

Criminal Law—First Circuit Allows Guilty Plea for Misprision to Stand Under Plain Error Review—*United States v. Caraballo-Rodriguez*, 480 F.3d 62 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 489 (2007)

The federal misprision statute requires that a person with knowledge of a felony report such knowledge to the authorities.¹ Generally, the prosecution must prove that the defendant took some affirmative step to conceal the crime from authorities.² In *United States v. Caraballo-Rodriguez*,³ the Court of Appeals for the First Circuit considered whether the defendant's conviction for misprision could be sustained under plain error review absent proof of an affirmative act of concealment.⁴ The court held that there was no act requirement and thus, no plain error at trial.⁵

Oswaldo Caraballo-Rodriguez was a police officer for the Puerto Rico Police Department.⁶ In May 2001, another officer invited him to participate in a cocaine smuggling conspiracy.⁷ Although he agreed to participate, before the commission of the crime, he anonymously called the Drug Enforcement Administration (DEA) to alert them to the conspiracy.⁸ Caraballo-Rodriguez

1. 18 U.S.C. § 4 (2006) (stating federal crime of misprision). A person is punishable under the statute if she “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.” *Id.*

2. *See* *United States v. Davila*, 698 F.2d 715, 717 (5th Cir. 1983) (holding government must prove affirmative step to conceal felony). Misprision requires that a person have knowledge of the commission of the felony, fail to notify authorities, and take some step to conceal the crime. *Id.*; *Neal v. United States*, 102 F.2d 643, 646 (8th Cir. 1939) (stating proof of affirmative step of concealment required). The court reversed the defendant's conviction because the facts did not prove that the defendant took an affirmative step to conceal the felony. *Neal v. United States*, 102 F.2d 643, 650 (8th Cir. 1939).

3. 480 F.3d 62 (1st Cir. 2007).

4. *See id.* at 69 (explaining court's use of plain error review). Because Caraballo-Rodriguez failed to argue the lack of factual basis for the plea at trial or move to withdraw his plea, the court held that plain error was the appropriate standard of review. *Id.* Under plain error review, the defendant must prove that: “(1) [t]here was error; (2) the error was plain; (3) the error affected the defendant's substantial rights; and (4) the error adversely impacted the fairness, integrity, or public reputation of judicial proceedings.” *Id.*

5. *Id.* at 70. The court held that the trial court was free to accept the plea without proof of an affirmative act because no precedent bound the court to a particular statutory construction. *Id.* *But see id.* at 82-84 (Torruella, J., dissenting) (arguing statute requires proof of an affirmative act). Specifically, Judge Torruella argues that all legal authorities agree that the federal misprision statute requires an affirmative act of concealment. *Id.* at 82-83. A lack of binding precedent does not give the court discretion to make a ruling without legal support. *Id.* Thus, Judge Torruella argued that the prosecution failed to prove an element of misprision. *Id.* at 87.

6. *Id.* at 64 (majority opinion) (explaining Caraballo-Rodriguez's occupation).

7. 480 F.3d at 65 (stating female officer invited Oswaldo Caraballo-Rodriguez to join smuggling operation). Diana Crispin-Diaz recruited Caraballo Rodriguez to participate in the crime. *Id.* at 66. Arturo Ortiz-Colon, a former police officer working with the government, told Diaz-Crispin about the conspiracy and asked her to recruit more officers. *Id.*

8. *Id.* at 64-65 (explaining Caraballo-Rodriguez's initial phone call to DEA). He placed the phone call one day before participating in the drug trafficking. *Id.*

refused to furnish the names of his co-conspirators.⁹ He then participated in the crime.¹⁰ Two weeks after the felony, Caraballo-Rodriguez again contacted the DEA and disclosed the details of the crime including his name and the names of his co-conspirators.¹¹

In August 2001, Caraballo-Rodriguez and fifteen others were arrested and indicted.¹² With the assistance of an attorney, he negotiated a plea with the government whereby he agreed to plead guilty to a lesser charge—misprision—in exchange for the government agreeing to drop all other charges against him.¹³ This plea reduced his sentence from a minimum of more than fifteen years to a maximum of three years.¹⁴

In December 2002, Osvaldo Caraballo-Rodriguez pled guilty to misprision, acknowledging that he was entering the plea freely because he was guilty of the offense.¹⁵ The court accepted his plea, and, in April of 2003, sentenced him to time served.¹⁶ Subsequently, in May of 2003, Caraballo-Rodriguez appealed

9. *Id.* at 64-65 (stating Caraballo-Rodriguez refused agents' requests to identify himself or his co-conspirators). *But see id.* at 65 (admitting DEA would not have stopped crime even with names). Because this was a sting operation, even if he had named the conspirators, DEA not would have interfered with the criminal exchange. *Id.*

10. *Id.* at 64-65 (describing Caraballo-Rodriguez's participation in crime). He and his co-conspirators aided in the transport of more than five kilograms of cocaine using their official vehicles and carrying weapons to protect the shipment. *Id.* at 64. In exchange for his services, Caraballo-Rodriguez received \$4,000.00. *Id.* at 65.

11. 480 F.3d at 65 (indicating Caraballo-Rodriguez met with DEA agents to cooperate with investigation). Caraballo-Rodriguez gave full details of the drug transaction including names, a description of the transaction, as well as his compensation for his services. *Id.*

12. *Id.* at 65 (outlining arrests and indictments of conspirators). The indictment named Caraballo-Rodriguez and the fifteen others on four counts:

- (1) conspiracy to knowingly and intentionally possess with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 846; (2) attempt to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 846; and (3) aiding and abetting in knowingly carrying firearms during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A)(i). There was also a forfeiture count against all sixteen defendants under 21 U.S.C. § 853.

Id.

13. *See id.* at 65 (outlining benefits Caraballo-Rodriguez received in exchange for his plea). For his guilty plea, the government agreed to drop all other charges that it had against him, which significantly reduced his potential prison term. *Id.* His new plea stated that he had knowledge of only 400 to less than 500 grams of cocaine, as opposed to five kilograms. *Id.* Also, the government agreed to recommend a sentence limited to time served. *Id.*

14. *Id.* at 77 (reiterating Caraballo-Rodriguez received significant reduction in potential prison time from plea deal).

15. 480 F.3d at 65-67 (stating Caraballo-Rodriguez pled guilty to misprision). Caraballo-Rodriguez, in response to the judge's questions, stated that he understood the charges against him and still wished to plead guilty. *Id.* at 66.

16. *See id.* at 68 (detailing Caraballo-Rodriguez sentence hearing). The court accepted the parties' recommendation for time served. *Id.* Caraballo-Rodriguez was arrested on August 14, 2001, and released on personal recognizance on December, 4 2002. *Id.* The court also ordered him to pay the minimum fine of \$100. *Id.*

his conviction arguing that the facts did not support a conviction for misprision because he took no affirmative step to conceal the crime.¹⁷ He argued that Rule 11 of the Federal Rules of Criminal Procedure requires there to be a factual basis for any plea accepted by the court.¹⁸ The court determined that no precedent bound the trial court to require proof of an affirmative act of concealment, and therefore, there was no plain error that required a reversal of the conviction.¹⁹

Misprision originated in sixteenth century England, although its common law roots can be traced back even further.²⁰ During the sixteenth century there were no formal police forces to pursue and apprehend criminals, so the burden was on citizens to report the felonies they witnessed and to pursue the perpetrators.²¹ At common law, a person was guilty of misprision for simply failing to report a crime.²² Additionally, partial disclosure was not a defense to misprision; a person was required to fully disclose all known facts about the felony.²³ However, by the end of the nineteenth century, there had been so few prosecutions for misprision that legal scholars questioned its continued existence.²⁴

17. See *id.* (explaining basis of Caraballo-Rodriguez's appeal). The court appointed Caraballo-Rodriguez new counsel after his first trial who filed the current appeal. *Id.* He claimed that the prosecution failed to establish an act to conceal the conspiracy so his actions did not constitute misprision. *Id.* at 68-69.

18. *Id.* at 68-69 (summarizing Caraballo-Rodriguez's position). He argued that there was plain error because the trial court accepted the plea without a factual basis in violation of Rule 11. *Id.* at 69; see also FED. R. CRIM. P. 11.

19. 480 F.3d at 70-76 (explaining basis for holding no plain error at trial). The court held that simply failing to report a felony could constitute misprision. *Id.* However, it declined to decide on the act requirement, holding that because the trial court could find Caraballo-Rodriguez guilty on the facts, there was no plain error. *Id.*

20. See Gabriel D. M. Ciociola, *Misprision of Felony and Its Progeny*, 41 BRANDEIS L.J. 697, 699-707 (2003) (outlining historical progression of common law misprision in England). Sir William Staunford first used the term misprision to describe one's duty to alert authorities if he had knowledge of the commission of a felony. *Id.* at 699; see also Christopher Mark Curenton, *The Past, Present, and Future of 18 U.S.C § 4: An Exploration of the Federal Misprision of Felony Statute*, 55 ALA. L. REV. 183, 184 (2003) (describing an English citizen's historical duty to "raise a hue and cry"). A person could violate his "hue and cry" duty in four ways: failing to report a known felony, failing to report the discovery of a deceased body, failing to respond to the "hue and cry" of others, or failing to make a reasonable effort to arrest a felon. Curenton, *supra*, at 184.

21. See Ciociola, *supra* note 20, at 702-03 (explaining reason for duty to "raise a hue and cry"). Historically in England, there were not any paid police officers; therefore, it was the duty of the community as a whole to prevent crime. *Id.* at 702; see also Curenton, *supra* note 20, at 184 (noting the limitations on duty to "hue and cry"). The obligation to report felonies and pursue felons was limited to men between the ages of fifteen and sixty years old. *Id.* But see P.R. Glazebrook, *Misprision of Felony: Shadow or Phantom?*, 8 AM. J. LEGAL HIST. 189, 199 (1964) (describing duty to "hue and cry" unpopular duty that was often evaded).

22. See Curenton, *supra* note 20, at 184 (explaining common law elements of misprision). Misprision had two elements: First, a person must have had knowledge of the crime; second, that person failed to report such knowledge. *Id.* The prosecution was not required to prove an affirmative act of concealment. *Id.*

23. See Curenton, *supra* note 20, at 184 (explaining liability for partial disclosure of felonies); see also Carl Wilson Mullis III, Comment, *Misprision of Felony: A Reappraisal*, 23 EMORY L.J. 1095, 1099 n.23 (1974) (stating at common law person must make full disclosure). If a person failed to report all known facts, he would be guilty of misprision. Mullis, *supra*, at 1099 n.23.

24. See *Accessory After the Fact—Misprision of Felony*, 8 U. CHI. L. REV. 338, 339 (1941) (citing

In the United States, misprision has been a federal offense since 1790.²⁵ Congress has modified the statutory language, but it remains materially the same.²⁶ Legal scholars dispute whether the current federal misprision statute requires an affirmative act of concealment or whether a person can be guilty by simply failing to report a known felony.²⁷ Further, courts and commentators argue that a partial but truthful disclosure may not amount to concealment.²⁸

The federal misprision caselaw strongly suggests a construction of the statute requiring an affirmative act.²⁹ Courts construe federal laws according to the language of the statute.³⁰ Accordingly, the first case to interpret the “conceals and” language of the federal statute to require an affirmative act was *United States v. Farrar*.³¹ Since then, every circuit court interpreting the

prosecutions for misprision virtually non-existent); *see also* Curenton, *supra* note 20, at 184 (citing lack of criminal prosecutions for misprision); Mullis, *supra* note 23, at 1096 (noting historical lack of recorded misprision cases).

25. Crimes Act of Apr. 30, 1790, ch. 9, § 6, 1 Stat. 112, 113.

26. Crimes Act of Apr. 30, 1790, ch. 9, § 6, 1 Stat. 112, 113, *amended by* Act of Mar. 4, 1909, ch. 321, § 146, 35 Stat. 1088, 1114 (current version at 18 U.S.C. § 4 (2006)); *see also* Mullis, *supra* note 23, at 1101 (discussing evolution of federal misprision statute). The original statute covered crimes on the “high seas, or within any place . . . under the sole jurisdiction of the United States.” Mullis, *supra* note 23, at 1101 n.37. In 1909, Congress extended the purview of the statute to include “any crime cognizable by the courts of the United States.” *Id.*

27. *Compare* Ciociola, *supra* note 20, at 722 (outlining elements of current federal misprision statute), Curenton, *supra* note 20, at 185 (arguing that statute requires both active concealment and failure to disclose), Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 520 (1986) (stating no legal duty of private citizens to report felonies), and Jack Wenik, *Forcing Bystander to Get Involved: Case for Statute Requiring Witness to Report a Crime*, 94 YALE L.J. 1787, 1791 (1985) (contending mere failure to report crime is not sufficient for conviction), with George Golberg, *Misprision of Felony: An Old Concept in a New Context*, 52 A.B.A. J. 148, 149 (1966) (contending history of misprision strongly suggests interpretation requiring affirmative act erroneous), and Mullis, *supra* note 23, at 1104 (rejecting argument federal misprision statute requires affirmative act). Misprision under federal law requires some positive act of concealment; mere failure to disclose facts about a known felony to authorities is not a criminal act. Ciociola, *supra* note 20, at 722. Mullis contends that Congress never intended the statute to require an affirmative act because at the time of its adoption, such a requirement had never been applied to misprision. Mullis, *supra* note 23, at 1104. He goes on to argue that the phrasing “conceals and” in the statute simply refers to a “conscious non-disclosure.” *Id.*

28. *See* *United States v. Ciambrone*, 750 F.2d 1416, 1418 (9th Cir. 1984) (holding partial disclosure does not amount to affirmative act of concealment). The court reasoned that the defendant’s partial disclosure did not result in a greater concealment of the felony than if he had said nothing at all. *Id.*; *see also* Curenton, *supra* note 20, at 186 (arguing partial disclosures not affirmative acts).

29. *See infra* note 32 (citing cases interpreting statute to require affirmative act); *see also* Curenton, *supra* note 20, at 185-86 (discussing current interpretation of federal misprision statute); Comment, *Common-Law Offense of Misprision of Felony Held Not Part of Modern Criminal Law*, 54 HARV. L. REV. 506 (1941) (citing misprision cases requiring proof of affirmative act as condition precedent). Curenton maintains that the language “conceals and does not as soon as possible make known” has been uniformly interpreted to require an affirmative act of concealment. Curenton, *supra* note 20, at 185.

30. *See* *United States v. Wiltberger*, 18 U.S. 76, 96 (1820) (holding courts find intention of legislature through statutory language); *United States v. Thurman*, 687 F.2d 11, 12 (3d Cir. 1982) (contending court inquiry ends if statutory language is clear).

31. *United States v. Farrar*, 38 F.2d 515, 517 (D. Mass. 1930), *aff’d*, 281 U.S. 624 (1930) (holding 18 U.S.C. § 251 “conceals and” language mandates affirmative act of concealment). The defendant had knowledge of felonious production of liquor but failed to report it to authorities. *Id.* at 516. The court held that 18 U.S.C. § 251, the predecessor to 18 U.S.C. § 4, required the prosecution to show that the defendant took some step to

misprision statute has required proof of some affirmative act of concealment.³² The Supreme Court discussed the federal misprision statute in small number of cases; however, as of yet, the Court has not ruled on the affirmative act requirement.³³

In *United States v. Caraballo*, the court considered whether there was a plain error at trial that required a reversal of Osvaldo Caraballo-Rodriguez's conviction for misprision.³⁴ The court rejected the defendant's argument that there was plain error because the prosecution failed to show an affirmative act of concealment.³⁵ The court noted that other circuits have required an affirmative act, but it noted misprision's common law origin supports its position that failure to disclose alone puts a person within the purview of the statute.³⁶ Ultimately, the court chose not to make a judgment on the act requirement, holding that there was no binding precedent either way, and therefore, the trial court was free to accept the guilty plea on the facts.³⁷ Thus, the court determined that there was no plain error and affirmed Caraballo-

conceal the crime from authorities. *Id.*

32. See *United States v. Adams*, 961 F.2d 505, 509-10 (5th Cir. 1992) (stating defendant must commit affirmative act to prevent discovery of felony); *United States v. Ciambrone*, 750 F.2d 1416, 1417 (9th Cir. 1984) (holding affirmative step of concealment element of misprision); *United States v. Davila*, 698 F.2d 715, 717 (5th Cir. 1983) (requiring some positive act to conceal felony from authorities); *United States v. Hodges*, 566 F.2d 674, 675 (9th Cir. 1977) (ruling government must show accused took affirmative step to conceal crime); *United States v. Daddano*, 432 F.2d 1119, 1124 (7th Cir. 1970) (agreeing with defendant's assertion prosecution must show some act of concealment); *Lancey v. United States*, 356 F.2d 407, 409-10 (9th Cir. 1966) (holding mere silence insufficient for a conviction); *Neal v. United States*, 102 F.2d 643, 646 (8th Cir. 1939) (holding government must prove affirmative step to conceal crime); *Bratton v. United States*, 73 F.2d 795, 798 (10th Cir. 1934) (holding federal statute requires affirmative act). In *Bratton*, the court construed the phrase "conceals and does not as soon as possible make known" to require some act of concealment. *Bratton v. United States*, 73 F.2d 795, 797 (10th Cir. 1934). Otherwise the phrase "conceals and" would have no meaning. *Id.*

33. See *Marbury v. Brooks*, 20 U.S. (7 Wheat.) 556, 575-76 (1822) (discussing duty to report). Chief Justice Marshall argued, "It may be the duty of a citizen to accuse every offender, and to proclaim every offence which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man." *Id.*; see also *Branzburg v. Hayes*, 445 U.S. 552 n. 36 (1980) (stating federal misprision statute construed to require affirmative step). But see *Roberts v. United States*, 445 U.S. 552, 558 (1980) (discussing federal misprision statute). The Court stated that "gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship," but did not rule on whether such an act was criminal. *Id.*

34. 480 F.3d at 63 (discussing issue in case).

35. *Id.* at 70 (holding no precedent bound trial court to require proof of active concealment). The court held that the trial court was free to choose between two competing theories. *Id.* Merely choosing one construction of the statute over another was not a plain error. *Id.*

36. See *id.* at 70-74 (discussing whether federal misprision statute requires proof of affirmative act). The court supported its position by pointing out that under the common law, a person was guilty simply for failure to "hue and cry;" there was no requirement of active concealment. *Id.* at 71-72. In addition, the court used definitions from both a standard and legal dictionary to show that the word "conceal" was ambiguous; therefore, the trial court was free to interpret the word as either active concealment or simply failing to disclose. *Id.* at 71.

37. See *id.* at 70 (stating court's reasoning for holding).

Rodriguez's conviction.³⁸

The majority incorrectly held that there was no plain error at trial.³⁹ Under Rule 11 of the Federal Rules of Criminal Procedure, a court must verify that there is a factual basis for a plea before entering a guilty verdict.⁴⁰ Because Caraballo-Rodriguez committed no affirmative act of concealment, the court erroneously held that there was a factual basis.⁴¹

The majority's holding departed significantly from the opinions of numerous legal scholars and circuit judges on the affirmative act requirement.⁴² The majority improperly supported its assertions using the common-law interpretation of misprision that punishes for simply failing to raise "hue and cry."⁴³ Here, the United States charged Caraballo-Rodriguez pursuant to a federal statute, so the meaning of misprision should be resolved by examining the language of the statute.⁴⁴ The court incorrectly determined that the language of the statute suggests that failure to disclose alone can be criminal.⁴⁵ The determination is particularly erroneous given that the rationale for requiring citizens to "raise a 'hue and cry'" in the presence of a felony no longer exists.⁴⁶ The court failed to recognize that the language "conceals and" indicates that Congress intended that a person must take some step to "conceal" the crime in order to be guilty.⁴⁷

Accordingly, the majority erred in ruling that a factual basis supported the plea because the federal misprision statute requires proof of an affirmative act

38. 480 F.3d at 77 (affirming conviction determining trial had discretion to enter guilty plea).

39. *See id.* at 87-88 (Torruella, J., dissenting) (arguing element of crime not proved, thus plain error). Judge Torruella contended that the trial court could not enter a guilty plea without the prosecution proving that Caraballo-Rodriguez took some step to conceal the crime. *Id.*

40. *See id.* at 69 (majority opinion) (describing requirements of Rule 11). In addition, Rule 11 requires that the defendant understand the nature of the charges against him. *Id.*; *see also* FED. R. CRIM. P. 11.

41. *See* 480 F.3d at 69 (determining factual basis for conviction existed). The court should have first determined whether an affirmative act is required and then applied the rule to Caraballo-Rodriguez's situation. *Id.* at 82 (Torruella, J., dissenting).

42. *See supra* note 32 and accompanying text (citing cases holding affirmative act required); *see also* Ciociola, *supra* note 20, at 722 (stating federal misprision statute requires affirmative act); Curenton, *supra* note 20, at 185 (arguing statute requires both active concealment and failure to disclose).

43. *See* 480 F.3d at 71-72 (discussing common law elements of misprision). *But see supra* note 32 and accompanying text (citing cases holding federal statute requires affirmative act).

44. *See* 480 F.3d at 63 (describing Caraballo-Rodriguez's offense); *supra* note 30 (maintaining federal statutes interpreted according to language).

45. *See* 480 F.3d at 71 (interpreting language of statute). *But see* Curenton, *supra* note 20, at 185-86 (stating statute requires affirmative act of concealment).

46. *See Accessory After the Fact, supra* note 24, at 341 (noting appearance of paid officers brought declining in communal law enforcement responsibility); *see also* Curenton, *supra* note 20, at 186 (distinguishing between misprision under common law and misprision under current federal statute). Curenton argues that there was a duty to "raise a 'hue and cry'" at common law because the onus was on the citizens to prevent and punish felonies. Curenton, *supra* note 20, at 186. However, in modern times, that duty rests solely on organized police forces and not citizens. *Id.* at 191.

47. *See* *Bratton v. United States*, 73 F.2d 795, 797-98 (10th Cir. 1934) (holding words "conceal and" meaningless without affirmative act requirement).

of concealment.⁴⁸ Assuming the government's evidence was true, there is no evidence that Caraballo-Rodriguez committed the required affirmative act.⁴⁹ Furthermore, the majority improperly held that a partial disclosure can be an affirmative act of concealment.⁵⁰ It is incomprehensible, however, that a person is more culpable if he partially helps authorities rather than remaining silent.⁵¹ There is no plainer error than a trial court entering a judgment not supported by the facts.⁵² Thus, the court improperly affirmed Caraballo-Rodriguez's conviction.⁵³

In *United States v. Caraballo-Rodriguez*, the First Circuit considered whether there was plain error at trial requiring a reversal of the defendant's conviction. The court's decision did not properly interpret the federal misprision statute. The days of "raising a hue and cry," when the citizens had to perform the function of the police, are long past. It is now the duty of law enforcement officials to pursue and punish criminals, and it is the duty of citizens to refrain from interfering. Accordingly, the crime of misprision under federal law requires the government to demonstrate an affirmative act of concealment. Because Caraballo-Rodriguez took no affirmative step to conceal the crime, there was no factual basis for the plea resulting in a plain error at trial.

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48. See 480 F.3d at 69 (holding factual basis for plea on government's theory existed). *But see supra* note 32 (outlining legal authority requiring affirmative act).

49. See 480 F.3d at 87 (Torruella, J., dissenting) (arguing Caraballo-Rodriguez committed no affirmative act to conceal crime).

50. *Id.* at 73-74 (majority opinion) (arguing partial disclosure can be affirmative act of concealment). *But see supra* note 28 and accompanying text (discussing authority supporting proposition that partial disclosure does not constitute misprision).

51. See 480 F.3d at 84 (Torruella, J., dissenting) (reasoning partial truthful disclosure at least as helpful to police as non-disclosure); see also Curenton, *supra* note 20, at 186 (stating incomplete but truthful disclosure may not amount to concealment).

52. 480 F.3d at 87 (Torruella, J., dissenting) (arguing miscarriage of justice because Caraballo-Rodriguez not guilty of crime).

53. *Id.* at 89 (advocating court should reverse conviction).