase collaboration and communication between U.S. Attorney's Offices and our tribal partners have also strengthened the bond of trust between federal and tribal investigators, prosecutors, other criminal justice personnel, and localities and have made Indian Country communities safer as a result. In an effort to move forward the government-to-government relationships between the Department and sovereign tribes even more, the Department is in the process of adopting a new Statement of Principles to guide all of the actions we take in working with federally-recognized Indian tribes. This proposed Statement will codify our determination to serve as a partner in fighting crime and enforcing the law in Indian Country. It will also memorialize our commitment to Indian tribes, serving as a blueprint for reinforcing relationships, reforming the criminal justice system and aggressively enforcing federal criminal laws and civil rights protections.

The Statement of Principles will be meaningful only to the extent that it is crafted in consultation with tribal leaders. In order to gain the benefit of their insights, expertise, goals, and aspirations, we have posted the document on our website⁴ and have shared it directly with the leaders of all 566 federally-recognized tribes. We plan to hold consultations with tribal leaders over the next several months so that we are in a position to finalize and publish the Statement this year and in doing so, establish a set of core principles by which we can chart our future course.

⁴ <http://www.justice.gov/tribal/>

B. Combating Domestic Violence

The fight against domestic violence in Indian Country has been an especially important priority for the Department of Justice. VAWA 2013 strengthens federal domestic violence offenses and the federal assault statute – a statute frequently used in Indian Country intimate-partner violence crimes. It also contributes to tribal self-determination by recognizing that tribes have full civil jurisdiction to issue and enforce protection orders involving any person – Indian or non-Indian – in matters arising anywhere in Indian Country or otherwise within the tribe’s authority. These provisions were first proposed and have long been championed by the Department.

VAWA 2013 represents a historic step forward for tribal sovereignty and jurisdiction. It recognizes the tribes’ inherent power to exercise “special domestic violence criminal jurisdiction” over those who commit acts of domestic violence or dating violence or violate certain protection orders in Indian Country, regardless of their Indian or non-Indian status. While this jurisdictional provision of the new law takes effect on March 7, 2015, VAWA 2013 also authorizes a voluntary “Pilot Project” to allow tribes to begin exercising this jurisdiction sooner. Just last week, the Associate Attorney General granted three tribes’ Pilot Project requests, and they will soon begin exercising this criminal jurisdiction. We look forward to continuing to assist these and other tribes with the implementation of this important law.

III. Implementing VAWA 2013 in the Sentencing Guidelines

The two primary statutes governing federal criminal jurisdiction in Indian Country are 18 U.S.C. §§ 1152 and 1153. Section 1153, known as the Major Crimes Act, gives the federal

government jurisdiction to prosecute certain enumerated offenses, such as murder, manslaughter, rape, aggravated assault, and child sexual abuse, when they are committed by Indians in Indian Country. Section 1152, known as the General Crimes Act, gives the federal government jurisdiction to prosecute all crimes committed by non-Indians against Indian victims in Indian Country. Section 1152 also grants the federal government jurisdiction to prosecute some crimes by Indians against non-Indians, although that jurisdiction is shared with tribes, and provides that the federal government may not prosecute an Indian who has been punished by the local tribe.

To protect tribal self-government, section 1152 specifically excludes non-major crimes between Indians, which fall under exclusive tribal jurisdiction. The federal government also has jurisdiction to prosecute federal crimes of general application, such as drug and financial crimes, when they occur in Indian Country, unless a specific treaty or statutory provision provides otherwise. Certain domestic violence and stalking offenses, commonly referred to as “the Violence Against Women Act Crimes” (18 U.S.C. §§ 2261 – 2265A), are also crimes of general application. This means that the status of the defendant and victim as Indian or non-Indian is irrelevant. U.S. Attorney’s Offices can prosecute these felony domestic violence and stalking crimes when committed in Indian Country if the statutory elements are met. On a limited number of reservations, the federal criminal responsibilities under sections 1152 and 1153 have been ceded to the States under “Public Law 280” or other federal laws.⁵

The federal assault statute (18 U.S.C. § 113) is used for prosecuting cases of domestic and sexual violence where there is federal jurisdiction pursuant to either the Major Crimes Act or

⁵ Federal jurisdiction was ceded under Public Law 83-280, 18 U.S.C. § 1162, which required six states to assume jurisdiction over Indian Country crimes and divested the federal government of jurisdiction to prosecute under the Major and General Crimes Acts in those areas. The Act also gave other states the option to assume that jurisdiction. Congress has also passed a variety of tribe-specific statutes providing for a similar framework of state jurisdiction over crimes in those locations. The federal government retains jurisdiction to prosecute generally applicable offenses in P.L. 83-280 areas.

the General Crimes Act. Therefore, any changes made to the sentencing guidelines for either §2A2.2 (Aggravated Assault) or §2A2.3 (Minor Assault) will apply to both Indian and non-Indian defendants.

A. Proposed Changes to §2A2.2, Aggravated Assault

Law enforcement is only recently learning what survivors of non-fatal strangulation have known for years: “Many domestic violence offenders and rapists do not strangle their partners to kill them; they strangle them to let them know they can kill them – any time they wish.”⁶ There are clear reasons why strangulation assaults, particularly in an intimate partner relationship, should be a separate felony offense and taken extremely seriously at sentencing:

- Strangulation is more common than was once realized. Recent studies have shown that 34 percent of abused pregnant women reported being “choked.”⁷ In another study, 47 percent of female domestic violence victims reported being “choked.”⁸
- Victims of multiple non-fatal strangulations “who had experienced more than one strangulation attack, on separate occasions, by the same abuser, reported neck and throat injuries, neurologic disorders and psychological disorders with increased frequency.”⁹
- Almost half of all domestic violence homicide victims have experienced at least one episode of strangulation prior to a lethal or near-lethal violent incident. Victims of one

⁶ Casey Gwinn, *Strangulation and the Law*, in THE INVESTIGATION AND PROSECUTION OF STRANGULATION CASES, 5, 5 (Training Inst. on Strangulation Prevention & Cal. Dist. Att’ys Assoc. eds. 2013).

⁷ Bullock, L., et al., *Abuse Disclosure in Privately and Medicaid-Funded Pregnant Women*, 51 JOURNAL OF MIDWIFERY & WOMEN’S HEALTH, 361, 366 (2006).

⁸ Block, C. R., *The Chicago Women’s Health Risk Study: Risk of Serious Injury or Death in Intimate Violence, A Collaborative Research Project 236*, (Illinois Criminal Justice Information Authority ed.) (2000).

⁹ Donald J. Smith, Jr. et al., *Frequency and Relationship of Reported Symptomology in Victims of Intimate Partner Violence: The Effect of Multiple Strangulation Attack*, 21 J. EMERGENCY MED. 323, 325-26 (2001).

episode of strangulation are over six times more likely to be a victim of attempted homicide by the same partner, and are over seven times more likely of becoming a homicide victim at the hands of the same partner.¹⁰

- Even given the lethal and predictive nature of these assaults, the largest non-fatal strangulation case study ever conducted (“the San Diego Study”) found that most cases lacked physical evidence or visible injury of strangulation – only 15 percent of the victims had a photograph of sufficient quality to be used in court as physical evidence of strangulation, and no symptoms were documented or reported in 67 percent of the cases.¹¹
- The San Diego Study found major signs and symptoms of strangulation that corroborated the assaults, but often only minor visible external injury.¹²
- Loss of consciousness can occur within 5-10 seconds, and death within 4-5 minutes.¹³ The seriousness of the internal injuries, even with no external injuries, may take a few hours to be appreciated, and death can occur days later.¹⁴
- Because most strangulation victims do not have visible external injuries, strangulation cases are frequently minimized by law enforcement, medical advocacy, mental health professionals, and courts.¹⁵

¹⁰ Nancy Glass et al., *Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women*, 35 J. EMERGENCY MED. 329, 333 (2008).

¹¹ Gael B. Strack, George E. McClane, Dean Hawley, *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues*, 21 J. EMERGENCY MED. 303, 305-06 (2001).

¹² *Id.*

¹³ GWINN, *supra* note 6, at 8 (citing Dean A. Hawley, *Forensic Medical Findings in Fatal and Non-Fatal Intimate Partner Strangulation Assaults*, 6 (2012), available at <http://www.strangulationtraininginstitute.com/index.php/library/viewcategory/843-scholarly-works-and-reports.html>2013 (last visited Jan. 27, 2014)).

¹⁴ *Id.*

- Even in fatal strangulation cases, there is often no evident external injury (confirming the findings regarding the seriousness of non-fatal, no-visible-injury strangulation assaults).¹⁶
- Non-fatal strangulation assaults may not fit the elements of other serious assaults due to the lack of visible injury. Studies are confirming that an offender can strangle someone nearly to death with no visible injury, resulting in professionals viewing such an offense as a minor misdemeanor or as no provable crime at all.¹⁷
- Experts across the medical profession now agree that manual or ligature strangulation is “lethal force” and is one of the best predictors of a future homicide in domestic violence cases.¹⁸

The Commission published two options for amending §2A2.2 in cases of assault by strangling, suffocating, or attempting to strangle or suffocate. **The Department urges the Commission to adopt Option 2. We urge the Commission to make the enhancement for strangulation or suffocation five offense levels, and that the cumulative adjustment for application of subdivisions (3) and (4) not exceed 10 levels.**

The amended assault statute provides for the new offense of assault of a spouse, intimate partner, or dating partner by strangling or suffocating, or attempting to strangle or suffocate (18 U.S.C. § 113(8)). During the debate on the legislation, extensive information was presented to Congress, consistent with the research cited above, that strangulation is present in a large number

¹⁵ *Id.*

¹⁶ *Id.* (citing Dean A. Hawley, *Forensic Medical Findings in Fatal and Non-Fatal Intimate Partner Strangulation Assaults*, 6 (2012), available at <http://www.strangulationtraininginstitute.com/index.php/library/viewcategory/843-scholarly-works-and-reports.html2013> (last visited January 27, 2014)).

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 8 (citing Nancy Glass et al., *Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women*, 35 J. EMERGENCY MED. 329, 333 (2008)).

of assaults by men against female intimate partners; that such conduct is particularly terrifying, both to the victim and to witnesses (most often children); and that the conduct is often recurring and enhances the abuser's control over the victim. Evidence was further presented that strangulation and suffocation often do not result in visible physical injury or leave physical evidence of abuse, making it difficult for law enforcement to detect, but may cause long-term psychological and physiological damage to the victim.

Option 1 proposes a 3 to 7 level enhancement for strangulation or suffocation only where the victim has not sustained bodily injury. The Department sees no reason to limit any strangulation/suffocation enhancement to situations in which there is no bodily injury to the victim. As discussed above, strangulation and suffocation, or an attempt of either, is specific serious conduct that warrants enhanced punishment even when some enhancement would already be applied due to the existence of an injury.

We believe the appropriate enhancement for suffocation/strangulation is five levels, which is the same as the enhancement for serious bodily injury. We recognize, however, that when injury occurs, the cumulative adjustment under the guidelines should be limited, and we recommend that the cumulative adjustment for application of subdivisions (3) and (4) not exceed 10 levels.

The Department also recommends a change to the commentary language found on page 17 of the reader-friendly compilation of the proposed amendments. The background commentary states that "this guideline covers felonious assaults that are more serious than minor assaults because of the presence of an aggravating factor, *i.e.*, serious bodily injury; the involvement of a dangerous weapon with intent to cause bodily injury; strangling, suffocating, or attempting to strangle or suffocate; or the intent to commit another felony." We recommended

that “minor” be replaced with “other.” Use of the word “minor” in a domestic violence situation or an assault where a dangerous weapon (including a firearm) was used is inappropriate and does a disservice to victims and the community in that such language can be interpreted by officials, victims, and defendants as minimizing or trivializing potentially lethal behavior.

B. Proposed Changes to §2A2.3, Minor Assault

Prior to the amendments of VAWA 2013, 18 U.S.C. § 113(a)(7) provided for a maximum imprisonment term of five years for assault resulting in substantial bodily injury to an individual who has not attained the age of 16. Now, although the maximum imprisonment term remains five years, § 113(a)(7) has been expanded to apply to a spouse, an intimate partner, and a dating partner, in addition to a victim who has not attained the age of 16. The Department asked Congress for this change because assaults resulting in substantial bodily injury represent an intermediate step on the ladder of escalating domestic violence, and federal law should recognize this. Under the federal assault statute prior to the passage of VAWA 2013, the offense was inadequate. If an adult Indian victim suffered a substantial bodily injury at the hands of her spouse, intimate partner, or dating partner, the maximum possible prison sentence was typically only six months if the perpetrator was non-Indian. And if the perpetrator was Indian, the federal government lacked jurisdiction altogether.

The Commission proposes two options for broadening the scope of the four-level specific offense characteristic now in §2A2.3. **The Department urges the Commission to adopt Option 2, which would apply the enhancement to *any case in which the offense resulted in substantial bodily injury*.** Option 1 would apply the enhancement only to cases in which the offenses resulted in substantial bodily injury to an individual less than 16 years old, a spouse, an

intimate partner, or a dating partner. We believe Option 2 is appropriate because it focuses on the level of injury sustained by the victim, and represents an approach for accounting for injuries that is most consistent with all the purposes of sentencing. The enhancement for substantial bodily injury should not be limited to victims under the age of 16, a spouse, an intimate partner, or a dating partner, but rather should be applicable to all assault victims.

The Department also recommends that the Commission consider a change to the title of §2A2.3 (Minor Assault) and some of the commentary language in the guideline. We believe the title for the guideline should be changed to “Assault.” Section 2A2.3 applies to felony assaults, like assault resulting in substantial bodily injury. Substantial bodily injury is defined in 18 U.S.C. § 113 as a temporary but substantial disfigurement or a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty. By definition, a felony-level assault is not “minor.” Furthermore, the commentary for §2A2.3 states that this guideline applies where “the offense involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened.” Given the number of serious crimes committed with a firearm or other dangerous weapon, especially in the context of intimate partner violence, it seems prudent that the word “minor” be dropped from the guideline title and all corresponding references in the guideline. Use of the word “minor” in a domestic violence situation or an assault where a dangerous weapon, including where a firearm was possessed and its use threatened, does a disservice to victims and the community in that it can be interpreted by officials, victims, and defendants as minimizing or trivializing potentially lethal behavior.¹⁹

¹⁹ In the “Background” commentary, we suggest that the word “minor” be replaced with “misdemeanor.”

C. Proposed Changes to §2A6.2, Stalking or Domestic Violence

The Commission proposes that the new offense of assault by strangling, suffocating, or attempting to strangle or suffocate a spouse, of an intimate partner, or dating partner found at 18 U.S.C. § 113(a)(8) be referenced to §2A6.2 in addition to §2A2.2. The Department supports this change. We believe the change is consistent with the structure of the current guidelines' treatment of domestic violence. The Commission proposes that guidelines define the terms "strangling" and "suffocating" by reference to the definitions provided in 18 U.S.C. § 113. We support this as well.

The Commission proposes two options for amending §2A6.2 to account for cases involving strangulation or suffocation. Option 1 provides for a two-level enhancement for strangling or suffocating to be applied independently of bodily injury. For the reasons discussed above, **the Department supports Option 1**, which recognizes the aggravating conduct of strangling, suffocating, or attempting to strangle or suffocate as an independent aggravating factor. Option 2, on the other hand, combines bodily injury with strangling, suffocating, or attempting to strangle or suffocate into one aggravating factor. As we stated, combining injury and the act of strangulation fails to appreciate and account for the independent harms of both aggravating factors. Strangulation and suffocation, or an attempt of either, is specific serious conduct that deserves enhanced punishment regardless of injury. If the strangulation victim has suffered injury at the hand of the assailant, the injury, too, should be scored as an aggravating factor.

D. Issues for Comment Not Addressed in Previous Comments

1. Supervised Release

Supervised release is particularly important in cases of intimate-partner violence because victims are uniquely vulnerable to abusive partners and because there is a high degree of recidivism in cases of domestic violence. **The Department believes the Commission should provide additional guidance for such cases and “highly recommend” the imposition of supervised release, as it does for defendants with a history of drug abuse.** We suggest the Commission consider three provisions of federal law as it reviews this issue and as Congress considers additional legislation in this area.

First, 18 U.S.C. § 3583(a) provides for including a term of supervised release after imprisonment. It requires “that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the *first time* (emphasis added) of a domestic violence crime as defined in section 3561(b).” Second, 18 U.S.C. § 3563(a)(4) provides that for a defendant convicted of a domestic violence offense for the first time, “that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant.” And finally, §5D1.3(a)(3) of the guidelines, outlining the mandatory conditions of supervised release, states that “the defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) *for the first time* (emphasis added) shall attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available

within a 50-mile radius of the legal residence of the defendant.” We believe that defendants, their victims, and the community would benefit if those individuals convicted of a *second, third or subsequent* domestic violence crime also receive a term of supervised release. We also believe that in certain circumstances, defendants serving a term of supervised release following a domestic violence crime should be required, as a condition of that supervised release, to participate in a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. These types of programs have the potential to benefit all domestic violence offenders and not just those sentenced to a term of probation.

Additionally, §5D1.3(d)(1) addresses a “special” condition of supervised release prohibiting a defendant previously convicted of a felony or for having used a firearm or other dangerous weapon during commission of the offense from possessing a firearm or other dangerous weapon. The Department strongly recommends the addition of another “special” condition prohibiting the purchase or possession of a firearm or ammunition where the defendant has a conviction for a qualifying misdemeanor crime of domestic violence (18 U.S.C. § 922(g)(9)) or is subject to a qualifying protection order (18 U.S.C. § 922(g)(8)).

2. Assault with Intent to Commit Certain Sex Offenses Under Sections 113(a)(1) and (2)

The Commission seeks comment on whether changes are necessary to the guidelines to address the statutory changes to 18 U.S.C. §§113(a)(1) and (2). VAWA 2013 amended

§ 113(a)(1) so that it now includes the crimes of assault with intent to commit aggravated sexual abuse (18 U.S.C. § 2241) and assault with intent to commit sexual abuse (18 U.S.C. § 2242).

Assault with intent to commit any felony, § 113(a)(2), has been amended to conform to changes in § 113(a)(1), so the offenses of assault with the intent to commit murder, aggravated sexual abuse, and sexual abuse are exceptions to the charge of assault with intent to commit any felony.

The crimes of assault with intent to commit sexual abuse of a minor or ward and assault with intent to commit abusive sexual contact are still included within 18 U.S.C. § 113(a)(2).

We recommend that assault with intent to commit sex offenses be treated in the guidelines as an attempted sex offense. We urge the Commission, for example, to amend the guidelines' Statutory Index to reference the offenses of assault with intent to commit aggravated sexual abuse and sexual abuse to §2A3.1. Section 2A3.1 currently includes specific offense characteristics appropriate for sex offenses, and the Department sees no need to further amend §2A3.1.

3. Proposed Amendment to Appendix A for 18 U.S.C. §§ 1152 and 1153

The Commission requests comment on whether it is appropriate to add §2A6.2 (Domestic Assault and Stalking) to the Statutory Index referencing 18 U.S.C. § 1153. Although we believe it is unnecessary to list 18 U.S.C. § 1153 in the Statutory Index, if it remains, we think it appropriate to add §2A6.2 because it may be the most appropriate guideline for certain assault cases prosecuted under 18 U.S.C. § 113. Section 1153 is a jurisdictional statute that enumerates specific covered offenses. The specific offense committed, *i.e.*, *murder, assault, sex offense*, should govern the most appropriate guideline and, consequently, we think a reference to § 1153 is unnecessary.

The Commission also requests comment on whether it is necessary to have a Statutory Index referencing 18 U.S.C. § 1152. We think the reference to 18 U.S.C. §1152 in Appendix A should be deleted. Section 1152 is also a jurisdictional statute that provides jurisdiction for specific covered offenses. The specific offense committed, *i.e.*, *murder, assault, sex offense*, should govern the most appropriate guideline and, consequently, a reference to § 1152 is unnecessary.

4. 18 U.S.C. §§ 2261, 2261A, 2262 (Domestic Violence and Stalking)

The Department offers no comments or suggested edits to the Commission’s proposed amendment to the Application Notes for §2A6.2. However, we do suggest that changes should be made to the synopsis of the proposed amendment so that the language is fully consistent with the amendments in VAWA 2013.²⁰

²⁰ Our suggestion: *This part of the proposed amendment addresses statutory changes to 18 U.S.C. §§ 2261 (Interstate domestic violence), 2261A (Stalking), and 2262 (Interstate violation of protection order). Statutory changes to these provisions were made by Public Law 109–162 in 2006 and were expanded and restated by section 107 of the Act. The proposed amendment amends the Commentary to §2A6.2 to reflect these statutory changes.*

*Before these statutory changes, these offenses generally required as a jurisdictional element of the offense that the defendant travel in interstate or foreign commerce or into or out of Indian country or within the special maritime and territorial jurisdiction of the United States. ~~or, in the case of a stalking offense under section 2261A(2), that the defendant use the mail or any facility of interstate or foreign commerce. As a result of~~ The statutory changes clarify that, the jurisdictional element *can also* ~~may instead~~ be met by presence in the special maritime and territorial jurisdiction of the United States. *In addition, although travel across jurisdictional boundaries is still required for 2261, 2262 and 2261A(1) offenses, a stalking offense charged under 2261A(2) no longer requires that the stalker and the victim be in different jurisdictions as long as *or, in the case of a stalking offense under section 2261A(2), by using an interactive computer service, electronic communication service, or electronic communication system or other facility of interstate commerce is utilized.* The proposed amendment revises the definition of “stalking” in the Commentary to §2A6.2 to conform to these statutory changes.**

*These statutory changes have also clarified that ~~expanded and restated the elements of~~ stalking offenses under section 2261A ~~to cover a broader range of conduct. As a result of these statutory changes, section 2261A has been extended to~~ cover placing a person under surveillance with intent to kill, injure, harass, or intimidate. *In addition, new statutory language now covers* ~~and~~ conduct that causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress. The proposed amendment expands the definition of “stalking” in the Commentary to §2A6.2 to reflect the expanded conduct covered by these statutory changes to section 2261A.*

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Thank you for the opportunity to share the views of the Department of Justice on this important topic. We look forward to working with the Commission on these issues and to working with all in the criminal justice system to achieve increased public safety and greater justice under the law.