
24-778-cr(L)

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

KEITH RANIERE,
Defendant-Appellant.

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

AMICUS BRIEF for DEFENDANT-APPELLANT

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STATEMENT OF AMICUS

Hon. Richard Mays, Sr., was born on August 5, 1943 in Little Rock, Arkansas. Amicus Mays graduated from Howard University in 1965 with a B.A. in Political Science and Business Administration. In 1968 he went on to earn his L.L.B. from the University of Arkansas, School of Law, as the only African-American member of his class.

In 1968, Amicus Mays started working as an Assistant United States Attorney in the Organized Crime Division of the US Justice Department in Washington, DC.

Shortly thereafter, he returned to Arkansas as Deputy Prosecutor for Pulaski County in the Sixth Judicial District, as the District's first African-American prosecutor.

In 1971, Amicus Mays joined the firm of Walker, Kaplan & Lavey, the first racially integrated law firm in Arkansas, and from 1973 through 1977 Amicus Mays served in the Arkansas General Assembly as among the first group of African-Americans to serve.

In 1977, he founded the law firm of Mays, Byrd & Associates. By 1980, Governor Bill Clinton appointed Amicus Mays to the Arkansas Supreme Court as an Associate Justice. The same year, he accepted a position as an Adjunct Professor at the University of Arkansas Little Rock's, William H. Bowen School of Law.

From 1992 through 1996, Amicus Mays was the co-chairman of the Clinton-Gore

Presidential Inauguration Committee. Thereafter, he joined the private sector working in energy-based industries.

In 2013, Amicus Mays became the Chairman of the Board of Directors for “Soul of the South,” a television network focused on content surrounding African-Americans and Southern Culture.

From 2005 to 2015, Amicus Mays served as the Vice-Chairman and Chairman of the Arkansas Claims Commission. Amicus Mays also served on the Arkansas Banking Board, Economic Development Commission and Arkansas Ethics Commission.

In 2015 and 2016, Amicus Mays was Honored by the Arkansas Civil Rights Heritage Trail and inducted into the Arkansas Black Hall of Fame, respectively.

Amicus Mays files the instant brief in support of Defendant-Appellant and in furtherance of the notions of justice, fairness and the equal, open discourse of litigation before the Federal Judiciary.

Specifically, as addressed herein and in greater detail by the Defendant-Appellant’s brief, there were several maladies that individually should have resulted in the granting of Defendant-Appellant’s motions, if not an outright dismissal. However, in the totality of circumstances, the Government’s conduct before the Trial Court joined with the Trial Court’s acquiescence thereof, stands as a dangerous precedent. Defendant-Appellant’s rights to Confrontation and Due Process were clearly violated.

The Trial Court's permission and crediting of secret evidence not disclosed at/before trial, that violated the Government's own protocols, as well as evidence that Defense Counsel was precluded from testing in a hearing, stand as a message that the Government can do no wrong before the eyes of the trial court.

Our Judiciary was established in Article III of the Constitution as a means of checks and balances with the Executive Branch. In 1791, the Bill of Rights was ratified, providing clarity and further protections of the individual accused against the perceived dangers of unchecked government agents. In 1868, the Fourteenth Amendment sought to expand the protections afforded individuals in broader strokes anticipating a need in a developing society. The record before the Trial Court in this case demonstrates a frightening regression of those protections.

PRELIMINARY STATEMENT

The record on appeal is an immutable image of the Trial Court's unbridled deference to the Government. The record on appeal shows the Trial Court's abuses of discretion in both diminishing the severity of, if not wholly ignoring, the Government's malfeasances while refusing to credit valid Defense arguments. The thrust of Defendant-Appellant's appeal is to ensure that a defendant's basic constitutional rights are always preserved.

Defendant-Appellant appeals from the post-conviction Memorandum & Orders by The Hon. Judge Nicholas G. Garaufis, USDJ (hereinafter referred to as "Judge Garaufis" and "the Trial Court") in *United States v. Keith Raniere, et. al*, 18-cr-204, (EDNY) in which he denied, without a hearing, Defendant-Appellant's Motion to Compel Production of Evidence and Motion for Reconsideration (hereinafter jointly referred to as "Motions to Compel") (SPA12-19), Final Rule 33 Motion for a New Trial (hereinafter referred to as "Rule 33") (SPA20-30), and Motion for Recusal (SPA1-11). Defendant-Appellant's Rule 33 motion was based upon the findings of seven (7) independent digital forensics experts, **including four (4) former FBI examiners**, that evidence necessary to prove the predicate acts of child pornography and sexual exploitation, was extensively falsified, with Government involvement in the fraudulent conduct and its cover-up.

“[A] camera card ... and a hard drive were deliberately and extensively manipulated... 168 photos, including the alleged contraband, were planted on the hard drive... Given admitted [G]overnment misconduct, including violating evidence protocols, providing evidence to unidentified and unauthorized personnel, and altering the original camera card, **the involvement of [G]overnment 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) (emphasis added).

This conclusion reached by multiple experienced and credible experts, including former Government agents, is historic and unprecedented in the experience of the *Amicus Filer*. It raises Due Process concerns regardless of the question of Defendant-Appellant’s innocence or guilt. To ensure public confidence in the Judiciary, this Court must Order the matter to be reversed and remanded with an evidentiary hearing.

A hearing would have properly scrutinized this evidence used to prove material elements of the child pornography and sexual exploitation predicate acts. In fact, the actions of the Government and its post-trial submissions are so disturbing as to warrant *Brady* relief in the form of an acquittal or dismissal of the indictment, or at minimum, the reversal and remand of the Court’s Decisions/Orders.

It is also clear that Defendant-Appellant met the Rule 33 threshold for *Brady* violations and the threshold for “newly discovered evidence.” The Government took affirmative steps to conceal the existence of a second forensic image of the camera’s

memory card, which was secretly created during trial by FBI Senior Forensic Examiner Brian Booth (hereinafter referred to as “Booth”) and used as a basis in his analysis, that was never properly disclosed by the Government. This is described in detail by Dr. James Richard Kiper, Ph.D., defense digital forensics expert, retired FBI Special Agent and Forensic Examiner who concluded that thirty-seven (37) photo files on this second forensic image were, to a “high likelihood” planted there in FBI custody between two specific dates. (A1036-1037). This could be fully verified with access to the withheld forensic images, that the Government and Court have refused to disclose. Dr. Kiper affirms he that in his 20 years of service to the FBI, he “never observed or claimed that an FBI employee tampered with evidence, digital or otherwise.” (A1003).

The Government also concealed that an unauthorized FBI photograph technician, who was **not listed on the chain of custody**, secretly accessed the camera’s unpreserved memory card. This was disclosed for the first time by the prosecution **more than four (4) years after trial**, in a mere footnote of their Consolidated Opposition. (A1579 at n.6; A1762) The four (4) former FBI defense experts concluded that this action involved **intentional FBI evidentiary misconduct that is unprecedented in their combined fifty five (55) years of service**. (A1772 ¶¶ 1-2; A1776 ¶ 21).

The Trial Court, in its Decision/Order, weighed the Government’s single report discussing secret new evidence greater than the opinions of Defense’ seven (7) forensic

experts that said it had intentionally violated FBI protocols. The Trial Court, by its Decision/Order, has created the dangerous precedent that seemingly no amount of evidence critical of the Government's wrong-doing can outweigh a prosecutor's bare assertions. Further, that a defendant's rights afforded under the Sixth Amendment do not attach post-verdict.

The Government created a report post-trial solely to oppose Defendant-Appellant's Rule 33 motion and Motions to Compel. This report came from the Government's post-conviction forensic expert, FBI Senior Computer Scientist David Loveall II (hereinafter referred to as "Mr. Loveall"), and a declaration from a material witness, the alleged victim Camila. Neither of the individuals testified before the jury that convicted Defendant-Appellant at trial. Neither individual was subjected to adversarial process post-trial. The Trial Court's wholesale acceptance and reliance on this new Government evidence, without a hearing, violated the fundamental constitutional protections afforded to defendants in our justice system.

Relying on Camila's hearsay declaration, without her being subject to cross examination, violated Defendant-Appellant's Sixth Amendment Right of Confrontation. It is a clear abuse of the Trial Court's discretion. Photos were presented to the Jury and Trial Court as contraband based on their alleged 2005 dates derived from digital forensic analysis of the hard drive and the camera's memory card. Camila did

not testify at trial and only identified herself in the photos asserting that they were taken in 2005. Yet, Defense counsel never had the opportunity to cross-examine Camila on the veracity of her statement, which is contradicted by her prior statement at sentencing and the Government's trial evidence as discussed in Defendant-Appellant's brief, her memory or most notably her bias, as she signed the declaration after she received restitution in the amount of \$507,997.45. (A1821).

Trial Court also abused its discretion by relying on Mr. Loveall's forensic report despite its striking flaws. Not only did Mr. Loveall never testify, he relied on the analysis of another FBI examiner who did not testify, to assert new and material facts in his report, thus violating Confrontation protections.

The report itself was improper and should not have been accepted, let alone weighed, by the Trial Court. The portions of Mr. Loveall's Report containing rebuttals violated the requirements of Federal Rule of Evidence 702 and *Daubert* by failing to cite any of the underlying data used to establish his opinions. Most striking, Mr. Loveall analyzed and made material claims about evidence that the Government and Trial Court refused to disclose to the defense, making his report a product of 'secret evidence.'

The Trial Court's denial of the motions and refusal to order a hearing, despite the determination by Defense witnesses as to unprecedented Government misconduct, as well as the Court's reliance on new and unscrutinized evidence, created post-trial by the

Government, is clear and unequivocal abuse of discretion and runs afoul of the notion of justice.

The foundations of a criminal trial are established, in no small part, by a defendant's right to confront his accuser(s). Without the opportunity to cross-examine Government witnesses on forensic assertions that the Trial Court relied upon to deny the Rule 33, Defendant-Appellant lost a vital opportunity under the Confrontation Clause. Adding to that devastating loss, was the Trial Court's acceptance of Camila's post-trial testimonial Declaration as wholly truthful and persuasive, absent a hearing where she could have been subject to cross-examination by the Defense Counsel, undermined the legal process.

Failing to reverse the Decisions/Orders at issue, and Order a dismissal, let alone a remand for a new trial, would set a dangerous precedent allowing the Government to shield itself from accountability for its misconduct that a defendant discovers post-verdict.

ARGUMENT

I. The Trial Court Abused Its Discretion in Denying Defendant-Appellant's Rule 33 Motion

A. The Trial Court Violated Defendant-Appellant's Sixth Amendment Rights by Accepting New Evidence Without a Hearing

Defendant-Appellant's case is unique because the Court relied on, and credited, new evidence created by the Government following the trial, for the purpose of opposing Defendant-Appellant's Rule 33 motion. This evidence was not subjected to cross-examination, meaning the defense had no opportunity to challenge the veracity of the out-of-court assertions. Thus, Defendant-Appellant's rights under the Confrontation Clause of the Sixth Amendment were violated and the Decision/Order denying his Rule 33 motion be reversed and remanded for hearing.

Under *Crawford v. Washington*, 541 U.S. 36 (2004), a witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. This principle was further extended to affidavits reporting the results of forensic analysis as testimonial in their nature, requiring in-person testimony in an adversarial proceeding *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

In *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the Court reaffirmed that forensic reports are testimonial and subject to the Confrontation Clause, requiring

analysts who prepare reports to testify for admissibility. In *Smith v. Arizona*, 602 U.S. ____ (2024), the Supreme Court held that when an expert witness relies on an absent analyst's testimonial statements, those statements must be considered for their truth, thereby implicating the Confrontation Clause.

This Court has relied on *Smith v. Arizona* to reinforce that the Confrontation Clause is always applicable, unless evidence is neither testimonial nor hearsay. *United States v. Johnson*, 2024 U.S. App. LEXIS 22691, *34 (2d Cir. 2024). That analysis should have been applied by the Trial Court herein.

Defendants have fewer rights in post-conviction proceedings, given the existence of evidence previously subjected to an adversarial process during trial. However, the Government's newly created evidence was never subjected to cross-examination, nor presented for the jury's scrutiny. Thus, the Trial Court was in no position to make its own credibility determination. Yet despite these facts, the Trial Court chose to make a credibility determination for both Mr. Loveall's report and Camila's declaration while it ignored the seven (7) defense experts' opinions.

First, the Trial Court credited the post-trial affidavit of Camila despite its hearsay. The Government introduced evidence of her age in the photographs. The information about her age was a crucial element of proof for necessary Predicate Acts charged. Yet while the Trial Court acknowledged the witness never testified at trial (SPA24) and that

Defendant-Appellant never had a prior opportunity to cross-examination her, the Trial Court fully credited and weighed the affidavit in its Decision/Order. Moreover, the Trial Court failed to discuss and weigh the witness' obvious bias, after Defendant-Appellant's confirmation that Camila had received a substantial sum in restitution prior submitting her declaration. (A1821).

Second, the Court relied on a post-trial forensic report from the Government. The report was accepted and weighed without giving Defendant-Appellant any opportunity to test the veracity of the report through cross-examination. Mr. Loveall's report included hearsay. It relied on another individual's analysis of forensic test settings, in addition to Mr. Loveall establishing his own assertions of material facts relative to the forensic analysis. (A1621-1622 ¶ 9). The Trial Court's acceptance of Mr. Loveall's report with hearsay content is worth reversing and remanding alone. The fact that the Trial Court did so without having Mr. Loveall testify in open court and be subject to cross-examination in a hearing is striking and unconscionable.

A trial court must ensure that an expert's testimony rests on a reliable foundation and is relevant. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 580 (1993). It is an abuse of discretion to admit expert testimony based on speculative assumptions. *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 22 (2d Cir. 1996). When expert opinion is based on inadequate data or methodology, *Daubert* and Rule 702

mandate exclusion. *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002). Expert testimony must be “based on sufficient facts or data.” Fed. R. Evid. 702(b).

It may seem minimal in comparison with the other issues raised in Defendant-Appellant’s brief, but the Trial Court’s erroneous acceptance and reliance upon an unsupported Government submission underscores the abuse of its discretion. To an extent, it also highlights the bias that the Trial Court exhibited toward Defendant-Appellant. The notions of fairness and objectivity were abandoned in this moment. The Trial Court abused its discretion when it chose to accept an untested and partially unsupported submission from the Government. The Trial Court compounded that abuse by then weighing that untested and unsupported submission against the Defendant-Appellant and Defense’ seven (7) expert witnesses who contradicted its veracity.

Mr. Loveall’s submission is not even dated. The Trial Court weighed the value of a report without the context of a date with which to ascribe the author’s underlying knowledge against the evidence that was properly admitted in trial. The report was inadmissible as a technical matter, but its acceptance was substantive in showing the Trial Court’s abuse of discretion.

This set of circumstances is the exact harm sought to be prevented under the *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) and *Smith v. Arizona*, 602 U.S. ____;

144 S. Ct. 1785 (2024) holdings, which require that the analyst responsible for the original analysis testify in court. Absent the in-court testimony subject to cross examination, there could be no safeguard that Mr. Loveall used acceptable methodology, especially in light of the Government's withholding of secret evidence that violated the FBI's own protocols.

Defendant-Appellant's case raises a unique Confrontation Clause issue, because of the post-trial setting.

The Jury never heard from witnesses Camila or Mr. Loveall. By crediting the truthfulness of post-trial evidence, the Trial Court not only denied Defendant-Appellant's Sixth Amendment rights, it usurped the jury's role in assessing witness credibility. As noted in *U.S. 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 surrounding Defendant-Appellant's Rule 33 motion practice. The Trial Court should have held a hearing whereby Mr. Loveall and Camila testified.

It is axiomatic to all Federal criminal proceedings that the Confrontation Clause protections be applied and safeguarded for a defendant. It is saddening that the Trial

Court relied upon newly presented, untested, post-trial evidence from previously unused witnesses in making a decision at all, let alone crediting and weighing that evidence as material. This is a most dangerous precedent set by the Trial Court. As Defendant-Appellant correctly states, if not reversed, it will permit the Government to create new evidence and theory whole-cloth, in post-trial litigation, thereby depriving defendants of a full and fair opportunity to challenge evidence under the Confrontation Clause. Moreover, this precedent would undoubtedly evolve into the Government stripping a defendant of their post-conviction right to challenge the validity of the conviction in many cases.

B. The Trial Court Violated Defendant-Appellant's Due Process Rights by Accepting Mr. Loveall's Use of 'Secret Evidence'

The Fifth and Fourteenth Amendments guarantee a defendant Due Process. It is offensive to the long-standing protections afforded by the Bill of Rights and surrounding case-law, that the Government use secret evidence. This is a clear and unequivocal abuse of discretion meriting reversal and remand for a hearing. In fact, the Government's violation of Due Process and *Brady* requirements should further mandate dismissal of the indictment.

The Government is prohibited from using evidence that has not been properly disclosed. In *U.S. v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004), the Second Circuit held that the district court's reliance on *ex parte* information provided by the Government,

which was not disclosed to the defense during a post-conviction bail hearing, violated the defendant's due process. *Id.* at 322.

A U.S. District Court may dismiss an indictment for government misconduct if it determines there was a serious Due Process violation. *United States v. Kearns* (9th Cir., 1983) 5 F.3d 1251, 1253. Dismissal for a Due Process violation requires the Government's conduct to "be so grossly shocking and outrageous as to violate the universal sense of justice." *Id.* "[This argument] is usually raised in situations ...where the crime is '**manufactured by the government from whole cloth.**'" *United States v. Green* (9th Cir., 1992) 962 F.2d 938, 942. (emphasis added)

Defense experts discovered post-trial that the contents of a memory card and hard drive, including photo files, folders, and timestamps, used to prove Predicate Acts necessary for Defendant-Appellant's conviction were manipulated and/or fabricated.

Most troubling about the Trial Court's acceptance and crediting the new evidence foisted by the Government post-verdict, was the fact that it did so despite the Government's efforts to keep the underlying information in the report secret. Use of secret information is prohibited and thus this Court must dismiss the indictment to send a strong message to the Government, quieting similar behavior in any other potential cases.

According to the submissions, Mr. Loveall used both the first and second forensic image to make his analysis. In so doing, he made material assertions about the original and forensic images. (A1621-1622¶ 9.) The Government and Trial Court refused to provide Defense Counsel access thereto. As a result, Defendant-Appellant was denied the opportunity for his own experts to either verify or challenge Mr. Loveall's critical claim that the two (2) forensic images were "identical." Moreover, the Government's refusal to allow Defense counsel or Defense experts access, prohibited Defendant-Appellant from exploring his experts' conclusions that photo files were planted while in FBI custody.

The *Abuhamra* case dealt with a post-conviction bail hearing involving *ex parte* evidence, but the Due Process violation here impacts a greater liberty interest. This case involves the denial of a post-conviction challenge with the use of secret forensic evidence. The second forensic image was deliberately concealed by the Government at trial, under its exclusive control. Unlike *ex parte* evidence, the instant report was not even disclosed to the Trial Court prior to post-judgment motion practice.

In the case-at-hand, the Trial Court's Decision/Order ignored Defendant-Appellant's arguments and instead relied on the secret forensic evidence used by the Government in Defendant-Appellant's case. Each action, the Government's secrecy and the Court's reliance on the secret evidence, in and of itself must be ruled as a

violation of Due Process.

More simply stated, the Government made material misrepresentations that it had complied with all discovery obligations before and during trial. Upon confirmation that such secret evidence existed, the Government astoundingly refused to permit Defense access. Then despite the Government's repeated violations and Defense's experts' assertions invalidating the report, the Trial Court chose to accept Mr. Loveall's report, and weigh it against the Defendant-Appellant's submissions. This shocking conflagration of violations by the Government and abuse by the Trial Court in Defendant-Appellant's Rule 33 proceeding clearly and unequivocally violated his Due Process.

C. The Court Erred By Not Applying the Proper *Brady* Rule 33 Standard and Refusing to Hold that the Secret Evidence Was “New” and Merited *Brady* Relief

The Trial Court abused its discretion by applying the wrong standard in reviewing Defendant-Appellant's Rule 33 motion. The record reveals that the Trial Court used the more stringent *Forbes* standard, which requires a showing that newly discovered evidence “would likely result in an acquittal.” *United States v. Forbes*, 790 F.3d 403, 406-07 (2d Cir. 2015) (SPA25). However, the correct standard of review for the Rule 33 should have been “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding **would have been different.**” *United States v.*

Bagley, 473 U.S. 667, 682 (1985) (A1818). (emphasis added)

The Trial Court's application of an incorrect legal standard on its own requires a reversal of Defendant-Appellant's Rule 33 motion.

Additionally, the Trial Court made an egregious error by denying Defendant-Appellant's motions, and thus permitting the Government's use of secret evidence. This is a dangerous precedent that must call for a reversal, if not outright dismissal by this Court to ensure no further defendants suffer this inequity.

In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The three (3) elements of a *Brady* violation are: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *United States v. Jackson*, 345 F.3d 59, 71 (2d Cir. 2003) (alterations in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

As to the first element, "[f]avorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility

of a Government witness. *United States v. Jackson*, 345 F.3d 59, 70 (2d Cir. 2003) (quoting *In re United States v. Coppa (In re United States)*, 267 F.3d 132, 139 (2d Cir. 2001) citing *Giglio v. United States*, 405 U.S. 150, 153-55 (1972)).

As to the second element, *Brady* material that is not “disclos[ed] in sufficient time to afford the defense an opportunity for use” may be deemed “suppressed” within the meaning of the *Brady* doctrine. *Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001). In *Banks*, The Supreme Court opined:

“...A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. " *Banks v. Dretke* 540 U.S. 668, 694-96 (2004).

The Supreme Court in *Agurs*, held that “[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.” *United States v. Agurs*, 427 U.S. 97, 106 (1976). The deliberate suppression by the State of evidence favorable to a defendant would constitute a denial of due process. *Alcorta v. State of Texas*, 355 U.S. 28, 78 (1957).

As to the third element needed to show a *Brady* violation, whether prejudice ensued, the materiality analysis "turns on the cumulative effect of all . . . evidence suppressed by the Government." *Kyles v. Whitley*, 514 U.S. 419, 421 (1995).

United States v. Thomas, 981 F.Supp. 2d 229, 242 (SDNY 10.30.13) further articulated:

“*Brady* does not require a "strong" or "overwhelming" probability of a **different outcome**, only a "**reasonable probability** that the Government's suppression affected the outcome of the case. *Coppa*, 267 F.3d at 135. ...The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial...resulting in a verdict worthy of confidence. *Kyles*, 514 U.S. at 434 (internal citations omitted).”

The Court incorrectly concluded, “that the evidence [presented by Defendant-Appellant] is not newly discovered under Rule 33.” (SPA29). Additionally, the Court failed to recognize that Defendant-Appellant presented evidence that was both “suppressed” under a *Brady* analysis as well as “newly discovered” under Rule 33, as discussed below.

i. The Second Forensic Image of the Camera’s Memory Card Is *Brady* Material and Newly Discovered Evidence Under Rule 33

The Court erroneously held:

“Mr. Ranieri seeks to circumvent his defense's ability to inspect and challenge the photographs' metadata by distinguishing the evidence his defense reviewed from other pieces of evidence **such as the CF card [memory card] which – to be clear, his defense was also aware of during trial** (*see, e.g.*, June 13, 2019 Trial Tr. 4901:1-25, 4902:11-25, 4906:10-4907:4) – ...Defendant provides no persuasive argument that he could not have discovered this evidence with diligence.” (SPA28) (emphasis added).

The Trial Court fundamentally misconstrued the issue. Defendant-Appellant’s argument was not about the CF card itself, but rather the data extracted from it. More

specifically, the second forensic image that was withheld from Defendant-Appellant. At trial, the Defense was aware of the first forensic image only. The Defense had no knowledge that the data that Mr. Booth analyzed, created a report from, and testified to came from the second forensic image until after the trial.

The record reveals that on direct examination, AUSA Tanya Hajjar elicited testimony from Mr. Booth describing the FBI's protocol of only creating a single forensic image from the original digital evidence, yet the witness omitted the material fact that he had violated this protocol by creating a second image for analysis. (A311:21-A312:19).

Despite repeated and specific Defense requests under Rule 16 and 3500 prior and during trial, including that sidebar referenced above (A416:9-11; A417:25- A418:7; A418:16-22; A419:5-9), the Government never disclosed the existence of the second forensic image, nor Mr. Booth's violation of FBI protocol by creating and using it.

For *Brady* purposes, the Government is imputed with knowledge of the second forensic image, as it was created by one of its testifying witness. See *United States v. Morell*, 524 F.2d 550, 555 (2d Cir.1975). Moreover, the defense lacked the "essential facts" needed to take advantage of this evidence, due to the fact that the prosecution actively concealed its existence. *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995). Under *Banks*, the prosecution cannot "hide" material evidence and then shift the

burden to the defense to “seek” it. *Supra*.

A review of the record shows that there was a reasonable probability that the Government’s suppression of the second forensic image affected the outcome of the case, thus establishing a *Brady* violation. See *Coppa*, 267 F.3d at 135. Had the second forensic image been disclosed, especially given Mr. Booth’s testimony that proper FBI protocol is that only one (1) forensic image is made, competent defense counsel would have had it analyzed for impeachment.

The Jury heard incomplete evidence, designed to both establish necessary and material predicate acts, while preventing Defense from having information necessary to properly impeach the relevant witnesses.

Defendant-Appellant fell victim to the precise harm that *Brady* seeks to avoid. He was precluded from properly confronting witnesses with vital information, and thus the Jury was also precluded from making a full and fair analysis of witness credibility. In so doing, the Government deliberately prevented the Jury from making a full and fair analysis of whether the Government had met its burden of proof.

As stated above, the Trial Court’s application of the incorrect standard of analysis for Defendant-Appellant’s *Brady* arguments in his Rule 33 motion requires reversal. However, the material nature of these Government actions requires the extraordinary relief of an acquittal.

2. The Secret FBI Photograph Technician Is *Brady* Material and Newly Discovered Evidence Under Rule 33

The Trial Court utterly failed to hold the Government accountable for its hiding of material information. The Decision/Orders made little acknowledgement of the Government's footnote disclosure in support of the threshold arguments of its Consolidated Opposition. This disclosure, made four (4) years after trial, revealed new information of significant Government misconduct with respect to the camera and memory card as discussed in detail in Defendant-Appellant's brief.

The Defendant-Appellant clearly and diligently sought this information by the repeated demands pre-trial, during trial and during Mr. Booth's examination. However, the existence of the FBI technician was not disclosed, let alone any of their reports or notes. The Government's failure to respond to a specific request, such as this one, is "seldom, if ever, excusable." *Agurs*, 427 U.S. at 106.

The secret FBI photograph technician clearly constituted "suppressed" and "newly discovered evidence" under Rule 33, as no amount of due diligence on the part of the Defense could have exposed it. It is clear that the undisclosed FBI photograph technician was intentionally concealed. The Government's post-verdict submissions directly contradicted itself by revealing that the camera, containing the memory card, was mishandled approximately six (6) months after seizure, but before it was sent to CART. (A1579 at n.6; A1233-1235).

The Government's lack of notice required under *Brady/Giglio* regarding this secret FBI photograph technician clearly and unequivocally deprived the Defense of seeking a suppression of the digital evidence altogether or, alternatively, fully investigating the integrity of the digital evidence in the manner they accomplished post-trial.

The post-trial record shows that Defendant-Appellant revealed significant concerns with the reliability and integrity of the evidence and proof of data falsification. Defense was deprived of the opportunity to pursue these direct avenues of attack on the evidence at trial. Justice demands that Defendant-Appellant be entitled to a new trial as a result of this shocking violation of *Brady/Giglio*. The Defense's strategy surrounding same would have fundamentally differed had this violation not occurred, which would have had a material impact on the outcome of the trial. Moreover, the mere presentation of the missing information would have had a material impact on the Jury's evaluation of necessary elements, and thus the outcome of the trial.

D. The Trial Court Abused its Discretion by Refusing to Accept Proof Submitted by Defense Experts, that the Government Violated Protocols and Mishandled Evidence

In its decision, the Court overlooked and ignored this critical principle: discovery of Government involvement in facilitating and concealing the falsification of material evidence used to prove the necessary Predicate Acts. The Trial Court's refusal to accept

Defendant-Appellant's seven (7) experts conclusions of manipulation and falsification is a clear abuse of its discretion. The Trial Court's abuse requires a reversal and remand for hearing. However, this Court should strongly consider an outright dismissal in light of the Government's malfeasance.

The seven (7) post-trial defense experts, including four (4) former FBI examiners, concluded:

“[T]he camera card and the hard drive were extensively tampered with. Hundreds of files were planted, staged, and manipulated across both devices...**the involvement of [G]overnment personnel in this evidentiary fraud is inescapable.**” (A1703 ¶ 16) (emphasis added).

Our legal system operates on a presumption of good faith by the Government. The defense had no reason to suspect, let alone investigate, the Government for evidentiary fraud. The Government's active concealment is especially offensive, in light of the Trial Court's pre-trial order, which prohibited Mr. Raniere from “presenting evidence or arguments concerning ... alleged Government misconduct in the course of this prosecution”. (A272).

The Trial Court refused to acknowledge the seven (7) defense experts' findings in its Decision/Orders. The Trial Court's acceptance of the new Government evidence absent a hearing unquestionably also denied Defendant-Appellant his rights under the Confrontation Clause. Defense Counsel had no opportunity to cross-examine Mr. Loveall with the benefit of defense expert evaluations. Had he been given the

opportunity, the record would have been strikingly different. Had Defendant-Appellant been given the opportunity to explore the second image before the Jury, the result of the trial would undoubtedly be different, because it clearly and substantially undermined the integrity of the investigation and credibility of key Government witnesses like Mr. Booth.

The stark materiality of the undisclosed and suppressed evidence on the Defense' ability to cross-examine Government witnesses, and the Jury's would-be ability to scrutinize those witnesses with said information on proper impeachment, cannot be disputed.

Under a totality of the circumstances, the secret evidence also would have raised questions about the integrity of the Government's investigation. This Court must conclude that the Government's non-disclosures clearly affected the outcome of the trial.

In addition to crediting Mr. Loveall's Report and the Camila post-trial declaration, the Trial Court compounded its errors by relying upon 'ample trial evidence,' against the serious issues raised by Defendant-Appellant, in order to deny the Rule 33 and related Motions to Compel. Defendant-Appellant points out in his brief that apart from this evidence being refutable, if the camera's memory card and hard drive were excluded due to their being falsified, the pertinent child pornography and sexual

exploitation acts had no basis.

Despite the credit and weight afforded to the Government's post-trial expert witness, the Trial Court unfairly categorized evidence from trial against the newly presented evidence by Defense in an obvious attempt to defeat it without proper consideration. In its Decision/Order, the Trial Court wholly ignored the proper Rule 33 standard, mandating reversal and remand.

It is the duty of the Court to ensure fairness and equity for all defendants. Comity is the evaluative standard of any court in helping to prevent a judge from disparately manipulating the system on a case-by-case basis to the effect of their whim. Despite the nature of the charges, the tenor of the accused, personalities of attorneys or any other factors that may improvidently but naturally enter a judge's mind, the notions of comity and equal rights/remedies are instilled to prevent the very harms we see in the post-verdict litigation here.

The Defense presented multiple acclaimed sources to substantiate its arguments. It presented the Trial Court with findings and opinions from seven (7) independent digital forensics experts. They all submitted reports made under penalty of perjury, in support of Defendant-Appellant's motion, and each confirmed that the camera's memory card and hard drive were intentionally manipulated with falsified data.

It is unfathomable that a Trial Court would adopt the statements of an untested and secreted Government forensics analysis, along with an untested “victim” statement, yet wholly discount the sworn statements of seven (7) experts including several former Government law enforcement agents as to the impropriety of the Government’s actions. The post-verdict proceedings clearly denied Defendant-Appellant his Constitutionally guaranteed rights of Confrontation and Due Process. The Trial Court’s analysis is demonstrably abusive and requires reversal.

CONCLUSION

The record on appeal is an immutable image of the Trial Court's unbridled deference to the Government. The record shows the Government's malfeasances and the Trial Court's abuses of discretion in both diminishing the severity of, if not wholly ignoring, them while refusing to credit valid Defense arguments.

For the foregoing reasons, it is respectfully requested that this Court issue an Order dismissing the indictment in light of the Government's actions; or alternatively vacating the Decisions/Orders of the Trial Court, Numbered 1238, 1256 and 1194, reversing and remanding the matter to the trial court; and for such other and further relief as this Court deems just and proper.

Dated: New York, NY
November 4, 2024


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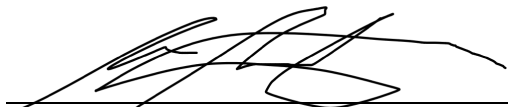


Hon. Richard Mays, Sr., *Amicus Filer*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this reply brief contains 6,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Word in 14-point Times New Roman.



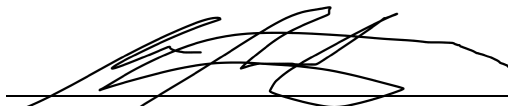
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November 4, 2024

Date

CERTIFICATE OF SERVICE

I certify that on this the 4th day of November, 2024, pursuant to 2nd Circuit Rules and FRAP 25, I caused the foregoing to be served electronically on the following through the ECF System:



Aaron M. Goldsmith, Esq.
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November 4, 2024

Date