

**CASE NO: 15-1179**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**IN RE THE WALL STREET JOURNAL, THE ASSOCIATED PRESS,  
CHARLESTON GAZETTE, NATIONAL PUBLIC RADIO, INC., AND THE  
FRIENDS OF WEST VIRGINIA PUBLIC BROADCASTING, INC.,**

*Petitioners.*

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Petition for Writ of Mandamus to the  
United States District Court for the Southern District of West Virginia in  
*U.S. v. Blankenship*, No. 5:14-cr-00244-1 (S.D. W. Va)

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**RESPONSE OF RESPONDENT DONALD L. BLANKENSHIP  
TO PETITION FOR WRIT OF MANDAMUS**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 15-1179 Caption: IN RE THE WALL STREET JOURNAL, ET AL.

Pursuant to FRAP 26.1 and Local Rule 26.1,

RESPONDENT DONALD L. BLANKENSHIP

(name of party/amicus)

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who is a Respondent, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?  YES  NO  
 If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
 If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
 If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Blair G. Brown

Date: 2/24/2015

Counsel for: DONALD L. BLANKENSHIP

**CERTIFICATE OF SERVICE**

\*\*\*\*\*

I certify that on 2/24/2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Blair G. Brown  
 (signature)

2/24/2015  
 (date)

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Respondent Donald L. Blankenship, the defendant below, submits this response to the petition for a writ of mandamus filed by five media entities to challenge the district court's January 7, 2015 modified gag and sealing order.

**A. This Court Should Allow The District Court To Decide The Pending Motion To Transfer Before Ruling On The Mandamus Petition.**

Six weeks after the district court entered its January 7, 2015 order partially denying and partially granting Petitioners' motion to reconsider and vacate the gag and sealing order that was entered back on November 14, 2014, Petitioners filed a petition for a writ of mandamus and moved for an expedited decision.

The district court's January 7, 2015 gag and sealing order is based on an assumption that this case will be tried in Beckley, West Virginia. Since entry of the order, Respondent Donald L. Blankenship has filed a motion to transfer this case to another district for trial, and that motion is now pending in the district court. The motion to transfer demonstrates that transfer is required by Fed. R. Crim. P. 21 and constitutional due process guarantees because polling shows that about half of the small community that comprises the Beckley Division of the Southern District of West Virginia has already decided that Mr. Blankenship is

guilty and because that community has been saturated with extraordinarily prejudicial publicity.<sup>1</sup>

The Petitioners and the amici both recognize that transfer for trial in another district can be an alternative to a gag and sealing order. If this case is transferred for trial in another district, the gag and sealing order would be unnecessary and likely would be vacated by the district court. If vacated, the petition for a writ of mandamus would be moot.

Before this Court acts on the mandamus petition, it should allow the district court, based on the record in that court, to rule on the motion for transfer. The motion to transfer is now set for hearing on March 3, 2015, although we may ask for a short adjournment in order to file a reply to the opposition of the United States that will be filed on February 27, 2015.

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<sup>1</sup>The motion to transfer and the related memorandum and exhibits are Exhibit A to this response. Because those papers in Exhibit A are subject to the district court's January 7, 2015 general sealing order, they are submitted to this Court to be filed under seal. The Court should be aware that Mr. Blankenship has filed a motion in the district court specifically to seal the transfer motion and the related memorandum and exhibits because, even if the general sealing order were vacated, those papers should remain sealed. *See* Exhibit B to this response (filed under seal) (sealed motion in district court to seal transfer motion and related papers). By their nature, the transfer motion and related papers are a compendium of prejudice. Publication of the motion to transfer materials would add to the profound problems of prejudgment and prejudice that already exist in the Beckley Division of the Southern District of West Virginia. The district court has not yet ruled on the sealing motion addressed specifically to the transfer motion and related papers. Until the district court rules, the transfer motion and related papers should remain under seal whether the January 7, 2015 general sealing order remains as it is or is modified.

As a matter of efficiency, a decision on the transfer motion will determine whether there even is a gag and sealing order subject to mandamus review. Moreover, the transfer motion calls on the district court to determine whether, in the particular circumstances present in the Beckley Division of the Southern District of West Virginia, there is sufficient confidence in the efficacy of voir dire and trial management techniques to permit the case to be tried there – or whether trial in another district is preferable as a matter of discretion or is required as a matter of law. In this case, that decision involves a voluminous record, containing survey results and analysis and years of print and electronic media. That decision also involves discretion and fact-finding committed to the district court, which in the first instance decides whether a case presents the kind of facts that require transfer. *See United States v. Skilling*, 561 U.S. 358, 378 n.11 (2010).

**B. There Is No Basis To Conclude That The District Court's Findings Regarding Prejudice Are Erroneous.**

The Petitioners and the amici challenge the adequacy of the district court's finding that publicity from the parties or trial participants would unfairly prejudice Mr. Blankenship's right to trial by a fair and impartial jury. In making that challenge, they have not been true to the district court's January 7, 2015 decision.

Before the indictment in this case was filed, the district court had handled and resolved four other criminal cases arising out of an investigation into the

Upper Big Branch mine disaster.<sup>2</sup> In her January 7, 2015 order, the district judge was clear (at page 9 in particular) that she had reviewed a substantial amount of press concerning the indictment in this case and also press going back to the 2010 disaster. The order catalogs the kind of material that is in that press, including statements of family members of deceased miners and the findings of investigations regarding the disaster.

As demonstrated in the motion to transfer for trial in a different district, the facts amply support the district judge's findings regarding the prejudicial nature of the press about this case in the small "coal country" community where it is now pending. Relatives of deceased miners have marched with "Wanted for Murder" posters bearing Mr. Blankenship's name and picture and have pleaded for a criminal conviction that they have told the community will give them peace of mind.<sup>3</sup> One United States Senator from West Virginia applauded the indictment of Mr. Blankenship, publicly accusing him of "callousness and open disregard" for miners and further indicating that a fair trial "is more than he deserves," and the other has publicly stated that Mr. Blankenship "has blood on his hands" and has applauded the indictment of Mr. Blankenship as showing that "justice would be

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<sup>2</sup>*United States v. Hughie Elbert Stover*, 5:11-cr-00038; *United States v. Gary May*, 5:12-cr-00050; *United States v. David Hughart*, 5:12-cr-00220; *United States v. Thomas Harrah*, No. 5:11-cr-0082.

<sup>3</sup>Exhibit D to Motion to Transfer (part of Exhibit A hereto), WCHS, Apr. 2, 2014, 5:00 p.m. (image also printed on page 12 of memorandum supporting transfer motion, which is part of Exhibit A hereto).

served.”<sup>4</sup> These are just a few examples of the unusual and prejudicial publicity that underlies the Beckley Division’s prejudgment as to Mr. Blankenship.

The district judge plainly was aware of the type of prejudicial publicity within her home jurisdiction. The district judge just as plainly made a considered determination that continuation of that publicity substantially threatened her ability to seat a fair and impartial jury. Petitioners and the amici are, therefore, incorrect when they assert that there is no basis for the district court’s finding of prejudice or, even if there is one, that the court was not aware of it.

The district court was correct to have concern (January 7, 2015 Order at 7-9) with respect to unfair prejudice “given the environment” in the part of coal country in which the case is pending, a small community directly impacted by the UBB disaster. As Mr. Blankenship’s transfer motion explains, the small size of a community matters with respect to an evaluation of the significance of prejudgment and prejudice that may affect the ability to seat a fair and impartial jury. *Skilling*, 561 U.S. at 382 (“We have emphasized in prior decisions regarding transfer the size and characteristics of the community in which the crime occurred.”). Where there are other extreme facts, as in this case, the small size of a

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<sup>4</sup>*Upper Big Branch Mine Disaster; Blankenship Indicted*, Charleston Gazette (November 14, 2014); Brian Ross et al., *U.S. Senator: Coal Boss Has ‘Blood on His Hands.’* ABC NEWS, available at <http://abcnews.go.com/Blotter/us-senator-coal-boss-don-blankenship-blood-hands/story?id+23162460> (last visited Feb. 24, 2015).

community may compel the conclusion that the court cannot have confidence in the efficacy of voir dire and trial management to preserve fair trial rights.

Concern with preservation of fairness at trial regarding the evaluation of evidence is particularly important here. In all four counts, the indictment describes non-criminal conduct but then charges it as criminal. Perhaps the simplest example (the others are explained in pending motions to dismiss showing that no crimes are alleged in the indictment): counts 3 and 4 allege as a felonious false statement the general assertion that “we strive to be in compliance with regulations at all times.” Further, if this case is not dismissed on motions and there is a trial, there will be compelling evidence that no crimes occurred, evidence of innocence – never made public – showing Mr. Blankenship’s consistent efforts to increase mine safety, as well as evidence that the indictment has distorted the meaning of other documents by selectively quoting isolated fragments out of the context of the entire document. The indictment compensates for its distortions and inadequacies by weaving throughout an inflammatory profits-over-people theme that draws power from years of prejudicial publicity exploiting that same misleading theme.

A jury, thus, would be called on to have an open mind and to pay close attention to the entire record and not to exaggerate or accept distortions of snippets of the record or to be blinded by the inflammatory people-over-profits theme in the

indictment. As the motion to transfer shows, however, a defense illuminating the true record concerning Mr. Blankenship will go directly into the teeth of the prejudice that has been created by profits-over-people publicity that has been unrelenting for years and that the indictment exploits. Indeed, as discussed in the transfer motion, we know from polling that about half of the community admits to having already judged Mr. Blankenship to be guilty as charged. Petitioners and the amici give far too little credit to the district court for its concern about prejudice in “the environment” in which the case is pending. *See Irvin v. Dowd*, 366 U.S. 717, 722 n.3, 728 (1961) (transfer required where there cannot be confidence that, despite juror assurances of an ability to be fair, circumstances suggest that prior knowledge and beliefs that “will combat [defense] testimony and resist its force”).

The district court also was correct to be sensitive to prejudice because the public erroneously believes, as explained in the transfer motion, that the charged crimes involve the deaths of 29 miners in the UBB disaster. The community was devastated by those deaths and is passionate that, because of them, Mr. Blankenship must be convicted of some crime. But the indictment contains no allegation that any charged conduct caused the UBB disaster or any of the fatalities associated with it. Indeed, paragraph 82 of the indictment notes that Mr. Blankenship approved a corporate statement asserting that any view that the disaster “was the result of a willful disregard for safety regulations” is “completely

unfounded,” but the indictment excludes that statement from the allegedly false statements listed in counts 3 and 4. Nevertheless, in a community that sees the indictment as framing a trial for 29 murders, the risk of misunderstanding and prejudgment posed by publicity is elevated.

### **C. Conclusion**

Mr. Blankenship’s transfer motion explains why this is an exceptional case that requires transfer. Transfer will preserve trial fairness and First Amendment rights – and one other right, as well. Mr. Blankenship has a Sixth Amendment right to a public trial, a right that applies to the openness of records regarding pretrial motions and proceedings and is closely analogous to the First Amendment rights asserted in the mandamus petition. *United States v. Stevens*, 2008 U.S. Dist. Lexis 123464 (D.D.C. Dec. 19, 2008); see *Pressley v. Georgia*, 558 U.S. 209, 212 (2010). In order to protect Mr. Blankenship’s right to a fair trial, the district court’s gag and sealing order infringes Mr. Blankenship’s constitutional right to a public trial. Because motions in this case<sup>5</sup> address important issues concerning prosecutorial misconduct, judicial disqualification and prosecuting serious crimes without a sufficient basis in the charging document, informing the public regarding this case – including providing clarity about what this case is and is not – serves

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<sup>5</sup>Attached hereto as Exhibit C is a memorandum filed below: “Memorandum to the Court Concerning Defendant Donald L. Blankenship’s Pretrial Motions,” which lists the defense motions that are now pending in this case. That memorandum is not sealed in the district court.

both First Amendment and Sixth Amendment interests. Transfer for trial in another district, a question that the district court will decide soon enough, may eliminate all existing constitutional concerns.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Response of Respondent Donald L. Blankenship to Petition for a Writ of Mandamus, and the exhibits to it (except for the sealed exhibits), have been electronically filed and service has been made by virtue of such electronic filing this 24<sup>th</sup> day of February 2015 on:

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