

Misprision of a Felony – 18 U.S.C. § 4



Out of the thousands of Federal criminal laws currently in effect, there are handful of rarely cited offenses that have been “resurrected” so to speak, by the government in health care fraud and other white-collar prosecutions. One of these criminal laws is the “**Misprision of a Felony**” statute. This law has a long and storied history, dating back to 1555 under English common law.^[1] Since that time, English jurists have recognized the “**duty to raise the ‘hue and cry’ and report felonies to the authorities.**”^[2] While still in place, the statute has effectively been relegated to the dustbin of history in England where violations of the offense are now rarely prosecuted.

I. Enactment of Misprision of a Felony Statute in the United States:

Adopting our own version of this criminal common law, the first Congress passed a Misprision of a Felony Statute in 1780.^[3] Over the last 200 years, this Federal statute has remained on the books and has been amended several times.^[4] Today, the Misprision of a Felony statute is codified at 18 U.S.C. § 4 and provides that:

*“Whoever, 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,** shall be fined under this title or imprisoned not more than three years, or both.” (emphasis added).*

While it would be incorrect to suggest that violations of this offense are commonly charged by Federal prosecutors, we have seen a number of recent health care fraud and other white collar cases where Misprision of a Felony is either included in an indictment or ultimately used to entice a defendant to plead guilty in a case. A more detailed discussion of the current use and prosecution

of Misprision of a Felony offenses is provided below.

II. Are You Required to “Snitch” on Someone Who Commits a Felony?

At the outset, we should first recognize what Misprision of a Felony does ***not*** require. You are not required to “snitch” or turn in the perpetrator of a felony crime as long as you were not involved in the crime and took action to conceal it. For example, if you overheard a physician tell a third party that he was performing and billing insurance payors for medically unnecessary services AND you took no action to conceal the felonious conduct, you would ***likely*** not have an affirmative obligation to report what you heard to Federal authorities. I qualified the previous statement in recognition of the fact that although your failure to report the physician’s actions to Federal authorities would not expose you to criminal liability, if you are a licensed health care professional, you have an affirmative duty to report the physician’s conduct to the State Medical Board. For instance, in Texas, should you fail to report another licensee’s “***continuing threat to the public welfare,***” you are subject to discipline by the Texas Medical Board. Additional categories of individuals who may have an affirmative obligation to report felonious conduct include elected officials.

III. How is the Misprision of a Felony Statute Being Applied Today?

While there are various from circuit to circuit, the Nine Circuit recently issued an opinion^[5] which sets the elements that must be shown to sustain a conviction in a Misprision of a Felony prosecution, it must be proven beyond a reasonable doubt that:

- (1) *The principal . . . committed and completed the felony alleged;*
- (2) *The defendant had full knowledge of that fact;*
- (3) *The defendant failed to notify the authorities of the principal’s actions; and*
- (4) *The defendant took affirmative steps to conceal the crime of the principal.*

Notably, the Ninth Circuit also clarified that with respect to the knowledge element, 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.***”* (emphasis added).^[6]

How would a defendant know whether a principal's conduct constitutes a felony? The Ninth Circuit panel held that the government must prove the defendant knew the underlying offense was punishable by death or more than one year in prison.^[7] The jury instructions^[8] issued by the Ninth Circuit illustrate what has to be shown by prosecutors when pursuing a violation of 18 U.S.C. § 4:

A MISPRISION OF FELONY (18 U.S.C. § 4)

"The defendant is charged in [Count _____ of] the indictment with misprision of felony in violation of Section 4 of Title 18 of the United States Code. In order for the defendant to be found guilty of that crime, the government must prove each of the following elements beyond a reasonable doubt:

First, a Federal felony was committed, as charged in [Count _____ of] the indictment;

Second, the defendant had knowledge of the commission of that felony;

Third, the defendant had knowledge that the conduct was a Federal felony;

Fourth, the defendant failed to notify a Federal authority as soon as possible; and

Fifth, the defendant did an affirmative act, as alleged, to conceal the crime.

A felony is a crime punishable by a term of imprisonment of more than one year.

Mere failure to report a Federal felony is not a crime. The defendant must also commit some affirmative act designed to conceal the fact that a Federal felony has been committed. See United States v. Olson, 856 F.3d 1216 (9th Cir. 2017)."

IV. Recent Prosecutions of Misprision of a Felony Offenses:

Although Misprision of a Felony charges are still relatively infrequent, we have been seeing this statute utilized as a charging instrument in a number of recent health care fraud prosecutions. The "concealment" element is the lynchpin needed for the government to effectively prosecute these offenses. In the context of health care fraud case, examples of concealment might include: (1) false certifications, (2) false statements to investigators, (3) obstructing a Federal audit (which is a criminal offense in and of itself). Two recent cases charging offenses of this statute are described below:

- **Northern District of Texas.** In this case, the defendant (a physician) supervised nurse practitioners for in-home patients. The defendant was reportedly unaware that that a co-worker had been previously convicted of healthcare-related fraud and had no medical training. In July 2016, the defendant physician observed a patient list for patients and visits that he did not perform. He asked about these patients. But did not report the violations to authorities. He subsequently admitted that he knew the conduct was illegal and that another individual used his unauthorized signature to bill Medicare and pleaded guilty to Misprision of a Felony. Unfortunately, the record doesn't document the affirmative act of concealment needed to prove this offense. Presumably, it may have occurred if he approved the billing of the claims and knowing that his signature had been used without his authorization. The defendant is facing 3 years of incarceration.
- **Central District of California.** In this case, a physician (who purchased a hospital) was prosecuted for his involvement in a massive health care fraud case where sham contracts were used to conceal illegal kickback payments to physicians who funneled spinal surgeries to his hospital. According to the government, the kickback activities were already taking place when the defendant physician bought the hospital. After the purchase, once the physician-owner became that illegal kickback payments were being made, he authorized the continued use of the sham contracts. The defendant subsequently pleaded guilty to a single count criminal information charging him with misprision of a felony.

V. Defending Charges of Misprision of a Felony:

The facts in every Misprision of a Felony case are different. As such, you need to engage an experienced, skilled litigator to determine how to best construct your defense. Possible defenses include, but are not limited to:

- **Fifth Amendment Privilege Against Self-Incrimination.** Under the Fifth Amendment to the Constitution, you cannot “*be compelled in any criminal case to be a witness against himself.*” Therefore, you can't be convicted of Misprision of a Felony if you choose not to testify or make a statement because you think it might incriminate you and result in your prosecution.
- **The Conduct at Issue Does Not Qualify as “Concealment.”** Depending on the facts, you may be able to show that your conduct did not rise to the level of constituting concealment.
- **You Were Unaware that the Associated Offense was a Felony.** Can you show that you were unaware that the associated offense was a felony? Did you think that it was a misdemeanor and was not subject to a year or more in jail?
- **Is Pleading to a Charge of Misprision of a Felony in Your Best Interests?** Depending on your conduct and your role in the associated offense, it may be in your best interests to try and plead to a violation of **18 U.S.C. § 4. When faced with charges of 18 U.S.C. § 1347,^[9] 42 U.S.C. § 1320a-7b(b)^[10]** or a host of other, more egregious charges, it may be in your best interests for your legal counsel to try and see if Misprision of a Felony is a viable plea alternative. Unlike many other felony statutes, you are face imprisonment of up

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to 3 years, a fine or both.

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[1] Sir William Staunford gave the offense its name, considering it to be similar to the offense of concealment of a felony, as provided in a 1555 statute dealing with the Misprision of Treason.

[2] *Branzburg v. Hayes*, 408 U.S. 665, 696 (1972) quoting Blackstone's Commentaries on the Laws of England. Book the Fourth - **Chapter the Ninth: Of Misprisions and Contempts**, Affecting the King and Government. As the original version in Blackstone's Commentaries stated: "*MISPRISION of felony is alfo the concealment of a felony which a man knows, but never affented to; for, if he affented, this makes him either principal, or acceffory.*"

[3] Act of April 30, 1790, Ch. 9, §6, 1 Stat. 113.

[4] Most states have also enacted a version of the Misprision of a Felony statute. It is typically more restrictive and harder to prosecute than the Federal statute. Only a handful of states ever prosecute these offenses.

[5] **United States v. Olson**, No. 15-30022 (9th Cir. 2017)

[7] *Ibid*, page 2.

[8] *Id.*

[9] **Manual of Model Criminal Jury Instructions** – For the District Courts of the Ninth Circuit. (Last Updated 09/2019)(P. 219)

[10] Violations of the Health Care Fraud Statute can result in fines of up to \$250,000, imprisonment of not more than 10 years, or both.

[11] Violations of the Anti-Kickback Statute can result in fines of not more than \$100,000, imprisoned of not more than 10 years, or both.