# Was the Client a Non-Violent Offender?
# Does She Have Any History of Violence?

When the Deputy Attorney General first announced the clemency initiative on January 30, 2014, he said that eligible candidates would be non-violent drug offenders. When the final criteria were announced on April 23, this was amended to non-violent offenders. Thus, regardless of the offense type, you need to determine whether the client's conduct in the instant offense was non-violent. The criteria announced on April 23 also explicitly limited eligible candidates to those with no history of violence prior to the current term of imprisonment.

## I. Was the Client's Conduct in the Instant Offense Non-Violent?

### A. The Standard

Many federal statutes and guidelines define a violent offense as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another."[1] A guideline provision just added in 2011 provides for a 2-level increase if "the defendant used violence, made a credible threat to use violence, or directed the use of violence." USSG § 2D1.1(b)(2) (eff. Nov. 1, 2011). "[I]n a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence," this subsection "would not apply." *Id*., cmt. (n. 11(B)). Use of the phrase "the defendant" in the guideline and the commentary means that this is determined based on the defendant's own conduct, not the "relevant conduct" of others.

The elements or the name of the offense do not necessarily tell you whether the client's conduct was violent. For example, the client was not convicted of an offense that has as an element the use, attempted use, credible threat to use, or direction to use physical force against the person of another, but proven facts in the record demonstrate that her conduct was violent. Or the client was convicted of an offense with an element of force under an aiding and abetting or conspiracy theory, but her own conduct was not violent.

**Bottom Line**: Look at the proven facts of record to determine <u>whether the client herself used, attempted to use, made a credible threat to use, or directed the use of physical force against the person of another</u>. Attempt situations may warrant a closer look. *See* USSG § 2D1.1(b)(2) (not including attempt).

### B. How to Determine What Facts Were Proven

Examine the statute(s) of conviction, indictment, any pretrial motions, plea agreement including agreed factual basis for the guilty plea and transcript of plea colloquy (if there was a guilty plea), the trial transcript including jury instructions (if there was a trial), the presentence report (PSR) and any objections and addenda thereto, sentencing memoranda, and the transcript of the sentencing hearing. Discuss with the client and his/her former attorney(s) to gain insight.

[1] *See* 18 U.S.C. § 924(e)(2)(B)(i); 18 U.S.C. § 3559(c)(2)(F)(ii); USSG § 4B1.2(a)(1).

Do not blindly accept facts that are not essential to the offense of conviction that are merely alleged in the PSR. Justice Scalia has characterized presentence reports as "hearsay-riddled,"[2] an apt characterization in many cases. The sentencing memoranda and sentencing transcript frequently reveal that the facts in the PSR are inaccurate, or are not the only reasonable view of the facts. If the defendant objected to a factual allegation, and the judge resolved the dispute at the sentencing hearing, the standard of proof was a mere preponderance, and hearsay was permissible. USSG § 6A1.3.

There are many factual allegations in PSRs that have not been established by any standard of proof. They were never objected to, litigated, ruled upon, or found by the judge. There are several reasons for this. First, if the defendant objects, the judge need not resolve the dispute when it would make no difference to the sentence. *See* Fed. R. Crim. P. 32(i)(3)(B). Second, defendants frequently refrain from objecting because they can lose their reduction for acceptance of responsibility for pleading guilty to the offense if deemed to have "falsely denied" any "relevant conduct" alleged in the PSR. *See* USSG § 3E1.1, cmt. (n.1(A)). Third, the fact may have been important, but defense counsel dropped the ball.

Was there an objection to a factual allegation of violence? If not, why not? Did the judge rule on it? If no objection was made, or the judge sustained the objection or did not rule on it because it made no difference to the sentence, the offender should not be deemed violent.

If you conclude that the client's conduct in the instant offense was not actually violent, and s/he meets all of the criteria, explain the circumstances in the Memorandum in Support of Petition for Sentence Commutation.

### C. Some Specific Offenses

We are unlikely to see many candidates for clemency involving actual violence because violent offenses are usually prosecuted by the states, and sentences for many federal crimes of violence have a statutory maximum of ten years or less. However, there are some federal offenses with high enough sentences that can be committed in violent ways, but the client herself did not use, attempt to use, make a credible threat to use, or direct the use of physical force against the person of another. Here are some examples.

**Aiding and Abetting**. In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the defendant accompanied two others to a site where they planned to sell marijuana to others. When the would-be buyers stole the drugs and ran, one of the sellers (whether it was Rosemond or another was contested) fired shots in their direction. Rosemond maintained that he did not carry a gun to the scene and did not use a gun during the transaction.

The government charged Rosemond with violating 18 U.S.C. § 924(c) by using or carrying a gun in connection with a drug trafficking crime, or, in the alternative, aiding and abetting that offense under 18 U.S.C. § 2. The judge instructed the jury that Rosemond was guilty of aiding and abetting the § 924(c) offense if he (1) "knew his cohort used a firearm in the

[2] *Booker v. United States*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting in part).

drug trafficking crime," and (2) "knowingly and actively participated in the drug trafficking crime."

Rosemond was convicted under these instructions. Because the government proceeded under alternative theories and the verdict form was general, there was no way to determine whether the jury found that Rosemond used the gun or instead aided and abetted a confederate's use of the gun. Rosemond actively participated in a drug transaction, but the instruction advising the jury to consider merely whether Rosemond knew his cohort used a firearm was erroneous because it "did not direct the jury to determine *when* Rosemond obtained the requisite knowledge" of the gun and allowed the jury to convict "even if Rosemond first learned of the gun when it was fired and took no further action to advance the [predicate] crime." *Id*. at 1252. The Court held that that an aiding and abetting conviction under § 924(c) requires the government to prove the defendant had "advance knowledge" that a confederate would use or carry a gun in committing the crime. *Id.* at 1243. "Advance knowledge" "means knowledge at a time the accomplice can do something with it—most notably, opt to walk away." *Id.* at 1249-50.

In *Nagi v. United* States, 134 S. Ct. 2288 (2014), the Supreme Court vacated the judgment, and remanded to the court of appeals for further consideration in light of *Rosemond* where the court of appeals had held that there was sufficient evidence that Nagi had aided and abetted the use of a firearm during and in relation to an assault at a bar based on testimony that he was inside the bar during the assault, sped away from the bar with others in a car, and a pistol was later found on the ground near where the car had been parked. *See United States v. Nagi*, 541 Fed. App'x 556, 571 (6th Cir. 2013).

Relying on *Rosemond* in *United States v. Goldtooth*, __ F.3d __, 2014 WL 2611276 (9th Cir. June 12, 2014), the Ninth Circuit vacated convictions for aiding and abetting a robbery (of a pouch of tobacco) where the evidence showed that the defendants had no advance knowledge that a person they were with would snatch the tobacco.

**Conspiracy.** The basic element the government must prove to convict a defendant of conspiracy is that the defendant entered into an agreement to commit an offense knowing its object. For some offenses (and depending on the circuit), the government need not prove that any conspirator did an overt act toward committing the offense. *See, e.g., United States v. Franco-Santiago*, 681 F.3d 1, 9 n.14 (1st Cir. 2012) (no need to prove overt act for conviction of conspiracy to commit Hobbs Act robbery); *United States v. Pistone*, 177 F.3d 957, 959-60 (11th Cir. 1999) (same); *United States v. Clemente*, 22 F.3d 477, 480 (2d Cir. 1994) (same). Even when the government must prove an overt act, *see* 18 U.S.C. § 371 (general conspiracy statute); *United States v. Benton*, 852 F.2d 1456, 1465 (6th Cir. 1988) (conspiracy to commit Hobbs Act robbery "does require proof of an overt act"), the defendant himself may not have done any of the overt acts proved or engaged in any violent conduct.

Under *Pinkerton v. United States*, 328 U.S. 640 (1946), a defendant may be vicariously liable for a substantive offense committed by a coconspirator if the act was "done in furtherance of the conspiracy," and was "reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id*. at 647-48.

**Firearms Offenses.** Of the eight people whose sentences were commuted in December 2013, in addition to being convicted of drug trafficking, one was convicted of possessing a firearm and another received a guideline increase for a firearm someone else possessed. The Department of Justice has said that it is looking for candidates "similar to" those whose sentences were commuted in December. Thus, unless the client himself used a firearm (or directed its use), he should not be disqualified on the basis of a conviction for a firearms offense. To "use" a firearm means that the firearm "was brandished, discharged, or otherwise used as a weapon." 18 U.S.C. § 3559(c)(2)(D). For further guidance, *see* How a Person Convicted of a Firearms Offense or Who Received a Guideline Increase Because a Firearm "Was Possessed" May Qualify for Commutation.

**Bank Robbery.** As defined in 18 U.S.C. § 2113, bank robbery can be committed in different ways, some violent, some not. Most federal bank robberies are committed with a demand note and are not violent. A common scenario is that the defendant walks into a bank with both hands showing, and either says or passes a note saying that he is robbing the bank and to give him the money. In some cases, the defendant says he has a gun, but does not pull one, or does not have one. In some cases, the defendant walks into the bank with one hand in his pocket, and passes a demand note or displays a fake gun. In one recent case, the robber put smiley faces on the demand notes so that the tellers would not be afraid. Some of these are very sad cases involving addicts or people with mental illnesses.

**Hobbs Act Robbery.** The elements of this offense generally fit our standard for violent conduct, *see* 18 U.S.C. § 1951, but people have been convicted of this offense whose conduct did not meet that standard. For example, Marion Hungerford, a mentally ill 52-year-old woman, with no prior convictions, had raised four children, and led a law-abiding life until her husband of 26 years left her because of her deteriorating mental condition. With no money or employment prospects, she began living with another man. To obtain money for basic living expenses, he robbed several stores. No one was hurt and the total loss was less than $10,000. Ms. Hungerford never touched a gun and took no active part in the robberies. Due to her mental illness, she held a fixed belief that she was innocent, and therefore declined the prosecutor's offer of a plea bargain in exchange for her testimony against the actual robber. She was sentenced to over 159 years in prison: 155 years based on seven § 924(c) counts, and 57 months for the robberies under the guidelines. The robber received a sentence of 32 years in exchange for his testimony against Ms. Hungerford. Ninth Circuit Judge Reinhardt described Ms. Hungerford's sentence as "irrational, inhumane, and absurd," and "immensely cruel, if not barbaric."[3]

**Racketeering.** RICO predicates range from copyright infringement, securities fraud, and trafficking in contraband cigarettes, to murder, and everything in between. *See* 18 U.S.C. § 1961.

[3] *United States v. Hungerford*, 465 F.3d 1113, 1118-23 (9th Cir. 2006) (Reinhardt, J., concurring in the judgment).

**Possession and Use of Chemical Weapons?** Not every offense that carries a scary label was violent. For example, in *Bond v. United States*, 134 S. Ct. 2077 (2014), Ms. Bond was convicted under 18 U.S.C. § 229(a)(1) of possessing and using a chemical weapon by spreading two toxic chemicals on her husband's lover's car, mailbox, and door knob in hopes that the other woman would develop an uncomfortable rash. On one occasion the woman suffered a minor chemical burn that she treated by rinsing with water, but Bond's attempted assaults were otherwise entirely unsuccessful. The Supreme Court held that Congress did not intend for the statute to reach this unremarkable local offense of an amateur attempt by a jilted wife to injure her husband's lover, which the state declined to prosecute even as a simple assault. The government's reading of the statute "would transform a statute concerned with acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults."

## II. Does She Have Any History of Violence?

Many prior offenses are not "violent felonies" or "crimes of violence" under current law. *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (DUI is not a "crime of violence"); *Begay v. United States*, 553 U.S. 137 (2008) (DUI is not a "violent felony"); *Chambers v. United States*, 555 U.S. 122 (2009) (escape conviction based on a failure to report to custody not a "violent felony"); *Johnson v. United States*, 559 U.S. 133, 140 (2010) (simple battery not a "violent felony"); *Descamps v. United States*, 133 S. Ct. 2276 (2013) (burglary without unlawful entry not a "violent felony"). Many other offenses are not violent under appellate caselaw applying these Supreme Court decisions. If you think your client has a prior that might be violent, research the offense under appellate caselaw. For further guidance, *see* How a Person Who Was Sentenced under the ACCA, 18 U.S.C. § 924(e), Would Likely Receive a Lower Sentence Today.

A prior offense may be classified as violent under the law, but the client did not commit it in a violent way. For example, the client was convicted for sexual contact without consent for kissing his teenaged girlfriend, or of statutory rape for having consensual sex with his girlfriend. A 17-year-old boy was prosecuted and convicted as an adult of burglary of a habitation for entering the home of his mother and stepfather and stealing some coins and jewelry. A defendant was convicted of third-degree assault for throwing a rock at a car that had tried to run him over. Discuss the offense with the client, examine the PSR, and examine the state court records. For how to obtain state court records, *see* Necessary Documents and How to Obtain Them.