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**Diminished Capacity - Expanded Discretion: Section 5K2.13 of the Federal Sentencing Guidelines and the Demise of the Non-Violent Offense**

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DIMINISHED CAPACITY—EXPANDED DISCRETION:
SECTION 5K2.13 OF THE FEDERAL SENTENCING GUIDELINES
AND THE DEMISE OF THE "NON-VIOLENT OFFENSE"

I. Introduction

In the Anglo-American tradition, courts have developed a rich history of taking the mental status of the offender into account when determining criminal responsibility and the appropriate sentence. Since the advent of the Sentencing Reform Act, the United States Sentencing Commission ("Commission") has continued this tradition by providing for a downward departure from mandatory sentencing—that is, reducing the defendant's sentence—by taking into account diminished mental capacity and the nature of the offense. Exemplified by section 5K2.13 of the Federal Sentencing Guidelines ("Guidelines"), this policy provides for downward departure when the defendant has a diminished mental capacity and has committed an offense without using actual or threatened violence.


3. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (1997) (describing grounds for departure). In general, and for the purpose of this Comment, downward departure means that a judge may depart from the prescribed mandatory ranges of the Guidelines and assign a sentence below the mandatory minimum. See id. (discussing factors involved in downward departure); see also Perin & Gould, supra note 1, at 432-33 (discussing departure and emotional conditions). The Guidelines describe departures as follows:

   The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds an "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(b) (1997) (quoting 18 U.S.C. § 3553(b) (1995)).


   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.
During the past decade the definition and application of "non-violent offense" under section 5K2.13 has been a topic of vigorous debate, resulting in a split among the federal circuit courts of appeals.\(^5\) Because of this circuit split, the Commission revamped section 5K2.13. Before amending the Guidelines, the majority of circuits concluded that the language found in section 4B1.2 of the Guidelines controlled the meaning of the phrase "non-violent offense."\(^6\) Section 4B1.2, however, does not contain a definition of non-violent offense. Instead, it delineates what constitutes a "crime of violence" under the career offender provisions of the Guidelines.\(^7\) Before the amendment to section 5K2.13, the majority of circuits found the phrase "non-violent offense" to mean the opposite of the term "crime of violence."\(^8\) A significant minority of circuits, however, had held that the phrase "non-violent offense" was not controlled by the "crime of violence" language located in section 4B1.2.\(^9\)

Moreover, the circuits also disagreed over whether a sentencing court should exercise its discretion and consider the facts and circumstances of each case in determining what constituted a non-violent offense, or should subvert judicial discretion to the prescribed statutory elements and definitions of the Guidelines.\(^10\)

Reacting to this significant disagreement among the circuit courts of appeals, the Commission reformulated the language and applicability of section 5K2.13.\(^11\) The Commission’s decision to completely rewrite the

\(^5\) *Id.* Compare United States v. Mayotte, 76 F.3d 887, 889 (8th Cir. 1996) (holding "crime of violence" definition controlling on phrase "non-violent offense"), United States v. Poff, 926 F.2d 588, 591-93 (7th Cir. 1991) (same), United States v. Borrayo, 898 F.2d 91, 94 (9th Cir. 1989) (same), and United States v. Maddalena, 893 F.2d 815, 819 (6th Cir. 1989) (same); with United States v. Weddle, 30 F.3d 532, 540 (4th Cir. 1994) (holding "crime of violence" language not controlling on phrase "non-violent offense"), and United States v. Chatman, 986 F.2d 1446, 1450 (D.C. Cir. 1993) (same).

\(^6\) See Jeremy D. Feinstein, Note, *Are Threats Always "Violent" Crimes?*, 94 Mich. L. Rev. 1067, 1067-68 (1996) (discussing meaning of violent offense). Whether or not a crime is characterized as violent under section 5K2.13 is significant in two ways. First, if a crime is considered non-violent and the defendant suffers from diminished mental capacity, he or she may be entitled to sentence reduction. See *id.* at 1068 (discussing first prong of section 5K2.13). Second, if the crime is classified as violent and the defendant falls under the career offender provisions of the Guidelines, he or she may receive a more severe sentence. See *id.* (characterizing distinction between two phrases as difficult).

\(^7\) *See* U.S. Sentencing Guidelines Manual § 4B1.2 (2000) (defining "crime of violence"). Section 4B1.2 states that a crime of violence "has as an element the use, attempted use, or threatened use of physical force against the person of another ..." *Id.*

\(^8\) *See* e.g., Poff, 926 F.2d at 591-93 (asserting majority position).

\(^9\) *See* Weddle, 30 F.3d at 540 (asserting minority view and discussing dissent in *Poff*).

\(^10\) *See* United States v. Askari, 140 F.3d 536, 544-46 (3d Cir. 1998) (noting that surrounding circumstances test allows court to exercise its discretion).

language of section 5K2.13 was due, at least in part, to the Third Circuit’s decision in United States v. Askari\textsuperscript{12} and its comprehensive analysis of section 5K2.13 jurisprudence.\textsuperscript{13}

This Comment focuses upon the historical and jurisprudential foundations of downward departures for diminished mental capacity under the Federal Sentencing Guidelines\textsuperscript{14}. Part II examines section 5K2.13 of the Federal Sentencing Guidelines as written prior to 1998.\textsuperscript{15} Moreover, Part II delineates the considerable disagreement among the federal circuit courts of appeals that occurred prior to the Commission amending section 5K2.13.\textsuperscript{16} Part III discusses the Third Circuit’s decision in Askari and its contribution to section 5K2.13 jurisprudence.\textsuperscript{17} Part IV focuses upon the new language of section 5K2.13 and its current application to offenders who suffer from diminished mental capacity.\textsuperscript{18} Finally, Part V discusses the potential impact of the new language of section 5K2.13 upon the various circuit courts of appeal.\textsuperscript{19}

\textsuperscript{12} 140 F.3d 536 (3d Cir. 1998).

\textsuperscript{13} See id. at 547 (accepting minority view but taking different view of appropriate standard).

\textsuperscript{14} For a discussion of the history and application of diminished mental capacity jurisprudence under section 5K2.13, see infra notes 20-76 and accompanying text.

\textsuperscript{15} For a discussion of pre-amendment section 5K2.13 language, see infra notes 30-39 and accompanying text.

\textsuperscript{16} For a discussion of the circuit split regarding section 5K2.13’s application, see infra notes 40-76 and accompanying text.

\textsuperscript{17} For a discussion of the facts and analysis of the Third Circuit’s decision in Askari, see infra notes 77-121 and accompanying text.

\textsuperscript{18} For a discussion of the new language of section 5K2.13 and its current application, see infra notes 122-60 and accompanying text.

\textsuperscript{19} For an analysis of future section 5K2.13 jurisprudence, see infra notes 142-60 and accompanying text.

II. BACKGROUND: DOWNWARD DEPARTURE FOR DIMINISHED CAPACITY  
UNDER THE PRE-1998 GUIDELINES  

A. The Federal Sentencing Guidelines

In 1975, legislation was introduced in the 94th Congress establishing the United States Sentencing Commission. Reacting to a perceived dissatisfaction with the disparity in federal sentencing discretion, Congress enacted legislation to combat this purported trend. In 1984, both houses of Congress passed the Sentencing Reform Act as part of the

20. See Kate Stith & Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 WAKE FOREST L. REV. 223, 223 (1993) (discussing origins of Sentencing Commission). Senator Edward M. Kennedy introduced the original legislation. See id. In 1974, the Yale Law Journal conducted a seminar on sentencing and parole reform. See id. at 229 (discussing journal’s attempt to develop scientific method of sentencing for federal courts). This attempt produced the parole guideline table which would later become the Sentencing Guidelines. See id. In 1975, the Yale sentencing seminar completed its proposal for eliminating sentencing disparity in the federal system. See id. at 230. Later that year, the final draft of the Yale project became the basis for the legislation proposed by Senator Kennedy. See id.

21. See Douglas A. Berman, A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking, 11 STAN. L. & POL’Y REV. 93, 95 (1999) (noting that “vast discretion was the hallmark of federal sentencing” for over seventy-five percent of twentieth century); Stith & Koh, supra note 20, at 226-27 (discussing issue of disparity in sentencing). Traditionally, judges in the federal system enjoyed a substantial amount of discretion in sentencing issues. See id. at 225 (noting that before sentencing guidelines, federal criminal statutes stated only maximum terms). Additionally, there existed no appellate review mechanism of a federal judge’s sentencing discretion. See id. at 226 (noting that lack of appellate review lasted for over two-hundred years). In 1910, the introduction of the parole system marked one of the first controls over judicial determination of sentencing. See id. (indicating that parole officers and not the judiciary made these decisions). With the beginnings of federal parole, prison terms became partially indeterminate. See id. at 226-27 (noting that court’s sentence effectively determined only minimum term). The rehabilitative model brought about the advent of indeterminacy and parole. See id. at 227 (noting that rehabilitation justified early release from prison).

One of the most influential critics of the federal sentencing system was a former federal district judge named Marvin E. Frankel. See id. at 228. Frankel characterized the federal sentencing power as “almost wholly unchecked and sweeping . . . terrifying and intolerable for a society that professes devotion to the rule of law.” Id. (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1972)). Frankel was the catalyst for a movement that sought to eliminate the indeterminate rehabilitative parole system. See id. at 229-30. The Sentencing Commission itself acknowledged sentencing disparity in the pre-Guideline era:

The region in which the defendant is convicted is likely to change the length of time served from approximately six months more if one is sentenced in the South to twelve months less if one is sentenced in central California . . . . [B]lack [bank robbery] defendants convicted . . . . in the South are likely to actually serve approximately thirteen months longer than similarly situated bank robbers convicted . . . . in other regions.


Operating the Guidelines is a relatively straightforward process. The Guidelines mandate a sentencing range at the intersection of an offense level and criminal history category. Absent meaningful and unusual circumstances, a defendant must be sentenced within the appropriate


25. See Selya & Kipp, supra note 21, at 6-8 (discussing operation of Guidelines). The central aspect of the Guidelines is the sentencing grid that contains forty-three offense levels and six criminal history categories. See id. at 6. The categories are cross-referenced on an X, Y axis system. See id.

26. See id. (discussing steps involved in sentencing process). Despite the apparent simplicity of the Guidelines, there are numerous steps involved in its application to any given offender. See id. The sentencing judge first determines the appropriate statute of conviction and assigns a base offense level. See id. Second, the judge determines whether adjustments to the base offense level are warranted. See id. at 7. Adjustments to the base level are governed by five factors: the victim's characteristics; the defendant's role in the offense; whether the defendant obstructed justice; the incidence of multiple counts; and whether the defendant accepted responsibility for his actions. See id. Third, the judge calculates the defendant's criminal history category. See id. (noting that points are assigned based on offender's past conviction record). After consulting the sentencing grid to determine the appropriate sentencing range, the court then must consider a number of factors prescribed by Congress. See id. The factors prescribed by Congress include: the seriousness of the offense; deterrence; public protection; the indicated sentence under the Guidelines; policy statements of the Sentencing Commission; and avoidance of unwarranted disparities in sentencing. See id. If the
sentencing range. Nevertheless, the Guidelines do allow a judge to depart from the Guideline-imposed sentence if there are reasons justifying the departure and if the decision is subject to appellate review. Appellate courts generally affirm departures from the Guidelines only if the departures are reasonable.

Interim calculations are performed correctly, imposition of a sentence within the sentencing range may not be reviewed on appeal. See id.

27. See id. at 6 (noting interaction between categories); see also Steven E. Zipperstein, Certain Uncertainty: Appellate Review and the Sentencing Guidelines, 66 S. Cal. L. Rev. 621, 621-23 (1992) (noting that before 1987, federal appellate courts played virtually no role in criminal sentencing process). Appellate review is provided in 18 U.S.C. § 3742 and describes the circumstances under which an appeal may be brought. See id. at 629 (providing appealability of four different types of sentencing decisions). Both sides of the adversarial process may appeal sentences imposed in violation of law, sentences imposed as a result of incorrect application of the Guidelines, departures and unreasonable sentences. See id. at 629-30 (discussing factors appellate court should consider during review). The statute does not provide jurisdiction for appeals from sentences as a result of correct application of the Guidelines or from bargains under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure. See id. at 632 (discussing scope of jurisdiction).

28. See 18 U.S.C. § 3553(c) (2000) (mandating that judges justify departures from Guidelines). Section 3553(c) provides:

(c) Statement of reasons for imposing a sentence. — The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a) (4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a) (4), the specific reason for the imposition of a sentence different from that described.


29. See 18 U.S.C. §§ 3742(e)(3) & (f)(2) (2000) (setting standard of review); see also Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 5-6 (1988) (stating that judge can depart from Guidelines subject to appellate review under reasonableness standard). Section 5K2.0 of the guidelines indicates that according to 18 U.S.C. § 3553(b) (1998), a sentencing court may grant a departure from the Guidelines in the presence of "aggravating or mitigating circumstance[s] of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2000). In essence, the Commission gave the courts the ability to consider factors in addition to those identified in the Guidelines that have not been given appropriate consideration by the Commission. See id. (indicating that Commission did not consider all possible factors involved). Decisions of this type are left to the discretion of the sentencing court. See id.
B. Downward Departure for Diminished Mental Capacity Under Section 5K2.13 of the Guidelines

1. Pre-Amendment Language

Prior to the 1998 Amendments to the Guidelines, section 5K2.13 allowed a sentencing court to grant a departure below the sentencing range prescribed.

[For] 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.\(^{30}\)

The Commission did not provide a definition of non-violent offense in the Guidelines, and courts were inconsistent in its application.\(^{31}\) Although the language "non-violent offense" was not defined in either section 5K2.13 or the commentary accompanying the Guidelines, section 5K2.13 excluded numerous categories of offenses from downward departure.\(^{32}\) Additionally, courts rarely granted departures from the Guidelines based upon diminished capacity under section 5K2.13.\(^{33}\)

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32. See id. (lacking definition of “non-violent offense”); see also United States v. Askari, 140 F.3d 536, 540 (5th Cir. 1998) (noting failure to define non-violent offense in section 5K2.13 or accompanying commentary). Although the term “non-violent offense” was not specifically defined in section 5K2.13, courts identified offenses that fell in the violent category. See, e.g., United States v. Premachandra, 32 F.3d 346, 348 (8th Cir. 1994) (holding armed robbery with pellet gun violent offense); United States v. Dailey, 24 F.3d 1324, 1327 (11th Cir. 1994) (holding threatening communications qualifies as violent offense); United States v. Maddalena, 893 F.2d 815, 819 (6th Cir. 1989) (holding armed robbery qualifies as violent offense); see also, e.g., Andrew M. Campbell, Downward Departure Under § 5K2.13 of United States Sentencing Guidelines (18 U.S.C.A. Appx) Permitting Downward Departure for Defendants with Significantly Reduced Mental Capacity Convicted of Nonviolent Offenses, 128 A.L.R. Fed. 595, § 19(b) (1995) (noting numerous cases in which section 5K2.13 did not apply). These cases included those in which the reduced mental capacity was a result of voluntary substance abuse. See id. (citing United States v. Hunter, 980 F. Supp. 1439 (M.D. Ala. 1997)).
33. See generally United States v. Edwards, 98 F.3d 1364 (D.C. Cir. 1996) (holding severe adjustment disorder not sufficient for downward departure); United States v. Webb, 49 F.3d 636 (10th Cir. 1995) (holding paranoia not sufficient for downward departure); United States v. Morrison, 46 F.3d 127 (1st Cir. 1995) (holding depression not sufficient for departure); United States v. Christensen, 18 F.3d 882 (9th Cir. 1994) (holding bipolar disorder not sufficient for departure); United States v. Regan, 980 F.2d 44 (1st Cir. 1993) (holding isolated delusion not sufficient for downward departure); United States v. Perkins, 963 F.2d 1523 (D.C.
Although the language of pre-amendment section 5K2.13 did not define the term “non-violent offense,” the career offender provisions of the Guidelines defined the phrase “crime of violence.” Under the Guidelines, section 4B1.1 defines “career offender,” whereas section 4B1.2 provides definitions for the terms found in section 4B1.1, including “crime of violence.” The definition located in section 4B1.2 specifies the term of imprisonment and delineates the statutory elements involved in a crime of violence. The application notes of section 4B1.2 expand on the definition.

Cir. 1992) (holding personality disorder not sufficient for downward departure); United States v. Hamilton, 949 F.2d 190 (6th Cir. 1991) (holding compulsive gambling not sufficient for downward departure); United States v. Lauzon, 938 F.2d 326 (1st Cir. 1991) (holding mental retardation not sufficient for downward departure); United States v. Davis, 919 F.2d 1181 (6th Cir. 1990) (holding panic disorder not sufficient for downward departure).


35. Id. The relevant language states:

§ 4B1.1. Career Offender
A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Id.; see also Smith, supra note 24, at 11.39 (discussing career offender provisions).


37. See id. The relevant language of section 4B1.2 states:

(a) The term “crime of violence” means any offense under federal or state law punishable by imprisonment for a term exceeding one year, that—

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

(2) 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.

(b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Id. (emphasis in original).
nition with specific examples. Nevertheless, the interpretation of pre-amendment section 5K2.13 and section 4B1.2 produced considerable dis-sent among circuit courts of appeals.

2. Pre-Amendment Circuit Split

Prior to the total revamping of the diminished capacity provision of the Guidelines, the issue among the circuit courts was whether the phrase "non-violent offense" contained in section 5K2.13 was defined by reference to section 4B1.2's "crime of violence" definition. A majority of circuits, including the United States Courts of Appeals for the Sixth, 41

38. See id. The application notes elaborate:

1. For purposes of this guideline—

"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

"Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extor- tionate extension of credit, and burglary of a dwelling. Other offenses are included as "crimes of violence" if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

Id.


40. See United States v. Askari, 140 F.3d 536, 543 (3d Cir. 1998) (noting various circuit courts have answered this question differently).

41. See generally United States v. Barajas-Nunez, 91 F.3d 826 (6th Cir. 1996) (holding inability to speak English not sufficient for downward departure); United States v. Epley, 52 F.3d 570 (6th Cir. 1995) (finding lack of causation of mental disorder and commission of offense); United States v. Johnson, 979 F.2d 396 (6th Cir. 1992) (holding severe adjustment disorder not sufficient for downward departure); United States v. Hamilton, 949 F.2d 190 (6th Cir. 1991) (finding no causation with compulsive gambling disorder); United States v. Wilson, 920 F.2d 1290 (6th Cir. 1990) (holding that plotting for murder is not non-violent offense); United States v. Davis, 919 F.2d 1181 (6th Cir. 1990) (denying downward departure for panic disorder).
Seventh,\textsuperscript{42} Eighth,\textsuperscript{43} Ninth\textsuperscript{44} and Eleventh\textsuperscript{45} Circuits, concluded that the definition of non-violent offense found in pre-amendment section 5K2.13 meant the opposite of the crime of violence definition found in section 4B1.2.\textsuperscript{46} A minority of circuits, including the United States Courts of Appeals for the Third,\textsuperscript{47} Fourth\textsuperscript{48} and District of Columbia Cir-

\textsuperscript{42} See generally United States v. Johnson-Dix, 54 F.3d 1295 (7th Cir. 1995) (holding unusually low intelligence quotient not sufficient for downward departure); United States v. Johnson, 999 F.2d 1192 (7th Cir. 1993) (affirming decision denying departure for schizophrenia); United States v. Frazier, 979 F.2d 1227 (7th Cir. 1992) (holding depression not sufficient to warrant downward departure); United States v. Gentry, 995 F.2d 186 (7th Cir. 1991) (holding general emotional problems insufficient for downward departure).

\textsuperscript{43} See generally United States v. Risse, 83 F.3d 212 (8th Cir. 1996) (holding post-traumatic stress disorder sufficient for downward departure); United States v. Jackson, 56 F.3d 959 (8th Cir. 1995) (holding no downward departure for unspecified emotional problems); United States v. Premachandra, 32 F.3d 946 (8th Cir. 1994) (holding F.3d robe as violent offense); United States v. Dillard, 975 F.2d 1554 (8th Cir. 1992) (denying downward departure for paranoid schizophrenia); United States v. Schneider, 948 F.2d 1074 (8th Cir. 1991) (denying downward departure for coercion of overbearing wife); United States v. Ruklick, 919 F.2d 95 (8th Cir. 1990) (holding schizoaffective disorder sufficient for downward departure).

\textsuperscript{44} See generally United States v. Cook, 53 F.3d 1029 (9th Cir. 1995) (holding unarmed bank robbery qualifies as violent offense); United States v. Christensen, 18 F.3d 822 (9th Cir. 1994) (holding manic-depression not sufficient for downward departure); United States v. Garza-Juarez, 992 F.2d 896 (9th Cir. 1993) (granting departure under section 5K2.13); United States v. Lewison, 988 F.2d 1005 (9th Cir. 1993) (allowing departure for unspecified emotional problems); United States v. Anders, 956 F.2d 907 (9th Cir. 1992) (holding that voluntary intoxication is not basis for downward departure); United States v. Fairless, 975 F.2d 664 (9th Cir. 1992) (holding single act of aberrant behavior sufficient for departure); United States v. Sanchez, 933 F.2d 742 (9th Cir. 1991) (holding no departure for unarmed bank robbery).

\textsuperscript{45} See generally United States v. Holden, 61 F.3d 858 (11th Cir. 1995) (finding no causation between mental condition and offense); United States v. Chigbo, 38 F.3d 543 (11th Cir. 1994) (holding no causation between crime and mental status); United States v. Salemii, 26 F.3d 1084 (11th Cir. 1994) (holding kidnapping violent crime); United States v. Dailey, 24 F.3d 1323 (11th Cir. 1994) (holding that paranoia reduced defendant's volitional abilities); United States v. Munoz-Realpe, 21 F.3d 375 (11th Cir. 1994) (reversing district court's grant of downward departure); United States v. Patterson, 15 F.3d 169 (11th Cir. 1994) (holding no causation between mental condition and commission of offense); United States v. Russell, 917 F.2d 512 (11th Cir. 1990) (finding diminished capacity in dependent personality disorder).

\textsuperscript{46} See Travis, supra note 31, at 531 (noting that any crime defined as violent under section 4B1.2 is not non-violent offense).


\textsuperscript{48} See generally United States v. Cropp, 127 F.3d 354 (4th Cir. 1997) (holding no downward departure for voluntary drug use); United States v. Withers, 100 F.3d
cuits concluded that the majority approach was devoid of any support in the policy statements and text of sections 5K2.13 and 4B1.2. Accordingly, this minority position had adopted a “fact specific inquiry to determine whether the underlying conduct was indeed nonviolent.” Even though five circuit courts comprised the pre-amendment majority approach to the issue, only the United States Court of Appeals for the Seventh Circuit’s decision in United States v. Poff provided a detailed and elaborate analysis of their position and reasoning.

a. The Majority Position

After initially focusing on the text of the Guidelines, the Poff majority acknowledged that the Commission did not define the phrase “non-violent offense” in section 5K2.13. The Poff court found that, in general, a


50. See Travis, supra note 31, at 531-32 (discussing leniency policy behind section 5K2.13); see also Daniel Wise, Retarded Man’s Sentence Is Cut Under Fed’s Guidelines Factors, N.Y. L.J., July 10, 1997, at 1 (noting that Guideline standards are applied unfairly to mentally retarded individual manipulated by co-defendant).

51. Travis, supra note 31, at 552.

52. 926 F.2d 588 (7th Cir. 1991).

53. See Travis, supra note 31, at 537-38 (discussing majority view). The majority defines the phrase non-violent offense narrowly. See id. at 537-39 (expressing view that definition of crime of violence controls departure under section 5K2.13). In Poff, the appellant had a mental health history as well as a history of making threats. See Poff, 926 F.2d at 589-90. She was convicted under 18 U.S.C. § 871 (1982) for writing threatening letters to then-President Ronald Regan. See id. at 590. Appellant raised an insanity defense at her trial. See id. Once convicted, her past criminal record mandated that she receive her sentence pursuant to the career offender provisions of the Sentencing Guidelines. See id. The appellant contended that the career offender provisions did not apply because she never intended to carry out her threats. See id. The court dismissed this argument noting that “threats . . . themselves are a form of violence.” See id. (citing Rogers v. United States, 422 U.S. 35, 46-47 (1975) (Marshall, J., concurring)).

54. See Poff, 926 F.2d at 591 (noting failure to define non-violent offense in section 5K2.13). The appellant in Poff contended that this omission indicated that the Commission meant for the terms “non-violent” and “crime of violence” to con-
choice of different words in statutory language usually reflects an intent to convey a different meaning. Rather than focusing on the lack of a definition, the Poff court instead chose to concentrate on the fact that the Commission utilized the same root word for both phrases—violence. Based upon this similarity, the Seventh Circuit in Poff reasoned that as the "root and meaning" in both phrases were the same, it would be inappropriate to allocate different meanings to the same word or phrase when used on multiple occasions within the Guidelines. Specifically, the court stated that the Guidelines should be read as a whole and, "when the same word appears in different, though related sections, that word likely bears the same meaning in both instances."

The Poff court next turned to the Armed Career Offender provision of 18 U.S.C § 924, as it existed in 1990, to further support its finding that linguistic differences between the phrases were insignificant. Specifically, the Poff majority turned to 18 U.S.C. § 924(e)(2)(B)(i), which defines the term "violent felony" to "include any crime that, has as an element the use, attempted use, or threatened use of physical force against the person of another." In doing so, the court noted that this definition was consistent with the crime of violence found in section 4B1.2 of the Guidelines.

The Poff majority reasoned that because there is no difference between a violent offense and a crime of violence, it is impossible to derive a distinction between a violent felony and a violent offense. In further support of its position, the Poff court asserted that if the Commission had intended the phrases in section 5K2.13 and section 4B1.2 to convey different meanings. See id. The Poff court did acknowledge that "[c]ourts often say that choice of different words reflects an intent to say something different." Id. (citing Zabinski v. Montgomery Ward & Co., 919 F.2d 1276, 1279 (7th Cir. 1990), for proposition that use of different words denotes intent to have different meaning).

55. See Poff, 926 F.2d at 591 (acknowledging difficulty in discerning meaning of ambiguous phrases).

56. See id. (discussing construction of phrases). The Poff court acknowledged that in one instance the Commission used the word "violence" with the negative construction "non," and in the other case used it as a prepositional phrase. See id.

57. See id. Based on this analysis, the Poff majority stated that "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 . . . ." Id. (quoting United States v. Montgomery Ward & Co., 150 F.2d 369, 377 (7th Cir. 1945), rev'd, 326 U.S. 690 (1945)). The Poff majority also noted that this burden could not be met by "teas[ing] meaning from the Commission's use of a prepositional phrase rather than an adjective." Id.

58. Id. (citing Prussner v. United States, 896 F.2d 218, 228 (7th Cir. 1990), for proposition that Guidelines should be read as a whole).

59. See id. at 592.

60. Id. (quoting 18 U.S.C. § 924(e)(2)(B)(i) (1996)).

61. See id. (noting similarity in language between violent felony, violent offense and crime of violence).

62. See id.
ent meanings, it would have expressly done so. To support its conclusion, the Poff majority noted that other courts considering the issue concluded that the two phrases found in section 5K2.13 and section 4B1.2 are mutually exclusive. While the majority in Poff held that the language in section 4B1.2 was controlling on section 5K2.13, a powerful dissent provided the rationale and foundation for strong opinions by a growing number of circuit courts.

b. The Minority Position

The opinion of the minority of circuits, best articulated by the United States Courts of Appeals for the District of Columbia Circuit in United

63. See id. (discussing intent of Sentencing Commission). The court believed that the Commission could have offered different definitions for each term. See id. Similarly, the court noted that a simple cross-reference between sections would have eliminated the current confusion. See id. (noting that Sentencing Commission could not have foreseen this difficulty). Moreover, the court noted that the "natural reading" of the two terms suggests that they are "contrapositive." See id. (noting laypersons understanding of terms). Therefore, "the omission of a separate definition, or a cross-reference, is only surprising if the Commission intended the terms to overlap." Id. The Poff court also acknowledged that its position did not "rely solely on the common root of the terms in question." Id. Specifically, the Poff court noted that the Commission "chose to define threats as crimes of violence in the Career Offender provision of the Guidelines." Id. Discussing the Guidelines, the court noted that the Guidelines permit career offenders or other historically violent defendants to receive increased sentences to deter future violent behavior. See id. The Poff court also noted that section 5K2.13 limits the authority of courts to grant a downward departure to defendants with diminished mental capacity when "the defendant's criminal history . . . does not indicate a need for incarceration to protect the public." Id. Accordingly, even if the terms were not mutually exclusive, the departure still would not have been granted based on the defendant's past criminal history. See id. (noting that to hold otherwise would result in inconsistent interpretation of Guidelines).

64. See id. (noting that "[e]very court that has considered the interplay between § 4B1.2 and § 5K2.13 has held that the terms are mutually exclusive . . ."); see, e.g., United States v. Russell, 917 F.2d 512, 517 (11th Cir. 1990) (noting terms "non-violent offense" and "crime of violence" are mutually exclusive); United States v. Borrayo, 898 F.2d 91, 94 (9th Cir. 1989) (same); United States v. Rosen, 896 F.2d 789, 791 (3d Cir. 1990) (same), overruled by United States v. Askari, 140 F.3d 536 (3d Cir. 1998); United States v. Maddalena, 893 F.2d 815, 819 (6th Cir. 1989) (same); United States v. Speight, 726 F. Supp. 861, 865-66 (D.C. 1989) (same). The Poff majority also indicated that even if the Commission had intended to define violence differently in section 5K2.13, the court would be forced to guess at a meaning. See Poff, 926 F.2d at 592-93.

States v. Chatman,\textsuperscript{66} the Fourth Circuit in United States v. Weddle\textsuperscript{67} and the dissenting opinion in Poff, began their analysis of pre-amendment section 5K2.13 by focusing on its plain language.\textsuperscript{68} First, these opinions noted that the Guidelines lacked express language suggesting that the "crime of violence" definition of section 4B1.2 controlled the "non-violent offense" language of section 5K2.13.\textsuperscript{69} Indeed, the opinions by the Chatman court as well as the dissent in Poff noted that the lack of cross-referencing between sections 5K2.13 and 4B1.2 was especially telling because the Guidelines are, in general, thoroughly cross-referenced.\textsuperscript{70}

\textsuperscript{66} 986 F.2d 1446 (D.C. Cir. 1993). In Chatman, the defendant pled guilty to bank robbery in violation of 18 U.S.C. § 2113(a) and then appealed his sentence of thirty-seven months of incarceration. See id. at 1447-48. The defendant appealed his sentence pursuant to section 5K2.13 of the Guidelines, claiming diminished mental capacity and the commission of a non-violent offense. See id. at 1448. Because the defendant used a threatening note during the commission of the offense, the district court refused to grant a departure under section 5K2.13. See id. (citing district court's reason for refusing downward departure). Noting that the district court underestimated its discretion, the court of appeals remanded the case to the district court for resentencing. See id.

\textsuperscript{67} 30 F.3d 532 (4th Cir. 1994). In Weddle, the defendant pled guilty to mailing threatening communications in violation of 18 U.S.C. § 876. See Weddle, 30 F.3d at 534. In the plea agreement, the parties stipulated that no departures applied to the case. See id. at 535. The defendant's probation officer suggested downward departure for diminished capacity under section 5K2.13 if the court found that the act in question was a non-violent offense. See id.

\textsuperscript{68} See Chatman, 986 F.2d at 1447 (discussing text and application of section 5K2.13's plain language); Weddle, 30 F.3d at 537-38 (noting plain language of section 5K2.13's text); Poff, 926 F.2d at 594-95 (Easterbrook, J., dissenting) (finding language of section 5K2.13 instructive); see also Berman, supra note 21, at 103 (noting that plain language of Guidelines is often "vague"). According to Professor Berman, the vague language itself is one of many ways a federal judge may assert a judicial role in the determination of sentences. See id. (noting that Guidelines require judges to make crucial judgments about range and applicability of sentences even after Sentencing Reform Act).

\textsuperscript{69} See Poff, 926 F.2d at 594 (Easterbrook, J., dissenting). Judge Easterbrook noted:

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; instead the Commission selected different formulations. Although it laid out a detailed meaning for "crime of violence" in § 4B1.2, it did not provide so much as a cross-reference in § 5K2.13, a curious omission if the Commission meant to link these phrases so tightly that they are mutually exclusive.

\textit{Id.}; see also Chatman, 986 F.2d at 1450 (noting lack of express language). Noting that some courts have relied on section 4B1.2, the court in Chatman stated, "Nothing in the Guidelines themselves or in the Application Notes suggests that section 4B1.2 is meant to control the interpretation and application of section 5K2.13." \textit{Id.}

\textsuperscript{70} See Poff, 926 F.2d at 594 (Easterbrook, J., dissenting) (noting lack of cross-references). The dissent in Poff noted that although "[c]ourts often say that different language in different places conveys different meanings," this approach often oversimplifies the precision exercised by legislators. \textit{Id.} (citing Pittston Coal Group v. Sebben, 488 U.S. 105, 115 (1988)); see also United States v. Gaggi, 811 F.2d 47, 56 (2d Cir. 1987) (showing that different language can convey different meaning);
These courts also indicated that the common root shared by the phrases “crime of violence” and “non-violent offense” may not necessarily denote polar opposites. The dissent in Poff took great care to painstakingly indicate that the Commission sought to establish in section 4B1.2 that the determination of “whether a crime is one ‘of violence’ depends on its elements and not on the defendant’s conduct, so that an unrealized prospect of violence makes the crime one of violence.” The dissent in Poff noted that it took a detailed definition to make an unrealized prospect of violence a crime of violence. Additionally, the Poff dissent determined that the appropriate interpretation was to read the language of section 5K2.13 without tying it to the “term of art” found in section 4B1.2.

Tafoya v. Dept. of Justice, 748 F.2d 1389, 1391-92 (10th Cir. 1984) (same). The Poff dissent also noted that the Guidelines and accompanying commentary were written with great attention to relation among sections. See id. (citing United States v. Pinto, 875 F.2d 145, 144 (7th Cir. 1989)). Similarly, the court in Chatman noted that, despite the fact that the Commission amended section 4B1.2 and its commentary twice between 1991 and 1993, the revised section 4B1.2 never linked or referenced section 5K2.13. See Chatman, 986 F.2d at 1450 (citing U.S. Sentencing Guidelines Manual app. C, at 253-54, 284-85 (1992) to show Commission had opportunity to link section 4B1.2 with section 5K2.13).

71. See Poff, 926 F.2d at 594 (Easterbrook, J., dissenting) (noting that phrases may take meanings other than opposites).

72. See id. (citing Taylor v. United States, 495 U.S. 575, 585 (1990), for proposition that unrealized violence makes "crime of violence"); see also Chatman, 986 F.2d at 1451 (noting Poff).

73. See Poff, 926 F.2d at 594 (Easterbrook, J., dissenting) (characterizing definition as abnormal term of art); see also Weddle, 30 F.3d at 539 (noting that it was proper to define "non-violent offense" without tying it to "crime of violence"); Chatman, 986 F.2d at 1451 (quoting Poff dissent that sections "address entirely different issues"). Additionally, sections 4B1.2 and 5K2.13 were designed to address different concerns and issues. See id. (discussing policy concerns). Section 4B1.1 prescribes a formula to determine whether a defendant meets criteria to be classified as a career offender and, as a result, is subject to longer terms of incarceration. See id. at 540 n.3 (noting that purpose of section 4B1.2 is to define terms of art utilized in section 4B1.2). The Chatman court noted:

In section 994(h), Congress directed the Commission to ensure that the Guidelines specify prison sentences that are "at or near the maximum term authorized" for "career offenders," which include those who have "been convicted of a felony that is either a crime of violence or a drug offense and who ha[ve] been previously convicted of two felonies where each was either a 'crime of violence' or a drug offense . . . . " Longer sentences for such offenders are justified by the purposes of incapacitation, as set out in 18 U.S.C. § 3553(a)(2) (1988) and discussed in the Introductory Commentary to Part A of Chapter 4 of the Guidelines . . . .

Reflecting these policy concerns, the definition of "crime of violence" in section 4B1.2 is a distinctively crafted "term of art," . . . designed to identify career offenders . . . . [S]ection 4B1.2 appears to characterize as "crimes of violence" many offenses that, taken individually on their facts, might be interpreted as non-violent.

Chatman, 986 F.2d at 1451 (citations omitted).

74. See Poff, 926 F.2d at 594 (Easterbrook, J., dissenting) (asserting that section 4B1.2 does not apply to section 5K2.13). Judge Easterbrook noted: "A 'non-violent offense' in ordinary legal . . . understanding is one in which mayhem did
Moreover, the Chatman court specifically noted that the term "crime of violence" is geared toward identifying career offenders, though the term "non-violent offense" in section 5K2.13 refers "to those offenses that, in the act, reveal that a defendant is not dangerous, and therefore need not be incapacitated for the period of time the Guidelines would otherwise recommend." Finally, these courts indicated that, from a policy standpoint, the intent of section 4B1.2 was to treat the career offender severely, where section 5K2.13's intent was to create lenity for those with diminished mental capacity.

III. TOWARDS AN AMENDMENT TO SECTION 5K2.13: THE THIRD CIRCUIT'S DECISION IN UNITED STATES v. ASKARI

On April 23, 1992, Muhammad Askari robbed the First Bank of Philadelphia. The police apprehended Askari, who was unarmed and suffering from paranoid schizophrenia, approximately two blocks from the crime scene. After two years of psychiatric treatment, the district court found Askari competent and sentenced him to 210 months in prison.

not occur. The prospect of violence . . . sets the presumptive range; when things turn out better than they might, departure is permissible." Id.

75. Chatman, 986 F.2d at 1451-52 (noting policy behind section 5K2.13).
76. See Poff, 926 F.2d at 595 (Easterbrook, J., dissenting) (discussing policy arguments behind section 5K2.13).
77. See Brief for Appellant at 3, United States v. Askari, 140 F.3d 536 (3d Cir. 1998) (No. 95-1662) (noting that facts are undisputed).
78. See id. at 4 (discussing apprehension); see also United States v. Askari, 140 F.3d 536, 537 & n.1 (3d Cir. 1998) (discussing lapse in competency). The attending psychiatrist indicated that Askari was "too delusional to be able to cooperate with his attorney." Id. at 537 n.1 (discussing competency to stand trial). Upon examination, a psychiatrist concluded that Askari suffered from paranoid schizophrenia, drug addiction and seizure disorder. See id. (discussing diagnosis). According to mental health professionals, the essential feature of paranoid schizophrenia is the presence of delusions or auditory hallucinations in a context where cognitive functioning and affect are preserved. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV-TR 312 (4th ed. text rev. 2000) (establishing diagnostic criteria); LEE N. ROBINS & DARREL A. REGIER, PSYCHIATRIC DISORDER IN AMERICA 33 (1991) (discussing base rates of mental illness in United States). Experts estimate that approximately two to four million people in the United States meet criteria for schizophrenia at any given time. See id. ROBINS & REGIER, supra, at 33. In addition to the social costs, schizophrenia also imposes a significant financial burden on society. See id. at 34 (discussing health care expenditures for patients). Individuals diagnosed with schizophrenia occupy approximately thirty percent of available hospital beds nationwide. See id. (noting that this amounts to approximately 100,000 beds on any given day). As a result, the treatment of schizophrenic patients costs the nation approximately $7 billion annually in health care costs. See id. (noting that expenditures for schizophrenia is equivalent to financial burden imposed by all forms of cancer combined).

79. See Askari, 140 F.3d at 537-38 (discussing reasons for commitment and eventual sentencing). The district court committed Askari to the United States
Muhammad Askari appealed his sentence, claiming that he was entitled to a downward departure pursuant to section 5K2.13 because his offense was non-violent. Askari, acting alone, completely unarmed and suffering from diminished capacity, provided a catalyst for the complete revamping of section 5K2.13.

The United States Court of Appeals for the Third Circuit affirmed the holding of the district court, finding that the definition of crime of violence contained in the career offender provision did not govern the meaning of non-violent offenses in the Guidelines' policy statement permitting downward departure for diminished capacity. In affirming the district court, the Third Circuit abrogated its prior holding in United States v. Rosen by applying an analytical framework adopted by a growing minority of other circuit courts. In finding that the crime of violence definition of section 4B1.2 did not apply to section 5K2.13, the court established new precedent in the Third Circuit consistent with the philosophy and policy statements of the United States Sentencing Commission, and that which would soon thereafter be codified into new section 5K2.13.


80. For a discussion of the arguments asserted by Askari in favor of downward departure, see infra notes 93-103 and accompanying text.

81. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.13, cmt. background (1998) (citing Askari as one reason for amendment to section 5K2.13).

82. See Askari, 140 F.3d at 550 (discussing holding). Although the Askari court abrogated the analytical framework established in United States v. Rosen, the defendant's sentence was affirmed because his offense did not meet the Askari courts definition of non-violent offense. See id. at 549-50.

83. 896 F.2d 789, 791 (3d Cir. 1990) (holding “non-violent offense” means opposite of “crime of violence”), overruled by United States v. Askari, 140 F.3d 536 (3d Cir. 1998).

84. See, e.g., United States v. Weddle, 30 F.3d 532, 540 (4th Cir. 1994) (adopting minority approach); United States v. Chatman, 986 F.2d 1446, 1450 (D.C. Cir. 1993) (finding section 4B1.2 does not control application of section 5K2.13); see also Askari, 140 F.3d at 537 & n.2 (noting that four other circuits had adopted minority approach). In a concurring opinion, the Askari court recognized that the decision in Rosen is incorrect and should be reconsidered by the court en banc. See id. at 537 (Becker, J., concurring) (suggesting that downward departure under section 5K2.13 is available when commission of crime involves no violence in fact).

85. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (1998) (codifying basic holding of Askari into section 5K2.13). According to Judge Becker:

While “crimes of violence” and “non-violent offense” employ the same root word, the phrases “readily may take meanings other than as opposites." More importantly, the distinct objectives of the two provisions counsel that the meaning of the former not govern that of the later. In short, some factors at work in the departure sections of the Guidelines are in tension with those at work under the career offender sections, and it does not make sense to import a career offender-based definition of “crime of violence” into a departure section in the absence of specific cross-reference. Rather, it is better to permit the district courts to consider all the facts and circumstances surrounding the commission of a crime when deciding whether it qualifies as a non-violent offense under § 5K2.13.
In reaching its conclusion, the Third Circuit in Askari initially revisited its decision in Rosen.\(^6\) In Rosen, the court of appeals affirmed the district court's holding, noting that, although the crime at issue was committed without the use of physical force, it nevertheless did not qualify as a non-violent offense.\(^7\) By affirming the district court, the Rosen court adopted the definition of crime of violence found in section 4B1.2 of the Guidelines, which made such a departure under section 5K2.13 wholly inapplicable.\(^8\)

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\(^6\) See Askari, 140 F.3d at 542 (discussing facts of Rosen). In Rosen, the defendant pled guilty to extortion in violation of 18 U.S.C. § 876 (2000). See id. (explaining that defendant violated statute by mailing threatening communications in order to extort money). The defendant in Rosen was an admitted compulsive gambler. See id. (citing Rosen). At his sentencing hearing, the defendant presented expert testimony regarding his mental condition and argued for downward departure under section 5K2.13 of the Guidelines. See id. (noting that Rosen stated he had no intention to carry out threats). The district court in Rosen refused to grant the departure, holding that compulsive gambling did not justify departure. See id. (discussing holding in Rosen). The district court held that the defendant's mental condition was not a mitigating factor. See id. (noting court's refusal to acknowledge compulsive gambling as mitigating psychiatric illness). Second, the court concluded that the defendant's crime was not non-violent. See id. The defendant was sentenced under section 2B3.2 of the Guidelines. See id. Section 2B3.2 covers extortion by force or threat of injury or serious damage. See U.S. SENTENCING GUIDELINES MANUAL § 2B3.2 (2000) (discussing section 2B3.2). The application notes of section 2B3.2 of the Guidelines provides in relevant part:

This guideline applies if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat . . . . Even if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it. An ambiguous threat, such as "pay up or else," . . . ordinarily should be treated under this section.

Id. § 2B3.2 n.2.

\(^7\) See id. (finding no merit in defendant's argument); see also United States v. Borrayo, 898 F.2d 91, 94 (9th Cir. 1989) (utilizing section 4B1.2's definition of crime of violence); cf. United States v. Poff, 723 F. Supp. 79, 84 (N.D. Ind. 1989) (same). The Askari court also noted that it had recently cited Rosen as controlling precedent. See Askari, 140 F.3d at 542 (explaining precedential value of Rosen); United States v. McBroom, 124 F.3d 539, 542 (3d Cir. 1997) (citing Rosen and utilizing section 4B1.2 definition of crime of violence); see also Joseph A. Slobodian, Votation New Factor in Sentencing: Diminished Capacity Includes 'Compelled' Act, NAT'L L.J., Sept. 15, 1997, at A6 (discussing McBroom and expanding definition of diminished mental capacity).

The Askari court first noted that there is considerable question in other circuit courts of appeals over whether the phrase non-violent offense in section 5K2.13 should be defined by utilizing the crime of violence definition found in section 4B1.2 of the Guidelines. See Askari, 140 F.3d at 543. Specifically, the Askari court
The Seventh Circuit's majority decision in *Poff* provided a significant point of departure for the Third Circuit in *Askari*. After detailing the noted that the majority of the circuit courts of appeals subscribe to the position that the crime of violence definition found in section 4B1.2 should be applied to the phrase “non-violent offense” found in section 5K2.13. See *Askari*, 140 F.3d at 543. Conversely, the *Askari* court identified the growing minority of circuit courts of appeals that subscribe to the position that the district court's discretion to grant downward departures under section 5K2.13 should not be controlled by the crime of violence definition of section 4B1.2. See *id*. Although the Seventh Circuit's decision in *Poff* stands with the majority of circuits, five dissenting judges shared the view of the minority of the circuits. See *id*. (citing *Poff* 6-5 decision).

The First Circuit had examined numerous cases under pre-amendment section 5K2.13. See generally United States v. Santos, 131 F.3d 16 (1st Cir. 1997) (affirming trial court's determination that mental illness did not contribute to commission of offense); United States v. Robles-Torres, 109 F.3d 85 (1st Cir. 1997) (finding that trial court did not abuse its discretion by refusing to depart downward for mental illness); United States v. Morrison, 46 F.3d 127 (1st Cir. 1995) (holding that no departure was warranted for depression); United States v. DeCosta, 37 F.3d 5 (1st Cir. 1994) (noting that district court found case unexceptional and could not justify departure); United States v. Gifford, 17 F.3d 462 (1st Cir. 1994) (remanding for resentencing because district court felt it lacked discretion to depart); United States v. Regan, 989 F.2d 44 (1st Cir. 1993) (holding that no departure for delusional condition was warranted); United States v. Barnett, 989 F.2d 546 (1st Cir. 1993) (upholding denial of departure for short-term memory loss); United States v. Lauzon, 989 F.2d 326 (1st Cir. 1991) (holding that diminished capacity did not contribute to commission of crime); United States v. Fulton, 960 F. Supp. 479 (D. Mass. 1997) (granting downward departure for past childhood abuse due to violent nature of crime in instant case); Norfleet v. United States, 981 F. Supp. 718 (D. Mass. 1997) (holding mental illness not appropriate grounds for departure).

The Second Circuit also had examined numerous cases under section 5K2.13. See generally United States v. Kyles, 40 F.3d 519 (2d Cir. 1994) (noting that career offender guidelines do not permit downward departure for diminished capacity); United States v. Piervinanzi, 23 F.3d 670 (2d Cir. 1994) (declaring court may grant downward departure); United States v. Miller, 993 F.2d 16 (2d Cir. 1993) (granting upward departure due to psychological harm to victim); United States v. Prescott, 920 F.2d 139 (2d Cir. 1990) (denying departure for borderline personality disorder); United States v. Acosta, 846 F. Supp. 278 (S.D.N.Y. 1994) (granting downward departure for mental retardation); United States v. Marquez, 827 F. Supp. 205 (S.D.N.Y. 1993) (holding that evidence did not warrant downward departure); United States v. Cotto, 793 F. Supp. 64 (E.D.N.Y. 1992) (granting downward departure for mental retardation and vulnerability).

The Fifth Circuit also had the opportunity to examine numerous cases under section 5K2.13. See generally United States v. Soliman, 954 F.2d 1012 (5th Cir. 1992) (holding depression insufficient for downward departure).

The Tenth Circuit also had the opportunity to examine cases under section 5K2.13. See generally United States v. Webb, 49 F.3d 636 (10th Cir. 1995) (holding diagnosis of personality disorder insufficient for downward departure); United States v. Eagan, 965 F.2d 887 (10th Cir. 1992) (holding bipolar disorder insufficient for downward departure in instant case); United States v. Fox, 930 F.2d 820 (10th Cir. 1991) (noting that unarmed bank robbery is “violent offense”); United States v. Spedalieri, 910 F.2d 707 (10th Cir. 1990) (holding that court lacked jurisdiction to review lower court's determination that reduced mental capacity was insufficient for downward departure).

89. See *Askari*, 140 F.3d at 543 (stating that *Poff* majority provides “elaborate argument” in favor of its opinion). The *Askari* court identified the main points of
majority view among the circuits, the Askari court enumerated the minority positions as articulated by the dissent in Poff and as expanded by the courts in Chatman and Weddle.\(^90\) Considering both views, the *en banc* Askari

the *Poff* majority's decision. *See id.* at 543-44. First, the *Poff* majority emphasized the similarity between the two phrases and concluded that the word violent "likely bears [the] same meaning in both instances." *Id.* at 543. In reaching this conclusion, the *Poff* majority focused on the root word "violence." *See id.* In reaching this conclusion, the *Poff* court focused on the fact that the Sentencing Commission used the same word—violence—as a root for both phrases. *See id.* The *Poff* majority indicated that the root word was the same despite the fact that one is used as a negative and the other is used as a modifier. *See id.* Second, the majority in *Poff* turned to the Armed Career Offender Provision of 18 U.S.C. § 924(e)(2)(B)(i) to further support its contention that section 4B1.2 should control section 5K2.13. *See id.* at 543-44 (noting *Poff* majority's second assertion). According to the *Poff* majority, the Armed Career Offender Provision mirrors the crime of violence definition found in section 4B1.2 of the Guidelines. *See id.* at 544 (citing *Poff*).

In section 924(e)(2)(B)(i), Congress defined a violent felony as any crime that "has as an element of the use, attempted use, or threatened use of physical force against another . . . ." *Id.* (quoting *Poff* majority's reading of section 924(e)(2)(B)(i)). Finding no practical distinction between the two definitions, the *Poff* majority reasoned that if it is difficult to discern a difference between crime of violence and violent felony, "it is well nigh impossible to divine any distinction between "violent felony" and a "violent offense"." *See id.* (quoting majority in *Poff*). Expanding on this line of thought, the *Poff* majority attempted to address the intent of the Sentencing Commission regarding the phrases found in sections 4B1.2 and 5K2.13. *See id.* (noting *Poff* majority's third assertion). Specifically, the *Poff* majority indicated that "if the . . . Commission wanted to differentiate between different types of violence, it would have expressly [done so in 5K2.13]." *Id.* The *Poff* court noted in concluding this point that even if the Commission had intended different meanings for the two phrases, there is no guidance in the Guidelines to determine its meaning. *See id.* (quoting *Poff* majority stating "we could do little but guess as to its meaning").

The Askari court then noted the *Poff* majority's policy arguments in favor of interpreting the two phrases similarly. *See id.* at 544 (considering underlying objectives of two provisions). First, the *Poff* majority noted that the Guidelines reflect a view that offenders with a history of violent offenses, including threats of violence, should receive longer sentences. *See id.* The *Poff* majority also observed that section 5K2.13 limits the authority of courts to decrease sentences due to diminished mental capacity to instances where the defendant committed a non-violent offense. *See id.* (asserting that section 5K2.13 is intended to discourage inappropriate departures). Similarly, the *Poff* court asserted that the Commission further limited the ability of courts to depart by adding the phrase "the defendant's criminal history does not indicate a need for incarceration to protect the public." *Id.*

Finally, the *Poff* majority indicated that individuals suffering from mental disorders are less amenable to treatment, making the need for prolonged incarceration more urgent. *See id.* Based on all of these assertions, the majority in *Poff* concluded that the Commission believed departures for diminished capacity under section 5K2.13 were only warranted when there is little chance of violent behavior. *See id.* (noting that this interpretation would not subvert intent of Commission).

\(^90\) *See id.* at 544 (noting rationale of *Poff* dissent). As a basis for its own holding, the Askari court outlined the principal arguments set forth by the *Poff* dissent, starting with the text of section 5K2.13. *See Askari,* 140 F.3d at 544 (discussing textual argument of *Poff* dissent). Regarding the text of section 5K2.13, the minority of courts note that there is nothing in the Guidelines, accompanying notes or legislative history that suggests section 4B1.2 was meant to be applied to section
court examined the language, structure and purpose of the Guidelines, and reconsidered the definition of non-violent offense found in section 5K2.13.\textsuperscript{91} Contrary to its earlier holding in \textit{Rosen}, the \textit{Askari} court found that the analysis set forth by the minority view was more convincing.\textsuperscript{92}

Although the court in \textit{Askari} declined to detail its own reasoning, it did note that there were four significant points in the minority view that it found exceedingly persuasive.\textsuperscript{93} First, the \textit{Askari} court recognized that section 5K2.13 was devoid of any cross-reference to the crime of violence definition located in section 4B1.2.\textsuperscript{94} Indeed, the court found this lack of reference highly instructive in light of numerous amendments to the Guidelines by the Commission.\textsuperscript{95}

Second, the \textit{Askari} court noted that downward departures, pursuant to section 5K2.13, are limited to “defendants whose criminal history does not indicate a need for incarceration to protect the public.”\textsuperscript{96} Accordingly, the court found that this succeeded in removing section 5K2.13 de-

\textsuperscript{91} See id. (citing \textit{United States v. Chatman}, 986 F.2d 1446, 1450 (D.C. Cir. 1993)). The \textit{Chatman} court noted that some courts interpret the intent of the Sentencing Commission as requiring a crime to be characterized as a violent crime within section 4B1.2 if any one of the crimes’ statutory elements involves threatened use of physical force. See \textit{Chatman}, 986 F.2d at 1450 (noting that specific facts and circumstances of offense are disregarded under this approach). The \textit{Askari} court noted that the minority view suggests that the omission of the phrase “crime of violence” or a cross-reference to section 5K2.13 was done intentionally by the Commission to prevent section 4B1.2 from being applied to section 5K2.13. See \textit{Askari}, 140 F.3d at 544-45. The \textit{Askari} court noted:

\begin{quote}
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; instead, the Commission selected different formulations. Although it laid out a detailed meaning for “crime of violence” in § 4B1.2, it did not provide so much as a cross-reference in § 5K2.13, a curious omission if the Commission meant to link these phrases so tightly that they are mutually exclusive.
\end{quote}

\textit{Id.} at 545 (quoting \textit{Poff}, 926 F.2d at 594; \textit{Chatman}, 986 F.2d at 1450). Similarly, the \textit{Askari} court noted that despite numerous amendments, the Commission had never altered section 5K2.13 to incorporate the crime of violence definition of section 4B1.2. See id. (citing \textit{Poff} and \textit{Chatman} for proposition that section 4B1.2’s “crime of violence” was not incorporated into section 5K2.13 “non-violent offense”).

\textsuperscript{92} See \textit{Askari}, 140 F.3d at 546 (discussing court’s initial view of section 5K2.13). The \textit{Askari} court noted that the initial view as expressed in \textit{Rosen} was a reasoned interpretation that now represents the majority opinion among the circuit courts of appeals. See id. (discussing opinion in \textit{Rosen}).

\textsuperscript{93} See id. (noting with favor view expressed in dissent in \textit{Poff} and majority opinions in \textit{Chatman} and \textit{Weddle}).

\textsuperscript{94} See id. (noting most compelling arguments).

\textsuperscript{95} See id. (detailing first point of agreement). Although the Sentencing Commission amended the Guidelines over five-hundred times in the last nine years, there has never been a cross-reference to the two sections in question. See id.

\textsuperscript{96} See id. (referencing lack of interdependence between sections 4B1.2 and 5K2.13).

\textsuperscript{91} See \textit{id.} (limiting section 5K2.13 to criminals with no history of need for incarceration).
partures from the reach of career offenders.\textsuperscript{97} Elaborating its rationale, the \textit{Askari} court found that this safeguard makes it unnecessary to incorporate the definition of non-violent offense from section 4B1.2.\textsuperscript{98}

Third, the \textit{Askari} court noted that section 1B1.1 of the Guidelines articulates a list of definitions for general applicability.\textsuperscript{99} Upon examination, the court found that this list of general definitions did not include definitions for crime of violence or non-violent offense.\textsuperscript{100} As such, the \textit{Askari} court indicated that the definition contained in section 4B1.2 was not designated for general applicability and, therefore, should not be considered when applying section 5K2.13.\textsuperscript{101}

Finally, the court in \textit{Askari} noted that the policy concerns of sections 4B1.2 and 5K2.13 are different; section 4B1.2 is punitive in nature whereas section 5K2.13 fosters a policy of lenity.\textsuperscript{102} Based upon these points, the court concluded that the section 4B1.2 definition of crime of violence should not be applied to section 5K2.13.\textsuperscript{103}

Although the \textit{Askari} court adopted the minority view that section 4B1.2 should not be applied to section 5K2.13, it expressed a different view of the applicable standard to evaluate a potential downward departure.\textsuperscript{104} In cases expressing the majority viewpoint, the \textit{Askari} court directed the district court judge to "make a fact specific inquiry [into] whether the defendant ha[d] committed a 'non-violent offense.'"\textsuperscript{105} Accordingly, the \textit{Askari} court had to address the remaining question of

\begin{itemize}
\item \textsuperscript{97} See id. at 546 (noting limits of section 5K2.13 application to parties without a history of repeated criminal activity).
\item \textsuperscript{98} See id. (articulating second point of agreement with minority position).
\item \textsuperscript{99} See id. (articulating third point of agreement and noting lack of generalization of two definitions).
\item \textsuperscript{100} See id. (noting detailed inquiry into language of Guidelines).
\item \textsuperscript{101} See id. (discussing section 1B1.1 of Guidelines). The \textit{Askari} court noted that this provision provides that: "[d]efinitions . . . [which] appear in other sections . . . are not designated for general applicability; therefore their applicability to sections other than those expressly referenced must be determined on a case by case basis." \textit{Id.} (alteration in original).
\item \textsuperscript{102} See id. (discussing policy concerns).
\item \textsuperscript{103} See id. at 546-47 (stating that crime of violence definition is not inapplicable to section 5K2.13). Specifically, the court stated: In short, the choice of different phrasing, the absence of a cross-reference, and the explicit definitions attached to one section but not the other, all suggest that the Sentencing Commission did not intend to import the . . . definition from . . . § 4B1.2 to . . . § 5K2.13. Of course, the Sentencing Commission could adopt a definition of "non-violent offense" which, if in conformity with the statute, could be binding on the district judge. Or it could delete the reference to "non-violent offense" in . . . § 5K2.13. But in the absence of some direction from the Sentencing Commission, we are unwilling to apply the "crime of violence" definition articulated in . . . § 4B1.2 to . . . § 5K2.13. \textit{Id.}
\item \textsuperscript{104} See id. at 547 (accepting minority view but taking different view of appropriate standard).
\item \textsuperscript{105} See id. (questioning standard applied by courts in \textit{Chatman} and \textit{Poff}).
\end{itemize}
whether there were any constraints on a district court's review of the facts and surrounding circumstances of the crime.106

In determining whether there were any constraints upon a court's review of the facts and circumstances of the crime, the Askari court began by discussing modern criminology and the Sentencing Reform Act.107 The court noted that traditionally there has been a distinction between a finding of guilt and an imposition of a sentence.108 Additionally, the Askari court noted that until the advent of the Guidelines, courts looked to the facts and circumstances of each case before deciding on an appropriate sentence.109 According to the Askari court, the implementation of the Sentencing Reform Act brought rigid sanctions and diminished the role of the courts in the sentencing process.110 The court noted that the Commission consequently attempted to mitigate the harsh consequences of mandatory sentences through the mechanism of the downward departure.111

Next, the court in Askari conceded that the district court should consider all the facts and circumstances surrounding the crime, but conditioned this approach on the application of the Sentencing Reform Act and the appropriate statutory language defining criminal culpability.112 Finding no guidance from the Commission on how to define the phrase "non-violent offense," the court looked to the Sentencing Reform Act, which articulates several factors used in determining sentences.113 Based upon

106. See id. (beginning analysis of appropriate standard).
107. See id. (discussing court's diminishing role in sentencing process); see also Ami L. Feinstein et al., Federal Sentencing, 30 AM. CRIM. L. REV. 1079, 1114 (1993) (noting that commentators' reaction to Guidelines was predominantly negative); Kate Stith & Jose A. Cabranes, Judging Under the Federal Sentencing Guidelines, 91 NW. U. L. REV. 1247, 1247-48 (1997) (noting that appellate review of sentencing decisions was significant accomplishment of Sentencing Reform Act).
109. See Askari, 140 F.3d at 547 (discussing courts unique role in sentencing).
110. See id. (discussing changes brought by sentencing reform). Since the adoption of the Guidelines, the mere fact of conviction has carried rigid sanctions. See id. (noting that even unconvicted conduct can be punished as relevant conduct).
111. See id. (noting that departure decisions are multifaceted decisions). Acknowledging the role of downward departure in sentencing, the Askari court stated that from a pure policy standpoint, the Commission did not intend to allow departures under section 5K2.13 for dangerous or violent offenders. See id. (questioning whether Guideline structure can provide departure in every case where it is appropriate).
112. See id. (discussing appropriate standard for assessing criminal culpability).
113. See id. (discussing enabling statute of Sentencing Reform Act); see also 18 U.S.C. § 3553(b) (1994) (discussing application of guidelines in imposing a sentence). Section 3553(b) provides in relevant part:
these enumerated factors, the court found that the point of departure for determining the seriousness of the offense is to look at the statutory elements of the crime and the surrounding conduct.\textsuperscript{114}

Following this analysis, the \textit{Askari} court expressed the view that departures under section 5K2.13 "exclude conduct that involves actual force, threat of force, or intimidation, the latter two measured under a reasonable person standard."\textsuperscript{115} Accordingly, the court concluded that non-violent offenses under section 5K2.13 "are those which do not involve a reasonable perception that force against persons may be used in committing the offense."\textsuperscript{116}

The \textit{Askari} court also addressed the argument that conduct may be statutorily violent, yet still warrant leniency due to diminished mental capacity and a lack of a dangerous criminal history.\textsuperscript{117} Specifically, the court inquired whether downward departure under section 5K2.13 is warranted in cases where violence was threatened but not realized.\textsuperscript{118} The court affirmatively concluded that downward departures under section 5K2.13 are warranted in cases where the offense at issue is one involving instances where a threat of violence is never carried out.\textsuperscript{119}

\begin{flushright}
In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.
\end{flushright}

\textit{Id.} Simply put, the Sentencing Reform Act articulates factors used in the determination of sentences. \textit{See Askari,} 140 F.3d at 547 n.15 (noting that Guidelines seem to supplant factors). Section 1B1.1 of the Guidelines defines "offense" as "the offense of conviction and all relevant conduct under \S 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." U.S. \textbf{SENTENCING GUIDELINES MANUAL} \S 1B1.1 n.1 (2000). The \textit{Askari} court defined bank robbery in accordance with the Guidelines as "taking, or attempting to take, anything of value, by force and violence, or intimidation, or by extortion." \textit{See Askari,} 140 F.3d at 548 (noting language of 18 U.S.C. \S 2113(a)). Similarly, the \textit{Askari} court noted that the force, violence or intimidation elements require "proof of force or threat of force as an element of the offense." \textit{Id.} (citing \textit{United States v. Maddalena}, 895 F.2d 815, 819 (6th Cir. 1989)). The court defined intimidation as "to make fearful or put into fear." \textit{Id.} (citing \textit{United States v. McCarty}, 36 F.3d 1349, 1357 (5th Cir. 1994)).

\textsuperscript{114} \textit{See Askari,} 140 F.3d at 547-48 (defining point of departure).

\textsuperscript{115} \textit{Id.} at 549.

\textsuperscript{116} \textit{Id.} Therefore, if a bank robbery victim is threatened with harm, and the threat can be realized under an objective reasonable person standard, the offense must be violent in nature. \textit{See id.} (noting that conviction and sentence must be congruent).

\textsuperscript{117} \textit{See id.} (noting other grounds for departure).

\textsuperscript{118} \textit{See id.} (drawing distinction between realized and unrealized threats of violence).

\textsuperscript{119} \textit{See id.} at 549 \& n.18 (stating that there is no impediment to this interpretation in Guidelines). Even after applying this interpretation of section 5K2.13,
One day after the Third Circuit decided Askari, the United States Sentencing Commission amended section 5K2.13.120 “When the terms of this amendment—which applies to pending cases—was revealed, Askari sought reconsideration of the en banc decision.”121

IV. SENTENCING COMMISSION AMENDS SECTION 5K2.13: ITS IMPACT AND IMPLICATIONS FOR FUTURE DIMINISHED CAPACITY DEPARTURE

A. The Language of New Section 5K2.13

In January of 1998, approximately two months before the Third Circuit decision was handed down in Askari, the United States Sentencing Commission began the task of settling the growing circuit debate by amending section 5K2.13.122 After considering four different options, the Commission ultimately settled on a “compromise” version that effectively eliminated the language previously used and adopted a wholly new phraseology.123 Significantly, the language of the amended section 5K2.13 is devoid of any reference to either non-violent offense or to competing section 4B1.2’s definition of crime of violence.124

the Askari court held that the defendant had not committed a non-violent offense. See id. at 549-50 & n.18. The court took particular note of the testimony of the bank teller who stated: “And then I gave him my money . . . . [I was scared] [b]ecause he had his hand in his shirt and I didn’t know if he was going to pull a gun out on me or a knife or, you know, at that point I was, you know, scared.” Id. at 550 (alteration in original). Therefore, the court concluded that an “ordinary person in the bank teller’s position reasonably could infer a threat of bodily harm from Askari’s demand and actions.” Id. The court reasoned that based on the elements of the crime and the surrounding conduct, the defendant did not commit a non-violent offense. See id. Therefore, the Askari court held that the defendant did not qualify for downward departure under section 5K2.13 “because he didn’t commit a ‘non-violent offense.’” Id.


122. See id. at 42 (noting that one day after decision in Askari was handed down Commission adopted an amendment to section 5K2.13); see also Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 63 Fed. Reg. 632 (Jan. 6, 1998) (discussing proposed amendments to section 5K2.13). In January of 1998, the Federal Sentencing Commission, reacting to a split among the circuit courts of appeals, decided to consider four proposed amendments to 5K2.13. See id. (describing proposals to amend section 5K2.13).

123. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2000) (describing departure for diminished mental capacity). Notably, the language the Commission ultimately adopted not only failed to explicitly adopt either the majority or minority view, but also omitted the term “crime of violence” from the text of section 5K2.13. See id. (stating that crimes involving actual violence or serious threat of violence are exempt from being considered for diminished mental capacity downward departure).

124. See id. (describing activities that do not qualify for diminished mental capacity downward departure.)
The first option that the Commission considered—and invited public comments upon—adopted the majority appellate view as expressed in Poff. This option would have kept the language of section 5K2.13 as previously drafted while merely inserting a clarifying phrase. This option struck the term "non-violent offense" and replaced it with "an offense other than a crime of violence." More significant, however, was its proposed application note that instructed a district court to consult section 4B1.2 for a definition of "a crime of violence."

The second proposed amendment to section 5K2.13 that the Commission considered adopted the minority appellate view of the diminished capacity departure. Although this proposed amendment would have retained part of the original language of section 5K2.13, the majority of the language of section 5K2.13 was stricken and new language was inserted in its stead. Under this option, the district court, when applying section

125. See Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 63 Fed. Reg. at 632 (describing four prospective candidates for new language of section 5K2.13). According to this first option, the language of section 5K2.13 was to remain essentially the same. See id. (noting proposed language of first option). Under option one, the new section 5K2.13 would have read as follows:

If the defendant committed an offense other than a crime of violence while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a sentence below the applicable guideline range 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.

126. See id. (describing applicable conduct). Notably, this proposed amendment struck the term "non-violent offense" and inserted the phrase "an offense other than a crime of violence." See id. (proposing omission of term "non-violent offense" from language of section 5K2.13).

127. See id. (noting change of phraseology).

128. See id. (defining crime of violence). According to the application note that accompanied this proposed amendment, the definition of crime of violence is found in section 4B1.2. See id. (finding definition of crime of violence in section 4B1.2).

129. See id. (noting that option two adopts minority appellate view). According to this potential amendment, when considering the propriety of a diminished capacity departure, the district court should consider the totality of the circumstances in order to determine whether the offense was non-violent. See id. (describing role of district court in determining whether crime of violence took place).

130. See id. (noting language of second option). Under option two, the new section 5K2.13 would have read as follows:

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 sentence below the applicable guideline range may be warranted. In determining whether an offense is non-violent, the court should consider the totality of the facts and circumstances of the offense. If the facts and circumstances of the offense or the defendant’s criminal history indicate the defendant is dangerous such that there is a need for incarceration to protect the public, a departure under this policy statement is not warranted. If a departure is warranted, the...
5K2.13, would consider the totality of the circumstances in order to determine whether the offense was non-violent.131 According to the Sentencing Commission’s Synopsis of Proposed Amendments, this second option “define[d] the scope of the departure broadly to allow consideration of the facts and circumstances surrounding the commission of the crime in determining whether a defendant is dangerous.”132

The third proposed amendment to section 5K2.13—the one ultimately adopted by the Sentencing Commission—was deemed to be a “compromise” version of pre-amendment section 5K2.13.133 This proposed version of section 5K2.13 wholly abandoned the language previously used and focused upon a general policy statement followed by three notable exceptions. Conspicuously omitted from the language of this proposal was the term “non-violent offense” as well as any reference to section 4B1.2.134

The fourth and final proposal the Commission considered would have eliminated the non-violent offense element while retaining the remaining language of section 5K2.13.135 Purportedly, this option had the potential of eliminating the conflicting viewpoints among the federal cir-

departure should reflect the extent to which reduced mental capacity contributed to the commission of the offense.

Id.

131. See id. (finding applicable standard for district court when reviewing whether offense was non-violent).
132. Id. (discussing four options presented).
133. See id. (labeling third option as “compromise” version).
134. See id. (inserting terms “actual violence” and “serious threat of violence” in place of “non-violent offense”). Moreover, the application notes that accompanied this proposed version of section 5K2.13 defined “significantly reduced mental capacity.” See id. According to this application note, “[s]ignificantly reduced mental capacity’ means the defendant is unable to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.” Id.

135. See id. (describing fourth option considered by Commission). Under this option, the Commission would have eliminated the “non-violent offense” element while retaining the majority of the original language. See id. (stating fourth proposed option for section 5K2.13 language). According to this proposal, section 5K2.13 would have read:

If the defendant committed the offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a sentence below the applicable guideline range may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, unless the nature and circumstances of the offense or the defendant’s criminal history indicate a need for incarceration to protect the public.

Id.
cuits while retaining most of the original language. This proposal, however, ultimately was rejected.

After public comment and consideration of the four potential candidates for the amendment language, the Commission adopted the third option: the “compromise” version of section 5K2.13. The language of section 5K2.13, as agreed upon by the Commission, currently reads:

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant’s offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant’s criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Not only does this new version of section 5K2.13 explicitly address the “circuit conflict regarding whether the diminished capacity departure is precluded if the defendant committed a ‘crime of violence’ as that term is defined in the career offender guideline,” but it also “adds an application note that defines ‘significantly reduced mental capacity’ in accord with the [Third Circuit’s] decision in United States v. McBroom.”

Although section 5K2.13 was amended as a result of the disagreement among the circuit courts of appeals as to the definition and application of the non-violent offense language previously utilized, the question remained whether the circuits that had adopted the majority viewpoint

136. See id. (discussing reason for proposed amendment). According to the Commission, “[t]his amendment addresses the circuit conflict regarding whether a diminished capacity departure is precluded if the defendant committed a ‘crime of violence’ as that term is defined in the career offender guideline.” Id. In describing the reason for the proposed amendment, the Commission cited the Seventh Circuit’s decision in Poff, the Ninth Circuit’s decision in Borrayo, the Third Circuit’s decision in Rosen, the Eleventh Circuit’s decision in Dailey, the District of Columbia Circuit’s decision in Chatman, and the Fourth Circuit’s decision in Weddle. See id. (noting four options and reason for amendment).


138. See id. (describing conduct available for downward departure under diminished capacity section of Guidelines).

139. Id.

140. Id. at 1130 (describing reason and applicability of section 5K2.13); see also Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 63 Fed. Reg. at 692 (discussing circuit split).
would read the new version of the diminished capacity downward departure as expressly disallowing any reference to section 4B1.2.141

B. Current and Future Section 5K2.13 Jurisprudence

When the Commission embraced this new version of section 5K2.13, they explicitly withheld language from the amendment which would have adopted either the majority or minority approach.142 Instead, the Commission opted for a “compromise” approach that, arguably, would have no direct impact on the section 5K2.13 debate.143 By failing to expressly adopt one view over the other, the Commission potentially fumbled its best chance to clarify the violence prong of section 5K2.13.144 Moreover, the language ultimately adopted by the Commission led some to opine that the new section 5K2.13 would have virtually no effect on the circuit split upon which the amendment was premised.145 The language ultimately selected, however, has led at least one circuit to reconsider its prior section 5K2.13 jurisprudence.146


144. For a discussion of the potential impact of post-amendment section 5K2.13, see infra notes 161-70 and accompanying text.

145. See U.S. Sentencing Guidelines Manual § 5K2.13 (2000) (noting reason for amendment). According to the Commission: The purpose of this amendment is to allow (except under certain circumstances) a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity. This [5K2.13] amendment addresses a circuit conflict regarding whether the diminished capacity departure is precluded if the defendant committed a “crime of violence” as that term is defined in the career offender guideline. Id. Unfortunately, the language ultimately selected is devoid of any explicit adoption of one view over another. See id. (stating that departure is inapplicable to offenses committed with actual violence).

146. See United States v. Allen, 181 F.3d 104, No. 98-1480, 1999 WL 282674, at *2 (6th Cir. Apr. 30, 1999) (suggesting new section 5K2.13 language may change application). According to the United States Court of Appeals for the Sixth Cir-
The Sixth Circuit has recognized that the new language of amended section 5K2.13 indeed has given it a new range of application.\textsuperscript{147} In \textit{United States v. Allen},\textsuperscript{148} the court noted that "the policy for future cases will be to look to the particular facts and circumstances present in an individual defendant’s offense when determining whether a section 5K2.13 departure is possible . . . [T]he Sentencing Commission indicated that it was making a substantive change . . ."\textsuperscript{149} By interpreting the new language of section 5K2.13 as embracing a "totality of the circumstances" approach, the Sixth Circuit acknowledged that the categorical approach that it had adopted previously was rejected by the Commission.\textsuperscript{150} The Sixth Circuit’s decision in \textit{Allen} not only stands for the proposition that the Commission expressly rejected the former majority approach, but it also provides other courts that were once within the majority a basis upon which they too can embrace the totality of the circumstances approach to defining "actual violence" or "threat of violence."\textsuperscript{151}

Nowhere was the impact of the new language of section 5K2.13 so uncertain than in the Seventh Circuit, the birthplace of \textit{Poff} and its progeny.\textsuperscript{152} Although the United States Court of Appeals for the Seventh Circuit has not dealt with this issue specifically, several district courts within the Seventh Circuit have.\textsuperscript{153} Among the most notable recent decisions are a pair of cases in the United States District Court for the Northern District of Illinois.\textsuperscript{154} In both \textit{United States v. McFadzean}\textsuperscript{155} and \textit{United States v. Bradshaw},\textsuperscript{156} Judge Williams noted the effect of new section 5K2.13.\textsuperscript{157} A-
according to Judge Williams, "Although the Commission falls short of offering the courts a bright line rule here, [the] commentary suggests that it intended the new language to have some effect."

Relying on the Sixth Circuit's decision in *Allen*, Judge Williams noted that "[a] strict reading of the new language suggests that unless [a] court believes [a defendant's] offense involve[s] actual violence or a serious threat of violence, it may (if all other requirements are met) grant [a defendant's] motion for a downward departure." In moving away from the rigid structure of defining the violence prong of section 5K2.13 by looking to section 4B1.2, the district court has signaled the possible demise of pre-amendment section 5K2.13 interpretation within the circuits that were once in the majority.

V. Conclusion

The United States Sentencing Guidelines provide an overly broad and extremely rigid structure for the sentencing of criminal offenders. As such, tension has developed between the need to protect society from dangerous criminal offenders and the need to show leniency towards those offenders who suffer from diminished mental capacity and commit crimes devoid of either actual violence or a serious threat of violence.

By implicitly rejecting the proposition that the crime of violence definition of

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See id. (noting impact of new section 5K2.13). According to the district court in *McFadzean*, the amendment to section 5K2.13 superseded prior case law and warranted a new interpretation of downward departures for diminished mental capacity. See id. (finding prior case law outdated in light of amendment to Guidelines); see also *Bradshaw*, 1999 WL 1129601, at *2 (articulating pre-amendment section 5K2.13 jurisprudence). In *Bradshaw*, the district court considered whether a bank robbery was effectively foreclosed from downward departure consideration in light of the newly amended version of section 5K2.13. See id. at *2-4 (noting change in section 5K2.13 language). According to the *Bradshaw* court, the new language had significant effect upon downward departures for diminished capacity, leading the court to adopt a fact-specific approach to departure inquiries. See id. at *3 (applying totality of circumstances approach to section 5K2.13 downward departure).


159. Id. The district court in both *McFadzean* and *Bradshaw* found the Sixth Circuit's analysis in *Allen* to be instructive. See id. at *5 (noting *Allen* court's decision to look to particular facts and circumstances present in particular case); *Bradshaw*, 1999 WL 1129601, at *3 (same). In *Allen*, the Sixth Circuit acknowledged tension between its own case law and the new amendment. See United States v. Allen, 181 F.3d 104, No. 98-1480, 1999 WL 282674, at *2 (6th Cir. Apr. 30, 1999) (noting that policy for future cases is to look to particular facts and circumstances in individual defendant's offense for determining section 5K2.13 applicability).


161. See Berman, supra note 21, at 93-94 (describing unfavorable reception of Guidelines by judges, lawyers and scholars).

section 4B1.2 applies to section 5K2.13, the United States Sentencing Commission successfully has advocated a return to the principles of culpability, punishment and deterrence that have been so well established by the rich traditions of the criminal law.\(^{163}\)

The Commission's decision to amend the language of section 5K2.13 reaffirms those traditions.\(^{164}\) Specifically, the Commission has attempted to reaffirm the guiding principle that defendants, whose diminished mental and volitional capacity contributed to the commission of the instant offense, are less culpable for their actions and should therefore receive the lenient, sympathetic help of society rather than the increased sentences mandated for career offenders.\(^{165}\) Section 5K2.13, as adopted by the Commission, has such a potential reaffirming possibility.\(^{166}\)

Moreover, by indicating that a court should consider the surrounding facts and circumstances of the offense, the Commission overtly sanctions a return to the exercise of discretion by a sentencing judge, thus signaling a retreat from the rigid, inflexible and unjust mandates of the Guidelines.\(^{167}\) Although the formation of the Guidelines, in an effort to elimi-

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164. See Leblanc-Allman, supra note 1, at 1095 (discussing use of "guilty but mentally ill" pleas); Nygaard, supra note 1, at 951 (discussing insanity defense in context of individual differences); Perin & Gould, supra note 1, at 431-52 (discussing mental disability and Federal Sentencing Guidelines).

165. See generally Carlos M. Pelayo, Comment, "Give Me a Break! I Couldn't Help Myself"?: Rejecting Volitional Impairment as a Basis for Departure Under Federal Sentencing Guidelines Section 5K2.13, 147 U. Pa. L. Rev. 729 (1999) (describing history and application of volitional impairment for departure). But see U.S. Sentencing Guidelines Manual § 5K2.13, cmt. n.1 (1998) (defining "significantly reduced mental capacity"). According to the application note that accompanies the new version of section 5K2.13, "[s]ignificantly reduced mental capacity' means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful." Id.

166. See U.S. Sentencing Guidelines Manual § 5K2.13 (1998) (explicitly providing leniency to offenders suffering from "significantly reduced mental capacity").

nate the wide ranging sentencing disparity, was well intentioned, imposing mandatory statutory sentences may have been an inappropriate and reactionary intrusion upon the traditional function of the judiciary. Characterized as a dynamic relationship between judges and other law-making bodies, the Guidelines have produced unforeseen and counterproductive results. By amending section 5K2.13, the Commission signals a return to the practice of allowing courts some discretion in determining when a departure for diminished mental capacity may be warranted. Whether


168. See Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 YALE L.J. 1681, 1743 (1992) (noting that “Commission failed to devote sufficient attention to uncovering the sources of disparity among judges”). Studies conducted before the Sentencing Reform Act found distinct disparity in sentencing by judges for similar cases. See id. (discussing initial studies). Judges indicated that the discrepancies were due to the individuality of the cases and not the identity of the judges. See id. (stating that research was insufficient to draw conclusion reached); see also U.S. Sentencing COMM’N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 77 (1991) (noting that rate of defendants pleading guilty has not changed since Guidelines’ implementation); Harvey Berkman, Disparities Still Alive Under Sentencing Guidelines, N.Y. L.J., Sept. 15, 1997, at A10 (noting that Guidelines do not eliminate sentencing disparities); Daniel Wise, Ten Years Later, Federal Sentencing Guidelines Go Down Easier: U.S. Commission Hobbled by Vacancies, N.Y. L.J., Nov. 3, 1997, at 1 (discussing statistical evidence of sentencing disparity). Although disparity appears to be diminishing for upward departure under the Guidelines, clear statistical evidence exists demonstrating significant variation among the circuits regarding downward departure. See id. at 7 (assigning percentages to each circuit for upward and downward departure). For example, for the first time period covering October 1, 1995 through September 30, 1996, the circuits reported the following percentages of upward departures under the Guidelines: D.C. Circuit, 1.3; First Circuit, 0.9; Second Circuit, 0.7; Third Circuit, 0.8; Fourth Circuit, 0.7; Fifth Circuit, 1.2; Sixth Circuit, 0.8; Seventh Circuit, 1.3; Eighth Circuit, 1.1; Ninth Circuit, 0.8; Tenth Circuit, 1.0; and Eleventh Circuit, 1.2. See id. In contrast, significant variation in percentages exist between the circuits for downward departure under the Guidelines: D.C. Circuit, 5.9; First Circuit, 7.3; Second Circuit, 15.2; Third Circuit, 5.3; Fourth Circuit, 3.9; Fifth Circuit, 9.7; Sixth Circuit, 4.6; Seventh Circuit, 4.9; Eighth Circuit, 6.2; Ninth Circuit, 21.3; Tenth Circuit, 13.6; and Eleventh Circuit, 5.7. See id.

169. See Freed, supra note 168, at 1683-85 (discussing relationship between various law-making bodies). The Guidelines proceed on two different levels. See id. at 1683 (discussing altered interactions). First, there is a “level of formal, visible adherence to, or open departure from, guideline prescriptions in the trial courts, followed by review in the courts of appeals...”. Id. Second, there is “the level of informal noncompliance with the [Guidelines] that are eluding scrutiny by courts of appeals and are in fact reacting to appellate rejections of reasonable departures from unreasonable guidelines.” Id. (asserting that second level is replacing first).

170. See Berman, supra note 21, at 102-04 (arguing that judges retain much discretion in determining sentences despite rigidity of Guidelines).
all federal courts will accept the Commission’s invitation remains to be seen.

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