

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KAREN B. OLSON,
Defendant-Appellant.

No. 15-30022

D.C. No.
3:13-cr-00093-TMB-1

OPINION

Appeal from the United States District Court
for the District of Alaska
Timothy M. Burgess, Chief Judge, Presiding

Argued and Submitted August 4, 2016
Anchorage, Alaska

Filed May 15, 2017

Before: Raymond C. Fisher, Richard A. Paez
and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Fisher;
Concurrence by Judge Hurwitz

SUMMARY*

Criminal Law

The panel affirmed the defendant's conviction under 18 U.S.C. § 4 (misprision of felony) for concealing and failing to notify authorities of her business partner's submission of false statements to the United States Department of Agriculture Rural Development Program in connection with a federal grant application.

The panel held that, to secure a conviction under § 4, 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 the conduct was a felony; that to establish the latter, the government must prove the defendant knew the offense was punishable by death or a term of imprisonment exceeding one year; and that sufficient evidence supports the jury's finding that the defendant here knew the principal's crime was punishable by more than a year in custody.

Concurring in part and concurring in the result, Judge Hurwitz would leave to another day, in a case in which it matters to the outcome, whether the government must prove in a § 4 prosecution that the defendant knew the underlying offense was a felony.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Glenda Kerry (argued), Law Office of Glenda J. Kerry, Girdwood, Alaska, for Defendant-Appellant.

Retta-Rae Randall (argued), Assistant United States Attorney, United States Attorney's Office, Anchorage, Alaska, for Plaintiff-Appellee.

OPINION

FISHER, Circuit Judge:

Karen Olson appeals her conviction for misprision of felony under 18 U.S.C. § 4. She was convicted of concealing and failing to notify authorities of her business partner's submission of false statements to the United States Department of Agriculture Rural Development Program (USDA) in connection with a federal grant application. She challenges her conviction, arguing the government failed to prove she knew the conduct she concealed constituted a felony. We address her argument in two parts. First, we agree with Olson that, to secure a conviction under 18 U.S.C. § 4, 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 the conduct was a felony. *See Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009) (“[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element.”). Second, applying that standard, we hold sufficient evidence supports the jury’s

finding that Olson had the requisite knowledge here. We therefore affirm.¹

BACKGROUND

The USDA awarded a grant to Robert Wells to open a milk processing facility. The terms of the grant provided that certain equipment was to be purchased wholly or in part with grant funds, and that the USDA would hold a first lien position on any equipment purchased with grant money. Although the grant was in Wells' name, he had an informal "handshake" partnership with Olson, a former Alaska executive director of the USDA Farm Service Agency who wrote Wells' grant application. Wells described her as the "brains" behind the grant, and their informal partnership entitled her to 50 percent of the profits from the milk processing facility.

Around the same time, Kyle Beus received a separate USDA grant to establish an ice cream and cheese manufacturing facility. The paperwork for both Wells' and Beus' grant applications warned that anyone who made false, fictitious or fraudulent statements could be fined or imprisoned for up to five years.

Wells, Beus and Olson agreed to locate their two projects at the same facility. Unbeknownst to Wells and Olson, Beus instructed his contractor, Nether Industries, to inflate the value of certain dairy processing equipment – including a clean-in-place (CIP) system and a glycol chilling system – on papers submitted to the USDA for reimbursement. Beus also

¹ We reject Olson's remaining challenges in an unpublished memorandum disposition filed concurrently with this opinion.

submitted invoices to Nether, allegedly for project expenses, so he could personally receive a portion of the grant money the USDA disbursed.

A year into the enterprise, Beus told Wells and Olson he had leased certain “technologically obsolete” pieces of equipment rather than purchase new equipment as agreed in the original grant application, including a “really cheap old glycol unit” and an “incomplete clean-in-place system.” As to some of this equipment, Olson informed the USDA there had been a change of plans that called for “leasing instead of outright purchasing some of the original smaller equipment.” She did not do so, however, with respect to the CIP system and glycol cooling system. The attached “Proposed Money Grant Expenditure” included a CIP system listed at \$35,000 and a glycol cooling system listed at \$50,000 when, in fact, those systems had been leased rather than purchased.

After the USDA disbursed the grant funds, Olson filed a final report with the department. It included a “Final List of Expenditures by Category and Completion” that once again falsely listed the purchase of a \$35,000 CIP system and a \$50,000 glycol cooling system.

Olson later became aware that Beus had been misappropriating grant funds by submitting false invoices to Nether Industries and receiving payments – which Olson described as “kickbacks” – in return. Olson also discovered Beus had improperly used grant funds to make a \$71,000 personal investment in a milk jug manufacturer. An entry in her day planner around this time reveals that she knew Beus’ actions were improper. She wrote: “Began full-time work on financials/straightening out Kyle’s mess. Learning of questionable deals – Nether – Kyle spent \$190,000 of our

grant on others, so Nether way over budget. Also, Kyle misused our [] advance \$ as his own stock purchases – !” Olson told the project’s office assistant she “could send [Beus’] ass to jail.” She wrote members of her board that “[t]he revelations of the past week have crystallized for me that [Beus’ agreement to co-locate the projects] was simply a way to divert our grant money into a grandiose plan that has not worked,” and that Beus “has put the entire dairy industry at risk for an ever-widening investigation closing off all loan sources and public goodwill.”

Olson was convicted after a jury trial of misprision of felony under 18 U.S.C. § 4. Her conviction was based on her knowledge that Beus, the principal, submitted false statements to the USDA in furtherance of his scheme to misappropriate grant funds in violation of 18 U.S.C. § 1014 – a felony under federal law. Olson appeals.

STANDARD OF REVIEW

“We review a question of statutory construction *de novo*.” *United States v. Weitzenhoff*, 35 F.3d 1275, 1283 (9th Cir. 1993). “Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, which requires a court of appeals to determine whether, ‘after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *United States v. Nevils*, 598 F.3d 1158, 1163–64 (9th Cir. 2010) (en banc) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (citation omitted).

DISCUSSION

I

The misprision of felony statute states:

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.

18 U.S.C. § 4 (emphasis added).

To establish misprision of felony, 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.” *Lancey v. United States*, 356 F.2d 407, 409 (9th Cir. 1966) (alterations omitted) (quoting *Neal v. United States*, 102 F.2d 643, 646 (8th Cir. 1939)). Only the second element is at issue here.

To show a defendant has “knowledge of the actual commission of a felony cognizable by a court of the United States,” 18 U.S.C. § 4, the parties agree the government must prove at least that the defendant knew the principal *engaged in conduct* that satisfies the essential elements of the underlying felony. In other words, the defendant must “know the facts that make [certain] conduct fit the definition of the

offense.” *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Staples v. United States*, 511 U.S. 600, 608 n.3 (1994)). The parties disagree as to whether – and to what extent – the government must also prove the defendant knew such conduct *was a felony*. We conclude Olson has the stronger argument.

First, Olson’s construction is consistent with the general presumption that a mens rea requirement applies to each element of an offense. “Absent indication of contrary purpose in the language or legislative history of the statute,” *Liparota v. United States*, 471 U.S. 419, 425 (1985), we “ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element,” *Flores-Figueroa*, 556 U.S. at 652. *See United States v. Williams*, 553 U.S. 285, 294 (2008) (applying a knowledge requirement to each subdivision in a statute in the absence of “grammar or structure enabl[ing] the challenged provision or some of its parts to be read apart from the ‘knowingly’ requirement”); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77–78 (1994) (“[A]s a matter of grammar it is difficult to conclude that the word ‘knowingly’ modifies one of the elements in [the statute], but not the other.”). This “presumption in favor of a scienter requirement,” *X-Citement Video*, 513 U.S. at 72, “reflects the basic principal that ‘wrongdoing must be conscious to be criminal,’” *Elonis*, 135 S. Ct. at 2009 (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). As a general matter, “a defendant must be ‘blameworthy in mind’ before he can be found guilty.” *Id.* (quoting *Morissette*, 342 U.S. at 252).

In *Liparota*, for example, the statute at issue imposed criminal liability on “whoever knowingly uses, transfers,

acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter.” *Liparota*, 471 U.S. at 420 n.1 (alteration omitted) (quoting 7 U.S.C. § 2024(b)(1) (1985)). The evidence showed the defendant purchased food stamps from an undercover agent for less than face value. *See id.* at 421. The government argued the statute required proof only that the defendant knew of his acquisition of the cards, not that the acquisition was unauthorized by law. *See id.* at 423. The Supreme Court disagreed. Because it was not clear from the text of the statute which phrase or phrases Congress intended the knowledge requirement to modify, and because the legislative history contained nothing to clarify congressional purpose, the knowledge requirement applied to each phrase in the statute. The government was required to show the defendant *knew* purchasing food stamps for less than face value was unauthorized by law. *See id.* at 425. Since *Liparota*, the Court has applied this presumption to a range of statutes. *See, e.g., Flores-Figueroa*, 556 U.S. at 657 (applying a knowledge requirement to each phrase in the aggravated identity theft statute); *Williams*, 553 U.S. at 294 (applying a knowledge requirement to all elements in a child pornography statute); *X-Citement Video*, 513 U.S. at 78 (applying a knowledge requirement to all elements in a statute criminalizing the exploitation of minors).

The same presumption applies here. First, as in *Liparota*, the text of the misprision statute alone does not make clear whether the knowledge requirement applies to each element. *Compare* 18 U.S.C. § 4 (“Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States”), *with* 7 U.S.C. § 2024(b)(1) (1985) (“[W]hoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not

authorized by this chapter . . .”). Putting aside the *Flores-Figueroa* presumption, the mental state in § 4 could plausibly be read to modify only “actual commission” or both “actual commission” and “of a felony cognizable by a court of the United States.” Under *Flores-Figueroa*, however, we presume Congress intended the knowledge requirement to apply to both phrases, *see* 556 U.S. at 652, and nothing in the text or legislative history negates the presumption that Congress so intended. The government has not pointed to anything suggesting Congress intended to penalize someone who did not know she was witnessing the commission of a felony. Accordingly, given the language of § 4 and the *Flores-Figueroa* presumption, the statute is best interpreted as requiring proof that, in addition to showing the defendant knew the principal engaged in conduct satisfying the essential elements of the underlying felony, the government must also show the defendant knew such conduct was a felony.

Second, even putting the presumption aside, the history of misprision also supports Olson’s construction. In England, before the advent of professional police forces, individual citizens bore the responsibility for combating crime. *See* Carl Wilson Mullis, III, *Misprision of Felony: A Reappraisal*, 23 Emory L.J. 1095, 1114 (1974). They had “a duty to raise the hue and cry and report felonies to the authorities.” *Branzburg v. Hayes*, 408 U.S. 665, 696 (1972) (internal quotation marks omitted). *See* Hue and Cry, *Black’s Law Dictionary* (10th ed. 2014) (“The public uproar that, at common law, a citizen was expected to initiate after discovering a crime.”). A citizen who breached this duty could be charged with misprision. *See* Mullis, *supra*, at 1095. In this country, the First Congress enacted the American misprision statute as part of the Crimes Act of 1790, the current version of which is “functionally identical” to its

predecessor. *United States v. Phillips*, 827 F.3d 1171, 1175 (9th Cir. 2016).

This context suggests Congress intended the misprision statute to apply solely to conduct the average person would understand as criminal and serious. As an English court has explained, requiring knowledge of the serious criminal nature of the underlying offense “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. . . . [M]isprision comprehends an offence which is of so serious a character that an ordinary law-abiding citizen would realise he ought to report it to the police.” *Sykes v. Dir. of Pub. Prosecutions*, [1962] A.C. 528 at 563.²

The government argues in passing that *United States v. Graves*, 143 F.3d 1185 (9th Cir. 1998), *as amended* (June 4, 1988), supports its position. *Graves*, however, did not address the question we are considering here. *Graves* concerned the “accessory after the fact” statute, which states: “Whoever, *knowing that an offense against the United States has been committed*, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.” *Id.* at 1187 (emphasis added) (quoting 18 U.S.C. § 3). The defendant was charged as an accessory (“charged offense”) to the crime

² Misprision has become a little used and much maligned criminal charge. England eliminated the offense a few years after the *Sykes* decision. See Mullis, *supra*, at 1100–01. American commentators have urged Congress to do the same, arguing the crime has outlived its usefulness in light of modern methods of law enforcement. See, e.g., E. Lee Morgan, *Misprision of Felony*, 6 S.C. L. Q. 87, 95 (1953–54); Mullis, *supra*, at 1111 n.92 (listing commentators).

of felon in possession of a firearm (“underlying offense”). *See id.* at 1186. The underlying offense, felon in possession of a firearm, contains two elements: first, possession of a weapon and second, a previous felony conviction. *See id.* at 1187. There was no evidence the defendant knew the principal was a felon, but the government argued it need not make such a showing. *See id.* We disagreed, holding a “defendant who is accused of being an accessory after the fact must be shown to have had actual knowledge of each element of the underlying offense.” *Id.* at 1189. The government was therefore required to prove the defendant knew that “the offender possessed a firearm” and that the offender “had previously been convicted of a felony.” *Id.*

Applied here, *Graves* stands only for the undisputed proposition that Olson must have had knowledge of the elements of the *underlying offense* – submission of false statements to the USDA. *Graves* does not address or support the government’s argument regarding the specified knowledge requirement of the *charged offense* here – misprision of a felony.³

In sum, in light of Supreme Court precedent and relevant history, we hold the misprision statute requires knowledge not only that the principal engaged in conduct that satisfies

³ Both parties invoke *United States v. White Eagle*, 721 F.3d 1108 (9th Cir. 2013), in support of their respective positions. This case has no bearing on our analysis here because it did not address the knowledge requirement of the misprision statute. *See id.* at 1119–20 (addressing only the “failure to notify the authorities” and the “affirmative step to conceal” elements).

the essential elements of the underlying felony, but also that the underlying offense is a felony.⁴

II

The question then becomes: What does it mean to know conduct constitutes a felony?

When a term used in a statute is defined by that statute or by “any other relevant statutory provision,” *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012), we generally presume that definition applies to the statute’s use of the term. *See Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (“When a statute includes an explicit definition, we must follow that definition, even if it varies from that term’s ordinary meaning.”); *see also Meese v. Keene*, 481 U.S. 465,

⁴ Olson asks us to go further by holding the government must show the defendant knew the relevant conduct was a felony under *federal* law, based on the statute’s language stating “of a felony *cognizable by a court of the United States*.” 18 U.S.C. § 4 (emphasis added). We decline to do so. “The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum.” *United States v. Feola*, 420 U.S. 671, 685 (1975). The requirement that the felony be cognizable by a court of the United States was included in the statute to state the foundation for federal jurisdiction. *See United States v. Howey*, 427 F.2d 1017, 1018 (9th Cir. 1970). “A defendant’s knowledge of the jurisdictional fact is irrelevant,” *id.*, as has been held in numerous cases interpreting analogous statutory provisions. *See, e.g., United States v. Felix-Gutierrez*, 940 F.2d 1200, 1206–07 (9th Cir. 1991) (holding a defendant charged with being an accessory after the fact need not know the principal crime was one against the United States despite the presence of such language in the statute); *Feola*, 420 U.S. at 687 (holding a defendant charged with conspiracy need not know his conduct violated federal law despite the statute’s prohibition on conspiring to commit an offense against the United States).

484 (1987) (“It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.”); *United States v. Lettiere*, 640 F.3d 1271, 1274 (9th Cir. 2011) (“[There is a] well-settled principle that, for purposes of statutory interpretation, the language of the statute is the first and, if the language is clear, the only relevant inquiry.”).

This presumption is not absolute, however. If interpreting a term consistently with its statutory definition would, for instance, lead to “obvious incongruities” or would “destroy one of the major [congressional] purposes,” the statutory definition may yield to context. *See Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949); *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (confirming that the presumption of consistent usage may yield to context).

Here, the term “felony” is defined as part of the federal criminal code as a crime punishable by death or a term of imprisonment exceeding one year. *See* 18 U.S.C. § 3559(a); *see also Burgess v. United States*, 553 U.S. 124, 130 (2008) (“[T]he term ‘felony’ is commonly defined to mean a crime punishable by imprisonment for more than one year.” (citing 18 U.S.C. § 3559(a))). Although the misprision offense and the felony definition are in separate sections of the United States Code, they were included in the same statute at least twice. In 1909, Congress passed an act to “codify, revise, and amend the penal laws of the United States.” *See* Criminal Code of 1909, ch. 321, 35 Stat. 1088, 1088 (preamble) (the “1909 Crime Act”). Along with a slightly modified version of the original misprision statute, *see id.* § 146, 35 Stat. at 1114, the 1909 Crime Act included, apparently for the first time, a statutory definition for the term “felony,” *see id.* § 335, 35 Stat. at 1152 (“All offenses which may be punished

by death, or imprisonment for a term exceeding one year, shall be deemed felonies.”). The 1948 Crimes and Criminal Procedure Act (the “1948 Crime Act”), enacted to “revise, codify, and enact into positive law, Title 18 of the United States Code, entitled ‘Crimes and Criminal Procedure,’” Crimes and Criminal Procedure Act, Pub. L. No. 80-772, 62 Stat. 683, 683 (1948) (preamble), similarly included versions of both provisions. *See id.* §§ 1, 4, 62 Stat. at 684. Indeed, the 1948 Crime Act actually included the felony definition and the misprision offense on the very same page. *See id.*

This is a case, therefore, in which Congress has adopted a statute using a term – “felony” – and in the same statute adopted a definition that presumptively applies. Moreover, it does not appear the presumption is rebutted by context. Applying the statutory definition, for instance, neither leads to incongruities nor destroys Congress’ purposes. *See Lawson*, 336 U.S. at 201. The drafting history of the 1909 and 1948 Crime Acts supports this conclusion. Before 1909, the term “felony” lacked a uniform definition. A Senate Report on the 1909 Crime Act explained that the term “felony” had an “indefinite classification,” resulting in its being “indiscriminately applied.” S. Rep. No. 60-10, at 12 (1908). The report therefore underscored the need for a uniform definition, which would “characterize the whole system rather than pertain to any particular part of it.” *Id.* Far from “destroy[ing] one of the major [congressional] purposes,” *see Lawson*, 336 U.S. at 201, incorporating § 3559’s definition into the misprision statute furthers Congress’ intent to bring a measure of uniformity to the criminal code.

We therefore hold the government must prove the defendant knew the underlying offense was punishable by

death or more than one year in prison. The defendant need not know the precise term of imprisonment authorized by law, but at least she must know the potential punishment exceeds one year in prison.⁵

III

In Olson's case, there was sufficient evidence to support a jury's finding that she knew submitting false statements to the USDA was punishable by a sentence of incarceration exceeding one year. *See Nevils*, 598 F.3d at 1163–64.⁶ The USDA grant form Olson completed on behalf of Wells explicitly warned that any individual who submitted false

⁵ Knowledge is ordinarily a subjective standard, and the parties do not argue the rule is otherwise here. *See, e.g., United States v. Twine*, 853 F.2d 676, 680 (9th Cir. 1988) (“We drew our conclusion in the face of Congress’ use of the terms ‘knowingly and willfully,’ words which the Model Penal Code defines in a subjective manner.”); *United States v. Jewell*, 532 F.2d 697, 707 (9th Cir. 1976) (en banc) (Kennedy, J., dissenting) (“[K]nowledge [is] a matter of subjective belief, an important safeguard against diluting the guilty state of mind required for conviction.”).

⁶ As to this issue, Olson raises only a sufficiency of the evidence claim. Olson does not contest the adequacy of the misprision jury instruction apart from its failure to include a unanimity instruction – an issue we address in a concurrently filed memorandum disposition. Nor did she proffer a jury instruction at trial clarifying this point of law. We therefore assume the jury was properly instructed on misprision and address solely Olson's argument that there was insufficient evidence of her knowledge. In future cases, of course, a defendant in Olson's position could request an instruction requiring the government to prove that she knew the underlying offense was punishable by more than one year in prison. The instructions given here did not specifically address this issue, but Olson did not challenge the instruction on appeal, so we need not address whether the failure to give such an instruction was erroneous.

statements to the USDA could be imprisoned up to five years. Olson had seen similar warnings “many times,” and the jury could have inferred Olson’s sophistication from her experience as executive director of the USDA Farm Service Agency. This evidence was sufficient for a reasonable jury to find Olson knew Beus’ crime was punishable by more than a year in custody.

CONCLUSION

We hold 18 U.S.C. § 4 requires the government to prove the defendant knew the principal engaged in conduct that satisfies the essential elements of the underlying felony *and* that the defendant knew such conduct was a felony. To establish the latter, the government must prove the defendant knew the offense was punishable by death or a term of imprisonment exceeding one year. Sufficient evidence supports that finding here. For the reasons stated in this opinion and in a concurrently filed memorandum disposition, we affirm Olson’s conviction.

AFFIRMED.

HURWITZ, Circuit Judge, concurring in part and concurring in the result:

This case does not turn on whether the government must prove in a misprision prosecution under 18 U.S.C. § 4 that the defendant knew the underlying offense was a felony. As the majority correctly concludes, the evidence at trial sufficed for a misprision conviction even if the government bears that burden of proof.

The majority's interpretation of the statute may be correct. But, I would leave such analysis for another day, in a case in which it matters to the outcome. *See Whitehouse v. Ill. Cent. R. Co.*, 349 U.S. 366, 372–73 (1955) (“These are perplexing questions. Their difficulty admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case.”); *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) (noting “the cardinal principle of judicial restraint” that “if it is not necessary to decide more, it is necessary not to decide more”).