IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY

UNITED STATES OF AMERICA

v. CRIMINAL NO. 5:14-00244

DONALD L. BLANKENSHIP

UNITED STATES' RESPONSE TO DEFENSE MOTION TO STRIKE GOVERNMENT'S EXHIBIT 83, TO EXCLUDE ANY SIMILAR EVIDENCE, AND FOR A CURATIVE INSTRUCTION

Government's Exhibit 83 and other evidence regarding citation data at Massey or other coal companies have been properly admitted into evidence and repeatedly held relevant and admissible. Defendant's motion should be denied.

Exhibit 83 is an email that Massey's safety director, Elizabeth Chamberlin, sent to Defendant's assistant Sandra Davis, with the subject "For the Chairman." The attachment to the email includes violation data for fourteen coal companies for the years 2007, 2008, and 2009. The attachment shows Massey at the top of the list with the most violations. This exhibit and other similar evidence of mine comparisons are relevant to each count of the superseding indictment, relevant based on arguments made in Defendant's opening statement and evidence adduced in his cross examinations, and do not create a "fatal variance." This evidence is not unfairly prejudicial, and does not give rise to a Rule 16 violation.

First, Defendant raised the issue of comparing UBB to other mines owned by other mining companies during his opening statement, when defense counsel asserted that other longwall mines (including Buchanan, Speed, and Harris) had more violations than UBB:

> And what the evidence will show about the number of citations is that during the indictment period, 39 longwall mines in the United States, 18 had more violations than UBB. In fact, the top 13 on the list received more than a thousand violations during the same period. Some of these mines were bigger than UBB and some were smaller. But during the indictment period, there were seven longwall mines in Central App, and four of those received more violations than UBB did during the same period of time. Buchanan, 1,837; Speed, 1,340; Harris, 1,093. Harris is an important comparison. Harris is right next to UBB. It's on the same coal seam. It's on the same set of reserves. And you would think that it would be symptomatic of the same sort of things. And it's inspected by the same MSHA personnel. But during this same indictment period, Harris had more violations than UBB, 1,093 versus 837. It mined less coal than UBB. And it had more total man-hours than UBB did.

Tr. 83:21-84:14.

Second, this Court has made numerous findings on the record that this evidence is relevant and has admitted multiple records into evidence over Defendant's relevance objections. *See* Government's Exhibits 60, 61, 62, 63, and 64. Ruling specifically on these issues with respect to Exhibit 83, the Court stated, "I find Government's Exhibit 83 to be relevant to the issues contained in the indictment." Tr. 706:21-22.

The Court has also recognized that comparison evidence has been introduced by the Defendant: "For purposes of the record, I think the record will bear this out with respect to Mr. Childress's testimony, there was evidence regarding comparisons on both direct and cross-examination." Tr. 706:17-20.

On October 23, 2015, the Court admitted Government's Exhibit 176, a memorandum reflecting staffing reduction at several Massey mines, over Defendant's objection that information about mines other than UBB is irrelevant. The Court specifically found that the evidence was relevant. Tr. 2509:10-15 ("I overrule the objection, finding the document to be relevant given the allegations contained in the indictment.).

On October 29, Mr. Delinsky argued for the defense against the use of Government's Exhibit 83 (which had already been admitted) during redirect examination of Christopher Blanchard. Mr. Delinsky argued, "The use of total Massey violations as opposed to the UBB violations is in effect a fatal variance from the charges in the indictment." Tr. 3351:22-24. The Court considered this argument, and rejected it, noting that "I think even Mr. Taylor would tell you, Mr. Delinsky, that cross-examination wasn't limited to UBB." 3352:10-12.

Defendant's motion to strike and exclude is an attempt to resurrect these failed objections and present new grounds for these objections that were not timely raised in the first instance. Moreover, on November 5, 2015, while this motion was pending, Mr. Taylor introduced evidence during his cross examination of United States witness Bill Ross of the comparison of UBB with the non-Massey mines Speed and Harris—precisely the type of evidence Defendant seeks to strike and exclude in his motion. Tr. 4299:9-4301:2.

In at least one of its many rulings on the relevance of this evidence, the Court has already rejected Defendant's variance argument. Suffice it to say, the comparison of UBB to other mines in terms of safety and compliance records is included in the allegations of the superseding indictment. ECF 169 at ¶ 8. This type of evidence that has been admitted at trial in no way changes the elements of the offenses charged. *See United States v. Schnabel*, 939 F.2d 197, 203 (4th Cir. 1991). Defendant does not, and cannot, argue that this is the case.

Third, with respect to "unfair surprise," Defendant asserts that the indictment provided no notice of the theory that the number of citations and orders could be relevant to the charged offenses. This is untrue. Paragraph 8 of the superseding indictment specifically states that "UBB ranked among the worst mines in the United States in . . . shutdown orders." Paragraph 79 of the superseding indictment discusses Defendant's compensation in 2009 in relation to the number of

total violations issued that year at all of Massey's mines. The indictment clearly notifies Defendant that comparison information from other Massey mines and other mine companies will be featured in the United States' proof. To the extent the indictment does not provide the exact numbers of citations at other mines, or a detailed explanation of how and when this information will be used at trial, as the United States has explained in one of its responses to a defense motion to dismiss (a motion that the Court denied),

> [An indictment] does not need to specify the theories upon which the United States will rely to prove the facts that the indictment alleges. *United States v. Musacchio*, 968 F.2d 782, 787 (9th Cir. 1991) (United States "not required to allege its theory of the case"); *United States v. Cochrane*, 985 F.2d 1027, 1031 (9th Cir. 1993) (indictment "need not specify the theories or evidence upon which the government will rely to prove [essential] facts"). Nor must the indictment specify the factual proof that will be relied upon to support the charges. *See, e.g.*, *United States v. Innamorati*, 996 F.2d 456, 477 (1st Cir. 1993) ("[The defendant] misapprehends the law. The government need not recite all of its evidence in the indictment, nor is it limited at trial to the overt acts listed in the indictment [which charged conspiracy]."); *United States v. Carr*, 582 F.2d 242, 244 (2d Cir. 1978) ("The Government is not required to set forth evidentiary matter [in the indictment]."); *United States v. Hoover*, 467 F.3d 496, 500 (5th Cir. 2006) ("Although the indictment must allege the essential elements of the charge offense, it is not necessary for an indictment to go further and to allege in detail the factual proof that will be relied upon to support the charges." (internal quotation marks and brackets omitted)); *Braatelien v. United States*, 147 F.2d 888, 892 (8th Cir. 1945) ("The evidence to support the charge [of conspiracy] need not be set out.").

ECF 129 at 2-3.

Defendant is not unfairly prejudiced, nor is there a Fifth Amendment violation, because the indictment does not explain the relevance of UBB's safety compliance record compared to that of other mines. Such comparisons are pieces of evidence—which Defendant has himself relied upon in his opening statement and in cross examinations—that the jury may consider as part of the overall evidence in this case.

Finally, Defendant objects to comparison data of other mines as a Rule 16 violation, and on the basis that he has not had equal access to the underlying data. This part of the motion refers to United States' exhibits that were introduced through Tyler Childress, and contain information generated by a public MSHA database about citation records at other mines. Defendant complains that because he does not have access to the private MSHA database that Mr. Childress used to create charts—a database that is separate from the public database and used by employees—he cannot prepare a defense. Defendant bases this argument on the sole complaint that "the public portion of the MSHA website . . . does not allow the defense to retrieve data by company, but rather only by individual mine," while the non-public database contains data by company.

It appears, however, that this issue was resolved during the defense's cross-examination of Mr. Childress, when it was revealed that the public database contains mine operator information in addition to mine name:

> Q. Mr. Childress, before we broke for lunch we were talking about the MSHA database. Do you recall that?
> A. Yes.
> Q. And based on your knowledge of the MSHA database, does it indicate who the operator of each coal mine is?
> A. Yes.

Tr. 526:7-12. During cross, defense counsel elicited clarification from Mr. Childress that citation information for any coal mine in the country is publicly available:

> Q. And if anybody wanted to see the manhours at UBB or any other coal mine in the country since 2008 on a quarterly basis, on an annual basis, they could find that pretty
> easily, right?
> A. Yes.
> Q. And the same question with respect to citations and violations. That information is publicly available on the, on the MSHA database website and has been since at least 2008, right?

A. Yes.

Tr. 523:17-524:1; *see also* Tr. 528-523 (explaining that data underlying charts is publicly available). There is no Rule 16 violation because this data is contained in a public database, even if it must be searched for using different terms than those used by Mr. Childress.

Defendant also asserts that the United States' failure to produce data underlying its Exhibit 83 is a Rule 16 violation and constitutes "unequal access to data." This exhibit is a Massey document, promulgated by Massey insiders and provided to Defendant, the CEO of Massey, during the indictment period. The United States did not compile the information in Exhibit 83 from a source unavailable to Defendant. Nor is this document a surprise—this Massey-generated document has been in Defendant's possession for at least nearly a year. Moreover, this exhibit was introduced for the purpose of notice and knowledge, and not for the truth of the underlying data, so any underlying data pertinent to the comparisons in Exhibit 83 is irrelevant to this particular exhibit.

For these reasons, the Court should deny Defendant's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing "**UNITED STATES' RESPONSE TO DEFENSE MOTION TO STRIKE GOVERNMENT'S EXHIBIT 83, TO EXCLUDE ANY SIMILAR EVIDENCE, AND FOR A CURATIVE INSTRUCTION**" has been electronically filed and service has been made on opposing counsel by virtue of such electronic filing this 9th day of November, 2015 to:

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