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## Guiding the Sentencing Court's Discretion: A Proposed Definition of the Phrase Non-Violent Offense under United States Sentencing Guideline 5K2.13

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# GUIDING THE SENTENCING COURT'S DISCRETION: A PROPOSED DEFINITION OF THE PHRASE "NON-VIOLENT OFFENSE" UNDER UNITED STATES SENTENCING GUIDELINE § 5K2.13

## I. INTRODUCTION

The United States Sentencing Commission enacted the Sentencing Guidelines in an attempt to establish a fair and effective federal sentencing system.<sup>1</sup> This system instituted sentencing ranges which the sentencing court must apply when sentencing all offenders.<sup>2</sup> The Commission recognized, however, that there are certain factors relevant to a crime or criminal for which the general Guidelines could not fully account.<sup>3</sup> Therefore, the Commission established policy statements which enabled the sentencing court to depart from the applicable Guideline when certain factors exist.<sup>4</sup>

One such policy statement is United States Sentencing Guideline § 5K2.13, which allows the court to use the defendant's reduced mental capacity as a mitigating factor in sentencing.<sup>5</sup> Section 5K2.13 sets out three requirements for departure. The defendant must have (1) committed a non-violent offense (2) while suffering from a significantly reduced mental capacity which contributed to the commission

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<sup>1</sup> UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL, ch. 1, pt. A(3), at 2 (1994) [hereinafter U.S.S.G.].

<sup>2</sup> See generally Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883 (1990).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* Departure provisions were included in the Guidelines in order to further the basic purposes of the guidelines which were uniformity, proportionality and honesty. See U.S.S.G., ch. 1, pt. A(3), at 2-3, 5-6 (1993); 28 U.S.C. § 994(a)(2) (1993); see, e.g., U.S.S.G. § 5K2.13.

<sup>5</sup> U.S.S.G. § 5K2.13:

If the defendant committed a *non-violent* offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

*Id.* (emphasis added).

of the offense and was not caused by voluntary use of drugs or other intoxicants, and (3) a criminal history which does not indicate a need for incarceration to protect the public. Elements (2) and (3) are generally fact specific inquiries that have not produced opposing legal views and are infrequently reviewed on appeal.<sup>6</sup>

Conflict has arisen within the federal circuits, however, regarding the interpretation of element (1), the commission of a non-violent offense.<sup>7</sup> The Sentencing Commission failed to adequately define the phrase "non-violent offense" in the Guidelines and the Supreme Court has yet to examine this issue. Although this phrase appears to be straightforward, the federal courts have been unable to establish a consistent interpretation.

The majority of circuits have defined the term "non-violent offense" as any crime that does not have "as an element the use, attempted use, or threatened use of physical force. . . ."<sup>8</sup> These circuits have held that this definition of "non-violent offense" is the contrapositive of the definition of "crime of violence" in U.S.S.G. § 5K2.13.<sup>9</sup> Therefore any crime defined as violent under § 4B1.2, including threats of violence, are not "non-violent offenses."<sup>10</sup>

A minority of circuits have concluded that this approach is not supported by the policies underlying §§ 4B1.2 and 5K2.13.<sup>11</sup> As such,

<sup>6</sup> See, e.g., *United States v. Weddle*, 30 F.3d 532 (4th Cir. 1994). The defendant pled guilty to one-count of mailing threatening communications. *Id.* The district court found "[g]iven the overall picture . . . that defendant suffered from a major depressive episode." *Id.* at 537. On appeal, the government did not dispute the defendant's significantly reduced mental capacity or the conclusion that his criminal history did not warrant incarceration to protect the public. *Id.*

<sup>7</sup> Compare *United States v. Chatman*, 986 F.2d 1446 (D.C. Cir. 1993) (which held that the definition of "crime of violence" in § 4B1.2 should not control the application of § 5K2.13) with *United States v. Poff*, 926 F.2d 588 (7th Cir.) (which held that the definition in § 4B1.2 should control the application of § 5K2.13), *cert. denied*, 502 U.S. 933 (1991); see also, *United States v. Dailey*, 24 F.3d 1323, 1327 (11th Cir. 1994) (recognizing a split within the circuits and temporarily holding the definition found in § 4B1.2 applicable to § 5K2.13 because, under Eleventh Circuit case law, they were bound by the earliest decided case).

This conflict has even produced a split within a circuit. Compare *United States v. Russell*, 917 F.2d 512 (11th Cir. 1990) (applied definition found in § 4B1.2) with *United States v. Philibert*, 947 F.2d 1467 (11th Cir. 1991) (did not mention definition found in § 4B1.2). The Eleventh Circuit, while tentatively holding the majority approach, discussed *infra* at notes 59 through 84 and accompanying text, applicable, has left the issue open for an *en banc* determination. See *Dailey*, 24 F.3d at 1327.

<sup>8</sup> See *Poff*, 926 F.2d at 588; *Russell*, 917 F.2d at 517; *United States v. Borraro*, 898 F.2d 91, 94 (9th Cir. 1990); *United States v. Rosen*, 896 F.2d 789, 791 (3d Cir. 1990); *United States v. Maddalena*, 893 F.2d 815, 819 (6th Cir. 1989).

<sup>9</sup> See *United States v. Weidrick*, 19 F.3d 32 (9th Cir. 1994); *Poff*, 926 F.2d at 592; *Russell*, 917 F.2d at 517; *Borraro*, 898 F.2d 94; *Rosen*, 896 F.2d at 791; *Maddalena*, 893 F.2d at 819.

<sup>10</sup> See, e.g., *Poff*, 926 F.2d at 592.

<sup>11</sup> See *Chatman*, 986 F.2d at 1446; *Weddle*, 30 F.2d at 532; see also *Philibert*, 947 F.2d 1467 (determining whether offense was one of violence without examining the definition found

they have applied a fact specific inquiry to determine whether the underlying conduct was indeed non-violent.<sup>12</sup>

This Comment suggests that the current interpretations of “non-violent offense” are inconsistent with the underlying purposes of the Sentencing Guidelines and § 5K2.13 in particular, because they fail to adequately balance a determinate system with the leniency intended by § 5K2.13. The courts adopting the majority approach fail to recognize textual difficulties with their analysis, as well as the leniency espoused by § 5K2.13. The courts adopting the minority rationale have failed to offer sufficient guidance to the sentencing court. Therefore, this Comment offers a new approach that balances these competing interests.

To better understand the following discussion, Part II briefly discusses the history of sentencing and sets forth the concerns confronting Congress when promulgating the Sentencing Guidelines. Part III discusses the approach taken by the majority of the federal circuits. It analyzes the rationale of the approach and offers criticisms of its rationale. Part IV summarizes the minority approach and sets forth criticisms of its interpretation. Part V then proposes a revision of § 5K2.13 in light of the current provision’s failure to provide the just sentencing scheme envisioned by Congress when establishing the Guidelines and its policy statements.

## II. HISTORY

For most of the past century, the federal government’s system of sentencing criminals was largely indeterminate.<sup>13</sup> While statutes specified penalties for crimes, they typically gave the sentencing court broad discretion to decide whether the offender should be incarcerated, for how long, and whether some other form of punishment, such as probation or a fine, should be imposed in place of imprisonment.<sup>14</sup> This system was supplemented by parole, which allowed the offender to return to society earlier than his sentence would have allowed under the “guidance and control” of their parole officer.<sup>15</sup>

This system of discretionary sentencing and parole was based on the desire to rehabilitate the offender, thereby minimizing the risk that he would resume criminal activity upon his unsupervised return

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in § 4B1.2); *United States v. Spedalieri*, 910 F.2d 707, 711 (10th Cir. 1990) (same); *United States v. Bellrichard*, 801 F. Supp. 263, 269 (D. Minn. 1992) (same).

<sup>12</sup> *Chatman*, 986 F.2d at 1446.

<sup>13</sup> See Theresa Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 393-94 (1991).

<sup>14</sup> *Id.*

<sup>15</sup> See *id.*; see also *Zerbst v. Kidwell*, 304 U.S. 359, 363 (1938).

to society.<sup>16</sup> Each criminal's amenability to rehabilitation was necessarily an *ad hoc* determination made by the individual's sentencing judge and parole officer.<sup>17</sup> The judge and parole officer would assess the criminal's amenability to rehabilitation before handing down the sentencing and release decisions.<sup>18</sup> Therefore, sentencing officials exercised great discretion.<sup>19</sup>

The wide discretion exercised by sentencing officials, however, led to serious disparities in sentences.<sup>20</sup> Also, the indeterminate sentencing system produced high recidivism rates. Critics questioned rehabilitation as a theory of punishment and regarded its goals as unattainable in most cases.<sup>21</sup> Therefore, Congress determined that a new system, which incorporated alternative theories of punishment, was necessary.<sup>22</sup>

The first step in moving away from the discretionary system came in 1958, when Congress authorized the creation of judicial sentencing institutes and joint councils, whose purpose was to formulate sentencing standards.<sup>23</sup>

In 1973, still unhappy with the system of sentencing currently in place, the United States Parole Board adopted guidelines that established a "customary range" of confinement.<sup>24</sup> In 1976, Congress endorsed this initiative through the Parole Commission and Reorganization Act.<sup>25</sup> In that act, Congress attempted to give the Parole Commission a role in moderating "the disparities in the sentencing practices of individual judges."<sup>26</sup> Under the new system, the judge continued to set the sentence within the statutory range fixed by Congress, while the Parole Commission set the prisoner's actual release date.

This indeterminate sentencing system failed in two respects.

<sup>16</sup> See Karle & Sager, *supra* note 13, at 393-94.

<sup>17</sup> See Sanford H. Kadish, *The Advocate and then Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L.REV. 803, 812-13 (1961).

<sup>18</sup> See Karle & Sager, *supra* note 13, at 393-94.

<sup>19</sup> See Kadish, *supra* note 17, at 812-13.

<sup>20</sup> See Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 54 (1973).

<sup>21</sup> See S. REP. NO. 225, 98th Cong., 1st Sess. (1983); H.R. REP. NO. 1017, 98th Cong., 2d Sess. (1984); 1984 U.S.C.A.N. 3182 (1984); see also NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 24-43 (1974); F. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981).

<sup>22</sup> See Nagel, *supra* note 2, at 883-84.

<sup>23</sup> See 28 U.S.C. § 334 (1993).

<sup>24</sup> See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 391 (1980) (discussing a matrix combining age at first conviction, employment background, other personal factors, and offense severity rating to establish a customary range).

<sup>25</sup> See 18 U.S.C. §§ 4201-4218, *repealed by* tit. 2 § 218(a)(5) (Supp. 1996) (effective 1997).

<sup>26</sup> See *generally* S. Conf. Rep. No. 94-648, at 19 (1976); see also *United States v. Addonizio*, 442 U.S. 178, 189 (1979).

First, the system created great variation among sentences imposed by different judges on similarly situated offenders.<sup>27</sup> For instance, a statistical survey of the Second Circuit revealed that sentences imposed in almost identical cases ranged from three to twenty years.<sup>28</sup>

Second, the system created uncertainty as to the time the offender would actually serve in prison.<sup>29</sup> Race, sex, and the region in which the defendant was convicted, among other things, caused these differences.<sup>30</sup> These unfair disparities and uncertainties caused a widespread public concern because they proved to be a serious impediment to an evenhanded and effective criminal justice system.<sup>31</sup>

Congress recognized the need for a new system because these new approaches failed to cure the "shameful" and "unjustified" consequences of this failing system.<sup>32</sup> After wrestling with the problem for more than a decade,<sup>33</sup> Congress enacted the Sentencing Reform Act of 1984.<sup>34</sup>

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<sup>27</sup> See Frankel, *supra* note 20, at 54. Judge Frankel, an outspoken critic of the pre-guidelines system, found that "[t]he evidence is conclusive that judges . . . , administering statutes that confer huge measures of discretion, mete out widely divergent sentences . . . explainable only by the variations among judges." *Id.*

<sup>28</sup> See ANTHONY PARTIDGE & WILLIAM B. ELRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES 1-3* (1974). See also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

In a separate study, 47 Virginia District Court judges similarly exhibited wide disparity in sentencing the same offender. William Austin & Thomas A. Williams, III, *A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. CRIM. L. & CRIMINOLOGY 306, 306-10 (1977). These judges examined five hypothetical cases and "produced a variety of patterns of disparity, but some form of disparity was always present." *Id.* at 306.

<sup>29</sup> See Breyer, *supra* note 28, at 4; see also, BUREAU OF JUSTICE STATISTICS, UNITED STATES SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1987, at 142-43 (Katherine M. Jamison & Timothy J. Flanagan eds., 1988).

<sup>30</sup> *Sentencing Guidelines: Hearings on Sentencing Guidelines Before the Subcommittee on Criminal Justice of the House Comm. of the Judiciary*, 100th Cong., 1st Sess. 676-77 (1987) (testimony of Ilene H. Nagel, U.S. Sentencing Commissioner).

<sup>31</sup> See S. REP. NO. 225, 98th Cong., 2d Sess. 38, 40 (1983). The report on the 1984 Sentencing Act referred to the "outmoded rehabilitation model" for federal criminal sentencing and recognized that the efforts of the criminal justice system to rehabilitate criminals had failed. *Id.*

<sup>32</sup> *Id.* at 38.

<sup>33</sup> Before settling on the Guidelines at issue here, Congress considered numerous other competing proposals for sentencing reform. It rejected strict determinate sentencing, which would have offered mandatory sentences for each offense, because it concluded that the Guideline system would be successful in reducing sentencing disparities, while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case. *Id.* at 78-79. Additionally, Congress rejected a plan that would have made the Guidelines only advisory because some legislators feared that under such circumstances, they would not produce the desired changes. *Id.* at 79.

<sup>34</sup> The Sentencing Reform Act of 1984 was passed as Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-437 §§ 211-39, 98 Stat. 1837, 1987 (codified in U.S.C. §§ 3551-86, 3621-25, 3742 and 28 U.S.C. §§ 991-98 (1988)).

The main goal of the Sentencing Reform Act was to channel judicial discretion through a highly structured sentencing scheme designed to promote honesty,<sup>35</sup> uniformity, and proportionality<sup>36</sup> in sentencing.<sup>37</sup> To promote honesty, Congress eliminated the parole system for federal prisoners sentenced after the Commission instituted the Guidelines.<sup>38</sup> As a result, a sentence imposed by the court would be the sentence served in prison, less approximately fifteen percent reduction for good behavior.<sup>39</sup> To promote uniformity and proportionality, the Sentencing Reform Act established the Federal Sentencing Commission to promulgate the detailed Sentencing Guidelines which judges must follow when imposing sentences.<sup>40</sup>

As part of the Sentencing Reform Act Congress enacted a Guidelines Manual, which set out goals that Congress intended to achieve by enacting the Sentencing Guidelines.<sup>41</sup> The statutory mission states that:

The Sentencing Reform Act of 1984 . . . provides for the development of Guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.<sup>42</sup>

Additionally,

Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. [It also] sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.<sup>43</sup>

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<sup>35</sup> "By 'honesty' Congress meant to end the previous system whereby a judge might sentence an offender to twelve years, but the Parole Commission could release him after four." Breyer, *supra* note 28, at 4.

<sup>36</sup> By "uniformity" and "proportionality," Congress intended "to reduce unjustifiably wide sentencing disparity." *Id.*

<sup>37</sup> U.S.S.G., ch. 1, pt. A(3), intro. cmt. (1994).

<sup>38</sup> See 18 U.S.C. § 3551 (1988 & Supp. III 1994); U.S.S.G., ch. 1, pt. A(1) and (2), intro. cmt. The Parole Board was scheduled to be phased out within five years after the adoption of the Guidelines and all prisoners sentenced under the pre-Guidelines system were to be assigned specific terms of imprisonment. 18 U.S.C. § 3551(b)(1), (3) (1988). To further promote honesty, all sentences were reviewable for conformity with the law, rather than abuse of discretion. 18 U.S.C. §§ 3742 (a), (b), (e) (1988 & Supp. III 1991).

<sup>39</sup> See 18 U.S.C. § 3551 (1988).

<sup>40</sup> "The United States Sentencing Commission is an independent agency of the judicial branch composed of seven voting and two non-voting, *ex-officio* members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." U.S.S.G., ch.1, pt.A(1), intro. cmt. (1994).

<sup>41</sup> U.S.S.G., ch.1, pt. A, intro. cmt. (1994).

<sup>42</sup> *Id.*; see also 18 U.S.C. § 3553(a)(2).

<sup>43</sup> U.S.S.G., ch. 1, pt. A(3), intro. cmt.

As can be evidenced by these statements, rehabilitation was no longer the sole theory behind sentencing.<sup>44</sup> Further, Congress intended to totally replace the current system with a more structured scheme designed to limit judicial discretion.<sup>45</sup>

Congress also enacted a number of specific directives to further narrow the Commission's drafting discretion.<sup>46</sup> For example, statutes instructed the Commission to take into account the nature and degree of harm caused by the offense, community views and concerns about the gravity of the offenses, and aggravating and mitigating circumstances when establishing offense categories.<sup>47</sup> These directives also allowed the Commission to consider the nature and capacity of the correctional facilities and services.<sup>48</sup> Finally, the maximum range of imprisonment for each sentencing category could not exceed the minimum by more than twenty-five percent.<sup>49</sup>

These goals led the Commission to create the Sentencing Guidelines, a basically determinate sentencing system.<sup>50</sup> It created a generic sentencing table containing forty-three vertical offense levels and six horizontal criminal history levels.<sup>51</sup> Every federal offense was assigned a base vertical level ranging from level one, the lightest sentence, to level forty-three, the most severe. Similar offenses were grouped into generic categories. All offenders sentenced under the same offense category received the same base offense level.<sup>52</sup> The base level would be increased or decreased in exactly the same manner when "specific offense characteristics" were involved.<sup>53</sup> A prisoner's sentence could only be reduced by any credit earned while in custody.

Federal judges did retain some limited discretion to sentence outside the prescribed guideline range. If the sentencing judge found departure was warranted from the range prescribed by the Guidelines, he must support that finding in a writing stating his reasons.<sup>54</sup> This

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<sup>44</sup> 28 U.S.C. § 994(k) (1993).

<sup>45</sup> See Nagel, *supra* note 2, at 884.

<sup>46</sup> See *id.* at 902-06 for a summary of the directives.

<sup>47</sup> 28 U.S.C. § 994 (c) (1988).

<sup>48</sup> 28 U.S.C. § 994 (g) (1988).

<sup>49</sup> 28 U.S.C. § 994(b) (2) (1988).

<sup>50</sup> See Charles Ogeltree, *The Death Of Discretion? Reflections on the Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1944-46 (1988). The Commission intended to design a sentencing system that reduced the disparities in the sentences of defendants convicted of similar crimes. *Id.* at 1944; see also, *United States v. Gonzalez-Lopez*, 911 F.2d 542, 547 (11th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991).

<sup>51</sup> U.S.S.G., ch.5, pt.A (Sentencing Table), (Nov. 1994). The Sentencing Commission established clear rules to determine an offender's criminal history level. Nagel, *supra* note 2, at 922-25.

<sup>52</sup> Nagel, *supra* note 2, at 922-23.

<sup>53</sup> *Id.* at 923.

<sup>54</sup> 18 U.S.C. § 3553(c).



authority merely allowed the sentencing judge to depart from the Guidelines when certain mitigating or aggravating factors existed.<sup>55</sup>

To promote fairness and leniency, the Guidelines made the existence of a significantly reduced mental capacity one such mitigating factor.<sup>56</sup> However, the Commission determined that significantly reduced mental capacity was relevant only where the offender committed a non-violent offense.<sup>57</sup>

### III. THE MAJORITY APPROACH

#### A. REASONING

The majority of the circuits have defined the phrase "non-violent offense" narrowly.<sup>58</sup> They have held that the definition of "non-violent offense" is controlled by the definition of "crime of violence" in § 4B1.2.<sup>59</sup> As such, the definitions of "non-violent offense" under § 5K2.13 and "crime of violence" under § 4B1.2 are mutually exclusive.<sup>60</sup> Section 4B1.2 defines "violent crime" as:

any offense under federal or state law punishable by imprisonment for a term exceeding one year that—

(i) has as an *element* the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.<sup>61</sup>

Therefore, any crime defined as violent under § 4B1.2, including threats of violence, is not a "non-violent offense."<sup>62</sup>

While many circuits have adopted this view, only the Seventh Cir-

<sup>55</sup> See, e.g., U.S.S.G. § 5K2.13. (departure due to significantly reduced mental capacity); see also 18 U.S.C. § 3553 (b). The sentencing court is allowed to depart if it finds present a mitigating or aggravating factor which the Commission did not adequately consider when formulating the guidelines. *Id.* A mitigating factor is one that, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability. See, e.g., *People v. Morrin*, 187 N.W.2d 434 (Mich. Ct. App. 1971). An aggravating factor, on the other hand, is any circumstance attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequences. *Id.* at 434.

<sup>56</sup> See U.S.S.G. § 5K2.13.

<sup>57</sup> See *id.*

<sup>58</sup> See *United States v. Poff*, 926 F.2d 588 (7th Cir.) (6-5 *en banc* decision), *cert. denied*, 502 U.S. 829 (1991); *United States v. Russell*, 917 F.2d 512 (11th Cir. 1990); *United States v. Borrayo*, 898 F.2d 91 (9th Cir. 1990); *United States v. Rosen*, 896 F.2d 789 (3d Cir. 1990); *United States v. Maddalena*, 893 F.2d 815 (6th Cir. 1989).

<sup>59</sup> U.S.S.G. § 4B1.2(1).

<sup>60</sup> See *United States v. Weidrick*, 19 F.3d 32 (9th Cir. 1994); *Poff*, 926 F.2d at 588; *Russell*, 917 F.2d at 517; *Borrayo*, 898 F.2d at 91; *Rosen*, 896 F.2d at 791; *Maddalena*, 893 F.2d at 819.

<sup>61</sup> U.S.S.G. § 4B1.2. (emphasis added).

<sup>62</sup> *Poff*, 926 F.2d at 588; *Russell*, 917 F.2d at 517; *Rosen*, 896 F.2d at 791; *Borrayo*, 898 F.2d at 91; *Maddalena*, 893 F.2d at 819.

cuit offers any detailed explanation to support this definition.<sup>63</sup> Specifically, the court asserted three points to support their approach. First, the court noted that U.S.S.G. § 1B1.1(i) directed the court to read the Guidelines as a whole.<sup>64</sup> It reasoned therefore, that since the root word violent appeared in two different, though related sections, it must have the same meaning in both sections.<sup>65</sup> Specifically, the court stated that where the same word was used in both phrases, “a rather heavy load rests on him who would give different meanings to the same word or the same phrase when used a plurality of times in the same Act. . . .”<sup>66</sup>

The court found support for this reasoning in the Armed Career Offender Act, where Congress defined the term “violent felony” in exactly the same manner as the Sentencing Commission defined “crime of violence” in U.S.S.G. § 4B1.2.<sup>67</sup>

Although the phrases were slightly dissimilar, the court found it “nigh impossible to divine any distinction between a ‘violent felony’ and a ‘violent offense.’”<sup>68</sup> Similarly, regarding the Sentencing Guidelines, the court reasoned that had the Commission desired to distinguish among types of violence, it would have expanded its vocabulary.<sup>69</sup> Because the Commission did not, it is “difficult to discern a difference between ‘violent offense’ and ‘crime of violence.’”<sup>70</sup> The court thus refused to “tease meaning from . . . the use of a prepositional phrase [of violence] rather than an adjective [violent].”<sup>71</sup>

Second, the Seventh Circuit claimed that every court dealing with the issue concluded that “non-violent offense” is defined by reference to “crime of violence.”<sup>72</sup> In fact, most courts found the issue so obvi-

<sup>63</sup> *Poff*, 926 F.2d at 588.

<sup>64</sup> *Id.* at 592.

<sup>65</sup> *Id.* at 588; *see also* United States v. Montgomery Ward & Co., 150 F.2d 369, 377 (7th Cir. 1945).

<sup>66</sup> United States v. Poff, 926 F.2d 588, 591 (7th Cir.) (quoting *Montgomery Ward*, 150 F.2d at 377), *cert. denied*, 502 U.S. 829 (1991); *see also* Prussner v. United States, 896 F.2d 218, 228 (7th Cir. 1990) (*en banc*) (defining the word “information” the same in two different tax statutes); *Reiche v. Smythe*, 80 U.S. 162, 165 (1871) (“Both acts are *in pari materia*, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act. . . .”); *United States v. Stewart*, 311 U.S. 60 (1944).

<sup>67</sup> *See* 18 U.S.C. § 924(e)(2)(B); *see also* United States v. Vidaure, 861 F.2d 1337, 1340 (5th Cir. 1988); United States v. Dickerson, 901 F.2d 579 (7th Cir. 1990); United States v. Mathis, 739 F. Supp. 15 (D.D.C. 1990) (determining whether a crime is a violent felony under 18 U.S.C.A. § 924(e) requires examination of the elements of the crime charged as well as the underlying conduct).

<sup>68</sup> *See Poff*, 926 F.2d at 591.

<sup>69</sup> *Id.* at 592.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 591.

<sup>72</sup> *Poff*, 926 F.2d at 592.

ous that they made the determination with little or no discussion.<sup>73</sup>

The court asserted that where every court dealing with an issue came to the same conclusion and the legislative body had failed to take action, that resolution should be presumed correct.<sup>74</sup> The court, therefore, asserted that by failing to respond to this view, the Sentencing Commission had impliedly accepted the majority position.<sup>75</sup>

Third, the court argued that any alternative definition would require the courts to guess as to the meaning of "non-violent offense."<sup>76</sup> Even if the Commission intended to define "non-violent offense" differently, the court could "do little but guess as to its meaning."<sup>77</sup> The court noted that when an alternative approach necessitates guesswork on the court's part, it is more prudent to select a definition offered in another section of the statute.<sup>78</sup> The court found it problematic that there was no authority suggesting that the definition of "non-violent offense" would be either more or less restrictive than the definition found in § 4B1.2.<sup>79</sup> When formulating the definition of "non-violent offense," the court would not have anything to guide it except its own beliefs. As such, the court deemed it prudent to apply an available definition of a similar phrase.<sup>80</sup> Therefore, the definition of "crime of violence" found in § 4B1.2 was found applicable to the phrase "non-

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<sup>73</sup> See *United States v. Russell*, 917 F.2d 512, 517 (11th Cir. 1990).

The crime here, armed robbery, is a crime of violence regardless of whether the weapon [the defendant] carried into the bank was fired or even loaded: the use or threatened use of force is an element of the offense. . . . [T]he term crime of violence includes the crime of robbery. . . . No doubt the Commission recognized that robbery by its nature involves the threat of violence. Therefore there is no departure allowed.

*Id.* (quoting *United States v. Gonzalez-Lopez*, 911 F.2d 542, 548 (11th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991)); see also *United States v. Rosen*, 896 F.2d 789, 791 (3d Cir. 1990) (stating that the "[d]efendant would have us conclude that § 5K2.13's use of the term 'non-violent' means something other than the opposite of a crime of violence. We can find no support for such a contention. . . ."); *United States v. Borryo*, 898 F.2d 91, 94 (9th Cir. 1990) (stating that "[b]ecause 'non-violent offense' is not defined in the guidelines, we defer to the definition of 'crime of violence' in . . . [U.S.S.G. § 4B1.2]. We find no basis for a conclusion that the Commission intended any other meaning."); *United States v. Madalena*, 893 F.2d 815, 819 (6th Cir. 1989) (stating that the "[d]efendant's robbery. . . involved the threatened use of physical force' . . . [as defined under U.S.S.G. § 4B1.2] . . . . Thus section 5K2.13 is not applicable to defendant, for he did not commit a non-violent offense."); *United States v. Speight*, 726 F. Supp. 861, 866 (D.D.C. 1989) (departing from the guidelines under § 5K2.13 where the crime did not meet the definition of "crime of violence" under § 4B1.2.).

<sup>74</sup> *United States v. Poff*, 926 F.2d 588, 593 (7th Cir.) (citing *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989)), *cert. denied*, 502 U.S. 829 (1991).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 592.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 591.

violent offense" in § 5K2.13.<sup>81</sup>

#### B. CRITICISMS

Although the Seventh Circuit offered an in depth discussion of the factors supporting their approach, their analysis fails on many levels. While it was able to assert three points to support its approach, each point is problematic. Additionally, the court failed to take into account the policies incorporated in the Guidelines and in § 5K2.13 in particular. Therefore, the majority approach is not the proper approach to defining the phrase "non-violent offense."

The court's textual analysis fails in four respects. First, there is no authority to read the Guideline in the manner in which the majority suggests. U.S.S.G. § 1B1.1(i), which the court used to support its textual analysis, offers no such direction. It merely states that the court should

[r]efer to Part H and K of Chapter Five, specific offender characteristics and departures, and to any other policy statement or commentary in the Guidelines that might warrant consideration in imposing sentence.

In fact, the Guidelines prohibit unauthorized cross referencing of definitions.<sup>82</sup> When discussing the applicability of the definitions found in the general definitions section, the Guidelines stated that "[d]efinitions of terms also may appear in other sections. Such definitions are not designed for general applicability."<sup>83</sup> Therefore, according to the methods of statutory interpretation mandated by the Guidelines, the definition of "crime of violence" found in § 4B1.2 cannot be used to define "non-violent offense" in § 5K2.13.

Second, it is clear that the same phrase does not exist in both sections. "It would have been easy to write § 5K2.13 to say that the judge may depart unless the defendant committed a 'crime of violence' as § 4B1.2 defines it."<sup>84</sup> The Commission, however, elected to use separate formulations in each section, "crime of violence" and "non-violent offense."<sup>85</sup> Where Congress elects to use different phrases, those phrases should have distinct meanings.<sup>86</sup> The mere

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<sup>81</sup> *Id.* at 588.

<sup>82</sup> U.S.S.G. § 1B1.1, cmt. 2.

<sup>83</sup> *Id.*

<sup>84</sup> *United States v. Poff*, 926 F.2d 588, 594 (7th Cir.) (Easterbrook, J., dissenting), *cert. denied*, 502 U.S. 829 (1991).

<sup>85</sup> *See id.* (Easterbrook, J. dissenting).

<sup>86</sup> *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 115 (1988) (stating distinct phrases have different meanings); *Zabielski v. Montgomery Ward*, 919 F.2d 1276, 1279 (7th Cir. 1990) (same); *United States v. Gaggi*, 811 F.2d 47, 56 (2d Cir. 1987) (same); *Tafoya v. United States Department of Justice*, LEAA, 748 F.2d 1389, 1391-92 (10th Cir. 1984) (same); *Lankford v. LEAA*, 620 F.2d 35, 36 (4th Cir. 1980) (same); *Seeber v. Washington*,

fact that the Commission used the words "violent" and "violence" is irrelevant because the court must examine the entire phrase.<sup>87</sup> Therefore, since the two phrases are distinct, they must be defined differently.<sup>88</sup>

Third, the phrase "crime of violence" is a term of art that is not generally applicable to other sections with similar phrases.<sup>89</sup> To define a "crime of violence," one must examine the elements of the offense.<sup>90</sup> Where an element of an offense is violence, even the unrealized prospect of violence, that offense is a "crime of violence."<sup>91</sup>

Further, courts have noted that it is better to define words and phrases according to their normal meaning instead of defining them by using a term of art.<sup>92</sup> The ordinary legal and lay meaning of the phrase "non-violent offense" involves the conduct of the offender and not the element of the offense.<sup>93</sup> Therefore, the same specialized definition does not apply to both sections.

Moreover, the Guidelines themselves suggest different meanings for the phrase "non-violent offense" and "crime of violence."<sup>94</sup> According to § 4B1.2, "crime" encompasses the elements of the felony or misdemeanor which is the subject of the conviction.<sup>95</sup> However, the Guidelines specifically define the term "offense" as "all relevant conduct. . . ."<sup>96</sup> Thus, the two nouns in the respective sections are different and each requires a distinct analysis. The word "crime" suggests that the court examine the language of the criminal statute in question to determine whether the criminal defendant acted violently. The word "offense," on the other hand, suggests that the court examine the underlying conduct of the offense, and not merely the statute, to determine the nature of the defendant's actions.<sup>97</sup> Establishing the precise nature of the acts of a given defendant has

634 P.2d 303, 306 (Wash. 1981) (same).

<sup>87</sup> See *Pittston Coal*, 488 U.S. at 115.

<sup>88</sup> *United States v. Chatman*, 986 F.2d 1446, 1453 (D.C. Cir. 1993).

<sup>89</sup> *Id.*

<sup>90</sup> See U.S.S.G. § 4B1.2.

<sup>91</sup> See *Taylor v. United States*, 495 U.S. 575, 600 (1990) (discussing sentencing enhancement provision with similar policy to that of § 4B1.2).

<sup>92</sup> *Id.*

<sup>93</sup> See WEBSTER'S NEW INTERNATIONAL DICTIONARY 1565 (3d ed. 1966).

<sup>94</sup> U.S.S.G. § 1B1.1, cmt. 1(b).

<sup>95</sup> U.S.S.G. § 4B1.2. See also *Taylor*, 495 U.S. at 575 (examining elements of crime, not underlying conduct); *United States v. Wilson*; 951 F.2d 586 (4th Cir. 1991) (same); *United States v. Poff*, 926 F.2d 588 (7th Cir.) (same), *cert. denied*, 502 U.S. 829 (1991); *United States v. John*, 936 F.2d 764 (3d Cir. 1991) (same).

<sup>96</sup> U.S.S.G. § 1B1.1, cmt. 1(l).

<sup>97</sup> *Id.* See also *United States v. Leavitt*, 925 F.2d 516, 518 (1st Cir. 1991) (stating when a statute's terms cover separate kinds of behavior, the court should look beyond the words of the statute and to the indictment and perhaps the jury instructions as well).

nothing to do with determining the elements of a given "crime of violence."<sup>98</sup> Therefore, because the definition found in § 4B1.2 examines the elements of the crime, it is incompatible with the Guidelines' suggested definition of "non-violent offense" in § 5K2.13.<sup>99</sup>

While the majority recognized the difference between the word "offense" and the word "crime," it fails to adequately dispose of the issue and it only addresses the issue in a parenthetical, which is unpersuasive.<sup>100</sup> While recognizing that there might be a difference between the terms, the court does not find the distinction significant because "'offense' encompasses a broader spectrum of illegality than does 'crime.'"<sup>101</sup> The court, however, neither explains the ramifications nor offers any authority for this assertion. Therefore, the Commission's different formulations in each section must be given their distinct meanings.

Merely because Congress and the Commission defined other slightly different terms the same as "non-violent offense" is not sufficient to determine that another similar phrase is defined the same.<sup>102</sup> The majority attempted to account for the difference between "crime of violence" and "non-violent offense" through a comparison to 18 U.S.C. § 924, the Armed Career Offender Act. There, the phrase "violent felony" is defined the same as "crime of violence."<sup>103</sup> Such a comparison makes sense: both phrases are virtually identical. The only minor difference is that "violent felony" includes only felonies, while "crime of violence" includes both felonies and misdemeanors. More importantly, 18 U.S.C. § 924 and U.S.S.G § 4B1.2 are both career offender provisions. Therefore, both statutes intend to increase punishment for those who are more dangerous and thus deserving of increased incapacitation.

Fourth, in addition to the suggestion within the Guidelines that

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<sup>98</sup> *United States v. Sherbondy*, 865 F.2d 996, 1005-06 (9th Cir. 1988). *See also* *United States v. McVicar*, 907 F.2d 1, 2 (1st Cir. 1990). *But see* *United States v. Borroyo*, 898 F.2d 91, 94 (9th Cir. 1990) (examining the conduct of the crime to determine whether it is 'crime of violence' under § 4B1.2); *United States v. Goodman*, 914 F.2d 696, 699 (5th Cir. 1990) (same).

<sup>99</sup> *United States v. Chatman*, 986 F.2d 1446, 1450 (D.C. Cir. 1993); *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990) (elements of the crime committed and not the particular conduct of the defendant controls the applicability of § 4B1.2).

<sup>100</sup> *United States v. Poff*, 926 F.2d 588, 591 (7th Cir.), *cert. denied*, 502 U.S. 829 (1991). The parenthetical states that "[o]ne might ascribe significance to the use of 'offense' in § 5K2.13 and 'crime' in § 4B1.2, but that would not help appellant since 'offense' encompasses a broader spectrum of illegality than does 'crime.'" *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *See Chatman*, 986 F.2d at 1450.

<sup>103</sup> *Compare* 18 U.S.C. § 924 (c)(3) (which defines "crime of violence") *with* 18 U.S.C. § 924 (e)(2)(B) (which defines "violent felony").

these two phrases be defined differently, the Commission's lack of a cross-reference between the two sections is significant.<sup>104</sup> A cross-reference between the two sections clearly would have alleviated the problem, yet the majority deemed this absence a meaningless oversight.<sup>105</sup> In dismissing this criticism as overly critical hindsight, they found it hardly surprising that the Commission failed to foresee the argument that a crime of violence could, under the sentencing Guidelines, also be a non-violent offense.<sup>106</sup> This conclusion, however, fails to recognize that the Commission did use explicit cross-referencing in other sections. For example, U.S.S.G. § 4A1.1 expressly adopts the definition of "crime of violence" as found in U.S.S.G. § 4B1.2.<sup>107</sup> At least two other sections in the Sentencing Guidelines expressly adopt the definition of "crime of violence" found in § 4B1.2.<sup>108</sup> Moreover, the Commission has amended § 4B1.2 twice in the last two years without providing a cross-reference with § 5K2.13.<sup>109</sup> The lack of a cross-reference is a curious omission if the two sections were linked as tightly as the majority suggests.<sup>110</sup>

Although drafters sometimes fail to recognize that a similar phrase exists in another section and, thus, believe the two are equivalent, here the Sentencing Commission wrote the Guidelines as a unit and paid special attention to the relationship among sections.<sup>111</sup> As evidence of their care, they amended the Guidelines 359 times over the three years prior to the *Poff* decision.<sup>112</sup> Had they intended to define the terms the same, they would have stated it explicitly with a cross-reference between sections. Thus, it makes sense to attribute different meanings to the phrases "non-violent offense" and "crime of violence."<sup>113</sup>

Because the Guidelines offer neither a specific definition or cross-reference, any approach involves guess work. The majority chooses not to apply another definition because they would have to guess the definition of "non-violent offense."<sup>114</sup> Because there is no cross-reference in § 5K2.13 that states the definition in § 4B1.2 is ap-

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<sup>104</sup> *Poff*, 926 F.2d at 592.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> U.S.S.G. § 4A1.1, cmt. 6.

<sup>108</sup> *See, e.g.*, U.S.S.G. § 7B1.1, cmt. 2; U.S.S.G. § 4B1.4(b)(3).

<sup>109</sup> *United States v. Chatman*, 986 F.2d 1446, 1450 (D.C. Cir. 1993).

<sup>110</sup> *Id.*

<sup>111</sup> *United States v. Pinto*, 875 F.2d 143, 144 (7th Cir. 1989).

<sup>112</sup> *Chatman*, 986 F.2d at 1452.

<sup>113</sup> *See, e.g.*, *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972); *cf. Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 146 (1985).

<sup>114</sup> *See United States v. Poff*, 926 F.2d 588, 592 (7th Cir.), *cert. denied*, 502 U.S. 829 (1991).

plicable to § 5K2.13, however, the approach used by the majority is also nothing more than guess work.<sup>115</sup> In fact, their approach violates the maxim of statutory interpretation prohibiting the court from adopting an interpretation of a federal criminal statute which increases an individual's penalty when that interpretation is based on a mere guess as to Congress' intent.<sup>116</sup> This rule applies equally to sentences as it does to criminal statutes.<sup>117</sup> The majority approach removes the sentencing court's discretion in many situations and thus forces the court to impose higher sentences where they might otherwise want to impose a more lenient one. Therefore, the Seventh Circuit's guess that the definition found in § 4B1.2 applies to § 5K2.13 is no more valid than the approach criticized by the Seventh Circuit.

Further, the majority's approach fails to take into account the maxim giving effect and meaning to each word of a statute.<sup>118</sup> The court could not interpret the language of a statute so as to render words and phrases meaningless.<sup>119</sup> The conclusion that the definition of "crime of violence" in § 4B1.2 controls the definition of "non-violent offense" in § 5K2.13 renders that phrase meaningless because it merely becomes an alternative way of saying "crime of violence." This is an unintended result as it is the job of the drafters to create and not to destroy.<sup>120</sup> The majority's reading violates this rule of statutory construction and renders superfluous the phrase "non-violent offense."<sup>121</sup>

The problems with the majority's analysis are not limited to the interpretation of the text. The majority's assertion that the circuits were unanimous on this issue is also incorrect.<sup>122</sup> At the time the Seventh Circuit made their assertion in *Poff* in 1991, the circuit's were not unified. Although they did not expressly adopt an alternative approach, the Tenth Circuit determined the court's authority to depart under § 5K2.13 without making reference to § 4B1.2.<sup>123</sup> In effect,

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<sup>115</sup> Cf. *Ladner v. United States*, 358 U.S. 169, 178 (1958) (stating that interpretation of criminal statute must be based on more than guess work).

<sup>116</sup> See *id.* at 178; see also *Whalen v. United States*, 445 U.S. 684, 695 (1980); *Simpson v. United States*, 435 U.S. 6, 15 (1978).

<sup>117</sup> See *United States v. Batchelder*, 442 U.S. 114, 121 (1979); see also *Simpson*, 435 U.S. at 14-15.

<sup>118</sup> See *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (stating that each word of a statute shall be given meaning); see also *Inhabitants of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

<sup>119</sup> See *Menasche*, 348 U.S. at 538-39.

<sup>120</sup> See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

<sup>121</sup> See *Menasche*, 348 U.S. at 538-39.

<sup>122</sup> See, e.g., *Chatman*, 986 F.2d 1446, 1450 (D.C. Cir. 1994) (adopting the minority approach); *United States v. Weddle*, 30 F.3d 532, 540 (4th Cir. 1994) (applying the minority approach).

<sup>123</sup> *United States v. Spedalieri*, 910 F.2d 707, 711 (10th Cir. 1990).



they used a fact specific inquiry similar to the approach later adopted by the D.C. Circuit.<sup>124</sup> All circuits dealing with the issue had not determined that § 4B1.2 controls the definition of “non-violent offense” found in § 5K2.13. Thus, the Commission’s silence is not an implied approval of the majority’s view.

Further, the Seventh Circuit’s analysis also fails to take into account the policies of the Guidelines. In proposing that “non-violent offense” is defined identically to “crime of violence,” the court misapplied *United States v. Montgomery Ward*.<sup>125</sup> At issue in *Montgomery Ward* was the definition of the word “production” in the War Labor Disputes Act.<sup>126</sup> To determine the definition, the Seventh Circuit examined the definition of the same word in the Fair Labor Standards Act.<sup>127</sup> Both of the Acts set up the mechanism for the settlement of disputes between employer and employee.<sup>128</sup> The only difference was that one statute dealt with peace time disputes and the other with war time disputes. Nevertheless, the purpose of the two Acts, settling labor disputes, was the same.

The same cannot be said here. The policy considerations behind these two sections of the Sentencing Guidelines suggest that they are not *in pari materia* and thus, the definitions should be different. The two sections have vastly different agendas. Section 4B1.2 asks whether a individual is a career offender and should therefore receive a higher sentence than others who have committed the same offense.<sup>129</sup> The career offender provisions were enacted to punish those offenders that have shown a penchant for committing violent acts, whether they go through with those acts or not.<sup>130</sup> These offenders are subject to longer sentences in order to deter criminal conduct, provide just punishment, and protect the public from further crimes by the offender.<sup>131</sup> Thus, § 4B1.2 does not grant the career offender the

<sup>124</sup> See *Chatman*, 986 F.2d at 1450.

<sup>125</sup> 150 F.2d 369 (7th Cir. 1945).

<sup>126</sup> *Id.* at 377.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See U.S.C. § 994(h) (1988). Congress here directed the Commission to ensure that the Guidelines specify prison sentences that are at or near the maximum term authorized for career offenders. Those offenders include persons who have been convicted of a felony that is either a crime of violence or a drug offense and who have been previously convicted of two felonies where each was either a crime of violence or a drug offense. *Id.*; see also *United States v. Baskin*, 886 F.2d 383, 389 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1089 (1990).

<sup>130</sup> U.S.S.G. § 4B1.2 (1993).

<sup>131</sup> See 18 U.S.C. § 3553(a)(2) (1994); see also U.S.S.G., ch. 4, pt. A, intro. cmt. (1994) (stating a defendant with a prior criminal record is more culpable than a first time offender and thus deserving of greater punishment); 128 CONG. REC. 26,518 (1982) (Sen. Kennedy) (stating in support of 28 U.S.C. § 994(h) that the “shrinking law enforcement

benefit of the doubt and instead assumes the worst because career offenders are clearly dangerous to society.<sup>132</sup>

On the other hand, the policy concerns motivating § 5K2.13 are entirely distinct. U.S.S.G. § 5K2.13 wishes to treat with lenity offenders whose reduced mental capacity contributed to the commission of the offense.<sup>133</sup> The Commission intended to maintain the usual sentencing practices of judges prior to the enactment of the Guidelines.<sup>134</sup> In the past, judges routinely handed out lower sentences to persons who, though not legally insane, were not in full command of their actions and thus not fully responsible for their actions and not worthy of harsh sentences. To maintain these past practices, the Commission encouraged lower sentences for those with reduced mental capacity.

Also, the rule of lenity suggests that where a "reasonable doubt persists about a statute's intended scope" after an examination of the text and policies of the statute, the court should opt for "the construction yielding the shorter sentence."<sup>135</sup> The policies of § 5K2.13, leniency to those who were not fully responsible for their acts, suggest that the court has the opportunity to grant a shorter sentence to an offender with a diminished mental capacity. To accomplish this goal, the phrase "non-violent offense" should encompass the broadest range of offenses, therefore granting the sentencing court the authority to depart in the broadest of circumstances.

In addition to the policies of the Guidelines, the theories of punishment incorporated into the Guidelines support a lenient reading of § 5K2.13. Two theories of punishment that influence sentencing determinations, the desert and deterrent theories, support leniency when the offender suffers from a diminished mental state.<sup>136</sup> Under the desert theory, persons who cannot control their conduct do not deserve as much punishment as those who act with malice or for personal gain, because those who lack self-control are not as blameworthy

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resources must be targeted on incapacitating" those who repeatedly commit violent crimes); U.S.S.G. § 4B1.1 (Background Note).

<sup>132</sup> See U.S.S.G., ch. 4, pt. A, intro. cmt. (1994).

<sup>133</sup> See *United States v. Poff*, 926 F.2d 588, 595 (7th Cir.) (Easterbrook, J., dissenting), *cert. denied*, 502 U.S. 829 (1991).

<sup>134</sup> U.S.S.G., ch. 1, pt. A(3) (1994) (noting that the Commission examined pre-sentencing practices to determine the ranges for the sentencing guidelines.).

<sup>135</sup> See *United States v. Chapman*, 500 U.S. 453, 463 (1991) (stating if a court encounters a grievous ambiguity or uncertainty in the language and structure of an act, the court may interpret the act most favorably to the defendant to avoid an absurd or glaring unjust result); *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Ladner v. United States*, 358 U.S. 169, 178 (1958); *Bell v. United States*, 349 U.S. 81, 83 (1955).

<sup>136</sup> See *Poff*, 926 F.2d at 595 (Easterbrook, J., dissenting).

as those acting with evil intent.

Under the deterrent theory, legal sanctions are less effective with people who suffer from diminished mental capacity, because sanctions will not deter someone whose actions are beyond his self-control.<sup>137</sup> Thus, under both theories those with diminished mental capacity deserve less severe punishment.

Because both the desert and deterrent rationales support departure where the offender suffers from a significantly reduced mental capacity, the critical determination is whether the offender is dangerous.<sup>138</sup> If the sentencing court deems the offender dangerous, the court should not have the authority to depart from the Guidelines; however, when the offender is not dangerous, the court should be granted the authority to depart if it wishes. In order to determine whether the offender is dangerous to society, the court must examine the underlying conduct of the offense and not merely the elements of the crime.

The majority's examination of the elements of the crime leads to anomalous results. Under the majority's approach, the innocuous threatener is treated exactly the same as a terrorist bomber whose bomb does not explode due to incompetence, because the majority approach treats any threat in the same manner, whether or not the threatener intended to carry out the threat. The Sentencing Commission could not have intended such anomalous results.<sup>139</sup> Instead, where the offense shows that the offender is not dangerous to society and incarceration would, at most, serve a limited purpose, the court should have the authority to depart if it deems proper.<sup>140</sup> Under such circumstances, it seems "highly implausible that the Sentencing Commission intended to *prohibit* a downward departure under section 5K2.13."<sup>141</sup>

#### IV. THE MINORITY APPROACH

##### A. REASONING

A minority of circuits have refused to hold the definition of "crime of violence" found in § 4B1.2 applicable to the definition of

<sup>137</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 189-90 (1968), reprinted in GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 39, 59-60 (1976).

<sup>138</sup> See *United States v. Poff*, 926 F.2d 588, 595 (7th Cir.) (Easterbrook, J., dissenting), cert. denied, 502 U.S. 829 (1991).

<sup>139</sup> See *United States v. X-Citement Video*, 115 S. Ct. 464, 467-68 (1994) (determining that the Court will not interpret a statute to create anomalous, unjust results).

<sup>140</sup> *Poff*, 926 F.2d at 595 (Easterbrook, J., dissenting).

<sup>141</sup> *United States v. Chatman*, 986 F.2d 1446, 1453 (D.C. Cir. 1993).

“non-violent offense” found in § 5K2.13.<sup>142</sup> Instead, those courts have chosen to adopt their own approach to determine what is, in fact, a non-violent offense.<sup>143</sup> Here, the courts examine the underlying conduct of the offense to determine whether the offender committed a violent offense.<sup>144</sup> The text and the policies of the Guidelines support this approach.<sup>145</sup> The language of the text suggests that the § 5K2.13 definition is distinct from all other phrases in the Guidelines.<sup>146</sup> In addition, the policies of the statute and the Guidelines suggest an alternative definition of “non-violent offense” to the definition of “crime of violence” found in § 4B1.2.

While the minority agrees that the definition of “crime of violence” found in § 4B1.2 does not apply to the definition of “non-violent offense” found in § 5K2.13, adherents disagree on which definition should apply. Some suggest that one definition of a non-violent offense is an offense that does not involve “mayhem.”<sup>147</sup>

When examining the conduct of the offender, it was “[t]he prospect of violence (the ‘heartland’ of the offense, in the Guidelines’ argot) [that set] the presumptive range; when things turn[ed] out better than they might, departure [was] permissible.”<sup>148</sup> This language was the central theory behind the idea that the meaningless threatener should not be treated as a violent offender. The Seventh Circuit dissenters chose to set the presumptive range at the existence of mayhem.<sup>149</sup> Mayhem, defined at common law,

required a type of injury which permanently rendered the victim less able to fight offensively or defensively; it might be accomplished either by the removal of (dismemberment), or by the disablement of, some bodily member useful in fighting. Today, by statute, permanent disfigurement has been added; and as to dismemberment and disablement, there is no longer a requirement that the member have military signifi-

<sup>142</sup> See *id.*

<sup>143</sup> See, e.g., *id.* at 1452 (establishing a fact specific inquiry into the underlying conduct of each offense to determine whether the offense is non-violent).

<sup>144</sup> See *id.*

<sup>145</sup> See *supra* notes 82 through 141 and accompanying text for a discussion of the criticisms of the rationale supporting the majority approach and, accordingly, the rationale in support of the minority approach.

<sup>146</sup> The minority makes one unneeded concession regarding the majority’s reasoning by stating that “[a]lthough a textual argument supports this conclusion [that § 4B1.2 controls § 5K2.13], we should not attribute this heartlessness to the Sentencing Commission unless we must—and we needn’t.” *United States v. Poff*, 926 F.2d 588, 593 (7th Cir.) (Easterbrook, J., dissenting), *cert. denied*, 502 U.S. 827 (1991). While it is true that we should not attribute such heartlessness to the Commission, the text does not support such a conclusion. See U.S.S.G. § 1B1.1, cmt. n.2 (prohibiting random cross-referencing of context-specific definitions of terms).

<sup>147</sup> *Poff*, 926 F.2d at 594 (Easterbrook, J., dissenting).

<sup>148</sup> *Id.* at 594 (Easterbrook, J., dissenting).

<sup>149</sup> See *id.*

cance. In many states the crime of mayhem is treated as aggravated assault.<sup>150</sup>

Using mayhem as a baseline allows the court to depart when the offender commits certain violent acts that do not reach this level of seriousness or when the offender fails in his attempt at the commission of a serious offense.

Some circuits adopting the minority view, however, have refused to adopt this definition.<sup>151</sup> Instead, those circuits have chosen to examine the specific facts of each case to determine whether the offense was violent or non-violent.<sup>152</sup> They offer no definition; instead, it is up to each individual sentencer to determine whether or not the offense entailed violence.<sup>153</sup>

#### B. CRITICISMS

The criticisms of the minority approach are limited. The use of an inquiry into the underlying conduct of each case has been questioned.<sup>154</sup> However, greater dispute has arisen regarding the alternative definitions applied to determine whether an offense is in fact non-violent, because each is flawed in its own respect. The first definition defines "non-violent" too broadly. However, the second definition's attempt to correct this error does not offer any guidance to courts functioning within a system of limited discretion. Therefore, courts need a new definition that will allow the court sufficient discretion but also give substantial guidance.

Some have criticized the use of an inquiry into the specific facts of each case.<sup>155</sup> The *Chatman* court noted its authority to examine the facts of each case even when determining the applicability of § 4B1.2.<sup>156</sup> The court derived this authority from *United States v. Baskin*,<sup>157</sup> which held that the sentencing judge retains discretion to ex-

<sup>150</sup> BLACK'S LAW DICTIONARY 979 (6th ed. 1990).

<sup>151</sup> See, e.g., *United States v. Chatman*, 986 F.2d 1446, 1454 (D.C. Cir. 1993) (vacating sentence and remanding for determination that bank robbery at issue was a non-violent offense).

<sup>152</sup> *Id.* at 1453.

<sup>153</sup> *Id.*

<sup>154</sup> See *id.* at 1455 (Ginsburg, D.H., J., concurring).

<sup>155</sup> See *id.* at 1454 (Ginsburg, D.H., J., concurring); *United States v. Gonzalez-Lopez*, 911 F.2d 542, 546-48 (11th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991).

<sup>156</sup> *Chatman*, 986 F.2d at 1452 n.7 (citing *United States v. Baskin*, 886 F.2d 383, 388-90 (D.C. Cir. 1989)), *cert. denied*, 494 U.S. 1089 (1990); *United States v. Bradshaw*, 935 F.2d 295, 303 (D.C. Cir. 1991), *United States v. Butler*, 924 F.2d 1124, 1131-32 (D.C. Cir.), *cert. denied*, 502 U.S. 871 (1991).

<sup>157</sup> *United States v. Chatman*, 986 F.2d 1446, 1453 n.7 (D.C. Cir. 1993) (citing *Baskin*, 886 F.2d at 389). The defendant in *Baskin* had been convicted of possession and intention to distribute drugs. The sentencing judge was confronted with a complex set of facts. The defendant had been convicted of armed robbery in the past. If that crime was a "crime of

amine the facts of a predicate crime to determine whether it was a crime of violence under the career offender provisions of the Guidelines and whether the court could depart from the Guidelines.<sup>158</sup> Where such a rule existed, the sentencing court is allowed to examine the facts of each case under § 5K2.13 to determine whether to depart from the Guidelines.

If the rule of *Baskin* led to the holding in *Chatman*, however, any circuit without such a precedent would necessarily have to rule that a fact specific inquiry was not applicable.<sup>159</sup> Moreover, the Eleventh Circuit questioned the validity of *Baskin*: “[t]he D.C. Circuit [in *Baskin*] seems to suggest that a sentencing court [take into account] . . . the facts of a prior conviction when determining the appropriateness of departure. We cannot believe that the Commission intended such a result.”<sup>160</sup> If one accepts this criticism, it is the elements of the crime and not the underlying conduct of the offense that should control the inquiry under § 5K2.13.

However, criticism of the *Chatman* court is hardly axiomatic for three reasons. First, the *Chatman* majority relied very little on the *Baskin* decision.<sup>161</sup> Second, although the Eleventh Circuit questioned the *Baskin* holding, it was recently affirmed by the D.C. Circuit.<sup>162</sup> Third, merely because a fact-specific inquiry is not valid does not mean that § 4B1.2 contains the applicable definition. It is clear that a definition other than the one in § 4B1.2 is applicable to § 5K2.13.<sup>163</sup>

The majority approach failed in its attempt to offer an alternative definition. Likewise, both the approach taken by the Seventh Circuit dissenters in *Poff* and the *Chatman* court are problematic. While the

violence” then the defendant would be classified as a career offender. See U.S.S.G. § 4B1.2. Additionally, the sentencing judge admitted that he would have liked to impose a less severe sentence if the facts of the case demonstrated a factor not adequately taken into consideration by the Guidelines. *Baskin*, 886 F.2d at 383.

<sup>158</sup> *Baskin*, 886 F.2d at 389. See 18 U.S.C. § 3553(b) (court has authority to depart from Guidelines where there exists factors that Guidelines failed to adequately take into consideration). However, the district court did not examine the underlying conduct of the offense when making either determination. *Baskin*, 886 F.2d at 389.

<sup>159</sup> See *Chatman*, 986 F.2d at 1454 (Ginsburg, D.H., J., concurring).

<sup>160</sup> *United States v. Gonzalez-Lopez*, 911 F.2d 542, 550-51 (11th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991); see also *United States v. John*, 936 F.2d 764, 767 (3d Cir. 1991) (noting that “it is not only impermissible, but pointless, for the court to look through to the defendant’s actual criminal conduct” where the prior conviction is for a crime an essential element of which is the use or threatened use of force).

<sup>161</sup> *Chatman*, 986 F.2d at 1453 n.7 (“We emphasize . . . that our decision today does not rely on *Baskin*.”).

<sup>162</sup> *United States v. Bradshaw*, 935 F.2d 295 (D.C. Cir. 1991); *United States v. Butler*, 924 F.2d 1124 (D.C. Cir.), *cert. denied*, 502 U.S. 871 (1991).

<sup>163</sup> See *supra* notes 82 through 141 and accompanying text for a discussion of the criticisms of the majority approach.

*Poff* dissenters attempt to define the phrase, "non-violent offense" as one that does not involve mayhem,<sup>164</sup> they fail to offer any other guidance. Moreover, this definition may cover too few offenses.<sup>165</sup> Crimes that do not actually result in violence still may indicate that a defendant is "exceedingly dangerous, and should be incapacitated."<sup>166</sup> The *Poff* dissenters seem to imply that any offender who attempts to commit a violent act but fails due to incompetence should be granted a departure.<sup>167</sup> This says too much. The incompetent criminal should not benefit because "things turned out better than they might."<sup>168</sup> Where the offender exhibits an intention to commit the offense, he should not be given the benefit of his failure to actually carry out the threat.<sup>169</sup> Departing from the Guidelines would run contrary to the purposes of § 5K2.13 because it would give the sentencing court the authority to depart in cases where the offender is dangerous to society.<sup>170</sup>

It is clear, however, that the Commission did not intend for the sentencing court to "treat the innocuous threatener and the murderous one identically."<sup>171</sup> In this regard, the Seventh Circuit has found the correct distinction: the important difference between one offender and the next is the objective intention to commit the threatened act.<sup>172</sup>

The D.C. Circuit in *Chatman*, recognizing difficulties with the Seventh Circuit proposal, applied a fact specific inquiry.<sup>173</sup> While the court seemed to suggest the correct resolution, they did not complete the task. In criticizing the approach of Judge Easterbrook, the D.C. Circuit stated that where "an offense . . . involved a real and serious threat of violence—such as assault with a deadly weapon" it cannot fall within the realm of offenses characterized as non-violent.<sup>174</sup>

While the sentencing court need not limit itself to examining

<sup>164</sup> *United States v. Poff*, 926 F.2d 588, 594 (7th Cir.) (Easterbrook, J., dissenting), *cert. denied*, 502 U.S. 829 (1991).

<sup>165</sup> *See United States v. Chatman*, 986 F.2d 1446, 1453 (D.C. Cir. 1993).

<sup>166</sup> *See id.* at 1454.

<sup>167</sup> *See Poff*, 926 F.2d at 594 (Easterbrook, J., dissenting).

<sup>168</sup> *Cf. id.* (Easterbrook, J., dissenting) ("The prospect of violence . . . sets the presumptive range; when things turn out better than they might, departure is possible.")

<sup>169</sup> *Cf. id.* (Easterbrook, J., dissenting).

<sup>170</sup> *See U.S.S.G. § 5K2.13.*

<sup>171</sup> *Id.*; *see also United States v. Lucas*, 619 F.2d 870 (10th Cir. 1980) (bank robbery with toy gun was sufficient to sustain a conviction for bank robbery committed by "force and violence, or by intimidation.")

<sup>172</sup> *See Rogers v. United States*, 422 U.S. 35, 43 (1975) (Marshall, J., concurring); *see also Lucas*, 619 F.2d at 870 (examining objective facts to determine whether conduct was intimidating).

<sup>173</sup> *United States v. Chatman*, 986 F.2d 1446, 1453 (D.C. Cir. 1993).

<sup>174</sup> *Id.* at 1454.

whether the offense actually entailed violence or mayhem, it is insufficient to leave the court without a test.<sup>175</sup> Such a solution cuts against the goal of the Sentencing Guidelines—consistency in sentencing throughout jurisdictions<sup>176</sup>—and, as such, will lead to a regression to the indeterminate sentencing systems of the past.

Although it may be effective in some cases to allow the court to go on a case by case basis,<sup>177</sup> this is not one of those situations. The Guidelines are a comprehensive set of rules that are designed to limit the sentencing court's discretion.<sup>178</sup> Thus, the Supreme Court must offer a definition to the lower sentencing courts.

#### V. A RESOLUTION

Thus far, the judicial system has failed to adequately define the phrase "non-violent offense." Neither § 5K2.13 nor the Sentencing Guidelines offer an adequate test for courts to apply. Therefore, the courts have been given the difficult task of filling in the blanks left by the Sentencing Commission. The circuits' conflicting approaches have failed to take into account the factors underlying § 5K2.13 in particular and the Sentencing Guidelines in general. A new approach is needed.<sup>179</sup>

The Seventh Circuit conceded that there is "an argument in favor of permitting downward departures . . . when the prospect that [an offender] will carry through with threats seems nil."<sup>180</sup> Recognizing that rationale, this Comment proposes a new approach in order to achieve the goals of the Sentencing Guidelines and § 5K2.13. It offers the sentencing court a lenient and guided approach to departure under U.S.S.G § 5K2.13.

This approach defines "non-violent offense" as:

- (1) any course of conduct that does not involve

<sup>175</sup> See *Nagel*, *supra* note 2, at 883-84.

<sup>176</sup> U.S.S.G., ch. 1, pt. A, intro. cmt. (Nov. 1994).

<sup>177</sup> See, e.g., *Jacobelis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating "I know it when I see it" when defining the undefinable, pornography).

<sup>178</sup> U.S.S.G., ch. 1, pt. A, intro. cmt. 3; see also *United States v. Nuno-Para*, 877 F.2d 1409, 1412 (9th Cir. 1989); *Karle & Sager*, *supra* note 13, at 393.

<sup>179</sup> However, this dispute may be moot because the Commission's failure to adequately define "non-violent offense" under § 5K2.13 and, thus, to differentiate between the clear-minded terrorist and the mentally incapacitated threatener may constitute a failure to adequately take into consideration the mitigating factor of reduced mental capacity. 18 U.S.C. § 3553(b); Albert W. Alschuler, *The Failure of the Sentencing Guidelines*, 58 U. CHI. L. REV. 901, 912 n.41 (1991). If such is the case, then the court has the authority to depart regardless of the definition it gives to the term "non-violent offense." 18 U.S.C. § 3553(b); Alschuler, *supra* at 912 n.41. But, because no court has adopted this view, the question remains ripe for Supreme Court review.

<sup>180</sup> *United States v. Poff*, 926 F.2d 558, 593 (7th Cir.), *cert. denied*, 502 U.S. 829 (1991).



- (a) the use or
  - (b) attempted use of physical force.
- (2) A threat of physical force is a non-violent offense unless the offender has committed an overt act which evidences an intent to commit the threatened act.<sup>181</sup>

A threat would, in effect, rise to the level of an attempt where the actor has committed an overt act.<sup>182</sup> Such overt acts would include, but not be limited to, the possession of some materials to be used in the commission of the offense at or near the place contemplated for its commission or lying in wait, searching for or following the contemplated victim, or any other act that evidences an intent to commit the violent act.<sup>183</sup> The proposed definition would also incorporate crimes such as assault with a deadly weapon or attempted armed robbery where a threatening note was given to the teller, but would not involve a threat of physical harm that a reasonable person would not know would culminate in the commission of the offense.<sup>184</sup> Here, the court would receive guidance without restricting the court's discretion.<sup>185</sup> In this manner, the sentencing court can exercise its guided discretion to determine whether to depart from the Guidelines.<sup>186</sup>

One jurisdiction has argued that any threat is a crime of violence and thus must not be included in the definition of "non-violent offense."<sup>187</sup> The Seventh Circuit has argued that the Supreme Court defines threats as a form of violence and thus they fail to meet any definition of non-violent offense.<sup>188</sup> The court based its analysis on the Supreme Court's determination that threats "may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out."<sup>189</sup> This was further evidenced by the statutes criminalizing the utterance of the threats and

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<sup>181</sup> See, e.g., MODEL PENAL CODE § 5.01(2) (1985) (examining conduct which is strongly corroborative of the actor's criminal purpose).

<sup>182</sup> See MODEL PENAL CODE § 5.01 (1985) (determining what level of conduct constitutes an attempt to commit the violent act).

<sup>183</sup> See MODEL PENAL CODE § 5.01(2) (1985) (stating overt acts evidencing an intent to commit the attempted act).

<sup>184</sup> See *Rogers v. United States*, 422 U.S. 35, 45 (1975) (Marshall, J., concurring).

<sup>185</sup> See *Scott v. Illinois*, 440 U.S. 367, 374 (1979) (Powell, J., concurring) (stating that the hundreds of district courts throughout the country need guidance); see also *Baldasar v. Illinois*, 446 U.S. 222, 231 (1980) (Powell, J., dissenting) (regretting the formulation of an approach to the right to counsel that lacked guidance).

<sup>186</sup> See *United States v. Johnson*, 457 U.S. 537, 547 (1982) (stating the goal of the criminal justice system is to treat similarly situated defendants similarly).

<sup>187</sup> See *United States v. Poff*, 926 F.2d 588, 591-92 (7th Cir.), cert. denied, 502 U.S. 829 (1991).

<sup>188</sup> *Id.* at 591 (noting that "[t]hreats are themselves a form of violence. . ."; therefore, they cannot constitute a non-violent offense under § 5K2.13).

<sup>189</sup> *Rogers v. United States*, 422 U.S. 35, 46-47 (1975) (Marshall, J., concurring).

not the intent to carry them out.<sup>190</sup> In fact, when the defendant manifests an intent to carry out the threats, the Guidelines required courts to increase the sentence from the base offense level.<sup>191</sup> Thus, a threat is a form of violence that cannot also be a non-violent offense.

However, the Seventh Circuit's assertion that the Supreme Court held that threats were a form of violence is mistaken. The Supreme Court has never held that threats were a form of violence. While Justice Marshall in *Rogers* did discuss the potential harms caused by a threat,<sup>192</sup> he never described threats as a form of violence. He merely discussed the negative effects that threats have on society.<sup>193</sup> Clearly then, threats are punishable conduct.<sup>194</sup> However, Justice Marshall's analysis does not suggest that a threat cannot be non-violent. Therefore, this Comment suggests that a threat by itself, while punishable, need not be a violent offense. A threat in conjunction with some other dangerous act, on the other hand, would constitute a violent offense.

In addition, some may argue that this new approach offers a term of art similar to the one criticized by this Comment.<sup>195</sup> However, this new approach merely attempts to lay out, in an organized manner, the ordinary meaning of the phrase "non-violent offense." In doing so, it is able to incorporate the majority's underlying notion of a strict definition with the minority's attempt at leniency through broadened court discretion. The proposed definition thus balances these competing interests and offers an ordinary meaning of the phrase "non-violent offense."

Because this Comment attempts to offer the ordinary meaning of the phrase "non-violent offense," some may argue that section (2) of the proposed definition should take into account the state of mind of the victim instead of the state of mind of the offender. Such an approach would recognize that the mere threat of violence, whether committed or not, inflicts emotional harm on the intended victim.<sup>196</sup>

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<sup>190</sup> See, e.g., 18 U.S.C. §§ 871, 876 (1994); see also *United States v. Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986) (stating that threat itself, and not the intent to carry it out, is the punishable offense); *United States v. Left Hand Bull*, 901 F.2d 647, 649 (8th Cir. 1990) (stating defendant's inability to carry out threat is irrelevant).

<sup>191</sup> See U.S.S.G. § 2A6.1(b).

<sup>192</sup> *Rogers*, 422 U.S. at 46-47 (Marshall, J., concurring) (stating that "[p]lainly, threats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out.").

<sup>193</sup> See *id.* (Marshall, J., concurring).

<sup>194</sup> See, e.g., 18 U.S.C. §§ 871, 876 (1994) for examples of federal statutes criminalizing threats.

<sup>195</sup> See *supra* notes 89 through 93 and accompanying text for a criticism of the use of a term of art.

<sup>196</sup> *Rogers v. United States*, 422 U.S. 35, 45 (1975) (Marshall, J., concurring).

This type of approach would be based on whether a reasonable person could interpret the actions as intending violence instead of whether the offender intended violence.<sup>197</sup> This would amount to a negligence standard. However, the court has long been reluctant to infer a negligence standard in criminal statutes.<sup>198</sup> The important determination is whether or not the offender intended to commit the violent act.

If the court determines that the offender is not worthy of incapacitation because he did not intend to commit the threatened act and thus is not dangerous, it may depart. However, if the court feels that the offender was dangerous and was reasonably likely to commit the threatened activity if not incarcerated, then the court is not bound to adhere to the Guidelines.<sup>199</sup> While other approaches would offer the court similar choices, this approach guides the courts' actions without severely limiting its discretion to exercise its leniency on worthy offenders. This would promote the goals of U.S.S.G. § 5K2.13 and the Sentencing Guidelines.

Thus, under this approach offenders will receive sentences that are commensurate with their actual blameworthiness and dangerousness.<sup>200</sup> Examine, for example, the case of Carolyn Poff.<sup>201</sup> Ms. Poff was "a forty-four year old woman convicted [of] writing six threatening letters to President Reagan in 1988."<sup>202</sup> Her father, now deceased, sexually abused her until she was twenty.<sup>203</sup> As an adult, she moved in and out of psychiatric institutions.<sup>204</sup> Among the manifestations of this abuse was her penchant for threatening public officials, at what she believed, was at the behest of her dead father.<sup>205</sup> Ms. Poff had also previously been convicted of threatening President Carter, but never actually attempted to complete any threatened activity.<sup>206</sup> At sentenc-

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<sup>197</sup> See *United States v. Maddalena*, 893 F.2d 815, 819 (6th Cir. 1989). An offense is violent where "an ordinary person [in the same situation as the victim] reasonably could infer a threat of bodily harm." *Id.*; *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987); see also *United States v. Sanchez*, 933 F.2d 742, 747 (9th Cir. 1991).

<sup>198</sup> *Morrisette v. United States*, 342 U.S. 246 (1952); see also *Rogers v. United States*, 422 U.S. 35, 45 (1975) (Marshall, J., concurring).

<sup>199</sup> U.S.S.G. § 5K2.13 (stating that it is completely within the court's discretion to depart from the Guidelines, thus dangerous offenders will be incarcerated).

<sup>200</sup> See Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 199 (1983) (asserting a need to protect the proportionality principle, so that legislative abuse of sentencing powers does not lead to the defendant's degree of punishment exceeding his just deserts).

<sup>201</sup> *United States v. Poff*, 926 F.2d 588 (7th Cir.), cert. denied, 502 U.S. 829 (1991).

<sup>202</sup> *Id.* at 590; see also 18 U.S.C. § 871 (1994).

<sup>203</sup> *Poff*, 926 F.2d at 590.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

ing, the court held that it did not have the authority to depart from the sentencing guidelines and sentenced Ms. Poff to fifty-one months in a correctional facility.<sup>207</sup>

This result exemplifies the problems with the majority approach because even the Secret Service acknowledged that Ms. Poff was not considered a real threat to the President.<sup>208</sup> A just result would allow the system to help Ms. Poff become a functional member of society once again while serving a probationary sentence. Under this proposed definition, the Sentencing Court would have the authority to sentence Ms. Poff outside the statutory range because other than the threatening notes, she never took any additional steps to carry out her threats.<sup>209</sup> In fact, the frequency with which Ms. Poff sent the letters only further proved that she was an innocuous threatener and deserving of lenient treatment by the sentencing court.

A more difficult case is presented by Anthony R. Weddle.<sup>210</sup> Mr. Weddle pled guilty to mailing threatening letters to a man he had previously assaulted.<sup>211</sup> Mr. Weddle's guilt was obviously not at issue, yet his sentencing presented a difficult question to the sentencing court.<sup>212</sup> A literal application of the Sentencing Guidelines directed the court to sentence Mr. Weddle to between fifteen and twenty-one months in jail.<sup>213</sup>

The court, however, examined the circumstances surrounding Mr. Weddle's actions before determining the proper sentence.<sup>214</sup> Mr. Weddle was a sympathetic figure, as he was an otherwise upstanding member of society who found himself in a situation that caused him to lose control of his actions. He was a police officer with a family.<sup>215</sup> In 1992, he was diagnosed with Hodgkin's disease.<sup>216</sup> Soon thereafter, his wife of nine years and mother of his three children left him and

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> See *United States v. Weddle*, 30 F.3d 532 (4th Cir. 1994).

<sup>211</sup> *Id.* at 534. On September 11, 1992, Mr. Weddle attempted to drive Mr. Gary Angleberger off the road and when that failed, he followed him back to his home and attempted to assault him with a "slapjack." Mr. Weddle pled guilty to this offense and was sentenced to probation. *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 535. Pursuant to the plea agreement, both parties stipulated to the applicable sentencing guidelines, arriving at an offense level of 13. Additionally, the probation officer recommended a one criminal history point enhancement under U.S.S.G. § 4A1.1(c) and two criminal history points under U.S.S.G. § 4A1.1(d) for his actions while already on probation. These enhancements placed him in criminal history category II, which required the court to impose a 15-21 month sentence. *Id.* at 535.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 534.

<sup>216</sup> *Id.*

went to live with another man named Gary Angleberger.<sup>217</sup> Because of these traumatic events, Mr. Weddle became severely depressed.<sup>218</sup> In this depressed state, he sent a threatening note to Mr. Angleberger through his sister-in-law.<sup>219</sup> This message stated that Mr. Weddle would hunt Mr. Angleberger down and “eliminate him from the picture” if he did not stop seeing Mr. Weddle’s wife.<sup>220</sup> The message also made reference to the possibility of Mr. Angleberger’s children becoming fatherless.<sup>221</sup> After Mr. Angleberger failed to respond to this note, Mr. Weddle began mailing and delivering threatening letters directly to Mr. Angleberger’s home.<sup>222</sup>

Subsequent to an arrest for assaulting Mr. Angleberger and forced to resign from the police force, Mr. Weddle sent an envelope to Mr. Angleberger that contained three .38-caliber bullets.<sup>223</sup> For this he was arrested and pled guilty to mailing threatening letters.<sup>224</sup> Based on these circumstances, his probation officer suggested that the sentencing court depart from the Sentencing Guidelines pursuant to U.S.S.G. § 5K2.13 and impose a lighter sentence.<sup>225</sup> The Fourth Circuit applied the minority approach aforementioned fact specific inquiry and held that mailing threatening communications was a non-violent offense.<sup>226</sup> Thus, having departed from the Guidelines, the court sentenced Mr. Weddle to three years probation.<sup>227</sup>

The new definition proposed by this Comment would produce the same result because the threats for which Mr. Weddle was convicted never went beyond the threat stage. Although Mr. Weddle had, in the past, committed violent acts, he never took any steps toward carrying them out. The proposed approach allows the court to be lenient where the offender deserves sympathetic treatment, but restricts the courts discretion where the offender is clearly dangerous. Thus under this structured system, the sentencing court may grant a sentence that is commensurate with the offender’s actual

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 535.

<sup>225</sup> *Id.*

<sup>226</sup> *See id.* at 540. Applying the “clearly erroneous” standard, the Fourth Circuit upheld the District Court’s determination that Mr. Weddle’s offense was non-violent. The District Court held “that [defendant’s] threatening letters were not violent in and of themselves, and [that] there was no violence other than that which occurred on that one occasion . . . .” *Id.*

<sup>227</sup> *Id.* at 536.

blameworthiness.

## VI. CONCLUSIONS

The new approach to non-violent offenses suggested by this Comment attempts to offer a lenient, structured approach to the sentencing courts. Going to jail or serving probation are vastly different outcomes. The Guidelines fail to define the phrase "non-violent offense" and have left the courts with the difficult task of filling in the holes left by the Guidelines. The majority approach fails in this task because it misinterprets the text of the Guidelines and, more importantly, ignores the purposes of the Guidelines and § 5K2.13, which support leniency in this situation. Further, the minority approach ignores the purposes of the Guidelines because it fails to limit the discretion of the courts in any manner. Unless either the judicial system remedies this confusion or Congress amends the Sentencing Guidelines to include a more clear definition, the present existing situation is prone to unjust results. Therefore, it is imperative that the definition of "non-violent offense" in § 5K2.13 guide the court's discretion so that offenders receive sentences commensurate with their blameworthiness and are not unjustly punished.

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