24-778-CR(L)

24-1285-CR(CON), 24-1317-CR(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

KEITH RANIERE, A.K.A. VANGUARD,

Defendant- Appellant.

On Appeal from the United States District Court
for the Eastern District of New York

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

DEBORAH J. BLUM, ESQ.
Attorney for Defendant-Appellant
225 Broadway, Suite 715
New York, New York 10007
646-535-2586

ARGUMENT

This is a petition for panel rehearing and rehearing en banc from a Summary Order ("SO") issued and entered by this Court on October 27, 2025. A copy of the SO is attached to this Petition. It contains over a dozen material, prejudicial errors which are clear-cut under Federal Rules of Appellate Procedure ("FRAP") 40(b)(1) and (b)(2)(A), (B) & (D), requiring this Court to grant both a panel rehearing and rehearing en banc.

Several of this Court's material and prejudicial errors fall squarely within FRAP 40(b)(2)(A), (B), and (D), requiring en banc review to maintain uniformity, resolve conflicts with Supreme Court precedent, and address issues of exceptional importance. FRAP(b)(2)(A): The panel's ruling conflicts with this Court's own decisions in *United States v. Franzese,* 525 F.2d 27, 30-31 (2d Cir. 1975) (crediting post-trial affidavits for their truth), *Amorgianos v. Nat'l R.R. Passenger Corp.,* 303 F.3d 256 (2d Cir. 2002) (accepting data-free expert opinion), and *United States v. Abuhamra,* 389 F.3d 309 (2d Cir. 2004) (relying on secret evidence). FRAP(b)(2)(B): It also conflicts with Supreme Court precedent by permitting surrogate expert testimony in violation of *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) and *Smith v. Arizona*, 144 S. Ct. 1785, 1791 (2024)*;* admitting unreliable expert assertions contrary to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); applying harmless-error review to government fraud on

the court contrary to *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), and *Arizona v. Fulminante*, 499 U.S. 279 (1991); and minimizing the irremediable prejudice of child-pornography evidence contrary to *Andrew v. White,* 604 U.S. 86 (2025). FRAP 401(b)(2)(D): These errors raise questions of exceptional importance - they replace adversarial testing with judicial conjecture, and by treating government falsification as time-barred and harmless, they would erode the integrity of appellate review.

At the center of these errors lies the panel's improper reliance on—and crediting for its truth—the post-trial affidavit of FBI Senior Computer Scientist David Loveall II.[1] Crediting this untested, unsupported, and undated affidavit for its truth was impermissible and contrary to controlling precedent for five independent reasons:

1. Loveall has never been subject to cross-examination and, under *United States v. Franzese*, 525 F.2d. at 30-3, his post-trial affidavit cannot be used to reject the defense experts' findings as false, only to test the **legal sufficiency** of Mr. Raniere's allegations.

2. His report makes material assertions about the forensic analysis of FBI examiner Stephen Flatley, specifically, the undisclosed forensic settings Flatley used to create his report; due to the fact that Flatley never testified and was never subject to cross-examination, accepting Loveall's assertions about Flatley's analysis for its truth constitutes the use of a surrogate expert in direct violation of *Bullcoming v. New Mexico* and *Smith v. Arizona*.

[1] The panel also impermissibly relied on Camila's post-trial declaration for its truth. However, none of its assertions addressed—let alone refuted—the forensic findings of the seven defense experts.

3. The Loveall Report cites no data - let alone sufficient data - to support his claims, violating Fed. R. Evid. 702(b) and *Daubert v. Merrell Dow Pharmaceuticals*; under *Amorgianos v. National R.R. Passenger Corp,* 303 F.3d at 256, 266, such testimony must be excluded.

4. Loveall's Report is undated and thus non-compliant with 28 U.S.C. § 1746; this Court has upheld exclusion of undated affidavits. *Reynolds v. Sealift, Inc.*, 311 F. App'x 422, 425 (2d Cir. 2009).

5. It materially relies on secret evidence - the undisclosed second forensic image of the memory card - in violation of *United States v. Abuhamra*, which held that due process is violated even when the government relies on secret evidence affecting a lesser liberty interest, as in that case involving bond for a post-conviction sentencing hearing.

Put simply, the panel's failure to address these material issues pertaining to the Loveall Report, should render the report inadmissible. Without the Loveall Report, the defense experts' findings stand entirely unchallenged. That report was the government's sole forensic response to the unanimous conclusions of seven defense experts, including four former FBI examiners, that the alleged child-pornography evidence was falsified and planted. Their joint report found that:

> "the alleged contraband [was] planted on the hard drive … [and] the camera card … extensively tampered with. Hundreds of files were planted, staged, and manipulated across both devices. Given admitted government misconduct, including violating evidence protocols, providing evidence to unidentified and unauthorized personnel, and altering the original camera card, the involvement of government personnel in this evidentiary fraud is inescapable—an unprecedented finding in our combined 150+ years of forensic experience." (A1698 ¶¶1–2; A1700 ¶8; A1703 ¶16.)

Absent Loveall's untested affidavit, these findings stand unrefuted and are legally sufficient to warrant:

- vacatur of at least three predicate acts, as the falsified hard drive, camera, and its memory card would be excluded (RBr. at 9–13);
- resentencing, as those acts elevated the Guidelines range (RBr. at 2, 26);
- dismissal for deliberate government misconduct (OBr. at 48–52; RBr. at 26–27); and
- reversal for structural error (OBr. 48–52; RBr. 29–30).

Panel rehearing is warranted under FRAP 40(b)(1) because the Panel overlooked and misapprehend key facts and points of law, including:

- It failed to conduct structural-error analysis raised by Mr. Raniere, as required by *Arizona v. Fulminanate*.
- It accepted the government's claim that the second forensic image was a "duplicate," unsupported by any evidence in the record.
- It stated that the Loveall Report relied on a "second copy" disclosed to the defense, contrary to record citations showing concealment.
- It concluded that the defense "already had access" to the evidence sought in its motion to compel, despite unrebutted proof that the second image was withheld.
- It described the seven experts' findings as mere "criticisms of handling," overlooking their detailed forensic identification of planted files and timestamp manipulation.
- It violated *Franzese* by crediting two untested post-trial affidavits, Loveall's Report and Camila's Affidavit for their truth when only testing for legal sufficiency is allowed.

- It failed to decide whether the Loveall Report violates *Daubert* or 28 U.S.C. § 1746.

- It failed to address distinct *Brady* violations explicitly raised; and
- It failed to assess the sentencing impact of suppressed evidence, as *Brady requires*.

If left uncorrected, the Panel's errors would vitiate the function of appellate review as a safeguard of justice.

I. THE PANEL'S CREDITING OF THE UNTESTED LOVEALL AND CAMILA AFFIDAVITS FOR THEIR TRUTH WARRANTS PANEL AND EN BANC REHEARING Untested Loveall and Camila Affidavits for Their Truth Warrants Panel and En Banc Rehearing.

The panel rejected the seven experts' findings of government falsification by adopting the district court's conclusion that the Loveall Report and Camila's affidavit were "far more plausible." (SO at 9:11–18.) Calling one side "far more plausible" is a factual finding of truth, which *Franzese* squarely prohibits.

In the Second Circuit, post-trial affidavits submitted by the government "may be considered in assessing the **sufficiency of a petitioner's claims** in post-conviction proceedings." *Dalli v. United States*, F.2d 758, 762 n.4 (2d Cir. 1974). (RBr. at 16-17) However, such material may "**not [be considered] as a basis for finding a petitioner's allegations to be false.**" *United States v. Franzese,* 525 F.2d 27, 30-31 (2d Cir. 1975), quoting *United States v. Salerno,* 290 F.2d 105, 106 (2d Cir. 1961). (*Id.*)

Loveall has never been subject to cross-examination and as such, his post-trial affidavit cannot be used to find Mr. Raniere's experts findings of systematic government misconduct, including falsifying and planting evidence, to be false. *Franzese,* 525 F.2d at 27, 30-31

To "rebut" the defense experts' findings that 37 files were planted on the camera's memory card which in FBI custody, prior to Booth's unauthorized re-imaging, the Loveall Report advanced new, unsupported, and material claims about undisclosed "settings" in the forensic analysis by FBI Examiner Stephen Flatley—who never testified. (OBr. at 14, 27 ¶2, 27 n.12, 29.) By crediting Loveall's Report without testimony from either Loveall or Flatley, the panel directly contravened *Bullcoming v. New Mexico*, 564 U.S. 647, 658–59 (2011), and *Smith v. Arizona*, 143 S. Ct. 361, 369–70 (2023). (OBr. at 27–28.)

Even apart from that, the Loveall Report should never have been admitted. Mr. Raniere detailed that the Report's claims were technical conjecture that lacked any supporting data whatsoever, violating *Daubert*; additionally, the absence of a date rendered it noncompliant with 28 U.S.C. § 1746. Each is a serious defect that should render it inadmissible (OBr. at 3, 6, 18, 30–32; RBr. 6 (Fact #11).) The panel did not address either issue, *Daubert* or non-compliance with 28 U.S.C. § 1746. Without Loveall's inadmissible report, the defense experts' unanimous finding of government falsification stands unrefuted.

Loveall's conclusions relied on the undisclosed second forensic image of the memory card—secret evidence whose use violates *United States v. Abuhamra*. (OBr. at 27-30).

As noted in *United States v. Autuori*, 212 F.3d 105, 120 (2d Cir. 2000):

> "[T]he court may weigh the evidence and credibility of witnesses... At the same time, the court may not wholly usurp the jury's role. It is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment."

There were no exceptional circumstances that enabled the trial judge to intrude upon the jury's function of credibility assessment. The jury never heard from Loveall or Camila. By crediting the truthfulness of post-trial evidence, this Court and the District Court usurped the jury's role in assessing witness credibility and Mr. Raniere's Sixth Amendment rights.

These errors warrant panel rehearing because the panel overlooked or misapprehended these controlling authorities and never even ruled on the *Daubert*, § 1746, *Bullcoming*, or *Smith* issues while misapplying *Franzese* by crediting post-trial affidavits for their truth to reject Mr. Raniere's allegations as false—the very action *Franzese* forbids. The same errors independently warrant rehearing en banc, as detailed in Argument III below.

II. THE PANEL OVERLOOKED AND MISAPPREHEND MULTIPLE MATERIAL ERRORS, EACH INDEPENDENTLY, WARRNTING PANEL REHEARING UNDER FRAP 40(b)(1)

This Court has no discretion to avoid its duty to render decisions in the appeals that are properly before it. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976) (holding that federal courts have a "virtually unflagging obligation … to exercise the jurisdiction given them"); *Willcox v. Consol Gas. Co. of New York*, 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction"); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) ("It is a judge's duty to decide all cases within his jurisdiction that are brought before him").

Beyond impermissibly crediting the Loveall and Camila post-trial affidavits for their truth, the panel committed numerous additional material errors—each independently warranting panel rehearing under FRAP 40(b)(1) as specified in the Preliminary Statement and further detailed below.

A. Failure to Conduct Structural-Error Analysis Required by *Arizona v. Fulminante*

Arizona v. Fulminante, 499 U.S. at 309–10, holds that structural error affects the framework of the trial, requires automatic reversal of the conviction, and must be analyzed before harmless-error review. Mr. Raniere's appeal identified

deliberate, systematic misconduct targeting falsified evidence by at least eight FBI/DOJ officials—spanning the search team, CART, non-CART agents, and prosecutors—and argued that its pervasiveness constituted a structural defect. (OBr. at 50–51; RBr. at 29–30.) The panel failed to conduct any structural-error analysis. The panel also failed to address Mr. Raniere's argument that dismissal is warranted due to "widespread", "continuous", and "egregious and deliberate" misconduct by the government. *United States v. Mangano*, 2022 U.S. Dist. LEXIS 3048, at *7 (E.D.N.Y. Jan. 6, 2022) (citations omitted). (OBr. at 48-52; RBr. at 26-27).

B. Failure to Rule on Request for Judicial Notice

Under Fed. R. Evid. 201(c)(2), "the court **must** take judicial notice if a party requests it and the court is supplied with the necessary information." (emphasis added). Mr. Raniere made such a request, citing the government's records contained in the appellate appendices that establish the relevant facts on their face—including the FBI photo technician's absence from the chain of custody (A1233–35) The panel failed to rule on that request, in violation of Rule 201. These facts were material to the *Brady* issues discussed herein.

C. The Panel Improperly Resolved Disputed Facts Without a Hearing

A court may deny a post-trial motion without a hearing only if the defendant fails to show "disputed issues of definite, specific, and nonconjectural material fact." *United States v. Gershman*, 31 F.4th 80, 93 (2d Cir. 2022).

Mr. Raniere demonstrated numerous non-conjectural disputed issues of material fact warranting an evidentiary hearing under *Gershman* (RBr. at 30). These include:

1. Camila's untested declaration alleged a single production date, contradicting the government's trial theory of two separate production dates—each charged as a distinct predicate act of exploitation. (OBr. at 13 n.5, 26 ¶3, 27 ¶1; RBr. at 31 n.13.) This conflict goes to the validity of the predicate acts and, at minimum, affects sentencing.
2. Whether Loveall's or the seven defense experts' findings are correct regarding the planting and falsification.
3. The nature, scope, and identities of the FBI personnel omitted from the chain of custody and the individual(s)s who, in violation of FBI policy, accessed the unpreserved memory card before the FBI photo technician.

D. Failure to Address the Uncontested Expert Findings of Evidence Falsification

Federal jurisdiction over the charged child-pornography predicates requires proof that the materials involved "moved in or otherwise affected interstate commerce." 18 U.S.C. §§ 2251(a), 2252(a). The government itself admitted that it "relied on the Canon camera evidence primarily to establish federal jurisdiction." (GBr. at 42.)

Here, the camera and its memory card are treated as a single evidentiary item. The government described the two together—the camera and its contents stored on the memory card—as one device.[2] (GBr. at 7, 13 n.5, 19, 40–41.)

[2] E.g.: "Booth had conducted a forensic analysis of the Canon camera, but Booth did not testify regarding any **images or metadata recovered from <u>that device</u>**, and no images or metadata from the Canon camera were introduced." (GBr. at 19.) (emphasis added)

Falsification of the card therefore renders the entire device inadmissible. Because this combined device was the sole basis for the interstate-commerce element, its exclusion eliminates federal jurisdiction. (RBr. at 12.) As such, it would require, in the least, resentencing.

The panel nevertheless overlooked uncontested findings by seven defense forensic experts showing that dozens of files on the camera's memory card were planted and falsified; the government had an opportunity to dispute these findings in its motion for reconsideration but did not. (OBr. 34 (Table Rows 2–4); id. nn. 15–18.)

E. The Panel's *Brady* Analysis Was Erroneous, Overlooking Material Facts and Misapplying the Law, and Ignoring Distinct Issues

Banks v. Dretke, 540 U.S. 668, 694–96 (2004), rejects any rule by which "the prosecutor may hide, [and] the defendant must seek." Here, the record shows active concealment of the second forensic image: AUSA Hajjar misrepresented its existence during sidebar; FBI examiner Booth inserted a deceptive examination note that misrepresented his conduct as approved and proper; and the prosecution failed to comply with defense' demands under Rules 16 and 3500. (OBr. at 15-16, 41–42; RBr. at 6 (Fact #9), 9 (Facts #22–23), 21–22.) The panel did not address this evidence. Instead, it asserted, without citation or evidentiary support, that "the report revealed on its face that it relied on a second forensic copy of the camera

card." (SO at 4.) The government made a similar, erroneous claim, pointing the report's the file path, which was directly refuted in Mr. Raniere's reply brief. (GBr. at 40, RBr. at 21).

Booth, a CART member, explained that CART's role is to "protect and process" digital evidence; this involves creating a "forensic image," which is an extraction of the device's data. (A308:2-8; A310:3-A311:2). Booth testified that CART protocol allows for **only one (1) forensic image per device** and that all evidence review and analysis is conducted based on that image. (A311:21-A312:19. The prosecution did not disclose that Booth's "Replacement" report was derived from **a second forensic image**, which he created, a violation of FBI protocol, the existence of which was discovered by the defense post-trial. (A1006-1007, 1038-1039).

The panel deemed the second forensic image immaterial, accepting the government's claim that it was merely a "duplicate." (SO at 4.) But no hash values or any other proof in the record supports that assertion. The only statement approximating it is Loveall's reference to "disk images" being identical - yet his affidavit never actually compares the two forensic images and provides no supporting data. In fact, defense experts found thirty-seven files that appear only in Booth's image and Dr. Kiper concluded a "high likelihood" they were planted in FBI custody, rebutted only by Loveall's unsupported speculation about Flatley's

alleged report "settings." (OBr. at 16; RBr. at 26, 34.) This evidence requires exclusion of the camera *and* its memory card, which collapses these predicate acts due to lack of federal jurisdiction (RBr. at 12) and, at minimum, mandates resentencing given their impact on the sentencing Guidelines (RBr. at 26) — satisfying *Brady*'s materiality requirement, which under *United States v. Coppa*, 267 F.3d 132, 139 (2d Cir. 2001), extends to evidence "material either to guilt or to punishment."

Finally, and importantly**,** the panel failed to address the *Brady* arguments concerning the secret FBI photo technician and the undisclosed unknown individual who accessed the unpreserved card even prior, revealed in the government's opposition, as well as the argument that government involvement in falsification—and its concealment—is categorically a *Brady* violation. (OBr. at 47-48; OBr. at 2, 7, 19 at n.8, 20, 21, 44-47; GBr. at 7-8; RBr. at 3 (Fact #2), 8 (Fact #19), 22-23, 26-27).

F. The Panel Overlooked Clear Evidence of Judicial Bias

The panel failed to address clear evidence of bias: an independent journalist described the judge's conduct at restitution as "one of the most bizarre moments in court [he had] ever seen," when the judge told counsel to "go cry about a funeral" for a colleague who had just died. (OBr. at 61.) The judge also admitted developing a personal "distaste" for Mr. Raniere as a result of the trial—raising

whether a judge who acknowledges bias from trial can fairly decide a Rule 33 motion attacking that same verdict. (OBr. at 55; RBr. at 32 ¶3.) And he justified cutting off cross-examination by saying, "as a human being, it was the right decision… Before I'm a judge, I'm a human being," effectively conceding he acted knowing it was outside the bounds of judicial propriety, which raises the appearance of impartiality (OBr. at 59.) Instead the Panel "commend[ed] Judge Garaufis" for conduct that an objective observer would find disqualifying. (SO at 15:14–15.)

III. Grounds for En Banc Rehearing Under FRAP 40(b)(2)

A. Conflicts with Prior Second Circuit Decisions

1. **Franzese Conflict – Crediting Post-Trial Affidavits for Truth.**
   The panel violated *Franzese*, which limits post-trial affidavits to testing *legal sufficiency*—whether the facts alleged, if true, would warrant relief—not to deciding factual disputes. By treating the untested Loveall and Camila affidavits as "far more plausible," the panel resolved facts and contradicted this Court's own rule.

2. **Amorgianos Conflict – Admitting Data-Free Expert Opinion.**
   Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, requires expert testimony to rest on "sufficient facts or data." Loveall's report contained none, yet the panel relied on it as reliable expert evidence.

3. **Abuhamra Conflict – Relying on Secret Evidence.**
   In *United States v. Abuhamra*, this Court held that due process forbids reliance on undisclosed evidence, even in post-conviction settings. Here, the

panel upheld findings based on an undisclosed second forensic image, contradicting *Abuhamra*.

B. Conflicts with Supreme Court Precedent

1. ***Bullcoming / Smith* Conflict – Use of Surrogate Expert.**
By adopting Loveall's statements about Flatley's untested analysis, the panel permitted a surrogate expert in violation of *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and *Smith v. Arizona*, 144 S. Ct. 1785 (2024). The Loveall Report relied on Flatley's analysis, settings he used to generate his report), to make material assertions. (A1621-1622 ¶ 9). Neither Flatley nor Loveall testified in the case, and Loveall had no involvement in the prosecution of Mr. Raniere. (A1618 ¶ 2). This set of circumstances is the exact harm sought to be prevented under *Bullcoming v. New Mexico,* 564 US 647 (2011), and *Smith v. Arizona*, 144 S.Ct. at 1791 which require that the analyst responsible for the original analysis testify in court (forensic reports are testimonial & subject to the Confrontation Clause). *See Crawford v. Washington,* 541 U.S. 36 (2004) and *Melendez v. Massachusetts,* 557 US 305 (2009) (the Court held that affidavits reporting the results of forensic analysis are testimonial, requiring the analyst who prepared the report to testify in person.

2. ***Daubert* Conflict – Lack of Reliable Principles.**
Treating Loveall's data-free assertions as admissible expert opinion contravenes *Daubert*, which requires a reliable, testable methodology, supported by "sufficient" data.

3. **Hazel-Atlas / Fulminante Conflict – Fraud and Structural Error.**
By implying a time bar for government involvement in evidence fabrication and applying harmless-error review to evidence falsification, the panel departed from *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), which holds that "fraud on the court" is not subject to any time bar and renders the judgment void, which holds that certain errors are *structural* and never subject to harmless-error review. Government fraud on the court—here involving agents whose conduct is imputed to the prosecution

team—is such an error: "a wrong against the institutions of justice" that "tamper[s] with the administration of justice."

4. ***Andrew v. White* Conflict – Irremediable Prejudice.**
   By treating the prejudice from child-pornography allegations as curable through post-hoc excision (RBr. at 15-16), the panel ignored *Andrew v. White* (see RBr. at 15–16), where far milder sexual-morality evidence was held to render trial fundamentally unfair.

D. The Proceeding Involves Questions of Exceptional Importance

1. **Substitution of Affidavits for Adversarial Process.**
   If left standing, the ruling would permit courts to deny post-conviction motions on the basis of untested affidavits—replacing cross-examination with judicial conjecture, eroding the integrity of appellate review and usurping the role of the jury**.**

2. **Time-Bar on Government Fraud.**
   By treating government falsification as time-barred and harmless, the decision contradicts *Hazel-Atlas* and *Rule 60(d)(3)*, which recognize no temporal limit on "fraud on the court." It would hold prosecutors to a lower standard of honesty than private litigants.

CONCLUSION

Mr. Raniere respectfully requests panel rehearing and additionally rehearing en banc.

Dated: November 10, 2025

Respectfully submitted,

\s\ Deborah J. Blum
By: Deborah J. Blum
DEBORAH J. BLUM, ESQ.
Attorney for Defendant-Appellant
225 Broadway, Suite 715
New York, New York 10007
646-535-2586

CERTIFICATE OF COMPLIANCE WITH FRAP 32(A) AND 40(D)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 40(d)(3)(a) because this brief contains 3,798 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

Dated:
November 10, 2025

Respectfully submitted,

\s\ Deborah J. Blum

By: Deborah J. Blum
DEBORAH J. BLUM, ESQ.
Attorney for Defendant-Appellant
225 Broadway, Suite 715
New York, New York 10007
646-535-2586

24-778 (L)
United States v. Raniere

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of October, two thousand twenty-five.

PRESENT:

PIERRE N. LEVAL
RICHARD J. SULLIVAN,
MARIA ARAÚJO KAHN,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

No. 24-778 (L)
No. 24-1285 (CON)
No. 24-1317 (CON)

KEITH RANIERE, a.k.a. VANGUARD,

Defendant-Appellant.*

For Defendant-Appellant: DEBORAH J. BLUM, ESQ., New York, NY.

For Appellee: TANYA HAJJAR (Anthony Bagnuola, *on the brief*), Assistant United States Attorneys, *for* Joseph Nocella, Jr., United States Attorney for the Eastern District of New York, NY.

Appeal from orders of the United States District Court for the Eastern District of New York (Nicholas G. Garaufis, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the April 26, 2023, March 7, 2024, and April 29, 2024 orders of the district court are **AFFIRMED**.

Keith Raniere – who is currently serving a 120-year sentence following his conviction after a jury trial on charges of racketeering, racketeering conspiracy, wire-fraud conspiracy, forced-labor conspiracy, sex-trafficking conspiracy, and two counts of sex trafficking – appeals from the district court's denial of his post-trial motions for a new trial, for post-conviction discovery, and for recusal of the district-court judge who has presided over his case since 2018. We assume the parties' familiarity with the underlying facts, procedural history, and issues on

* The Clerk of Court is respectfully directed to amend the caption as set forth above.

appeal, to which we refer only as necessary to explain our decision. *See United States v. Raniere*, 55 F.4th 354 (2d Cir. 2022); *United States v. Raniere*, No. 20-3520-CR, 2022 WL 17544087 (2d Cir. Dec. 9, 2022).

We review the denial of motions for a new trial under Federal Rule of Criminal Procedure 33, to compel post-conviction discovery, and for judicial recusal pursuant to 28 U.S.C. § 455 for abuse of discretion. *See United States v. Sessa*, 711 F.3d 316, 321 (2d Cir. 2013); *United States v. Forbes*, 790 F.3d 403, 411 (2d Cir. 2015); *United States v. Wedd*, 993 F.3d 104, 114 (2d Cir. 2021).

I. The District Court Did Not Abuse its Discretion in Denying Raniere's Third Motion for a New Trial.

Raniere first contends that the district court erred in denying his third motion for a new trial based on "newly discovered evidence" and purported *Brady* violations related to the "core evidence" underlying three predicate acts of his racketeering conviction. Raniere Br. at 1 (internal quotation marks omitted); *see also Brady v. Maryland*, 373 U.S. 83 (1963). Those predicate acts – for child exploitation and child pornography – were added in a second superseding indictment after the government discovered that Raniere produced and possessed numerous sexually explicit photographs of a fifteen-year-old girl, "Camila," that were recovered from a Western Digital-brand hard drive (the "Hard Drive") and

Canon EOS 20D camera (the "Camera") seized from a townhouse that Raniere used.

The government provided Raniere with the Hard Drive, Camera, photographs recovered from both, and the accompanying forensic reports prior to trial. Though Raniere raised concerns about his ability to analyze this evidence in time for trial, he nevertheless "requested that the Court keep the dates for the current trial schedule" because he was "ready to go to trial." Sp. App'x at 22–23 (alteration adopted and internal quotation marks omitted).

At trial, the government introduced illicit photographs of Camila and metadata from the Hard Drive to prove the child exploitation and child pornography predicate acts of the racketeering count in the superseding indictment. When the FBI analyst who initially examined the Camera was unavailable to testify, FBI Senior Forensic Examiner Brian Booth reexamined the Camera and its contents, creating a duplicate forensic image of the camera card and a new forensic report. Raniere did not object to the new report's admission into evidence, and his trial counsel extensively cross-examined Booth about the Hard Drive, the Camera, their contents, and the associated metadata. The report revealed on its face that it relied on a second forensic copy of the camera card.

The jury ultimately convicted Raniere on all seven counts in the indictment, finding that he had committed all eleven predicate acts charged. This Court affirmed Raniere's conviction and sentence on direct appeal. *See Raniere*, 55 F.4th at 366; *Raniere*, 2022 WL 17544087, at *9.

After extensive post-trial litigation, Raniere filed a third motion for a new trial, asserting that newly discovered evidence from the Camera's "memory card and hard drive," Raniere Br. at 1, revealed that "the government manufactured child pornography and planted it on a computer hard drive to tie it to him," App'x at 770. According to Raniere, prosecutors had "falsified, fabricated, and manipulated all the key evidence" to convict Raniere of the child exploitation and child pornography predicate acts. *Id.* To support his claims, Raniere relied primarily on a post-hoc report prepared by his retained expert, retired FBI agent James Richard Kiper, that criticized Booth's handling of the Hard Drive and Camera and declared that "the FBI must have been involved in this evidence tampering." *Id.* (internal quotation marks omitted). After filing his third motion for a new trial, Raniere filed several related motions seeking to compel the government to produce copies of digital forensic evidence and FBI examination notes, among other things.

The government opposed Raniere's third motion for a new trial and attached an affidavit from Camila confirming that she is the subject in the photos introduced at trial, which were taken when she was fifteen. It also attached a declaration from David Loveall II, a senior FBI computer scientist, explaining that Kiper's report was "misleading or erroneous" in various respects and that it "ignore[d] plausible explanations for observed phenomena in favor of allegations of tampering." *Id.* at 1619. The district court ultimately denied Raniere's motion, concluding that Raniere did nothing more than "challenge evidence that he previously stated he was ready to challenge, that he had the opportunity to challenge, and that he did in fact challenge during his trial." Sp. App'x at 27–28.

Federal Rule of Criminal Procedure 33 permits district courts to order a new trial "if the interest of justice so requires." But courts may exercise this power only "in the most extraordinary circumstances," when "letting a guilty verdict stand would be a manifest injustice." *United States v. Gramins*, 939 F.3d 429, 444 (2d Cir. 2019) (emphasis and internal quotation marks omitted). Where, as here, a Rule 33 motion is premised on newly discovered evidence, the court may only grant relief if "(1) the evidence was newly discovered after trial; (2) facts are alleged from which the court can infer due diligence on the part of the movant to

obtain the evidence; (3) the evidence is material; (4) the evidence is not merely cumulative or impeaching; and (5) the evidence would likely result in an acquittal." *Forbes*, 790 F.3d at 406–07 (alteration adopted and internal quotation marks omitted). And "[w]e have long held" that for evidence to be "newly discovered," a defendant must show that "the evidence could *not* with due diligence have been discovered before or during trial." *Id.* at 408–09 (emphasis added). Finally, to secure a new trial for *Brady* violations, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"; "must have been suppressed by the [government], either willfully or inadvertently"; and must have resulted in prejudice to the defendant. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

The district court did not abuse its discretion in denying Raniere's motion for a new trial because Raniere identified no newly discovered evidence, much less evidence that was suppressed under *Brady*. *See* Fed. R. Crim P. 33; *Forbes*, 790 F.3d at 409; *Strickler*, 527 U.S. at 281–82. After discovering the pictures of Camila on the Hard Drive, the government informed Raniere that it would introduce digital evidence from both the Hard Drive and the Camera at trial. Raniere hired a forensic expert to review the relevant photographs on FBI premises, and

Raniere's trial counsel cross-examined FBI Examiner Booth at length about "the photographic evidence, the Western Digital hard drive, the camera card ('CF card'), [and] the related metadata." Sp. App'x at 23–24. And that cross-examination yielded fruit: the jury heard testimony from Booth that metadata could be altered, and that the Camera's memory card was accessed "while it was in the possession of the FBI," raising the possibility of tampering. App'x at 495–96. Nevertheless, Raniere's trial counsel did not pursue the issue, and at no point did Raniere overtly suggest that the child-pornography evidence had been doctored or planted. It follows that the Camera's memory card and allegedly suppressed child pornography were not "new evidence" that "could not with due diligence have been discovered before or during trial." *United States v. Alessi*, 638 F.2d 466, 479 (2d Cir. 1980). The same is true with respect to Raniere's *Brady* claim, since "[e]vidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982) (citations omitted).

But even if we assumed that evidence from the Camera was newly discovered (or suppressed, for that matter), Raniere cannot show that "the

evidence would likely result in an acquittal," *Forbes*, 790 F.3d at 406–07 (internal quotation marks omitted), as required under Rule 33, or that it would "put the whole case in such a different light as to undermine confidence in the verdict," *Kyles v. Whitley*, 514 U.S. 419, 435 (1995), as required under *Brady*. For starters, Raniere does not explain *why* the duplicate forensic image of the Camera was materially exculpatory; he merely asserts that he "would have had it analyzed by a forensic expert," which might have led to a potential "application for suppression." Raniere Br. at 43. But such vague statements do not come close to meeting Raniere's burden of "proving that he is entitled to a new trial" under either Rule 33 or *Brady*. *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009); *see United States v. Certified Env't Servs., Inc.*, 753 F.3d 72, 91 (2d Cir. 2014). And that's particularly true here, given the district court's finding that "the evidence presented at trial, the Loveall report," and Camila's affidavit "verifying her identity and age in the photos" were a "far more plausible explanation for the discrepancy in the [Camera's] metadata." Sp. App'x at 29; *see United States v. Escalera*, 957 F.3d 122, 137 (2d Cir. 2020) (noting that, for purposes of a Rule 33 motion, we "accept[] the district court's factual findings unless clearly erroneous").

Moreover, Raniere's argument that the district court's "reliance upon" Loveall's report and Camila's declaration "violates the Confrontation Clause" is meritless. Raniere Br. at 21. It was Raniere's burden to establish that a "manifest injustice" warranting the reversal of his conviction had occurred. *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992) (internal quotation marks omitted). We have long held that affidavits "submitted by the [g]overnment" "may be considered in assessing the sufficiency" of a defendant's claim in post-conviction proceedings. *United States v. Franzese*, 525 F.2d 27, 30–31 (2d Cir. 1975) (Friendly, J.) (internal quotation marks omitted).

Raniere also overlooks the mountain of evidence presented at trial that substantiated the child exploitation and child pornography predicate acts related to the fifteen-year-old Camila. *See* Sp. App'x at 23 (noting other evidence, including "messages from the victim where she referenced her sexual relationship with Raniere beginning in 2005," when Camila was fifteen years old; "communications from Mr. Raniere referencing the photos; testimony from the victim's sister that she was aware of the relationship [between Camila and Raniere]" and that Camila was fifteen years old at the time; and "the victim's medical records"). Even setting aside the allegedly newly discovered or

suppressed evidence, there is no "real concern that an innocent person may have been convicted," *Sanchez*, 969 F.2d at 1414, because "the jury was presented with sufficient evidence" to convict Raniere of "sexually abusing Camila in September 2005," *Raniere*, 2022 WL 17544087, at *3.

Finally, it bears noting that the jury convicted Raniere on all seven counts and found that all eleven predicate racketeering acts had been proven. As two racketeering acts demonstrate the required "pattern" of racketeering activity, *see First Cap. Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 178 (2d Cir. 2004), even without the predicate acts at issue here, "the result of the proceeding would [not] have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.) (internal quotation marks omitted).

The district court therefore did not abuse its discretion in denying Raniere's motion for a new trial.

II. The District Court Did Not Abuse its Discretion in Denying Raniere's Motions for Post-Conviction Discovery.

Raniere next asserts that the district court abused its discretion in denying his multiple post-conviction motions to compel the production of evidence. We are unpersuaded.

To begin, Raniere provides no legal basis for his claim to possess a freestanding "separate non-statutory" right to "post-judgment" discovery. Dist. Ct. Doc. No. 1230 at 1 (capitalization altered). To the extent that Raniere contends that *Brady* compels such a result, we disagree. *Brady* enshrines a pretrial right and thus provides "the wrong framework" for analysis because Raniere "has already been found guilty at a fair trial, and has only a limited interest in post[-]conviction relief." *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69 (2009). And, for the reasons discussed above, Raniere (1) already had access to the evidence that he now requests at the time of trial, and (2) ignores the "ample evidence" supporting his conviction on the relevant predicate acts.[1] App'x at 1689.

The district court did not abuse its discretion in denying Raniere's motions to compel post-conviction discovery.

[1] Raniere has filed a petition for habeas corpus pursuant to 28 U.S.C. § 2255, which the district court held in abeyance pending resolution of this appeal. While discovery is available in section 2255 proceedings upon a showing of "good cause," *see* Habeas Corpus R. 6(a), "[a] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course," *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).

III. The District Court Did Not Abuse its Discretion in Denying Raniere's Motion for Recusal.

Raniere also asserts that the district court abused its discretion in denying his motion to recuse, pointing to Judge Garaufis's alleged partiality at trial and at the restitution hearing. We disagree.

A district judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).[2] The governing "standard is objective reasonableness – whether an objective, disinterested observer fully informed of the underlying facts, would entertain significant doubt that justice would be done absent recusal." *United States v. Carlton*, 534 F.3d 97, 100 (2d Cir. 2008) (alteration adopted and internal quotation marks omitted). That inquiry "deals exclusively with appearances." *United States v. Amico*, 486 F.3d 764, 775 (2d Cir. 2007). Recusal decisions are left "to the sound discretion of the district court," *LoCascio v. United States*, 473 F.3d 493, 495 (2d Cir. 2007), and are "rare[ly]" "disturbed" on appeal, *In re Int'l Bus. Machines Corp.*, 45 F.3d 641, 642 (2d Cir. 1995). And the bar is high – even those "judicial remarks" that are "critical or disapproving of, or even hostile to, counsel, the parties, or their cases"

[2] Though 28 U.S.C. § 455(b)(1) provides a separate statutory basis for recusal based on "personal bias or prejudice concerning a party," Raniere has not relied on that provision in this appeal.

do not ordinarily "support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Only "deep-seated favoritism or antagonism" that makes "fair judgment impossible" warrants recusal. *Id.*

Raniere cannot satisfy that benchmark. At trial, the district judge curtailed the cross-examination of cooperating government witness Lauren Salzman "to avoid needless harassment" and to "attend to the witness's wellbeing." Sp. App'x at 7. The district court explained at the time that it would not countenance "someone hav[ing] a nervous breakdown on the witness stand." App'x at 286–87. Raniere argues that this decision evinced an intent "to prevent the jury from hearing testimony that was favorable to the defense." Raniere Br. at 58. But as we noted previously in affirming Raniere's conviction on direct appeal, Raniere's counsel had conducted "an already lengthy cross-examination" of Salzman, asking "many questions on related topics." *Raniere*, 2022 WL 17544087, at *7. Far from showing "deep-seated antagonism" toward Raniere, *Liteky*, 510 U.S. at 555 (ellipsis omitted), the district court's decision to curtail Salzman's testimony fell within its "wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice,

confusion of the issues, the witness'[s] safety, or interrogation that is repetitive," *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Nor did the district court demonstrate objective bias at the restitution hearing. Raniere points to an exchange between the district judge and defense counsel regarding counsel's request for a postponement of the proceedings as further evidence of alleged partiality. But again, *Liteky* held that "expressions of impatience, dissatisfaction, annoyance, and even anger" toward a party, particularly when devoted to "ordinary efforts at courtroom administration," are not grounds for recusal. 510 U.S. at 555–56. That is especially true here given that this exchange occurred after trial and was directed toward Raniere's counsel rather than the defendant himself.

For these reasons, Raniere has failed to show that the district court abused its discretion in denying his motion for recusal. Recognizing the challenges confronted by district-court judges on a daily basis, the Court commends Judge Garaufis for handling this seven-year litigation with skill, patience, and restraint.

* * *

We have considered Raniere's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the orders of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court