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9th Circuit Clarifies Elements of Misprision of Felony



A Ninth Circuit panel recently issued a decision in [United States v. Olson](#), affirming the conviction of the former Alaska executive director of the U.S. Department of Agriculture's ("USDA") Farm Service Agency for misprision of felony under 18 U.S.C. § 4.

Specifically, the panel held that the former director was correctly convicted of misprision of felony "for concealing and failing to notify authorities of her business partner's submission of false statements" to the USDA's Rural Development Program in connection with a federal grant application. In so holding, the Ninth Circuit provided critical clarification of the type of knowledge the government must prove to establish "misprision of felony." Misprision of felony is one of the oldest federal crimes, and was first enacted in a "functionally identical" version as part of the Crimes Act of 1790. **Elements of "Misprision of Felony"** The panel affirmed the long-established federal rule that "[t]o establish misprision of a felony," under 18 U.S.C. § 4, "the government must prove beyond a reasonable doubt: '(1) that the principal . . . committed and completed the felony alleged; (2) that the defendant had full knowledge of that fact; (3) that he failed to notify the authorities; and (4) that he took affirmative steps to conceal the crime of the principal.'" The panel, however, also provided additional clarification as to the knowledge element. It held for the first time that "the government must prove not only that the defendant knew the principal engaged in conduct that satisfies the essential elements of the underlying felony, but also that the **defendant knew that the conduct was a felony.**" The Court then answered the question: "What does it mean to know conduct constitutes a felony?" The panel held that the "government must prove the defendant knew the underlying offense was punishable by death or more than one year in prison." The court further clarified that "[t]he defendant need not know the precise term of imprisonment authorized by the law, but at least she must know the potential punishment exceeds one year in prison." Notably, Judge Andrew Hurwitz separately concurred, agreeing with the ultimate holding but indicating that he would leave the determination of whether the government must prove "that the defendant knew the underlying offense was a felony" "for another day, in a case in which it mattered to the outcome." **Implications for Defendants** As the panel opinion pointed out, "[m]isprision has become a little used and much maligned criminal charge." And, "American commentators have urged Congress to" eliminate the offense, "arguing the crime has outlived its

usefulness in light of modern methods of law enforcement." Nonetheless, misprision of felony remains a [much discussed](#), and as this case illustrates, still-utilized tool of the Department of Justice. When the government brings this charge, as the panel opinion itself suggested, defendants charged with "misprision of felony" should certainly "request an instruction requiring the government to prove that [the defendant] knew the underlying offense was punishable by more than one year in prison." As a practical matter, prosecutors may be able to show this knowledge in many different ways. In *Olson*, for example, the court concluded that there was sufficient evidence to support a jury's finding that the defendant knew that submitting false statements to the USDA was punishable by a sentence of incarceration exceeding one year because the grant form she had completed explicitly warned that any individual who submitted false statements could be imprisoned up to five years and she had seen such warnings "many times." But the Ninth Circuit's ruling provides an additional hurdle for prosecutors to clear in the event it continues to be part of the federal enforcement toolkit.

Authors

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