

No. 08-22

In the Supreme Court of the United States

HUGH M. CAPERTON, ET AL.

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

Respondents.

**On Writ of Certiorari to the
West Virginia Supreme Court of Appeals**

**MOTION FOR LEAVE TO FILE A
SUPPLEMENTAL BRIEF AND
SUPPLEMENTAL BRIEF FOR RESPONDENTS**

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**MOTION FOR LEAVE TO FILE A
SUPPLEMENTAL BRIEF**

Pursuant to Rules 25.5 and 25.6, respondents A.T. Massey Coal Co., et al., respectfully request leave to file the accompanying supplemental brief presenting the Court with information pertinent to this matter—specifically, a press release detailing Justice Benjamin’s voting history in matters involving Massey Energy Company and its affiliates—that was issued by the West Virginia Supreme Court of Appeals after briefing was completed. Justice Benjamin’s voting history in Massey cases bears significantly on respondents’ contention that, even if the Due Process Clause requires recusal when there is a “probability of bias,” there was no such probability here.

Respectfully submitted.

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MARCH 2009

SUPPLEMENTAL BRIEF FOR RESPONDENTS

In our principal brief (at 5-6, 9, 50-51), we argue that, even if disqualification were constitutionally required when a judge felt a “debt of gratitude” to a litigant, and therefore harbored a “probability of bias” in its favor, Justice Benjamin’s disqualification would not be constitutionally required, because (among other things) he voted against affiliates of Massey Energy Company (Massey) in numerous other cases. Two days ago, the West Virginia Supreme Court of Appeals released pertinent new information about Justice Benjamin’s voting record that buttresses our argument.

According to a March 2, 2009 news release issued by the Supreme Court of Appeals’ Public Information Office in response to press inquiries (App., *infra*, 1a-7a), available at <http://www.state.wv.us/wvsca/press/cover.htm>, Justice Benjamin has voted against Massey affiliates 81.6% of the time since taking office (App., *infra*, 2a). In decisions on the merits, on petitions for a writ of prohibition, and on petitions for appeal, Justice Benjamin has voted against Massey at least 15 times. *Id.* at 3a-7a. As the news release explains, of the five cases with “full written opinions of the Court” during this period, the only one in which Justice Benjamin has voted in Massey’s favor is this case. *Id.* at 2a. In at least one of those cases, the conduct of Massey CEO Don Blankenship was at issue every bit as much as in the present case. See Pet. App. 19a-32a, *Massey Energy Co. v. Wheeling Pittsburgh Steel Corp.*, No. 08-218 (U.S. Sup. Ct.) (cert. denied Dec. 1, 2008).

The information in the news release was derived from the caseload system of the clerk’s office of the West Virginia Supreme Court of Appeals and re-

viewed by lawyers who work for the court to ensure its accuracy. App., *infra*, 1a, 7a.

Respectfully submitted.

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APPENDIX



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Summary of Chief Justice Benjamin's Dispositive Voting Record Regarding Massey Energy Cases from 01/01/2005 to 12/31/2008

CHARLESTON, W.Va. – The following information was prepared by, and is being released by, the Public Information Office of the Supreme Court of Appeals of West Virginia. It was reviewed by lawyers who work for the Supreme Court to ensure its accuracy. It was prepared in response to press inquiries about Chief Justice Benjamin's voting record in cases involving Massey Energy.

As broken down below and detailed in the attached table of Massey Energy-related votes, during his first four years on the Supreme Court of Appeals of West Virginia, Chief Justice Benjamin voted in five cases which were determined by full written

opinions of the Court. He issued his own separate written opinions in three of those five cases. He also voted in three cases which sought writs of prohibition. And he voted in eleven petitions seeking full appellate review. In some of these cases, Massey Energy or its subsidiary was a petitioner/appellant. In others, Massey Energy or its subsidiary was the respondent/appellee.

Overall, Chief Justice Benjamin voted against the interests of Massey Energy or its subsidiary 81.6% of the time. Most of these votes occurred before the Caperton v. Massey Energy case was decided, and involve votes in cases which were decided by unanimous and non-unanimous votes of the Court. (Of course, in the rehearing of the Caperton case, Chief Justice Benjamin appointed two of the acting Justices after the recusal of Justices Maynard and Starcher and those two circuit judges split their decision, one voting for Massey and one voting against Massey.) According to information which was in the file or which was referenced in local news reports, all votes by Chief Justice Benjamin represented votes against the financial interests of Massey Energy of approximately \$317 million.

Chief Justice Benjamin voted in favor of the interests of Massey Energy or its subsidiary 18.4% of the time. Of the five full written opinions of the Court during this time, the only case in which Chief Justice Benjamin voted in favor of Massey Energy's interests was in Caperton v. Massey. The Caperton case appears to have represented the third-highest value of the Massey cases in which Chief Justice Benjamin voted, behind Wheeling Pittsburgh Steel v Central West Virginia Energy (valued at approximately \$220 million, without interest) and U.S. Steel

Mining Co., LLC v. Helton (valued at approximately \$85 or more million).

The votes do not include such non-dispositive matters as votes on motions for time extensions, exceeding the page limitations on briefs, *pro hac vice* admissions, bifurcations, stays, etc. Identification of Massey subsidiaries was derived from Massey Energy's SEC filing, form 10-K, filed 02/29/2008, the most recent filing of its kind. Valuations, where available, are based upon representations of the parties or representations from media.

Chief Justice Benjamin Massey Energy-Related Votes

Full Written Court Opinions	4 Against	\$ 90.5+
Million	1 For (<u>Caperton</u>)	\$ 50
Million		
Petitions Seeking Prohibition Writs	3 Against	
	0 For	
Petitions Seeking Appeal	8 Against	\$226.46
Million	3 For	\$ 3.46
Million	<u>1 For & Against</u>	<u>(later dismissed)</u>
Total: 81.6% against Massey Energy	15.5 Against	approx.
\$317 Million		
	18.4% for Massey Energy	3.5 For approx.
\$53.5 Million		
(includes <u>Caperton</u>)		

Reported Court Decisions With Written Opinions - By Date

CHIEF JUSTICE BENJAMIN VOTES ON DISPOSITIVE MATTERS RELATED TO MASSEY ENERGY – 2005 - 2008						
Case Name – Docket No.						
Date	Type of Court Action	Court Vote	C.J. Benjamin Vote	Value to Massey	C.J. Benjamin Writing?	
Summary:	Brief Summary of Matter					
REPORTED COURT DECISIONS WITH WRITTEN OPINIONS – BY DATE						
<i>U.S. Steel Mining Co. LLC v. Helton</i> – No. 32528						
12/02/2005	Full Written Opinion	3-1-1 – Affirmed (Against Massey)	Against Massey*	approx \$85+ million + \$5 million/yr.	Concurrence & Dissent	
Summary:	This case involving eleven coal companies questioned the application of several of West Virginia's coal severance taxes on mined coal destined for foreign markets. The taxes were based on the tonnage of coal mined. On 09/06/05 The Charleston Gazette estimated the case to be worth up to \$500 million plus future annual tax assessments to the companies. Of the companies, Massey had perhaps the greatest tax exposure in view of the tonnage of coal it has mined in West Virginia. The majority opinion of the Court found all five taxes at issue to be constitutional. Chief Justice Benjamin issued a separate opinion in which he agreed with the majority on virtually all of the amounts in issue. He argued, however, that the minor aspect of the value added to the coal by its final loading for export was beyond the scope of two of the taxes at issue, but that such was quite small and could be easily remedied by a refund of nominal overpaid taxes. In a separate concurring opinion, J. Albright stated that the amount C.J. Benjamin referenced was simply the tax on the "relatively minimal cost of the mechanical act of scooping up and dumping the coal into the car." He stated that such an amount was " <i>de minimis</i> ." * Except for such <i>de minimis</i> amount, C.J. Benjamin found entirely against the coal companies, including Massey.					
<i>Helton v. Reed</i> – No. 32891						
06/13/2006	Full Written Opinion	4-1 – Reversed (Ag. Massey)	Against Massey	\$5.5 Million	Concurrence	
Summary:	Massey subsidiary, Elk Run Coal Company, as Appellee, sought to maintain a refund ruling of \$5.5 million of paid severance taxes. Massey subsidiary sought same favorable tax treatment as other coal companies who had benefitted from an error by the state Tax Commissioner. In a 4-1 decision, the Court reversed the circuit court (Kanawha County) which had found in favor of the Massey subsidiary. C.J. Benjamin wrote a separate concurrence in which he stated that he believed the majority relied too much on equity instead of an easy application of statutory law against the Massey subsidiary. J. Maynard issued a dissenting opinion.					
<i>Davis, et al. v. Eagle Coal and Dock Company, et al.</i> – No. 33054						
12/04/2006	Full Written Opinion	5-0 – Answered Question	Against Massey	Uncertain	None	
Summary:	Massey was a defendant below and argued in favor of federal preemption by the federal Mine Safety and Health Act in case involving dust collection and roof bolters. The plaintiffs alleged that the dust collection systems failed to protect roof bolter operators from silica dust released during the machines' operations, and that any warning pertaining to silica dust as a result of operating the machines were inadequate. The circuit court certified a question to the WV Supreme Court of Appeals which answered the question in favor of the employees that such lawsuits could be filed and could remain in WV state courts. The case was appealed to the United State Supreme Court which refused to hear the case.					
<i>Caperton v. A.T. Massey Coal, et al.</i> – No. 33350						
11/21/2007	Full Opinion - Withdrawn	3-2 – Reversed – W/D	For Massey - W/D	Withdrawn	Withdrawn	
04/03/2008	Full Written Opinion	3-2 – Reversed (for Massey)	For Massey	\$50 Million	Concurrence	
Summary:	Currently on appeal to the United States Supreme Court. In a 3-2 decision (J. Davis), the Court reversed the trial court (Boone County) on grounds of Forum Selection (Virginia) and <i>Res Judicata</i> . C.J. Benjamin and Judge Fred Fox II (sitting for J. Starcher) joined in the majority opinion. An earlier jury trial in Virginia on the actions raised in the plaintiffs' complaint resulted in a judgment against Massey of approximately \$6 million. At issue in West Virginia was whether an additional action for more damages could proceed beyond the Virginia trial. The majority decision held that such a suit could not proceed in West Virginia in view of the Virginia action. The majority opinion focused on venue in light of a forum-selection clause in the applicable 1997 contract and on the principles of <i>res judicata</i> . The original 11/21/07 decision of the Court was withdrawn and the matter was reargued in 2008. C.J. Benjamin issued a lengthy concurring opinion on 07/28/08 on legal issues related to the majority decision as well as to the issue of recusal. J. Albright issued a dissenting opinion to which Judge Cookman (sitting for J. Maynard) joined. Based upon a filing in the case, the U.M.W.A. has a primary interest in any recovery.					

<i>May v. Board of Review & Mate Creek Security</i> – No. 33703						
06/17/2008	Full Written Opinion	5-0 – Reversed (Ag. Massey)	Against Massey	Uncertain	None	
Summary:	Deborah May contended that she was compelled to quit her job as a personal maid to Don Blankenship because of mistreatment and changes in her job which had been made by Blankenship. She was denied unemployment compensation benefits on the grounds that she had left her job voluntarily without good cause. The circuit court upheld that administrative determination. The Supreme Court reversed and remanded the case with directions to award Ms. May unemployment compensation benefits.					
PETITIONS SEEKING GRANTING OF FULL REVIEW ON APPEAL – BY DATE						
<i>McNeely v. Independence Coal Company, Inc.</i> – No. 042156						
02/09/2005	Refused Massey Petition	5-0 (Against Massey)	Against Massey	\$1 Million	None	
Summary:	Massey subsidiary sought full review of lower court verdict in favor of plaintiffs, the McNeelys. The couple had alleged a deliberate intent action against Independence Coal. The amount of the verdict was approximately \$1 million. Chief Justice Benjamin voted with a unanimous Court to refuse the petition of the Massey subsidiary.					
<i>Marfork Coal Co. v. Director, WV Dept. Of Environmental Protection and Janice Nease and Freda Williams</i> – No. 051011						
11/03/2005	Granted Massey Petition (on selected issues only)	Issue 1: 3-2 (for Massey) Issue 2: 3-2 (for Massey)	For Massey Against Massey	Environmental	None	
Summary:	This action arose out of a WVDEP suspension of a Marfork Coal Co. surface mining permit. The Court remanded a previous appeal in this administrative appeal action on 10/25/2004 (before Chief Justice Benjamin was on the Court), with instructions that the substantive issues be considered. Marfork raised several assertions of error on this petition. Chief Justice Benjamin voted with a 3-2 majority to accept the petition on only one issue (Justices Davis and Albright would have refused on that assertion of error). Chief Justice Benjamin voted against the 3-2 majority on the other issue (Justices Albright and Benjamin would have refused on that assertion of error). Thus, Chief Justice Benjamin voted for Massey on one issue raised, and against Massey's subsidiary on another issue raised in this case. The case was later resolved and was dismissed on the joint motion of the parties.					
<i>American Mining Ins. Co. v. Lightening Contract Services, Inc. and Alex Energy, Inc. v. United Nat'l. Group v. Lexington Ins. Co.</i> – No. 052364						
11/29/2005	Refused Ins. Co. Petition	5-0 (for Massey)	For Massey	Insurance Coverage	None	
Summary:	Chief Justice Benjamin joined a unanimous Court in refusing to grant the petition of American Mining Insurance Company. The insurance company sought an appeal of a summary judgment ruling of coverage in favor of Massey Energy subsidiary, Alex Energy. The case stemmed from a declaratory judgment action where American Mining argued that it was not obligated to defend or indemnify Lighting Contract Services and Alex Energy in an employment-related claim under the Commercial General Liability Policy.					
<i>Birchfield v. Independence Coal Co., Inc. d/b/a Progress Coal Co., Massey Energy Co., et al.</i> – No. 060451						
09/13/2006	Refused Massey Petition	4-0 (Against Massey)	Against Massey	Uncertain Death Case	None	
Summary:	Massey petition sought review of certified question about a deliberate intent cause of action involving the deaths of two miners of Progress Coal Company on 09/17/2003. The requested certified question concerned whether Massey could be sued based upon a violation of its own safety manual. The circuit court ruled that it could. The Supreme Court of Appeals refused the petition and the case was settled on remand. Justice Davis was disqualified in this matter.					
<i>Ooten v. Massey Coal Services, Inc.</i> – No. 061853						
<i>Ooten v. Massey Coal Services, Inc.</i> – No. 061854						
01/24/2007 01/24/2007	Refused Plaintiffs' Petition Refused Massey Petition	3-1 (Against Massey) 3-1 (Against Massey)	Against Massey For Massey (2 issues)	\$3.46 Million \$3.46 Million	None None	
Summary:	Plaintiffs below (No. 061853) and Massey (No. 061854) sought to appeal from circuit court verdict and various post-trial motions and for post-trial discovery. The case alleged that Massey's mining operations had damaged or destroyed water wells and water supplies, caused subsidence or settlement damage and that the company did not provide an adequate supply of replacement water. Chief Justice Benjamin was the only justice to vote to grant both plaintiffs' and Massey's petitions (though he would only hear two of the issues raised by Massey). Justice Davis was disqualified in these two matters.					
<i>Brown v. Rawl Sales and Processing Co. and Massey Energy Co.</i> – No. 070889						
09/11/2007	Refused Massey Petition	5-0 (Against Massey)	Against Massey	Required Services	None	
Summary:	Appeal by Massey from a Mingo County Circuit Court order which had ordered Massey to provide water to certain Mingo County residents. Water users of Rawl, Lick Creek, Merrimac and Sprigg had alleged that the injection of coal mine slurry into an abandoned underground mine and the operation of an above-ground slurry impoundment had contaminated water wells. The Supreme Court refused the appeal petition.					

<i>Jackson v. Power Mountain Coal Co. – No. 072598</i>						
04/28/08	Refused Plaintiff Petition	3-2 (for Massey)	Against Massey	New Trial Sought	None	
Summary:	Plaintiff sought a full appellate review of circuit court order which denied his motion for a new trial on the issue of damages and his motion to set aside the jury verdict and award a new trial on damages. Plaintiff asserted that the jury's verdict of compensation damages was inadequate to fully and fairly compensate him in light of uncontroverted evidence of harm (near amputation-type injury). The Supreme Court of Appeals refused the plaintiffs' petition. Chief Justice Benjamin voted in the minority to grant the plaintiff's petition (against Massey's interests).					
<i>Timmermeyer v. Goals Coal Company and Coal River Mountain Watch – No. 34138</i>						
05/21/2008	Granted CRMW Petition	4-1 (Against Massey)	Against Massey	Environmental	None	
Summary:	Coal River Mountain Watch appeals from the circuit court's final order affirming the decision of the Surface Mine Board in this administrative appeal. Respondent, Goals Coal Company, sought to build a coal storage silo within three hundred feet of an elementary school, and the Surface Mine Board concluded that the proposed site was within the permit area of the relevant permit. Chief Justice Benjamin voted with the 4-1 majority to accept the petition of Coal River Mountain Watch. The case is scheduled to be argued before the Supreme Court of Appeals on 04/08/2009, though Chief Justice Benjamin has temporarily recused himself from cases involving Massey Energy interests while the Caperton case is pending before the United States Supreme Court of Appeals.					
<i>Wheeling Pittsburgh Steel Corp. & Mountain State Carbon, LLC v. Central West Virginia Energy Co. & Massey Energy Co. - Nos. 080183 & No. 080182</i>						
05/22/2008	Refused Massey Petition	5-0 (Against Massey)	Against Massey	\$220 Million	None	
Summary:	Two separate petitions seeking full appellate review by Massey and its subsidiary of July 2007 Brooke County Circuit Court jury verdict which awarded \$220 million, plus interest, to Wheeling Pittsburgh Steel and one of its subsidiaries. Wheeling Pittsburgh Steel accused Massey of improperly diverting coal which should have been delivered to it under its contract to markets which were more profitable for Massey. Massey and its subsidiary were accused of breach of contract and fraud. The refusal to accept the petition let stand the verdict. The case was appealed to the United States Supreme Court. On 06/25/2008, Massey sought a stay of the Court's mandate pending its appeal to the United States Supreme Court. That stay was granted on a 3-2 vote, with Chief Justice Benjamin voting in the minority against Massey (would have refused the stay).					
<i>Burns v. Independence Coal Co., Inc. – No. 081402</i>						
11/12/2008	Refused Massey Petition	4-1 (Against Massey)	Against Massey	\$2 Million	None	
Summary:	Massey subsidiary, Independence Coal Company, sought to appeal its post-trial motions after an adverse jury verdict in an employment case. The jury found that the company wrongfully discharged plaintiff Burns in retaliation for his making complaints about workplace safety. Independence argued that inadmissible evidence overshadowed the real issues at trial and prejudiced the jury, that the jury's finding on this count was unsupported by the evidence, and that the damages awarded were unreasonable and unsupported by the evidence. The jury awarded a total of \$1,999,554 to plaintiff, which included \$1 million in punitive damages. Chief Justice Benjamin joined the 4-1 majority which decided not to grant Independence Coal's petition.					
PETITIONS SEEKING EXTRAORDINARY RELIEF THROUGH PROHIBITION – BY DATE						
<i>Central West Virginia Energy Company v. Gaughan – No. 052797</i>						
01/11/2006	Prohibition Writ Denied	5-0 (Against Massey)	Against Massey	Procedural	None	
Summary:	Massey subsidiary sought a writ of prohibition challenging an order of the circuit court requiring disclosure of non-public prices of metallurgical coal sold or projected to be sold by it and its non-party affiliates to non-parties. Chief Justice Benjamin joined the 5-0 Court which refused to grant the requested extraordinary relief.					
<i>SER Independence Coal Co. v. Hoke – No. 071498</i>						
06/06/2007	Prohibition Writ Denied	4-0 (Against Massey)	Against Massey	Procedural	None	
Summary:	Independence Coal, a Massey subsidiary, sought to prohibit the enforcement of a circuit court order which had denied its motion to consolidate three cases for trial. Chief Justice Benjamin joined the 4-0 Court, which refused to grant the requested extraordinary relief. Justice Davis was disqualified in this matter.					
<i>SER Central West Virginia Energy Co. v. Wilson – No. 34403</i>						
10/23/2008	Prohibition Writ Dismissed	5-0	Against Massey	Procedural	None	
Summary:	Massey subsidiary, Central West Virginia Energy, sought a writ of prohibition related to an order in circuit court which it claimed "grant[ed] relief which is largely dispositive of every issue in the case." The matter was dismissed on 10/23/2008 as moot after the circuit court scheduled a hearing on the matter on 11/05/2008. Central West Virginia Energy, by motion of 10/22/2008, opposed the dismissal based on mootness.					

Disclaimers: This list was compiled by use of a list of Massey subsidiaries obtained from Massey Energy's SEC filing, form

10-K, filed 02/29/2008 – the most recent filing of its kind. Each name listed was compared with the Clerk’s Office Caseload system, using the broadest possible search.

Nothing prior to January 1, 2005, when Chief Justice Benjamin joined the Court, was considered.

Only final, or dispositive, votes of a matter are listed. Miscellaneous motions, *pro hac vice* motions, stays, motions to exceed page limitations, and other underlying motions are not listed.