

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: December 12, 2022

Docket #: 22-3112

Short Title: In Re: Keith Raniere

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 1:18-cr-204-1

DC Court: EDNY (BROOKLYN)

DC Judge: Scanlon

DC Judge: Garaufis

DOCKETING NOTICE

A Petition for Writ of Mandamus filed by Keith Raniere has been docketed in the above referenced case under 22-3112. This number must appear on all documents related to this case that are filed in this Court. For pro se parties the docket sheet with the caption page, and an Acknowledgment and Notice of Appearance Form are enclosed. In counseled cases the docket sheet is available on PACER. Counsel must access the Acknowledgment and Notice of Appearance Form from this Court's website <http://www.ca2.uscourts.gov>.

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CAPTION: The caption in a Petition for a Writ of Mandamus of Writ or Prohibition is *In re [EDIT], Petitioner*. It shall not bear the name of the district court judge. (*Local Rule 21(a)*).

DESIGNATIONS OF RESPONDENTS: All parties below other than the petitioner shall be deemed respondents for all purposes. (*FRAP21(b)*).

NO ANSWER: Unless the Court directs otherwise no answer to a petition for writ of mandamus or prohibition will be accepted. (*FRAP21(b)*).

Inquiries regarding this case may be directed to 212-857-8546.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

In Re KEITH RANIERE,
Petitioner.

On Petition from the United States District Court
For the Eastern District of New York
Case No. 1:18-cr-00204-NGG-VMS
(Hon. Nicholas Garaufis)

**PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

Dated: December 9, 2022

Joseph M. Tully, Esq.
CA SBN 201187
TULLY & WEISS ATTORNEYS AT LAW
713 Main Street
Martinez, CA 94553
Phone: (925) 229-9700
Fax: (925) 231-7754

Counsel for Petitioner

PETITIONER REQUESTS ORAL ARGUMENT

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual who therefore has no parent corporation or stockholders.

Dated: December 9, 2022,

/s/ Joseph M. Tully

Joseph M. Tully, Esq.

TULLY & WEISS ATTORNEYS AT LAW

Counsel for the Petitioner

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STATEMENT OF JURISDICTION

This petition arises out of the extensive criminal prosecution of the Petitioner in the United States District Court for the Eastern District of New York. This Court has jurisdiction to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651.

RELIEF SOUGHT

Petitioner seeks a Writ of Mandamus instructing the District Court to grant Petitioner's motion for recusal and any such other relief as this Court deems appropriate.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

During a series of proceedings, the district court displayed personal distaste for the Petitioner and his counsel to such an alarming degree that no ordinary observer could conclude that the court's conduct satisfies justice, or the appearance thereof. The district court judge, Hon. Nicholas G. Garaufis, declined to rule on Petitioner's motion that he recuse himself pending the conclusion of an appeal before this Court that was handed down only recently.

However, this case is complicated by the fact that there is a Rule 33 motion for a new trial pending before the district court, which, like

the motion to recuse, was stayed pending the outcome of the appeal before this Court. Importantly, ***precedent conflicts on whether the district court has discretion as to which matter it should rule on first, the recusal or the Rule 33 motion.*** This conflict in precedent provides impetus for the Second Circuit Court itself to issue instructions now that in this case—and in cases like it—a motion for recusal should be considered a threshold issue that must be decided before a ruling should be made on a Rule 33 motion.

STATEMENT OF THE CASE

The full basis of the motion for recusal is best laid out in the appended Memorandum of Law in Support of Keith Raniere’s Motion for Judge Nicholas G. Garaufis to Disqualify Himself Pursuant to 28 U.S.C. § 445. For the Court’s ease, we present here a brief summary:

I. Facts Underlying Recusal

A. The Jury Trial

During the jury trial, Judge Garaufis repeatedly acted in ways that would lead a rational person to understand that he has a deep-seated bias against Petitioner, tipping the scale of the trial in favor of the government. For example, Judge Garaufis completely cut off cross-

examination of the government's star witness, Lauren Salzman, before inviting further direct examination from the government. His order to cease cross-examination was absolutely damaging to Mr. Raniere's case: though Ms. Salzman was called as a government witness, she also had valuable exculpatory evidence that Mr. Raniere should have been allowed to elicit. Additionally, the Court's attitude toward Mr. Raniere's counsel during trial was demeaning and bullying, communicating to the jury that the Judge Garaufis had made up his mind about the case¹.

B. The Restitution Hearing

Judge Garaufis' behavior at the restitution hearing was as aggressive as it was bizarre. As reported by news media, at one point in the proceedings Judge Garaufis spent *thirty minutes* in a strange and aggressive staring contest with Mr. Raniere's counsel.²

This incredibly odd interaction came after a very tense series of exchanges. The restitution hearing was the first appearance of Mr. Raniere's counsel Jeffrey Lichtman and Marc Fernich. At the restitution hearing, it was established that co-defendant Clare

¹ USA v. Raniere et al, 1:18-cr-00204-NGG-VMS-1, Dkt. 1170-72, appended hereto as Exhibit A.

² See Dan Adler, NXIVM Leader Keith Raniere Ordered to Pay More than \$3.4 Million to 21 Victims, Vanity Fair, <https://www.vanityfair.com/style/2017/07/nxivm-keith-raniere-restitution-order> (July 21, 2021).

Bronfman was paying for Mr. Raniere's attorney fees, that Mr. Lichtman and Mr. Fernich were new to the case, and that they had spoken to Mr. Raniere on the phone once, for about one hour, to briefly summarize the government's stance on restitution but had been unable to see him before the hearing to go over the government's submissions. Over several exchanges, Judge Garaufis berated Mr. Fernich for having requested a delay in proceedings by letter to give him time to come to Court reasonably prepared—whereas Judge Garaufis, for reasons clear only to him, believed counsel should have specifically stated that more time was needed to visit the client.

At a certain point, Judge Garaufis then began berating Mr. Fernich for asking for a one-hour delay in the proceedings so that he could attend the funeral and shiva of a close friend and colleague.

C. The Sentencing Hearing

Judge Garaufis' personal animosity toward Mr. Raniere was also displayed in his sentencing of his co-defendants.³ Judge Garaufis imposed on Clare Bronfman a sentence of 81 months: *three times* the maximum sentencing range provided by the United States Sentencing

³ *USA v. Raniere et al*, 1:18-cr-00204-NGG-VMS-1, Dkt. 936 at 7, 21, 22 appended hereto as Exhibit B.

Guidelines, and *two years longer* than even what the prosecution themselves had requested. The reason for this extreme departure, as stated by Judge Garaufis himself, was the fact that Ms. Bronfman remained close with Mr. Raniere. Judge Garaufis wrote, “Ms. Bronfman’s allegiance to Raniere shines through again and again. She has paid his legal fees and, to this day, maintains that he ‘greatly changed her life for the better.’” Judge Garaufis sentenced Ms. Bronfman not based on the crimes she pled guilty to, but based on his personal animosity toward Mr. Raniere.

II. Facts Underlying the Rule 33 Motion

The facts underlying the Rule 33 motion are best explained in that motion, which is appended⁴. For the Court’s benefit, however, we present a summary here:

In its prosecution of Keith Raniere, the child pornography at issue was manufactured and planted on a computer hard drive. The government then falsified, fabricated, and manipulated all the key evidence, including key FBI personnel testimony, to convict Mr. Raniere

⁴ Due to the voluminous nature of petitioner’s pending Rule 33 pleadings, counsel respectfully incorporates them by reference as if appended herein, as plead and found at *USA v. Raniere et al*, 1:18-cr-00204-NGG-VMS-1, Dkt. 1168-69; 1176; and 1178.

of the most heinous crimes he was charged with, possession of child pornography and sexual exploitation of a child. Such extensive government tampering renders the critical pieces of evidence used to convict him of these charges incompetent, unreliable, and invalid. The government's conduct here not only shatters rights inherent in the concept of ordered liberty, but it also shocks the conscience.

Evidence of this tampering was provided by Dr. J. Richard Kiper, Ph.D., a retired FBI Special Agent of 20 years who served as a case agent, a supervisor, a computer forensic examiner, a Unit Chief of the FBI Academy in Quantico, a whistleblower who was lauded by the United States Senate, and who was the "raison d'être" of the FBI Whistleblower Protection Enhancement Act of 2016. Dr. Kiper concludes, "My analysis demonstrates that some of these alterations definitely took place while the devices were in the custody of the FBI. Therefore, in the absence of any other plausible explanation it is my expert opinion that the FBI must have been involved in this evidence tampering." Two additional experts reviewed the evidence and concluded that electronic evidence in Mr. Ranieri's trial was extensively

manipulated while in FBI custody and that it was falsified to fit the government's narrative of criminal conduct.

REASONS FOR GRANTING THE WRIT

Relevant Legal Standards

A. Recusal

Judicial disqualification is governed by 28 U.S.C. § 455, which provides in relevant part that a judge or justice “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). The disqualification statute “is concerned largely with ensuring the federal judiciary appears to be impartial, in addition to actually being impartial.” *United States v. Sypolt*, 346 F.3d 838, 840 (8th Cir. 2003) [cleaned up]. As this Court has ruled, the test of § 455 “deals exclusively with appearances. Its purpose is the protection of the public’s confidence in the impartiality of the judiciary.” *United States v. Amico*, 486 F.3d 764, 775 (2d Cir. 2007). The central focus is on whether the allegations of bias “when coupled with the judge’s rulings on and conduct regarding them, would lead the public reasonably to believe that these problems affected the manner in which he presided . . . in other words, ‘[w]ould a reasonable person,

knowing all the facts, conclude that the trial judge's impartiality could reasonably be questioned? Or, phrased differently, would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done different absent disqualification?" *Id.* at 775 [cleaned up].

Disqualification under Sections 455, subsections (a) and (b)(1) are subject to the *extrajudicial source factor*, or the standard that "personal bias or prejudice" must come from an "extrajudicial source" rather than from judicial rulings alone. *Liteky v. United States*, 510 U.S. 540, 541 (1994) (citing *United States v. Grinnell Corp.* 384 U.S. 563, 583). It is essential to clarify that "the presence of such a source does not necessarily establish bias, and its absence does not necessarily preclude bias." *Id.* at 541. While a ruling alone seldom constitutes a valid basis for bias or partiality disqualification motions, such rulings require disqualification when they evidence such deep-seated favoritism or antagonism as would make fair judgment impossible. *Id.* Further, opinions formed by the judge on the basis of facts introduced or events occurring during current or prior proceedings can provide grounds for a disqualification motion if they also display favoritism or antagonism

that would make fair judgment impossible. *Id.* Nonetheless, as the Nation’s High Court has opined, “what matters is not the reality of bias or prejudice, but its appearance. Quite simply and quite universally, disqualification is required whenever “impartiality might reasonably be questioned.” *Id.* at 548. As noted by the Second Circuit, “The goal of section 455(a) is to avoid not only partiality but also the appearance of partiality. The section does so by establishing an “objective standard ‘designed to promote public confidence in the impartiality of the judicial process.’” The rule functions as a critical internal check to ensure the just operation of the judiciary.” *Ligon v. City of N.Y.*, 736 F.3d 118, 123 (2d Cir. 2013), vacated in part by *Ligon v. City of N.Y.*, 743 F.3d 362 (2d Cir. 2014). The inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.” *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (referencing *Liteky*, 510 U.S. at 548; citing *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1309 (2d Cir. 1988).)

Further, disqualification under § 455(a) is “necessarily fact-driven,” and the analysis thereof is guided “not by comparison to similar situations addressed by prior jurisprudence, but rather by an

independent examination of the unique facts and circumstances of the particular claim at issue.” *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008).

Additionally, “[I]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of disqualification.” *Ligon*, 736 F.3d at 124 [internal citations omitted].

B. Mandamus

“Traditional” mandamus requires three elements be met: (1) “the party seeking issuance of the writ must have no other adequate means to attain the relief [it] desires,” (2) “the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances,” and (3) the petitioner must demonstrate that the “right to issuance is clear and undisputable.” *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380–81 (2004).

However, in the alternative, the Court is empowered to offer guidance to district courts “when the question is of sufficient importance and there is a dearth of guidance on the issue.” *In re Zyprexa Products Liability Litigation*, 594 F.3d 113, 125 (2010) (Kaplan, J., concurring).

I. The requirements of traditional mandamus have been met.

If this Court does not grant this petition for a writ of mandamus, Mr. Raniere will be forced to wait until such time Judge Garaufis rules to discover in which order he rules on the motions. Due to the conflict in case precedent, it is a distinct possibility that the Rule 33 motion can be unfairly swept under the rug before the Recusal issues can be satisfied to comport with basic and fundamental fairness as well as Constitutional Due Process. This would result in not only prejudice but also a loss of judicial economy as the tangled mess of having an unlawful, improper, and unfair ruling on a Rule 33 motion for a new trial prior to hearing the Recusal motion would take much time and attention to address *ex post facto*. The demonstrable evidence of FBI perjury and evidence tampering in Mr. Raniere's trial is provable to a scientific certainty, a standard higher than even proof beyond a reasonable doubt, and Mr. Raniere only seeks to have his day in court to establish such.

As best detailed in the filed memorandum of law in support of the motion to disqualify, Mr. Raniere has demonstrated a clear and undisputable right to have any further proceedings presided over by an

impartial judge, a role that Judge Garaufis either cannot perform or cannot appear to perform. Accordingly, the Court should grant a writ of mandamus directing Judge Garaufis to disqualify himself because Mr. Ranieri has demonstrated that he has no other adequate means of relief, because he has a clear and indisputable right to the disqualification, and because a granting of the writ is appropriate under the circumstances.

II. Even if the Court denies the petition for a writ of mandamus, it should issue an advisory mandamus opinion to clarify the proper sequencing of rulings on petitions for recusal.

The Supreme Court “departed in some degree” from the traditional mandamus standards and considered the use of advisory writs in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), and this Court has used advisory writs on several occasions when denying a writ of mandamus when the question is of sufficient importance and there is a dearth of guidance on the issue. *In re Zyprexa Products Liability Litigation*, 594 F.3d 113, 125 (2010) (citing *In re International Business Machines Corp.*, 687 F.2d 591 (2d Cir. 1982); *United States v. Amante*, 418 F.3d 220 (2005); *Kaufman v. Edelstein*, 539 F.2d 811 (1976)).

A. The question of when a district court should rule on a petition for recusal is an important question deserving of this Court's advisory mandamus power.

The question of the sequencing of opinions on motions for disqualification when there are also other substantive motions *sub judice* is one that will surely recur in the many cases, of which the instant proceedings are but one example, where a party requests a new trial or appeals and the case may be remanded while at the same time moving to have a judge disqualify themselves. Making a clear sequencing rule will aid judges in giving them clear instructions, will aid movants in decreasing the likelihood that important substantive motions will be ruled on by judges later forced to disqualify themselves through appellate proceedings, and will aid the entire judiciary by reducing the instances of duplicative proceedings.

Parties who discover only through the course of a trial that the judge assigned to their case is so biased as to create the appearance of impartiality face a terrible double bind. On the one hand, they are required to raise objections and request recusal at the earliest possible moment. On the other, the request for recusal is often necessarily tantamount to an accusation that the judge is not performing or cannot

perform their jobs correctly. While good judges do their best to rule on motions for disqualifications dispassionately, it is doubtful that a judge who actually *is* biased is likely to admit it. So they will continue to preside over proceedings in which their original bias against one party is now *exacerbated* by the fact that the party has requested recusal and publicly accused them. Movants should know that if the issue of disqualification comes up, raising an objection at the earliest practicable moment as required will not increase the likelihood their proceedings will not be unnecessarily affected by a judge saving the ruling on the recusal motion for the last second, with the effect of essentially wasted the time available to the party to appeal for interlocutory or final appeal.

B. There is a dearth of guidance on this issue.

Precedent handed down by this Court has not fully articulated how and when district courts should consider the sequence in which rulings should be made when a motion for recusal, if granted, would remove a judge from further participation in a proceeding.

In *Pashaian v. Eccelston Properties, Ltd.*, 88 F.3d 77 (2d Cir. 1996), this Court held that a judge did not err in deciding a preliminary injunction before effecting his recusal.

Yet even district courts seem to recognize that the permissive ruling of *Pashaian* should surely be the exception and not the rule. For example, in a recent § 1983 case brought by an incarcerated pro se plaintiff against his jailers, the judge held that the “recusal issue is a threshold issue that must be resolved before the Court may consider any substantive motion.” *Barnes v. Harling*, 368 F.Supp.3d 573, 591 (W.D.N.Y. 2019).

CONCLUSION

For the reasons set forth above, the Court should issue a writ of mandamus directing the trial judge to recuse himself from the case and for the case to be assigned to a new judge. In the alternative, the Court should issue a denial that nonetheless clarifies that motions for recusal should be ruled upon as a threshold matter before substantive issues are decided.

Dated: December 9, 2022

Respectfully submitted,
Keith Ranieri,
Petitioner

/s/ Joseph M. Tully
Joseph M. Tully, Esq.
TULLY & WEISS ATTORNEYS AT
LAW
Counsel for the Petitioner

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. R. 21(d)(1) because, excluding the portions exempted by Fed. R. App. R. 21(a)(2)(C) this brief contains 3588 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: December 9, 2022

/s/ Joseph M. Tully
Joseph M. Tully, Esq.
TULLY & WEISS ATTORNEYS AT
LAW
Counsel for the Petitioner

CERTIFICATE OF SERVICE

I certify that on December 9, 2022, this petition and the accompanying addendum were filed electronically with the Clerk of the Second Circuit Court of Appeals through the Court's electronic filing system, which will accomplish service on counsel for all parties.

Dated: December 9, 2022

/s/ Joseph M. Tully
Joseph M. Tully, Esq.
TULLY & WEISS ATTORNEYS AT
LAW
Counsel for the Petitioner