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'Misprision of a Felony'

A Bargaining Tool for Defense Counsel

By Michael G. Considine and Doreen Klein

Notwithstanding the continuing reliance of federal courts on the Sentencing Guidelines, they recognize that Congress did not intend to weaken the plea bargaining system when it enacted the Sentenc-ing Reform Act. Given the formulaic nature of the guidelines, plea bargaining may be the best way to secure the most advantageous result for a client facing federal criminal charges. One bargaining tool is for defense counsel to suggest that his client plead to an alternative charge, such as misprision of a felony, 18 U.S.C. § 4.

Much has been written about the inflexibility of the Federal Sentenc-ing Guidelines, which attempt to impose consistency in sentencing by assigning numeric values to factors such as the charges against the defendant and the monetary value of the victims' loss, and then slotting those values into a formula to determine the "recommended" minimum and maximum sentences for the charged offense. The degree to which courts feel bound to impose a sentence within the guidelines range varies among the circuits. However, since *U.S. v. Booker*, 543 U.S. 220 (2005) was issued on Jan. 12, 2005, effectively making the guidelines "advisory," statistics compiled by the U.S. Sentencing Commission show that the courts have generally imposed sentences within the established Guidelines ranges.

The concern that the Guidelines constrain judicial discretion takes on heightened urgency because the statutory crimes to which they apply cast such a wide net. Chief among these is 18 U.S.C. § 371 — the federal conspiracy statute, whose scope enables the Department of Justice (DOJ) to target even peripheral participants who may be exposed to punishment approaching that of their principal co-conspirators. For example, the total loss amount generated by the conspiracy may be attributed to the defendant even if he is personally responsible for only a negligible amount and otherwise played a small role in the scheme. Moreover, the loss amount is but one factor that the guidelines take into account. After calculating other adjustments, the recommended sentence may quickly reach the outer limits of the statutory maximum even for a peripheral participant who committed a single fraudulent act.

Thus, when negotiating a potential plea with the DOJ, it may important to try to find alternative charges within the criminal statutory scheme that fairly capture the culpable conduct and yet "cap" the potential imprisonment term.

Elements of Misprision

Misprision of a felony presents an appealing option. This charge, largely unchanged since its enactment by the First Congress in 1790, is broad enough to have widespread applicability to criminal conduct yet has a statutory maximum of only 3 years. Moreover, the DOJ has agreed to such pleas with increasing frequency in recent years.

Misprision of a felony is committed when the defendant, "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." The Second Circuit has defined the elements of the offense as follows: "1) the principal committed and completed the alleged felony; 2) defendant had full knowledge of that fact; 3) defendant failed to notify the authorities; and 4) defendant took steps to conceal the crime." *United States v. Cefalu*, 85 F.3d 964, 969 (2d Cir. 1996).

The traditional misprision case involves a "stranger to a criminal act [who] has taken some affirmative action to conceal the crimes of others." *United States v. Davila*, 698 F.2d 715, 718-19 (5th Cir. 1983). The notion that the misprision defendant is a stranger to the underlying felony is also reflected in Modern Federal Jury Instructions – Criminal ¶ 12.02 (government must prove that the alleged felony "was committed by someone other than the defendant"). In recent years, however, courts have recognized that misprision applies to individuals who actually engaged in the underlying felonious conduct. Indeed, the Eighth Circuit has noted that allowing defendants who were actively involved in underlying felonies to plead guilty to misprision of felony is not uncommon. *United States v. Bolden*, 368 F.3d 1032, 1037 (8th Cir. 2004).

Case law demonstrates that another element of the crime — the requirement that a defendant "conceal" the commission of the underlying felony — is broadly construed. While merely failing to disclose the felony does not establish "concealment" for purposes of the offense, some cases suggest that hiding information from the authorities, as opposed to the general public, constitutes "concealment." Other cases indicate that any act of concealment — such as driving the perpetrators to a location to stash stolen goods — serves to hide the crime from authorities and suffices to establish concealment.

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Notably, the statute by its terms does not impose a duty to disclose the underlying felony but only a duty not to conceal the felony. Except for some unfortunate language used by the Seventh Circuit in *United States v. Jennings*, 603 F.2d 650 (7th Cir. 1979) ("[B]y the time defendants' duty to report the crime arose … defendants had already solicited bribes in front of several witnesses") and *United States v. Kuh*, 541 F.2d 672 (7th Cir. 1976) ("[A]t the time the duty to disclose arose, the defendants … were simultaneously involved in criminal conduct … "), the cases do not appear to rely upon any duty to disclose as a triggering event.

Misprision Under the Guidelines

Consistent with its character as an offense that is ancillary to the underlying felony from which it arises, the Sentencing Guidelines for misprision of a felony set the base offense level at 9 levels lower than the offense level for the underlying offense, although in no event less than a value of 4, or more than a value of 19. 18 U.S.C.S. Appx. § 2X4.1. Given this favorable guidelines treatment, in recent years misprision has gained favor in a number of contexts.

Reported federal plea agreements show that the DOJ has utilized the misprision statute to cover a wide range of conduct, often where defendants were involved in — and sometimes charged with — the underlying felonies.

For example, in *U.S. v. O'Leary*, 01 Cr. 80514, the former Senior Vice President for Corporate Finance of MCA Financial Corporation was charged with various felony fraud counts arising from his role in defrauding MCA's investors and lenders by creating "sham assets and bogus revenues" and by the sale of property at marked-up prices to unsuspecting parties. According to the prosecutors in the Eastern District of Michigan, the defendant was an integral part of the scheme as he helped conceal such conduct from MCA's lenders and external auditors by actually "directing MCA employees to prepare databases that automatically and fraudulently" created documents that hid the scheme. Yet the charges were resolved by a plea of misprision.

In February 2005, an attorney in Georgia pleaded guilty to misprision in connection with his scheme to defraud a mortgage lender. *U.S. v. Lewis*, 05 Cr. 00007 (S.D. Ga.). According to prosecutors, the attorney falsely persuaded mortgage lenders that properties were more valuable than they actually were and falsely represented that persons applying for loans were seeking "refinance" rather than original purchase loans. As a result of his conduct, participants in the scheme generated numerous commissions and fees for loans that would otherwise have been declined by the lender.

Also in the Southern District of Georgia, in May 2005 a defendant was charged with misprision for her role in manipulating financial records to disguise illegal transactions in connection with a 7-month copyright infringement operation which involved the illegal production of more than 1000 pirated movies worth more than $200,000. *U.S. v. Dart*, 05 Cr. 00020.

In June 2005, the former employee of a bail bonding company pleaded guilty to misprision in the Eastern District of Louisiana for his conduct in concealing a mail fraud conspiracy involving the owner of the corporation, the owner's sister and a state court judge. The employee, who was caught on videotape in the FBI's 6-year-long "Wrinkled Robe" investigation handing the judge an envelope of $5000 in cash, confessed to the bribery and lying to the FBI by stating that the payments were not intended to influence the judge. *U.S. v. Bowley*, 04 Cr. 00295.

Finally, it is worth noting that misprision is not limited to individuals. In 1995, the government indicted Daiwa Bank, Ltd. in a multi-count indictment for, among other crimes, misprision of a felony, marking perhaps the first time that the misprision charge was asserted against a corporation. *U.S. v. Daiwa Bank, Ltd.*, 95 Cr. 00947 (S.D.N.Y.). A few months later, the corporation pled guilty to 17 charges, including misprision.

Caveats for Defense Counsel

In cases where the defendant is a participant in the crime, the court *sua sponte* might order an upward departure from the sentencing, although obviously not beyond 3 years. Such cases "fall outside the heartland of typical misprision cases because the applicable guideline presumes that the defendant is not guilty of the underlying felony." *U.S. v. Bolden*, 277 F. Supp.2d 999, 1012 (E.D. Ark. 2003), *aff'd* 368 F.3d 1032 (8th Cir. 2004).

Moreover, under the Mandatory Victims Restitution Act (MVRA), the court is required to order restitution to the victims of any offense described within the statute. Therefore, while a plea to misprision caps the defendant's jail time at three years, the "cap" has no bearing on a defendant's obligation to make restitution to the victims of his offense, which can amount to aggregate losses generated over the life of the conspiracy.

Conclusion

Given the onerous impact of the sentencing guidelines in white-collar cases, the virtually unlimited exposure in a multi-count indictment, and the potential for upward departures, the effort to cap a defendant's exposure under the statutory scheme becomes a vital part of a vigorous defense. The misprision statute has significant appeal, both to the defense attorney and the government, for a variety of reasons: its potential for broad application, the fact that it arises out of the underlying felony and therefore is often supported by the facts of the case, and its statutory cap of three years' imprisonment. Though misprision is a relic of the Revolutionary War, defense counsel should keep it in mind at the bargaining table.

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