UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-3520, -3789 Caption [use short title] US v. Bronfman, Raniere, et al.

Motion for: Supplemental Appeal Brief

Set forth below precise, complete statement of relief sought:

See attachments.

MOVING PARTY: Keith Raniere **OPPOSING PARTY:** USA

☐ Plaintiff ☑ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Joseph Tully **OPPOSING ATTORNEY:** Kevin Trowel, Esq.

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Court- Judge/ Agency appealed from: Hon. Nicholas G. Garaufis USDJ-EDNY

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Joseph M. Tully **Date:** 11/5/2021 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

20-3520 (L)20-3789 (con)

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-v.-

ALLISON MACK, KATHY RUSSELL, LAUREN SALZMAN, NANCY SALZMAN, AKA Prefect,

Defendants,

KEITH RANIERE, AKA Vanguard, CLARE BRONFMAN,

Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR DEFENDANT-APPELLANT KEITH RANIERE

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ADOPTION OF STATEMENT OF JURISDICTION AND STATEMENT OF CASE

This supplement hereby adopts the Statement of Jurisdiction and Statement of the Case of the previously filed appeal in this matter. This supplement serves only to present the additional issue of an improper jury instruction. This issue is labeled as item six (6) as it is meant to supplement and not replace the prior five (5) issues presented to this Court.

ADDITIONAL ISSUE PRESENTED FOR REVIEW

6. Whether the trial court committed a prejudicial error of law in giving the jury an errant instruction on commercial sex over Defendant's objection which mislead and inadequately informed the jury and allowed for improper argument.

NOTATION ON TIMING OF FILING

Due to the timing of Attorney Joseph M. Tully substituting in as attorney of record in the present matter, an agreement between counsel has been reached regarding a time extension for filing to November 5, 2021. Attorney Kevin Trowel for the government and Joseph Tully for Mr. Raniere jointly request and have no objection

to filing of this supplement being made by November 5, 2021, and the filing of the government's response to have a reciprocal extension.

SUMMARY OF ARGUMENT

The Court was presented with jury instructions on commercial sex from both Defense counsel and government counsel in this case. Defense counsel submitted an instruction from Sand, M*odern Federal Jury Instructions* which stated "A 'commercial sex act' is any sex act on account of which anything of value is given to or received by any person." (Dkt. No. 692-1, at 64 and 86.)

The government provided an alternative instruction, not from the Sand instructions, which diluted the required elements of the charge. Specifically, the government's instruction read, "A commercial sex act is any sex act of which anything of value is given to or received by any person because of such sex act. … A thing 'of value' need not involve a monetary exchange and need not have any financial component." (Dkt. No. 693, at 73 of 116). Note that this instruction replaces the "on account of" language with "because of" and further widens the phrase, "anything of value" from the Sand instruction, which is already near boundless, to not require a "monetary exchange" or "any

financial component." Defense Counsel objected to its use as it provided undue emphasis. (R. 5271; 5273.)

The Court adopted the government's instruction, ultimately stating to the jury that:

> "A commercial sexual act is any sex act of which anything of value is given to or received by any person because of such sex act. It is not required that the victim actually performed a commercial sex act as long as the Government has proved that the Defendant recruited, enticed, harbored, transported, provided, obtained, maintained, patronized or solicited the victim for purposes of engaging in commercial sex acts. A thing "of value" need not involve a monetary exchange and need not have any financial component. The phrase "any sex act" should be given its plain meaning and may include any act performed with another for sexual gratification." (Dkt. No. 728, at 100.)

In diluting the necessary *quid pro quo* causal relationship between the sex act and thing of value received, and in emphasizing the lack of a requirement of any financial component without further explanation, the instruction blatantly ignores the fact that the Trafficking Victims Protection Act ("TVPA") was created to address sexual exploitation *for profit* and as an economic activity, not merely

as mistreatment of women and children. *See* 22 U.S.C. § 7101(2). Further, by giving an amorphous, open-ended, and limitless definition of "value" without also clarifying the necessity of a causal relationship between value received and the sex act, the court confused and inadequately informed the jury.

This error of law resulted in the government being able to unconstitutionally argue that any sexual activity, performed by any persons, that Mr. Raniere became aware of by any means, and which then made him happy, was a commercial sex act, all based upon the contention that first-line members of DOS enjoyed certain privileges because they were in Mr. Raniere's esteem. (R. 5414-5415.) Therefore, it was argued, any sex acts involving them, even indirectly, that made Mr. Raniere happy were commercial sex acts. (*Id.*)

This erroneous instruction further allowed the government to ignore the need to establish a causal relationship or *quid pro quo* between the particular sex act and the received benefit. This lack of a required nexus allowed the prosecutor to argue that an email from

months prior about a different individual was enough to establish *quid pro quo* grounds here regarding the sex act at hand. (R. 5416.)

The adoption of the government's requested, inaccurate, and repetitious instruction improperly ignored established law, the purpose of the TVPA, and resulted in the jury erroneously finding that the sexual act on May 31, 2016, was performed "on account of which anything of value is given to or received by any person" without any substantive proof. 18 U.S.C. § 1591(e)(3).

ARGUMENT

Legal Standard

A claim of error in the district court's jury instructions is reviewed *de novo* and can result in a reversal if the plaintiff-appellants can show that in viewing the charge given as a whole, they were prejudiced by the error. *Anderson v. Branen*, 17 F.3d 552, 556 (2d Cir. 1994) citing *See United States v. Pujana-Mena*, 949 F.2d 24, 27 (2d Cir. 1991); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1378 (2d Cir. 1989), cert. denied, 494 U.S. 1026, 110 S.Ct. 1470, 108 L.Ed.2d 608 (1990).

A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the

law. *Folger Adam Co. v. PMI Industries, Inc.*, 938 F.2d 1529, 1533 (2d Cir. 1991); *Norfleet v. Isthmian, Inc.*, 355 F.2d 359, 362-363 (2d Cir. 1966). An erroneous instruction, unless harmless, requires a new trial. *Anderson v. Branen*, 17 F.3d 552, 556 (2d Cir. 1994).

1. The Commercial Sex Jury Instruction Misled and Did Not Adequately Inform the Jury of the Law.

To prove Racketeering Act 10A, the sex trafficking of Nicole, the government had to prove beyond a reasonable doubt that Mr. Raniere knew Nicole would be engaged in a commercial sex act. (Dkt. No. 728, at 94.) The sex act alleged is Nicole's May 31, 2016, experience. However, if this act was a commercial sex act needed to be clearly defined so that the jury could decide if Mr. Raniere knew Nicole's act would constitute such.

As laid out extensively in prior briefings, the TVPA is meant to address sexual exploitation *for profit* and as an economic activity, not merely as mistreatment of women and children. *See* 22 U.S.C. § 7101(2). The statute "broadly focuses the trier of fact's inquiry on whether a given individual has been exploited for profit …" *United States v. Marcus*, 487 F. Supp. 2d 289, 306-07 (E.D.N.Y. 2007) rev'd on other grounds, 538 F.3d 97 (2d Cir. 2008). Here, the government not

only failed to meet their burden in proving the elements of the charge, but the instruction so misled and did not adequately advise the jury that, despite the obvious and clearly briefed holes in their case, an invalid verdict of guilty was entered on this count.

It is established law that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship* (1970) 397 U.S. 358, 364. The prosecution bears the burden of proving every element, which in this case includes proving the causal relationship between the sex act and the thing of value provided therefore.

Section 1591 defines "commercial sex act" as "any sex act, on account of which anything of value is given to or received by any person, and "[T]he use of the phrase 'on account of which' suggests that there...needs to be a causal relationship between the sex act and an exchange of an item of value." *United States v. Marcus*, 487 F. Supp. 2d 289, 306-07 (E.D.N.Y. 2007) rev'd on other grounds, 538 F.3d 97 (2d Cir. 2008). This requires a showing of "some sort of *quid pro quo* for the sex acts" that are alleged. *Kolbek v. Twenty First Century Holiness*

Tabernacle Church, Inc. (W.D. Ark., Dec. 24, 2013, No. 10-CV-4124) [pp. 28]. In Hobbs Act cases, establishment of a *quid pro quo* is required for the prosecution to fulfill its burden of proof. *United States v. Vigil* (D.N.M., Feb. 3, 2006, CR 05-2051 JP) [pp. 19]. Courts have found that expanding the *quid pro quo* requirement to non-campaign cases is appropriate. *Id*. at 16].

The instruction here was misleading in replacing the language of "on account of" with "because of" without any further explanation. *Quid pro quo* is something that is understood colloquially and has available instructions. *See United States v. Vigil* (D.N.M., Feb. 3, 2006, CR 05-2051 JP). Without the inclusion of such language or instruction, the presented instruction allowed for the prosecution to avoid their duties under *Winship* and not even discuss the existence of a *quid pro quo*.

In *Kolbek v. Twenty First Century Holiness Tabernacle Church, Inc.*, the Court found that there must be evidence of a causal relationship between sex acts and the payment of expenses for this *quid pro quo* requirement to be met. *Kolbek v. Twenty First Century Holiness Tabernacle Church, Inc.* (W.D. Ark., Dec. 24, 2013, No. 10-CV-4124) [pp. 28]. "The fact that sexual abuse was committed by the ministry's leader

and that members of the ministry had their expenses paid for through ministry funds is simply not sufficient to establish a violation of 18 U.S.C. § 1591." *Kolbek v. Twenty First Century Holiness Tabernacle Church, Inc.* (W.D. Ark., Dec. 24, 2013, No. 10-CV-4124) [pp. 28]. Thus, a mere showing that something of value was provided is not enough without additional evidence that the thing of value was provided *on account of* the sex act. Here, the extraordinarily limited *quid pro quo* evidence did not establish such a causal relationship. However, because the jury was not adequately instructed on the law, they did not realize the prosecutor had failed to meet their burden.

Further, the instruction is repetitive in stating that "A thing 'of value' need not involve a monetary exchange and need not have any financial component." The instruction improperly misled the jury to accept the government's argument that making Mr. Raniere happy was a thing "of value" under the law. The government explained that "there were certain privileges, including economic privileges, that came with being in the first-line, including the longest line of free labor flowing up to you. Maintaining a spot in the first-line and receiving those benefits,

meant keeping the defendant happy." (R. 5414.) These privileges were never shown tied to the specific sex act alleged here.

Put another way, the government intentionally emphasized the most confusing part of commercial sex act law so as to mislead the jury and obfuscate the lack of causal relationship between the sexual act and the alleged value obtained therefrom. By accentuating the amorphous definition of "value," the prosecutor expanded it to include any happiness derived by Mr. Raniere on account of Allison's work. This in turn allowed for the relationship between the sexual act and benefit to be glossed over as an assumption instead of proved beyond a reasonable doubt.

An apt analogy to first-line membership in commercial sex case law is under the theory of career advancement. It is recognized that career advancement can be a thing "of value" for finding a commercial sex act, but only when a *quid pro quo* relationship can be shown. *Corradino v. Liquidnet Holdings, Inc.*, 19 Civ. 10434 (LGS) (S.D.Y.Y. Jul. 8, 2021.) In *Corradino v. Liquidnet Holdings, Inc.* the Plaintiff refused the sexual and romantic advances of a supervisor offered to her and still advanced in the company, showing that while the sexual acts

were referenced as something that *could* help advance her career, that they were not necessary. *Corradino v. Liquidnet Holdings, Inc.*, 19 Civ. 10434 (LGS) (S.D.Y.Y. Jul. 8, 2021.).

Here, the sex acts were also not necessary for the career advancement or status of Allison. Allison was already in the DOS first-line and was not required to perform or solicit any sex acts to maintain her standing. We know this because Ms. Salzman was also a member of the DOS first-line and never facilitated any such sex act. (R. 1790-1794.) Just because such acts were mentioned or suggested does not mean that they were required or, that in providing them, career advancement was given. Allison's status as a first-line member of DOS cannot be characterized as contingent upon this act as her first-line status had occurred long before the act. Further, there is no evidence that her first-line status was more secure after the alleged provision.

Moreover, the prosecutor's argument regarding *quid pro quo* had nothing to do with Nicole and demonstrated that Allison was provided economic assistance even when sexual acts had not been provided. The government argued that "evidence of a *quid pro quo* between Allison and the defendant" was provided through an email in which Allison

requested that Mr. Raniere prioritize his review of her income payment so that she could get it expeditiously despite his busy schedule. (R. 5415.) His response to her request was an unconditioned, "Yes." (R. 5416.) However, the government then argued that because Mr. Raniere subsequently included the question, "Any news on India?" in the same email that suddenly his agreement to prioritize an administrative process of approving income payments was conditioned on a sex act. (*Id.*) However, there was no condition on getting Allison her income from her work as a trainer, and it had *nothing* to do with the May 31, 2016, act with Nicole. (*Id.*)

The happiness of Mr. Raniere, whom the government had meticulously crafted a narrative against including objecting to all testimony regarding positive interactions, altruistic goals, or flattering characterizations thereof, became the thing "of value." However, this is not an appropriate finding of the element, and was only found to be such by the jury because of the legally improper and confusing instruction. With the reiteration of the "value" being so expansive, the Court needed to unambiguously instruct the jury that any such "value" needed to occur "on account of" the sex act, and have some causal

relationship rather than just general proximity. By appealing to the authority of the confusing instruction before defining the alleged value in such broad terms, the prosecutor created the appearance of assumed connectivity rather than proving beyond a reasonable doubt that a specific sex act led directly to the promise of provision of value.

The Sand instruction used the "on account of" language and already contained language indicating that "anything of value" would qualify. The duplicative emphasis on this not requiring a "monetary exchange" or "any financial component" allowed for the undue emphasis to which Defense Counsel specifically objected. (R. 5273.) Without further clarification that the thing "of value" had to have occurred on account of the sex act, or in specific exchange for the act as a *quid pro quo*, the Court allowed for the weaponized vagueness used in the prosecution's summation to sidestep their burden of proof.

2. Mr. Raniere was Prejudiced by the Error in the Commercial Sex Instruction

The instruction here was prejudicial to Mr. Raniere because it permitted the government to lessen its burden regarding the need to establish any actual value in being a first-line DOS member or any proof that the alleged benefits were on account of the alleged sex acts.

As was found pre-trial, "Whether or not Mack or Raniere received benefits such as 'status' or 'acts of care' before the alleged sex acts occurred, simply as a result of their membership in an organization … - or whether they received these benefits on account of the alleged sex acts – is a factual question …". *United States v. Raniere*, 384 F.Supp. 3d 282, 319. This factual question was one for the jury to decide, so the Court could not decide it in a pre-trial motion to dismiss. *Id.*

By the same standard, the government cannot lessen its burden by using the instruction to say that proof of Mr. Raniere's happiness from an event is enough to show a commercial benefit flowed directly from the event. (R. 5414.) In closing, the government did not point to any evidence showing that any specific thing of value was exchanged on account of the sex act on May 31, 2016, but instead was able to argue that an email which referenced both Mr. Raniere providing economic support to Allison and the status of Allison collecting pictures of India shows that *any* act relating to sexuality and having *any* tangential connection to Mr. Raniere was performed in order to receive an economic benefit and that value was assumed to have been received as a direct result of such acts. (R. 5415-5416.)

Here, the evidence of such an attenuated connection between the act and benefit would not have led to the jury finding the element proven but-for the jury instruction which so diluted the causal relationship between act and value that the jury could not have known any better. The phrase "because of" that the court used in its instruction ignores the fact that "the *quid pro quo* requirement is essentially a requirement of intent." *United States v. Vigil* (D.N.M., Feb. 3, 2006, CR 05-2051 JP) [pp. 12]. Without this explained, the jury was left with colloquial definitions of "because of" rather than the legal standard of a causal relationship. For example, while it is not incorrect to say, "because of the rain, the man wore a hat," the rain cannot and thus did not have a *quid pro quo* relationship with the man putting on the hat.

To underscore the critical distinction of "on account of," which underscores a *quid pro quo*, versus "because of," which means only a "connection to" or a proximate causational relationship to, an analysis of the absurdities that the court's instruction as given includes is warranted. Under the instruction the court gave, if a husband has sexual relations with his wife and, as a result of being contented and happy because of the experience, treats his work staff to lunch the next

day, then the act between husband and wife the night prior is a "commercial sexual act" because the employer's staff received the value of lunch "because of" the sex act the employer had with his wife. Moreover, in this same hypothetical, if the husband goes to work the next day and, instead of buying his staff lunch, merely gives his secretary a compliment, his HR director a "high five," or gave a nice, reassuring smile to his administrator, indicating some level of favor, the sex act from the night before with his wife would still be a "commercial sexual act" because of the obviated *quid pro quo* between the sex act and anything received by anyone. It is not the vagueness of the concept of value that is disputed here, it is the vagueness of the required causal relationship. This instruction amounted to a mandate to the jury to convict on this count.

Without the inappropriate language substitution and the portion of the instruction diluting "value" and ignoring any requirement for a *quid pro quo* or direct attribution of the value to the act, the jury would not have found that any alleged sexual act was commercial in nature, and thus this erroneous instruction prejudiced Mr. Raniere's case.

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CONCLUSION

For the foregoing reasons, Mr. Raniere is entitled to a new trial or at a minimum a hearing to further explore the allegations set forth.

Dated: October 27, 2021, Respectfully submitted,

TULLY & WEISS ATTORNEYS AT LAW

/s/ Joseph M. Tully
JOSEPH M. TULLY
Attorney for KEITH RANIERE

CERTIFICATE OF COMPLIANCE

I certify pursuant to FRAP 32 and Local Rule 32.1(a)(4) that the foregoing brief was prepared on a computer using Microsoft Word. The proportionally spaced typeface, font size, and spacing used was the following:

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Dated: October 27, 2021,

Respectfully submitted,

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