No. _____

IN THE

Supreme Court of the United States

DONALD L. BLANKENSHIP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM W. TAYLOR, III
Counsel of Record
ERIC R. DELINSKY
R. MILES CLARK
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Washington, DC 20036
(202) 778-1800
wtaylor@zuckerman.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

In *Bryan v. United States*, this Court held that criminal willfulness requires proof "that the defendant acted with knowledge that his conduct was unlawful." 524 U.S. 184, 191-92 (1998). A jury convicted Petitioner of conspiracy to "willfully" violate mine safety regulations on the government's theory that his company's coal production budgets were too aggressive. The district court instructed the jury that it could convict Petitioner based on knowing conduct (absent knowledge of its unlawfulness) or upon finding that he acted with "reckless disregard" for whether his conduct "will cause a [regulation] to be violated." The court of appeals agreed that "reckless disregard" for the consequences of one's actions constitutes criminal willfulness, allowing convictions of individuals who "'should have known' that an action or omission would lead to a safety violation."

1. Did the court of appeals contravene this Court's decisions by approving jury instructions that permit a criminal conviction for a "willful" violation of law without proof that the defendant acted with knowledge that his conduct was unlawful?

The court of appeals also ruled that the district court's refusal to allow cross-examination of a key prosecution witness about significant new matter elicited by the government on redirect was harmless principally because Petitioner "could have recalled" the witness in the defense case.

2. Did the court of appeals contravene this Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), by treating the right to later call witnesses as a substitute for the right to cross-examine witnesses called by the prosecution?

PARTIES TO THE PROCEEDING

Petitioner Donald L. Blankenship was defendant-appellant below. Respondent United States of America was appellee below.

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Donald L. Blankenship respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

This petition seeks review of two issues that are fundamental to the integrity of criminal proceedings in the United States: jury instructions defining criminal intent (here, willfulness) and the right to cross-examine prosecution witnesses. While these issues independently merit review, the context in which they arose cannot be ignored. This case stemmed from a rush to judgment at the highest levels of the federal government. It was permeated throughout with unchecked abuses of power by prosecutors intent on securing a conviction by any means possible in order to assign to Petitioner blame for a terrible tragedy. This prosecution begs for scrutiny by this Court.

Don Blankenship is the former Chairman and CEO of Massey Energy Company. In April 2010, an explosion at Massey's Upper Big Branch (UBB) coal mine took the lives of 29 miners. Any hope of a fair and impartial investigation was dashed almost immediately. Before investigators even were able to enter the mine, President Obama declared from the White House that the tragedy was "a failure first and foremost of management" and that the mine's owners needed to be "held accountable for decisions they

made and preventative measures they failed to take."[1] The head of coal mine safety at the Mine Safety & Health Administration (MSHA) preordained the outcome of that agency's investigation, instructing personnel just days after the accident: "I want all of you to know that the mine operator blew this mine up, MSHA didn't." The prejudgment even made its way into the chambers of the district judge, whose law clerk published a law review article calling for Blankenship's prosecution. *See* D. Ct. Dkt. 233-3.

After nearly four years and multiple rounds of investigation, no charges were filed against Blankenship. Then, on the four-year anniversary of the UBB tragedy, Blankenship released a documentary film showing that an MSHA-imposed ventilation plan had impaired the mine's ability to deal with a natural gas inundation that caused the explosion. The film sought to expose a federal government cover-up of its own role in the tragedy—a role further revealed by government witnesses at trial, including one who emotionally testified that he had "begged" MSHA officials not to require ventilation changes that would greatly reduce the airflow in the area of the mine where the explosion occurred. C.A. App. 1344, 1361.

The documentary infuriated Blankenship's critics. West Virginia Senator Joe Manchin stated on national television that he believed "Don has blood on his hands" and that "justice will be done," and he wrote to Blankenship that he would be communicating with the U.S. Attorney's Office. The

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[1] Jeff Mason, *Obama Blames Owner for West Virginia Mine Disaster*, REUTERS, Apr. 15, 2010.

United Mine Workers of America publicly "urge[d] the U.S. Attorney's Office" to redirect its focus "all the way up the corporate chain of command." Protesters picketed the U.S. Attorney's Office in Charleston with "wanted" signs bearing Blankenship's image. D. Ct. Dkt. 82 at 3, 9-15; 122 at 12.

Months later, prosecutors empaneled a grand jury and obtained a 42-page indictment the following day. West Virginia Senator Jay Rockefeller hailed the indictment as "another step toward justice" for the families of miners lost in the explosion, declaring that Blankenship treated their safety with "callousness and open disregard" and that a fair trial "is more than he deserves." D. Ct. Dkt. 122 at 10. It soon was reported that the U.S. Attorney—whose father is one of the five district judges in the Southern District of West Virginia—was eyeing a run for Governor.[2]

Although Massey had thousands of employees and operated dozens of mines, the indictment charged

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[2] In a sealed (now public) filing, the government argued that his "extreme and unorthodox" free speech activities and "immense wealth" rendered Blankenship a danger to "the safety of the community" that warranted imposition of onerous conditions of pre-trial release. D. Ct. Dkt. 40 at 3, 5. Prosecutors wrote that Blankenship's UBB documentary and financial support for a Republican candidate to the West Virginia Supreme Court "*troubled the United States and should trouble the Court*." *Id.* at 5 (emphasis added). The district court, in turn, prohibited Blankenship from having any contact with thousands upon thousands of individuals, including some family members and many lifelong friends. *See* D. Ct. Dkt. 14 (appearance bond), 15 (conditions of release), 50 & 223 (orders denying motions to amend or review release conditions). That the prosecution sought to restrict Blankenship's liberty pending trial based on free speech critical of the government underscores the prosecution's troublesome nature and the need for review.

Blankenship *alone* with conspiracy to "willfully" violate safety regulations at UBB—a mine he never even visited during the relevant period. The indictment advanced a novel prosecution theory, criminalizing management decisions about labor budgets and production targets. While there can be no doubt Blankenship was prosecuted *because of* the tragedy, he indisputably was not charged with causing it. The indictment did not allege that the conspiracy (which was a misdemeanor) caused the explosion, and the government successfully moved to exclude evidence regarding its cause from trial. D. Ct. Dkt. 320 at 10.

Blankenship also was charged with, and ultimately acquitted of, three felonies. These included false statements and securities fraud counts based on public statements by the company after the explosion—which Blankenship did not write or edit—that Massey "strive[d]" to comply with safety regulations and did "not condone" violations. C.A. App. 102-103. These unprecedented charges[3] added twenty-five years to Blankenship's potential exposure. A former member of the prosecution team stated on local television while the jury was deliberating that no one believed the statements "could constitute two federal felonies" and that his former colleagues pursued those "novel" charges as a "tactical" move to

[3] The U.S. Securities and Exchange Commission did not even initiate an informal inquiry into the statements for which the U.S. Attorney's Office sought to hold Blankenship criminally responsible. Nor did plaintiffs in consolidated securities litigation filed in the wake of the UBB tragedy contend that these statements give rise to *civil* liability under the federal securities laws.

inflate the maximum penalties in the indictment and as a pretext to "get in front of the jury" evidence that otherwise would not be admissible.

The Southern District of West Virginia was saturated with prejudice against Blankenship from animosity generated over many years by his political opponents, increasing dramatically after the UBB tragedy. Over objection, trial was held in the district, where the families of deceased miners maintained a courtroom vigil during the trial, constantly in the eyes of the jury. Over objection, the government called an accident investigator to testify about the cause of the explosion, even though it had obtained an order excluding such evidence from trial. The government even was permitted to introduce into evidence *newspaper articles* linking the explosion to the practices of Massey and Blankenship. GX 459A, 460A. The prejudicial impact of the UBB tragedy was so unavoidable that the Fourth Circuit panel (perhaps unaware that the district court had instructed the jury that the case had nothing to do with the explosion and that jurors would violate their duty if they discussed or considered it, D. Ct. Dkt. 540 at 5-6) referred to the explosion *six times* in its brief recital of the "evidence" in its opinion affirming Blankenship's conviction. App. 3a-5a.

On return of the verdict, the U.S. Attorney—who personally argued to the jury—resigned to formally announce his run for Governor. Although Blankenship was acquitted of all felony charges and convicted only of a misdemeanor, both the former U.S. Attorney and the lead Assistant who had joined him prosecuting the case appeared together on "60 Minutes" prior to sentencing and compared Blankenship to the kingpin

of a criminal drug organization. D. Ct. Dkt. 634 at 51. Weeks later, on a sentencing date scheduled to coincide with the six-year anniversary of the UBB tragedy, the district court imposed the maximum sentence for his misdemeanor conviction—one year's imprisonment and a fine of $250,000—and precluded Blankenship from addressing the court and the public about the tragedy. Although Blankenship was found to present no risk of flight, he was summarily denied release pending appeal.

In January of 2017, the Fourth Circuit affirmed Blankenship's conviction. In the weeks that followed, the U.S. Attorney's Office, under new leadership, produced dozens of memoranda of interviews (MOIs) that had not been disclosed prior to trial, despite repeated representations that all MOIs had been produced. Included among these previously undisclosed MOIs are a total of ten pertaining to the government's key cooperating witness at trial and another witness who was the subject of a document described by the government in closing as the "single most important document in the case." C.A. App. 1588.

OPINIONS BELOW

The Fourth Circuit's opinion (App. 1a-31a) is reported at 846 F.3d 663. The Fourth Circuit's order denying rehearing (App. 33a-34a) is unreported. The judgment of conviction (C.A. App. 298-304) is unreported.

JURISDICTION

The Fourth Circuit entered judgment on January 19, 2017, and denied a timely petition for rehearing on February 24, 2017. App. 32a-33a. 28 U.S.C. § 1254(1) confers jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the Constitution of the United States provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him[.]

The relevant statutory provision, 30 U.S.C. § 820, is reprinted at App. 34a-39a.

STATEMENT

This prosecution concerned compliance with mine safety regulations during a 27-month period at one of Massey Energy's dozens of coal mines. A central issue at trial was whether Blankenship, Massey's Chairman and CEO at the time, intended for his management decisions to cause safety violations.

1. In November 2014, the United States indicted Blankenship for conspiracy, under 18 U.S.C. § 371, to violate 30 U.S.C. § 820(d) by "willfully" violating mine safety standards at the UBB mine; conspiracy to defraud the United States; false statements; and

securities fraud. C.A. App. 62-104 (indictment), 105-145 (superseding indictment). This petition challenges Blankenship's lone misdemeanor conviction for conspiracy to "willfully" violate mine safety standards.

The Mine Safety and Health Act of 1977, as amended (the Mine Act), authorizes the Secretary of Labor to promulgate mandatory mine health and safety standards. 30 U.S.C. § 811. The 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.

Mine safety violations are enforced under 30 U.S.C. § 820, which imposes both civil and criminal penalties based on an escalating hierarchy of culpability. *See id.* §§ 820(a)-(d). On the civil side, mine operators are strictly liable for all violations, regardless of fault. *Id.* § 820(a). The amount of the civil penalty is based on "whether the operator was negligent," among other factors. *Id.* § 820(i). Additional civil penalties may be assessed for failure to correct violations in a timely manner. *Id.* § 820(b)(1). Violations deemed to be "flagrant"—defined as "a reckless or repeated failure to make reasonable efforts to eliminate a known violation … that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury"—are subject to the highest civil penalty of up to $220,000. *Id.* § 820(b)(2).

Corporate officials or agents who "knowingly" authorize, order or carry out a violation are subject to criminal penalties (as well as civil penalties). *Id.* § 820(c). Any mine operator who "willfully violates" a safety standard also is subject to criminal penalties.

Id. § 820(d). The maximum criminal penalties under the statute are imprisonment for one year and a $250,000 fine. *Id.*

The indictment did not charge Blankenship with "reckless or repeated failure to make reasonable efforts" to eliminate "known" violations of safety standards. Congress has not defined such conduct to constitute a criminal offense; such conduct exposes operators only to civil liability. 30 U.S.C. § 820(b)(2). Nor did it charge, under section 820(c), that Blankenship "knowingly" authorized, ordered, or carried out a safety violation. It charged, instead, a conspiracy to "willfully violate" safety standards in violation of section 820(d). C.A. App. 138.[4]

2. The case proceeded to a six-week trial in 2015. Although the government built its case on a record of regulatory citations issued at UBB—none of which alleged willful or even knowing conduct—the government did not produce a single MSHA inspector who had written any of the citations in evidence at trial.[5] Nor did it call a single witness who testified

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[4] The indictment did not identify a single regulation that Blankenship agreed to "willfully violate." According to the government, "[n]o listing of specific standards" was required to allege the offense, "and none would be required to prove it." C.A. App. 147. The district court agreed, C.A. App. 167-174, 201-207, and also denied a motion for bill of particulars seeking identification of the regulations Blankenship allegedly agreed to violate willfully, D. Ct. Dkt. 214 at 1, 9-10 (motion); 293 (order).

[5] Although the government was ordered to produce relevant MSHA e-mails, its Rule 16 disclosures likewise contained virtually no e-mails from the MSHA inspectors who were present in the UBB mine and issued citations there during the alleged conspiracy period.

that Blankenship authorized or intended any alleged violation described in any citation. The government's theory of criminality was that Blankenship—who was never present in the mine during the alleged conspiracy—was aware through regular reports that the mine was receiving a high number of citations and could have significantly reduced violations by budgeting for more miners and lower coal production targets, yet he failed to do so in order to increase profits.

The central dispute at trial was whether Blankenship harbored the *mens rea* (willfulness) required to commit the charged offense. The defense demonstrated with documents and testimony elicited on cross-examinations that Blankenship did not know or believe that his management decisions would cause safety violations to occur or otherwise break the law. Important government witnesses testified that Blankenship did not believe hiring more miners would reduce violations; never once suggested that safety regulations be violated; personally pushed supervisors hard to reduce violations; and instituted a company-wide program—headed by a former MSHA inspector—to achieve such reductions in the middle of the alleged conspiracy. *E.g.*, C.A. App. 397-399, 517, 533, 540-541, 691-692, 719, 725-726, 727-730, 735-737, 771-776, 784-786, 1298, 1315-1321, 1322, 1391, 1395-1399, 1400-1401, 1409-1415, 1601-1619, 1624-1633, 1638-1639, 1767, 1787, 1792, 1803, 1805-1809, 1827, 1960.

The prosecution's key witness—and the only one it claimed was a co-conspirator—was Chris Blanchard, the former head of the Massey subsidiary that owned and operated the UBB mine. C.A. App. 417, 470.

Blanchard was immunized the day before he testified in the grand jury to avoid prosecution. *Id.* 492, 520-521, 1777. He was the only trial witness from the UBB mine who communicated with Blankenship during the time of the alleged conspiracy.

On cross-examination, Blanchard unequivocally denied the existence of any agreement to violate safety standards; denied that he had ever committed a willful violation himself; denied there was an understanding that violations would be tolerated; and testified that Blankenship expected him to run UBB in compliance with MSHA regulations and wanted him to reduce violations. *E.g.*, C.A. App. 518-19, 540-541, 568-569, 574-585, 704-706, 712-713, 725-726, 727-730, 781-782, 784-786. Blanchard also testified that communications misinterpreted by the government were not directions by Blankenship to break the law. *E.g.*, *id.* 517, 522-23, 524-529, 534-537, 540-541, 548-569, 786.[6]

3. On redirect, the government impeached Blanchard with previously unmentioned grand jury testimony. It used leading questions to force Blanchard to adopt the answers he had given in the grand jury—to tightly scripted questions—regarding supposedly incriminating statements by Blankenship that the government chose not to elicit during direct

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[6] Blanchard's cross-examination testimony came as no surprise to the government. Blanchard testified that he or his attorneys told the government he had not committed any crimes, had not participated in any conspiracy, and had no agreement with Blankenship to violate mine safety standards. C.A. App. 783-784. Thus, in an apparent effort to shield its response to such testimony from cross-examination, the government reserved its response for redirect examination.

examination. C.A. App. 788-794. The government then introduced dozens of MSHA citations that had not been mentioned during direct or cross-examination, GX 328, 329, 331, 339, 345-349, 350A, 351-360, 362-363, 365-370, 376-378, 381-388, 390, 394, and, with a carefully structured redirect examination, left the jury with the false impression that Blankenship was aware of the factual allegations detailed in those citations, *e.g.*, C.A. App. 877-910. In total, 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.

Defense counsel asked for leave to cross-examine Blanchard about the new material elicited on redirect. C.A. App. 226-229, 1164-1176. The court declined to permit any re-cross at all. *Id.* 1181-1196. At the close of the government's case, the defense rested.

4. Regarding what it means to "willfully violate" mine safety standards, the government requested and received four special instructions that were first-of-their-kind and invented specifically for this case. App. 12a-13a (reprinted as instruction Nos. 1-4 in opinion below); *see id.* 40a-41a. The instructions purported to define "willfulness" for persons "with supervisory authority," a term not found in section 820(d). One of the four permitted the jury to convict upon finding that Blankenship

> knowingly, purposely and voluntarily fail[ed] to take actions that are necessary to comply with [a safety standard.]

Id. 13a (instruction No. 3). Another permitted conviction upon a finding that Blankenship acted, or failed to do so:

> with reckless disregard for whether that action or failure to act will cause [a safety standard] to be violated.

Id. (instruction No. 4).

These special instructions, which defined "willfulness" in terms of knowing conduct or reckless disregard for its consequences, permitted conviction without proof that Blankenship had agreed to conduct he knew was unlawful and *even if* the jury believed the testimony—all from government witnesses—that Blankenship fought for safety and did not believe his decisions contributed to violations.

The defense objected, C.A. App. 1536-1545, and unsuccessfully requested an instruction following the requirement explained in *Bryan v. United States*, 524 U.S. 184 (1998), that criminal willfulness requires proof of knowledge that one's conduct is unlawful and thus intent to break the law, C.A. App. 1548; *see* D. Ct. Dkt. 357-2, Ex. A at 44-45 (proposed instruction No. 40). The court overruled all objections and gave the special instructions. C.A. App. 1538, 1555-1557.

In closing argument, the government invoked the special instructions to make sure the jury knew to convict without proof of criminal intent. The government argued that the mere fact that Blankenship failed to prevent safety violations was criminal without regard to what he actually knew or intended. C.A. App. 1590-1591. The government conceded that it was "probably true" that "the defendant didn't want to have safety violations," *id.* 1593, and argued that criminal guilt followed from a simple breach of "defendant's duty to see that the laws were followed," *id.* 1562. The government displayed this slide to the jury, as if it were a civil

negligence plaintiff: "The Defendant had a DUTY to see that his mines complied with the mine safety laws." *Id.* 272.

The jury twice announced deadlock. After an *Allen* charge, the jury returned its guilty verdict on the misdemeanor conspiracy to willfully violate safety regulations. The jury acquitted on all other charges and counts—including one for which the court gave a proper criminal willfulness instruction. App. 41a.

The district court imposed the maximum sentence for the misdemeanor: one year's imprisonment and a fine of $250,000. The district court and Fourth Circuit, both without explanation, denied release pending appeal.

5. Although the government did not defend the special willfulness instructions in its briefing, *see* Pet. C.A. Reply Br. 1-2, 5-6 (highlighting the failure to defend the instructions on appeal), the Fourth Circuit affirmed. Upholding the instructions, the court first concluded that "*Bryan* and [*Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007)] did not prohibit the use of 'reckless disregard' in defining 'willfully' for purposes of criminal statutes." App. 19a. The panel reasoned that, in *Bryan*, this Court noted that "willfully" can have different meanings depending on the context and stated only "[a]s a general matter" that criminal willfulness requires proof "that the defendant acted with knowledge that his conduct was unlawful." *Id.* 14a. Regarding *Safeco*, the Fourth Circuit pointed to this Court's holding that recklessness can amount to willfulness in *civil* cases. *Id.* 15a.

The Fourth Circuit stated that it "repeatedly has held, post-*Bryan* and *Safeco*, that 'reckless disregard'

and 'plain indifference' can constitute criminal 'willfulness.'" App. 16a-18a (discussing two *civil* cases affirming summary judgments upholding administrative license revocations). It further emphasized that "other Circuits" interpreting "a variety of criminal statutes" have "reached the same conclusion." *Id.* 18a-19a (citing both pre- and post-*Bryan* decisions from other circuits).

Turning to the question of whether "reckless disregard" amounts to criminal "willfulness" for purposes of section 820(d), the Fourth Circuit (App. 19a-20a) primarily relied on its pre-*Bryan* decision in *United States v. Jones*, 735 F.2d 785 (4th Cir. 1984), which upheld a trial court's reckless-disregard-of-law instruction in a prosecution under section 820(c) for "knowing" conduct, rather than one under section 820(d) for a "willful violation." *Jones* did not involve special willfulness instructions for supervisors. Nor did it involve an instruction, like one at issue here, defining criminal willfulness as reckless disregard for the consequences of one's actions.

While the Fourth Circuit recognized that section 820(d) "parallels the criminal liability provision in the Gun Control Act at issue in *Bryan*," App. 22a, it did not explain why *Bryan's* holding and reasoning did not command the same result in a prosecution under the Mine Act's "parallel" provision. Instead, without acknowledging that section 820 imposes only civil penalties for reckless conduct, the Fourth Circuit found that "the legislative history" of the Mine Act "indicate[s] that Congress intended to bring conduct evidencing reckless disregard within the meaning of 'willfully.'" App. 21a. The court pointed to a 1977 Senate Report, which stated that enhanced *civil*

enforcement provisions were included in the Mine Act to address chronic violators. *Id.* 21a, 24a.

Seemingly motivated by its judgment that the civil enforcement mechanisms Congress put in the Mine Act are inadequate "to deter corporate misconduct," App. 24a-25a (citing a law review article), the Fourth Circuit concluded that mining executives must be held criminally responsible for management decisions later determined to have been made in "reckless disregard" for their consequences in order to "force[] mine operators to internalize the costs associated with noncompliance with mine safety laws," *id.* 25a (citing another law review article).

Succinctly stated, the court held that section 820(d)'s willfulness requirement permits the imposition of criminal penalties on corporate executives or others who "'should have known' that an action or omission would lead to a safety violation," "regardless of whether [they] subjectively wanted" violations to occur or continue. App. 27a.

Addressing the argument that two of the special instructions (Nos. 1 & 3) erroneously permitted conviction based on mere "knowing" conduct, the Fourth Circuit did not hold that "knowing" conduct alone (*i.e.*, "knowledge of the facts," *Bryan*, 524 U.S. at 193) satisfies section 820(d)'s willfulness requirement. Instead, in order to make the instructions fit within the *Bryan* standard for criminal willfulness, the court simply read into the instructions words that do not appear in them. For instance, the court interpreted the instruction that a supervisor "willfully violates" a safety standard if he "knowingly, purposely and voluntarily fails to take actions that are necessary to comply with [a standard]," App. 13a (instruction

No. 3), as unambiguously "requir[ing] the jury to conclude that Defendant *knew* the action … was 'necessary to comply with [a standard],'" *id.* 29a (emphasis added); *see id.* 28a (similar analysis regarding instruction No. 1). In other words, the Fourth Circuit concluded that the jury would have understood the phrase "that are necessary to comply" as if it actually read "that [he knows] are necessary to comply."

The court construed instruction No. 3 in this manner even though the missing language it read into the instruction *does* appear in others. The court therefore assumed that the jury would have interpreted differently worded instructions to carry identical meanings. In fact, the immediately preceding (and parallel) instruction required the jury to find that Blankenship "knowingly, purposely and voluntarily takes actions that *he knows* will cause a standard to be violated." App. 13a (instruction No. 2) (emphasis added). Thus, the Fourth Circuit assumed not only that the jury would read the words "he knows" into instruction No. 3, but that it would do so despite the fact that the juxtaposition of instruction Nos. 2 and 3 signaled to the jury that those very words (and the critical concept they conveyed) were omitted intentionally.

6. In holding that the district court's denial of recross-examination was not reversible error, the Fourth Circuit recognized that Blanchard "was an important witness" for the prosecution and assumed that he testified to "new matter" on redirect, triggering a Confrontation Clause right to cross-examine in a recross-examination. App. 10a. Nevertheless, citing cases decided before *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), but not

Melendez-Diaz itself, the court concluded that any error was harmless principally because the defense—which did not put on a separate defense case—"could have recalled Blanchard as a witness later in the trial." *Id.* 11a-12a. Demonstrating its importance to the government's case, Blanchard's untested redirect testimony is the *only* trial testimony quoted in the panel's recitation of the evidence at the outset of its opinion. App. 4a (citing C.A. App. 790-791, 793).

The Fourth Circuit summarily denied rehearing en banc. App. 32a-33a. On May 10, 2017, Blankenship completed his one-year prison sentence.

REASONS FOR GRANTING THE PETITION

This petition presents two questions meriting review. *First*, the opinion below adopted first-of-their-kind jury instructions that conflict with *Bryan v. United States*, 524 U.S. 184 (1998), which holds that criminal willfulness demands "proof that the defendant knew that his conduct was unlawful," and also with *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007), which reaffirms *Bryan*. If uncorrected, the Fourth Circuit's holding will diminish statutory *mens rea* requirements in a wide range of criminal prosecutions and will allow defendants to be convicted on the basis of business or other decisions made without knowledge of unlawfulness, without intent to violate the law, and without intending for the proscribed conduct even to have occurred.

Second, the opinion below conflicts with *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), which holds that denial of the constitutional right to cross-examine a prosecution witness is error even if a defendant could have called the witness in the defense case. The Fourth Circuit's holding is a dangerous one

that renders unreviewable almost any Confrontation Clause violation.

I. THE OPINION BELOW CONFLICTS WITH *BRYAN* AND *SAFECO*, WHICH HOLD THAT CRIMINAL WILLFULNESS REQUIRES PROOF OF KNOWLEDGE THAT ONE'S CONDUCT IS UNLAWFUL.

Consistent with prior confessions of error by the Solicitor General, *Bryan* and *Safeco* leave no room for doubt that "reckless disregard" for the consequences of one's actions and "knowing" conduct (absent knowledge of its illegality) cannot establish criminal willfulness.

1. When this Court held in *Bryan* that, "[a]s 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,'" 524 U.S. at 191-92 (citation omitted), it was not writing on a blank slate. *See Ratzlaf v. United States*, 510 U.S. 135, 149 (1994) (conviction for "willfully" violating a federal antistructuring provision requires proof that the defendant "knew the structuring in which he engaged was unlawful"); *Cheek v. United States*, 498 U.S. 192, 201 (1991) (reaffirming that "willfulness" in criminal tax cases requires proof that the defendant intentionally violated a "known legal duty").

Bryan involved a conviction for "willfully" dealing in firearms without a federal license, in violation of 18 U.S.C. § 922(a)(1)(A) and 924(a)(1)(D).[7] This Court

[7] Section 922(a)(1)(A) makes it unlawful for any person to engage in the business of dealing in firearms without a license. That provision is enforced criminally through section 924(a)(1)(D), which imposes criminal penalties on anyone who "willfully violates any other provision of this chapter."

already had recognized that criminal willfulness necessitated proof "that the defendant acted with knowledge that his conduct was unlawful." *Ratzlaf*, 510 U.S. at 137. As a result, the "question presented" in *Bryan* was whether the term "willfully," as used in section 924(a)(1)(D), *only* "requires proof that the defendant knew that his conduct was unlawful," as the government argued, "or whether it *also requires* proof that he knew of the federal licensing requirement," as Bryan contended. 524 U.S. at 186 (emphasis added). Agreeing with the government, the Court found that section 924(a)(1)(D) fell into the "general" category of criminal willfulness referred to in *Bryan's* above-quoted holding. Three dissenting Justices would have gone further and invoked the rule of lenity to require an even higher *mens rea—i.e.*, proof of offense-specific knowledge. 524 U.S. at 200-05 (Scalia, J., dissenting, joined by Rehnquist, C.J. and Ginsburg, J.).

Thus, while this Court acknowledged in *Bryan*, as it has in other decisions, that "willfully" has different meanings in different contexts, *see id.* at 191, the Court addressed the criminal context in *Bryan* and established a floor regarding proof that is required to impose criminal penalties for conduct that Congress has determined is "only criminal when done 'willfully,'" *id.* at 193. "The jury *must find* that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *Id.* (emphasis added); *accord Dixon v. United States*, 548 U.S. 1, 5-6 (2006).

While ultimately affirming Bryan's conviction, the Court held it was error and "a misstatement of the law" for the trial court to charge: "*nor is the*

government required to prove that he had knowledge that he was breaking the law." 524 U.S. at 199 (emphasis in original) (declining to reverse based on failure to object and other reasons); *see id.* at 200 (Souter, J., concurring) (vacating the conviction would have been required if the defendant had raised and preserved an objection to the erroneous instruction). The instructions in this case conveyed the same erroneous message, only in different words.

2. The Fourth Circuit misconstrued the phrase "[a]s a general matter" to limit the reach of *Bryan's* holding and thus misread *Bryan* as supporting the proposition that criminal willfulness can be established by "reckless disregard" or even negligence. App. 14a-16a. *Bryan* does nothing of the sort, as the Solicitor General twice has repeated in confessions of error before this Court. U.S. Br., *Ajoku v. United States*, No. 13-7264, 2014 WL 1571930, at *9-10 (Mar. 10, 2014); U.S. Br., *Russell v. United States*, No. 13-1757, 2014 WL 1571932, at *6 (Mar. 10, 2014); *cf.* U.S. Br. at *11-12, *Perry v. United States*, No. 03-3674 (May 5, 2017).

Russell and *Ajoku* were prosecutions for "knowingly and willfully" making false statements to obtain large federal health care payments, in violation of 18 U.S.C. § 1035. In *Russell*, the trial court defined willfulness to require only proof that the defendant "knew [the statement] was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth." U.S. Br., at *4. In *Ajoku*, the trial court instructed that willfulness requires only proof that the defendant made a false statement "deliberately and with knowledge" of falsity. U.S. Br., at *8. The Solicitor General confessed error in both

cases, conceding that *Bryan* required an instruction that the defendants acted with knowledge that their conduct was unlawful. U.S. Br., *Russell*, at *6; U.S. Br., *Ajoku*, *9-10. This Court granted certiorari, vacated the judgments, and remanded both cases at 134 S. Ct. 1872 (2014) (mem.). Though raised below, Pet. C.A. Br. 41-42, 46, 48, the panel's opinion does not acknowledge these confessions of error.

3. The Fourth Circuit also mistakenly found comfort in *Safeco*, which addresses "willfulness" as a statutory condition for *civil* liability in the context of a statute that uses the term in both civil *and* criminal provisions. 551 U.S. at 56-57, 60. To be sure, this Court held in *Safeco* that proof of recklessness is sufficient to prove willfulness in a civil case. But in reaching that conclusion, the Court emphasized that *civil* willfulness is different from *criminal* willfulness, even within the same statute. "It is different in the criminal law.… Thus we have consistently held that a defendant *cannot* harbor such criminal intent unless he 'acted with knowledge that his conduct was unlawful.'" *Id.* at 57 n.9 (quoting *Bryan*) (emphasis added); *see id.* at 60 ("The vocabulary of the criminal side [of the statute] is consequently beside the point in construing the civil side."); *cf. id.* at 57 (recklessness is "standard civil usage"), 60 (civil willfulness gives plaintiffs "a choice of mental states"). Far from suggesting that recklessness can constitute willfulness in a criminal case, *Safeco* reaffirms in no uncertain terms that it cannot.

Because the jury was not required to find that Blankenship acted with knowledge that his conduct was unlawful, *Bryan* and *Safeco* require reversal of his conviction for conspiracy to "willfully" violate mine

safety standards under 30 U.S.C. § 820(d). By refusing to follow this Court's holdings and undermining the statutory *mens rea* requirement, the Fourth Circuit approved instructions that allowed the jury to convict Blankenship for budgeting decisions that do not amount to the crime Congress defined.

II. CERTIORARI IS NECESSARY TO ADDRESS THE REFUSAL OF COURTS OF APPEALS TO CONSISTENTLY APPLY *BRYAN* AND *SAFECO*.

As discussed, since no later than 1998—when *Bryan* was decided—this Court's decisions have established that criminal willfulness requires proof of knowledge that one's conduct is unlawful. And, to the extent any remaining doubt may have existed after *Bryan*, *Safeco* confirmed that criminal willfulness can never be established by recklessness. That the *Bryan* standard sets the floor for criminal willfulness is reflected not only in confessions of error by the Solicitor General but also in many decisions by courts of appeals interpreting a wide range of statutes in which Congress has chosen to impose criminal liability only when violations of law are committed "willfully." Indeed, before last year, the Fourth Circuit consistently applied the *Bryan* standard in criminal cases. *See United States v. Bishop*, 740 F.3d 927, 932-35 (4th Cir. 2014) (22 U.S.C. § 2778(c)); *United States v. Bursey*, 416 F.3d 301, 308-09 & n.8 (4th Cir. 2005) (18 U.S.C. § 1752(a)(1)(ii)); *United States v. Bostic*, 168 F.3d 718, 722 (4th Cir. 1999) (criminal willfulness requires "conscious performance of bad acts with an appreciation of their illegality").

Nevertheless, as the opinion below exemplifies, courts of appeals across the country continue to hold in various contexts—often relying, as the Fourth

Circuit did here, on pre-*Bryan* authority and civil cases—that criminal willfulness can be established without proof that the defendant intended to act unlawfully. For example, in rulings that trace their roots to *United States v. Charnay*, 537 F.2d 341, 351-52 (9th Cir. 1976), the Ninth Circuit consistently holds that statutes criminalizing only "willful[]" violations of the securities laws do not require the jury to find knowledge of unlawfulness or illegality. *See United States v. Lloyd*, 807 F.3d 1128, 1166 (9th Cir. 2015); *United States v. Reyes*, 577 F.3d 1069, 1080 (9th Cir. 2009); *United States v. English*, 92 F.3d 909, 915 (9th Cir. 1996). The Second Circuit has a similar line of cases stretching back to *United States v. Peltz*, 433 F.2d 48, 54 (2d Cir. 1970). *See United States v. Kaiser*, 609 F.3d 556, 568-70 (2d Cir. 2010).

In many other contexts, courts of appeals all too often still refuse to apply the *Bryan* standard. *See*, *e.g.*, *United States v. Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006) (18 U.S.C. § 1001); *United States v. George*, 386 F.3d 383, 392-96 (2d Cir. 2004) (18 U.S.C. § 1542); *United States v. Figueroa*, 729 F.3d 267, 277-78 (3d Cir. 2013) (18 U.S.C. § 242); *United States v. Trudeau*, 812 F.3d 578, 588-89 (7th Cir. 2016) (criminal contempt); *cf. United States v. Kay*, 513 F.3d 432, 447 (5th Cir. 2007) ("The definition of 'willful' in the criminal context remains unclear" and in some cases means only "committing an act, and having knowledge of that act[.]"); Eighth Circuit Model Crim. Jury Instructions, § 7.02, comm. cmts. (2014) (in "most cases" willfully means "voluntarily and intentionally" and "no further definition is needed"); Tenth Circuit Crim. Pattern Jury Instructions, § 1.38, cmt. (2011) (a willfulness requirement may only "impose on the government the burden of proving that

the defendant had knowledge of his conduct"). Only two Circuits have pattern criminal willfulness instructions adopting the *Bryan* standard. *See* Third Circuit Model Crim. Jury Instructions, § 5.05 (2017); Eleventh Circuit Pattern Jury Instructions (Crim. Cases), § B9.1A (2016).

Some courts of appeals remain recalcitrant even after the Solicitor General has confessed error or otherwise taken the position before this Court that the *Bryan* standard governs prosecutions under particular statutes. For instance, while acknowledging that this Court vacated the judgments in *Ajoku* and *Russell* after the Solicitor General conceded what *Bryan* requires with regard to 18 U.S.C. § 1035 specifically, the Fourth Circuit this past year still found that "the meaning of willfully in [section] 1035 … is, at a minimum, subject to reasonable debate," and held that an instruction defining "willfully" to mean "deliberately, voluntarily, and intentionally" was not plain error. *United States v. Perry*, 659 F. App'x 146, 156-57 (4th Cir. 2016), *petition for cert. filed*, (Feb. 2, 2017) (No. 16-7763); *cf. United States v. Eglash*, 640 Fed. App'x 644, 646 (9th Cir. 2016) (18 U.S.C. § 1001); *United States v. Mazzeo*, 592 Fed. App'x 559, 561-62 (9th Cir. 2015) (same).

Simply put, certiorari is necessary to reinforce that this Court meant what it said in *Bryan* and *Safeco*: a defendant cannot harbor the intent of criminal "willfulness" unless he acted with knowledge that his conduct was unlawful, which is to say, that he acted with intent to violate the law.

III. THE OPINION BELOW WILL UNDERMINE STATUTORY *MENS REA* REQUIREMENTS AND EXPOSE TO PROSECUTION MANAGEMENT DECISIONS MADE WITH NO INTENT TO VIOLATE ANY LAW.

The Fourth Circuit's decision threatens to dramatically expand—in the absence of congressional authority—the federal criminal liability of individual corporate officers and directors for the unintended consequences of corporate actions.

Although the Fourth Circuit addressed willfulness in the context of the Mine Act's criminal provision, there is no limiting principle in the panel's decision to cabin its holding to that statute. To the contrary, after concluding that *Bryan* and *Safeco* do not preclude defining criminal willfulness in terms of "reckless disregard," the Fourth Circuit proceeded to hold that reckless disregard constitutes criminal willfulness under section 820(d) *precisely because* that provision "parallels" the statute addressed in *Bryan*. App. 22a; *see id.* 22a-23a (noting that "both Section 820(d) and Section 924(d)(1) prohibit the 'willful violation' of the substantive provisions of their respective statutes and the regulations promulgated thereunder," and agreeing that "[t]here is no textual basis for distinguishing the Mine Act's identically constructed liability provision from the statutory liability provision in *Bryan*"). That logic would dilute the *mens rea* requirement in any federal statute intended by Congress in express terms to criminalize only "willful" violations of law.[8]

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[8] *E.g.*, Securities and Exchange Act, 15 U.S.C. § 78ff(a); Arms Export Control Act, 22 U.S.C. § 2778(c); Taft-Hartley Act, 29

But the decision goes even further by adopting a diminished standard of criminal willfulness unique to persons "with supervisory authority." Employing standard *civil* usage, the Fourth Circuit held that any corporate official who (1) "'should have known' that an action or omission would lead to a safety violation," or (2) "fails to take actions necessary to remedy safety violations…, regardless of whether the [official] subjectively wanted the violations to continue," is criminally liable for "willfully" violating mine safety regulations. App. 27a. That holding permits juries to convict corporate officials for committing willful violations of law not only without proof that the officials knew *their* conduct was unlawful; it allows for convictions without proof that the officials even intended for the proscribed conduct (committed by subordinates) to have occurred. In other words, the Fourth Circuit's holding permits the government to second-guess corporate actions and to hold corporate officials criminally responsible for ordinary business decisions later determined to have failed to prevent the occurrence or recurrence of regulatory or other violations.

The Fourth Circuit's principal reason for departing from the *Bryan* standard, as to corporate officials, is the policy judgment that personal criminal liability is necessary to "force[] mine operators to internalize the

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U.S.C. § 186(d)(2); Fair Labor Standards Act, 29 U.S.C. § 216(a); Occupational Safety and Health Act, 29 U.S.C. § 666(e); Atomic Energy Act, 42 U.S.C. § 2278a(b) and (c); Federal Land Policy and Management Act, 43 U.S.C. § 1733(a); 49 U.S.C. § 521(b)(6)(A) (commercial motor vehicle safety); International Emergency Economic Powers Act, 50 U.S.C. § 1705(b); Federal Election Campaign Act, 52 U.S.C. § 30109(d).

costs associated with noncompliance with mine safety laws, even when such noncompliance would be profit-maximizing from a business perspective." App. 25a. Congress, of course, is free to enact criminal statutes with *mens rea* elements aimed at forcing corporate compliance with federal regulatory regimes, and even subjecting corporate executives to such standards. But when, as here, Congress expressly has reserved criminal penalties for willful conduct and has chosen to impose only civil liability for negligence and recklessness, courts are not free to override the judgment of Congress and to criminalize management decisions found to be negligent or reckless.

Absent review by this Court, the opinion below will give federal prosecutors a basis to investigate and indict business executives for corporate actions the government believes did not maximize their companies' legal or regulatory compliance efforts. It will open the door to jury presentations that criminal willfulness is established on a finding that corporate officials did not do enough to ensure that their companies never operate outside of any legal or ever-changing regulatory requirements. And it will allow those in supervisory positions to be incarcerated for management decisions they made without any conception of illegality or intent that any laws would be violated.

As this case well illustrates, the dangers posed by the Fourth Circuit's decision are not hypothetical. Armed with an opinion diluting the criminal willfulness standard for corporate executives and others in supervisory positions, the government is all but certain to seek to diminish its burden in other cases.

IV. THE OPINION BELOW CONFLICTS WITH *MELENDEZ-DIAZ*, WHICH HOLDS THAT A CRIMINAL DEFENDANT'S RIGHT TO CALL WITNESSES IS NO SUBSTITUTE FOR THE RIGHT OF CONFRONTATION.

It is well established that the Sixth Amendment rights to confrontation and cross-examination "apply with equal strength to recross examination where new matter is brought out on redirect examination." *United States v. Caudle*, 606 F.2d 451, 457-58 (4th Cir. 1979); *accord United States v. Riggi*, 951 F.2d 1368, 1375 (3d Cir. 1991); *see United States v. Jones*, 982 F.2d 380, 384 (9th Cir. 1992); *United States v. Vasquez*, 82 F.3d 574, 577 (2d Cir. 1996); *United States v. Ross*, 33 F.3d 1507, 1517-18 & n.19 (11th Cir. 1994).

The Fourth Circuit recognized that Blanchard "was an important witness" for the prosecution and correctly assumed that he had testified to "new matter" on redirect (supposedly incriminating statements by Blankenship and scores of written safety citations that had never before been discussed or placed in evidence), triggering a Confrontation Clause right to cross-examine in a recross-examination. App. 10a. The panel nevertheless concluded that the district court's refusal to permit Petitioner any opportunity to cross-examine Blanchard on the new matter was harmless, principally because the defense "could have recalled Blanchard as a witness later in the trial." *Id.* 11a. That holding cannot be reconciled with *Melendez-Diaz*. The defense raised *Melendez-Diaz* below, Pet. C.A. Reply Br. 38-39, but the Fourth Circuit's opinion does not address the case.

In *Melendez-Diaz*, this Court rejected a state's argument that its statute allowing drug analysts to "testify" through written reports did not violate the Confrontation Clause "because petitioner had the ability to subpoena the analysts." 557 U.S. at 324. The reason was simple: "[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Id.* As the Court elsewhere has recognized, the right to confrontation "arise[s] automatically on the initiation of the adversary process and no action by the defendant is necessary to make [it] active in his or her case." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). More specifically, the right is "designed to restrain the prosecution by regulating the procedures by which it presents *its case* against the accused. [It applies] in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own." *Id.* at 410 n.14 (emphasis added) (quotation marks omitted). Thus, as this Court squarely held in *Melendez-Diaz*, a defendant's ability to compel witnesses—whether "pursuant to state law or the Compulsory Process Clause—is no substitute for the right of confrontation." 557 U.S. at 324.

Any other conception of the Confrontation Clause would render it a superfluous constitutional right. The Compulsory Process Clause, which guarantees defendants the right "to have compulsory process for obtaining witnesses in [their] favor," U.S. Const. amend. VI, already gives defendants the right to "compel a witness' presence in the courtroom." *Taylor*, 484 U.S. at 409. By construing the Confrontation Clause to afford a defendant nothing more than the Compulsory Process already provides,

the Fourth Circuit contravened not only *Melendez-Diaz* but also the "first principle of constitutional interpretation," which is that "every word must have its due force, and appropriate meaning." *Wright v. United States*, 302 U.S. 583, 588 (1938) (quotation marks omitted). "No word" in the Constitution "was unnecessarily used, or needlessly added." *Id.*

Furthermore, criminal defendants have an unqualified Fifth Amendment right to present no case at all. By ruling that a criminal defendant must call a government witness in a defense case in order to obtain his right to cross-examination, the opinion below diminishes both rights and forces criminal defendants to choose between them, even though the Constitution guarantees both.

V. THIS CASE IS A GOOD VEHICLE TO REVIEW THE QUESTIONS PRESENTED.

1. This petition presents a clean opportunity for the Court to resolve the question whether criminal willfulness requires proof of knowledge that one's conduct is unlawful—meaning, intent to violate the law—or whether it can be established by proof of knowing conduct or reckless disregard for its consequences.

First, Blankenship made specific objections to the special instructions on grounds that they contravened the decisions of this Court defining criminal willfulness, and the district court overruled his objections. C.A. App. 1536-1545, 1548, 1555-1557. The issue was then fully considered by the panel below, which analyzed it extensively in a published opinion. App. 12a-29a. The Fourth Circuit, in turn,

refused to reconsider the case en banc, despite the panel's departure from *Bryan* and *Safeco*.

Second, the issue is outcome-determinative. If the special instructions were incorrect, Blankenship would be entitled to a new trial. For good reason, the Fourth Circuit did not purport to find that any error in the instructions could be overlooked as harmless. An error in defining the elements of an offense is harmless only if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder v. United States*. 527 U.S. 1, 15 (1999); *see McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016) (instructional error not harmless where it allowed conviction for conduct that is not a crime). And here, not only was the element of criminal willfulness hotly contested, but the verdicts show the instructional error was decisive.

While the jury convicted Blankenship of conspiracy to "willfully" violate mine safety standards, it acquitted him of making false statements about the same subject. Immediately following the challenged instructions defining "willfully" with respect to the count of conviction (Count One), the jury was instructed that, in connection with the count of acquittal (Count Two), "willfully" meant that the defendant acted voluntarily, purposely, "and with knowledge that 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." App. 41a. Thus, not only was the instructional error on the count of conviction not harmless; it appears to have been dispositive.

2. This petition also presents a clean opportunity for the Court to address the Fourth Circuit's ruling

that a criminal defendant's Compulsory Process Clause right to compel witnesses to appear at trial renders harmless—and ultimately unreviewable—a trial court's violation of the defendant's Confrontation Clause rights.

Blankenship pressed his claim before the district court, which heard argument and took briefing on the issue before rejecting his position. The Fourth Circuit considered and addressed the issue in its published opinion, and refused to reconsider en banc despite the panel's departure from, and failure even to address, *Melendez-Diaz*. And the error was not harmless. It concerned dozens of new exhibits and the *only* testimony that Blankenship made statements even arguably consistent with the charged conspiracy. In other words, as the opinion below acknowledges, Blankenship was prevented from cross-examining testimony that was among the government's most powerful evidence against him.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM W. TAYLOR, III
Counsel of Record
ERIC R. DELINSKY
R. MILES CLARK
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Washington, DC 20036
(202) 778-1800
wtaylor@zuckerman.com

Counsel for Petitioner

MAY 25, 2017

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4193

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DONALD L. BLANKENSHIP,

Defendant - Appellant.

ILLINOIS COAL ASSOCIATION; OHIO COAL ASSOCIATION; WEST VIRGINIA COAL ASSOCIATION,

Amici Curiae.

Appeal from the United States District Court for the Southern District of West Virginia, at Beckley. Irene C. Berger, District Judge. (5:14-cr-00244-1)

Argued: October 26, 2016 Decided: January 19, 2017

Before GREGORY, Chief Judge, WYNN, Circuit Judge, and DAVIS, Senior Circuit Judge.

Affirmed by published opinion. Judge Wynn wrote the opinion, in which Chief Judge Gregory and Senior Judge Davis joined.

ARGUED: William Woodruff Taylor, III, ZUCKERMAN SPAEDER LLP, Washington, D.C., for Appellant. Steven Robert Ruby, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee. **ON BRIEF:** Michael R. Smith, Eric R. Delinsky, ZUCKERMAN SPAEDER LLP, Washington, D.C., for Appellant. Carol A. Casto, United States Attorney, R. Gregory McVey, Gabriele Wohl, Assistant United States Attorneys, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee. Christopher A. Brumley, Jeffrey M. Wakefield, Nathaniel K. Tawney, Wesley P. Page, Bradley J. Schmalzer, FLAHERTY SENSABAUGH BONASSO PLLC, Charleston, West Virginia, for Amici Curiae.

WYNN, Circuit Judge:

Defendant Donald Blankenship ("Defendant"), former chairman and chief executive officer of Massey Energy Company ("Massey"), makes four arguments related to his conviction for conspiring to violate federal mine safety laws and regulations. After careful review, we conclude the district court committed no reversible error. Accordingly, we affirm.

I.

This case arises from a tragic accident on April 5, 2010 at the Upper Big Branch coal mine in Montcoal, West Virginia, which caused the death of 29 miners. Massey owned and operated the Upper Big Branch mine.

In the years leading up to the accident, the federal Mine Safety & Health Administration (the "Mine Safety Administration") repeatedly cited Massey for violations at the Upper Big Branch mine of the Mine Safety & Health Act of 1977, 30 U.S.C. § 801 *et seq*. (the "Mine Safety Act"), and its implementing regulations. [1] In 2009 alone, the Mine Safety Administration identified 549 violations at the Upper Big Branch mine. Indeed, in the 15 months preceding the April 2010 accident, the Upper Big Branch mine received the third-most serious safety citations of any mine in the United States. Many of these violations related to improper ventilation and accumulation of combustible materials—problems that were key contributing factors to the accident. Defendant was aware of the violations at the Upper Big Branch mine

[1] Because the jury convicted Defendant, we recite the evidence in the light most favorable to the government.

in the years leading up to the accident, receiving daily reports showing the numerous citations for safety violations at the mine.

Not only did Defendant receive daily reports of the safety violations, beginning in mid-2009, but Defendant also received warnings from a senior Massey safety official about the serious risks posed by the violations at Upper Big Branch. And the safety official informed Defendant that "[t]he attitude at many Massey operations is 'if you can get the footage, we can pay the fines.'" J.A. 1907. Evidence suggested that Defendant had fostered this attitude by directing mine supervisors to focus on "run[ning] coal" rather than safety compliance and to forego construction of safety systems. J.A. 1902, 1924. Defendant also told the Massey employee in charge of the Upper Big Branch mine that "safety violations were the cost of doing business" and that it was "cheaper to break the safety laws and pay the fines than to spend what would be necessary to follow the safety laws." J.A. 790-91.

Notwithstanding the numerous citations and warnings, Defendant had a "policy to invariably press for more production even at mines that he knew were struggling to keep up with the safety laws." J.A. 793. For example, Defendant directed the supervisor of Upper Big Branch to reopen a mine section to production even though it lacked a legal return airway. Additionally, Massey employees advised Defendant that the lack of adequate staff was a key factor in the high number of safety violations at Upper Big Branch. Contrary to this advice, Massey reduced staff at the Upper Big Branch mine less than two months before the accident, a decision that

Defendant would have had to approve given his close supervision of mine operations and staffing.

On November 13, 2014, a federal grand jury indicted Defendant for: (1) conspiring to willfully violate federal mine safety laws and regulations; (2) conspiring to defraud federal mine safety regulators; (3) making false statements to the Securities & Exchange Commission regarding Massey's safety compliance; and (4) engaging in securities fraud. The grand jury issued a superseding three-count indictment (the "Superseding Indictment") on March 10, 2015, which combined the conspiracy counts into a single, multi-object conspiracy charge and included additional factual allegations. Following a six-week trial, a jury convicted Defendant of conspiring to violate federal mine safety laws and acquitted him of the remaining indicted offenses. The district court sentenced Defendant to one year imprisonment and assessed a $250,000 fine, both of which were the maximum permitted by law. Defendant timely appealed.

On appeal, Defendant argues that the district court: (1) erroneously concluded that the Superseding Indictment sufficiently alleged a violation of Section 820(d); (2) improperly denied Defendant the opportunity to engage in re-cross examination of an alleged co-conspirator; (3) incorrectly instructed the jury regarding the meaning of "willfully" in 30 U.S.C. § 820(d), which makes it a misdemeanor for a mine "operator" to "willfully" violate federal mine safety laws and regulations; and (4) incorrectly instructed the jury as to the government's burden of proof. We address each argument in turn.

II.

First, Defendant argues that the district court erred in refusing to dismiss his indictment. When, as here, a defendant challenges the sufficiency of an indictment prior to verdict, we review the sufficiency of the indictment de novo, "'apply[ing] a heightened scrutiny' to ensure that every essential element of an offense has been charged." *United States v. Perry*, 757 F.3d 166, 171 (4th Cir. 2014) (quoting *United States v. Kingrea*, 573 F.3d 186, 191 (4th Cir. 2009)).

To satisfy the Fifth and Sixth Amendments, "[a]n indictment must contain the elements of the offense charged, fairly inform a defendant of the charge, and enable the defendant to plead double jeopardy as a defense in a future prosecution for the same offense." *Id.* Under this standard, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the [offense] intended to be punished." *Id.* (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). To the extent an indictment relies on a "general description based on the statutory language," the indictment also should include "a statement of the facts and circumstances as will inform the accused of the specific [offense], coming under the general description." *Id.* (quoting *Hamling*, 418 U.S. at 117-18).

The jury convicted Defendant of conspiring to violate 30 U.S.C. § 820(d), which, in pertinent part, makes it unlawful for "[a]ny operator [to] willfully violate[] a mandatory [mine] health or safety

standard." The Superseding Indictment alleged that Defendant was "an operator[] of [Upper Big Branch]," and in that capacity, conspired to "routinely violate federal mandatory mine safety and health standards." J.A. 138. Accordingly, the indictment "set forth the offense in the words of the statute itself," which is generally sufficient. *Perry*, 757 F.3d at 171.

Notwithstanding that the Superseding Indictment tracked the language of the statute, Defendant asserts the Superseding Indictment was insufficient because it did not cite the specific mine safety regulations that he allegedly conspired to violate. We disagree.

As detailed above, when an indictment uses a "general description based on the statutory language," the indictment satisfies the Constitution if it includes an accompanying statement of facts that apprises a defendant of the specific offense the government alleges the defendant committed. *Id.* at 171. Here, as the district court correctly noted, although the Superseding Indictment did not include citations to specific regulations, it included a thirty-page factual background that identified numerous mine safety regulations that Defendant allegedly conspired to violate, including: (1) mine ventilation regulations, (2) mine-safety examination requirements, (3) regulations regarding support of roof and walls, and (4) regulations governing accumulation of explosive coal dust. The Superseding indictment also detailed how Defendant conspired to violate these and other regulations.

Defendant cites no authority holding that an indictment is insufficient for failing to include specific regulatory citations when the indictment describes at length which regulations the defendant violated and

how he violated those regulations. And the two cases upon which Defendant principally relies—*United States v. Hooker* and *United States v. Kingrea*—are readily distinguishable.

In *Hooker*, this Court found an indictment insufficient when it failed to include an essential statutory element of the offense—that the conduct at issue affected interstate commerce. 841 F.2d 1225, 1227-28 (4th Cir. 1988). By contrast, the Superseding Indictment tracked *the* statutory language verbatim. In *Kingrea*, the indictment again omitted an essential statutory element of the crime, and this omission "broaden[ed] the character of the crime beyond the scope of the crime as Congress has defined it in the applicable statute." 573 F.3d at 192. Here, not only did the Superseding Indictment track the statutory language, it also did not broaden the scope of the offense. Accordingly, the district court did not err in refusing to dismiss the Superseding Indictment.

III.

Second, Defendant argues that the district court violated his rights under the Sixth Amendment Confrontation Clause by denying him the opportunity to engage in recross-examination of Chris Blanchard, the Massey employee in charge of the Upper Big Branch mine. The governing rule is that "[w]here new evidence is opened up on redirect examination, the opposing party must be given the right of cross-examination on the new matter, but the privilege of recross-examination as to matters not covered on redirect examination lies within the trial court's discretion." *United States v. Riggi*, 951 F.2d 1368, 1375 (3d Cir. 1991) (quotation omitted); *see also United States v. Fleschner*, 98 F.3d 155, 158 (4th Cir.

1996) ("[I]f a new subject is raised in redirect examination, the district court must allow the new matter to be subject to recross-examination.").

Although there is no bright line rule delineating what constitutes "new matter," testimony elicited on redirect does not amount to "new matter" if the testimony only "expand[s] or elaborate[s] on the witness' previous testimony." *United States v. Baker*, 10 F.3d 1374, 1404-05 (9th Cir. 1993) (noting that "the authorities are devoid of any analysis of what constitutes 'new matter.'"), *overruled in part on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000).

By contrast, redirect testimony raises "new matter" when it encompasses a subject outside of the scope of direct examination or when a witness offers materially different testimony regarding a subject first introduced on direct. *See, e.g.*, *id.* at 1405 (concluding redirect raised new matter when witness testified on redirect that flask could produce significantly more methamphetamine than the amount he had testified it could produce on direct); *United States v. Jones*, 982 F.2d 380, 384 (9th Cir. 1992) (holding redirect testimony that, for the first time, placed defendant at crime scene constituted new matter); *United States v. Caudle*, 606 F.2d 451, 457-59 (4th Cir. 1979) (concluding redirect raised new matter when witness first testified to substance of report on redirect, even though witness had testified as to preparation and dissemination of report on direct).

Here, in reviewing whether the redirect examination raised new matter, the district court commendably received oral argument and, in concluding that redirect did not raise new matter,

thoroughly reviewed the transcript of direct, cross, and redirect and explained how each issue raised on redirect did not constitute new matter. Defendant principally argues that the district court improperly denied him the opportunity to recross-examine Blanchard regarding (1) his testimony on redirect that he testified before the grand jury that Defendant told Blanchard that it was "cheaper to break the safety laws and pay the fines" than comply, J.A. 790, and (2) a number of safety citations first introduced on redirect to rebut Blanchard's testimony on cross-examination that many citations did not reflect serious violations.

Assuming *arguendo* that the district court erred, after completing its thorough review, in denying recross-examination on those subjects, we conclude any such error was harmless beyond a reasonable doubt. *See Baker*, 10 F.3d at 1405 ("Reversal is not required if, assuming the damaging potential of recross-examination were fully realized, we can say that the error was harmless beyond a reasonable doubt."). "Factors to consider in determining harmlessness include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case." *Id.* at 1405-06 (internal quotation marks omitted).

Here, although Blanchard was an important witness, all of the subjects on which Defendant requested recross-examination were either effectively dealt with on cross-examination or cumulative of other evidence introduced at trial. For instance, on cross-

examination, Blanchard testified unambiguously that he did not conspire with Defendant to violate mine safety laws, and Blanchard testified that the government threatened to prosecute him if he did not testify before the grand jury, during which he inculpated Defendant. J.A. 519-20. Likewise, both Defendant and the government introduced numerous safety citations at Upper Big Branch, through Blanchard and other witnesses.

Furthermore, Defendant's cross-examination of Blanchard lasted nearly five days—more time than direct and redirect examination combined—and therefore Defendant had an extensive opportunity to examine Blanchard. The government also presented other evidence and testimony that would allow the jury to determine Defendant prioritized coal production at the expense of safety compliance, including memoranda from Defendant to Massey employees and statements from Defendant to Blanchard. *See, e.g.*, J.A. 1157-58 (Defendant telling Blanchard to reopen mine section even though it lacked legal return airway); J.A. 1902 (Defendant telling supervisors to "run coal" and not "build overcasts," which are ventilation systems); J.A. 1924 ("You need to . . . run some coal. We'll worry about ventilation or other issues at an appropriate time."). And the government presented other evidence establishing that the citations reflected serious safety violations.

Most significantly, Defendant could have recalled Blanchard as a witness later in the trial. *United* States *v. Gibson*, 187 F.3d 631, 1999 WL 543220, at *5-6 (4th Cir. July 27, 1999) (table) (holding denial of recross harmless because defendant could recall witness); *United States v. Ross*, 33 F.3d 1507,

1518 (11th Cir. 1994) (same); *Hale v. United States*, 435 F.2d 737, 752 n.22 (5th Cir. 1970) (holding denial of recross did not violate Confrontation Clause when defendant had opportunity to recall witness). Accordingly, the district court did not reversibly err in denying Defendant an opportunity to engage in recross-examination of Blanchard.

IV.

Next, Defendant argues that the district court errantly instructed the jury regarding the meaning of "willfully" violating federal mine safety and health standards for purposes of 30 U.S.C. § 820(d). This Court reviews de novo "whether the district court's instructions to the jury were correct statements of law." *Gentry v. E. W. Ptrs. Club Mgmt. Co. Inc.*, 816 F.3d 228, 233 (4th Cir. 2016) (quotation omitted). "In conducting such a review, we do not view a single instruction in isolation; rather we consider whether taken as a whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." *United States v. Jefferson*, 674 F.3d 332, 351 (4th Cir. 2012) (internal quotation omitted).

Defendant takes issue with the following instructions regarding the meaning of "willfully" in Section 820(d):

> 1. 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.

2. 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[;]

3. [O]r knowingly, purposefully, and voluntarily fails to take actions that are necessary to comply with the mandatory mine safety or health standard[;]

4. [O]r 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.

J.A. 1555-57.

A.

Defendant first argues that the fourth instruction improperly allowed the jury to convict Defendant for "reckless" conduct, rather than requiring the government to prove Defendant "knew his conduct would cause a violation of safety regulations . . . and was unlawful." Appellant's Br. at 44. In particular, Defendant contends that the Supreme Court's decisions in *Bryan v. United States*, 524 U.S. 184 (1998), and *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), bar courts from defining "willfully" in criminal statutes in terms of "reckless disregard."

1.

In *Bryan*, the Supreme Court reviewed whether the government introduced sufficient evidence to convict the defendant of "willfully" violating the federal Gun Control Act, which, among other things, prohibits dealing in firearms without a license. 524 U.S. at 189; *see also* 18 U.S.C. § 924(a)(1)(D). The defendant *argued* that in order to prove that he "willfully" violated federal gun laws, the government had to introduce evidence that "he was aware of the federal law that prohibits dealing in firearms without a federal license." 524 U.S. at 189. The Supreme Court rejected the defendant's argument, holding that, as a result of the long-standing principle that ignorance of the law is no excuse, the government need not prove that the defendant knew of the statutory provision at issue to violate it. *Id.* at 196.

In reaching this conclusion, the Court noted that "willfully" is "a word of many meanings whose construction is often dependent on the context in which it appears." *Id.* at 191 (internal quotation omitted). The Court said that, "[a]s a general matter," in the criminal context, "willful" means an act "undertaken with a 'bad purpose,'" and a "'willful' violation of a statute" occurs when "'the defendant acted with knowledge that his conduct was unlawful.'" *Id.* at 191-92 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)). The Court provided several additional examples of criminally "willful" conduct, including: (1) acting "without justifiable excuse"; (2) acting "stubbornly, obstinately, perversely"; (3) acting "without ground for believing it is lawful"; and (4) acting with "careless disregard [as to] whether or not one has the right so to act." *Id.* at 191 n.12.

Safeco involved a civil action under Section 1681n of the Fair Credit Reporting Act, which establishes a cause of action against entities that "willfully" fail to comply with the statute. 551 U.S. at 56-57. The Supreme Court rejected the defendant's argument that willfully limited liability to "acts known to violate the Act, not to reckless disregard of statutory duty." *Id.* at 57. In reaching this conclusion, the Court said that "where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well." *Id.* The Court further noted that, as explained in *Bryan*, in the criminal context "willfully" often requires the government to prove a defendant to have a "'bad purpose'" or to have "'acted with knowledge that his conduct was unlawful.'" *Id.* at 57 n.9 (quoting *Bryan*, 524 U.S. at 191-93).

Neither *Bryan* nor *Safeco* supports Defendant's position that reckless disregard cannot amount to criminal willfulness. In particular, *Bryan* and *Safeco* emphasized that "willful" has multiple meanings and that the "bad purpose" language upon which Defendant relies defines willful only as a "general matter"— i.e. not in all circumstances. Additionally, even if *Bryan* and *Safeco* had required a showing that a Defendant acted with a "bad purpose"—which they did not—the Supreme Court long ago recognized—in a decision relied on in *Bryan*—that "reckless disregard" can amount to acting with a "bad purpose" for purposes of criminal "willfulness." *Screws v. United States*, 325 U.S. 91, 101-04 (1945) (plurality op.).[2] And

[2] Although the Supreme Court did not issue a majority opinion in *Screws*, this Court and other Circuits have treated the definition of "willfulness" in Justice Douglas' plurality opinion—which

Bryan—upon which *Safeco* entirely relied—expressly recognized that "conduct marked by careless disregard" constitutes "willfulness." 524 U.S. at 191 n.12. Accordingly, *Bryan* and *Safeco* did not overturn longstanding Supreme Court precedent holding that reckless disregard can amount to criminal willfulness.

We further point out that this Court repeatedly has held, post-*Bryan* and *Safeco*, that "reckless disregard" and "plain indifference" can constitute criminal "willfulness." For example, in a decision addressing the meaning of "willfully" in the civil and criminal penalty provisions in federal gun control laws, [3] we concluded that "[a]t its core [willful] describes conduct that results from an exercise of the will, distinguishing 'intentional, knowing, or voluntary' action from that which is 'accidental' or inadvertent." *RSM, Inc. v. Herbert*, 466 F.3d 316, 320 (4th Cir. 2006). Accordingly, "when determining the willfulness of conduct, we must determine whether the acts were committed in deliberate disregard of, *or with plain indifference toward*, either known legal obligations or the general unlawfulness of the actions." *Id.* at 321-22 (emphasis added). We further held that this construction of "willfully" was "in accordance with *Bryan*'s construction of the term in the *criminal*

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encompasses "reckless disregard"—as controlling. *See, e.g.*, *United States v. Mohr*, 318 F.3d 613, 619 (4th Cir. 2003); *United States v. Bradley*, 196 F.3d 762, 769 (7th Cir. 1999); *United States v. Johnstone*, 107 F.3d 200, 207-08 (3d Cir. 1997).

[3] *RSM* was a civil action under the Gun Control Act contesting the revocation of a firearms license under 18 U.S.C. § 923(e). 466 F.3d at 321 n.1. Although *RSM* interpreted Congress' use of willfully in a civil provision, we held its interpretation of "willful" also applied to Section 924(a)(1)(D), the provision interpreted by the Supreme Court in *Bryan*. *Id.*

context of § 924(a)(1)(D)." *Id.* at 321 n.1 (emphasis added).

Applying this standard to the conduct at issue, we held that the defendant's repeated failure to comply with federal gun laws in the face of warnings by federal officials amounted to "willfulness":

> To be sure, a single, or even a few, inadvertent errors in failing to complete forms may not amount to "willful" failures, even when the legal requirement to complete the form was known. Yet *at some point*, when such errors continue or even increase in the face of repeated warnings given by enforcement officials, accompanied by explanations of the severity of the failures, one may infer as a matter of law that the licensee simply does not care about the legal requirements. *At that point*, the failures show the licensee's plain indifference and therefore become willful.

RSM, 466 F.3d at 322 (emphasis retained). Thus, we have held that "not car[ing]" about adherence to legal requirements amounts to criminal "willfulness," which is what the fourth instruction stated here. Notably, *RSM*'s description of the defendant's willful conduct tracks the government's theory of the case here: Defendant was repeatedly informed of safety violations at Upper Big Branch, and notwithstanding that knowledge, Defendant chose to prioritize production and pay fines rather than to take steps necessary to prevent the safety violations from continuing.

Following *RSM*, which post-dated *Bryan* but pre-dated *Safeco*, we held that *Safeco* did not call into question *RSM*'s analysis of the meaning of "willfully." *Am. Arms Int'l v. Herbert*, 563 F.3d 78, 85-86 (4th Cir. 2009). Additionally, in *American Arms*, we expressly equated "plain indifference" with "reckless disregard" for purposes of finding willfulness. *Id.* at 87.

In interpreting a variety of criminal statutes, other Circuits have reached the same conclusion: post-*Bryan* and *Safeco*, "reckless disregard" still can—and does— constitute criminal willfulness. *See, e.g.*, *United States v.* Trudeau, 812 F.3d 578, 588-89 (7th Cir. 2016) (concluding that because meaning of "willful" is "influenced by its context," *Safeco* did not bar defining willful in terms of reckless disregard); *United States v. Anderson*, 741 F.3d 938, 948 (9th Cir. 2013) (stating that "recklessness" is a "valid theor[y]" for establishing defendant "willfully" engaged in criminal copyright infringement); *United States v. George*, 386 F.3d 383, 392-96 (2d Cir. 2004) (Sotomayor, J.) (concluding, after lengthy survey of case law, that *Bryan* did not displace earlier Supreme Court case law holding criminal "willfullness" requires "only the minimum *mens rea* necessary to separate innocent from wrongful conduct" and therefore interpreting "willfully" requirement in criminal passport fraud statute as proscribing "false statements that are knowingly included in the passport application"); *United States v. Johnstone*, 107 F.3d 200, 208-09 (3d Cir. 1997) ("'[W]illful[ly]' in [federal criminal civil rights statute, 18 U.S.C. § 242,] means either particular purpose or reckless disregard."); *United States v. Rapone*, 131 F.3d 188, 195 (D.C. Cir. 1997) (defining "willful" for purposes of criminal contempt as "deliberate or reckless disregard of the obligations created by a court order"); *cf. United States v. Kay*,

513 F.3d 432, 447-48 (5th Cir. 2007) (concluding, post-*Bryan*, that a "defendant's *knowledge* that he committed the act is sufficient" to constitute criminal willfulness (emphasis added)).

In sum, contrary to Defendant's position, *Bryan* and *Safeco* did not prohibit the use of "reckless disregard" in defining "willfully" for purposes of criminal statutes.

2.

Having determined that "reckless disregard" can constitute criminal "willfulness," we now must determine whether the district court properly concluded that "reckless disregard" amounts to willfulness for purposes of Section 820(d). In deciding this question, we do not write on a clean slate. In *United States v. Jones*, 735 F.2d 785 (4th Cir. 1984), we affirmed a trial court's instruction that a criminal defendant "willfully" violated a federal mine safety standard if he acted "either in intentional disobedience of the [safety] standard or in reckless disregard of its requirements." *Id.* at 789. "This language conforms to the interpretations of willfulness provided by several of the circuits," we held. *Id.* In reaching this conclusion, we relied on the Sixth Circuit's decision in *United States v. Consolidation Coal Co.*, 504 F.2d 1330 (6th Cir. 1974)—the only appellate decision interpreting the meaning of "willfully" in a criminal provision of a federal mine safety statute—which held that an act or omission is "willful if done knowingly and purposefully by a coal mine operator who, having a free will or choice, either intentionally disobeys the standard or *recklessly disregards* its requirements." *Id.* at 1335 (emphasis added); *Jones*, 735 F.2d at 789.

Defendant contends that we should disregard *Jones* because, notwithstanding that the district court instructed the jury on the meaning of "willfully," *Jones* involved a prosecution under a provision in the Mine Safety Act with a "knowing," as opposed to "willful," *mens rea* requirement. But we see no reason to depart from *Jones*' statement that, for purposes of the Mine Safety Act's criminal provision, willfulness encompasses reckless disregard—nor does Defendant provide us with any.

Section 820(d) derives from a substantively identical provision in the federal Coal Mine Health and Safety Act of 1969 (the "Coal Act"), which the Mine Safety Act replaced. At the time Congress enacted the Mine Safety Act, the Sixth Circuit had already interpreted "willfully" in the Coal Act in terms of "reckless disregard." *Consol. Coal Co.*, 504 F.2d at 1335. Because "[w]e assume that Congress is aware of existing law when it passes legislation," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), we must presume that Congress intended "willfully" in Section 820(d) to have the same meaning as the judicial construction of the term in the Coal Act, *see United States v. Georgopoulous*, 149 F.3d 169, 172 (2d Cir. 1998) (construing, post-*Bryan*, "willfulness" element in labor union bribery statute as requiring only general intent because such a construction accorded with the judicial construction of willfulness in the statute from which the bribery provision derived). That Congress enacted the Mine Safety Act because it believed the penalties available under the Coal Act had proven insufficient to deter safety violations further evidences that Congress did not intend for courts to construe "willfully" in the Mine Safety Act more strictly than they had interpreted the term in the parallel

provision in the Coal Act, as Defendant invites us to do here. *See* S. Rep. 95-181, at 4, 9 (1977) ("[E]nforcement sanctions under the [Coal Act] are insufficient to deal with chronic violators.").

Other Congressional statements in the legislative history of the Mine Safety Act further indicate that Congress intended to bring conduct evidencing reckless disregard within the meaning of "willfully." In particular, Congress imposed enhanced penalties in the Mine Safety Act because it found "[m]ine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions, and there is still no means by which the government can bring habitual and chronic violators of the law into compliance." S. Rep. 95-181, at 4. Accordingly, Congress saw criminal penalties as a mechanism to punish "habitual" and "chronic" violators that choose to pay fines rather than remedy safety violations.

As noted previously, we explained in *RSM* that an inference of plain indifference—and therefore willfulness—arises from evidence of "continu[ing]" or "increas[ing]" violations "in the face of repeated warnings given by enforcement officials." 466 F.3d at 322. Put differently, a "long history of repeated failures, warnings, and explanations of the significance of the failures, combined with knowledge of the legal obligations, readily amounts to willfulness." *Id.*

Other courts have reached the same conclusion. *See, e.g.*, *Screws*, 325 U.S. at 104-05 (plurality op.) (holding that reckless disregard amounted to criminal willfulness and stating that "contin[uing]" or

"persist[ing]" in action that violates established law constituted willfulness under that definition); *United States v. Jeremiah*, 493 F.3d 1042, 1045-46 (9th Cir. 2007) ("[A] finding of willfulness was supported by [defendant's] repeated failure to make restitution payments on time."); *Rapone*, 131 F.3d at 195 (holding defendant's failure to heed "repeated warnings" of noncompliance provided basis for factfinder to conclude defendant acted "willfully"); *United States v. Garcia*, 762 F.2d 1222, 1225-26 (5th Cir. 1985) (finding that defendant's continued violation of particular provision in tax code in the face of "repeated" warnings from government officials constituted willfulness); *cf. Willingham Sports, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 415 F.3d 1274, 1277 (11th Cir. 2005) ("[A defendant's] repeated violations after it has been informed of the regulations and warned of violations does show purposeful disregard or plain indifference.").

That (1) Congress imposed enhanced penalties on mine operators in order to punish operators who "chronic[ally]" and "habitual[ly]" violate mine safety laws, rather than to devote resources to safety compliance, and that (2) courts construe willfulness in terms of reckless disregard when a statute is intended to levy criminal penalties on defendants who persist in violating a federal law notwithstanding repeated warnings of the violations, further indicates Congress intended to define "willfully" in Section 820(d) in terms of reckless disregard.

Finally, 30 U.S.C. § 820(d) parallels the criminal liability provision in the Gun Control Act at issue in *Bryan* and *RSM*, 18 U.S.C. § 924(d)(1). In particular, both Section 820(d) and Section 924(d)(1) prohibit the

"willful violation" of the substantive provisions of their respective statutes and the regulations promulgated thereunder. Indeed, Defendant acknowledges that "[t]here is no textual basis for distinguishing the Mine Act's identically constructed liability provision from the statutory liability provision in *Bryan*." Appellant's Br. at 48. Additionally, the Mine Safety Act and Gun Control Act serve similar purposes by establishing complex federal regulatory regimes designed to protect public safety. In *RSM*, we held that plain indifference or reckless disregard amounts to criminal willfulness for purposes of Section 924(d)(1). 46 F.3d at 321-22 & n.1. Given the textual and functional similarity between Section 924(d)(1) and Section 820(d), we likewise interpret "willfully" in Section 820(d) in terms of reckless disregard.

3.

Defendant and amici coal industry trade associations nonetheless maintain that, as a matter of policy, Congress did not intend for reckless disregard to amount to willfulness, as that term is used in Section 820(d), for four reasons: (1) Congress could not have intended to hold mine operators criminally liable for making "budgeting" and "business" decisions about how to allocate resources between production and safety compliance; (2) "violations inexorably result from coal production" and therefore violations should not give rise to criminal liability absent evidence a defendant committed such violations with specific intent to violate a particular mine safety statute or regulation; (3) defining willfully in terms of reckless disregard would allow juries to find mine operators criminally liable even when the operators did not want safety violations to occur; and (4) if "reckless

disregard" amounts to willfulness, then operators will be deterred from engaging "in detailed oversight over important aspects of safety and regulatory compliance." *See* Appellant's Br. at 53-54; Amicus Brief of Illinois Coal Ass'n, Ohio Coal Ass'n and West Virginia Coal Ass'n ("Amicus Br.") at 24, 26. We disagree.

First, the legislative history of the Mine Safety Act contradicts Defendant's and amici's argument that Congress did not intend to punish mine operators for the type of budgeting and business decisions the government challenged here. In particular, Congress repeatedly stated that the Mine Safety Act's enforcement provisions were designed to deter mine operators from choosing to prioritize production over safety compliance on grounds that it was "cheaper to pay the penalties than to strive for a violation-free mine." S. Rep. No. 95-181, at 9; *see also id.* at 4 (expressing concern that "[m]ine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions"). To that end, Congress said that operators should not balance the financial returns to increasing output against the costs of safety compliance. *See id.* at 9 ("The Committee strongly believes that industry-wide compliance with strong health and safety standards *must be a basic ground rule for increased production*." (emphasis added)).

Congress imposes penalties on corporate officers —like Defendant—alongside enterprise penalties because it is often impossible to impose monetary penalties on corporations large enough to deter corporate misconduct. John C. Coffee, *"No Soul to*

Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 390-91 (1980) ("[O]ur ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation's resources."). And when the returns to violating a law exceed a potential corporate fine, discounted by the likelihood of the government imposing the fine, corporate officers who do not face personal liability will treat "criminal penalties as a 'license fee for the conduct of an illegitimate business'"—as the government's evidence showed Defendant did here. *See United States v. Park*, 421 U.S. 658, 669 (1975) (quoting *United States v. Dotterweich*, 320 U.S. 277, 282-83 (1943)).

By subjecting mine operators to personal liability, including incarceration, Congress forced mine operators to internalize the costs associated with noncompliance with mine safety laws, even when such noncompliance would be profit-maximizing from a business perspective. *See* Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 Vand. L. Rev. 329, 430-31 (2004) (explaining that subjecting corporate officers to personal liability forces such officers to internalize risk associated with corporation's non-compliance with laws). Put differently, in subjecting mine operators—who have "primary responsibility for providing a safe and healthful working environment," S. Rep. No. 95-181, at 18—to personal liability, Congress wanted to deter operators from choosing to treat penalties for violating safety provisions as a "license fee" to be factored into profit-maximization analyses, *Park*, 421 U.S. at 669. Accordingly, contrary to Defendant's and amici's position, a mine operator

cannot immunize himself from criminal liability under Section 820(d) by characterizing his mine's repeated failure to comply with safety laws as a consequence of "tough decisions" he had to make weighing "production, safety, and regulatory compliance." Amicus Br. at 26.

Second, regarding amici's contention that the "unavoidability" and "inexorability" of mine safety violations precludes use of such violations to establish criminal intent, we rejected an identical argument in *RSM*. There, the defendant—a firearms dealer—argued that its repeated failure to correctly fill out forms establishing that a customer was qualified to purchase a firearm did not amount to willfulness because, given the complexity of the regulatory regime and the number firearms the defendant sold, "human errors were virtually inevitable." 466 F.3d at 322. In rejecting defendant's argument, we explained that even though "inadvertent" violations may not amount to willfulness, continuing violations in "the face of repeated warnings" allows a jury to infer criminal intent. *Id.* We see no reason to diverge from that principle here, particularly in light of the parallels between Section 820(d) and Section 924(d)(1). *See supra* Part IV.A.2.

Next, Defendant argues that defining willfully in terms of reckless disregard impermissibly allowed the jury to convict him even if it concluded that Defendant desired "to eliminate and reduce the [safety] hazards and violations" at the Upper Big Branch mine. Appellant's Br. at 54. But just as the law holds criminally liable an individual who drives a car with brakes he knows are inoperable, even if he does not intend to harm anyone, *e.g.*, *State v. Conyers*, 506

N.W. 2d 442, 443-44 (Iowa 1993), so too Section 820(d) holds criminally liable a mine operator who fails to take actions necessary to remedy safety violations in the face of repeated warnings of such violations, regardless of whether the operator subjectively wanted the violations to continue.

Finally, contrary to amici's assertion, defining willfully in terms of reckless disregard should not deter mine operators from engaging in detailed safety oversight. The Mine Safety Act declares that "operators"—like Defendant—"have the *primary* responsibility to prevent . . . unsafe and unhealthful conditions and practices" at mines. 30 U.S.C. § 801 (emphasis added). And in *Jones*, we affirmed the trial court's instruction that "[r]eckless disregard means the closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard, which standard the defendant should have known and had reason to know at the time of the violation." 735 F.2d at 790. Here, the district court correctly defined "reckless disregard" using the language we endorsed in *Jones*. J.A. 1556. Because mine operators have "primary" responsibility for safety and regulatory compliance and because an operator acts with reckless disregard if he "clos[es] [his] eyes" to safety compliance or "should have known" that an action or omission would lead to a safety violation, a mine operator cannot avoid liability under Section 820(d) by failing to engage in close oversight over safety and regulatory compliance.

In sum, the district court properly instructed the jury that it could conclude that Defendant "willfully" violated federal mine safety laws if it found that Defendant acted or failed to act with reckless

disregard as to whether the action or omission would lead to a violation of mine safety laws.

B.

In addition to taking issue with the "reckless disregard" language in the fourth instruction, Defendant also suggests that the first, second, and third instructions improperly permitted the jury to convict Defendant even if he did not know that a particular act or omission would lead to a violation of mine safety laws and regulations. Again, we disagree.

The first instruction stated that a defendant 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." J.A. 1556. Defendant maintains that this instruction "permits a finding of willfulness . . . even if a person does not know that 'the act' in question is required by safety regulations." Appellant's Br. at 46. But by using the definite article "the" to modify "act," the instruction required that the jury find that Defendant knew the act was "required by a mandatory safety or health standard." *Cf. Gale v. First Franklin Loan Svcs.*, 701 F.3d 1240, 1246 (9th Cir. 2012) ("In construing a statute, the definite article 'the' particularizes the subject which it precedes and is a word of limitation." (alterations and quotations omitted)).

The second instruction described willfully as "knowingly, purposefully, and voluntarily tak[ing] actions that he knows will cause a standard to be violated." J.A. 1556. The third instruction stated that an operator acts willfully if he "knowingly,

purposefully, and voluntarily fails to take actions that are necessary to comply with the mandatory mine safety or health standard." *Id.* Contrary to Defendant's argument, the use of "that" in each of these instructions required the jury to conclude that Defendant knew the action or omission would "cause a standard to be violated" or was "necessary to comply with the mine safety or health standard." *See* The Chicago Manual of Style § 5.220 (16th ed. 2010) (explaining that "that" is a "relative pronoun . . . used restrictively to narrow a category or identify a particular item being talked about").

Accordingly, all three instructions reflect the "bad purpose" *mens rea* discussed in *Bryan* because they required that the jury conclude that Defendant took actions that he knew would lead to violations of safety laws or failed to take actions that he knew were necessary to comply with federal mine safety laws—i.e., Defendant knew that his actions and omissions would lead to violations of mine safety laws and regulations.

V.

Finally, Defendant asserts that the district court reversibly erred in providing the so-called "two-inference" instruction, pursuant to which it instructed the jury that if it "view[ed] 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." J.A. 1552. Defendant asserts that the two-inference instruction impermissibly reduced the government's burden of proof.

As explained previously, we review de novo whether a jury instruction correctly stated applicable law, assessing "whether taken as a whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." *Jefferson*, 674 F.3d at 351 (quotation omitted); *see also United States v. Khan*, 821 F.2d 90, 92 (2d Cir. 1987) (determining whether use of "two-inference" instruction constituted reversible error by assessing whether "the court's charge, taken as a whole, properly instructed the jury on reasonable doubt").

Although this Court has not had an opportunity to pass judgment on the two-inference instruction, our Sister Circuits disfavor it. *See, e.g.*, *United States v. Dowlin*, 408 F.3d 647, 666 (10th Cir. 2005); *United States v. Jacobs*, 44 F.3d 1219, 1226 (3d Cir. 1995); *Khan*, 821 F.2d at 93. In *Khan*, the Second Circuit explained that, although correct as a matter of law, the two-inference instruction "by implication suggests that a preponderance of the evidence standard is relevant, when it is not. . . . 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 no[t] strong enough to be beyond a reasonable doubt." 821 F.2d at 93. We agree and therefore direct our district courts not to use the two-inference instruction going forward.

Although we disapprove of the two-inference instruction, the district court's use of that instruction here does not amount to reversible error because, when viewed as a whole, the court's instructions correctly stated the government's burden. In particular, the court instructed the jury several dozen times that it

needed to find Defendant guilty beyond a reasonable doubt, including immediately before and after it used the two-inference instruction. Likewise, the court correctly instructed the jury regarding the presumption of innocence and the government's burden. Accordingly, the district court did not reversibly err in providing the two-inference instruction. *See, e.g.*, *United States v. Soto*, 799 F.3d 68, 96-97 (1st Cir. 2015) (rejecting challenge to "two-inference" instruction under "any standard of review" because "there was no 'reasonable likelihood' that the jury misunderstood the government's burden"); *Dowlin*, 408 F.3d at 666-67 ("The instructions as a whole told the jury not to convict [the defendant] unless the government proved his guilt beyond a reasonable doubt."); *United States v. Creech*, 408 F.3d 264, 268 (5th Cir. 2005) (finding no reversible error in use of two-inference instruction when district court repeatedly informed the jury of the presumption of innocence, the "heavy burden borne by the government," and that the law does not require the defendant to prove his innocence); *Khan*, 821 F.2d at 92 (finding use of two-inference instruction not reversible error because "[t]he judge instructed the jury several times on the meaning of reasonable doubt and specifically told the jury to acquit unless it was 'satisfied beyond a reasonable doubt of the defendant's guilt'").

VI.

For the foregoing reasons, we affirm the District Court's judgment.

AFFIRMED

APPENDIX B

FILED: February 24, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4193

(5:14-cr-00244-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DONALD L. BLANKENSHIP

Defendant - Appellant

ILLINOIS COAL ASSOCIATION; OHIO COAL ASSOCIATION; WEST VIRGINIA COAL ASSOCIATION

Amici Curiae

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

30 U.S.C. § 820. Penalties

(a) Civil penalty for violation of mandatory health or safety standards

(1) The operator of a coal or other mine in which a violation occurs of a mandatory health of safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(2) The operator of a coal or other mine who fails to provide timely notification to the Secretary as required under section 813(j) of this title (relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less than $5,000 and not more than $60,000.

(3)(A) The minimum penalty for any citation or order issued under section 814 (d)(1) of this title shall be $2,000.

(B) The minimum penalty for any order issued under section 814(d)(2) of this title shall be $4,000.

(4) Nothing in this subsection shall be construed to prevent an operator from obtaining a review, in accordance with section 816 of this title, of an order imposing a penalty described in this subsection. If a court, in making such review, sustains the order, the

court shall apply at least the minimum penalties required under this subsection.

(b) Civil penalty for failure to correct violation for which citation has been issued

(1) Any operator who fails to correct a violation for which a citation has been issued under section 814(a) of this title within the period permitted for its correction may be assessed a civil penalty of not more than $ $5,000[1] for each day during which such failure or violation continues.

(2) Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

(c) Liability of corporate directors, officers, and agents

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 815(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that

may be imposed upon a person under subsections (a) and (d) of this section.

(d) Criminal penalties

Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title and section 817 of this title, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under subsection (a)(l) or section 815(c) of this title, shall, upon conviction, be punished by a fine of not more than $250,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than $500,000, or by imprisonment for not more than five years, or both.

(e) Unauthorized advance notice of inspections

Unless otherwise authorized by this chapter, any person who gives advance notice of any inspection to be conducted under this chapter shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or both.

(f) False statements, representations, or certifications

Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not

more than $10,000, or by imprisonment for not more than five years, or both.

(g) Violation by miners of safety standards relating to smoking

Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than $250 for each occurrence of such violation.

(h) Equipment falsely represented as complying with statute, specification, or regulations

Whoever knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal or other mine, including, but not limited to, components and accessories of such equipment, which is represented as complying with the provisions of this chapter, or with any specification or regulation of the Secretary applicable to such equipment, and which does not so comply, shall, upon conviction, be subject to the same fine and imprisonment that may be imposed upon a person under subsection (f) of this section.

(i) Authority to assess civil penalties

The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's

ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

(j) Payment of penalties; interest

Civil penalties owed under this chapter shall be paid to the Secretary for deposit in to the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order.

(k) Compromise, mitigation, and settlement of penalty

No proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

(l) Inapplicability to black lung benefit provisions

The provisions of this section shall not be applicable with respect to subchapter IV of this chapter.

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[1] So in original.

APPENDIX D

JURY INSTRUCTIONS, NOVEMBER 17, 2015 (EXCERPT)

WILLFULLY – With respect to Count One, a violation of a safety standard is done willfully if it is done knowingly, purposely and voluntarily, either in intentional disobedience of the standard or in reckless disregard of its requirements. Reckless disregard means the closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard, which standard the defendant should have known and had reason to know at the time of the violation. The term willfully requires an affirmative act either of commission or omission, not merely the careless omission of a duty.

Stated differently, a person willfully violates a mandatory health and safety standard if he knowingly, purposely and voluntarily commits an act forbidden by the standards or knowingly, purposely and voluntarily fails to perform an act required by the standards.

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, purposely, 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, purposely and voluntarily takes actions that he knows will cause a standard to be violated, or knowingly, purposely and voluntarily fails to take actions that are necessary to comply with a mandatory mine safety or health standard, or if he knowingly, purposely 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.

The word "willfully" as used in Count Two of the Superseding Indictment means that the defendant committed the act voluntarily and purposely, and with knowledge that 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. The Government need not prove that the defendant was aware of the specific provision of the law that he is charged with violating or any other specific provision.