

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

|                                 |   |                                      |
|---------------------------------|---|--------------------------------------|
| <b>UNITED STATES OF AMERICA</b> | ) |                                      |
|                                 | ) |                                      |
| <b>V.</b>                       | ) | <b>CRIMINAL NO. 2:22-cr-86-RJC-1</b> |
|                                 | ) |                                      |
| <b>CHARLES HUNTER HOBSON</b>    | ) |                                      |

**MOTION TO DISMISS BASED ON COURT’S SUPERVISORY POWERS**

“When confronted with coercive prosecutorial tactics . . . , the [Supreme] Court has often condoned those practices or let them pass in silence.” *Hunter v. United States*, 146 S. Ct. 1702, 1715 (2026) (Gorsuch, J., concurring). This Term, it “begins to correct course.” *Id.*

This case is directly in *Hunter*’s cross hairs. The government improperly used a five-year-old proffer to deprive a United States citizen of his constitutional right to a fair trial. Its threats disabled the adversarial process throughout the trial. The government then cashed in on this unlawful effort, calling its proof “overwhelming and uncontradicted.” The government never sought a ruling that the proffer waiver was knowing, voluntary, triggered, or enforceable. Even if it had, *Hunter* confirms that a valid waiver does not compel enforcement. On a lesser record, where the court did rule and no proffer statement was ever admitted, the Second Circuit vacated and ordered a new trial. *United States v. Ohuwanisola*, 605 F.3d 124 (2d Cir. 2010).

At a minimum, Hobson is entitled to a new, fair trial—one in which he can confront the government’s witnesses, test its evidence, and present a defense without one hand tied behind his back. But the government’s deliberate actions warrant more. Hobson asks this Court to dismiss the indictment with prejudice under its supervisory power, protect the integrity of the federal courts, and prevent them from “making . . . themselves accomplices in willful disobedience of law.” *United States v. Bundy*, 968 F.3d 1019, 1030 (9th Cir. 2020) (quoting *McNabb v. United States*, 318 U.S. 332, 345 (1943)).

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## BACKGROUND

### A. Hobson's Choice and Paragraph 5

This case arose out of a voluntary self-disclosure by Corsa Coal of its Egyptian coal transactions to the DOJ. Corsa was never charged. Neither was the CEO nor anyone in Finance, though Frederick Cushmore's FBI 302s allege that knowledge of the bribery was widespread.<sup>1</sup> On April 5, 2021, DOJ lawyer Sarah Edwards transmitted to Hobson's counsel two grand jury subpoenas, one commanding his testimony before the grand jury in Pittsburgh on April 13. Ex. 4. She offered an interview in Washington, D.C. as an alternative. Hobson faced a choice: meet with the government in the grand jury or at DOJ headquarters—hardly voluntary. He chose the lesser of two evils and proffered over two days in 2021, on May 13 and June 7. ECF No. 172-1, Ex. 4. Agreeing to the Washington D.C. meeting did not lift the subpoena, Assistant U.S. Attorney Eric Olshan (WDPA) told Hobson “[t]he subpoena will remain in force, subject to our setting a new appearance date down the road.”

Hobson signed a proffer agreement that said his statements would not be used “in the government’s case-in-chief at trial or for purposes of sentencing,” except paragraph 5, which let the government, “[i]n any proceeding, including sentencing,” use his statements “to cross-examine [him], to rebut any evidence or arguments offered on [his] behalf, or to address any issues or questions raised by a court on its own initiative.” ECF No. 172-1, at ¶ 5. Nothing in the proffer told him he was giving up his lawyers’ freedom to argue, or that a question from the bench could turn his own words against him. The government built its case around paragraph 5.

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<sup>1</sup> See Ex. 1 at GX 801.1.00012 (“It was Cushmore’s understanding that Hobson, Harrigan, Bonacci, Lund, George, Meehan, Zellem, and possibly Schicke knew that paying commissions meant a portion of those commissions would be paid to officials at Al-Nasr.”). The government pursued Hobson and Cushmore instead.

## **B. Incomplete Account of *Rovirosa* and Proffer Threat**

Nearly five years later, at the February 4, 2026 pretrial conference, the proffer agreement resurfaced. Defense counsel raised *United States v. Rovirosa Martinez*, No. 4:25-CR-00415 (S.D. Tex.), an FCPA case pending post-trial motions in Texas, while objecting to the government’s WhatsApp and email evidence. Counsel had “been parsing through the judge’s orders in that case”; the messages there “did come in in a limited way” and “there were objections made.” Feb. 4, 2026 Tr. 24. Hobson’s lawyers also flagged a Confrontation Clause problem with using a “reader” to put foreign-language messages before the jury. Feb. 4, 2026 Tr. 27. These were the issues that would result in *Rovirosa*’s post-verdict acquittal. Sidestepping the Confrontation Clause, the Court told defense counsel he would “certainly be entitled to argue to the jury” that the government’s reading was not “reasonable” and that the messages reflected “honest professional endeavors”—“a fair argument that . . . you likely will be in a position to make.” Feb. 4, 2026 Tr. 23.

DOJ lawyer William E. Schurmann did not want the DOJ’s unconstitutional conduct in *Rovirosa* to infect Hobson’s case. He answered that *Rovirosa* was “a case that was tried recently” in which the messages “were admitted and used at trial in the government’s case in chief.” Feb. 4, 2026 Tr. 28. He left out what an Assistant Chief of the Fraud Section would know—*Rovirosa* had a pending Rule 29 motion and a motion to dismiss attacking the very issues raised by Hobson’s counsel. Five days later, U.S. District Judge Hoyt ordered briefing on these Confrontation Clause issues.<sup>2</sup> On April 14, 2026, he granted *Rovirosa*’s Rule 29 motion and motion to dismiss, found

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<sup>2</sup> See Order for Limited Briefing, *United States v. Rovirosa Martinez*, No. 4:25-CR-00415, ECF No. 123 (S.D. Tex. Feb. 9, 2026) (Ex. 2).

deliberate violations of the Confrontation Clause, and entered a judgment of acquittal for insufficiency of the evidence.<sup>3</sup>

In a bizarre and improper sequence, Schurmann then told the defense that Hobson’s constitutional arguments from *Rovirosa* violated the proffer. These were, he told the Court, “precisely the sort of thing that concern us in the potential of the door opening exercise,” with “effects it may have on the waiver provisions of the proffered letter.” *Id.* at 29. This framing formed the foundation of DOJ’s view during the trial, that any exercise of Hobson’s constitutional rights would trigger the proffer. Rather than making a motion to ask the Court to rule on his wild expansion, Schurmann proposed delivering the government’s proffer memorandum “to chambers and defense . . . but not filed . . . on the open docket.” *Id.* at 53.

### **C. The Proffer Threat and the Constitutional Violations It Produced**

Court Requires Motion, Government Brings Threats. Following Schurmann’s limitless and unconstitutional view of the proffer, on the first morning of the trial, before opening, Hobson’s lawyers asked the Court to “share with us how broadly or narrowly” the Court will read the proffer. Day 1 Tr. 7. The Court told the government if it wanted to use the proffer, it was to “make a motion for a finding of waiver,” and the Court would then expect the government “to provide me with direction and clarity regarding what portions of the statement have been waived.” Day 1 Tr. 25. It told the government to come with authority and briefing, and warned of “at least some amount of delay between when you make that motion and when I say, okay, some portion of this will be available to be used.” *Id.*

Unconstitutional Proffer Threats Following Opening. After opening statements, DOJ lawyer Ligia Markman argued that Hobson’s lawyer’s statements about Corsa and Cushmore

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<sup>3</sup> Memorandum and Order Dismissing Indictment and Granting an Acquittal, *United States v. Rovirosa Martinez*, No. 4:25-CR-00415, ECF No. 147 (S.D. Tex. Apr. 14, 2026) (Ex. 3).

opened the door “a tad [sic].” She said Hobson’s attorney “mentioned that Mr. Hobson or Corsa did not believe [Al Nasr] was a government-owned entity,” and that Cushmore “doesn’t know” what Hobson did. Day 2 Tr. 3. No motion nor request for a ruling.

With court observing, Hobson’s lawyer defended his opening statement to the government that he was talking about what “Corsa believed,” “not Mr. Hobson,” and that he made a point to avoid talking about Hobson in the opening. Day 2 Tr. 4. This explanation was consistent with and applied governing law as discussed below (*see Oluwanisola*). Based on the improper threat, Hobson’s counsel then felt compelled to preview the cross of the government’s key witness, Cushmore, to Markman for her approval. *Id.* Without the required motion, the Court tried to stay out of this unusual exchange, “I’m going to do my best to not accept the invitation, not that you’re inviting me, but I’m not going to take the bait . . . I’m going to stay out of it until I get a motion.” *Id.* None came, but on-going threats and unlawful conduct by the government continued unabated.

Government Curtailed Cushmore Cross Violated *Napue*. The government had a giant hole in their case from Day 1—proving Hobson knew Al Nasr was state owned. Without the proffer, they had to rely on Cushmore whose position on this issue had evolved in government’s favor since his initial interview in 2021. On direct examination, Markman asked Cushmore, “Do you have an understanding of who owned Al Nasr?” He answered dutifully, “It’s a state owned, state-owned entity.” Day 2 Tr. 151. When Markman asked how Cushmore knew, he said he had always known remarking “I have known of Al Nasr prior and everybody kind of knew it was a state-owned agency.” As Markman turned to prove Hobson’s knowledge, Cushmore provided key testimony, “Yes, because it was a general understanding.” Day 2 Tr. 152. But in 2021, according to his FBI 302, Cushmore told the government he did not know the specifics of Al Nasr’s ownership, stating “[he] did not know the specifics of who owned Al-Nasr. Though Al-Nasr was

funded by the government of Egypt, [he] did not know if it was wholly owned by the government.”  
*See* Ex. 1 at GX 801.1.00006.

Hobson’s counsel tried to exploit this fact on cross by trying to show that the Al Nasr office did not present as a government instrumentality to visitors such as Cushmore and Hobson. But Cushmore shut him down and denied ever having said there were no pictures of the Egyptian President at Al Nasr’s Cairo offices. Day 2 Tr. 156. According to the FBI, a lie. In his 302 from 2021, he reportedly said, “There was nothing in the Al-Nasr office in Cairo that was indicative of being a government office. The office was dilapidated, not very impressive. There were no pictures of the Egyptian President . . . .” *See* Ex. 1 at GX 801.1.00006. Markman did not correct the false testimony of the government’s only percipient witness on this key issue. Neither did Hobson’s lawyers, fearful of Markman’s continuous proffer warning on her expansive view of the proffer in full view of the Court.

Markman stops the cross. Later in the same cross, consistent with *Oluwanisola*, Hobson’s lawyer asked Cushmore whether *he* knew if anyone at Al Nasr had received any money at all. Before Cushmore could answer, Markman asked to approach. At sidebar she misstated Cushmore’s question and threatened the proffer: “The argument is that Ahmed didn’t pay these bribes. First of all, it’s irrelevant to the law, but again, in the proffer, Mr. Hobson says that he understood that the bribes were being paid.” Day 2 Tr. 177. Hobson’s lawyers, however, had not asked about what Hobson knew, they asked about Cushmore (*see Oluwanisola* discussion below). But Hobson’s lawyer surrendered without a fight, telling the Court he would “go on for a little while longer, double check a couple basic questions, stay away from that until tomorrow morning.” *Id.* at 178. He returned to the subject only the next morning, and only obliquely. Day 3 Tr. 18. Uncorrected false testimony and the proffer threats allowed Markman to prop up the government’s

key witness (due process violation) and take Hobson’s lawyer out of the equation (Sixth Amendment violations).

No motion for acquittal. At the close of the evidence, Hobson’s counsel declined to make even an oral Rule 29 motion, stating on the record a “proffer problem, argument problem” and electing to “wait for Rule 29C” that he would file months later in threadbare form. Day 6 Tr. 11.

#### **D. Two Unconstitutional Bookends Shape Burden-Shifting Closing**

After DOJ lawyers Schurmann and Markman engineered the silence, DOJ lawyer Natalie Kanerva argued it and told the jury the evidence was “both overwhelming and uncontradicted,” Day 6 Tr. 91, that Al Nasr’s government ownership was “clear and uncontradicted,” Day 6 Tr. 121, and that “defense counsel didn’t even challenge” it. Day 6 Tr. 119. And with no defense case to answer, she turned to Hobson’s character and closed on harm to the local mining community (he stealing from the community)—an argument the Court had barred during trial. Day 6 Tr. 128; Day 1 Tr. 200–201. She closed on the same note. Two men, the jury was told, managed the Al Nasr relationship, spoke with Nassar every day, negotiated the contracts and the commission rates, and “knew how the commission payments would actually be spent.” Then: “One of those people came here last week to tell you about what he did. Today is Defendant Hobson’s day.” Day 6 Tr. 130.

#### **E. The Government’s Individualized Excuses Mask Due Process Violations**

For the government, every problem in this case has a narrow answer. Not admitted. Good faith. Helpful. Weight vs. admissibility. Context. Harmless. None convincing. The government has demonstrated throughout this case that it wants the Court to focus on the parts, not the whole, and not due process. That is not the way the Constitution works. It protects Hobson from the government, not the other way around. And a trial is a constitutional promise that supplies context,

tests the government’s proof, and makes silence unlawful. The government stripped this guarantee from Hobson before the first witness.

### LEGAL FRAMEWORK FOR REVIEW

A conviction obtained in violation of due process cannot stand. The touchstone is “the fairness of the trial, not the culpability of the prosecutor.” *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Relief follows where the government’s conduct “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). At the heart of that fairness is the accused’s right to “a meaningful opportunity to present a complete defense.” *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)); see *Washington v. Texas*, 388 U.S. 14, 19 (1967) (the right to present a defense is “a fundamental element of due process of law”).

A district court may also dismiss an indictment or order a new trial under its supervisory power to remedy willful or reckless prosecutorial misconduct. *Gov’t of the V.I. v. Fahie*, 419 F.3d 249, 254–56 (3d Cir. 2005). The supervisory power permits relief only for misconduct causing concrete prejudice; it cannot be used to circumvent harmless-error principles or to impose a remedy untethered to the injury. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254–56 (1988); *United States v. Hasting*, 461 U.S. 499, 505–07 (1983). Here the misconduct reached both an element of the offense and the defense’s ability to test it. Prejudice from multiple errors is measured cumulatively. *Kyles v. Whitley*, 514 U.S. 419, 436–37 (1995).

*Hunter* settled who decides. A court need not enforce a waiver—there, of the right to appeal—when enforcement “would result in a miscarriage of justice,” because the judiciary holds an institutional stake in the proceeding that the parties’ bargain cannot displace. *Hunter*, 146 S. Ct. at 1708, 1712–13.

## ARGUMENT

### I. *Mezzanatto* Does Not Address the Proffer Agreement Used Here

A proffer agreement is a contract drafted by DOJ, read like any other. *United States v. Hardwick*, 544 F.3d 565, 570 (3d Cir. 2008). When it gives away constitutional rights, it binds only if the waiver is knowing and voluntary. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The Supreme Court’s key case on proffers is *United States v. Mezzanatto*, 513 U.S. 196 (1995). Mezzanatto proffered three months after his arrest, under a narrow agreement permitting that “statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial if the case proceeded that far.” 513 U.S. at 198. He admitted knowing about a meth operation and its quantities but cast himself as a small-time dealer. *Id.* Then he took the stand, minimized his role, and was cross-examined with his own words.

The Supreme Court allowed a defendant to waive his rights under Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11 provided it was knowing and voluntary and he took the stand and told a different story. 513 U.S. at 210. Five Justices doubted his proffer could reach the government’s case in chief. *Mezzanatto*, 513 U.S. at 211 (Ginsburg, J., concurring); *id.* at 218 (Souter, J., dissenting). The Court warned that some “evidentiary provisions . . . are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discredit[ing] the federal courts.” *Id.* at 204.

Foreshadowing this case, two Justices warned prosecutors would demand ever-broader waivers until the proffer “in time come to function as a waiver of trial itself,” leaving “the possibility of trial . . . reduced to fantasy.” *Id.* at 217–18 (Souter, J., dissenting). Following *Mezzanatto*, most Circuits have upheld proffer waivers at trial. *See, e.g., United States v. Velez*,

354 F.3d 190, 196 (2d Cir. 2004); *United States v. Krilich*, 159 F.3d 1020, 1025–26 (7th Cir. 1998). The Third Circuit’s case is *Hardwick*, 544 F.3d at 568–69, a narcotics prosecution involving murder and a multi-level organization. There the Third Circuit affirmed use of a proffer on rebuttal, but only after the government moved in limine and the district court found that defense cross-examination had triggered the waiver.<sup>4</sup> Citing *Mezzanatto*, the Third Circuit upheld that use under the same “any evidence or arguments” clause Hobson signed. *Id.* at 569–72. Nothing in *Mezzanatto* or its progeny blesses what the government did here.

## II. The Second Circuit Vacated a Conviction on Weaker Facts in *Oluwanisola*

The government’s plan the entire trial was to avoid a ruling, a hearing, and findings. At the pretrial conference, Schurmann told the Court it would send the Court a proffer brief off the record. At every turn, the government tied the hands of Hobson’s counsel, from arguing he could not invoke his constitutional rights to he could not challenge the credibility of the government’s key witness:

| <i>Stage of the proceeding, speaker, and citation</i>                        | <i>Sample of Improper Areas Where Proffer Invoked</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
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| Pretrial conference, Feb. 4 (DOJ lawyer Schurmann)<br>Feb. 4, 2026 Tr. 28–29 | Defense legal argument about the admissibility of WhatsApp and email evidence, and counsel’s reliance on <i>United States v. Rovirosa Martinez</i> . “[C]onnected to our concern here about Mr. Hobson’s proffered protected statements to the government[,] [t]he argument Mr. Gaines is making and the positions that he is taking as these messages are precisely the sort of thing that concern us in the potential of the door opening exercise here . . . [and] the effects it may have on the waiver provisions of the proffered letter.” [prohibited by <i>Oluwanisola</i> , <i>nothing to do</i> with factual statements in proffer, and prohibited by <i>Hunter</i> , unlawful framing of constitutional rights before trial] |

<sup>4</sup> The government’s own account of *Hardwick* omits that the government obtained a ruling in that case (and that factually, it is inapposite, as outlined below). It cites the case for the rule that proffer waivers are enforceable “when defense counsel elicits evidence or makes arguments contradicting the proffer.” ECF No. 228, at 9. But in *Hardwick* the government moved in limine after the close of its case; the District Court granted the motion, found that the cross-examinations had triggered the waiver, ordered the co-defendant references redacted to meet Confrontation Clause concerns, and instructed the jury on the limited use of the statements. 544 F.3d at 569. None of that happened here because the government used the threat of the proffer to preclude a defense, instead of the supposed words of the proffer itself through its case agent.

| <i>Stage of the proceeding, speaker, and citation</i>                                        | <i>Sample of Improper Areas Where Proffer Invoked</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
|----------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Day 2, Feb. 10—before the first witness<br>(DOJ lawyer Markman)<br>Day 2 Tr. 3–4             | Three items from the defense opening statement, raised as door-opening: (1) Price’s statement that Corsa did not believe Al Nasr was a government-owned entity; (2) the statement that Cushmore “doesn’t know what Mr. Hobson did”; and (3) remarks about charging decisions. “[S]ince you asked us to mention when we think the door might be opening a tad. We have a couple of instances where that happened yesterday. . . . We’re not seeking an order. We’re not seeking a ruling.” “[W]e would like to make sure that defense is aware if questions come up on cross-examination that tend to continue to elicit argument or evidence of those things, we believe that that’s the door opening.” The Court declined to intervene: “I’m going to stay out of it until I get a motion or until or unless I get a motion.” [Nothing do with the factual statements by Hobson in the proffer, and Markman seeking to limit cross and defense of the case in violation of <i>Oluwanisola</i> , discussed below]. |
| Day 2, Feb. 10—during cross-examination of Cushmore<br>(DOJ lawyer Markman)<br>Day 2 Tr. 177 | Hobson’s lawyer asked Cushmore whether he knew if anyone in the high commission of Al Nasr had received any money at all. Before the witness answered, Markman asked to approach: “Your Honor, we just want to once again give notice. The argument is that Ahmed didn’t pay these bribes. First of all, it’s irrelevant to the law [sic], but again, in the proffer, Mr. Hobson says that he understood that the bribes were being paid.” [Markman confusing Cushmore’s knowledge with Hobson, violated <i>Oluwanisola</i> as outlined below]                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |

But the government did not want any record of this. On the second day of trial, after telling the Court which parts of the defense opening it believed had opened the door, Markman added: “we’re not seeking an order. We’re not seeking a ruling. We just want to make sure that” and the Court finished Markman’s sentence: “They’re in there.” Day 2 Tr. 3.

That is the method in ten words. The government wanted the boundaries of the defense fixed and understood. It did not want an order fixing them, because an order can be argued against and appealed from. A warning cannot. Call it what the record calls it. The Court called it a “forewarning that the defense might be—might want to be careful to not open the door.” Feb. 4, 2026 Tr. 11. The government calls it engaging “in good faith” on what “might render” the statements admissible—it presents denial of due process to a defendant as a favor to the Court. ECF No. 228, at 6 n.1. But, as the Court recognized, a party that believes evidence is admissible moves to admit it. Using threats instead is not good faith. It is the whole problem. The government reimagines the result as “a strategic choice for the defense team, not a constitutional constraint.”

ECF No. 228, at 9. The cross not taken, the witnesses not called, the Rule 29 motion not made—a choice made under a threat the government never had to defend, and that no ruling ever tested, is not strategy.<sup>5</sup> It is the threat working. Whatever the label, the method allowed the government to dictate boundless use of the proffer, imply this was blessed by the Court, and left no order to appeal. The Court’s comments in reaction to the government’s unconstitutional view of the proffer acted essentially like a ruling, or the Court blessing the government’s view. Ruling or not, the Second Circuit has squarely rejected the government’s view of the proffer as violative of the Sixth Amendment.

In *United States v. Oluwanisola*, 605 F.3d 124 (2d Cir. 2010), the Second Circuit vacated the convictions of Olawale Oluwanisola for narcotics trafficking through the mail because the government took an expansive view of its right to use the defendant’s post-arrest proffer, effectively precluding him from mounting a defense. Tracking Hobson, the clause there allowed

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<sup>5</sup> The government’s proof that this was strategy is a sentence Hobson’s lawyer made at closing: “Remember our cross-examinations were pretty short because we were going after one or two things from each witness.” ECF No. 228, at 5 (quoting Day 6 Tr. 145). That is a lawyer explaining a short cross to twelve people in the middle of a trial. No advocate tells a jury his hands are tied. Outside the jury’s hearing, the same lawyer told the Court something different: he was crossing a minefield, with no way to know which question would loose the whole proffer. Day 2 Tr. 108–09. Read together, the closing is not evidence of a free choice. It is a lawyer making the best of one he did not have. Contrary to the suggestion in the government’s brief, Hobson’s lawyers were not passive. They objected at the pretrial conference to the government’s hearsay and to its use of a reader for foreign-language messages, Feb. 4, 2026 Tr. 24, 27; they objected when the government first offered Professor Arafa, *id.* at 44; and after the government’s closing they moved for a mistrial on the ground that the Court had admitted Professor Arafa on the government’s representation that he would speak only to Egyptian law on Count 6, and that the government had then used his ultimate opinion to prove the American-law element. Day 6 Tr. 132, 137. The Court denied the motion. *Id.* at 142. The government calls what the defense did “a strategic choice for the defense team, not a constitutional constraint.” ECF No. 228, at 9. This Court saw it otherwise on the first day. Before Cushmore was called, the Court raised the problem itself—“the issue regarding Mr. Cushmore, it’s really going to come up only in your cross”—and asked whether to hold cross over. Counsel answered that he “would like more time to try to avoid that cross minefield that we have all discussed today.” Day 1 Tr. 77. The Court restructured the trial day around it: “We won’t begin cross today for sure.” *Id.* The next day counsel reported that he had gone through an earlier witness “carefully” and had “avoid[ed] that proffer problem for the most part.” Day 2 Tr. 109. Then consider the shape of the choice. Hobson’s lawyers fought wherever fighting was free. They went silent at the cross of Cushmore, Day 2 Tr. 177–78; at the decision to call no witness, Day 6 Tr. 15; and at the motion for judgment of acquittal, where Hobson’s lawyers put the reason on the record—“proffer problem, argument problem.” Day 6 Tr. 11. A lawyer indifferent to the record does not move for a mistrial after the government’s summation. The silence here was not a disposition. It was an unconstitutional boundary, and the government drew it.

the government to rebut “directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf of” the defendant. *Id.* at 127. During the trial, Oluwanisola’s lawyer tried to cross-examine a postal employee about his observations and his report writing, and otherwise to test his credibility. When the government objected, the court ruled that the question would open the door to the proffer, even though it went solely to credibility. Like Hobson’s case, the proffer came up several times during the trial. *Id.* at 129. Unlike Hobson’s case, the government actually sought and obtained rulings defining the waiver’s scope.

The Second Circuit vacated Oluwanisola’s conviction and ordered a retrial, holding that the rulings on the scope of the waiver “violated Oluwanisola’s [sic] Sixth Amendment rights.” *Id.* at 133. A “cross examination question that goes to the credibility of the government’s witness, without a factual assertion contradicting the facts admitted in the proffer statement, is not sufficient to trigger the waiver provision here.” *Id.* at 133. The Court noted that “[u]nder the government’s construction of the waiver provision, defense counsel would be prohibited from asking a witness any question during cross examination about his testimony on direct—even if the testimony was misleading, weak, or contradictory—because the only plausible reason to do so would be to call into question the witness’s credibility.” *Id.* at 132–33. And, “[w]e do not read the language in the waiver provision to prohibit Oluwanisola from placing the government’s evidence in context, even if that context is that a government witness is not credible.” *Id.* at 133.

That is exactly the position DOJ lawyers Markman and Schurmann took here. Questioning Cushmore about what he did not know—the specifics of Al Nasr’s ownership, whether it was government controlled, and an office he had described in terms inconsistent with a government building—is not an assertion that Hobson did not know. Even if Hobson’s proffer contained an admission about Al Nasr, that is not an admission that Cushmore knew Al Nasr’s ownership,

discussed ownership with Hobson, remembers it accurately today, or testified truthfully when he spoke to the FBI. Distinguishing *United States v. Barrow*, 400 F.3d 109, 114 (2d Cir. 2005), the Second Circuit explained that there counsel had affirmatively argued mistaken identity in his opening and then accused a witness of fabricating a meeting, so “one can easily infer that defense counsel was making the implicit factual assertion that no meeting took place because his theory of mistaken identity depended on that fact.” 605 F.3d at 133. The Second Circuit also refused to measure the damage by counting the moments the government chose to flag: “the effect of the court’s ruling went far beyond the several questions that the government chose to challenge,” and the government’s “extreme interpretation of *Barrow*” had “the effect of severely limiting Oluwanisola’s ability to mount an effective defense.” *Id.* at 134. The chart below shows the uncanny record parallels between *Oluwanisola* and Hobson’s case.

| <i>Oluwanisola</i>                                                                                                                                                                                                                                                                                             | <i>Hobson</i>                                                                                                                                                                                                                                                                                                                                                                                                                 |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| The government’s pretrial letter filed on the record with the court.                                                                                                                                                                                                                                           | The government’s trial memorandum, kept off the docket during the trial.                                                                                                                                                                                                                                                                                                                                                      |
| Before openings, Oluwanisola’s lawyer, Nobel stated he intended to argue the government could “not prove beyond a reasonable doubt each and every element to this crime,” and that “as long as I frame the argument as to a specific sufficiency issue, I am entitled to make that argument.” 605 F.3d at 127. | Before openings, Hobson’s lawyer, Gaines asked the Court “to share with us how broadly or narrowly the Court will read that clause with regard to how cautious we have to be,” adding, “I don’t think the Court is going to strip us of our defense like the most extreme version of this.” Day 1 Tr. 7.                                                                                                                      |
| Nobel, after the court said it did not see how he could argue specific elements were unmet: “[t]hen there’s nothing I can do in the courtroom, Your Honor, and as I read the case law, they do not put defense counsel in the position where he can’t do anything.” 605 F.3d at 128–29.                        | Gaines, describing the position the threat put him in: “[W]e, the defense, has been on our guard for not trying to what we call open the door to that proffer . . . It’s a minefield, I think we all agree on, for the defense.” Day 2 Tr. 109.                                                                                                                                                                               |
| Nobel sought guidance and got none. The court: “I’m really not in a position to go any further than giving advisory opinions than I have.” 605 F.3d at 130.                                                                                                                                                    | Gaines sought guidance and got none. The Court: “I don’t like giving too many advisory opinions, but I invite you both to have a dialogue first.” Feb. 4, 2026 Tr. 12. Gaines again on Day 3: “Do you think that your analysis today, your study of the law on this, makes it harder for us to ask questions, Your Honor? That’s an advisory opinion, I know.” The Court: “You do proceed at your own peril.” Day 3 Tr. 9–10. |
| Nobel: he had “certainly tried to tailor my presentation by talking about lack of evidence rather than affirmative proof of something,” but noted “a gray area between specific insufficiency arguments and affirmative assertions.” 605 F.3d at 130.                                                          | Gaines: “We have been on guard. The government has rested. The proffer has not come in. We are doing everything we can to be careful. We’ve been careful almost to a fault almost. We been very conservative . . . I hope that I will not step on a land mine.” Day 5 Tr. 81.                                                                                                                                                 |

| <i>Oluwanisola</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | <i>Hobson</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Cross-examination, Coleman. Counsel asked whether the supervisor made a written report, to establish the date of the observation. The court ruled counsel “could not ask about a written report without opening the door to the proffer statements because the sole purpose of verifying the date would be to question the credibility of the witness,” warning: “[i]f you go further than that in a way that questions his credibility inconsistent with what your client said in his proffer, then you’re going to have that problem.” 605 F.3d at 129–30. | Cross-examination, Cushmore. Counsel asked whether he knew if anyone in the high commission of Al Nasr had received any money at all. Before the witness answered, DOJ lawyer Markman approached: “we just want to once again give notice . . . in the proffer, Mr. Hobson says that he understood that the bribes were being paid.” Day 2 Tr. 177. Counsel then told the Court he would “stay away from that until tomorrow morning,” Day 2 Tr. 178, and returned to it the next morning only obliquely, Day 3 Tr. 18. |
| The court made evidentiary rulings but did not admit the proffer. “At no point during the trial did the district court rule that Oluwanisola had ‘opened the door’ to the admission of his proffer statements.” 605 F.3d at 130–31.                                                                                                                                                                                                                                                                                                                          | The Court never ruled. “Has this Court made that ruling yet that they can do that?”—“I have not made that ruling.” Day 1 Tr. 16. And after the government’s Day 2 door-opening notice: “I’m going to stay out of it until I get a motion or until or unless I get a motion.” Day 2 Tr. 5. The government never made one.                                                                                                                                                                                                |
| The proffer statements were never admitted. The Second Circuit vacated anyway, holding that the injury was the restriction itself: reading the waiver to reach sufficiency argument and cross-examination “would leave the defendant, for all practical purposes, defenseless.” 605 F.3d at 132.                                                                                                                                                                                                                                                             | The proffer statements were never admitted. The government’s post-trial position is that this defeats the claim—that the silence was “a strategic choice for the defense team, not a constitutional constraint.” ECF No. 228, at 9.                                                                                                                                                                                                                                                                                     |

The Second Circuit gave an analogy to try to explain the limits of *Barrow*: “There is no inconsistency or contradiction between a defendant’s admission that he robbed the bank and his challenge to a witness’s testimony that *the witness saw* the defendant rob the bank and recognizes the defendant.” *Id.* at 133. To hold otherwise, the Court recognized, would essentially mean that the proffer extinguished all trial rights and the Sixth Amendment right to counsel. And, because the government (and Court) in *Oluwanisola* took an expansive view, the defendant effectively had no trial rights, same as Hobson.

It is instructive to compare the cross set forth in *Hardwick* which triggered the proffer, to *Oluwanisola* and Hobson. *Hardwick* predated *Oluwanisola* by nearly two years, but it adopted the Second Circuit’s reasoning in *Barrow* and *Velez* nearly verbatim. In *Hardwick*, the cross went to culpability or who done it, in *Oluwanisola* and Hobson it went to the witnesses credibility. One example below illustrates the point:

|                                 | <i>Hardwick</i>                                                                                                                                                                                                              | <i>Oluwanisola</i>                                                                                                                            | <i>Hobson</i>                                                                                                                                 |
|---------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------|
| Subject of the cross            | Who committed the murders. Murray put an alternative perpetrator before the jury—that Lee and Perez, not he, were responsible for the deaths of Rosa and Allen. 544 F.3d at 570–71.                                          | Whether a supervisor’s written report existed, to fix the date of a postal worker’s observation. 605 F.3d at 129–30.                          | Whether the government’s cooperating witness knew if anyone in the high commission of Al Nasr had received any money at all. Day 2 Tr. 177.   |
| What the answer would establish | An affirmative fact of the defendant’s own. Cross of that kind is “tantamount to the assertion of an argument.” <i>Hardwick</i> , 544 F.3d at 571 (citing <i>United States v. Frazier</i> , 469 F.3d 85, 89 (3d Cir. 2006)). | A gap in the government’s proof—that it could not tie more than a kilogram of heroin to deliveries Oluwanisola picked up. 605 F.3d at 129–30. | A gap in the government’s proof—that its principal witness could not say any bribe reached anyone.                                            |
| Relation to the proffer         | Contradicted it. Murray “had confessed in his proffer statements that he ordered Rosa’s killing.” 544 F.3d at 570.                                                                                                           | Contradicted nothing. He had admitted picking up mail at that address in that period, and the question did not deny it. 605 F.3d at 133.      | Contradicted nothing. Hobson’s understanding that bribes were being paid and Cushmore’s ignorance of who received money are not inconsistent. |
| What happened next              | The government invoked the waiver, the court ruled the door was opened, and the proffer statements were admitted. <i>Hardwick</i> , 544 F.3d at 571.                                                                         | The court ruled and barred the question, but never found the door opened and never admitted a statement. 605 F.3d at 131.                     | The government gave “notice” at sidebar. No motion, no ruling. Counsel dropped the subject for the day. Day 2 Tr. 177–78.                     |

*Oluwanisola* sets clear guardrails mandated by the Sixth Amendment that the government jumped in this case. *Hardwick* permits use of a proffer when the defense affirmatively contradicts it; *Oluwanisola* holds that testing the government’s proof or a witness’s credibility does not do so. Both apply *Barrow*. Hobson’s curtailed cross-examination falls on the *Oluwanisola* side of that constitutional line.

Setting aside every issue that follows this section (involuntariness, *Napue*, Confrontation Clause), *Oluwanisola* instructs the Court exactly what should happen in this case, without reading any further—conviction set aside, new trial. To order a new trial, the Court does not have to decide that the waiver could not have been knowing and voluntary, that Cushmore lied and Markman sat

idly by, the impact of the unconstitutional closing, or the willful violations of the Confrontation Clause. But it is the sum of those parts that warrants dismissal.<sup>6</sup>

### III. Five-Year-Old FCPA Proffer Under Subpoena Not Knowing and Voluntary

*Oluwanisola*, *Hardwick*, and *Mezzanatto* roundly condemn what the government did in this case even assuming the proffer was knowing and voluntary. Had the government sought to lawfully use the proffer like every other published case, the Court would have quickly concluded it was not.

A waiver is the “intentional relinquishment or abandonment of a known right,” *Zerbst*, 304 U.S. at 464, made “with sufficient awareness of the relevant circumstances and likely consequences.” *Brady*, 397 U.S. at 748. *Mezzanatto* made clear that only proffers that were knowing and voluntary would be enforced. *Mezzanatto*, 513 U.S. at 210. Enforcement is not automatic. Before a waiver of trial rights may be enforced, this Court has an “affirmative duty” to “examine the knowing and voluntary nature of the waiver” and to “assure itself that its enforcement works no miscarriage of justice.” *United States v. Mabry*, 536 F.3d 231, 237–38 (3d Cir. 2008); see *United States v. Khattak*, 273 F.3d 557, 562–63 (3d Cir. 2001).

Timing is important to assess and understand risk. *Mezzanatto* signed his proffer after his arrest. 513 U.S. at 197–98. *Velez* signed “[s]hortly after being charged.” *Velez*, 354 F.3d at 191. *Oluwanisola* asked for a proffer “[a]fter his arraignment,” hoping for a cooperation deal. *Oluwanisola*, 605 F.3d at 127. *Rosemond* proffered “[f]ollowing his arrest for narcotics-related charges.” *United States v. Rosemond*, 841 F.3d 95, 99 (2d Cir. 2016). *Barrow*’s co-defendant signed after the federal charges issued. *Barrow*, 400 F.3d at 113. *Burch* signed later still—his DEA

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<sup>6</sup> The government suggests Hobson should raise this on appeal. ECF No. 228, at 1, 10. It tells the Court in the same filing that Hobson “may have other avenues” and “should use the appropriate legal mechanism,” while taking no position on which one. ECF No. 228, at 6 & n.1, 8. This motion is the mechanism.

debriefing came nearly three months after his plea hearing. *United States v. Burch*, 156 F.3d 1315, 1319 (D.C. Cir. 1998). Pierson signed in plea negotiations following his arrest. *United States v. Pierson*, 89 F.4th 976, 980 (7th Cir. 2024). Each of these men knew what he was giving up because he could see what he was facing. He had been arrested or charged. He had a lawyer. He had a charging document, discovery, and a trial date.

With pre-indictment proffers, the trade is concrete: my words against a chance at a deal, in a case I can already measure. A man arrested at a stash house knows the government is deciding whether to charge him, and he knows what for. He can price a waiver because he can see the case it will be used in. But for a complex corporate fraud investigation, risk analysis does not work that way. Indeed, when Hobson sat down in May 2021, DOJ had not decided whom to charge. Corsa had self-reported. The company, its chief executive, its finance employees, its board, and its sales agents were all on the table, and each faced a different calculus of cooperation credit, declination, and corporate resolution.

Hobson signed his proffer in 2021. He was not under arrest. He had not been charged. The government misrepresents this as “a voluntary interview.” ECF No. 228, at 2. But Hobson did not seek it; he came in under a grand jury subpoena the government kept in force. Ex. 4. The indictment came on March 29, 2022, ten months after the first session, and trial came almost four years after that. He had no charging document, no discovery, no witness list, no trial date. There was nothing to measure the surrender against. That is not a failure to read the letter. No one can weigh what a clause will cost him at a trial that does not exist, on charges that have not issued, against evidence he has never seen.

#### **IV. Unlawful Tactics Meet *Hunter*’s Miscarriage-of-Justice Standard**

“The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” *Herring v. New York*, 422 U.S. 853, 862 (1975). What the accused is entitled to is not a good result. It is “the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656 (1984). When the process “loses its character as a confrontation between adversaries,” the guarantee is gone and the adversary process is “presumptively unreliable,” whatever the evidence looked like. *Id.* at 656–57, 659. And it can make no difference to the defendant whether that testing was disabled by his own lawyer’s default or by an adversary who made testing the most dangerous thing counsel could do. That testing is built question by question, by a lawyer deciding not whether a question is a good one but whether the answer is worth the risk that his client’s own words come in behind it. When the price of one question may be the whole case, the question does not get asked.

*Hunter* confirms the Court safeguards due process rights, not the government. Hunter’s plea agreement contained an appeal waiver, which the district court found “knowing and voluntary.” At sentencing, Hunter objected to a condition of supervised release requiring him to take whatever psychiatric medication a physician prescribed. 146 S. Ct. at 1708–09. The Fifth Circuit enforced the waiver against his claim that his sentence with the medication condition was unconstitutional. The Supreme Court vacated and remanded, 8–1. A waiver cannot be enforced, the Court held, when enforcing it “would result in a miscarriage of justice”—“the kind of egregious error that would bring the judicial system into disrepute.” 146 S. Ct. at 1708.

The decision in *Hunter* reminds the Court that the judiciary has a non-waivable institutional interest in refusing to lend its authority to any action, procedural or contractual, that would produce that result. *Hunter*, 146 S. Ct. at 1712. This interest belongs to the Court, not the parties. That

holding does not rest on anything peculiar to appeals. It rests on the court’s own role. Federal courts, the majority explained, have an “independent” “institutional interest” in ensuring that legal proceedings “appear fair to all who observe them.” *Id.* at 1712 (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)). And “[f]rom start to finish,” the Court wrote, “courts are in the middle of, and partly responsible for,” the waivers they enforce and the results those waivers produce. *Hunter*, 146 S. Ct. at 1712.

The reason *Hunter* gives—the court’s own stake in a fair proceeding—has nothing to do with appeals. The appeal waiver was the setting, not the principle. *Hunter* reaffirmed *Mezzanatto*, the proffer-waiver case, and quoted *Wheat*. *Hunter*, 146 S. Ct. at 1712. The knowing-and-voluntary rule it restates is the general rule for giving up any right. *Zerbst*, 304 U.S. at 464. And if a court may refuse to enforce a waiver that gives up the appeal, it may refuse one that gives up the trial. The rule should apply with more force here. An appeal waiver is negotiated on the public record, approved by a judge, and put to the defendant in open court. A proffer letter is signed in a government conference room with no judge in the building.<sup>7</sup>

The record reflects the Court struggled with the limits of the proffer. Working through the Second Circuit’s *Barrow* decision on the first day of trial, it said the case “gives me quite a bit of food for thought about where those limits are,” and then, plainly: “it’s not perfectly clear in my mind where they are.” Day 1 Tr. 10. Two days later counsel asked whether the Court’s own study of the law made it harder for the defense to ask questions, and the Court answered as candidly:

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<sup>7</sup> The government answers that *Hunter* changed nothing here, because the Third Circuit has applied the miscarriage-of-justice exception “for at least 25 years.” ECF No. 228, at 4. Take the concession. If the principle has been the law of this Circuit for a quarter century, this Court may apply it now, and the government has supplied the standard by which this motion should be measured. The government also notes that Hobson “did not enter a plea agreement” and did not “execute an appellate waiver.” *Id.* at 8. That is true, and it cuts the other way. An appeal waiver is negotiated on the record, read to the defendant in open court, and approved by a judge before it binds him. Hobson’s waiver was signed in a conference room in 2021 and enforced five years later by a warning no judge ever reviewed.

“it’s a reasonable thing to hope that I might be able to give you better guidance. I don’t think I can.” Day 3 Tr. 9. Twenty-five years ago, Judge Gershon of the Eastern District of New York worked through this same problem in a written decision striking the language of the proffer agreement used here. *United States v. Duffy*, 133 F. Supp. 2d 213, 216 (E.D.N.Y. 2001). In ruling on a motion (never made here), she noted the Sixth Amendment concerns that escaped the analysis in *Mezzanatto*, which dealt with a much more limited proffer. The government there, as here, offered to identify the areas it considered fair game. The colloquy she described as impractical is the one that took place in this courtroom. She wrote that “[e]ven within the narrowly-prescribed areas that the government concedes are fair game, there are nuances and line drawing problems. For me to preview each of defense counsel’s questions in advance would be impractical, and yet, there is no other way for him truly to be certain of the consequences . . . .” *Duffy*, 133 F. Supp. 2d at 216. She found that Duffy’s counsel could not effectively represent him under such conditions and granted his motion to strike the language from the proffer.

The Court’s first duty is to the Constitution and the integrity of the judicial process, not the government and its pursuit of foreign bribery. There is no contract the defendant can sign that can change this equation. Irrespective of the Court’s finding on whether Hobson’s five-year-old expansive proffer agreement was knowing and voluntary as a matter of law or whether the government had followed the proper steps to use it, *Hunter* confirms what this Court itself recognized at trial in working through *Barrow*. Day 3 Tr. 5–10. Enforcing a waiver no court ever passed on, to sustain a verdict the defense was never free to test, is the miscarriage of justice *Hunter* describes. The Court does not have to sit idly by and watch an unfair trial, irrespective of a piece of paper the government says entitles it to strip a defendant of his due process rights.

## V. Engineered Silence Supercharges *Napue* Violations and Unconstitutional Closing

Testimony the government knows to be false must be corrected when it appears, *Napue v. Illinois*, 360 U.S. 264, 269 (1959),<sup>8</sup> and in this Circuit the duty turns on whether there is any reasonable likelihood the falsehood could have affected the judgment. *Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 146–50 (3d Cir. 2017).<sup>9</sup>

The government knew Cushmore was its key witness. It threatened the proffer virtually any time his name came up in an effort to scuttle his cross. Cushmore wanted to help the government; he had pleaded guilty and needed its help at sentencing. He wanted to help so badly he denied telling the government there were no pictures of the Egyptian President in Al Nasr’s offices; the government’s own interview report records that he said exactly that. Hobson’s lawyers knew he’d said this. So did the government. That the defense had the report is no answer: the Due Process Clause imposes “the responsibility and duty to correct” false testimony on “representatives of the State,” not on defense counsel. *Glossip v. Oklahoma*, 604 U.S. 226, 245 (2025) (quoting *Napue*, 360 U.S. at 269–70). The government wrote the report, prepared the witness for trial extensively, heard his answer in Court, and said nothing. It had spent the trial making the impeachment that would have exposed the answer the most dangerous question in the

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<sup>8</sup> Henry Napue was tried for the murder of an off-duty policeman shot during a robbery in a dimly lighted Chicago cocktail lounge. The State’s case rested on George Hamer, a co-participant already “serving a 199-year sentence for the same murder,” because “the passage of time and the dim light in the cocktail lounge made eyewitness identification very difficult and uncertain, and . . . some pertinent witnesses had left the state.” *Napue*, 360 U.S. at 265–66. On redirect, in the last testimony the jury heard from him, the prosecutor asked Hamer whether he had been promised anything. “Have I promised you that I would recommend any reduction of sentence to anybody? A. You did not.” *Id.* at 271. The prosecutor had promised him exactly that. He said nothing, and the jury convicted. A unanimous Court reversed, holding that the same result obtains whether the State solicits false evidence or “allows it to go uncorrected when it appears.” *Id.* at 269.

<sup>9</sup> The *Napue* violation independently requires a new trial, without regard to the proffer or to any other error in this case. The government bears the burden of proving harmlessness beyond a reasonable doubt, *Chapman v. California*, 386 U.S. 18, 24 (1967), and it cannot carry it. Cushmore was its only supposed percipient witness to the bribery, the statement he denied making bore on the contested element, and the government told the jury his account stood uncontradicted. Day 6 Tr. 91, 121.

case, running to the bench for a conference or articulating boundless reaches of the proffer if the defense spoke Cushmore's name.<sup>10</sup>

The Fifth Amendment forbids "comment by the prosecution on the accused's silence." *Griffin v. California*, 380 U.S. 609, 615 (1965). And it may not induce silence and then punish it. *Doyle v. Ohio*, 426 U.S. 610, 617–18 (1976). The government did both. It spent the trial warning that any defense would trigger the waiver. It got the trial it wanted—no testimony, no defense witness, no defense case. Then it made that silence its theme, telling the jury the proof was "uncontradicted" and that the defense had not challenged Al Nasr's status at all. Day 6 Tr. 91, 119, 121.

The government had to prove that Al Nasr was an instrumentality of the Egyptian government and that Hobson knew it. On that second question the only man who could have contradicted the government's proof was the defendant it had silenced. Calling that proof

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<sup>10</sup> In *Napue*, Illinois defended the conviction on the two grounds the government will offer here, and the Court rejected both. *First*, the lie went only to Hamer's credibility and not to any element of the offense. That does not matter. The principle "does not cease to apply merely because the false testimony goes only to the credibility of the witness," because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue*, 360 U.S. at 269. Quoting the New York Court of Appeals, the Court put it plainly: "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false." *Id.* at 269–70. *Second*, the jury had already been told that a public defender had promised "to do what he could" for Hamer, *id.* at 268, so it knew he had reason to shade his testimony. That did not cure it either. A jury "apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner" does not turn "what was otherwise a tainted trial into a fair one." *Id.* at 270. Relief follows if the falsehood "could in any reasonable likelihood have affected the judgment of the jury." *Id.* at 271. Cushmore was this trial's Hamer—a cooperating participant, serving his own exposure, whose word was the government's proof on the element in dispute—and DOJ lawyer Markman let his denial stand and then Kanerva told the jury he was un rebutted. The material was in the government's own file. An FBI report of Corsa's internal investigation presentation records that Corsa's outside counsel "did not find evidence to suggest Corsa knew Al-Nasr was a state-owned entity" until August 22, 2018, when counsel for a prospective equity investor produced documentation of Egyptian ownership—a "revelation" to a company that had been relying on a third-party insurance review describing Al Nasr as "a privately held LLC." Until then, "Corsa operated under the understanding that Al-Nasr was privately held." Ex. 5 at Sentinel-02-0000000304. Kanerva was among the DOJ lawyers present for that presentation. Ex. 5 at Sentinel-02-0000000298. The last charged email predates that date by fifteen months. Markman warned after opening statements that any defense on this subject would loose the proffer, Day 2 Tr. 3–4; counsel then took Cushmore on a cross that avoided it, Day 2 Tr. 177–78; and the government told the jury the element stood uncontradicted, Day 6 Tr. 119, 121. The answer to its own witness was in its own file the entire time.

“uncontradicted” is dangerous in any case. Here it shifted the burden and convicted him for a silence the government produced.<sup>11</sup>

## VI. Willful Confrontation Clause Violations

Al Nasr’s status as an instrumentality of the Egyptian government was an element the government had to prove. It is what makes this an FCPA case. It proved that element with a paid expert, and then used the expert’s answer to carry the element actually in dispute: what Hobson knew.

Professor Arafa told the jury that a 1961 presidential decree created Al Nasr, that the State owned and funded it, and that the government named its board. Day 3 Tr. 56–57, 59–78. Then he gave the ultimate opinion: Al Nasr “is owned by the Egyptian government 100 percent.” *Id.* at 78. Every word of it came from English translations of Egyptian decrees he could not source. “You don’t know where the translation came from? A. I don’t.” *Id.* at 83–84. He had told the jury he reviewed “the English translations of these documents as well,” *id.* at 56, so the man vouching for the translations could not say who made them. The decrees reached the jury in a slide deck built by DOJ lawyers and the witness. The government never offered it, so nothing was admitted, and the Court allowed it published anyway because an expert “can rely on virtually anything.” Day 3 Tr. 48. So the jury settled a foreign government’s ownership of a foreign company on the word of a man reading a document no one vouched for, translated by people no one named.

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<sup>11</sup> The government’s proof of knowledge consisted of three documents Hobson wrote and never explained: a November 2016 email referring to “a few that the agent has to take care of,” Day 2 Tr. 66; an April 2017 business-development email to a new contact describing a contract Severstal signed in 2012 with “the Egyptian state-owned steel mill Al Nasr,” Day 4 Tr. 120; and a May 2017 message explaining that a chairman’s removal was slow because “since they are government, it takes a while,” Day 3 Tr. 31. Each was read to the jury and construed by a witness who did not write it. The record held the answer. Corsa’s controller testified that nothing in the company’s documents showed Al Nasr was state owned, and that Corsa learned otherwise, to his surprise, only in 2017 or 2018. Day 2 Tr. 21, 29–30. Counsel could take that testimony to Corsa’s knowledge and no further. Day 2 Tr. 4.

The government used the same technique on the decrees. Asked whether the Court had already ruled on them, it answered: “We’re not seeking to admit these as exhibits. Professor Arafa will be testifying regarding Egyptian law. So I don’t think—there’s no necessity of a ruling of authenticity or hearsay in that matter.” Day 3 Tr. 47. No exhibits, so no authenticity ruling and no hearsay ruling. The decrees reached the jury anyway, in the expert’s mouth.

The government had promised otherwise. At the pretrial conference, when counsel objected that instrumentality belonged to the jury and not to a law professor—“[t]hey’re supposed to determine that company is a foreign instrumentality, not the law professor”—the government assured the Court that Professor Arafa “will certainly not be testifying to whether it is an instrumentality under U.S. law,” that he “will not be assessing the *Esquenazi* factors,” and that “[h]e will be testifying to the Egyptian law.” Feb. 4, 2026 Tr. 44. On that representation he was permitted to testify. He then gave the jury the ownership opinion set out above, and in summation the government told the jury he had been “qualified by this Court” to give it. Day 6 Tr. 119. The witness the Court admitted is not the witness the jury heard.

## **VII. Government Methodology Prohibited: From *Crawford* to *Rovirosa***

The Confrontation Clause exists because of one trial in particular. In 1603 Sir Walter Raleigh stood accused of treason. The Crown’s proof was a written statement from Lord Cobham, and Cobham was never brought to court. Raleigh asked the judges for one thing: “Call my accuser before my face.” They refused, and he was condemned on paper he could not test. *Crawford v. Washington*, 541 U.S. 36, 44 (2004), recounts that trial as the most notorious instance of the abuse the Clause was written to end. The Framers knew the story. They wrote the Clause so that the “principal evil” it targeted—“the use of ex parte examinations as evidence against the accused”—could not be repeated. *Id.* at 50. The rule that follows is short. A testimonial statement by an absent

declarant stays out unless the declarant is unavailable and the defense already had a chance to cross-examine him. Reliability is no substitute: “the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Id.* at 68–69.

That rule reaches translators, because a translator is a witness (although not one the DOJ ever wants to call for cross-examination). The Eleventh Circuit explained why in *United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013): “Interpreters do not interpret words; they interpret concepts.” *Id.* at 1324 (quoting Nat’l Ass’n of Judiciary Interpreters & Translators, Frequently Asked Questions About Court and Legal Interpreting and Translating (2013)). A translated statement is two statements by two declarants—the original speaker’s, and the translator’s. *Id.* That is this case in a sentence. One word choice separates a direction from a request, a promise from a courtesy, corrupt intent from a clumsy email. Pre-*Crawford*, courts treated a live interpreter as a mere “language conduit,” but that idea came out of the reliability framework of *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), which the Supreme Court abandoned in *Crawford*. *Charles* pointed out that the language-conduit framework, resting on *Roberts*’s “indicia of reliability,” 448 U.S. at 66, cannot survive *Crawford* because it trades constitutionally required cross-examination for a judge’s comfort. 722 F.3d at 1327 (“Even though an interpreter’s statements may be perceived as reliable . . . the Court, in *Crawford*, rejected reliability as too narrow a test.”). A translator working alone from an old message has no speaker to correct her. She reads words on a page and decides, by herself, what they meant. Justice Holmes made the same point on language a century earlier when he wrote: “[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought.” *Towne v. Eisner*, 245 U.S. 418, 425 (1918). In FCPA cases, these translation decisions by government contractors are not made contemporaneous with the speech, these decisions are

made sometimes years later with no engagement with the speaker, familiarity with the country, or knowledge of the culture—the furthest thing in the world from a language conduit.

The government’s usual answer to a missing witness is a certificate, and the Supreme Court has closed that door more than once. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009): “The Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.” *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011): a surrogate who did not do the work cannot answer for the one who did. *Hemphill v. New York*, 595 U.S. 140, 151 (2022), says the same of judges— “[i]f *Crawford* stands for anything,” it bars “substituting their own determinations of reliability for the method the Constitution guarantees.” And *Smith v. Arizona*, 602 U.S. 779, 783–84 (2024), closes the last exit: when an expert conveys an absent person’s out-of-court statements to support his opinion, and those statements support the opinion only if they are true, they come in for their truth and the Clause is triggered. The Constitution requires the government call the translators as witnesses who can concede that these translations are largely guesses as to meaning. That effort would involve confrontation as opposed to the government’s one-sided presentation (which was the point Hobson’s lawyers made pretrial).

The government avoided confrontation by calling no Egyptian witnesses or translators and instead paying Professor Arafa to read records he’d be given and that were never admitted, tell the jury what they meant, and deliver the ultimate opinion on an element. By using Arafa as a filter, the government side-stepped meaningful Confrontation required by the Constitution. Counsel questioned Professor Arafa and objected. What no one could do was confront the translator, because the government never produced one. Not one Egyptian witness showed up for the trial.

Just a paid “expert” who would tell the jury the government’s evidence on key issues was sufficient.

Consider the element that makes this a federal case at all. If Hobson had been charged with robbing a bank, the government would have to prove the bank was FDIC-insured—the fact that federalizes the offense. No court would let it prove that through a cooperating teller who helped empty the vault, had no responsibility for the bank’s insurance, knew nothing beyond a sticker on the door, and with zero participation by the bank in the prosecution. The certificate comes in, and a custodian who can be cross-examined. The instrumentality element got lighter treatment here for one reason: this was an FCPA case and the government did not have foreign witnesses who cared enough about the government’s foreign bribery prosecutions to show up and participate. But due process does not thin out because the government wants to spend taxpayer dollars focusing on foreign bribery with purported victim countries who have zero interest in the government’s prosecution. As a witness told Congress when the FCPA was written, it would be “repugnant to try a person in this country for the violation of a law . . . the witnesses to which are not available in this country.”<sup>12</sup> *Hunter* reminds the Court it should not become a willing participant in the government’s effort to cheat the Constitution.

The decrees do not avoid Confrontation Clause scrutiny. A 1961 presidential decree is a foreign public record, made to run a government and not to convict Hobson; standing alone it is not testimonial. *See Crawford*, 541 U.S. at 56; *cf. Melendez-Diaz*, 557 U.S. at 324. The testimonial

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<sup>12</sup> When the conduct occurs abroad, Representative Eckhardt (a key participant in the drafting of the FCPA) observed, a defendant tried in the United States confronts witnesses who are “halfway across the world,” while “the government would undoubtedly have both the resources and the ability to bring in witnesses from overseas whereas the individual would have a very difficult time bringing in witnesses to rebut such testimony.” He warned against placing on an individual a burden so heavy “that we effectively deny him what is considered ordinary due process of law in this country,” and called it “repugnant to try a person in this country for the violation of a law of this country . . . the witnesses to which are not available in this country.” *Unlawful Corporate Payments Act of 1977: Hearings on H.R. 3815 and H.R. 1602 Before the Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate & Foreign Commerce*, 95th Cong. (1977).

statement is the translation—prepared for this trial, by a translator no one named, for the single purpose of putting an element before the jury. That is what *Charles* and *Smith* reach, and it is what the government could produce no witness to defend. Egyptian law is a question of law, and in deciding a question of foreign law a court may consider any relevant source, admissible or not. FED. R. CRIM. P. 26.1. That is not what happened. Professor Arafa was not called to inform a ruling by this Court. He was put in front of the jury to decide an element, on documents no translator authenticated. And this Court had already ruled he could not testify to the ultimate issue under American law. Day 6 Tr. 136. Instrumentality is demanding and fact-intensive. It turns on the foreign government’s ownership, its control, and whether the entity performs a function the government treats as its own. ECF No. 181, at 65–66. A specialized, dispositive fact may not be proved by funneling it through a conduit and calling the result an opinion.<sup>13</sup>

Two months after this trial ended, a federal court refused this exact method—in a Fraud Section FCPA trial that took place in December 2025. In *Rovirosa* the government proved its FCPA case through English translations of Spanish messages, and “the record shows that the government intentionally did not call as witnesses the Translators.” Ex. 3 at 8. Judge Hoyt applied *Crawford* and held the translations testimonial, because the government’s “primary purpose for offering the messages was to convict Rovirosa, *i.e.* to prove the elements of the crimes charged.” *Id.* at 6. Certifications did not save them; satisfying the business-records rule is not satisfying the Sixth Amendment. *Id.* at 7. Neither did the government’s substitute witness—an agent who re-read the translations and pronounced them accurate. “To permit this type of ‘expert’ evidence,”

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<sup>13</sup> Hobson does not concede that *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014), states the correct rule. The statute reaches an officer or employee of a foreign government “or any department, agency, or instrumentality thereof.” 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A). Congress did not write that phrase to reach the employees of commercial enterprises a foreign state happens to own, and the Third Circuit has not adopted *Esquenazi*. Hobson preserves the argument that Al Nasr’s employees are not foreign officials as a matter of law. The argument in text assumes *Esquenazi arguendo* and shows that the government failed to prove even that standard.

the court held, “turns on its head the science and art of proper translation considerations,” and “[t]o ignore the art and science of the translation process is to render cross-examination of the Translators, useless or questionable.” *Id.* at 8–9. The jury had seen the problem before the court did. It sent out a note asking for the Spanish originals, and they could not be given to it because the government had never offered them. *Id.* at 9. The court granted the motion to dismiss the indictment under Rule 29(c) and, alternatively, acquitted Rovirosa on all charges for lack of evidence to support the conviction in violation of the Confrontation Clause. *Id.* It also found the government’s failure to produce the promised forensic copies of the Spanish messages “fatal to the government’s case.” *Id.*

The Third Circuit has not decided whether a translation prepared for trial is the translator’s own testimonial statement. *Crawford, Charles*, and Judge Hoyt’s ruling on nearly identical facts supply the answer. And this record is worse than the one in *Rovirosa* where the translations were of his own messages, so the underlying speaker at least sat in the courtroom. Here the testimonial layer is a trial-prepared translation whose translator is unnamed, of a foreign decree that was itself never admitted, and the package reached the jury through a paid expert on the one element that makes this an FCPA case. The government then told the jury that on that element “defense counsel didn’t even challenge that.” Day 6 Tr. 119. That was false. Counsel told the jury the decrees were never admitted and the translations never certified—“It’s not good enough for Federal Court. Okay? It’s not good enough for you. It’s not good enough for Mr. Hobson. His documents did not come into evidence.” Day 6 Tr. 165. What he could not do was cross-examine the translator, because the government never called one. Schurmann told him at the pretrial conference that he could not even raise a Confrontation Clause argument because, in the DOJ’s alternative reality, it

somehow implicated the proffer. Using a due process violation to prevent a Confrontation Clause argument is a novel approach by DOJ to upending the Constitution.

### **VIII. Rule 29 Cannot Measure a Record the Government Silenced**

The government's position in its brief filed July 27 is that the proffer and the sufficiency of its proof are separate questions—that Hobson complains only that “other evidence and argument should have been introduced.” ECF No. 228, at 6. The Second Circuit rejected that division in *Oluwanisola*. It “agree[d] with the government that there was sufficient evidence to convict Oluwanisola,” but was “not convinced that the court’s error in interpreting the waiver provision was harmless.” 605 F.3d at 134. Judge Hoyt did not separate the two. He dismissed under Rule 29(c) and, in the alternative, acquitted Roviroso on all charges for lack of evidence to support a conviction obtained in violation of the Confrontation Clause. Ex. 3 at 9. In that phrase the violation and the failure of proof are the same fact. They are here too.

Two violations reached the same element, and each did two things: it kept evidence from the jury, and it corrupted what the jury got. The proffer took the cross of the government’s cooperating witness, the impeachment sitting in the government’s own report, and the motion for acquittal; the government then argued the silence it had produced. The Confrontation Clause violation supplied the only proof of that element—an unsourced translation delivered as an ultimate opinion the government had promised would not be given—and the government then told the jury the expert had been “qualified by this Court” to give it. The record for both is set out above.

These are not two problems. They are one. The proffer disarmed the only party who could have confronted Professor Arafa, and the confrontation violation is what came through the opening. Set aside the ownership opinion and the decrees no witness authenticated and no named

translator rendered, and instrumentality has nothing left to stand on. Leave them in and the conviction rests on proof the government made certain no one could test. Either way there is no verdict here to measure. Judge Hoyt did not pretend otherwise on a thinner record.<sup>14</sup>

## IX. Roadmap to Relief

Dismissal under the supervisory power requires both willful misconduct and prejudice. *Fahie*, 419 F.3d at 255. Willfulness is not confined to intent. In this Circuit “a pattern of constitutional violations” can show the recklessness that satisfies it, *id.* at 256, and flagrant

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<sup>14</sup> Had defense counsel been free to argue it, the Rule 29 motion would have included a full throated outline of the evidentiary and legal deficiencies, including: The statute reaches an officer or employee of a foreign government “or any department, agency, or instrumentality thereof.” 15 U.S.C. § 78dd-2(h)(2)(A). Whatever content that word carries, it requires that the entity perform a function the foreign state treats as its own. The record contains no evidence of any such function. The government proceeded on that understanding itself: it told this Court its expert would address the factors that bear on it, Day 3 Tr. 40, 44, and its summation argued them, Day 6 Tr. 120. Having tried the case on that theory, it cannot now call the function requirement surplus. The government also never traced a dollar to anyone at Al Nasr. Its financial analyst had no record of a payment, a promise, or an authorization from Hobson or Nassar to any Al Nasr employee, Day 5 Tr. 62–64; its case agent knew of no bank record, no invoice, and no attempt to subpoena a witness from Egypt, Day 4 Tr. 173–74; and its expert had “no evidence or personal knowledge whatsoever” that Hobson ever paid anyone, Day 3 Tr. 89. Without a governmental function there is no foreign official; and without a payment, offer, promise, or authorization directed to such an official, there is no FCPA offense. What remains of Counts Two and Three is an email forwarding a commission invoice to Corsa’s accounting department and a wire paying that commission. Counts Four through Six rest on two specified unlawful activities that fail together—the FCPA for the reasons above, and Egyptian law because no statute, decree, or certified translation was admitted and its content reached the jury as one witness’s opinion though it is a question for the Court, FED. R. CRIM. P. 26.1—and the jury was told either one would suffice. ECF No. 181, at 74, 81. Because foreign law is the Court’s question and not the jury’s, that predicate was legally inadequate rather than merely unproved, and a verdict that may rest on a legally inadequate ground must be set aside. *Yates v. United States*, 354 U.S. 298, 312 (1957); see *Griffin v. United States*, 502 U.S. 46, 59 (1991) (distinguishing a legally inadequate theory from one merely unsupported by the evidence). Count Seven fails on its own terms. The scheme charged was the concealment of the commission arrangement from Corsa, but Corsa approved it. Corsa’s logistics coordinator testified that “[u]sually the CEO would be the end approver” of the payments to Nassar, that the CEO was George Dethlefsen, and that he was “[u]ltimately” the one who had to authorize the commission payments. Day 3 Tr. 207. The first approver was “either Mr. Hobson or Mr. Cushmore”—the government’s cooperating witness, a Corsa executive who admitted he was part of the arrangement from the beginning. Day 3 Tr. 218. Corsa’s board approved the commissions, and Harrigan reminded it of that when it complained about their size: “well you approved it, so what are you complaining about.” Ex. 1 at GX 801.1.00013. The government’s charged concealment theory cannot establish a deprivation of Corsa’s property where its chief executive was the final approver of both the Al Nasr contracts and the commission payment, and its cooperating executive participated in the arrangement from the beginning. The instruction compounded the failure. Count Seven charged a scheme to obtain money or property under 18 U.S.C. § 1343, yet the jury was told it could convict on a scheme depriving another “of the intangible right of honest services.” ECF No. 181, at 88. 18 U.S.C. § 1346 was never charged and never defined, and honest services is the one intangible interest § 1343 does not reach on its own. *Kousisis v. United States*, 145 S. Ct. 1382, 1397 (2025); *Ciminelli v. United States*, 598 U.S. 306, 312 (2023). Hobson would also have preserved the sufficiency of the evidence as to every remaining element of every count. Viewed in the light most favorable to the government, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), that record will not carry these convictions.

misconduct need not be intentional where the government acts with reckless disregard for its constitutional obligations. *Bundy*, 968 F.3d at 1038, 1041–42.<sup>15</sup>

The pattern here was not accidental. The government chose threats over rulings and stayed with that choice for an entire trial—at the pretrial conference, after opening statements, and again as the defense approached its cross of the government’s principal witness. Feb. 4, 2026 Tr. 29, 51–52; Day 2 Tr. 3–4, 108–10. It never once asked the Court to make a legal ruling applying the limits of the Sixth Amendment. If it had, the Court would have confronted hard constitutional limits on use of the proffer set by *Oluwanisola*. A prosecutor who takes the benefit of a waiver for an entire trial while making sure no judge ever passes on it is reckless with the defendant’s rights and with the Court’s.

Dismissal with prejudice is unavailable where a lesser remedy will cure the prejudice. *Fahie*, 419 F.3d at 259. A new trial cannot restore what the first one cost. It would remedy the errors and hand the government the case its methods concealed—the chance to produce the translator it never called, to seek the Egyptian witnesses it never sought, and to retry a defense it has now watched from the inside. *See Bundy*, 968 F.3d at 1043–44 (affirming dismissal with prejudice where retrial “would only advantage the government by allowing [it] to strengthen [its] witnesses’ testimony based on the knowledge” gained from the defense at the first trial). Because the error struck an element of the offense and Hobson’s ability to answer it, it cannot be called harmless. *Gov’t of the V.I. v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976); *Kyles*, 514 U.S. at 436–37. Dismissal with prejudice is the appropriate remedy.

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<sup>15</sup> The outer limits of the supervisory power are satisfied here. *Bank of Nova Scotia*, 487 U.S. at 254–56, and *Hasting*, 461 U.S. at 505–07, hold that a court may not use that power to undo harmless error or to enforce prophylactic rules untethered from prejudice—*Hasting* as to trial error, *Bank of Nova Scotia* as to grand-jury irregularity measured against Rule 52(a). Neither premise is present. This misconduct was not harmless (*see Oluwanisola, Crawford, Napue*) and did not touch a collateral matter. It reached an element of the offense and Hobson’s ability to answer it, and it did so cumulatively. That is the concrete prejudice *Bank of Nova Scotia* requires.

A new trial is independently warranted, without regard to the supervisory power. The Second Circuit ordered exactly that in *Oluwanisola*, on a record where the district court had ruled and no proffer statement was ever admitted. 605 F.3d at 132, 134.<sup>16</sup> A non-constitutional trial error requires a new trial in this Circuit unless it is “highly probable that the error did not contribute to the judgment.” *United States v. Zehrbach*, 47 F.3d 1252, 1265 (3d Cir. 1995) (*en banc*). The constitutional errors—the coercion that disabled the defense, proof of a foreign element through an unconfrosted declarant, uncorrected false testimony in violation of *Napue*, and the comment on the silence the government induced—are measured against harmlessness beyond a reasonable doubt, and the government bears that burden. *Chapman v. California*, 386 U.S. 18, 24 (1967). It cannot carry it as to any one of these errors, let alone all of them together. They reached both the government’s proof and Hobson’s ability to test it, and their prejudice is measured cumulatively. *Kyles*, 514 U.S. at 436–37. A new trial follows from the violations themselves, without any finding of bad faith.

Rule 29 and Rule 33 supply the last two paths, and each asks a different question than the first two. Rule 29 measures whether the evidence actually admitted can carry these convictions; Hobson’s motion under Rule 29(c), filed within the extensions this Court granted, remains pending. Rule 33 asks whether “the interest of justice so requires” a new trial, and it requires no finding that anyone acted in bad faith. FED. R. CRIM. P. 33(a). The Court need not accept every

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<sup>16</sup> Rule 33’s fourteen-day limit does not bar the alternative relief. The relief Hobson seeks first—dismissal of the indictment under the Due Process Clause and this Court’s supervisory power—is not Rule 33 relief and carries no such limit. As to the request for a new trial, the deadline in Rule 33(b)(2) is not jurisdictional but “an inflexible claim-processing rule.” *Eberhart v. United States*, 546 U.S. 12, 13 (2005) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004)). It is subject to extension for excusable neglect on a motion made after the time has run. Fed. R. Crim. P. 45(b)(1)(B). The government does not contend otherwise; its opposition applies that same rule to Hobson’s Rule 29 filing. ECF No. 228, at 3–6. Setting aside the direct causal impact the government’s proffer stunt had on Hobson’s post-trial filings, *Hunter* was decided on June 18, 2026, four months after the verdict, and it confirms the principle on which this motion rests. Intervening authority of that kind is excusable neglect (or government generated neglect vis-à-vis the proffer), and to the extent the Court requires a separate showing, Hobson requests leave under Rule 45(b)(1)(B).

argument in this motion to reach any one of these paths. It need only conclude that the proceeding it presided over did not test the government's case. A trial is worth exactly what the due process that produced it was worth. A jury's finding is not a substitute for due process; it is supposed to be the product of it. Where the government arranges what the jury is permitted to see, the verdict is not made reliable by the jury's word. It is made unreliable by the government's.

### CONCLUSION

An American trial rests on a promise, and the Constitution makes it twice. Article III commands that the trial of all crimes be by jury. The Sixth Amendment says it again, and then says what a trial takes: notice, confrontation, compulsory process, counsel. The Fifth adds due process and the right to say nothing at all. U.S. Const. art. III, § 2; *id.* amends. V, VI. These are not separate protections to be checked off one at a time. They are one mechanism described in parts, and no part works alone. Confrontation is worthless if counsel cannot ask the question. Silence is no right at all if silence becomes proof. And the right to counsel is not the right to have a lawyer in the room—it is the right to a lawyer who can ask the next question without handing the government his client's conviction.

That promise was not kept here. Every rule that makes a trial a trial was turned against the man it was written to protect. The lawyer who should have been his shield became his risk. The silence the Constitution gave him became the government's best evidence. Then the government stood in front of twelve citizens and told them no one had even tried. *Hunter* puts a different question to this Court than the one the government wants answered. Not whether prosecutors crossed a line. Whether this Court will put its name on what they built. A conviction is the Court's act, not the government's, and the judiciary holds its own stake in what it certifies. *Hunter*, 146 S. Ct. at 1712. Nothing in the law requires this Court to call this a trial. Hobson does

not ask for a favor. He asks for what the Constitution promised him twice and this proceeding never gave him. A new trial is the least of it. Dismissal with prejudice is what this record earns, because the government should not get a second turn at a defense it has already watched from the inside. Hobson respectfully requests that the Court dismiss the indictment with prejudice, and in the alternative vacate the conviction and order a new trial.

Respectfully submitted,  
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#### CERTIFICATE OF SERVICE

I certify that on August 24th, 2026, the foregoing was filed electronically with the Clerk of Court through the CM/ECF system, which will serve notice of electronic filing on all counsel of record.

/s/ Ryan D. McConnell  
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