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9th Circ. Raises The Bar On Misprision Of A Felony

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When special counsel Robert Mueller began his work last month, he may have been surprised to learn the Ninth Circuit had added a new element to one of the potential crimes within his jurisdiction just two days before his appointment. In United States v. Olson, the court held that misprision of a felony requires a defendant to know the crime he or she is concealing is a felony.[1] Apparently, no other court has considered the possibility of such a requirement in the 227 years since the crime was codified. Despite this critical change, Olson gives little guidance on how to prove, for example, that a defendant knew that a private citizen could be sentenced to more than a year in prison for corresponding with a foreign government to influence that government or to undermine the United States. The potential implications are not limited to cases under the purview of the special counsel's office. In cases involving low-level or little-known underlying felonies, this new element may convert the most widely applicable obstruction statute, carrying among the lowest sentences for such a crime, into the most difficult to prove.

Misprision of a Felony

English law recognized "a duty to raise the 'hue and cry' and report felonies to the authorities" as early as the 13th century.[2] The first Congress codified misprision in 1790, and today's 18 U.S.C. § 4 is "functionally identical" to the original statute, penalizing "[w]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States."[3] The offense is widely understood to have four elements: an underlying felony was committed, the defendant had full knowledge of that fact, the defendant failed to notify authorities, and the defendant took an affirmative step to conceal the crime.[4] Misprision presents few options for defendants. The primary violator need not be convicted or even prosecuted,[5] but it is also no defense that the government was aware of the underlying crime or had identified the perpetrator.[6] Additionally, unlike an accessory after the fact, one who commits misprision need not intend to assist the primary violator.[7] Until Olson, the second element was viewed as requiring the defendant to know only that "the principal engaged in conduct that satisfies the essential elements of the underlying felony."[8]

Conduct that violates the misprision statute may constitute obstruction of justice, but there is no equally broad obstruction statute. Instead, the obstruction chapter of Title 18 contains a host of statutes, each

targeting a specific form of misconduct. Section 1505 prohibits obstruction of a "pending proceeding ... before any department or agency of the United States" or Congress. Courts are divided on whether such proceedings must be conducted by an agency with rule-making or adjudicative authority or can also include purely criminal investigations by a law enforcement agency or U.S. Attorney's Office.[9] Section 1510 bars bribery to prevent the reporting of an offense and the disclosure of certain forms of protected information. Section 1511 bars obstruction of state and local law enforcement to facilitate illegal gambling, and Section 1512 prohibits witness tampering and the alteration and destruction of documentary and physical evidence. Obstruction of federal auditors, bank examinations, and health care offense investigations are outlawed by Sections 1516, 1517 and 1518. Sections 1519 and 1520 prohibit the falsification of records and the failure to maintain audit workpapers.[10]

Whereas misprision carries a maximum sentence of three years, about half of these obstruction crimes carry sentences of up to five years, and most of the rest have even higher caps, including 20 years for falsifying records or altering physical evidence and up to the death penalty for killing a witness.[11]

United States v. Olson

Karen Olson's misprision conviction arose out of a milk processing facility she and a partner, Robert Wells, opened in Alaska. Wells obtained a U.S. Department of Agriculture grant to support the project, and the pair agreed to share space with another grant recipient, Kyle Beus, who opened an ice cream and cheese manufacturing facility. About a year later, Beus told Olson and Wells that — contrary to the plan in his grant application — he had used grant money to lease, rather than buy, certain equipment. Olson later submitted two reports to the USDA listing Beus' leases as purchases and overstating the equipment's value. The original paperwork for both Wells' and Beus' grant applications had warned that anyone who made false statements could receive up to five years in prison. Olson, a former USDA official, wrote Wells' application.

After a jury trial, Olson was convicted of one count of misprision of a felony. She was also convicted of one count of making a false statement to influence the USDA, in violation of 18 U.S.C. § 1014, and acquitted of one count of mail fraud, in violation of 18 U.S.C. § 1341.[12]

The Ninth Circuit affirmed the convictions. In a summary order, the court held the evidence was sufficient for the jury to find Olson knew Beus had made false statements to the USDA and concealed the crime when she used his inflated equipment valuations in her later reports.[13] The court issued a separate published opinion by Judge Raymond C. Fisher, joined by Judge Richard A. Paez, evaluating whether the government had to prove Olson knew Beus' crime was a felony and, if so, whether it had done so.

The court held that the misprision statute requires the defendant to know the underlying crime is a felony. The court noted mens rea requirements presumptively apply to all elements of an offense, and it found nothing in the text or legislative history of the misprision statute to rebut that presumption. The court also reasoned that the history of misprision suggested Congress intended to limit it to underlying conduct "the average person would understand as criminal and serious." Quoting an opinion on misprision under U.K. common law, the court noted requiring the defendant to know the underlying offense was serious "disposes of many of the supposed absurdities, such as boys stealing apples, which many laymen would rank as a misdemeanour and no one would think he was bound to report to the police."[14]

The court also concluded that, to know an underlying offense was a felony, the defendant must know

that it was punishable by death or imprisonment exceeding one year, the U.S. Code's definition of the term. The court rejected Olson's argument that the government should be required to show that she knew Beus' crime was a federal felony, reasoning the requirement of a federal offense was intended only to ensure federal jurisdiction, and other statutes that required a defendant's knowledge of a federal offense did not require the defendant to know its federal nature.[15]

Finally, the court held the government had presented sufficient evidence Olson knew Beus' crime was a felony. The court cited three facts: Wells' grant application, which Olson completed, warned the submission of false statements to the USDA could be punished by up to five years in prison; Olson "had seen similar warnings 'many times'"; and "Olson's sophistication from her experience" as a USDA official.

Judge Andrew D. Hurwitz wrote a separate opinion concurring in part and concurring in the result. Judge Hurwitz would not have reached whether the government was required to prove Olson knew the underlying offense was a felony, because the evidence was sufficient to satisfy any such requirement. Accordingly, Judge Hurwitz wrote, whether the element was required did not affect the result of Olson's case.

Implications

The Olson court did not discuss what types of facts might prove or fail to prove a defendant's knowledge a crime was a felony, other than the three facts it held proved Olson's knowledge. Those facts are likely unusual. Witnesses to frauds against the government are not usually former officials in the government agency being victimized. Many government forms warn that submitting false statements is a felony, but the person who completes the form typically commits the underlying crime rather than concealing it. Olson was prosecuted for misprision of Beus' crime in completing his application; it was only happenstance she had completed a separate application herself.

Satisfying this new element may prove challenging for the government. In the absence of evidence like that in Olson, prosecutors may argue any misprision defendant must know, simply through exposure to popular culture and the news, that most acts of violence, large drug transactions, and large frauds are felonies. Defendants would likely respond that this argument improperly shifts the burden to defendants to prove their innocence.[16] When an underlying crime occurs in a workplace, the government may seek evidence of compliance training a misprision defendant received, raising potentially difficult questions of attorney-client privilege and the employer's potential waiver of the privilege.[17]

In other cases the government may rely on a defendant's prior experience with the criminal justice system, or knowledge of others' experience with it. Such experience may not always help the prosecution, though. Encounters with Virginia law, for example, would teach a defendant that on the first offense impersonating a federal agent is subject to up to a year's imprisonment (making it a misdemeanor), even though it can carry more than a year under federal law (making it a felony).[18] Confusion can arise within the federal system as well, because, like Virginia law, federal law categorizes some crimes as misdemeanors the first time committed but as felonies thereafter.[19]

If these approaches fail, it is not clear how the government would prove a defendant who concealed a seemingly low-level or rarely prosecuted crime knew the offense was punishable by more than a year in prison. Small frauds and false statement crimes may fall into this category, along with small narcotics transactions. Other federal crimes observers may not realize are felonies include structuring

transactions to avoid currency reporting requirements,[20] stowing away on a vessel or aircraft,[21] willful injury of a mailbox,[22] and storage of hazardous waste without a permit, even if the perpetrator does not know a permit is required.[23] Misprision prosecutions in connection with some of these offenses will likely be rare.[24]

One previously obscure federal felony has become prominent in relation to Mueller's investigation: corresponding with a foreign government to influence that government or to undermine the United States, in violation of the Logan Act.[25] If Mueller concludes former National Security Adviser Michael Flynn or anyone else committed that crime, and a third party attempted to conceal it, Olson's rule would require a misprision prosecution to prove the third party knew the conduct was punishable by more than a year in prison. If the concealment occurred after the Logan Act attracted the media's attention, Mueller could surmount this hurdle with evidence from the defendant's email or web-browsing history. If it occurred before, he may need to pursue any education or training the defendant received, perhaps as a government employee, and manage any privilege issues that arise.

Outside the Ninth Circuit, of course, Olson is not binding. Even there, the government may try to avoid it by taking up Judge Hurwitz's implication that Olson's creation of a new misprision element was dicta, because it was unnecessary to the resolution of the case.[26] But if the Ninth Circuit stands by the new standard, or other courts adopt it, the government — including the special counsel — may find it difficult to satisfy.

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[1] --- F.3d ----, 2017 WL 2055631, at *3 (9th Cir. May 15, 2017).

[2] Branzburg v. Hayes, 408 U.S. 665, 696 & n.34 (1972).

[3] Olson, 2017 WL 2055631, at *4; see also An Act for the Punishment of Certain Crimes against the United States, 1 Stat. 112, 113, § 6 ("if any person or persons having knowledge of the actual commission of the crime of wilful murder or other felony, upon the high seas, or within any fort, arsenal, dock-yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, shall conceal, and not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority, under the United States, on conviction thereof, such person or persons shall be adjudged guilty of misprision of felony").

[4] See, e.g., United States v. Cefalu, 85 F.3d 964, 969 (2d Cir. 1996); Baer v. United States, 722 F.3d 168, 176 (3d Cir. 2013); United States v. Goldberg, 862 F.2d 101, 104 (6th Cir. 1988); United States v. White Eagle, 721 F.3d 1108, 1119 (9th Cir. 2013); United States v. Baez, 732 F.2d 780, 782 (10th Cir. 1984); United States v. Brantley, 803 F.3d 1265, 1276 (11th Cir. 2015). The Fifth Circuit combines the first two elements into one, that the defendant knew a felony had been committed. See Patel v. Mukasey, 526 F.3d 800, 803 (5th Cir. 2008). The First Circuit has not decided whether affirmative concealment of the

underlying crime is required. See United States v. Caraballo-Rodriguez, 480 F.3d 62, 70 (1st Cir. 2007).

[5] See White Eagle, 721 F.3d at 1120.

[6] See Lancey v. United States, 356 F.2d 407, 409–10 (9th Cir. 1966).

[7] See United States v. Daddano, 432 F.2d 1119, 1129 (7th Cir. 1970).

[8] Olson, 2017 WL 2055631, at *3.

[9] Compare, e.g., United States v. Wright, 704 F. Supp. 613, 614 (D. Md. 1989) (excluding criminal investigations), with United States v. Durham, 432 F. App'x 88, 91 n.4 (3d Cir. 2011) (including criminal investigations).

[10] The text of Section 1519 might be thought to prohibit the alteration or destruction of physical evidence generally, but the Supreme Court has held that it applies only to records. See Yates v. United States, 135 S. Ct. 1074, 1085 (2015) (plurality opinion of Ginsburg, J.); id. at 189-90 (Alito, J., concurring in the judgment).

[11] Only two of these offenses can carry potential terms equal to or less than that for misprision. A bank employee's disclosure of a subpoena without intent to obstruct a judicial proceeding is a misdemeanor, subject to up to a year's imprisonment. See 18 U.S.C. § 1510(b)(2). Outside the context of a criminal trial, merely harassing a person—as opposed to threatening him or her or using force—and obstructing that person or another's testimony or reporting a crime is punishable by up to three years' imprisonment. See 18 U.S.C. § 1512(d), (j).

[12] United States v. Olson, No. 3:13-cr-00093-TMB (D. Alaska), ECF No. 77 (Verdict Form).

[13] See United States v. Olson, --- Fed. Appx. ----, 2017 WL 2105446, at *1 (9th Cir. May 15, 2017).

[14] Olson, 2017 WL 2055631, at *4 (quoting Sykes v. Dir. of Pub. Prosecutions, [1962] A.C. 528 at 563). The Olson court did not note that the U.K. opinion nonetheless concluded a misprision defendant "need not know the difference between felony and misdemeanor—many a lawyer has to look in the books for the purposes—but he must at least know that a serious offence has been committed."

[15] See id. at *5 n.4 (citing United States v. Felix-Gutierrez, 940 F.2d 1200, 1206–07 (9th Cir. 1991) (accessory after the fact); United States v. Feola, 420 U.S. 671, 687 (1975) (conspiracy)).

[16] See, e.g., United States v. Sandoval-Gonzalez, 642 F.3d 717, 724–25 (9th Cir. 2011) (holding that government improperly shifted burden of proof in trial for illegal reentry of an alien after deportation by arguing in summation that "there is a presumption that if someone is born outside of the United States, they are not considered a United States citizen").

[17] See In re Grand Jury Investigation, 412 F. Supp. 943 (E.D. Pa. 1976) (Becker, J.) (granting in part and denying in part motion to compel production of legal advice provided to bank employees in investigation of employees' misprision of customers' bank fraud).

[18] See 18 U.S.C. § 912; Va. Code §§ 18.2-11(a), 18.2-174.

[19] See 8 U.S.C. § 1325(a) (illegal entry into the United States); 33 U.S.C. § 1319(c)(1) (negligent violation of the Clean Water Act).

[20] See 31 U.S.C. § 5324.

[21] See 18 U.S.C. § 2199.

[22] See 18 U.S.C. § 1705.

[23] See United States v. Dean, 969 F.2d 187, 190–91 (6th Cir. 1992) (discussing circuit split on whether defendant must know permit is required).

[24] But see United States v. Bolden, 368 F.3d 1032, 1033 (8th Cir. 2004) (defendant indicted for structuring resolving charges by pleading guilty to misprision of structuring).

[25] See 18 U.S.C. § 953.

[26] See United States v. Johnson, 256 F.3d 895, 914–16 (9th Cir. 2001) (en banc) (opinion of Kozinski, J., discussing varying approaches to identifying dicta among Ninth Circuit judges).
