APPENDIX

APPENDIX

APPENDIX A

United States Court of Appeals
For the Fourth Circuit

No. 20-6330

[Filed December 7, 2021]

UNITED STATES OF AMERICA,	)
	)
Plaintiff - Appellee,	)
	)
v.	)
	)
DONALD L. BLANKENSHIP,	)
	)
Defendant - Appellant.	)
	)

Appeal from the United States District Court
for the Southern District of West Virginia - Beckley

Submitted: September 22, 2021
Filed: December 7, 2021

Before NIEMEYER, DIAZ, and QUATTLEBAUM, Circuit Judges.

NIEMEYER, Circuit Judge:

In this proceeding under 28 U.S.C. § 2255, Donald Blankenship seeks to vacate his conviction for conspiring to willfully violate coal mine safety standards, alleging that the federal prosecutors violated his due process rights in failing to produce documents favorable to him before trial, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring the government to disclose exculpatory evidence), and *Giglio v. United States*, 405 U.S. 150 (1972) (requiring the government to disclose impeaching evidence).

Following an explosion at Massey Energy Company's Upper Big Branch coal mine in Montcoal, West Virginia, that killed 29 miners, Blankenship — who was at the time of the explosion the Chairman of the Board and CEO of Massey — was charged with and convicted of conspiring to willfully violate mandatory federal mine safety and health standards, in violation of 30 U.S.C. § 820(d) and 18 U.S.C. § 371. The trial evidence centered on the allegation that Blankenship had *willfully* failed to address numerous notices of mine safety violations that Massey had received, favoring coal-mine production and profits over safety.

Following the trial and in response to Blankenship's ongoing requests, the government produced documents to Blankenship that it had not produced before trial and that it should have produced under applicable Department of Justice ("DOJ") policies. Indeed, an internal DOJ review concluded that prosecutors in the case failed, as DOJ policies require, to "develop a process for review of pertinent information to ensure that discoverable information

[was] identified." The suppressed documents fell broadly into two categories: (1) memoranda of interviews conducted of seven Massey employees and (2) internal emails and documents of the Mine Safety and Health Administration ("MSHA") showing, among other things, some MSHA employees' hostility to Massey and Blankenship.

The district court, recognizing that the documents were improperly suppressed, concluded nonetheless that they were not material in that there was not a reasonable probability that they would have produced a different result had they been disclosed before trial. The court stated that "after thorough review, nothing ha[d] been presented to undermine confidence in the jury's verdict." It accordingly denied Blankenship's § 2255 motion.

Having given the record a close review ourselves, we reach the same conclusion as the district court. Accordingly, we affirm.

I

Before the explosion at the Upper Big Branch mine, which occurred on April 5, 2010, Massey had repeatedly been cited with respect to that mine for violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* Indeed, in the 15 months prior to the explosion, it received the third-most serious safety citations of any mine in the United States.

In November 2014, a federal grand jury returned an indictment against Blankenship, who by then had retired from Massey, and the grand jury's superseding indictment alleged that from 2008

through April 9, 2010, Blankenship had, in connection with the Upper Big Branch mine, conspired to willfully violate federal mine safety and health standards, in violation of 30 U.S.C. § 820(d) and 18 U.S.C. § 371. It also charged that Blankenship had conspired to defraud the United States by impeding the MSHA in the enforcement of mine safety and health laws; had made false statements to the Securities and Exchange Commission, in violation of 18 U.S.C. § 1001(a) and § 2; and had engaged in securities fraud, in violation of 15 U.S.C. § 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2.

At trial, the government's proof focused mainly on its allegation that Blankenship had conspired with other Massey employees to willfully violate mine health and safety standards in order to produce more coal at a lower cost. It presented evidence that Blankenship had received daily reports showing the numerous citations for safety violations at the mine. Bill Ross, one of Massey's senior safety officials, testified about his concern over the number and type of citations that Massey had been receiving and how his concerns had been communicated to Blankenship. For example, in a June 2009 memorandum prepared for Blankenship by a Massey in-house attorney, Blankenship was advised that Ross believed that "[t]he attitude at many Massey operations is 'if you can get the footage, we can pay the fines.'" The memorandum noted further that Ross's observation was that the company "would rather get violations, including unwarrantable actions, than wait for approval" from the MSHA, which "show[ed] a lack of concern for both safety and the law."

The evidence also showed that Blankenship had fostered this lax attitude toward safety by directing mine supervisors to focus on "running coal" rather than complying with safety standards. In particular, the Massey executive in charge of managing the Upper Big Branch mine, Chris Blanchard, testified (pursuant to a cooperation agreement) that Blankenship had made statements to him to the effect that "safety violations were the cost of doing business the way he wanted it done," taking from his various conversations with Blankenship that Blankenship "saw it as cheaper to break the safety laws and pay the fines than to spend what would be necessary to follow the safety laws." Blanchard agreed that Blankenship had "continually pressured" him "on profit and costs but rarely, if ever, said anything about the hundreds of safety law violations at [the Upper Big Branch mine]." According to Blanchard, Blankenship's policy was "to invariably press for more production even at mines that he knew were struggling to keep up with safety laws." Indeed, even though Massey employees advised Blankenship that the lack of adequate staff was a key factor in the high number of safety violations at the Upper Big Branch mine, Massey reduced staff there less than two months before the accident, a decision Blankenship would have had to approve given his close supervision of mine operations and staffing.

In addition to the testimony of Ross and Blanchard, the government also presented testimony from numerous coal miners about how they were required to work in unsafe conditions at the mine.

Blankenship's primary defense at trial was that none of the violations of safety standards had

been willful. He acknowledged that he had pushed his subordinates to increase coal production while keeping costs down, but he maintained that the evidence also showed that he took safety seriously and had led a successful initiative in 2009 to cut down citations at all the Massey mines, including the Upper Big Branch mine. To present his defense, Blankenship's counsel vigorously cross-examined both Ross and Blanchard, presenting numerous Massey documents through them in support of his defense. Blankenship did not, however, call any witnesses, even though he had, in a pretrial filing, designated several high-level Massey employees as among those whom he might call to testify on his behalf.

The jury, after deliberating for approximately two weeks, convicted Blankenship of the misdemeanor offense of conspiring to willfully violate mine safety and health standards and acquitted him on the remaining counts. The district court sentenced Blankenship to 12 months' imprisonment and imposed a $250,000 fine.

On appeal, we affirmed the district court's judgment, *United States v. Blankenship*, 846 F.3d 663 (4th Cir. 2017), and the Supreme Court denied Blankenship's petition for a writ of certiorari, *Blankenship v. United States*, 138 S. Ct. 315 (2017).

Following his conviction, Blankenship continued to request evidence that he believed the government had suppressed both before and during trial, despite his repeated requests and motions for the evidence. The government had responded to his earlier requests by stating that it had complied with its discovery obligations. But in response to

Blankenship's post-trial requests, the United States Attorney's Office began providing Blankenship with documents it had not previously produced, having by then concluded that its earlier production of documents had not complied with DOJ policies governing discovery.

The documents belatedly produced fell into two broad categories. First, the government produced memoranda prepared by federal law enforcement agents summarizing their interviews of seven individuals who had been high-ranking Massey employees during the time period charged in the indictment (2008 to 2010). Two of these employees were Ross and Blanchard, who testified at trial and were cross-examined extensively, while the remaining five — Mark Clemens, Steve Sears, Sabrina Duba, Charlie Bearse, and Stephanie Ojeda — did not testify at trial. Four of those five, however, had been included on Blankenship's pretrial witness list. Only Sears, who had overseen Massey's sales operation, was not. The second category of documents produced by the government were internal documents from the MSHA, including emails and disciplinary records for a few MSHA employees in connection with their supervision of the Upper Big Branch mine. Some of the MSHA documents contained statements by several employees that indicated a hostility to Massey and Blankenship.

In response to the government's late production of documents, Blankenship filed a § 2255 motion to vacate his conviction, asserting that the government had violated its obligations under *Brady* and *Giglio* by suppressing materially favorable evidence in violation of the Due Process Clause.

Blankenship's motion was initially referred to a magistrate judge, who recommended to the district court that the motion be granted. The district court, however, reviewed the matter de novo and issued an opinion and order dated January 15, 2020, denying the motion. The court concluded that while the documents at issue had been improperly suppressed, Blankenship had not been prejudiced, as the documents were not material to the outcome of the trial. Specifically, the court concluded that the memoranda relating to the interviews of Ross and Blanchard were "overwhelmingly negative toward [Blankenship], and that most of the favorable information cited by" Blankenship in the summaries could "only be viewed as such when taken entirely out of context of the full documents." The court observed that "several statements cited by [Blankenship] as favorable" — including Blanchard's statements that "Blankenship had a disdain for MSHA," "felt MSHA made things up," and "viewed violations as the cost of doing business" — "directly contradict[ed] the theory of the case pursued by the defense team" at trial, which was "that Blankenship was serious about remedying violations and did not willfully break the law or ignore violations." And, as to the remainder of the statements in these memoranda that Blankenship identified as exculpatory, the court concluded, "[a]fter careful review of the trial transcript," that "all of the undisclosed allegedly exculpatory statements contained in the Blanchard and Ross [interview memoranda] were covered thoroughly and repeatedly" in the cross-examination of those witnesses at trial.

With respect to the memoranda relating to the interviews of the remaining five Massey employees who did not testify at trial, the district court agreed

with Blankenship that the memoranda suggested that those individuals could have provided some trial testimony that would have been favorable to him. It noted, however, that "all but one of the witnesses were on [Blankenship's] trial witness list" and that they all "occupied positions that would make them both obvious and available sources of potential exculpatory information." In view of those circumstances, the court concluded "that defense counsel's failure to call or interview these witnesses, if indeed they were not interviewed by the defense, was an apparent 'tactical decision,' rather than a constitutional deprivation." In this regard, it relied on our prior holding in *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990), that a *Brady* violation is not shown when the "exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked." The court also observed that "most of the favorable substance of these [interview memoranda] was brought out as evidence during the trial," making the statements "cumulative, at best."

Finally, with respect to the internal MSHA records, the court concluded that they "were not material, because there was no reasonable probability that the evidence could have had an impact on the verdict." Blankenship had argued that the undisclosed MSHA records "could have been used to demonstrate that (1) MSHA citations did not reflect actual violations; (2) [there was] MSHA bias and contempt toward Massey and Blankenship; (3) it was not clear that Massey's practices related to advance notice to [miners that inspectors had arrived at the site] were actually illegal; and (4) several MSHA supervisors were disciplined by the agency for

inadequate supervision over [the Upper Big Branch mine] — particularly [with respect to the mine's] approved ventilation plans." The court noted, however, that pursuant to its pretrial rulings, evidence relating to unsubstantiated citations, the legality of Massey's advance notice practices, and improper MSHA ventilation plans was not admissible at trial. In particular, the court explained that the MSHA citations had been admitted "only to show Blankenship's knowledge or intent relative to safety issues, as opposed to evidence of actual safety law violations" and that the jury had been instructed at least twice that the citations could not be used to establish violations of safety laws. As for the MSHA emails showing employee hostility to Blankenship and Massey, the court noted that "[e]mails tending to show bias on behalf of individual MSHA employees [did] not necessarily substantiate a claim that the agency itself was biased." Moreover, the court observed, the materiality "inquiry must be undertaken in light of the entire record," and "the evidence presented against [Blankenship] was substantial." "The core evidence regarding safety violations was not MSHA citations," the court explained, "but testimony from miners and others with direct, firsthand knowledge of conditions in the mine." At bottom, the court concluded that Blankenship had "failed to meet his burden to establish that a reasonable probability exist[ed] that the outcome of the trial might have been different had the suppressed evidence been disclosed prior to trial."

By order dated October 23, 2020, we granted Blankenship's request for a certificate of appealability on the issue of whether the government violated *Brady* and *Giglio*.

II

Due process requires that in a criminal prosecution, the government must disclose to the defendant evidence favorable to him if the suppression of that evidence would deny him a fair trial. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Court in *Brady* held that the prosecution's suppression of evidence that is favorable to the accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* And evidence favorable to the defendant includes not only exculpatory evidence but also evidence that the defendant can use to impeach government witnesses. *See Giglio v. United States*, 405 U.S. 150, 153–54 (1972); *United States v. Bagley*, 473 U.S. 667, 676 (1985). Just as the *Brady* rule does not depend on the good faith, *vel non*, of the prosecutor, it also is not limited to evidence known only to the prosecutor. Thus, the obligation applies to "evidence known only to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

Nonetheless, "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Id.* at 436–37. Rather, the suppressed evidence must be materially favorable to the accused — that is, the nondisclosure must be "so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."

Strickler v. Greene, 527 U.S. 263, 281 (1999). Stated otherwise, the question is whether "the favorable evidence," "considered collectively," "could reasonably be taken to put the whole case in such a different light as *to undermine confidence in the verdict*." *Kyles*, 514 U.S. at 435–36 (emphasis added).

With these governing principles in hand, we now turn to the two categories of documents at issue to determine whether they were favorable to Blankenship and whether there is a reasonable probability that their disclosure would have produced a different result — i.e., whether Blankenship was prejudiced by their suppression.

A

With respect to the suppressed memoranda relating to the interviews of seven Massey employees, several described interviews with Ross and Blanchard, who testified at trial. Blankenship acknowledges on appeal that "[t]he District Court was correct in finding that the substance of [the] undisclosed exculpatory statements" made by Ross and Blanchard in their pretrial interviews "was covered" during defense counsel's thorough cross-examination of these witnesses at trial and therefore that "these nondisclosures were not ultimately violations of *Brady*."

With respect to the memoranda relating to the pretrial interviews of the remaining five Massey employees, it is significant that these employees held executive or administrative positions at Massey that placed them in close contact with Blankenship during the relevant period. Mark Clemens was Senior Vice President of Operations for Massey Coal Services and

reported directly to Blankenship; Steve Sears oversaw the company's sales operation and reported on an informal basis to Blankenship; Sabrina Duba was a senior accountant who communicated with Blankenship on a daily basis; Charlie Bearse was responsible for a group of mines and communicated regularly with Blankenship; and Stephanie Ojeda was the in-house lawyer who prepared the June 2009 memorandum for Blankenship that summarized Ross's safety concerns.

The statements in these interview memoranda that might have been helpful to Blankenship's defense generally pertained to things that Blankenship himself had said or done with respect to safety or to the employees' overall perception of the company's commitment to safety. Clemens, for example, stated generally that "there was pressure at Massey to run coal, but not enough pressure to overlook safety" and that he had "initiated a non-fatal days lost (NFDL) audit" at Blankenship's direction after MSHA found that not all accidents were being reported. Sears stated that "Massey's primary focus was safety" and that "Blankenship [had] started a safety program . . . and pushed safety more than any other CEO in the industry." Duba helped develop the format for the daily violation report that Blankenship received and stated that Blankenship "wanted to know" the identities of "the repeat offenders." Bearse acknowledged that the mines he supervised "receiv[ed] a lot of citations" but stated that "[t]he [i]ntent was always zero violations" and that "he could make a list of safety things that he was involved with" and that "the list would be half" as long without Blankenship's involvement. Bearse also stated that Massey's staffing on mine sections "was the industry

standard" and that while "Blankenship was very aggressive and in your face," "safety was implied." Ojeda, who had been interviewed by Blankenship's counsel a few weeks before her interview with the government agents, stated that Blankenship "seemed to think that Ross was legitimate" and that she thought he was "looking for solutions from Ross."

It is apparent that each of these five witnesses held high positions in Massey and, from those positions, interacted closely with Blankenship, indeed engaging with him on some of the very issues raised in his prosecution. Blankenship knew what he had told them and asked them to do, and undoubtedly he also had a sense of their views about the company's approach to safety. Indeed, he listed four of the five individuals as potential witnesses to testify *on his behalf* in his pretrial witness list, surely knowing how they might help his case.

These facts do not describe a circumstance where Blankenship was required to "scavenge for hints of undisclosed *Brady* material" or which amounted to a hide-and-seek process in which Blankenship was the seeker. *Banks v. Dretke*, 540 U.S. 668, 695–96 (2004). Rather, the information was in Blankenship's own house and held by in-house witnesses close to him. At the very least, he knew of the availability of this type of information and where to find it. Its location was surely where he would first look — indeed, probably did look. This circumstance therefore is governed by our holding in *Wilson* that "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a

defendant is not entitled to the benefit of the *Brady* doctrine." 901 F.2d at 381.

Blankenship contends that *Wilson* is no longer good law in light of the Supreme Court's subsequent decision in *Banks*, even though we have continued to apply *Wilson* following *Banks*. *See, e.g.*, *United States v. Parker*, 790 F.3d 550, 561–62 (4th Cir. 2015); *United States v. Catone*, 769 F.3d 866, 872 (4th Cir. 2014); *Lovitt v. True*, 403 F.3d 171, 184 (4th Cir. 2005). *Wilson* and *Banks*, however, control two entirely different circumstances. In *Banks*, the State suppressed information that a key government witness had set up the defendant's arrest and had served as a paid police informant. 540 U.S. at 678–84. Moreover, the State covered up the paid-police-informant fact during trial by failing to correct the witness's false testimony that he was not a paid informant. *Id.* In the postconviction proceeding, the State nonetheless argued that the defendant had failed to use "appropriate diligence in pursuing" his *Brady* claim, faulting him for failing to discover the suppressed facts earlier. *Id.* at 695. The Supreme Court rejected this argument, explaining that its "decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* It characterized the State's argument as essentially being "that 'the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence,' so long as the 'potential existence' of a prosecutorial misconduct claim might have been detected." *Id.* at 696 (citation omitted). And it admonished that a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system

constitutionally bound to accord defendants due process." *Id.*

The circumstances in *Banks* in no way describe those here. To obtain access to the testimony of individuals who had once been his own employees, Blankenship would not have been required to scavenge, guess, search, or seek. He had the evidence before him and undoubtedly was aware of it, as he indicated his choice to use the very same employees as his own witnesses at trial. This case instead falls squarely under the principle that the *Brady* doctrine is not available where the favorable information is available to the defendant and lies in a source where a reasonable defendant would have looked. *See Wilson*, 901 F.2d at 381.

To be clear, the government's need to comply with its *Brady* obligations is not obviated by the defendant's lack of due diligence. The constitutional right cannot be so burdened. It is, after all, the fairness that inheres in the fulfillment of the government's *Brady* obligations that must be satisfied — the fairness of disclosing to the defendant evidence favorable to him — and the government cannot ignore fundamental fairness concerns by arguing that the defendant failed to find evidence that the government did not disclose. The government's role is grander than serving as an advocate solely for conviction; it must be an advocate for the just outcome of a criminal prosecution. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (noting that the government's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done").

Yet, while that precept is overriding, common sense should not be ignored. Thus, when assessing the

defendant's role in preparing his defense, he should not be allowed to turn a willfully blind eye to available evidence and thus set up a *Brady* claim for a new trial. In this manner, we distinguish the burden of due diligence — which the defendant need not carry in asserting a *Brady* claim — from the common-sense notion of self-help imputable to a defendant in preparing his case. This is precisely the distinction between *Wilson* and *Banks*.

In this case, the district court also appropriately noted the lack of materiality where Blankenship was able to elicit most of the favorable substance of the statements in the interview memoranda through the cross-examination of Ross and Blanchard and then decided, as a matter of strategy, not to call any witnesses to testify. Blankenship's lead counsel even highlighted this point during closing arguments, noting that he had told the jury in his opening statement "that it might take us a while to put on the evidence that indicated that Massey did not want citations. *I didn't realize that we were going to do it with the Government's key witness*," i.e., Blanchard. (Emphasis added).

We conclude accordingly that the suppression of the interview memoranda for Ross, Blanchard, and the five potential defense witnesses did not prejudice Blankenship.

B

With respect to the internal MSHA documents that were suppressed — consisting primarily of emails between and among agency employees and disciplinary records for three MSHA employees that stemmed from an internal agency review conducted

after the Upper Big Branch mine explosion — Blankenship contends that they should have been produced under *Brady* and *Giglio* to allow him to demonstrate, most notably, that the MSHA was biased against him and Massey.

One document in this category was generated before the explosion. When an MSHA public affairs employee circulated to other MSHA employees a Massey press release noting that two Massey mines were receiving a safety award from the MSHA, one employee wrote to another, "This won't play well with certain parties." All the other "bias" documents were dated after the fatal explosion and indicated that certain MSHA employees viewed Blankenship or Massey negatively. For instance, about two weeks after the explosion, one MSHA official commented that a "hazard complaint news release" that the agency was preparing to release should "put a dagger into massey" by noting a complaint that the MSHA had received at another Massey mine "even after the explosion." This "dagger" comment appears to have prompted the head of the MSHA to warn in response that the news release was "about presenting the facts to the public in a responsible way." Several months later, when an MSHA employee forwarded to a colleague an article with the title "Don Blankenship Is an Evil Bastard," the colleague joked that it appeared that the other employee had written the title. About a year later, when news circulated in December 2011 that Blankenship intended to start a new coal company, an employee at MSHA lamented that "[t]he Grinch that stole safety is back." And, in the most vivid exchange, one MSHA employee used graphic and violent language to discuss his vehement dislike of Blankenship after Blankenship, who at the

time was still the head of Massey, was quoted in the news as saying that the fatal explosion had "impact[ed] production in that people [were] trying to make sure they're in compliance with every rule." The employee wrote that he "hope[d] that [Blankenship] . . . get[s] raped by a rhinoceros. Horn end."

These records were indeed unflattering to the MSHA and undoubtedly could be used to show hostility of the particular employees involved. But it does not follow that they were material to Blankenship's prosecution for conspiracy to willfully violate mine safety and health standards. First, none of the MSHA employees who wrote the "bias" emails testified at Blankenship's trial, nor were any of them proffered as witnesses or even — as far as we can tell — mentioned in the lengthy proceeding. There is also no indication that any of these MSHA employees had any involvement in the decision by the United States Attorney's Office to charge Blankenship with criminal offenses. In these circumstances, it is far from clear how Blankenship would have been able to introduce these documents into evidence at trial or even use them to discover admissible evidence. *See Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (inadmissible evidence "could have had no direct effect on the outcome of trial" for *Brady* purposes).

Blankenship's theory appears to be that the records would have been admissible to show that the MSHA as an agency was biased against him. But the district court rejected the argument, stating that "[e]mails tending to show bias on behalf of individual MSHA employees do[] not necessarily substantiate a claim that the agency itself was biased against [Blankenship] or Massey." Moreover, even if

Blankenship were somehow able to introduce the records into evidence, they may well have done his defense more harm than good, as the records themselves generally indicated that the reason certain MSHA employees were hostile to Blankenship was because they perceived him as being reckless with regard to mine safety.

We agree with the district court that the suppression of these documents and the other MSHA records did not violate *Brady* and *Giglio*. The bias of individual MSHA employees — if bias is the correct word when considering that the employees' hostile comments were in response to the perceived lack of mine safety — could not be accepted to show agency bias unless it was shown that the employees spoke for the agency or had some responsibility in regard to Blankenship's prosecution. But that has not been shown. Most importantly, the core issue at trial did not relate to the validity of the mine safety citations or to MSHA conduct; it focused on Blankenship's state of mind — whether he conspired to *willfully* violate mine safety standards. And the evidence relevant to that issue came from (1) miners and others with factual knowledge of the conditions at the mine and (2) Massey employees and documents providing evidence relevant to Blankenship's state of mind.

We agree with the district court that this category of documents was not material to the outcome of the trial and that their suppression therefore did not constitute a *Brady* violation. *See Bagley*, 473 U.S. at 682.

* * *

The circumstances that have brought us to this point in the prosecution of Blankenship are not flattering to the government, and Blankenship's protest is not a frivolous one. Nonetheless, after a careful review, we conclude that the suppression at issue — both with respect to the individual categories of documents and when they are considered cumulatively — does not undermine confidence in the verdict. The verdict that Blankenship conspired to willfully violate mandatory mine standards was supported by ample evidence, and there is not a reasonable probability that the jury's conclusion would have been altered by the documents' disclosure. The district court's order denying Blankenship's § 2255 motion is accordingly

AFFIRMED.

APPENDIX B

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

CIVIL ACTION NO. 5:18-cv-00591
(Criminal No. 5:14-cr-00244)

Judge Irene C. Berger

[Filed January 15, 2020]

DONALD L. BLANKENSHIP,	)
	)
Movant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent.	)
	)

MEMORANDUM OPINION AND ORDER

On April 18, 2018, the Movant filed a motion pursuant to 28 U.S.C. § 2255, alleging that his conviction should be overturned due to violations of his constitutional rights. By *Standing Order* (Document 665) entered on April 20, 2018, the matter was referred to the Honorable Omar J. Aboulhosn, United States Magistrate Judge, for submission to

this Court of proposed findings of fact and recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). The Court has reviewed the Magistrate Judge's *Proposed Findings and Recommendation* (PF&R) (Document 736), to which no objections have been filed, and has reviewed the various underlying motions as well as the attendant briefing.

On March 10, 2015, the Movant was charged in a three-count superseding indictment with (1) conspiring to willfully violate mandatory federal mine safety and health standards at Massey Energy Company's (Massey) Upper Big Branch-South mine (UBB), in violation of 30 U.S.C. § 820(d) and 18 U.S.C. § 371, and to defraud the United States by impeding the Mine Safety and Health Administration (MSHA) in the administration and enforcement of mine safety and health laws at UBB, (2) making false statements to the Securities and Exchange Commission in violation of 18 U.S.C. § 1001 and 18 U.S.C. § 2 and (3) making false and fraudulent statements in connection with the sale or purchase of securities in violation of 15 U.S.C. § 78ff, 18 U.S.C. § 2, and 17 C.F.R. § 240.10b-5. (Document 170 at 34–41.)

Following a 36-day jury trial, the Movant was found guilty of conspiracy to violate Mine Safety regulations, in violation of 30 U.S.C. § 820(d) and 18 U.S.C. § 371, as charged in Count One of the Superseding Indictment, and was acquitted on the remaining two counts. (Documents 529, 553.) On April 6, 2016, the Movant was sentenced to twelve months of imprisonment, a one-year term of supervised release, a fine of $250,000, and a special assessment of $25. (Document 589.)

On April 7, 2016, the Movant filed a *Notice of Appeal* to the United States Court of Appeals for the Fourth Circuit (hereinafter, "Fourth Circuit") seeking relief from his conviction and sentence on the grounds that this 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 Chris Blanchard, 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 United States' burden of proof. (Documents 591, 647 at 5–6.) On January 19, 2017, the Fourth Circuit affirmed the decision of this Court, finding no reversible error. *United States v. Blankenship*, 846 F.3d 663 (4th Cir. 2017).

The Movant then petitioned the United States Supreme Court for certiorari, arguing that this Court incorrectly instructed the jury regarding the meaning of the term "willfully," and improperly denied re-cross examination of Mr. Blanchard. On October 10, 2017, the Supreme Court denied certiorari. *Blankenship v. United States*, 138 S.Ct. 315 (2017).

On April 18, 2018, the Movant filed this *Motion to Vacate and Set Aside Defendant's Conviction and Sentence Pursuant to 28 U.S.C. § 2255*, arguing that his sentence and conviction should be vacated on the following grounds: (1) the United States suppressed material exculpatory and/or impeachment evidence in violation of *Brady v. Maryland* and *Giglio v. United States*, (2) the United States suppressed evidence in

violation of the Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedure and (3) prosecutorial misconduct denied Movant due process and a fair trial, in violation of the Fifth Amendment. (Document 663 at 10–19.)

On June 6, 2018, the United States Attorney's Office for the Southern District of West Virginia filed a *Notice of Recusal*, recusing itself from defending the Section 2255 motion filed by the Movant. (Document 672.) Due to the recusal, the United States Attorney for the Southern District of Ohio was ultimately assigned to represent the United States in this matter. *Id.*

Following an extension of time, the Movant filed a *Memorandum in Support of Motion to Vacate Conviction Pursuant to 28 U.S.C. § 2255* (Document 703) on September 5, 2018, and on September 6, 2018, filed an *Amended Memorandum in Support of Motion to Vacate Conviction Pursuant to 28 U.S.C. § 2255* (Document 705). The Movant also filed a *Motion for Oral Argument* (Document 733) and a *Motion for Evidentiary Hearing* (Document 704-1), arguing that if the § 2255 petition for relief was not granted, then an evidentiary hearing would be needed to resolve factual issues. On November 16, 2018, the United States filed the *Government's Consolidated Response in Opposition to Defendant's Motion to Vacate Under 28 U.S.C. § 2255 and Defendant's Request for Evidentiary Hearing* (Document 728) and on November 30, 2018, the Movant filed his *Consolidated Reply to Government's Consolidated Response in Opposition to Motion to Vacate Under 28 U.S.C. § 2255 and Motion for Evidentiary Hearing* (Document 731).

On August 26, 2019, the Magistrate Judge filed the PF&R. The Court has reviewed the Magistrate Judge's PF&R, to which no objections have been filed, under a de novo standard of review. After careful consideration and for the reasons stated herein, the Court finds that the findings and conclusions of the PF&R should be rejected.

STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 636, the district court reviews the magistrate judge's proposed findings and recommendations regarding a petition for posttrial relief made by individuals convicted of criminal offenses or petitions challenging conditions of confinement. 28 U.S.C. § 636(b)(1)(B) and (C). If no objections are filed, the district judge "may accept reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *Thomas*, 474 U.S. at 150, 153; *Nettles v. Wainwright*, 667 F.2d 404, 409 (5th Cir. 1982), *overruled on other grounds by Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (noting that the district court "has the duty to conduct a careful and complete review" when deciding whether to accept, reject, or modify the magistrate judge's recommendations); *see also Williams v. Wainwright*, 681 F.2d 732, 732 (11th Cir. 1982) (citing *Louis v. Blackburn*, 630 F.2d 1105 (5th Cir. 1980)). "The district judge has jurisdiction over the case at all times," and "retains full authority to decide whether to refer a case to the magistrate, to review the magistrate's report, and to enter judgment." *Thomas*, 474 U.S. at 154. "Moreover, while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review

by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard." *Id.*

FACTS

The Movant is the former chairman and chief executive officer of Massey. In 2009 and 2010, MSHA issued numerous citations to Massey for violating requirements of the Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* At trial, the United States introduced testimony to show that Massey was issued the most citations for safety violations in the country during the indictment period, including some of the most serious safety violations. The United States presented evidence at trial that the Movant conspired to violate mine safety laws by prioritizing coal production over mine safety.

The evidence presented included cheating on dust samples, advance warning of visits by mine inspectors, lack of adequate staff, concealing safety warnings as confidential, and testimony from numerous coal miners demonstrating that they were required to work in unsafe conditions or conditions with inadequate ventilation. The United States presented further evidence that the Movant was aware of the violations at UBB mine in the years leading up to a deadly explosion and received daily reports showing numerous citations for safety violations at the mine and warnings from a Massey safety official about the serious risks posed by violations at UBB.

Following a six-week jury trial involving lengthy deliberations, the Movant was ultimately convicted of the misdemeanor offense of conspiring to violate mine safety laws and acquitted of the

remaining felony offenses. Prior to returning a verdict, the jury deliberated for approximately two weeks, twice informed the Court that they could not agree on a verdict and received an *Allen* charge from the Court.

The Movant notes that the charges against him were "vigorously contested" and "his attorney served numerous formal and informal demands for discovery on the prosecution team." (Document 663, at 1.) Throughout pre-trial, trial, and appellate proceedings, the defense team made several informal and formal requests—including six motions filed with this Court—seeking the disclosure of *Brady* material from the prosecution, along with several other motions regarding discovery.[1] In response, the United States asserted that it had complied with all discovery requests, including all Court orders regarding *Brady*

[1] Motions filed with this Court seeking exculpatory material include: Motion to Enforce the Government's *Brady* Obligations (Document 111); Defense Motion to Compel the Government to Identify in its Production *Brady* and Rule 16(a)(1) Material (Document 245); Motion to Compel Production of Witness Interview Notes and Records of Attorney Proffers Containing *Brady* Information (May 6, 2015) (Document 248); Motion to Compel Production of MSHA Material (Document 261); Motion to Compel Compliance with *Brady* Order and for Other Appropriate Relief (Document 283); Motion to Compel MSHA to Comply with Subpoena Duces Tecum (Document 377) and Motion to Compel Compliance with Subpoena, for Production of *Brady*, Rule 16, and Jencks Material, and for Evidentiary Hearing (Document 481). The defense counsel notes that in addition to the listed motions, it also sent a number of communications directly to the United States Attorney's Office seeking the same material.

obligations.[2] The Court reviewed the motions submitted by the Movant, and issued several orders regarding the prosecution's discovery obligations.[3]

Following the Movant's conviction, he continued to request evidence believed to have been suppressed by the United States. In 2017, the United States Attorney's Office began sending the Movant previously suppressed materials.

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[2] *See, e.g.*, United States' Response to Defendant's Motion No. 19, Motion to Enforce the Government's *Brady* Obligations (Document 133); United States' Response to Defense Motion to Compel Concerning *Brady* and Rule 16 (Document 246); United States' Response to Defendant's Motion to Compel Production of Witness Interview Notes and Records of Attorney Proffers Containing *Brady* Information (Document 251); United States' Response to Defendant's Motion to Compel Production of MSHA Material (Document 273); United States' Combined Motion for Production of Reciprocal Discovery and Response to Defendant's Motion to Compel Compliance with *Brady* Order and Other Appropriate Relief (Document 284); Response to Motion to Compel MSHA to Comply with Subpoena Duces Tecum (Document 388) and United States' Response to Defendant's Motion to Compel Compliance with Subpoena, for Production of *Brady*, Rule 16, and Jencks Material, and For Evidentiary Hearing (Document 496).

[3] Document 222 (denying Defendant's Motion to Enforce the Government's *Brady* Obligations (Document 111) as premature.); Document 279 (granting in part and denying in part defendant's motions for *Brady* disclosures); Document 295 (denying Defendant's motion to Compel Compliance with *Brady* Order and for Other Appropriate Relief (Document 283)); Document 358 (granting Defendant's request for a Rule 17(c) subpoena duces tecum to be served on MSHA); Document 551 (denying the motion to compel compliance with subpoena, for production of *Brady*, Rule 16, and Jencks Material, and for Evidentiary Hearing (Document 481)).

The facts underlying the Movant's claims are undisputed. Prior to trial, the United States failed to produce numerous documents to the Movant. The undisclosed documents include sixty-one Memoranda of Interviews (MOIs) authored by law enforcement agents. Eleven of the MOIs pertain to pre-indictment interviews and fifty pertain to post-indictment interviews. Ten of the undisclosed MOIs pertain to two of the United States' main witnesses, Chris Blanchard and Bill Ross. In addition, the United States Attorney's Office produced the contents of a previously undisclosed attorney proffer by Chris Adkins, former Chief Operating Officer at Massey and Mr. Blanchard's immediate supervisor.

The United States also failed to produce MSHA material prior to trial. This material includes 48 MSHA emails, twenty-one pages of disciplinary records for MSHA employees in connection with UBB and a number of miscellaneous emails and records related to MSHA employee performance. On July 30, 2018, the United States Attorney's Office produced dozens of MSHA and Department of Labor (DOL) records subject to a protective order. In August 2018, that office produced four additional documents previously withheld in whole or in part based on attorney-client privilege.

ARGUMENT

Based on these previously undisclosed documents, the Movant claims that his sentence and conviction should be vacated on the following grounds: (1) the United States suppressed material exculpatory and/or impeachment evidence in violation of *Brady v. Maryland* and *Giglio v. United States*; (2) the United States suppressed evidence in violation of the Jencks

Act and Rule 26.2 of the Federal Rules of Criminal Procedure and (3) the United States violated the District Court's Orders regarding discovery thereby committing prosecutorial misconduct, depriving Movant of his constitutional right to due process and a fair trial. (Document 663 at 10–19.)

First, the Movant argues that the prosecution violated *Brady v. Maryland* and *Giglio v. United States* by suppressing evidence that was both exculpatory and/or impeaching. In particular, the Movant claims that nondisclosure of the MOIs from the United States' two main witnesses, Blanchard and Ross, impeded the ability to conduct efficient, targeted cross-examination of the witnesses. The Movant claims that material contained in suppressed MOIs for Blanchard would show that MSHA inspectors would write citations to Massey that were both illegitimate and biased, that Massey did not want cheating on the respirable dust samples, and that MSHA was responsible for decisions that ended up endangering the health and safety of miners.

For Ross, the Movant argues that undisclosed MOIs would reveal that the UBB mine was set up to fail based on the ventilation system [a non-belt air system] MSHA forced the UBB mine to use. According to him, the Ross MOI would pair with other withheld MSHA materials to reveal that MSHA recognized deficiencies in its handling of the UBB ventilation plan. The Movant further argues that the withheld material would negate the United States' portrayal of Ross as a whistleblower.

The Movant also argues that MOIs for five other potential witnesses—Sabrina Duba, Charlie Bearse, Stephanie Ojeda, Steve Sears, and Mark

Clemens[4]—all of whom were former Massey employees, were never disclosed and contained exculpatory and impeachment material that could have helped his defense. The Movant argues that statements these witnesses provided in their MOIs contradicted the United States' theory that he pushed production over safety and failed to budget sufficient funds to hire more safety personnel, which he claims was perhaps the single most important issue at trial. The Movant also notes that, "[t]hese witnesses were all employees whose roles gave them more insight than many of the witnesses who ultimately testified." (Document 709, at 18.) Additionally, the Movant argues that an attorney proffer for Chris Adkins, former Chief Operating Officer for Massey Energy and Blanchard's immediate supervisor, was undisclosed.

The Movant further argues that MSHA turned over dozens of exculpatory and impeaching documents that could demonstrate: (1) MSHA issued unsubstantiated violations to UBB, (2) MSHA had animus/contempt toward the Movant and Massey, (3) MSHA itself was conflicted as to whether Massey's practices involving advance notice actually violated regulations, (4) MSHA's role in violations at UBB, including MSHA requiring an inadequate ventilation plan at UBB, and (5) disparity in government treatment of Blankenship (criminal prosecution) and MSHA employees responsible for UBB's mine safety (slap on wrist). The Movant essentially argues that withheld MSHA materials would show that the

[4] The Movant originally listed Frampton and Williams as additional witnesses, however, in later filings it appears that these witnesses were abandoned. Therefore, the Court will not address the Frampton or the Williams MOIs.

citations could not form the basis for a conviction to "willfully" violate mine safety laws.

Second, the Movant argues that suppression of evidence constituted a violation of the Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedure because some of the MOIs contained statements made by witnesses who testified at trial, including MOIs for Ross, Blanchard, and Lafferty. The Movant argues that his sentence and conviction must be vacated, since some of the excluded evidence was central to the United States' case.

Third, the Movant argues that his constitutional right to a fair trial was violated because the United States committed prosecutorial misconduct by failing to comply with both this Court's Order requiring the prosecution to turn over any known *Brady* material (Document 279) and this Court's order granting the request for a Rule 17(c) subpoena duces tecum to be served on MSHA (Document 358). The Movant argues that the prosecutors not only failed to disclose information pursuant to the Rule 17(c) subpoena and this Court's order regarding the production and identification of *Brady* material, but also misrepresented the United States' compliance with both obligations in court filings and oral arguments. The Movant argues that these violations were of such magnitude as to undermine confidence in the verdict and deprive him of his constitutional right to due process and a fair trial. Thus, he argues that vacating his sentence and conviction is warranted in this case.

On August 26, 2019, the Magistrate Judge issued a PF&R recommending that this Court grant the Movant's motion pursuant to 28 U.S.C. § 2255 to

vacate, set aside or correct sentence by a person in federal custody. Because the United States concedes that the materials at issue were suppressed, the Magistrate Judge conducted his analysis as follows:

> [T]he undersigned must consider whether the suppressed documents were (1) favorable to Movant either because the documents were exculpatory or impeaching, and (2) material to the verdict such that the suppression prejudiced Movant's defense. The cumulative effect of all suppressed evidence favorable to a defendant must be considered, rather than considering each item of evidence individually. Thus, the cumulative effect requirement applies to the materiality element—not the favorability element. The undersigned, therefore, will first determine whether the suppressed evidence individually was favorable to the Movant. Once making this determination, the undersigned will consider the cumulative effect of all suppressed evidence favorable to Movant.

(PF&R at 14.) (citations omitted). The Magistrate Judge determined that all undisclosed evidence was favorable to the Movant, except for one email regarding an exchange about an MSHA employee issuing another violation at UBB.[5] In sum, the

[5] "Although the email indicates that a certain MSHA employee would be 'happy to give [Movant and Massey] one more piece of paper,' such does not reveal agency bias because the email clearly

Magistrate Judge determined that: (1) the MSHA email concerning advance notice was favorable to the Movant, (2) four MSHA emails showing agency bias were favorable to the Movant, but one email alleged to reveal agency bias was not favorable to the Movant and (3) the MSHA disciplinary records and internal emails were favorable to the Movant.[6]

The Magistrate Judge further concluded that the undisclosed MOIs for the five potential defense witnesses, Mark Clemens, Steve Sears, Sabrina Duba, Charlie Bearse, and Stephanie Ojeda, were favorable to the Movant. The Magistrate Judge determined that the "other source" exception to *Brady*, as explained in *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990), was not applicable to these witnesses because: (1) it was clear the United States had the undisclosed

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provides evidence supporting the issuance of a violation. Accordingly, the foregoing email is not favorable to Movant. (Criminal Action No. 5:14-00244, Document No. 663-5, p. 40, Page ID 23404, USAO0000028.)" (PF&R at 24.)

[6] "[T]he undersigned has concluded that the following MSHA documents are favorable to Movant: (1) USAO0000030 (Criminal Action No 5:14-00244, Document No. 663-5, pp. 44-45, Page ID No. 23408.); (2) USAO0000114 (Criminal Action No. 5:14-cr-00224, Document No. 663-6, p. 55, Page ID No. 23527.); (3) USAO0000033 (Criminal Action No. 5:14-00244, p. 10, citing Document No. 663-5, p. 49, Page ID No. 23413.); (4) USAO0000109 (Criminal Action No. 5:14-00244, Document No. 663-6, p. 49, Page ID no. 23531.); (5) DLB-001532 (Criminal Action No. 5:14-00244, Document No. 696-2, p. 1, Page ID No. 23797.); (6) USAO 000132 (Criminal Action No. 5:14-00244, Document No. 663-6, p. 80, Page ID No. 23552.); and (7) USAO0000024 (Criminal Action No. 5:14-00244, Document No. 663-5, p. 34, Page ID No. 23398.). The undersigned finds that USAO0000028 is not favorable to Movant. (Criminal Action No. 5:14-00244, Document No. 663-5, p. 40, Page ID No. 23404; USAO0000028.)" (PF&R at 29–30.)

documents (whereas in other cases it was not clear the government actually had exculpatory documents), (2) defense counsel actually sought the material and the United States misrepresented that such evidence had been disclosed and (3) in this case, the MOIs were clearly under the control of the prosecution and there is no indication that the MOIs were available to defense counsel through other sources. In addition, the Magistrate Judge concluded that the MOIs for the central witnesses, Blanchard and Ross, were also favorable to the Movant.

The Magistrate Judge next concluded that, considered cumulatively, the suppressed evidence was material, and found that there was a reasonable probability that its disclosure could have made a difference in the resulting verdict. Specifically, the Magistrate Judge determined that the United States might have had a weaker case and the defense might have had a stronger case if the suppressed materials from MSHA and the MOIs for the five potential witnesses had been disclosed. Moreover, the Magistrate Judge determined that disclosure of the "suppressed MOIs could have reduced the value of Mr. Blanchard and Mr. Ross as witnesses for the United States." (PF&R at 57.)

The Magistrate Judge ultimately concluded that he did not have confidence in the verdict, and found that, based on the above reasoning, he lacked assurance that the jury's verdict would have been the same had the suppressed evidence been disclosed. The Magistrate Judge determined that the "Movant has satisfied his burden of proof, establishing by a preponderance of the evidence that the United States violated his constitutional rights by committing a

Brady violation justifying Section 2255 relief." (PF&R at 58.) The Magistrate Judge recommended that this Court grant the Movant's Section 2255 motion. Based on the Magistrate Judge's finding with respect to a *Brady* violation, he did not address the Movant's claims regarding the Jencks Act and prosecutorial misconduct. In sum, the Magistrate Judge recommended that this Court grant the Movant's motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Document 663), deny as moot Movant's Motion for Evidentiary Hearing (Document 704-1), deny as moot Movant's Motion for Oral Argument (Document 733), and remove this matter from the Court's docket.

SUBSTANTIVE LAW

In *Brady v. Maryland*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "Three essential components of a *Brady* violation circumscribe the duty [of disclosure]: (1) the evidence at issue must be favorable to the defendant, whether directly exculpatory or of impeachment value; (2) it must have been suppressed by the state, whether willfully or inadvertently; and (3) it must be material." *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 555 (4th Cir. 1999) (internal quotation marks omitted). "Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

Undisclosed *Brady* evidence "is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109–110 (1976). To establish a *Brady* claim, the burden of proof rests with the defendant. *United States v. Chavez*, 894 F.3d 593, 600 (4th Cir. 2018); *see also Garlotte v. Fordice*, 515 U.S. 39, 46 (1995).

"[W]hile courts of necessity examine undisclosed evidence item-by-item, their materiality determinations must evaluate the cumulative effect of all suppressed evidence to determine whether a *Brady* violation has occurred." *United States v. Ellis*, 121 F.3d 908, 91 (4th Cir. 1997); *see also Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *Monroe v. Angelone*, 323 F.3d 286, 298 (4th Cir. 2003). The evidence is not material if, "considering the collective impact of the evidence, it could not 'reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Campbell v. Polk*, 447 F.3d 270, 276 (4th Cir. 2006) (quoting *Kyles*, 514 U.S. at 435). Impeachment evidence may be material if it was the "only significant impeachment material," or if the witness to be impeached "supplied the only evidence of an essential element of the offense." *United States v. Parker*, 790 F.3d 550, 558 (4th Cir. 2015) (quoting *United States v. Bartko*, 728 F.3d 327, 339 (4th Cir.

2013)). "In contrast, impeachment evidence is not material if it is cumulative of evidence of bias or partiality already presented and thus would have provided only marginal additional support for the defense." *Id.* (quoting *Bartko*, 728 F.3d at 339) (internal quotation marks omitted).

The materiality of suppressed evidence is also assessed in light of the evidence presented at trial. *Bartko*, 728 F.3d at 339; *United States v. Gil*, 297 F.3d 93, 103 (2d Cir. 2002). "Where the evidence against the defendant is ample or overwhelming, the withheld *Brady* material is less likely to be material than if the evidence of guilt is thin." *Gil*, 297 F.3d at 103. The context of the entire record is used to evaluate the omission. *Agurs*, 427 U.S. at 112–13. "If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* Additionally, admissibility of the suppressed evidence also bears on its materiality. *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (finding that suppressed evidence was not "material" under *Brady* due, in part, to its inadmissibility at trial).

However, the Fourth Circuit has firmly established that where the suppressed evidence is both available to the defendant and in a source where a reasonable defendant would look, the *Brady* rules do not apply.[7] *United States v. Wilson*, 901 F.2d 378, 381

[7] Moreover, "[t]he majority of federal circuits . . . refuse to find a *Brady* violation where the defense can access the material through its own due diligence." *State v. Mullen*, 171 Wash. 2d

(4th Cir. 1990); *United States v. Bros. Const. Co. of Ohio*, 219 F.3d 300, 316 (4th Cir. 2000); *Lovitt v. True*, 403 F.3d 171, 184 (4th Cir. 2005). This includes suppressed evidence that could have been obtained by the defendant through "reasonable and diligent investigation." *Barnes v. Thompson*, 58 F.3d 971, 976 (4th Cir. 1995); *Hoke v. Netherland*, 92 F.3d 1350, 1355 (4th Cir. 1996). Moreover, when the defense counsel has failed to investigate an obvious and readily available source of evidence, it may bolster the conclusion that failure to investigate was an apparent "tactical decision" by the defense counsel and no *Brady* violation occurred. *Barnes*, 58 F.3d at 977.

The *Brady* rule illustrates the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 280 (1999). The United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

881, 896 n.5 (2011) (citing *Ellsworth v. Warden*, 333 F.3d 1, 6 (1st Cir. 2003); *DiSimone v. Phillips*, 461 F.3d 181, 197 (2d Cir. 2006); *United States v. Pelullo*, 399 F.3d 197, 213 (3d Cir. 2005); *United States v. Jeffers*, 570 F.3d 557, 573 (4th Cir. 2009); *Pondexter v. Quarterman*, 537 F.3d 511, 526 (5th Cir. 2008); *Owens v. Guida*, 549 F.3d 399, 415 (6th Cir. 2008); *Carvajal v. Dominguez*, 542 F.3d 561, 567 (7th Cir. 2008); *Mandacina v. United States*, 328 F.3d 995, 1001–02 (8th Cir. 2003); *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991); *Ward v. Hall*, 592 F.3d 1144, 1183 (11th Cir. 2010); *Xydas v. United States*, 445 F.2d 660, 668 (D.C. Cir. 1971)).

Because of this role, prosecutors in doubt should resolve close calls in favor of disclosure. *Kyles*, 514 U.S. at 439. Favoring disclosure also works "to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Id.* at 540. "*Brady* material" often is used to describe prosecutors' broad duty of disclosure, however, "strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.'" *Strickler*, 527 U.S. at 282. That is because the *Brady* rule is designed to ensure compliance with the due process requirement that the defendant receive a fair trial. *Bagley*, 473 U.S. at 675.

DISCUSSION

The United States does not dispute that the evidence at issue was suppressed. Therefore, to determine whether a violation of *Brady/Giglio* occurred, the analysis will turn on whether the suppressed information was (a) favorable to the Movant and (b) material such that it undermines confidence in the verdict. The Court will assess each piece of evidence item by item but make the overall materiality determination by looking at the evidence cumulatively. *Ellis*, 121 F.3d at 91. Again, there are three main bodies of undisclosed evidence at issue in this case: MOIs from five potential defense witnesses and an attorney proffer for Chris Adkins, MOIs from two government witnesses, Blanchard and Ross, and MSHA materials.

Prior to addressing the three main bodies of undisclosed evidence, however, the Court has

observed that the Movant has woven several repeated arguments throughout his submissions that should be resolved initially. The Movant argues that some of the undisclosed evidence would have shown MSHA's awareness of danger at the UBB mine and its failure to address it, MSHA's uncertainty about whether certain conditions at the mine were actually violations that should support a citation, MSHA'S issuance of unsubstantiated violations to UBB, and that MSHA employees received a "slap on the wrist" for misconduct while he was criminally prosecuted. Given the substance of the Movant's conviction, and the applicable law, any undisclosed evidence tending to prove any of these issues would have been inadmissible. The Movant and the United States agreed, pre-trial, that the allegations in this case did not include the *cause* of the UBB mine explosion. (United States' Motion in Limine Document 320; Defendant's Motion for Jury Instructions Regarding the UBB Mine Explosion and to Exclude Evidence Regarding the Explosion Document 287; and United States' Response Document 290.) Thus, neither MSHA's negligence or failures, if any, its uncertainty about regulations nor the fact that its employees were not criminally prosecuted was at issue, relevant, or admissible during the trial of this case. Evidence of this nature would, therefore, not be material for purpose of *Brady* analysis.

Moreover, the Movant argues that the undisclosed evidence indicates that MSHA citations are such that they do not establish violations of safety laws, that it issued unsubstantiated violations to UBB and that MSHA decisions and policies made mine conditions less safe, specifically its ventilation plan. The Court instructed the jury, on at least two

occasions, that the citations could not be used to establish violations of safety laws. (Document 601 at 585; Document 626 at 5819.) Further, this Court granted a motion in limine to exclude "claims that federal mine safety standards were incorrect, misguided or imprudent" (Oct. 6, 2015 Tr. at 266.) and specifically granted a motion in limine regarding the Movant's quarrel with MSHA's ventilation plan (Document 463.).

Thus, any undisclosed evidence tending to prove that citations do not establish safety law violations or were unsubstantiated, or tending to prove the efficacy of the ventilation plan or other standard, would not have been admissible and, therefore, is not material for *Brady* purposes. *Wood,* 516 U.S. at 6, (1995).

A. MOIs from Five Potential Defense Witnesses and Attorney Proffer

Potentially, some of the most "material" evidence, meaning evidence most likely to undermine confidence in the verdict, is found in the MOIs of Clemens, Sears, Duba, Bearse, and Ojeda. The MOIs suggest that these witnesses could have testified that the Movant did not push production over safety, that there were steps taken to insure safety, that the Movant took Ross's recommendations about safety seriously, and that staffing was not an issue as suggested by the United States. This information would have been favorable to the Movant.

However, all of these people were current or past employees of Massey who held administrative or executive positions. Clemens was in charge of production, sales, and budgeting, Sears oversaw

Massey coal sales, Duba was a Massey senior accountant, Bearse was President of Massey resource group and Ojeda was Massey in-house counsel. Each of them held positions with Massey (the very company of which the Movant was CEO) that would require them to have knowledge about production, sales, safety, and/or staffing. In fact, as noted above, the Movant, in his brief, stated that "[t]hese witnesses were all employees whose roles gave them more insight than many of the witnesses who ultimately testified."[8] (Document 709 at 18.) Moreover, it is undisputed that all of these Massey employees, except Sears (who was retired at time of trial), were on the ***Movant's*** trial witness list.[9]

Given the clear language of *Wilson*, the Movant is not entitled to the benefit of *Brady* protection for these witnesses even though their MOIs are favorable, because the "exculpatory information [was] not only available to the defendant but also lies in a source where a reasonable defendant would have looked . . . " 901 F.2d at 381. Importantly, the substance of those MOIs was available to the Movant through employees of the very company of which he was CEO. The Movant was actually in a better position than the United States to know what the testimony of these witnesses, relative to production, sales, safety and staffing, was likely to be.

Under *Brady*, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if

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[8] The Movant chose to rest without calling witnesses.

[9] The fact that Sears was retired did not make him unavailable as a witness.

suppressed, would deprive the defendant of a fair trial." *Bagley*, 473 U.S. at 676. Requiring a defendant to exercise reasonable diligence in interviewing potentially exculpatory witnesses does not constitute deprivation of a fair trial.

Factors relevant to the Court's finding include the fact that all but one of the witnesses were on the Movant's trial witness list, the witnesses occupied positions that would make them both obvious and available sources of potential exculpatory information, the Movant had knowledge of the witnesses and that this case was—in the Movant's own words—"vigorously contested" by the defense counsel. (Document 663 at 1.) These factors lead the Court to conclude that defense counsel's failure to call or interview these witnesses, if indeed they were not interviewed by the defense, was an apparent "tactical decision," rather than a constitutional deprivation. *Barnes*, 58 F.3d at 977. Although unnecessary to the analysis here, the Court finds it unlikely that persons listed as potential trial witnesses by the defense were not interviewed.

As noted above, the Magistrate Judge determined that the "other source" exception to *Brady* was not applicable to these five potential witnesses because (1) it was clear that the United States had the undisclosed documents (whereas in other cases it was not clear the government actually had exculpatory documents); (2) defense counsel actually sought the material and the government misrepresented that such evidence had been disclosed and (3) in this case, there is no indication that the MOIs were available to defense counsel through other sources. The Court

finds, however, that this reasoning does not render the "other source" exception inapplicable to this case.

First, there is nothing in the *Wilson* opinion that suggests its language is not applicable if the government actually possesses the *Brady* material. The very import of *Wilson* is that a Defendant cannot rely on the government's failure to disclose the material if it is otherwise available to the Defendant or is in a place where a reasonably diligent defendant would have looked. It will always be the case that the government has possession of the evidence and failed to produce it, or our analysis would not be within the realm of *Brady*. *Spicer*, 194 F.3d at 555.

Second, for a *Brady* claim, the distinction among situations in which the defendant makes "no request," a "general request," or a "specific request" for the disclosure of suppressed evidence has been dissolved. *Bagley*, 473 at 682; *Strickle*r, 527 U.S. at 280 (noting that the prosecutorial duty to disclose evidence is the same "even though there has been no request by the accused"). "[R]egardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles*, 514 U.S. at 433 (quoting *Bagley*, 473 U.S. at 682). The Movant's request regarding MOIs in this case does not alter the *Brady* analysis, and likewise has no bearing on the application of the "other source" exception under *Wilson*.

Last, although the MOIs were in the control of the prosecutors and not accessible to the Movant, it is the exculpatory interview information contained in

the MOIs or the *substance* of the MOIs, that is really at issue for purposes of *Brady*, not the MOI documents. The actual *substance* of the MOIs from these witnesses was clearly available to the Movant. When a witness is readily available for a defendant to interview or question, and the witness is a source where a defendant, using reasonable diligence would look, the Fourth Circuit has held that the *Wilson* exception applies and does not require the prosecution to turn over information or notes from interviews with such witnesses. *See Wilson*, 901 F.2d at 381 (finding no *Brady* violation where defendant could have interviewed a witness that was likely to have exculpatory evidence prior to trial); *Hoke*, 92 F.3d at 1355 (finding no *Brady* violation where police failed to disclose interview notes from three witnesses with potentially exculpatory information because defendant could have discovered the witnesses through reasonably diligent investigation); *Lovitt*, 403 F.3d at 184 (finding exception to *Brady* where defendant could have questioned doctor about her opinion regarding the murder weapon's potential to inflict the victim's wounds).[10] To be clear, it is access to the witnesses themselves, not access to documents

[10] In reaching the opposite conclusion regarding the MOIs from these witnesses, the Magistrate Judge appears to have relied primarily on *Strickler v. Greene*, 527 U.S. 263 (1999) (finding that petitioner may reasonably rely on prosecution's open file policy as representation that the suppressed information had been disclosed) and *United States v. Parker*, 790 F.3d 550 (4th Cir. 2015) (finding that the defendant's knowledge that a witness was involved in a scam did not relieve the government of its obligations under *Brady* to disclose that the witness was subject of an ongoing fraud investigation by the SEC). However, the Court finds the line of cases specifically dealing with suppressed interview information from available and obvious witnesses to be more pertinent to this particular case.

containing interview notes, that guides the analysis when determining whether the *Wilson* exception is applicable. In this case, by conducting reasonably diligent investigation, the Movant could have interviewed the five potential witnesses to obtain exculpatory statements.

Thus, there is no *Brady* violation resulting from prosecutorial failure to disclose the MOIs for these witnesses. Because MOIs from these witnesses fall under the *Wilson* "other source" exception to the *Brady* rule, the MOIs from Clemens, Sears, Duba, Bearse, and Ojeda do not factor into the cumulative materiality of the non-disclosures, despite being favorable to the Movant. Additionally, and perhaps parenthetically, most of the favorable substance of these MOI's was brought out as evidence during the trial making the statements made in the MOI's cumulative, at best.

The Movant argues a proffer made by an attorney for Chris Adkins, the Chief Operating Officer at Massey and Blanchard's immediate supervisor, was undisclosed. The Court has reviewed the attachments submitted by the Movant and notes the attorney proffer was not submitted to the Court as an exhibit.[11] In addition, apart from stating that the attorney proffer was undisclosed, the Movant has not made any further argument that the proffer was

[11] The attachments to Document 703 do not include a document labeled USAO0000174 as cited by the movant. (See Document 705, at 7.) Instead, the series of USAO documents submitted with the Movant's memorandum end at USAO0000173. (Document 703-3)

favorable such that it could serve as the basis for a *Brady* violation.

Pursuant to the Court's Order, filed June 12, 2015, the United States was not required to produce documents containing handwritten and typewritten notes of interviews made by government attorneys and agents or attorney proffers, but instead, was required to produce the "substance" of such documents. (Document 279.) After careful review of the record, the Court has discovered that the substance of an attorney proffer from counsel representing Mr. Adkins, dated August 22, 2014, was, in fact, disclosed to the Movant. Specifically, the United States disclosed the following:

> Mr. Adkins' counsel related information from Mr. Adkins that included the following: Mr. Blankenship was involved in the development of the violation targets and report cards for the so-called hazard elimination program. Mr. Adkins also believed that Massey made some degree of effort to comply with mine safety laws.

(Document 283-1, at 3.) Because the Movant failed to submit the attorney proffer to the Court, the Court cannot verify whether the above-disclosed attorney proffer was the same as that cited by the Movant as undisclosed. However, due to the Movant's failure to make any argument regarding the favorability of the attorney proffer, the Court order requiring only that the substance of such proffers be disclosed and the Movant's failure to submit the purportedly

undisclosed proffer for Court review, the Court finds the Movant has failed to meet his burden of proof in establishing that such evidence was, in fact, *Brady* material.

B. MOIs from Government Witnesses: Ross and Blanchard

The Movant argues that ten MOIs from two of the government's main witnesses should have been disclosed. As an initial matter, it is not clear that the MOIs from Ross and Blanchard contain information that is, in fact, favorable. After careful review, the Court observes that the MOIs from Ross and Blanchard are overwhelmingly negative toward the Movant, and that most of the favorable information cited by the Movant may only be viewed as such when taken entirely out of context of the full documents. A *Brady* claim arises when there is an "obviously exculpatory character of certain evidence" or "the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce . . ." *Agurs*, 427 U.S. at 107. It is not apparent that such a duty applies to evidence that may only be construed as favorable when entirely stripped from the surrounding context. In addition, at least two of the MOIs contained no information that could be construed as favorable to the Movant. (Document 663-4 at 42, MOI-001550; Document 663-4 at 24, MOI-001553.)

Moreover, several statements cited by the Movant as favorable directly contradict the theory of the case pursued by the defense team. For example, the Movant cites part of the following statement from Blanchard's MOI as exculpatory, "Blankenship viewed violations as the cost of doing business and felt

violations were going to be written by MSHA. . .. Blankenship had a disdain for MSHA first, above DEP and the state. Blankenship felt MSHA made things up." (Document 663-2, MOI 001402.) However, the notion that Blankenship felt violations were made up was entirely contradictory to the defense theory of the case, which was instead that Blankenship was serious about remedying violations and did not willfully break the law or ignore violations. (See Document 613 at 3042, lines 14-19; Document 613 at 3056, lines 2-24.) In fact, although the defense claims it did not have access to the above-mentioned statement, it extensively questioned Blanchard on cross-examination to make the point that Blankenship *did not* think that citations were just made up or the "cost of doing business." (*See e.g.*, Document 610 at 2546-47; Document 611 at 2694, lines 14-18; Document 614 at 3094, lines 3-17.)

Similarly, the Movant cites two statements from the Ross MOIs as exculpatory although they directly contradict the defense theory of the case. First, the Movant cites a few lines from a MOI in which Ross describes a conversation with Blankenship about violations, noting that "Blankenship was most interested in knowing why MSHA was so biased against Massey." (Document 663-3, MOI 001492.) Second, the Movant cites the following statement: "Ross advised that when he met with Blankenship, Blankenship wanted to know if Massey was getting all of the violations because MSHA was biased." (Document 663-3, MOI 001499.) In the MOI, the following sentence is found: "Ross explained to Blankenship that the reason Massey received violations was because they had compliance issues." *Id.*

Statements tending to establish that the Movant *believed* MSHA was biased are not favorable. Instead, information proffered to the effect that the Movant thought violations were not real or serious would not have helped him avoid a finding that he willfully violated mine safety laws. Consistent with this, the defense counsel went to great lengths to draw out the exact opposite point on cross-examination: that the Movant believed all citations from MSHA were legitimate and that he was serious about remedying violations. (*See e.g.*, Document 610 at 2527; Document 613 at 3042, 3056.)

For the remainder of the statements cited by the Movant as exculpatory, the Court has assumed their favorability and examined the record to determine whether the statements were material to the outcome of the trial. After careful review of the trial transcript, the Court has discovered that the subject of *every single* exculpatory statement cited by the Movant as undisclosed was covered by the defense counsel during cross-examination at trial.[12] In fact, all of the undisclosed allegedly exculpatory statements contained in the Blanchard and Ross MOIs were covered thoroughly and repeatedly with the witnesses during cross-examination.

For example, the Movant cites, as undisclosed *Brady* material, two statements demonstrating that both Ross and Blanchard thought all mines would have at least some citations. This topic, however, was extensively covered with both witnesses on cross-

[12] The Court notes that ideally, consistent with professional and ethical standards, prior to filing such a motion, Movant's counsel would have reviewed the trial transcript to ensure the accuracy of arguments related to nondisclosure.

examination. For Blanchard, the Movant cites the following statement from an undisclosed MOI: "Blanchard stated there was no amount of money or resources that could take care of all violations at a mine." (Document 663-4 at 33, MOI-001547.) However, during cross-examination, the defense questioned Blanchard about this exact point at least five separate times. (*See e.g.*, Document 610 at 2546-47 (testifying that it would take an impossible amount of money to get to zero citations and that it does not matter how many workers you have in a mine, there will still be some citations); Document 611 at 2587, 2589, 2694; Document 612 at 2852.) Similarly, during cross-examination Ross provided a response that was nearly identical to the undisclosed statement in the MOI. The undisclosed piece of evidence from the Ross MOI states: "Ross advised that you would be hard pressed to go to a mine and not find some violations." (Document 663-4 at 16, MOI-001531.) However, during cross-examination Ross stated, "It would be hard pressed to find a mine that you wouldn't find at least some violations. I don't know how many." (Document 618 at 4161-62.) Ross further explained this point at trial by stating that he was not aware of any mines in the country with zero citations. *Id.*

Furthermore, the Movant argues that several statements tending to show MSHA bias were wrongfully suppressed. (Document 663-4 at 74, MOI-001580; Document 663-3 at 85-98, MOI-001492; Document 663-3 at 85-98, MOI-001499.) At trial, however, the defense team exhausted the concept of MSHA bias during cross-examination of Ross and Blanchard, rendering the additional statements in the MOIs merely cumulative of evidence previously presented. (*See e.g.*, Document 611 at 2603; Document

618 at 4168-72, 4194-96; Document 619 at 4221-25, 4233-37, 4251-52, 4302, 4305-06, 4314-15, 4315-17; Document 614 at 3284-3308.)

To argue for wrongful suppression, the Movant cites the following undisclosed statement: "Blanchard advised that he never knowingly gave a direct order where he told someone to do something that caused a law to be broken." (Document 663-3 at 48-51, MOI-001457.) However, on cross-examination at trial, Blanchard testified that there was no information indicating that Blankenship wanted to violate safety laws, that Blanchard never committed a willful violation of mine safety regulations, and that there was no agreement or understanding between Blanchard and Blankenship to violate mine safety laws. (Document 610 at 2527, 2531; Document 611 at 2694.) Therefore, the additional statement would have added no value to Blanchard's testimony for the Movant, since it was merely redundant or cumulative of exculpatory evidence previously presented to the jury during trial.

Another exculpatory statement from an undisclosed MOI cited by the Movant reads: "Blanchard was surprised to read the testimony from UBB miners that respirable dust fraud was occurring at the mine. Blanchard added the company did not want people cheating on their respirable dust sampling." (Document 663-4 at 74, MOI-001580.) However, this exact point was repeatedly elucidated on cross-examination at trial. (Document 610 at 2527-28; Document 613 at 3068-69.)

Next, the Movant cites the following undisclosed statement: "Blanchard does not believe that MSHA or anyone from MSHA was trying to do

something to endanger the health and safety of miners. Blanchard does think decisions MSHA made ended up endangering the health and safety of miners." (Document 663-4 at 74, MOI-001580.) However, during cross-examination at trial, the defense more fully questioned Blanchard about his understanding of the decisions MSHA made—particularly how some MSHA decisions made ventilation of the mine more difficult. (Document 611 at 2603; Document 613 at 3264, 3284-3308.) As such, all of the favorable information contained in the undisclosed Blanchard MOIs was covered on cross-examination at trial.

Likewise, for the undisclosed Ross MOIs, *every single* exculpatory statement cited by the Movant was covered extensively on cross-examination at trial. One such piece of evidence referenced by the Movant states: "Blankenship also informed Ross that Massey needed to reduce violations for sure." (Document 663-3 at 73, MOI-001487.) This point, however, was covered numerous times during cross-examination of Ross. For example, one line of questioning stated: "Q: And you did know, didn't you, that [Blankenship] wanted the operators of these mines to reduce the citations? A: Yes." (Document 618 at 4126; *see also* Document 618 at 4151; Document 619 at 4255-56, 4318, 4374, 4375-76.)

The Movant also cites the following undisclosed statement: "Blankenship wanted Ross to talk to him about the issues." (Document 663-4 at 16, MOI-001530.) During cross-examination the fact that Blankenship wanted feedback and suggestions from Ross regarding citation issues was covered on at least eight separate occasions. (Document 618 at 4123-25,

4136-37, 4146, 4148-49, 4161; Document 619 at 4254, 4322.) Covering the same point for the ninth time would have added no possible value to the defense.

Next, the Movant notes that a Ross MOI stated: "Ross advised that he was hired by Massey Energy to teach foremen about ventilation, respirable dust, and other safe workplace measures. Ross was able to travel wherever he wanted to travel. Ross would also be told by Chris Adkins to visit certain mines where they thought his assistance was needed." (Document 663-2 at 67, MOI-001474.) During cross-examination at trial, the defense counsel demonstrated extensive knowledge about Ross' employment and the nature of his role at Massey, making the undisclosed statement repetitious considering exculpatory information on the same point presented at trial. (Document 618 at 4121-22, 4126, 4151, 4163-73.)

The Movant also argues that the following statement was material: "Ross explained to Blankenship that Massey miners think the way they are doing things was the right way for Blankenship. Blankenship informed Ross that he did not know why they were getting this idea. Blankenship stated that he did not know that was the way Massey miners thought." (Document 663-3 at 73, MOI-001488.) As noted above, the point was made repeatedly that Blankenship wanted mine operators to reduce citations. Additionally, it was covered at trial that Blankenship had a hard time understanding why there were so many citations at the mine, and that he wanted miners to do a better job eliminating violations. (Document 618 at 4128-29.)

Last, the Movant cites the following undisclosed statement: "On August 5, 2009, at a

meeting with all of Massey Energy's salaried people at Scott High School . . . Adkins stated that they should comply with all regulations at the mine site and that they did not have to worry anymore." (Document 663-2 at 67-71, MOI-001476.) However, once again, the fact that Adkins wanted compliance with regulations was covered extensively on cross-examination at trial. The trial transcript reflects an exchange between defense counsel and Ross regarding Adkins' statements at the same August 5, 2009 meeting as follows:

> Q: And you have also heard Mr. Adkins say, "We've gotten ourselves in a situation where we'll take a violation just to keep running coal. That's the wrong mindset to have, and it's what we're going to change today." You heard him say that?
>
> A: Yes.
>
> Q: Do you recall him saying, "I'm asking everybody to step it up a notch. I'm asking for everybody at Massey to ramp it up a notch, that that's all I'm asking, eliminate the hazard. You see a hazard, eliminate it immediately." Do you recall him saying that?
>
> A: Yes.
>
> Q: And do you recall his saying near the end of the meeting, "If you are violating the law, it's because you want to do it. Because I'm sitting here telling you today the main guy over all

> production, Massey plants and everything, I'm telling you, you don't have to do it. So, if you're doing it, you're doing it on your own. I'm not winking. I'm not nodding. I'm telling you, don't do it." Do you remember his saying that?
>
> A: Yes.
>
> Q: And as you suggested at some point that Mr. Blankenship and Mr. Adkins make it clear what their message was, that is what Mr. Adkins did right then; isn't it?
>
> A: Yes.

(Document 619 at 4325; see also Document 618 at 4151.) Therefore, not only did the defense counsel elucidate the point that Mr. Adkins wanted people to comply with regulations and reduce violations, but it also appears as though defense counsel had access to a script of what Mr. Adkins said during the August 5, 2009 meeting.

After careful review of the record, it is apparent that the favorable information in the undisclosed MOIs for Ross and Blanchard is merely redundant of evidence presented to the jury at trial when viewed cumulatively. *Parker*, 790 F.3d at 558 (quoting *Bartko*, 728 F.3d at 339). The substance of the undisclosed exculpatory statements was covered extensively and repeatedly with Ross and Blanchard at trial. Because additional statements going to the same points that were covered at trial are cumulative of evidence previously presented, their disclosure

could have no impact on the outcome of the case. Therefore, the Court finds that the MOIs for Ross and Blanchard are not material, and the nondisclosure of the Ross and Blanchard MOIs cannot serve as the basis for a *Brady* violation.

C. MSHS Material

The Movant further argues that several MSHA documents should have been disclosed. The Movant argues that the undisclosed material was exculpatory and could have been used to demonstrate that (1) MSHA citations did not reflect actual violations; (2) MSHA bias and contempt toward Massey and Blankenship; (3) it was not clear that Massey's practices related to advance notice were actually illegal and (4) several MSHA supervisors were disciplined by the agency for inadequate supervision over UBB—particularly for failing to consider the interaction between mine dust and the approved ventilation plans. The Magistrate Judge determined that one MSHA email was not favorable to the Movant, and the Court agrees. (Document 663-5 at USAO0000028.) For the remaining undisclosed MSHA materials, the Court has assumed their favorability. However, the Court finds that the undisclosed MSHA materials were not material, because there was no reasonable probability that the evidence could have had an impact on the verdict. Most of the Movant's arguments here were addressed by the Court earlier in this opinion.

As previously stated, evidence that is inadmissible at trial is not material under *Brady*, since it has no bearing on the outcome of the case. *Wood*, 516 at 6. Again, pursuant to this Court's pretrial rulings, evidence related to unsubstantiated

violations, advance notice, and improper MSHA ventilation plans was inadmissible. By Order entered October 6, 2015, this Court ruled that evidence designed to show that a system of advanced notice was lawful would not be admissible. (Oct. 6, 2015, Tr. at 870-71.) The Movant's argument that suppressed MSHA material could have supported a defense that Massey's practice of informing miners when inspectors arrived was lawful has no merit, since evidence going toward such a defense would have been barred at trial.

Similarly, by the same Order, this Court ruled that citations from MSHA would be admissible only if they are "not being offered for the truth of the matter asserted in them or, in other words, to prove violations of safety standards but are being offered as evidence of the defendant's knowledge, intent, and/or willfulness as well as notice." (Oct. 6, 2015, Tr. at 854.) These citations were admissible only to show Blankenship's knowledge or intent relative to safety issues as opposed to evidence of actual safety law violations. Therefore, evidence related to the legality of advanced notice and unsubstantiated citations are not material.

The Movant also argues that evidence showing that MSHA officials failed to consider the interaction between the ventilation plans and mine dust in approving plans was material. The Movant argues that this evidence would have supported a key defense—that the ventilation plan MSHA imposed created unavoidable violations. (Document 663 at 13.) However, as previously stated, by Order entered on October 6, 2015, the Court granted the United States' motion in limine to exclude "claims that federal mine

safety standards were incorrect, misguided, or imprudent." (Oct. 6, 2015, Tr. at 866.) Because the Movant seeks to argue that MSHA ventilation plans were incorrect or misguided, this evidence and defense would have been inadmissible. In addition, arguments presented before and during trial suggest that the Movant was well aware of such evidence. Therefore, evidence related to MSHA discipline for the ventilation plans is not material due to its inadmissibility.

The remaining exculpatory evidence consists of several undisclosed emails from MSHA employees, which the Movant argues would have supported the defense that MSHA was biased against both Massey and Blankenship. For example, an MSHA employee sent an email stating: "I hope that him [Blankenship] and Glenn Beck get raped by a rhinoceros. Horn end." (Document 663-6 at USAO0000109.) Another email demonstrates an MSHA Mine Administrator responding to a draft press release regarding complaints about Massey mines by stating: "My only comment is to put a dagger into massey [sic]." (Document 663-5 at USAO0000033.)

The Court must now determine whether these emails contain information that, if disclosed, would have been exculpatory in such a manner as to undermine confidence in the verdict. Importantly, this inquiry must be undertaken in light of the entire record. *Agurs*, 427 U.S. at 112–13. Emails tending to show bias on behalf of individual MSHA employees does not necessarily substantiate a claim that the agency itself was biased against the Movant or Massey. In fact, as the Movant acknowledged, the sentiment contained in at least one of the two emails

was directly "overruled by the head of MSHA." (Document 663-5 at USAO0000033.) This supports the notion that decisions made on behalf of the agency were not impacted by bias held by individual MSHA employees.

Moreover, the evidence presented against the Movant was substantial. At trial, the Court instructed the jury on the count of conviction as follows:

> Thus, in order to find the Defendant guilty of Count One, the Government must prove beyond a reasonable doubt that two or more persons agreed to willfully violate mandatory mine safety standards at UBB during the indictment period; that the Defendant intentionally joined the agreement knowing that one of its objectives was to willfully violate mine safety standards at UBB; that the Defendant intended that willful violations of mine safety standards be committed at UBB; and that at least one overt act in furtherance of the conspiracy was knowingly and willfully committed by at least one member of the conspiracy during the life of the conspiracy.

(Document 540 at 22.) It is not evident that information related to MSHA bias is directly relevant to whether the Movant willfully violated mine safety standards. The core evidence regarding safety violations was not MSHA citations, but testimony from miners and others with direct, firsthand knowledge of conditions in the mine. The jury trial proceeded for six weeks, during which numerous

individual miners testified and considerable additional evidence was presented to show that the Movant willfully violated mine safety regulations. In this light, even if the Court viewed the individual employee emails as evidence of *agency* bias, the Court finds that the Movant has failed to meet his burden of demonstrating that a reasonable probability exists that the outcome of the trial might have been different had the suppressed evidence, alleged to be related to MSHA bias, been disclosed prior to trial.

In sum, all evidence cited by the Movant in support of the § 2255 motion was either excluded by Court rulings, exhaustively covered at trial, or immaterial to the charge. The record makes clear that much, if not all, of the information cited by the Movant as *Brady* material was available to the defense team from some source. For the Ross and Blanchard MOIs, every single statement cited as undisclosed pertained to topics covered extensively by the defense team at trial. Moreover, as noted above, a majority of the MSHA documents cited as *Brady* material covered topics that the Court ruled on repeatedly prior to and during trial, making it apparent to the defense team that such evidence was inadmissible.

Having considered all of the arguments made by the Movant, the nature and content of the undisclosed documents, the substantive evidence presented at trial and the applicable law, the Court finds the Movant has failed to meet his burden to establish that a reasonable probability exists that the outcome of the trial might have been different had the suppressed evidence been disclosed prior to trial. Specifically, after thorough review, nothing has been

presented to undermine confidence in the jury's verdict.

D. Jencks Act

The Movant argues that the prosecution violated the Jencks Act by failing to disclose MOIs. However, a Jencks Act claim fails where the failure to disclose does not result in prejudice. *Rosenberg v. United States*, 360 U.S. 367, 371 (1959). Moreover, the Jencks Act applies to statements that are written and "signed or otherwise adopted or approved by the witness as well as a recording of a witness' oral statement that is a substantially verbatim recital." *United States v. Roseboro*, 87 F.3d 642, 645 (4th Cir. 1996) (quoting 18 U.S.C. § 3500(b)) (internal quotation marks omitted) (noting that "when a government agent interviews a witness and takes contemporaneous notes of the witness' responses, the notes do not become the witness' statement"). The MOIs at issue in this case are not producible under the Jencks Act. The MOIs constitute summaries of conversations with such witnesses, evidenced by the use of third person to reference the interviewees throughout the documents. Additionally, during its *Brady* analysis, the Court determined that failure to disclose the MOIs did not result in prejudice. Therefore, the Court finds that the Movant's request for relief pursuant Jencks Act claim should be denied.

E. Prosecutorial Misconduct

The Movant argues that the United States committed prosecutorial misconduct by misrepresenting compliance with the Court's discovery orders. "To prevail on a claim of prosecutorial misconduct, a defendant must show (1)

that the prosecutor's remarks and conduct were, in fact, improper and (2) that such remarks or conduct prejudiced the defendant to such an extent as to deprive the defendant of a fair trial." *United States v. Tipton*, 581 Fed. Appx. 188, 189 (2014) (quoting *United States v. Allen*, 491 F.3d 178, 191 (4th Cir. 2007)). The Movant, however, appears to be essentially rehashing and converting the *Brady* claim into the legal framework for prosecutorial misconduct. Although this Court does not condone any violation of its orders, because the prosecution's conduct resulted in no prejudice to the Movant, the Court finds that the requested relief should be denied.

F. Motions for Evidentiary Hearing and Oral Argument

The Movant also filed a *Motion for Oral Argument* (Document 733) and a *Motion for Evidentiary Hearing* (Document 704-1), arguing that if the § 2255 petition for relief was not granted, then an evidentiary hearing would be needed to resolve factual issues. The Court finds that there are no pending factual disputes since the parties agree to the underlying facts regarding nondisclosure. Therefore, an evidentiary hearing and oral argument would not benefit the Court in this matter. These motions should be denied.

CONCLUSION

Again, it is undisputed that the United States failed to disclose documents and that this failure is violative of Department of Justice policy and the rules of discovery. The sheer number of undisclosed documents is troubling. Moreover, basic review of the record reveals that many of the statements made by

Counsel for the Movant, as to his knowledge of undisclosed materials and the impact of nondisclosure, are simply inaccurate. The legal profession and this Court demand more of all concerned. Importantly, however, there is clear precedent that guides the analysis and dictates the ultimate resolution in this matter.

WHEREFORE, after thorough review and careful consideration, the Court **ORDERS** that the *Motion to Vacate and Set Aside Defendant's Conviction and Sentence Pursuant to 28 U.S.C. § 2255* (Document 663) be **DENIED** and that this matter be **DISMISSED** and **STRICKEN** from the Court's docket.

Further, the Court **ORDERS** that the Movant's *Motion for Evidentiary Hearing* (Document 704-1) and *Motion for Oral Argument* (Document 733) be **DENIED** and that all other pending motions be **TERMINATED AS MOOT**.

The Court **DIRECTS** the Clerk to send a certified copy of this Order to the Honorable Omar J. Aboulhosn, to counsel of record, and to any unrepresented party.

APPENDIX C

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

CIVIL ACTION NO. 5:18-cv-00591
(Criminal No. 5:14-cr-00244)

Magistrate Judge Omar J. Aboulhosn

[Filed August 26, 2019]

DONALD L. BLANKENSHIP,	)
	)
Movant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent.	)
	)

PROPOSED FINDINGS AND RECOMMENDATION

Pending before the Court are the following Motions: (1) Movant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (Document No. 663), filed on April 18, 2018; (2) Movant's Motion for Evidentiary Hearing (Document No. 704), filed on September 5, 2018; and

(3) Movant's Motion for Oral Argument (Document No. 733), filed on July 31, 2019. By Standing Order, this matter was referred to the undersigned for submission of proposed findings of fact and a recommendation for disposition pursuant to 28 U.S.C. § 636(b)(1)(B). (Document No. 665.)

PRELUDE

Carl Calvin "Pee Wee" Acord, Jason Atkins, Christopher Bell, Gregory Steven Brock, Kenneth A. Chapman, Robert E. Clark, Cory Thomas Davis, Charles Timothy Davis, Michael Lee "Cuz" Elswick, William Ildon "Bob" Griffith, Steven "Smiley" Harrah, Edward Dean Jones, Richard K. Lane, William Roosevelt Lynch, Joe Marcum, Ronald Lee Maynor, Nicholas Darrell McCroskey, James E. "Eddie" Mooney, Adam Keith Morgan, Rex L. Mullins, Joshua Scott Napper, Howard D. "Boone" Payne, Dillard Earl "Dewey" Pesinger, Joel R. "Jody" Price, Gary Wayne Quarles, Deward Allan Scott, Grover Dale Skeens, Benny Ray Willingham, and Ricky Workman.[1]

These are the names of the miners who lost their lives on the afternoon of April 5, 2010 when an explosion occurred at the Upper Big Branch ["UBB"] Coal Mine in Montcoal, WV. The criminal trial of the Movant, while related to the events of that day, was not in fact a trial as to the cause of the April 5, 2010 tragedy, but was instead, generally, related to criminally prosecuting the Movant for allegations of violating mine safety laws. Regardless, the undersigned finds it appropriate to remember the men who lost their lives on April 5, 2010 and the

[1] http://www.ubbminersmemorial.com/the-miners

family members who have had to live with the loss of their loved ones since this tragedy occurred.

The UBB disaster was a tragedy felt most poignantly in southern West Virginia, but it was also felt around the world when it was learned of the magnitude of the tragedy and the number of lives lost that day. The significance that coal mining has played in the growth and history of the United States cannot be overstated. Furthermore, it is impossible to overstate the impact that coal mining has had to the history of the State of West Virginia, to the way of life that many West Virginians have lived from generation to generation, and to the economic well-being of the lives of families who have made coal mining their career. While mining has become much safer over the last century, due in large part to federal and State mining laws and regulations, this tragedy shows that coal mining is still a dangerous profession and that mining, while safer, is still not safe. Over the last century, in response to many other mining tragedies and the loss of life, Congress and States responded with legislation to attempt to prevent the next tragedy from happening. Over the course of the last 120 years, mining employment fell from a high of 862,536 miners in 1923 to just 82,699 in 2018.[2] More importantly, mining deaths fell from a high of 3,242 lives in 1907 to a low of 8 in 2016.[3] Much of the lowering of mining deaths can be attributable to the improvements mandated by mine safety legislation.

With that said, the decision that follows should not be seen as a decision on what caused or did not

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[2] https://arlweb.msha.gov/stats/centurystats/coalstats.asp

[3] *Id.*

cause the UBB disaster as the criminal trial of the Movant was not about that issue. The issue at the criminal trial of the Movant was whether the Movant criminally violated mine safety laws. A jury of his peers found that he did. The issue in this immediate matter before the undersigned is should the Movant's conviction be vacated or set aside due to admitted errors by the United States during the discovery phase and trial of the Movant's criminal prosecution.

The decision that follows is based upon the laws and the facts that the undersigned has before him. While the Movant attempts to ascribe ill motives to the United States and the attorneys that tried the case, the undersigned has found no ill motive in the actions taken during the prosecution of this case. While the United States has admitted that errors were made and further argues reasons as to why those areas don't necessitate the relief sought by the Movant, the undersigned has found that those errors were simply that: errors. An analysis of the laws and the facts and the conclusions reached by the undersigned follow this preamble.

PROCEDURAL BACKGROUND

1. Criminal Action No. 5:14-00244:

By Superseding Indictment filed on March 10, 2015, Movant was charged with one count of conspiracy to willfully violate mandatory mine safety and health standards in violation of 30 U.S.C. § 820(d) and 19 U.S.C. § 371 and to defraud the United States by impeding the Mine Health Safety Administration ["MSHA"] in the administration and enforcement of mine safety and health laws in violation of 18 U.S.C.

§ 371 (Count One); one count of making false statements to the Securities and Exchange Commission in violation of 18 U.S.C. § 1001 (Count Two); and (3) one count of making false statements in connection with the sale or purchase of securities in violation of 18 U.S.C. § 78ff (Count Three). (Criminal Action No. 5:14-002244, Document No. 170.) Following a 36-day jury trial beginning on October 7, 2015, Movant was convicted as to Count One and acquitted as to Counts Two and Three. (Id., Document No. 529.) The District Court sentenced Movant on April 6, 2016, to a 12-month term of imprisonment. (Id., Document Nos. 585 and 589.) The District Court further imposed a one-year term of supervised release, a $250,000 fine, and a $25.00 special assessment. (Id.)

Movant filed a Notice of Appeal on April 7, 2016. (Id., Document No. 591.) In his appeal, Movant argued that the District Court erred by: (1) "erroneously conclude[ing] that the Superseding Indictment sufficiently alleged a violation of Section 820(d);" (2) "improperly deny[ing] [Movant] the opportunity to engage in re-cross examination of an alleged coconspirator;" (3) "incorrectly instruct[ing] 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 instruct[ing] the jury as to the government's burden of proof." Id., Document No. 647; United States v. Blankenship, 846 F.3d 663, 667 (4th Cir. 2017). On January 19, 2017, the Fourth Circuit Court of Appeals affirmed the District Court's judgment. Id. Movant filed a petition for certiorari, which was denied by the United States Supreme Court on October 10, 2017.

Blankenship v. United States, ___ U.S. ___, 138 S.Ct. 315, 199 L.Ed.2d. 207 (2017).

2. Section 2255 Motion:

On April 18, 2018, Movant, by counsel, Howard C. Vick, Benjamin L. Hatch, and W. Henry Jernigan, Jr., filed his instant Motion to Vacate and Set Aside Conviction and Sentence Pursuant to 28 U.S.C. § 2255. (Civil No. 5:18-00591, Document No. 663.) As grounds for *habeas* relief, Movant argues as follows: (1) The United States suppressed material exculpatory and/or impeaching evidence in violation of Brady v. Maryland and Giglio v. United States (Id., pp. 10 –13.); (2) The United States suppressed evidence in violated of the Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedure (Id., pp. 13 – 14.); (3) The United States violated the District Court's Orders regarding discovery thereby depriving Movant of his constitutional right to a fair trial (Id., pp. 14 – 17.); and (4) Prosecutorial misconducted denied Movant due process and a fair trial (Id., pp. 18 – 19.). As relief, Movant requests that his sentence and conviction be vacated and set aside. (Id., p. 19.) As Exhibits, Movant attaches a copy of pertinent documents that were allegedly improperly withheld (Id., Document Nos. 663-1, 663-2, 663-3, 663-4, 663-5, 663-6.).

On the same day, Movant filed a "Motion for Extension of Time to Submit a Memorandum in Support of Motion to Vacate Pursuant to 28 U.S.C. § 2255." (Id., Document No. 664.) In support of his Motion, Movant explained that "the Department of Justice's Office of Professional Responsibility ["OPR"] is conducting an investigation into the conduct of the

prosecutors in [Movant's] case" and "the findings of the OPR report are likely to add material information to the subject matter of the Section 2255 Motion." (Id.) Movant stated that he expects that the OPR will issue its reports in the near future and "the interest of justice will be best served if [Movant] has the opportunity to address that information in his briefing." (Id.) Movant further noted that he had "learned of relevant new material as recently as April 6, 2018, and it is likely that more may come to light in the coming weeks." (Id.) Accordingly, Movant requested an extension of time to file his Memorandum in Support "until an appropriate date after the OPR report has been issued." (Id.)

By Order entered on April 23, 2018, the undersigned granted Movant's Motion for Extension of Time, directed Movant to file his Memorandum in Support of his Section 2255 Motion by June 4, 2018, and directed the United States to file its Answer no later than 45 days after the filing of Movant's Memorandum in Support. (Id., Document No. 667.) On May 21, 2018, Movant filed a "Motion for *In Camera Review*" of documents being withheld on privilege grounds by the United States Attorney for the Southern District of Virginia. (Id., Document No. 669.) The United States Attorney's Office for the Southern District of West Virginia was recused from defending the Section 2255 Motion. Subsequently, the undersigned granted an extension of time to the United States for the filing of a response to Movant's "Motion for *In Camera Review*," Movant for the filing of his Memorandum in Support of his Section 2255 Motion, and the United States for the filing of its Answer to Movant's Section 2255 Motion. (Id., Document No. 674.)

On June 21, 2018, Movant filed a "Motion to Conduct Discovery." (Id., Document No. 681.) The United States filed its Response in Opposition on July 3, 2018, and Movant filed his Reply on July 13, 2018. (Id., Document Nos. 685 and 686.) The undersigned conducted an in-chambers informal conference concerning Movant's pending "Motion to Conduct Discovery" on July 16, 2018. (Id., Document No. 689.) Movant appeared via telephone, by counsel, Benjamin L. Hatch, Howard C. Vick, Jr., Michael A. Baudinet, and W. Henry Jernigan, Jr. The United States appeared via telephone, by counsel, AUSA Douglas W. Squires, AUSA Jessica H. Kim, and AUSA S. Courter Shimeall. During the discussions, the parties reached the following agreement to resolve the issues raised in Movant's above Motion:

1. The United States will provide to Movant the Department of Justice's Office of Professional Responsibility ("DOJ") full Report of Investigation, and documents related to the DOJ's review, by **August 15, 2018.**

2. If the United States is unable to produce the foregoing by August 15, 2018, the United States **must** notify the Court of its inability to comply by **August 8, 2018**. The United States **must** further notify the Court of the specific reasons for its inability to comply with the August 15, 2018 deadline, and provide the Court with a date certain for the production of the foregoing documents.

3. If Movant concludes his discovery request is not satisfied after receipt and review of the

> above documents, Movant may file a new Motion for Discovery.

(Id., Document No. 688.) The undersigned, therefore, denied Movant's "Motion to Conduct Discovery" (Document No. 681) is as moot. (Id.)

The United States filed its Response to Movant's "Motion for *In Camera Review*" on July 30, 2018. (Id., Document No. 693.) Movant filed his Reply on August 7, 2018. (Id., Document No. 696.) By Order entered on August 8, 2018, the undersigned granted in part and denied in part as moot Movant's "Motion for *In Camera Review*" (Document No. 669). (Id., Document No. 697.) Specifically, the undersigned granted Movant's Motion as to Document Nos. DLB-001463, DLB-001464-77, DLB-001496-001501, and DLB-001532, and denied as moot Movant's Motion as to all remaining documents. (Id.) Thus, the Court directed the United States to produce the foregoing documents for *in camera review*. (Id.) Subsequently, the United States represented that it agreed to release Document Nos. DLB-001463 and DLB-001464-77 to Movant pursuant to the Court's Protective Order entered on July 27, 2018. (Id., Document No. 698.) The United States further stated that Document Nos. DLB-001463 and DLB-001464-77 were sent via overnight mail to Movant's counsel. (Id.) Concerning DLB-001496-001501, the United States states that it is amenable to disclosing the above document with redactions to account for the privileged communications. (Id.) The undersigned reviewed the above document and determined that such contained privileged attorney-client communications. (Id.) Accordingly, the United States was ordered to produce Document No. DLB-001496-001501, with redactions of the privileged attorney-client communications, to

Movant. (Id.) Concerning DLB-001532, the undersigned determined that such did not contain privileged attorney-client communicates and the United States was ordered to produce Document No. DLB-001532, without redaction, to Movant. (Id.)

On September 5, 2018, Movant filed Memorandum in Support of his Section 2255 Motion. (Id., Document Nos. 703 and 712-5.) As Exhibit, Movant's attaches copies of the pertinent evidence that was withheld by the United States. (Id., Document Nos. 703-1 – 703-17.) On September 6, 2018, Movant filed his Amended Memorandum in Support of his Section 2255 Motion. (Id., Document Nos. 705 and 712-5.) First, Movant argues that the United States suppressed material, exculpatory, and impeachment evidence in violation of Brady and Giglo. (Id., pp. 12 – 26.) Second, Movant claims that the United States suppressed evidence in violation of the Jencks Act and deprived Movant of due process. (Id., pp. 26 – 28.) Finally, Movant asserts that the United States violated the District Court's discovery Orders and committed prosecutorial misconduct. (Id., pp. 28 – 30.)

Movant also filed a "Motion for Evidentiary Hearing." (Id., Document No. 704-1.) Movant argued that the existing record demonstrates that he is entitled to relief under Section 2255. (Id.) Movant, however, states that he requests an evidentiary hearing if the Court is not inclined to grant him Section 2255 relief based on the record. (Id.)

On November 16, 2018, the United States filed its Consolidate Response in Opposition to Movant's Section 2255 Motion and Request for Evidentiary Hearing. (Id., Document No. 728.) First, the United

States argues that Movant's Brady and Giglio claims are meritless because the undisclosed favorable evidence was not material. (Id., pp. 6 – 23.) Second, the United States claims that the Jencks Act claim is without merit because the statements were not relevant to the witnesses' testimony on direct examination. (Id., pp. 23 – 35.) Third, the United States disputes it committed prosecutorial misconduct by failing to comply with the Court's discovery orders. (Id., pp. 35 – 37.) Finally, the United States asserts there is no need for an evidentiary hearing because the record conclusively shows Movant is entitled to no relief. (Id., pp. 38 – 40.)

On November 30, 2018, Movant filed his Consolidate Response in Opposition. (Id., Document No. 731.) First, Movant states that "examples cited in [Movant's] Memorandum in Support illustrates prejudice, but are not a comprehensive list of all the favorable, material, undisclosed evidence." (Id., pp. 7 – 9.) Second, Movant disputes that he suffered no prejudice because the evidence against him at trial was "strong" or "overwhelming." (Id., pp. 9 – 11.) Third, Movant argues that the "undisclosed MSHA evidence supported [his] defense theory." (Id., pp. 11 – 16.) Fourth, Movant claims that the "undisclosed MOI would have led to the identification of potential defense witnesses." (Id., pp. 16 – 21.) Fifth, Movant argues that "undisclosed MOI would have led to impeachment of key witnesses." (Id., pp. 21 – 23.) Sixth, Movant asserts that "the facts in this case demonstrate bad faith sufficient to support reversal for Jencks Act violations." (Id., pp. 23 – 24.) Seventh, Movant contends that this Court "should make its own factual determinations at an evidentiary hearing." (Id., pp. 24 – 26.) Finally, Movant claims

"[t]his patent prosecutorial misconduct must be remedied." (Id., pp. 26 – 30.)

On July 31, 2019, Movant filed a "Motion for Oral Argument." (Id., Document No. 733.) Movant states that he "seeks oral argument to support the resolution of his 2255 Motion." (Id.) Although Movant acknowledges that he is not incarcerated, Movant states that his conviction continues to cast "an ongoing cloud over [Movant's] professional and personal life." (Id.) Movant, therefore, requests "oral argument on the 2255 Motion so that the parties may present their arguments to the Court and respond to any issues the Court may raise." (Id.) On August 1, 2019, the United States filed its Response in Opposition. (Id., Document No. 734.) The United States notes that oral argument is not a matter of right in a *habeas* case, materials needed to review the motion are before the Court, and oral argument would not aid in the decisional process. (Id.) On August 8, 2019, Movant filed his Reply arguing that "oral argument may assist the Court in evaluating the facts and legal issues of the matter." (Id., Document No. 735.)

FACTUAL BACKGROUND

A coal mine explosion occurred at the UBB mine on April 5, 2010, resulting in the tragic death of 29 miners. The UBB mine was owned and operated by Massey Energy Company ["Massey"]. Movant was the former chairman and chief executive officer of Massey. In 2009 and 2010, Massey was repeatedly cited by MSHA for violating requirements of the Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq*. During the jury trial, testimony was presented that MSHA

issued UBB 466 violations in 2009, 480 violations in 2010, and UBB had the third most serious safety violations in any mines in the United State for the indictment period. Testimony was also presented that Massey had the most violations in the United States for 2009 and 2010. The United States argued that Movant conspired with other Massey officials to violate the mine safety laws in order to produce more coal. The United States presented testimony that there was an unspoken understanding at UBB that safety violations were acceptable so long as the mine was producing coal. The conspiracy involved the advance warnings of mine inspectors, cheating on dust samples, and the concealing of Mr. Ross's safety warnings by designing such as confidential. Coal miners testified that they were required to work in conditions known to be unsafe and without proper ventilation. Following a six-week jury trial, Movant was convicted of conspiring to violate mine safety laws and acquitted of the remaining offenses. Prior to returning a verdict, the jury deliberated for approximately two weeks, twice informed the District Judge that they could not agree on a verdict, and received an Allen charge from the Court.

Following Movant's conviction, Movant continued his quest for evidence allegedly suppressed by the United States. In 2017, the United States Attorney's Office began sending Movant letters enclosing materials previously suppressed. Movant contends that the United States Attorney's Office has now produced more than 1,000 additional pages of documents that should have been provided to Movant prior to his criminal trial.

DISCUSSION

The relevant portion of Section 2255 provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion made pursuant to Section 2255 is a collateral attack on a conviction or sentence. To succeed on a Section 2255 motion, the movant must prove that "his sentence or conviction was imposed in violation of the Constitution or law of the United States, that the court was without jurisdiction to impose such a sentence, that the sentence exceeded the maximum authorized by law, or that the sentence otherwise is subject to collateral attack." 28 U.S.C. § 2255. "A motion collaterally attacking a petitioner's sentence brought pursuant to § 2255 requires the petitioner to establish his grounds by a preponderance of the evidence." Sutton v. United States, 2006 WL 36859, * 2 (E.D.Va. Jan. 4, 2006).

Movant argues that the United States failed to disclose numerous pieces of materially favorable

exculpatory evidence under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), and material impeachment evidence under Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). It is well established that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). In United States v. Agurs, 427 U.S. 97, 111, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976), the Supreme Court clarified the prosecutor's duty to require disclosure of favorable evidence to the defense, even if not requested. This duty encompasses impeachment evidence (often referred to as "*Giglio* material"), exculpatory evidence, and evidence "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 1567-68, 131 L.Ed.2d 490 (1995). A prosecutor, however, does not have a "constitutional duty routinely to deliver his entire file to defense counsel." United States v. Agurs, 427 U.S. 97, 111, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976); also see Kyles, 514 U.S. 419, 437, 115 S.Ct. at 1567("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice.) If the prosecution suppresses Brady material, the disclosure of which would have in all reasonable probability resulted in a different outcome, then the mandates of due process are violated. See United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Brady v. Maryland, 373 U.S. at 87, 83 S.Ct. at 1196-97.

To state a valid Brady claim, the evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching, [the] evidence must have been suppressed by the State, either willfully or inadvertently," and the evidence must have been material to the verdict such that its suppression prejudiced the defense. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999); Monroe v. Angelone, 323 F.3d 286, 299-300 (4th Cir.2003). Suppressed evidence is "information which had been known to the prosecution but unknown to the defense." Agurs, 427 U.S. at 103, 96 S.Ct. 2392. "Evidence is 'exculpatory' and 'favorable' if it 'may make the difference between conviction and acquittal' had it been 'disclosed and used effectively.'" United States v. Wilson, 624 F.3d 640, 661 (4th Cir. 2010(citing Bagley, 473 U.S. at 676, 105 S.Ct. at 3375)). Concerning materiality, the Supreme Court emphasized three aspects. Kyles, 514 U.S. at 434, 115 S.Ct. at 1565. First, the Supreme Court stressed that "a showing of materially does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Id., 514 U.S. at 434, 115 S.Ct. at 1566(*Bagley's* touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important.") Stated another way, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. Therefore, a "reasonable probability" is shown when the suppression of evidence "undermines confidence in the outcome of the trial." Id. Second, the Supreme Court emphasizes that when considering materiality,

there is not a sufficiency of the evidence test. Id. The Supreme Court explained that "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id., 514 U.S. at 434-35, 115 S.Ct. at 1566. Again, a defendant must only show that the favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. Finally, the Supreme Court stressed that the question of materiality must be considered "collectively, not item by item." Id. at 436, 115 S.Ct. at 1567(noting that it was debatable whether lower court assessed the "cumulative effect of the evidence" because the court's decision contained repeated references dismissing particular items of evidence as immaterial, thereby suggesting that cumulative materiality was not the touchstone).

It is undisputed that the United States failed to produce to Movant, prior to trial, 61 Memoranda of Interviews ("MOIs") written by law enforcement agents. (Criminal Action No. 5:14-cr-00244, Document No. 728, p. 5 and Document No. 712-6, p. 2.) Eleven of the MOIs pertained to pre-indictment interviews and 50 pertained to post-indictment interviews. (Id.) Movant further argues that the United States failed to produce MSHA material including emails and disciplinary records. (Id., Document No. 712-5, pp. 7 - 8, 13 – 17.) In Response, the United States states that for purpose of the Motion, it does not dispute that the Government suppressed documents. (Id., Document No. 728, p. 6.) Therefore, the undersigned, must consider whether the suppressed documents were (1) favorable to Movant either because the documents were

exculpatory or impeaching, and (2) material to the verdict such that the suppression prejudiced Movant's defense. The cumulative effective of all suppressed evidence favorable to a defendant must be considered, rather than considering each item of evidence individually. As discussed in Kyles, a court must consider the cumulative effective of all suppressed evidence favorable to a defendant rather than considering each item of evidence individually. Kyles, 514 U.S. at 436, 115 S.Ct. at 1567. Thus, the cumulative effective requirement applies to the materiality element - - not the favorability element. The undersigned, therefore, will first determine whether the suppressed evidence individually was favorable to Movant. Once making this determination, the undersigned will consider the cumulative effective of all suppressed evidence favorable to Movant.

1. Issue of Favorability of Suppressed Evidence:

A. MSHA Evidence:

First, Movant argues that suppressed MSHA material included emails and disciplinary records that were "incredibly favorable to [Movant] and would have provided significant support for his defense at trial on multiple issues." (Criminal Action No. 5:14-00244, Document 712-5, p.13.) Movant states that "[t]hese materials could have caused the defense to change its decision and present a case, including by presenting the compelling point that [Movant] was subject to criminal prosecution when MSHA officials were given a slap on the wrist for their own conduct." (Id.) Movant further alleges that evidence obtained since trial supports Movant's claim that a MSHA

official altered and destroyed documents that "likely contained additional exculpatory and impeachment information." (Id., pp. 13 – 14.) Although Movant stresses that his examples are not inclusive of all favorable, material, undisclosed evidence, Movant contends that he has provided examples sufficient to prove a Brady violation. (Id.) As stated above, the undersigned will consider each example of suppressed evidence to determine if such was favorable to Movant:

i. Advance Notice:

As his first example, Movant argues that the suppressed MSHA material would have supported Movant's defense that Massey's practice of informing miners when inspectors arrived at the mine did not constitute illegal advance notice. (Id., Document No. 712-5, p. 14.) Movant contends that suppressed internal emails reveal that MSHA officials were conflicted as to whether Massey's practice constituted an improper advanced notice. (Id., citing Document No. 663-5, pp. 44 -45, Page ID No. 23408, USAO0000030.) Movant further notes that the emails exhibited the "tremendous discretion and uncertainty inherent in the decision to issue a citation." (Id., p. 14.) Movant acknowledges that he made some of the points during trial through former Massey employees, but Movant argues that MSHA evidence would have provided independent corroboration. (Id.) Movant notes that independent corroboration of a defense theory is not cumulative testimony or evidence and can undermine the confidence in a verdict. (Id., pp. 14 – 15.)

In Response, the United States argues that the "MSHA materials neither relate to the [Movant's] criminal charges, nor would they have led to evidence that would have supported this defense." (Id., Document No. 728, p. 8.) First, the United States contends that the email chain between MSHA officials discussing advance notice is irrelevant because Movant was acquitted of this aspect of Count One. (Id., p. 9.) The United States further notes that the email is irrelevant because it occurred on January 24, 2012, which was after the period of time in issue in the Superseding Indictment ("Beginning no later than January 1, 2008 and continuing through April 9, 2010 . . ."). (Id.)

In Reply, Movant disputes the United States' argument that the MSHA email (USAO0000030) was irrelevant because such was dated after the indictment period. (Id., Document No. 731, p. 11.) Movant argues that it is immaterial that the email discussion took place after the indictment period so long as the email discusses relevant information. (Id., pp. 11 – 12.) Movant maintains that the emails involved discussions among MSHA investigators as to events occurring at UBB during the indictment period, which were relevant and discoverable. (Id., p. 12.) Movant further argues that suppressed evidence regarding advanced notice was relevant and prejudicial despite his acquittal on the second object of the conspiracy count. (Id., p. 13.) Movant explains that "evidence expressly rebutting a key aspect of the prosecution's theory undermines the theory as a whole." (Id.) Specifically, Movant explains that the United States proceeded on the theory that Movant's emphasis on "production over safety" led miners to provide illegal advanced notice to cover up violations

at UBB. (Id.) Movant contends that even though the jury did not convict him on this object of the conspiracy, the jury could have considered the evidence relevant to the conspiracy to violate mine regulations. (Id.) Movant notes that "evidence from MSHA itself that inspectors did not consider this to be an illegal or improper practice would have undermined the entire tenor of this theory." (Id.)

The undersigned first finds that the suppressed emails regarding advance notice are not rendered irrelevant merely because the emails were composed on January 24, 2012, which was outside the indictment period (January 1, 2008 through April 9, 2010). Movant maintains that the emails involved discussions among MSHA investigators as to events occurring at UBB during the indictment period, which was relevant and discoverable. The Court agrees. Next, the undersigned will consider whether the advance notice emails were favorable despite Movant's acquittal on this object of the conspiracy as to Count One. In Count One, Movant was charged with a conspiracy involving two objects: (1) willfully violating mandatory mine health and safety standards; and (2) defrauding an agency of the United States (MSHA). Movant was acquitted of the conspiracy object of defrauding MSHA. (Criminal Action No. 5:14-00244, Document No. 529.) Movant, however, was convicted of conspiring to violate the mandatory mine health and safety standards. (Id.) At trial, the United States proceeded on the theory that Movant's knowledge and participation in advance notice was both (1) fraud on the Department of Labor and MSHA and (2) evidence of Movant's knowledge and participation in a conspiracy to violate the mine safety regulations. (Criminal Action No. 5:14-00244,

Document No. 626, pp. 75 – 79, Page ID Nos. 21641-45.) The United States argued that "[t]he goal of defendant's conspiracy was to violate the mine health and safety laws in order to run more coal. And to do this, he engaged in a relentless campaign of obstruction. The Defendant's conspiracy engaged in a system of advance warnings to tip off the members underground to hide surely thousands more violations that were not ever able to be caught by inspectors." (Id., Document No. 626, p. 50, Page ID No. 21616.) The United States further argued that "providing advance warning of an inspector's presence is illegal in and of itself." (Id., p. 77.) The United States presented testimony from numerous witnesses (Smith, Racer, Justice, Hughart, Hutchen, Ellison, Stewart, and Blanchard) that Movant encouraged the practice of providing notice of an inspector's presence at the mine so that mine safety violations could be hide or avoided. (Id.) The suppressed MSHA email chain revealing that MSHA officials were conflicted as to whether Massey's practice constituted an improper advanced notice is favorable to Movant. Although the jury acquitted Movant of the conspiracy charge where the object involved defrauding MSHA, it is certainly reasonable that the jury could have at least partially relied upon the alleged advance notice in concluding that Movant conspired to violate mandatory mine health and safety standards. Accordingly, the undersigned finds that MSHA email involving advance notice (Criminal Action No 5:14-00244, Document No. 663-5, pp. 44 - 45, Page ID No. 23408, USAO0000030) is favorable to Movant.

ii. MSHA Bias:

(a) Movant's Arguments:

Movant argues that the suppressed MSHA material would have supported Movant's defense that a MSHA citation does not necessarily reflect an actual violation of a mine safety law. (Criminal Action No. 5:14-00244, Document No. 712-5, p. 15.) Movant again claims that because the decision to issue a MSHA citation involves significant discretion, such could not form a basis for a conviction of violating mine safety law. (Id.) Movant concludes that the suppressed MSHA documents would have supported his defense by showing the following: (1) MSHA issued citations, and resisted challenges to citations, even in cases where there was insufficient proof of a violation; (2) MSHA employees were biased against Massey and Movant; and (3) MSHA inspectors often disagreed concerning what constituted a violation. (Id.) In support, Movant first references an email from a MSHA attorney discussing several citations issued to UBB. (Id., citing Document No. 663-6, p. 55, Page ID No. 23527, USAO0000114.) Movant contends that the MSHA attorney noted that one citation could not be sustained and must be vacated. (Id.) Movant claims that the MSHA attorney "writes further that more information would be needed to sustain two other citations if Massey pressed its challenge, but notes that MSHA still would not vacate those citations." (Id.) Movant states that this email "provided crucial evidence explaining why [he] often considered MSHA citations the 'cost of doing business' and chose not to challenge them on the merits." (Id.)

Second, Movant references an email from a MSHA employee pointing out a "potential violation" at UBB, stating that one section "seem[ed] to be mining" but written notice was not provided for two weeks. (Id., citing Document No. 663-5, p. 40, Page ID No. 23404, USAO0000028.) The responding email stated as follows: "Sounds like a violation is in order. Let Norman know about it and I am sure he will be more than happy to give them one more piece of paper." (Id.) Movant contends that the foregoing emails demonstrate "MSHA's willingness to issue citations without sufficient proof that the underlying violation occurred, as well as its bias against Massey and [Movant]." (Id., p. 16.)

Finally, Movant references several other emails that he claims "paint[s] an even more compelling picture of this bias." (Id.) In response to a draft press release, MSHA Mine Administrator Kevin Stricklin stated as follows: "My only comment is to put a dagger into [M]assey." (Id., citing Document No. 663-5, p. 663-5, Page ID No. 49, USAO0000033.) Movant states that Mine Administrator Stricklin was "one of the MSHA employees later disciplined in connection with UBB. (Id.) In another email, a MSHA employee stated as follows: "I hope that [Movant] and Glenn Beck get raped by a rhinoceros. Horn end." (Id., citing Document No. 663-6, p. 49, Page ID No. 23521, USAO0000109.) In a final email, Movant states that a DOL official reported Movant's indictment to the Secretary of Labor stating "And sometimes bad things happen to bad people." (Id., citing Document No. 696-2, p. 1, Page ID No. 23797, DLB-001532.) Therefore, Movant alleges that the foregoing undermines MSHA's credibility and the citation process. (Id.)

(b) United States' Arguments:

In Response, the United States disputes that the MSHA attorney-client communication regarding a settlement in an administrative matter shows that Movant was not acting willfully. (Id., Document No. 728, p. 9, citing Document No. 663-6, p. 55, Page ID No. 23527, USAO0000114.) The United States explains that his communication does not undermine the evidence and testimony presented exhibiting that there were 836 violations issued to UBB from January 2008 to April 2010, and that Movant had knowledge regarding the violations. (Id.) Specifically, the United States notes that during trial Blanchard, Ross, and Davis testified that Movant received daily violation reports. (Id., citing Document No. 614, p. (19210), Document No. 618, p. 19848, 19854-55, 19855, 19935-37, Document No. 602, p. 16509, 16513-17.) Furthermore, the United States asserts that mere reckless disregard was sufficient *mens rea* to support Movant's conviction. (Id., pp. 9 – 10.)

Furthermore, the United States disputes that the additional emails exhibit agency bias. (Id., p. 10.) The United States explains that the email referenced by Movant involving a "potential violation" and giving UBB "one more piece of paper" was regarding a single citation and the email was sent during the MSHA accident investigation in 2011. (Id., citing Document No. 663-5, p. 40, Page ID No. 23404, USAO0000028.) The United States claims that email is irrelevant because it was composed in 2011, outside the indictment period. (Id.) The United States further argues the email is not favorable because it involves a citation to UBB and the email cites specific records documenting the actual violation. (Id.) The United

States asserts that MSHA employees' willingness to cite UBB for documented violations does not demonstrate bias." (Id.) Regarding the other four emails, the United States argues that none support Movant's theory of agency bias. (Id.) The United States claims that the email from Mine Administrator Stricklin ("….put a dagger into [M]assey") was "a single intemperate comment from a MSHA employee shortly after the tragedy at UBB that does not show wide-spread bias." (Id., p. 10, citing Document No. 663-5, p. 49, Page ID No. 23413, USAO0000033.) The United States further noted that "the response from the DOL assistance secretary redirected the focus to "presenting the facts [about the tragedy] in a responsibly way." (Id.) The United States claims that another email was not favorable to Movant's defense because it involved a profane statement ("raped by a rhinoceros") from a "MSHA employee with no apparent enforcement connection to UBB" and an employee from a private sector. (Id., citing Document No. 663-6, p. 49, Page ID No. 23521, USAO0000109.) The United States explains that the email involving the Secretary of Labor was not favorable to Movant's defense because the email was composed after Movant's indictment, "and therefore has no relation to any possible pre-indictment MSHA enforcement bias." (Id., pp. 10 – 11, citing Document No. 696-2, p. 1, Page ID No. 23797, DLB-001532.)

Finally, the United States stresses that none of the individuals on the above emails were employed by the Department of Justice or involved in the criminal investigation. (Id.) The United States argues that "[a]lthough [Movant] claims that these emails could have undermined MSHA's credibility, he ignores that this matter was not brought by MSHA, and did not

rely solely on testimony from MSHA employees." (Id.) The United States contends that given the "egregious pattern of 836 violations during the charged period[,] . . . [f]our isolated emails from people not involved in the criminal case do not refute a large volume of evidence of properly issued citations against UBB." (Id.)

(c) Movant's Reply Arguments:

In Reply, Movant disputes the United States' argument that the MSHA emails (USAO0000028 and 32) were irrelevant because such were dated after the indictment period. (Id., Document No. 731, p. 11.) Movant argues that it is immaterial that the email discussion took place after the indictment period so long as the email discusses relevant information. (Id., pp. 11 – 12.) Movant maintains that the emails involved discussions among MSHA investigators as to events occurring at UBB during the indictment period, which were relevant and discoverable. (Id., p. 12.) Second, Movant disputes the United States' argument that evidence that would "undercut" the number of violations issued by MSHA is irrelevant. (Id.) Movant notes that the United States proceeded on the theory that Movant had an "egregious pattern of 836 violations" at UBB. (Id.) Movant argues that his "unimpeachable evidence . . . undermined the prosecutors' narrative that the number of violations actually reflected an 'egregious pattern.'" (Id.) Third, Movant argues that the internal MSHA email reveals that the investigator was instructed to issue a citation even though he identified only a "potential" violation. (Id.) Movant argues that this email was favorable and

relevant to allow Movant to question the investigator as to the reasoning for issuing the citation. (Id., p. 13.)

Finally, Movant argues that "MSHA was intimately involved in this prosecution." (Id., p. 14.) Movant, therefore, contends that the emails exhibiting bias by MSHA is relevant. (Id.) Movant notes that "the prosecution team itself consisted of a Department of Labor Office of the Inspector General Special Agent and 'DOL attorneys, several of whom were appointed as Special AUSAs for the Blankenship trial.'" (Id., p. 14 citing OPR 00012 and Document Nos. 397 and 398.) Movant states that a DOL special agent participated in a number of the MOI interviews. (Id.) Movant also states that "according to [former AUSA] Ruby, the prosecutors relied on DOL and MSHA to determine what documents were exculpatory and should be disclosed to the defense. (Id., citing OPR 000121-22). Movant concludes that MSHA "was clearly part of the prosecution team in this case" and evidence of bias by MSHA was relevant. (Id.) Specifically, Movant argues that evidence exhibiting bias by MSHA was relevant to the jury's determinate as to whether such bias affected how inspectors and their supervisors treated citations to UBB, and to any effect on the subsequent investigation and charges brought by the United States against Movant. (Id.)

(d) Court's Findings:

Concerning Movant's reference to an email from a MSHA attorney discussing several citations issued to UBB, the undersigned finds such is favorable to Movant. (Criminal Action No. 5:14-cr-00224, Document No. 663-6, p. 55, Page ID No. 23527, USAO0000114.) As Movant notes, the email indicates

that MSHA counsel was aware that one citation (Citation 7261300/air quality) could not be sustained if challenged by Movant. (Id.) MSHA counsel noted that Movant had challenged citation, and thus, counsel recommended that the citation be vacated. The foregoing indicates that although MSHA was aware the citation could not be sustained, such would not have been vacated unless challenged by Movant. (Id.) As to citation 7278775 (protection from roof and rib falls), MSHA counsel indicates that the seriousness of the citation might need to be reconsidered due to the lack of information provided by the mine inspector. (Id.) MSHA counsel, however, recommended Movant's challenge to the citation be denied. (Id.) Concerning the foregoing email, Movant states that this email "provided crucial evidence explaining why [Movant] often considered MSHA citations the 'cost of doing business' and chose not to challenge them on the merits." (Id.) The undersigned finds that the foregoing email is favorable to Movant. (Criminal Action No. 5:14-cr-00224, Document No. 663-6, p. 55, Page ID No. 23527, USAO0000114.) The United States clearly relied upon reference to MSHA citations in support of its argument that Movant conspired to violate mine safety standards. The United States presented testimony that Massey was issued more safety violations than any other mines in the United States for 2009 and 2010. The forgoing email indicates that MSHA inspectors issued citations to Massey without providing sufficient evidence to support the citation, or that could not be sustained if challenged.

Concerning the email from the MSHA employee pointing out a violation at UBB, and the responding email that Norman "will be more than

happy to give them one more piece of paper" is not favorable to Movant. (Criminal Action No. 5:14-00244, Document No. 663-5, p. 40, Page ID No. 23404, USAO0000028.) In the foregoing email, a MSHA employee notes a potential violation and states evidence supporting such. (Id.) In response, another MSHA employee states that a violation is in order and "Let Norman know about it and I am sure he will be more than happy to give them one more piece of paper." (Id.) Despite Movant's allegations to the contrary, the foregoing does not provide favorable evidence. The email contains evidence supporting the basis for the violation. Although the email indicates that a certain MSHA employee would be "happy to give [Movant and Massey] one more piece of paper," such does not reveal agency bias because the email clearly provides evidence supporting the issuance of a violation. Accordingly, the foregoing email is not favorable to Movant. (Criminal Action No. 5:14-00244, Document No. 663-5, p. 40, Page ID No. 23404, USAO0000028.)

Concerning the email from Mine Administrator Stricklin ("….put a dagger into [M]assey"), the undersigned finds that such is favorable to Movant. (Criminal Action No. 514-00244, p. 10, citing Document No. 663-5, p. 49, Page ID No. 23413, USAO0000033.) Although the response from the DOL assistant secretary redirected the focus to "presenting the facts to the public in a responsible way," such does indicate a bias towards Massey or Movant. Concerning the email from the MSHA employee to an employee of a private sector (stating he hoped Movant was "raped by a rhinoceros"), the undersigned finds that such is favorable to Movant to show bias by a MSHA employee. (Criminal Action No. 5:14-00244,

Document No. 663-6, p. 49, Page ID No. 23521; USAO0000109.) Although the United States argues that this MSHA employee had "no apparent enforcement connection to UBB," Movant contends that certain MSHA employees were involved in his prosecution and bias by a MSHA employees is relevant. The undersigned agrees. Concerning the email from a DOL official reporting Movant's indictment to the Secretary of Labor stating "And sometimes bad things happen to bad people," the undersigned find such is favorable to Movant. (Id., Document No. 696-2, p. 1, Page ID No. 23797; DLB-001532.) Again, the undersigned finds that the forgoing indicates bias toward Movant and such was favorable to his defense.

According, the undersigned finds that the following emails were favorable to Movant: (1) USAO0000114 (Criminal Action No. 5:14-cr-00224, Document No. 663-6, p. 55, Page ID No. 23527.); (2) USAO0000033 (Criminal Action No. 5:14-00244, p. 10, citing Document No. 663-5, p. 49, Page ID No. 23413.); (3) USAO0000109 (Criminal Action No. 5:14-00244, Document No. 663-6, p. 49, Page ID No. 23521.); and (4) DLB-001532 (Criminal Action No. 5:14-00244, Document No. 696-2, p. 1, Page ID No. 23797.) The undersigned finds that USAO0000028 is not favorable to Movant. (Criminal Action No. 5:14-00244, Document No. 663-5, p. 40, Page ID No. 23404; USAO0000028.)

iii. MSHA Disciplinary Documents:

Finally, Movant argues that disciplinary records concerning MSHA employees were suppressed. (Criminal Action No. 5:14-00244,

Document No. 712-5, pp. 16 – 17.) Movant claims that the MSHA employment records show that "MSHA employees responsible for oversight of the UBB mine during the period the indictment were subject to disciplinary action including for their failure to consider the interaction between the mine dust and the ventilation plans MSHA required at the UBB mine." (Id., p. 16, citing Document Nos. 663-6, pp. 78 – 83, 91 - 96, 101 - 106 and Document No. 669-1.) Thus, Movant argues "[t]his evidence would have supported a key defense argument: the MSHA-required and approved ventilation plan – not some criminal conspiracy – actually caused many of the violations for which the government sought to hold [Movant] responsible." (Id.) Movant further states that in an undisclosed email one MSHA employee "chastises another [stating] 'you told Lynn that the Internal Review report still made it appear that MSHA was responsible for a defective ventilation plan at UBB. (It would have been really good if you had told me that, since I am the one who can fix it.)'" (Id., p. 17, citing Document No. 663-5, p. 34, Page ID No. 23398, USAO0000024.) Movant argue that the foregoing is "independent evidence" supporting his defense that "could have opened a number of avenues for further inquiry." (Id.)

In Response, the United States disputes that the disciplinary actions taken by MSHA against MSHA employees was favorable to Movant. (Id., Document No. 728, pp. 11 – 12.) The United States disagrees that the disciplinary letters demonstrate that MSHA caused many of the violations Movant was held accountable. (Id., p. 11.) The United States explains that disciplinary decisions were made following MSHA's post-UBB Internal Review and it

was determined that MSHA's failure on several occasions to follow internal agency policies in enforcement at UBB actually resulted in less stringent enforcement at the mine. (Id., p. 12, citing Document No. 663-6, pp. 78 - 106, ID No. 23550-78.); (also citing https://www.msha.gov/PerformanceCoal/UBBInternalReview/UBBInternalReview.asp.) Thus, the United States asserts that the disciplinary documents show that "MSHA should have been harder on [Movant] for his repeated violations of mine-safety regulations." (Id.) Next, the United States disputes that MSHA's required ventilation plan was withheld. (Id.) The United States explains that testimony concerning the issue of whether the type of ventilation plan required by MSHA was responsible for the safety issues at UBB came out at trial (Id., citing Document No. 618, pp. 231-36, Page ID No. 19998-20003 and Document No. 601, pp. 34 – 35, Page ID No. 16238-39.) The United States further notes that the jury was not allowed to consider evidence or arguments related to any disagreements between MSHA and UBB as to the interpretation or application of ventilation standards. (Id.) Finally, the United States asserts that Movant relies upon a February 2012, email exchange occurring between MSHA counsel and MSHA team members that drafted the UBB Internal Review Report, which was outside the indictment period and is irrelevant to bias. (Id., p. 11, citing Document No. 663-5, p. 34, Page ID No. 23398; USAO0000024.) The United States further contends that the email "reflects internal discussion in the Report drafting process regarding phrasing related to ventilation," which would not have supported Movant's defense. (Id.)

In Reply, Movant argues the MSHA disciplinary records are favorable and material because they provide independent evidence of a faulty ventilation plan. (Id., Document No. 731, p. 15.) Although Movant acknowledges that portions of the disciplinary records were unfavorable to Movant, Movant contends that the disciplinary records also contained favorable information. (Id.) Movant explains that the disciplinary records "demonstrate that MSHA personnel failed to review the ventilation and dust control plans for UBB as a consolidated plan." (Id., citing and Document No. 663-6, p. 80, Page ID No. 23552, USAO 000132.) Movant claims that this finding in conjunction with another undisclosed email (USAO 00024), provides evidence that the MSHA-approved ventilation plan led to violations. (Id.) Movant disputes that this evidence would have been inadmissible or cumulative. (Id.) Movant argues that this evidence would not have been precluded by the District Court's ruling on the motion *in limine* because it did not relate to a disagreement between MSHA and UBB. (Id.) Movant explains that the disciplinary records and the undisclosed email reveal that MSHA identified problems with the plan it imposed on UBB. (Id.) Movant further argues that the foregoing documents "could have opened additional avenues of inquiry for the defense, including the decision of whether or not to call MSHA officials as witnesses." (Id.) Movant argues that the suppressed evidence was not cumulative. (Id.) Movant acknowledges that he presented the defense that MSHA bore responsibility for the ventilation violations. (Id.) Movant, however, contends that suppressed evidence provides independent corroboration with MSHA's own documents, rather than Massey witnesses, that supported Movant's defense. (Id.)

The undersigned finds that both the MSHA disciplinary records and internal email are favorable to Movant. The Internal Review Report by MSHA recognized that there were inadequacies in MSHA's safety and health standards and District 4 personnel failed to follow established policies and procedures. Specifically, the Internal Review Report indicates that MSHA personnel failed to properly apply and enforce safety standards upon Movant and UBB. The Internal Review, however, ultimately concluded that neither the actions of District 4 personnel or inadequacies in MSHA safety and health standards *caused* the explosion. As part of the MSHA disciplinary records, a "Letter of Reprimand" issued to Deputy Administrator Charles J. Thomas states that "District 4 management failed to follow CMS&H policies and procedures applicable to the plan approval process." (Criminal Action No. 5:14-cr-00244, Document No. 663-6, p. 80, Page ID No. 23552, USAO 000132.) Specifically, it was determined that "District 4 management did not follow national guidance outlined in Procedure Instruction Letter No. 109-V-03, which specified that separate ventilation and dust control plans were to be consolidated into a single mine ventilation plan subject to a single review date." (Id.) Although the United States is correct that testimony came out at trial concerning the issue of whether the type of ventilation plan required by MSHA was responsible for the safety issues at UBB, such testimony focused on MSHA's rejection of Massey's proposed use of belt air ventilation and the number of ventilation related citations issued to Massey. (Id., citing Document No. 618, pp. 231-36, Page ID No. 19998-20003 and Document No. 601, pp. 34 – 35, Page ID No. 16238-39.) There is no indication that Movant had independent evidence indicating

that MSHA determined that District 4 personnel failed to follow proper policies and procedures when reviewing and approving the ventilation plan for UBB. Although the District Court's ruling on the motion *in limine* precluded any evidence concerning a disagreement between MSHA and UBB as to the interpretation or application of ventilation standards, the above referenced MSHA disciplinary records did not concern such a disagreement. The above MSHA disciplinary records relate to the failure MSHA employees to consolidate separate ventilation and dust control plans into a single mine ventilation plan. Although the Internal Review Report and disciplinary records certainly contain unfavorable evidence to Movant, the undersigned finds that the disciplinary records also contain some favorable evidence. The disciplinary records provide support for Movant's argument that the ventilation plan approved or imposed by MSHA contributed to safety violations. Additionally, the undersigned finds that the undisclosed MSHA email acknowledging that the Internal Review Report "made it appear that MSHA was responsible for a defective ventilation plan at UBB," is favorable to Movant. (Criminal Action No. 5:14-00244, Document No. 663-5, p. 34, Page ID No. 23398, USAO0000024.) As stated above, the MSHA email provides independent evidence supporting Movant's defense that MSHA's approved ventilation plan contributed to Movant's and UBB's safety violations.

iv. Conclusion as to "favorability" as to MSHA documents:

Based upon the foregoing, the undersigned has concluded that the following MSHA documents are

favorable to Movant: (1) USAO0000030 (Criminal Action No 5:14-00244, Document No. 663-5, pp. 44 - 45, Page ID No. 23408.); (2) USAO0000114 (Criminal Action No. 5:14-cr-00224, Document No. 663-6, p. 55, Page ID No. 23527.); (3) USAO0000033 (Criminal Action No. 5:14-00244, p. 10, citing Document No. 663-5, p. 49, Page ID No. 23413.); (4) USAO0000109 (Criminal Action No. 5:14-00244, Document No. 663-6, p. 49, Page ID No. 23521.); (5) DLB-001532 (Criminal Action No. 5:14-00244, Document No. 696-2, p. 1, Page ID No. 23797.); (6) USAO 000132 (Criminal Action No. 5:14-00244, Document No. 663-6, p. 80, Page ID No. 23552.); and (7) USAO0000024 (Criminal Action No. 5:14-00244, Document No. 663-5, p. 34, Page ID No. 23398.). The undersigned finds that USAO0000028 is not favorable to Movant. (Criminal Action No. 5:14-00244, Document No. 663-5, p. 40, Page ID No. 23404; USAO0000028.)

B. Memoranda of Interviews (MOIs):

As stated above, it is undisputed that the United States failed to produce to Movant, prior to trial, 61 MOIs written by law enforcement agents. (Criminal Action No. 5:14-cr-00244, Document No. 728, p. 5 and Document No. 712-6, p. 2.) Eleven of the MOIs pertained to pre- indictment interviews and 50 pertained to post-indictment interviews. (Id.) Movant first contends that the information provided in the MOIs could have provided useful information for cross examination. (Id., Document No. 712-5, pp. 17 – 18.) Movant further argues that production of the MOIs would have allowed Movant to make a determination on whether to advance an argument that could be corroborated by witnesses. (Id.) Although Movant stresses that his examples are not inclusive of all

favorable and material MOIs, Movant contends that his examples are sufficient to prove a Brady violation. (Id.)

i. MOI of Potential Defense Witnesses:

(a) Movant's Argument:

Movant identifies five potential defense witnesses that he claims could have provided exculpatory testimony: Mark Clemens, Steve Sears, Sabrina Duba, Charlie Bearse, and Stephanie Ojeda. (Id.) Movant contends that the statements provided by the above witnesses in their MOIs "contradicted the government's theory that [Movant] pushed production over safety and failed to budget sufficient funds to hire more safety personnel, which was perhaps the single most important issue at trial." (Id., p. 18.) Movant stress that "these witnesses were all [Massey] employees whose roles gave them more insight than many of the witnesses who ultimately testified." (Id.) Concerning Mark Clemens, Movant contends that Mr. Clemens was in charge of Massey's production, sales, and budgeting. (Id., Document No. 712-5, p. 18.) Movant argues that "[d]ue to Clemens' role at Massey, he was uniquely qualified to address the government's theory that [Movant] pressured subordinates to run coal and ignore safety." (Id.) Movant contends that the MOI for Mr. Clemens reveals that Mr. Clemens "would have rejected this theory, as he told the government that 'there was pressure at Massey to run coal, but not enough to overlook safety.'" (Id., citing Document No. 663-2, p. 3, Page ID No. 23095, MOI-001506).

As to Steve Sears, Movant states that Mr. Sears "oversaw Massey Coal Sales." (Id., p. 18.) Similar to

Mr. Clemens, Movant asserts that Mr. Sears' role at Massey make him "qualified to address the government's theory that [Movant] pressured subordinates to run coal and ignore safety." (Id.) Movant claims that the Mr. Sears stated as follows in his MOI: "Massey's primary focus was safety. [Movant] started a safety program for individuals and pushed safety more than any other CEO in the industry. People have been fired because of safety." (Id., pp. 18 - 19, citing Document No. 663-2, p. 7, Page ID No. 23099, MOI-001509). The MOI further reveals that Mr. Sears stated "he had a positive opinion about safety at all of Massey's operations." (Id., p. 19.)

Concerning Sabrina Duba, Movant contends that Ms. Duba was a Massey senior accountant, who ran the budgeting process for the mines. (Id.) Movant asserts that the MOI reveals Ms. Duba told the government that Movant "would tell them to go back and make sure the [production] figures used were not too aggressive." (Id., p. 19, citing Document No. 663-3, p. 16, Page ID No. 23200, MOI-001412). Movant argues that this statement "would have contradicted the government's theory that Mr. Blankenship relentlessly pushed production." (Id., p. 19.) Movant further argues that MOI reveals that Ms. Duba could have testified to the following: (1) Movant "did not participate in budget meetings or have involvement in the final business plan reviews;" (2) Ms. Duba was instructed by Chris Adkins to focus on eliminating the most serious violations; and (3) Movant directed Ms. Duba to identify the people responsible for violations to learn who were the 'repeat offender.'" (Id., citing Document No. 663-3, pp. 17 - 18, Page ID No. 23201-02, MOI-001413-14).

As to Charlie Bearse, Movant asserts that Mr. Bearse was a president of a Massey resource group. (Id., p. 19.) The MOI reveals that Mr. Bearse stated that Massey's section staffing was the "industry standard." (Id., citing Document No. 663-2, p. 20, Page ID No. 23112; MOI-001392). Movant argues that this statement contradicted testimony of two other resource groups presidents that testified for the government. (Id.) Movant further states that this statement "directly contradicts the government's overarching theory that 'the [Movant] never came up with the money for that one more coal miner,' and supports [Movant's] contention that the mine was properly staffed." (Id., citing Document No. 599, p. 55, Page ID No. 15846). Second, the MOI revealed that Mr. Bearse explained that "if there was something wrong at the mine, you were expected to stop, fix the problem and then move on." (Id., citing Document No. 663-2, p. 21, Page ID No. 23113, MOI-001393.) Mr. Bearse stated "[t]here were not discussions that violations were OK, but there were discussions about trying to get better." (Id.) Mr. Bearse further stated that "You can go to any mine and find safety violations." (Id., pp. 19 – 20, citing Document No. 663-2, p. 22, Page ID No. 23114, MOI-00134.) Finally, Movant states that Mr. Bearse acknowledged he had been reprimanded for a violation for operating without air in a section and, at times, he feared discipline over compliances issues. (Id.)

Concerning Stephanie Ojeda, Movant states she was an in-house lawyer at Massey that provided favorable evidence in her MOI. (Id.) Specifically, Movant argues that Ms. Ojeda's MOI stated the following favorable information: (1) "Ojeda knew that [Movant] wanted a report [on her meeting with Ross] but was not sure how she learned that" (Id., citing

Document No. 663-4, p. 3, Page ID No. 23285, MOI-01519.); (2) "[Movant] and Adkins seemed to think Ross was legitimate," and "Ojeda thought they were looking for solutions from Ross" (Id., citing Document No. 663-4, p. 6, Page ID No. 23288, MOI-01522.); (3) "[Movant] did not like learning of inadequacies at Massey Ojeda [] advised that Adkins was going to take heat for what Ross had stated" (Id., citing Document No. 663-4, p. 7, Page ID No. 23289, MOI-01523.); (4) "The Hazard Elimination Committee started around the same time as Ross's recommendations were made" " (Id., citing Document No. 663-4, p. 10, Page ID No. 23292; MOI-01526.); and (5) "Ojeda was certain issues raised by Ross were discussed by the Hazard Elimination Committee" (Id.). Furthermore, Movant argues that Ms. Ojeda made exculpatory statements concerning the confidentiality designations placed on the memorandum memorializing Ross's thoughts and recommendations. (Id.) Specifically, Movant explains that the United States argued at trial that Ms. Ojeda's instructions to keep certain material related to Ross confidential, was evidence of a conspiracy with Movant. (Id.) Movant argues that Ms. Ojeda's MOI establishes that neither Ms. Ojeda nor Movant engaged in such a conspiracy. (Id.) Movant notes that MOI reveals that Ms. Ojeda informed the government that she "was not specifically told to attend the Ross meeting so that the meeting between Ross and [Stan] Suboleski would remain privileged" and "it was typical to include a warning on privileged documents." (Id., pp. 20 – 21, citing Document No. 663-4, pp. 5 - 6, Page ID No. 23287-88, MOI-01521-22.) Finally, Movant states that Ms. Ojeda's MOI contradicted the United States' "suggestion that the privilege warning was intended to hide the material from Elizabeth Chamberlin, who oversaw safety at Massey." (Id., citing Document No.

663-4, p. 5, Page ID No. 23287, MOI-01521 and Document No. 618, pp. 24 – 25, Page ID Nos. 19791-92.) Specifically, Ms. Ojeda stated that she did "not remember adding the language that the report should not be shared with non-practicing attorneys to warn Ross not to share the report with Chamberlin." (Id.)

(b) United States' Response:

In Response, the United States disputes that the suppressed evidence would have led to the identification of defense witnesses. (Criminal Action No. 5:14-00244, Document No. 728, pp. 12 - 18.) Citing United States v. Wilson, 901 F.2d 378 (4th Cir. 1990), the United States argues that Movant is not entitled to the benefit of Brady based upon the five potential witnesses now identified by Movant. (Id., p. 13.) The United States contends that all five potential witnesses were both available to Movant and a source where a reasonable defendant would have looked. (Id.) The United States points out that all five of the potential witnesses were Movant's own employees and "all of them except Sears were actually listed on the defendant's initial witness list, which was provided, by the Court Order." (Id., citing Document No. 280, p. 3, Page ID No. 4985.) The United States contends that "it 'would have been natural' for the defendant to interview his own employees 'to determine if [they] could have supplied [him] with exculpatory evidence." (Id.) Thus, the United States concludes that "[i]n light of Wilson, [Movant] cannot predicate any Brady claim on these materials." (Id.)

The United States further argues that Movant's Brady claim fails because "the witnesses would not have provided favorable, material evidence." (Id., pp. 14 – 18.) As to Mr. Clemens, the United States claims

Mr. Clemens statement that "there was pressure to run coal, but not enough to overlook safety" was not favorable to Movant because "Clemens was not involved with mine safety or MSHA compliance." (Id., p. 14.) The United States concludes that since Mr. Clemens "had such minimal involvement in mine safety, the omission of his MOI did not prejudice [Movant]." (Id.)

Concerning Mr. Sears, the United States acknowledges that his statements regarding Massey and Movant's focus on safety was favorable to the defense. (Id.) The United States, however, argues that Movant was not prejudiced by the nondisclosure because (1) Mr. Sears made the statement while he was employed by Movant as a "sales arm," and (2) Mr. Sears "did not have any legitimate knowledge of MSHA requirements or compliance." (Id., pp. 14 – 15.) The United States explains that Ms. Sears' statements "should be treated with a degree of suspicion" because he "certainly possessed an aspect of self-interest in protecting both himself and Massey." (Id.) The United States further argues that the MOI for Mr. Sears indicates he "was most concerned about production and least concerned with health risks arising from poor ventilation." (Id., p. 15.) The United States concludes that the MOI for Mr. Sears is immaterial because Mr. Sears' statements are "significantly undermined by not only the influence that Massey and [Movant] exercised over Sears, but also by Sears' own interest in production over safety." (Id.)

As to Ms. Duba, the United States argues that her MOI statement only related to production figures and was irrelevant to safety compliance. (Id.) Specifically, the United States explains that "[w]hen

read in the context of the full MOI . . . it is clear that the statement is about [Movant's] receipt of final production, including detailed worksheets, his review of those worksheets, and his concern with the numbers." (Id.) The United States asserts that Ms. Duba's "statement had nothing to do with reducing production figures to allocate more funds to safety or MSHA compliance." (Id.) The United States further disputes that Ms. Duba could have provided exculpatory testimony. (Id., p. 16.) The United States claims that Ms. Duba's "position at Massey was unrelated to the charges in the Superseding Indictment." (Id.) As to Ms. Duba's statement that Movant wanted violations tracked, the United States notes that Ms. Duba stated Movant's motive for requesting such was unclear. (Id.) Finally, the United States argues that Ms. Duba's "MOI was cumulative of testimony adduced at trial of other witnesses, including Chris Blanchard and Bill Ross, regarding [Movant's] micro-management governing style and his focus on costs and profits." (Id.)

Concerning Mr. Bearse, the United States argues "Bearse held the same position as Chris Blanchard who was cross examined for five days [and] [t]his information was equally available for him." (Id.) The United States also argues that the MOI statement referenced by Movant "are general statements taken out of context." (Id., p. 17.) The United States contends that when considering the full context of Mr. Bearse's statement that "if there was something wrong at the mine, you were expected to stop [and] fix the problem," Mr. Bearse acknowledged that "people did not stand up and do what was needed to be done." (Id.) When considering the statement Mr. Bearse feared discipline over compliance issues, the United States notes that if

the full context of the statement is reviewed, such reveals that Mr. Bearse never received more than a verbal reprimand. (Id.) The United States stresses the MOI reveals that Mr. Bearse "could not recall a specific instance in which he actually feared discipline." (Id.)

As to Ms. Ojeda, the United States asserts that none of the statements helps Movant. (Id., pp. 17 – 18.) The United States first notes that "[t]he fact that [Movant] would want a report on Ojeda's meeting with Ross came out at trial through Ross's testimony." (Id., citing, Document No. 618, pp. 149-50, 11, 16; Page ID Nos. 19916-17, 19778, 19783.) The United States further claims that Movant extensively cross-examined Witnesses Ross and Blanchard concerning the Hazard Elimination Program, the Hazard Elimination Committee, and Movant's attitude towards violations. (Id.) The United States, therefore, concludes that the availability of the information contained in the MOI for Ms. Ojeda was available from other witnesses and Movant did not suffer any prejudice. (Id.)

(c) Movant's Reply:

In Reply, Movant first argues that Movant did not have "influence" over or "access" to the above potential witnesses. (Id., Document No. 731, pp. 17 – 18.) Movant disputes that he had "full access" to former Massey employees at the time of his prosecution. (Id.) Movant explains that he retired from Massey on December 31, 2010, which was nearly four years before his indictment. (Id.) Movant further states that "Massey was defunct by 2011." (Id.) Furthermore, Movant argues that United States' claim that Movant suffered no prejudice from his failure to call the potential witness is without merit. (Id.) Movant notes

that the United States contends Movant suffered no prejudice because the witnesses would not have been credible in the eyes of the jury. (Id.) Movant argues that "[i]t is not for the government to make after the fact, self-serving credibility assessments – [Movant] was entitled to have a jury decide that issue." (Id.) As to Mr. Sears, Movant notes that the MOI reveals that Mr. Sears had retired from Massey and was working as a consultant for its successor, Alpha. (Id.) Movant notes that he had been retired from Massey for nearly a year at the time Ms. Sears provided his information. (Id.) Movant further states that "[t]he government relied heavily on cooperation from Alpha in its investigation of [Movant]," so "it was not evident that Sears would provide favorable testimony to [Movant]." (Id., pp. 17 – 18.)

Next, Movant disputes that he "should have been able to keep track of which of Massey's 7,359 employees would have provided him with exculpatory evidence, and it is his own fault that he did not." (Id., p. 18.) Movant argues that the United States reliance upon Wilson fails. (Id., p. 19.) First, Movant notes that the Court in Wilson faulted the defendant for not identifying one witness who would have had very specific knowledge. (Id.) Movant states that unlike Wilson, Movant was "the former CEO of a multi-billion dollar publicly traded company with thousands of employees trying to identify everyone who, years later, could possibly provide relevant, much less favorable, evidence." (Id.) Second, Movant contends that there was a factual dispute in Wilson as to whether the government ever possessed the exculpatory information, unlike the circumstances in Movant's case where it is undisputed that the United States possessed the information. (Id.) Movant stresses that

the United States "did possess the information, were ordered by the Court to disclose it, and represented to the Court that they had done so." (Id.) Finally, Movant argues that it was reasonable for defense counsel to rely on the United States' representation that all such material had been disclosed. (Id.)

Finally, Movant argues that the United States "spins the evidence to minimize its impact." (Id.) Movant argues that the United States "confuses the weight of the evidence with its favorable tendency" in its arguments concerning the five potential defense witnesses. (Id.) As to Mr. Clemens, Movant argues that Mr. Clemens "clearly had insight into the degree of pressure [Movant] put on production." (Id.) Movant acknowledges that the United States could have cross examined Mr. Clemens as to his knowledge of mine safety, but Movant asserts that the jury was entitled to hear the evidence. (Id.) Concerning Ms. Duba's statements, Movant argues that the United States again improperly argues there was no prejudice because the jury would not have found Ms. Duba credible due to her role at Massey. (Id., p. 20.) As to Mr. Bearse, Movant disputes that Mr. Bearse's MOI statements were not favorable because of other statements. (Id.) Movant again acknowledges that the United States could have cross examined Mr. Bearse, but Movant was entitled to put the favorable evidence before the jury. (Id.) Movant contends that the United States improperly reasons that the five potential witnesses' statements were not more credible than other testimony presented at trial by Mr. Blanchard and Mr. Ross. (Id.) Movant explains that the United States argued that Mr. Blanchard was a co-conspirator with Movant and "corroboration of key evidence from witnesses who were not also co-conspirators – as well

as who had different perspectives and insight into Massey's operations – would have been more credible and therefore not cumulative." (Id., pp. 20 – 21.) Movant notes that his priorities were "hotly contested" at trial. (Id., p. 21.) Movant, therefore, contends that testimony by the potential witnesses that Movant prioritized safety "could have pushed it over the edge for the jury." (Id., p. 21.)

(d) Court's Findings:

Movant argues that the United States' suppression of MOIs prevented Movant from identifying five potential defense witnesses that he claims could have provided exculpatory testimony: Mark Clemens, Steve Sears, Sabrina Duba, Charlie Bearse, and Stephanie Ojeda. Citing Wilson, the United States first argues that Movant is not entitled to benefit of the Brady doctrine concerning the above potential witnesses because each were available to Movant in a source where a reasonable defendant would have looked. (Criminal Action No. 5:14-00244, Document No. 728, p. 13.) In Wilson, the Fourth Circuit stated that "the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources." Wilson, 901 F.2d at 380(citing United States v. Davis, 878 F.2d 1501, 1505 (11th Cir. 1986)); also see United States v. Caro, 733 Fed.Appx. 651, 676 (4th Cir. 2018)(stating that the "other source" doctrine, holds that "the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources.")(citing Wilson, 901 F.2d at 380)); United States v. Bros. Const. Co. of Ohio, 219 F.3d 300, 316 (4th Cir. 2000)("[T]he *Brady* rule does not apply if the evidence in question is available to the defendant from other sources, either directly or via investigation

by a reasonable defendant."). The undersigned finds that the facts in the instant case are distinguishable from Wilson. Unlike Wilson, the United States in the above case clearly had possession of the MOIs for the five potential witnesses and the United States represented to the Court and defense counsel that all material had been produced pursuant to the Court's discovery order. The Fourth Circuit in Wilson noted that the witness acknowledged she was questioned by government officials prior to the defendant's trial, but the witness asserted "vague statements" concerning whether she communicated favorable evidence to the government. Wilson, 901 F.2d at 381. Thus, it was unclear whether the government actually possessed Brady material. Further, there was no indication in Wilson that defense counsel sought the material and the government misrepresented that all such material had been disclosed pursuant to a discovery order. In the instant case, the MOIs were clearly under the control of the United States and there is no indication that the MOIs were available to defense counsel through other sources. Movant further disputes that he had access to the five potential witnesses that provided statements in the MOIs, and that defense counsel failed to exercise reasonable diligence in obtaining the exculpatory information. (Criminal Action No. 5:14-00244, Document No. 731, pp. 18 - 19.) Although the United States contends that Movant should have been aware of the five potential witnesses because each were under his employment at Massey, Movant stresses that he had been retired from Massey for approximately four years at the time of his indictment and there were more than 7,000 persons under his former employment. See United States v. Parker, 790 F.3d 550, 562 (4th Cir. 2015)(finding that the defendant's knowledge that a witness was involved in

a scam did not relieve the government of its obligations under *Brady* to disclose that the witness was subject of an ongoing fraud investigation by the SEC). Furthermore, the MOIs of the five potential witnesses were in control of the United States and it is undisputed that defense counsel sought such information from the United States. If the United States asserts that it has complied with Brady, defense counsel may reasonably rely upon the United States' representation that all materials required under Brady have been disclosed. See Strickler v. Greene, 527 U.S. 263, 283, n. 23, 119 S.Ct. 1936, 1949, 144 L.Ed.2d 286 (1999). Thus, the undersigned cannot conclude that defense counsel failed to act with due diligence in obtaining the MOIs for the five potential witnesses. Based upon the foregoing, the undersigned concludes that the "other source" exception to Brady does not apply to the circumstances of this case because the United States acknowledges that it had control of the MOIs for the five potential witnesses prior to trial, failed to produce such, and represented to the Court and defense counsel that all material had been produced.

Next, the United States contends that Movant's Brady claim fails because "the witnesses would not have provided favorable, material evidence." (Criminal Action No. 5:14-00244, Document No. 728, p. 14.) Thus, the undersigned will consider whether the MOIs for the five witnesses provided favorable evidence. First, the United States does not appear to dispute that Mr. Clemens and Mr. Sears provided favorable information in their MOIs.[4] (Id., Document No. 14.) The

[4] The United States does dispute that Movant was prejudiced by the suppression of Mr. Clemens and Mr. Sears's MOIs.

undersigned has also reviewed Mr. Clemens and Mr. Sears' MOIs and finds such to be favorable to Movant. As to Ms. Duba, the undersigned also finds that her MOI is favorable to Movant. Ms. Duba's MOI reveals that Movant instructed Ms. Duba to make sure Massey's production figures used were not too aggressive. (Id., Document No. 663-3, p. 16, Page ID No. 23200; MOI-001412). Additionally, Ms. Duba's MOI reveals that Movant wanted to eliminate serious MSHA violations and he instructed Ms. Duba to determine which people were responsible for violations and for failing to eliminate violations. (Id., Document No. 663-3, pp. 18, Page ID No. 23202; MOI-001414). Although Duba's MOI reveals she could not say why Movant wanted the violations tracked, the above statements were still favorable to Movant. (Id., Document No. 663-3, pp. 17 - 18, Page ID No. 23201-02; MOI-001413-14). The United States presented testimony at trial that there was an unspoken understanding at UBB that safety violations were acceptable so long as the mine was producing coal. The foregoing is favorable to Movant as it indicates that Movant did not relentlessly push production over safety.

Concerning Mr. Bearse, the MOI reveals that he stated that Massey's section staff was the "industry standard" and that Massey employees were expected to stop and fix problems. (Criminal Action No. 5:14-00244, Document No. 663-2, pp. 20 - 21, Page ID No. 23112-13, MOI-001392-93.) Although Mr. Bearse acknowledged that employees sometimes would not "stand up and do what was needed to be done" concerning problems, the foregoing statement still constitutes favorable evidence because it supports Movant's claim that known safety violations were

expected to be fixed. Additionally, Mr. Bearse's statement that Massey's section staff was the "industry standard" was favorable to Movant because the United States presented evidence at trial that Movant failed to properly staff UBB. Specifically, the United States presented testimony from miners that additional staff was necessary to comply with safety requirement. In closing arguments, the United States stated that "the evidence in the case is that Massey staffed its mines with a lot fewer miners than the rest of the industry." (Criminal Action No. 5:14-0244, Document No. 626, p. 186, Page ID No. 21752.)

Concerning the MOI for Ms. Ojeda, the undersigned finds that such contains evidence both favorable and unfavorable[5] to Movant. First, Ms. Ojeda stated that "[Movant] and Adkins seemed to think Ross was legitimate" and Ms. Ojeda thought "they were looking for solutions from Ross" concerning safety concerns. (Criminal Action No. 5:14-00244, Document No. 663-4, p. 6, Page ID No. 23288, MOI-01522.) The foregoing statement is favorable to Movant as the United States presented evidence that Movant disregarded Mr. Ross's safety concerns. Although the MOI for Ms. Ojeda reveals that Ms. Ojeda stated that

[5] Although Ms. Ojeda stated she "was not specifically told to attend the Ross meeting so that the meeting between Ross and [Stan] Suboleski would remain privileged," Ms. Ojeda stated she believed "Massey probably thought that having Ojeda at the meeting allowed for the meeting and the memorandum prepared after the meeting to remain privileged." (Criminal Action No. 5:14- 00244, Document No. 663-4, p. 5, Page ID No. 23287; MOI-01521.) Ms. Ojeda "based her opinion as to why she was told the attend the meeting on her familiarity with the common practices at Massey." (*Id.*) Ms. Ojeda explained that "Massey had received direction from their outside counsel to have an attorney present if the company wanted something to remain privileged." (*Id.*)

"the Hazard Elimination Committee started around the same time as Ross' recommendations were made," Ms. Ojeda stated she did "not remember Ross' recommendations being discussed at the Hazard Elimination Committee meeting." (Id., Document No. 663-4, p. 10, Page ID No. 23292; MOI-01526.) Ms. Ojeda, however, acknowledged that "some issues addressed by the committee paralleled what Ross had discussed." (Id.) Ms. Ojeda further acknowledged that she "never asked why Ross' recommendations were not being specifically addressed," but she "was certain issues raised by Ross were discussed by the Hazard Elimination Committee." (Id.) Thus, the foregoing is favorable to Movant. Finally, Ms. Ojeda's MOI contains a statement contradicting the United States' argument that Movant conspired to conceal Mr. Ross's safety concerns from Elizabeth Chamberlin, who oversaw safety for Massey, by including a privilege warning on the memorandum memorializing Mr. Ross's concerns and recommendations. Specifically, Ms. Ojeda stated that she did "not remember adding the language that the report should not be shared with non-practicing attorneys to warn Ross not to share the report with Chamberlin." (Id., Document No. 663-4, p. 5, Page ID No. 23287; MOI-01521.) At trial, the United States argued that Movant's conspiracy to violate mine safety law involved keeping Mr. Ross's safety warnings secret or confidential. (Id., Document No. 626, p. 50, Page ID No. 21616.)

Based upon the foregoing, the undersigned finds that the MOIs for Mr. Clemens, Mr. Sears, Ms. Duba, Mr. Bearse, and Ms. Ojeda were favorable to Movant.

ii. MOI of Testifying Government Witnesses:

(a) Movant's Argument:

Movant argues that the United States suppressed "five MOIs each for central witnesses Chris Blanchard and Bill Ross." (Criminal Action No. 5:14-00244, Document No. 712-5, pp. 21 – 24.) Movant claims that the "MOIs were rife with impeachment information that [Movant] could have used on cross-examination of these witnesses to further undermine the government's case." (Id., p. 21.) Movant first asserts that Mr. Blanchard was the United States' main witness, "whose testimony was intended to connect [Movant] to the alleged conspiracy." (Id.) Movant explains that at trial the United States asked Mr. Blanchard "whether there was an understanding at Massey and UBB that it was often cheaper simply to pay the fines that came along with violations than it was to spend the money that would have been necessary to follow the law," and Mr. Blanchard stated "That was the implicit understanding." (Id., p. 22, citing Document No. 614, p. 84, Page ID No. 19112.) Movant argues that in the MOI, Mr. Blanchard explained his "understanding" as follows: Movant "viewed violations as the cost of doing business and felt violations were going to be written by MSHA. There are always going to be violations that MSHA could cite . . . [Movant] felt MSHA made things up." (Id., citing Document No. 663-2, p. 56, Page ID No. 23148, MOI-1402.) Movant contends that the foregoing would have supported his defense that there was no criminal conspiracy to violate safety laws, but that "MSHA would always find some reason to issue citations,

especially given the degree of judgment (not to mention bias) involved on the part of the inspectors, and some citations, although incorrect, would not be worth the cost of disputing." (Id.) As additional impeachment evidence contained in Mr. Blanchard's MOI, Movant cites the following statements: (1) Mr. Blanchard "was surprised to read the testimony from UBB miners that respirable dust fraud was occurring at the mine," because "the company did not want people cheating on their respirable dust sampling" (Id., citing Document No. 663-4, p. 76, Page ID No. 23358, MOI-1581.); and (2) Mr. Blanchard stated that "decisions MSHA made ended up endangering the health and safety of miners" (Id., citing Document No. 663-4, p. 75, Page ID No. 23357, MOI-1580.).

Second, Movant states that Bill Ross was a "key witness at trial for whom multiple MOIs were undisclosed." (Id., p. 23.) Movant acknowledges that during discovery, the United States produce a 302 of a May 12, 2010 interview with Mr. Ross, and a September 12, 2001 grand jury transcript. (Id.) Movant notes, however, that the United States failed to disclose five MOIs memorializing five interviews with Mr. Ross. (Id.) Movant acknowledges that just before trial, the United States disclosed that during an interview Mr. Ross "said he did not agree with [MSHA's] general policy of denying proposed ventilation plans that proposed to use of belt aircourses for ventilation." (Id., citing USAO0000170.) Prior to trial, Movant contested the sufficiency under Brady and requested disclosure of the full notes of the interview, but the United States never provided such. (Id.) Movant contends that the undisclosed MOI now reveals that Mr. Ross stated that "Joe Mackowiak did not want belt air used to ventilate the mines in his

district. Ross told Mackowiak that he should reconsider what he was saying with mines that liberated a lot of methane." (Id., citing Document No. 663-4, p. 18, Page ID No. 23300, MOI-1532.) Additionally, "Ross advised that the UBB mine was set up to fail based on the ventilation system MSHA forced the UBB mine to use." (Id.) Movant argues that the above statements are "substantially different in both tone and content from the feeble disclosure provided by the government and simply did not arm [Movant] with sufficient information to adequately address this topic on cross- examination." (Id., p. 23.) Movant claims that the other MOIs for Mr. Ross contained information that would have been "an effective tool in disciplining Ross during cross-examination." (Id., p. 24.) Movant notes that Mr. Ross made statements that Movant told Mr. Ross that Massey needed to reduce violations and Movant was going to address the violations it was receiving. (Id., citing Document No. 663-3, p. 69, Page ID No. 23253, MOI-1476 and Document No. 663-3, p. 75, Page ID No. 23259, MOI-1487.) Movant further notes that Mr. Ross stated that during a meeting on August 5, 2009, "[Mr.] Akins stated that they should comply with all regulations at the mine site and that they did not have to worry anymore." (Id., citing Document No. 663-3, p. 70, Page ID No. 23254; MOI-1477.) Finally, Movant argues that Mr. Ross's MOIs "undermined the government's portrayal of Ross as a 'whistle-blower,' who had courage to confront Massey Management about issues he observed." (Id., citing Document No. 599, p. 49, Page ID No. 15840 and Document No. 626, p. 173, Page ID No. 21739.) Movant argues that the MOIs reveal "multiple occasions where senior officials at Massey sought out Ross's input on conditions at the mine." (Id.) Specifically, Movant references the following MOI statements: (1) Mr. Ross

stated that, at Mr. Adkin's direction, Mr. Ross had an all-day meeting with Ms. Ojeda and Mr. Suboleski "to discuss some of the issues he had observed while visiting Massey Energy mines" (Id., citing Document No. 663-3, p. 68, Page ID No. 23252, MOI-1475.); (2) Mr. Ross stated that after the all-day meeting, Mr. Adkins "instructed Ross to go tell [Movant] what he thought about Massey and MSHA's view of Massey" (Id., citing Document No. 663-3, p. 69, Page ID No. 23253, MOI-1476.); (3) Mr. Ross stated that Movant "wanted Ross to talk to him about the issues" (Id., citing Document No. 663-4, p. 16, Page ID No. 23298, MOI-1530.); (4) Mr. Ross stated that Mr. Adkins directed Mr. Ross to visit mines in need of additional expertise on safety, and Mr. Ross was able to travel to whichever mines he chose to teach foremen about ventilation, respirable dusty, and other safety measure (Id., citing Document No. 663-3, p. 67, Page ID No. 23251, MOI-1474 and Document Nos. 663-4, p. 17, Page ID No. 23299, MOI-1531.)

(b) United States' Argument:

The United States argues that the suppressed MOIs "would not have led to impeachment of key witnesses." (Id., Document No. 728, pp. 18 – 21.) The United States does not dispute that the MOIs contained favorable statements, but that "[a]ny alleged impeachment evidence contained in the MOIs . . . was made available at trial." (Id., p. 18.) Concerning Mr. Blanchard, the United States claims that "[b]y the time examinations were complete, both the defense and the United States viewed Blanchard as a witness in support of the defendant." (Id., p. 19, fn. 5.) The United States further disputes that Mr. Blanchard's MOI statement was favorable to Movant concerning MSHA

endangering miners because such was excluded by the District Court's ruling on a motion *in limine*. (Id., p. 20.) Concerning Mr. Ross, the United States again does not dispute that his MOI statements were favorable. (Id., pp. 20 – 21.) The United States, however, argues that the MOI statements for Mr. Blanchard and Mr. Ross were not material because the same favorable evidence was brought out at trial through defense counsel's cross examination. (Id.)

(c) Court's Findings:

Based upon the foregoing, the undersigned finds that the MOIs for Mr. Blanchard and Mr. Ross were favorable to Movant. With the exception of Mr. Blanchard's statement that MSHA endangered miners, the United States does not dispute that the MOIs were favorable. The United States disputes that Mr. Blanchard's MOI statement concerning MSHA endangering miners was favorable Movant because such was excluded by the District Court's ruling on a motion *in limine*. (Id., p. 20.) A review of the full context of the MOI for Mr. Blanchard reveals that in discussing Massey's inability to use belt air ventilation, Mr. Blanchard stated as follows: "Blanchard does not believe that MSHA or anyone from MSHA was trying to do something to endanger the health and safety of miners. Blanchard does think decisions MSHA made ended up endangering the health and safety of miners. Blanchard does not think Joe Mackowiak was willing to sit down with Performance Coal Company and work out their differences."[6] (Criminal Action No. 5:14-0244,

[6] The United States acknowledges that Mr. Ross testified that belt air was necessary for proper ventilation, but the positioning of fans made it impossible for UBB to present proper evidence to MSHA to justify the use of belt air. Additionally, the United

Document No. 663-4, pp. 74 - 75, Page ID No. 23356-57; MOI-1579-80.). The District Court clearly excluded any evidence and arguments that mine safety standards were incorrect and that Massey disagreed with MSHA's interpretation or application of belt air mine regulations at UBB. (Criminal Action No. 5:14-00244, Document No. 463.) The District Court further noted that this included any evidence or arguments that MSHA "forced" UBB to adopt a ventilation plan that did not use belt air. (Id.) The statements contained in Mr. Blanchard's MOI does not state mine safety regulations were incorrect, that Massey disagreed with MSHA's interpretation or application of the regulations, or MSHA "forced" Massey to adopt a non-belt air ventilation plan. Thus, the MOI statement regarding MSHA endangering miners was favorable to Movant. The issue of whether the remainder of the suppressed MOI statements by Mr. Blanchard and Mr. Ross were material will be addressed in Section C below.

2. Issue of Materiality of the Favorable Suppressed Evidence:

Favorable evidence is not material where the suppressed evidence is consistent with that witness's testimony at trial. See United States v. Ellis, 121 F.3 908, 916 (4th Cir. 1997). Undisclosed evidence may be material under Brady if the evidence "would be an effective tool in disciplining witnesses during cross-

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States acknowledges that Mr. Ross testified as to his disagreement with the ventilation supervisor at MSHA about the ventilation system MSHA required at UBB. (*Id.*, Document No. 728, p. 21, citing Document No. 618, pp. 231- 240, Page ID Nos. 19998 – 20007.)

examination by refreshment of recollection or otherwise." United States v. Gil, 297 F.3d 93, 104 (2nd Cir. 2002). Additionally, inadmissible evidence is material if the evidence could have led to admissible evidence. Id.; also see Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). When concerning materiality, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434, 115 S.Ct. at 1566. The evaluation of materiality is not a sufficiency of the evidence test. Id. A movant is not required to "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. A movant need only show that the favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. Finally, the question of materiality is considered "collectively, not item by item." Id. at 436, 115 S.Ct. at 1567.

The undersigned has determined that the United States suppressed MSHA documents and MOIs that were favorable to Movant. As to MSHA documents, the undersigned determined that the following were favorable to Movant: (1) USAO0000030 (Criminal Action No 5:14-00244, Document No. 663-5, pp. 44 - 45, Page ID No. 23408.); (2) USAO0000114 (Criminal Action No. 5:14-cr-00224, Document No. 663-6, p. 55, Page ID No. 23527.); (3) USAO0000033 (Criminal Action No. 5:14-00244, p. 10, citing Document No. 663-5, p. 49, Page ID No. 23413.); (4) USAO0000109 (Criminal Action No. 5:14-00244, Document No. 663-6, p. 49, Page ID No. 23521.); (5)

DLB-001532 (Criminal Action No. 5:14-00244, Document No. 696-2, p. 1, Page ID No. 23797.); (6) USAO 000132 (Criminal Action No. 5:14-00244, Document No. 663-6, p. 80, Page ID No. 23552.); (7) USAO0000024 (Criminal Action No. 5:14-00244, Document No. 663- 5, p. 34, Page ID No. 23398.). As to MOIs, the undersigned determined that the following were favorable to Movant: (1) Mr. Clemens' MOI; (2) Mr. Sears' MOI; (3) Ms. Duba's MOI; (4) Mr. Bearse's MOI; (5) Ms. Ojeda's MOI; (6) Mr. Blanchard's MOIs; and (7) Mr. Ross's MOIs.

The undersigned finds that the suppressed MSHA emails indicated that MSHA inspectors issued citations to Massey without providing sufficient evidence to support the citation and that could not be sustained if challenged. Additionally, there were MSHA emails indicating bias towards Movant. (See Criminal Action No. 5:14-cr-00224, Document No. 663-6, pp. 49, 55, Page ID Nos. 23521, 23527, USAO0000109; USAO0000114; Document No. 663-5, p. 49, Page ID No. 23413, USAO0000033; and Document No. 696-2, p. 1, Page ID No. 23797, DLB-001532). The United States clearly relied upon reference to MSHA citations in support of its argument that Movant conspired to violate mine safety standards. Next, there were suppressed MSHA disciplinary records and an email relating to the failure MSHA employees to consolidate separate ventilation and dust control plans into a single mine ventilation plan. The disciplinary records and emails provide support for Movant's argument that the ventilation plan approved or imposed by MSHA contributed to safety violations. (Criminal Action No. 5:14-cr-00244, Document No. 663- 6, p. 80, Page ID No. 23552, USAO

000132, and Document No. 663-5, p. 34, Page ID No. 23398, USAO0000024.)

Mr. Clemens, Mr. Sears, Ms. Duba, Mr. Bearse, and Ms. Ojeda are potential defense witnesses, whose MOIs were suppressed. The MOI for Mr. Clemens reveals that Mr. Clemens stated that even though there was pressure at Massey to run coal, the pressure was not enough to overlook safety. (Id., Document No. 663-2, p. 3, Page ID No. 23095, MOI-001506). The MOI for Mr. Sears reveals that Mr. Sears stated that "Massey's primary focus was safety" and Movant "started a safety program for individuals and pushed safety more than any other CEO in the industry." (Id., Document No. 663-2, p. 7, Page ID No. 23099, MOI-001509). The MOI for Ms. Duba reveals that Movant instructed Ms. Duba to make sure their production figures were not too aggressive. (Id., Document No. 663-3, p. 16, Page ID No. 23200, MOI-001412). Additionally, Ms. Duba's MOI reveals that Movant wanted to eliminate serious MSHA violations and Movant instructed Ms. Duba to determine which people were responsible for violations and for failing to eliminate violations. (Id., Document No. 663-3, pp. 18, Page ID No. 23202, MOI-001414). The MOI, however, for Ms. Duba reveals she could not say why Movant wanted the violations tracked. (Id., Document No. 663-3, pp. 17 - 18, Page ID No. 23201-02, MOI-001413-14). The MOI for Mr. Bearse reveals that he stated that Massey's section staff was the "industry standard," which contradicts the United States' argument that Movant failed to properly staff UBB. (Criminal Action No. 5:14-00244, Document No. 663-2, pp. 20 - 21, Page ID No. 23112-13, MOI-001392-93.) The MOI for Mr. Bearse further revealed that although employees sometimes would not "stand up and do what was

needed to be done," Movant expected Massey employees to stop and fix problems. (Id.) The MOI for Ms. Ojeda revealed that Movant and Mr. Adkins thought Mr. Ross was "legitimate" and Ms. Ojeda thought "they were looking for solutions from Ross" concerning safety concerns. (Criminal Action No. 5:14-00244, Document No. 663-4, p. 6, Page ID No. 23288, MOI-01522.) The MOI for Ms. Ojeda further contained a statement that she did "not remember adding the language that the report should not be shared with non-practicing attorneys to warn Ross not to share the report with Chamberlin." (Id., Document No. 663-4, p. 5, Page ID No. 23287, MOI-01521.) This contradicts the United States' argument that Movant conspired to conceal Mr. Ross's safety concerns from Elizabeth Chamberlin, who oversaw safety for Massey, by including a privilege warning on the memorandum memorializing Mr. Ross's concerns and recommendations.

Mr. Blanchard and Mr. Ross were witnesses presented by the United States, whose MOIs contained impeachment information that was suppressed by the United States. It is undisputed that Mr. Blanchard was an important witness at Movant's trial. Movant argues that the MOIs for Mr. Blanchard contained impeachment evidence concerning Mr. Blanchard's testimony that it was the "implicit understanding" at "Massey and UBB that it was often cheaper simply to pay the fines that came along with violations than it was the spend the money that would have been necessary to follow the law." (Criminal Action No. 5:14-0244, Document No. 614, p. 84, Page ID No. 19112). In Mr. Blanchard's MOI, Mr. Blanchard more fully explained his "understanding" as follows: Movant "viewed violations as the cost of doing business and felt

violations were going to be written by MSHA. There are always going to be violations that MSHA could cite . . . [Movant] felt MSHA made things up." (Id., Document No. 663-2, p. 56, Page ID No. 23148, MOI-1402.) As additional impeachment evidence contained in Mr. Blanchard's MOI, Movant cites the statement that Mr. Blanchard "was surprised to read the testimony from UBB miners that respirable dust fraud was occurring at the mine," because "the company did not want people cheating on their respirable dust sampling." (Id., Document No. 663-4, p. 76, Page ID No. 23358, MOI-1581.) Finally, Mr. Blanchard's MOI reveals that Mr. Blanchard stated that "decisions MSHA made ended up endangering the health and safety of miners." (Id., Document No. 663-4, pp. 74 - 75, Page ID No. 23356-57, MOI-1579-80.).

On cross-examination at trial, Mr. Blanchard testified that he and Movant did not have "an agreement or an understanding" that there would be violations of the mine safety regulations, but "we both realized that violations would be written" because "violations are inevitable." (Id., Document No. 611, pp. 113 and 6, Page ID No. 18485 and 18378.) Mr. Blanchard testified on re- direct that UBB had 466 violations in 2009 and 480 violations in 2010. (Id., Document No. 614, pp. 106-07, Page ID No. 19134-35.) Mr. Blanchard clarified on re-direct that even though he believed it was inevitable for a mine to have zero violations, that he did not think it was "fine" for a mine to have the number of violations that UBB received. (Id., Document No. 614, pp. 106-07, Page ID No. 19134-35.) Additionally, on cross-examination Mr. Blanchard testified that Massey did not want people cheating on their respirable dust samples because it could trigger investigations by MSHA. (Id., Document No. 613, pp.

42 – 43, Page ID No. 18859-60.) Unlike the MOI, the cross-examination testimony did not reveal that Mr. Blanchard and Movant were unaware of the misconduct regarding the respirable dust samples. Further, the United States presented testimony from Ms. Pauley, Mr. Smith, Mr. Ellison, Mr. Stewart, and Mr. Halstead that there was widespread cheating on dust pumps samples and Movant was aware of such conduct.

Movant argues that Mr. Ross was another key witness for the United States, who was portrayed as a "whistle-blower." (Id., Document No. 712-5, pp. 23 – 24.) Movant acknowledges that "just before trial . . . prosecutors disclosed to defense that during an interview, Ross had 'said he did not agree with [MSHA's] general policy of denying proposed ventilation plans that proposed to use belt aircourses for ventilation.'" (Id., p. 23.) Movant states that he challenged this disclosure as insufficient and requested the full notes of the interview, but such was never provided. (Id.) Movant explains that the suppressed MOI reveals that Mr. Ross stated that "Joe Mackowiak did not want belt air to be used to ventilate the mines in his district. Ross told Mackowiak that he should reconsider what he was saying with mines that liberated a lot of methane." (Id., citing Document No. 663-4, p. 18, Page ID No. 23300, MOI-1532.) The MOI further noted that Mr. Ross advised that "UBB mine was set up to fail based on the ventilation system MSHA forced the UBB mine to use." (Id.) Movant notes that Mr. Ross made statements that Movant told Mr. Ross that Massey needed to reduce violations and Movant was going to address the violations it was receiving. (Id., citing Document No. 663-3, p. 69, Page ID No. 23253, MOI-1476 and Document No. 663-3, p.

75, Page ID No. 23259, MOI-1487.) Although the United States portrayed Mr. Ross as a "whistle-blower," the MOIs reveal several occasions where senior officials at Massey sought out Mr. Ross's input on conditions at the mine. (Id.) The MOIs reveal that Mr. Ross stated that following: (1) At Mr. Adkin's direction, Mr. Ross had an all-day meeting with Ms. Ojeda and Mr. Suboleski "to discuss some of the issues he had observed while visiting Massey Energy mines" (Id., citing Document No. 663-3, p. 68, Page ID No. 23252, MOI-1475.); (2) After the all-day meeting, Mr. Adkins "instructed Ross to go tell [Movant] what he thought about Massey and MSHA's view of Massey" (Id., citing Document No. 663-3, p. 69, Page ID No. 23253, MOI-1476.); (3) Movant "wanted Ross to talk to him about the issues" (Id., citing Document No. 663-4, p. 16, Page ID No. 23298, MOI-1530.); and (4) Mr. Adkins directed Mr. Ross to visit mines in need of additional expertise on safety, and Mr. Ross was able to travel to whichever mines he chose to teach foremen about ventilation, respirable dusty, and other safety measure (Id., citing Document No. 663-3, p. 67, Page ID No. 23251, MOI-1474 and Document Nos. 663-4, p. 17, Page ID No. 23299, MOI-1531.)

The United States contends that the foregoing is not material because such came out in Mr. Ross's testimony at trial. At trial, Mr. Ross testified that belt air was necessary for proper ventilation, but the positioning of fans made it impossible for UBB to present proper evidence to MSHA to justify the use of belt air. (Id., Document No. 618, pp. 231 - 240, Page ID Nos. 19998 – 20007.) Mr. Ross explained at trial that there had to be justification to use belt air, and he made UBB's justifications for use of belt air based on the mine liberating methane and it would help with

respirable dust. (Id., pp. 231-32, Page ID Nos. 19998-99.) Mr. Ross explained with the new MSHA requirements, he knew "it would be difficult to get all the data that they requested in order to utilize belt air." (Id.) Mr. Ross, however, testified that he believed the better ventilation plan for UBB was use of belt air. (Id., p. 235, Page ID No. 20002.) Additionally, Mr. Ross testified as to his disagreement with the ventilation supervisor at MSHA (Mr. Machoviak) about the ventilation system MSHA required at UBB. (Id., pp. 236-37, Page ID Nos. 20003-04.) Mr. Ross explained that Mr. Machoviak told him and Movant that "they were going to make sure that UBB did not have a plan that took belt air off the longwall." (Id.) Mr. Ross further testified that Mr. Machoviak had made "boasts about the fact that no mines in this district was going to be allowed to use belt air" and Mr. Ross challenged Mr. Machoviak stating the "we've got to have belt air at UBB." (Id., p. 239, Page ID No. 20006.) Mr. Ross states that he informed Mr. Machoviak that "UBB liberates a lot of methane, too. . . we need that belt air as much as anybody else in this industry needs belt air that has longwalls." (Id., p. 240, Page ID No. 20007.) Mr. Ross, however, testified that Mr. Machoviak "was adamant about not using belt air at UBB." (Id.) Although Mr. Ross testified concerning his opinion on the use of belt air at UBB, Mr. Ross did not testify that he believed "UBB mine was set up to fail" based on the ventilation system approved by MSHA. (Id., Document No. 663-4, p. 18, Page ID No. 23300; MOI-1532.) Furthermore, the impeachment evidence contained in Mr. Ross's MOIs is material. Although the United States presented Mr. Ross as a "whistle-blower," the MOIs reveal that Mr. Ross acknowledged that Massey officials sought out Mr. Ross's opinion on safety conditions at UBB. (Id., Document No. 663-3, pp. 67-

69, Page ID No. 23251-53, MOI-1474-76, and Document No. 663-4, pp. 16 - 17, Page ID No. 23298-99, MOI-1530-31.) At trial, the United States argued that Movant wanted to conceal Mr. Ross's safety warnings and Movant's main concern was with the production of coal - - not addressing safety issues.

Although the United States argues that the above suppressed evidence was not material because the evidence supporting Movant's conviction was overwhelming, the undersigned disagrees. The Supreme Court has emphasized that when considering materiality, there is not a sufficiency of the evidence test. Kyles, 514 U.S. at 434, 115 S.Ct. at 1566. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id., 514 U.S. at 434-35, 115 S.Ct. at 1566. A defendant must only show that the favorable evidence, considered collectively, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. The undersigned finds in the instant case that disclosure of the suppressed evidence could have made a different result reasonably probable. The United States' case focused extensively upon numerous citations issued by MSHA, testimony concerning inadequate mine staffing, and testimony that Movant pushed coal production over safety. The United States argued that Movant's conspiracy involved advance warning of mine inspectors, cheating on dust samples, and keeping Mr. Ross's safety warnings secret or confidential. At trial, the United States presented testimony that miners were forced to "operate with skeleton crews" and were expected to produce "big footage" of coal. Testimony was presented that Movant was informed that UBB

needed more miners to comply with the safety laws, but Movant refused to hire additional staff. Ms. Pauley, Mr. Smith, Mr. Racer, Mr. Hutchens, Mr. Adams, Mr. Ellison, Mr. Young, and Mr. Stewart testified that they were required to work in conditions known to be unsafe and without proper ventilation. Ms. Pauley, Mr. Smith, Mr. Ellison, Mr. Stewart, and Mr. Halstead further testified that there were widespread cheating on dust pumps samples, and Movant was aware of such conduct. The United States argued that Movant knew that serious safety violations (roof support, combustible materials, and lack of ventilation) were continually occurring at UBB, but there was an unspoken understanding at UBB that safety violations were acceptable so long as the mine was producing coal. The United States argued that Movant did not want to comply with safety laws because such would have costed money and reduced Movant's overall profit. Disclosure of the suppressed MSHA materials and the MOIs for Mr. Clemens, Mr. Sears, Ms. Duba, Mr. Bearse, Ms. Ojeda, Mr. Blanchard, and Mr. Ross could have resulted in a weaker case for the United States, and a stronger one for the defense. Disclosure of the suppressed MOIs could have reduced the value of Mr. Blanchard and Mr. Ross as witnesses for the United States. Considering the suppressed evidence collectively, the suppressed evidence could have had some weight and its tendency could have been favorable to Movant. The undersigned acknowledges that the suppressed evidence does not undisputedly prove Movant's innocence, but the question is whether the Court is confident that the jury's verdict would have been the same. Based upon the undersigned's summary of the suppressed evidence, and the evidence presented by the United States to secure Movant's conviction, the undersigned does not have confidence

in the verdict. Accordingly, the undersigned respectfully recommends that Movant's Section 2255 Motion be granted. The undersigned finds it unnecessary to address the merits of Movant's claim based upon the Jencks Act and prosecutorial misconduct.

POSTLUDE

The undersigned believes it is important to contextualize this case in light of the vitriolic rhetoric that the Movant attempts to place on the actions of the United States. A detailed and thorough review of the evidence in this case clearly shows that, while errors were made and that those errors, when collectively reviewed, **could** have resulted in a different verdict, the undersigned did not find that the actions taken by the United States were malicious or done in bad faith. The record does not establish a scintilla of evidence that then-United States Attorney Booth Goodwin and then-AUSA Steven Ruby acted in bad faith or with malice towards the Movant. While the benefit of collateral review establishes that the verdict COULD have been different had the favorable evidence been made available to Movant, it is equally as likely that had the evidence been disclosed that Movant COULD have still been convicted. Movant, however, has established his burden under Brady that requires him to show that the suppressed, favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." See Kyles, 514 U.S. at 434, 115 S.Ct. at 1567. With that said, the undersigned believes that there is no question that Movant has satisfied his burden of proof establishing by a preponderance of the evidence that the United

States violated his constitutional rights by committing a Brady violation justifying Section 2255 relief.

The Movant may attempt to paint the undersigned's recommendation in this matter as proof of something more sinister than errors, but from the undersigned's review of the entire record produced in this matter, there is no evidence that Mr. Goodwin and Mr. Ruby acted with any ulterior motive other than to attempt to hold the Movant responsible for criminal violations of the laws of the United States. As this recommendation clearly states, while errors were made in the pursuant of justice in this matter, which requires that the undersigned recommend relief for the Movant, it is equally important to make clear that the undersigned does not find a scintilla of evidence that Mr. Goodwin and/or Mr. Ruby acted with improper motive or malice towards the Movant.

PROPOSAL AND RECOMMENDATION

Based upon the foregoing, it is therefore respectfully **PROPOSED** that the District Court confirm and accept the foregoing factual findings and legal conclusions and **RECOMMENDED** that the District Court **GRANT** Movant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (Document No. 663), **DENY as moot** Movant's Motion for Evidentiary Hearing (Document No. 704), **DENY as moot** Movant's Motion for Oral Argument (Document No. 733), and **REMOVE** this matter from the Court's docket.

Movant is notified that this Proposed Findings and Recommendation is hereby **FILED**, and a copy will be submitted to the Honorable United States District Judge Irene C. Berger. Pursuant to the provisions of

Title 28, United States Code, Section 636(b)(1)(B), Rule 8(b) of the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code, and Rule 45(c) of the Federal Rules of Criminal Procedure, Movant shall have seventeen days (fourteen days, filing of objections and three days, mailing/service) from the date of filing of these Findings and Recommendation within which to file with the Clerk of this Court, written objections, identifying the portions of the Findings and Recommendation to which objection is made, and the basis of such objection. Extension of this time period may be granted for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208, 104 S. Ct. 2395, 81 L. Ed. 2d 352 (1984). Copies of such objections shall be served on opposing parties, District Judge Berger, and this Magistrate Judge.

The Clerk is requested to send a copy of this Proposed Findings and Recommendation to counsel of record.

APPENDIX D

United States Court of Appeals
For the Fourth Circuit

No. 20-6330
(5:14-cr-00244-1)
(5:18-cv-00591)

[Filed February 4, 2022]

UNITED STATES OF AMERICA,	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
DONALD L. BLANKENSHIP,	)
	)
Defendant - Appellant	)
	)

ORDER

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 E

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

CIVIL ACTION NO. 5:18-cv-00591
(Criminal No. 5:14-cr-00244)

Judge Irene C. Berger

[Filed January 16, 2020]

DONALD L. BLANKENSHIP,	)
	)
Movant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent.	)
	)

JUDGMENT ORDER

In accordance with the *Memorandum Opinion and Order* dismissing the Movant's petition, entered on January 15, 2020, the Court **ORDERS** that judgment be entered accordingly and that this case be **DISMISSED** and **STRICKEN** from the docket of this Court.

The Court **DIRECTS** the Clerk to send a certified copy of this Judgment Order to counsel of record and any unrepresented party.

APPENDIX F

U.S. Department of Justice

Office Of Professional Responsibility

950 Pennsylvania Avenue, N. W., Suite 3266
Washington, D.C. 20530

[Dated: May 30, 2018]

May 30 2018

MEMORANDUM

TO: James A. Crowell IV
Acting Director
Executive Office for U.S. Attorneys

John V. Geise
Chief
Professional Misconduct Review Unit

Robert M. Duncan, Jr.
United States Attorney
Eastern District of Kentucky[1]

[1] In May 2018, the United States Attorney's Office for the Southern District of West Virginia was recused from the *Blankenship* case. The United States Attorney's Office for the Eastern District of Kentucky now represents the government in that matter.

FROM: Robin C. Ashton
Counsel

SUBJECT: Report of Investigation into the Conduct of Former United States Attorney R. Booth Goodwin II and Former Assistant U.S. Attorney Steven Ruby in *United States v. Blankenship,* Cr. No. 5:14-00244 (S.D.W. Va.)

Enclosed is the Office of Professional Responsibility (OPR) Report of Investigation into the conduct of former United States Attorney R. Booth Goodwin II and former Assistant U.S. Attorney Steven Ruby in *United States v. Blankenship,* Cr. No. 5:14-00244 (S.D.W. Va.).

On April 5, 2010, an explosion in the West Virginia Upper Big Branch (UBB) coal mine killed 29 coal miners. The United States Attorney's Office for the Southern District of West Virginia (USAO) commenced a criminal investigation shortly after the explosion.

On November 13, 2014, a federal grand jury indicted Donald Blankenship, Chief Executive Officer and Chairman of the Board of Directors of Massey Energy Company, which owned UBB. Ruby led the government's criminal investigation and litigation team. Goodwin was an active participant during the criminal investigation and trial. Blankenship was represented by the law firm Zuckerman Spaeder LLP (Zuckerman). The *Blankenship* case was tried in the fall of 2015. At the conclusion of the trial, Blankenship was convicted of a misdemeanor conspiracy to violate

mine safety standards and acquitted of all other charges.

In March 2016, Zuckerman sent a letter to the Department of Justice Criminal Division's Assistant Attorney General, alleging, among other things, that: (a) the government failed to disclose exculpatory e-mails in the possession of the Mine Safety and Health Administration (MSHA); (b) the government made false statements to the court and jury about Blankenship's involvement in Massey budget decisions; (c) the government did not call MSHA inspectors to testify at trial in order to avoid revealing the government's discovery violations; and (d) an MSHA employee destroyed MSHA documents shortly after the UBB explosion. Zuckerman's allegations were forwarded to OPR.

As a result of its investigation, OPR found that Zuckerman's initial misconduct allegations were without merit. QPR found that: (a) the government did not withhold exculpatory MSHA e-mails; (b) the government did not make false statements about Blankenship's involvement in the Massey budget process; (c) the government did not inappropriately decide not to use MSHA inspectors as trial witnesses; and (d) there was no evidence to support the allegation that an MSHA employee destroyed MSHA documents shortly after the UBB explosion.

During OPR's investigation, however, OPR learned that the government had failed to disclose to the defense numerous memoranda of interviews (MOIs) written by law enforcement agents on the prosecution team. Although prior to the *Blankenship* trial the government disclosed to the defense approximately 370 MOIs, it failed to disclose 61 MOIs,

including 11 pertaining to pre-indictment interviews, and 50 pertaining to post-indictment interviews. As a result of its investigation, OPR made the following factual findings and reached the following conclusions regarding Ruby's and Goodwin's conduct related to the failure to disclose the 61 MOIs:

(1) Some of the undisclosed MOIs contained discoverable statements that were required to be disclosed by applicable Department discovery rules and policies, including United States Attorneys' Manual Section 9-5.001(C)(1)-(3). OPR concludes that neither Ruby nor Goodwin withheld discoverable statements from the defense with the intent of preventing the defense from obtaining those statements. However, OPR found that: (a) Ruby recklessly violated Department-mandated discovery obligations by failing to disclose the discoverable statements contained in 11 pre-indictment MOIs; (b) Ruby and Goodwin recklessly violated Department-mandated discovery obligations by failing to disclose the discoverable statements contained in some of the 50 post-indictment MOIs; (c) Ruby and Goodwin recklessly violated discovery requirements imposed by a January 2010 memorandum from then-Deputy Attorney General David Ogden (the Ogden Memorandum), which requires prosecutors to "develop a process for review of pertinent information to ensure that discoverable information is identified;" (d) Ruby's and Goodwin's "process" for deciding which statements contained in post-indictment MOIs to disclose was to rely on their memory of what was said during interviews, some of which occurred months before they made disclosure decisions; their deficient process resulted in the failure to disclose discoverable statements contained in numerous post-indictment

MOIs; and (e) because Ruby and Goodwin recklessly violated the Department's discovery policies regarding the disclosure of discoverable statements, they committed professional misconduct.

(2) OPR found insufficient evidence to conclude that Ruby's and Goodwin's failure to disclose discoverable statements contained in the undisclosed MOIs violated *Brady v. Maryland,* 373 U.S. 83 (1963), *Giglio v. United States,* 405 U.S. 150 (1972), or West Virginia Rule of Professional Conduct (RPC) 3.8(d), which requires the disclosure of information that tends to negate the accused's guilt. The government violates its *Brady* obligations only if, *inter alia,* a defendant is prejudiced by the failure to disclose. Zuckerman Spaeder LLP, the firm representing Blankenship, and the entity in the best position to explain whether, how, and to what extent the defense was prejudiced by the government's failure to disclose the 61 MOIs, explicitly declined OPR's request to provide it with that information. Prosecution team members credibly told OPR that the discoverable statements contained in the 61 undisclosed MOIs were not only available to the defense from other sources, but were in fact used during the defense's cross-examination of government witnesses. Based on the facts known to it, OPR cannot prove by preponderant evidence that Blankenship was prejudiced by the government's failure to disclose the discoverable statements in the 61 MOIs, and so cannot conclude that the government's conduct violated *Brady, Giglio,* or West Virginia RPC 3.8(d).

(3) Ruby failed to make a full disclosure of discoverable statements contained in three MOIs, and statements made during one proffer session, which he

attempted to summarize in two summary disclosure letters. OPR found Ruby's disclosures to be inadequate and incomplete. Although OPR concludes that Ruby's inadequate disclosures were not intended to withhold exculpatory statements from the defense, OPR nevertheless concludes that Ruby's inadequate disclosures were made in reckless disregard of the requirement, as set forth in the Ogden Memorandum, that prosecutors take "great care" when making disclosures by summary letter. Ruby was responsible for both of the deficient letter disclosures. OPR found that Goodwin was also responsible for the inadequate and incomplete disclosures in one of the two summary disclosure letters. OPR finds that Ruby and Goodwin recklessly violated the Ogden Memorandum's requirements and therefore committed professional misconduct.

(4) The government filed three arguably misleading pleadings with the court, and Ruby made one arguably misleading statement in court, regarding the government's MOI disclosures. Those pleadings and Ruby's statement may have led the court to reasonably, but erroneously, believe that the government had disclosed all MOIs in its possession. OPR reached the following conclusions about the alleged misstatements to the court:

> (a) Ruby and Goodwin did not intentionally mislead the court regarding the government's MOI disclosures.
>
> (b) Ruby and Goodwin did not violate West Virginia RPC 3.3(a)(1), which prohibits an attorney from *knowingly* making a false statement to the court,

because OPR found that neither Ruby nor Goodwin intentionally made false statements to the court.

(c) OPR found insufficient evidence to conclude that the government's pleadings and Ruby's statement in court about the government's MOI disclosures violated West Virginia RPC 4.1, which prohibits attorneys from knowingly making false material statements to third parties such as Zuckerman Spaeder LLP.

(d) OPR did not reach a conclusion about whether Ruby and Goodwin recklessly made misleading statements to the court about the government's MOI disclosures. When OPR investigates an allegation that the government made misleading statements to the court, OPR would ordinarily request to interview the court to ask how the court interpreted the statements at issue. OPR could not follow its usual procedures in the *Blankenship* case because the case is being actively litigated and the court would be unable to engage in *ex parte* communications with the government. OPR is therefore unable to ascertain the court's views as to whether the court was misled by the government's statements about its MOI disclosures.

In early 2017, OPR informed the USAO that the government had not disclosed numerous MOIs to

the defense. Shortly thereafter, the USAO disclosed all 61 MOIs to the defense. In the fall of 2017 and the spring of 2018, the USAO made additional disclosures of MSHA documents to defense counsel. In December 2017, Blankenship obtained new counsel from the law firm McGuireWoods, LLP. On April 18, 2018, McGuireWoods filed a "Motion to Vacate and Set Aside Defendant's Conviction and Sentence Pursuant to 28 U.S.C. § 2255." The motion alleges that the government's failure to disclose prior to trial 61 MOIs, as well as certain MSHA documents that were disclosed to the defense in 2017 and 2018, violated *Brady* and *Giglio,* and that the government had made misrepresentations to the court regarding its discovery disclosures.

OPR has informed Goodwin and Ruby of the results of its investigation, and has advised them to contact the Professional Misconduct Review Unit (PMRU) if they intend to appeal OPR's findings and conclusions. OPR will inform McGuireWoods of the results of OPR's investigation after the PMRU has addressed the merits of Goodwin's and Ruby's anticipated appeal of OPR's findings and conclusions.

Enclosure

cc: Scott Schools
Associate Deputy Attorney General
(with enclosure)

Jay Macklin
General Counsel, EOUSA
(with enclosure)

APPENDIX G

DEPARTMENT OF JUSTICE

OFFICE OF PROFESSIONAL RESPONSIBILITY

REPORT

Investigation of Allegations of Misconduct Against Former United States Attorney R. Booth Goodwin II and Former Assistant U.S. Attorney Steven Ruby Related to *United States v. Blankenship,* Cr. No. 5:14-00244 (S.D.W. Va.)

May 30, 2018

INTRODUCTION

On April 5, 2010, an explosion in the Upper Big Branch (UBB) coal mine, located in West Virginia, killed 29 coal miners. UBB was then owned and operated by a subsidiary of the Massey Energy Company (Massey). Donald Blankenship was Massey's Chief Executive Officer and Chairman of the Board of Directors. The United States Attorney's Office for the Southern District of West Virginia (USAO) commenced a criminal investigation shortly after the explosion.

A federal grand jury indicted Blankenship on November 13, 2014, and returned a three-count

Superseding Indictment on March 10, 2015. Blankenship was charged with conspiracy to violate federal mine safety standards, in violation of 30 U.S.C. § 820(d) and 18 U.S.C. § 371; causing false statements to be filed with the Securities and Exchange Commission, in violation of 18 U.S.C. §§ 1001(a)(2) and (3) and 18 U.S.C. § 2; and causing false statements to be made in connection with the purchase and sale of securities, in violation of 15 U.S.C § 78ff and 18 U.S.C. § 2.

Assistant U.S. Attorney (AUSA) Steven Ruby led the government's criminal investigation and litigation team. United States Attorney R. Booth Goodwin II was an active participant in the criminal investigation and litigation team, including conducting the direct examination of several witnesses at trial and delivering the government's closing argument. Both Ruby and Goodwin have left the federal service. The other members of the prosecution team included [AUSA #1], [AUSA #2], [DOL Attorney], [FBI SA #1], [DOL SA #1], [Paralegal #1], and [Paralegal #2].

The trial of *United States v. Blankenship,* Cr. No. 5:14-00244 (S.D.W. Va.) began on October 1, 2015. The government presented the testimony of 27 witnesses. The defense rested without calling any witnesses. The jury reached a verdict on December 3, 2015. Blankenship was convicted of a misdemeanor conspiracy to violate mine safety standards and acquitted of all other charges. On April 6, 2016, the court sentenced Blankenship to one year in prison and imposed a substantial fine. Blankenship appealed to the U.S. Court of Appeals for the Fourth Circuit, which after oral argument affirmed his conviction.

Blankenship appealed to the Supreme Court, which denied his petition for a writ of certiorari. *United States v. Blankenship,* 846 F.3d 663 (4th Cir. 2017), *cert. denied,* 138 S. Ct. 315 (October 10, 2017). In the spring of 2017, Blankenship was released from federal prison.

Blankenship was represented by the Washington, D.C. law firm Zuckerman Spaeder LLP (Zuckerman).[1] In March 2016, Zuckerman sent a letter to the Department of Justice (Department or DOJ) Criminal Division's Assistant Attorney General, alleging, *inter alia,* that the government had violated its constitutional obligations by failing to disclose exculpatory documentary and testimonial evidence from several sources. Zuckerman did not raise on appeal any of the allegations contained in its March 2016 letter to the Department. One of Zuckerman's allegations was that the government had failed to disclose exculpatory statements obtained during several pretrial witness interviews. Zuckerman's allegations were forwarded to the Department's Office of Professional Responsibility (OPR). OPR opened an inquiry into Zuckerman's allegations, which was later converted to an investigation.

OPR's investigation of Zuckerman's misconduct allegations included the following investigative measures. OPR: (1) reviewed the e-mail accounts of Ruby, Goodwin, [AUSA #1], [AUSA #2], [Paralegal #1], and [Paralegal #2] for the relevant time periods; (2) obtained Ruby's written response to Zuckerman's

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[1] On December 14, 2017, Zuckerman informed OPR that it no longer represented Blankenship. Shortly thereafter, OPR was notified that Blankenship had retained new counsel from the law firm McGuireWoods LLP.

initial misconduct allegations;[2] 3) on several occasions obtained additional information and documents from Ruby to supplement his written response;[3] (4) on several occasions obtained additional information and documents from Zuckerman pertaining to its misconduct allegations;[4] (5) on several occasions obtained information and documents from the USAO;[5] (6) reviewed relevant documents, pleadings, and trial transcripts; and (7) interviewed Ruby, [AUSA #1], [AUSA #2], [DOL SA #1], [DOL Attorney], [FBI SA #1], [Paralegal #1], and [Paralegal #2].[6] As described in more detail below, Goodwin declined OPR's requests for an interview.

In its initial letter to the Department, Zuckerman alleged, among other things, that: (a) the

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[2] June 4, 2016 Ruby Written Response (Written Response). Ruby's Written Response is attached at Tab A.

[3] *See e.g.,* September 30, 2016 Ruby Letter to OPR, attached at Tab B; January 19, 2017 Ruby e-mail to OPR, attached at Tab C.

[4] *See e.g.,* April 19, 2016 Zuckerman e-mail to OPR; December 19, 2016 Zuckerman e-mail to OPR; May 16, 2017 Zuckerman letter to OPR.

[5] *See e.g.,* January 24, 2017 USAO e-mail to OPR; June 5, 6, and 28, 2017 USAO e-mails to OPR; November 6, 2017 USAO e-mail to OPR.

[6] OPR's interview of Ruby was conducted under oath in the presence of a court reporter, and was transcribed. The transcript is attached at Tab D. OPR's other interviews were digitally recorded. Some of those interviews were later transcribed. On October 27, 2017, OPR sent Ruby a copy of his interview transcript, and offered him the opportunity to comment on or make corrections to the transcript. Ruby did not respond to OPR's offer.

government failed to disclose exculpatory e-mails in the possession of the Mine Safety and Health Administration (MSHA); (b) the government made false statements to the court and jury about Blankenship's involvement in Massey budget decisions; (c) the government did not call MSHA inspectors to testify at trial in order to avoid revealing the government's discovery violations; and (d) an MSHA employee destroyed MSHA documents shortly after the UBB explosion.

As a result of its investigation, OPR found that Zuckerman's initial misconduct allegations were without merit. OPR found that: (a) the government did not withhold exculpatory MSHA e-mails; (b) the government did not make false statements about Blankenship's involvement in the Massey budget process; (c) the government did not inappropriately decide not to use MSHA inspectors as trial witnesses; and (d) there was no evidence to support the allegation that an MSHA employee destroyed MSHA documents shortly after the UBB explosion.

After receiving Ruby's Written Response, OPR asked him some follow up questions. 1n response to one of those questions, Ruby cited a Memorandum of Interview (MOI) to support his contention that certain information had been disclosed to the defense. When OPR cited that MOI to Zuckerman, Zuckerman told OPR that it never received the MOI. After checking USAO records, Ruby told OPR that the MOI was mistakenly not disclosed to the defense. OPR thereafter undertook an exhaustive investigation of the government's handling of MOIs.

During the criminal investigation, law enforcement agents assigned to the investigation had

written hundreds of MOIs. OPR found that although prior to the *Blankenship* trial the government disclosed to the defense approximately 370 MOIs, it failed to disclose 61 MOIs, including 11 pertaining to pre-indictment interviews, and 50 pertaining to post-indictment interviews (collectively, "undisclosed MOIs").[7]

After OPR learned of the government's failure to disclose 61 MOIs, OPR asked Goodwin for a written response pertaining to that issue. On May 24, 2017, Goodwin responded with a two-page letter that did not answer most of OPR's questions.[8] OPR twice asked Goodwin (who was no longer a Department of Justice employee) for an opportunity to interview him. OPR informed Goodwin that it had obtained information that was inconsistent with Goodwin's

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[7] In early 2017, OPR informed the USAO that the prosecution team had not disclosed numerous MOIs. Shortly thereafter, the USAO produced 61 previously undisclosed MOIs to the defense. Although Zuckerman told OPR that Blankenship's defense was prejudiced by the government's failure to disclose the 61 MOIs, it declined OPR's request to identify how the defense had been prejudiced, stating in part that it might raise that issue with the court. On April 18, 2018, McGuireWoods filed a "Motion to Vacate and Set Aside Defendant's Conviction and Sentence Pursuant to 28 U.S.C. § 2255." The motion alleges that the government's failure to disclose prior to trial 61 MOIs, as well as certain MSHA documents that were disclosed to the defense in 2017 and 2018, violated *Brady* and *Giglio,* and that the government made misrepresentations to the court regarding its MOI disclosures. In May 2018, the United States Attorney's Office for the Southern District of West Virginia was recused from the *Blankenship* case. The United States Attorney's Office for the Eastern District of Kentucky was assigned to handle *Blankenship,* and will respond to the Section 2255 motion.

[8] Goodwin's May 24, 2017 letter is attached at Tab E (Goodwin Letter).

statement to OPR in his short written response that, "It is frustrating to me if memoranda of interview were not turned over."[9] OPR also told Goodwin that it was concerned that "at least three pleadings filed by the government contain arguably misleading information about the government's disclosure of [MOIs]."[10] Goodwin declined OPR's first request for an interview and failed to reply to OPR's second request.

As a result of its investigation, OPR made the following factual findings and reached the following conclusions regarding Ruby's and Goodwin's conduct related to the failure to disclose the 61 MOIs:

(1) Some of the undisclosed MOIs contained discoverable statements that were required to be disclosed by applicable Department discovery rules and policies, including United States Attorneys' Manual Section 9-5.001(C)(1)-(3). OPR concludes that neither Ruby nor Goodwin withheld discoverable statements from the defense with the intent of preventing the defense from obtaining those statements. However, OPR found that: (a) Ruby recklessly violated Department-mandated discovery obligations by failing to disclose the discoverable statements contained in 11 pre-indictment MOIs; (b) Ruby and Goodwin recklessly violated Department-mandated discovery obligations by failing to disclose the discoverable statements contained in some of the 50 post-indictment MOIs; (c) Ruby and Goodwin recklessly violated discovery requirements imposed by a January 2010 memorandum from then-Deputy Attorney General David Ogden (the Ogden

[9] Goodwin Letter at 1; October 5, 2017 OPR e-mail to Goodwin.

[10] *Id.*

Memorandum), which requires prosecutors to "develop a process for review of pertinent information to ensure that discoverable information is identified;" (d) Ruby's and Goodwin's "process" for deciding which statements contained in post-indictment MOIs to disclose was to rely on their memory of what was said during interviews, some of which occurred months before they made disclosure decisions; their deficient process resulted in the failure to disclose discoverable statements contained in numerous post-indictment MOIs; and (e) because Ruby and Goodwin recklessly violated the Department's discovery policies regarding the disclosure of discoverable statements, they committed professional misconduct.

(2) OPR found insufficient evidence to conclude that Ruby's and Goodwin's failure to disclose discoverable statements contained in the undisclosed MOIs violated *Brady v. Maryland,* 373 U.S. 83 (1963), *Giglio v. United States,* 405 U.S. 150 (1972), or West Virginia Rule of Professional Conduct (RPC) 3.8(d), which requires the disclosure of information that tends to negate the accused's guilt. The government violates its *Brady* obligations only if, *inter alia,* a defendant is prejudiced by the failure to disclose. Zuckerman Spaeder LLP, the firm representing Blankenship, and the entity in the best position to explain whether, how, and to what extent the defense was prejudiced by the government's failure to disclose the 61 MOIs, explicitly declined OPR's request to provide it with that information. Prosecution team members credibly told OPR that the discoverable statements contained in the 61 undisclosed MOIs were not only available to the defense from other sources, but were in fact used during the defense's cross-examination of government witnesses. Based on

the facts known to it, OPR cannot prove by preponderant evidence that Blankenship was prejudiced by the government's failure to disclose the discoverable statements in the 61 MOIs, and so cannot conclude that the government's conduct violated *Brady, Giglio,* or West Virginia RPC 3.8(d).

(3) Ruby failed to make a full disclosure of discoverable statements contained in three MOIs, and statements made during one proffer session, which he attempted to summarize in two summary disclosure letters. OPR found Ruby's disclosures to be inadequate and incomplete. Although OPR concludes that Ruby's inadequate disclosures were not intended to withhold exculpatory statements from the defense, OPR nevertheless concludes that Ruby's inadequate disclosures were made in reckless disregard of the requirement, as set forth in the Ogden Memorandum, that prosecutors take "great care" when making disclosures by summary letter. Ruby was responsible for both of the deficient letter disclosures. OPR found that Goodwin was also responsible for the inadequate and incomplete disclosures in one of the two summary disclosure letters. OPR finds that Ruby and Goodwin recklessly violated the Ogden Memorandum's requirements and therefore committed professional misconduct.

(4) The government filed three arguably misleading pleadings with the court, and Ruby made one arguably misleading statement in court, regarding the government's MOI disclosures. Those pleadings and Ruby's statement may have led the court to reasonably, but erroneously, believe that the government had disclosed all MOIs in its possession.

OPR reached the following conclusions about the alleged misstatements to the court:

(a) Ruby and Goodwin did not intentionally mislead the court regarding the government's MOI disclosures.

(b) Ruby and Goodwin did not violate West Virginia RPC 3.3(a)(1), which prohibits an attorney from *knowingly* making a false statement to the court, because OPR found that neither Ruby nor Goodwin intentionally made false statements to the court.

(c) OPR found insufficient evidence to conclude that the government's pleadings and Ruby's statement in court about the government's MOI disclosures violated West Virginia RPC 4.1, which prohibits attorneys from knowingly making false material statements to third parties such as Zuckerman Spaeder LLP.

(d) For the following reasons, OPR did not reach a conclusion about whether Ruby and Goodwin recklessly made arguably misleading statements to the court about the government's MOI disclosures. When OPR investigates an allegation that the government made misleading statements to the court, OPR would ordinarily request to interview the court to ask how the court interpreted the statements at issue. OPR could not follow its usual procedures in the *Blankenship* case, because the case is being actively litigated, and the court would be unable to engage in *ex parte* communications with the government. OPR is therefore unable to ascertain the court's views as to whether the court was misled by the government's statements about its MOI disclosures. In its Section 2255 motion, McGuireWoods has alleged that the

government made misrepresentations to the court about its MOI disclosures. The defense, if it chooses, may further pursue that allegation in the post-conviction litigation, which will allow the court to inform the parties as to whether it was misled by the statements at issue.

On March 22, 2018, OPR sent its draft report to the USAO, Ruby, and Goodwin, and provided them with an opportunity to review and comment on the draft report. The USAO told OPR that it had no substantive comments about the draft report. Ruby submitted an eight-page letter, and Goodwin submitted a four-page letter, in response to OPR's draft report.[11] After carefully considering Ruby's and Goodwin's comments, OPR changed one of its findings and made minor revisions to its report.

I. FACTUAL BACKGROUND

A. Upper Big Branch Coal Mine Explosion

On April 5, 2010, an explosion killed 29 coal miners in West Virginia's Upper Big Branch (UBB) coal mine. UBB was then owned and operated by a subsidiary of the Massey Energy Company (Massey). At the time of the explosion, Donald Blankenship was Massey's Chief Executive Officer and Chairman of the Board of Directors.

B. The Mine Safety and Health Administration's Post-Explosion Investigations

The Mine Safety and Health Administration (MSHA), a component of the U.S. Department of

[11] Ruby's comments on the draft report are attached at Tab F. Goodwin's comments on the draft report are attached at Tab G.

Labor (DOL), enforces federal laws, regulations, and safety standards (collectively, safety standards) governing coal mine safety. During the period covered by the indictment, MSHA coal mine inspectors regularly inspected UBB and issued citations and imposed monetary fines when they found violations of safety standards. After the UBB explosion, MSHA conducted an investigation to determine the cause(s) of the accident. In a December 6, 2011 report, MSHA concluded that the 29 coal miner deaths were preventable and resulted from Massey's failure to comply with applicable federal safety standards.[12] After the UBB explosion, MSHA also conducted an internal review of its own pre-explosion enforcement activities at UBB, and issued a report of the results of that review on March 6, 2012.[13]

The MSHA post-explosion investigation concluded that the physical conditions that led to the explosion were the result of a series of basic and avoidable safety violations at UBB. The MSHA investigation concluded that the UBB accident began with a small explosion resulting from the ignition of methane gas, triggering a much larger explosion of coal dust, which killed the 29 miners. According to MSHA, Massey could have prevented the initial methane gas explosion if it had properly maintained UBB's "longwall" coal-mining machine. When

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[12] MSHA's *Report of Investigation, Underground Coal Mine Explosion, April 5, 2010, Upper Big Branch Mine-South, Performance Coal Company, Montcoal, Raleigh County, West Virginia, ID No. 46-08436,* December 6, 2011.

[13] *Internal Review of MSHA's Actions at the Upper Big Branch Mine-South, Performance Coal Company, Montcoal, Raleigh County, West Virginia,* March 6, 2012.

properly working and maintained, a longwall coal-mining machine uses sprays of water to both suppress potentially-explosive coal dust that is generated as result of mining coal, and to reduce heat generated by the longwall coal-mining machine during its operation that could ignite methane gas released during the mining process.

MSHA found that UBB's longwall coal-mining machine was not properly maintained, which likely caused the initial methane gas ignition. In addition, MSHA found that Massey failed to follow basic safety procedures for detecting levels of methane gas in the mine. MSHA also found that Massey failed to comply with the MSHA-approved ventilation and roof control plans for UBB, which increase the probability of unsafe levels of methane gas accumulation. Underground coal mines must maintain adequate ventilation to provide miners with safe air to breathe, and to prevent the accumulation of unsafe levels of methane and other dangerous gasses. MSHA found that Massey failed to install proper supports for the mine's roof, which contributed to the accumulation of methane gas. Finally, MSHA found that Massey violated basic safety standards by allowing an excessive accumulation of coal dust, which ultimately fueled the large explosion. MSHA found that Massey failed to properly use rock dust in the mine, which can control and render inert coal dust and prevent it from catching fire.[14]

[14] MSHA's *Report of Investigation,* Executive Summary at 2.

C. Criminal Investigation

The USAO commenced a criminal investigation soon after the UBB mine explosion occurred.

1. The Prosecution Team

The government's investigative and prosecution team consisted of USAO attorneys, an FBI Special Agent, a DOL Office of the Inspector General (DOL OIG) Special Agent, and DOL attorneys, several of whom were appointed as Special AUSAs for the *Blankenship* trial.

R. Booth Goodwin II was the United States Attorney for the Southern District of West Virginia from 2010 to the end of 2015.[15] Goodwin was an active member of the USAO's investigative and prosecution team. Goodwin participated in discovery decisions, witness interviews, and pretrial and trial strategy. Goodwin conducted the examination of several witnesses during the *Blankenship* trial and delivered the government's closing argument. Ruby told OPR that he and Goodwin met daily to discuss the *Blankenship* case. Ruby asserted that Goodwin approved all significant decisions the trial team made during the UBB explosion investigation and *Blankenship* litigation.[16]

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[15] [Redacted]

[16] September 28, 2017 OPR interview of Steven Ruby (Ruby Interview) at 9. Specifically, Ruby said, "I would say the decision-making authority on decisions of any significance rested with [Goodwin]. The . . . grunt work of preparing for trial was largely me, but . . . the case was very important to him, and not without reason. It was obviously a significant case. And he made clear from the beginning, that ... any decision of significance had to be

Steven Ruby was an AUSA in the USAO from 2009 to early 2017.[17] In 2012, Ruby was appointed Counsel to the United States Attorney. Ruby led the prosecution team and was involved in almost every decision the team made. Ruby was a relatively inexperienced federal trial prosecutor; Ruby told OPR that prior to the *Blankenship* case, he had tried two relatively minor cases in federal court.[18]

[AUSA #1]. [AUSA #1] was added to the *Blankenship* prosecution team in February 2015, in large part because of his extensive trial experience.

[AUSA #2], and was immediately assigned to the *Blankenship* team. Because of her federal court inexperience, [AUSA #2] was assigned primarily to conduct legal research, writing, and other supporting tasks.

[DOL Attorney] was Ruby's chief DOL point-of-contact. [DOL Attorney] assisted the prosecution team with searches of MSHA documents and other tasks. [DOL Attorney] was appointed as a Special AUSA (SAUSA), and attended the *Blankenship* trial (though he did not play an active role during the trial).

[FBI SA #1] has been an FBI Special Agent (SA) for 15 years. FBI SA #1 was assigned to the criminal investigation shortly after the UBB mine explosion.

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made by him, and he reiterated that more strongly around the summer of 2015. And that [continued] through the pretrial process and all the way through trial." *Id* at 190-91.

[17] [Redacted]

[18] *Id.* at 28. [Redacted]

[DOL SA #1] has been a DOL OIG SA for 16 years. [DOL SA #1] was assigned to the criminal investigation shortly after the UBB mine explosion.

[Paralegal #1] is a paralegal specialist in the USAO. [Paralegal #1] was responsible for almost all of the technical aspects of the government's collection of evidence and the disclosure of materials to the defense.

[Paralegal #2] was a legal assistant in the USAO at the time of the Blankenship investigation and trial. [Paralegal #2]. [Paralegal #2] assisted [Paralegal #1] and prosecution team attorneys with various administrative tasks.

2. Blankenship's Defense Team

Blankenship was represented by a large team of attorneys from the Washington, D.C. law firm Zuckerman Spaeder LLP (Zuckerman), as well as local counsel. The lead attorney was a nationally prominent criminal defense attorney, William Taylor, III. Zuckerman defended Blankenship aggressively throughout the criminal investigation, trial, and appellate proceedings.

3. Pre-Indictment Criminal Investigation

The UBB mine exploded in April 2010. Blankenship was indicted in November 2014. During the four and one-half intervening years, the USAO conducted an active criminal investigation. As a result of obtaining documents during that investigation, and obtaining documents generated by MSHA's accident investigation and internal review following the UBB mine explosion, at the time of the indictment the

USAO possessed over four million pages of documents related to the explosion. [Paralegal #1] maintained a computer software electronic searchable database (called Relativity) into which [Paralegal #1] put most of the documents the government received through its investigation. [Paralegal #1] placed Bates-stamp markings on the electronic documents both in Relativity and on the paper documents maintained elsewhere.

During the criminal investigation, the prosecution team interviewed numerous witnesses, some multiple times. [DOL SA #1], [FBI SA #1], or both, attended almost all of those interviews. Ruby attended almost all interviews, and Goodwin attended many as well, including interviews of witnesses whose MOIs were not disclosed to the defense.[19] Either [DOL SA #1] or [FBI SA #1] took handwritten notes during witness interviews, and they thereafter drafted memoranda to memorialize the substance of the

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[19] A few interviews were conducted by attorneys from the Criminal Division and not the USAO. For example, [Witness #1], by [DOL SA #1] and an attorney from the Criminal Division's Fraud Section. One of Zuckerman's initial misconduct allegations was that the government had failed to disclose exculpatory evidence [Witness #1] provided the government during that interview. When asked about this allegation, Ruby initially told OPR that [Witness #1] had not been interviewed because the government refused to grant [Witness #1] immunity. Ruby Written Response at 10. Later, however, OPR learned that the government had failed to disclose 11 pre-indictment MOIs, including [Witness #1] MOI. When OPR asked Ruby about this, Ruby told OPR that because he had not been present during [Witness #1] interview, he had forgotten that the Criminal Division had interviewed [Witness #1]. Ruby reiterated that [Witness #1]. January 19, 2017 Ruby e-mail to OPR.

interviews.[20] Neither [DOL SA #1] nor [FBI SA #1] sent drafts of their MOIs to others who attended the interview for review or comment.[21] Both [DOL SA #1] and [FBI SA #1] said that no one ever told them to include or omit information in any of the MOIs they wrote.[22]

[DOL SA #1] and [FBI SA #1] prepared MOIs for witnesses who were being prepared for their trial testimony. [DOL SA #1] did so in all cases. [FBI SA #1] said that on occasion, when a witness had nothing new to say during a witness preparation session, FBI SA #1] would not memorialize that preparation session in an MOI.[23]

Once completed, [DOL SA #1] and [FBI SA #1] either hand-delivered or e-mailed MOIs to the USAO. [DOL SA #1] and [FBI SA #1] almost always gave completed MOIs to [Paralegal #1], though they would occasionally give them to Ruby or [Paralegal #2]. [Paralegal #1] put completed MOIs in the Relativity database, and would apply a Bates-stamp label

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[20] [FBI SA #1] memoranda were labeled as FBI form 302s. [DOL SA #1] memoranda were labeled as DOL/OIG reports of interview. Because the prosecution team Bates-stamped all of these memoranda using the letters "MOI" (Memorandum of Interview), OPR will refer to these documents as MOIs.

[21] [DOL SA #1] said that [DOL SA #1] might have provided Ruby with a draft MOI for [Witness #2] (though OPR found no evidence that [DOL SA #1] did so). The [Witness #2] MOI was the only post-indictment MOI disclosed to the defense. September 26, 2017 OPR interview of [DOL SA #1] at 23.

[22] [DOL SA #1] Interview at 24-25; September 27,2017 OPR interview of [FBI SA #1] Interview)

[23] [FBI SA #1] Interview at 17.

beginning with the letters "MOI" and ending with a six-digit number. The first page of the first Bates-stamped MOI was labeled, "MOI-000001." [Paralegal #1] would apply Bates-stamp label numbers to the MOIs [Paralegal #1] received based solely on when [Paralegal #1] received them, and not based on the dates of the interview or the dates of when the MOI was drafted. By the time the *Blankenship* trial ended (a few MOIs were prepared during trial), [DOL SA #1] and [FBI SA #1] and had written over 425 MOIs.

D. The *Blankenship* Indictment

1. The Indictment and Superseding Indictment

Blankenship was indicted on November 13, 2014. A three-count Superseding Indictment was returned on March 10, 2015, charging Blankenship with conspiracy to violate federal mine safety standards, in violation of 30 U.S.C. § 820(d) and 18 U.S.C. § 371; causing false statements to be filed with the Securities and Exchange Commission, in violation of 18 U.S.C. §§ 1001(a)(2) and (3) and 18 U.S.C. § 2; and causing false statements to be made in connection with the purchase and sale of securities, in violation of 15 U.S.0 § 78ff and 18 U.S.C. § 2.

2. The Government's Factual Basis for Alleging Criminal Conduct: The Mine Safety Count[24]

The indictment set forth an extensive factual recitation supporting the charge that Blankenship conspired with others to violate mine safety standards. That charge was premised upon, *inter alia,* the following factual allegations.

a. Blankenship Failed to Employ Sufficient Workers

The indictment alleged that unsafe conditions in UBB were caused in part because Blankenship, in order to increase profits, employed an insufficient number of workers to do the jobs that were required to keep UBB conditions safe.[25]

b. Blankenship Imposed Aggressive Production Quotas

The indictment alleged that unsafe conditions in UBB were caused in part because Blankenship set coal production quotas that left too little time for

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[24] OPR's Report will not discuss the indictment's securities-related charges, because the discovery issues discussed below do not relate to those counts. The indictment alleged that after the UBB explosion, Blankenship had violated federal securities laws by authorizing and approving statements to the public that falsely asserted that Massey strove to comply with mine safety standards and that Massey did not condone safety violations. The indictment alleged that such statements were fraudulent and deceived sellers and potential purchasers of shares of Massey stock. The jury acquitted Blankenship of the securities-related charges.

[25] Indictment ¶¶ 24, 26, 27, 30, 36, 49, 92, 100(a).

workers to implement and maintain safety measures.[26]

c. Blankenship Emphasized Profit Over Safety

The indictment alleged that unsafe conditions in UBB were caused in part because Blankenship decided that profits would be maximized by paying regulatory fines instead of paying workers to implement safety measures or for structural improvements to enable UBB to comply with federal safety standards.[27]

d. UBB Managers Were Instructed to Violate Safety Standards

The indictment alleged that during the indictment period, Blankenship instructed and encouraged UBB managers to violate mine safety standards. The indictment alleged that Blankenship disregarded safety violations when communicating with UBB managers, which led them to understand that Blankenship accepted and expected such violations. The indictment alleged that members of the conspiracy falsified the results of coal dust samples taken in UBB as required by federal safety standards.[28]

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[26] Indictment ¶¶ 71124, 26, 27, 30, 36, 49, 68, 100(a), 100(g).

[27] Indictment ¶ 58.

[28] Indictment ¶¶ 59, 91, 94, 99, 100(b), 100(f).

e. Budget Decisions Were Made to Maximize Profit, Regardless of the Impact on Safety

The indictment alleged that Blankenship was the highest-ranking official involved in Massey's annual budget and production plan process, which determined how many workers were budgeted for safety-related positions, and set the amount of coal each mine was required to produce. The indictment alleged that Blankenship repeatedly denied requests by UBB managers to hire more workers to fill jobs that were critical to mine safety, and reduced the number of workers in such positions.[29]

f. Employee Compensation Rewarded Profit While Ignoring Mine Safety Violations

The indictment alleged that Blankenship used employee compensation as a means of communicating to employees that it was acceptable for UBB to violate mine safety standards.[30]

g. UBB Provided Workers with Advance Warning Regarding the Presence of MSHA Inspectors

The indictment alleged that unsafe conditions in UBB existed in part because UBB employees outside the mine unlawfully provided employees working in the mine with advance notice that MSHA

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[29] Indictment ¶¶ 50, 67, 69.

[30] Indictment ¶¶ 79, 95, 100(h).

inspectors had arrived at UBB, and were on the way to inspect the mine.[31]

II. FACTS RELEVANT TO ZUCKERMAN'S INITIAL MISCONDUCT ALLEGATIONS

On March 7, 2016, Zuckerman sent a letter to the Department of Justice alleging that the Blankenship prosecution team had engaged in prosecutorial misconduct.[32] At that time, Zuckerman was unaware that the government had not disclosed 61 MOIs, and therefore did not raise that issue in its letter (although Zuckerman did question why it had received only one MOI memorializing a post-indictment interview). Zuckerman's allegations are set forth below.

A. The Government Allegedly Misrepresented Blankenship's Attendance at Budget Meetings

Zuckerman alleged that the government failed to disclose exculpatory evidence and misled the court regarding Blankenship's attendance at budget and planning meetings for Massey and its subsidiaries, including UBB. Zuckerman noted that one of the government's central allegations was that in order to increase profits, Blankenship refused to adequately staff UBB to ensure mine safety. Zuckerman alleged that the government failed to disclose evidence that was inconsistent with that contention, and that the

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[31] Indictment ¶¶ 37, 97, 98, 100(c), 100(d), 100(e).

[32] Zuckerman sent its letter to the Criminal Division's Assistant Attorney General. The letter was forwarded to OPR.

government elicited false testimony to support its contention.[33]

Specifically, Zuckerman alleged that [Witness #3] told the government in a pretrial interview that Blankenship did not attend Massey budget and planning meetings, a fact that Zuckerman said was inconsistent with the government's contention that Blankenship made decisions regarding staffing levels for safety-related positions.[34] Zuckerman said that the government never disclosed the information [Witness #3] had provided the government. Zuckerman also alleged that the government told the court and the jury that Blankenship attended budget and planning meetings, which the government knew was false because of the information [Witness #3] provided. Zuckerman alleged that Ruby designed his questions to [Witness #4] in such a way as to avoid directly asking about Blankenship's presence at budget and planning meetings, and to create the false impression that Blankenship was involved in those meetings.[35]

In his written response to this allegation. Ruby stated that Zuckerman had misstated the government's contention. Ruby said that Blankenship's attendance at budget and planning meetings was irrelevant; what the government contended and proved at trial was that Blankenship

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[33] March 7, 2016 Zuckerman letter to DOJ at 1-8.

[34] [Witness #3] did not testify at trial. Presumably, Zuckerman spoke with [Witness #3] or [Witness #3] attorneys after [Witness #3] spoke with the government, and were told what information [Witness #3] had provided the government during [Witness #3] interview.

[35] *Id.* at 3-8.

made budget and planning decisions. Ruby stated that while Blankenship may not have attended some budget and planning meetings, the information discussed in those meetings was provided to him, and that Blankenship made the ultimate budget and planning decisions, including decisions about staffing.[36]

Ruby also responded to Zuckerman's allegation by asserting that the information [Witness #3] provided that the government allegedly withheld – that Blankenship did not attend all budget and planning meetings – was provided to the defense in other materials the government had disclosed, including:[37] (1) an October 22, 2014, [Witness #4] MOI;[38] (2) an August 23, 2013, [Witness #5] MOI); an

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[36] Ruby Written Response at 6-7.

[37] Ruby also made the obvious point that Blankenship himself knew whether he attended budget and planning meetings. September 30, 2016 Ruby letter to OPR at 6. It would therefore be difficult for the defense to allege that the failure to disclose [Witness #3] statements about those meetings would have prejudiced the defense.

[38] Although Ruby told OPR that the October 22,2014 MOI had been disclosed, as discussed above, that assertion was erroneous. When OPR asked Zuckerman to respond to Ruby's contention that the information they alleged had been withheld was provided in other documents, including the October 2014 MOI, Zuckerman told OPR that it never received that MOI. OPR had told Ruby that OPR might show Zuckerman any documents Ruby used to refute Zuckerman's allegations: "We may show any such documents to Taylor and ask him to explain his allegation that Blankenship's defense was prejudiced by the government's decision not to produce statements in light of the production of those documents." July 18, 2016 OPR e-mail to Ruby. The fact that Ruby cited and provided OPR with a copy of the MOI, knowing that OPR intended to show it to Zuckerman, tends to

August 2009 calendar of Blankenship's activities; and (3) voluminous e-mails that showed that Blankenship received information about the budget and planning process outside of committee meetings.[39]

OPR asked [AUSA #1], [AUSA #2], [FBI SA #1], and [DOL SA #1] for their views regarding Zuckerman's allegation that the government withheld evidence that showed that Blankenship did not attend budget and planning meetings. Each agreed with Ruby's explanation that the government's contention, supported by evidence presented at trial, was that Blankenship made the final budget and planning

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support Ruby's assertion that the failure to disclose 11 pre-indictment MOIs, including the October 2014 MOI, was a mistake, and that he had not been aware of that mistake until Zuckerman told OPR that it never received the October 2014 MOI. Similarly, in both Ruby's Written Response and his September 30, 2016 letter to OPR, Ruby discussed an MOI from an undisclosed pre-indictment interview of Ruby's citation to the undisclosed MOI, knowing that OPR might show that MOI to Zuckerman, is further evidence that Ruby mistakenly believed that the MOI had been disclosed.

[39] OPR noted that the voluminous e-mails that Ruby provided OPR to demonstrate Blankenship's involvement in the budget and planning process outside of the budget and planning committee meetings were e-mails that were sent to Blankenship, and did not include return e-mail communications. When asked about this, witnesses told OPR that it was very unusual for Blankenship to send e-mails. Rather, he would either communicate by telephone, or he would make handwritten notes on the messages sent to him, which would then be faxed to whoever needed to know Blankenship's thoughts, response, or instructions. September 27, 2017 OPR interview of [Redacted] Interview) at 54; September 27, 2017 OPR interview of [Redacted] Interview) at 67; [Redacted] Interview at 41-42; [Redacted] Interview at 58.

decisions, and that Blankenship's presence or absence at budget and planning meetings was not relevant.[40]

Zuckerman's supposition that the government had interviewed [Witness #3] and decided not to disclose her MOI was correct, for Ruby acknowledged that he decided not to disclose [Witness #3] MOI.[41] However, while Zuckerman alleged that decision was made to suppress exculpatory evidence, Ruby said he made that decision because [Witness #3] statements were inculpatory, not exculpatory.[42] Ruby said that [Witness #3] confirmed that Blankenship had final approval over the budget and planning process, which was consistent with the government's contention.[43]

The MOI memorializing [Witness #3] interview addressed Blankenship's role in the budget and

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[40] [Redacted] Interview at 52-53; [Redacted] Interview at 66; [Redacted] Interview at 38-40; [Redacted] Interview at 57.

[41] Ruby Written Response at 6. Ruby affirmatively considered disclosing MOI, but then decided against producing it. On September 10, 2015, Ruby sent himself a "to do" list for the *Blankenship* case. Included in that list was the notation, "Produce [MOIs]" On September 21, 2015, Ruby sent Zuckerman a letter summarizing discoverable information fi-om the and MOIs, but not the MOI.

[42] Ruby Written Response at 6. In his interview, after reviewing certain statements in the MOI, Ruby acknowledged that his initial statement to OPR was not correct. Ruby acknowledged that some of statements were discoverable. Ruby Interview at 134-37. *See* summary of MOI discussed below in Section 111(E)(6).

[43] Ruby Written Response at 6.

planning process, as well as other issues.[44] The MOI contains the following statements about Blankenship's involvement in the budget and planning process:

- *Blankenship reviewed data on spreadsheets pulled from a computer program used for budgeting.*
- *Blankenship was provided with production figures supported by detailed worksheets.*
- *Blankenship used to attend budget meetings, but in 2008, when the location for the meetings changed, Blankenship did not attend them.*
- *Blankenship became less involved in the budget review over a two-to-three-year span.*
- *Blankenship was not involved in the final business plan reviews.*
- *If Blankenship reviewed the budget plans he reviewed them on his own.*
- *Blankenship received three copies of the final plan book.*

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[44] As noted in Section 111(E)(6) below, OPR identified several statements in MOI that are inconsistent with the government's factual basis for alleging criminal conduct as set forth in the indictment, and therefore should have been disclosed to the defense.

- *[Witness #3] would keep Blankenship updated on the process of preparing the plan summary, and Blankenship would call or fax questions to [Witness #3].*

- *Blankenship reviewed a high-level summary of the budget book.*

Some statements in the [Witness #3] MOI support the government's contention that Blankenship was involved in the budget and planning process. Others contradict that position (and are inconsistent with other statements in the MOI). In particular, the statement that, "Blankenship was not involved in the final business plan reviews," is inconsistent with the government's contention that Blankenship had the final say regarding Massey's business plans. OPR asked [FBI SA #1], who wrote the [Witness #3] MOI, and Ruby about this statement, and whether it contradicted the government's factual basis for alleging criminal conduct. [FBI SA #1] said that statement was "probably a poorly worded sentence on my part," and noted that it was not consistent with the other statements in the MOI.[45] [FBI SA #1] said that even if [Witness #3] had made that statement, it was not consistent with the government's evidence.[46] Ruby said that the statement that Blankenship was not involved in business plan "reviews" referred to meetings, not decisions, and so was not inconsistent with the

[45] [Redacted] Interview at 60.

[46] *Id.* at 61.

government's factual basis for alleging criminal conduct.[47] OPR examined [FBI SA #1] handwritten notes taken during [Witness #3] pretrial interview, which contained the statements used to draft [Witness #3] MOI. On page five of [FBA SA #1] notes, [FBA SA #1] wrote, "Final Business Plan Reviews - DB [Blankenship] not involved in meetings." [FBI SA #1] handwritten notes show that the statement in [Witness #3] MOI that Blankenship was not involved in final business plan reviews was not an accurate description of what [Witness #3] said during [Witness #3] interview.

B. The Government Allegedly Withheld Exculpatory MSHA E-Mails

Zuckerman alleged that the government intentionally withheld exculpatory evidence because the government did not disclose any e-mails from the two MSHA inspectors who wrote the majority of UBB citations during the indictment period.[48] Zuckerman further alleged that among the 70,000 pages of MSHA documents it had subpoenaed shortly before the trial, it found only two e-mails to or from eight MSHA inspectors who inspected UBB during the indictment period.[49] Zuckerman alleged that it had information from two current or former MSHA employees who told Zuckerman that MSHA employees communicated by e-mail. Zuckerman therefore inferred that the government intentionally failed to disclose MSHA

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[47] Ruby Interview at 136.

[48] March 7, 2016 Zuckerman letter to DOJ at 10.

[49] *Id.* at 11.

inspector e-mails that contained exculpatory information.

Ruby told OPR that Zuckerman's allegation was factually false, as the government had disclosed to the defense "hundreds" of MSHA inspector e-mails.[50] OPR asked Ruby to send it a sample of those e-mails; Ruby then sent OPR about 20 e-mails to or from many of the MSHA inspectors who had inspected UBB during the indictment period.[51]

In addition to providing OPR with e-mails to and from some of the MSHA inspectors who inspected UBB during the indictment period that had been disclosed to the defense, Ruby told OPR that the reason why there were fewer substantive e-mails to or from MSHA inspectors about UBB than one would ordinarily expect was that MSHA had a policy that directed MSHA inspectors to discuss inspection findings only in official MSHA documents.[52] Ruby said [DOL Attorney] told him about that MSHA policy.[53]

In fact, Zuckerman was aware of MSHA's policy regarding e-mail communications well before it alleged that the government had engaged in misconduct by failing to disclose exculpatory MSHA inspector e-mails. On September 17, 2015, Zuckerman

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[50] Ruby Written Response at 13.

[51] September 30, 2016 Ruby letter to OPR, exhibits 39-59.

[52] Ruby Written Response at 13.

[53] Ruby Interview at 66. , and said they had not heard of any such MSHA policy. Interview at 54; Interview at 46; Interview at 53-54. said recalled that Ruby told about such an MSHA policy. [Redacted] Interview at 47-49.

filed a motion to compel MSHA to comply with an early-return subpoena Zuckerman had sought in August 2017. Zuckerman alleged in part that the documents the government produced in response to the subpoena failed to include MSHA inspector e-mails, and that those e-mails were likely exculpatory. On September 24, 2015, the Department of Labor filed a brief in opposition to the motion to compel.[54] The DOL informed the court that the reason why the MSHA documents produced to the defense did not include voluminous e-mails in which UBB conditions were discussed was that MSHA policy required MSHA inspectors to use official MSHA forms to record their observations about mine conditions.[55]

[DOL Attorney] told OPR that Ruby accurately described to OPR the MSHA policy that discouraged MSHA inspectors from discussing their inspection findings in anything other than official documents, and that such discussions were not likely to be found in MSHA e-mails because of that policy.[56]

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[54] Zuckerman incorporated by reference its September 17 motion into a second motion to compel filed on November 6,2015. The court denied that motion on December 9, 2015.

[55] The DOL brief cited the following passage in an MSHA Citation and Order Writing Handbook: "For Coal inspectors, the forms provided to document inspectors' observations during enforcement activities are MSHA Form 7000 Series. Inspectors are not to take notes on other paper and copy them to these forms unless otherwise directed." September 24, 2015 brief at 4.

[56] October 13,2017 OPR interview of [Redacted] Interview.

C. The Government Allegedly Did Not Have MSHA Inspectors Testily at Trial to Avoid Revealing Discovery Violations

A significant part of the government's evidence adduced at trial was the volume and seriousness of the citations that MSHA inspectors issued after inspecting UBB during the indictment period. However, the government did not call any MSHA inspectors to testify during the trial. Zuckerman alleged that "the only conceivable explanation" for why the government did not have MSHA inspectors testify was that "doing so would have exposed Jencks and discovery violations."[57] Zuckerman did not support its allegation with any testimonial or documentary evidence.

Ruby told OPR that the government intentionally decided not to use MSHA inspectors as witnesses, but not for the reasons Zuckerman alleged. Ruby said that he was concerned that a West Virginia jury might be hostile or unreceptive to the testimony of MSHA inspectors, who are federal government employees, and who are sometimes perceived by some in the West Virginia federal jury pool as hostile to the coal industry, a key West Virginia employer. Ruby said that the government was able to elicit from coal miner witnesses the same facts about unsafe conditions in UBB as the government would have elicited from MSHA inspectors.[58] Both [DOL Attorney] and [FBI SA #1] told OPR that they recalled that the government did not use MSHA inspectors as

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[57] March 7, 2016 Zuckerman letter to DOJ at 11.

[58] Ruby Written Response at 14.

trial witnesses for the same reason Ruby articulated.[59]

D. An MSHA Employee Allegedly Destroyed Documents Shortly After the UBB Explosion

Zuckerman alleged that the government failed to investigate or disclose evidence concerning MSHA's destruction of UBB records after the mine explosion. In support of its allegation, Zuckerman cited two declarations filed in an unrelated civil proceeding concerning an attempt by the Massey subsidiary that owned UBB to obtain documents from MSHA. One declaration was from a former-MSHA employee; the other was from an employee of a different Massey subsidiary. The two declarations contained allegations that in the summer of 2010, an MSHA employee destroyed MSHA documents related to UBB.[60]

The defense raised the document destruction issue with the court. In a December 9, 2015 decision, the court denied the defense motion related to the allegation. The court found that the two declarations the defense cited were "rife with hearsay."[61] The court noted that two of the MSHA officials accused of the document destruction submitted sworn declarations

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[59] [Redacted] Interview; [Redacted] Interview at 52-53. Ruby said that he recalled discussing this issue with Goodwin. Ruby Interview at 68. Neither nor recalled any discussion about not using MSHA inspectors as trial witnesses. [Redacted] Interview at 52-53; [Redacted] Interview at 47.

[60] March 7, 2016 Zuckerman letter at 11-12.

[61] December 9, 2015 opinion at 5.

denying the allegations, and that one of the two declarants cited by the defense acknowledged in an *in camera* hearing during the *Blankenship* trial that he had no firsthand knowledge of any document destruction. Ruby said that the government had been unaware of the allegation of document destruction until mid-trial, when Zuckerman raised the issue with the court.[62]

E. The Government Allegedly Failed to Disclose Exculpatory Evidence Provided by [Witness #4]

[Witness #4]. [Witness #4] entered into an immunity agreement with the government prior to trial. [Witness #4] cross-examination lasted five-days. During cross-examination, [Witness #4] testified that he had committed no crimes; [Witness #4] and Blankenship had not conspired to violate mine safety laws; Blankenship did not instruct him to violate mine safety laws; and that Blankenship wanted and ordered UBB to reduce MSHA violations. [Witness #4] also testified on cross-examination that he or his attorneys made similar statements to the government prior to trial. Zuckerman alleged that the government intentionally failed to disclose those statements to the defense before trial.[63]

Ruby told OPR that [Witness #4] statements during cross-examination identified by Zuckerman surprised the government. Ruby said that it was not uncommon in federal criminal practice for witnesses

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[62] Ruby Written Response at 5.

[63] March 7,2016 Zuckerman letter to DOJ at 9.

to change their stories during cross-examination. The government interviewed [Witness #4] six times prior to and during trial, but disclosed only one of the six MOIs memorializing those interviews. None of the statements that Zuckerman alleges were intentionally withheld were contained in any of the five undisclosed MOIs. [DOL SA #1] told OPR that if [Witness #4] had made statements during interviews that [Witness #4] had not conspired with Blankenship, or that [Witness #4] had not broken any laws, [DOL SA #1] would have put those statements in the MOIs [DOL SA #1] drafted.[64] [FBI SA #1] said that the closest [Witness #4] came to making a statement such as those he made during cross-examination was a statement contained in an April 8, 2015 undisclosed MOI: "[Witness #4] advised that [Witness #4] never knowingly gave a direct order where [Witness #4] told someone to do something that caused a law to be broken."[65] Ruby, however, did not view that statement as inconsistent with the government's factual basis for alleging criminal conduct. Ruby said that the government's contention was that the conspiracy to violate mine safety standards in order to maximize profits was a tacit, and not an explicit, agreement.[66]

OPR examined the handwritten notes that [DOL SA #1] and [FBI SA #1] took during [Witness #4] six interviews by the prosecution team, which they used to write [Witness #4] MOIs (not all were legible).

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[64] [Redacted] Interview at 42-43.

[65] [Redacted] Interview at 44.

[66] Ruby Interview at 123.

OPR did not find any evidence that [Witness #4] said to the government before trial the statements [Witness #4] made during cross-examination that were the basis for Zuckerman's misconduct allegation.

OPR asked Zuckerman whether it was aware of any evidence other than [Witness #4] statement on cross-examination that [Witness #4] or [Witness #4] attorneys provided that information to the government, that supported its contention that the government intentionally failed to disclose [Witness #4] statements. Zuckerman said it was not aware of any additional evidence to support its contention.[67]

F. The Government Allegedly Failed to Disclose Two Specific Exculpatory Documents

Zuckerman alleged that the government failed to disclose two exculpatory documents: a letter from an MSHA manager in which he expressed his approval of a Massey plan to reduce MSHA citations; and a summary of an MSHA inspector report in which the inspector expressed positive opinions regarding UBB conditions.

1. The "Applaud" Letter

On September 17, 2015, the defense filed a motion to compel MSHA to comply with an early-return subpoena. The defense claimed that MSHA's search for documents in response to the subpoena was deficient because MSHA's response did not include a July 24, 2009, letter from [Witness #9] (UBB was located in District 4) to [Witness #10]. In the letter,

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[67] May 16, 2017 Zuckerman letter to OPR, Exhibit 3 at 4.

[Witness #9] twice stated that [Witness #9] "applaud[ed]" a new Massey initiative to eliminate hazards to miners working in Massey coal mines. Zuckerman's contention that the government had not disclosed this document was correct. OPR asked Zuckerman how it obtained the "applaud" letter, given that the government had not disclosed it. Zuckerman told OPR that it "did not have permission" to tell OPR how it obtained the letter.[68]

Ruby told OPR that he first saw the "applaud" letter when reviewing the defense's September 17, 2015 motion to compel.[69] Ruby said that he asked [DOL Attorney] to try to determine why the letter had not been disclosed to the defense. According to Ruby, DOL could not find a copy of the "applaud" letter in any DOL file, and did not know why DOL did not have a copy. Ruby said that [DOL Attorney] speculated that whoever sent the letter ([Witness #9] or an administrative staff member) may not have kept a copy for DOL records.[70] [DOL Attorney] confirmed Ruby's recollection. [DOL Attorney] said that Ruby asked [DOL Attorney] to try to determine why the "applaud" letter had not been disclosed, and that DOL could not find the letter in its files.[71]

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[68] *Id.*, Exhibit 3 at 6.

[69] Ruby Written Response at 9. OPR asked to search the Relativity database for the "applaud" letter. could not find that letter in the database, which supports Ruby's contention that the letter was not in the government's possession. September 28, 2017 e-mail to OPR.

[70] September 30, 2016 Ruby letter to OPR at 9.

[71] [Redacted] Interview.

Ruby's assertion that the government had not seen the "applaud" letter before September 17, 2015 was not entirely correct. On August 22, 2014, several months before Blankenship was indicted, Ruby and [AUSA #2] met with two attorneys representing [Witness #10]. [AUSA #2] took extensive notes during that meeting. It is clear from a review of those notes, and an e-mail that [AUSA #2] sent to Ruby later that day, that [Witness #10] attorneys described the "applaud" letter in detail during the meeting, but for unstated reasons did not provide the government with a copy of the letter.[72] Thus, in August 2014, Ruby and were informed about, but not provided a copy of, the "applaud" letter.

OPR found that [AUSA #2] notes from the August 22, 2014 meeting with [Witness #10] attorneys contained discoverable material. That material includes the following representations by [Witness #10] attorneys:

- *[Witness #10] wanted the Hazard Elimination Program (a new Massey safety initiative) to reduce violations by 20%, but Blankenship wanted them reduced by 50%.*

- *Massey mines were safe.*

- *MSHA violations were not related to safety.*

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[72] In notes, [Redacted] noted, "need this ltr," and in e-mail commented that he had not "seen the whole thing [letter]." August 22,2014 e-mail to Ruby.

- *Having zero MSHA violations was not realistic.*
- *If you fix 75 violations, MSHA would find 75 more.*
- *MSHA inspections are subjective.*
- *MSHA was harder on Massey than other mines.*
- *The number of MSHA violations corresponds to the number of MSHA inspection hours.*
- *Receiving violations did not mean that a mine was unsafe.*
- *Blankenship received the weekly minutes from the Hazard Elimination Committee.*
- *"Report cards" (documents containing information about mine conditions) were Blankenship's idea to increase accountability.*

On June 22, 2015, in response to a court order discussed below. Ruby sent Zuckerman a letter in which he provided the defense with information that it might claim to be *Brady* material. In that letter, Ruby summarized the discoverable statements made by attorneys as follows: "Blankenship was involved in

the development of violation targets and report cards for the so-called hazard elimination program. [Witness #10] also believed that Massey made some degree of effort to comply with mine safety laws."

On September 27, 2017, OPR received [AUSA #2] notes from [AUSA #2] meeting with [Witness #10] attorneys. On October 5, 2017, OPR provided those notes to the USAO, alerting it to the fact that the notes might contain discoverable material, and noting that as far as OPR was aware, the government had not made any disclosures to the defense about the statements by [Witness #10] attorneys; in fact, OPR's statement was incorrect, as Ruby had made the minimal disclosure noted above in his letter of June 22, 2015. On October 20, 2017, the USAO made a supplemental disclosure to the defense about attorneys' statements to the government. The USAO noted the following statements by [Witness #10] attorneys:

- *[Witness #10] suggested a goal of 20% reduction of MSHA violations at Massey mines in conjunction with the Hazard Elimination Program; Blankenship responded that there should be a 50% reduction goal.*

- *[Witness #10] believed that the number of citations at Massey corresponded to the number of MSHA inspection hours.*

- *[Witness #10] believed that not all violations at Massey related to safety and that violations did not mean the mines were unsafe.*

- *[Witness #10] believed that Blankenship shared his view that the number of violations cited did not mean the mines were unsafe but corresponded to the number of MSHA inspection hours.*

On November 18, 2017, OPR realized that Ruby had in fact made a short disclosure regarding statements made by [Witness #10] attorneys in his June 22, 2015 letter to Zuckerman. On that date, OPR informed the USAO that OPR's prior statement that to its knowledge Ruby had not made such a disclosure was erroneous.

2. MSHA Inspector [Witness #11] Inspection Notes

In response to the defense's August 2015 request for an early-return subpoena, the government produced thousands of pages of documents. Among them was a chart summarizing the results of MSHA inspections of various mines, including UBB. One entry on the chart summarized the results of an October 14, 2009 inspection of UBB by MSHA inspector [Witness #11], who found, among other things, that "the section is very clean and well kept... the belts are well rock dusted and very clean. The condition of this mine is very good. Management is trying very hard to improve the condition of the mine, they are doing a good job." Zuckerman alleged that the government's failure to disclose that document except in response to the defendant's subpoena indicated

that the government had failed to properly search MSHA documents for exculpatory evidence.[73]

In response to Zuckerman's allegation, Ruby said that the reason why the document containing the summary of [Witness #11] UBB inspection was not disclosed earlier was because it contained information about other mines as well as UBB.[74] Ruby stated that although the chart containing that entry was not disclosed, the government had disclosed the handwritten notes taken by MSHA inspectors who were at UBB on October 14, 2009.[75] OPR reviewed those notes and found that they contain many, but not all, of the positive comments about UBB conditions that were in the chart entry quoted above.

III.FACTS RELEVANT TO THE GOVERNMENT'S MOI DISCLOSURES

A. Ruby's Initial Statements to OPR Regarding Disclosure Decisions

In Ruby's first communications with OPR, he said that he was the prosecution team member primarily responsible for decisions regarding what

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[73] In its September 17, 2015, motion to compel MSHA to comply with its subpoena, Zuckerman raised the issue of the government's failure to disclose the chart containing the summary of October 14, 2009 UBB inspection as evidence that the government was violating its discovery obligations. Zuckerman incorporated by reference its September 17 motion into a second motion to compel filed on November 6, 2015. The court denied that motion on December 9, 2015.

[74] Ruby Written Response at 11-13.

[75] *Id.*

material should be disclosed to the defense and the timing of those disclosures, and that other attorneys on the prosecution team played only "minor roles in discovery matters."[76] Ruby also said that the prosecution team's law enforcement agents were not involved in discovery decisions.[77] However, during his OPR interview, Ruby clarified his earlier statements regarding who made disclosure decisions. In his interview, Ruby said that his initial statements to OPR were meant to describe discovery decisions related to the government's initial – and by far the largest – disclosure of information after the indictment. Ruby said that his initial statements to OPR did not accurately describe the process by which the decision was made not to disclose MOIs of interviews occurring post-indictment, discussed below.[78]

B. The Government's Initial Disclosures

On December 4, 2014, the government provided the defense with its initial discovery disclosures. Essentially, the government provided the defense with almost all of the four million pages of documents in its Relativity database, as well as other materials (some of which could not be put into Relativity for technical reasons). The vast majority of the documents the government disclosed came from

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[76] *Id.* at 3, fn. 4. [Redacted] said that Ruby made most of the case-related decisions, but also that was not privy to what Ruby and Goodwin discussed in absence. [Redacted] Interview at 10-11.

[77] Ruby Written Response at 3, fn. 4. Both [Redacted] and [Redacted] said that they did not know who made disclosure decisions. [Redacted] Interview at 7; [Redacted] Interview at 10.

[78] Ruby Interview at 32-33.

Massey, Massey's corporate subsidiaries (including UBB), and MSHA. The government's initial disclosures also included more than 300 MOIs. The government's December 4, 2014 disclosures were provided to the defense in an electronic database, which enabled the defense to search the documents disclosed.

The defense acknowledged that the government's initial disclosure of documents and MOIs contained what it contended was exculpatory material. In a pleading filed in February 2015, the defense stated that its review of the four million pages of documents the government disclosed in December 2014 "revealed information highly favorable to the defense."[79] In a pleading filed in July 2015, the defense stated that the government had conducted over 350 interviews, and that "the [MOIs] of many of those interviews make plain that persons interviewed gave exculpatory information to the government."[80] As discussed below, the fact that the defense acknowledged that the government disclosed what the defense considered to be exculpatory material is relevant to OPR's assessment of whether Ruby and Goodwin intentionally withheld exculpatory material in undisclosed MOIs and MSHA documents.

C. Ruby and Goodwin Decide to Disclose Some, But Not All, MOIs

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[79] Memorandum in Support of Defense Motion ... to Enforce the Government's *Brady* Obligations at 3.

[80] Motion to Compel Compliance with *Brady* Order and for Other Appropriate Relief at 4.

Ruby and Goodwin provided OPR with conflicting information about who decided to disclose only some of the MOIs in the government's possession. Ruby told OPR that he and Goodwin decided that the government should disclose essentially all materials in its possession as of the date of the government's initial disclosures in December 2014.[81] That decision included the disclosure of all of the hundreds of MOIs in the government's possession at that time. Ruby said that it was their intention to disclose all MOIs reflecting pre-indictment interviews.[82]

Ruby told OPR that after the indictment was filed, Zuckerman conducted an extremely aggressive defense of Blankenship that included (in the prosecution team's view) personal attacks on Goodwin and [redacted].[83] Ruby said that these aggressive attacks caused Goodwin to change his views regarding the scope of the government's future disclosures.[84] According to Ruby, Goodwin decided that the government would disclose only material that was required to be disclosed by applicable rules and

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[81] Ruby Interview at 34-35.

[82] *Id.* at 96.

[83] *Id.* at 38-39. [Redacted]

[84] Ruby said that his belief about why Goodwin changed his views as to the scope of the government's disclosures was an inference based on his understanding and recollection of events. *Id.* at 41. In Goodwin's comments on OPR's draft report, he adamantly denied the inference that Ruby drew regarding the decision to restrict the scope of the government's disclosures: "Any perception that I did or did not do something because of personal attacks made on me and my family by the defense is absolutely false." April 19, 2018 Goodwin letter at 4.

policies.[85] As one consequence of this policy change, they decided that the government would not disclose any MOI that reflected a post-indictment interview, but would instead disclose by letter information in those MOIs that was required to be disclosed.[86] Specifically, Ruby said:

> [Goodwin] started, at some point, to develop a view that we are not going to give them more than we have to. He said, "we are not" – he said those words to me at least once, but I don't think he thought that we were – I don't think he thought that we were violating our discovery obligations. I think his view was that there was no requirement to turn over the [MOIs] in full, as long as we disclose the exculpatory information, and I didn't argue with that.[87]

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[85] Ruby Interview at 8. In addition to deciding that the government would only disclose what was required. Ruby said that Goodwin also decided that the government would no longer respond to Zuckerman's e-mail correspondence about the case (Zuckerman's attorneys frequently raised issues with the government by e-mail). *Id.* at 124-26. According to Ruby, Goodwin said that if Zuckerman wanted information from the government, the defense could file a motion with the court, to which the government would respond. As noted below, Zuckerman sent Ruby several e-mails asking questions about the disclosure of MOIs, to which Ruby did not respond.

[86] *Id.* at 38-39.

[87] *Id.* at 39.

Ruby emphasized that he would not have unilaterally made the decision not to disclose post-indictment MOIs:

> The U.S. Attorney personally ran the case. And I have -- I would like to think that I have some skills as a lawyer that I think were helpful to our team at trial and pretrial proceedings, but to be perfectly blunt, I was not the discovery expert here. The U.S. Attorney had a lot more seniority, not just in terms of rank in the office, but also in time in the office than I did. And I didn't make any of the decisions about disclosure of post-[indictment] MOIs without consulting with him.[88]

Because Goodwin chose not to fully cooperate with OPR's investigation, OPR was unable to ask him whether Ruby's account of the decision not to disclose MOIs reflecting post-indictment interviews was correct, or whether Goodwin had a different recollection and account of that decision. Although Goodwin declined OPR's request to interview him, he did send OPR a short letter in response to OPR's request for a written response to the allegation that the government had failed to disclose MOIs containing discoverable statements. In his letter, Goodwin stated: "[I]t was my intention and direction to [Ruby] that all information we gathered during the lengthy investigation be provided ... If anything was not produced, I am confident it must have been

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[88] *Id.* at 21.

inadvertent... It is frustrating to me if memoranda of interview were not turned over."[89]

OPR asked Ruby to respond to the assertions in Goodwin's letter to OPR. Ruby said:

> All I can say to that is that we specifically discussed how we were going to handle the post-[indictment] MOIs. And I don't know if he, in writing this, is thinking about his -- the approach that we took on the materials from the pretrial phase when we did just produce it all or at least intended to produce it all. I don't know. I don't know what he is referring to there, but we certainly had many conversations about the approach that we took with the post-[indictment] MOIs.[90]

OPR found no independent evidence to support Ruby's contention that Goodwin knew about and authorized the decision not to disclose post-indictment MOIs. OPR found no e-mails or documents to support Ruby's assertion, and no witnesses said that they believed Goodwin knew of or authorized the decision. Ruby said that he usually did not communicate with Goodwin by e-mail, because his office was near

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[89] May 24, 2017 Goodwin written response. OPR had sent Goodwin a request for written response on May 23, 2017. Goodwin responded to OPR's questions in five paragraphs, and did not respond to most of OPR's questions. In contrast. Ruby's June 4, 2016 written response, and Ruby's September 30, 2016 letter to OPR, totaled 25 pages, and Ruby attached hundreds of pages of exhibits to his correspondence.

[90] Ruby Interview at 92.

Goodwin's, and they would be in each other's offices many times a day to discuss the *Blankenship* case.[91]

[Paralegal #1] maintained the Relativity electronic database where the vast bulk of the documents the government obtained during its investigation was stored. [Paralegal #1] also maintained and regularly updated a spreadsheet containing an index of the documents stored in Relativity or elsewhere in the government's possession. [Paralegal #1] put a substantial amount of information in the spreadsheet about documents in the government's possession, including notations about instructions from the attorneys regarding a particular document or class of documents. Beginning in August 2014, [Paralegal #1] spreadsheet contained an entry that Goodwin wanted "to produce everything we have in this case." This entry was included in all of the later versions of the spreadsheet that OPR reviewed. This entry is arguably inconsistent with Ruby's assertion that after the government's initial disclosures in December 2014, Goodwin decided to disclose to the defense only material that the government was required to disclose. Ruby told OPR that he believed that this entry in [Paralegal #1] spreadsheet referred to a decision that he and Goodwin had made to disclose essentially all material in the government's possession at the time of the initial December 2014 disclosure, and that it did not apply to later disclosure decisions, including decisions about the disclosure of MOIs reflecting post-indictment interviews.[92]

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[91] *Id.* at 194.

[92] *Id.* at 34-36.

In sum, Ruby and Goodwin provided OPR with inconsistent and conflicting information about who made the decision not to disclose post-indictment MOIs, but rather to disclose by letter only those statements they deemed discoverable contained in post-indictment MOIs.[93]

Ruby told OPR that all members of the prosecution team were aware and approved of the decision not to disclose post-indictment MOIs, and instead to make required disclosures by summary letter. In a January 19, 2017 e-mail to OPR, Ruby stated, "the decision to make disclosures from post-indictment interviews by means of letters rather than production of full interview memoranda was a decision made by the prosecution team, and ultimately the then-U.S. Attorney." In his interview,

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[93] On April 19, 2018, Goodwin sent OPR a four-page letter with comments concerning OPR's draft report. As to the disclosure of post-indictment MOIs, Goodwin states, "I apparently do not recall matters in the exact way [Ruby] does," apparently referring to Ruby's contention that Goodwin made the decision not to disclose post-indictment MOIs, and instead to disclose discoverable information in those MOIs by letter. April 19, 2018 letter at 3. In his comments on OPR's draft report, Goodwin defends the decision not to disclose post-indictment MOIs in their entirety by asserting that post-indictment MOIs were prepared during trial preparation, and their disclosure would have revealed the prosecution's trial strategy. OPR disagrees with Goodwin's assertion as it related to most, if not all, of the undisclosed post-indictment MOIs. For example, some of the undisclosed post-indictment MOIs relate to the prosecution team's discovery in May 2015 that prior to the UBB explosion, [Witness #13], had written a memorandum that was at least in part critical of Massey's safety practices. The MOIs generated as a result of that discovery reflected the prosecution team's initial gathering of evidence related to the [Witness #13] memorandum, and did not relate to its trial preparation strategy.

Ruby stated, "the team discussed, fairly extensively, over the course of the pretrial process, the issue of what was exculpatory from our post-indictment witness interviews and agreed that the disclosure letters that we sent included everything that was even arguably exculpatory. And the U.S. Attorney personally signed off on the completeness of those letters."[94]

OPR found no evidence to support Ruby's contention that the prosecution team members were aware of (other than [Paralegal #1]) or approved the decision not to disclose post-indictment MOIs. [AUSA #1] [AUSA #2] [DOL SA #1] and [FBI SA #1] told OPR that prior to the start of OPR's investigation, they believed that the prosecution had disclosed to the defense all MOIs, whether reflecting pre- or post-indictment interviews.[95] All said they were unaware that the government had intentionally not disclosed MOIs reflecting post-indictment interviews.[96] [DOL

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[94] *Id.* at 20.

[95] [AUSA #1] Interview at 13; [AUSA #2] Interview at 11-12; [DOL SA #1] Interview at 10; [FBI SA #1] Interview at 15. [DOL Attorney] told OPR that [DOL] was not involved in discovery decisions, and so did not know what decisions the prosecution had made regarding the disclosure of MOIs. [DOL Attorney] Interview.

[96] [FBI SA #1] told OPR that he recalled only one instance when [FBI] knew that an MOI would not be disclosed. [FBI SA #1] said that [FBI SA #1] had been present for an interview that occurred during the Blankenship trial. [FBI SA #1] recalled that Ruby told [FBI SA #1] that the MOI [FBI SA #1] intended to draft would not be disclosed because the interview was solely for the purposes of trial preparation. [FBI SA #1] said [FBI SA #1] did not recall any other situation where [FBI SA #1] knew that an MOI [FBI

SA #1] and [FBI SA #1] said they were surprised to learn that some MOIs were not disclosed.[97] [AUSA #1] said [AUSA #1] was "kind of shocked" to learn that all MOIs were not disclosed.[98] [AUSA #2] said [AUSA #2] simply assumed that all MOIs were being disclosed, and that [AUSA #2] had "no reason to doubt" that all MOIs were disclosed.[99]

The evidence shows that [Paralegal #1] knew that Ruby had decided not to disclose some MOIs. [Paralegal #1] maintained a spreadsheet in which [Paralegal #1] made notations about some of the documents in the government's possession. Among the entries on the spreadsheet are several that indicate that on January 29, 2015, Ruby had directed [Paralegal #1] not to produce five MOIs to the defense. In addition, at various times in 2015, [Paralegal #1] sent Ruby several e-mails about MOIs that the USAO had received that indicate that [Paralegal #1] understood or was aware that Ruby did not want those MOIs produced.[100] No one else was copied on those e-mails, and OPR found no evidence that [Paralegal #1] told anyone else about Ruby's instruction not to disclose certain MOIs.

D. Disclosure of Pre-Indictment MOIs

SA #1] prepared would not be or was not disclosed. [FBI SA #1] Interview at 13.

[97] [DOL SA #1] Interview at 10-11; [FBI SA #1] Interview at 15.

[98] [AUSA #1] Interview at 19.

[99] [AUSA #2] Interview at 12.

[100] *See e.g.*, April 21 and June 23, 2015 [Paralegal #1] e-mails to Ruby.

1. The Government Disclosed 372 Pre-Indictment MOIs

On April 21, 2015, Ruby sent Zuckerman a list of 372 MOIs that the government had previously disclosed (most on December 4, 2014). The list was organized by Bates-stamp numbers, and did not contain the names of the persons interviewed. The listed MOIs were marked with Bates-stamp numbers from MOI-000001-001361.[101] In his transmittal e-mail, Ruby told Zuckerman that "these memoranda are not Jencks material; the United States has provided them as a courtesy to the defense." All of the 372 MOIs contained information about interviews that had been conducted prior to the November 2014 indictment.

2. The Government Did Not Disclose 11 Pre-Indictment MOIs

Ruby told OPR that he and Goodwin intended to disclose to the defense all MOIs that memorialized interviews conducted before the November 13, 2014 indictment. During the course of its investigation, however, OPR learned that the government had not disclosed to the defense 11 MOIs resulting from pre-indictment interviews. Attached at Tab H to this Report is a chart containing information about the 11 pre-indictment MOIs that were not disclosed to the

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[101] There are two small gaps in the Bates-stamp labels: 001284 and 001346-1348 are missing. The reason why 001284 is missing is not relevant to OPR's investigation. The MOI with Bates-stamp numbers 1346-1348 is missing because it reflected a post-indictment interview and was therefore not disclosed. Ruby did not inform Zuckerman about the reasons for those gaps.

defense, including the witness' name, date of interview, Bates-stamp labels, the date the USAO received the MOI from [DOL SA #1] or [FBI SA #1], and whether the witness testified at trial.

As shown in the chart attached at Tab H, the USAO first received these 11 MOIs after the initial indictment was filed in November 2014, and after the government's initial disclosures were made on December 4, 2014, and in some cases many months later. [DOL SA #1] drafted ten of the 11 MOIs; [FBI SA #1] drafted one of the MOIs. [DOL SA #1] e-mailed several of the 11 MOIs directly to Ruby, and the remainder to [Paralegal #1] or [Paralegal #2] who forwarded them to Ruby. Most of the 11 MOIs were attached to transmittal e-mails, and each e-mail contained an icon for the attached MOI that showed the MOI's pre-indictment date. Thus, if Ruby had read the transmittal e-mails carefully, he either knew or should have known that the 11 MOIs reflected pre-indictment interviews.

The e-mails that transmitted those 11 MOIs to Ruby made clear that the attached MOIs had not previously been disclosed. For example, [Paralegal #1] sent Ruby an e-mail on January 23, 2015, attaching the September 18, 2014 [Witness #14] MOI (*see* Tab H). In [Paralegal #1] e-mail, [Paralegal #1] asked Ruby if he wanted to add the [Witness #14] MOI to the next discovery production. OPR did not find a response to this e-mail. As another example, on February 13, 2015, [Paralegal #1] sent Ruby an e-mail attaching several MOIs, including the [Witness #4], [Witness #8], [Witness #6], and [Witness #12] MOIs (*see* Tab H). In [Paralegal #1] e-mail, [Paralegal #1] informed Ruby that [Paralegal #1] had received the

MOIs "this week." As noted immediately above, the dates on the icons attached to these e-mails showed clearly that the attached MOIs were pre-indictment MOIs. Thus, if Ruby had carefully read these e-mails, he knew or should have known that some of the attached MOIs were pre-indictment MOIs that had not been disclosed.

OPR asked Ruby why he did not provide the defense with the 11 pre-indictment MOIs, in light of Ruby's stated intent to disclose all such MOIs. Ruby told OPR that he did not intentionally withhold the 11 MOIs from the defense. Rather, Ruby said that the failure to disclose those 11 MOIs was a mistake. Ruby said that he assumed that any MOIs the USAO received after November 2014 related to post-indictment interviews and therefore were not going to be disclosed. Ruby said that he must have been so busy with other matters that he never looked at the dates of the 11 MOIs when he received the e-mails transmitting them. Ruby said that because he received all of the 11 MOIs after the initial indictment was returned, sometimes months after the MOI was drafted, he must have assumed that the MOIs memorialized post-indictment interviews.[102]

Specifically, Ruby stated, "And all I can say is that, I mean, to be bluntly honest, I didn't keep track of them. I just didn't -- I did not -- I lost visibility of the fact that there were, if I knew it at the time, that there were memos from '14 that hadn't been put in the

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[102] Ruby said that, "my belief at the time was that that the . . . MOIs that were coming in post-indictment were from post-indictment interviews." Ruby Interview at 97-98.

file yet or completed yet at the time of the indictment. And, you know, those just didn't get produced."[103]

Ruby denied that he intentionally failed to disclose the 11 pre-indictment MOIs in order to withhold exculpatory evidence from the defense: "[N]obody in this office or on the trial team intentionally withheld anything that they believed should have been produced to the defense in the *Blankenship* case. "[104]

3. The Government Made One Letter Disclosure of Information In a Pre-Indictment MOI

On September 21, 2015, shortly before trial, Ruby sent Zuckerman a letter in which he disclosed potential exculpatory statements obtained during interviews of three witnesses: [Witness #8] and [Witness #7], and [Witness #13].[105] The [Witness #8] interview was conducted, and an MOI was drafted, prior to the November 2014 indictment. Ruby did not receive the MOI until February 2015. Ruby provided the defense with some of the discoverable statements from the [Witness #8] interview in the letter, but did not provide the defense with the [Witness #8] MOI. OPR asked Ruby why he did not disclose the entire [Witness #8] MOI, as that would have been consistent

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[103] *Id* at 97.

[104] *Id* at 4-5.

[105] [Witness #8] [Witness #7] [Witness #13]

with what Ruby said was the government's decision to disclose all pre-indictment MOIs. Ruby told QPR that,

> I've given some thought to how that happened. It hadn't been produced. I don't remember paying attention to the date of interview on [Witness #8]. And all I can – the only explanation I can come up with for why it didn't register is number one, we were in the week before trial and all of that going on and number two, you do, over the course of an investigation a thousand interviews, and you are not necessarily going to have an accurate mental chart of when they all happened. It just didn't -- I did not -- I have no recollection of noticing at the time I included the language about the [Witness #8] interview when the interview had taken place.[106]

As discussed below, OPR found that Ruby's letter disclosure did not fully disclose all of [Witness #8] discoverable statements. *See* Sections III(D)(4) and III(E)(4).

4. The 11 Undisclosed Pre-Indictment MOIs Contained Discoverable Statements

OPR found that all of the 11 pre-indictment MOIs that were not disclosed to the defense contained statements inconsistent with the government's factual basis for alleging criminal conduct as set forth

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[106] Ruby Interview at 99-100.

in the indictment *(see* Section I(D)(2) above), or that were otherwise helpful to the defense. Those MOIs, or discoverable statements in those MOIs, therefore should have been disclosed prior to trial. OPR concluded that the 11 undisclosed pre-indictment MOIs listed in the chart attached at Tab H included the following discoverable statements:[107]

a. Two [Witness #14] MOIs. [Witness #14].

- *[Witness #14] asked [Witness #4] if a certain action [Witness #4] wanted to take was legal, but [Witness #4] ignored the question and said do it.*[108]

- *No MSHA inspector had ever said for [Witness #14] not to call ahead; this was not an enforced rule.*

- *[Witness #14] was never told not to put something in the log book.*

- *UBB had good ventilation when a certain fan was operating.*

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[107] OPR is not suggesting that its understanding of the *Blankenship* case is sufficient so as to allow it to act as the final arbiter concerning the relevance or discoverability of each statement contained in the undisclosed MOIs. Rather, it has set forth in this Report what it believes are the clearest examples of discoverable statements contained in the MOIs.

[108] This statement was potential impeachment material as to [Witness #4], one of the government's most important witnesses, which would be required to be disclosed by *Giglio v. United States*, 405 U.S. 150, 154 (1972).

b. [Witness #8] MOI. [Witness #8].

- *[Witness #8] suspected that compensation was tied to safety.*
- *There were a lot of safety violations enforced now that were not before.*
- *If Blankenship had not been involved, the list of safety-related initiatives would be half of what it was.*
- *[Witness #8] always tried to follow the law.*
- *Committing violations was not intentional.*
- *It was not manpower shortages, but the level of experience that contributed to violations.*
- *Massey put pressure on people and held them accountable.*
- *[Witness #8] never told anyone to break the law.*
- *The intent was zero violations.*
- *Massey section staffing was the industry standard.*
- *Safety was implied and always there ([Witness #8] gave the example of telling*

someone you love them, if you don 't tell them every time you see them, it does not mean you don't love them, and this was the same for Blankenship and safety).[109]

- *If something was wrong, you were expected to stop and fix it.*

- *It is not economically possible to have zero violations, you would have to shut down every mine.*

- *There were no discussions that violations were ok. There were discussions about trying to get better.*
- *You were always trying to achieve zero violations.*

- *If Massey was tolerant of violations, then everyone in the industry is as well.*

- *Upper management wanted [Witness #8] to read every violation.*

- *Everyone was trying to do a good job, but could have done better.*

- *It was a useless exercise to get MSHA approval because MSHA put up hurdles, and the process was dysfunctional.*

- *Every mine has safety violations.*

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[109] Ruby summarized this statement in the [Witness #8] MOI in his letter disclosure as discussed in Section III(E)(4), below.

- *[Witness #8] was reprimanded for running a mine with no air.*

- *[Witness #8] feared discipline as a result of compliance issues.*

- *Massey did a good job reporting violations.*

c. [Witness #4] MOI. [Witness #4]

- *There was enough air in the mine to meet the minimum requirements.*

- *The violation reduction program started in 2009.*
- *Blankenship sometimes attended budget meetings.*

- *Violations were a cost of doing business.*

- *MSHA is always going to write violations.*

- *Blankenship felt MSHA made things up.*

- *If [Witness #4] told someone to break the law it went from civil to criminal.*

- *There will always be MSHA violations to cite.*

d. [Witness #6] MOI. [Witness #6]

- *When Blankenship wrote on a report card (a document containing information about mine conditions), it meant he was not happy with failed rates and violations, that a corrective action plan was needed, and that he wanted to set up a meeting.*

- *Violation reduction targets were the first step to getting something in place to start reducing violations and to show improvement.*

- *Prior to 2009, Massey did not have a target number for violations until [Witness #6] implemented the Hazard Elimination Program; the target was derived from numbers from the previous quarter.*

- *The target would have been a 50% reduction in violations based on the average of the last two quarters.*

- *Blankenship was familiar with the Hazard Elimination Program.*

e. [Witness #12] MOI. [Witness #12]

- *The Hazard Elimination Program called for a 50% reduction in violations.*

- *People left the meeting where the plan was discussed wanting to reduce violations.*

- *MSHA and Massey disagreed about what constituted a violation, because it is a subjective decision.*

f. Two [Witness #15] MOIs. [Witness #15]

- *Blankenship received daily violation reports.*

- *[Witness #15] was brought in to obtain more useful safety information related to violations.*

- *[Witness #10] said that they needed to be better at tracking trends and that safety was lacking.*

- *[Witness #10] wanted to see the full violations.*

- *[Witness #15] believed accidents were discussed in the context of best practices and how to prevent future accidents.*

g. [Witness #1] MOI. [Witness #1]

- *In 2009, no one wanted to buy coal.*

- *There was pressure to run coal, but not enough to overlook safety.*

- *UBB was run well, and [Witness #1] had not heard anything negative about the mine.*

h. [Witness #16] MOI. [Witness #16]

- *Massey's primary focus was safety.*
- *Blankenship pushed safety more than any CEO in the industry.*
- *People have been fired because of safety violations.*
- *[Witness #16] had a positive opinion of safety at all Massey mines.*

i. [Witness #17] MOI. [Witness #17]

- *The sense was that MSHA wrote violations at Massey that it did not write at other mines.*
- *[Witness #17] believed that the violations per inspection rate was not as bad as at other mines. There was a sense that MSHA was picking on Massey, and that some violations were legitimate and some were not.*
- *No one thought that you could go through an inspection and not receive any violations.*

- *There was a big push to conduct accurate respirable dust sampling.*

- *[Witness #17] did not believe that Massey had an attitude that it was acceptable to receive violations and then just keep on going.*

E. Non-Disclosure of Post-Indictment MOIs

1. The Government Did Not Disclose 50 Post-Indictment MOIs

The prosecution team continued to interview witnesses after the November 2014 indictment, and those interviews were memorialized in MOIs. As discussed above, Ruby (and Goodwin, according to Ruby) decided not to disclose post-indictment MOIs to the defense, and instead decided to provide by summary letter any discoverable statements contained in the MOIs. OPR found that the government possessed, but did not disclose prior to or during trial, 50 post-indictment MOIs. Attached at Tab I to this Report is a chart containing information about the 50 post-indictment MOIs that were not disclosed to the defense, including the witness' name, date of interview, Bates-stamp numbers, and whether the witness testified at trial.

2. The Government Disclosed One Post-Indictment MOI

Notwithstanding the decision to not disclose post-indictment MOIs, the government did in fact disclose one post-indictment MOI On August 27, 2015, Ruby sent Zuckerman an MOI memorializing the

interview of [Witness #2], who had been interviewed on July 21, 2015.[110] [Witness #2]

OPR asked Ruby why, if he and Goodwin decided not to disclose post-indictment MOIs, he nevertheless provided the [Witness #2] MOI to Zuckerman. Ruby said that there was no formal process by which he decided which post-indictment MOIs should be disclosed, and that he relied on his recollection of the substance of the post-indictment interviews.[111] Ruby said that [Witness #2] "was somebody who was without question going to give exculpatory testimony, if [Witness #2] were called ... there was a lot of exculpatory material in there in [Witness #2] Interview."[112]

OPR found no evidence in the trial team's e-mail accounts or elsewhere that Ruby discussed with anyone his decision to disclose the [Witness #2] MOI to the defense. [DOL SA #1] said that [DOL SA #1] did not recall that [Witness #2] provided more exculpatory evidence than did other witnesses.[113] [FBI SA #1] said that [FBI SA #1] did not know why the [Witness #2] MOI was disclosed, and did not recall that [Witness #2] provided information that was

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[110] The [Witness #2] MOI was marked with the Bates-stamp labels [Witness #2].

[111] Ruby Interview at 129. Ruby said that, "in retrospect and with infinite time and resources, would we have done that [process] differently? Probably." *Id.* at 130.

[112] *Id.*

[113] [DOL SA #1] Interview at 24.

particularly harmful to the government's case.[114] [AUSA #1] said [AUSA #1] had no recollection of discussing the [Witness #2] MOI with Ruby.[115]

Ruby sent Zuckerman the [Witness #2] MOI on August 27, 2015. The next day, Zuckerman sent an e-mail to Ruby, Goodwin, and [AUSA #1], in which Zuckerman asked whether there were "additional interviews . . . that contain exculpatory information [] that you have not turned over [such as] [Witness #3] [Witness #1] [and] [Witness #7]." OPR found no evidence that the government responded to Zuckerman's question. In fact, the government possessed MOIs for [Witness #3] [Witness #1] and [Witness #7] that had not been disclosed (the [Witness #1 MOI was one of the 11 pre-indictment MOIs that were not disclosed, and the [Witness #3] and [Witness #7] MOIs were post-indictment MOIs).[116] About two weeks later, Ruby sent himself a list of things to do on the *Blankenship* case, including deciding whether to "Produce [Witness #7] [Witness #3] [Witness #8] [MOIs]"[117] Although this item on Ruby's to-do list makes it appear that Ruby was considering how to respond to Zuckerman's question about the existence of additional MOIs, Ruby said that he could not be sure whether he was thinking about Zuckerman's question when he wrote that to-do list item.[118]

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[114] [FBI SA #1] Interview at 37.

[115] [AUSA #1] Interview at 26.

[116] [Witness #3]. [Witness #1].

[117] September 10, 2015 Ruby e-mail to himself.

[118] Ruby Interview at 156-57.

3. The [Witness #2] MOI Contained Discoverable Statements

OPR identified the following discoverable statements in the [Witness #2] MOI:

- *People said MSHA picked on Massey and was harder on Massey than other companies.*
- *Massey started a Hazard Elimination Committee to reduce hazards, and Blankenship asked [Witness #2] to sit in on meetings and to give advice.*
- *Blankenship wanted two safety personnel working in UBB every day.*
- *After two safety engineers were added at UBB, there was a drop in violations.*
- *[Witness #2] believed the rock dusting was always good.*
- *Blankenship thought Massey was pretty good compared to other operators.*
- *MSHA decisions about mine operations caused a decrease in ventilation airflow.*
- *[Witness #2] described a list of Massey safety innovations.*
- *Many MSHA violations reflect opinions.*

- *MSHA inspectors have quotas (one violation per inspection day).*

- *The largest number of violations at any mine is for coal accumulation, and you can always find coal accumulation.*

4. Ruby Made One Letter Disclosure of Discoverable Statements Contained in Three MOIs

As noted above, Ruby told OPR that he intended to review all post-indictment MOIs to determine if the witnesses provided potentially exculpatory statements, and if so, to disclose those statements by letter, rather than by disclosing the entire MOI. This decision was unusual for the USAO. The USAO discovery policy in effect in 2015 stated that, "Generally, we disclose reports of interview to defense counsel, in the exercise of an expansive discovery practice."[119] [AUSA #1] told OPR that the standard USAO practice was to disclose MOIs, and not to make disclosures by letter.[120]

In fact, Ruby sent one letter to Zuckerman in which he made disclosures of information obtained during witness interviews.[121] On September 21, 2015,

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[119] October 20,2010 USAO Discovery Policy at 6.

[120] [AUSA #1] Interview at 10, 12.

[121] On June 22, 2015, Ruby sent Zuckerman a letter in which he identified discoverable material. The letter contained one paragraph in which Ruby provided discoverable statements the government obtained during two separate proffers from attorneys representing two Massey employees. No MOIs were generated from those proffer sessions. Ruby's disclosure of

shortly before trial. Ruby sent Zuckerman a letter disclosing information provided by [Witness #13], [Witness #7], and [Witness #8]. [Redacted] was interviewed, and [Witness #8] MOI was written, before the indictment. [Witness #13] was interviewed six times, both before and after the indictment. The information about [Witness #13] contained in the September 21 letter was obtained during post-indictment interviews. [Witness #7] interview occurred post-indictment.

Ruby told OPR that when deciding which statements to disclose from post-indictment MOIs, including the [Witness #7] and [Witness #8] MOIs, he relied on his memory for what had been said during interviews: "[T]here wasn't a formal process in place for reviewing [] post-indictment MOIs to see if, should they be produced, should they not be produced. We really relied on our recollections of the interviews. And in retrospect and with infinite time and resources, would we have done that differently? Probably."[122] Ruby acknowledged that his process for selecting statements to disclose was "imperfect" and "not ideal,"[123] and that "in retrospect with more time and more resources and the benefit of hindsight, I would certainly say that a different approach would have been better."[124] Ruby said that while he did not

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discoverable statements from one of those proffer sessions is discussed in Section II(F)(1) above.

[122] Ruby Interview at 129-30.

[123] *Id.* at 131-33.

[124] *Id.* at 132-33.

recall whether he looked at the [Witness #8] MOI before deciding what to disclose, he "probably" reviewed it.[125]

Ruby said that Goodwin was aware that Ruby was making disclosure decisions about statements contained in post-indictment MOIs based on Ruby's memory, and not based on a review of the MOIs themselves:

> The [] post-indictment [MOIs] were not being reviewed. I don't know that we had a specific conversation about it, but based on the conversations that we did have -- it was clear when we discussed the subject of what to put in these [disclosure] letters, that we were having that discussion based on our recollections of witness interviews. I mean, there would have been -- there would have been no reason for him to believe that there was a systematic process in place to -- the evidence, I guess, based on -- the evidence that he would have had, based on our discussions, was that we were working from recollection and that neither he nor I nor anybody else undertook to put in place a process where we systematically reviewed each MOI for discoverable information.[126]

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[125] *Id.* at 132.

[126] *Id.* at 189-90.

Ruby's September 21, 2015, letter disclosed very little information. The letter informed the defense that: (1) [Witness #7] said [Witness #7] was not sure that Blankenship received the memorandum about mine safety that had sent in February 2010;[127] (2) [Witness #13] said that [redacted] did not agree with a particular MSHA mine ventilation policy; and (3) [Witness #8] said that Blankenship was interested in safety even though he did not expressly say so,[128] and that Blankenship was involved with a number of changes to equipment that [Witness #8] believed improved safety.

Ruby told OPR that all of the members of the prosecution team reviewed the September 21, 2015 letter before it was sent: "[T]he team discussed, fairly extensively, over the course of the pretrial process, the issue of what was exculpatory from our post-indictment witness interviews and agreed that the disclosure letters that we sent included everything that was even arguably exculpatory. And the U.S. Attorney personally signed off on the completeness of those letters."[129] Ruby said that [AUSA #1] reviewed

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[127] [Witness #13]. The [Witness #13] memorandum contained [Witness #13] findings of [Witness #13] review of Massey safety issues.

[128] The letter paraphrased the MOI, which stated that [Witness #8] likened Blankenship's interest in safety to a romantic relationship where one person knows the other loves him or her even if not expressly stated.

[129] Ruby Interview at 20. Although Ruby referred to "disclosure letters," OPR is only aware of one letter in which disclosures were made about information contained in MOIs. As noted above in Section 11(F)(1), Ruby sent a letter in June 2015 in which he made disclosures about information obtained in two attorney

the disclosure letter and agreed that everything exculpatory had been disclosed."[130]

OPR reviewed the e-mail accounts of all of the attorneys on the prosecution team. OPR found no evidence that Ruby sent a draft of the September 21, 2015 letter to anyone for his or her review. OPR found no evidence that any of the attorneys commented on the September 21, 2015 letter before or after it was sent. Ruby said it was not surprising that there were no such e-mails, as he would have simply walked to [AUSA #1] or Goodwin's office to show them a hard copy of the draft letter to obtain their views, and would not have sent a draft by e-mail.[131]

[AUSA #1], [AUSA #2], [DOL SA #1], and [FBI SA #1] all denied that they had ever reviewed or approved of a draft of the September 21, 2015 letter, or had seen the final letter at the time it was sent.[132] [AUSA #1] said he was certain he had never seen the letter before it was sent, for when he first saw the letter in 2017, he did not know who [Witness #8] was, and would have reviewed the [Witness #8] MOI before signing off on the letter.[133] [AUSA #1] said that [AUSA

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proffer sessions. According to Ruby, Goodwin "signed off" on the disclosure letters by reviewing and approving them before they were sent.

[130] *Id.* at 16.

[131] *Id.* at 87.

[132] Interview at 21-22; Interview at 22-23; Interview at 35; Interview at 50.

[133] Interview at 21-22. [Redacted] told OPR that disagreed with Ruby's contention that the team had agreed to make a disclosure by letter of information in post-indictment MOIs. *Id.* at 25.

#1] did not believe that the September 21, 2015 letter contained all of the discoverable statements in the [Witness #8] MOI that Ruby summarized.[134]

OPR asked Ruby for his response to [AUSA #1] assertion that [AUSA #1] never reviewed the September 21,2015 letter. Ruby said that he recalled asking Goodwin and [AUSA #1] for their input on the letter, and said that "I am very confident" that [AUSA #1] reviewed the letter. However, Ruby also said that he did not think that [AUSA #1] was being untruthful.[135] Ruby said he had a specific recollection of talking to Goodwin about whether the September 21 letter accurately described what [Witness #8] had said in [Witness #8] interview, and that Goodwin said that he was fine with the language in the draft letter.[136]

5. Ruby's September 21, 2015 Letter Did Not Disclose All Discoverable Statements Contained in the Three MOIs

OPR compared the discoverable statements in the [Witness #8], [Witness #13], and [Witness #7] MOIs to the information contained in Ruby's September 21, 2015 disclosure letter. OPR concluded that Ruby did not disclose all discoverable statements contained in those MOIs.[137]

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[134] *Id.* at 23.

[135] Ruby Interview at 87, 91 -92.

[136] *Id.* at 89.

[137] *Compare* Section III(D)(4) above (summarizing the discoverable statements in the MOI) and Section III(E)(6) below

6. Some of the 50 Undisclosed Post-Indictment MOIs Contained Discoverable Statements

In addition to the [Witness #13] and [Witness #7] post-indictment MOIs, which were partially summarized in a letter disclosure, there were 48 other post-indictment MOIs that were neither disclosed nor summarized. Some of those 48 post-indictment MOIs contained statements that were inconsistent with the government's factual basis for alleging criminal conduct as set forth in the indictment, or were otherwise helpful to the defense. Those MOIs, or the discoverable statements contained in them, should have been disclosed prior to trial. OPR concluded that, at a minimum, the undisclosed post-indictment MOIs contained the following discoverable statements:

a. Four [Witness #4] MOIs.[138]

- *[Witness #4] never gave an order causing a law to be broken.*
- *[Witness #4] was surprised that dust fraud was occurring, as the company did not want cheating on dust sampling.*
- *No amount of money or resources can cure all violations at a mine.*

(summarizing the discoverable statements in the and MOIs), with the few statements Ruby included in the September 21,2015 disclosure letter.

[138] The government disclosed to the defense one pre-indictment MOI, and mistakenly failed to disclose a second pre-indictment MOI.

- *MSHA decisions endangered the health and safety of miners.*

- *Several UBB managers did all they could to focus on safety.*

b. Five [Witness #13] MOIs.[139]

- *Blankenship told [Witness #13] that Massey needed to reduce violations, and that Massey was going to look at and get a handle on violations.*

- *Blankenship told [Witness #13] that he did not know why miners thought he wanted things done a certain way.*

- *[Witness #10] said everyone should comply with all regulations and that they should not worry anymore.*
- *[Witness #10] told [Witness #13] to tell [Witness #7] and [Witness #2] about findings concerning safety, and [Witness #7] took all of [Witness #13] notes.*

- *[Witness #10] told [Witness #13] that Blankenship wanted to meet with [Witness #13].*

- *Blankenship asked [Witness #13] what he should do about [Witness #13] findings.*

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[139] The government disclosed to the defense one pre-indictment MOI.

- *Blankenship never challenged [Witness #13] over the issues [Witness #13] raised.*

- *[Witness #10] told [Witness #13] [Witness #10] wanted [Witness #13] to teach workers how to ventilate.*

- *[Witness #10] told [Witness #13] to tell Blankenship [Witness #13] views.*

- *Blankenship talked about a commitment to safety.*

- *Blankenship wanted [Witness #13] to tell him about the issues.*

- *[Witness #13] was hired to teach foremen about ventilation, respirable dust, and safety issues.*

- *You would be hard pressed to go to a mine and not find some violations.*

- *UBB was going to fail because of MSHA ventilation system requirements.*

- *An MSHA official said belt air should not be used to ventilate mines; [Witness #3] told him to reconsider for certain mines.*

- *The UBB mine was set up to fail based on the ventilation system MSHA forced the UBB mine to use.*

c. [Witness #3] MOI.

- *Blankenship said not to make production figures too aggressive.*

- *[Witness #10] said [Witness #3] wanted to focus on more serious violations and eliminate them.*

- *Blankenship told [Witness #3] to reprogram the system to determine who was responsible for violations and for not eliminating violations.*

- *Blankenship wanted to know the identity of repeat offenders.*

d. [Witness #7] MOI.

- *Blankenship wanted a report from [Witness #7] meeting with [Witness #13].*
- *The legal warnings that [Witness #7] placed on the [Witness #13] memorandum were more expansive than usual, but [Witness #7] could have cut and pasted them, and does not recall adding the warnings to prevent [Witness #13] from sharing the report with [Witness #18].*[140]

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[140] Zuckerman told OPR that the portions of the MOI that concerned the legal warnings that placed on the memorandum (regarding the issue of safety in Massey mines) were exculpatory because they were inconsistent with the government's contention during trial that those warnings were intended to keep memorandum secret. May 16, 2017 Zuckerman letter to OPR, Exhibit 2 at 6-8.

- *Blankenship and [Witness #10] thought [Witness #13] was legitimate and were looking for solutions from [Witness #13].*

- *[Witness #7] thought Blankenship would want to see the [Witness #13] memorandum.*

- *The Hazard Elimination Committee began work at about the same time that [Witness #13] started raising safety issues.*

- *The Hazard Elimination Committee discussed the issues [Witness #13] raised.*

e. [Witness #5] MOI.

- *When [Witness #5] told Blankenship that production was going to drop, because [Witness #5] wanted to get it right.*

f. Two [Witness #19] MOIs. [Witness #10] had been a mine superintendent at UBB.

- *[Witness #19] said that [Witness #4] was willing to accept a certain amount of violations to get a certain mine operation set up, and that [Witness #4] made a conscious decision to violate the law.*[141]

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[141] This statement was potential *Giglio* material as to one of the government's most important witnesses.

- *The track at the UBB mine usually looked pretty decent.*

- *UBB was one of the better mines.*

g. [Witness #20] MOI.

- *[Witness #20] called [Witness #4] the most arrogant a**h*** someone would have to deal with in their life.*[142]

- *[Witness #20] believed that the MSHA report on the explosion was ridiculous.*

h. [Witness #11] MOI.

- *UBB appeared to be a typical coal mine.*

- *The belt appeared to be rock dusted well.*

- *If the conditions [Witness #11] saw had been worse, [Witness #11] would have written citations to coincide with notes.*

- *[Witness #11] never had a Massey Energy employee complain about not being able to talk to MSHA inspectors.*

F. The USAO and Prosecution Team Members Acknowledged that Some of the Undisclosed MOIs Contained Discoverable Statements

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[142] This statement was potential *Giglio* material as to one of the government's most important witnesses.

In early 2017, in part as a result of information provided by OPR, the USAO learned that the government had not disclosed 11 pre-indictment MOIs and 50 post-indictment MOIs prior to the Blankenship trial. By this time, both Ruby and Goodwin had left the USAO. After reviewing the MOIs, the USAO decided to provide Zuckerman with the 61 MOIs, which it did in several productions.[143] [AUSA #1] told OPR that the USAO concluded that some of the MOIs contained statements that should have been disclosed prior to trial.[144] [AUSA #2] stated, "I think we should have turned over all of these [undisclosed MOIs]. And I think these statements are exculpatory, they should have been included in our production ... we should have turned [them] over . . . under Department policy and under *Brady*."[145]

OPR asked the prosecution team members for their views – based on their extensive knowledge of the government's case and Blankenship's defense – as to whether some of the statements in the undisclosed MOIs would have been helpful to the defense had they been disclosed prior to trial.[146] Those statements

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[143] In its transmittal letters, the USAO stated that it was not taking a position as to whether the MOIs were required to have been disclosed prior to trial, or whether the defense suffered any prejudice as a result of the failure to have disclosed those MOIs.

[144] Interview at 14.

[145] Interview at 40-42.

[146] Rather than question witnesses about their views regarding voluminous individual statements from undisclosed MOIs, OPR asked them about common themes that were found in many of the undisclosed MOIs. OPR asked witnesses about certain

(italicized for clarity) and the responses of the team members follow.

Blankenship or Massey was willing to spend money to improve safety. Ruby, [AUSA #1], [AUSA #2], and [DOL SA #1] told OPR that statements of this sort would have been helpful for the defense.[147]

Blankenship cared about safety. [AUSA #1], [DOL SA #1], and [FBI SA #1] told OPR that statements of this sort would have been helpful for the defense.[148]

Blankenship wanted MSHA violations reduced. Ruby, [AUSA #1], [AUSA #2], [DOL SA #1], and [FBI SA #1] told OPR that statements of this sort would have been helpful for the defense.[149]

Blankenship wanted to receive information about Massey or UBB violations in order to reduce them. Ruby, [AUSA #1], [AUSA #2], [DOL SA #1], and

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potentially exculpatory statements even if they were only contained in one or two MOIs.

[147] Ruby Interview at 176; Interview at 30-31; Interview at 36; Interview at 30. Ruby said such statements "in isolation" would be helpful.

[148] Interview at 33; Interview at 30; Interview at 37.

[149] Ruby Interview at 177; Interview at 33; Interview at 36; Interview at 30; Interview at 37. Ruby said such statements "in isolation" would be helpful. said Blankenship wanted to reduce violations not to improve safety, but to reduce monetary fines.

[FBI SA #1] told OPR that statements of this sort would have been helpful for the defense.[150]

Blankenship or other Massey leaders wanted workers to comply with safety regulations. Ruby, [AUSA #2], and [DOL SA #1] told OPR that statements of this sort would have been helpful for the defense.[151]

Blankenship or Massey wanted to start a program to reduce violations and to teach workers how to reduce violations. Ruby, [AUSA #1], [AUSA #2], [DOL SA #1], and [FBI SA #1] told OPR that statements of this sort would have been helpful for the defense.[152]

Blankenship did not want production targets to be too aggressive. [AUSA #1], [AUSA #2], [DOL SA #1], and [FBI SA #1] told OPR that statements of this sort would have been helpful for the defense.[153] Ruby

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[150] Ruby Interview at 178; Interview at 33-34; Interview at 36; Interview at 31; Interview at 37. Ruby said such statements "in isolation" would be helpful. said Blankenship wanted to reduce violations not to improve safety, but to reduce monetary fines.

[151] Ruby Interview at 178-79; Interview at 36; Interview at 31. Ruby said such statements "in isolation" would be helpful.

[152] Ruby Interview at 179; Interview at 34; Interview at 36; Interview at 31; Interview at 40. Ruby said such statements "in isolation" would be helpful. said that while helpful, most Massey workers never heard of the program to reduce violations and were not invited to attend the initial meeting about the program.

[153] Interview at 34-35; Interview at 37; Interview at 31; Interview at 40.

told OPR that this statement "maybe" was discoverable.[154]

Blankenship wanted to receive information about who was committing violations. Ruby, [AUSA #1], [AUSA #2], [DOL SA #1], and [FBI SA #1] told OPR that statements of this sort would have been helpful for the defense.[155]

MSHA decisions and policies made mine conditions less safe. [AUSA #1], [AUSA #2], [DOL SA #1], and [FBI SA #1] told OPR that statements of this sort would have been helpful for the defense.[156] Ruby told OPR that statements of this sort would not have been helpful for the defense.[157]

MSHA violations reflect opinions, not facts. [AUSA #1] and [AUSA #2] told OPR that statements of this sort would have been helpful for the defense.[158]

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[154] Ruby Interview at 134-35. Ruby said that this statement was not inconsistent with the government's theory of the case, as the government maintained that whatever the production quota was, Blankenship told workers to beat that figure. Ruby said the statement was therefore neither exculpatory nor material. *Id.* at 134-35. OPR notes that the indictment does not support Ruby's interpretation, as it asserted that production quotas left too little time for workers to implement required safety measures.

[155] Ruby Interview at 179; Interview at 35; Interview at 37; Interview at 32; Interview at 40. Ruby said such statements "in isolation" would be helpful.

[156] Interview at 35; Interview at 37; Interview at 32; Interview at 40.

[157] Ruby Interview at 180.

[158] Interview at 35; Interview at 37.

Ruby and [FBI SA #1] told OPR that statements of this sort would not have been helpful for the defense.[159]

MSHA was aware of dangers but did not act in response. [AUSA #1], [AUSA #2] and [DOL SA #1] told OPR that statements of this sort would have been helpful for the defense.[160] Ruby and [FBI SA #1] told OPR statements of this sort would not have been helpful for the defense.[161]

UBB operations met minimum regulatory requirements. [AUSA #2] told OPR that statements of this sort might be helpful to the defense.[162] [AUSA #1] and [FBI SA #1] told OPR that statements of this sort would not have been helpful for the defense.[163]

UBB was a well-run mine. Ruby, [AUSA #1], [AUSA #2] and [FBI SA #1] told OPR that statements of this sort would have been helpful to the defense.[164]

MSHA inspectors were sometimes complimentary of UBB conditions. [AUSA #1], [AUSA #2] and [DOL SA #1] told OPR that statements of this

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[159] Ruby Interview at 181; Interview at 40.

[160] Interview at 35-36; Interview at 37; Interview at 32.

[161] Ruby Interview at 181; Interview at 40.

[162] Interview at 37.

[163] Interview at 36; Interview at 40.

[164] Ruby Interview at 184; Interview at 36; Interview at 37; Interview at 40. Ruby said such statements would be helpful if they referred to safety, not profit.

sort would have been helpful for the defense.[165] Ruby told OPR that statements of this sort were marginally helpful.[166] [FBI SA #1] told OPR that statements of this sort would not have been helpful for the defense.[167]

UBB had decreasing numbers of infractions. [AUSA #1], [AUSA #2], [DOL SA #1], and [FBI SA #1] told OPR that statements of this sort would have been helpful for the defense.[168] Ruby told OPR that statements of this sort might be helpful for the defense.[169]

MSHA was biased against Massey as opposed to other companies. Ruby, [AUSA #1], [AUSA #2], [DOL SA #1], and [FBI SA #1] told OPR that statements of this sort would have been helpful for the defense.[170]

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[165] Interview at 36-37; Interview at 38; Interview at 33.

[166] Ruby Interview at 185-86. Ruby said such evidence was akin to saying that for 29 out of 30 days, a bank robber did not rob a bank.

[167] Interview at 41. said that if MSHA inspectors found positive conditions, it could have been because the mine had advance notice of MSHA inspectors' visits.

[168] Interview at 38; Interview at 38; Interview at 33; Interview at 41-42.

[169] Ruby Interview at 186. Ruby said that the statement itself was not true.

[170] Ruby Interview at 187; Interview at 38; Interview at 38; Interview at 33; Interview at 41-42. Ruby said that such statements "in isolation" were helpful. said that if MSHA was

There was no difference in conditions or violations between UBB and other mines. [AUSA #1] and [AUSA #2] told OPR that statements of this sort would have been helpful for the defense.[171] [FBI SA #1] told OPR that statements of this sort would not have been helpful for the defense.[172]

It is impossible to have perfect mine conditions; there will always be citations that can be written. [AUSA #1] and [AUSA #2] told OPR that statements of this sort would have been helpful for the defense.[173] [DOL SA #1], and [FBI SA #1] told OPR that statements of this sort would not have been helpful for the defense.[174]

Violations of safety standards were not intentional. Ruby, [AUSA #1], [AUSA #2], [DOL SA #1], and [FBI SA #1] told OPR that statements of this sort would have been helpful for the defense.[175]

Violations of safety standards were not a result of a worker shortage, but of worker inexperience. [AUSA #1], [AUSA #2], [DOL SA #1], and [FBI SA #1]

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biased, it was because of all the violations found at Massey mines.

[171] Interview at 39; Interview at 39.

[172] Interview at 42.

[173] Interview at 39; Interview at 39.

[174] Interview at 33-34; Interview at 42.

[175] Ruby Interview at 188; Interview at 39; Interview at 39; Interview at 34; Interview at 41-42. Ruby said that such a statement "in isolation" would be helpful.

told OPR that statements of this sort would have been helpful for the defense.[176]

G. Prosecution Team Members Asserted that the Defense Was Not Prejudiced by the Failure to Disclose 61 MOIs

As noted above, prosecution team members acknowledged that some of the undisclosed MOIs contained discoverable statements that should have been disclosed prior to trial. However, these same witnesses asserted that most, if not all, of those discoverable statements were available to the defense from other sources, including produced documents and disclosed MOIs. These witnesses asserted that during the defense's cross-examination of the government's witnesses,[177] it was able to introduce documents and elicit testimony that covered essentially all of the discoverable statements that were contained in the undisclosed MOIs.

Ruby made this point as follows:

> [T]o the extent there was information that could be regarded as materially favorable [in the undisclosed MOIs], most or all of that information was available to the defense in some other form. In that regard, it is important to emphasize the larger context of the discovery, in which hundreds of other memos and interview transcripts—

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[176] Interview at 40; Interview at 39; Interview at 34; Interview at 41-42. Ruby said that because made this statement, it was not relevant because did not work at UBB.

[177] The defense called no witnesses.

> including memos and transcripts of interviews with many of these same witnesses—were disclosed, not to mention hundreds of thousands of documents, many of which disclosed the same information discussed in these memos. One of the benefits of making broad disclosures is that even if discoverable information from one source is inadvertently omitted from a production, the same information will be made available from another source. If there were inadvertent omissions here, you will find that this redundancy effect generally applied.[178]

Ruby added that the fact that the discoverable statements contained in the undisclosed MOIs was readily available to the defense by the time of trial from other sources is evidence that the failure to disclose the statements in those MOIs was not intentional, for it would make no sense to suppress information already in the defense's possession.[179]

At the conclusion of Ruby's OPR interview, he agreed to provide OPR with evidence to support his claim that the discoverable statements in the 61 undisclosed MOIs were available to the defense from other sources.[180] A few days after Ruby's interview, OPR sent him a list of over 100 arguably discoverable

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[178] January 19,2017 Ruby e-mail to OPR.

[179] Ruby Interview at 178.

[180] *Id.* at 197.

statements from some of the 61 MOIs, most of which are discussed in this report, and asked him whether the information in those statements was "known or available to the defense from other sources."[181] Ruby did not respond to OPR's question, and did not provide OPR with evidence that the defense had access to the information in those statements from other sources.

Ruby's assertion that there was significant overlap between statements contained in the undisclosed MOIs and other materials that were disclosed is partially correct. Some witnesses whose MOIs were not disclosed had been interviewed on other occasions, either by the prosecution team, before the grand jury, or by MSHA after the UBB explosion, and the MOIs, grand jury transcripts, or MSHA interview transcripts had been disclosed to the defense. However, the USAO told OPR that for six important witnesses whose statements were memorialized in undisclosed MOIs – [Witness #3], [Witness #15], [Witness #7], [Witness #8], [Witness #16], and [Witness #1] – the prosecution team had not disclosed any other MOI, grand jury transcript, MSHA transcript, immunity agreements, or proffer agreements. Of course, the information in the undisclosed MOIs for those six witnesses may have been available from other sources, such as Massey or MSHA documents, or MOIs for other witnesses.

[AUSA #1] told OPR that many of the discoverable statements in the undisclosed MOIs were brought up by the defense during trial.[182] [AUSA #2]

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[181] October 3,2017 OPR e-mail to Ruby.

[182] Interview at 30-39.

stated, "I don't think any of these [undisclosed MOIs] would have changed the direction of trial . . . Because most of it was introduced during their cross-examination of our witnesses ... none of [them] would have changed the outcome of the trial had we disclosed [them]."[183] [DOL SA #1] said that many of the statements in the undisclosed MOIs that would have been helpful to the defense were brought out during the defense's cross-examination of the government's witnesses.[184] [FBI SA #1] told OPR that many of the statements in the undisclosed MOIs that may have been helpful to the defense were brought out by the defense during the trial.[185]

It is important to note that no one, including Ruby, told OPR that the reason why the 61 undisclosed MOIs were not disclosed was because the information in those MOIs was available to the defense from other sources, including the 372 disclosed MOIs or the four million pages of discovery produced to the defense. If that had been the reason why some or all of the 61 MOIs were not disclosed, OPR would have to undertake a different factual and legal analysis than that reflected in this report. But neither Ruby nor anyone else asserted that claim. The reason why the 11 pre-indictment MOIs were not disclosed was because, as Ruby admitted, he made a mistake, and not because he knew that the defense already possessed the statements in those 11 MOIs. And the reason why the 50 post-indictment MOIs were not disclosed was because, according to Ruby, he

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[183] Interview at 40-42.

[184] Interview at 48-49.

[185] Interview at 43.

and Goodwin decided to make disclosures by letter, and not because they knew that the defense already possessed the statements in those 50 MOIs. The fact that the defense may have possessed some or all the discoverable statements contained in the undisclosed MOIs is therefore only relevant to the issue of whether the defense was prejudiced by the failure to disclose the 61 MOIs. It is not relevant to the issue of whether the government violated its discovery obligations when it failed to disclose them.

H. Blankenship's Defense Team Declined to Explain How the Government's Failure to Disclose 61 MOIs Prejudiced the Defense

OPR asked Zuckerman whether and how Blankenship's defense had been prejudiced by the government's failure to disclose 61 pre- and post-indictment MOIs. Zuckerman declined to fully answer OPR's question, but stated:

> A number of the questions that you have posed ask us to address prejudice to the defense from the government's failure to disclose exculpatory information. While Mr. Blankenship was prejudiced by the government's misconduct, we do not address that issue in our responses. Nor do we believe this is the appropriate forum to address prejudice, especially because we may yet raise such issues with the Court. Even if the government misconduct did not prejudice the defense, respectfully, that is not the question. The issue is whether the

government prosecutors committed misconduct.[186]

I. The Government Identified for the Defense Ten MOIs that Contained Discoverable Statements

1. The Court Orders the Government to Identify *Brady* Material

On June 12, 2015, in response to a defense motion, the court directed the government to designate and disclose to the defense all *Brady* material of which it was aware. A few days after the court's order, [DOL SA #1] recalled that Ruby asked [DOL SA #1] to review the MOIs had drafted to identify those that contained *Brady* material.[187] On June 19, 2015, [DOL SA #1] sent Ruby an e-mail, attaching 12 MOIs, stating, "Per our discussion. I have reviewed and attached the following." Of the 12 MOIs attached to [DOL SA #1] June 19 e-mail, ten were pre-indictment and two were post-indictment.[188]

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[186] May 16, 2017 Zuckerman letter to OPR at 1. Blankenship's attorneys did in fact eventually raise this issue with the court. On April 18,2018, McGuireWoods filed a "Motion to Vacate and Set Aside Defendant's Conviction and Sentence Pursuant to 28 U.S.C. § 2255." The motion alleges that the government's failure to disclose 61 MOIs as well as certain MSHA documents prejudiced Blankenship's defense.

[187] Interview at 14-15. Ruby told OPR that he did not recall asking or to conduct a search of MOIs they drafted to look for Brady material. Ruby Interview at 57. said that did not recall Ruby asking to conduct a search of the MOIs drafted to look for Brady material. Interview at 27, 30. OPR found no evidence that conducted such a search.

[188] Pre-indictment MOIs: (March 11, 2014); (April 28, 2010); (May 11,2010); (June 4,2014); (August 14,2014); (August 27,2014); (November 10, 2011); (November 10, 2011); (November

Of the ten pre-indictment MOIs selected, six had not been disclosed previously to the defense.[189]

On June 22, 2015, pursuant to the court's order, Ruby sent Zuckerman a letter identifying documents and MOIs that "the Defendant might claim are *Brady* material."[190] Ruby identified ten MOIs as possibly containing *Brady* material: [Witness #22] (May 11, 2010); [Witness #21] (April 28, 2010); [Witness #12] (November 16, 2011); [Witness #25] (February 5, 2012); [Witness #6] (June 9, 2012); [Witness #24] (November 10, 2011); [Witness #26] (February 4, 2014); [Witness #27] (August 27, 2014); [Witness #19] (November 15, 2010); [Witness #23] (August 27, 2014). All ten MOIs were pre-indictment and had previously been disclosed to the defense.

Ruby said he did not recall how he chose the ten MOIs he identified as containing potential *Brady* material.[191] There are, however, significant overlaps, as well as significant differences, between the list of 12 MOIs [DOL SA #1] selected, and the list of ten MOIs Ruby ultimately selected. [DOL SA #1] selected

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10, 2011); (February 5, 2014). Post-indictment MOIs: (January 16, 2015); (January 21,2015).

[189] The six MOIs pertained to [Witness #17]; [Witness #12]; [Witness #6]; [Witness #1]; [Witness #10] and [Witness #8].

[190] June 22, 2015 Ruby letter to Zuckerman at 1. In the letter. Ruby stated that, "the United States does not know of any evidence that truly tends to exculpate [the] Defendant."

[191] Ruby Interview at 59-60. Ruby told OPR that he did not have a formal process for reviewing all of the MOIs. Ruby said that based on his discussions with the trial team, he believed the team knew the evidence well enough to make disclosure decisions without a formal review process. *Id.* at 61.

two post-indictment MOIs. Ruby did not select either one. [DOL SA #1] and Ruby selected the same MOIs for [Witness #22], [Witness #21], [Witness #24] and [Witness #23]. [DOL SA #1] and Ruby both selected MOIs from [Witness #12] and [Witness #6] but selected different MOIs; [Witness #6] [Witness #12] had been interviewed multiple times.[192] Although [DOL SA #1] selected MOIs from [Witness #17] [Witness #1] and [Witness #8] as containing potential *Brady* material, Ruby did not select those MOIs in the list he sent to the defense. The [Witness #17] [Witness #1] and [Witness #8] MOIs had not been disclosed, and as discussed above, each contained statements that OPR finds should have been disclosed.

2. Discoverable Statements in the Ten MOIs Identified By Ruby

OPR reviewed the ten MOIs that Ruby told the defense might contain potential *Brady* material in order to identify the discoverable statements contained in those MOIs. As discussed later in this report, OPR found no difference between the discoverable statements contained in those ten MOIs and the discoverable statements contained in some of the 61 undisclosed MOIs. This finding supports both OPR's conclusion that the discoverable statements in some of the 61 undisclosed MOIs should have been disclosed to the defense, and the prosecution team's assertion that the defense was not prejudiced by the failure to disclose the 61 MOIs, because the discoverable statements in them were available to the

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[192] Notably, [DOL SA #1] identified MOIs pertaining to and that had not been disclosed. Ruby selected MOIs pertaining to and that had been disclosed.

defense from other sources, such as MOIs that had been disclosed.

OPR found that the ten MOIs Ruby identified as containing potential Brady material contained the following discoverable statements.

a. [Witness #27] MOI.

- *Blankenship wanted to see the report cards (regarding mine conditions) even if he was traveling.*

- *Blankenship never told [Witness #27] to say or not to say something to investigators.*

- *[Witness #27] was never concerned that what Blankenship was asking [Witness #27] to do might be against the law.*

b. [Witness #23] MOI.

Although both [DOL SA #1] and Ruby identified the [Witness #23] MOI as one that contained discoverable statements, OPR did not identify any such statements in [Witness #23] MOI.[193]

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[193] OPR asked the USAO, Ruby, and why Ruby and put the MOI on the list of MOIs they described as containing potential Brady material. TTie USAO said that the MOI was identified because "had some positive things to say about Blankenship and relationship with December 15,2017 USAO e-mail to OPR. Ruby did not respond to OPR's e-mail. told OPR that had had positive work experiences with Blankenship, as evidenced by several positive comments made about Blankenship as noted in MOI. December 4, 2017 e-mail to OPR. OPR does not necessarily agree that such information was discoverable material that was

c. [Witness #25] MOI.

- *Blankenship would not directly tell you to break the law.*

- *Blankenship never instructed [Witness #25] not to inform MSHA of issues [Witness #25] was experiencing at [a mine].*

d. [Witness #19] MOI.

- [Witness #4] *had once advised* [Witness #19] *to operate the mine in a way that would have violated the law.*

e. [Witness # 12] MOI.

- *[Witness # 12] made a decision to shut down a Massey mine because of high methane levels.*

- *[Witness # 12] discussed with Blankenship spending $1 million for certain seals to be installed at a Massey mine and Blankenship approved the purchase.*

- *Blankenship never specifically directed [Witness # 12] to keep producing coal while the mine was in violation status.*

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required to be disclosed in a case about a conspiracy to violate mine safety standards and securities law violations.

- *[Witness # 12] said [Witness # 12] was unaware that [Witness # 4] or anyone else at Massey ever took the position that something needed to be withheld from MSHA.*

f. [Witness # 21] MOI.

- *There were no safety issues at UBB that affected [Witness # 21] personally and [Witness # 21] did not believe any safety issues contributed to the explosion.*

- *[Witness # 21] believed that the water problem at a certain mine section was under control at the time of the explosion.*

- *[Witness # 21] was never told to lie to an inspector and never heard of anyone else lying.*

- *On the day of the explosion mine conditions and air quality was good, and no methane was detected.*

- *[Witness # 21] did not believe negligence played any part in the explosion.*

- *[Witness # 21] wanted to know what caused the explosion, but cannot link the explosion to something someone did or did not do.*

g. [Witness #22] MOI.

- *[Witness #22] never asked [Witness #22] men to do anything that was unsafe.*

- *[Witness #22] told [Witness #22] men that if [Witness #22] ever did anything that was not safe, [Witness #22] would be fired.*

- *Blankenship and [Witness #10] wanted miners to work safely.*

h. [Witness #26] MOI.

- *[Witness #26] never observed a violation that was not fixed.*

- *[Witness #26] focused on safety at his operations.*

- *With MSHA's scrutiny there were going to be violations.*

- *[Witness #26] mine managers thought they were running safe operations.*

- *It was not accepted that [Witness #26] mines were going to violate safety standards.*

- *When Massey began to grow, [Witness #10] and [Witness #28] attended more budget meetings than Blankenship.*

- *Massey's management did not tolerate violations.*

- *[Witness #26] was not aware of giving the mines advance notice of the presence of MSHA inspectors.*

- *[Witness #26] was never told by [Witness #26] superiors that advance notice should be given at [Witness #26] mines.*

- *Every mine would receive violations.*

- *[Witness #26] was never told by anyone at Massey to specifically break the law or that they did not care how often [Witness #26] broke the law.*

- *[Witness #26] was not aware of any actions by Blankenship that [Witness #26] believed were illegal.*

i. [Witness #24] MOI.

- *A certain statistical measure of safety was the only thing that figured into executive compensation before the UBB explosion.*

- *Bonuses were tied to production, safety, and performance.*

- *Group president bonuses were based on safety, production, and environmental violations.*

- *Safety was always discussed at Massey and the discussions seemed real and important.*

j. [Witness #6] MOI.

- *The "kill the spider" program to eliminate mine hazards was initiated on August 1, 2009.*

- *[Witness #10] wanted to reduce the number of citations and injuries.*

- *The Hazard Elimination Program reduced citations and accidents at Massey.*

- *Blankenship set a goal of reducing hazards by 50%.*

- *During [Witness #6] first visit to UBB [Witness #6] found the mine well ventilated and rock dusted.*

- *A ventilation test was created after Blankenship told [Witness #6]that he wanted to ventilate a mine.*

- *[Witness #6] once shut down a mine without any discouragement for doing so.*

- *[Witness #6] was sure that MSHA knew that advance notice was being given of their inspections.*

- *Blankenship never turned down any suggestions made regarding ventilation.*

- *During the first year of the Hazard Elimination Program, there were fewer citations and penalties at Massey.*

J. Potential *Giglio* Material in Undisclosed MOIs

In late June 2015, Ruby asked [Paralegal #1] to review all of the MOIs drafted during the *Blankenship* investigation and prosecution and identify all negative statements in those MOIs about [Witness #4].[194] [Paralegal #1] created a 59-page chart as a result of her MOI review. The chart contained the witness' name, the MOI date and Bates-stamp numbers, and a summary description of the negative information about [Witness #4] contained in the MOI. [Paralegal #1] sent the chart to Ruby on June 29, 2015, and at Ruby's request to [AUSA #2] on July 13, 2015.[195]

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[194] Ruby told OPR that he did not recall asking [Paralegal #1] to prepare the chart. Ruby Interview at 152-53. Ruby said that there was a lot of negative information about in MOIs that were disclosed, and that he did not recall thinking about disclosure issues in connection with the chart. *Id.* at 153-54.

[195] [AUSA #2] told OPR that did not recall why sent the chart, but that around that time, the team was preparing for the cross-examination of witnesses. Interview at 68. If, as asserts, believed that all MOIs were being disclosed, then would not have been

The chart contained information culled from numerous MOIs that had been disclosed to the defense, and other information culled from ten MOIs that had not been disclosed. Among other statements, an undisclosed MOI from a March 17, 2015, interview of [Witness #19] stated that [Witness #4] was willing to accept a certain number of violations in order to get a certain mining operation set up, and that made a conscious decision to violate the law.

IV. FACTS RELEVANT TO THE GOVERNMENT'S REPRESENTATIONS TO THE COURT AND THE DEFENSE ABOUT MOI DISCLOSURES

The defense filed numerous motions seeking orders requiring the government to comply with its *Brady* obligations and to disclose the handwritten notes taken by government agents during witness interviews. In response to those motions, the government made representations to the court and the defense about its MOI disclosures. Zuckerman has alleged that the government's representations to the court and the defense were false or misleading.[196] In addition, Zuckerman sent Ruby several e-mails about the government's MOI disclosures, one of which revealed Zuckerman's misunderstanding of the government's practice, to which Ruby did not respond.

A. February, May, and July 2015 Pleadings Regarding MOI Disclosures

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aware that the chart contained potential *Giglio* material that had not been disclosed to the defense.

[196] May 16, 2017 letter from Zuckerman to OPR, Exhibit 1 at 3.

On February 6, 2015, the defense filed a "Motion to Enforce the Government's *Brady* Obligations." The supporting memorandum requested that the government produce handwritten or typewritten notes from the interviews the government had conducted. On February 20, 2015, the government filed a response entitled, "United States' Response to Defendant's Motion to ... Enforce the Government's *Brady* Obligations." In the response, the government opposed Blankenship's motion, stating in part, "the United States has provided extensive discovery. . . . Includ[ing]... materials which the United States is not required to disclose, including FBI 302s."[197] The government did not inform the court that it was not disclosing post-indictment MOIs to the defense. Ruby electronically signed the pleading.

[AUSA #1] drafted the February 20, 2015 brief, and sent a draft to Goodwin and Ruby before it was filed.[198] Ruby told that he thought the draft "looks great."'[199] Goodwin told Ruby that he reviewed the draft and that "no further changes [are] necessary."[200] Goodwin also sent a draft of the pleading to [AUSA #2].[201]

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[197] Brief at 2.

[198] February 19, 2015 e-mail from to Goodwin, Ruby, and [AUSA #3].

[199] February 19,2015 e-mail from Ruby.

[200] February 20,2015 e-mail from Goodwin to [Paralegal #1] and Ruby.

[201] February 20,2015 e-mail from Goodwin to [AUSA #2].

On May 6, 2015, the defense filed a brief entitled, "Motion to Compel Production of Witness Interview Notes . . . Containing *Brady* Information." In the motion, the defense stated that its February 6 motion requested "all handwritten and typewritten notes of witness interviews ... which contain *Brady* information."[202] The motion again requested "all handwritten and typewritten notes of witness interviews . . . that contain *Brady* material."[203] It is clear that the defense was seeking the underlying materials for all witness interviews. On May 14, 2015, the government filed a response entitled, "United States' Response to Defendant's Motion to Compel Production of Witness Interview Notes and Records of Attorney Proffers Containing *Brady* Information." In the brief, the government opposed Blankenship's motion to obtain attorney and agent handwritten notes taken during witness interviews, stating in part, "the United States has exceeded its discovery obligations by producing – in a digitally searchable format – typed 302 reports that summarize witness interviews, regardless of whether they contain exculpatory information."[204] The government did not inform the court that it was not disclosing post-indictment MOIs to the defense. Ruby electronically signed the pleading.

[AUSA #2] drafted the May 14, 2015, brief, and sent a draft to Ruby.[205] Ruby sent the draft to [AUSA

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[202] Defense motion at 1.

[203] *Id.* at 4.

[204] Brief at 2.

[205] May 13, 2015 e-mail from [AUSA #2] to Ruby.

#1].[206] The brief was filed after minor revisions. On May 14, [Paralegal #2] sent a copy of the filed brief to Goodwin and others on the prosecution team.[207]

On July 8, 2015, the defense filed a Motion to Compel Compliance with *Brady* Order. The motion requested an order compelling the government to "produce all handwritten and typewritten notes ... of witness interviews."[208] It is clear that the defense was seeking the underlying materials for all witness interviews. On July 14, 2015, the government filed a response entitled, "United States' . . . Response to Defendant's Motion to Compel Compliance With *Brady* Order." In the brief, the government opposed Blankenship's motion to compel the government to disclose *Brady* material, stating in part, "the United States has produced memorandums that reflect the substance of well over 300 witness interviews. The Court has already rejected Defendant's claim that he is entitled to the United States' work product relating to witness interviews, and since the United States has complied with [the court's] Brady Order with respect to the substance of those interviews, there is no need to revisit that ruling."[209] The government also wrote that, "Defendant's renewed request for . . . notes of interviews, should be denied . . . [because] the United States has already produced memorandums that

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[206] May 13, 2015 e-mail from Ruby to [AUSA #1].

[207] May 14, 2015 e-mail from [Paralegal #2] to Goodwin and others.

[208] Defense motion at 12.

[209] Brief at 8.

memorialize the substance of those interviews. . . ."[210] The government did not inform the court that it was not disclosing post-indictment MOIs to the defense. Ruby electronically signed the pleading.

Ruby drafted the July 14, 2015 brief, and sent a draft to Goodwin, [AUSA #1] and [AUSA #2] for their review.[211] Both Goodwin and made revisions to the draft.[212]

[AUSA #1] told OPR that when [AUSA #1] drafted the February pleading, [AUSA #1] believed that the government had disclosed all MOIs, and did not intend to mislead the court.[213] [AUSA #2] said that with respect to all three pleadings, [AUSA #2] believed that the government had disclosed all MOIs.[214] Ruby told OPR that with respect to these three pleadings, the government did not intend to mislead the court through the government's representations about its MOI disclosures. Ruby stated, "we certainly didn't file anything with the intent of misleading the court or say anything in a pleading with the intent of misleading the court.... [A]ll of these statements were intended to refer to the

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[210] Brief at 12.

[211] July 13, 2015 e-mail from Ruby to Goodwin, [AUSA #1] and [AUSA #2].

[212] *See* various e-mails among Ruby, Goodwin, and from July 13 and July 14, 2015, including a July 13, 2015 e-mail from Goodwin to the team, in which Goodwin asks to receive the most current draft for review.

[213] Interview at 22.

[214] Interview at 45.

pre-indictment interview memoranda that we had produced."[215]

B. Ruby's Statement During Trial Regarding MOI Disclosures

During [Witness #4] five-day cross-examination, [Witness #4] testified that [Witness #4] had not conspired with Blankenship and had not committed any crimes, and that Blankenship wanted MSHA violations reduced. [Witness #4] testified that [Witness #4] or [Witness #4] attorneys had provided that information to the government prior to trial. The defense then alleged that the government violated its *Brady* obligations by failing to disclose that information. (This allegation is discussed more fully above in Section II(E).) The prosecution and defense discussed this matter with the court, outside the presence of the jury. During that discussion. Ruby told the court, "We've turned over Grand Jury material from this witness [Witness #4]. We have also turned over 302s from our interviews with this witness ... and so to the extent that there is exculpatory information that we had from this witness, that's been turned over to the defense."[216]

[DOL SA #1] and [FBI SA #1] prepared six MOIs memorializing [Witness #4] interviews from the following dates: October 22, 2014; November 11, 2014; April 2, 2015; September 12, 2015; September 21, 2015; and October 18, 2015. In fact, the government had disclosed only the pre-indictment MOI dated

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[215] Ruby Interview at 105, 109.

[216] October 30, 2015 Trial Transcript at 3712.

November 11, 2014. According to Ruby, he mistakenly believed that the second pre-indictment MOI, dated October 22, 2014, had also been disclosed. Because the remaining four [Witness #4] MOIs reflected post-indictment interviews, Ruby intentionally had not disclosed them. Ruby's statement to the court that the government had "turned over 302s from our interviews with this witness" was arguably misleading.[217]

Ruby told OPR that he did not intend to mislead the court, and that his statement was meant to refer to the two pre-indictment MOIs (one of which Ruby mistakenly believed had been disclosed).[218] Ruby said that he did not mean to state that all of [Witness #4] MOIs had been disclosed and that it never crossed his mind to mislead the court.[219] Witnesses told OPR that Goodwin attended the trial every day.[220] Because Ruby's statements about the disclosure of [Witness #4] MOIs were made in open court, Goodwin presumably heard them. Because Goodwin declined OPR's request for an interview, OPR was unable to ask Goodwin why he did not correct Ruby's arguably misleading statement, if, as

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[217] OPR notes that Ruby's statement to the court on October 30, 2015 that "[w]e have also turned over 302s from our interviews with this witness" occurred only 12 days after the government's final interview of on October 18,2015. Ruby attended that interview. In addition, was interviewed twice in September 2015, the month before Ruby made his arguably inaccurate statement to the court; both Ruby and Goodwin attended those interviews.

[218] Ruby Interview at 118.

[219] *Id.* at 119-20.

[220] Interview at 29.

Ruby asserts, Goodwin knew that the government had not disclosed post-indictment MOIs.

C. Zuckerman Asked the Government Whether It Was Disclosing All MOIs

On April 15, 2015, a Zuckerman attorney sent an e-mail to Ruby, asking, "From your earlier statements to us and the Court, we understand that all of the [MOIs] that the government conducted as part of its investigation... have been provided to the defense…. If our understanding is incorrect, please let us know."[221] On April 17, 2015, the same Zuckerman attorney sent another e-mail to Ruby, asking him to respond to the attorney's April 15 e-mail. OPR found no evidence that Ruby forwarded either of these e-mails to anyone. Both [AUSA #1] and [AUSA #2] told OPR that they did not recall seeing this e-mail.[222] OPR found no evidence that Ruby responded to Zuckerman's question, notwithstanding that the e-mail showed that Zuckerman wrongly understood that it had received all MOIs in the government's possession.[223] OPR asked Ruby why he did not

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[221] In his April 15,2015 e-mail, the Zuckerman attorney stated that the defense could not locate all of the MOIs that the government had previously disclosed, and that the MOIs appeared to have different Bates-stamp markings. Ruby responded to that portion of Zuckerman's April 15 e-mail. On April 21, 2015, Ruby sent Zuckerman a list of all MOIs that the government had disclosed, arranged by Bates-stamp numbers.

[222] Interview at 21; Interview at 48.

[223] [AUSA #2] said that [AUSA #2] was generally aware that Ruby did not respond to all of Zuckerman's e-mails. [AUSA #2] said that the team was concerned that whatever the response, it would be used against the government. Interview at 49-50.

respond to Zuckerman's e-mail. Ruby said that as a result of Goodwin's decision that the team should not respond to Zuckerman's e-mails, he may not have read the e-mail carefully, but that it was not his intent to mislead Zuckerman by failing to respond.[224]

D. Evidence that Zuckerman Knew or Should Have Known that the Government Was Not Disclosing All MOIs

As described above, on several occasions the government made statements to the court that could be read to indicate that the government was providing the defense with all MOIs in its possession. OPR found no reason to believe that the court knew or should have known that the government was not in fact disclosing all MOIs to the defense. In contrast, OPR found evidence that by August 2015 Zuckerman knew or should have known that the government was not disclosing all MOIs.

First, Zuckerman was aware that the [Witness #2] MOI that was disclosed in August 2015 was the only post-indictment MOI it received. In its March 7, 2016 letter to the Department of Justice alleging government misconduct, Zuckerman noted that the government "provided the defense with only a single [MOI] conducted after the indictment was returned."[225]

Second, on September 21, 2015, Ruby sent Zuckerman a letter in which he disclosed potential exculpatory statements the government had obtained

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[224] Ruby Interview at 124-26.

[225] March 7,2016 letter at 3.

during interviews of [Witness 7], [Witness #8], and [Witness #13]. In the letter, Ruby told Zuckerman that the information he was disclosing came from witness interviews. Zuckerman therefore knew that at least for these three witnesses, the government was not providing complete MOIs memorializing the interviews.

Third, all of the MOIs disclosed to the defense were marked with Bates-stamp numbers. In August 2015, Ruby sent the defense the [Witness #2] MOI, with Bates-stamp markings MOI 1534-1540. The highest Bates-stamp marking of an MOI provided to the defense prior to the disclosure of the MOI was MOI 1356-1361. Had Zuckerman carefully examined the MOIs it received from the government, it would have seen that there was a gap of almost 200 pages. The obvious explanation for that gap is that there were MOIs marked with Bates-stamp numbers MOI 1362-1533 that the government had not disclosed.[226]

Fourth, OPR found evidence to suggest that Zuckerman was communicating with some witnesses after those witnesses had been interviewed by the government. If that is so, and if Zuckerman never received MOIs for those witnesses, then Zuckerman knew or should have known that it was not receiving

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[226] The fact that there was a 200-page Bates-stamp number gap between the [Witness #2] MOI and next highest numbered MOI is evidence that Ruby did not intentionally mislead the defense about the existence of undisclosed MOIs. Had Ruby sought to hide the existence of the undisclosed MOIs, he would have directed that the [Witness #2] MOI be marked with the Bates-stamp number MOI-1362, the number immediately after the last page of the highest Bates-stamp number on an MOI disclosed to the defense.

all MOIs. For example, in its March 7, 2016 letter to the Department, Zuckerman stated that it had learned that "the government interviewed several individuals who provided information that obviously was favorable to Mr. Blankenship's defense but was never disclosed.[227] When OPR asked Zuckerman to identify those individuals, Zuckerman identified [Witness #1], [Witness #6], and [Witness #8]. In fact, the government had interviewed [Witness #1] and [Witness #8] and had not disclosed the MOIs from those interviews (though Ruby did provide the defense with some information about [Witness #8] interview in his September 21, 2015 letter as discussed above). It is reasonable to conclude that Zuckerman spoke to those witnesses or their counsel after the government had interviewed them, and thus had reason to believe that it had not received all MOIs, if MOIs had been prepared after the government's interviews of those witnesses.

In sum, there is substantial evidence that by August 2015, Zuckerman was or should have been aware that it was not receiving all MOIs the government generated.

V. FACTS RELEVANT TO THE GOVERNMENT'S SEARCH FOR EXCULPATORY EVIDENCE

Zuckerman alleged that the government systematically withheld exculpatory evidence. OPR found evidence inconsistent with Zuckerman's assertion that the government ignored or intentionally violated its discovery obligations. OPR found that the government searched MSHA documents at least three times for exculpatory

[227] March 7, 2016 letter at 3.

evidence. In addition, as noted above, in pleadings filed with the court, the defense acknowledged that the government had disclosed what the defense described as exculpatory material both in MOIs and documents that the government had disclosed.

A. February 2015 Search of MSHA Documents

According to [DOL Attorney], in February 2015, Ruby instructed the DOL to search MSHA documents for potentially exculpatory evidence.[228] On February 20, 2015, [DOL Attorney] sent Ruby an e-mail describing in detail how DOL intended to search MSHA documents. In [DOL Attorney] e-mail, [DOL Attorney] stated that DOL would use the following search terms to identify potentially relevant documents: Blankenship; UBB; Upper Big Branch; PCC; Performance Coal; Advance Notice. [DOL Attorney] told Ruby that those search terms would be used to search the e-mail accounts of four groups of MSHA employees within specific time frames: MSHA District 4 (which included UBB) from January 1, 2008 to April 5, 2010; MSHA Headquarters from January 1, 2008 to March 6, 2012; the MSHA Accident Investigation team, from April 12,2010 to December 6, 2011; and the MSHA Incident Review team, from April 29, 2010 to March 6, 2012. [DOL Attorney] also told Ruby that DOL would search Incident Review team non-e-mail documents, using the same search terms.[229]

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[228] [DOL Attorney] Interview.

[229] Ruby told OPR that he thought that DOL attorneys searched non-e-mail documents only from the Incident Review team because non-e-mail documents from the other three groups had already been searched. Ruby Interview at 51-52.

Ruby forwarded [DOL Attorney] e-mail to Goodwin. Goodwin responded to [DOL Attorney] e-mail on February 24, 2015.[230] Goodwin told [DOL Attorney] that "the point of this exercise is to determine if there is any 'exculpatory' information concerning Massey/UBB in general, and Defendant Blankenship in particular." Goodwin told [DOL Attorney] that such exculpatory information would include, but would not be limited to "(1) statements or indications that Blankenship/UBB was good on safety; (2) statements or indications that MSHA was targeting UBB/Blankenship for improper motives (e.g. because he was critical of MSHA); or (3) statements or indications that citations issued at UBB might be overstated."

On March 26, 2015, [DOL Attorney] told Ruby that DOL attorneys had reviewed about 24,000 e-mails and marked 936 as potentially exculpatory, though noted that "[m]ost of these are not likely to be exculpatory when you review them—we're erring on the side of inclusion."[231] In March 27 and 30 e-mails,

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[230] Ruby told OPR that he believed that Goodwin responded to [DOL Attorney] e-mail because this was around the time [redacted].

[231] March 26, 2015 e-mail from [DOL Attorney] to Ruby. [DOL Attorney] also told Ruby that the team reviewing the e-mails had stopped reviewing e-mails that had been sent "to" those whose e-mail accounts they were searching, and were only searching e-mails that had been sent "from" those whose e-mail accounts they were searching. [DOL Attorney] told OPR that DOL had stopped searching "to" e-mails because they were mostly duplicative of other e-mails, and the search terms were so broad that they captured irrelevant documents such as media reports about the UBB explosion that were contained in "to" e-mail accounts, but not in "from" e-mail accounts. [DOL Attorney] Interview.

[DOL Attorney] informed Ruby that contractors for DOL were sending Ruby discs containing the 936 e-mails. Ruby forwarded both e-mails to [AUSA #2].

When OPR initially interviewed the trial team members, they either said they had no knowledge of the February/March 2015 MSHA e-mail searches, or did not recall whether the government had disclosed any of the 936 e-mails identified by DOL attorneys.[232] Because no prosecution team member could recall with any certainty whether any of the 936 MSHA e-mails that DOL attorneys had identified as potentially exculpatory had been disclosed, OPR asked the USAO to determine what had happened to the 936 e-mails.

After reviewing its records, the USAO determined that Ruby had asked [AUSA #2] to review the e-mails identified by DOL attorneys. [AUSA #2] reviewed the e-mails, and selected those [AUSA #2] believed might be discoverable. On April 1, 2015, [AUSA #2] sent Ruby a link to an electronic folder containing the e-mails [AUSA #2] had identified, and on April 3 [AUSA #2] sent the same link to Goodwin,

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[232] [DOL SA #1] and [DOL Attorney] said they had no knowledge about the February/March DOL search of MSHA e-mails. Interview at 21-22; Interview at 50. said did not know whether the 936 e-mails identified by DOL attorneys were disclosed. Interview at 29. Even though contemporaneous e-mails showed that reviewed the 936 e-mails identified by DOL attorneys, during interview had no recollection of doing so. Interview at 33. said had no knowledge about whether any of the 936 e-mails identified by DOL attorneys were disclosed. Interview. Ruby said he did not recall why in February 2015 he asked DOL to initiate a search of MSHA documents for exculpatory evidence. Ruby Interview at 51. Ruby said that most of the 936 e-mails identified by DOL attorneys were not exculpatory, and some were disclosed, though he did not recall how many. *Id.* at 52-53.

and Ruby (again). In those e-mails, [AUSA #2] said that [AUSA #2] had identified e-mails about how MSHA inspectors "did not know how advance notice worked," and identified post-explosion e-mails that contained MSHA employees' negative opinions about Blankenship or Massey. On April 6, 2015, Ruby sent Zuckerman a letter concerning various issues. At the end of the letter, Ruby stated that the government was disclosing "a small set of additional documents." Those documents included nine MSHA e-mails (and one attached spreadsheet) related to the issue of advance notice. These e-mails were among the 936 e-mails identified by DOL attorneys as potentially containing exculpatory material. The government did not at that time disclose any of the other 936 e-mails identified by DOL attorneys.

After OPR asked the USAO to try to determine how many of the 936 e-mails identified by DOL attorneys had been disclosed, the United States Attorney asked the *Blankenship* team to review those e-mails to determine if further disclosures were warranted. On November 17, 2017, the USAO sent Zuckerman a disc containing 48 e-mails that were among the e-mails the DOL attorneys had identified as potentially exculpatory in March 2015 that had not previously been disclosed. OPR asked the USAO to explain why it had selected those 48 e-mails to disclose to the defense. The USAO said that, "[t]here is no one specific reason why the emails were selected. If they arguably related in any way to a negative attitude toward or treatment of Massey or Blankenship, we included them."[233]

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[233] December 15, 2017 USAO e-mail to OPR. The defense discussed some of the 48 e-mails in its Section 2255 motion.

Nine of the 48 MSHA e-mails that the USAO disclosed in November 2017 were dated before the UBB mine explosion. The 48 e-mails contained information about several different issues, including the following: MSHA employees' negative opinions of Blankenship or Massey (most of those date from after the UBB mine explosion); whether MSHA inspectors knew about or enforced the rule against mines providing advance notice of MSHA inspector activities; discussions of various issues related to UBB as MSHA's report of its internal review about the explosion was being drafted and revised; and technical discussions of various conditions at UBB prior to the explosion (in some cases several years before the explosion). OPR did not reopen its investigation to determine whether the government was required to disclose the 48 e-mails before trial because: (a) OPR reached conclusions regarding similar disclosure issues with respect to MOIs; (b) OPR's investigation was substantially complete when the USAO disclosed the 48 MSHA e-mails; and (c) Blankenship's Section 2255 motion raised the issue of the late disclosure of the 48 MSHA e-mails and is pending before the court.[234]

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[234] On April 6, 2018, after OPR's investigation was complete, the USAO informed OPR that on that date it had made another disclosure of MSHA documents to Blankenship's attorneys. The USAO disclosed documents related to MSHA's disciplining of four MSHA employees as a result of information learned during its internal review of its pre-explosion enforcement activities at UBB. The documents showed that two employees received one-day suspensions, one employee received a letter of reprimand, and one employee received a letter of counseling. The defense discussed some of these documents in its Section 2255 motion. In May 2018, the USAO informed OPR that it was disclosing

B. June 2015 Search of Selected Documents in the USAO's Database

The defense made repeated motions seeking an order compelling the government to disclose *Brady* material. Although the court largely denied those motions, on June 12, 2015, the court ordered that the government should "designate and disclose to defense counsel any and all *Brady* material by the close of business on June 22, 2015."[235] To comply in part with the court's order, Ruby selected approximately 600 documents. On June 18, 2015, Ruby told [AUSA #1] and [AUSA #2] that he and they would each review approximately 200 documents to identify potential *Brady* material. Both [AUSA #1] and [AUSA #2] reviewed their sets of documents and sent Ruby a list of documents that they suggested be identified as potential *Brady* material.[236] On June 21, 2015, Ruby sent a letter to the defense, identifying approximately 140 documents and ten MOIs as containing potential *Brady* material.

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additional MSHA documents to the defense, some of which were related to the MSHA documents disclosed on April 6.

[235] Memorandum Opinion and Order at 14.

[236] Neither [AUSA #1] nor [AUSA #2] knew whether Ruby accepted their suggestions as to what documents should be designated as discoverable. Interview at 26-28; Interview at 41, 45-46. said that to identify potential Brady material, looked for documents in which Blankenship expressed anger about a mine's safety record, or where he said something positive about mine safety. Interview at 26-28.

C. September 2015 Search of MSHA Documents

On August 13, 2015, the defense moved for an early-return subpoena seeking production of certain MSHA documents. The government thereafter disclosed approximately 70,000 pages of documents. Ruby asked DOL attorneys to search those documents for discoverable evidence. On September 8, 2015, [DOL Attorney] sent Ruby an e-mail, attaching a chart listing 115 documents that might be considered exculpatory. [DOL Attorney] told OPR that many of the documents on the chart were duplicates, and so the actual number of potentially exculpatory documents was less than 115. In a September 10, 2015, letter to Zuckerman, Ruby identified as potentially exculpatory two of the documents that [DOL Attorney] had identified in [DOL Attorney] chart. Ruby told OPR that although he had no recollection of how many of the documents identified in the September search as potentially exculpatory were disclosed, some of the documents on the chart prepared were used by the defense at trial, which suggested that they had been disclosed.[237] [DOL Attorney] said that the defense used some of the documents on chart during its cross-examination of witnesses during trial.[238]

[DOL SA #1] and [AUSA #1] told OPR they had no knowledge about the September search of MSHA documents.[239] [AUSA #2] said that [AUSA #1] did not

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[237] Ruby Interview at 64-65.

[238] [DOL Attorney] Interview.

[239] Interview at 21 -22; Interview at 51.

recall ever seeing the chart [DOL Attorney] sent Ruby listing the 115 documents.[240] [FBI SA #1] said [FBI SA #1] was aware of the September search of MSHA documents because there had been discussions in court about that issue during pretrial motions.[241]

As noted above, in March 2015, DOL attorneys identified 936 MSHA e-mails as potentially exculpatory. In September 2015, in response to a subpoena, the government produced thousands of MSHA documents. The USAO told OPR that there were approximately 200 documents that were included in both the March and September 2015 sets of documents.[242] Thus, in September 2015, the government had disclosed to the defense about 200 of the e-mails that DOL attorneys had identified in March 2015 as potentially exculpatory.

VI. APPLICABLE STANDARDS

A. OPR's Analytical Framework

OPR finds professional misconduct when an attorney intentionally violates or acts in reckless disregard of a known, unambiguous obligation imposed by law, applicable rule of professional conduct, or Department regulation or policy. In determining whether an attorney has engaged in professional misconduct, OPR uses the preponderance of the evidence standard to make factual findings.

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[240] Interview at 33.

[241] Interview at 29.

[242] November 6,2017 USAO e-mail to OPR.

An attorney intentionally violates an obligation or standard when the attorney (1) engages in conduct with the purpose of obtaining a result that the obligation or standard unambiguously prohibits; or (2) engages in conduct knowing its natural or probable consequence, and that consequence is a result that the obligation or standard unambiguously prohibits.

An attorney acts in reckless disregard of an obligation or standard when (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard; (2) the attorney knows or should know, based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate, or cause a violation of, the obligation or standard; and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney's disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

If OPR determines that an attorney did not engage in professional misconduct, OPR determines whether the attorney exercised poor judgment, made a mistake, or acted appropriately under all the circumstances. An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from

professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. A mistake, on the other hand, results from an excusable human error despite an attorney's exercise of reasonable care under the circumstances.

B. Standards of Conduct

1. Applicable Bar Rules

Department of Justice regulations provide that Department attorneys shall, in all cases, conform to the rules of ethical conduct of the court before which a particular case is pending.[243] Blankenship was pending before the U.S. District Court for the Southern District of West Virginia. That court has adopted the West Virginia Rules of Professional Conduct (RPC) as the rules governing the professional conduct of attorneys who litigate criminal cases in that court.[244] [Redacted].[245] [Redacted].[246] Therefore,

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[243] 28 C.F.R. §§ 77.3 and 77.2(j)(l)(i).

[244] Local Rule of Criminal Procedure 44.7.

[245] Because Goodwin declined to be interviewed by OPR, OPR does not know whether Goodwin is a member of any other state bar.

[246] [Redacted]

OPR applies the West Virginia RPC in evaluating the conduct of Ruby and Goodwin.[247]

2. Duty to Disclose Favorable Evidence to the Defense

The *Blankenship* prosecution team had a duty to disclose favorable evidence to the defense. This duty was required by: (a) the Constitution, as explained and promulgated in *Brady* and its progeny; (b) Department of Justice policy, as set forth in the United States Attorneys' Manual (USAM), the Ogden Memorandum, and USAO rules; and (c) the West Virginia RPC.

a. Constitutional Obligations

The Fifth Amendment's due process requirements as explained in *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny require a prosecutor to disclose to the defense evidence favorable to the accused that is material either to guilt or punishment. *Brady*, 373 U.S. at 87. In addition, the government must disclose material evidence affecting a witness' credibility. *Giglio v. United States*, 405 U.S. 150, 154 (1972). Exculpatory or impeachment evidence is material if its "omission is of sufficient significance to result in a denial of the defendant's right to a fair trial," *United States v. Agurs*, 427 U.S. 97, 108 (1976),

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[247] [Redacted] As discussed below. West Virginia RPC 3.8(d) requires prosecutors to make certain pretrial disclosures to the defense. [Redacted], no West Virginia court or disciplinary authority has discussed whether the scope of West Virginia RPC 3.8(d) is broader than, or co-extensive with, a prosecutor's duty under *Brady*. For the reasons OPR explains below, it does not reach a finding as to whether Ruby and Goodwin violated West Virginia RPC 3.8(d). [Redacted]

or its suppression undermines confidence in the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 678 (1985).

A *Brady* violation occurs when: (1) evidence that is material and favorable to the accused, either because it is exculpatory or because it is impeaching; (2) is suppressed by the government, either willfully or inadvertently; and (3) prejudice ensues. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

Brady is not violated if the defendant either knows of the exculpatory evidence or could have obtained it through the exercise of due diligence. *See, e.g.. United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004); *Fullwood v. Lee*, 290 F.3d 663, 686 (4th Cir. 2002) (the *Brady* rule "does not compel the disclosure of evidence available to the defendant from other sources, including diligent investigation by the defense."); *United States v. Wilson*, 901 F.2d 378,381 (4th Cir. 1990) (when the exculpatory evidence at issue is "not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine."); *United States v. Diaz*, 922 F.2d 998, 1007 (2d Cir. 1990) ("there is no improper suppression within the meaning of *Brady* where the facts are already known by the defendant.").

b. Department of Justice Policies

(i) The United States Attorneys' Manual

The Department's policy on the disclosure of exculpatory and impeachment information is set forth in Section 9-5.001 of the U.S. Attorneys' Manual (USAM), which generally requires prosecutors to

produce exculpatory and impeachment information beyond that which is constitutionally and legally required. Section 9-5.001(C) is titled, "Disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required." That section expressly states that prosecutors must disclose information "beyond what is 'material' to guilt" as articulated under the Supreme Court precedent cited above. Section 9-5.001(C)(1)-(3) reads:

> (1) Additional exculpatory information that must be disclosed. A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.
>
> (2) Additional impeachment information that must be disclosed. A prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction

> and acquittal of the defendant for a charged crime.
>
> (3) Information. Unlike the requirements of *Brady* and its progeny, which focus on evidence, the disclosure requirement of this section applies to information regardless of whether the information subject to disclosure would itself constitute admissible evidence.

USAM Section 9-5.001(F) summarizes prosecutors' disclosure obligations as follows: "[T]his policy encourages prosecutors to err on the side of disclosure in close questions of materiality and identifies standards that favor greater disclosure in advance of trial through the production of exculpatory information that is inconsistent with any element of any charged crime and impeachment information that casts a substantial doubt upon either the accuracy of any evidence the government intends to rely on to prove an element of any charged crime or that might have a significant bearing on the admissibility of prosecution evidence."

(ii) USAO Policies

The USAO Discovery Policy became effective in October 2010. Section 1(C) notes that, "The Department of Justice has adopted a policy that requires us to go beyond even the strict requirements of *Brady* and *Giglio* and other relevant case law." Section 1(C) then summarizes the requirements of USAM Section 9-5.001. The USAO Discovery Policy notes that a prosecutor's disclosure obligations are also governed by West Virginia RPC 3.8(d), discussed below. The USAO Discovery Policy specifically

addresses the disclosure of MOIs: "Generally, we disclose reports of interview to defense counsel, in the exercise of an expansive discovery practice."

(iii) The January 2010 Ogden Memorandum

On January 4, 2010, then-Deputy Attorney General David W. Ogden issued a detailed memorandum (the Ogden Memorandum) to all Department prosecutors that set forth rules regarding criminal discovery. The memorandum directs prosecutors to familiarize themselves with the government's disclosure obligations, including the duties set forth in *Brady* and *Giglio* and the Department's policies as set forth in USAM § 9-5.001. The memorandum encourages prosecutors "to provide discovery broader and more comprehensive than the discovery obligations" imposed by *Brady* and *Giglio* and the Federal Rules of Criminal Procedure.

The Ogden Memorandum specifically addresses the disclosure of information obtained during trial preparation meetings with witnesses. The memorandum notes that although such meetings "generally need not be memorialized . . . prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pretrial witness preparation session."[248]

The Ogden Memorandum requires prosecutors to "ensure that [information the government obtains] is reviewed to identify discoverable information," and

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[248] Ogden Memorandum, Step 1, Gathering and Reviewing Discoverable Information, Section B(8)(b).

to "develop a process for review of pertinent information to ensure that discoverable information is identified."[249]

The Ogden Memorandum specifically addresses the practice of making required disclosures by letter: "If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, *prosecutors should take great care* to ensure that the full scope of pertinent information is provided to the defendant.[250]

c. West Virginia Rule of Professional Conduct 3.8(d)

West Virginia RFC 3.8(d) requires that a prosecutor in a criminal case shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . ." Most states have a rule of professional conduct similar or identical to West Virginia RPC 3.8(d). There is a split among the courts and disciplinary authorities of those states as to whether the scope of a prosecutor's duties under 3.8(d) is broader than, or co-extensive with, the requirements of *Brady* and its progeny.

Courts and authorities that interpret the scope of 3.8(d) as broader than the requirements of *Brady* include: *McMullan v. Booker*, 761 F.3d 662, 675 (6th Cir. 2014); *Brooks v. Tennessee*, 626 F.3d 878, 892-93 (6th Cir. 2010); *United States v. Wells*, No. 3:13-CR-

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[249] Ogden Memorandum, Step 2, Conducting the Review.

[250] Ogden Memorandum, Step 3, Making the Disclosures, Section C (emphasis added).

00008-RRB, 2013 WL 4851009, at *4 (D. Alaska Sept. 11,2013); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1232-36 (D. Nev. 2005); *In re Kline*, 113 A.3d 202, 212-16 (D.C. 2015); *In re Feland*, 820 N.W.2d 672, 678 (N.D. 2012); *Schultz v. Commission for Lawyer Discipline*, No. 55649, 2015 WL 9855916 (Texas Bd. Discipl. App. December 17, 2015); State Bar of Arizona Ethics Comm. Op. 94-07 (1994); Association of the Bar of the City of New York Prof'l Ethics Committee, Formal Opinion 2016-3, "Prosecutors' Ethical Obligations to Disclose Information Favorable to the Defense" (July 22, 2016).

Courts and authorities that interpret the scope of 3.8(d) as co-extensive with the requirements of *Brady* include: *United States v. Weiss*, Criminal Case No. 05-CR-179-B, 2006 WL 1752373, at *5-7 (D. Colo. June 21, 2006); *In re Attorney C*, 47 P.3d 1167, 1170-71 (Colo. 2002); *In re: Ronald Seastrunk*, No. 2017-B-0178, 2017 WL 4681906 (La. October 18, 2017); *Disciplinary Counsel v. Kellogg-Martin*, 923 N.E.2d 125, 135-39 (Ohio 2010); *State ex rel. Oklahoma Bar Ass'n v. Ward*, 353 P.3d 509, 520-22 (Okla. 2015); *In re Riek*, 834 N.W.2d 384, 388-93 (Wis. 2013).

As far as OPR is aware, neither West Virginia courts nor disciplinary authorities have yet addressed the issue of the scope of RPC 3.8(d). OPR therefore does not know whether that rule imposes a greater disclosure obligation on the *Blankenship* prosecutors than that required by *Brady* and its progeny.

RPC 3.8(d) does not by its express terms address the issue of whether a prosecutor violates its requirements if he acts recklessly, or whether the rule is violated only by intentional acts. OPR is aware of only one authority that appears to have addressed this

issue with regard to West Virginia RPC 3.8(d), albeit in *dicta*. In *Lawyer Disciplinary Board v. Hatcher*, 483 S.E.2d 810, 817-18 (W.Va. 1997) (emphasis added), the court noted in passing that a prosecutor "who *knowingly* fails to make a timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, also runs the risk of violating the West Virginia Rules of Professional Conduct, particularly Rule 3.8, concerning the special responsibilities of a prosecutor." *Hatcher* appears to interpret Rule 3.8(d) to mean that prosecutors are subject to discipline under RPC 3.8(d) only if they intentionally fail to disclose evidence that tends to negate the guilt of the accused.

d. No Duty to Disclose Entire MOIs

In the *Blankenship* case, the government voluntarily disclosed hundreds of MOIs and did not disclose 61 MOIs. There is no legal requirement that the government disclose to the defense entire MOIs. In fact. Fed. R. Crim. P. 16(a)(2) explicitly exempts reports of law enforcement agents from mandated government pretrial disclosures:

> Information Not Subject to Disclosure. Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of

> statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

See United States v. Fort, 472 F.3d 1106, 1107 (9th Cir. 2007) ("We hold that the documents in dispute [reports prepared by local law enforcement agents] are not discoverable because they are covered by Federal Rule of Criminal Procedure 16(a)(2) whether prepared by federal, state, or local officials."); *United States v. Holihan*, 236 F. Supp. 2d 255, 263-64 (W.D.N.Y. 2002) ("The FBI 302 reports are internal investigative documents 'made by the attorney for the government or any other government agent investigating or prosecuting the case' and, as such, are excepted from Rule 16 discovery. Fed. R. Crim. P. 16(a)(2). Such information may also qualify as Jencks Act material pursuant to 18 U.S.C. § 3500, and for which the court is without authority to order pretrial disclosure.").

Of course, notwithstanding Rule 16(a)(2), the government must make a timely disclosure of all potential *Brady* and *Giglio* material in an MOI. As the Ogden Memorandum makes clear, that disclosure can be made by means other than the disclosure of the entire MOI, such as by letter.

3. Duty of Candor

a. Prosecutors Have a General Duty of Candor to the Court

A Department attorney has a general duty of candor to the court that emanates from case law and judicial expectations:

> All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself.

Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir. 1993). *See also Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that "The United States Attorney is the representative ... of a sovereignty ... whose interest [] in a criminal prosecution is not that it shall win a case, but that justice shall be done."); *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457-58 (4th Cir. 1993) (noting that lawyers have the "first line task" of ensuring the integrity of the adversary system).

Lack of candor encompasses not just overt false statements but also the selective omission of relevant information. *Ndreko v. Ridge*, 351 F. Supp. 2d 904, 910 (D. Minn. 2004). As one court stated: "Selective omission of ... relevant ... information exceeds the bounds of zealous advocacy and is wholly inappropriate." *Montgomery v. City of Chicago*, 763 F. Supp. 301, 307 (N.D. Ill. 1991). Stressing the relationship between candor and the administration of justice, one federal court highlighted the increased obligation of attorneys appearing in federal court:

> Attorneys appearing before a federal court are its officers. As such, they owe a primary duty to the administration of justice. They owe the court and the

> public duties of good faith and complete candor in dealing with the judiciary. In addition, as officers of the court, they have a duty to protect and preserve the right to a fair trial. To fulfill such requirements, attorneys must ensure that they bring all conditions and circumstances that are relevant in a given case directly before the court.

In re Dinova, 212 B.R. 437, 447 (1997).

b. West Virginia RFC 3.3(a)(1)

West Virginia RFC 3.3, Candor Toward the Tribunal, reads in part, "(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." RFC 3.3(a)(1). As defined in the RFC, "'knowingly' . . . denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." RFC 1.0(f).

By its express terms, RFC 3.3(a)(1) arguably prohibits only false statements, and does not address statements that are factually correct yet misleading. Also, by inclusion of the word "knowingly," RFC 3.3(a)(1) arguably prohibits only intentional false statements, and not false statements made recklessly. As far as OFR is aware, neither West Virginia courts nor disciplinary authorities have yet addressed the issue of the scope of RFC 3.3(a)(1), and whether it prohibits reckless or misleading statements. Other jurisdictions and authorities have interpreted the scope of 3.3(a)(1) to include reckless and misleading

statements. *See, e.g.. In the Matter of Egbune*, 971 F.2d 1065, 1065 (Colo. 1999) (when considering Rule 3.3(a)(1), recklessness is equivalent to "knowing" for disciplinary purposes); *Office of Disciplinary Counsel v. Wrona*, 908 A.2d 1281, 1289 (Pa. 2006) (an attorney violated Rule 3.3(a)(1) because the attorney made accusations against the presiding judge "with reckless disregard of the truth or falsity of the accusations."); Annotated Model Rules of Professional Conduct (8th Edition), Rule 3.3, Statements Or Omissions That Mislead ("courts routinely employ Rule 3.3(a)(1) and equivalent rules to discipline lawyers who have misled through their silence ... Any differences between 'false' and 'misleading' statements are irrelevant for Rule 3.3(a)(1) purposes)" (citations and quotations omitted).

c. West Virginia RPC 4.1

West Virginia RPC 4.1, Truthfulness In Statements To Others, reads in part, "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." Comment 1 to RPC 4.1 reads in part, "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts ... Misrepresentations can [] occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." OPR notes that the comment to RPC 4.1 expressly discusses misrepresentations, whereas the comments

to RPC 3.3 do not, though both rules prohibit false statements.

VII. FINDINGS AND ANALYSIS

In the following section, OPR sets forth its findings and analysis regarding the allegations that: (1) the government engaged in misconduct in the manner alleged by Zuckerman in its correspondence with the Department; (2) the prosecution violated its discovery obligations by failing to disclose discoverable statements contained in 61 undisclosed MOIs; (3) the prosecution failed to include all discoverable information made in a proffer session and contained in three MOIs that it summarized in two disclosure letters; and (4) the prosecution made misrepresentations and false statements to the court and Zuckerman regarding its disclosure of MOIs.

A. Zuckerman's Initial Allegations Lack Merit

In Zuckerman's initial letter to the Department alleging prosecutorial misconduct, Zuckerman complained that the government had engaged in a pattern of misconduct. OPR finds that those claims lack merit.

Perhaps most important, OPR found that the prosecution team's conduct was inconsistent with Zuckerman's portrayal of it as intentionally suppressing a wide variety of evidence and information in order to prevent the defense from having access to such material. Perhaps the best example of that inconsistency is Ruby's direction to MSHA soon after the indictment was filed to conduct a thorough search for exculpatory documents. In response to Ruby's direction, Department of Labor

attorneys and other personnel spent a significant amount of time searching MSHA e-mails and documents for discoverable evidence. While it is true that few e-mails were disclosed as a result of that time-consuming search, if Ruby had acted consistently with Zuckerman's portrayal of him, he would not have asked MSHA to conduct that search.[251] Ruby was responsible for two additional searches of documents for exculpatory evidence in June and September 2015, and directed the government's initial discovery production, which disclosed to the defense four million pages of documents in an electronically searchable format.

1. The Government Did Not Misrepresent the Facts Concerning Blankenship's Attendance at Budget Meetings

OPR finds Zuckerman's contention that the government presented false information to the court

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[251] As noted, Ruby initiated a search of MSHA e-mails for exculpatory material, and Goodwin provided DOL attorneys conducting the search with examples of potentially exculpatory topics. Ruby directed [AUSA #2] to review the MSHA e-mails identified by DOL attorneys as potentially exculpatory and to select those that might be discoverable. OPR finds that these facts support a conclusion that Ruby and Goodwin did not intentionally withhold exculpatory material. However, prior to trial the government disclosed very few of the e-mails the DOL attorneys had identified, and the USAO disclosed 48 additional MSHA e-mails in 2017. Given these facts it is possible that notwithstanding Ruby's and Goodwin's laudatory intent when initiating the search of MSHA e-mails, they failed to conduct a sufficient review of the e-mails identified by the search. For the reasons stated above, OPR did not attempt to resolve that issue. As the defense has raised the issue of the late disclosure of the 48 MSHA e-mails in its Section 2255 motion, the government and the court will have an opportunity to address that issue.

and jury by arguing that Blankenship attended Massey budget and planning meetings to be without merit. Neither the indictment nor the evidence the government presented at trial asserted that Blankenship attended every budget meeting. Indeed, as Zuckerman alleged, and as the evidence Ruby provided to OPR showed, Blankenship did not attend every budget meeting. But that fact is irrelevant. As alleged in the indictment and argued at trial, the government contended that Blankenship made budget and planning decisions that placed profit over safety. It is irrelevant where those decisions were made – in a budget meeting or elsewhere. What is important is who made them, and the government presented evidence that Blankenship made such decisions. OPR finds Zuckerman' s allegation to be without merit.

2. The Government Did Not Withhold MSHA Inspector E-Mails

Zuckerman alleged that the government disclosed only two e-mails between MSHA inspectors regarding UBB conditions, and inferred that the government must have been intentionally withholding other exculpatory e-mails. Ruby provided OPR with numerous e-mails to and from MSHA inspectors who had inspected the UBB mine, which showed that Zuckerman's inference was incorrect. Moreover, even if it were the case that the government disclosed fewer MSHA inspector e-mails than one would expect, when Zuckerman raised this issue with the court, Department of Labor attorneys cited an MSHA policy that discouraged MSHA inspectors from documenting inspection findings in documents other than the official forms used for such purposes. The

court rejected the defense's argument that the government had failed to disclose all exculpatory MSHA inspector e-mails. OPR finds Zuckerman's allegation to be without merit.

3. The Government Appropriately Relied on UBB Miners to Testify About UBB Conditions

Zuckerman alleged that the government did not use MSHA inspectors as trial witnesses because it was trying to hide exculpatory or damaging testimony. Other than noting that MSHA inspectors did not testify, Zuckerman offered no evidence to support its claim. Ruby plausibly explained that the government did not call MSHA inspectors at trial because the trial team was concerned that a West Virginia jury might unfavorably view the testimony of federal government employees, and because the government could use coal miners to elicit the same facts about UBB conditions. Several trial team members agreed with Ruby's explanation. OPR found Zuckerman's allegation to be without merit.

4. The Court Found No Merit to the Claim that an MSHA Employee Destroyed MSHA Documents Shortly After the UBB Explosion

Zuckerman alleged that the government failed to investigate an allegation that shortly after the UBB explosion an MSHA employee destroyed documents related to UBB. Zuckerman raised this issue with the court, which questioned one of the two persons who had made the allegation. The court rejected the allegation, finding it rife with hearsay. Zuckerman

presented no additional information to OPR. Ruby told OPR that the government had not learned of the allegation until Zuckerman raised it mid-trial. As the court examined and rejected this claim, and because Zuckerman presented OPR with no new evidence, OPR finds the claim to be without merit[252]

5. The Government Did Not Withhold Exculpatory Statements Made by [Witness #4]

Zuckerman alleged that during cross-examination, [Witness #4] made exculpatory statements; that [Witness #4] testified that [Witness

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[252] As discussed above, in November 2017, the USAO disclosed 48 MSHA e-mails to the defense. In one of those e-mails, dated December 4, 2011, an MSHA employee wrote to another MSHA employee the following: "How many miners worked their entire career at UBB? We had a shredding party here in Beckley and the charts you printed for everyone were modified so that they can't be read." Blankenship's attorneys discuss this e-mail in their Section 2255 motion, and assert that it supports their contention that MSHA intentionally destroyed documents. The content of the December 4, 2011 e-mail is unrelated to Zuckerman's contention during trial that an MSHA employee destroyed MSHA documents shortly after the UBB explosion. The MSHA employees named in the two alleged incidents are different, and the document destruction referenced in Zuckerman's original allegation allegedly occurred more than a year prior to the December 2011 e-mail. The December 4, 2011 e-mail therefore does not provide any new support for the allegation that an MSHA employee destroyed documents shortly after the UBB explosion. OPR did not reopen its investigation to determine whether the government was required to disclose the December 4, 2011 e-mail before trial because OPR's investigation was substantially complete at the time it first learned of the e-mail and because Blankenship's Section 2255 motion raised the issue of the late disclosure of that e-mail, and the motion is pending before the court.

#4] made those statements to the government prior to trial; and that the government did not disclose those statements during discovery. Zuckerman told OPR that other than [Witness #4] testimony, it had no other evidence to support its contention that the government intentionally withheld exculpatory statements allegedly made by [Witness #4] None of the five undisclosed [Witness #4] MOIs, nor the handwritten notes of the agents who wrote those MOIs, contained the exculpatory statements that [Witness #4] made during cross-examination. Ruby told OPR that the government was surprised by [Witness #4] testimony on cross-examination. OPR found no evidence to support Zuckerman's allegation that the government knew about and intentionally withheld the exculpatory statements [Witness #4] made during cross-examination.

6. The Government Did Not Intentionally Withhold Two Discoverable Documents

Zuckerman alleged that the government withheld two exculpatory documents: a letter in which an MSHA official "applaud[ed]" a Massey initiative to reduce safety violations, and a chart showing, *inter alia*, the results of a UBB inspection by an MSHA inspector who was complimentary of UBB conditions.

OPR found no evidence that the prosecution team possessed the "applaud" letter prior to the time when Zuckerman attached it to one of its discovery motions in September 2015. The "applaud" letter was sent by an MSHA official to [Witness #10]. When [Witness #10] attorneys met with Ruby and [AUSA #2] in August 2014, they discussed the contents of the letter, but [AUSA #2] notes of the meeting and

contemporaneous e-mails make clear that for unknown reasons, [Witness #10] attorneys did not give the government a copy of the letter. Ruby subsequently disclosed by letter some of what [Witness #10] attorneys told Ruby and [AUSA #2] though as noted below, OPR found that Ruby's summary failed to disclose all of the discoverable statements contained in [AUSA #2] notes taken during the meeting. Although Zuckerman's allegation that the government intentionally did not disclose the "applaud" letter was incorrect, OPR found that Ruby should have made further disclosures about what [Witness #10] attorneys told him in August 2014.

The prosecution team did not possess the chart containing the exculpatory entry made by an MSHA inspector. Ruby explained that because the chart contained information about mines other than UBB, it was not included within the scope of documents the team had requested. Ruby correctly noted, however, that the team had disclosed the handwritten notes taken by the MSHA inspector, and that those notes contained many of the exculpatory statements found in the chart entry. OPR finds that although the government did not intentionally withhold the chart with the notation about the UBB inspection, it would have been better if the government had obtained and disclosed all relevant documents, regardless of whether they related solely to UBB. In any event, the disclosure of the handwritten notes greatly reduced or eliminated any prejudice resulting from the failure to disclose the chart.

B. The Failure to Disclose Discoverable Statements Contained in MOIs

1. The Failure to Disclose 11 Pre-Indictment MOIs Was Not Intended to Suppress Exculpatory Statements

The government disclosed to the defense 372 pre-indictment MOIs, but failed to disclose 11 pre-indictment MOIs. OPR finds that Ruby alone was responsible for the failure to disclose the 11 MOIs. However, Ruby's failure to disclose them was not intended to withhold exculpatory material from the defense.

a. Ruby Alone Was Responsible For the Failure to Disclose 11 Pre-Indictment MOIs

Ruby and the prosecution team's legal assistants were responsible for the technical aspects of the government's discovery disclosures, whether by letter, e-mail, overnight delivery, or other means of providing information. OPR found no evidence that Goodwin, or [AUSA #1] [AUSA #2] [DOL SA #1] or [FBI SA #1] transmitted to the defense any discovery disclosures. Ruby, or a legal assistant acting at Ruby's direction, sent the defense all of the MOIs disclosed by the government. Therefore, no one on the prosecution team, other than Ruby and the legal assistants, had actual knowledge of what MOIs were disclosed or not disclosed, and any knowledge they had regarding that issue came from Ruby, the legal assistants, or through a review of the government's discovery productions.

Ruby told OPR that he and Goodwin decided to disclose all pre-indictment MOIs. Although he could have assigned the task to others, Ruby decided to make all of the government's discovery disclosures himself, aided by the legal assistants, who faithfully followed Ruby's directions. All of the 11 undisclosed pre-indictment MOIs were sent to Ruby or a legal assistant after they were drafted. None were sent to any other attorney on the prosecution team. Therefore, no attorney other than Ruby knew that the law enforcement agents on the prosecution team had sent the USAQ 11 MOIs for pre-indictment interviews several months after the November 2014 indictment, and after the government's December 2014 initial discovery disclosures to the defense. OPR found that [AUSA #1] [AUSA #2] [DOL SA #1] and [FBI SA #1] were credible witnesses, and found no evidence to contradict their assertions that they believed all MOIs had been disclosed.

Based on the foregoing facts, OPR finds that Ruby is solely responsible for the failure to disclose the discoverable statements contained in the 11 pre-indictment MOIs identified in the chart attached at Tab H to this report.

b. Ruby's Failure to Disclose Discoverable Statements In 11 Pre-Indictment MOIs Was Not Intended to Withhold Exculpatory Material from the Defense

Ruby asserted that his failure to disclose 11 pre-indictment MOIs was not intended to withhold exculpatory statements from the defense. Although there is some evidence that contradicts Ruby's

assertion,[253] OPR finds that preponderant evidence supports Ruby's contention that his failure to disclose discoverable statements contained in the 11 pre-indictment MOIs was a result of Ruby's mistaken belief that those 11 MOIs were post-, not pre-, indictment MOIs.

There are several sources of evidence that support Ruby's contention that his failure to disclose the 11 pre-indictment MOIs was unintentional. First, there appears to be no logical reason why Ruby would have disclosed 372 pre-indictment MOIs, but not the 11 MOIs identified in the chart attached at Tab H. If the 11 undisclosed MOIs contained discoverable statements that were obviously more exculpatory than the discoverable statements contained in the hundreds of disclosed MOIs, one might then draw a reasonable inference that Ruby intentionally treated those 11 MOIs differently. But OPR found no difference in the exculpatory value of the discoverable statements contained in the disclosed and undisclosed pre-indictment MOIs. Compare Section III(D)(4) above (discoverable statements in 11 undisclosed pre-indictment MOIs) with Section III(I)(2) above (discoverable statements in ten disclosed pre-indictment MOIs that Ruby identified for the defense as containing potentially exculpatory statements). It is counterintuitive to suggest that Ruby intentionally disclosed hundreds of MOIs, and also intentionally withheld 11 MOIs, even though the exculpatory value of the discoverable statements contained in those 11

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[253] For example, the fact that Ruby received e-mails that clearly showed the dates of the pre-indictment MOIs makes it more difficult to accept his explanation that he believed all MOIs he received after the indictment reflected post-indictment interviews.

MOIs was no different than the exculpatory value of the discoverable statements contained in the MOIs that were disclosed.[254]

Second, the only difference that OPR observed between the disclosed and undisclosed pre-indictment MOIs was that the 11 pre-indictment MOIs that were not disclosed were not provided to the USAO until after the November 2014 indictment, and in some cases many months after the indictment. That fact supports Ruby's contention that he thought that all MOIs the USAO received after November 2014 contained statements made during post-indictment interviews, which he and Goodwin had decided not to disclose.

Third, Ruby's responses to OPR's questions suggest that he believed that all pre-indictment MOIs had been disclosed. During its investigation, OPR told Ruby that it might show Zuckerman all of the material that Ruby provided to OPR, in order to obtain Zuckerman's response to Ruby's contentions. Thereafter, Ruby provided OPR with two of the 11 undisclosed pre-indictment MOIs (pertaining to [Witness #4] and [Witness #6], *see* chart attached at Tab H). If Ruby had intentionally withheld the [Witness #4] and [Witness #6] MOIs, it would make no sense for him to then provide them to OPR, knowing that OPR intended to show them to Zuckerman, which would immediately claim a

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[254] Indeed, in a pleading filed in July 2015, the defense acknowledged that "many" of the 350 MOIs disclosed by the government contained "exculpatory information." Motion to Compel Compliance with *Brady* Order at 4.

discovery violation (which is exactly what happened with the [Witness #4] MOI).

Fourth, many of the discoverable statements contained in the 11 undisclosed pre-indictment MOIs were available to the defense from other sources, including the hundreds of disclosed MOIs. It makes little sense to intentionally withhold statements that the defense already possessed.

OPR finds that preponderant evidence supports a finding that Ruby's failure to disclose 11 pre-indictment MOIs was not the result of an intentional decision to withhold exculpatory evidence.

2. The Decision Not to Disclose 50 Post-Indictment MOIs Was Not Intended to Suppress Exculpatory Statements

The government did not disclose 50 post-indictment MOIs. OPR finds that the failure to disclose those 50 MOIs was intentional, and that Ruby and Goodwin were responsible for that decision. Although the decision to not disclose 50 post-indictment MOIs was intentional, OPR finds that neither Ruby nor Goodwin made that decision with the intent to withhold exculpatory evidence from the defense.

a. Ruby and Goodwin Made the Decision Not to Disclose Post-Indictment MOIs

According to Ruby, he and Goodwin decided not to disclose to the defense post-indictment MOIs; they decided instead that they would make any required disclosures of potentially exculpatory statements contained in those MOIs by letter. Ruby also stated

that all of the prosecution team members knew and approved of that decision. [AUSA #1] [AUSA #2] [DOL SA #1] and [FBI SA #1] however, all denied that they knew about and approved of the decision to disclose discoverable statements in post-indictment MOIs by letter, and to withhold the remainder of the MOIs. To the contrary, all told OPR that they thought all MOIs, including those memorializing post-indictment interviews, were disclosed to the defense.

OPR found no documentary evidence, including contemporaneous e-mails, to support Ruby's contention that others knew about his and Goodwin's plan for how they would handle their disclosure obligations pertaining to the potentially exculpatory statements contained in post-indictment MOIs. OPR found [Witness #1] [AUSA #2] [DOL SA #1] and [FBI SA #1] to be credible witnesses. OPR told [AUSA #1] [AUSA #2] [DOL SA #1] and [FBI SA #1] that they were not subjects of OPR's investigation. They therefore did not face disciplinary consequences as a result of their conduct, and had no incentive to mislead OPR regarding their knowledge of the disclosure of MOIs. Because [AUSA #1] [AUSA #2] [DOL SA #1] and [FBI SA #1] were credible, had no reason to provide OPR with inaccurate information, and because OPR found no documentary evidence inconsistent with their assertions, OPR finds that the preponderant evidence supports their contention that they believed that all MOIs, whether pre- or post-indictment, were disclosed to the defense.

The issue of whether Goodwin, as Ruby insists, knew and approved of the decision not to disclose post-indictment MOIs is more complicated. In a short written statement that did not address the majority of

OPR's written questions to him, Goodwin told OPR that he instructed Ruby to make full disclosures, and that it would be frustrating to learn that some MOIs were not disclosed. When OPR asked Goodwin for an interview, OPR informed him that because he both supervised and participated in the *Blankenship* prosecution, OPR considered him to be a subject of OPR's investigation. Goodwin declined OPR's request for an interview. After OPR interviewed Ruby, OPR again asked Goodwin for an interview, and informed him that it had received information inconsistent with Goodwin's professed frustration at learning that some MOIs had not been disclosed, and that OPR had concerns that the government had filed three pleadings that might have contained misleading information about the disclosure of MOIs. Goodwin did not respond to OPR's second interview request. In Goodwin's response to OPR's draft report, which sets forth in detail Ruby's claim that it was Goodwin who made the decision not to disclose post-indictment MOIs, Goodwin did not clearly agree with or refute that claim. Goodwin merely stated that, "I apparently do not recall matters in the exact way [Ruby] does."[255]

OPR found Ruby to be credible. He acknowledged that he made mistakes regarding the process he followed in determining which post-indictment MOIs to disclose, and the process he followed to decide what information to put in his summary disclosure letters. Ruby provided OPR with specific details regarding Goodwin's role in making the decision not to disclose post-indictment MOIs, and regarding Goodwin's review and approval of the September 21, 2015 letter disclosure. Ruby's specific

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[255] April 19, 2018 Goodwin letter to OPR at 3.

recollection is largely unrebutted because of Goodwin's decision not to answer most of OPR's written questions, and refusal to be interviewed. Although Goodwin stated that he was "frustrated" if MOIs were not disclosed, that general denial is not sufficient to overcome the evidentiary weight of Ruby's specific recollection.

OPR acknowledges that it is treating Goodwin differently than it is treating [AUSA #1] [AUSA #2] [DOL SA #1] and [FBI SA #1] All five deny that they knew that MOIs were not disclosed, and there is no documentary evidence to contradict those denials. All five would therefore seem to be similarly situated and deserving of the same treatment by OPR. There are, however, significant differences among the five that led OPR to conclude that Goodwin – unlike [AUSA #1] [AUSA #2] [DOL SA #1] and [FBI SA #1] – knew about the decision to withhold post-indictment MOIs and to make any required discovery disclosures by letter.

First, Goodwin was the United States Attorney, and he had supervisory authority over Ruby. It is difficult to believe that Ruby, a relatively inexperienced prosecutor, would make a decision to stop disclosing MOIs in such a high-profile case without consulting with Goodwin.[256] In contrast, the evidence shows that Ruby made most discovery decisions without consulting [AUSA #1] [AUSA #2] [DOL SA #1] or [FBI SA #1]

Second, the facts show that the *Blankenship* case was of the utmost importance to Goodwin, who

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[256] Ruby said that if Goodwin had not decided to stop disclosing post-indictment MOIs, he probably would have continued the practice of disclosing all MOIs. Ruby Interview at 192 .

was deeply involved in the government's investigative and pretrial work, attended every day of trial, examined several of the government's witnesses at trial, and delivered the government's closing argument. OPR found Ruby's assertion credible that because of the importance of the *Blankenship* prosecution, Goodwin was involved in every major prosecution decision, including the decision not to disclose certain MOIs.[257] Ruby also plausibly explained that Goodwin became irritated at Zuckerman's aggressive defense strategy, and responded to it by reducing the government's discovery disclosures to the required minimum; as stated previously, this explanation was emphatically denied by Goodwin himself.

Third, because [AUSA #1] [AUSA #2] [DOL SA #1] and [FBI SA #1] agreed to OPR's request to be interviewed, OPR was able to ask them specific questions about Ruby's contention that the prosecution team was aware and approved of the decision not to disclose post-indictment MOIs and to make required disclosures by letter. Goodwin's refusal to be interviewed prevented OPR from asking him similar questions.

Fourth, in both civil and administrative disciplinary proceedings, courts and disciplinary authorities may draw an adverse inference when a witness refuses to testify after probative evidence has been offered against them. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("the Fifth Amendment does

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[257] Indeed, Goodwin participated in many of the witness interviews for which MOIs were not disclosed. Goodwin attended four of [Witness #4] interviews; two of [redacted] interviews; and the interviews of [redacted] among others.

not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."); *Book v. US. Postal Service*, 675 F.2d 158, 160 fn.4 (8th Cir. 1982) (in affirming a Merit Systems Protection Board order of dismissal from the federal service, the court stated, "Although the silence of Book may be considered and thereby produce an adverse inference, the disciplinary action, whatever it may be, may not be based exclusively on the employee's failure to testify but it must be demonstrated by independent evidence that it is warranted."). Here, OPR told Goodwin that OPR had evidence that was inconsistent with his initial statement that he was frustrated if MOIs were not disclosed. The evidence to which OPR referred was Ruby's testimony that Goodwin knew and approved of the decision not to disclose post-indictment MOIs, and Goodwin's approval of the letters sent to the defense that summarized several MOIs. Goodwin chose to remain silent despite being informed that OPR had obtained evidence inconsistent with his initial assertions. After OPR provided Goodwin with OPR's draft report, which contained a detailed account of Ruby's claim that it was Goodwin who decided not to disclose post-indictment MOIs, Goodwin did not provide OPR with specific information about that decision, noting only that he and Ruby did not recall matters in exactly the same way.

OPR may therefore, under the case law cited above, draw an adverse inference from Goodwin's silence. Accordingly, given Goodwin's refusal to provide any information, explanation, or contrary evidence even after being informed there was probative evidence against him, OPR can rely on the

uncontroverted evidence before it and infer that Goodwin was aware and approved of the decision not to disclose post-indictment MOIs, and also of the letters summarizing discoverable statements contained in several MOIs.

In sum, under the circumstances discussed above, it is appropriate for OPR to treat Goodwin differently from the other trial team members.

Although OPR finds that Ruby and Goodwin intentionally did not disclose 50 post-indictment MOIs, OPR does not find that Ruby's and Goodwin's decision was made with the intent to withhold exculpatory evidence from the defense. The primary bases for this conclusion are the facts that: (a) Ruby made a letter disclosure of some of the discoverable statements contained in the [Witness #13] and [Witness #7] post-indictment MOIs; (b) Ruby disclosed the entire [Witness #2] post-indictment MOI; (c) Ruby made no effort to conceal the existence of the post-indictment MOIs (the [Witness #2] MOI had Bates-stamp numbers of 1534-1540, and the next highest Bates-stamped MOI that was disclosed was numbered 1356-1361); (d) it would make little sense to intentionally withhold information contained in MOIs when, as the trial team credibly asserted, that information was available to the defense from other sources; (e) it would make little sense to withhold information contained in MOIs when the government knew that the defense was talking with at least some of the witnesses whose MOIs were not disclosed;[258] and (f) the defense acknowledged that the government

[258] Many of the undisclosed MOis memorialized interviews with high-ranking Massey employees. It is likely that Blankenship and his attorneys had ready access to those witnesses.

disclosed exculpatory material in both disclosed MOIs and documents; there is no logical reason why Ruby and Goodwin would authorize the disclosure of some exculpatory material, but intentionally withhold other exculpatory material of the same nature as that previously disclosed.

b. The Government Had No Duty to Disclose Entire MOIs

The fact that Ruby and Goodwin intentionally did not disclose 50 MOIs does not by itself demonstrate that any specific discovery obligation was thereby violated. Fed. R. Crim. P. 16(a)(2) explicitly exempts law enforcement agents' reports from Rule 16's mandatory disclosure requirements. Although the USAO discovery policy for the Southern District of West Virginia provides that the usual practice in that office is to disclose MOIs, that practice is not mandatory. The analysis of a claim that the government violated its discovery obligations because it failed to disclose entire MOIs would therefore be straightforward, except for the fact that the government did in fact disclose in their entirety 372 MOIs. Given those prior disclosures, absent some reason to believe otherwise, it would be reasonable for the defense to conclude that the government was disclosing all MOIs in their entirety. OPR's analysis of the issue of whether Ruby and Goodwin misled Zuckerman and the court is discussed in Section VII(D) below.

3. Some of the Undisclosed MOIs Contained Discoverable Statements

Although the government did not have a duty to disclose MOIs in their entirety, the Constitution, Department policy, and the West Virginia RPC impose a duty on the government to disclose certain types of material. Specifically, the government is required to disclose evidence or information (as distinct from admissible evidence) that: is favorable to the accused and that is material either to guilt or punishment; is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense; casts substantial doubt upon the accuracy of any evidence – including but not limited to witness testimony – the prosecutor intends to rely on to prove an element of any crime charged; and that tends to negate the guilt of the accused or mitigates the offense.

a. Statements Inconsistent with the Government's Factual Basis for Alleging Criminal Conduct

Some of the undisclosed MOIs contained statements that were inconsistent with the government's factual basis for alleging criminal conduct as set forth in the indictment (see Section I(D)(2)(a)-(g), above). A sample of such statements follows.

Part of the government's factual basis for alleging criminal conduct as set forth in the indictment was that UBB conditions were unsafe and caused the explosion, and at least by implication that MSHA citations were accurate, reliable, unbiased,

and evidenced unsafe UBB conditions. There were a variety of statements in undisclosed MOIs that were inconsistent with that factual basis, such as those suggesting that UBB was run safely; MSHA violations were subjective; MSHA was biased against Massey; MSHA violation citations were inevitable and unrelated to safety; and that MSHA decisions made UBB unsafe. Several examples of such statements contained in undisclosed MOIs follow.

[Witness #14], stated that when a certain fan was running, UBB had good ventilation. [Witness #8], said that it was not possible to have zero MSHA violations. [Witness #12], said that MSHA violations were subjective. [Witness #1], said that UBB was a well-run mine. [Witness #17], said that MSHA wrote violations for Massey mines that it did not write for other mines and that the violations per inspection rate for Massey were not as bad as other mines. [Witness #4] said that MSHA decisions endangered miner health and safety. [Witness #13], said that UBB was going to fail because of MSHA ventilation requirements that UBB was required to use. [Witness #19], said that UBB was one of the better mines.

Part of the government's factual basis for alleging criminal conduct as set forth in the indictment was that Blankenship cared more about profit than about safety, and that Blankenship disregarded safety violations when communicating with employees. There were statements contained in undisclosed MOIs that were inconsistent with that part of the indictment. Several examples follow.

[Witness #8] said that if Blankenship had not been involved, the number of Massey safety initiatives would have been half of what it was. He maintained

that Massey put pressure on employees and held them accountable, and that there never discussions indicating that safety violations were acceptable. [Witness #8] said that [Witness #8] feared being disciplined over compliance issues.

[Witness #6], said that when Blankenship made notations on citation reports, it meant that [Witness #6] was not happy with the violations and that [Witness #6] wanted a corrective action plan. [Witness #6] said [Witness #6] started the Hazard Elimination Program to cut violations by 50%. [Witness #16] , said that Massey's primary focus was safety, that Blankenship pushed safety more than any other CEO, and that people were fired because of safety violations. [Witness #17] said that [Witness #17] did not believe that Massey had the attitude that safety violations were acceptable.

[Witness #4] said that several UBB managers did all they could to focus on safety. [Witness #13] said that Blankenship told [Witness #13] that Massey needed to reduce violations and that [Witness #13] talked about a commitment to safety. [Witness #3], said that Blankenship told [Witness #3] to reprogram the computer system so that it could determine who was responsible for violations and to identify repeat offenders. [Witness #15], said that accidents were discussed in the context of best practices and how to prevent them from recurring.

Part of the government's factual basis for alleging criminal conduct as set forth in the indictment was that Blankenship compromised worker safety by failing to hire a sufficient number of employees to accomplish jobs necessary for adequate safety. There was at least one statement in an

undisclosed MOI that was inconsistent with that portion of the indictment. [Witness #8] stated that it was worker inexperience, not manpower shortages, that led to safety violations.

Part of the government's factual basis for alleging criminal conduct as set forth in the indictment was that members of the conspiracy falsified respirable dust samples. There were statements in undisclosed MOIs that were inconsistent with that portion of the indictment. For example, [Witness #17] said that there was a big push to conduct accurate respirable dust sampling. [Witness #4] said that [Witness #4] was surprised that dust fraud was occurring as Massey did not want cheating on dust sampling.

Part of the government's factual basis for alleging criminal conduct as set forth in the indictment was that Blankenship used employee compensation to send the message that profit was more important than safety. There were statements in undisclosed MOIs that were inconsistent with that portion of the indictment. For example, [Witness #8] stated that [Witness #8] suspected that compensation was tied to safety.

Part of the government's factual basis for alleging criminal conduct as set forth in the indictment was that Blankenship set coal production quotas so high as to preclude workers from performing necessary safety tasks. There were statements in undisclosed MOIs that were inconsistent with that portion of the indictment. For example, [Witness #3] said that Blankenship instructed that production figures should not be too aggressive. [Witness #1] said that in 2009, no one wanted to buy coal. That

statement is arguably inconsistent with the indictment, for if demand for coal was low, then there would be little pressure to increase coal production if the mined coal could not be sold.

Part of the government's factual basis for alleging criminal conduct as set forth in the indictment was that UBB miners unlawfully received advance notice that MSHA inspectors were on their way to conduct inspections. There were statements in undisclosed MOIs that were inconsistent with that portion of the indictment. For example, [Witness #14] stated that the prohibition against advance notice was not an enforced rule.

b. Statements Casting Doubt On [Witness #4] Testimony

Many MOIs contained statements critical of [Witness #4], arguably one of the government's most important witnesses. There were so many such statements that after Ruby asked [Paralegal #1] to identify negative statements made about [Witness #4] in MOIs, she prepared a 59-page chart. Some of the statements in [Paralegal #1] chart came from ten undisclosed MOIs. For example, [Witness #14] stated that [Witness #4] ignored [Witness #14] question about whether a particular action was legal, and ordered [Witness #14] to do it.

c. Ruby Disclosed 11 MOIs as Possible *Brady* Material, But Failed to Disclose 61 Others Containing the Same or Similar Statements

Prior to trial, Ruby told the defense that the government had identified 11 MOIs that the defense

might conclude contained potential *Brady* material, including the [Witness #2] MOI and the ten MOIs Ruby identified in June 2015 as part of a larger disclosure letter. OPR agrees with Ruby that the 11 MOIs he identified for the defense contained discoverable statements. *See* Sections III(E)(3) and III(I)(2) above (the [Witness #2] MOI and the ten MOIs, respectively). OPR also found that some of the 61 undisclosed MOIs contained discoverable statements. *See* Sections III(D)(4) and III(E)(6) above (discoverable statements in the 11 pre-indictment MOIs and 50 post-indictment MOIs, respectively). After comparing the discoverable statements contained in the 11 MOIs Ruby identified for the defense and the discoverable statements in some of the 61 undisclosed MOIs, OPR found that there were no significant differences between the discoverable statements in those two sets of MOIs. This finding supports OPR's conclusion that the discoverable statements in the 61 undisclosed MOIs should have been disclosed, and also supports the prosecution team's contention that the defense was not prejudiced by the failure to disclose those statements, because they were available to the defense from other materials in its possession.

OPR provides below examples of similar discoverable statements contained in both the 11 MOIs Ruby identified for the defense as containing potential Brady material, and in some of the undisclosed 61 MOIs.

[Witness #2], said that MSHA was harder on Massey than other companies; [Witness #17] similarly had stated that MSHA wrote violations for Massey that it did not write for others. [Witness #2] said that

MSHA violations are opinions; [Witness #12] similarly had stated that MSHA violations were subjective. {Witness #2] said that rock dusting was always good; [Witness #11] similarly had stated that when [Witness #11] inspected UBB [Witness #11] found the rock dusting to be good. [Witness #2] said that MSHA decisions caused a decrease in airflow ventilation; [Witness #13] similarly had stated that UBB was going to fail because of MSHA ventilation decisions.

[Witness #19] said that [Witness #4] once advised him to operate UBB in such a way as to violate the law; [Witness #19] said essentially the same thing in an undisclosed MOI. [Witness #26] said that Massey management did not tolerate violations; [Witness #8] similarly had stated that Massey put pressure on people and held them accountable. [Witness 24], said that a certain statistical measure of safety was the only thing that figured into executive compensation; [Witness #8] similarly had stated that [Witness #8] suspected that compensation was tied to safety. [Witness #24] said that safety was always discussed at Massey; [Witness #15] similarly had stated that accidents were discussed in the context of best practices and how to prevent them from recurring. [Witness #6] said that [Witness #6] was sure that MSHA knew that miners received advance notice of inspections; [Witness #14] similarly had stated that the prohibition against advance notice was not an enforced rule.

4. The Failure to Disclose Discoverable Statements Violated Department Policy

As shown above, statements in some of the 61 undisclosed MOIs contained evidence or information that was inconsistent with the government's factual basis for alleging criminal conduct as set forth in the indictment. These statements were therefore required to be disclosed by USAM Section 9-5.001(C)(1)-(3) and by the USAO discovery policy. The failure to do so violated those policies.

OPR's conclusion is consistent with the actions of the USAO and the opinions of most of the prosecution team. The USAO learned in 2017 that the government had not disclosed 61 MOIs, and shortly thereafter appropriately disclosed all of those MOIs to the defense.[259] In addition, when OPR asked members of the prosecution team whether certain statements contained in the undisclosed MOIs would have been helpful to the defense, there was general agreement that most of the statements identified by OPR would have been helpful.

The Ogden Memorandum requires prosecutors to "develop a process for review of pertinent information to ensure that discoverable information is identified." The "process" that Ruby and Goodwin followed when determining which statements in post-indictment MOIs to disclose was to try to recall from memory what had been said during the interviews they attended. Neither Ruby nor Goodwin actually

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[259] The USAO told the defense that the production was not an admission that the 61 MOIs were required to be disclosed prior to trial or that the defense was prejudiced by the government's failure to disclose them.

reviewed post-indictment MOIs before making disclosure decisions. Ruby acknowledged that relying on his memory was not an ideal way to handle his disclosure obligations. OPR finds that not only was that process not ideal, but that it violated the Ogden Memorandum requirements, because relying on one's memory of numerous interviews cannot ensure that all discoverable information is disclosed. The process by which Ruby and Goodwin made disclosure decisions regarding statements contained in post-indictment MOIs therefore violated Department policy.[260]

5. Ruby and Goodwin Committed Professional Misconduct by Recklessly Violating Their Duty to Disclose Discoverable Evidence

Ruby was responsible for the government's failure to disclose discoverable statements contained in 11 pre-indictment MOIs. Ruby and Goodwin shared responsibility for the government's failure to disclose discoverable statements contained in 50 post-indictment MOIs. Both therefore violated the Department's discovery policies. OPR found that neither Ruby nor Goodwin intentionally violated the

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[260] In his April 19, 2018 response to OPR's draft report, Goodwin asserted that OPR's conclusion that it was reckless not to have a system for reviewing potentially discoverable material in MOIs was erroneous, because that review happened in "real time" during witness interviews. OPR finds Goodwin's argument unpersuasive, and disagrees with his assertion that reviews happened in "real time." The government's post-indictment interviews occurred throughout the winter, spring, and summer of 2015. Ruby sent one letter in September 2015 disclosing discoverable statements in three MO Is. Ruby's "review" of post-indictment interviews to decide what to disclose occurred in September 2015, not in "real time."

Department's discovery policies for the purpose of withholding discoverable evidence from the defense. OPR found that Ruby's and Goodwin's violation of the Department's discovery policies was the result of their reckless conduct, and therefore constituted professional misconduct.[261]

Ruby stated that while he intended to disclose all pre-indictment MOIs, he mistakenly failed to disclose 11 such MOIs. That mistake was a result of Ruby's reckless conduct. Ruby received e-mails and attachments that clearly showed that he was receiving for the first time pre-indictment MOIs, albeit after the November 2014 indictment had been

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[261] In his May 7, 2018 response to OPR's draft report, Ruby asserted that OPR's conclusion that he had recklessly violated the Department's disclosure policies was erroneous. Ruby argued that none of the statements in the 61 undisclosed MOIs would have been helpful to the defense, and that the defense clearly agreed with that assessment, because although the defense possessed the 61 MOIs in early 2017, it did not file its Section 2255 motion until April 2018. Ruby's argument is not persuasive. OPR expressly stated that it did not reach the conclusion that the failure to disclose the 61 MOIs violated Brady or Giglio, precisely because OPR could not establish that the defense had been prejudiced by the failure to disclose them. The Department's discovery policies state explicitly that the Department imposes discovery obligations on prosecutors that are broader than those required by Brady and Giglio. Ruby never claimed that he decided not to disclose the 11 pre-indictment MOIs and the 50 post-indictment MOIs because they did not contain helpful information. He claimed he mistakenly failed to disclose the 11 pre-indictment MOIs, and intentionally withheld the 50 post-indictment MOIs. Therefore, the issue of whether the statements in the 61 MOIs would actually have been helpful to the defense is relevant only to the analysis of whether the defense was prejudiced by the failure to disclose the 61 MOIs, and not to the issue of whether the failure to disclose them violated the Department's broad disclosure policies.

returned and the December 2014 initial discovery disclosures had been made. Moreover, Ruby said that he "probably" reviewed the [Witness #8] MOI before summarizing it. OPR ultimately credited Ruby's contention that he failed to notice the dates of those 11 MOIs when he received them, and that he did not notice the date of the [Witness #8] MOI. Those failures, however, were the result of Ruby's reckless disregard of information that would have alerted him to the fact that numerous pre-indictment MOIs had not been disclosed. Ruby's failure to notice the dates of the 11 undisclosed pre-indictment MOIs and the resulting failure to disclose the discoverable statements in those MOIs, caused the government to violate its disclosure obligations.

Ruby was equally reckless in the manner in which he made decisions about what statements to disclose from post-indictment MOIs. Ruby stated that he relied on his memory of what occurred during post-indictment interviews when making decisions about what statements to disclose to the defense. That process led Ruby to disclose the [Witness #2] MOI in its entirety, but to provide only limited information about the [Witness #7] and [Witness #13] MOIs in a letter disclosure. Ruby disclosed no other statements from any of the other post-indictment MOIs.

For several reasons, OPR finds the process Ruby employed was so haphazard and inadequate that it demonstrated a reckless disregard of the government's discovery obligations. First, Ruby did not attend at least two post-indictment interviews, including a May 2015 [Witness #13] interview and a September 2015 [Witness #11] interview. Ruby could not rely on his memory when attempting to ensure

that discoverable statements for interviews he did not attend were appropriately disclosed. Second, given all of Ruby's duties and responsibilities pertaining to such a large and complex case, it was reckless for him to rely on his memory when identifying discoverable statements made in 50 post-indictment interviews. Many of those interviews occurred months before Ruby sent his September 2015 letter disclosing discoverable statements contained in post-indictment MOIs. Ruby acknowledged to OPR that relying on his memory when determining which statements contained in post-indictment MOIs to disclose was an imperfect and not ideal process. OPR finds that Ruby's decision to rely on his memory to identify discoverable statements in 50 post-indictment MOIs was unjustifiable and objectively unreasonable.

Ruby told OPR that Goodwin was aware that Ruby was not reviewing post-indictment MOIs, and instead was using his memory to decide whether they contained discoverable statements that were required to be disclosed. Goodwin apparently approved of, or at least did not object to, that reckless practice. In addition, Goodwin attended numerous post-indictment interviews, including multiple interviews of two of the government's most important witnesses, [Witness #4] and [Witness #13] and interviews of others who provided discoverable statements, such as [Witness #3] [Witness #7] [Witness #5] [Witness #15] and [Witness #19] Goodwin therefore either was, or should have been, aware that there were statements made during those interviews that were required to be disclosed. OPR found no evidence that Goodwin made any effort to ensure that any exculpatory statements made in post-indictment MOIs were disclosed, even though he knew, and was in large part responsible for

the fact, that the MOIs themselves would not be. According to Ruby, he and Goodwin discussed what disclosures needed to be made from post-indictment MOIs, and Goodwin agreed with Ruby's decisions regarding those disclosures. As discussed below, OPR found that those disclosures were deficient. OPR concludes that Goodwin acted in reckless disregard of his obligation to take the requisite steps to ensure that the government complied with the Department's discovery policies.

In sum, OPR concludes that both Ruby and Goodwin recklessly violated the Department's disclosure policies, and therefore committed professional misconduct.[262]

6. OPR Found Insufficient Evidence Based Upon Which It Could Determine Whether the Failure to Disclose Discoverable Statements Contained in Undisclosed MOIs Violated *Brady*, *Giglio*, or West Virginia RPC 3.8(d)

OPR found that Ruby and Goodwin committed professional misconduct by acting in reckless disregard of their obligation imposed by Department policy to disclose discoverable statements in some of the 61 undisclosed MOIs. That finding, however, is not a sufficient basis upon which to conclude that Ruby and Goodwin also violated the requirements of *Brady* and *Giglio* with respect to those discoverable statements. A prosecutor violates *Brady's* requirements only if a defendant is prejudiced by the

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[262] Although OPR found that Ruby and Goodwin recklessly violated their obligations under the Department's broad discovery policies, [redacted].

disclosure violation. Witnesses OPR interviewed adamantly maintained that Blankenship suffered no prejudice as a result of the government's failure to provide him with the discoverable statements contained in the 61 undisclosed MOIs, because those same statements were available to the defense from other sources, including the 372 MOIs that were disclosed, as well as the millions of pages of documents that also were disclosed. The fact that undisclosed evidence was known and available to the defense from other sources is a well-recognized defense to an alleged *Brady* violation.[263]

In such circumstances, OPR ordinarily would attempt to rigorously test the accuracy of the prosecution team's assertion that the discoverable statements contained in the undisclosed MOIs were known and available to the defense from other sources. Here, however, OPR faced a serious obstacle in attempting to engage in such an assessment. OPR asked Zuckerman to provide OPR with evidence that Blankenship's defense was prejudiced by the government's failure to disclose discoverable statements contained in the 61 undisclosed MOIs. Although Zuckerman alleged generally that Blankenship had in fact been prejudiced, Zuckerman explicitly declined to provide OPR with any evidence to support its assertion. Zuckerman stated that it did not believe that OPR's investigation was "the appropriate forum" to address its claim of prejudice, at least in part because Blankenship might raise the issue with the court.

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[263] *See* cases cited in Section VI(B)(2)(a) above.

Zuckerman, the party in the best position to know whether Blankenship was prejudiced by the government's failure to disclose discoverable statements contained in the 61 undisclosed MOIs, declined to provide OPR with the requested information about that issue. Because the prosecution team credibly asserted that Blankenship was not prejudiced, and because OPR has insufficient countervailing information to refute the government's contention, OPR cannot establish by preponderant evidence that Blankenship was in fact was prejudiced by the government's nondisclosures; it therefore similarly cannot establish that the government's failure resulted in a *Brady* or *Giglio* violation.[264]

C. Ruby and Goodwin Recklessly Violated the Ogden Memorandum's Requirement That Letter Disclosures Contain All Exculpatory Material

On June 22, 2015, and September 21, 2015, Ruby sent Zuckerman letters in which he provided them with discoverable statements made in two attorney proffer sessions, and three MOIs, respectively. The Ogden Memorandum states that when disclosure of exculpatory material is made by letter, "*prosecutors should take great care* to ensure that the full scope of pertinent information is provided

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[264] Because West Virginia authorities have not, to OPR's knowledge, decided whether the scope of West Virginia RPC 3.8(d) is broader than, or co-extensive with, the scope of *Brady* and its progeny, OPR cannot find that Ruby and Goodwin violated RPC 3.8(d). Although OPR found that Ruby and Goodwin recklessly violated the

to the defendant."[265] OPR concludes that Ruby and Goodwin recklessly violated that requirement, and therefore committed professional misconduct.

Ruby's June 22, 2015, letter to Zuckerman informed Zuckerman that attorneys representing [Witness #10] had provided the government with discoverable material. Ruby summarized that material in two sentences: "Blankenship was involved in the development of violation targets and report cards for the so-called hazard elimination program. [Witness #10] also believed that Massey made some degree of effort to comply with mine safety laws." When OPR examined [AUSA #2] handwritten notes from the attorney proffer session, it found that those notes contained the following discoverable statements:

- *[Witness #10] wanted the hazard elimination program to reduce violations by 20%, but Blankenship wanted them reduced by 50%.*
- *Massey mines were safe.*
- *MSHA violations were not related to safety.*
- *Having zero violations was not realistic.*
- *If you fix 75 violations, MSHA would find 75 more.*
- *MSHA inspections are subjective.*
- *MSHA was harder on Massey than other mines.*
- *The number of violations corresponds to the number of MSHA inspection hours.*
- *Receiving violations did not mean that a mine was unsafe.*

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[265] Ogden Memorandum, Step 3, Making the Disclosures (emphasis added).

- *Blankenship received the weekly minutes from the Hazard Elimination Committee.*
- *Report cards were Blankenship's idea to increase accountability.*

On September 21, 2015, Ruby sent a letter to Zuckerman in which he provided discoverable statements contained in the three MOIs of Charlie [Witness #8] [Witness #13], and [Witness #7] Ruby's disclosures regarding those three MOIs were highly truncated. Ruby revealed that: (1) [Witness #7] said [Witness #7] was not sure that Blankenship received the memorandum about mine safety that [Witness #13] had sent [Witness #7] in February 2010; (2) [Witness #13] said that [Witness #13] did not agree with a particular MSHA mine ventilation policy; and (3) [Witness #8] said that Blankenship was interested in safety even though [Witness #8] did not expressly say so, and Blankenship was involved with a number of changes to equipment that [Witness #8] believed improved safety. OPR reviewed the [Witness #8] [Witness #13] and [Witness #7] MOIs to identify discoverable statements. OPR's analysis of the [Witness #8] MOI is set forth in Section III(D)(4) above, and OPR's analysis of the [Witness #13] and [Witness #7] MOIs is set forth in Section III(E)(6) above.

OPR finds that Ruby's June 22, 2015, and September 21, 2015, letter disclosures did not fully disclose all of the discoverable statements made by [Witness #20] attorneys, or contained in the [Witness #8] [Witness #13] and [Witness #7] MOIs. The fact that Ruby made a partial disclosure is evidence that supports his contention that he did not intentionally withhold exculpatory evidence. Nevertheless, OPR finds that Ruby did not disclose all of the discoverable

statements [Witness #10] attorneys, and [Witness #8] [Witness #13] and [Witness #7] provided the government. That failure was at least part of a result of Ruby's reckless decision to rely on his memory of what occurred during his discussions with [Witness #10] attorneys and what was said in the [Witness #7] and [Witness #13] interviews when making required disclosures. Because Ruby did not take "great care" when making those letter disclosures, he recklessly violated the Ogden Memorandum's requirements and committed professional misconduct.

Ruby asserted that Goodwin reviewed and approved the contents of the September 21, 2015 letter before Ruby sent it to Zuckerman, and that Goodwin knew that Ruby was relying on his memory when deciding what information to include in the disclosure letter. Because Goodwin declined OPR's request for an interview, and thus did not rebut Ruby's contentions, the preponderant evidence supports Ruby's claim that Goodwin reviewed and approved the letter and was aware of the process by which Ruby was making disclosure decisions. OPR therefore finds that Goodwin also recklessly violated his duty to take "great care" when making a letter disclosure of exculpatory information, and hence committed professional misconduct.[266]

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[266] Although OPR found that Ruby and Goodwin recklessly violated Department discovery policies regarding disclosure letters, [redacted].

D. Ruby and Goodwin Did Not Intentionally Mislead the Court or Zuckerman About the Government's MOI Disclosures

In response to defense motions requesting, *inter alia*, the disclosure of exculpatory evidence and the handwritten notes of the agents who drafted MOIs, the government filed three pleadings that in part discussed the government's MOI disclosures. Ruby, [AUSA #1] and [AUSA #2] each drafted one of the pleadings, and all of the prosecution team attorneys, including reviewed drafts of the pleadings or received copies of them after they were filed. The three pleadings contained statements about the government's disclosure of MOIs. The February 2015 pleading stated that "the United States has provided extensive discovery ... including ... FBI 302s." The May 2015 pleading stated that "the United States has ... produc[ed] ... typed 302 reports." The July 2015 pleading stated that "The United States has produced [MOIs] that reflect the substance of well over 300 witness interviews." Each of those statements, taken in isolation, was technically accurate. The United States did disclose numerous FBI 302s and over 300 MOIs.

However, even if technically correct, OPR finds that given the context in which they were made, those statements, both individually and collectively, were potentially misleading. In response to defense motions to obtain handwritten notes from all government interviews, OPR finds that any neutral party, such as the court, reading the government's responses might reasonably interpret them to mean that the United States had disclosed to the defense all 302s and memoranda of witness interviews, and the

government therefore was not required to disclose the underlying notes. At the time each of those pleadings was filed, the government possessed post-indictment MOIs that had not been disclosed, and Ruby and Goodwin knew those MOIs would in fact not be disclosed. Moreover, those statements were central to the government's arguments that the defendant's motions should be denied because the government had complied with, or exceeded, its discovery obligations. For example, the court denied a defense motion to obtain agents' handwritten notes taken during witness interviews, because the substance of those interviews was contained in disclosed MOIs. The court may well have resolved that motion differently if it had known that for some witnesses, the defense received neither an MOI nor the agent's handwritten notes.

During trial, in response to a defense argument that the government had failed to disclose certain exculpatory statements that [Witness #4] had allegedly made to the government prior to trial, Ruby told the court that the government had "turned over 302s from our interviews" of [Witness #4]. Although the government had disclosed one [Witness #4] pre-indictment MOI, and Ruby incorrectly believed that the government had disclosed a second pre-indictment MOI, at the time Ruby made that statement to the court, the government had not disclosed five [Witness #4] MOIs, some of which were completed shortly before Ruby made his statement to the court. OPR finds that given the context in which this statement was made, it was potentially misleading. OPR finds that any neutral party, such as the court, listening to that statement might reasonably interpret it to mean

that the United States had disclosed all of [Witness #4] 302s to the defense.

Ruby told OPR that neither the government's pleadings nor his oral statements to the court concerning the government's MOI disclosures were meant to mislead the court. Ruby said that all of the government's representations regarding MOI disclosures were intended to refer to the government's production of pre-indictment MOIs. In his May 7, 2018 response to OPR's draft report, Ruby argued in part that: (1) none of the government's written statements were made in the context of a discussion about whether all MOIs had been disclosed; (2) the natural interpretation of assertions that the government disclosed MOIs is that the government did not disclose all MOIs; and (3) the small prosecution team was overwhelmed by Blankenship's much larger defense team, and therefore had little time to carefully parse every word in every pleading. Ruby also argued that: (1) the court would not have naturally interpreted his oral statement to mean that all [Witness #4] MOIs had been disclosed; (2) defense counsel knew that the government had interviewed [Witness #4] and had not disclosed all MOIs; and (3) the court did not reference MOIs in a later discussion about [Witness #4] while it did mention [Witness #4] grand jury testimony.

Given OPR's factual findings, and after carefully considering Ruby's objections to those findings, OPR reaches the following conclusions regarding the allegation that the government filed false or misleading pleadings and made one false or misleading statement to the court regarding the government's MOI disclosures.

1. Neither Ruby Nor Goodwin Intentionally Misled the Court Regarding the Government's MOI Disclosures

For several reasons, OPR concluded that neither Ruby nor Goodwin intentionally made false written or oral statements to the court regarding the government's MOI disclosures. First, as discussed below, OPR found that by the time of trial, Zuckerman knew that the government had not disclosed all MOIs in their entirety. If Ruby and Goodwin had intended to mislead the court by asserting that the government had disclosed all MOIs, they would not have given the defense information that showed that assertion to be false. Second, the only possible reason why Ruby or Goodwin would have intentionally provided the court with false information about the government's MOI disclosures would be to hide a disclosure violation. But OPR found that neither Ruby nor Goodwin intentionally withheld potentially exculpatory material from the defense. Since neither Ruby nor Goodwin believed they had done anything wrong, or had anything to hide from the court, they had no reason to intentionally mislead the court about the government's MOI disclosures.

2. Neither Ruby Nor Goodwin Intentionally Violated West Virginia RPC 3.3(a)(l)

Because OPR found that neither Ruby nor Goodwin intentionally misled the court regarding the government's MOI disclosures, OPR also found that neither Ruby nor Goodwin violated West Virginia RPC 3.3(a)(1), which prohibits an attorney from "knowingly ... mak[ing] a false statement of fact ... to a tribunal."

3. Neither Ruby Nor Goodwin Intentionally Violated West Virginia RPC 4.1

OPR finds that neither Ruby nor Goodwin violated West Virginia RPC 4.1 in their communications with Zuckerman. Zuckerman was arguably misled by the government's first pleading in February 2015 about the extent of the government's MOI disclosures. Thereafter, in April 2015, Zuckerman twice asked Ruby whether the government was disclosing all MOIs. Ruby failed to answer Zuckerman's questions. Zuckerman was aware of Ruby's silence at the time the government filed its May and July pleadings containing representations about the government's MOI disclosures. In August 2015, Zuckerman received the only post-indictment MOI disclosed by the government, and in September 2015 it received a letter disclosing statements made during three witness interviews. Finally, it appears that Zuckerman spoke to witnesses who had been interviewed by the government, and for whom the government had not disclosed an MOI. Thus, beginning in April 2015, and certainly before the start of the trial, Zuckerman possessed information indicating that the government was not disclosing all MOIs. OPR therefore finds insufficient evidence to conclude that Ruby and Goodwin violated RPC 4.1 by "knowingly . . . mak[ing] a false statement of material fact" to Zuckerman.

Ruby's failure to respond to Zuckerman's questions about whether the government was disclosing all MOIs in its possession does not violate RPC 4.1, for as a comment to RPC 4.1 makes clear, an attorney "has no affirmative duty to inform an

opposing party of relevant facts." While Ruby may not have violated RPC 4.1, OPR nevertheless finds that his conduct fell below the high standards the Department expects its prosecutors to maintain. The Department expects its prosecutors to deal honorably with opposing counsel, even if prosecutors vehemently disagree with how opposing counsel are representing defendants. Ruby's repeated failure to correct Zuckerman's misunderstanding of the extent of the government's MOI disclosures falls short of the Department's expectations for how its prosecutors will communicate with opposing counsel.

4. Because OPR Was Unable to Interview the Court, OPR Does Not Reach a Conclusion As to Whether Ruby or Goodwin Recklessly Violated Their Duty of Candor to the Court

The question as to whether OPR can prove by preponderant evidence that Ruby and Goodwin recklessly violated their general duty of candor to the court by making misleading written and oral assertions about the government's MOI disclosures is exceedingly close. OPR believes that the most natural understanding of Ruby's oral statement that the government had disclosed "302s from our interviews" of [Witness #4] is that the government had disclosed all of [Witness #4] MOIs. OPR also believes that the most logical reading of the government's assertions in three pleadings about its MOI disclosures, in the context of defense motions for orders requiring the government to disclose all handwritten notes of interviews, is that the government had disclosed all MOIs. However, Ruby offered several arguments in support of his contention that the government's statements were not made recklessly.

OPR acknowledges that it is possible that the court may not have interpreted the written and oral statements at issue in the same manner as has OPR. In such circumstances, OPR would ordinarily seek to interview the court, so as to learn how the court interpreted the government's statements about its MOI disclosures. If the court understood that the government had disclosed all MOIs, OPR would very likely find that Ruby and Goodwin recklessly made the statements at issue in violation of their duty of candor to the court. If the court understood that the government had disclosed some, but not necessarily all, MOIs, OPR would likely find that Ruby and Goodwin did not violate that duty.

Because the *Blankenship* case is being actively litigated, and Blankenship has alleged in his Section 2255 motion that the government made misrepresentations to the court about its MOI disclosures, OPR cannot at this time engage the court in *ex parte* communications about that issue. Because OPR is currently unable to obtain the evidence it needs to resolve the question as to whether the court was misled by Ruby's and Goodwin's statements, OPR will not make a finding resolving the question of whether Ruby and Goodwin recklessly violated their duty of candor to the court. Because the defense has raised that issue in its Section 2255 motion, the court will have an opportunity to provide the parties with its view of the merits of the defense's allegation.

Although OPR does not reach a conclusion as to whether Ruby or Goodwin recklessly violated their duty of candor to the court by making misleading statements about the government's MOI disclosures, OPR finds that the pleadings they filed and Ruby's

oral statement to the court about those disclosures were a product of their exceedingly careless conduct. Both Ruby and Goodwin should have been much more careful about the written and oral statements they made to the court. Ruby's assertion that the defense overwhelmed the government by virtue of its greater resources, even if true, does not excuse a careless course of conduct by government attorneys. The Department expects its prosecutors to take great care when informing the court about the government's actions to comply with its constitutional obligations. Neither Ruby nor Goodwin adhered to that expectation in their communications with the court about the government's MOI disclosures. If either Ruby or Goodwin had remained in the federal service, OPR would have referred this finding to the Department to take whatever action it thought appropriate to ensure that such conduct was not repeated.

CONCLUSION

On April 5, 2010, an explosion in the West Virginia Upper Big Branch (UBB) coal mine killed 29 coal miners. The United States Attorney's Office for the Southern District of West Virginia commenced a criminal investigation shortly after the explosion.

On November 13, 2014, a federal grand jury indicted Donald Blankenship, Chief Executive Officer and Chairman of the Board of Directors of Massey Energy Company, which owned UBB. AUSA Steven Ruby led the government's criminal investigation and litigation team. United States Attorney R. Booth Goodwin II was an active participant during the criminal investigation and trial. Blankenship was represented by the law firm Zuckerman Spaeder LLP

(Zuckerman). The *Blankenship* case was tried in the fall of 2015. At the conclusion of the trial, Blankenship was convicted of a misdemeanor conspiracy to violate mine safety standards and acquitted of all other charges.

In March 2016, Zuckerman sent a letter to the Department of Justice Criminal Division's Assistant Attorney General, alleging, among other things, that: (a) the government failed to disclose exculpatory e-mails in the possession of the Mine Safety and Health Administration (MSHA); (b) the government made false statements to the court and jury about Blankenship's involvement in Massey budget decisions; (c) the government did not call MSHA inspectors to testify at trial in order to avoid revealing the government's discovery violations; and (d) an MSHA employee destroyed MSHA documents shortly after the UBB explosion. Zuckerman's allegations were forwarded to the Department's Office of Professional Responsibility (OPR).

As a result of its investigation, OPR found that Zuckerman's initial misconduct allegations were without merit. OPR found that: (a) the government did not withhold exculpatory MSHA e-mails; (b) the government did not make false statements about Blankenship's involvement in the Massey budget process; (c) the government did not inappropriately decide not to use MSHA inspectors as trial witnesses; and (d) there was no evidence to support the allegation that an MSHA employee destroyed MSHA documents shortly after the UBB explosion.

During OPR's investigation, however, OPR learned that the government had failed to disclose to the defense numerous memoranda of interviews

(MOIs) written by law enforcement agents on the prosecution team. Although prior to the *Blankenship* trial the government disclosed to the defense approximately 370 MOIs, it failed to disclose discoverable statements contained in 61 MOIs, including 11 pertaining to pre-indictment interviews, and 50 pertaining to post-indictment interviews. As a result of its investigation, OPR made the following factual findings and reached the following conclusions regarding Ruby's and Goodwin's conduct related to the failure to disclose the 61 MOIs:

(1) Some of the undisclosed MOIs contained discoverable statements that were required to be disclosed by applicable Department discovery rules and policies, including United States Attorneys' Manual Section 9-5.001(C)(1)-(3). OPR concludes that neither Ruby nor Goodwin withheld discoverable statements from the defense with the intent of preventing the defense from obtaining those statements. However, OPR found that: (a) Ruby recklessly violated Department-mandated discovery obligations by failing to disclose the discoverable statements contained in 11 pre-indictment MOIs; (b) Ruby and Goodwin recklessly violated Department-mandated discovery obligations by failing to disclose the discoverable statements contained in some of the 50 post-indictment MOIs; (c) Ruby and Goodwin recklessly violated discovery requirements imposed by a January 2010 memorandum from then-Deputy Attorney General David Ogden (the Ogden Memorandum), which requires prosecutors to "develop a process for review of pertinent information to ensure that discoverable information is identified;" (d) Ruby's and Goodwin's "process" for deciding which statements contained in post-indictment MOIs to

disclose was to rely on their memory of what was said during interviews, some of which occurred months before they made disclosure decisions; their deficient process resulted in the failure to disclose discoverable statements contained in numerous post-indictment MO Is; and (e) because Ruby and Goodwin recklessly violated the Department's discovery policies regarding the disclosure of discoverable statements, they committed professional misconduct.

(2) OPR found insufficient evidence to conclude that Ruby's and Goodwin's failure to disclose discoverable statements contained in the undisclosed MOIs violated *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), or West Virginia Rule of Professional Conduct (RPC) 3.8(d), which requires the disclosure of information that tends to negate the accused's guilt. The government violates its *Brady* obligations only if, *inter alia*, a defendant is prejudiced by the failure to disclose. Zuckerman Spaeder LLP, the firm representing Blankenship, and the entity in the best position to explain whether, how, and to what extent the defense was prejudiced by the government's failure to disclose the 61 MOIs, explicitly declined OPR's request to provide it with that information. Prosecution team members credibly told OPR that the discoverable statements contained in the 61 undisclosed MOIs were not only available to the defense from other sources, but were in fact used during the defense's cross-examination of government witnesses. Based on the facts known to it, OPR cannot prove by preponderant evidence that Blankenship was prejudiced by the government's failure to disclose the discoverable statements in the 61 MOIs, and so

cannot conclude that the government's conduct violated *Brady*, *Giglio*, or West Virginia RPC 3.8(d).

(3) Ruby failed to make a full disclosure of discoverable statements contained in three MOIs, and statements made during one proffer session, which he attempted to summarize in two summary disclosure letters. OPR found Ruby's disclosures to be inadequate and incomplete. Although OPR concludes that Ruby's inadequate disclosures were not intended to withhold exculpatory statements from the defense, OPR nevertheless concludes that Ruby's inadequate disclosures were made in reckless disregard of the requirement, as set forth in the Ogden Memorandum, that prosecutors take "great care" when making disclosures by summary letter. Ruby was responsible for both of the deficient letter disclosures. OPR found that Goodwin was also responsible for the inadequate and incomplete disclosures in one of the two summary disclosure letters. OPR finds that Ruby and Goodwin recklessly violated the Ogden Memorandum's requirements and therefore committed professional misconduct.

(4) The government filed three arguably misleading pleadings with the court, and Ruby made one arguably misleading statement in court, regarding the government's MOI disclosures. Those pleadings and Ruby's statement may have led the court to reasonably, but erroneously, believe that the government had disclosed all MOIs in its possession. OPR reached the following conclusions about the alleged misstatements to the court:

(a) Ruby and Goodwin did not intentionally mislead the court regarding the government's MOI disclosures.

(b) Ruby and Goodwin did not violate West Virginia RPC 3.3(a)(1), which prohibits an attorney from knowingly making a false statement to the court, because OPR found that neither Ruby nor Goodwin intentionally made false statements to the court.

(c) OPR found insufficient evidence to conclude that the government's pleadings and Ruby's statement in court about the government's MOI disclosures violated West Virginia RPC 4.1, which prohibits attorneys from knowingly making false material statements to third parties such as Zuckerman Spaeder LLP.

(d) For the following reasons, OPR did not reach a conclusion about whether Ruby and Goodwin recklessly made arguably misleading statements to the court about the government's MOI disclosures. When OPR investigates an allegation that the government made misleading statements to the court, OPR would ordinarily request to interview the court to ask how the court interpreted the statements at issue. OPR could not follow its usual procedures in the Blankenship case, because the case is being actively litigated, and the court would be unable to engage in *ex parte* communications with the government. OPR is therefore unable to ascertain the court's views as to whether the court was misled by the government's statements about its MOI disclosures. In its Section 2255 motion, McGuireWoods has alleged that the government made misrepresentations to the court about its MOI disclosures. The defense, if it chooses, may further pursue that allegation in the post-conviction litigation, which will allow the court to inform the parties as to whether it was misled by the statements at issue.

APPENDIX H

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

Criminal No. 5:14-cr-00244

[Filed April 18, 2018]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
DONALD L. BLANKENSHIP,	)
	)
Defendant.	)
	)

MOTION TO VACATE AND SET ASIDE DEFENDANT'S CONVICTION AND SENTENCE PURSUANT TO 28 U.S.C. § 2255

Donald L. Blankenship, by and through counsel, respectfully moves this court to vacate set aside, and correct his sentence and conviction as contrary to the laws and Constitution of the United States pursuant to 28 U.S.C. § 2255.

INTRODUCTION

1. Don Blankenship was charged by indictment on November 13, 2014 with several felony offenses and one misdemeanor offense related to an explosion at the Upper Big Branch ("UBB") mine owned by his company, Massey Energy. The charges were vigorously contested by Mr. Blankenship, and his attorneys served numerous formal and informal demands for discovery on the prosecution team. This Court ordered the government to disclose all *Brady* information and to specify that information to the defense. On December 3, 2015, after trial and after lengthy deliberations – punctuated by several *Allen* charges – the jury acquitted Mr. Blankenship on all felony counts. The jury convicted, however, on the misdemeanor charge of conspiracy to violate mine safety regulations.

2. After trial and sentencing, something extraordinary occurred. Mr. Blankenship and his counsel continued to assert his right to discovery of exculpatory and other information required for his defense. After the two attorneys who led the prosecution of Mr. Blankenship left the United States Attorney's Office, the government began to produce reports and other information that were responsive to Mr. Blankenship's discovery requests that it had not disclosed pre-trial. In a series of letters stretching from January 31, 2017 to April 6, 2018, the government provided to Mr. Blankenship sixty-one previously undisclosed memoranda of interview ("MOI"), forty-eight previously undisclosed emails, and nine other previously undisclosed documents. The sheer quantity of withheld information is staggering, and its quality would have made it essential to Mr.

Blankenship's defense. Included in this never-before disclosed information are five MOIs *each* for the government's two main witnesses. The materials also include internal Mine Safety and Health Administration ("MSHA") emails that directly contradict the government's theory of prosecution. In addition, the materials include documents reflecting sanctions imposed on MSHA officials for their performance of their official duties – evidence which corroborates a central part of Mr. Blankenship's defense. This mountain of undisclosed information includes exculpatory *Brady* material, impeaching *Giglio* material, and witness Jencks material, among other things.

3. There is no lawful basis by which these materials could have been withheld. The Department of Justice, for its own part, has referred these matters to its Office of Professional Responsibility ("OPR") for investigation. OPR has not yet released its report and findings, but Mr. Blankenship expects that the report will issue in the near future. Mr. Blankenship anticipates that the findings of the OPR report will add material information to the subject matter of this Motion.

4. The full scope of the prosecution's conduct in this matter is still coming to light. Mr. Blankenship has received new information from the government as recently as April 8, 2018. And the findings of OPR will no doubt shed further light on this matter. Mr. Blankenship brings this Motion to vindicate his constitutional and other rights. The prosecution if this case deprived Mr. Blankenship of his constitutional right to a fair trial, violated the Jencks Act, violated this Court's discovery orders, and

made material misrepresentations to Mr. Blankenship's defense counsel and to the Court. The conviction of Mr. Blankenship that resulted from this terribly flawed process cannot stand. The jury that convicted Mr. Blankenship deliberated for nine days and twice told the judge that it could not agree on a verdict. Ultimately, it convicted Mr. Blankenship on only a single, misdemeanor count. In short, this was an extremely close call. The newly disclosed evidence, withheld by the prosecution until after trial, would have tipped the balance in Mr. Blankenship's favor. As a result, Mr. Blankenship's conviction and sentence was imposed in violation of the Constitution and laws of the United States. Therefore, this Court should vacate and set aside that conviction and sentence

PROCEDURAL HISTORY

5. On November 13, 2014, a grand jury in the Southern District of West Virginia (S.D.W.Va.) indicted Mr. Blankenship. *United States v. Donald L. Blankenship*, Crim. No. 5:14-cr-00244 (ECF No. 1).[1] As amended by the superseding indictment on March 10, 2015, prosecutors charged Mr. Blankenship with three counts: (1) conspiracy to both willfully violate federal mine safety and health standards in violation of 18 U.S.C. §371 and 30 U.S.C. § 820(d) and to defraud the United States in violation of 18 U.S.C. § 371; (2) false statements to the Securities and Exchange Commission in violation of 18 U.S.C. §1001; and (3) false statements in connection with the sale or purchase of securities in violation of 18 U.S.C. §78ff.

[1] All ECF numbers cited herein refer to this docket.

(ECF No. 169). Mr. Blankenship pled not guilty to all counts.

6. Mr. Blankenship was tried before a jury sitting in the S.D.W.V. He did not testify at trial. On December 3, 2015, the jury convicted Mr. Blankenship on Count 1, but only as to the conspiracy to violate Mine Safety regulations. (ECF No. 529) The jury acquitted Mr. Blankenship on Counts 2 and 3. (*Id.*). The district court entered a judgment of conviction on December 10, 2015. (ECF. No. 553)

7. On April 6, 2016, the district court sentenced Mr. Blankenship to twelve months incarceration followed by one year of supervised release, as well as a $250,000 fine and a $25 special assessment. (ECF No. 589). Prosecutors objected to Mr. Blankenship remaining on bond pending appeal.

8. Mr. Blankenship filed a timely appeal to the Fourth Circuit. (ECF No. 591; Case No. 16-4193). He argued that: (1) the indictment insufficiently alleged a violation of 30 U.S.C. § 820(d); (2) that the district court improperly denied re-cross examination of an alleged co-conspirator, Chris Blanchard; (3) that the district court incorrectly instructed the jury regarding the meaning of "willfully" as used in 30 U.S.C. §820(d); and (4) the district court incorrectly instructed the jury as to the government's burden of proof. The Fourth Circuit affirmed Mr. Blankenship's conviction on January 19, 2017. *United States v. Blankenship*, 846 F.3d 663 (4th Cir. 2017).

9. Mr. Blankenship petitioned the United States Supreme Court for a writ of certiorari. (ECF No. 655; Case No. 16-1413). He raised the following

two issues in his petition: that the district court (1) incorrectly instructed the jury regarding the meaning of willfully, and (2) improperly denied re-cross examination of Mr. Blanchard. The Supreme Court denied certiorari on October 10, 2017. 138 S.Ct. 315 (2017).

10. Mr. Blankenship has filed no other motions, petitions, or applications concerning the judgment of conviction in any court.

JURISDICTION

11. This Court has jurisdiction over this motion as it imposed Mr. Blankenship's sentence. 28 U.S.C. § 2255(a).

12. Mr. Blankenship is presently in custody within the meaning of Section 2255 as he is serving a term of supervised release under the supervision of Probation and Pretrial Services for the District of Nevada. *See United States v. Swaby*, 855 F.3d 233, 238-39 (4th Cir. 2017); *see also Maleng v. Cook*, 490 U.S. 488, 491-92 (1989). His term of supervised release ends on May 9, 2018.[2]

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[2] A motion under Section 2255 does not become moot when the custodial sentence terminates if the movant continues to suffer collateral consequences that flow from the conviction. *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968); *Swaby*, 855 F.3d at 239 n.2. The Fourth Circuit has held that payment of a fine or restitution upon conviction – as done by Mr. Blankenship here – qualifies as a collateral consequence sufficient to keep a Section 2255 motion from becoming moot. *Nakell v. Att'y Gen. of North Carolina*, 15 F.3d 319, 322 (4th Cir. 1994).

13. This motion is timely because it has been filed within one year of the date on which the judgment of conviction became final. 28 U.S.C. §2255(f)(1); *Clay v. United States*, 537 U.S. 522, 527 (2003) (judgment of conviction becomes final when the U.S. Supreme Court denies petition for writ of certiorari).

STATEMENT OF FACTS

14. Zuckerman Spaeder ("Zuckerman") represented Mr. Blankenship in the pre-trial, trial, and appellate proceedings. Throughout the proceedings, the Zuckerman defense team raised concerns to the prosecution and the Court about the adequacy of the prosecution's disclosure of *Brady* material. In addition to informal requests, the defense filed multiple motions seeking exculpatory and impeachment material.[3] The government consistently replied that it had provided the defense with all

[3] Zuckerman also sent a number of communications directly to the USAO seeking the same material. Motions filed with the court that sought exculpatory material include: Motion to Enforce The Government's *Brady* Obligations (Feb. 6, 2015) (ECF No. 111); Motion to Compel the Government to Identify in its Production *Brady* and Rule 16(a)(1) Material (Apr. 28, 2015) (ECF No. 245); Motion to Compel Production of Witness Interview Notes and Records of Attorney Proffers Containing *Brady* Information (May 6, 2015) (ECF No. 248); Motion to Compel Compliance with *Brady* Order and for Other Appropriate Relief (July 8, 2015) (ECF No. 283); and Motion to Compel Compliance with Subpoena, for Production of *Brady*, Rule 16, and Jencks Material, and for Evidentiary Hearing (Nov. 6, 2015) (ECF No. 481).

documents required by *Brady*, *Giglio*, and Jencks, as well as the Court's orders regarding discovery.[4]

15. The government provided its initial discovery on December 4, 2015 and January 29, 2015. On April 15, 2015, the defense emailed Assistant U.S. Attorney Steve Ruby and asked him to confirm "that all of the memoranda of interviews that the government conducted as part of its investigation, as well as the documents used during those interviews . . . have been provided to the defense." The defense also requested a complete list of all interviews conducted. AUSA Ruby responded on April 21, 2015 with a list of interviews.

16. On June 12, 2015, in response to a defense motion, this Court ordered the government to "specifically designate any known Brady material as such and disclose the same to defense counsel." Mem. Op. & Order at 11 (June 12, 2015) (ECF No. 279). The prosecutors' response flatly denied that any

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[4] *See, e.g.,* United States' Response to Defendant's Motion No. 19, Motion to Enforce the Government's *Brady* Obligations at 2 (Feb. 20, 2015) (ECF No. 133) ("Defendant's belief notwithstanding, all discoverable evidence, including all *Brady* material known to the United States, has been provided to Defendant."); United States' Response to Defendant's Motion to Compel Production of Witness Interview Notes and Records of Attorney Proffers Containing *Brady* Information at 1-2 (May 14, 2015) (ECF No. 251) (claiming that the government was "aware of its ongoing *Brady* obligations" and "is in compliance with its discovery obligations"); United States' Combined Motion for Production of Reciprocal Discovery and Response to Defendant's Motion to Compel Compliance with *Brady* Order at 8 (July 14, 2015) (ECF No. 284) ("[S]ince the United States has complied with the *Brady* Order with respect to the substance of those interviews, there is no reason to revisit that ruling.")

exculpatory evidence existed in the entire investigation:

> As an initial matter, the United States notes that *all the evidence of which it is aware tends to support the conclusions that Defendant and others at Massey Energy Company made a business decision to regularly commit illegal minesafety violations at the Upper Big Branch mine* ("UBB") and then caused statements and omissions to be made that concealed that decision after the 2010 UBB explosion. In other words, *the United States does not know of any evidence that truly tends to exculpate Defendant*. Defendant may propose that evidence is exculpatory if it shows that there were occasions when he or others at Massey complied with mine safety laws rather than violating them. That view would be mistaken . . . Similarly, Defendant may propose that evidence that he or others at Massey expressed general concern for safety tends to show that he did not conspire to violate mine safety laws. That claim, too, would be erroneous. (Emphases added)

Nonetheless, prosecutors proceeded to identify ten out of the more than 300 MOIs that had actually been disclosed to the defense that "Defendant might

claim tend to be exculpatory in some way, even if such a claim would lack merit."[5]

17. After receiving the government's response, Mr. Blankenship sought further relief from this Court, citing a litany of deficiencies in the government's representations. Motion to Compel Compliance with *Brady* Order (July 8, 2015) (ECF No. 283) (ECF No. 283). For example, in some instances, rather than turning over a complete MOI, the government provided cursory statements that purported to summarize potentially exculpatory information provided by a witness. *Id.* at 3. In its opposition to the Motion to Compel, the government assured the Court that "the United States has complied with the *Brady* Order." United States' Combined Motion for Production of Reciprocal Discovery and Response to Defendant's Motion to Compel Compliance with *Brady* Order (July 14, 2015) (ECF No. 284). In light of the government's representations, the Court denied further relief. Mem. Op. & Order (Aug. 10, 2015) (ECF No. 295).

18. Given his concerns about the prosecution's compliance with its discovery obligations, Mr. Blankenship also sought evidence directly from MSHA. On September 9, 2015 this Court issued an order granting Mr. Blankenship's request for a Rule 17(c) subpoena *duces tecum* to be served on MSHA. (ECF No. 358). The subpoena was issued that same day and sought three categories of documents including: "All documents regarding the UBB mine

[5] This response is contained in Exhibit A of Mr. Blankenship's Motion to Compel Compliance with *Brady* Order (July 8, 2015) (ECF No. 283, Att. No. 1).

during the Indictment Period located in the files of the MSHA inspectors and officials who were present in the mine during the Indictment Period and their supervisors." (ECF No. 359).

19. On September 17, 2015, Mr. Blankenship filed a motion to compel compliance with the Rule 17(c) subpoena, arguing that MSHA's response could not possibly have been complete. Motion to Compel MSHA to Comply with Subpoena Duces Tecum (Sept. 17, 2015) (ECF No. 377). Prosecutors defended MSHA's response and urged the Court to deny Mr. Blankenship's motion. Response to Motion to Compel MSHA to Comply with Subpoena Duces Tecum (Sept. 24, 2015) (ECF No. 388). Mr. Blankenship renewed the motion on November 6, 2015. Motion to Compel Compliance with Subpoena, for Production of *Brady*, Rule 16, and Jencks Material, and for Evidentiary Hearing (Nov. 6, 2015) (ECF No. 481). Once again, the prosecutors insisted that MSHA had complied with the subpoena. United States' Response to Motion to Compel (Nov. 15, 2015) (ECF No. 496). This Court ultimately denied Mr. Blankenship's motion. Mem. Op. & Order (Dec. 9, 2015) (ECF No. 549).

20. During trial, prosecutors continued to assert the government's compliance during argument before the court. For example, during cross-examination, Chris Blanchard testified about a number of exculpatory topics that he claimed to have previously told the government. Defense counsel asked to see the MOIs from those interviews: "This witness was interviewed a number of times by the Government and, according to the witness, told them that he did not, did not believe that he was guilty of a

crime, that he didn't believe that he participated in a conspiracy with Mr. Blankenship, and a number of other more specific exculpatory statements. We were never provided with any of that, notwithstanding our aggressive [and] persistent efforts." (Trial Tr. Vol. XVII at 3710:23-3711:5). AUSA Ruby told the court point blank that "We have [] turned over 302s from our interviews with this witness . . . to the extent that there is exculpatory information that we had from this witness, that's been turned over to the defense." (*Id.* at 3712:9-18). As of that time, the government had turned over a single 302 (also referred to as a MOI) for Mr. Blanchard.

21. On January 19, 2017, OPR notified the acting U.S. Attorney[6] that MOIs conducted during the investigation into Mr. Blankenship had not been disclosed to the defense. In response, the U.S. Attorney's Office ("USAO") began a review of the file and, over the course of the following weeks, provided Mr. Blankenship with sixty-one memoranda of interview that had not been disclosed previously. In October 2017, the USAO provided details regarding an undisclosed attorney proffer by Chris Adkins, Mr. Blanchard's immediate supervisor. Then, in November 2017, the USAO turned over several dozen emails from MSHA. Most recently, on April 6, 2018, the USAO learned of still more undisclosed MSHA documents which it then promptly turned over to Mr. Blankenship. All these undisclosed materials, along

[6] Carol Casto – who was not a member of the prosecution team in Mr. Blankenship's case – became the acting U.S. Attorney in January 2016 and served in that role until the appointment of the current U.S. Attorney in January 2018.

with the letters of transmittal, are being submitted with this Motion.

GROUNDS FOR RELIEF

22. Mr. Blankenship hereby incorporates by reference paragraphs 1 through 21 of this motion.

23. Prosecutors' conduct deprived Mr. Blankenship of his constitutional right to a fair trial. Each of the following grounds is individually sufficient to warrant the requested relief.

1. Suppression of Material Exculpatory and/or Impeaching Evidence in Violation of *Brady v. Maryland* and *Giglio v. United States.*

24. Despite their repeated assertions to the court, prosecutors failed to turn over material, exculpatory and/or impeachment evidence in violation of their obligations under *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). The prosecutors' failure to comply with their *Brady* and Giglio obligations violated Mr. Blankenship's constitutional right to a fair trial and warrants vacating his conviction and sentence.

A. Memoranda of Interview

25. The sixty-one MOI provided to Mr. Blankenship post-trial contain mountains of exculpatory material. Among them were five MOI for *each* of the government's two main witnesses at trial. They failed to disclose twenty-three pages of reports from five separate interviews with alleged co-conspirator Chris Blanchard. Similarly, five

interviews comprising twenty-eight pages of reports for Bill Ross – a former MSHA inspector hired by Mr. Blankenship specifically to address safety concerns – also went undisclosed.

26. These sixty-one MOI contain numerous examples of exculpatory and impeaching evidence. The full list of *Brady/Giglio* material in the undisclosed MOI is enormous and cannot be detailed in full within the confines of this Motion. A few key examples, however, are highlighted below.

27. The undisclosed MOIs from Mr. Blanchard include the following information:

- Mr. Blanchard told investigators: "Blanchard advised that he never knowingly gave a direct order where he told someone to do something that caused a law to be broken." (MOI-001457).

- The government argued at trial that Massey's failure to increase staffing levels at UBB proved Mr. Blankenship's intent to violate mine safety regulations. *See, e.g.,* Trial Tr. Vol. XXVIII at 5842:24-5843:24. But as is reflected in the undisclosed materials, Mr. Blanchard told investigations that there was "no amount of money or resources that could take care of all violations at a mine." (MOI-001547).

- One of the most critical pieces of evidence for the prosecution was Mr. Blankenship's receipt of reports that showed the citations issued to UBB. (*See, e.g.,* Trial Tr. Vol. XXVIII at 5839:9-11, 5953:12-19). But in fact, Mr. Blanchard told the prosecutors that "Blankenship . . . felt violations were going to be written by MSHA. Blankenship felt MSHA made things up." (MOI-001402).

28. A review of the five undisclosed MOIs for Mr. Ross likewise includes obvious exculpatory and impeaching statements:

- Like Mr. Blanchard, Bill Ross provided evidence that many of the citations at UBB were outside Massey's control. Mr. Ross told investigators in an undisclosed MOI that "the UBB mine was set up to fail based on the ventilation system MSHA forced the UBB mine to use." (MOI-001532). This was a critical part of Mr. Blankenship's defense – that UBB received citations, at least in part, because MSHA required them to use an ineffective ventilation system that caused violations.

- Ross also told the government of several statements Blankenship made about *reducing* violations. (MOI-001487; MOI-001476; MOI-001488).

- What is more, one of the alleged co-conspirators, Chris Adkins (Mr. Blanchard's immediate supervisor), told Ross that "they should comply with all regulations at the mine site." (MOI-001477)

29. In addition, the government never turned over MOIs for many other witnesses that included exculpatory information that would have benefited Mr. Blankenship's defense. For example, the government never turned over a MOI for Mark Clemens, who oversaw Massey's production, sales and budgeting. Among other exculpatory information in his MOI, Mr. Clemens directly refuted one theory of prosecution when he told the government that "there was pressure at Massey to run coal, but not enough pressure to overlook safety." (MOI-001506). In addition, the information contained in undisclosed MOIs for Sabrina Duba, Charlie Bearse, Stephanie Ojeda, Steve Sears, Lisa Williams, and Gary Frampton all contained additional exculpatory and impeachment information that would have benefited Mr. Blankenship at trial.

B. MSHA Documents

30. In November 2017 and April 2018, the USAO turned over dozens of exculpatory and impeaching documents and emails from the Mine Safety and Health Administration ("MSHA"). We cannot identify every such instance here, but provide the following as particularly egregious examples.

31. Several of the MSHA emails support Mr. Blankenship's defense theory that many citations did

not reflect actual violations. For example, one email from a MSHA attorney discusses several citations issued to UBB. In this email, the attorney observes that one citation could not be sustained and must be vacated. She also points out that more information would be needed from inspectors to sustain two other citations. (USAO0000114). In another email, a MSHA employee points out a "potential violation" at UBB. He receives the following response: "Sounds like a violation is in order. Let Norman know about it and I am sure he will be more than happy to give them one more piece of paper." (USAO0000028).

32. Other emails demonstrate MSHA's contempt for Mr. Blankenship and Massey Energy. In response to a draft press release regarding complaints about Massey mines, MSHA Mine Administrator Kevin Stricklin replied: "My only comment is to put a dagger into massey [sic]." He was overruled by the head of MSHA, Joe Main, who responded that "This is about presenting the facts to the public in a responsible way." (USAO0000033). But Mr. Stricklin's remark is tame in comparison with what another MSHA employee wrote: "I hope that him [Blankenship] and Glenn Beck get raped by a rhinoceros. Horn end." (USAO0000109).

33. Even more astoundingly, the issue of advance notice – the illegal practice of warning miners that inspectors had arrived – came up regularly at trial. It was a major focus of the government's case that Mr. Blankenship defrauded the United States, but was also used to demonstrate his participation in a conspiracy to violate the mine safety regulations. In fact, however, the undisclosed internal MSHA emails reveal that MSHA officials themselves were conflicted

as to whether Massey's practices actually violated regulations regarding advance notice. In one especially pointed email, a MSHA investigator explained: "The fact is most [inspectors] did not really think that what was going on was advance notice. The lack of citations says a lot." (USAO0000030).

34. Finally, the documents provided on April 6, 2018 show that multiple MSHA supervisors were disciplined by the agency for inadequate supervision over UBB. In particular, these documents criticize MSHA officials for failing to consider the interaction between the mine's dust and ventilation plans when they approved them. This evidence supports another of Mr. Blankenship's key defenses at trial – that MSHA required Massey to use a ventilation plan that inherently created violations. These documents also reveal the disparity between the government's treatment of Mr. Blankenship (criminal prosecution) and that of the MSHA officials responsible for the UBB mine's safety (a slap on the wrist).

2. Suppression of Evidence in Violation of the Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedure.

35. Many of the MOIs include statements by witnesses who testified at trial and should therefore have been turned over to the defense. *See* Jencks Act, 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2(a). The sanctions for Jencks violations at trial include striking the witnesses' testimony and/or declaring a mistrial. Fed. R. Crim. P. 26.2(e). Because the excluded testimony was critical to the government case, Mr. Blankenship's conviction and sentence must be vacated.

36. Roughly two-thirds of the undisclosed memos were authored by FBI Special Agent James Lafferty, who testified at trial on a number of subjects, including subjects related to those covered in the MOIs. These MOIs are unequivocally Jencks material that should have been produced. *See United States v. Hinton,* 719 F.2d 711, 714 n.2, 716, 722 (4th Cir. 1983) (formal MOIs are considered a government agent's statement for Jencks Act purposes but informal notes are not). Notably, Special Agent Lafferty authored all of the undisclosed Ross MOIs and all but one of the Blanchard MOIs.

37. Moreover, one of the undisclosed MOIs includes a diagram drawn by Mr. Ross to explain how continuous miners operated in connection with certain ventilation systems. Mr. Ross testified extensively on the subject matter of ventilation and mining operations. (*See, e.g.,* Trial Tr. Vol. XIX at 3904:18-3905:25).

38. If the testimony of Mr. Ross, Mr. Blanchard, and Special Agent Lafferty had been stricken, there clearly would have been insufficient evidence to convict. In fact, striking the testimony of any one of them would have seriously undermined the government's case. This fact alone warrants vacating Mr. Blankenship's conviction and sentence.

3. Violation of District Court Orders Regarding discovery.

39. By failing to disclose these MOIs and MSHA documents, the government violated two orders issued by the Court regarding discovery. These

violations deprived Mr. Blankenship of his constitutional right to a fair trial.

A. District Court's Brady *Order*

40. As described in paragraph 15, this Court ordered the government to "specifically designate any known Brady material as such and disclose the same to defense counsel." The prosecution's response denied that any exculpatory evidence existed in the entire investigation. None of the sixty-one interviews were included on that list, despite the fact that a number had already occurred by that time. And, of course, those interviews conducted later on were never disclosed at all.

41. Moreover, prosecutors repeatedly told the Court and the defense that they had complied with the Court's order. For instance, Mr. Blanchard testified on cross-examination that he had made several exculpatory statements during meetings with prosecutors. Having received only a single MOI from an interview with Mr. Blanchard, the defense requested the MOI from those other interviews. In response, AUSA Ruby asserted that "We have [] turned over 302s from our interviews with this witness . . . to the extent that there is exculpatory information that we had from this witness, that's been turned over to the defense." (Trial Tr. Vol. XVII at 3712:9-18). But, in fact, the government had not turned over 302s – plural – as AUSA Ruby claimed. It had turned over only a single 302 and had withheld *five* others with Mr. Blanchard – totaling twenty-three pages of notes. Included in one of those undisclosed MOIs was a statement corroborating that Mr. Blanchard told the government he had committed

no crime: "Blanchard advised that he never knowingly gave a direct order where he told someone to do something that caused a law to be broken." (MOI-001457).

B. Rule 17(c) Subpoena

42. On September 9, 2015, pursuant to this Court's order granting Mr. Blankenship's request for a Rule 17(c) subpoena *duces tecum* to be served on MSHA (ECF No. 358), the subpoena was issued requesting: "All documents regarding the UBB mine during the Indictment Period located in the files of the MSHA inspectors and officials who were present in the mine during the Indictment Period and their supervisors." (ECF No. 359).

43. Mr. Blankenship – correctly as we now know – believed that MSHA's responses were inadequate. When he sought the Court's assistance in compelling better responses, prosecutors vigorously opposed those efforts. *See supra* para. 19.

44. However, documents turned over to Mr. Blankenship in November 2017 include emails that were responsive to the Rule 17(c) subpoena and should have been produced pursuant to it.

45. What is more, the defense discovered evidence that MSHA had *destroyed* documents in the aftermath of the UBB explosion. It raised this issue with the court and requested an evidentiary hearing. (ECF No. 481). In opposition to Mr. Blankenship's motion, prosecutors told this Court: "MSHA has complied with the subpoena, and the United States has complied and continues to comply with its

discovery obligations." (ECF No. 496). As a result, the court did not find Mr. Blankenship's evidence of non-compliance to be sufficient: "Absent additional testimony or evidence regarding alleged document destruction by MSHA or any MSHA employee, and any additional link between such acts and this case, the Court sees no legal basis or justification for granting the Defendant's Motion." (ECF No. 549).

46. The undisclosed MSHA letters provide that additional evidence. In December 2011, a MSHA employee William Francart sent an email asking: "How many miners worked their entire career at UBB? We had a shredding party here in Beckley and the charts you printed for everyone were modified so that they can't be read." (USAO0000032). This email reinforces the conclusion that MSHA intentionally destroyed its records related to UBB.

C. Fraud on the Court

47. In addition to its failure to turn over *Brady* material, prosecutors misrepresented the government's compliance with its *Brady* obligations and the court's *Brady* order in both court filings and oral arguments.

48. For example, in its opposition to Mr. Blankenship's pre-trial motion to Compel Compliance with the Court's Brady Order, prosecutors told the Court that "the United States has complied with the *Brady* Order." (ECF No. 284). Likewise, in its opposition to a similar motion during trial, prosecutors told this Court: "MSHA has complied with the subpoena, and the United States has complied and continues to comply with its discovery obligations."

Response to Defendant's Motion to Compel (Nov. 15, 2015) (ECF No. 496). Neither of these statements was true.

49. AUSA Ruby misrepresented the government's compliance during argument before the court. As described earlier, after Chris Blanchard testified about a number of exculpatory topics that he told the government, Mr. Taylor asked to see the MOIs from those interviews. AUSA Ruby told the Court that "We have [] turned over 302s from our interviews with this witness . . . to the extent that there is exculpatory information that we had from this witness, that's been turned over to the defense." (Trial Tr. Vol. XVII at 3712). This was simply not true.

4. Prosecutorial Misconduct

50. In order to establish a claim under *Brady*, it is not necessary to show that the prosecutors intentionally suppressed evidence. *See Brady*, 373 U.S. at 87 (the "good faith or bad faith of the prosecution" is irrelevant if the suppressed evidence "is material either to guilt or to punishment"). Nonetheless, the quantity and quality of the suppressed exculpatory and other information here leads to the unfortunate conclusion that the misconduct was intentional. The prosecutorial misconduct was of such magnitude as to deny Mr. Blankenship due process and a fair trial, and it therefore violated his Fifth Amendment rights and warrants vacating his conviction and sentence.

51. Defense counsel frequently raised the issue of nondisclosure with both prosecutors and the court, asking for specific documents or statements. On

behalf of the prosecution team, AUSA Ruby repeatedly countered that they had complied with their obligations even though they so obviously had not. AUSA Ruby in particular, *must have known* that these representations were not true. He had personally participated in the vast majority of the undisclosed interviews including all five Blanchard interviews, along with three of those involving Bill Ross.

52. Moreover, prosecutors denied that any exculpatory evidence even existed. In response to the Court's *Brady* Order, AUSA Ruby denied that any exculpatory evidence existed in the entire investigation. Yet, it is clear from his response that AUSA Ruby understood the precise nature of the information that Mr. Blankenship considered exculpatory. Instead of providing that information, he simply argued that the evidence *did not* actually exculpate Mr. Blankenship.

53. The Blanchard incident is the most telling display of the willfulness of the misconduct. After defense counsel requested notes from Mr. Blanchard's MOIs, stunningly, AUSA Ruby did not offer to review the file or ask the Court for time to confirm. Instead, he boldly told the Court that all exculpatory information from the witness had been turned over. (*See* Trial Tr. Vol. XVII at 3712:9-18). And yet, twenty-three pages of notes from five interviews *that AUSA Ruby personally attended* had never been disclosed.

54. Despite the efforts of the new U.S. Attorney to remedy these discovery violations, Mr. Blankenship has reason to believe that additional

exculpatory material remains undisclosed. Specifically, handwritten notes of interviews by investigating agents have never been disclosed. In a pre-trial motion, defense counsel requested the handwritten notes of interviews. The Court ordered that the substance of those notes be produced, a requirement the government claimed had been satisfied by the typewritten memos. Nonetheless, it is probable that witnesses made exculpatory statements to the government that are not reflected in the typed MOIs that were produced.[7] Based on the pattern of violations here, it seems likely that material evidence may be contained in the handwritten notes that is not reflected in the typed MOIs.

55. Additionally, before trial, the defense requested certain information regarding communications between the government and immunized witnesses. Specifically, they requested information on whether immunized "witnesses or their counsel profess innocence or otherwise make factual representations or proffers inconsistent with their or Mr. Blankenship's guilt." No response to that request has ever been provided.

56. Finally, even with the most recent batch of MSHA emails provided by the government, there is no indication that the routine day-to-day communications among MSHA inspectors have ever been produced, despite defense counsel's repeated requests.

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[7] For example, Mr. Blanchard testified that he (or his attorney) informed the government that he had not engaged in a conspiracy with Mr. Blankenship. (Trial Tr. Vol. XVI at 3309:17-3310:4). No such statement appears in any of the disclosed MOIs.

CONCLUSION

WHEREFORE, Donald L. Blankenship moves this Court to vacate and set aside his sentence and judgment of conviction as having been imposed in violation of the Constitution and the laws of the United States, and for such other relief as is necessary and appropriate. Mr. Blankenship also moves the Court to hold an evidentiary hearing to consider the full facts, and to determine whether additional information exists that should have been provided to Mr. Blankenship pre-trial.

APPENDIX I

U.S. Department of Labor
Office of Inspector General
Office of Investigations

Report of Interview – Charlie Bearse

Investigation on: February 5, 2014
At: Charleston, WV
File: 31-0862-0001 PC

Date Prepared: 2/7/2014

On February 5, 2014, Charlie Bearse accompanied by attorney Tom Scarr was interviewed at the United States Attorney's Office located at 300 Virginia St., Suite 4000, Charleston, WV. Also present and participating in the interview were Steve Ruby, Assistant United States Attorney and Special Agents Jeffrey Carter, U.S. Department of Labor, Office of Inspector General, Office of Labor Racketeering and Fraud Investigations and Jim Lafferty, Federal Bureau of Investigation.

Bearse was the President of Sydney Resource group from 2007 through 2010. Sydney Resource group encompassed the following operations: Taylor, Freedom, Process, Clean and M-3. Bearse worked for Massey for 18 years, left for four years and has been with Massey/Alpha for the past seven or eight years.

Bearse was aware that his operations received violations. He acknowledged that they received a lot of violations. Bearse looked at the differences in the violations. He did not intentionally ignore violations. Bearse believed that he had a feel for the numbers at the time in terms of volume. Bearse was not surprised that he was one of the highest paid Presidents. Bearse suspected that somewhere compensation was tied to safety. Part of Bearse's compensations was quarterly incentives. Bearse could not recall the matrix that was used for the quarterly compensation. It was possibly tied to violations and safety. There was a matrix to measure safety, non-fatal days lost (NFDL) was the primary measure. There were also key performance indicators.

Bearse did not adjust pay because of safety or violations. The mines were written a lot of violations. Bearse stated that a lot of violations are enforced now that used to not be enforced. Bearse stated that he has mined a lot of coal and has never gotten a man killed.

After a mine foreman was killed when he was run over by a shuttle car Bearse made it a policy to wear reflective clothing and 20 years later the state has made it part of their regulations. Bearse stated that he could make a list of safety things that he was involved with and if Don Blankenship was not involved the list would be half that.

Bearse could not compare Massey and Alpha. He stated that things evolve because of events and went on to say the difference is that Alpha is operating under the non-prosecution agreement (NPA), requiring Alpha to meet certain requirements for training and safety, There is a cultural difference with

Alpha. You have a lot less interaction from the top at Alpha. Bearse had more interaction with Chris Adkins, Elizabeth Chamberlain and other senior levels at Massey.

Bearse reported directly to Adkins. Bearse mostly interacted with Blankenship through memos. Blankenship would write notes and send them back to Bearse.

There was not a period of time that Bearse was not trying to follow the law. A lot of factors play a role. There was a generation that went to college and didn't work in the mines. Pressure to train because of the generation gap. The bar continues to rise with regulations. The regulations can be interpreted in different ways. Level of enforcement increased on the federal level and the state followed. Bearse felt that District Manager Norman Page had it out for the Sydney operation.

When asked about the number of citations written for combustible material and rock dust, Bearse stated every mine had to be rock dusted and had to have people to take care of it. Bearse felt it was worked on. Committing violations was not intentional. Bearse believed he had the toughest district manager who had it out for Sydney. You have a 35 year old mine with difficult seam conditions. Bearse believed Page was trying to drive the mine out of business even after Page knew the mine was going to be closed.

Bearse stated that if he had a temporary situation he would have contractors take care of it. If he needed additional staff he talked to Adkins. Bearse stated

that he was not going to blame one citation on anyone above him, it stops with Bearse.

Bearse stated that it was riot a shortage of manpower that contributed to violations. It's the level of experience. There's a shortage of experience, but it is starting to come back around. The culture of the industry stops at a high school education. Bearse believes most people have good intentions. Bearse stated that it is about money and people also. The industry is down 10,000 miners in Central Appalachia. Some of it is because of the number of citations and some is economic factors.
Massey had a high turnover rate. Massey put pressure on people and held them accountable. Pay was also a factor. It's a race with your competitor. Everyone looks to see who is paying what. If Massey raises rates of pay then the other operators raise their rates. Miners end up going back and forth between mines.

Bearse stated that Taylor Fork in 2008 was one of the first mines to go on potential pattern of violation (PPOV). Freedom may have also been on PPOV at one time. When Taylor Fork was on PPOV, Bearse assigned accountability to people. Maps were put on the walls and areas of responsibility were assigned to people and citations were posted. This worked at Taylor Fork. It shows MSHA that you are trying and that you are making improvements. Bearse stated that he took this way of operating to other mines that weren't on PPOV. Bearse stated that he uses this technique today at Elk Run. Bearse did not recall a change in production when Taylor Fork was on PPOV compared to when it was not.

Bearse never instructed anyone to break the law. The intent was always zero violations. Bearse believed that is was possible to have a lower number of violations at Sydney. People create hazards and people are hazardous. Bearse also added that Sago and Aracoma caused an increase in enforcement.

Bearse stated that the NPA dictated staffing and rock dust. Freedom did not have designated rock dust personnel. There were staffing differences between Massey and Alpha since the takeover. Personnel were added to rock dust as a means to comply with the NPA. Bearse stated that was the only staffing difference.

Massey operated each section with 13 people on the day and evening shift and 9 on midnight. They operated two continuous miners, two shuttle cars, two roof bolters, an electrician, and a foreman. That was the industry standard. Bearse stated that the mine dictates manpower. Bearse does not see a material difference.

Since UBB there has been elevated enforcement and standards. UBB has caused the industry to change. Bearse stated that additional personnel make a difference. Bearse stated that he didn't know why they didn't do more. Bearse assesses the situation by considering what he needs with what he.

Bearse believed that he was one of the highest paid presidents because he had been with Massey for a long time. Bearse stated that he understood Don Blankenship, but others did not. Blankenship was very aggressive and in your face. Blankenship could have done a better job of explaining things. He had so

much knowledge and talent. Safety was implied and always there. It takes a while to get a work group there. Even if Blankenship was hands off the message would have been the same. Bearse gave the example of telling someone that you love them. If you don't tell them every time you see them it doesn't mean you don't love them. Bearse stated that was the same with Blankenship, safety was implied.

Bearse explained if there was something wrong at the mine you were expected to stop, fix the problem and then move on. Bearse believed that people did not stand up and do what needed to be done. Bearse had conversations concerning safety, socialistic and capitalistic issues.

A court order was issued to shut Freedom down after Bearse had conversations with Page that Massey was going to shut the mine down. Freedom was bigger and older than other Massey operations.

It is not economically feasible to have zero citations, Bearse stated that you would have to shut down every mine in the industry.

It was decided that Freedom would shut down in 2010. Trying to exit a mine has a lot of ramifications. Where do you go next and how do you exit. It was a proactive decision that was thrown down Massey's throats by the agencies. It was decided to shut down because of compliance and all the problems that a 35 year old mine has. Bearse again stated that he never got anyone killed.

You are always trying to achieve zero violations. Bearse stated that tolerant implies that it is OK to

receive violations and if that was true then everyone in the industry is tolerant of violations. Bearse did not meet a goal of zero violations, so does that mean that Alpha tolerated violations.

Apparently violations were tolerated because the system kept operating. There were not discussions that violations were OK, but there were discussions about trying to get better. Massey was not tolerant of anything it recognized that the "head winds" kept getting stronger, referring to compliance such as agency blitzes. Massey was not tolerant of being where it was or staying where it was.

Bearse stated that upper management wanted him to read every citation that was written. Bearse focused on the issues and problems and did not wait to receive a call from Adkins for a D order or "heavy paper". Adkins reviewed some of the citations, because some were more of an issue than others. Everyone at Massey was trying to do a good job, but could have done better. Bearse believed that he was doing everything in his power that he could.

Massey spent more time doing useless exercises trying to get things approved by MSHA. Bearse stated that you need to work together to accomplish more. MSHA was putting up hurdles all the time. Bearse believed that the whole process was dysfunctional.

You can go to any mine and find safety violations. Bearse worked on safety projects, such as proximity monitors and reflective clothing. Bearse again stated that there was not a tolerance that was OK. Massey could have done a better job and so could MSHA. Bearse stated that he is intelligent, always worked

hard and had good relationships with people. Bearse could have kept up with the number of violations better and could have had better awareness. He could have made more people aware and made a bigger deal of things. Massey was weak and the industry has been week concerning training. Bearse was aware that he was receiving a lot of citations and so was upper management. Bearse was not disciplined, but took some tongue lashings over issuance of orders.

Bearse stated that a B order will not cause a shutdown of productivity and went on to say he may have been reprimanded by Adkins. Bearse believed that he was reprimanded for running with no air on a section. Bearse could not recall the specifics with the reprimand, but recalled a harsh conversation concerning the violation. Bearse's salary was not reduced because of safety violations received and he did not have conversations concerning the potential of his pay being reduced. Bearse stated that he feared discipline over certain compliance issues from time to time, but could not give any specific instances. Freedom had particular issues that were touchy. The superintendents were not disciplined because of the number of violations.

Bearse stated that the superintendent at Clean Energy was fired because he advanced near an area that was mined out and full of water. The area was not examined before it was tapped and flooded. Jessie Hunt was the superintendent fired. This would have been in 2009 or 2010. Bearse was not aware if Hunt returned to work at another Massey operation.

Alpha has not added additional people to the section, but has added two additional outby personnel on

average per mine. It's a standard increase particularly because of the 85% rock dust law. It's qualified because this is a different day and time. Bearse feels that Massey would have added additional people also. Bearse explained that you staff for what you have.

Bearse has shut down and interrupted production at mines because of safety or compliance. Bearse provided that he interrupted production at Taylor Fork when they hit gas in the roof. Bearse stated that someone has to be responsible for corrections and that they are behavioral based.

Bearse stated that he was aware of advance notice, but it has been a long time. It was a practice in the 1980's. To the best of Bearse's knowledge advance notice was not a practice at Sydney.

Bearse was aware that an internal audit was conducted and was aware that after UBB, Massey was accused of not reporting all accidents. Bearse stated that he worked at UBB for a year after the accident. Bearse believed that Massey was doing a good job reporting accidents. There were discussions about preventing lost time accidents. Bearse was not aware of any accidents that were not reported at Sydney. Bearse stated that at the resource group level and down that if an accident is not reported then someone is pushing the envelope, making it look better and playing with the numbers.

Bearse stated that he did not think that Elizabeth Chamberlain, Blankenship, or Adkins was doing anything with the safety numbers. Steve Endicott was the safety director at Sydney. If Endicott knew about an accident he would report it. Bearse had discussions

with Endicott about reportability. If the numbers were played with it was closer to the operations.

The last contact that Bearse had with Blankenship was in November 2010, when Blankenship resigned. Bearse had contact with Adkins a month ago because Adkins is working for a concrete company, The owner is a friend and they are doing business with the company.

Bearse is currently the general manager of Elk Run Mine (equivalent to president under Massey). Jason whitehead is vice president of operations for Coal River East Business Unit.

APPENDIX J

U.S. Department of Labor
Office of Inspector General
Office of Investigations

Interview – Mark Clemens

Report of Interview
Investigation on: November 10, 2011
At: Richmond, VA
File: 31-0862-0001 PC

Date Prepared: 11/14/2011

On November 10, 2011, Mark Clemens was interviewed at the United States Attorney's Office located in Richmond, VA by Thomas Hall, DOJ Trial Attorney, Fraud Section and Special Agent Jeffrey Carter, United States Department of Labor, Office of Inspector General, Office of Labor Racketeering and Fraud Investigations. The nature of the contact was explained and Mohr voluntarily provided the following information:

Also present during the interview was Pete White and Nora Lovell, Attorneys from Schulte Roth & Zabel.

Clemens stated that he is no longer with Massey/Alpha Natural Resources and that his last day was June 9, 2011. Clemens had been employed by Massey for 22 years. Prior to the merger with Alpha,

Clemens was senior vice president of operations for Massey Coal Services. After the merger he was president of optimization.

Clemens started working for Massey June 1989. He was an accounting trainee in a three year training program where he learned all aspects of the coal mining business. After he completed his training Clemens spent two years in the accounting department. Clemens passed is CPA exam and became a staff account. In 1993 Clemens transferred to Massey's Omar Subsidiary as the comptroller and held that position for one year. In 1994 Clemens became the comptroller for Performance Coal Company. August 1997 Clemens was the corporate comptroller for Massey and held that position for approximately 14 to 15 months. Clemens held the position of vice president for subsidiary accounting until February 2000. Clemens also held positions as president of Independence Coal and the head of budgeting for Massey.

Clemens stated that his role with Massey from 2007 until the acquisition was allocation working with production, sales and budgeting. Clemens matched up production and sales. He also had a big role in budgeting. Clemens stated that his predecessor was Drexel Short. Clemens reported directly to Don Blankenship. Clemens stated that approximately four to five individuals reported to Clemens along with the different work groups. Clemens stated that he also indirectly worked with Sabrina Duba and Stacy Wagner who worked in sales. They reported directly to Baxter Phillips.

Clemens stated that he had contact with all individuals in sales: Steve Sears, Mike Allen, John Parker and Tom Dougherty. Clemens had some contact with the customers. Clemens stated that he got involved with the larger complaints which dealt with deliveries, inventory issues and quality control. Clemens stated that he dealt more with the situation than the customer.

Clemens recalled that he met mainly with Scott Vogel and Bill McCartney from U.S. Steel. Clemens was involved in negotiations. Sears and John Poma attended these meetings also. Sears and Poma focused on contracts, negotiations and customer relations more so than Clemens. If Clemens got involved that meant there was an issue.

Clemens stated that he didn't get involved very often. Clemens cited an example when Herman Maze called because his inventory was low and that he was going to have to shut down. Clemens stated that Maze was given priority for shipping.

Clemens stated that the coal industry was give and take with meeting needs. Clemens explained that for example in 2009 no one wanted coal. A shift in the steel market would create a demand for coal. Clemens recalled the following issues, customers held back on their coal, rail road related issues, geological conditions at the mines, the labor pool was tight and there was a lot of turnover.

Clemens stated that if an issue was elevated to his level that he would have discussed it with Baxter Phillips and Don Blankenship. Clemens couldn't recall any specific occasions. Clemens stated that he

saw Blankenship at least once a week or he may see him every day dependent upon what was going on. Clemens saw Phillips less than Blankenship.

Clemens stated that there was a sense that 2019 was going to turnaround for coal. Massey was able to keep its workforce intact and may have added a few sections.

Clemens stated that he recalled an issue with a customer late 2009 or early 2010. He couldn't recall any specifics, but stated it shouldn't have been an issue with getting coal.

Clemens didn't work with overseas customers much. He visited India once with Sears for contract negotiations and may have been to the UK twice. Sears was responsible for Massey's overseas accounts.

Clemens was presented with a schedule from U.S. Steel dated April 27, 2010. Clemens couldn't recall why there was a shortfall with U.S. Steel. Clemens stated that it could have been a rail road problem, but doesn't know for sure. Clemens explained that you try to make up what you can with your customers. Clemens stated the following were remedies for coal shortfall issues. The contract could be extended to make up the tons and the blend could be adjusted and a lower quality coal could be accepted. Clemens stated that companies often would not accept the lower quality coal.

Clemens stated that the following metallurgical coal customers were serviced from Marfork: U.S. Steel, Wheeling Pitt, Great Lakes, Berns Harbor, Corus, ILUA, and Arcelor Mittal.

Clemens stated that there was pressure at Massey to run coal, but not enough pressure to overlook safety. According to Clemens all of management wanted to run coal. Clemens stated that Blanchard wasn't under any more pressure than any other President at Massey.

Clemens stated that he had contact with Chris Blanchard. Clemens spoke with Blanchard weekly, but very rarely went to see him. Clemens discussed budget and delivery issues with Blanchard. Blanchard had visited Clemens. Clemens stated that conference calls were held monthly for coal sales. Blanchard participated in these calls along with James Sutphin, who was a direct report to Clemens, the sales force and the traffic department. They discussed the production sales summary, sales reporting and tracked contracts. Issues were discussed and production was married up with contracts. Blankenship may have been present for some of these calls.

Mine presidents and the lab managers scheduled trains, managed day to day reporting that was used to track where the company stood compared to its contracts.

Clemens stated that he wasn't involved with safety or MSHA. Clemens stated that he received a call from Blankenship and based on that call initiated a non-fatal days lost (NFDL) audit. This was done after MSHA conducted an audit and found accidents that weren't reported. Clemens, Blanchard and Nick Johnson were involved. Clemens stated that Elizabeth Chamberlain worked with mine presidents

and safety directors. The audit looked at reportable accidents and reviewed to see if any were lost time accidents. Clemens stated that they missed reporting some accidents.

Clemens stated that during the audit it was found that some miners were performing light duty work. Clemens believed that there may have been a misunderstanding of the rules. Clemens stated that instances were found where accidents were reported to MSHA, but not to the company. Massey started the audit then Ernst and Young was hired to finish the audit.

Clemens stated that he felt UBB was run well and hadn't heard anything negative about the mine. It was the largest deep mine producer with a high quality of coal that Massey had. Clemens did recall that UBB received a large number of violations. Clemens stated that UBB had a resident inspector along with some of the other larger operations. Massey had 50 to 60 PPOV mines. Clemens was aware of this because of the reporting to the SEC in 2009.

Clemens stated that following individuals worked on the SEC filings: Eric Grinnan from corporate, Roger Hendrickson-Investor relations, Eric Tolbert-CFO and Elizabeth Chamberlain was responsible for the NFDL rate.

After the explosion Chris Adkins, Chief Operating Officer for Massey was focused on UBB. Clemens assumed Adkin's duties, Clemens sent force Majeure letters to its customer. Clemens stated that Massey met approximately 48% of customer contracts.

Clemens stated that the delay in getting the longwall up and running at UBB was an issue, but couldn't recall any specific problems it created.

APPENDIX K

FEDERAL BUREAU OF INVESTIGATION

Interview – Sabrina Duba

Report of Interview
Investigation on: February 4, 2015
At: Charleston, WV
File: 318A-PG-78955-302

Date Drafted: 02/05/2015
Date of Entry: 02/06/2015

SABRINA DUBA was interviewed at the United States Attorney's Office located in Charleston, West Virginia. DUBA was accompanied by her attorneys, Stephen Miller and Rebecca Brody. United States Attorney Booth Goodwin and Assistant United States Attorney Steve Ruby were present and participated throughout the interview. After being advised of the identities of those in attendance and the nature of the interview, DUBA provided the following information:

DUBA is from Man, West Virginia. DUBA is still working for Alpha Natural Resources (Alpha), in Julian, West Virginia. DUBA is the Vice President of Financial Analyst for the Northern Region.

DUBA was the office manager at the Logan County Public Defender's Office prior to joining

Massey Energy (Massey) in November 2000. DUBA was hired as an accountant trainee. DUBA stated that she is a Certified Public Accountant. DUBA worked in Martin County before moving to Massey's Chapmanville office at the end of 2001. DUBA was still an accountant trainee when she began handling special projects for DON BLANKENSHIP. DUBA built the daily profit and loss models that were used to standardize and consolidate Massey's profit and loss statements. DUBA worked for SEAN TESSIE until he left in 2002. DUBA then worked for SCOTT SPEARS. Once SPEARS left, DUBA began reporting to MARK CLEMMONS and ERIC TOLBERT. DUBA advised that TESSIE, who was the manager of subsidiary accounting, was also responsible for handling special projects for BLANKENSHIP. TESSIE passed off this responsibility to DUBA. DUBA was promoted to assistant controller before being named the vice president of subsidiary accounting in 2006. DUBA remained in this role until Massey's merger with Alpha.

DUBA started working on Massey's budgeting process in 2003.

DUBA was provided with an e-mail and attachment she sent on Monday, August 11, 2008, regarding the revised 2009 business plan timetable. DUBA advised that Massey started preparing these plans for the following year in April.

DUBA advised that the preparation of five year mine plans were prepared by the chief engineers who would review the mine plans with the group presidents.

DUBA stated that Hyperion was a computer program used for budgeting. Prior to 2006, Massey used Excel spreadsheets for budgeting. Hyperion was locked to keep individuals from making changes to the budget until an approved time period. DUBA advised that the activity involving the entry of preliminary five year production and release data completed with Hyperion was referring to the time period when changes could be made to the budget in Hyperion.

DUBA advised that production at underground mines would include section footage, tons per feet mined, and other data.

Data would be pulled from Hyperion over to an Excel spreadsheet before it was provided to BLANKENSHIP. CLEMMONS reviewed the spreadsheet with DUBA before sending the report to BLANKENSHIP.

Massey's board of directors did not review the five year production summary.

JOHN MARCUM was a controller who worked for DUBA.

The resource croups had their own projections for staffing and man hours worked. The resource groups would provide their information to DUBA for input into Hyperion. The man hours worked was a projected figure and was not an actual figure.

The mine map review would occur at Massey's regional office. DUBA started going to mine map reviews in 2009. Engineers would discuss timing and capital needs. Geology issues would be discussed as

well. Budget figures and staffing figures were not typically discussed unless the discussions involved the addition of a new section.

The cost input entered into Hyperion was a driver based model that was measured on a per yard or per foot basis. Costs were keyed to projected tonnage. DUBA provided as an example that the number of bolts needed per foot or the costs per bolt used were measured. Labor costs would include the head costs, hours worked per day, and the number of people that would work multiplied by the number of days they would work. These figures were provided by the human resource managers or the group presidents.

The final staffing and man hours worked were discussed after production reviews occurred. Sales projections would assist in determining which mines would be operational.

The summary of final production with detailed worksheets sent to BLANKENSHIP would include worksheets that listed the clean tons produced per foot and other information. Information for above ground operations such as detailed surface by spread were included in the worksheets. BLANKENSHIP would tell them to go back and make sure the figures used were not too aggressive. DUBA added that on average a mine would run coal 240 days out of the year.

While reviewing the activity involving the allocation of production to customers using projected prices, DUBA stated that when she first got involved in the budget process, BLANKENSHIP and

CLEMMONS were involved in this meeting. This shifted to CLEMMONS and the Richmond sales group being involved in the meeting. DUBA would help some once CLEMMONS and the sales group being involved in the meeting. This meeting was used to determine where coal was going to come from to fill orders.

DUBA advised that the group on-site review was an internal review that did not involve BLANKENSHIP or CLEMMONS.

DUBA stated that she sat in on the preliminary business plan reviews. The review occurred in Julian and included group presidents and group controllers.

A full review of profit and loss and a full review of accounting took place. There was a discussion of how the profit and loss statements were built from the bottom up. Head counts were discussed to include how many people would be working on the belt or at a load out. DUBA advised that the staffing at a mine was standard. There would be an ancillary head count of the administrative staffing. The staffing of production crews would depend on how the sections were set up. The face set up was pretty standard. DUBA was pretty sure the standardized set ups were written down on a staffing chart or a sections setup chart. DUBA added that everyone was familiar with the setup from experience.

There was no standard chart for the staffing of outby areas and belt crews. DUBA advised that the head count was different per mine. DUBA stated that the larger the mines, the larger the size of the belts. DUBA had never heard of a measurement involving a certain number of people per feet of belt. DUBA was asked if there were discussions related to the cutting

of labor cost in relation to outby areas and fireboss positions. DUBA advised that CHRIS ADKINS and CLEMMONS would have discussed this with group presidents. DUBA was not aware of the conversations that took place but she was sure they did have those discussions. Everyone took notes in their budget books. There was a follow up later to make sure the issues that had been noted were addressed.

DUBA advised that the attendance of BLANKENSHIP at these meetings changed over time. In 2006 everyone showed up for the meetings. In 2008 when the meetings began occurring in Julian, BLANKENSHIP never attended a budget meeting. Later, DUBA stated that BLANKENSHIP attended the profit and loss meetings and the budget meetings. BLANKENSHIP was not involved in the final business plan reviews. Some resource groups were not involved in these meetings. DUBA, MARCUM, MIKE SNELLING, and ADKINS were involved in different aspects of the meetings. If BLANKENSHIP reviewed the budget plans he reviewed them on his own.

Three copies of the final plan book were made for BLANKENSHIP. A copy of the final plan book was sent to Lauren Land, to BLANKENSHIP's home, and to BLANKENSHIP's office in Julian.

DUBA would hear from BLANKENSHIP regarding the tweaking of pricing on uncommitted pricing and other issues.

DUBA reviewed an e-mail she sent to BLANKENSHIP on September 15, 2009, with an attached first draft of the 2010 consolidated plan summary. BLANKENSHIP would sometimes call or

fax questions to DUBA. BLANKENSHIP was interested in cash flow and EBIDTA figures.

DUBA advised that any time she had information she felt was good enough to share with BLANKENSHIP she would pass the information along. DUBA usually received two faxes a day from BLANKENSHIP. DUBA received more faxes on Mondays. DUBA communicated often with BLANKENSHIP.

DUBA communicated every day with BLANKENSHIP regarding the consolidated profit and loss statements. DUBA described the communication as being constant.

DUBA went to a few board meetings. DUBA did not sit in on board sessions. DUBA was not involved in committee meetings. DUBA attended the board meetings in case she was needed. DUBA then remembered that she did set in on one session. DUBA was not sure why she was invited to sit on on this one session.

BLANKENSHIP reviewed a high level summary of the budget book.

JOHN POMA and CLEMMONS prepared a powerpoint summarizing information from the final consolidated books. DUBA does not believe the board got a copy of the final consolidated books.

BLANKENSHIP would have questions regarding the daily profit and loss reports he would receive from DUBA. BLANKENSHIP would want to know why the feet of coal mined per shift was low.

DUBA would go back to the resource group presidents and controllers to obtain answers for BLANKENSHIP.

DUBA reviewed an e-mail and attachment sent to BLANKENSHIP on April 1, 2009, regarding YTD March Violation data. DUBA advised that there were two reasons why she was asked to prepare this data. First, DUBA was over field accounting which was involved in the payment of violations. Second, DUBA also handled reporting projects for BLANKENSHIP. DUBA knew how BLANKENSHIP liked to receive data. DUBA added that she was referring to the visual presentation of the data.

DUBA advised that DAVID OWINGS was a corporate controller for Massey.

DUBA advised that there was a discrepancy in what Massey was showing internally for the amount owed in citations and what MSHA was reporting. BLANKENSHIP wanted to make sure that Massey was accruing their fines correctly. The process included reconciling data from MSHA with Massey's information. DUBA advised her reference point was in dollars. DUBA stated that Massey discovered that they were processing payments several times for the same violation.

DUBA stated that ELIZABETH CHAMBERLIN had sent an e-mail about DUBA's controller processing a late payment. BLANKENSHIP responded by asking questions about how payments to MSHA were processed and how they were tracked. DUBA advised this analysis

was part of Massey's M-3. This sparked a new process of how payments were made to MSHA.

ADKINS informed DUBA that he wanted to focus on the more serious types of violations like S&S violations and where they were getting them. ADKINS was specifically interested in focusing on eliminating serious violations. BLANKENSHIP instructed DUBA go to the IT department and reprogram the system to determine which people were responsible for violations and who was responsible for not eliminating violations. DUBA believed these instructions were made via fax. BLANKENSHIP wanted to know who were the repeat offenders.

DUBA knew that the overall assessment amount for citations had gone up significantly in 2008. DUBA added that the assessment amount for citations had gone up year after year. DUBA could not say why BLANKENSHIP wanted violations tracked.

DUBA provided the violation report to BLANKENSHIP that she thought he would want. DUBA advised that after working for Massey for ten year she knew wanted they wanted. DUBA worked with IT to come up with a model that was used for the daily violation report. DUBA may have faxes related to this issue at her office.

DUBA sent BLANKENSHIP a personal e-mail one and a half years ago letting him know what was going on in her life. BLANKENSHIP responded. DUBA advised that BLANKENSHIP took an interest in some people he worked with. BLANKENSHIP would ask DUBA about her extended family. DUBA gets some of BLANKENSHIP's tweets forwarded to

her by CLEMMONS. DUBA does not get tweets directly from BLANKENSHIP. BLANKENSHIP took an interest in DUBA's career advancement at Massey. Prior to her last e-mail exchange with BLANKENSHIP, DUBA and BLANKENSHIP exchanged a couple of e-mails. DUBA described the e-mails as communication where they were just checking in with each other. Since BLANKENSHIP was indicted there had been no effort by BLANKENSHIP or anyone on behalf of BLANKENSHIP to contact DUBA.

JONATHAN IMES rolled together daily production reports for DUBA. This was IMES' full time job. Production reports had to go out by 11 a.m. The production reports had to be reconciled with other reports. IMES had an IT background. IMES is now involved in Alpha's sourcing group.

All resource controllers reported up through DUBA. DUBA was also responsible for Massey's payroll department, accounts payable departments, and staff accountants.

DUBA described her department as the operations accounting focused. The corporate accounting focus involved pensions and black lung issues. DUBA described this as more of a "street" focus.

APPENDIX L

FEDERAL BUREAU OF INVESTIGATION

Interview – Stephanie Ojeda

Report of Interview
Investigation on: June 3, 2015
At: Charleston, WV
File: 318A-PG-78955-302

Date Drafted: 06/03/2015
Date of Entry: 07/09/2015

STEPHANIE OJEDA was interviewed at the United States Attorney's Office located in Charleston, West Virginia. OJEDA was accompanied by her attorneys, Steven McCool and Julia Fisher. United States Attorney Booth Goodwin, Assistant United States Attorney (AUSA) Steve Ruby, AUSA Greg McVey, and AUSA Gabriele Wohl participated in the interview. After having been advised of the nature of the interview, OJEDA provided the following information:

OJEDA did not know BILL ROSS' position at Massey Energy (Massey) until she recently saw the announcement to Massey members dated April 11, 2008.

OJEDA worked at a Massey building located in Kanawha City. The building was located near the

Goodwill. Massey built a corporate office in Julian, West Virginia. Massey moved their offices from the Kanawha City location to the Julian Office at the end of 2008.

OJEDA met ROSS at one of the first operator's meeting she attended.

OJEDA was notified that she would be taking part in a meeting with ROSS and STAN SUBOLESKI by talking to SHANE HARVEY. OJEDA was already aware of the meeting when she received the e-mail from CHRIS ADKINS on June 16, 2009, requesting that she meet with them.

OJEDA had met SUBOLESKI at an operator's meeting. OJEDA knew that he was a mining engineer and was a member of Massey's Board of Directors.

OJEDA thought the meeting between ROSS and SUBOLESKI was unusual. OJEDA does not remember if HARVEY explained why SUBOLESKI was meeting with ROSS. OJEDA knew that ROSS worked closely with ELIZABETH CHAMBERLIN on training and dust issues. OJEDA thought ROSS had raised issues that SUBOLESKI wanted to hear about. OJEDA did not talk to SUBOLESKI before the meeting occurred.

The meeting with ROSS and SUBOLESKI took place at Massey's Julian office. ROSS talked the majority of the time. ROSS had a notebook with a lot of handwritten notes. OJEDA asked ROSS if she could make a copy of his notes. ROSS allowed OJEDA to make a copy of his notes. ROSS spoke fast and addressed multiple topics. OJEDA believed at the

time that ROSS had been underground making observations at specific mines and conducting training with foremen, bosses, and maybe superintendents. ROSS had written comments from conversations he had with people from Massey. OJEDA and SUBOLESKI mostly listened to what ROSS had to say. SUBOLESKI asked ROSS some follow up questions.

OJEDA and SUBOLESKI's notes taken during the meeting were almost identical. OJEDA could not remember any agreement she made with SUBOLESKI where he would prepare a memorandum of what ROSS had discussed.

OJEDA would have kept her notes from the ROSS meeting. SAMANTHA HILL, OJEDA's assistant at Massey, would have retained OJEDA's notes in a file folder. All of the handwritten notes from the Hazard Elimination Program were kept with the memorandums prepared from the notes. OJEDA's notes were maintained with the Hazard Elimination Program's notes and memorandums.

OJEDA had not spoken with DON BLANKENSHIP directly about her and SUBOLESKI's meeting with ROSS. OJEDA would have told HARVEY how the meeting went and that ROSS had handwritten notes. OJEDA would have told HARVEY that she could not attest to the accuracy of the information in ROSS' notes.

OJEDA reviewed a handwritten note BLANKENSHIP wrote on an e-mail ADKINS sent to OJEDA and copied to others dated June 16, 2009. OJEDA advised she was not sure at the time if

BLANKENSHIP even knew that they had already met with ROSS. OJEDA knew that BLANKENSHIP wanted a report but was not sure how she learned that.

OJEDA reviewed an e-mail she sent to ADKINS on June 22, 2009. OJEDA could not remember talking to ADKINS about BLANKENSHIP wanting a report. It was not unusual to ask ADKINS if he wanted to see the report before it was sent to BLANKENSHIP. OJEDA added that it was not unusual considering ADKINS sent her the initial e-mail requesting that she attend the meeting between ROSS and SUBOLESKI.

At the end of the meeting with ROSS, SUBOLESKI informed OJEDA that he wanted everything addressed by ROSS included in the report. OJEDA does not remember SUBOLESKI stating why he wanted everything included in the report instead of just providing a summary of ROSS had discussed.

OJEDA reviewed an e-mail she sent to ADKINS on June 22, 2009. OJEDA advised that when she referred to ROSS' handwritten notes not being good she was referring to the seriousness of the issues being addressed in the notes and the fact that the notes were disorganized. OJEDA does not know how ROSS got access to the information included in his notes. OJEDA did not know the reason for the meeting with ROSS until the meeting occurred. OJEDA did not know ROSS' background for knowing the information he provided.

OJEDA believed HILL copied ROSS' entire notebook. OJEDA reviewed the notes in the

possession of the United States Attorney's Office. OJEDA does not believe the notes she reviewed were the entire set of notes HILL copied. OJEDA does not believe anyone directed ROSS to prepare the notes he made. OJEDA believed ROSS prepared the notes on his own.

OJEDA does not remember having a conversation with ADKINS before the memorandum of ROSS' meeting with SUBOLESKI was sent to BLANKENSHIP. OJEDA does not remember discussing the memorandum with ADKINS.

After reviewing the June 25, 2009 e-mail she sent to BLANKENSHIP, ADKINS, HARVEY, and SUBOLESKI, OJEDA stated that it was her idea to send a lengthy, detailed memorandum because of the importance of the issues being addressed by ROSS, ROSS' overall concern with Massey's safety program, and ROSS' concerns with Massey's relationship with MSHA. OJEDA was concerned with the idea that Massey's foremen and mine managers were raising the issues ROSS discussed at the meeting.

OJEDA stated it would not have been her job to find out if ROSS was a legitimate source for the information he provided.

OJEDA knows she discussed with HARVEY the contents of ROSS' notes. OJEDA believed she showed HARVEY a copy of ROSS' notes.

OJEDA described ROSS as a nice man who got very confused sometimes while speaking. OJEDA added that what she meant was that ROSS was very

animated when he spoke which caused him to have a "bumbling" speech pattern.

OJEDA would have mentioned to HARVEY how ROSS had obtained this information, where he conducted training, and what violations ROSS had reviewed.

OJEDA did not tell HARVEY that Massey should not take ROSS' concerns seriously.

OJEDA had concerns that SUBOLESKI, a board member, was attending a meeting where ROSS would be expressing his concerns with Massey directly to him. OJEDA had concerns that the meeting would have triggered some type of disclosure obligation. OJEDA advised she probably mentioned to HARVEY the issues raised by having SUBOLESKI in the meeting.

OJEDA had worked at Dupont. OJEDA was not familiar with a board member attending the type of meeting that took place between ROSS and SUBOLESKI. OJEDA does not remember discussing her concerns with ADKINS.

OJEDA advised she had knowledge of Massey's involvement with civil litigation matters including the Aracoma mine fire litigation. OJEDA had concerns with putting the issues discussed at the ROSS meeting in a memorandum. OJEDA was fairly certain she raised this issue with HARVEY. OJEDA probably raised her concerns with HARVEY before and after the meeting. OJEDA could not remember how HARVEY responded to her concerns.

OJEDA stated that at the time of the meeting with ROSS, she believed SUBOLESKI was on Massey's safety committee. OJEDA was not sure how ROSS' concerns got to SUBOLESKI's attention.

OJEDA believed SUBOLESKI wanted to have the meeting with ROSS. Massey probably thought that having OJEDA at the meeting allowed for the meeting and the memorandum prepared after the meeting to remain privileged.

OJEDA stated that MASSEY had received direction from their outside counsel to have an attorney present if the company wanted something to remain privileged.

OJEDA was not specifically told to attend the ROSS meeting so that the meeting between ROSS and SUBOLESKI would remain privileged. OJEDA based her opinion as to why she was told to attend the meeting on her familiarity with the common practices at Massey. OJEDA advised that the intended privilege claim would extend to everyone included in the e-mails.

OJEDA does not remember discussing with ADKINS the requirement to keep the ROSS documents confidential.

OJEDA advised that it was typical to include a warning on privileged documents to provide notice that approval from the legal department was needed before documents could be shared with others.

OJEDA reviewed the warning she wrote in an e-mail she sent to ROSS and SUBOLESKI on June 25,

2009. OJEDA advised that the warning was more than she usually provided. OJEDA does not remember adding the language that the report should not be shared with non-practicing attorneys to warn ROSS not to share the report with CHAMBERLIN. OJEDA could not remember discussing the issue of sharing the report with CHAMBERLIN with SUBOLESKI or ROSS. OJEDA stated that the language related to non-practicing attorneys was not standard. OJEDA does not recall why the language was added. RICHARD GRINNAN and JOHN POMA were two non-practicing attorneys who worked in Massey's Richmond office. OJEDA does not think HARVEY wrote the e-mail that OJEDA sent to ROSS and SUBOLESKI. OJEDA may have cut and pasted the contents of the e-mail.

OJEDA had no specific conversations other than the communication she sent to ADKINS about concerns with keeping the ROSS memorandum privileged.

OJEDA reviewed an e-mail BLANKENSHIP sent to JIM TWIGG on June 29, 2009. OJEDA stated that TWIGG had worked at Massey at one time, but was not sure in what capacity. OJEDA could not remember if TWIGG worked in corporate or operations at Massey. OJEDA could not remember discussing the idea of getting TWIGG involved with the issues ROSS raised.

OJEDA does not remember having discussions of raising ROSS' concerns with the board of directors. OJEDA did not discuss this issue with HARVEY. OJEDA assumed ROSS' concerns would have to be shared with the entire board. OJEDA believed it

would have to be shared because SUBOLESKI was a board member and he had been personally provided with so much information from ROSS. OJEDA was not sure if ROSS' concerns were disclosed to the board of directors. OJEDA believed ROSS' concerns were disclosed in the safety presentation. OJEDA was not a part of the board meeting. OJEDA saw some of the presentations provided to the board. SUBOLESKI led the safety committee and was a board member.

OJEDA reviewed an e-mail she received from ADKINS written on June 30, 2009. OJEDA does not remember getting any pre-notification that she was going to get the e-mail about ROSS. BLANKENSHIP and ADKINS seemed to think that ROSS was legitimate. OJEDA thought they were looking for solutions from ROSS. OJEDA advised that the letter she was going to receive from ROSS was being channeled through her for privilege purposes. OJEDA added that another purpose of sending the letter to her was so that OJEDA could make the information that ROSS was providing more understandable since ROSS could ramble.

OJEDA stated that this was the first time ROSS was involved in sending documents he prepared to the legal department. OJEDA added that this was the reason why she told him to mark confidential on every page of the document. OJEDA advised it was standard practice to have each page of a confidential document marked as confidential.

OJEDA advised that around the time of the meeting between ROSS and SUBOLESKI, the handling of violations had just been transferred to the legal department. OJEDA had just started getting the

daily violation reports. OJEDA did not know if the amount of citations Massey was receiving was common. OJEDA stated the number of fines and the amounts assessed were huge.

OJEDA reviewed an e-mail she sent to BLANKENSHIP, BAXTER PHILLIPS, ADKINS, and others on July 6, 2009. OJEDA advised she kept the memorandum she prepared close to the notes provided by ROSS. OJEDA did this because it appeared this was what they wanted from ROSS. OJEDA stated it looked like the reason she was put in the middle of the communication with ROSS was to keep the communication privileged. OJEDA knew this did not necessarily make the communication privileged.

OJEDA would have let HARVEY know that she had received ROSS' notes and had prepared a memorandum. OJEDA may have let HARVEY read ROSS' typed up notes.

OJEDA was not sure why PHILLIPS was added to the e-mail communication regarding issues raised by ROSS. OJEDA was not sure why he was not on the first ROSS memorandum's e-mail chain. OJEDA assumed the first ROSS memorandum had been communicated to him at some point. OJEDA advised that someone would have told her to include PHILLIPS on the e-mail.

Either ADKINS, HARVEY, SUBOLESKI, or ROSS told her to add PHILLIPS to the e-mail chain. OJEDA does not remember discussing the issues raised by ROSS with PHILLIPS directly.

OJEDA was asked about ADKINS' comments in an e-mail he sent to OJEDA on July 2, 2009. OJEDA read ADKINS' statement to mean he knew how BLANKENSHIP was going to react to ROSS' recommendations. OJEDA advised that BLANKENSHIP was probably not happy with the memorandum prepared after the first meeting with ROSS. ADKINS was over the operations of Massey. Because of ADKINS' position, BLANKENSHIP would have discussed the issues raised by ROSS with ADKINS. BLANKENSHIP did not like learning of inadequacies at Massey. OJEDA also thought that part of ADKINS' problem was with the formatting of the memorandum. When asked why ADKINS did not ask her to reformat the memorandum, OJEDA stated that ADKINS would not have asked her to reformat the memorandum. OJEDA then advised that ADKINS was going to take the heat for what ROSS had stated.

OJEDA did not know that ADKINS brought ROSS into the company. OJEDA thought ROSS reported to CHAMBERLIN.

OJEDA was not aware that BLANKENSHIP had asked ROSS to write a script for a training video.

OJEDA remembered seeing a "Do The Math" video or powerpoint at an operator's meeting. OJEDA added that she may have seen a t-shirt with the "Do The Math" slogan.

OJEDA did not know that ROSS met with BLANKENSHIP at Lauren Land.

OJEDA reviewed an e-mail and memo ROSS sent to her on February 1, 2010. OJEDA does not remember the e-mail. OJEDA stated that ROSS was attending or had attended hazard elimination meetings. ROSS may have read his memo at one of the hazard elimination meetings.

OJEDA reviewed a Hazard Elimination Committee memorandum prepared by her on February 8, 2010. OJEDA believed that ROSS provided more in the meeting than what was portrayed in her memorandum. OJEDA would have written in her notes what ROSS had said at the Meeting. OJEDA does not know why she did not put more of what ROSS provided into her memorandum. OJEDA does not remember what ROSS said at the meeting but she would have memorialized what he had said in her notes. OJEDA's notes would have been kept in a folder or placed in a binder. OJEDA thought her notes were scanned at some point after the Upper Big Branch explosion. OJEDA acknowledged that not all of the issues ROSS addressed in his January 29, 2010 memo were covered in the memorandum prepared for the hazard elimination meeting held on February 2, 2019. OJEDA acknowledged that pre-shift examinations does not cover the scope of what ROSS covered in his memo.

OJEDA advised that she shared everything that ROSS provided to her. OJEDA sometimes faxed documents but she typically did not use faxes to share documents with individuals located in the corporate offices. OJEDA would not have mailed ROSS' January 29, 2010 memo. OJEDA reiterated that she shared everything ROSS provided to her. OJEDA does not have a specific memory of sharing ROSS' memo but she believed she would have shared the document

based on her typical practice. OJEDA advised that she would have shared ROSS' memo first and foremost with HARVEY. OJEDA may have shared the memo with ADKINS. OJEDA stated that if she had hand-delivered the document to ADKINS, she would have prepared a cover letter to accompany the document.

OJEDA would not have sent ROSS' memo to BLANKENSHIP without HARVEY's permission. Based on the follow up BLANKENSHIP had asked for regarding other information ROSS had provided, OJEDA believed he would have wanted to know what ROSS had said in this January 2010 memo. OJEDA added that based on her prior experience with BLANKENSHIP, ROSS' memo would have been something BLANKENSHIP would have wanted to see.

OJEDA reviewed an e-mail she sent to HARVEY on October 19, 2010. OJEDA advised that she handled a lot of employment/labor disputes at Massey that involved discrimination allegations, special treatment allegations, and gender bias claims. OJEDA advised that it was not her experience that women at Massey were not taken seriously. OJEDA stated her experience at Massey was that people thought she was more direct with people than they were accustomed to receiving from a woman. OJEDA never received feedback that people did not appreciate her speaking up. OJEDA's brother, a Massey employee, told her that people were not used to women speaking up at Massey. OJEDA worked primarily with men.

CHAMBERLIN commented to OJEDA when she (OJEDA) started with the company that Massey did net take women as seriously as they did men.

OJEDA could not remember having any other conversations with CHAMBERLIN about women having issues at Massey. OJEDA thought some men were threatened by women in high positions at Massey. OJEDA advised that she experienced this with Alpha Natural Resources and to some extent with Patriot as well. SABRINA DUBA was a controller at Massey.

CHAMBERLIN intimidated people. CHAMBERLIN had a very harsh personality, was very unpleasant, and was a difficult person to work with. OJEDA added that CHAMBERLIN was very territorial. CHAMBERLIN was furious when she learned that the violation work was being transferred to the legal department. CHAMBERLIN intimidated OJEDA. OJEDA believed the problems CHAMBERLIN had With Massey personnel was due to her personality. The issues people had with CHAMBERLIN had nothing to do with the fact that she was a woman. OJEDA stated that CHAMBERLIN probably thought that she was not taken as seriously by executive management and subordinates because she was a woman.

OJEDA advised she was not thinking of anything specific when she made the comment that Massey thought women who worked there were crazy.

OJEDA. reviewed e-mails HARVEY sent to her on January 29, 2011 and January 30, 2011. OJEDA believed HARVEY sent the January 29, 2011 e-mail to all Massey attorneys. OJEDA advised the January 30, 2011 e-mail was not a typical e-mail HARVEY would send. Prior to this e-mail HARVEY had never said anything to OJEDA about Massey being a crazy

company where the top few kept all the money. OJEDA assumed that HARVEY was speaking of Massey in his e-mail. OJEDA was not sure who HARVEY was referring to when he talked about the top few.

OJEDA advised that she had seen individuals disciplined at Massey for reasons that did not make any sense.

OJEDA advised that any follow up discussions at Massey related to ROSS' recommendations did not include her involvement. OJEDA could not imagine that some type of follow up discussions did not occur because of the importance of the matter, the individuals who were involved in the matter, and the requests made that ROSS provide specific recommendations.

OJEDA would not know the details of Massey's operations other than what she learned through citation litigation.

The Hazard Elimination Committee started around the same time as ROSS' recommendations were made. OJEDA does not remember ROSS' recommendations being discussed at the Hazard Elimination Committee meetings. OJEDA advised that some issues addressed by the committee paralleled what ROSS had discussed. OJEDA does not remember ROSS in any other hazard elimination meetings other than the one noted on February 2, 2010. OJEDA advised that she did not remember ROSS attending the February 2, 2010 meeting until she reviewed the memorandum prepared after the meeting.

ROSS was involved in things with CHAMBERLIN and other issues while the Hazard Elimination Committee was meeting.

ROSS attended some safety director meetings and operator's meetings.

OJEDA believed that if ROSS' recommendations were addressed at the Hazard Elimination Committee meetings there was no reason why those discussions would not have been reflected in her notes.

OJEDA remembered meeting with BOB HARDMAN and MSHA when the Hazard Elimination Program began. OJEDA assumed ROSS' recommendations were a part of the Hazard Elimination Program.

OJEDA never asked why ROSS' recommendations were not being specifically addressed. OJEDA was certain issues raised by ROSS were discussed by the Hazard Elimination Committee. OJEDA does not know of anything every happening as a result of ROSS' recommendations. OJEDA does not believe ROSS' memorandum was shared with anyone outside of those included in the e-mails. OJEDA believed ROSS shared his information with others. OJEDA does not believe the reason why ROSS' information was not addressed by the Hazard Elimination Program was because it was assumed ROSS had already shared his concerns with Massey members.

OJEDA believed CHAMBERLIN saw ROSS' memorandum but does not know that to be true.

HARVEY may have provided a copy of the memorandum to CHAMBERLIN. OJEDA was not sure if GARY FRAMPTON received a copy.

CHAMBERLIN had commented about ROSS' concerns and his notes. CHAMBERLIN had encouraged ROSS to raise issues. CHAMBERLIN knew ROSS was meeting with OJEDA and SUBOLESKI. OJEDA could not remember if she brought up the meeting between ROSS and SUBOLESKI or if CHAMBERLIN brought it up first. CHAMBERLIN knew ROSS was keeping notes and assumed he was sharing his notes with CHAMBERLIN. OJEDA could not remember if CHAMBERLIN was glad ROSS was coming in to talk to SUBOLESKI. ROSS was happy to know he was going to be able to address his concerns. OJEDA noted that this was how ROSS was.

ROSS had a large notebook he kept his handwritten notes in.

OJEDA was not sure how she remembered CHAMBERLIN received a copy of ROSS' memorandum. OJEDA concluded CHAMBERLIN must have had a copy of the memorandum. OJEDA does not have knowledge that she was given the memorandum.

OJEDA was stunned that the federal government did not have ROSS' memorandum until recently.

BLANKENSHIP's attorneys wanted to talk to OJEDA a few weeks ago. OJEDA was asked general questions about documents. These documents

included the Hazard Elimination Committee documents. BLANKENSHIP's attorneys asked about the preparation of documents that went to the board of directors. This included powerpoint presentations prepared by the safety department and presented to the board. OJEDA was asked questions about the preparation of public speeches and statement preparation. OJEDA informed BLANKENSHIP's attorneys that she was not involved in preparing public speeches and preparing statements. OJEDA advised that HARVEY was involved in the preparation of public speeches and preparing statements. OJEDA added that a press relations firm was involved. MICHA RAGLAND worked with this company. OJEDA was asked if she was involved in operator's meetings or other meetings where BLANKENSHIP instructed others to break the law. OJEDA was asked if BLANKENSHIP every directed her to instruct others to break the law. OJEDA advised that the ROSS issue did not come up at all. OJEDA was asked about operation specific matters that she did know about. An Alpha attorney was present during her meeting with BLANKENSHIP's attorneys.

OJEDA stated that investigators working for BLANKENSHIP were looking for people who used to work for Massey who now work for Patriot. The investigators were looking for JOHN JONES who is now a vice president at Patriot.

APPENDIX M

U.S. Department of Labor
Office of Inspector General
Office of Investigations

Interview – Steve Sears

Report of Interview
Investigation on: November 10, 2011
At: Richmond, VA
File: 31-0862-0001 PC

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On November 10, 2011, Steve Sears was interviewed at the United States Attorney's Office located in Richmond, VA by Thomas Hall, DOJ Trial Attorney, Fraud Section and Special Agent Jeffrey Carter, United States Department of Labor, Office of Inspector General, Office of Labor Racketeering and Fraud Investigations. The nature of the contact was explained and Sears voluntarily provided the following information:

Also present during the interview was Pete White and Nora Lovell, Attorneys from Schulte Roth & Zabel.

Sears retired from Massey Energy/Alpha Natural Resources in June or July 2011. Sears retired with 30 years of service. He is currently under a consulting agreement with Alpha.

Sears started his career with Massey in January 1981. Sears worked as a company pilot for approximately three years. Eventually Sears began working in sales for Massey. He held various positions within sales, such as Industrial Sales President, Electric Power Sales President and President of Massey Coal Sales (MCS), overseeing all of sales operation. Sears also held positions within Coal Handling Solutions.

Sears was president of MCS from late 2007 until he retired in June or July 2011. Sears reported directly to Baxter Phillips. Prior to becoming President of MCS, Sears was Vice President for sales and marketing. Sears explained that he has spent six months out of the year overseas for the past two years. MCS was responsible for industrial, utility and metallurgical coal sales and transportation.

The following individuals were involved on the metallurgical coal sales side of Massey; Mike Allen, John Parker, John Dougherty, Gary Temple and Andy Smallneck. There were three administrative personnel assigned to metallurgical sales. The traffic department had another five individuals assigned. Sears explained that some finance positions reported to him. The coal handling groups also reported to Sears.

Mike Allen left Massey in April 2008. Sears believed that Allen started his own business, Allen Energy. Andy Smallneck was moved from industrial sales to metallurgical to work with Sears. In late 2009, Smallneck left the company and went to work for Trafigura. After Smallneck left, Sears and Dougherty assisted the metallurgical sales. David Smith was

brought from the field to assist metallurgical sales around the middle of 2010: Smith is currently employed by Alpha.

Sears reported directly to Baxter Phillips and on an informal basis to Don Blankenship. Sears also worked closely with Mark Clemens. Clemens worked with operations and the overseas employees.

Sears stated that the top metallurgical coal customers were US Steel, Steel Authority of India, Algoma, and Corus. Sears stated that sometimes he chased the customer and sometimes they chase him. He worked closely with his customers, but was not able to visit them all. Some overseas customers came to visit Sears and he took them to the mine operations.

Sears explained that some issues were elevated to Phillips or Blankenship, either directly or brought to their attention. Sometimes Blankenship would get involved with negotiations. Sears would back off when Blankenship got involved. Blankenship liked talking with customers and they liked talking with him. Phillips had relationships with Algoma, Corns, Hydra and Posco Steel. Phillips was happy to speak with customers. Sometimes customers wanted to speak with someone in a higher position.

Stars stated that he has known Chris Blanchard for many years. Sears has not had a lot of interaction with him, but stated that his interaction with Blanchard has been more often over the past couple of years. Blanchard is one of our better mine presidents. Blanchard understood mining, customers and finances. Sears stated that Blanchard would meet with customers. Sears has visited Blanchard at the

Marfork Mine office. Sears stated that Blanchard was a product of the people that worked for him and that he was a good person.

Sears stated that pressure from customers depended upon the coal market, whether it was high or low. It also depended on the customer's inventory. Sears explained that some customers carry lower inventories than others.

Complaints from customers also depended on the coal market. In 2008 customers were pushing for deliveries and in 2009 when coal prices were high they did not want it.

Some customers were more demanding than others. AK Steel operated with low inventory. Wheeling Pit was skeptical until they got to know Sears because of past experiences.

Sears stated that the biggest issues with deliveries were the railroads, CSX and Norfolk and Southern. Sears stated that if every rail car was available that was requested there would have been a production problem. Sears stated that they were not running the way they wanted to run, but that they were staying ahead of the rail road. If there was a production issue first step was to talk with the president of the operation, maybe Clemens and eventually Blankenship. Sears stated that most conversation with Blanchard were indirectly through Clemens.

Sears reviewed a document from US Steel dated 4/27/2010. Sears stated that he did not recall a specific problem that US Steel was having with Massey. They worked to accommodate customers. One of the biggest

issues was renegotiating contracts when the price of coal was high.

Sears stated that Massey's primary focus was safety. Blankenship started a safety program for individuals and pushed safety more than any other CEO in the industry. People have been fired because of safety. Sears was responsible for safety audits at Coal Handling Solution locations at Westvaco in VA and Eastman Chemical in TN.

Sears stated that there had been a ventilation plan in place at UBB for 15 years and in 2009 MSHA wanted to change the plan and started writing violations.

Sears explained that there were issues with the setup of the longwall at UBB that caused delays and in September of 2009, MSHA shut down the wall because of ventilation which hurt production. Sears stated that the longwall sometimes runs a lot of coal and sometimes it does not run any.

Sears stated that he had a positive opinion about safety at all of Massey's operations.

Non-Fatal Days Lost (NFDL) was a topic of discussion by Elizabeth Chamberlain at every operations meeting.