No. 16-4193

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES,

Appellee,

v.

DONALD L. BLANKENSHIP,

Appellant.

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

APPELLANT'S PETITION FOR REHEARING EN BANC

William W. Taylor, III
Michael R. Smith
Eric R. Delinsky
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Washington, DC 20036
202-778-1800 (phone)
202-841-8106 (fax)
wtaylor@zuckerman.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

BRIEFS OF THE SOLICITOR GENERAL

RULE 35 STATEMENT

1. The panel decision conflicts with *Bryan v. United States*, 524 U.S. 184 (1998), which holds that criminal willfulness demands "proof that the defendant knew that his conduct was unlawful," and with *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007), which reaffirms *Bryan*. Appellant was convicted of conspiracy to willfully violate mine safety regulations. 30 U.S.C. § 820(d). The panel upheld the trial court's denial of a criminal willfulness instruction requiring proof that Appellant knew his conduct was unlawful. The panel approved four alternative instructions that permit conviction of criminal defendants upon proof of recklessness or even simple noncompliance with regulations.

2. The panel decision conflicts with *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), which holds that denial of the constitutional right to cross-examine a prosecution witness is error even if a defendant could have called the witness in the defense case. The panel assumed that the denial of cross-examination of important redirect testimony by an important prosecution witness was error but held the error to be harmless because Appellant could have recalled the witness in a defense case (although he put on no separate case). That holding disregarded the denial of the constitutional confrontation right on the very ground that *Melendez-Diaz* held impermissible.

If the Court vacates the panel opinion and grants review, it should re-examine two other holdings. (a) Although the indictment alleged conspiracy to willfully violate safety regulations, the panel concluded the indictment was not required to identify the specific regulations that are elements of the offense or to identify the elements of any regulatory violation, disregarding that the texts of dozens of specific regulations were given to the jury to consider in determining guilt or innocence. Op. 7-8; Opening Br. 61-62; *see Russell v. United States*, 369 U.S. 749 (1962). (b) The panel disapproved an instruction explaining reasonable doubt that implied a jury may convict based on a civil preponderance standard. Op. 32-24. The panel nevertheless affirmed because the trial court also referred separately to the term "reasonable doubt" standard several times. The flawed instruction was the trial court's only explanation of reasonable doubt to the jury. Repeating the term reasonable doubt did not cure the erroneous explanation. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993) (erroneous reasonable doubt instruction is structural error).

STATEMENT OF THE CASE

This case was tried in the district where the tragic UBB mine explosion occurred. Right after the explosion, President Obama, public officials, and the UMW President blamed Appellant for it, and, after he released a film showing that a government-imposed ventilation plan impaired the mine's ability to deal with a natural gas inundation that caused the explosion, protestors picketed the U.S. Attorney's Office in support of a prosecution and Senator Joe Manchin announced publicly that Appellant had "blood on his hands." Opening Br. 2-3.

Aware of the charged environment, and having granted the government's motion to exclude evidence regarding the cause of the UBB explosion, Tr. 869, the trial court instructed the jury that the case had nothing to do with the explosion and that jurors would violate their duty if they discussed or considered it. Tr. 5780-81. Yet the prejudicial impact was so unavoidable the panel wrote that "[t]his case arises from a tragic accident on April 5, 2010 at the Upper Big Branch mine," referred to the accident five more times while reciting the evidence, and even ventured that the mine received citations for the kinds of "problems that were key contributing factors to the accident." Op. 3-5.

The government's theory of criminality was that Appellant could have eliminated safety violations by budgeting for more miners and lower production

targets and did not do so. Appellant contested the evidence and also contested the element of criminal willfulness, demonstrating with documents and testimony elicited on cross-examinations that he did not believe or know that his conduct would cause safety violations or violate the law. Important government witnesses testified that Appellant did not believe additional miners would diminish violations, that he pushed supervisors hard (even rudely) to reduce violations and instituted a safety program to achieve reductions, and that he never suggested that safety regulations be violated. Opening Br. 22-24, 27-31; Reply Br. 26. The only alleged co-conspirator to testify stated there was no conspiracy or understanding to tolerate safety violations. Opening Br. 22-23. He also testified that communications misinterpreted by the government were not directions by Appellant to break the law – such as a 2008 email directing "run some coal" and "worry about ventilation or other issues at an appropriate time," which referred to ventilation in 2015, not 2008. Opening Br. 19-21; Reply Br. 27-29 & n.8.

The government requested and received four special willfulness instructions for conspiracy to willfully violate safety regulations. Op. 13-14 (reproducing the instructions). None required proof of the core *Bryan mens rea* element: knowledge of illegality. One of the four permitted the jury to convict upon finding that Appellant acted "with reckless disregard" for whether his conduct "will cause" a safety violation. Op. 14. Another permitted conviction upon a finding that

Appellant did not take action necessary to comply with safety regulations, whether he knew of the necessity or not. Op. 14. These instructions permitted conviction *even if* the jury believed the testimony – all from government witnesses – that Appellant fought for safety and did not believe his decisions contributed to safety violations.

In closing argument the government invoked the special instructions and made sure the jury knew to convict without proof of criminal intent. The government argued that the mere fact that Appellant failed to prevent safety violations was criminal without regard to what he actually intended or believed. JA 1591. The government conceded that it was "probably true" that "the defendant didn't want to have safety violations," JA 1593, and argued that criminal guilt followed from a simple breach of "defendant's duty to see that the laws were followed," JA 1562. The government displayed this slide to the jury, as if it were a civil negligence plaintiff: "The Defendant had a DUTY to see that his mines complied with the mine safety laws." JA 272.

The jury twice announced deadlock. After an *Allen* charge, the jury returned its guilty verdict on the Count One conspiracy to willfully violate safety regulations. The jury acquitted on all other charges and counts – including the one for which the jury received a proper criminal willfulness instruction. JA 1557.

ARGUMENT

I. The Panel Approved Special Willfulness Instructions On Count One That Conflict With The *Bryan* and *Safeco* Decisions Requiring Proof That A Criminal Defendant Knew His Conduct Was Unlawful.

A. The Instructions

The trial court gave the jury several definitions of section 820(d) willfulness for the Count One conspiracy to willfully violate safety regulations. The four instructions are set out at 13-14 in the panel opinion exactly as follows:

> 1. A person with supervisory authority at or over a mine willfully fails to perform an act required by a mandatory safety or health standard if he knows that the act is not being performed and knowingly, purposefully, and voluntarily allows that omission to continue.
>
> 2. A person with supervisory authority at or over a mine also willfully violates a mandatory mine safety or health standard if he knowingly, purposefully, and voluntarily takes actions that he knows will cause a standard to be violated[;]
>
> 3. [O]r knowingly, purposefully, and voluntarily fails to take actions that are necessary to comply with the mandatory mine safety or health standard[;]
>
> 4. [O]r if he knowingly, purposefully, and voluntarily takes actions or fails to do so with reckless disregard for whether that action or failure to act will cause a mandatory safety or health standard to be violated.

Op. 13-14 (citing JA 1555-57) (brackets in original). The error in the third and fourth instructions was the most egregious.

This third instruction omitted any requirement that Appellant knew action was required in order to comply. The panel erroneously believed, however, that

the relative pronoun "that" "required the jury to conclude that Defendant knew the action . . . was 'necessary to comply with'" regulations. Op. 31. But "knowingly" modifies failure to act, not the restrictive clause following the relative pronoun "that." There is no way to read "that are necessary to comply" as "that [he knows] are necessary to comply."

The fourth instruction introduced recklessness into the calculus. It broadened and starkly contrasted with the second alternative instruction, which required that the defendant take actions "that he knows will cause a standard to be violated."

These instructions were specially written to exclude the need for proof that Appellant knew he was acting unlawfully. In its brief, remarkably, the government chose not to defend these instructions. *See* Reply Br. 1-2, 5-6 (explaining failure).

B. *Bryan* and *Safeco*

The panel recognized the Supreme Court has held "[a]s a general matter" that criminal willfulness requires a determination that "the defendant acted with knowledge that his conduct was unlawful," Op. 15 (quoting *Bryan*). The panel misread *Bryan*, however, also to hold alternatively that criminal willfulness requires no more than a determination that a defendant had "reckless disregard" for the consequences of his actions or inactions. Op. 14-20. *Bryan* holds nothing of

the sort, as the Solicitor General has twice repeated in confessions of error in the Supreme Court. *United States v. Ajoku*, 2014 WL 1571930 (No. 13-7264); *United States v. Russell*, 2014 WL 1571932 (No. 13-1757).

Russell and *Ajoku* were prosecutions for willfully making false statements to obtain large federal health care payments. In *Russell*, the trial court defined willfulness to require only proof that the defendant "knew [the statement] was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth." *Russell*, *4. In *Ajoku*, the trial court instructed that willfulness requires only proof that the defendant made a false statement "deliberately and with knowledge" of falsity. *Ajoku*, *8. The Solicitor General confessed error in both cases, conceding that *Bryan* required a proof-of-unlawfulness instruction. *Russell*, *6; *Ajoku*, *9-10. The Court granted certiorari, vacated the judgments, and remanded both cases at 134 S. Ct. 1872 (2014).

The Solicitor General's concession as to *Bryan* is supported by the holding at the very end of the decision. While affirming the defendant's conviction for willfully dealing in firearms without a license, the Court held that it was error and "a misstatement of the law" for the trial court to charge: "*nor is the government required to prove that he had knowledge that he was breaking the law*." 524 U.S. at 199 (emphasis in original) (declining to reverse based on failure to object and

other reasons). The instructions in this case conveyed the same erroneous message in different words.

While *Bryan* acknowledged that "willful" has different meanings in different contexts, it addressed the criminal context and set a floor there. Indeed, the Court stated that "[t]he question presented is whether" willfulness in the firearms statute "*requires* proof that the defendant knew that his conduct was unlawful" or requires greater knowledge (specific statutory requirements). *Id*. at 186 (emphasis added). The Court answered that question. "[I]n order to establish a 'willful' violation of a statute, 'the Government *must* prove that the defendant acted with knowledge that his conduct was unlawful.'" *Id*. at 191-92 (emphasis added) (citation omitted). "The jury *must find* that the defendant . . . acted with knowledge that his conduct was unlawful." *Id*. at 193 (emphasis added). The Court recognized as an exception that knowledge of specific statutory requirements may be required sometimes, but held the exception inapplicable to Bryan's prosecution. As the panel acknowledged, Op. 24-25, the statute involved in *Bryan* and the mine safety statute involved here are indistinguishable in their relevant structure and text.

The panel reasoned that three peripheral features of *Bryan* support a recklessness standard. The panel first interpreted the Supreme Court's observation that, as "a general matter," criminal willfulness requires proof of bad purpose, 524

U.S. at 191, to mean that proof of knowledge of illegality is not required "in all circumstances." Op. 16. The phrase "as a general matter" does detract from the Supreme Court's clear statement of the mandated proof requirement: "In other words, . . . the Government must prove that the defendant acted with knowledge that his conduct was unlawful." 524 U.S. at 191-92 (citations omitted). Second, the panel erroneously observed that *Bryan* "relied on" *Screws v. United States*, 325 U.S. 91 (1945). Op. 16. But *Screws* is mentioned in *Bryan* only in a footnoted quote from a dissent in another case concerning the meaning of knowingly, not willfully, and *Bryan*'s quotation from the dissenter (Justice Jackson) noted that *Screws* is an "exception" "which rests on a very particularized basis." 524 U.S. at 193 n.14. Third, the panel erroneously concluded *Bryan* recognized that "'conduct marked by careless disregard' constitutes 'willfulness.'" Op. 17. The quoted language is at the end of an introductory footnote summarizing willfulness standards described by other courts over the years, and the "careless disregard" reference refers to a 1915 federal district court case and a 1905 Iowa case. 524 U.S. at 191 n.12. The Court did not adopt any holding from those footnoted cases or dilute the standard of proof described in the text.

The panel found comfort in *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007), decided in *Bryan*'s wake. To be sure, *Safeco* held that proof of recklessness is sufficient to prove willfulness in a *civil* case. Op. 15-16. But the civil defendants

in *Safeco* claimed benefit of *Bryan*'s criminal standard because, among other reasons, the relevant statute used willfulness in both civil and criminal provisions. *Safeco*, 551 U.S. at 60. The Court concluded criminal willfulness is different from civil willfulness even in the same statute and so declined to extend *Bryan*'s definition to civil actions. *Id.* "It is different in the criminal law. . . . Thus we have consistently held that a defendant *cannot* harbor such criminal intent unless he 'acted with knowledge that his conduct was unlawful.'" *Id.* at 57 n.9 (quoting *Bryan*) (emphasis added); *cf. id.* at 57 (recklessness is "standard civil usage"), 60 (civil willfulness gives plaintiffs "a choice of mental states").

A necessary step in *Safeco*'s reasoning (and therefore part of its holding) was that the *Bryan*'s definition controls in a criminal case. If recklessness could form part of the criminal willfulness standard, the Court would not have drawn a line between the civil and criminal standards. The Court's answer to the civil defendants would have been that recklessness applies whether or not the civil or criminal standard is used.

The panel found important two civil decisions affirming summary judgments upholding administrative revocations of licenses to sell guns. Op. 17-19; *RSM v. Herbert*, 466 F.3d 316 (4th Cir. 2006); *Am. Arms Int'l v. Herbert*, 563 F.3d 78 (4th Cir. 2009). *RSM* rejected "'reckless' lack of concern" as a criminal willfulness

standard, 466 F.3d at 321 n.1, and *Am. Arms*, 563 F.3d at 85, relied on *Safeco*'s affirmance of the use of recklessness as a willfulness standard in civil cases, which is what the license revocations were. Any confusion the cases cause regarding willfulness in criminal prosecutions supports the need for rehearing en banc.

As for *United States v. Jones*, 735 F.2d 785 (4th Cir. 1984), Op. 20, which was not a section 820(d) prosecution, its irrelevance is explained in our Opening Brief at 47-52 and Reply Brief at 11-13. In any event, *Jones*' broad survey of the meaning of willfulness in both civil and criminal cases (while assuming a common meaning in both) nowhere suggested that Congress intended in section 820(d) to give the term a different meaning than ordinarily applies when it appears in criminal statutes. That meaning is now fixed by *Bryan* and *Safeco*.

C. Section 820's Text

Section 820's text and structure call for respect for Congress' hierarchy of civil and criminal penalties for mine safety violations, paired with corresponding levels of fault. Subsection (a) is essentially a strict liability civil penalty of up to $50,000, the level being determined under subsection (i) based on the "history of previous violations" and whether there is "negligence." Subsection (b)(1) adds a daily civil fine of $5,000 for ignoring a citation for a violation. Subsection (b)(2) increases the civil fine to $220,000 for "**a reckless or repeated failure** to make

reasonable efforts to eliminate a known violation of" safety regulations that "substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." (Emphasis added). Subsection (c) then criminally punishes officers who knowingly authorize, order or carry out a violation, and subsection (d) criminally punishes willful violations – both being subject to criminal penalties of imprisonment and a $250,000 fine.

The escalating hierarchy of culpability and penalty in section 820 shows that Congress distinguished various forms of civil liability from criminal liability for willful violations – indeed, even providing explicitly for civil liability for reckless conduct, which the panel did not acknowledge. Because *Safeco* holds that criminal willfulness means more than recklessness, even in a statute also using the same willfulness term to civilly penalize recklessness, it follows *a fortiori* that willful must mean more than recklessness in section 820, which explicitly distinguishes between civil recklessness and criminal willfulness. *Cf. Bryan*, 524 U.S. at 193 (when same statute uses terms knowingly and willfully to define different crimes (as is also true of sections 820(c) & (d) here), willfully should be given distinct meaning requiring proof of "knowledge that his conduct was unlawful").

The panel did not address these features of section 820 but did conclude that 1977 amendments discussed in Senate Report No. 95-181 confirm that the special

instructions appropriately used a recklessness standard for criminal willfulness. The panel noted that "Congress imposed enhanced penalties" in the amendments to punish chronic violators. Op. 22. The panel concluded that the "enhanced penalties" – which it did not identify as civil or criminal – show that "Congress intended to define 'willfully' in Section 820(d) in terms of reckless regard." Op. 24. But the Senate Report and a comparison of the original statute to the 1977 amendment show that Congress amended the statute to enhance civil enforcement and to increase civil fines but changed *nothing* in the criminal provision that is now section 820(d).

Based on the 1977 amendments, the panel also "presume[d] that Congress intended 'willfully' in section 820(d) to have the same meaning" given the term in *United States v. Consolidation Coal Co.*, 504 F.2d 1330 (6th Cir. 1974), because the amendments followed that decision and did not change "willfully violates" in section 820(d). Op. 20-21. *Consolidation Coal* does not support the special willfulness instructions given in this case. Further, there is no reason to believe that Congress was aware of this decision or intended, by silence, to codify it. No authority supports the proposition that a single appellate decision fixes the meaning of a statutory provision if Congress thereafter amends other parts of the statute.

Seemingly motivated by its misunderstanding that the UBB explosion could be traced to mine safety violations, the panel advocated a diluted *mens rea* standard assuring, without regard to criminal intention, that corporate officials may be criminally liable for management decisions alleged to later cause harm. Op. 25-30. That, however, is a policy judgment left to Congress.

II. In Direct Conflict With *Melendez-Diaz*, The Panel Held That Denial Of A Defendant's Constitutional Right To Confront And Cross-Examine A Prosecution Witness Is Harmless If The Defendant Could Have Recalled The Witness Later, In The Defense Case.

The panel recognized that Christopher Blanchard (the only witness called to establish a conspiracy) "was an important witness" for the prosecution and assumed that he testified to "new matter" on redirect (incriminating statements by Appellant and scores of written safety citations that had never before been discussed or placed in evidence), triggering a Confrontation Clause right to cross-examine in a recross-examination. Op. 9-10; *see United States v. Caudle*, 606 F.2d 451, 457-59 (4th Cir. 1979). Citing several cases decided before *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), but not *Melendez-Diaz* itself, the panel concluded that any error was harmless principally because the defense could have recalled Mr. Blanchard as a witness in the defense case, even though the defense did not put on a separate defense case. "Most significantly, Defendant could have recalled Blanchard as a witness later in the trial." Op. 12-13.

The panel disregarded a Confrontation Clause violation because Appellant could have recalled the witness. That is a dangerous holding rendering unreviewable almost any Confrontation Clause violation in any prosecution brought in this circuit in the future. *Melendez-Diaz* squarely holds that Confrontation Clause violations are not avoided if a defendant "had the ability to subpoena" the witness, and it follows that they cannot be so cured. "[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses to court." *Melendez-Diaz*, 557 U.S. at 324-25.

Absent the panel's erroneous holding, reversal was required. Blanchard's unchallenged redirect testimony was crucial to the government's case, as reflected in the panel's use of it to lay out the evidence in the light most favorable to the government. Op. 4. The fact that the defense had lengthy cross-examination preceding redirect has no bearing on the effect of leaving uncross-examined the scores of written safety citations that were first introduced in evidence on redirect and the testimony about Appellant's own statements that the prosecutor reserved for redirect. *See* Opening Br. 65-66.

CONCLUSION

The Court should vacate the panel decision and grant en banc review.

Respectfully submitted,

/s/ *William W. Taylor, III*
William W. Taylor, III
Michael R. Smith
Eric R. Delinsky
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Washington, DC 20036
202-778-1800 (phone)
202-841-8106 (fax)
wtaylor@zuckerman.com

Counsel for Donald L. Blankenship

CERTIFICATE OF COMPLIANCE

This brief contains 3,584 words and thus complies with the 3,900-word type-volume limitation.

/s/ William W. Taylor, III
William W. Taylor, III

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been electronically filed and service has been made by virtue of such electronic filing this 10th day of February, 2017, on the following counsel for the United States:

Steven R. Ruby
Gabriele Wohl
U.S. Attorney's Office
P.O. Box 1713
Charleston, WV 25326-1713

R. Gregory McVey
U.S. Attorney's Office
845 Fifth Avenue, Room 209
Huntington, WV 25701

/s/ William W. Taylor, III
William W. Taylor, III