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

UNITED STATES OF AMERICA	)	
v.	)	**Criminal No. 5:14-cr-00244**
DONALD L. BLANKENSHIP	)	

DONALD L. BLANKENSHIP'S REPLY
TO GOVERNMENT'S RESPONSE TO MOTION FOR
CONTINUED RELEASE PENDING APPEAL

Although the government has gone on record as opposed to Mr. Blankenship's release pending appeal, it offers no good argument for the Court to deny the motion. Contrary to the government's argument, Mr. Blankenship does not seek extraordinary relief. He seeks only the relief Congress intended to provide to any defendant in the circumstances presented here.

The government does not argue that Mr. Blankenship is a flight risk or a danger to the community or that he will appeal for purposes of delay. It argues that there are no substantial issues for appeal. While the government repeats its pretrial and trial arguments about the questions identified in Mr. Blankenship's motion, it fails to show that this novel prosecution does not present substantial questions for appeal. Calling the motion for release a stay of sentence (with its connotation of requiring the party seeking a stay to show a likelihood of success) does not change the standard Congress adopted. The Court need not conclude that its rulings were wrong, but only that there is room for reasonable disagreement, and that if the Fourth Circuit does disagree, it is likely to reverse Mr. Blankenship's conviction.

First, with regard to the indictment, the government ignores the inconsistency between its current position and its insistence at trial on trying to prove specific violations of mine safety

standards and on submitting selected mine safety standards to the jury in connection with the Count One conspiracy. The government argued at trial that the jury needed the standards in order to base its verdict on the elements of a violation of 30 U.S.C. § 820(d). The government does not even attempt to address or distinguish *United States v. Hooker*, 841 F.2d 1225 (4th Cir. 1988) (en banc), or *United States v. Kingrea*, 573 F.3d 186 (4th Cir. 2009), which state the rule directly applicable to this case: an indictment for a conspiracy to commit an offense must set out the elements of that offense, which in this case include the conduct forbidden by the particular mine safety standards Mr. Blankenship was alleged to have violated.[1]

Second, with respect to the special willfulness instruction given in this case, *United States v. Jones*, 735 F.32d 785 (4th Cir. 1984), did not address or approve an instruction for a violation of 30 U.S.C. § 820(d) at all, much less one that includes defining willfulness to include failing to prevent a civil mine safety violation or reckless disregard for whether a civil mine safety violation might occur. The Supreme Court provided a general definition of criminal willfulness in its later decision in *United States v. Bryan*, 524 U.S. 184 (1998), which the government tellingly does not mention. It is a substantial question whether *Jones* would still be good law in light of *Bryan*, even if it were "circuit precedent on willfulness in mine safety cases," as the government claims. In fact, *Jones* was reviewing a conviction under 30 U.S.C. § 820(c), which the Court interpreted as having a lesser *mens rea* element (knowing rather than willful). *Jones*, unlike this case, was not a Section 820(d) prosecution.

Third, the government claims that the Court's instruction about competing evidence of guilt or innocence "did not purport to define reasonable doubt, or even hint or suggest that it was

[1] The government relies on *Wong Tai* and related cases to support the idea that a conspiracy indictment is given some latitude with respect to the detail required in the factual allegations. The Fourth Circuit, however, has explicitly held that neither *Wong Tai* nor the referenced principle means the indictment may omit "an allegation of the element of the crime charged." *United States v. Hooker*, 841 F.2d 1225, 1229 (4th Cir. 1988).

doing so.' ECF 582, at 3. The challenged instruction, however, was a part of the Court's reasonable doubt instruction, located in the instructions under the heading "Burden of Proof," and the government understood it as such at the time. During the charge conference, after the defense objected to the instruction as "dilut[ing] the reasonable doubt standard," Tr. 5672, the government countered: "I know it's not directly, but this serves the purpose of providing another definition or another expression of what reasonable doubt is." Tr. 5674-75. "This is an expression, a correct expression of the meaning of, or at least one of the meanings of the concept of reasonable doubt." Tr. 5675. The Court explained that the challenged instruction "tells the jury that if there's reasonable doubt, they must acquit. And then it tells them if, as you say, it's a tie, they must acquit." Tr. 5673. Thus, there is no way to avoid the substantial question whether the challenged instruction was erroneous as diluting the meaning of reasonable doubt or as prohibited by the Circuit's rule against explaining reasonable doubt. That the government does not even attempt to defend the instruction on the merits underscores that point. Notably, the government does not dispute that several circuits have disapproved the exact same instruction at issue here.

Fourth, the government dismisses the question whether the Court curtailed Mr. Blankenship's constitutional cross-examination right as a "garden-variety" evidentiary ruling subject to deferential abuse of discretion review. The issue concerns the government's key witness Chris Blanchard – the only alleged coconspirator produced at trial and the only witness with testimony regarding statements by the defendants that could be considered as proof of an understanding that the government argued was a conspiratorial agreement. The government does not bother to dispute that an appellate court could find that the government deferred examination of the witness concerning that key testimony until redirect examination or that it also deferred

examination on many brand new exhibits (citations for violations) that were introduced during the redirect examination. Further, the government does not deny that all of this concerned new testimony and new evidence elicited by the government during its redirect examination. Instead it argues that a trial court's discretion immunizes Mr. Blankenship's conviction against reversal based on any garden variety error in prohibiting cross-examination regarding the new testimony and evidence introduced in the government's redirect examination. But the complete denial of cross-examination on new matter presented on redirect examination is not routine in this Circuit. The question here concerns the Sixth Amendment right to confront one's accuser, not a garden variety issue. Indeed, the Fourth Circuit has stated, in the same circumstances presented here, that "the trial court does not have discretion to curtail cross examination." *United States v. Caudle*, 606 F.2d 451, 459 (4th Cir. 1979). The government's failure to address *Caudle* is telling. There is clearly a substantial question for appeal.[2]

Fifth, the other evidentiary issues Mr. Blankenship has raised concern the balance of evidence in a hard-fought case that resulted in lengthy deliberations, multiple deadlocks, and acquittals on all other counts. In such a case, errors in the admission or exclusion of evidence loom much larger than in the ordinary case. The likelihood that the Fourth Circuit will reverse if it concludes, for example, that the government argued evidence for the truth even though it was

[2]In *United States v. Caudle*, 606 F.2d 451, 458-59 (4th Cir. 1979), the Fourth Circuit rejected the government's argument that a District Court has discretion to preclude cross-examination when new matter is introduced through the government's re-direct examination of its witness. As to "[t]he government argu[ment] that the trial court properly exercised its discretion by restricting the defendants' questions on the recross examination" of the witness, the Fourth Circuit distinguished discretion as to the extent of cross-examination after the right to cross-examine actually is afforded as to new matter introduced in the government's redirect examination and discretion to deny cross-examination altogether as to that new matter. "Since the defendant did not have an opportunity to exercise the right of cross-examination on this issue, the trial court's discretion to limit cross-examination simply did not become operative. Put another way, the trial court does not have discretion to curtail cross-examination until after the questioner has had a reasonable chance to pursue the matters raised on direct." *Id.* at 459.

admitted subject to a limiting instruction is much greater because it is much more likely to have swayed the jury.

Finally, it is unfortunate that the government would detour from the merits and offer arguments based on the defendant's wealth or the quality of his lawyers, all to support its demand for denial of release pending appeal of a twelve-month misdemeanor sentence. Established law and simple fairness support release, given the questions to be decided by the Court of Appeals and the length of the sentence.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been electronically filed and service has been made by virtue of such electronic filing this 5th day of April, 2016 on:

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