

**DEFENDANT'S PROPOSED INSTRUCTION NO. 67**

**IMPROPER CONSIDERATION OF DEFENDANT'S RIGHT NOT TO TESTIFY**

Mr. Blankenship chose not to testify in this case. Under our Constitution, a defendant has no obligation to testify or to present any evidence, because it is the Government's burden to prove a defendant guilty beyond a reasonable doubt. A defendant is never required to prove that he or she is innocent.

Therefore, you must not attach any significance to the fact that Mr. Blankenship did not testify. No adverse inference against a defendant may be drawn by you because he did not take the witness stand, and you may not consider it in any way in your deliberations in the jury room.<sup>1</sup>

The fact that Mr. Blankenship did not testify must not be discussed or considered in any way when deliberating and in arriving at your verdict. As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or of producing any evidence.<sup>2</sup>

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<sup>1</sup> Instr. 5-21, Federal Jury Instructions

<sup>2</sup> Instr. 15:14, Federal Jury Practice.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 68**

**NO DEFENSE CASE**

The defense in this case rested without calling any additional witnesses above and beyond those called by the government. Under our Constitution, a defendant has no obligation to present any evidence at all, because a defendant is presumed to be innocent and it is the Government's burden to prove a defendant guilty beyond a reasonable doubt. A defendant is never required to prove that he or she is innocent.

Therefore, no adverse inference against Mr. Blankenship may be drawn by you because he did not present additional testimony or evidence, and you may not consider it in any way in your deliberations in the jury room.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or of producing any evidence. The burden always remains on the government to prove guilt beyond a reasonable doubt.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 69**

**COUNT ONE: THEORY OF THE DEFENSE**

Mr. Blankenship submits that he is not guilty of conspiracy as charged Count One because, among other things, the government has failed to prove beyond a reasonable doubt that he intended there to be willful violations of the federal mine safety standards and that he intended to defraud MSHA at UBB. If you find that the government has failed to prove beyond a reasonable doubt that Mr. Blankenship intended there to be willful violations of federal mine safety standards and that it has failed to prove that he intended to defraud MSHA, you must find Mr. Blankenship not guilty.

Mr. Blankenship further submits that he is not guilty of the conspiracy charged in Count One because, among other things, the government has failed to prove beyond a reasonable doubt that he agreed with one or more other persons to willfully violate mine safety standards and to defraud MSHA at UBB. If you find that the government has failed to prove beyond a reasonable doubt that Mr. Blankenship agreed with one or more other persons to willfully violate mine safety standards and to defraud MSHA at UBB, you must find Mr. Blankenship not guilty.

**DEFENDANT’S PROPOSED INSTRUCTION NO. 70**

**COUNT ONE BASED ON THE UBB MINE**

You have heard evidence regarding citations and orders issued to the UBB mine. You also have heard evidence regarding citations and orders issued to other Massey mines and issued to all Massey mines in the aggregate. Count One, however, requires among other things that the government prove beyond a reasonable doubt that Mr. Blankenship agreed to willfully violate federal mine safety standards and defraud MSHA *at the UBB mine in particular*. If you find that Mr. Blankenship is not guilty of such a conspiracy *at the UBB mine*, then you must acquit him of Count One.<sup>3</sup>

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<sup>3</sup> See, e.g., Superseding Indictment ¶¶ 1-2.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 71**

**COUNT ONE: MERE APPROVAL OR ACQUIESCENCE**

Mere acquiescence or approval of a crime is not enough to establish that an individual is part of a conspiracy.<sup>4</sup>

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<sup>4</sup> *United States v. Brown*, 217 F.3d 841 (4<sup>th</sup> Cir. 2000).

**DEFENDANT'S PROPOSED INSTRUCTION NO. 72**

**COUNT ONE: MERE INDIFFERENCE OR LACK OF CONCERN**

Mere indifference or lack of concern is not enough to establish that an individual is part of a conspiracy or that he possesses the intent to accomplish the criminal objects of a conspiracy.<sup>5</sup>

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<sup>5</sup> *Direct Sales Co. v. United States*, 319 U.S. 703, 711, 713 (1943).

**DEFENDANT'S PROPOSED INSTRUCTION NO. 73**

**COUNT ONE: MERE INDIFFERENCE THAT FURTHERS THE CONSPIRACY**

A person who is indifferent to the goals of a conspiracy does not become a party to the conspiracy merely because he knows that his actions might somehow be furthering that conspiracy.<sup>6</sup>

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<sup>6</sup> *United States v. Collins*, 966 F.2d 1214, 1219–20 (7th Cir.1992); *United States v. Ray*, 61 Fed. Appx. 37, 50 (4<sup>th</sup> Cir. 2003).

**DEFENDANT'S PROPOSED INSTRUCTION NO. 74**

**COUNT ONE: MERE KNOWLEDGE**

Mere knowledge by an individual that other persons committed willful violations of federal mine safety standards, mere knowledge that other persons used advance warnings of inspections in order to defraud MSHA, and mere knowledge that other persons falsified dust samples is not enough to establish that an individual is part of a conspiracy.



**DEFENDANT'S PROPOSED INSTRUCTION NO. 75**

**COUNT ONE: NUMBER OF CITATIONS**

You have heard testimony in this case regarding the number of citations and orders issued to UBB and other Massey mines. You may not find Mr. Blankenship guilty of agreeing to willfully violate federal mine safety standards based on the number of citations and orders. None of these citations orders were issued for willful conduct.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 76**

**COUNT ONE: INCREASE OR DECREASE IN CITATIONS AND ORDERS**

You have heard evidence that at various times the number of citations and orders issued to UBB and other Massey mines increased or decreased or stayed the same. You may not find Mr. Blankenship guilty based on whether the number of citations and orders increased, decreased, or stayed the same. The issue is whether Mr. Blankenship intended to willfully violate mine safety standards and agreed with others to do so, regardless of whether the numbers of citations and orders went up, down or stayed the same. If you find that the government has failed to provide beyond a reasonable doubt the elements of conspiracy, you must find Mr. Blankenship not guilty even if the numbers of citations and orders increased during the relevant time period.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 77**

**COUNT ONE: MISMANAGEMENT NOT THE ISSUE**

You may not find Mr. Blankenship guilty simply if you find that Mr. Blankenship could have done a better job managing the company or because you find that he could have done a better job in reducing safety violations.

The issue for you to determine is whether the government has proven beyond a reasonable doubt that Mr. Blankenship intended to commit willful violations of federal mine safety standards and to defraud MSHA and agreed with others to do so, not whether Mr. Blankenship was negligent, inattentive, or could have done better in managing the company.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 78**

**COUNT ONE: CASH ON HAND**

You have heard evidence that Massey had available cash. However, you cannot convict Mr. Blankenship on this basis. Nor can you convict Mr. Blankenship because you find that he spent more on safety. Count One does not concern what Mr. Blankenship could have done or could have spent. It exclusively concerns whether the government has proved beyond a reasonable doubt that Mr. Blankenship joined a criminal conspiracy by agreeing with one or more persons to commit the crimes of willful violations of safety standards and of defrauding MSHA.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 79**

**COUNT ONE: STATUTE ON ADVANCE NOTICE**

You have heard evidence regarding a law that prohibits advance notice of MSHA inspections in circumstances that may or may not be applicable here. Mr. Blankenship, however, is not charged with violating this statute. You therefore may not find Mr. Blankenship guilty on the ground that he violated, or conspired to violated, this law.

With respect to these allegations of advance warnings of inspections, Mr. Blankenship instead is charged with conspiring to defraud MSHA. You only may convict Mr. Blankenship if you find that the government has proved beyond a reasonable doubt each of the elements of a conspiracy to defraud. If you find these elements of a conspiracy to defraud are not satisfied by proof beyond a reasonable doubt, then you must acquit Mr. Blankenship, regardless of whether you find that some other law was violated.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 80**

**COUNT ONE: PUNISHMENT FOR CONSPIRACY TO DEFRAUD**

There were statements during the trial about the punishment a person may receive if he violates a certain statute that addresses advance warnings of inspections. Mr. Blankenship, however, is not charged with that statute. The punishment he faces if convicted of the offense charged here is different and greater.

**DEFENDANT' PROPOSED INSTRUCTION NO. 81**

**COUNT ONE: STATUTE OF LIMITATIONS**

The government must prove beyond a reasonable doubt that an overt act, committed in furtherance of the conspiracy, was committed on or after November 13, 2009.<sup>7</sup>

The receipt of a citation or order on or after November 13, 2009 is not an over act, and you may not consider it as one.

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<sup>7</sup> *United States v. Head*, 641 F.2d 174, 177 (1981)

**DEFENDANT'S PROPOSED INSTRUCTION NO. 82**

**COUNT TWO: THEORY OF THE DEFENSE**

Mr. Blankenship submits that he is not guilty of making, or causing to be made a false statement, as charged in Count Two because, among other things, the government has failed to prove beyond a reasonable doubt that the statement was false, that Mr. Blankenship knew or believed that the statement was false, or that Mr. Blankenship even made the statement or caused the statement to be made. If you find that the government has failed to prove beyond a reasonable doubt any of these elements, then you must find Mr. Blankenship not guilty.

Mr. Blankenship further submits that he is not guilty of Count Two because, among other things, the government has failed to prove beyond a reasonable doubt the statement alleged to be false was capable of influencing any action or decision by the Securities & Exchange Commission. If you find that the government has failed to prove this beyond a reasonable doubt, then you must find Mr. Blankenship not guilty.



**DEFENDANT'S PROPOSED INSTRUCTION NO. 83**

**COUNT THREE: THEORY OF THE DEFENSE**

Mr. Blankenship submits that he is not guilty of making, or causing to be made an untrue statement, or a misleading omission, in connection with the purchase or sale of securities, as charged in Count Three.

Mr. Blankenship submits that he is not guilty of this charge because, among other things, the government has failed to prove beyond a reasonable doubt that the statement was false or misleading, that Mr. Blankenship knew or believed that the statement was false or misleading, or that Mr. Blankenship even made the statement or caused the statement to be made. If you find that the government has failed to prove beyond a reasonable doubt any of these elements, then you must find Mr. Blankenship not guilty.

Mr. Blankenship further submits that he is not guilty of Count Three because, among other things, the government has failed to prove beyond a reasonable doubt Mr. Blankenship possessed the intent to deceive investors or buyers or sellers of Massey stock. If you find that the government has failed to prove beyond a reasonable doubt that Mr. Blankenship possessed an intent to deceive investors, then you must find Mr. Blankenship not guilty.

Finally, Mr. Blankenship submits that he is not guilty of Count Three because, among other things, the statement was not made in connection with the purchase or sale of a security and because neither the statement nor any alleged omission was material to investors in light of the total mix of available information. If you find that the

government has failed to prove either of these elements beyond a reasonable doubt, then you must find Mr. Blankenship not guilty.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 84**

**COUNTS TWO & THREE BASED ON UBB MINE**

You have heard evidence regarding citations and orders issued not only to the UBB mine, but also to other Massey mines. The statement at issue in Counts Two and Three, however, is charged to be false due to an alleged practice of willful violations of safety violations *at the UBB mine* by Mr. Blankenship and Massey. Accordingly, to find Mr. Blankenship guilty of Count Two or Three, the government must prove beyond a reasonable doubt, among other things, that there was a practice of willful violations of safety laws at the UBB mine by Mr. Blankenship and Massey. If the government has not proved beyond a reasonable doubt such a practice of willful violations by Mr. Blankenship and Massey at the UBB mine, then you must find Mr. Blankenship not guilty of Counts Two and Three.<sup>8</sup>

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<sup>8</sup> Superseding Indictment ¶ 3.

**DEFENDANT’S PROPOSED INSTRUCTION NO. 85**

**COUNTS TWO & THREE: NUMBER OF CITATIONS**

The statement at issue in Count Two and Three is not charged to be false due to the number of citations and orders issued to UBB or to Massey.<sup>9</sup>

You may not find Mr. Blankenship guilty on Counts Two and Three based on the numbers of citations and orders issued to UBB or Massey.<sup>10</sup>

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<sup>9</sup> Superseding Indictment ¶ 3; *see also* ECF No. 129 at 37 (government brief representing that “[t]he statements did not concern the fact that UBB had been the scene of many safety violations”); *id.* at 38 (“the falsity and materiality of the statements ... stem from the Indictment’s allegations of willful law breaking by Defendant and his co-conspirators.”).

<sup>10</sup> *See* Trial Tr. at 523-34 (testimony of MSHA Analyst Tyler Childress that citations were available to the public on the MSHA website since at least 2008); Trial Tr. at 4799-4803 (testimony of Government Expert Frank Torchio that the numbers of citations and orders issue to UBB were publicly available, reported in the media, and not new information at the time of the alleged false statement).

**DEFENDANT'S PROPOSED INSTRUCTION NO. 86**

**CITATIONS & ORDERS NOT ADMITTED FOR TRUTH**

You have heard and seen evidence regarding citations and orders issued to UBB and to other mines. This evidence includes records of citations and/or orders, compilations of the raw number of citations and/or orders, and comparisons of the number of citations and/or orders received by various mines and companies.

You may not consider this evidence of citations and orders for their truth. That is, you may not consider them as evidence of what in fact occurred at UBB or at any other mine. Nor may you consider them as evidence of what conditions in fact existed at UBB or at any other mine. Nor may you consider any description contained in any record of any citation or order as evidence that the described conditions in fact existed or occurred.

You may only consider this evidence for the limited purpose of evaluating the state of mind of Mr. Blankenship, to the extent you find that Mr. Blankenship had notice of the information.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 87**

**GOVERNMENT WITNESS – NOT PROPER TO CONSIDER GUILTY PLEA**

You have heard testimony from a Government witness, David Hughart, who pled guilty to other charges. You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of Mr. Blankenship from the fact that a prosecution witness pled guilty to similar charges. That witness' decision to plead guilty was a personal decision. It may not be used by you in any way as evidence against or unfavorable to Mr. Blankenship.<sup>11</sup>

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<sup>11</sup> Instr. 7-10, Federal Jury Instructions.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 88**

**PRESSING PRODUCTION**

Pressing production within a business and imposing pressure to meet business plans and targets is lawful and legitimate business activity. You may not find Mr. Blankenship guilty simply if you find that he imposed pressure or targets for coal production.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 89**

**COST REDUCTION**

Taking measures or imposing pressure to reduce or limit costs and expenses, including by limiting or reducing the number of workers, is lawful and legitimate business activity. You may not find Mr. Blankenship guilty simply if you find that he took measures or imposed pressure to reduce costs or expenses.



**DEFENDANT'S PROPOSED INSTRUCTION NO. 90**

**BUSINESS REPORTS**

Receiving and reviewing production reports or other kinds of business reports is lawful and legitimate business activity. You may not find Mr. Blankenship guilty simply if you find that he received or reviewed such reports.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 91**

**WEALTH & COMPENSATION**

You have heard evidence regarding Mr. Blankenship's wealth and how much he earned at Massey. Mr. Blankenship's wealth is not evidence of guilt, and you may not consider it as such.

You also have heard evidence regarding his stock holdings and stock trades. It is lawful and legitimate to own stock and to buy and sell shares of stock. Such evidence is not evidence of guilt, and you may not consider it as such.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 92**

**MISSING WITNESS—CHRIS ADKINS**

You have heard evidence about a witness named Chris Adkins who has not been called to testify. It was peculiarly within the power of the government to produce Mr. Adkins to testify at trial, but the government failed to do so. You therefore may infer that the testimony of Mr. Adkins would have been unfavorable to the government.

**DEFENDANT'S PROPOSED INSTRUCTION NO. 93**

**MISSING WITNESS—MSHA INSPECTORS**

You have heard evidence about MSHA inspectors who were present in the UBB mine during the relevant period, who wrote citations and orders to UBB, and who the government alleges were defrauded by the charged conspiracy. It was peculiarly within the power of the government to produce these federal inspectors at trial, but the government failed to do so. You therefore may infer that the testimony of these MSHA inspectors would have been unfavorable to the government.