No. 16-4193

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES,

Appellee,

v.

DONALD L. BLANKENSHIP,

Appellant.

On Appeal from the United States District Court
For the Southern District of West Virginia (Criminal No. 5:14-cr-244)
Honorable Irene C. Berger, District Judge

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

Donald Blankenship appeals his conviction under 18 U.S.C. § 371 for conspiracy to violate 30 U.S.C. § 820(d), which makes it a crime to "willfully violate[]" a federal mine safety standard. The district court entered judgment on April 7, 2016, JA298, and Mr. Blankenship filed a notice of appeal that same day, JA305. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Proof of conspiracy to violate 30 U.S.C. § 820(d) requires proof of an intention to "willfully violate[]" federal mine standards, and proof of the willfulness *mens rea* requires proof that the defendant agreed that he or his conspirators would do something the defendant knew to be a crime. Did the district court's instructions erroneously allow the jury to convict Mr. Blankenship for conspiracy without proof of that *mens rea*?

2. An indictment for conspiracy to commit an offense under 18 U.S.C. § 371 must include each element of the substantive offense that is the object of the conspiracy. Was the superseding indictment insufficient because it did not identify which of the hundreds of mine safety regulations in Title 30 of the Code of Federal Regulations Mr. Blankenship conspired to willfully violate or allege the elements of any mine safety standard?

3. When new matter has been elicited during redirect examination of a prosecution witness, a defendant has a constitutional right to recross-examination so that the defendant may cross-examine on the new matter. Did the district court err in denying recross-examination of the government's key witness regarding new matter elicited during redirect examination: (a) previously unmentioned statements by the defendant regarding the alleged conspiracy; and (b) the details of forty-two new MSHA citation exhibits and the defendant's knowledge of them?

4. This Court's decisions prohibit jury instructions attempting to explain the meaning of reasonable doubt unless the jury has requested an explanation. Did the district court err in giving the jury an unsolicited instruction explaining reasonable doubt in terms equivalent to a preponderance of the evidence standard?

STATEMENT OF THE CASE

A. Overview

In April 2010, an explosion at the Upper Big Branch (UBB) mine in West Virginia took the lives of 29 miners. Beginning immediately after the disaster and before any investigation, President Obama, senior pubic officials, the media, the United Mine Workers, the Mine Safety & Health Administration ("MSHA") and others blamed Massey Energy and its CEO, Don Blankenship. Mr. Blankenship fought back publicly and in 2014 released a documentary film explaining that the cause of the explosion was a natural gas inundation in the mine made worse by

MSHA's insistence on a ventilation plan that forced the mine to reduce ventilation where miners were working (an insistence by MSHA confirmed by government witnesses at trial, JA1328-75, JA1415-16). The film infuriated Blankenship's critics. United States Senator Joe Manchin said Blankenship had "blood on his hands." Protestors picketed the U.S Attorney's Office demanding prosecution. ECF 82, 122, 189.

On November 13, 2014 – over four years after the UBB disaster – the government obtained an indictment. JA62-104. The government thereafter obtained a superseding indictment, JA105-45; all further references herein to the indictment are to the superseding indictment. Count one charged a conspiracy to do two things: (1) to violate 30 U.S.C. § 820(d) by willfully violating safety regulations; and (2) to defraud the United States by thwarting MSHA inspections. JA138-42. Counts two and three charged securities fraud and false statements to the SEC based on the company's statements that it "did not condone" regulatory violations and that it strived to comply with regulations. JA143-45.

After a six-week trial, the jury deliberated for ten days and twice announced deadlock, ultimately acquitting on all charges other than the count one conspiracy to willfully violate mine safety regulations. That conviction, coming after two deadlock notes and in the other circumstances of this case, merits close appellate scrutiny.

The Southern District of West Virginia was saturated with prejudice against Mr. Blankenship from animosity generated over many years by the media and by his political and ideological opponents, increasing dramatically after the UBB disaster. *E.g.*, ECF 122 & 384. Trial was held in Charleston, where the families of miners who died in the UBB disaster maintained a courtroom vigil during the trial, constantly in the eyes of the jury. Nominally the prosecution was not about blame for the disaster, JA316, JA1425-26, JA1551, but the UBB explosion was the reason for the prosecution which in reality was all about responsibility for it.

The United States Attorney personally participated in the trial and argued to the jury. On the return of the verdict, the United States Attorney resigned to run for Governor. Both the former United States Attorney and the Assistant who also prosecuted the case made a post-trial appearance together on "60 Minutes," comparing Blankenship to the kingpin of a drug organization and Massey to a criminal enterprise. *See* Sentencing Hr'g Tr. 51-52.

The indictment advanced a novel prosecution theory, attempting to define a crime where there was none. It sought to criminalize management decisions about budgets for hiring miners and production targets, *e.g.*, JA1591, contrary to the law enacted by Congress. The prosecution asked for and received jury instructions that made it unnecessary for the jury to determine whether Mr. Blankenship intended that anyone violate safety regulations or intended to commit a crime, JA1556-57,

even though willfulness is the *mens rea* prescribed by the law. The novel instructions were particularly important to the government because there was powerful evidence from the government's own witnesses that the defendant did not conspire to willfully violate safety standards and that he insisted on compliance with safety regulations and pushed personnel for improved safety performance. *E.g.*, JA568-69, JA580, JA717, JA1409.

There is an obvious danger for unfair conviction when a man who is unpopular in parts of the community is prosecuted in the wake of – but ostensibly not for causing – a terrible tragedy. This brief shows that the conviction here was unfair and must be reversed because of erroneous legal rulings at trial that conflicted with clear precedent and permitted conviction notwithstanding manifest shortcomings in the government's prosecution theory and in its proof.

B. The Offense Conspiracy Charged In Count One

The indictment contained boilerplate allegations of a conspiracy to routinely willfully violate mine safety regulations at the UBB mine in violation of 30 U.S.C. § 820(d). JA138 (¶¶ 87 & 89). The rest of the indictment made clear, however, that the conspiracy involved devoting too few company resources to reducing non-willful violations that occurred in the mines. *E.g.*, JA139 (¶¶ 92-93). There was no allegation that Blankenship and his alleged conspirators believed they were violating and intended to violate the law.

Paragraphs 11 through 15 broadly summarized mine safety standards. Those standards concerned such things as ventilation, explosive coal dust and safety examinations. JA109-10. Paragraph 100(j) alleged that overt acts in furtherance of the conspiracy consisted of safety violations cited by MSHA and described in paragraphs 16 to 36. JA142. The safety violations in paragraphs 16 to 36 mostly concerned violations of the standards broadly summarized in paragraphs 11 through 15. JA111-18. Paragraphs 24, 26, 30 and 36 summarized MSHA citations for violations, alleging not that Blankenship or a co-conspirator committed them but variously that they had "several causes, including" – or that "[a]mong the causes" were – inadequate staffing and "the imposition and aggressive enforcement of coal-production quotas." JA113-14, JA116, JA118.

None of the paragraphs – 11 through 15, 16 through 36, or any other – cited a federal regulation containing a mine safety standard that any conspirators agreed to violate or set out the requirements of a regulation. None of these paragraphs alleged that MSHA ever determined that any citation was for a willful safety violation.

C. The Object Of The Offense Conspiracy: Willful Violation Of A Mine Safety Standard

The object of the conspiracy was a violation of 30 U.S.C. § 820(d). That statute makes it a crime to "willfully violate[]" a federal mine safety standard. JA138 (¶ 87). The Mine Safety and Health Act (the Mine Act) authorizes the

Secretary of Labor to promulgate mandatory mine health and safety standards. 30 U.S.C. § 811. The mandatory health and safety standards applicable to underground coal mines are published at 30 C.F.R. Part 70. Those regulations fill over 200 pages of the most recent volume and include hundreds of different standards, many with subparts.

The Mine Act has both civil and criminal provisions. Sections 820(a) & (b) authorize the imposition of civil penalties on a mine operator that violates a safety standard or fails to correct a known violation. Such civil violations are pursued through citations issued by MSHA inspectors. Section 820(c) provides for civil *or* criminal liability for officers of a corporate operator if they "knowingly authorized, ordered, or carried out [a] violation." The indictment did not charge, under section 820(c), that Blankenship ever "authorized, ordered or carried out" a safety violation. It charged, instead, a conspiracy to violate section 820(d), which criminally punishes a person who "willfully violates a . . . safety standard." By charging only conspiracy, the government was not hamstrung by its inability to prove the completion of the object offense – the *willful* violation of a safety standard proscribed by section 820(d) – during the more than two years that paragraph 1 of the indictment alleged as the time frame of the conspiracy. But it still remained for the government to prove that Blankenship agreed that he or another conspirator would commit a willful violation.

D. Pretrial Motions

The defense moved to dismiss the count one offense conspiracy charge because, although it summarized certain mine safety standards relevant to alleged overt acts, it did not specify the safety standards and their requirements that the conspirators agreed to violate and thus did not allege an essential element under section 820(d), violation of "a mine safety standard." ECF 204. The government responded, not that the indictment identified the standards, but that it was unnecessary to do so. "No listing of specific standards is required to allege this object, and none would be required to prove it." JA147. The government added that the indictment gave "more than sufficient notice of specific safety standards that were violated in overt acts furthering the conspiracy." JA148. The court denied the motion to dismiss, ruling that the indictment adequately charged a conspiracy to defraud, which was not an issue raised by the motion. JA173.

The defense renewed the motion to dismiss, ECF 299, after the government admitted in opposition to another motion that it needed to prove the elements of "the very standards Defendant is charged with conspiring to willfully violate." JA182. Contradicting its earlier position, the government said that it would ask the court to instruct the jury on the elements of particular mine safety standards contained in the C.F.R., many of which were not even implied by a general discussion of standards in the indictment. JA185. The court denied the renewed

motion, evaluating the sufficiency of allegations of overt acts, not the sufficiency of allegations of each element of the offense. JA205-07.

The defense moved *in limine* to exclude evidence concerning civil citations issued by MSHA for non-willful safety violations because such violations are subject to civil penalties under 30 U.S.C. § 820(a) and are not crimes. ECF 311. The defense argued that the citations were irrelevant to the charged offense conspiracy, and, to the extent Blankenship's knowledge of the citations might be relevant to the truth of the statements charged as false in counts two and three, the probative value of the evidence was outweighed by the potential for prejudice and for confusing the jury about the mental state required to violate section 820(d). *Id.* at 5 (the jury might "seek to punish Mr. Blankenship for the non-willful violations"). The defense also filed a written objection before trial to the admission of the citations on hearsay and Confrontation Clause grounds. ECF 399. Even though no citation referred to a willful violation and no inspector who wrote a citation was called as a witness, the court admitted the citations. The court admitted the citations with a limiting instruction that they could be used only as proof of notice to Blankenship, not that violations occurred. *See* JA309-10, JA339-45, JA354-55.

E. Prosecution and Defense Theories At Trial

The government built its case on a record of citations for violations at UBB and asked the jury to attribute that record to a conspiracy. It repeatedly referred to MSHA citations as proof of the commission of violations at UBB, *e.g.*, JA1566, JA1585-86, JA1594, even though the citations and charts were not admitted for their truth, *e.g.*, JA342-45, JA1509, and none described a violation as willful, JA352-53, JA707-08, JA1376-77. Prosecutors did not call a single witness with knowledge of facts concerning the civil citations mentioned in the indictment or those introduced as evidence at trial. It produced a custodian from MSHA's headquarters who brought records of citations from MSHA's database. The custodian also prepared charts to illustrate the government's argument that UBB's citations were numerous. *E.g.*, Tr. 432-33, JA347, JA1866-1901. The government did not call a single witness who testified that Blankenship authorized or intended any violation described in any citation. *Cf.* JA522, JA535, JA542, JA555-56, JA1415.

In its rebuttal closing, the government argued that its case came down to UBB's record of safety violations, Blankenship's knowledge of it, and his "power to put a stop to the vast majority of the safety violations at UBB if he were willing to spend a little bit more money and take a little bit more time to devote to following the safety laws" and "taking actions and imposing policies and denying

requests that he knew" would continue to allow violations to occur. JA1585-86. The prosecutor "boil[ed] the entire case down to one question: . . . Do you believe that the defendant and his 'yes' men at Massey had an understanding . . . that safety laws would be overlooked at UBB when it was profitable to overlook them?" JA1586-87.

The prosecutor acknowledged that it was "probably true" that "the defendant didn't want to have safety violations." JA1593. The government hinged its contention that the "majority of the violations" at UBB were willful on special jury instructions (fully described *infra*) defining the duty of a "person with supervisory authority over a mine" to prevent violations. JA1590-91. The government argued: "it's not legal just to sit back, for somebody who's running a coal mine to just sit back and let violations happen. There is an affirmative duty to follow the safety laws." JA1591 (referring specifically to page 41 (JA236) of the jury instructions).[1] The prosecutor argued that Blankenship "personally violated the mine safety laws" and "that the mine was breaking" mine safety standards "and he knew that the majority of those violations could have been prevented if he had just provided enough coal miners and enough time to follow the law." JA1591.

[1]In closing, the government displayed this slide: "The Defendant had a DUTY to see that his mines complied with the mine safety laws." JA272; *accord* JA1562, JA1563, JA1565, JA1566; JA1568; *see* JA1508 (response to Rule 29 motion). The government also elicited testimony about a duty to prevent violations. JA804 (Blanchard); JA1429 (Ross).

The defense theory was that there was no agreement to violate or to willfully violate mine safety standards and, to the contrary, that Blankenship affirmatively undertook to reduce MSHA citations for violations.

The key witnesses offered by the government to establish the conspiracy actually did the opposite. Christopher Blanchard, a mining engineer who had headed the subsidiary operating UBB, JA470, JA476, denied the existence of a conspiracy to violate safety standards, JA518, not just in technical terms of conspiracy, but also in terms of an "unspoken agreement or understanding." JA1572, JA585. William "Bill" Ross, a former MSHA ventilation expert who was hired four months into the charged conspiracy to help Massey improve compliance with MSHA regulations, unequivocally affirmed that Blankenship did not want safety violations and that Blankenship was frustrated and genuinely concerned that citations were not being reduced. JA1315-21, JA1322, JA1395, JA1409-14. Government witnesses conceded Blankenship never suggested that anyone commit a violation, *e.g.*, JA568-69, JA585, JA1415, Tr. 736-37, and that he believed hiring more personnel was not the solution to reducing citations for safety violations, JA784-85, JA1415.

Government witnesses gave uncontradicted testimony that Blankenship ordered managers and their subordinates to reduce MSHA citations. JA397, JA518, JA533, JA568-59, JA572, JA717, JA1316-21, JA1322, JA1409, Tr. 4680-

84. They testified that, in the summer of 2009 in the middle of the alleged conspiracy, Blankenship ordered the company to undertake a rigorous Hazard Elimination Program headed by a former MSHA inspector. The purpose of the program was specifically to reduce the types of MSHA citations that had been issued at Massey mines. JA397-98, JA533, JA717, JA718-19, JA771-73, JA1395-1401, JA1631-33. When Massey COO Chris Adkins proposed a 20% cut in violations, Blankenship crossed the number out and substituted a year-end goal of 50%. JA1578 (discussing DX 5 (JA1603)). Blankenship wrote to Adkins that "we have to elevate the level of concern from the superintendents down through the mine foremen, firebosses, and back up to and including the group presidents with *violation reduction*." JA1605 (DX 9); *see* JA1577-78 (discussing DX 9).

F. The Evidence At Trial

The evidence principally consisted of: (1) testimony by miners about conditions at UBB; (2) MSHA citations issued to UBB and to other Massey mines, comparisons of the number of citations at UBB and Massey with those at other mines, and internal daily violation reports summarizing the number and type of violations in Massey's mines; (3) documents and audio-recordings showing that Blankenship was involved in the management of mines, including UBB, and that he gave directives regarding coal production and profitability; (4) Blanchard's

testimony; (5) Ross' testimony and (6) documents and testimony concerning the company-wide Hazard Elimination Program.

1. Miner Testimony

The government called nine former UBB miners to testify about conditions they saw in the mine. The miners testified to skepticism about Massey's commitment to safety, *e.g.*, JA325-26, JA327, JA374-75, JA382, JA441, JA447, pressures to produce, *e.g.*, JA378-79, JA408, JA409-11, and that they were not aware of Massey's Hazard Elimination Program, *e.g.*, JA382, JA391, JA441. In an effort to establish that the conditions described by some of the miners on certain dates violated mine safety standards, the government had the miners read MSHA citations issued on different dates, often for different parts of the UBB mine, and asked whether the conditions were similar to those described in the citations. JA386-89 (overruling objection to miner reading citation concerning entirely different section of the mine), JA421-23, JA428-32 (citations issued after miner left UBB). The district court denied a motion to strike the miners' testimony as unconnected to Blankenship and the alleged conspiracy. JA 284 at n.2, JA1513-18; *see* JA375-76, JA415-16, JA463.[2]

[2]The government introduced a miner's testimony that he was told to work despite insufficient airflow. The government proffered that the mine supervisor, Coalson, who gave that direction was a co-conspirator, JA380, but never proved the connection, JA1085-87 (suggesting Coalson was a victim, not a conspirator).

2. Citations

Over objection, the government introduced exhibits concerning citations through Tyler Childress, an MSHA custodian who retrieved records from an MSHA database. Tr. 432-33, JA347. Although the government's case was constructed atop these civil citations, the government did not produce a single MSHA inspector who had written any of the citations in evidence at trial.

Childress prepared charts, GX 57 through GX 64, based on records he retrieved from an MSHA database. GX 57 summarized citations issued to UBB during the indictment period, January 1, 2008 to April 9, 2010. JA1866. GX 58 summarized the disposition of the citations. JA1867. GX 59 summarized citations issued to Massey and to UBB in particular in 2009. JA1868. GX 60 presented the rate of violations per "inspection day," comparing UBB to an average for all underground mines. JA 1869. GX 61 and 62 compared the number of unwarrantable failure orders issued to UBB with the number issued to other mines. JA1870-71. GX 63 and 64 compared citations and orders issued to UBB with those issued to another mine. JA1872-73. GX 65-78 listed citations issued to UBB during the indictment period in a form extracted from MSHA's database rather than the actual citations issued by MSHA inspectors. JA1874-1901. GX 445 (JA1987-2016), a table comparing Massey citations to those at other companies, was created by Childress after he was excused and was admitted over

objection later in the trial without a witness. JA1452-67 & JA1509-10. None of the UBB citations reflected in the documents was issued for a willful violation. JA352-53, JA707-08, JA1376-77.

The court overruled defense objections and admitted the citations and tables "not for the truth of whether or not there was, in fact, a violation" but for the defendant's "knowledge and intent." JA349; *see* JA342-45 (jury cannot consider citations as evidence that violations of law occurred), JA354-55 (jury could not "consider this evidence to determine that there were actual violations of the mining laws"), JA 927, JA1475-82. The court admitted the citations conditionally, awaiting proof that Blankenship had notice of their actual contents, including particularly the narration of facts in each one as to alleged violations, and proof that he was aware of information comparing UBB and Massey to other companies. JA348-51, JA1475-82. The government never produced that proof. JA1501 ("I have no evidence that he received a citation"), JA1487-1500, JA1502-04, JA1519-21.

Despite limiting instructions, the government used and argued the citations for the truth of the matter asserted – that Massey and UBB actually violated mine safety standards. The jury would have understood the charts and tables comparing UBB, Massey and competitors to refer to the relative numbers of actual violations. *E.g.*, JA1869 (comparison of "Upper Big Branch versus all underground mines . . .

Violations per inspection day"). The only evidence the government presented of Blankenship's knowledge of comparisons was GX 83, which Massey had prepared to compare violations from 2007 to mid-2009 to competitors. The government never claimed that Blankenship had knowledge of the information presented in the charts and the tables that it had created to make comparisons.

In closing argument, the government repeatedly used hearsay proof – particularly GX 445 – for the truth that violations persisted or increased at Massey. JA1564 (referring to UBB being "caught and cited" for violations), JA1566 (UBB received 836 "violations" that could have been prevented with more staffing), JA1584 ("year after year, the safety violations kept going up" and were worse than other companies), JA1585 (describing UBB as the "site of hundreds of serious preventable safety violations, including the most unwarrantable failure orders of almost any coal mine in America"), JA1593 (referring to Massey-wide total of "safety violations . . . year after year"), JA1594 (indirectly referring to GX 445 to discuss increase in violations); *see* JA1561 ("under his leadership, Massey was an organization that year after year was *cited for* thousands upon thousands of preventable violations of mine safety laws.") (emphasis added).[3] The court denied the defense motion for a mistrial. JA1600, Tr. 5989-91.

[3]The government's notice evidence actually demonstrated Blankenship's determination that Massey reduce MSHA citations. The notice evidence was created at Blankenship's insistence. Tr. 4680-84, JA1792 ("I was with Don

3. Documents and Audio-Recordings

The government introduced documents sent to or by Mr. Blankenship, both to show his involvement in mine operations and to show that he set policies emphasizing coal production. *E.g.*, JA1902, JA1904, JA1920, JA1921, JA1923, JA1927, JA1929, JA1930, JA1931-32.

GX 79 was a memo from Blankenship to mine superintendents in 2005, years before the indictment period, in which he told them not to do anything other than run coal. JA1902. A follow-up memo, GX 79A, a few days later emphasized that safety was primary and production was secondary. Rather than forbidding safety-related activity such as construction, the memo urged the superintendents to "make every effort to do those jobs without taking members and equipment from the coal producing sections that pay the bills." JA1903.

In a memo to Blanchard, Blankenship warned against engineers' tendency to focus on long-term ventilation planning that could be addressed later, and in that

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yesterday. I know he is beating you on violations. Two things: 1. He brought up a couple of times with Mark and me that he wants a daily report on violation . . . . 2. One of the Board action items was: 'Create an action plan for each type of violation; set up a meeting to include Mr. Blankenship and Mr. Suboleski.'"), JA1639. The reports began in April 2009, during the charged conspiracy, and came to include information about individual citations at individual mines in August 2009, after the Hazard Elimination program began and the company announced its goal of reduction violations by 50 percent. JA533, JA1631-33, JA120 (¶ 43). The reports summarized information about citations but would not "have told him [Blankenship] the specific condition or practice that resulted in" a citation. JA1483, JA1487-1500; *see* JA1472-74, JA1475-82.

context wrote a note that Blanchard explained was not about compromising safety compliance: "We'll worry about ventilation or other issues at an appropriate time." JA1924 (GX 160). Blankenship protested slow progress when the mine was "acting like construction sections" by cutting too much rock. He instructed Blanchard to "[g]et as low as possible and run coal." JA1926 (GX 162); *see also* JA1925 (GX 161). Another time, the note read: "Run coal. Don't bolt for the year 2525." JA1927 (GX 163). Another memo stated that the "Idea is to stay in coal seam with low equipment. Do not cut any overcasts. Do not tear up the equipment okay?" JA1928 (GX 164).

The government introduced 20 excerpts from approximately 1,600 audio tape recordings that Mr. Blankenship had made of his conversations. JA1484. The government argued that these recordings were incriminating because they established that Blankenship closely managed Massey's operations and that he cared about his compensation and company profits. *E.g.*, GX 109A; GX 111A; GX 148A; GX 127A.

Blanchard, the recipient of the memos and a participant in some of the recorded conversations, denied that any of the memos or audio excerpts – or any communication from Blankenship for that matter – directed him to violate safety regulations or implied that he should. JA517, JA522-23, JA548, JA555-57. He testified that a document concerning safety compliance, GX 167, documented a

meeting that left no doubt that Adkins and Blankenship expected the presidents at this meeting to instruct the people under them to follow the regulations. JA567-71. Blanchard similarly explained that other notes were not instructions to violate regulations. *E.g.*, JA524-25, JA534-35 (explaining GX 160), JA491, JA553-54 (explaining GX 163), JA546-49 (discussing GX 166), JA549-51 (explaining GX 157), JA558-61 (discussing GX 154). For example, Blanchard explained the instruction not to "cut overcasts" and "not [to] tear up the equipment" was not an instruction to stop building overcasts or complying with ventilation requirements and, as Blanchard noted, one can "shoot" overcasts, as opposed to "cut[ting]" them, which avoids "tear[ing] up the equipment." JA495, JA526-29, JA536-41 (discussing GX 164).

4. Christopher Blanchard

Blanchard was the government's key witness. He had been head of the Massey subsidiary that owned and operated the UBB mine, among others. JA470. The only witness who the government claimed was a conspirator, JA417, he was immunized on November 11, 2014, the day before he testified in the grand jury to avoid prosecution, JA492, JA520, JA1777.

Blanchard testified that some mine safety violations at UBB could have been prevented with more miners to carry out safety-related tasks and that he requested miners, during the budgeting process, but did not always get as many as he

requested. JA472-73, Tr. 2297. On cross-examination, however, Blanchard could not say how many miners he had requested, Tr. 3170-72, acknowledged that he may have had as many or more miners as competitors had, JA993, and also acknowledged that he often had more miners than had been budgeted by the company, JA1824-26. Asked if there was "an understanding at UBB that a certain level of safety violations that could have been prevented were instead going to be tolerated," he testified "that a certain number of safety violations would be *written* that could have been prevented." JA475 (emphasis added). He believed "there was an understanding that it was cheaper to – or it was less money to pay the fines for the safety violations than the cost of preventing *all* the violations," and he thought Blankenship "shared the same opinion." JA475-76 (emphasis added). The government never asked whether Blanchard had agreed with Blankenship to willfully violate safety regulations.

Blanchard described incidents in which Blankenship had criticized the way he was running UBB, such as faulting him for not reopening a section of the mine that had been closed due to water blocking airflow. He testified that Blankenship told him that he "was letting MSHA run my coal mines." JA485. On cross-examination, however, Blanchard agreed "he wasn't saying that you were to incur or violate the regulations." JA786. Blanchard also testified that, as a result of this episode, the mine did not operate illegally; instead, in compliance with an

instruction from Blankenship, the mine ended up doing more than MSHA required. JA714-16, JA787, JA1781. The government elicited testimony that Blankenship criticized Blanchard more often about production and costs than about mine safety violations. *E.g.*, JA501-02.

On cross-examination, Blanchard unequivocally denied the existence of a conspiracy, whether explicit or tacit. He said "no" when asked if he "conspire[d] with Blankenship to commit willful violations of the mine safety regulations," JA518, denied that he had ever committed a willful violation himself, JA519, denied that there was an understanding with Blankenship "that it was acceptable to get violations of citations," JA535, stated that he knew that Blankenship and Adkins, Massey's COO, "expected [him] to keep, to the extent [he] possibly could do so, the mine in compliance with MSHA regulations," JA540-41, and testified that he received pressure from Adkins and Blankenship to explain why the mine was getting citations, JA574-84, "because they wanted the hazards eliminated and the violations reduced," JA580. He explained that they "didn't have an agreement or understanding;" instead, he thought "[they] both realized that violations would be written," because violations are inevitable. JA585. Asked if he had an "unwritten understanding" that Blankenship "instructed you or wanted you to have violations," Blanchard answered, "No, sir." JA585; *see* JA704-05, JA706, JA712-13 (denying that Blankenship caused any of the citations issued to UBB or that

there was a "conspiracy or an understanding to violate the MSHA regulations" resulting in certain citations), JA523 (cost to get to zero citations would be "an impossible amount of money"), JA783 (told government he had not participated in a conspiracy to commit willful violations), JA785-86 (additionally denying an unspoken agreement "to violate the mine safety laws" and stating his understanding that Blankenship "wanted UBB to eliminate and reduce the hazards and reduce violations"). Contrary to the government's theory, Blanchard also testified repeatedly that he knew Blankenship and others like Adkins were working to reduce violations and expected him to do the same. JA518, JA533, JA568-69, JA572, JA717, JA728-29, JA760, JA771.

Blanchard also testified on cross-examination to instances in which Blankenship or Adkins contacted him about violations and where he and other UBB managers imposed disciplinary action on those responsible. JA573-699, JA702-03. Blanchard testified that he reported that he had moved a safety director to the mine because he understood "that Mr. Blankenship wanted the accidents and violations to be reduced." JA723-26; *see* JA1760-61. He also understood from the Hazard Elimination Program that Blankenship wanted to reduce violations by finding hazards and bad practices and correcting them, and he was receiving pressure from above to do so. JA727-30.

Blanchard described efforts to reduce mine safety violations by increasing inspections by safety directors. *E.g.*, JA717, JA718-21, JA727-29, JA775-76; 1765-66. He explained that the size and complexity of, and thus the number of inspections at, UBB had increased over time, so that an increase in citations did not imply indifference to safety or greater carelessness. JA777-78. Addressing specific citations (such as for violations of the ventilation plan), Blanchard denied that Blankenship had instructed him to violate the plan or had caused the violations. JA781-82. Blanchard did not testify that Blankenship wanted him or anyone to violate safety regulations or that he, Blankenship or anyone else ever did so.[4] Blanchard testified that he never received a single communication from Blankenship to ignore safety compliance. JA517, JA522-23, JA555-57.

The government's redirect examination took a day and a half and was substantially longer than the direct – 381 transcript pages as compared to 284. Blanchard agreed that he was "telling the truth" when he testified in the grand jury that it was "the implicit understanding" at Massey and at UBB, "that it was often cheaper simply to pay the fines that came along with violations than it was to spend the money that would have been necessary to follow the law," that

[4]A note on GX 173 regarding a request to construct an airshaft that Blankenship did not believe was necessary read "Denied for now." JA1933. Blanchard testified that he never told Blankenship that he needed the airshaft to mine safely, that MSHA did not require the airshaft, and that construction of the proposed airshaft was not required to comply with safety standards. JA544-46.

Blankenship "didn't do anything to dissuade" that understanding, and that it was "the implication" of "words to the effect" from Blankenship "that he saw it as cheaper to break the safety laws and pay the fines than to spend what would be necessary to follow the safety laws." Blanchard also affirmed his grand jury testimony that Blankenship had spoken unspecified words to the effect that "safety violations were the cost of doing business the way he wanted it done," and that "there was an understanding that a certain level of MSHA and state violations were tolerable." JA788-95.

On redirect, the government also questioned Blanchard extensively on details of forty-two new exhibits – citations issued to UBB. GX 328-29, 331, 339, 349, 350A, 351-60, 362-63, 365-70, 376-78, 381-88, 390, 394. In addition to asking him if he disagreed with the citation, even if he had no basis to agree or disagree, the government asked if the citation was "reflected on" reports given to Blankenship after leading Blanchard through detailed questions about the contents of the citation that were not included in the daily violation reports that Blankenship received. *E.g.*, JA877-92.

Defense counsel asked for leave to cross-examine Blanchard about the new material elicited on redirect. JA1164-76, JA226-29. The defense sought an opportunity to bring before the jury the circumstances under which Blanchard had given his elliptical and tightly-negotiated answers to questions in the grand jury,

and how his new testimony about Blankenship's statements and his understanding of them was nonetheless consistent with his denial of a spoken or unspoken agreement to willfully violate mine safety standards. As to the new exhibits, the defense asked to address Blanchard's lack of knowledge of the facts described in the citations that he had been asked about, and also to address the large difference between the factual detail about a violation that is contained in an actual citation and the listing of citations in the daily violation reports routed to Blankenship. JA226-29. The court declined to permit any re-cross at all. JA1181-96.

5. William "Bill" Ross

Ross was a former miner and career (33-year) MSHA employee who came to Massey after he retired from MSHA in 2008 as district ventilation supervisor, with responsibility for improving Massey's MSHA compliance record. Ross reported directly to alleged co-conspirator Adkins, and his office was next to that of another alleged co-conspirator, Blanchard. JA1201-06, JA1264, JA1298, JA1323-26, JA1960. The centerpiece of Ross' testimony was a memorandum, GX 96 (JA1905-13), drafted by a Massey attorney memorializing Ross' candid, critical assessment of Massey's safety performance in a meeting with the lawyer and a Massey board member. In closing, the government described the first memo as the "single most important document in the case." JA1588.

Ross wrote a second memo (GX 97) after Blankenship asked him to propose solutions to the problems he had identified in his earlier memo. JA1262, JA1263; JA1914-17. Ross also wrote two memos critical of Massey's efforts to reduce violations in connection with the Hazard Elimination Program. JA2017 (GX 446); JA1961-63 (GX 191). There was no evidence that Blankenship ever saw the latter memos. JA1276-77, JA1283-87. Ross testified about a meeting with Blankenship in 2009 in which he also spoke candidly about safety violations. Ross proposed hiring an additional miner for each mine section, and Blankenship asked him if he knew how much that would cost. JA1290-91. Ross said he told Blankenship the one thing Massey could not afford was a mine disaster. JA1292.

Ross clarified that both the lawyer's memo describing his critical analysis and his memo proposing solutions resulted from requests that originated from Blankenship and were transmitted by e-mail to him and others by alleged co-conspirator Adkins. JA1803, JA1827. The lawyer's memo is organized around questions Adkins wanted answered, such as "How can we reduce our violations?" *Compare* JA1803 *with* JA1905-13. And the overall point of the lawyer and board member's meeting with Ross was to have an "open" conversation to gain Ross' "insight" to achieve the "[e]nd result" of "get[ting] [] violations numbers down." JA1803. Shortly after the meeting, Ross began to receive the daily violation reports, and he understood that Blankenship wanted his "insight" on how to "fix

the issues of the company." JA1394-95. Ross also testified that he could not think of a reason a man engaged in a conspiracy to willfully violate regulations would, in the middle of the conspiracy, begin to record every violation. JA1394; *see* JA573.

Ross discussed the message conveyed about compliance at the Hazard Elimination Program kick-off meeting, and stated that it was exactly the message that he wanted Adkins or Blankenship to deliver. JA1315, JA1395-1401. He testified that Blankenship was concerned about reducing mine safety violations. *E.g.*, JA1315-21; *see* JA1322 (agreeing Blankenship and Adkins wanted to reduce violations and get in compliance), JA1409 (stating that DX 528 confirmed his view that Blankenship was attentive to and unhappy about the citations), JA1415 (affirming that Blankenship "never suggested or implied that he wanted Massey mines or anybody in them to violate the law"). Ross agreed that Blankenship "wanted the operators of these mines to reduce the citations" and that he had been hired "to help them" do that. JA1298; *see* JA1395 (agreeing that "the company, and Mr. Blankenship specifically, wanted to fix the issues"), JA1322 (Blankenship and Adkins wanted subordinates to "reduce the violations or get in compliance").

Ross conceded that he had only an anecdotal basis for recommending hiring more miners to improve safety compliance, and that the statement that there were no "outby" people was an exaggeration. JA1377-79, JA1380-83, JA1385-86. He recognized that a staffing chart for UBB contained "outby" people that he had been

unaware of. JA1386-89. He had not made suggestions to change the staffing at UBB because he "didn't know the staffing at [UBB]." JA1384. Importantly, in view of the willfulness issue in the case and the prosecution's focus on failing to hire more miners, Ross acknowledged that Blankenship believed hiring more miners was *not* the solution to reducing citations and testified that "[t]hat's okay." JA1415; *see* JA784-85 (Blanchard testimony that Blankenship did not believe hiring more was solution to reducing citations).

The government's redirect examination principally challenged Ross' testimony that he believed that Blankenship sincerely wanted to reduce mine safety violations. To that end, the government presented Ross with evidence in the case of which Ross was largely unaware and statements that he was aware of but of which he had no personal knowledge. *E.g.*, Tr. 4377-85, 4474-86.

6. The Hazard Elimination Program

The defense established through government witnesses that, at Mr. Blankenship's direction in the spring and summer of 2009, Massey undertook a company-wide effort to reduce safety violations. JA1601-03, JA1605, JA1631-32. Gary Frampton, a former MSHA inspector, headed the program known as the Hazard Elimination Program. JA691-92, JA736-77, JA1767. Although the court permitted the defense to elicit limited testimony about the program, JA533, JA719, JA771-73, JA1315, JA1395-1401, it barred admission of a videotape of the

meeting at which Massey launched the program and put management's full weight behind it. The court ruled the tape inadmissible under Fed. R. Evid. 803 and 403, because there was a religious invocation at the meeting, because Adkins held a miner's child to emphasize that the miners had children at home and the importance of safety, and for other reasons. JA767-70, JA1185-87, JA1396-97.

Government witnesses testified on cross-examination that the program was sometimes referred to as a campaign to "kill the spider," meaning to eliminate violations at their source by fixing hazards as soon as they were observed. Tr. 1352-53. David Hughart, former president of a Massey subsidiary, attended the kick-off meeting for the Hazard Elimination Program and testified that he believed it was a serious effort to reduce safety violations. JA397-98. He created a plan for his subsidiary to implement the program. JA1634-35. And Hughart testified that the program "put higher awareness on safety" and "improved conditions." JA399.

Blanchard testified that Adkins told the mine supervisors at the meeting: "We don't want you to bend the rules to get that extra ton of coal," and that, "I'm the main guy over all production and I'm telling you not to violate the law." JA771-73. Ross reiterated that these statements were made, JA1397-1401, and that this was the message that he had urged Blankenship and Adkins to make clear, JA1315, JA1399. In response, Blanchard directed his safety directors to move their offices to UBB to work more closely with the miners and to solve problems

proactively. JA719-23, JA1760-61. He instructed his safety directors to "find the hazards, find the bad practices, and correct them," as he "understood that Mr. Blankenship wanted [him] to do." JA726-30, JA1765-66. Massey's newly appointed compliance officer Gary Frampton, Adkins and Blankenship followed up with Blanchard about hazard elimination. JA572, JA730-33, JA734-44, JA745, JA746-64, JA1768-76, JA1788-90, JA1797-99. When Blanchard wrote that his mines would not run unless they had 100% compliance, Blankenship wrote back: "You act [as if] this were an epiphany. If you don't demonstrate you care, they won't care." JA1786-87.

G. The Jury Instructions

The defense objected to three instructions that are relevant here.

1. Regarding "willful violation" of mine safety standards, the government proposed four special instructions "for persons with supervisory authority," a term not found in section 820(d).

> A person with supervisory authority at or over a mine willfully fails to perform an act required by a mandatory safety or health standard if he knows that the act is not being performed and knowingly, purposefully, and voluntarily allows that omission to continue.
>
> A person with supervisory authority at or over a mine also willfully violates a mandatory mine safety or health standard if he knowingly, purposefully, and voluntarily takes actions that he knows will cause a standard to be violated
>
> or knowingly, purposefully, and voluntarily fails to take actions that are necessary to comply with the mandatory mine safety or health standard,

> or if he knowingly, purposefully, and voluntarily takes action or fails to do so with reckless disregard for whether that action or failure to act will cause a mandatory safety or health standard to be violated.

JA191-92.

Unlike the usual instruction defining "willful" to require the defendant to know that the conduct was generally unlawful, the government's special instructions for supervisors defined "willful" in terms of knowing conduct or reckless disregard for its consequences. The defense objected, JA1537-45, and unsuccessfully requested an instruction following the requirement explained in *Bryan v. United States*, 524 U.S. 184 (1992), that willfulness requires proof of knowledge that conduct is unlawful and thus an intent to break the law, JA1548.

The government attributed its special instructions for supervisors to *United States v. Jones*, 735 F.2d 785 (4th Cir. 1984), but, as the defense noted, *Jones* involved a different offense and, after *Bryan*, was no longer good law on the meaning of willfulness in any event. JA1537. The court overruled all objections and gave the special instructions. JA1538, JA1555-57.

2. The government submitted a document containing mine safety regulations it wanted the jury to consider in connection with the offense conspiracy charge. JA238-68. The government thought the jury "may need all of these in" to show "for purposes of the record to show that the jury was instructed on all of the

standards that, that could apply to the testimony that came in about the miners from UBB." JA1527.

The defense objected: "These regulations never were presented to the grand jury." JA1528. Moreover, the standards in the exhibit were not identified in the indictment, nor were the elements of the standards alleged. JA1528. The defense objected to including the standards, whether the court read them as part of the instructions or provided them to the jury in written form. JA1529. The court overruled the objection and sent the set of mine safety standards to the jury with the instruction "[y]ou must review" them "during your deliberations relative to" the count one conspiracy. JA1553.

3. Over objection, the court included an instruction explaining the reasonable doubt standard. JA1530-31. "If the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, the jury of course should adopt the conclusion of innocence." JA1530. The court explained that the instruction tells the jury: "if, as you say, it's a tie, they must acquit." JA1531.

The court had given this instruction in previous cases. JA1531 (referring to court's prior instructions). The defense noted that its proposed instruction 32, JA197, as well as its proposed instruction 33, JA198, included other, traditional reasonable doubt instructions that might prevent the jury from interpreting the

court's instruction to mean that proof beyond a reasonable doubt is equivalent to a preponderance of the evidence. JA1533-35. The proposed instructions would have told the jury that reasonable doubt "is the highest burden of proof in our legal system," that the burden of proof is on the government and that the defendant "has no burden at all," and that reasonable doubt is "proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs." In addition to these other instructions, the defense also asked that the court clarify its instruction by telling the jury it must acquit even if the inference of guilt seems more plausible "if there remains reasonable doubt." JA1532.

The government defended the court's instruction as "serv[ing] the purpose of providing another definition or another expression of what reasonable doubt means" and as a "correct expression" of "one of the meanings of the concept of reasonable doubt." JA1532-33.

The court declined to clarify its instruction. JA1533. Citing the rule against explaining reasonable doubt, the court also "unhappily" declined to give defense-requested reasonable doubt instructions that might have ameliorated the dilution of the reasonable doubt standard inherent in the court's instruction. JA1534-35. The court thereafter gave its own reasonable doubt explanation to the jury. JA1552.

SUMMARY OF THE ARGUMENT

Mr. Blankenship's conspiracy conviction is infected with error and must be reversed. In its ambition to convict in the charged atmosphere following the UBB disaster, the government persuaded the district court to instruct the jury that it could convict on proof of less than the willfulness *mens rea* that the criminal law requires; to ignore the indictment's complete failure to meet constitutional pleading standards this Court repeatedly has explained; to deprive the defendant of his rights to confront and cross-examine a key prosecution witness on two very important matters first elicited by the government over the course of a day and half of redirect examination; and to violate this Court's repeated admonition against defining reasonable doubt. These errors resulted from basic flaws in the theory of the prosecution criminalizing management decisions and in the government's evidence about them, flaws the government could not survive without obtaining the rulings at issue here.

Although the boilerplate of the indictment charged Mr. Blankenship with conspiring to willfully violate mine safety regulations, the substance of the indictment and the government's approach at trial were based on a general failure to prevent future violations – a failure the government contended arose from the defendant's management decisions regarding production targets and staffing budgets. There was substantial credible proof that Blankenship wanted Massey's

mines to be safe, including hiring a career MSHA analyst to help Massey improve its compliance (even putting him to work at the elbow of other supposed conspirators) and launching a major initiative to reduce violations during the very period he was supposed to be conspiring to commit violations. The foundation of the government's misguided conspiracy theory was that Blankenship did not reduce citations for violations, even if he did not intend any violation to occur.

Congress has not made failing to prevent mine safety violations at some future time – by failing to increase operations budgets or otherwise – a crime. Under the provisions of 30 U.S.C. § 820(b)(2), even "reckless or repeated failure to make reasonable efforts to eliminate a known safety violation" that has killed or might kill is met with a civil fine. Congress did criminalize the commission of "willful[] violat[ions]," 30 U.S.C. § 820(d), and it made individual mine executives criminally liable if they have "authorized, ordered, or carried out" violations, 30 U.S.C. § 820(c). But the government obviously could not charge Blankenship with those substantive offenses. Instead, it wove a conspiracy out of dubious evidence of an "understanding" that the company would make economic decisions that would lead to or fail to reduce violations by mine personnel.

1. *Special willfulness instructions.* Special instructions defining willfulness were the key to winning a conviction for conspiracy to willfully violate mine safety regulations. The special instructions did two things. They equated the

failure to spend more to reduce future violations of safety regulations in general with willfully violating a mine safety standard. And they authorized the jury to find willful violations and to convict absent proof that Blankenship believed he was violating and intended to violate the law when, among other things, making management decisions about budgets and production targets. The special instructions thus authorized conviction whether or not Blankenship intended to violate the law and for a crime that Congress did not create.

The special instructions were directly contrary to *Bryan v. United States*, 524 U.S. 184, 192 (1992), which defined criminal willfulness as a *mens rea* requirement requiring at least that the government prove that "the defendant acted with knowledge that his conduct was unlawful." The special instructions impermissibly described willfulness in such terms as "reckless disregard for whether an action or failure to act will cause a mandatory safety or health standard to be violated," a standard that may be used in civil but not in criminal cases. *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 57 & n.9, 60 (2007).

2. *Insufficiency of indictment*. The indictment did not identify a single safety standard that Blankenship conspired to violate, willfully or otherwise. The Fifth Amendment grand jury right and the Sixth Amendment right to notice of charges require, however, that an indictment allege "all the elements of the criminal offense forming the object of the conspiracy." *United States v. Kingrea*,

573 F.3d 186, 192 (4th Cir. 2009); *accord United States v. Hooker*, 841 F.2d 1225 (4th Cir. 1988) (en banc). For a conspiracy to violate section 820(d), the elements are an agreement to "willfully violate[] a . . . safety standard." The standards define the prohibited conduct that the conspirators must have agreed to commit. Those standards are set forth in lengthy, complex regulations found in Title 30 of the Code of Federal Regulations. The generic charge here was the equal of charging a conspiracy to violate federal securities regulations, drug regulations or transportation regulations without saying which parts of which regulations the conspirators agreed to violate.

3. *Denial of cross-examination*. The district court refused to allow cross-examination of the government's key witness about testimony first elicited during redirect examination. The new testimony concerned statements Blankenship supposedly made about an understanding regarding safety violations. The new testimony also concerned forty-two new exhibits that were citations not previously mentioned or in evidence, inaccurately implying Blankenship's personal knowledge of the factual detail in them. The Sixth Amendment rights to confront and cross-examine "apply with equal strength to recross examination where new matter is brought on redirect examination." *United States v. Caudle*, 606 F.2d 451, 457-58 (4th Cir. 1979). There is no discretion at all to deny cross-examination on new matter. *Id*. at 458-59. The district court erroneously ruled

that it could deny cross-examination regarding the challenged testimony if redirect was within the scope of the cross-examination, but that is the wrong standard, as *Caudle* makes clear.

4. *Erroneous reasonable doubt instruction*. Over objection, the court gave a two-inference explanation of reasonable doubt that already has been condemned in other circuits: if the evidence "reasonably permit[s] either of two conclusions – one of innocence, the other of guilt – the jury should of course adopt the conclusion of innocence." That explanation of reasonable doubt violated this circuit's rule that, absent a jury request, reasonable doubt should not be explained. *United States v. Oriakhi*, 57 F.2d 1290, 1300 (4th Cir. 1995). As other circuits have held, the two-inference explanation erroneously implies that proof beyond a reasonable doubt is equivalent to a preponderance of the evidence standard permitting a guilty verdict if evidence of guilt outweighs evidence of innocence.

ARGUMENT

I. The District Court Erroneously Instructed The Jury That It Could Convict For Conspiracy To Willfully Violate Mine Safety Regulations Without Requiring Proof That Mr. Blankenship Understood His Conduct To Be Unlawful.

Although criminal willfulness instructions must require proof that the defendant "acted with knowledge that his conduct was lawful," *Bryan*, 524 U.S. at 191-92, the government persuaded the court to give erroneous special instructions for a "person with supervisory authority" that, among other departures from *Bryan*,

substituted "reckless disregard" instructions that the Supreme Court has held may be used in civil but not in criminal cases, *Safeco*, 551 U.S. at 57-58 & n.9, 60 (interpreting *Bryan*). The legal correctness of instructions is reviewed *de novo*. *United States v. Washington*, 743 F.3d 938, 941 (4th Cir. 2014).

A. Criminal Willfulness Requires Proof Of At Least An Awareness That Conduct Is Unlawful.

18 U.S.C. § 371 prohibits a conspiracy "to commit any offense against the United States." The essence of conspiracy is the agreement and intention to commit the object offense. *Iannelli v. United States*, 420 U.S. 770, 777 (1975); *Braverman v. United States*, 317 U.S. 49, 53 (1942). Conspiracy liability depends on proof that the agreement intended conduct satisfying all elements of the law the conspirators intended to violate. *Ocasio v. United States*, 136 S. Ct. 1423, 1429 (2016). The government need not prove attainment of the criminal object, but it must prove the defendant had "at least the degree of criminal intent necessary for the substantive offense itself." *United States v. Feola*, 420 U.S. 671, 686 (1975).

Here, the government had to prove "at least" that Blankenship agreed to "willfully violate" safety regulations. "As a general matter, when used in the criminal context . . . to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" *Bryan*, 524 U.S. at 191-92 (citation omitted). "'[W]illfully' is sometimes said to be 'a word of many meanings'" depending upon context. *Id.* at

191. In "highly technical" criminal statutes, willfulness requires knowledge of the specific law violated, not just general knowledge that conduct is unlawful. *Id.* at 194-95. For civil liability, willfulness typically includes reckless violation of a legal requirement. *Safeco Ins. Co.*, 551 U.S. at 57 ("standard civil usage"). But recklessness is not enough for even the lowest level of criminal willfulness. *Id.* at 57 & n. 9, 60. "It is different in the criminal law." *Id*. at 57 n.9.

Agreement on the usual meaning of criminal willfulness is reflected in this Court's post-*Bryan* decisions. *United States v. Bishop*, 740 F.3d 927, 933 (4th Cir. 2014) ("*Bryan* held . . . the Government must prove that the defendant acted with knowledge that his conduct was unlawful."); *United States v. Bursey*, 416 F.3d 301, 308-09 & n.8 (4th Cir. 2005) (same); *United States v. Bostic*, 168 F.3d 718, 722 (4th Cir. 1999) (must prove "bad acts with an appreciation of their illegality").

That same agreement is also reflected in the confessions of error by the United States in *United States v. Ajoku*, 2014 WL 1571930 (No. 13-7264), at *10 (brief), and *United States v. Russell*, 2014 WL 1571932 (No. 13-1757), at *6 (brief). The First and Ninth Circuits had affirmed convictions for willfully making false statements, relying on pre-*Bryan* decisions to sustain instructions that defined willfulness so that it did not require proof the defendant knew his conduct was unlawful. *United States v. Ajoku*, 718 F.3d 882 (9th Cir. 2013); *United States v. Russell*, 728 F.3d 23 (1st Cir. 2013). In the Supreme Court, the government

confessed error, acknowledging that "the general criminal-law interpretation of 'willfully' articulated in *Bryan* should govern." Br. for U.S. in Opp'n to Pet. for Cert., *Ajoku*, 2014 WL 1571930 (No. 13-7264), at *9-10, 13; Br. for U.S. in Opp'n to Pet. for Cert., *Russell*, 2014 WL 1571932 (No. 13-1757), at *10. The United States acknowledged that willfulness based on deliberate and knowing conduct but without knowledge that the conduct is unlawful "ordinarily applies only in the context of civil statutes." Br. for U.S. in Opp'n to Pet. for Cert., *Ajoku*, 2014 WL 1571930 (No. 13-7264), at *14; Br. for U.S. in Opp'n to Pet. for Cert., *Russell*, 2014 WL 1571932 (No. 13-1757), at *10. The United States nonetheless urged that Supreme Court review was not needed because the circuits might resolve their split "in light of the government's concession that a greater showing is required" to prove willfulness – "particularly because it appears that some of those courts have not considered the issue since this Court's decision in *Bryan*." Br. for U.S. in Opp'n to Pet. for Cert., *Ajoku*, 2014 WL 1571930 (No. 13-7264), at *19. The Supreme Court vacated both convictions and remanded. *Ajoku v. United States*, 134 S. Ct. 1872 (2014); *Russell v. United States*, 134 S. Ct. 1872 (2014).

In this case, the government likewise recognized that willfulness usually requires proof that the defendant knew his conduct to be unlawful. For count two (false statements), the government cited *Bryan* and proposed an instruction requiring proof that the defendant knew his conduct was "in a general sense,

unlawful. That is, the defendant must have acted with a bad purpose to disobey or disregard the law." JA193. In the charge conference, the government explained that it drafted its proposed instructions to be clear that different willfulness standards applied to counts one and two. JA1524. The court gave the correct *Bryan* instruction as to willfulness for count two, immediately after giving very different special instructions for the count one conspiracy to commit willful safety violations, underscoring the difference. JA1557.

Tellingly, the government also faithfully followed *Bryan* in the legal instructions it had given to the grand jury as to the count one conspiracy to willfully violate safety regulations in violation of 30 U.S.C. § 820(d). JA2028 (p. 13) & JA2048 (p. 4).

B. The District Court's Special Instructions On Willfulness Did Not Require Proof Of Knowledge That Conduct Is Unlawful.

Special instructions proposed at trial by the government for the count one object conspiracy eliminated the need for the government to prove and the jury to find that Blankenship knew his conduct was unlawful. JA191-92. The defense objected that the instructions diluted the required *mens rea* and did not convey that willfulness requires "that a violation must be committed with knowledge the conduct's unlawful," but the court overruled the objection and gave the government's proposed instructions verbatim. JA1536-1547, JA1548, JA1556-57. The special instructions are set out at page 31-32, *supra*.

The special instructions applied civil liability standards. The shift from criminal to civil willfulness is most glaring in the fourth and final special instruction – that a supervisor willfully violates safety regulations if he "knowingly, purposefully, and voluntarily takes action or fails to do so with *reckless disregard* for whether that action or failure to act will cause a mandatory safety or health standard to be violated." JA1556-57 (emphasis added). Given the prosecution theory that Blankenship's management decisions created circumstances in which those in the mines acted or failed to act in violation of safety regulations, the special willfulness instruction criminalized management decisions even if made without any subjective intention or expectation of committing a mine safety violation. Recklessness is based on the probabilistic relationship between conduct and effect. It does not require proof that a defendant knew of or intended the effect, or that he was aware that his conduct was unlawful. The reckless disregard standard dispensed with the need to prove that Blankenship knew his conduct would cause a violation of safety regulations, much less that his conduct was unlawful.

The instruction was reversible error for the same reasons that the reckless disregard instruction was reversible error in *United States v. Eilertson*, 707 F.2d 108 (4th Cir. 1983), a case decided before the Supreme Court required a heightened willfulness standard in tax prosecutions. *Eilertson* held it was error for the trial

court to permit a tax cheat charged with willful failure to file to be tried "on the theory of carelessness and reckless disregard" and to instruct the jury "using reckless disregard on the issue of willfulness." *Eilertson*, 707 F.2d at 109-10.

Safeco recognized the distinction between civil willfulness, which can be based on recklessness, and criminal willfulness, which cannot. *Safeco*, 551 U.S. at 57-58 & n.9; *accord*, *RSM, Inc. v. Herbert*, 466 F.3d 316, 325 & n.1 (4th Cir. 2006) (recklessness applicable to civil, not criminal, willfulness). The distinction exists because, "in the criminal law, 'willfully' typically narrows the otherwise sufficient intent, making the government prove something extra, in contrast to its civil law usage. . . ." *Safeco*, 551 U.S. at 60. Courts condemn absorption of civil law liability concepts to establish criminal liability as to regulatory offenses. *E.g.*, *United States v. Ladish Malting Co.*, 135 F.3d 484, 488 (7th Cir. 1998) (OSHA); *cf. United States v. Sasso*, 695 F.3d 25, 30 (1st Cir. 2012) (instruction erroneously diluted willfulness, permitting conviction if conduct had "natural and probable effect" of interfering with aviation, "regardless of whether the defendant *knew* that").

The other special instructions – the first three quoted at page 31, *supra* – did not use a reckless disregard standard but ran afoul of *Bryan* because they used a "knowingly" standard and did not require proof that Blankenship understood he was acting unlawfully and thus intended to break the law, and as to the third

instruction did not even require knowledge that conduct related to a matter governed by mine safety regulations.

The first special instruction was that a person with supervisory authority "willfully fails to perform an act required by a mandatory safety or health standard if he knows that the act is not being performed and knowingly, purposefully, and voluntarily allows that omission to continue." JA1556. Nowhere is there even a nod to what *Bryan* requires regarding awareness of illegality. Further, the instruction is tied to knowing conduct, and *Bryan* is clear that knowing conduct is not willful conduct.[5] Indeed, the instruction so dilutes typical criminal *mens rea* requirements that it permits a finding of willfulness, and thus a conviction, even if a person does not know that "the act" in question is required by safety regulations. Under the instruction, if a person knows that an action is not being taken and does nothing about it, he has acted criminally willfully so long as the action is required by safety regulations – whether he or she knows that or not.

[5]The words "knowingly, purposefully, and voluntarily" are alternative ways of expressing knowingly. *Bryan*, 524 U.S. at 192-93. They describe "'an act which is intentional, or knowing, or voluntary, as distinguished from accidental.'" *Id*. at 191 n.12; Br. for the U.S. in Opp'n to Pet. for Cert., *Ajoku*, 2014 WL 1571930 (No. 13-7264), at *14 (deliberately and knowingly have that intentionally and purposely have the same meaning as knowingly); JA1554 (instruction defining knowingly as "to act or participate voluntarily and intentionally"). Knowingly requires only "proof of knowledge of the facts" and does not require the "culpable state of mind" required by willfulness. *Bryan*, 524 U.S. at 192-93.

The second special instruction similarly addressed a person who acts "knowingly, purposefully, and voluntarily" and knows the act will cause a standard to be violated. JA1556. *Bryan*'s definition of willfulness is completely absent.

The third special instruction was even worse than the first and second, permitting a criminal willfulness finding only on proof that a person "knowingly, purposely, and voluntarily fails to take actions that are necessary to comply with the mandatory mine safety or health standard." JA1556. In addition to omitting proof of intent to violate the law as required by *Bryan*, the instruction does not require knowledge that particular action is even required by a safety standard. Under the instruction, if a person knows (*i.e.*, is not mistaken) that he is not doing something, a person has acted criminally willfully if safety regulations require certain action, whether the person knows that or not. That is much closer to strict criminal liability than to criminal liability conditioned on intent to break the law.

C. *United States v. Jones* Did Not Approve or Authorize The District Court's Special Willfulness Instructions.

The government has argued that the special instructions given in this case did not need to comply with *Bryan* because willfulness has a special meaning in the Mine Act, relying on *United States v. Jones*, 735 F.2d 785 (4th Cir. 1984). The Act, however, contains no indication that Congress intended willfulness to have a special meaning different from its usual meaning in criminal statutes, and *Jones* did not hold otherwise.

30 U.S.C. § 820(d) punishes an "operator who willfully violates" safety regulations. It contains no special definition of willfully. Section 820(d)'s structure parallels the firearms statute that was at issue in *Bryan* and that punished "whoever . . . willfully violates any other provision of this chapter[]." *Bryan,* 524 U.S. 188 n.6. There is no textual basis for distinguishing the Mine Act's identically-constructed liability provision from the statutory liability provision in *Bryan*. *Id*. at 192-93.

Section 820 as a whole confirms that willfulness in section 820(d) has its usual criminal law meaning.

First, section 820 distinguishes knowing and willful violations. Section 820(c) uses "knowing" rather than "willful" as the basis for imposing liability on an individual for authorizing, ordering or carrying out a mine safety violation. *See Jones*, 735 F.2d at 588 & n.4. Likewise, section 820(d) distinguishes between criminal liability for "willfully" violating a safety standard and criminal liability for "knowingly" violating administrative orders and decisions. Congress' choice of different liability triggers should be given effect, and applying *Bryan* as to the usual meanings of knowingly and willfully does so. *See* Br. for the U.S. in Opp'n to Pet. for Cert., *Ajoku*, 2014 WL 1571930 (No. 13-7264), at *14 (defining willfully to mean "deliberately and with knowledge" would give it the same meaning as knowingly and would "deprive th[e] term [willfully] of independent

effect"). Further, "[t]his court has held that 'because 'willful' generally connotes a conscious performance of bad acts with an appreciation of their illegality, . . . we can conclude that Congress intended to provide a different and lesser standard when it used the word 'knowingly.'" *Bostic*, 168 F.3d at 722 (citations omitted). The reverse is equally true.

Second, unless willful has its usual meaning, there is no difference between *civil* liability in section 820(b) and *criminal* liability in section 820(d). Section 820(b)(1) provides a civil penalty for an operator "who fails to correct a violation for which a citation has been issued." Section 820(b)(2) increases the civil penalty for an operator who is responsible for "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of" safety regulations that caused or could cause death or serious bodily injury. Both of these civil standards for imposing civil penalties for failing to correct cited violations and for reckless failure to eliminate known safety violations are equivalent to the district court's special instructions that criminal willfulness can be found based on proof of "allow[ing] [an] omission to continue," "fail[ing] to take actions that are necessary to comply with" safety regulations, or "take[ing] action or fail[ing] to do so with reckless disregard for whether that action or failure to act will cause a mandatory safety or health standard to be violated." JA1556-57. The instructions thus

disregard the statutory distinction between civil and criminal liability, a distinction that *Bryan*'s requirements for proof of criminal willfulness would preserve.

Unable to justify its special willfulness instruction based on the statute's actual text, the government relied on *United States v. Jones*. JA1537. *Jones*, however, did not consider the special instructions given in this case, did not involve a section 820(d) prosecution, and in any event must yield to *Bryan* and *Safeco*.

The very different instruction given in *Jones* is quoted in that opinion. 735 F.2d at 789 n.6. That *Jones* instruction was given verbatim in this case, JA1555-56, before the four different special instructions for supervisors were given, JA1556-57. The *Jones* instruction, which was given in a prosecution under section 820(c) for knowingly authorizing safety violations, was erroneous as a willfulness instruction in this section 820(d) prosecution because it did not require the jury to determine, as required by *Bryan*, whether Blankenship knew his conduct was unlawful. JA1548 (objection). Because the special instructions that were given here but not in *Jones* are also erroneous, the Court can reverse without even considering the instruction borrowed from the section 820(c) prosecution in *Jones*.

Jones was a prosecution under section 820(c) of agents of an operator for knowingly ordering a violation of safety regulations. *Jones*, 735 F.2d at 787 & n.1. This Court contrasted 820(c), which requires proof of a knowing violation, to

820(d), which requires proof of willfulness. *Id*. at 788 & n.4. The complication in *Jones* was that the indictment charging the section (c) violation erroneously alleged willful when it should have alleged knowing, and the trial court consequently instructed on willfulness. *Id*. at 789. This Court defined the determinative appellate issue as whether the trial court's instruction "allowed the jury to convict the defendants under a lesser standard of culpability than" required for a knowing violation. *Id*. The holding was that the instruction "set a level of behavior at least as culpable as that required to convict for knowing conduct" under section (c). *Id*. The Court did not purport to decide what would be a correct instruction in a prosecution for a willful violation under section (d).

This Court concluded that the instruction given in *Jones*, although couched in terms of willfulness, sufficiently conveyed the meaning of knowingly, quoting pattern jury instructions defining knowingly as "'an act . . . done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.'" *Id.* That is the same meaning that *Bryan* gives knowing and knowingly, in contrast to willful and willfully. This Court further referred to the meaning of "willful" in several civil cases, not because they set the standard for criminal willfulness, but to show that the term willful used in the instruction was at least as demanding as "knowing," which was the legal standard that controlled in *Jones*. *Id.* at 789 & n.7 (discussing, for example, *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239

(1938) (civil action for civil penalty), and *Intercounty Constr. Co. v. OSHRC*, 522 F.2d 777, 780 (4th Cir. 1975) (OSHA civil penalty). *Safeco*, 551 U.S. at 57 & n.9, relied on *Illinois Cent. R.R. Co.* as providing the "standard civil usage" of willfulness.

Jones' approval of an instruction as meeting section 820(c)'s knowingly standard does not require this Court to disregard *Bryan* when construing section 820(d), which requires willfulness.

D. The Special Willfulness Instructions Allowed The Jury To Convict Without Finding That Mr. Blankenship Intended To Commit Willful Mine Safety Violations.

The difference between the *Bryan* instruction the government proposed for count two and the special willfulness instruction it proposed for count one was crucial to its strategy to convict Blankenship for failing to do enough in managing the company to prevent mine safety violations at UBB, rather than for intending and agreeing to cause willful violations. The government acknowledged "it was probably true" that Blankenship "didn't want to have safety violations," JA1593, but the instructions made that irrelevant to the jury's consideration of willfulness.

The government was unable to charge under section 820(c) that Blankenship knowingly authorized violation of a safety regulation or under section 820(d) that he willfully violated a safety regulation. It charged instead a conspiracy to willfully violate regulations. JA138-42. But the government spent the trial

proving that non-willful violations occurred at UBB, *e.g.*, JA352-53, JA387-89, JA707-08, JA1376-77, and that different management decisions concerning budgets and production targets could have prevented some of those non-willful violations, *e.g.*, JA471.

The disconnect between the charge and the proof was evident during Chris Blanchard's cross-examination when he unequivocally denied conspiring, agreeing, or even having an "unwritten understanding" with Blankenship that he "instructed [him] or wanted [him] to have violations." JA585; *see* JA518, JA535, JA783. Blanchard denied having an understanding with Blankenship "to violate the mine safety laws," but rather had an understanding that he "wanted UBB to eliminate and reduce the hazards and violations." JA785-86; *see* JA572, JA580, JA582; JA717. There was ample evidence backing up Blanchard's assessment – from Blankenship's recruitment of Bill Ross, an MSHA safety analyst, to critique Massey's safety compliance, *e.g.*, JA1323-26, JA1960, JA1803; the hiring of new compliance staff at UBB, *e.g.*, JA719-23, JA726-30, JA1760, JA1765-66; the launching of Massey's Hazard Elimination Program with the full and vocal support of senior management, *e.g.*, JA771-73; JA1394-1401, JA1614-16, JA1631-32; and many internal memos and emails from Blankenship forcefully demanding more rigorous safety compliance throughout Massey, *e.g.*, JA1601-03, JA1604, JA1605, JA1612, JA1613, JA1617, JA1620-23, JA1809.

Rather than directly challenge Blanchard's testimony on cross, the government embraced Blanchard's redirect testimony of an "implicit understanding" at Massey "that it was often cheaper simply to pay the fines that came along with the violations than it was to spend the money that would have been necessary to follow the law." JA789. To win a conviction on that basis, however, the government needed to redefine "willful violation" of a mine safety standard to fit the conduct Blanchard had described. The special "reckless disregard" instruction, JA1556-57, did so by telling the jury it could convict if it found that Blankenship knew he was imposing production and staffing requirements or taking other action, even if Blankenship did not want, intend or know that mine safety violations would result, did not agree that more miners or lower production targets were required for miners to comply with safety regulation, and did not believe he was acting unlawfully.

The other three special instructions, JA1556-57, also allowed the jury to convict just for failing to prevent mine safety violations, again without Blankenship wanting, intending or knowing that he was engaged in any unlawful conduct. Thus, in rebuttal, the government twice directed the jury to the specific page of the court's instructions setting out the special willfulness standard to support the argument that "it's not legal to just sit back, for somebody who is running a coal mine to just sit back and let violations happen. There is an

affirmative duty to follow the safety laws." JA1591. That argument dovetailed with the slide the government earlier displayed in closing: "the Defendant had a DUTY to see that his mines complied with the mine safety laws." JA272, JA1570-71 (objection and request for curative instruction). The government argued that Blankenship did not "actually put money behind" safety and that he had the "power to stop the vast majority" of the violations if he had been "willing to spend a little more money" or "if he had just provided enough coal miners and enough time to follow the law." JA1584, JA1586, JA1591. The special willfulness instructions also allowed the government to argue that Blankenship "personally violated the mine safety laws" by failing to do enough to prevent violations, JA1591, effectively transforming the basis for *civil* liability for monetary penalties under 30 U.S.C. § 820(a) into a criminal offense, and an agreement to generally fail to prevent future civil violations into an agreement to willfully violate a mine safety standard and thus to commit a crime.

II. The Indictment Was Constitutionally Deficient Because It Failed To Allege The Standards That Are Essential Elements Of The Charged Conspiracy "To Willfully Violate Mandatory Federal Mine Safety And Health Standards."

When an indictment charges conspiracy under the offense clause of 18 U.S.C. § 371, it must allege "all the elements of the criminal offense forming the object of the conspiracy" or it cannot stand. *Kingrea*, 573 F.3d at 192; *accord*

Hooker, 841 F.2d at 1229 (en banc). In violation of that rule, the indictment here failed to allege which mine regulations Blankenship conspired to violate.

As Blankenship twice moved prior to the verdict to dismiss the indictment on this ground, *see* ECF Nos. 204 & 299, the standard of review is *de novo*, with "heightened scrutiny" applied. *Kingrea*, 573 F.3d at 191. The district court erroneously denied the motions to dismiss, JA172-74, JA205-06, and so the conviction obtained pursuant to the defective indictment must be reversed.

A. An Indictment Charging Conspiracy Must Allege All Essential Elements Of The Offense That Is The Object Of The Conspiracy.

"[T]he fundamental characteristic of a conspiracy is a joint commitment to an 'endeavor which, if completed, would satisfy all of the elements of [the underlying substantive] criminal offense.'" *Ocasio*, 136 S. Ct. at 1429 (alteration in original). Therefore, an indictment that fails to allege all the elements of the crime that the defendant conspired to commit "fail[s] to state an offense against the United States as the object of the conspiracy." *Kingrea*, 573 F.3d at 193. Consistent with these rules, even a "citation of the statute" specifying the object crime is constitutionally deficient in a conspiracy indictment. *Hooker*, 841 F.2d at 1229. Enforcing these rules ensures notice of the charges, as required by the Sixth Amendment, and that a grand jury has found evidence supporting the charges, as required by the Fifth Amendment. *Hooker*, 841 F.2d at 1230; *accord United States*

v. Spruill, 118 F.3d 221 (4th Cir. 1997); *United States v. Pupo*, 841 F.2d 1235 (4th Cir. 1988); *United States v. Hayes*, 775 F.2d 1279, 1282 (4th Cir. 1985).

In *Hooker*, the defendant was convicted of conspiracy to commit a RICO offense. 841 F.2d at 1226. The indictment alleged all elements of a RICO offense but one – that the RICO enterprise affected interstate commerce. *Id.* at 1227-28. This Court reversed the defendant's conspiracy conviction, explaining that the indictment failed to allege an offense because it failed to allege every element of the object crime. *Id.* at 1227-33. The Court emphasized that the indictment's citation to the RICO statute did not cure its failure to specifically allege every essential element of the RICO offense, since a conspiracy indictment must allege "the basic elements of the [object] offense itself." *Id.* at 1227-29; *accord United States v. Akpi*, 993 F.2d 229 (4th Cir. 1993).

Similarly, in *Kingrea*, the defendant was convicted of conspiracy to sponsor and exhibit an animal in an animal fighting venture. 573 F.3d at 190. The indictment omitted the element of sponsoring or exhibiting "*an animal in* an animal fighting venture." *Id.* at 191-92. This Court reversed the defendant's conspiracy conviction. "Put simply, the indictment against Kingrea failed to allege an essential element . . . of sponsoring or exhibiting 'an animal in' an animal fighting event. In so doing . . . the indictment also failed to state an offense against the United States as the object of the conspiracy." *Id.* at 193.

B. The Indictment Did Not Identify The Safety Regulations Blankenship Allegedly Conspired To Violate And Thus Did Not Allege All Essential Elements Of The Offense Charged As The Object Of The Conspiracy.

The indictment charged a conspiracy "to willfully violate mandatory federal mine safety and health standards at UBB," in violation of 30 U.S.C. § 820(d). JA138 (¶ 87(a)). Although there are hundreds of safety regulations in 30 C.F.R. Part 70, the indictment failed to allege which of them the conspirators intended to violate, and consequently also failed to identify their elements.

The conduct described in a regulation is an essential element of a section 820(d) offense. Standing alone, section 820(d) does not proscribe any particular conduct. It incorporates the complex regulations in the C.F.R., which define what must and must not occur in mines. A section 820(d) offense cannot exist except in reference to the content of a regulation because the crime is willfully doing or not doing something in violation of a standard contained in a regulation. Without knowing which regulation a defendant is accused of violating, it is not possible to know whether a crime has been committed. Certainly no one would think an indictment for a substantive violation adequate if it alleged only that a defendant willfully violated one of the regulations in Title 30 without specifying which one.[6]

[6]In the only prior prosecution of which we are aware for conspiracy to violate section 820(d), the indictment alleged that the object of the conspiracy was to violate three specifically-identified regulations. Indictment, ¶¶ 5(a), (b), (c), 10,

When a statute "criminalizes actions that are contrary to other laws and regulations," that statute "depends on other statutes and regulations to provide the specific elements of the offense." *Franco-Casasola v. Holder*, 773 F.3d 33, 37 (5th Cir. 2014). It follows here that the indictment had to allege, as an essential element of the offense, the regulations that were the object of the charged conspiracy to violate section 820(d) by willfully violating safety regulations. *See Kingrea*, 573 F.3d at 192-93; *Hooker*, 841 F.2d at 1229-30. "[S]ince it was necessary to violate another provision of" Title 30, Chapter 70 of the C.F.R. "in order to violate" section 820(d), this element "was essential, and the indictment should have contained this element and identified the provisions it implicated." *United States v. Leasure*, 110 F.3d 61, at *2 (4th Cir. 1997) (unpublished).[7]

The government has argued that the indictment was sufficient because it included paragraphs summarizing safety standards and describing incidents that resulted in safety citations. JA110-18 (¶¶ 13-36), JA130 (¶ 64). The paragraphs

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United States v. KenAmerican Res., Inc., No. 02-cr-18 (W.D. Ky. May 8, 2002). The indictment also alleged the specific elements of each regulation.

[7]The same principle applies to other crimes incorporating an intent to commit another offense. *Virgin Islands v. Pemberton*, 813 F.2d 626, 630 (3d Cir. 1987) (reversing because burglary indictment charging entry into building "with intent to commit an offense" did not specify which offense); *United States v. Good Shield*, 544 F.2d 950, 951 n.1 (8th Cir. 1976) (same); *United States v. Thomas*, 444 F.2d 919 (D.C. Cir. 1971) (same); *United States v. Hinkle*, 637 F.2d 1154, 1156-57 (7th Cir. 1981) (reversing because indictment for using device to facilitate controlled-substance offense did not specify which substance or which offense).

describing safety incidents provide only factual narratives of safety violations but do not identify regulations that were violated. A reader can try to locate the MSHA citation corresponding to each incident and find the safety regulation noted by the inspector, but that is a possible inference, not a grand jury finding that the defendant agreed to violate the cited regulation. As best we can determine, citations possibly relevant to the incidents described in the indictment concerned the following mine regulations: 30 CFR §§ 75.202(a), 75.333(b)(5), 75.363(a), 75.364(b)(1), 75.364(b)(2), 75.370(a)(1) and 75.400. Of course, none of those was actually identified in the indictment. Thus, although the district court ruled that the indictment "is replete with identification of the particular standard or standards the Defendant allegedly conspired to willfully violate," that reading was simply erroneous. JA173.

In *Akpi*, this Court rejected an attempt to tease out a missing offense element (an effect on interstate commerce) from the implications of facts described in the indictment, calling it a "misread[ing] and misappli[cation] [of] our holding in [*Hooker*]." *Akpi*, 993 F.2d 229, at *1, 3. Here, the missing offense element is even further removed from the indictment, since it is impossible to discern from the indictment alone, without consulting the evidence, which mine regulations Blankenship allegedly conspired to violate. It simply cannot be said that every

essential element was "charged in the body of the indictment." *United States v. Daniels*, 973 F.2d 272, 274 (4th Cir. 1992).

C. The Indictment Cannot Be Saved By Interpreting It To Refer To Standards It Does Not Expressly Identify Because The Trial Jury Was Instructed To Consider Standards Other Than Those The Indictment Could Be Read To Allege By Implication.

Even if the indictment *had* implicitly identified a set of standards, the government refused to be bound by those standards. In opposition to a motion to dismiss for failing to identify the regulations Blankenship conspired to violate, the government stated: "No listing of specific standards is required to allege this object [crime]" because Blankenship was charged with conspiring to violate "*whatever* mandatory federal mine safety and health standards needed to be violated in order to increase profits." JA147-48.

In opposition to a later motion *in limine*, however, the government cited to specific standards, asserted to be "the very standards Defendant is charged with conspiring to willfully violate," "key to the Superseding Indictment," and "the charges the United States must prove." JA182-83. Some of the newly cited standards could possibly be matched to the indictment by locating and matching citations for events described in the indictment. Many, however, could not: 30 C.F.R. §§ 75.321, 75.325, 75.330, 75.334, 75.371, 75.400-2, 75.402. JA182-83.[8]

[8]The government did refer to a safety standard identified in one of the citations that probably related to one of the incidents described in the indictment,

Before the case went to jury, the government changed course again. It asked the court to give the jury a thirty-page exhibit containing regulations so that the jury could "make the findings that it needed to find with respect to violations of mine safety or health standards." JA1525, JA238-69. The government argued it was necessary to give the regulations to the jury "for purposes of the record to show that the jury was instructed on all of the standards that, that could apply to the testimony that came in about the miners from UBB." JA1527.

The Court gave the exhibit (JA238-69) to the jury, instructing that the jurors "must review" the regulations "during [their] deliberations relative to count one of the superseding indictment." JA1553. The regulations in the exhibit differed from those identified in citations corresponding to the indictment's factual narratives, as well as from the regulations the government had invoked when opposing the motion *in limine*. Specifically, the exhibit contained the following regulations, which appeared neither in the citations that may be related to incidents mentioned in the indictment nor in the government's opposition: 30 C.F.R. §§ 71.201(a) and (b), 75.202(b), 75.220, 75.302, 75.313, 75.323, 75.324, 75.332, 75.342, 75.360, 75.362, 75.380, 75.401, 75.403.[9]

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30 C.F.R. § 75.400, and to other standards containing definitions or procedural rules: 30 C.F.R. §§ 75.401-1, 75.402-1, 75.402-2, 75.403-1. JA182-83.

[9]The exhibit also contained safety standards that appeared in the citations related to the incidents described in the indictment, JA238-69 (30 C.F.R. §§ 75.202(a), 75.363, 75.364, 75.370(a), 75.400), and some that appeared in the

In short, the defective indictment left the government "free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial." *Russell v. United States*, 369 U.S. 749, 768 (1962).

III. The District Court Erroneously Denied Recross-Examination Of Christopher Blanchard After The Government Elicited Important New Matter During A Lengthy Redirect Examination.

The defense sought to cross-examine the government's key witness, Blanchard, on new matter elicited on redirect examination. JA1164-70, JA226-29, JA1192-95. The district court erroneously declined to permit any re-cross.

A. When New Matter Is Elicited By The Government In The Redirect Examination Of A Witness, The Defendant Has A Sixth-Amendment Right To Cross-Examine On The New Matter.

United States v. Caudle, 606 F.2d 451 (4th Cir. 1979), reversed convictions because the district court denied an opportunity to recross a witness after the government elicited new matter on redirect. This Court reviews the question whether redirect examination includes new matter triggering the right to confrontation *de novo*. *Id.* at 459.

Caudle explains that the Sixth Amendment rights to confront and cross-examine a witness "apply with equal strength to recross examination where new matter is brought out on redirect examination." *Id.* at 457-58.

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opposition to the motion in limine, *id.* (30 C.F.R. §§ 75.321, 75.330, 75.334, 75.400, 75.400-2, 75.402). The exhibit also contained definitional and procedural standards. *Id.* (30 C.F.R. §§ 75.2, 75.400-1, 75.401-1, 75.402-1).

> Examining counsel is normally expected to elicit everything from a witness, so far as possible, at the first opportunity. Where . . . new matter is brought out on redirect examination, the defendant's first opportunity to test the truthfulness, accuracy, and completeness of that testimony is on recross examination. To deny recross examination on matter first drawn out on redirect is to deny the defendant the right of any cross-examination as to that new matter. The prejudice of the denial cannot be doubted.

Id. at 458 (citation omitted); *accord United States v. Riggi*, 951 F.2d 1368, 1375 (3d Cir. 1991) ("Recross is to redirect as cross-examination is to direct."). *Caudle* also explains that judicial discretion to control the scope and extent of cross-examination does not extend to denial of cross-examination of new matter elicited on redirect. *Id.* at 458-59; *see United States v. Fleschner*, 98 F.3d 155, 158 (4th Cir. 1996) (Widener, J., reaffirming *Caudle*, which he also authored, and recognizing trial court discretion as to further examination after concluding that redirect did not involve new matter). Other circuits apply the same rules, often citing *Caudle*.[10]

[10] *United States v. Jones*, 982 F.2d 380, 384 (9th Cir. 1992) (on redirect, witness for first time placed defendant at crime scene); *Riggi*, 951 F.2d at 1372-78 (witness testified on redirect for first time that he knew from "conversations" and was "told" that defendant headed crime family); *see United States v. Vasquez*, 82 F.3d 574, 577 (2d Cir. 1996) (denial of recross was error but harmless because new matter "unimportant in relation to the body of evidence . . . on this issue"); *United States v. Ross*, 33 F.3d 1507, 1517-18 & n.19 (11th Cir. 1994) (denial of recross was error but harmless because importance of new matter "was, at best, minimal"); *United States v. Baker*, 10 F.3d 1374, 1406 (9th Cir. 1993) (denial of recross was error but "harmless beyond a reasonable doubt" because no reason to think that new matter could have affected the verdict).

B. The Government Elicited Important New Matter During Blanchard's Redirect Examination.

Blanchard headed the UBB mine, directly communicated with Blankenship and was the only alleged co-conspirator who testified at trial. JA417, JA470. He testified on direct about an "understanding at UBB" "that it was cheaper . . . to pay the fines for the safety violations than the cost of preventing all violations," that he thought Blankenship "shared the same opinion," and that "a certain number" of citations "could have been prevented" by hiring more miners and allowing more time for safety work. JA471-72, JA475-76. Blanchard also testified that Blankenship received internal documents called daily violation reports, JA472, JA479, JA503-05, which tallied violations by category, JA1978-82 & JA1983-86. He did not testify on direct about particular citations.

On cross-examination, Blanchard denied an understanding with Blankenship "that it was acceptable to get violations o[r] citations;" denied any "unwritten understanding" that Blankenship "wanted you to have violations;" denied any "understanding to violate the MSHA regulation;" and denied any unspoken agreement "to violate the mine safety laws." JA519, JA535, JA585, JA706; *see* JA784-85 (same). He clarified the "understanding" elicited on direct was only that violations were "inevitable," meaning that no matter what some would be written, JA585, and that it would be "an impossible amount of money" to get to zero citations, JA523. He testified that some MSHA citations shown to him by the

defense were for trivial violations, that some generated criticism from Adkins and Blankenship, and that some were met with discipline. *E.g.* JA575-84, JA598-638.

On redirect, the government impeached Blanchard with previously-unmentioned grand jury testimony about what "the defendant told you" and "conversations that you had with the defendant." JA790-91. Blanchard adopted the testimony as true and thus as his trial testimony. JA790-91; *see* JA953 (government reference to "reaffirmed" testimony).

After getting Blanchard to affirm his grand jury testimony, the government used dozens of MSHA citations that had not been mentioned during direct or cross-examination, had Blanchard read each new citation's factual narrative of a violation, and had him testify that certain of the new citations were for violations that were not trivial or the subject of discipline or follow-up from Blankenship and were preventable. *E.g.*, JA871 *et seq.*, JA902, *et seq.* For many citations, the government created the misimpression that Blankenship received the detailed factual allegations in the citations. Blanchard agreed that each citation was "reflected" in daily violation reports received by Blankenship. *E.g.*, JA901-08. Examination on the new exhibits dominated redirect, which took a day and a half and produced nearly two hundred pages of transcript. JA871-1075. Redirect just on the citations was nearly as long as Blanchard's entire direct examination. Tr. 2239-2523 (direct).

C. The District Court Erred In Denying Recross-Examination Based On Whether Redirect Examination Was Within The Scope Of Cross-Examination.

The defense requested recross-examination. JA1164-70, JA226-29; JA1192-95. The government opposed the request; it argued a categorical prohibition: "[a]t the beginning of trial, the Court stated . . . that it would not allow re-cross examination." JA211-12. The government further urged that these were not new matters because they were "within the scope of cross-examination" and "directly responsive" to issues raised on cross-examination. JA1170-73, JA211-12, JA214-23. The government argued that whether to allow recross is "entirely within the sound discretion of the Court." JA211.

The district court ruled that there was no new matter, applying the government's within-the-scope test, and denied any opportunity for recross. JA1182 ("within the scope of cross"), JA1184 ("within the scope of [cross];" using word "redirect" but the corresponding page reference shows it meant cross), JA1190 ("all within the scope of cross-examination"), JA1191 (examination on new MSHA citations was not "beyond the scope" of cross), JA1195 (new citation exhibits "within the scope of cross-examination").

Caudle demonstrates that whether matter elicited on redirect is new and subject to cross-examination does not depend on whether redirect is within the scope of cross, but on whether it is new and could not have been cross-examined

before. The prosecution in *Caudle* turned on the truth of the defendants' statement that a witness, Dr. Levy, prepared a feasibility study. Levy addressed the study on direct, testifying that no one from his company was with the defendants when the study was compiled. 606 F.2d at 455. On cross, Levy gave testimony helpful to the defense, including that he agreed with the study's conclusion and had written a letter adopting it. *Id*. The redirect addressed the same study yet again and was well within the scope of cross. During redirect, the government "took Dr. Levy through a page-by-page examination of the . . . study. Such detailed testimony had not been asked for on direct examination." *Id*. The government had Levy parse what was and was not his work on each page. *Id*. at 455, 459 & n.2.

After redirect, it was unclear whether Levy was denying that particular words on each page of the report were his or was denying that the content on each page was his. *Id*. Defense counsel asked for recross to take Levy through the pages of the study. *Id*. at 456. The district court denied recross, which this Court concluded "constituted a denial of the right of a criminal accused to cross-examine the witnesses against him." *Id*. The Court explained that the page-by-page testimony was "first brought into the case by the government on redirect," and so denial of recross was reversible error because the defendants "never had the opportunity to cross-examine Dr. Levy at all on the" new matter. *Id*. at 459.

Although the new matter in *Caudle* was within the scope of cross, the redirect testimony was distinct in important ways from the direct testimony and therefore subject to cross-examination. That is the point of the decision. *Accord Baker*, 10 F.3d at 1405 (error to rule that testimony on redirect was not new matter "if the questions fell within an 'area' or 'subject matter' for which cross-examination had previously been available"); *Riggi*, 951 F.2d at 1373 (trial court erroneously believed it could deny recross if it restricted redirect to scope of cross).

D. The Denial Of Recross-Examination Violated The Constitutional Right To Confront A Key Witness.

Denial of an opportunity to recross Blanchard presents a more glaring error than the one that led to reversal in *Caudle*. Blanchard was a crucial witness for the government. He was "the Known UBB Executive" referenced in the indictment, JA119 (¶ 39), and the only alleged co-conspirator who testified at trial, JA 417, JA520. He was essential to the government's effort to prove a conspiratorial understanding. The district court stated: "the jury assessment of the credibility of this witness's testimony . . . is going to be crucial." JA807-09.

Blanchard's direct testimony boiled down to a weak statement that Blankenship "shared the same opinion" about an "understanding" that it was cheaper to pay fines than to prevent all safety violations." JA475-76. Blankenship's perceived "opinion" gave the government little or nothing. The government did not try to elicit testimony to give the "understanding" more

content or to show that Blanchard's perception of Blankenship's "opinion" rested on conversations with Blankenship. The government knew Blanchard's grand jury testimony but also knew that the testimony had been elicited in a non-public grand jury setting using tightly-scripted leading questions – and so did nothing on direct to draw out similar testimony when it would not have been permitted to lead. It waited for redirect.

On redirect, the government used leading questions and forced Blanchard to adopt his grand jury testimony as his trial testimony.

> Q: Do you recall . . . being asked in the Federal Grand Jury whether *the defendant told you or said words to the effect* that he saw it as cheaper to break the safety laws and pay the fines than to spend what would be necessary to follow the safety laws?
> . . .
>
> A: I said, "That was the implication."
>
> Q: And then do you recall . . . being asked whether that was your understanding, . . . whether it was cheaper to break the safety laws than to pay the money to follow them, do you recall being asked whether that was your understanding from *conversations that you had with the defendant*?
>
> A: Yes, sir.
>
> Q: What was your answer?
>
> A: "Yes."
>
> Q: And were you telling the truth when you gave that answer.
>
> A: Yes, sir.

> Q: Do you recall . . . being asked in the Federal Grand Jury . . . whether *the defendant told you* that safety violations were the costs of doing business the way he wanted it done, or words to that effect?
> . . .
>
> A: I answered you, "To that effect."
>
> Q: And you were telling the truth when you gave that answer?
>
> A: Yes, sir.

JA790-91 (emphasis added).

This was new matter. It rested the "understanding" on supposedly incriminating statements by Blankenship that had never before been mentioned. The redirect testimony explicitly referred to Blankenship's "conversations" and to what Blankenship "told" Blanchard. JA790-91. When redirect brings in such new testimony, an opportunity for recross is required. *Caudle*, 606 F.2d at 456-57; *Baker*, 10 F.3d at 1405 (redirect on previously-covered subjects of witness expertise and volume of flask yielded new matter as to prior defense stipulations of expertise and as to larger volume of flask); *Riggi*, 951 F.2d at 1372, 1376 (direct testimony indicated defendant's organized crime connection, but on redirect witness went further and testified to "conversations" in which witness' father "told" him that). This case is not at all like *Fleschner*, 98 F.3d at 158, a tax protester prosecution in which Judge Widener (who also authored *Caudle*) rejected a trivial claim that redirect testimony that a defendant passed a mental exam previously mentioned by the defense on cross injected new matter.

The testimony from a witness like Blanchard who sought to avoid prosecution, *e.g.*, JA520-22, JA788 (threatening with perjury), one who had denied any agreement to commit a crime, *e.g.*, JA518, JA519, JA535, JA585, JA783, JA785-86, cried out to be tested on cross-examination. The new testimony about an "understanding," while inculpatory, was vague and incomplete. The government had Blanchard adopt his prior testimony without the opportunity for explanation, even though that testimony contained intriguing caveats such as "to that effect." JA791. It is easy to understand why the government did not try to clarify the testimony, but the defense was entitled to the opportunity. Any experienced lawyer can imagine powerful cross-examination of an alleged co-conspirator who testifies for the first time on redirect that the defendant made inculpatory statements but provides no supporting detail.

Blanchard's testimony on redirect about forty-two citations also constituted new matter. The government never argued that Blanchard's direct or cross referred to the new citation exhibits used on redirect. The district court recognized that these were new exhibits but erroneously concluded that they were not new matter because use of them on redirect was "within the scope of cross-examination" as responsive to cross-examination suggesting that some citations were trivial or that Massey had taken disciplinary action in response to citations. JA1190-91.

The redirect examination went further than a response to those cross-examination points. Tr. 2239-2523. For many of the citations, the government sought to support a major prosecution theme by showing that the charged violations were preventable. *E.g.*, JA877-88, JA1060, JA1068-69. The government's examination also created the inaccurate impression that Blankenship had notice of the details of the citations.

> Q: Did you know . . . that the violation cited here was reflected in the report of violations that went to the defendant every day?
>
> A: Yes, sir.

JA901 (one example). The court overruled an objection that Blankenship received only a summary report that tallied categories of violations and did not mention specific violations or factual allegations. JA902-05; *see* JA1978-86. The government then asked many times whether particular citations were reflected in daily reports, eliciting answers such as "I knew that this citation would have been included." JA908. The government also referred to daily reports that "listed each specific citation" or contained "a list of individual citations" and "a list of specific violations that the defendant received." JA1011, JA909, JA936. Furthering the impression that Blankenship received the factual details in the citations, the government often had Blanchard testify, after reading the details in citations, that Blankenship never contacted him about them. *E.g.*, JA882-98.

If the defense had been permitted to recross, it could have shown the reports gave Blankenship no details contained in the citations. JA1978-86. The government's theory was built on Blankenship's alleged notice of violations. And the district court's instructions, *e.g.*, JA927, about using the citations to prove notice reinforced the impression that Blankenship must have had notice of the details Blanchard was reading to the jury. Blanchard could have cleared up that picture by explaining that Mr. Blankenship did not receive notice of the details of citations, if the defense had been permitted to cross-examine. Similarly, cross-examination would have dispelled the impression that the violations would have been prevented if Blankenship had made different staffing decisions. It was important to show that Blanchard was referring on redirect to the general principle that any violation can be prevented, JA804, and was not saying that management decisions caused specific violations.

Thus, it cannot be said – as *Caudle* requires to deny recross – that Blanchard's redirect testimony concerning the "understanding" and the dozens of citation exhibits was testimony that Blankenship had an earlier opportunity to cross-examine. The government may have had the right to draw out the testimony on redirect, but the defense then had a Sixth Amendment right to cross-examine.

IV. The District Court Erroneously Defined Reasonable Doubt.

The district court noted this Court's longstanding disapproval of instructions interpreting reasonable doubt, JA1533-34, but nevertheless provided the jury with a single-sentence rubric to use in reaching a verdict: "If the jury views the evidence in the case as reasonably permitting either of two conclusions – one of innocence, the other of guilt – the jury should of course adopt the conclusion of innocence." JA1552. The court, relying on the prohibition against unsolicited reasonable doubt instructions, declined to instruct the jury about the difference between the standard of proof in civil and criminal cases or to use any of the various formulations courts have used to emphasize to the jurors the gravity of their decision and the rigor of the government's burden and to differentiate proof beyond a reasonable doubt from lesser standards such as a preponderance of the evidence. JA1533-35 (denying additional instructions); pp. 33-34, *supra*; Federal Judicial Center, Pattern Criminal Jury Instructions No. 21 at 28-29 (1987) (contrasting civil and criminal burdens); *United States v. Moss*, 756 F.2d 329, 333-34 (4th Cir. 1985) ("convincing character" instruction); 1A O'Malley, et al., Federal Jury Practice and Instructions § 12.10 at 160-61 (6th ed. 2008) (complete instruction containing the language used by the district court).

The defense objected to the two-inference instruction, given in isolation without additional language to clarify the burden of proof. JA1531-32, JA197

(defense proposed instruction 32). The defense argued that the instruction "dilutes the reasonable doubt standard and makes it akin to the preponderance of the evidence standard." JA1530. The court overruled the objection, interpreting the instruction to mean, if "it's a tie, they must acquit." JA1531. The court declined to give the additional language requested by the defense to clarify the court's instruction. JA1533. The court also refused a defense request to give a different reasonable doubt instructions that would have mitigated the harm from the instruction the court gave. JA1533, JA1535, JA197-98 (defense proposed instructions 32 and 33).

Whether jury instructions correctly state the law is determined *de novo* on appeal. *Washington*, 743 F.3d at 941. Because "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard," the district court erred in giving the instruction. *Victor v. Nebraska*, 511 U.S. 1, 6 (1994). When a jury has been so instructed, "there has been no jury verdict within the meaning of the Sixth Amendment," and the conviction is structural error requiring reversal without regard to the strength of the evidence. *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993); *Johnson v. United States*, 520 U.S. 461, 469 (1997); *United States v. Curbelo*, 343 F.3d 273, 281 (4th Cir. 2003); *United States v. Reives*, 15 F.3d 42, 44 (4th Cir. 1994).

Several circuits have condemned the instruction the district court gave because stating that the jury must acquit if there is a "tie" between evidence of guilt and evidence of innocence implies that a preponderance of the evidence (more than a "tie") is sufficient to convict.

The Second Circuit reversed a conviction because of a similar instruction (and an improper summation) despite the absence of a contemporaneous objection in *United States v. Hughes*, 389 F.2d 535, 537 (2d Cir. 1968), and it has continued to condemn the instruction because it "may mislead a jury into thinking that the government's burden is somehow less than proof beyond a reasonable doubt." *United States v. Inserra*, 34 F.3d 83, 91 (2d Cir. 1994) (quoting *United States v. Kahn*, 821 F.2d 90, 93 (2d Cir. 1987)). In *Kahn*, the court sought to "make clear . . . that the 'two inference' language should not be used because, standing alone, such language may mislead the jury into thinking that the government's burden is somehow less than proof beyond a reasonable doubt." 821 F.2d at 93.

> The "two-inference" language, that if the jury believes the evidence permits either the inference of innocence or of guilt, the jury should adopt the former, is obviously correct as far as it goes. But such an instruction by implication suggests that a preponderance of the evidence standard is relevant, when it is not. Moreover, the instruction does not go far enough. It instructs the jury on how to decide when the evidence of guilt or innocence is evenly balanced, but says nothing on how to decide when the inference of guilt is stronger than the inference of innocence but not strong enough to be beyond a reasonable doubt.

Id.

The Third Circuit followed the Second Circuit in disapproving the instruction in *United States v. Jacobs*, 44 F.3d 1219, 1226 & n. 9 (3d Cir. 1995), *United States v. Isaac*, 134 F.3d 199, 203 (3d Cir. 1998), and *United States v. Greer*, 527 Fed. Appx. 225 (3d Cir. 2013) (not precedential). The First Circuit applied the same understanding to uphold the denial of a defendant's request for such an instruction. *United States v. Guerrero*, 114 F.3d 332, 344-45 (1st Cir. 1997) ("defendants' proposed instruction comes close to making a comparison between 'guilt or innocence,' which, if suggested as equal alternatives, 'risks undercutting the government's burden'").

In *United States v. Dowlin*, 408 F.3d 647, 666 (10th Cir. 2005), the Tenth Circuit agreed that the instruction "should not be used." The "saving grace" on plain error review in *Dowlin* that prevented reversal was that, in addition to the improper language, the trial court had "specifically defined 'reasonable doubt' and distinguished reasonable doubt from a preponderance of the evidence." *Id.* at 667. *See Isaac*, 134 F.3d at 203-04 (noting additional instructions defining the reasonable doubt standard); *Greer*, 527 Fed. Appx. at 234-35.[11]

[11] The Fifth Circuit found no plain error in instructions as a whole despite the two-inference language. *United States v. Creech*, 408 F.3d 264, 268 (5th Cir. 2005); *United States v. Pena*, 527 F.2d 1356, 1365 (5th Cir. 1976) (two-inference language "standing alone, might appear to shift that burden in certain factual

There is nothing to save the district court's erroneous instruction in this case. The district court refused to give any other instruction clarifying the meaning of reasonable doubt. JA1533-35. The jury would have understood the instruction as the district court did and as the First, Second, Third, and Tenth Circuits have – as requiring acquittal in the event of an evidentiary "tie." That impermissibly permits conviction if the weight of the evidence favors the government. Such a standard is "below that required by the Due Process Clause [incorporating the Sixth Amendment]," and even below the standard meriting reversal in *Cage v. Louisiana*, 498 U.S. 39, 41 (1990). *Id.* at 41 ("the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard").[12]

"It is well settled" in this circuit "that a district court should not attempt to define the term 'reasonable doubt' in a jury instruction absent a specific request for such a definition from the jury." *United States v. Oriakhi*, 57 F.3d 1290, 1300 (4th Cir. 1995); *accord United States v. Reives*, 15 F.3d 42, 45 (4th Cir. 1994); *United*

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situations," but trial court also emphasized the government's heavy burden and presumption of innocence and that defendant did not have to present evidence).

[12]One circuit expressed the view that a similar instruction "probably helped" the defense because "it permits the jury to acquit the defendant if the jury finds that a reasonable theory of acquittal exists, regardless of whether the theory for conviction is itself doubt free." *United States v. Richardson*, 562 F.2d 476, 482 (7th Cir. 1977). But the court deemed the instruction permissible only in "the rare case that involves solely circumstantial evidence." *Id.*

States v. Walton, 207 F.3d 694, 695 (4th Cir. 2000).[13] The jury here made no request, and so the instruction was improper even if it had not diminished the burden of proof. Because it was the only instruction explaining reasonable doubt and diluted the standard, it had particular impact. We know of no federal appellate decision reviewing the two-inference instruction as the sole explanation by a court to a jury of the reasonable doubt standard.

Even if an erroneous reasonable doubt instruction were not structural error requiring automatic reversal, reversal would be warranted in this case in light of the jury's deadlocks and lengthy deliberations and in light of this Court's repeated admonitions not to experiment with unsolicited reasonable doubt instructions. There were vigorous disputes about what the evidence in this case meant, especially in relation to Blankenship's intentions and state of mind. Confusing even one juror about the standard of proof could have tipped the outcome. The district court gave the instruction knowing this Court's rule against explanations of reasonable doubt and surely knowing that tinkering with reasonable doubt was, as the Seventh Circuit put it, "equivalent to playing with fire." *United States v. Shaffner*, 524 F.2d 1021, 1023 (7th Cir. 1975).

[13]"Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." *Miles v. United States*, 103 U.S. 304, 312 (1880); *accord*, *Holland v. United States*, 348 U.S. 121, 140 (1954); *see Cage*, 498 U.S. at 41 n.*.

CONCLUSION

The judgment of conviction should be reversed.

Dated: June 27, 2016

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument. This appeal presents four important questions arising from a six-week jury trial with a complex record including hundreds of exhibits. The government's reliance on a novel theory of criminal willfulness also raises important issues about the criminal liability of corporate officials for failing to prevent safety violations they did not agree or intend to cause.

CERTIFICATE OF COMPLIANCE

I certify this 27th day of June, 2016, that this brief satisfies the type-volume limitations set forth in the Court's May 24, 2016 Order (Dkt. No. 28). This brief contains 19,037 words, excluding the portions exempted by FRAP (32)(a)(7)(B)(iii). This brief has been prepared in 14-point Times New Roman font that meets the typeface and type styles requirements of FRAP 32(a)(5)-(6).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been electronically filed and service has been made by virtue of such electronic filing this 27th day of June, 2016, on the following counsel for the United States:

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