No. __-___

IN THE

Supreme Court of the United States

KEITH RANIERE, AKA VANGUARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 16, 2026

QUESTIONS PRESENTED

1. Whether credible allegations that government agents fabricated and planted evidence in a criminal prosecution—conduct that, in civil proceedings, constitutes "fraud on the court" exempt from any time limitation under *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), and Federal Rule of Civil Procedure 60(d)(3)—may be denied judicial review based on procedural timeliness requirements when the government actively concealed its own fraudulent scheme.

2. Whether due process and fundamental fairness permits a court to deny post-conviction relief based on untested government declarations from witnesses who never testified in the case, without affording the defendant any opportunity for adversarial testing of their assertions, thereby reducing post-conviction review to a non-adversarial proceeding.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the Court are as follows:

Keith Raniere, Petitioner

United States of America, Respondent

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith Raniere ("Mr. Raniere") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in *United States v. Keith Raniere, a.k.a. Vanguard*, No. 24-778-CR(L), consolidated with 24-1285-CR(CON) and 24-1317-CR(CON).

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit (*United States v. Raniere*, No. 24-778 (2d Cir. Oct. 27, 2025) (summary order), ECF. No 100-1) is reported. The order of the Second Circuit denying rehearing and rehearing en banc (*United States v. Raniere*, Nos. 24-778 (2d Cir. Dec. 16, 2025), ECF No. 111-1) is unreported. The memorandum and order of the United States District Court for the Eastern District of New York denying the motion for a new trial (*United States v. Raniere*, No. 18-cr-204 (E.D.N.Y. April 29, 2024), ECF No. 1256) is unreported.

JURISDICTION

The court of appeals entered its summary order on October 27, 2025, and denied the petition for rehearing on December 16, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Federal Rule of Criminal Procedure 33(b)(1) provides: "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty."

Federal Rule of Civil Procedure 60(d)(3) provides that a court may "set aside a judgment for fraud on the court."

Federal Rules of Evidence 702(b) provides that expert testimony is admissible only if "the testimony is based on sufficient facts or data."

Federal Rules of Evidence 702(c) provides that expert testimony is admissible only if "the testimony is the product of reliable principles and methods."

28 U.S.C. § 1746 provides that, wherever federal law requires a sworn declaration or affidavit, an unsworn declaration subscribed by the declarant as true under penalty of perjury and dated may be used in its place.

28 U.S.C. § 2111 provides that, on the hearing of any appeal or writ of certiorari, a court shall give judgment after examining the record without regard to errors or defects that do not affect the substantial rights of the parties.

STATEMENT OF THE CASE

A. Trial Conviction and Direct Appeal

In May and June 2019, following a six-week jury trial in the Eastern District of New York, Petitioner Keith Raniere was convicted on seven counts, including racketeering, racketeering conspiracy, wire-fraud conspiracy, forced-labor conspiracy, sex-trafficking conspiracy, one count of sex trafficking, and one count of attempted sex trafficking. The jury found all eleven charged predicate racketeering acts proven. Raniere was sentenced principally to 120 years' imprisonment.

Three of the predicate racketeering acts—two counts of sexual exploitation of a child and one count of possession of child pornography—were added in a second superseding indictment after FBI agents reported allegedly discovering nude photographs of a fifteen-year-old girl, "Camila," on a Western Digital hard drive seized from a townhouse associated with Raniere. The photographs were outside of the date range authorized by the search warrant, which was for 2015 and onwards. (A1138)[1]. The prosecution de-

[1] Unless otherwise noted, "A___" refers to Petitioner's Appendix submitted in connection with Petitioner's indirect appeal

scribed these new counts as being "at the heart of our racketeering conspiracy." (A217:14-16).

At trial, the government's case on the child exploitation and child pornography predicate acts depended heavily on this digital evidence: the hard drive, the Canon camera, its memory card, and the metadata contained within these devices. FBI Senior Forensic Examiner Brian Booth ("SFE Booth") was the sole witness who testified to the 2005 timestamps on the photographs—the dates that established the subject was fifteen years old—and the government relied on his testimony about the metadata to link the photographs to the Canon camera. A395:18-A404:11; A529:16-24, A530:17-23).

Critically, the original FBI Senior Forensic Examiner who analyzed the camera and memory card, Stephen Flatley, was purportedly sent overseas five weeks into the six-week trial and was unavailable to testify. SFE Booth was substituted as a trial witness, produced a "Replacement" Report that was disclosed two days before the close of testimony, and created an unauthorized second forensic image of the camera's memory card, in violation of FBI protocol, which was withheld and concealed from the defense.

The Second Circuit affirmed Raniere's conviction and sentence on direct appeal. See *United States v. Raniere,* 55 F.4th 354, 357 (2d Cir. 2022); *United*

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in *United States v. Raniere*, No. 24-778 (2d Cir. 2025), and "App. __a" refers to the Appendices to the Petition for a Writ of Certiorari filed herewith.

States v. Raniere, No. 20-3520, 2022 WL 17544087, at *l (2d Cir. Dec. 9, 2022) (summary order). This Court denied certiorari. *Raniere v. United States,* 143 S. Ct. 1756 (2023).

C. Post-Trial Discovery of Evidence Fabrication

After trial, Raniere retained seven independent digital forensics experts (the "Seven Experts"), including four former FBI examiners, who conducted extensive analysis of the digital evidence. Their unanimous, joint conclusion was extraordinary: the camera's memory card and hard drive were "deliberately and extensively manipulated," with at least sixty-seven files tampered with on the memory card, and "168 photos, including the alleged contraband… planted on the hard drive." (App. 66a-67a ¶¶1-2, 69a-70a ¶8, 75a-76a ¶15, 79a-110a (Apps. A-B thereto)); (A1011-1012, A1379, A1448-1451, A1700). The Seven Experts further concluded that "[g]iven 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." (App. 76a ¶16).

These facts were uncovered, verified, and submitted in a Rule 33 motion after the direct appeal had already been decided, and were therefore not part of the direct appeal record.

Specifically, the experts identified: (1) thirty-seven files appearing only in SFE Booth's report of the second forensic image of the memory card that were not in SFE Flatley's original image report, and metadata anomalies indicating a "high likelihood" that these files were planted while the evidence was in FBI custody; (2) hundreds of files planted, staged, and manipulated across both devices; (3) the involvement of at least eight FBI/DOJ personnel in evidence handling irregularities; and (4) deliberate violations of FBI evidence protocols at multiple stages, the vast majority of which was not contested by the government. (Def.'s Opening Br. at 34–35, 50-51, *United States v. Raniere*, No. 24-778 (2d Cir.), ECF No. 48-1; *see* also App. 140a-146a (excerpting table of findings of malfeasance from Def.'s Opening Br., including uncontested findings)).

The post-trial record also revealed critical facts that had been actively concealed by the government:

> First, SFE Booth secretly created a second forensic image of the camera's memory card. FBI Digital Evidence Policy Guide § 3.3.11.2 prohibits creating a second image without approval from the Assistant Director of the Operational Technology Division. No such approval was obtained. Instead, purported authorization came from a Supervisory Special Agent who lacked the authority to approve it. Despite Rule 16 and 3500 demands, the prosecution did not disclose that SFE Booth's "Replacement" Report was derived

> from this unauthorized second forensic image, which he created. (A1006-1007, 1038-1039).

At trial, FBI Special Agent Christopher Mills ("SA Mills") testified that FBI protocol requiring the involvement of the Computer Analysis Response Team ("CART") to review original digital evidence was adhered to with the handling of the camera. (A304:8-18). SFE Booth testified that CART protocol allows for only one forensic image per device and that all evidence review and analysis is conducted on that image. (A311:21 – A312:19).

Second, during cross-examination of SFE Booth regarding his examination of the camera and memory card, Assistant U.S. Attorney Tanya Hajjar ("AUSA Hajjar") requested a sidebar and represented that SFE Booth had not created any forensic images. (A414:3-A416:4). In response, the defense reiterated its request for all Rule 16 and 3500 materials. (A417:17-24; A417:25-418:4; A418:16-22).

Third, four years after trial, the government's footnote disclosure shows that the protocol SA Mills testified to had not in fact been followed for the camera and its memory card, as it was accessed outside of CART. (App. 130a-131a at n.6)

That footnote disclosure revealed that an unauthorized, unidentified FBI photograph technician accessed the unpreserved memory card, 177 days after its seizure, before any forensic image was created—a violation of FBI protocol, DEPG § 3.3.4.5, requiring

CART handling of original digital evidence. (A968-969). This technician was acting at the direction of the prosecution, purportedly for discovery production, and was deliberately omitted from the chain of custody, another FBI protocol violation, DEPG § 3.3.9.1.1.2, and was only revealed four years after trial. (A982, App. 132a-136a (chain of custody reflecting no entry by the FBI photograph technician)).

Fourth, the government revealed in its appellate opposition—more than five years after trial—that even before the FBI photo technician accessed the unpreserved memory card, yet another unknown, unauthorized individual had already improperly accessed it and viewed its contents. App. 137a-138a (excerpted concession from Gov't's Opp'n Br. that the contents of the unpreserved memory card had been viewed before the unauthorized FBI photograph technician was called in); *see also* A441:7–17 (SFE Booth testimony that the camera was inoperable and unchargeable, meaning the unpreserved memory card's contents could only have been viewed by directly accessing the card). Four former FBI CART examiners jointly declared that this conduct was unprecedented in their combined 55 years of FBI service and consisted of knowing violations of FBI protocol so severe that they "could result in an agent's termination." (App. 111a ¶¶2, 113a-114a ¶¶10-11, 117a ¶21).

Post-conviction, the prosecution did a fundamental re-write of its case, including advancing materially different accounts of the alleged number of illicit photographs: 1) before trial, it was "approximately 15" photos. (A226); 2) during trial, it was "18 or so images" (A391:7-9); and 3) in its Rule 33 Opposition, it was "at least nine". (A1573). Additionally, through Camila's declaration, the alleged underage victim who did not testify at trial, the prosecution quietly shifted the alleged dates of production from two to one, Camila described only a single encounter in which Raniere photographed her, thereby rendering at least one of the sentence-enhancing convicted predicate acts invalid. (A192-193, A1592 ¶8 , A1593 ¶10)

C. The District Court's Denial

Raniere filed a third motion for a new trial under Federal Rule of Criminal Procedure 33, presenting the Seven Experts' findings and asserting *Brady* violations. The government opposed, attaching two untested, post-trial affidavits: (1) a declaration from FBI Senior Computer Scientist David Loveall II, who had no involvement in the prosecution; and (2) a declaration from Camila, who also did not testify at trial.

The district court denied the Rule 33 motion without holding an evidentiary hearing, concluding that the Loveall Report and Camila's declaration offered "a far more plausible and convincing explanation than the reports submitted by the Defendant." (App. 30a). In doing so, the court relied on the Loveall Report to resolve disputed, credible, factual issues without adversarial testing. The court did not address the Daubert issue of the report's assertions' not citing to any data, its surrogate analyst reliance, whether the

Loveall Report being undated rendered it facially defective, or the secret evidence concern—its review of the concealed and withheld second forensic image that the defense was never permitted to examine (App. 57a-61a ¶¶5–9, 61a-62a ¶¶11–15, 63a-64a ¶¶17–18 (unsupported assertions by Loveall); 60a-61a ¶9 (assertion implying Loveall had access to both forensic images)), App. 67a-68a at ¶4(d); A1006-1007, A1038-1039).

D. The Second Circuit's Summary Order

The Second Circuit affirmed in a summary order dated October 27, 2025. (App. 1a-15a). The panel held that Raniere identified no newly discovered evidence because the evidence at issue was not "new evidence" that "could not with due diligence have been discovered before or during trial." (App. 7a-8a) (quoting *United States v. Alessi*, 638 F.2d 466, 479 (2d Cir. 1980)). The court found that because Raniere's trial counsel had cross-examined SFE Booth about the memory card being accessed on a singular date "while it was in the possession of the FBI," the underlying facts were available at the time of trial (App. 8a). Their premise is that because cross-examination elicited a singular concession, trial counsel should have discovered the government's falsification and extensive malfeasance.

In the alternative, the panel held that even assuming the evidence was newly discovered, Raniere "cannot show that 'the evidence would likely result in an acquittal.'" (*Id.*). The court held Raniere could not explain why the duplicate forensic image was "materially exculpatory," characterizing his arguments as "vague statements" that "do not come close to meeting Raniere's burden." (App. 8a-9a). The panel credited the district court's finding that the Loveall Report and Camila's affidavit, both untested—not put before the jury and not subject to cross-examination, provided "a far more plausible explanation for the discrepancy in the [Camera's] metadata." (App. 9a).

No court ever evaluated whether the digital evidence had in fact been fabricated or assessed the scope of government agents' involvement, as determined by the Seven Experts based on their findings of evidentiary tampering, misconduct, and violations of FBI protocols documented in the government's own records. The district court held no evidentiary hearing. Raniere raised that the government malfeasance was so pervasive that it constituted structural error and no analysis of structural error was undertaken.

E. Denial of Rehearing

The Second Circuit denied Raniere's petition for panel rehearing and rehearing en banc on December 16, 2025, without opinion. (*United States v. Raniere*, No. 24-778 (2d Cir.), ECF No. 111-1).

REASONS FOR GRANTING THE WRIT

I. CREDIBLE ALLEGATIONS OF GOVERNMENT EVIDENCE FABRICATION CANNOT BE DENIED JUDICIAL REVIEW BASED ON PROCEDURAL TIMELINESS REQUIREMENTS WHEN THE GOVERNMENT ACTIVELY CONCEALED ITS FRAUDULENT SCHEME

A. The Second Circuit's Due Diligence Holding

The panel denied judicial review of Petitioner's government evidence fabrication claims through two interlocking procedural holdings. First, it found the digital evidence was not "newly discovered" because Raniere's trial counsel had elicited testimony that the memory card was accessed "while it was in the possession of the FBI"; it therefore concluded the claim did not rely on new evidence that "could not with due diligence have been discovered before or during trial." (App. 7a-8a). Second, it held that even assuming the evidence was new, Raniere could not show prejudice because his arguments about materiality were "vague statements" insufficient to meet his burden. (App. 8a-9a).

The practical effect of these holdings is that Petitioner's fabrication claims—supported by the unanimous findings of seven independent forensic experts (the "Seven Experts"), including four former FBI examiners—were rejected without any court ever reaching the substance of the merits. No court properly examined whether the digital evidence was in fact fabricated. No evidentiary hearing was held. No structural-error analysis was conducted. The claims were disposed of on procedural grounds: timeliness and an allegedly insufficiently specific prejudice showing.

B. The Government's Active Concealment Defeats Any Due Diligence Requirement

This Court held in *Banks v. Dretke,* 540 U.S. 668, 694–96 (2004), that a defendant does not have a duty to "scavenge for hints of undisclosed Brady material" when the government conceals exculpatory evidence. The rule of *Banks* is straightforward: a defendant cannot be faulted for failing to discover what the government was actively hiding. "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696.

Here, the government did not merely fail to disclose material evidence—it actively concealed its misconduct at every stage, including:

> *Prohibited forensic re-imaging.* SFE Booth, who testified at trial, secretly created and relied on a second forensic image of the camera's memory card in violation of FBI Digital Evidence Policy Guide § 3.3.11.2, never disclosed the second image's existence and

> testified that CART protocol is to only forensically image the device one time. (A930, A1038, A312). SFE Booth testified the Government had asked him to create another report instead of SFE Flatley (A510). At sidebar, however, AUSA Hajjar represented to the Court that SFE Booth had "never said I was the one who imaged the devices," while the Government simultaneously withheld the second forensic image despite contemporaneous Rule 16 and 3500 demands. (A416*)*.

Government digital evidence fabrication. The Seven Experts—including four former FBI examiners—found that of the thirty-seven files appearing only in SFE Booth's second forensic image that were not in the report of the first forensic image, at least twenty-eight were tampered with and twenty were planted. (App. 75a-76a at ¶¶15(a), 15(b), 15(d), 79a-93a (App. A thereto)). Dr. James Richard Kiper, a retired Quantico Unit Chief also determined "a high likelihood" that the files were added to the camera's memory card and altered while the device was in FBI custody. (A1036-1037). Additionally, the Seven Experts determined that 168 photographs, including the alleged illicit photographs, were manually planted on the hard drive and deliberately disguised as automatic backups. (A1011-1012, A1379, A1448-1451, App. 69a-70a ¶8).

Secret off-books access to the tampered evidence. The government also concealed that the prosecution had directed an unauthorized FBI photograph technician, who was deliberately omitted from the chain of custody, to access the camera's memory card prior to forensic preservation in stark violation of FBI protocol—a fact revealed only four years after trial. (App. 130a-131a at n.6). Then, more than five years after trial, the government disclosed that yet another unknown, unauthorized individual had accessed the unpreserved evidence before the photo technician. (App. 137a-138a). This concealment is compounded by the fact that SA Mills testified that the camera, which contained the memory card, was handled with CART's assistance. (A304:8-18).

The panel's reasoning rests on the premise that trial counsel should have discovered the government's fabrication and extensive malfeasance because cross-examination elicited a single concession that the FBI had accessed the memory card without a write blocker on a singular date. This conflates awareness of a potential irregularity with discovery of a deliberate, multi-participant government scheme of digital evidence fabrication. This evidence supported the charges that the Government itself characterized as "the heart of the conspiracy." (A271).

Requiring a defendant to discover through "due diligence" what the government is actively concealing contradicts *Banks* and rewards the very deception it prohibits. The concealment also fatally undermines the panel's prejudice analysis. The court faulted Raniere for making only "vague statements" about the exculpatory value of the duplicate forensic image. But a defendant cannot fully articulate the prejudice flowing from evidence the government has hidden. In *Banks*, this Court recognized that requiring a defendant to demonstrate prejudice from suppressed evidence he was not permitted to examine creates an untenable paradox. 540 U.S. at 693–96. The panel's demand for specificity about evidence the government concealed replicates exactly this problem.

C. The Fraud-on-the-Court Doctrine Requires That These Claims Be Heard

This Court has long recognized that fraud implicating officers of the court presents a unique threat to the judicial system itself. In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238 (1944), the Court held that the judiciary possesses equitable authority to set aside judgments obtained through fraud on the court. Such fraud is "a wrong against the institutions set up to protect and safeguard the public" *Id*. at 246. "The 'flexibility' inherent in 'equitable procedure' enables courts 'to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices.' " *Holland v. Florida*, 560 U.S. 631, 650 (2010) (citing *Hazel-Atlas,* 322 U.S. at 248).

The equitable relief recognized in *Hazel-Atlas* has been codified in Federal Rule of Civil Procedure 60. Rule 60(b)(3) allows relief from a final judgment for "fraud . . . misrepresentation, or misconduct by an opposing party," but such motions must be made within one year. Fed. R. Civ. P. 60(b). Critically, however, Rule 60(d)(3) separately provides that this rule does not limit the court's inherent power to set aside a judgment for "fraud on the court." Fed R. Civ. P. 60(d)(3). The inherent power to set aside a judgment for "fraud on the court" can be exercised "at any time after judgment." See *Kennedy v. Schneider Elec.*, 893 F.3d 414, 419 (7th Cir. 2018); *United States v. Sierra Pac. Indus., Inc.,* 862 F.3d 1157, 1167 (9th Cir. 2017).

Courts have consistently held that "fraud on the court" involves only the most egregious misconduct, such as fabrication of evidence implicating officers of the court or bribery of a judge or juror. *See Hazlehurst for Hazlehurst v. Sec'y of Health and Human Services*, 177 Fed. Cl. 479, 503 (2025); *United States v. Smiley*, 553 F.3d 1137, 1145 (8th Cir. 2009); *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1338 (5th Cir. 1978). Petitioner's allegations—that FBI and DOJ personnel fabricated and planted the very evidence that irreparably contaminated the case and was used to secure his conviction—fall squarely within this category. Yet this Court has never addressed whether the equitable principle underlying Rule 60(d)(3)—that allegations of fraud on the court carry no temporal limitation—applies with equal force to post-conviction motions for new trial under Federal Rule of Criminal Procedure 33 in cases of government fabrication of evidence.

D. The Civil-Criminal Asymmetry Is Constitutionally Untenable

The Constitution guarantees criminal defendants at least as much procedural protection as civil litigants—and typically more. This Court has recognized that it is constitutionally permissible for a State to "provide fewer procedural protections" to a civil litigant "than in a criminal case." *Turner v. Rogers,* 564 U.S. 431, 442 (2011).

Yet the decision below inverts this hierarchy entirely. Under the Second Circuit's approach, a civil litigant who discovers that opposing counsel fabricated evidence retains the right to challenge the resulting judgment without any temporal limitation through Rule 60(d)(3). A criminal defendant who discovers that the government fabricated and planted the evidence used to convict him and sentence him to 120 years' imprisonment is told his claims are procedurally foreclosed. The government is held to a lower standard of accountability than a private litigant in a civil dispute.

The incongruity is sharpened by *Gonzalez v. Crosby*, 545 U.S. 524 (2005), which held that Rule 60(b) applies in habeas corpus proceedings to the extent that it is not inconsistent with applicable federal statutes and rules. *Id.* at 529. If Rule 60(b)'s protections extend to habeas petitioners, the principle underlying Rule 60(d)(3)—that fraud on the court admits of no time bar—should apply with even greater force to post-conviction claims alleging that the government corrupted the evidentiary foundation of the trial. Yet several circuits have held that Rule 60(b) is not directly applicable to criminal proceedings, *see*, *e.g.*, *United States v. Mosavi*, 138 F.3d 1365 (11th Cir. 1998); *United States v. Whisby*, 323 F.

App'x 781, 782 (11th Cir. 2009), leaving criminal defendants with no equivalent mechanism to challenge government fraud on the court—a gap this Court should close.

E. The Panel's Failure to Address Structural Error Compounds the Problem

Petitioner argued that the government's fabrication and planting of core trial evidence constitutes structural error requiring automatic reversal under *Arizona v. Fulminante*, 499 U.S. 279 (1991). (Def.'s Opening Br. at 48-52, Def.'s Reply Br. at 29-31, ECF No. 82.1) Structural errors affect "the framework within which the trial proceeds" and "defy analysis by 'harmless-error' standards." *Id.* at 309–10. When the evidentiary foundation of a conviction has been corrupted by the government's own fabrication, the trial "cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Rose v. Clark*, 478 U.S. 570, 577–78 (1986).

The panel never engaged with this argument. It did not analyze whether fabrication constitutes structural error. Instead, it demanded that Petitioner demonstrate particularized prejudice—that the evidence "would likely result in an acquittal." (App. at 6a-10a). But if government fabrication of core evidence is structural error, prejudice is presumed and need not be independently established. *See Arizona v. Fulminante*, 499 U.S. 279 (1991) **(distinguishing structural defects from trial errors and explain-**

ing that structural errors require automatic reversal because they defy harmless-error analysis). The panel's insistence on a particularized prejudice showing confirms it never reached the threshold structural error question. When a structural error is credibly raised, supported by a Seven Expert report, including four former FBI examiners—one of who was a Quantico Unit Chief, the Circuit Court is obligated to address it prior to its harmless error analysis, as it implicates the fundamental fairness of the trial and the validity of the conviction. The Circuit Court did not address Mr. Raniere's credibly raised structural error claims.

F. This Case Presents an Issue of Exceptional National Importance

If the government's active concealment of its own evidence fabrication can be rewarded with procedural foreclosure, then the constitutional guarantee of a fair trial becomes contingent not on the integrity of the proceedings but on the duration and success of the government's concealment. The principle underlying *Hazel-Atlas*—that courts must retain the power to remedy judgments procured through corruption of the adjudicative process—applies with even greater force in the criminal context, where the consequences include the loss of liberty. As this Court has observed, the government's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). A rule permitting the government to shield evidence fabrication behind procedural timeliness requirements is antithetical to this fundamental principle.

II. DUE PROCESS REQUIRES AN ADVERSARIAL PROCEEDING BEFORE A COURT MAY CREDIT UNTESTED GOVERNMENT FORENSIC DECLARATIONS TO DENY POST-CONVICTION RELIEF FROM A CONVICTION CHALLENGED ON GROUNDS OF EVIDENCE FABRICATION

A. The Second Circuit Eliminated Adversarial Testing from Post Conviction Review

Just as the Second Circuit's procedural holdings described in Section I inverted the hierarchy of rights between civil and criminal proceedings—affording criminal defendants fewer protections against fraud on the court than civil litigants receive—its treatment of the government's post-conviction submissions collapsed the adversarial process that is the bedrock of due process.

In opposing Petitioner's post-conviction motion, the government did not defend the conviction on the basis of the trial record or through witnesses who had been subject to cross-examination. Instead, it furnished untested declarations from witnesses who never testified at trial: FBI Examiner Loveall, whose report purported to rebut the unanimous findings of the Seven Experts, and Camila, whose declaration was submitted to defeat Petitioner's claims. Neither declarant was subjected to cross-examination. Neither was tested in any adversarial proceeding of any kind.

The district court credited both declarations as dispositive, and the Second Circuit affirmed. The result is that Petitioner's claims—supported by seven independent forensic experts, including four former FBI examiners, one of whom was a retired Quantico Unit Chief—were denied entirely on the basis of untested paper submissions from individuals the defense never had any opportunity to confront. No evidentiary hearing was held. No cross-examination was permitted. No adversarial testing of any kind occurred. Post-conviction review was reduced to a non-adversarial paper proceeding, and the conviction—no matter how corrupted its evidentiary foundation—was rendered effectively unreviewable.

B. Each Deficiency in the Government's Forensic Submission Was a Direct Consequence of the Absent Adversarial Process

A federal criminal defendant is not entitled to an evidentiary hearing as a matter of right on a pretrial or posttrial motion. Such a hearing is required, however, when the defendant makes a sufficient threshold showing that material facts are genuinely in dispute and cannot be reliably resolved on the paper record alone. *United States v. McGill*, 11 F.3d 223, 225 (1st Cir. 1993); *United States v. Lazu-Rivera*, 363 F. Supp. 2d 30 (D.P.R. 2005).

That threshold was plainly met here. Petitioner's Rule 33 was supported by the joint and individual reports of seven independent forensic experts, including a joint report in reply to Loveall's which squarely placed the government's forensic account in dispute. The government's response—an untested declaration from FBI Examiner Loveall, the Loveall Report—contained fundamental deficiencies that could not be evaluated on the written record alone. Even accounting for the reduced procedural protections that apply in post-conviction proceedings, those defects are sufficiently serious that the report would not withstand even a basic review for fundamental fairness.

Over the past three decades, this Court has constructed an interlocking framework of protections governing the admission and testing of forensic evidence in criminal proceedings. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589 (1993), the Court held that Federal Rules of Evidence 702 imposes a "gatekeeping" obligation on trial judges to ensure that expert testimony rests on a reliable foundation and is relevant to the task at hand *Id*. at 597. The Rule codifies that requirement: expert testimony is admissible only if it rests on a reliable foundation, including that it be based on "sufficient facts or data." Fed. R. Evid. 702(b).

In *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147 (1999), the Court extended that gatekeeping obligation to all expert testimony, including forensic analysis. Under this framework, courts evaluate whether methods are testable, subjected to peer review, supported by known error rates, and generally accepted within the relevant scientific community. *Daubert*, 509 U.S. at 593-94.

Separately, the Confrontation Clause imposes its own requirements. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that testimonial statements may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009), applied *Crawford* to forensic laboratory reports, holding that such reports are testimonial and the analyst must be subject to cross-examination. *Id*. at 311. *Bullcoming v. New Mexico,* 564 U.S. 647 (2011), held that a surrogate analyst who did not perform or observe the original testing cannot substitute for the analyst who did. *Id*. at 657–59. Most recently in *Smith v. Arizona*, 602 U.S. 779 (2024), this Court reinforced that an expert may not present another analyst's findings as "basis evidence" to circumvent the confrontation right because such statements can provide support for the expert's testimony "only if true.". *Id*. at 803.

Together, these decisions reflect a consistent principle: forensic evidence—and digital forensic evidence in particular—is uniquely susceptible to error and manipulation, and the adversarial process of cross-examination and reliability testing is essential to ensuring that such evidence is trustworthy.

The Loveall Report—the government's sole forensic response to the findings of seven independent experts—would have been inadmissible at trial under every strand of this Court's forensic evidence framework. *See Melendez-Diaz*, 557 U.S. 305; *Bullcoming,* 564 U.S. 647 (2011); *Smith*, 602 U.S. 779; Fed. R. Evid. 702(b); *Daubert,* 509 U.S. 579.

Petitioner does not contend that the full panoply of trial-stage evidentiary protections applies with identical force in post-conviction proceedings. But due process and fundamental fairness imposes its own floor. When the government submits forensic evidence as the dispositive basis for denying post-conviction relief—and when that evidence is so deficient that it could not have survived the most basic adversarial scrutiny—a court cannot simply credit it on paper without affording the defendant any opportunity to challenge it. The trial-stage framework is relevant not because it governs post-conviction directly, but because it establishes the baseline against which the reliability of forensic evidence is measured. Evidence that falls below every established threshold of reliability cannot become unreviewable simply because it is offered in a post-conviction proceeding rather than at trial. If anything, adversarial testing is even more critical here, where the defendant seeks to prove that the government fabricated the very evidence used to convict him and the government's untested response is the sole barrier to relief.

Had any adversarial process existed—the Loveall Report could not have survived. Each of its specific deficiencies confirms this:

> *Surrogate analyst testimony*. Loveall made material assertions about the forensic analysis performed by FBI Senior Forensic Examiner Stephen Flatley ("SFE Flatley")—specifically, about the undisclosed "settings" SFE Flatley used to generate his report (App. 60a-61a ¶ 9). At a hearing, the defense could have required SFE Flatley to testify about his own analysis or sought the government to withdraw conclusions attributed to him. Instead, the court credited Loveall's account of SFE Flatley's work without questioning either analyst.

No data, no reliable methodology. The Loveall Report cited no data whatsoever to support its conclusions. Its rebuttals were mere speculation. (App. 57a-60a-61a ¶¶5-9, 61a-62a ¶¶11-15, 63a-64a ¶¶17-18, 67a-68a ¶¶4(c)-(d); A1824). Expert testimony must rest on "sufficient facts or data" and employ "reliable principles and methods." Fed. R. Evid. 702(b)–(c), *Daubert*, 509 U.S. at 580. It is an objective fact that Loveall did not cite to data, let alone sufficient data as detailed in the joint expert report. App. 67a-68a ¶¶4(c)-(d). At a hearing, the defense could have compelled Loveall to produce his underlying data or concede that none existed.

Statutory noncompliance. The Report was undated, rendering it noncompliant with 28 U.S.C. § 1746 for declarations under penalty of perjury. Any adversarial proceeding—even the most minimal—would have surfaced this facial deficiency. The defense would have objected, and the court would have been required to address whether a noncompliant declaration can carry dispositive weight.

Reliance on secret evidence. Loveall's conclusions materially relied on the undisclosed second forensic image—evidence the defense was never permitted to examine. (App. 60a-61a ¶9 (Loveall asserting that he compared two forensic images, apparently implying access to both, although misidentifying them as 1B15 and 1B15a)).

The problem is not that each of these defects independently violated a particular trial-stage doctrine. The problem is that the absence of any adversarial process allowed them to occur simultaneously and without consequence. The court credited untested assertions from witnesses who never appeared, and it rejected Petitioner's claims—supported by seven independent experts—without providing any opportunity for adversarial testing of newly created evidence.

C. The Second Circuit's Own Precedent Confirms the Error

The Second Circuit's own precedent independently prohibits what occurred here. In *United States v. Franzese,* 525 F.2d 27, 30–31 (2d Cir. 1975), the court held that post-trial government affidavits "may be considered in assessing the sufficiency of a petitioner's claims" but "may not [be considered] as a basis for finding a petitioner's allegations to be false." A court may use such affidavits to test legal sufficiency—whether the facts alleged, if true, would warrant relief—but may not use them to resolve factual disputes.

Yet the district court found that the Loveall Report offered "a far more plausible and convincing explanation than the reports submitted by the Defendant." (App. 30a). Finding one side "far more plausible" is a factual determination—precisely what *Franzese* prohibits and created an intra-circuit split. The panel affirmed this approach and went further, using the Loveall Report to defeat Petitioner's showing of prejudice under both Rule 33 and Brady. (App. 9a-10a). This is not sufficiency testing; it is substantive factual adjudication on the papers, without cross-examination, a hearing, or any adversarial testing.

D. The Growing Centrality of Digital Forensic Evidence in Criminal Prosecutions Demands This Court's Guidance

Digital forensic evidence is no longer a niche feature of criminal prosecutions—it is central to them. Cases involving child exploitation, cybercrime, fraud, terrorism, and drug trafficking routinely turn on metadata, file system analysis, device forensics, and digital chain-of-custody determinations. Digital evidence is qualitatively different: it is voluminous, easily manipulated, and often opaque to lay jurors and judges.

Post-conviction challenges to digital forensic evidence will only increase as defendants obtain access to better forensic tools and as the scientific community develops improved methodologies for detecting manipulation. If post-conviction review can be reduced to a non-adversarial paper proceeding in which untested government declarations—from witnesses who never testified and were never cross-examined—are credited as dispositive, the result is a regime in which the government's forensic assertions are immunized from scrutiny. The analyst need not appear. The methodology need not be tested. The data need not be disclosed. And the defendant has no mechanism to expose error or fabrication.

This Court has spent three decades building a comprehensive framework to ensure that forensic evidence is subjected to adversarial testing before it can be used to convict. *Daubert*'s reliability gatekeeping, *Bullcoming*'s prohibition on surrogate analysts, *Smith*'s insistence that basis evidence triggers confrontation, and Rule 702's requirement of sufficient facts and data. These protections reflect a consistent constitutional principle—that forensic evidence, because it is uniquely susceptible to error and manipulation, demands adversarial testing before it can be relied upon to adjudicate fundamental rights. That principle cannot be rendered meaningless in post-conviction proceedings, where a defendant's liberty depends on the court's ability to evaluate whether the evidence underlying the conviction was fabricated.

Without this Court's guidance, the Second Circuit's decision establishes that government forensic assertions in post-conviction proceedings need never be subjected to adversarial testing—that untested declarations from witnesses who never testified can be credited as dispositive to deny relief from a 120-year sentence, even when opposed by the unanimous findings of seven independent forensic experts. Post-conviction review has been collapsed into a non-adversarial paper exercise, and the underlying conviction is rendered effectively unreviewable.

E. This Case Presents an Issue of Exceptional National Importance

The Second Circuit has established that the government can defeat a post-conviction challenge simply by submitting untested declarations from witnesses who never appeared in the case—no hearing, no cross-examination, no adversarial process of any kind. Without this Court's intervention, that rule will govern every federal post-conviction proceeding in the Circuit, rendering Rule 33 and habeas review a rubber stamp for the government's own assertions—and absent a clear rule from this Court, nothing forecloses other Circuits from adopting the same approach. Due process may be relaxed in post-conviction proceedings, but it must not be effectively eliminated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: March 16, 2026

Respectfully submitted,

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APPENDIX

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.

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

UNITED STATES OF AMERICA,

Appellee,

v.

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

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

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 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.

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[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).

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

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

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[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.

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" 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

[SEAL]

/s/ CATHERINE O'HAGAN WOLFE

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 16th day of December, two thousand twenty-five.

Docket Nos: 24-778 (Lead)
24-1285 (Con)
24-1317 (Con)

UNITED STATES OF AMERICA,

Appellee,

v.

KEITH RANIERE, AKA VANGUARD,

Defendant-Appellant.

ORDER

Appellant, Keith Raniere, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

It Is Hereby Ordered that the petition is denied.

For The Court:

Catherine O'Hagan Wolfe, Clerk of Court

[Seal]

/s/ Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

18-CR-204 (NGG)

UNITED STATES OF AMERICA,

–against–

KEITH RANIERE,

Defendant.

MEMORANDUM & ORDER

NICHOLAS G. GARAUFIS, United States District Judge.

On June 19, 2019, Defendant Keith Raniere was convicted of racketeering, racketeering conspiracy, wire fraud conspiracy, forced labor conspiracy, sex trafficking conspiracy, and two counts of sex trafficking. (*See* Jury Verdict (Dkt. 735); Judgment (Dkt. 969) at 1-2.) Now before the court is Mr. Raniere's third motion for a new trial premised on what he argues, is newly discovered evidence relating to two of the eleven predicate acts supporting his racketeering conviction. (*See* Not. of Mot. (Dkt. 1168); Mem. of Law in Support of Mot. for Rule 33 Relief ("Mot.") (Dkt. 1169); Suppl. to Mot. (Dkt. 1176); *see also* Mem. and Order dated July 17, 2020 (Dkt. 902) ("First Rule 33 M&O") (denying Defendant's first Rule 33 motion); Mem. and Order dated October 23, 2020 (Dkt. 963) ("Second Rule 33 M&O") (denying Defendant's second Rule 33 motion).)[1]

For the reasons discussed herein, Mr. Raniere's motion for a new trial is DENIED.[2]

I. BACKGROUND

The court assumes familiarity with this case's background, which the court reviews only as relevant to the present motion.[3]

[1] In addition to this third Rule 33 motion, Mr. Raniere filed a *pro se* fourth new trial motion on June 21, 2022. (*See* Pro Se Mot. (Dkt. 1178).) This motion raises the same issues previously considered by this court when denying Mr. Raniere's first two motions for a new trial relating to allegations of Government intimidation or perjury by key witnesses, which this court has previously rejected as bases to grant a new trial, as well as issues raised in the present motion which the court considers herein. Mr. Raniere's *pro se* motion is therefore also DENIED. (*See generally* First Rule 33 M&O (discussing purported perjury); Second Rule 33 M&O (discussing purported Government intimidation).)

[2] On April 19, 2024, Mr. Raniere filed a habeas petition which discusses some of the same underlying facts reviewed in his Rule 33 motion, but in the context of constitutional ineffective assistance of counsel claims. (*See* Habeas Petition (Dkt. 1252) at 27-42.) Because the habeas petition considers separate claims, the court finds that it is proper to consider the outstanding Rule 33 motion and the habeas petition separately. This order thus RESERVES DECISION on the outstanding habeas petition pending additional briefing from the parties.

[3] Much of the underlying facts relevant to this motion were recently reviewed when denying Mr. Raniere's request to compel evidence. (*See* Mem. and Order dated Nov. 6, 2023 (Dkt. 1224) at 1-3.)

As the leader of NXIVM, Mr. Raniere engaged in criminal activities that led a jury to find him guilty of racketeering, racketeering conspiracy, forced labor conspiracy, wire fraud conspiracy, sex trafficking conspiracy, and two counts of sex trafficking. (*See* Judgment at 1-2; *see also* Sentencing Mem. (Dkt. 966) at 9-18 (describing underlying criminal activity).) Mr. Raniere's racketeering charge was predicated on eleven acts, including child exploitation and possession of child pornography. (*See* Jury Verdict at 2-3.) The jury found that the Government proved each of these eleven predicate acts beyond a reasonable doubt. (*Id.*)

The child pornography and child exploitation predicate acts are the focus of this motion. These acts were added in the second superseding indictment returned by the grand jury in March 2019. (*See* Second Superseding Indictment (Dkt. 430) ¶¶ 21-23); *see also, generally,* Superseding Indictment (Dkt. 50).) Specifically, they were added after the Government discovered pornographic images depicting a minor in February 2019, while reviewing a previously seized hard drive (the "Western Digital hard drive"). (Gov Mem. of Law in Opposition to Rule 33 Mot. ("Opp.") (Dkt. 1213) at 4-5; *see also* Letter from Government dated February 21, 2019 (Dkt. 362) (noting discovery of child pornography images on the Western Digital hard drive).) The defense moved to dismiss or sever the newly added predicate acts (Defense Letter dated March 17, 2019 (Dkt. 436)), which this court denied. (Mem. and Order dated April 29, 2019 (Dkt. 600) at 31-32.)

The defense initially raised concerns about their ability to analyze the evidence relating to the newly added predicate acts prior to the start of the trial, which was then scheduled for April 29, 2019. (*See, e.g.*, Defense Letter dated March 17, 2019 at 2; March 18, 2019 Status Conference Tr. (Dkt. 467) at 20:11-24 (noting that jury selection was to begin on April 8, 2019, with the trial to begin on April 29, 2019).) However, in a filing dated March 22, 2019, Mr. Raniere represented that he was ready for trial "even though the government has superseded the indictment" and he "request [ed] that the Court keep the dates for the current trial schedule." (Defense Mem. dated March 22, 2019 (Dkt. 456-1) at 2-4.) Given the conflicting statements from Mr. Raniere's defense team, the Government sought to ensure that he was ready to proceed, after noting numerous times that it would consent to the trial's adjournment if necessary to allow his defense team time to conduct a forensic examination of the photographs and the photographs' metadata. (*See, e.g.,* Gov. Mem. of Law dated March 29, 2019 (Dkt. 485) at 6-10.)

The issue of a potential delay in the trial was then discussed at a status conference held on April 4, 2019, where the Government raised the defense's prior statements that Raniere may not be ready for trial following the recent filing of the Second Superseding Indictment. (April 4, 2019 Status Conference Tr. (Dkt. 510) at 11:14-17.) The court therefore asked Mr. Raniere's defense counsel whether they could make an "affirmative statement that based on what's in the second superseding indictment . . . that [Mr. Raniere] will still be ready to go to trial." (*Id.* at 14:20-25.) Mr. Raniere's counsel responded saying that he will "be ready to go to trial." (*Id.* at 15:1-5.) Mr. Raniere's counsel also noted that the Government had been "very responsive" and accommodating in allowing the defense's forensic expert to visit the FBI to examine the relevant evidence. (*Id.* at 12:10-13:2, 15:1-5.) The trial then began on May 7, 2019. (*See* Dkt. 631.)

At trial, the Government introduced the photographs of the victim and metadata to prove the child pornography and child exploitation predicate acts. (Opp. at 19.) Further evidence proving that the pictures were from 2005 when the victim was fifteen years old included messages from the victim where she referenced her sexual relationship with Raniere beginning in 2005; communications from Mr. Raniere referencing the photos; testimony from the victim's sister that she was aware of the relationship prior to Fall 2006; a folder containing nude pictures of the other women with whom Mr. Raniere had a sexual relationship and in which the pictures of the victim were found; testimony that Mr. Raniere sought to take similar pictures of other women; the victim's medical records, which included statements indicating she was in a sexual relationship with the same partner since she was underage; and testimony from the victim's sister identifying the victim as the person in a sanitized version of the photos. (*Id.* at 19-20 (citing trial exhibits and the trial transcript).)

Mr. Raniere's counsel cross-examined FBI Senior Forensic Examiner Booth extensively about the photographic evidence, the Western Digital hard drive, the camera card ("CF card"), the related metadata, and the chain of custody of the digital evidence. (June 13, 2019 Trial Tr. (Dkt. 979) at 4898:1-4947:4, 4962:8-4975:4, 4986:19-4988:21.) During his testimony, Booth acknowledged before the jury that the metadata was not reliable as to when the photos were taken (*id.* at 4940:13-15), that metadata could be changed or altered (*id.* at 4987:21-4988:12), and that he was unaware of who accessed the camera card on September 19, 2018 while it was in the FBI's possession. (*Id.* at 4973:19-25.)

The victim depicted in these photographs did not testify at trial, but she submitted a sworn declaration in response to this motion. (*See* Camila Decl. (Dkt. 1213-1).) In the declaration, the victim affirms that she reviewed each of the photographs at issue and that she is certain both that she is the subject of each photo and that she was 15 years old when the photos were taken. (*Id.* ¶¶ 5, 8.) She also affirms that Mr. Raniere began sexually abusing her in 2005, when she was 15 years old. (Camila Decl. ¶ 5; *see also* Camila Impact Statement (Dkt. 965-1) at 1.)

Following his conviction in June 2019, Mr. Raniere has filed multiple motions for a new trial pursuant to Fed. R. Grim. P. 33. (*See* Mot.; First Rule 33 M&O; Second Rule 33 M&O.) His first two were denied in July and October 2020. (First Rule 33

M&O; Second Rule 33 M&O.) The present motion was filed in May 2022. (*See* Mot.) The Government responded to this motion in July 2023 and Mr. Raniere filed his Reply on April 17, 2024.[4]

II. LEGAL STANDARD

Rule 33 endows district courts with the authority to order a new trial "if the interest of justice so requires." Fed. R. Crim. Pro. 33. District court have "broad discretion to grant a new trial," but should grant such motions "sparingly and in the most extraordinary circumstances, and only in order to avert a perceived miscarriage of justice." *United States v. Gramins,* 939 F.3d 429, 444 (2d Cir. 2019).[5] In considering Rule 33 motions, the focus is "whether letting a guilty verdict stand would be a *manifest injustice." Id.*

Relief under Rule 33 based on newly discovered evidence may be granted only upon a showing that "(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

[4] The delay in briefing of the present motion largely resulted from stays while the court considered separate motions filed by the Defendant or his appeals of separate motions. The court also granted numerous requests by the defense for extension of time to submit Mr. Raniere's Reply. (*See* Mem. and Order dated March 6, 2024 (Dkt. 1238) at 6-7 (reviewing the delay in briefing the present motion).)

[5] When quoting case law, except as otherwise noted, all citations and internal quotation marks are omitted, and all alterations are adopted.

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." *United States v. Forbes,* 790 F.3d 403, 406-07 (2d Cir. 2015). The Second Circuit has "long held that to constitute newly discovered evidence, not only must the defendant show that the evidence was discovered after trial, but he must also demonstrate that the evidence could not with due diligence have been discovered before or during trial." *Id.* at 408-09. The court in conducting this analysis considers the balance between "protecting the finality of judgments and the interests of justice [ ] inherent in the Rule 33 analysis." *Id.* at 408.

III. DISCUSSION

Mr. Raniere fails to demonstrate that justice requires a new trial, and the court therefore denies his motion.

The basis for the Defendant's motion are allegations that the Government manipulated and fabricated "all the key evidence" used to prove the child pornography and child exploitation predicate acts. (Mot. at 3.) In his Reply, Mr. Raniere clarifies that he does not allege that the photos themselves were falsified, but instead only that the "files, timestamps, folders and metadata" associated with the pictures were fabricated. (Reply (Dkt. 1253) at 16-17.) This purported clarification is surprising because in the very first sentence of Mr. Raniere's memorandum in support of the present motion filed in May 2022, he states that "the government manufactured child pornography and planted it on a computer hard drive to tie it to him." (Mot. at 3.) And subsequent filings did not contradict this statement but instead reinforced it through broad statements such as: "the child pornography evidence was fabricated." (First Post-Conviction Mot. to Compel (Dkt. 1192) at 3-4.) His Reply therefore directly contradicts his prior representations about the photographic evidence at issue. Nevertheless, in light of his Reply's purported clarification, the court considers the digital evidence's "files, timestamps, folders, and metadata." (Reply at 17.)

The Defendant argues that the FBI falsified metadata on the digital camera card ("CF card") and Western Digital hard drive to fit the Government's narrative that the photographs were taken in 2005 when the victim was fifteen years old. (*See, e.g.,* Mot. at 12-13.) He further alleges that he did not have time to thoroughly examine the metadata evidence (Reply at 2), and that the Government covered up this manipulation by soliciting false testimony during trial. (Mot. at 19-20.)

These allegations of data manipulation do not constitute newly discovered evidence under Rule 33, which requires the defendant to show that "the evidence was discovered after trial . . .[and] that the evidence could not with due diligence have been discovered before or during trial." *Forbes,* 790 F.3d at 409. They are also contrary to the record.

In the leadup to trial and during trial, Mr. Raniere was made aware of the metadata evidence soon after the Government discovered the photographs on the Western Digital hard drive. (*See* Letter from Government dated February 21, 2019.) His defense then had an opportunity to test and challenge this evidence prior to trial, including by hiring a forensic expert who visited the FBI to review this evidence. His defense then had an opportunity to cross-examine the FBI Agent called by the Government to discuss the photos and their metadata. In this cross-examination, the Agent testified to the metadata and its ability to be altered. (June 13, 2019 Trial Tr. at 4987:21-4988:20.) The jury considered this evidence alongside other evidence presented at trial and convicted Mr. Raniere of these charges.

Raniere argues that even if his defense team was aware of the evidence, a new trial is warranted because there was not sufficient time for his experts to analyze the metadata. (Reply at 10.) But this post-trial argument is in conflict with Mr. Raniere's trial counsel clearly stating multiple times after the photographs were discovered and the new charges were added to his Second Superseding Indictment that he was ready for trial. (*Cf.* April 4, 2019 Status Conference Tr. at 15:1-5; Defense Mem. dated March 22, 2019 at 2-4.) The Government offered to adjourn the trial date on consent specifically to allow the defense to have more time to examine the evidence connected to his child pornography and exploitation charges, which he rejected. (*See* Gov. Mem. of Law dated March 29, 2019 at 6-10; April 4, 2019 Status Conference Tr. at 15:1-5.)

Mr. Raniere ultimately seeks to have a new trial to 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. The jury found him guilty of the predicate acts at issue so he now attempts to manufacture "new evidence" he argues would lead to his acquittal to receive a second bite at the apple. These are not extraordinary circumstances where a new trial is necessary to prevent a manifest injustice.

Mr. Raniere separately argues that it was "impossible" to discover certain evidence relating to the metadata, specifically, the camera card and details of the chain of custody of the metadata. (Reply at 9-10.) In doing so, he seeks to distinguish the metadata evidence his defense indisputably had the opportunity to review and challenge—*i.e.*, the evidence found on the Western Digital hard drive—from other evidence connected to the metadata. (*Id.*) His argument is that if given the opportunity to examine this other source of the metadata, it would reveal the "tampering" on which his motion relies. (*Id.*) This argument fails. Mr. Raniere 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—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)—to argue that the evidence now in focus is both "newly discovered" and the "key evidence" that would prove his innocence. But the Defendant provides no persuasive argument that he could not have discovered this evidence with diligence, *see Forbes,* 790 F.3d at 409, or that the evidence now in focus demonstrates manipulation or falsification of metadata that would support an acquittal. Ultimately, as with his prior unsuccessful motion for a new trial, Mr. Raniere "does not point to a single case in which a court has recognized the kind of evidence he cites as the basis for his motion as 'newly discovered evidence' under Rule 33." (Second Rule 33 M&O at 7.)

The motion also fails because Mr. Raniere cannot demonstrate that the purported newly discovered evidence would result in acquittal or otherwise demonstrate that a new trial is necessary to prevent a manifest injustice. *Forbes,* 790 F.3d at 411. Mr. Raniere's primary support for his argument that the metadata was falsified are proffered expert reports submitted alongside his motion. (Reply at 3-4; *see also* Kiper Report (Dkt. 1169-1) at ECF 195-264); *see also* Dkt. 1178-2.) In response to these reports, the Government submitted a Declaration by David Loveall II, a Senior Computer Scientist with the FBI. (Loveall Decl. (Dkt. 1213-3).) This court previously considered the Defendant's and Government's reports when denying Mr. Raniere's motions to compel evidence. (*See* Mem. and Order dated Nov. 6, 2023 (Dkt. 1224) at 3-4, 9-

10; Mem. and Order dated March 6, 2024 (Dkt. 1238) at 3-4.) In doing so, the court found that the Loveall Declaration "offers a far more plausible and convincing explanation of any anomalies in the photos' metadata" than the reports submitted by the Defendant, especially when considered alongside the "ample evidence presented at trial," *see supra,* and the victim's affidavit affirming that she was fifteen in the photographs. (Mem. and Order dated Nov. 6, 2023 at 9-10; Mem. and Order dated March 6, 2024 at 3-4.).) Mr. Raniere disagrees with the court's prior findings in his Reply. (Reply at 18-21.) But he provides no reason for the court to reconsider its prior determination that the evidence presented at trial, the Loveall report, and the affidavit submitted by the victim verifying her identity and age in the photos provide a far more plausible explanation for the discrepancy in the metadata than the Defendant. The court is confident that the evidence demonstrates Mr. Raniere's guilt as to these charges.

In sum, the court finds that the evidence is not newly discovered under Rule 33 and that, even if it was considered newly discovered, it would not "likely result in an acquittal." *Forbes,* 790 F.3d at 407. Justice does not require a new trial and the court denies Mr. Raniere's Rule 33 motion.[6] *See*

[6] The court further finds that an evidentiary hearing is not necessary to decide the present motion. *See United States v. Ghavami*, 23 F. Supp. 3d 148, 157 (S.D.N.Y. 2014) ("Whether to hold an evidentiary hearing before deciding a motion for a new trial rests within the district court's discre-

United Sates v. Snyder, 740 F. App'x 727, 728 (2d Cir. 2018) (summary order) ("A district court ordinarily should not grant a new trial unless it is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.").

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for a New Trial is DENIED and his request for an evidentiary hearing is DENIED as moot.

SO ORDERED.

Dated: Brooklyn, New York
April 29, 2024

s/ NICHOLAS G. GARAUFIS
NICHOLAS G. GARAUFIS
United States District Judge

tion."); *see also United States v. Helmsley*, 985 F.2d 1202, 1209-10 (2d Cir. 1993) (district court may properly decline to hold hearing where "the moving papers themselves disclosed the inadequacies of the defendant['s] case.").

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

18-CR-204 (NGG)

UNITED STATES OF AMERICA,

–against–

KEITH RANIERE,

Defendant.

MEMORANDUM & ORDER

NICHOLAS G. GARAUFIS, United States District Judge.

Before the court are two motions filed by Defendant Keith Raniere: (1) his motion for reconsideration of the court's November 6, 2023, Memorandum and Order denying his motion to compel production of evidemce, (*see* Mot. for Recons. (Dkt. 1225)), and (2) a separate motion to compel production of evidence. (*See* Post-Conviction Mot. to Compel dated December 21, 2023 ("Second MTC") (Dkt. 1230).) For the reasons set forth below, both motions are DENIED.

The court further sets April 22, 2024, as the final deadline for Defendant's submission of his Reply in support of his pending Rule 33 motion.

I. BACKGROUND

The court assumes familiarity with the background of this case. In brief, Mr. Raniere was convicted on June 19, 2019 on seven counts, including racketeering, racketeering conspiracy, wire fraud conspiracy, forced labor conspiracy, sex trafficking conspiracy, and two counts of sex trafficking. (*See* Jury Verdict (Dkt. 735).) On October 27, 2020, he was then sentenced to 120 years in the custody of the Federal Bureau of Prisons. (*See* October 27, 2020 Minute Entry (Dkt. 968).) Since his conviction, Mr. Raniere has filed three motions for a new trial pursuant to Fed. R. Crim. P. 33. (*See, e.g.,* First Rule 33 Mot. (Dkt. 851); Second Rule 33 Mot. (Dkt. 956); Third Rule 33 Mot. (Das. 1169, 1176).) The court denied the first two of the these. (Mem. and Order dated July 17, 2020 (Dkt 902) (denying first Rule 33 motion); Mem. and Order dated October 23, 2020 (Dkt. 963) (denying second Rule 33 motion).) His third remains pending.

Since filing his latest Rule 33 motion, Mr. Raniere has made two requests to the court to compel the Government to produce information relating to his child exploitation and child pornography predicate acts. (*See* Post-Conviction Mot. to Compel dated April 14, 202:3 ("First MTC'); Second MTC.) On November 6, 2023, this court denied Mr. Raniere's first motion to compel the production of evidence. (*See* Mem. and Order dated November 6, 2023 (Dkt. 1224) (denying First MTC).) Mr. Raniere then moved for reconsideration of this denial two weeks later. (Mot. for Recons; *see also* Opp. to Mot. for

Recons. (Dkt. 1229).) He then filed his second, separate request for the court to compel production of evidence on December 21, 2023. (Second MTC; *see also* Opp. to Second MTC (Dkt. 1231); Reply (Dkt. 1233); Supp. Reply (Dkt. 1235).)

The court considers the motion for reconsideration and the latest motion to compel is turn.

II. MOTION FOR RECONSIDERATION

The standard courts apply when considering motions for reconsideration "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir. 1995). A motion for reconsideration "is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple[.]" *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012). Courts in this Circuit have thus generally held that parties seeking reconsideration may not advance new facts not previously presented to the Court, *See In re Facebook, Inc., IPO Secs. & Derivative Litig.*, 43 F. Supp. 3d 369, 373 (S.D.N.Y. 2014) (noting that a "party seeking reconsideration" may not "advance new facts, issues, or arguments not previously presented to the Court.") (quoting *Schonberger v. Serchuk*, 742 F. Supp. 108, 119 (S.D.N.Y. 1990)); *United States v.*

Morillo-Vidal, No. 10-CR-222 (RWS), 2011 WL 4072173, at *2 (S.D.N.Y. Sept. 13, 2011); *see also* Local Civil Rule 6.3 ("No affidavits shall be filed by any party unless directed by the Court.")

Mr. Raniere does not cite to any controlling law that the court overlooked. (*See generally* Mot. for Recons.) He asserts that the court overlooked two items that Defendant argues are "critical"—(1) that it was fundamentally unfair for the court to consider the Loveall Declaration and (2) that the Loveall Declaration was incorrect. (Mot. for Recons. at 1-2); *see also* Loveall Decl. (Dkt. 1213-3).) But neither of these arguments were overlooked or alter the conclusion reached by the court. The court, in denying the motion to compel evidence, found that Mr. Raniere did not have "(1) *Brady* rights to this information; (2) post-conviction due process rights to this information; and (3) the right to this information under principles of 'elemental fairness.' " (Mem. and Order dated November 6, 2023 at 5.) The Loveall Report was considered by the court in the latter "elemental fairness" analysis alongside the "ample evidence at trial" when finding that "even assuming" a standard premised on "elemental fairness" applied, Mr. Raniere could not meet this standard. (*Id.* at 8-10.) Specifically, the court found that:

> Mr. Loveall's report, refuting Kiper's key findings, offers a far more plausible and convincing explanation of any anomalies in the photos' metadata. Mr. Loveall's report is further supported by the ample evidence presented at trial

> and Camila's declaration that she is certain of the circumstances and timing of the photos. In sum, the evidence presented at trial, the Government's expert report, and Camila's declaration substantially outweigh the arguments raised in the Report and Mr. Raniere's motion. Mr. Raniere therefore does not raise a reasonable probability that testing the evidence would demonstrate he did not commit the offense. (*Id.* at 10.)

Mr. Raniere's arguments in the present motion questioning the veracity of the report are better characterized as attempts to relitigate old issues. *See Analytical Surveys, Inc.,* 684 F.3d at 52. The court therefore DENIES Defendant's motion for reconsideration.

III. SECOND POST-CONVICTION MOTION TO COMPEL

This Second MTC as much in common with the first. Mr. Raniere again requests information that he argues will demonstrate that the Government fabricated evidence relating to his conviction of racketeering acts of child pornography and child exploitation. (*See generally* Second MTC.)[1] And he

[1] In his First MTC, "Mr. Raniere request[ed] (1) two forensic copies of the camera card and corresponding FTK log files; (2) a file listing of the Hard drive that contained the images of child pornography (the 'Western Digital hard drive"); and (3) CART examination notes." (Memorandum and Order dated November 6, 2023 at 3 n.1.) In his Second MTC, Mr. Raniere requests: "all information pertaining to the

again argues that withholding this information violates his due process rights and principles of "elemental fairness." (*Id.* at 9-12).

The court thus incorporates its discussion concerning the relevant standards to Mr. Raniere's request to compel production of evidence from its November 6, 2023 order. (*See* Mem. & Order dated November 6, 2023 at 5-11.) In considering Defendant's present request under these standards, the court finds that Mr. Raniere does not have post-conviction due process right to the requested information and DENIES his motion.

Mr. Raniere again does not cite any law showing he has a right to the information requested. He primarily relies on *U.S. v. Abuhamra* 389 F.3d 109, 322. (2d Cir. 2004), for the contention that the Government must hand over this information. (*See* Second MTC at 9-10). In *Abuhamra,* the Second Circuit found that the respondent's right to a fair hearing was violated when the district court relied on information presented *ex parte* and *in camera* when denying respondent's bail application. *Id.* at 332-33. *Abuhamra* is thus inapplicable to this case where the court did not rely on arguments presented *ex parte* or *in camera* and does not concern access to information relevant to a party's bail

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unknown photograph technician who, prior to trial, and without authorization, changed and forensically manipulated an unpreserved, essential piece of evidence—the camera card." (Second MTC at 1; *see also* Second MTC, Ex. A (Requested Information Relating to the Photograph Technician) (Dkt. 1230-1).)

application. This motion instead concerns a request for information relevamt to Mr. Rainere's post-conviction motion for a new trial. His rights to this information therefore "must be analyzed in light of the fact that he 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 Mr. Raniere again does not demonstrate that "elemental fairness" should lead the court to compel the Government to grant him access to this information. Mr. Raniere's counsel had an opportunity to review and test the veracity of the photographic evidence prior to trial. (*See* Mem. and Order dated November 6, 2023 at 10-11.) The evidence requested would thus not support his Rule 33 motion because he cannot show that "'the evidence could not with due diligence have been discovered before or during trial.'" (*Id.* (quoting *United States v. Forbes,* 790 F.3d 403, 408-09 (2d Cir. 2015)). And Mr. Raniere is unable to show that the evidence raises a reasonable probability as to his innocence in light of the substantial evidence supporting the relevant charges in addition to the photos, including:

> messages from [the victim] where she referenced her sexual relationship with Raniere beginning in 2005 when she was fifteen years old; communications from Mr. Raniere referencing the photos; testimony from [the victim's] sister that she was aware of the relationship prior to Fall 2006; a folder con-

> taining nude pictures of the other women with whom Mr. Raniere had a sexual relationship and in which the pictures of [the victim] were found; testimony that Mr. Raniere sought to take similar pictures of other women; [the victim's] medical records, which included statements indicating she was in a sexual relationship with the same partner since she was underage; and testimony from [the victim's] sister identifying her as the person in a sanitized version of the photos. (Id. at 2.)

The Government provided additional information rebutting the claims of fabrication including: a declaration from the victim verifying the photos and the Loveall report discussed above. (*Id.* at 4, 9-10.) Considered together, Mr. Raniere is unable to demonstrate a reasonable probability that he did not commit the offense.

The court therefore finds that "Mr. Raniere provides no legal support for his request, and even if applying his desired standard of 'fundamental fairness,' Mr. Raniere fails to show that access to this evidence violates fundamental fairmess." (*Id.* at 11.)

IV. RULE 33 MOTION

Mr. Raniere was convicted in June 2019 and his third Rule 33 motion for a new trial has been outstanding since May 2022. (*See* Third Rule 33 Mot.) The court has not ruled on this motion primarily due to his filing of separate motions that the court considered and decided. (*See e.g.,* Not. of Mot. for Recusal (Dkt. 1170); First MTC; Second MTC.) The court also granted multiple requests to extend the deadline for Mr. Raniere to file a reply in support of his third Rule 33 motion due to logistical challenges presented by Mr. Raniere's incarceration. (*See* Def. Mots. for Extension of Time to Reply (Dkts. 1217, 1220, 1221, 1222, 1226).)

This court granted the most recent extension of time to file a reply on November 28, 2023, at which time the court noted that it would update the deadline for the Reply when ruling on Mr. Raniere's motion for reconsideration. (See Min. Entry dated November 28, 2023.) The court now sets the deadline for April 22, 2024, approximately 45 days following the release of this order. The court will not grant an additional request for an extension beyond this date. Mr. Raniere has had ample time to consider and respond to the Government's response to Mr. Raniere's third Rule 33 motion and now has an additional 45 days to do so. Any potential prejudice in not granting an additional extension is outweighed by an interest in the finality of his conviction.

V. CONCLUSION

For the reasons discussed herein, the court DENIES Mr. Raniere's motion for reconsideration and second post-conviction motion to compel. The court further sets a final deadline of April 22, 2024, for Mr. Raniere to file his reply in support of his pending third Rule 33 motion for a new trial.

So Ordered.

Dated: Brooklyn, New York
March 6, 2024

s/ Nicholas G. Garaufis
Nicholas G. Garaufis
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

18-CR-204 (NGG) (VMS)

UNITED STATES,

–against–

KEITH RANIERE, et al.,
Defendant.

MEMORANDUM & ORDER

NICHOLAS G. GARAUFIS, United States District Judge.

Pending before the court is a Motion for Recusal and Judicial Disqualification of this court, filed by Defendant Raniere on May 6, 2022. (Mot. for Recusal (Dkts. 1170-71).) Defendant Raniere seeks recusal pursuant to both 28 U.S.C. § 455(a) and 28 U.S.C. § 455 (b) (1). For the reasons set forth below, this motion for recusal is DENIED.

I. BACKGROUND

A. Factual History

The court assumes familiarity with the underlying facts of the case, *United States v. Raniere,* et al., and summarizes briefly below only those facts relevant to the instant motion.

In May and June 2019, this court held a several week jury trial regarding the criminal charges brought against Defendant Keith Raniere. That trial included testimony from a plethora of witnesses. (*See generally* Dkts. 634, 636, 638, 654, 658, 660, 661, 662, 670, 672, 674, 676, 678, 680, 687, 695, 697, 699, 704, 706, 711, 713, 723.) One such witness, Lauren Salzman, played an important role at trial as a cooperating witness. (*See generally* Dkts. 670, 672.) An exchange between the court and an attorney for the defense that took place during the cross-examination of Ms. Salzman, on the 10th out of 23 days of testimony, is among the incidents in dispute on this motion. (Mem. In Support (the "Mot.") (Dkt. 1171) at 2-7); (May 22, 2019 Trial Tr. (Dkt. 958) at 2265-70.) After the trial was completed, the court undertook typical post-trial duties such as presiding over restitution hearings and sentencing the various defendants who had pleaded guilty or been convicted at trial. Two such hearings are at issue in this motion.. First, on July 20, 2021, a hearing was held for the purposes of determining the amount of restitution owed by Defendant Raniere. (Mot. at 7-16; Restitution Hearing Tr. (Dkt._1193).) Second, on September 30, 2020, a hearing was held for the purposes of sentencing Defendant Clare Bronfman. (Mot. at 17-18; Bronfman Sent. Tr. (Dkt. 964).)

B. Procedural History

Defendant Raniere filed the instant Recusal Motion on May 6, 2022. (Mot.) On May 9, 2022, the Court acknowledged receipt of the motion and stated that it would defer consideration of the motion until the Second Circuit resolved the appeal of the judgment of conviction, which was at the time *sub judice* after oral argument. (May 9, 2022 Text Order.) On January 3, 2023, two mandates issued from the Second Circuit, affirming the district court's judgments in full. (Dkts. 1183-84.)[1] Shortly thereafter, Defendant filed with the Second Circuit a petition for a writ of mandamus, seeking relief consistent with this Motion. (*See* Dkt. 1185.) On March 20, 2023, a mandate issued from the Second Circuit, denying that petition on the basis that "Petitioner has not demonstrated that he lacks an adequate, alternative means of obtaining relief, that his right to the writ is clear and indisputable, and that granting the writ is appropriate under the circumstances." (*Id.*) The court now considers the Motion.

II. LEGAL STANDARD

Defendant Raniere moves for recusal under both 28 U.S.C. § 455(a) and 28 U.S.C. § 455(b) (1). These

[1] On April 17, 2023, the Supreme Court denied Defendant Raniere's petition for a writ of certiorari. *See* Order List, Supreme Court of the United States at 3 (Apr. 17, 2023), https://www.supremecourt.gov/orders/courtorders/041723zor_4gdj.pdf.

two statutory provisions are governed by similar but distinct legal standards.

1. 28 U.S.C. § 455(a)

In evaluating the appropriateness of recusal under § 455(a), courts consider the statutory requirement that a Judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).[2] This provision is to "be evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance." *Liteky v. United States,* 510 U.S. 540, 548 (1994)[3]; *see also Amico,* 486 F.3d at 775 ("[T]his test deals exclusively with appearances. Its purpose is the protection of the public's confidence in the impartiality of the judiciary."). The operative question is whether "an objective, disinterested observer fully informed of the under-

[2] *See, e.g., ISC Holding AG v. Nobel Biocare Fin. AG,* 688 F.3d 98, 107 (2d Cir. 2012) ("Recusal here is governed by 28 U.S.C. § 455(a), which states that '[a]ny . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.") (alterations in original); *see also SEC v. Razmilovic,* 728 F.3d 71 (2d Cir. 2013), *as amended* 738 F.3d 14, 29 (2d Cir. 2013); *In re Int'l Bus. Machs. Corp.,* 45 F.3d 641, 643 (2d Cir. 1995); *United States v. Amico,* 486 F.3d 764, 775 (2d Cir. 2007); *United States v. Giordano,* 442 F.3d 30, 48 (2d Cir, 2006); *United States v. Basciano,* No. 03-CR-929 (NGG), 2008 WL 794945, at *10 (E.D.N.Y. Mar. 24, 2008).

[3] When quoting cases, and unless otherwise noted, all citations and quotation marks are omitted, and all alterations are adopted.

lying facts, [would] entertain significant doubt that justice would be done absent recusal." *United States v. Carlton,* 534 F.3d 97, 100 (2d Cir. 2008) (alterations in original); *ISC Holding,* 688 F.3d at 107; *see also In re Drexel Burnham Lambert Inc.,* 861 F.2d 1307, 1313 (2d Cir. 1988); *Amico,* 486 F.3d at 775.

The *Liteky* court explained that the goal of a recusal analysis is to identify not just whether the judge in question holds a "favorable or unfavorable disposition or opinion," but whether such views are "wrongful or inappropriate." *Liteky,* 510 U.S. at 550. Moreover, the level of bias necessary to warrant recusal under §455(a) is higher if it is derived from a judicial—rather than extrajudicial—source. *Liteky,* 510 U.S. at 555 (stating that § 455(a) analyses rely on a highly "significant (and often determinative) extrajudicial source factor")

Alleged bias may not warrant recusal where "upon completion of the evidence, [a Judge is] exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person" throughout the trial. *Liteky,* 510 U.S. at 550-51. This would likely not constitute recusable bias because the judge's "knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings." *Id.* To constitute a basis for recusal due to bias stemming from judicial sources, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current [or] prior proceedings" would have to demonstrate "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 555; *see also ISC Holding,* 688 F.3d at 107; *Razmilovic,* 738 F.3d at 29; *Basciano,* 2008 WL 794945, at *10. Even "a judge's comments during a proceeding that are 'critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.'" *Carlton,* 534 F.3d at 100 (citing *Liteky,* 510 U.S. at 555); *see also Razmilovic,* 738 F.3d at 29.

By contrast, the "requirement of deep-seated antagonism does not apply" where "opinions are . . . 'derive [d] from a source outside judicial proceedings.'" *ISC Holding,* 688 F.3d at 107 (quoting *Liteky,* 510 U.S. at 551, 554) (differentiating bias derived from judicial versus extrajudicial sources).

2. 28 U.S.C. § 455(b) (1)

§ 455(b) (1) requires a judge to recuse himself "where he has a personal bias or prejudice concerning a party[.]" 28 U.S.C. § 455(b) (1). *See, e.g., United States v. Osinowo,* No. 95-CR-1334, 1996 WL 20514, at *1 (2d Cir. 1996). Courts have emphasized that while motions brought under § 455(a) are evaluated pursuant to an objective standard, § 455(b) (1) "mandates recusal only where the court harbors *actual* prejudice or bias against a particular defendant." *id.* (citing *Liteky,* 510 U.S. at 553) (emphasis added); *see also Pri-har v. United States,* 83 F. Supp. 2d 393, 397 (S.D.N.Y. 2000). As in a § 455(a) analysis, § 455 (b) (1) typically requires an "extrajudicial" source factor. *Liteky,* 510 U.S. at 553 ("§ 455(b) (1) . . . contains the 'extrajudicial source' limitation[.]"); *see also Curley v. St. John's Univ.,* 7 F. Supp. 2d 359, 362 (S.D.N.Y. 1998); *Pri-har,* 83 F.Supp. at 397 (applying the logic of *Liteky* to § 455(b) (1) claims).

3. Recusal for the Purposes of Ruling on a Rule 33 Motion

Although much of the controlling case law cited was developed in the context of a party seeking a judge's recusal prior to the commencement of litigation or trial, the standards for recusal under § 455(a) and/or (b) (1) remain the same where the party moving for recusal has also moved (or is simultaneously moving) for a new trial under Fed. R. Crim. P. 33. *See United States v. Scaretta,* No. 97-CR-1089, 1997 WL 829256, at *4 (2d Cir. 1997); *Osinowo,* 1996 WL 20514, at *1; *United States v. Robinson,* No. 16-CR-545 (SJF) (AYS), 2021 WL 62076, at *25 (E.D.N.Y. Jan. 6, 2021); *Pri-har,* 83 F. Supp. at 394; *United States v. Agunbiade,* No. 90-CR-610(S)-02 (JRB), 1995 WL 351058, at 1 (E.D.N.Y. May 10, 1995).[4]

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[4] In addition to filing a motion for a new trial pursuant to Rule 33, Defendant Raniere took the unusual step of filing a petition for a writ of mandamus at the Court of Appeals prior to decision on the Rule 33 motion. While such a step is typically not taken until *after* the district court decides the underlying recusal motion, the court is aware of two other cases in which parties attempted to do so prior to a district court ruling on the recusal. *Qualls v. United States,* No. 07-CR-14 (DLI), 2018 WL 1513625, at *1 (E.D.N.Y. Mar. 27, 2018); *Buhannic v. TradingScreen Inc.,* No. 19-CIV-10650

III. LEGAL ANALYSIS

The court will now assess the Defendant's various arguments for recusal in turn. None of the cited-to examples of supposed bias reach the standards set forth by 28 U.S.C. §§ 455(a) or 455(b) (1).

A. Trial conduct

First, the Defendant argues that "the Court's comments and personal opinions expressed about Mr. Raniere, his Defense team, and his co-defendants, displayed a deep-seated, unequivocal hostility and personal bias against Mr. Raniere and his Defense team, making disqualification for all future proceedings, in this case, warranted and, indeed, mandatory." (Mot. at 21.)

With regard to the allegedly biased conduct during Ms. Salzman's testimony at trial, the Defendant exhibits a foundational misunderstanding of what constitutes personal, extra-judicial bias, rather than honestly held viewpoints gained throughout presiding over a trial. Here, there is no indication whatsoever that this court harbored any animosity or "personal bias" toward Defendant Raniere prior to the trial, during which many unsavory facts

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(ER), 2020 WL 4058949, at *4 (S.D.N.Y. July 20, 2020). In both instances, the appellate court denied the petition for a writ of mandamus, and the district court proceeded to evaluate the recusal motions under the same legal standards it would have used had no writ of mandamus been sought. *Qualls,* 2018 WL 1513625, at *1; *Buhannic,* 2020 WL 4058949, at *4.

about Mr. Raniere were proven beyond a reasonable doubt.

The Defendant also fails to recognize the wide discretion granted to judges in the administration of a trial. "A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration remain immune." *Liteky,* 510 U.S. at 556; *see also Farr v. Greiner,* No. 01-CV-6921 (NG), 2007 WL 1094160, at *15 (E.D.N.Y. Apr. 10, 2007) (quoting *Gilliam v. Foster,* 75 F.3d 881, 900 (4th Cir.1996)) ("Generally, a trial judge possesses wide latitude to maintain control over the courtroom to ensure the integrity of the proceedings."). In particular, "[t]rial judges retain wide latitude to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of issues, the witness's safety, or interrogation that is repetitive or only marginally relevant." *Cordero v. Rivera,* 677 F. Supp. 2d 684, 699 (S.D.N.Y. 2009) (quoting *Delaware v. Fensterer,* 474 U.S. 15, 20 (1985)). Here, the court's choice to curtail cross-examination of a witness to avoid needless harassment and attend to the witness's wellbeing was well within the bounds of a trial judge's discretion. The court's behavior in furtherance of this legitimate goal, therefore, did not meet the extremely high standard for bias stemming from a judicial source—that of evincing "deep-seated . . . antagonism."[5] *Liteky,* 510 U.S. at

[5] Moreover, the comparison to a World War-I era case in which a federal judge exhibited blatant xenophobia is an analogy that is, at best, inapt.

555. Thus, the court is not required to recuse itself under 455 (b) (1)'s actual bias rule.

The standard under 455 (a) is one of whether "an objective, disinterested observer fully informed of the underlying facts, [would] entertain significant doubt that justice would be done absent recusal." *Carlton,* 534 F.3d at 100. Even if the court's comments at time evinced not just frustration and impatience, but some sort of distaste for the defendant, no reasonable observer would, after witnessing the trial over which the court was then presiding, earnestly believe that the distaste was the result of some sort of extrajudicial bias or deep-seated antagonism. This threshold has therefore also not been met.[6]

B. Restitution Hearing Conduct

Second, the Defendant asserts that "Judge Garaufis displayed an unacceptable bias toward Mr. Raniere's Defense team by letting his frustration with the Defense's request for a delay" of the Restitution Hearing interfere with his duty to preside over the trial impartially. (Mot. at 24.) Here too, there is no evidence that the court harbored any bias with an extra-judicial source against Mr. Raniere. The restitution hearing in question hap-

[6] The Defendant also raises the question of whether less extreme measures would have been possible. It is altogether possible that less extreme measures were available. However, that is not the standard to which this court must be held in considering a recusal motion.

pened *after* the trial took place. Moreover, any conduct evincing bias was allegedly aimed toward an attorney hired by Defendant Raniere after the conclusion of trial, and there is no evidence that any disagreement between the court and that counsel reflected a broader issue between the court and the defendant. Thus, the court exhibited no bias stemming from *either* an extrajudicial or judicial source toward the Defendant at this time, let alone the "deep seated . . . antagonism" required to mandate recusal under 28 U.S.C. 455(a). *Liteky,* 510 U.S. at 555. Finally, the fact that the allegedly biased conduct was directed only toward one of a series of lawyers representing the defendant, and never toward the defendant himself, weighs strongly against any finding that the district court "harbors actual prejudice or bias against a defendant," *Osinowo,* 100 F.3d at 2. This incident therefore also does not require recusal under 28 U.S.C. 455(b) (1).

C. Sentencing Hearing Conduct

Third and finally, the Defendant argues that this court's choice to "tripl[e] the sentence of Ms. Bronfman, a first-time offender, because she refused to 'renounce' Mr. Raniere and the NXIVM organization," presents further evidence of this court's bias toward Defendant Raniere. (Mot. at 26.)

In determining the appropriate sentence for Defendant Bronfman, the court considered the required sentencing factors. 18 U.S.C. § 3553(a). These factors include the need for a sentence that reflects the seriousness of the offense, the need for a sentence that promotes respect for the law, and the goal of providing a just punishment. (*See* Bronfman Sent. Tr. at ECF 121); *see also* 18 U.S.C. § 3553(a) (2) (A). The court made no findings as to whether Defendant Bronfman had any real time knowledge of the extent of Defendant Raniere's criminal behavior. As part of its analysis of the sentencing factors, however, the court did take into consideration Defendant Bronfman's continued support for Defendant Raniere *after* learning the full extent of his criminal conduct. (*See* Bronfman Sent. Tr. at ECF 123 ("It does, however, concern me that she continues to stand by Raniere and believe in his work, even as he stands convicted of heinous conduct."); *see also* Mandate of USCA as to 20-5320-cr (Dkt. 118) ("Summary Order") at ECF 38 ("a full reading of the District Court's lengthy statement (which covers thirty pages of the transcript) shows that it was primarily concerned with Bronfman's actions *after* she found out about DOS in June 2017, including gher reinvigorated support of Raniere").) In doing so, the court displayed fidelity to its obligation to carefully weigh the sentencing factors and other relevant information, and therefore displayed no bias—extra-judicial or otherwise.

The court carefully articulated the ways in which Defendant Bronfman's actions in devotion to Defendant Raniere without regard to the seriousness of his crimes had reflected a sincere lack of respect of the law. The court also endeavored to consider how the sentence compared to sentences of other similarly situated defendants. But, as the court took great pains to describe, the circumstances of Ms. Bronfman's offenses, and in particular the relationship between her and Mr. Raniere, provided important context when considering the seriousness of her offenses, and set her conduct far apart from other otherwise similarly situated defendants. (Bronfman Sent. Tr. at ECF 124 ("[T] he context of Ms. Bronfman's criminal conduct places her in [an] all together different category from other defendants convicted of the same offenses; and, therefore, her circumstances defy easy comparison.").) Indeed, the court made clear that "the offenses of conviction . . . were more serious here than those crimes might ordinarily be under other circumstances." (Bronfman Sent. Tr. at ECF 121.) The Second Circuit, affirming this court in full, agreed wholeheartedly with this assessment, pointing out that her "conduct—before and after her indictment—readily distinguishe[d] her" from her co-defendants, and reiterating this court's assertion that the context for her criminal conduct set her far apart from other defendants convicted of the same offenses. (Summary Order at ECF 38.) In sentencing Ms. Bronfman accordingly, the court appropriately exercised its wide discretion in matters of sentencing. (*See id.*) ("[T]he District Court acted well within its discretion in arriving at its conclusion.")

To have considered Ms. Bronfman's relationship with Mr. Raniere in the process of doing so does not indicate impermissible bias—either of the objective sort required for recusal under 455 (a) or of the actual sort required for recusal under 455 (b) (1). 28 U.S.C. § 455 (a)-(b) (1). Indeed, "[t]he Second Circuit has repeatedly held that a sentencing court is entitled to rely on information gleaned from a trial in which the person to be sentenced was neither a defendant no represented by counsel." (Bronfman Sent. Tr. at ECF 100.) To the extent the court properly gleaned such information about the relationship from the lengthy trial and the surrounding proceedings, and weighed that evidence at sentencing, it was proper to do so.

IV. CONCLUSION

For the foregoing reasons, Defendant Ranier's motion seeking for this court to recuse iteself prior to consideration to Rule 33 motions in the action is DENIED.

SO ORDERED.

Dated: Brooklyn, New York
April 26, 2023

s/ NICHOLAS G. GARAUFIS
NICHOLAS G. GARAUFIS
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Criminal Docket No. 18-204 (NGG)

UNITED STATES OF AMERICA

– against –

KEITH RANIERE,

Defendant.

DECLARATION

EASTERN DISTRICT OF NEW YORK, SS:

David Loveall II, Senior Computer Scientist with the Federal Bureau of Investigation ("FBI"), hereby declares under penalty of perjury, pursuant to 28 U.S.C. § 1746:

1. I am a Senior Computer Scientist assigned to the Operational Technology Division (OTD) of the FBI in Quantico, Virginia, where I have worked since May 2010. I was previously employed as a forensic examiner for the FBI in Kansas City. As a Senior Computer Scientist of OTD, I advise FBI personnel on issues related to digital forensics and computer science. I research emerging technologies that may impact FBI investigations; transition technology solutions from academia, other government agencies, and the private sector; and develop

custom software solutions to address FBI investigative challenges.

2. I was not involved in the investigation or prosecution of *United States v. Keith Raniere*, 18-CR-204 (NGG).

3. At the request of the United States Attorney's Office in the Eastern District of New York, I have reviewed a document titled "Summary of Technical Findings" authored by J. Richard Kiper and dated April 25, 2022 (the "Kiper Report"). I was also provided with access to certain evidence, including a Western Digital Hard Drive (1B16), and a Canon EOS 20D camera (1B15) and CompactFlash (CF) camera card (1B15a).

4. As set forth below, many of the conclusions set forth in the Kiper Report are misleading or erroneous. The Kiper Report repeatedly ignores plausible explanations for observed phenomena in favor of allegations of tampering.

First Finding

5. Kiper's analysis is faulty with respect to the first finding that "some digital photo files found on the CF card" had properties that "prov[e] manual alteration of the CF Card contents." The Kiper Report states that some of these digital photographs "had the same filenames and date/time stamps as their supposed backups on the WD HDD, yet they depicted two different people" and that they "contained thumbnail pictures from another existing set of photos." Kiper's conclusion that this

proves that the card's contents must have been intentionally altered is not correct. File Allocation Table ("FAT") file systems routinely produce results like those observed here, under conditions in which files are regularly created and deleted over time, and digital forensic tools are then used to recover the deleted files. This is particularly true if the capacity of the CF card is not sufficient to hold all the photographs taken by the camera, which necessitates the need to delete older photographs to store new ones.

6. Two points will assist in understanding why this is so. First, metadata (such as filenames and dates) are typically stored in a separate location on media from the actual file content. The location where the filename is stored "points" to the location where the file content is stored, and that is how the file system is able to associate the metadata with the content. Second, when files are deleted, they do not actually disappear from the underlying media, *e.g.*, the CF card. The file system simply makes available for reuse the space that those files previously occupied. Unless and until that space is overwritten, those files remain available for recovery. But when a large file is deleted and a smaller file is saved in its place, it is possible that some of the larger file can be recovered but not all.

7. The phenomenon observed by Kiper reflects the interaction of these two aspects of the file system, that is, (1) the separation of metadata and content and (2) the partial recovery of partially-overwritten files. These two aspects can result in

metadata from one file being misattributed to another. For an illustration of this effect, consider a file system that contains a single file in which the metadata (such as the file name and dates) is in a separate location from the file content:

If a second file is created, it will be given a previously-empty storage location for the file metadata:

If the first file is then deleted, the deleted file metadata and content (marked in red) are available for use:

If a third file is then created, with a content size that requires five "blocks," the third file will overwrite the content of File 1. In this example, File 1a is then permanently irrevocable and any digital forensic tool would recognize that File 1a is partially overwritten and not recoverable in its original state:

But if File 3 is then deleted, any attempt to recover File 1 or File 3 using an automated digital forensic tool may result in a misattribution of metadata to File 1 in an effort to allow the user of the tool the greatest opportunity to recover usable data:

In this case, File 3 would be recovered successfully but File 1 would contain a portion of File 3.

8. Therefore, Kiper's claim that the observed phenomenon "prov[es] manual alteration" is simply incorrect.

Second Finding

9. With respect to the second finding, Kiper claims that "additional files appeared on the FBI's forensic report of the CF Card between 4/11/19 and 6/11/19, in an apparent attempt to create a stronger relationship" between the camera card and the hard drive. This finding is misleading as stated, because the settings used to process and generate the two forensic reports generated on those dates were different. Although both reports used the same processing tool—AccessData Forensic Toolkit 6.3.1.26—there are numerous configurations and setting options for this tool, which can result in the generation of different reports. The fact that additional files appeared in one report is a result of the use of different settings. I have

examined the disk images created of 1B15 and 1B15a and determined that they are identical.

Third Finding

10. With respect to the third finding, the camera card was accessed on September 19, 2018. This is consistent with accessing the contents of the card without a write-blocker.

Fourth Finding

11. With respect to the fourth finding, Kiper claims that "dates of photos on the hard drive were altered through manual intervention." In fact, the differences Kiper identifies is likely attributable to a combination of factors, including the daylight savings time (DST) shift, contemporaneous manual or automatic changes to device clocks to account for daylight savings time ending, and a 2006 Microsoft Windows update that introduced dynamic DST time zones.

12. In 2006, Microsoft Windows released an update which configured Windows to use a "dynamic DST" exception for 2006 and 2007. Dynamic DST provides support for time zones whose boundaries for DST change from year to year. Dynamic time zones enable easier updating of computers, especially for locates where the yearly DST boundaries are known in advance.

13. Where, as here, however, a computer has a system clock set to a pre-2006 date and applies the DST update, that computer will incorrectly apply

the 2007 DST changes. The Exif data associated with that data, however, is unmodified. The dates of interest identified in the Kiper Report are between 2005-10-29 05:47:24 AM and 2005-10-30 04:34:20 AM. The Kiper Report observes that the "Modified" dates of photographs were "adjusted to be two hours behind" and then, starting with IMG_0138, they were "adjusted to be exactly the same time as the EXIF dates." Kiper Report at 7.

14. Kiper's conclusion that "[n]othing outside of human intervention could account for these changes," is therefore incorrect.

Fifth Finding

15. With respect to Kiper's fifth finding, Kiper argues that the fact that the modification date of a single certain file, IMG_0175, was not updated must be attributable to manual alteration. Kiper is incorrect, however, as use of the Adobe Photoshop Elements software does not always result in an updated modification date. For instance, if a user of Adobe Photoshop Elements clicks on a file and selects "Change to a specified date and time" for a file and selects "OK" without specifying a new date and time, the file may add its additional metadata (reflecting that the software was used to "modify" the file), without actually updating the file's filesystem modify date and time.

Sixth Finding

16. With respect to Kiper's sixth finding, it is of course possible to rename files and folders and any computer user may do so.

Seventh Finding

17. Kiper's seventh finding claims notes that certain files on the Western Digital hard drive have a "created" date of 2003 but have a "last modified" date of October 2005. Kiper acknowledges that when a computer is left out without a battery, the system clock will reset to a default date, such as 01/01/2003. In a footnote, Kiper claims that "although the 'factory default' date could theoretically be any date," he has "never seen one that is NOT on the first date of the month" of the year of manufacture. I procured a Dell Dimension 8300-20090330, the same model identified in the folder name, to test Kiper's claim. As to this model, there were 8 different Basic Input / Output Systems ("BIOS") software versions released, which were numbered sequentially from A00 to A07. The oldest was released on 2003-05-06 and the newest was released on 2004-10-01. The third release, labeled A02, was released on 2003-08-07. I installed the third release on the Dell Dimension 8300, removed the computer's internal battery, and disconnected it from its power outlet. After reconnecting the power and starting the computer, the computer reverted to its default date and time of 2003-07-21 00:00:00.

18. Kiper's report states that with a "bad CMOS battery," a computer "will continue to reset the system clock to [a default date] every time the computer powers up." This is misleading, particularly in the case of a Dell Dimension 8300. As long as the computer is plugged into electronical power, the date and time will continue to progress, and shutting down or rebooting the operating system will not reset the date. Again, I tested this using a Dell Dimension 8300. When I removed the internal battery, the clock continued to progress forward as long as the computer was connected to a power outlet, even while the computer was turned off. Disconnecting the computer from electricity reset the date to the default of 2003-07-21. Therefore, a file date of 2003-07-26 could be consistent with using a Dell Dimension 8300 with a bad battery, running BIOS A02 with a default date of 2003-07-21.

/s/ DAVID LOVEALL II
David Loveall II
Senior Computer Scientist
Federal Bureau of Investigation ("FBI")

Exhibit A

In The Matter Of:
United States of America v. Keith Raniere et. al.
United States District Court, Eastern District of New York
Case No. 1:18-cr-00204-NGG-VMS

Joint Expert Declaration in Response to FBI Senior Computer Scientist David Loveall II

We, the undersigned, each declare under penalty of perjury, pursuant to 28 U.S.C. 1746, that the following is true and correct:

I. Introduction

1. Government expert David Loveall II challenged select findings of Dr. Kiper. (Loveall Decl., Doc. 1213-3) In this response, we refute his rebuttals and further prove that a camera card (1B15a), which was found in a seized Canon camera (1B15), and a hard drive (1B16) were deliberately and extensively manipulated. Notably, the government used these devices to introduce and support charges of production and possession of alleged child pornography.

2. We have determined that photos were planted and staged across the two devices, with timestamps and folder names manipulated, apparently to simulate a 2005 timeframe. This conclusion is critical because the government depended entirely

on these photos' timestamps and folder names being authentic to argue that 22 of the photos on the hard drive were taken in 2005 and therefore illegal, based on the subject's age being fifteen in 2005.

3. This tampering, which involved the manipulation of hundreds of files and timestamps, created a seemingly cohesive chronology and linkage between the devices that perfectly aligns with the government's narrative that the defendant took 22 illegal photos in 2005 with the seized Canon camera (1B15), transferred them to his alleged, missing Dell computer, and later backed them up to the hard drive (1B16).

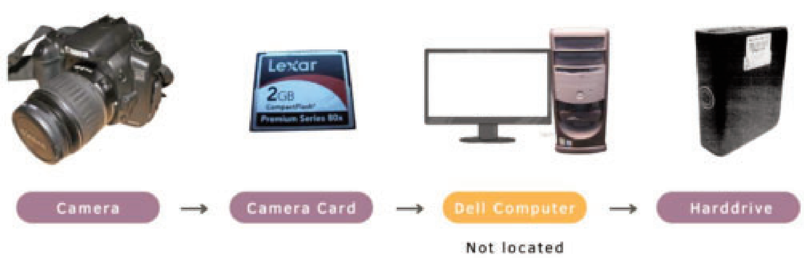


Diagram 1: The Government's Narrative

II. Refutation of Loveall's Rebuttals

4. In his report, Loveall made simple but critical errors and deviated from basic forensic

standards, which calls into question the reliability of his entire analysis. For instance:

a. He asserted that "DellDimension8300-20090330" is the model of a computer. (Loveall Decl., Doc. 1213-3 at ¶17). It is not. It is part of a folder name.

b. He asserted that a camera (1B15) was "identical" to its camera card (1B15a), but in fact, they are two completely different devices (Id. at ¶9).

c. He failed to provide any substantiated information from the original evidence, such as MD5 hash values for the forensic copies of the camera card, despite having direct access to those items.

d. His rebuttals are based on speculation rather than evidence. In digital forensics, merely providing hypotheses or unsubstantiated assertions is scientifically invalid.

e. He selectively responded to the evidence of tampering presented, failing to address key aspects integral to the findings, for example, Findings 2 and 7.

f. He failed to address the second part of Dr. Kiper's report, detailing serious FBI protocol breaches regarding the camera card and camera, and the additional findings from the other undersigned experts.

5. Loveall concurred with one of the seven technical findings, acknowledging that the camera card was altered in FBI custody (Finding 3).

6. Loveall also did not dispute that folder names on the hard drive, some of which were used to corroborate the age of the subject as fifteen, were manipulated (Finding 6).

7. Loveall's rebuttals were limited to Findings 1, 2, 4, 5, and 7, which we address below, organized by device.

Finding 7: Planting of the Alleged Contraband on the Hard Drive

8. Loveall theorized that all the files in an apparent backup of a Dell computer, including the alleged contraband, have creation dates of 2003 due to a malfunctioning computer battery that reset the computer's clock to 2003. (Loveall Decl. at ¶18) But this doesn't explain why the files are dated to 2003, but the backup folder in which they are located has a creation date of March 30, 2009, consistent with the string "20090330" in its name, referring to the same date. If the computer's clock was, in fact, reset to 2003, then when the backup

process started, the backup folder created would also have been given a 2003 date by the same clock that assigned a 2003 date to the files being backed up, and not a 2009 date. Loveall's response to Finding 7 was the only instance where he engaged in any type of testing or analysis, but ultimately his theory is scientifically incorrect. We conclude that 168 photos, including the alleged contraband, were planted on the hard drive and disguised as a computer backup. This invalidates the government's theory and evidence of possession — that the photos were authentically on the hard drive.

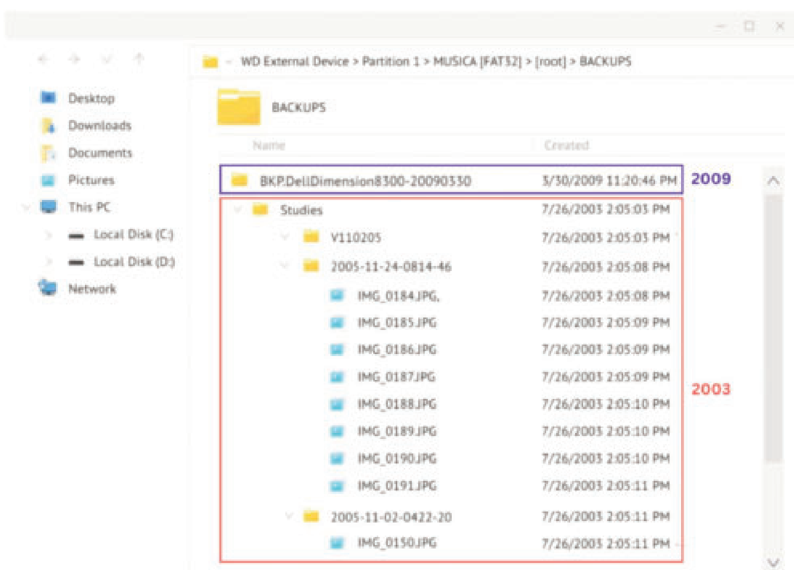


Diagram 2: Anomalous 2003 File Creation Dates in Alleged 2009 Computer Backup

Finding 4: Timestamp Manipulation on Photos 127-137 on the Hard Drive

9. Loveall theorized that the two-hour shifts in timestamps for Photos 127-137 could have occurred due to "a 2006 Microsoft Windows update that introduced dynamic DST time zones" (Loveall Decl. at ¶11). This is incorrect for several reasons: the update was not available in 2005 when the photos were supposedly saved; such an update would only change the computer clock by one hour, not two; and it would not alter the timestamps of files already existing on the computer. Thus, Loveall's explanation is demonstrably false. Our conclusion stands that someone manually changed the photo timestamps, resulting in these two-hour discrepancies. This most plausibly happened because they were attempting to mimic an automatic Daylight Savings Time change from 2005 but made errors in the process.

Finding 5: Timestamp Manipulation on Photo 175 on the Hard Drive

10. Loveall's theory is that someone used the timestamp-editing feature in Photoshop Elements on Photo 175 to change its time-

stamp. Yet they supposedly ran the tool without selecting a new timestamp, leaving the original timestamp unchanged. (Loveall Decl. at ¶ 15) He offers this to explain why Photo 175's timestamp indicates it was unaltered despite its metadata indicating Photoshop use. This theory is not plausible. It does not make sense to use a tool designed to change timestamps but not change the timestamp. Contrary to Loveall, the far more plausible explanation is that someone used the tool to modify the timestamps of this photo, but did not erase the metadata left behind by using the tool. Furthermore, using such a tool calls into question the authenticity of any timestamp, as we can no longer be sure if it was altered or left as is. Loveall's claim inadvertently demonstrates how easily timestamps can be changed. This contradicts the prosecution's case at trial, based on their expert Booth's false testimony that such timestamps are reliable and hard to change. (Trial T. at 4820:12-20; 4830:3-8)

Finding 2: Additional Photo Files Only Appearing on the Booth Report

11. Loveall only addressed that Booth's report of the camera card contained 37 more files, which appeared to be recovered photos taken by the seized camera. He overlooked the multiple anomalies regarding those

files, which support the likelihood that some of these additional files, which have no metadata or visual content, were staged to mimic originals of photos on the hard drive. (Kiper Report at Bates 005-006) Therefore, Loveall neglected a bulk of the finding, rendering his rebuttal incomplete and misleading, as it fails to address the substantive concerns about the authenticity of the files in question.

12. Furthermore, he inaccurately claimed that the camera and the camera card were "identical." (Loveall Decl. at ¶ 9) Perhaps he meant to refer to the two copies of the camera card. Regardless, he did not provide the hash values[1], the digital fingerprints required to prove such claims scientifically. (Trial T. at 4784:2-22) Using hash values to prove that content has not been altered is such a staple in digital forensics, and is trivial to do, that it raises questions about why Loveall, a purported forensic examiner, would choose to leave them out of his response. Setting aside his confusion regarding the camera and camera card, we are left to speculate whether Loveall really did verify the two camera card copies were identical, and if so, what

[1] The problem of Loveall's missing hash values is compounded by the fact that we cannot independently verify his claim, as the government has not granted us access to these copies.

verification process he used. To claim two pieces of digital information are identical without providing hash values is unheard of in our field. If the hash values are different, that would indicate additional tampering occurred in FBI custody.

13. Finally, New Finding 8 strongly indicates that some of 37 files were planted and staged with edited timestamps, including Photos 90-98, which on the hard drive depict a government witness identified as 'Daniela.' ("The Daniela Range") She testified to being photographed with a Canon camera as an adult by the defendant in 2005, the same year of these photos' timestamps. (Trial T. at 2422:7 - 2424:4) Therefore, the "Daniela Range" appeared to provide a critical link from the seized camera and the photos to the defendant. However, as analyzed in Appendix A, this range was planted and staged.

Finding 1: Manipulation of Purported Originals of 'Daniela' on the Camera Card

14. Loveall claimed that portions of Photos 180-183 being incorrectly associated with Photos 93, 94, 96, and 97 (part of the 'Daniela' range) in the FBI forensic report could be due to an error from a forensic tool rather than manipulation. (Loveall Decl. at ¶6, 7) His theory is speculative and incorrect. He didn't provide any evi-

dence that the tool used, ForensicToolkit —which is rigorously tested by the FBI —could make such an error (Id.) His hypothesis relies on a method of file overwriting that the camera doesn't use. (See Appendix B) He also suggested this error is more likely when the card is full, but it appears this card was at most 6% fully, using at most 120 MB of this 2 GB camera card, based on the furthest located files being Photos 21-41, which have not been overwritten. (Id.; Government Exhibit 521 A - Replacement) Regardless, new Finding 8 strongly indicates that the purported originals of 'Daniela' range on the camera were planted, manipulated, and staged.

III. New Findings

15. In responding to Loveall, we uncovered more evidence of tampering on the camera card and concluded that:

    a. Someone used a computer to plant Photos 81-100 (which includes the 'Daniela' range), and subsequently edited their creation dates. (Finding 8)

    b. Someone used a computer to plant Photos 224-243 on the camera card, and subsequently edited their creation dates. (Finding 9)

c. Someone used a computer to manually manipulate the last accessed dates of Photos 21-42. (Finding 10)

d. Someone used a computer to manually manipulate the last accessed dates of Photos 193-99. (Finding 11)

IV. Conclusion

16. We have refuted Loveall's rebuttals and further demonstrated the camera card and the hard drive were 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.

Signature: DocuSigned by:

Date: 11/20/2023

Name: Dr. James Richard Kiper, Ph.D.

Background: Former FBI Special Agent, Computer Forensic Examiner, and Unit Chief at the FBI Academy, 20 years' service to the FBI

Signature: DocuSigned by: Stacy R Eldridge

Date: 11/20/2023

Name: Stacy Eldridge

Background: Former FBI Senior Forensic Examiner, 10 years' service to the FBI

Signature: DocuSigned by: Mark Bowling

Date: 11/20/2023

Name: Mark Daniel Bowling

Background: Former FBI Forensic Examiner, Cyber Program Manager, FBI Inspector in Place, and FBI Assistant Special Agent in Charge, 20 years' service to the FBI

Signature: DocuSigned by: William Odom

Date: 11/20/2023

Name: William Odom

Background: Former FBI Special Agent and Forensic Examiner, Manager of FBI Forensics Lab in

Houston, 5 years' service to the FBI, 25+ years' experience in the field.

Signatur DocuSigned by: Steve Abrams

Date: 11/20/2023

Name: Steven Abrams, J.D., M.S.

Background: 25+ years in digital forensics, worked 1,500+ cases, served 11 years as a South Carolina State Constable, for the US Secret Service.

Signatur DocuSigned by: [illegible]

Date: 11/20/2023

Name: Stephen Bunting

Background: Former Captain of the University of Delaware Police, created the University of Delaware Police's digital forensics unit; trained hundreds of examiners and authored five textbooks in the field.

Signatur DocuSigned by: Wayne B. Norris

Date: 11/20/2023

Name: Wayne Norris

Background: 60+ years of software development experience across 35 operating systems, the government's lead software development expert witness in the landmark *Microsoft vs. Commissioner of Internal Revenue* case, 36 years of computer forensic expert witness experience.

Appendix A

Appendix A: New Findings of Planting and Staging on the Card

Finding 8: Planting and Staging of Photos 81-100 on the Card

1. We have determined that photos 81-100, ***were staged and planted on the card***. These photos include the "Daniela range," which as discussed in our joint statement at point 13, appeared to link the photos on the hard drive to the seized Canon camera and linked the photos and the seized camera to the defendant.

2. The calculations in our analysis are based upon tested and verified Canon EOS 20D camera behavior, as well as the file sizes and byte offset locations of carved photo data provided in the government's forensic reports and file listings (See Appendix B)

3. Our conclusion is based on the finding that Photos 93-97 could not occupy their current locations on the card if they were authentically saved to the card by the camera, as discussed below.

4. When the camera starts taking photos, it looks for the earliest available physical space to save them on the card. Photos 90 to 98 were taken one after the other, so when Photo 90 was taken, the space on the card before it was already full. This leads us to the question we'll examine below:

What was in the space before Photo 90, and was it voluminous enough to justify the current physical location of Photo 93?

5. To answer this, we examine how this type of camera, a Canon EOS 20D with firmware 2.0.2, overwrites the directory entries of deleted photos. It only overwrites the filenames, more specifically directory entries, of deleted photos with new ones if they're taken *within the same set of 100*. Once a photos' filename (directory entry) is overwritten, the previous photo's filename is not listed on the card anymore. For example:

    a. The photographer takes photos 500 through 550 and later deletes photos 520 – 530.

    b. The photographer then takes photos 551 – 570.

    c. The file directory entries for Photos 551 – 561 will overwrite the file directory entries for photos 520 – 530.

    d. When a forensic tool is run on the card, it will not find directory entries for photos 520-530, as they no longer exist.

6. Going back to our question of what was in the space before Photo 90, this camera's overwriting behavior tells us that the photos originally occupying the space before

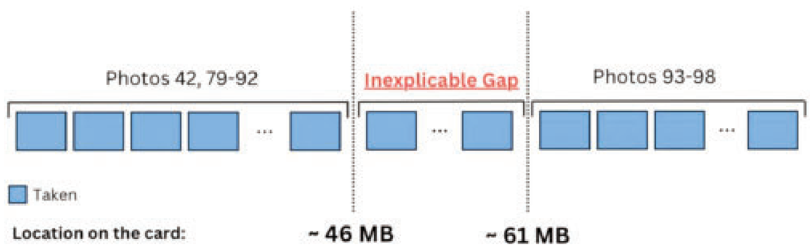
Photo 90 must either (a) still be listed by name in a directory entry or (b) they've been deleted and their filenames (directory entries) were overwritten by others before Photo 101 was taken. The photos in category (b) could have only been overwritten *after* the set of photos 90-98 were taken. Since there were only two post-98 photos left in this set of 100 – photos 99 and 100 – this means, at most, two photos were taken and saved before the physical location of Photo 90. If there were more than two, we would see more deleted directory entries listed because 99 and 100 can collectively only overwrite two filenames.

7. Checking the card, we see that Photos 21-41, 42, and 81-92 are the only pre-93 photos still listed. However, Photos 21-41 are physically located after Photo 93, so they cannot be the ones that were in the space before 93. That leaves us with Photos 42, 81-92, and at most, two unknown not-yet-overwritten photos as the possible occupants of the physical space before Photo 93. Photos 79 and 80 were deleted *after* Photo 98 was taken but *before* Photo 99 was taken. This means the two not-yet-overwritten photos were 79 and 80.

8. Here's the crux—Photo 93 is positioned ~61 megabytes (MB) into the card, but Photos 79-92 occupy only ~35 MB, leaving a 26 MB gap. (See Diagram 1 below) Given

the maximum possible photo size for this camera of ~12.3 MB, it would be impossible for Photo 42 to fill that gap such that the camera would write Photos 93 through 97 to their current locations on the camera card. Therefore, Photo files 93 through 97 *were not genuinely saved by the camera to their current positions on the card*; instead, someone copied them onto the card from somewhere else, using a computer.

Diagram 1: Illustration of Inexplicable Gap in Photo Locations



9. Furthermore, copying the files to the camera card would update the file creation timestamps, resulting in a disparity between the file creation timestamp stored in the FAT and the creation timestamp stored in their EXIF metadata. The fact that these timestamps match for these files indicates that someone has intentionally edited them.

10. To recapitulate this finding:

    a. Someone used a computer to add photo files 81-100 to the camera card.

    b. They edited the timestamps of each of these twenty files, in such a way that it perfectly aligned with the timestamp sequence on the hard drive.

11. These deliberate actions constitute planting and staging and call into question the authenticity of these photos' metadata, including their timing and the origin of the photos.

12. Considering that (a) the photos on the hard drive, including 81-100 and the alleged contraband, all have metadata linked to the seized Canon camera, giving the impression they were taken by that camera, (b) that FBI Special Agent Christopher Mills testified that he found this card inside that seized camera (Trial T. at 4305:14-24), and (c) that photos were planted and staged in a manner that perfectly aligned with the hard drive, the discovery of these manipulations directly erodes the authenticity of the main evidence presented by the government.

13. This discovery demonstrates deliberate planting, manipulation, and staging of these photos on the card.

Finding 9: Planting and Staging of Photos 224-243 on the Card

14. The range of Photos 224-243, the final sequence on the card, though not the alleged contraband, seamlessly continues from the last photo, Photo 223, on the hard drive. This continuity supports the government's narrative that the photos on the hard drive originated from the camera and card. However, we determined that this final range was planted and staged.

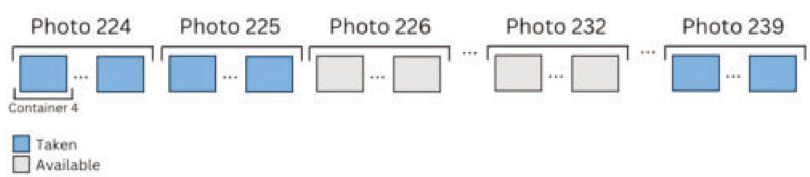
15. This conclusion is drawn primarily from the observation that Photo 242, the only photo in this range whose location we were explicitly given, is not located where it should be on the card if authentically saved to the card there by the camera. To understand why, let's describe how this camera's firmware determines where to store photos on the card.

16. The card consists of a series of data containers, technically called clusters, which we'll call "containers" for simplicity. The earliest container that the camera starts adding photos to is container 4. In each session, meaning the time from when the camera is turned on to off, it looks for the earliest container not occupied by an active (not deleted) file. This becomes its starting point. All subsequent photos taken in the session are added forward from there. If

one of those photos is deleted, creating a gap of available containers, this gap is only filled in the next session (when the camera is next powered off/on).

17. Photo 242 is part of the range 224-243. When Photo 224 was taken, there were no active (not deleted) photos remaining at the beginning of the card, and since Photos 224 - 243 were the last photos taken, they must be at the beginning of the card, starting at container 4.

18. In this range, the first session consists of Photos 224-239, but the directory entries for Photos 226 and 232 are missing, indicating they were deleted, leaving gaps that were overwritten by later photos.



19. The soonest that either Photos 226 or 232 could have be overwritten is after this session, by Photo 240. If Photo 240 occupied the gap left by 226 and/or 232, when Photo 240 was deleted, that space would be available again. Photo 240 must have been deleted before Photos 241-243 were taken in order for it to have been overwritten by one or more of Photos 241-243 as they were

the last taken. Thus, when Photo 241 was taken, the earliest physical location available is where Photo 226 began. Then, Photo 242 would start from where Photo 241 ended. Depending on the sizes of Photos 226 and 232, Photo 242 would be placed somewhere in the gaps left by Photos 226 and / or 232.

20. Therefore, we calculate that the space from container 4 to where Photo 242 started was occupied by Photos 224 through 231 (sans 226) and 241, totaling 16,744,448 bytes. Given each container holds 32,768 bytes, this would take 511 containers, *positioning Photo 242 at container 514, not at container 977*, as is currently the case.

21. This misplacement proves that Photo 242, along with the entire series from 224-243, could not have originated from the camera. Based on the same reasoning as points 9 and 10 above,

    a. Someone used a computer to add photos 224-243 to the camera card.

    b. They edited the timestamps of each of these twenty files, in such a way that it perfectly extended from the timestamp sequence on the hard drive.

22. Since Photos 224-241 collectively take up 968 containers, beginning at container 4, and Photo 242 begins at cluster 977, this provides convincing evidence that whoever

added these photos to the camera card did not take into account this camera's method of placing the photos.

23. This finding demonstrates that these photos *were planted, manipulated, and staged on the* card.

Finding 10: Tampering of Last Accessed Dates of Photos 21-42 on the Card

24. The earliest range of recovered photos on the card, 21-42, though not the alleged contraband, is significant because it seamlessly precedes the first range of photos on the hard drive (43-58), suggesting those photos came from this camera and card. However, this range contains an anomaly that reveals tampering of their last accessed dates, as discussed below.

25. The last accessed dates for 21-42, which note when each photo was last opened, are inconsistent. All but photos 29 and 42 have a last accessed date of October 16, 2005, two days after their alleged creation. However, photos 29 and 42 show a last accessed date of two days earlier, October 14, 2005. See the table below.

Table 1: Last Accessed Dates of Photos 21-42

Photo	Last Accessed Date
21	10/16/05
. . .	. . .
28	10/16/05
29	**10/14/05**
30	10/16/05
. . .	. . .
41	10/16/05
42	**10/14/05**

26. Thus, the last accessed date being changed to October 16, 2005, must have been triggered by an access event from a computer, more specifically, while the card was in a card reader or slot. This is because this particular camera model does not update the last accessed date when photos are viewed or accessed on the camera itself, nor does the last accessed date get updated when the pictures on the card are attached to a computer via USB connection directly to the camera, as the card is not mounted

as a drive, but rather the camera is attached as a "portable device". Thus, a program like Photoshop Elements cannot modify the pictures while the computer hosting it is connected to the camera; the program can only delete them after uploading them. If the user opts not to delete them from the card after they have been uploaded to a computer, then the last accessed date listed on the card is still not updated.

27. The contradiction in the data comes from the fact that this computer access event would have undoubtedly affected *all* of the photos in this range. They were all stored in the same folder, they were all active (i.e. not deleted) at that time, they were not deleted until after Photo 101, purportedly taken on October 20, 2005, they are still listed on the camera card (See point #4 above), *and* stored in the same folder. tampering.

28. The distinct differences in the last accessed dates for photos 29 and 42, deviating from the rest, provide evidence of tampering. These discrepancies cannot be attributed to regular camera use or routine Windows activities.

Finding 11: Tampering of Last Accessed Dates of Photos 193 - 199 on the Card

29. Similar to Finding 10 the last accessed dates for Photos 193 - 199 are inconsistent. Photos 194 and 197 - 199 have a last accessed date of December 21, 2005, two days after their alleged creation. However, Photos 193, 195, and 196 still show a last accessed date of two days earlier, December 19, 2005; the alleged creation date. See the table below.

Table 2: Last Accessed Dates of Photos 193 - 199

Photo	Last Accessed Date
193	12/19/05
194	12/21/05
195	12/21/05
196	12/19/05
197	12/19/05
198	12/21/05
199	12/21/05

30. Thus, the last accessed date being changed to December 21, 2005, must have been triggered by an access event from a computer, more specifically, while the card was in a card reader or slot. This is because this particular camera model does not update the last accessed date when photos are viewed or accessed on the camera itself, nor does the last accessed date get updated when the pictures on the card are attached to a computer via USB connection directly to the camera, as the card is not mounted as a drive, but rather the camera is attached as a "portable device". Thus, a program like Photoshop Elements cannot modify the pictures while the computer hosting it is connected to the camera; the program can only delete them after uploading them. If the user opts not to delete them from the card after they have been uploaded to a computer, then the last accessed date listed on the card is still not updated.

31. The contradiction in the data comes from the fact that this computer access event would have undoubtedly affected all of the photos in this range. They were all stored in the same folder, they were all active (i.e. not deleted) at that time, they were not deleted until after Photo 201 was taken on or after December 26, 2005, they are still listed on the camera.

32. The distinct differences in the last accessed dates Photos 194 and 197 - 199, deviating from the rest, provide evidence of tampering. These discrepancies cannot be attributed to regular camera use or routine Windows activities.

Appendix B

FAT16 File Creation / Deletion / Overwriting in the Canon 20D Camera

By Stephen Bunting –
Bunting Digital Forensic, LLC
18 November 2023

Overview

FAT16 is an organizational framework for storing files and directories (folders) on various storage devices, ranging from hard drives to floppy disks, USB drives, and media cards. It was created in 1984, and the original FAT16 file system can store a maximum of 2 gigabytes. Thus, it's rarely used today, as the size of most media today far exceeds that limit.

It derives its name from its predominant feature, the File Allocation Table (FAT), and the 16 its name from the length of each cluster entry in the FAT, which is 16 bits or 2 bytes.

The FAT16 file can be used by any operating system (OS). This paper focuses on the use of the FAT16 file system in the Canon 20D camera (Firmware Version 2.0.2)While the structure of the FAT16 file system doesn't vary between operating systems, how those operating system actually makes use of the directory entries and to which clusters they write data does vary.

Generally, how the Canon 20D operating system writes to FAT16 prioritizes speed, as burst rate (how many pictures per second the camera can record) is a highly sought-after feature by photographers. Windows, by contrast, seems to write to FAT16 in a manner that facilitates data recovery. The differences between how the Canon 20D and Windows write to FAT16 will also be reviewed.

Directory Entries

A directory entry in FAT16 lists files and directories for a parent folders. Each directory entry is 32 bytes long. Each line begins with the file or folder name followed by its file extension. For example, in IMG_0001.JPG, "IMG_0001" is the file name and "JPG" is the file extension. Among other information, the directory entry contains two additional very important pieces of information: the starting cluster and the file size in bytes. This is how the operating system knows where to find the first cluster of data and how much data is required, in bytes, for the file for purposes of creation, modification, or deletion.

File Allocation Table (FAT)

FAT16 uses two file allocation tables, FAT1 and FAT2, and they are identical, as as the second copy is a data protection feature. It will be referred to as the FAT. The FAT in FAT16 contains 2-byte arrays of numbers for each cluster in the data storage area, which is organized in Clusters. If the value for a cluster is zero, the cluster is available to store data. If not zero, it will contain a number. The number is the next cluster in the chain of clusters that make up the file. When the last cluster is used for a file, a special number is used to denote the cluster as EOF or end of file. Often referred to in forensics as EOF. Should a cluster be found to be bad, another special number will be used to mark it as bad and it will not be used.

In an ideal world, all clusters for a file would be contiguous with one cluster immediately following the other for the same file. However, fragmentation does occur. For example, suppose that the cluster run for a file is 2,3,8,9,10. What has happened is that another file occupies clusters 4,5,6,7. When this condition occurs, it is called file fragmentation. Its impact on file deletion and recovery will be discussed later.

The directory entry, among other things, tells us the file's name and extension, at which cluster the data for a file starts, and how large the file is in bytes. The FAT tracks cluster space utilization (which clusters are available or not) , the next cluster in cluster runs (the clusters that make up a file in the order they used by the file), and the end of the file, once the starting cluster is known.

CLUSTERS

Clusters are where a file or folder's data is actually stored. The directory entry and the FAT are pointers to this data storage area. Clusters have a fixed sized that is determined when media is formatted. In this example, and on the 2GB CF Card in the Raniere matter, the cluster size is 32,768 bytes.

The first cluster available for file and folder data is cluster 2.

Scenario One: One Photo Present on CF Card

Figure 1, below shows a file written to a FAT16 file system. The directory entry shows a file named IMG_0001.JPG with a starting cluster of 4 and a file size of 130,233 bytes. Looking at the entry for cluster four, the starting cluster, in the FAT we see that the number in cluster four, is 5, meaning 5 is the next cluster in the run. Then in cluster five, we see the number there is 6, the next cluster. Looking at cluster six, we see a 7, the next cluster. Finally, if we go to the entry for cluster 7, we see it contains the special number for the EOF. Dividing the size of the file by the size of a cluster, it is not an even number, meaning that there is some space left at the end of the cluster between the end of the file and the end of the final cluster. We call this slack space. The purple in the cluster space depicts the actual file or picture data; note cluster 7 is not completely full.

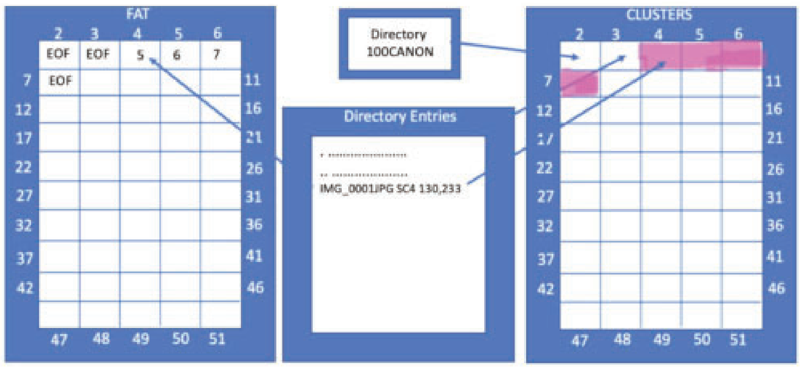


Figure 1 – Scenario one: Shows one file written to a FAT16 file system

Scenario Two: A Second Photo is Added to CF Card

Figure 2, below, depicts a second photo being taken and added to the FAT16 file system. The directory entry shows the file name is IMG_0002.JPG, that it starts at Cluster 8, and its size is 130,233. If we go to our FAT and look at the entry for the starts at cluster, 8, and the cluster run is 8,9,10,11. The green area in the cluster space depicts where the data for this file is stored. Currently, there is no fragmentation.

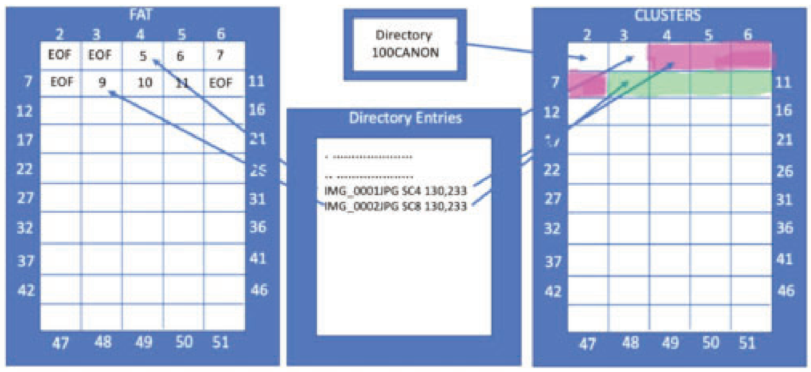


Figure 2 – Scenario Two: Shows adding a second file to our FAT16 file system

Scenario Three: Deleting a File using the Camera Trash Button during current power-cycle

Figure 3, below, shows what happens when a file is deleted using the in-camera trash button, while the camera has not been powered off yet. It's important to note that power cycling the camera dictates certain behaviors. When a file is deleted, two things occur.

1. The first character of the directory entry is changed to the hexadecimal notation of "E5" (0xE5), as seen below.
2. The FAT entries that make up the cluster run for the file are changed to zero, meaning the clusters are available for storing other data, BUT the data itself in the clusters is not touched. At this stage, the file is very much recoverable.

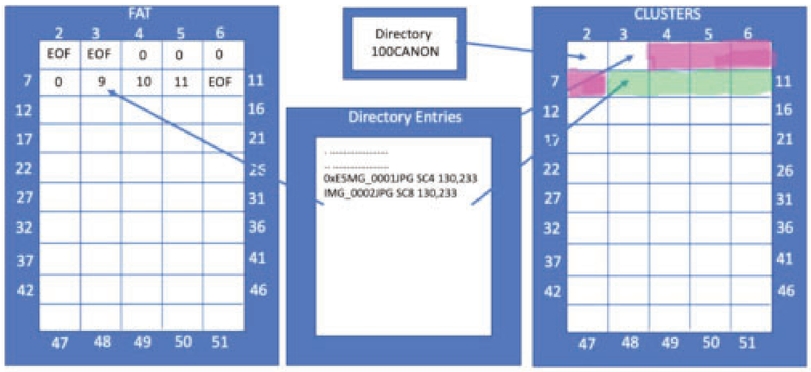


Figure 3 – Scenario Three: Shows what happens when a file is deleted

Scenario Four: Another Picture is Taken by the Camera During Same Power-Cycle

Figure 4, below, shows what happens when another picture is taken after the above file was deleted and within the same power-cycle, i.e. the camera has not been turned off and turned on again. Canon will overwrite any directory entries marked for deletion from the top down.

Canon will overwrite directory entries that are marked for deletion any time a new file is created until the active folder changes, i.e. file IMG _0101.JPG is taken, and folder 101CANON is created to hold the next set of 100 images. After the next folder in sequence is created, any file deleted in-camera by the Canon OS will be preserved in the inactive folder.

Canon writes in sequence default, i.e. IMG _0001.JPG to IMG_9999.JPG, and does not repeat a file number. It stores files in folders in increments of 100. The folders named sequentially, i.e. files 1-100 go into folder 100CANON, 101-200 go into 101CANON, 201-300 go into 102CANON, and so forth. While the Canon OS is writing new files to a folder, that is the active folder. Any preceding folders are no longer active and will not be written to again, therefore, deleted directory entries in those inactive folders are preserved.

Even though cluster 4 is the first available file (cluster marked zero), the Canon 20D, within the same power-cycle, will not write to cluster 4. Instead, the Canon 20D will look forward from the last cluster it wrote to for the next available cluster to write to, which in this case is cluster 12. The FAT shows the cluster run for file IMG_0003.JPG is clusters 12, 13, 14, 15. The area in the cluster space that depicts where IMG_0003.JPG will be written to is shown in aqua. The directory entry for IMG _0001.JPGs has been completely overwritten, but its data remains untouched and contiguous. It can be fully recovered by a technique known as carving.

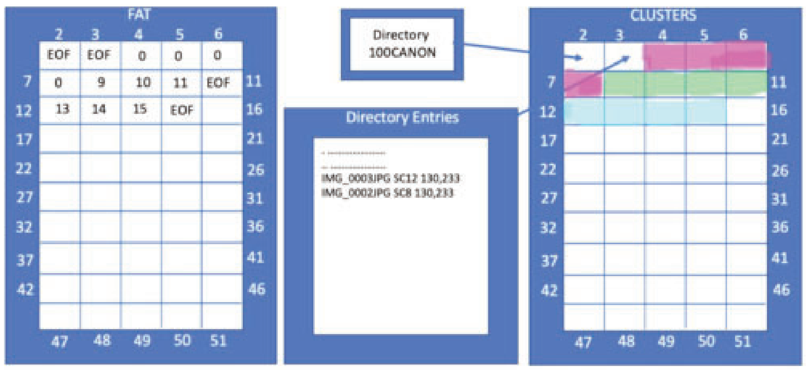


Figure 4 - Scenario Four: Shows a new file overwriting a directory entry in the same power-cycle

Scenario Five: Another Picture is Taken by the Camera after powered off and back on

Figure 5, below, shows a similar situation to the one described in Scenario Four; however, before taking IMG _0003.JPG, the camera is turned off and then powered on. When powered on, the cluster availability is refreshed as the first picture is taken, and Cluster 4 is now seen as the first available cluster. Just as before, the directory entry from the deleted file is overwritten as the folder 100CANON is still the active folder receiving new media files.

The FAT shows the cluster runs for this file start at cluster 4, and include4,5,6,7, which differs from the previous scenario where the picture was taken before a power-cycle of the camera. This difference has caused all traces of file IMG _0001.JPG to be overwritten; there is no directory entry and no data is left in the clusters.

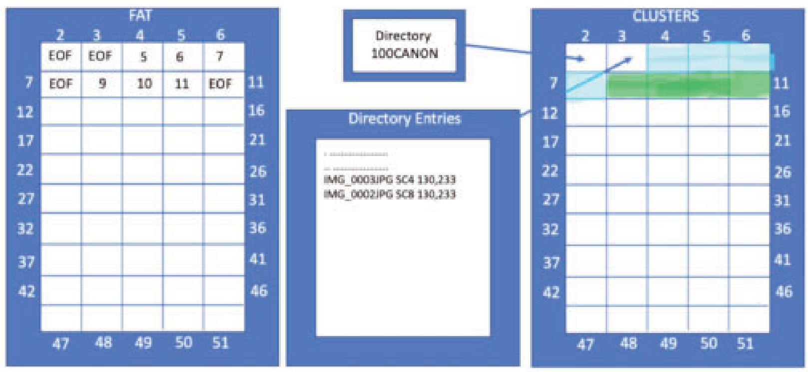


Figure 5 - Scenario Five: Shows IMG_0003.JPG taken after power-cycling the camera

Scenario Six: The Canon OS vs the Windows OS

Figure 6, below, shows the difference between the Canon OS and Windows. Instead of taking a picture to create IMG-0003.JPG, a program is used in Windows to create a file of the same exact size 130,233 bytes, and Windows is used to place the file on the CF Card. To achieve this, the CF Card is removed from the camera and placed it in a card reader attached to a Windows computer. In Windows Explorer drag and drop the Windows created file, whatever its contents, and place it in the folder 100CANON on the CF Card.

Windows will look at the clusters written on the CF Card and choose the starting cluster immediately following the last cluster in use at the time, which is Cluster 12; it does not matter that clusters 4-7 are available and able to fully contain the file without fragmentation. The cluster run for this file is 12, 13, 14, 15. Further, Windows will append the directory entry to the end of the current directory list. It will NOT overwrite any directory entries that have been marked for deletion.

The Canon OS and Windows OS behave quite differently. The Canon OS will overwrite directory entries marked for deletion from the top down and continue to do so until the current active directory becomes inactive Once a new folder becomes active no more images can be written to the inactive folder, and deleted directory entries therein will be 'preserved'. Windows, quite by contrast, will not overwrite any directory entries.

Canon will use the first available cluster at startup, and continue writing forward from that point, even though cluster space behind that point (i.e. closer to the beginning of the card) may become available due to file deletions, *during that power cycle*. Only when Canon has reached the last cluster of the CF Card will it go back to the beginning of the CF Card to seek any available space. In the Raniere matter, there is no indication that the card was ever filled as the highest file number written does not support having filled the 2GB CF Card in this case.

By contrast, Windows seeks the first available cluster immediately following the last cluster written to. Windows avoids writing fragmented files, whereas Canon writes to the next available cluster without regard to fragmentation.

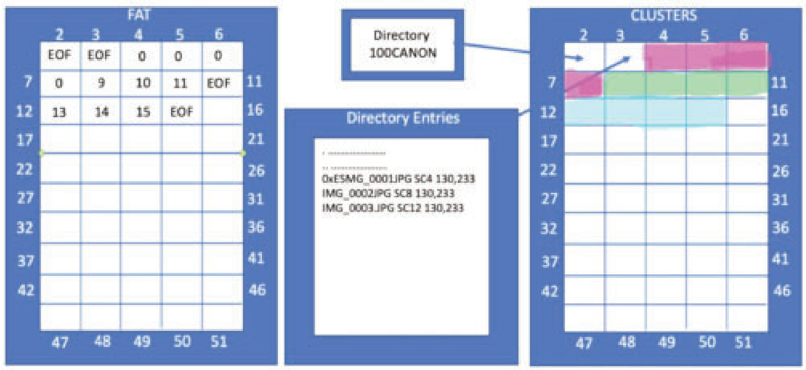


Figure 6 - Scenario Six: Showing file placed on CF Card by Windows

Scenario Seven: Writing Fragmented Files

Thus far, contiguous files of the same size have been used to keep things simple and to be able to make comparisons between different scenarios. Figure 7, below, shows a fragmented file. Rarely are JPG images the same size, as picture content varies greatly. In Scenario Five IMG_0003.JPG is one byte larger than would fit in 4 clusters. 4 clusters can hold 131,072 bytes, and one more byte forces the file to use one more cluster, even though it's just one byte. Thus, the cluster runs for this file are now 4,5,6,7,12. They are no longer contiguous, which is known as a fragmented file. The one byte of data in cluster 12 is depicted by the thin sliver of aqua. Regardless of how much space remains, no file can use it, but there could be data from another file in this slack space.

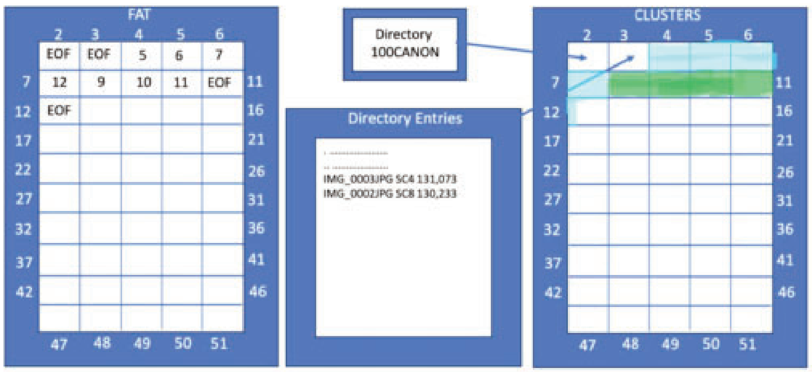


Figure 7 – Scenario Seven: Shows file fragmentation

Scenario Eight: Deleting Fragmented Files

Figure 8, below, shows what happens when fragmented files are deleted. In this case, the camera remains in the same power cycle as Scenario Seven. At this point the camera will use cluster 13 as the starting cluster as pictures have already been taken during this power cycle. Using the camera trash button, file IMG _0002.JPG is deleted. Its directory entry will be marked as deleted, and its clusters will be marked as available. Next, picture IMG _0004.JPG (130,233 bytes) will be taken, and it will occupy clusters 13, 14, 15, and 16 (shown in orange). Keep in mind the Canon OS only seeks available clusters in a forward direction, not backward, during a power cycle, continuing until it reaches the end of the cluster space. The directory entry for IMG_0004.JPG will overwrite the directory entry for IMG_0002.JPG, as it's marked for deletion. Next, still in the same power cycle, we will use the trash button to delete IMG_0003.JPG. Its directory entry will be marked as deleted and its cluster space will be marked as available.

Figure 8, below, shows the final result of the above activity. If attempting to recover data from this CF Card the fragmentation and lack of cluster run data makes file recovery inaccurate. In this case, the deleted directory entry for file 0xE5MG_0003.JPG, shows the starting cluster and file size. While this helps, the cluster runs are unknown. The assumption is to go to the starting cluster, which is Cluster 4. The file size is 131,073 bytes and requires 5 clusters.

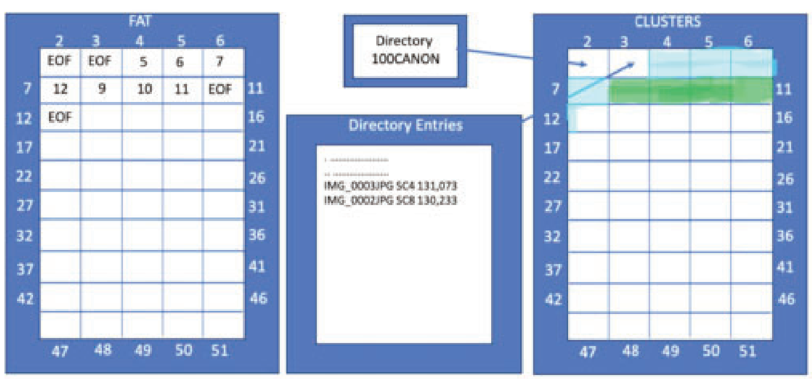


Figure 8 – Scenario Eight: Shows fragmented files when deleted

Scenario Nine: Recovering deleted, fragmented files

Figure 9, below, shows the problem when trying to recover a fragmented, deleted file. The starting cluster 4 is correct, as and that information was contained in the deleted directory entry. Starting at cluster 4, the data is recovered from the next 4 available clusters, 5-8. Recall that cluster 8 was originally the starting cluster for file IMG_0002.JPG, but its directory entry is gone, and its clusters are marked as available. Without the cluster runs there is no information indicating that the last byte of the file has to be recovered from cluster 12. Logically, the last byte of the files is recovered from cluster 8, which is incorrect. Figure 9, below, shows the sliver of aqua in cluster 8 that this recovery method would return, which is incorrect but unavoidable in these scenarios.

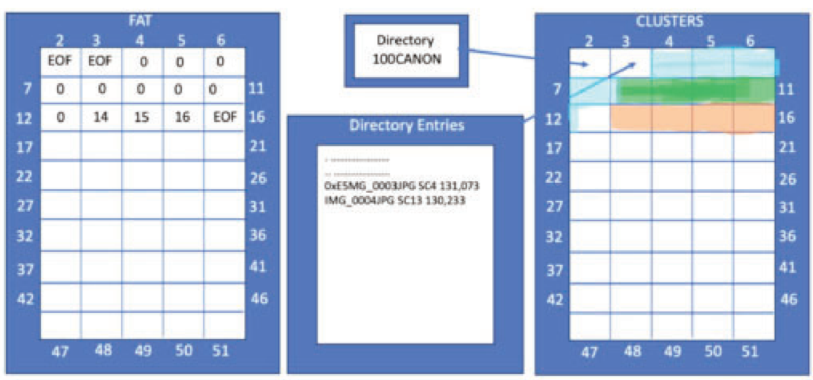
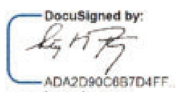


Figure 9 – Scenario Nine: Shows problems recovering deleted fragmented files

These scenarios and accompanying diagrams have been created after testing these scenarios repeatedly to test the rules and behaviors of these two operating systems (Canon 20D OS and Windows XP and 10). The results were consistent and repeatable.

The above findings and diagrams are true and correct to the best of my ability.

Stephen M. Bunting



11/20/2023

Joint Expert Declaration by Four Former
FBI CART Forensic Examiners Regarding the
Alleged FBI "Photograph Technician"

Re: *United States of America v. Keith Raniere et. al.*
Case No. 1:18-cr-00204-NGG-VMS

We, the undersigned, each declare under penalty of perjury, pursuant to 28 U.S.C. 1746, that the following is true and correct:

I. Introduction

1. We are former FBI Computer Analysis Response Team (CART) examiners.
2. We have a combined 55 years of experience in the FBI.
3. We are trained in FBI procedures and have trained other FBI personnel in them.

II. FBI Digital Evidence-Handling Procedures

4. An FBI photograph technician is not a CART member. Therefore, they are not authorized to review original digital evidence, let alone unpreserved original digital evidence, as this is the sole purview of CART. (See Digital Evidence Policy Guide (DEPG), Section 3.3.4.5.)
5. All FBI personnel are trained to sign the chain of custody when taking custody of,

and relinquishing, evidence, which is required by FBI protocol. (See DEPG, Section 3.3.9.1.1.2. "Chain of Custody.".)

6. Any FBI employee authorized to conduct forensic examinations is trained to use a write-blocker when reviewing original digital evidence, to avoid making alterations. (See CART SOPs Section 4.3.)

7. A forensic copy of the device must first be created before the contents can be reviewed, except in certain circumstances, such as exigent circumstances and approved previews. (CART SOPs, Section 4.5.) No such circumstances were established here.

8. Any FBI employee authorized to conduct forensic examinations is trained to stop their work if they come across files that are not in scope and notify the Case Agent, who would then apply for an additional search warrant for these files.

9. An FBI employee who deliberately accesses original evidence without authorization, deliberately violates the chain of custody, or knowingly allows another FBI employee to do so, could receive disciplinary consequences such as a written reprimand, an Office of Professional Responsibility (OPR) investigation, or termination.

III. Violations of FBI Procedure by the Alleged FBI Photograph Technician

10. The alleged FBI photograph technician violated the aforementioned protocols:

    a. They reviewed original, unpreserved digital evidence: the camera card.

    b. They did not sign the chain of custody. (DX 945.)

    c. They did not create a forensic copy of the camera card.

    d. They did not use a write-blocker, thereby *permanently altering the original, unpreserved evidence.*

    e. They completed their work, even though the files on the camera card were all dated to 2007 or before. (GX 521A - Replacement.) At the time of the review, on September 19, 2018, these dates were outside of the search warrant's scope, which was for the timeframe of 2015 onwards. They should have stopped their work when they saw the file dates and notified their Case Agent, who should have applied for an additional search warrant for these files.

11. Signing the chain of custody and preserving original evidence are fundamental pillars of FBI evidence handling procedures. Therefore, based on the above, we conclude

that the alleged FBI photograph technician, SA Lever, and any other FBI personnel involved in the September 19, 2018 mishandling of 1B15, the Canon camera and camera card, ***knowingly violated FBI protocols. Such willful actions could result in an agent's termination.***

IV. Non-Existent Role of FBI "Photograph Technician"

12. We are unaware of the job title "FBI Photograph Technician." There is a Job Series code, 1386, Photographic Technology. However in our 55 years of combined experience, it has never been used in FBI Field Offices. There are either "FBI Division Photographers," who are ***prohibited*** from handling original evidence, or there are examiners in CART or in the Forensic Audio, Video and Image Analysis Unit (FAVIAU). FAVIAU only exists at Quantico in Virginia.

13. FBI Division Photographers are typically tasked with downloading photos from FBI-owned media (e.g., search photos), *never* original evidence, like the camera card. They are generally from the Federal Job Series Code 1060, Photographer. They are trained to document investigative activity through the FD-302, the form for reporting information that may become testimony. If this FBI personnel conducted a review of

the camera card, an FD-302 should exist. However, **no FD-302 for the supposed examination of the camera card by the alleged FBI "photograph technician" has been disclosed.**

14. We can think of no legitimate reason to give the unpreserved camera card to an alleged FBI "photograph technician," in violation of FBI protocol, rather than directly to CART.

15. Expediting discovery production is not a valid exception to the FBI protocol. Moreover, circumventing CART with the alleged photograph technician was much slower and more personnel-intensive than simply having a CART examiner create a forensic copy of a small electronic device such as this 2 GB camera card.

16. This mishandling of the Canon camera and camera card was exceptional, considering all other 60+ devices produced in discovery were properly processed by CART, as required by FBI protocol.

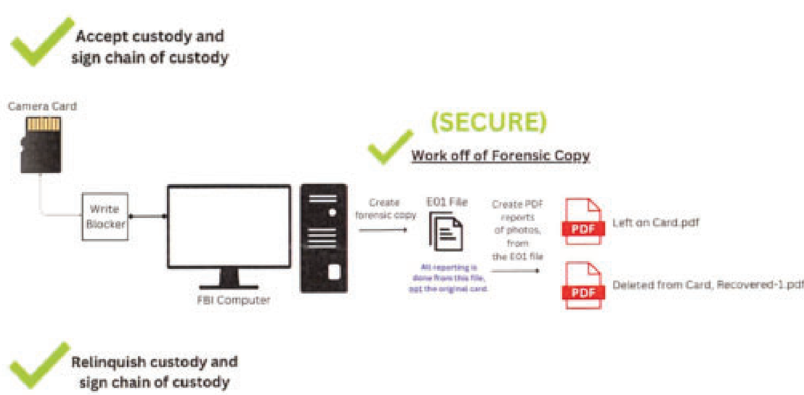
V. Improper Technical Actions of the Alleged FBI Photograph Technician

17. The alleged FBI photograph technician did not simply copy files from the camera card. They also used an unknown forensic tool on the camera card to recover deleted files. This is clear from the fact that the visual

depictions of Photos 21-41, Photos 180-183, and Photo 242, identified as deleted files in the FBI forensic reports, also appear in the September 25, 2018 PDF reports. (VDM_NXIVM00005028 - VDM_NXIVM00005130.) Deleted files are not, by default, available for copying. Additional steps must first be taken to forensically recover the deleted files. These steps constituted an unauthorized forensic examination.

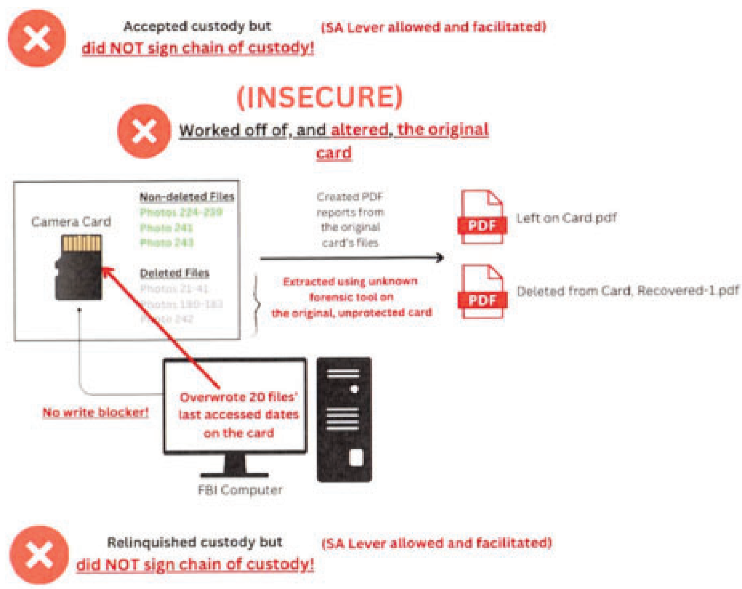
18. The diagram below shows the proper way to extract photos, without altering evidence.

Diagram 1: Proper Protocol



19. The diagram below shows what the FBI photograph technician did instead.

Diagram 2: The Actions of the Alleged FBI Photograph Technician



20. Since CART had not yet preserved the card prior to the alleged FBI photograph technician's alterations, there is no way to determine its original contents.

21. We have *never* in our careers at the FBI observed that a non-CART personnel, such as the unidentified alleged FBI photograph technician in this case, had (1) accessed original evidence, (2) ***altered*** the original evidence prior to preservation, and (3) failed to sign the chain of custody.

Signature: DocuSigned by: 2/13/2024

Name: **Dr. James Richard Kiper, Ph.D.**
Background: Retired FBI Special Agent, Computer Forensic Examiner, and Unit Chief at the FBI Academy, 20 years' service to the FBI

Signature: DocuSigned by: Stacy R Eldridge Date: 2/13/2024

Name: **Stacy Eldridge**
Background: Former FBI Senior Forensic Examiner, 10 years' service to the FBI

Signature: DocuSigned by: Mark Bowling Date: 2/13/2024

Name: **Mark Daniel Bowling**
Background: Former FBI Forensic Examiner, Cyber Program Manager, FBI Inspector in Place, and FBI Assistant Special Agent in Charge, 20 years' service to the FBI

Signature: DocuSigned by: William Odom Date: 2/13/2024

Name: **William Odom**
Background: Former FBI Special Agent and Forensic Examiner, Manager of FBI Forensics Lab in Houston, 5 years' service to the FBI, 25+ years' experience in the field.

Exhibit B

APPENDIX: Corrections to the Government's Misrepresentations in Doc. 1231

The government's response contains several misrepresentations that distort the truth. These are corrected below. Going forward, the Defense may need to attach an appendix to each of its filings, to correct such inaccuracies and prevent them from becoming further solidified.

1. The government repeats that the photograph technician merely "copied photographs." (Gov. Opp., Doc. 1231 at. 1.) However, this is inaccurate. As previously established, they did far more than copying photographs, such as using unknown forensic software. (Def. Mot., Doc. 1230 at 12 ¶ 1.)
2. The government presents "cop[ying] photographs . . . [to expedite] discovery" as a valid reason to circumvent CART, using the alleged FBI "photograph technician" to access the unpreserved original camera card. However it *does not*, as such conduct violates critical FBI protocol. (Gov. Opp. at 1; Exhibit A, Joint Former FBI Decl. at ¶ 15).
3. Contrary to the government's assertion, the Defense did *not* know at trial that *multiple* "law enforcement agents had accessed the camera card of the Canon EOS 20D camera without a write blocker." (Gov. Opp. at 2.) The Defense was only aware

that *an* access without a write blocker had occurred, not who was responsible. If the government is using plural "agents" literally, then this is newly disclosed information.

4. The government blames trial counsel for not "attempt[ing] to question any law enforcement agents regarding the access." (*Id.*) However, this overlooks the critical fact that *the government concealed this pre-CART operation*, and SA Mills falsely testified that the camera, which contained the card, was handled correctly, only by CART:

   > AUSA Hajjar: What happens when you recover a piece of digital evidence like Government Exhibit 520 [the camera] and 524 [the camera card]?
   >
   > SA Mills: So, when we receive—when we recover digital evidence, we have a process in which we bring the digital evidence back to our office and ***if we want the evidence to be reviewed, we would submit a request to our CART team.*** And the CART is the Computer Analysis Response Team and they is have specialists who are computer evidence examiners who would review that evidence for us or assisted us in reviewing the evidence with us.

> AUSA Hajjar: And is that what happened in this case with Government Exhibit 520 [the camera]?[1]
>
> SA Mills: ***Yes.*** (Trial T. at 4307:6-18.) (emphasis added)

5. The government's reference to their offer on August 3, 2018 (Gov. Opp. at 1, n.1.), for a physical inspection of evidence is misleading. A physical inspection would merely allow examining the *exteriors* of a device. The relevant evidence would have been the digital content *within* the devices, which was impossible to review at the time since none of the 8 Hale devices had yet been delivered or processed by CART. (Gov. Opp. at 1, n.l.; DX 945, DX 961, Doc. 1169 at 5, n.4.) In that sense, a physical examination would have been irrelevant and useless. Moreover, the withheld evidence at issue in this motion is the documentation of the secret operation involving the alleged FBI photograph technician, which occurred 6 weeks later, on September 19, 2018, rendering the August 3, 2018 offer further disconnected from the matter at hand.

6. The government's characterization of the photographs on the camera card exaggerates the content, describing them as "sexu-

---

[1] Note that AUSA Hajjar omits specific mention of GX 524, the camera card, in her second question.

ally explicit photographs of Raniere ***and other women***." (Gov. Opp. at 1, n. l.) (emphasis added.). Of the 42 photo files with viewable images, only 5 (Photos 34-38) can be classified as sexually explicit. These images depict male genitalia but involve only one woman, not multiple "other women." (*Id.*) ((VDM_NXIVM00005044-5130; GX 521A (Flatley Report).) Furthermore, the government refers to Mr. Raniere's identification in these photos as a fact, though this was never established. It is crucial to address these characterizations not to nitpick but to correct inaccuracies that, if unchallenged, might be accepted as truth. More critically, this scrutiny aims to highlight the inappropriateness and irrelevance of the government's description of the photographs, where the issue is undisclosed evidence that was concealed by the government. This appears to be an attempt to bias the discussion by eliciting moral judgment and prejudice, rather than focusing on the issue.

7. The government inaccurately claims that the Defense's motion "seeks disclosure . . . regarding the Federal Bureau of Investigation photograph technician" (Gov. Opp. at 1), implying the Defense was already aware that the "photograph technician" belonged to the FBI. This implication is

false and misleading, as their response marks the first instance they have disclosed the alleged photograph technician's FBI affiliation.

8. The government repeats their assertion that the FBI "photograph technician" was involved to "facilitate production of those photographs to defense counsel in discovery." (Gov. Opp. at 1; Doc. 1213 at 11, n.6.) This explanation appears disingenuous, as directly copying the camera card through CART would have been quicker (Joint Former FBI Decl. at ¶ 15.) and the government's delay in processing discovery, despite promises to the Court and Defense and looming trial dates, underscores a lack of urgency. The following timeline provides additional details:

Timeline of Discovery Delays vs. Government Representations

On March 27, 2018, FBI agents searched 8 Hale, looking for evidence of suspected sex trafficking. Among the items seized was 1B15, a Canon camera, containing a memory card. (Trial T. at 4305:14-24; DX 945.)

On April 19, 2019, Mr. Raniere was indicted on sex trafficking, sex trafficking conspiracy, and conspiracy to commit forced labor. (Doc. 14.)

On May 4, 2018, Mr. Raniere requested a mid-July trial date. (Pre-Trial T. 5/4/18 at 14:3.) However the government pushed for more time, stating it "would certainly move for exclusion of time given the nature of discovery." (*Id.* at 13:2-7.) She had explained to the Court that "an enormous amount of electronic device[s]" were seized at 3 Oregon and 8 Hale, and "[t]he FBI is in the process of processing those." (*Id.* at 4:17-25.) However, at this time, 39 days after seizure, *none* of the 8 Hale devices had been sent to CART, which is responsible for processing electronic devices (DX 961 at 1.) **The Court set a trial date of October 1, 2018.** (Pre-Trial T. 5/4/18 at 16:7-9.)

On July 10, 2018, SA Rees checked out 1B15, the Canon camera and memory card from Evidence Control. (DX 945 at 2.) None of the 8 Hale devices had yet been sent to CART for preservation, a required step before case agent review. (DX 961, *supra.*; Doc. 1169 at 5, n.4.) As such, her access was a violation of FBI protocol. She held this evidentiary item for ***17 days.*** (DX 945, *supra.*) Notably, the camera was inoperable due to a dead, uncharge-able battery. (Trial T. at 4918:3-17.) No reports, or FD-302s of SA Rees' unauthorized review were ever disclosed, the chain of custody leading to its discovery was only disclosed *after SA Rees* had testified.

On July 23, 2018, a superseding indictment was filed, adding 4 co-defendants and other charges, including racketeering conspiracy (Doc. 50.) Still, 119 days after seizure, none of the 8 Hale devices had been sent to CART for processing. (DX 961, *supra.*)

On July 25, 2018, Mr. Raniere requested that the Court maintain the October 1, 2018 trial date. However, AUSA Penza said this was not feasible, in part given the "additional discovery that will be involved." (Pre-Trial T. 7/25/18 at 8:1-9.) Moreover, she disagreed with the Defense's "characterization that our production of discovery has been slow," and that they did not produce certain portions earlier because they were "relevant to the superseding indictment." (*Id.* at 10:13-20.) However, none of the 8 Hale devices had yet been delivered to CART for processing, so their contents could not have been reviewed, let alone their relevance determined. **The Court moved the trial date to January** 7, **2019.** (*Id.* at 16:22-17:2.)

On August 3, 2018, AUSA Penza informed the Defense that they would produce ***"full discovery copies"*** of the seized electronics. (Letter Enclosing Discovery (August 3, 2018) at 5.) (emphasis added.) However, *130 days after seizure*, still none of the 8 Hale devices had even been delivered to CART. (DX 961.)

On August 8, 2018, less than two months before the original trial date and 135 days after seizure, the devices from 8 Hale, *except for the Canon camera and card,* were finally delivered to CART for processing, by SA Michael Lever. (DX 961 at 1.)

On September 11, 2018, the government wrote to the Court that CART had begun processing the 8 Hale and 3 Oregon devices "[w]ithin days of the execution of the warrants." (Doc. 129 at 2 ¶ 1.) However, not a single item from 8 Hale had even been delivered to CART until *135 days after* the execution of the warrant. That same day, the government promised to disclose ***"full discovery copies"*** of the seized materials and requested a "complex" case designation, which would permit further exclusion of time, under the Speedy Trial Act. (*Id* at 2-3.) (emphasis added.)

On September 14, 2018, AUSA Penza informed the Court that the government was going to provide "***full discovery copies*** to defendants of all the material in our possession." (Pre Trial T. 9/14/18 at 5:19-6:21.) (emphasis added.)

On September 18, 2018, AUSA Hajjar repeated to the Court this inaccurate statement of CART processing beginning "within days" of the search. (Pre-Trial T. 9/18/18 at 36:25-37:12).

On September 19, 2018, SA Lever, who had previously delivered the other 8 Hale devices to CART, now checked out 1B15, the camera and card, also in violation of FBI protocol. (DX 945 at 2.) Instead of delivering this item to CART, like he did for the other devices, he facilitated the unauthorized access and alteration by the secret FBI photograph technician, *outside of CART*. (DX 945, *supra;* Doc. 1213 at 11, n.6.; Gov. Opp. at 1.)

On September 27, 2018, AUSA Hajjar informed the Court that "We just pulled out the pictures out [sic] and gave them everything" from the 8 Hale camera. (Pre-Trial T. 9/27/18 at 35:6-9.) However, she omitted that this was done outside of CART and outside the chain of custody, and that they only gave two PDF documents, without the metadata, or any reports or FD-302s that indicated there was a FBI photograph technician, and did not disclose ***not the full discovery copy*** of the device that they had promised the Court they would. (Def. Mot, Doc. 1230 at 3-4.)

On October 3, 2018, the government moved to delay the trial to March 18, 2019. (Doc. 157.) Still the Canon camera and memory card had not been delivered to CART for processing.

On October 15, 2018, **the Court approved the trial adjournment to March 18, 2019.** (E.D.N.Y. October 15, 2018 (Garaufis, J.).)

On January 9, 2019, AUSA Penza informed the Court that the government expected a superseding indictment, but were weighing "timing considerations." (Pre-Trial T. 1/9/19 at 4:14-5:2.) Still, the Canon camera and memory card had not been delivered to CART. (DX 945.)

On January 11, 2019, the government moved to delay the trial. (Doc. 279.) 291 days after seizure, still the Canon camera and memory card had not been delivered to CART. (DX 945.)

On January 15, 2018, **the Court rescheduled the trial date to April 29, 2019.** (E.D.N.Y. January 15, 2019 (Garaufis, J.).)

On February 21, 2019, six weeks after AUSA Penza's announcement, FBI agents 'accidentally' discovered alleged contraband on the hard drive purportedly taken by the mishandled and unprocessed Canon camera. (Second Lever Aff. at ¶11, 14.) That day, SA Lever checked out the Canon camera and card for a second time. (DX 945 at 3.)

On February 22, 2019, ***333 days after seizure*** and after facilitating its secret mishandling, SA

Lever delivered the Canon camera and memory card to CART for processing. *(Id.)*

* * *

[Page 11] Computer Scientist Loveall II, this conclusion is faulty. Exhibit C, Loveall Decl. ¶¶ 17-18. But in any event, the digital evidence underlying this purported "finding" was known to Raniere at the time of trial. Indeed, it was undisputed at trial that the metadata associated with at least some of the files had various anomalies, including a "creation date" in 2003, a "modified" date in 2005, and an "accessed" date in 2010, and Raniere's counsel cross-examined FBI CART Senior Forensic Examiner Booth at length regarding these and other characteristics of the electronic data.[5] *See, e.g.*, Exhibit B-012-019.

Raniere was also aware at the time of trial that law enforcement agents had accessed the camera card of the Canon EOS 20D camera without a write blocker on September 19, 2018, and Raniere's trial counsel cross-examined Senior Forensic Examiner Booth regarding that access.[6] *See* Exhibit B-020-021

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[5] The child pornography images on the Western Digital Hard Drive were recovered by law enforcement over a decade after they were created, and were discovered on a computer drive onto which a Dell computer had apparently been backed up. The government put forth no evidence at trial regarding the way in which the images had been copied onto the Western Digital Hard Drive.

[6] This access was not the result of law enforcement "tampering," as Raniere's motion claims. Rather, having no reason to believe that the metadata of the contents of the Canon EOS 20D camera card had any evidentiary value, law enforcement

(testimony acknowledging that the camera card had been accessed while in the custody of the FBI on September 19, 2018). Examiner Booth testified, on cross-examination, that the camera card had been accessed "while it was in the possession of the FBI." Exhibit B-020. Raniere's trial counsel, however, did not raise the issue with the Court or the government and made no attempt to question any law enforcement agents regarding the access, including the case agent who

* * *

agents directed that a photograph technician copy the photographs from the camera card in order to provide the photographs more expeditiously to defense counsel. Shortly thereafter, on September 25, 2018, the government provided Raniere with copies of the photographs from the camera.

DEFENDANT'S EXHIBIT 945

Evidence Details

Case: 50A-NY2233091 **Item:** 1B15

Description: (U) One box containing one (1) Cannon Ultrasonic camera, serial number 1420908348.

Collected On: 03/27/2018 12:30 PM EST

Receipt Item #: *None* **Special Handling:** *None*

CATS ID #: *None* **Hazardous Materials:** *None*

FBI Seizure #: *None*

CATS Abandonment #: *None*

Abandonment #: *None*

Digital Information

Type: Digital Camera/Digital Video Camera

Make: Cannon Ultrasonic

Serial Number: 1420908348

Batteries Charged: No

Number Collected: 1

Collected by CART: No

Discovery Location

Area: Second floor **Others:** *None*

Specific: Room F **Others Agency:** *None*

Seizing Individual: McGinnis Elliot C

Collected By: McGinnis Elliot C

Seizing Individual: *None*

Other:

Anticipated Disposition

None on None

Storage Information

Holding Office: New York

Finalized By: Clifford M Barbosa

Last Inventory: 05/24/2018 9:33 AM EST

Location: E03707388 – ECR83

Barcode #: E6261241

Chain of Custody

Shipping/Transfer Log

History

Acquisition Event Details

Acquisition Event: (U) Search Warrant Executed at 8 Hale Drive, Halfmoon, NY 12065–Item Labeled 1

Collected From: (U) 8 Hale Drive Halfmoon
NY, New York, 12065
United States

Receipt Given: Yes

Holding Office: NEW YORK

Evidence Log: 50A-NY-2233091
Serial 74

FD-1004
Rev. 7-7-2016

FEDERAL BUREAU OF INVESTIGATION
EVIDENCE CHAIN OF CUSTODY

Evidence Type:	☐ General ☒ Digital	☐ Drugs ☐ Valuables	☐ Firearms/Weapon ☐ Firearms/Other	Item # 1

Special Handling Instructions			**Initial Receipt**	**Date and Time**
☐ HAZMAT	☐ Latents	☐ FGJ	Signature of Seizing Individual: [illegible]	3/01/18
☐ Req. Charging	☐ Freeze	☐ Refrigerate	Printed Name/Agency: Elliot McGinnis/FBI	1230PM
☐ Biohazard			Reason: Initial Collection	
☐ Other ______			Collected By: Elliot McGinnis	
			Agency: FBI	

Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature: [illegible]	04/02/18	Signature: Michael Le	04/02/18
Printed Name/Agency: Elliot McGinnis	4:44PM	Printed Name/Agency: Michael Lever /FBI	4:44PM
Reason: Evidence Retention		Reason: Evidence Retention	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature: Michael Lever	04/04/18	Signature: [illegible]	4/4/18
Printed Name/Agency: Michael Lever /FBI	8:00 AM	Printed Name/Agency: [illegible] FBI	8-00am
Reason: Evidence Retention		Reason: [illegible]	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature: [illegible]	7/10/18	Signature: Morgan	7/10/18
Printed Name/Agency: [illegible]	12:32	Printed Name/Agency: Morgan Rees / FBI	1232p
Reason: [illegible]		Reason: Review	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature: Morgan	7/27/18	Signature: Corey [illegible]	7/27/18
Printed Name/Agency: Morgan Rees / FBI	120p	Printed Name/Agency: Corey Montgomery	1320
Reason: evidence retention		Reason: Charged In	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature: Corey [illegible]	9/19/18	Signature: [illegible]	9/19/18
Printed Name/Agency: Corey Montgomery	0900	Printed Name/Agency: Michael Lever /FBI	9:00AM
Reason: C/O to SA		Reason: Evidence Review	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature: [illegible]	9/26/18	Signature: [illegible]	9/26/18
Printed Name/Agency: Michael Lever /FBI	1:15PM	Printed Name/Agency: [illegible]	1:15PM
Reason: Evidence Retention		Reason: [illegible]	

Firearm Certification by (FI/SWAT) / Explosive Material Certification by (SABT):	ATF Trace Form Completed: ☐
Printed Name:	NCIC: ☐
Signature:	
Date:	

Case ID: 50A-HH-2233091 1B: 15 Barcode: E6261241

This form is incomplete without reference to the FD-1087.

EVIDENCE CHAIN OF CUSTODY

Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature: [illegible]	2/21/19	Signature: [illegible]	2/21/19
Printed Name/Agency: [illegible]	3:08pm	Printed Name/Agency: Michael Leve/FBI	3:08pm
Reason: CO		Reason: CART	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature: [illegible]	2/22/19	Signature: [illegible]	2/22/19
Printed Name/Agency: Michael Leve/FBI	12:50pm	Printed Name/Agency: Stephen Flatley/FBI	12:50pm
Reason: CART		Reason: CART exam	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature: [illegible]	6/7/19	Signature: [illegible]	6/7/19
Printed Name/Agency: Stephen Flatley/FBI	1:48pm	Printed Name/Agency: [illegible]/FBI	1:48pm
Reason: Transfer		Reason: [illegible]	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature: [illegible]	6/10/19	Signature: [illegible]	6/10/19
Printed Name/Agency: [illegible]	10:02AM	Printed Name/Agency: Christopher Mills	10:02AM
Reason: [illegible]		Reason: evidence retention	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature: [illegible]	6/10/19	Signature: Brian S. Booth	6/10/19
Printed Name/Agency: Christopher Mills	4:55PM	Printed Name/Agency: BRIAN S. BOOTH	4:55PM
Reason: relinquish FBI		Reason: CART EXAM	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature: Brian S. Booth	6/[illegible]/19	Signature: [illegible]	6/[illegible]/19
Printed Name/Agency: BRIAN S. BOOTH	3:45PM	Printed Name/Agency: SA Michael J. Weniger	3:45PM
Reason: Relinquish to CA		Reason: Court	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature:		Signature:	
Printed Name/Agency:		Printed Name/Agency:	
Reason:		Reason:	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature:		Signature:	
Printed Name/Agency:		Printed Name/Agency:	
Reason:		Reason:	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature:		Signature:	
Printed Name/Agency:		Printed Name/Agency:	
Reason:		Reason:	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature:		Signature:	
Printed Name/Agency:		Printed Name/Agency:	
Reason:		Reason:	
Relinquished Custody	**Date and Time**	**Accepted Custody**	**Date and Time**
Signature:		Signature:	
Printed Name/Agency:		Printed Name/Agency:	
Reason:		Reason:	

Case ID: ______ 1B: ______ Barcode: ______

This form is incomplete without reference to the FD-1087.

* * *

[Page 6]a residence located at 8 Hale Drive, Halfmoon, New York (the "Hale Drive Residence"). ("SPA:22; DE:1213).

II. *Relevant Pretrial Proceedings*

A. Search of the Hale Drive Residence and Initial Production of Electronic Discovery

On March 27, 2018, law enforcement agents conducted a judicially authorized search of the Hale Drive Residence, which Raniere used as his "Executive Library," as well as a separate property belonging to the president of Nxivm. (A:1571, 1142). During those searches, law enforcement agents seized over 70 electronic devices, including the Western Digital Hard Drive and a Canon EOS 20D camera containing a memory card (the "Canon Camera"). (A:1571).

Shortly after the defendants' arraignment on a superseding indictment on July 23, 2018 (*see* DE:50), the government began producing electronic discovery, including copies of the contents of the seized electronic devices, to Raniere and his codefendants. (DE:593-1 (August 3, 2018 discovery letter); A:87-88 (September 11, 2018 discovery letter)). The government's August 2018 discovery letter to the defendants, including Raniere, notified the defendants that electronic devices had been obtained through the execution of a search warrant at the Hale **[Page 7]** Drive Residence and stated that the defendants could contact the government to "examine the physical evidence discoverable under Rule 16." (DE:593-1 at 5). Among other things, the discovery letter enclosed a copy of the search warrant, application for the Hale Drive Residence, as well as photographs taken during the execution of the warrant. (*Id.* at 3).

The district court thereafter directed the parties to litigate certain discovery issues before a magistrate judge; at subsequent hearings on September 13, 2018 and September 18, 2018, the magistrate judge directed the government to expedite the production of electronic discovery to defense counsel, to prioritize the discovery requested by counsel, and to report the status of production as to each electronic device in its possession. (DE:137, 139, 143, 145, 154). Several of the devices contained inaccessible media or appeared to contain no relevant data, and the Canon Camera contained primarily nude photographs of Raniere and his sexual partners. (GX:520, 521). At that time, having no reason to believe that the metadata associated with the photographs on the Canon Camera had any evidentiary value, agents with the Federal Bureau of Investigation ("FBI") directed that a photograph technician **[Page 8]**create a copy of the photographs from the Canon Camera's memory card to facilitate their expeditious disclosure to defense counsel. (A:1579).

In October 2018, the government provided all defendants, including Raniere, with copies of the Western Digital Hard Drive. (DE:593-2). At that time, law enforcement agents were not aware that the Western Digital Hard Drive contained child pornography; as a result, a full forensic copy of the drive was provided to all defendants. (*Id.*).

Approximately five months later, at another proceeding before the magistrate judge in February 2019, the government characterized the Hale Drive Residence as a property in which no defendant was seeking to assert "any privacy interests" and as to which "numerous people" had access. (A:179-84). No defendant objected to the government's assertion or claimed standing to challenge the execution of the search warrant at the Hale Drive Residence. (*Id.*).[3]

* * *

[3] After the child pornography images were discovered on the Western Digital Hard Drive, Raniere filed a motion to suppress the images seized from the Western Digital Hard Drive, which the district court denied. (GA:4).

[Page 32] (E.D.N.Y. Oct. 30, 2007) ("The document is not actually an affidavit, since it is unsworn, and is not admissible as an unsworn declaration because it is undated."); *Perkins v. Teele,* . . . 2018 U.S. Dist. LEXIS 122117 . . . at *2 n.3 (D. Conn. July 23, 2018) (disregarding an undated, unsworn declaration)". *United States v. Hicks,* 2024 U.S. Dist. LEXIS 7877, at *10 - 12 (W.D.N.Y 1.16.24).

Other Circuits have also deemed undated declarations inadmissible. *See, e.g., Flovac, Inc. v. Airvac, Inc.*, 817 F.3d 849, 854 n.2 (1st Cir. 2016); *Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir. 1995).

2. Analysis

The Loveall Report is undated, making it inadmissible, technically noncompliant, and invalid. (A1618, A1825). The Court abused its discretion in crediting and relying upon it.

D. Loveall's Report Failed to Refute the 7 Digital Forensics Experts' Findings

The Court's claim that "Loveall's explanations . . . thoroughly refute Kiper's key findings" is incorrect. (SPA29, citing to A1682-1683). Of Dr. Kiper's 7 technical findings, Loveall only provided speculative rebuttals to five (5) of them; the 7 digital forensics experts refuted these 5 in their joint response. (A1619 ¶ 5, A1619-1620 ¶ 6, A1620-1621 ¶ 7, A1621 ¶ 8, A1621-A1622 ¶ 9, A1622 ¶¶ 11-12, A1622-1623 ¶ 13, A1623 ¶¶ 14-15, A1623-1624 ¶ 17, A1624-1625 ¶ 18, A1699 - A1703). The prosecution and Loveall had the opportunity to contest at least

12 other significant defense findings and failed to do so. In their Opposition to the **[Page 33]**Rule 33, they opposed only Dr. Kiper's findings, in part, and none of the other experts' findings. In their Opposition to the Motion for Reconsideration, they failed to contest the 7 digital forensic experts' joint report. Thus, and as summarized below, the Loveall Report was hardly a "thorough refutation":

Defense Finding	**Loveall / Government's Response**
Mills committed perjury by testifying that the camera was handled in compliance with FBI protocol. (A1206).	**Uncontested.**
Booth committed perjury regarding the reliability of EXIF metadata and that receiving unsealed evidence is not extraordinary. (A1037-1039).	**Uncontested.**
SAs Lever and Maegan Rees each reviewed the unpreserved camera and memory card, for a total of 24 days, before it had been sent to CART, violating FBI procedure. (A1035-1036).	**Uncontested.**

The USAO was provided the original, unpreserved memory card, which is prohibited by FBI protocol. (A1383).	**Uncontested.**
An unauthorized forensic exam was done on the unpreserved memory card on 9/19/18, 5 months before it was delivered to CART. (A1383).	**Uncontested.**
Booth created a second forensic image of the memory card, in violation of FBI procedure. (A1006-1007, A1038-1039).	**Uncontested.**
[Page 34]Booth's receipt of the memory card from Mills in an unsealed bag violated FBI procedure. (A1034).	**Uncontested.**
Photos 81-100 on the memory card were planted by a computer with manually edited creation dates, falsely supporting the 2005 timeframe. (A1703 ¶ 15(a), A1707-1709).	**Uncontested.** This was submitted in the Motion for Reconsideration and the government did not address it in their Opposition.[15]

[15] This defense finding was also included in the Reply to the Rule 33, not in the original findings Loveall reviewed.

Photos 224-243 on the memory card were planted by a computer with manually edited creation dates, falsely supporting the 2005 timeframe. (A1703 ¶ 15(b), A1709-1711).	**Uncontested.** This was submitted in the Motion for Reconsideration and the government did not address it in their Opposition.[16]
A computer was used to manually edit the last accessed dates of Photos 21-42, falsely supporting the 2005 timeframe. (A1703 ¶ 15(c), A1711-1713).	**Uncontested.** This was submitted in the Motion for Reconsideration and the government did not address it in their Opposition.[17]

[16] *See* footnote 14.

[17] *See* footnote 14.

A computer was used to manually edit the last accessed dates of Photos 193-199, falsely supporting the 2005 timeframe. (A1703 ¶ 15(d), Bates 17-18).	**Uncontested.** This was submitted in the Motion for Reconsideration and the government did not address it in their Opposition.[18]
Folder names on the hard drive were intentionally manipulated, falsely supporting the 2005 timeframe. (A1009-1010, 1378-1379).	**Loveall responded but did not contest.** (A1623 ¶ 16).
The 168 photos, including the alleged contraband, were **manually planted the hard drive** and disguised to appear as if they were automatically backed up by a computer in 2009. (A1011-1012, **[Page 35]** A1379, A1448-1451).	Rebutted defense's finding without proof and their rebuttal is demonstrably false. (A1623-1624 ¶ 17, A1624-1624 ¶ 18, A1700 ¶ 8).

[18] *See* footnote 14.

Photos 93-97 on the memory card had their metadata intentionally manipulated. (A1004-1005, A1437-1439)	Rebutted defense's finding without proof and their rebuttal is demonstrably false. (A1619 ¶ 5, A1619-1620 ¶ 6, A1620-1621 ¶ 7, A1621 ¶ 8, A1702 ¶ 14).
37 photo files, with "high likelihood", were planted on the memory card in FBI custody, between 4/11/19 and 6/11/19. (A1036-1037).	Rebutted defense's finding without proof and is unverifiable by the defense without access to the forensic images. (A1621-1622 ¶ 9, A1702 at n.1).
Timestamps of at least 12 photos on the hard drive were intentionally manipulated to falsely support the 2005 timeframe. (A1008-1009; A1378-1379).	Rebutted defense's finding without proof and their rebuttal is demonstrably false. (A1622 ¶¶ 11-12, A1622-A1623 ¶ 13, A1623 ¶¶ 14-15, A1701 ¶¶ 9-10).

Memory card altered on 9/19/18 in FBI custody. (A1007-1008).	**Agreed.** (A1622 ¶ 10).

The Court's denial renders the above uncontested findings of government misconduct and data falsification as acceptable.

E. Loveall's Report Contained Indisputable Errors

The Court ignored false assertions made by Loveall that undermine the credibility of his report. For example, Loveall wrote:

> "The fact that additional files appeared in one report [of the memory card] is a result of the use of different settings. I have examined the disk images [forensic copies] created of 1B15 and 1B15a and determined that they are identical." (A1621-1622 ¶ 9).

To a layperson, this statement appears as though Loveall is confirming that the 2 forensic images of the memory card are "identical." However, he is actually stating

*   *   *