IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	Criminal Action No. 09-CR-29
v.	
JOSEPH L. BRUNO,	Speedy Trial Act Exclusion Pursuant to 18 U.S.C. § 3161(h)(7)(A) & (B) Through 30 Days After Conclusion of Hearing on Pretrial Motions
	(Hon. Gary L. Sharpe)
Defendant.	

Government's Memorandum of Law in Opposition to Defendant's Motion to Dismiss The Indictment

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Introduction and Summary

This Memorandum is submitted in opposition to defendant's motion to dismiss the superseding indictment charging him with two counts of honest services mail fraud, in violation of 18 U.S.C. §§ 1341, 1346. The charges are based on approximately $300,000 in payments to defendant, a public official, from entities affiliated with Jared. E. Abbruzzese. As set forth in the superseding indictment, defendant (1) received the payments in the form of "consulting" payments and payments for a virtually worthless horse; (2) accepted all of these payments knowing, understanding, and believing that (a) he was not entitled to the payments; (b) the payments were made in return for official acts as opportunities arose rather than being given for reasons unrelated to his office; and (c) his reasonably perceived ability to influence official action, at least in part, motivated the making of the payments; and (3) in return for the payments, would and did perform official acts benefitting the interests of Jared E. Abbruzzese and/or his affiliated companies as opportunities arose.

Defendant contends that the superseding indictment should be dismissed because (1) it is barred by the statute of limitations and (2) it includes a theory of prosecution which the government previously abandoned. Neither of defendant's arguments has any merit, and his motion should be denied.

I. Procedural Background

Following a month-long trial, on December 7, 2009, a jury convicted defendant of two counts of honest services mail fraud, acquitted him of five counts, and could not reach a verdict on one count. On May 6, 2010, the district court sentenced defendant to imprisonment for two years on each count to run concurrently. Defendant filed a timely notice of appeal. While defendant's appeal was pending, the Supreme Court decided *United States v. Skilling*, 130 S. Ct. 2896 (2010).

On November 16, 2011, the Second Circuit issued an opinion vacating the convictions and, without deciding whether the indictment "can be read as also charging a bribery or kickback theory," directed that the indictment be dismissed without prejudice because, although the indictment "alleges sufficient facts to support a bribery charge, it does not explicitly charge a bribery or kickback theory, and does not contain language to the effect that Bruno received favors or gifts 'in exchange for' or 'in return for' official actions." *United States v. Bruno*, 661 F.3d 733, 740 (2d Cir. 2011). The Court reasoned that it "would be preferable and fairer . . . for the government to proceed on explicit rather than implicit charges, and as the government intends to seek a superseding indictment, we dismiss the Indictment, without prejudice." *Id.* The opinion concluded: "For the foregoing reasons, Bruno's conviction is VACATED and the case

is REMANDED for further proceedings consistent with this opinion." *Id.* at 745.

The mandate was issued on December 9, 2011. A grand jury returned a two-count superseding indictment on May 3, 2012.[1]

II. The Superseding Indictment is Timely Under 18 U.S.C. § 3288.

The pending indictment is not barred by the statute of limitations because of the tolling provisions of 18 U.S.C. § 3288.

A. Relevant Law

Title 18, United States Code, Section 3288 states:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final . . . which new indictment shall not be barred by any statute of limitations.

This tolling provision applies whenever "'an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury.'" *United States v. Macklin*, 535 F.2d 191, 192 (2d Cir. 1976) (quoting prior version of 18 U.S.C. § 3288). It "is available to correct legal defects as well as grand jury defects or irregularities." *United States v. Italiano*, 894 F.2d 1280, 1286 n.

[1]Whether the pending indictment is referred to as a "superseding" or "new" indictment has no effect on any of the relevant legal analysis. The government called the pending indictment a "superseding" indictment because the Second Circuit used that term in its opinion. *Bruno*, 661 F.3d at 740 ("as the government intends to seek a superseding indictment).

10 (11th Cir. 1990).

As the Second Circuit has stated:

> This is a sensible application of the policies underlying statutes of limitations. The defendants are put on timely notice, because of the pendency of an indictment, filed within the statutory time frame, that they will be called to account for their activities and should prepare a defense. The statute begins to run again on those charges only if the indictment is dismissed, and the Government must then reindict before the statute runs out or within six months, whichever is later, in order not to be time-barred.

United States v. Grady, 544 F.2d 598, 601-02 (2d Cir. 1976) (citations/footnotes omitted). In other words, "[t]he purpose (of the saving clause is) to extend the statute of limitations, so that a person who had been indicted under an indictment which, as it turned out, would not support a conviction, should not escape because the fault was discovered too late to indict him again." *Macklin*, 535 F.2d at 193. The statute thus "allow[s] the prosecution a second opportunity to do what it failed to do in the beginning: namely, file an indictment free of legal defects." *United States v. W.R. Grace*, 504 F.3d 745, 753 (9th Cir. 2007).

The statute "provides the government with an additional 'six calendar months' from the date of the dismissal of the indictment to issue a new indictment against the defendant" when the indictment is upheld by the district court, but is later dismissed on appeal. *United States v. Garcia*, 268 F.3d 407, 411, 412 (6th Cir. 2001); *see id.* at 412 (concluding that the government had six months to return indictment against defendant where a Sixth Circuit

opinion had "effectively dismissed" the original indictments because of "fatal flaws in the Eastern District of Michigan's grand jury selection procedure"); *United States v. Crawford*, 60 Fed. Appx. 520, 531 (6th Cir. 2003) (unpublished) (same where the same Sixth Circuit opinion had "effectively dismissed" the second superseding indictment). *See also United States v. Italiano*, 894 F.2d 1280, 1281-82, 1283 (11th Cir. 1990) (indictment returned less than six months after appellate court ruled indictment was fatally flawed timely under 18 U.S.C. § 3288) (applying statute when it did not include the 60-day clause).

The subordinate clause added by a 1988 amendment – "in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final" – applies only where an appeal is filed after a district court dismisses an indictment.[2] *See Garcia*, 268 F.3d at 411 n. 2 (explaining that the 60-day provision is implicated when a district court's dismissal of an indictment is appealed; "Should the government choose to appeal the dismissal of the indictment, it will have sixty days from the date the dismissal of the indictment becomes final in which to issue a new indictment."). Unlike the six-month provision, the 60 days does not begin to run until the dismissal "becomes final."

[2]Only the government, and not a defendant, may properly file an appeal when an indictment is dismissed. *See United States v. Reale*, 834 F.2d 281, 283 (2d Cir. 1987) (court of appeals lacks jurisdiction of interlocutory appeal by defendant of dismissal of indictment without prejudice for violation of Speedy Trial Act).

Congress added this clause because of a concern that the six-month period, which begins to run from the dismissal, might well expire before the government's interlocutory appeal from a district court's dismissal of an indictment is final:

> Under the amendment, the government can appeal (after obtaining the approval of the Solicitor General, 28 C.F.R. 0.20) and, if unsuccessful, still have time in which to bring a new prosecution. This proposal was included in S. 1630 (511), the Criminal Code Reform bill approved by the Judiciary Committee in the 97th Congress.

134 Cong. Rec. S17360-02, Section Analysis of Judiciary Committee Issues in H.R. 5210, Section 7081, 1988 WL 182529. As a result, when an appeal follows a district court's dismissal of an indictment, this provision gives the government additional time to indict when its appeal is not decided within six months of the district court's dismissal.

This reading of the statute – that the 60-day provision applies only following a district court's dismissal – "makes sense as a matter of syntax." *Abbott v. United States*, 131 S.Ct. 18, 30 (2010). "The grammatical and logical scope of a proviso . . . is confined to the subject-matter of the principal clause to which it is attached." *Id.* at 30 (quotations omitted).

Here, the principal clause of section 3288 states that "[w]henever an indictment . . . is dismissed for any reason . . . a new indictment may be returned . . ." The antecedent of "appeal" in the subordinate clause is found in the principal clause: an indictment that has been dismissed. As a result, the

grammatical and logical scope of the 60-day appeal proviso is necessarily confined to an appeal from the dismissal of an indictment, and the clause is most naturally read, as it was by both the Sixth Circuit and the Judiciary Committee, as being addressed to interlocutory appeals filed by the government following a district court's dismissal of an indictment.[3]

B. The Indictment Was Timely Because It Was Returned Within Six Months of the Second Circuit's Opinion.

Applying Section 3288 here, the six-month provision applies because the district court did not dismiss the indictment before defendant filed his appeal; the subordinate appeal clause does not apply. The indictment was returned on May 3, 2012, within six months of the Second Circuit's November 16, 2011 opinion, and there is no statute-of-limitations issue.[4]

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[3]The 60-day provision also applies when a defendant, incorrectly, appeals from a district court's dismissal of an indictment. *See United States v. Kuper*, 2009 WL 1119490 (E.D.Pa. 2009) (noting that the parties "apparently agreed" that an indictment returned within 60 days of the issuance of the mandate following the Third Circuit's dismissal of defendant's appeal of the district court's dismissal of the original indictment on Speedy Trial Act grounds where more than six months had passed since the district court dismissed the original indictment). *Kuper* does not apply here because this Court did not dismiss the original indictment before the appeal, and the pending indictment was filed within the six months permitted by § 3288's principal clause.

[4]This is the earliest potential date that the six months could have begun to run, and, because the indictment was returned within six months of this date, it is unnecessary for this Court to decide whether a different event, such as the issuance of the mandate, or a district court's dismissal of an indictment following the mandate, instead starts the clock.

Defendant's argument to the contrary – that the 60-day clause applies when there is an appeal from a "non-dismissal" of an indictment – relies on a statute of his own making. Unsatisfied with the statute as written, defendant inserts the word, "non-dimissal" to offer his self-serving interpretation of the statute: "[t]he six-month period applies to cases where there has been an appeal of the dismissal or non-dismissal; the 60-day period applies in the case of an appeal." Bruno Br. at 6. Obviously, it is improper to insert any words into the statute. Even considering the insertion, however, for the sake of argument, it is clear that it would make the statute read like gibberish: "Whenever an indictment . . . is dismissed or not dismissed for any reason . . . a new indictment may be returned . . ." But how can a tolling provision apply when an indictment is not dismissed?

None of the cases cited by defendant are to the contrary, and he makes them appear to be so by plucking language from the opinions without providing critical procedural context. For example, in *United States v. Runnels*, 1994 WL 7614 (6th Cir. 1994) (unpublished), when the Sixth Circuit stated that "the new indictment was returned within 60 days of the dismissal of the original indictment," *id.* at *5, it was referring to the district court's dismissal of the indictment, not a dismissal by an appellate court. *See id.* at * 1 (stating that the district court dismissed the indictment "pursuant to the mandate issued by" the

Sixth Circuit). Moreover, the new indictment was returned on September 13, 1989, *Runnels*, 1994 WL 7614, at *1, 90 days after the Sixth Circuit issued its opinion on June 13, 1989, *United States v. Runnels*, 877 F.2d 481 (6th Cir. 1989); under defendant's reading of the 60-day clause, the statute would have run.[5]

Defendant's reliance on *United States v. Bolton*, 893 F.2d 894 (7th Cir. 1990), is similarly misplaced. There, the Seventh Circuit reversed the convictions and "remand[ed] the case to the district court with instructions to dismiss the . . . indictment under which the defendant was tried." *Id.* at 895. On the issue of the timing of reindictment, the Seventh Circuit merely noted that "in a post-argument letter of December 20, 1989, the United States Attorney advised us that Bolton can be reindicted and tried by virtue of 18 U.S.C. § 3288, which gives the government 60 days to file a new indictment after the dismissal of an invalid indictment." *Id.* at 895. The Seventh Circuit did not consider which portion of Section 3288 applied, and this single sentence based on a letter from a party is no reason to adopt defendant's implausible reading of the statute.[6]

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[5]Even if *Runnels* applied, defendant has never asked this Court to dismiss the original indictment, and the 60 days did not begin to run before the superseding indictment was returned.

[6]Defendant's reliance on 18 U.S.C. § 3296, which allows the government 60 days to move to reinstate counts voluntarily dismissed pursuant to a plea agreement when a defendant later causes his guilty plea to be vacated, is similarly misplaced. The time runs from when the order vacating the plea becomes final, and

Finally, *United States v. Gilchrist*, 215 F.3d 333 (3d Cir. 2000) held that when two counts are dismissed and the government files a timely appeal only as to one of the dismissed counts, the 60-day clause, which applied to the count whose dismissal was timely appealed, did not also apply to the dismissed count which was not appealed. Defendant's convoluted effort to re-shape the holding of *Gilchrist* as if it supports action on "non-dismissed" counts fails because in *Gilchrist* all counts were in fact dismissed by the district court. *See, e.g., id.* at 334 (noting appeal was from denial of motion to reinstate dismissed counts).

In summary, it "makes far more sense" to read the 60-day provision as limited to cases where a district court has dismissed an indictment. *Abbott*, 131 S.Ct. at 29. This interpretation is supported by the plain language of the statute, including its syntax, legislative history, and the Sixth Circuit's opinion in *Garcia*, 268 F.3d at 412.[7]

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there is no reference to a six-month provision. 18 U.S.C. § 3296(a). The reasons for the different time periods are obvious. Unlike a grand jury proceeding, which requires the presentation of witnesses and the drafting of a new indictment, the procedure under § 3296 requires only the filing of a simple motion. Sections 3288 and 3296 are analogous because both extend the statute of limitations for dismissed counts, not because they impose the same deadlines.

[7]Anticipating the strength of the government's reading of the statute, defendant argues in the alternative that if this Court concludes that the government's reading is correct, then the government was the "de facto appellant." Bruno Br. at 14. This is plainly wrong. Defendant filed the notice of appeal and rejected the government's proposal to agree to withdraw his appeal

C. The Superseding Indictment Does Not Broaden or Substantially Amend The Charges In The Original Indictment And Thus "Relates Back" For Statute of Limitations Purposes.

Charges in indictments returned under tolling principles which do not materially broaden or substantially amend the original charges "relate back" to the original indictment and inherit its timeliness. *United States v. Salmonese*, 352 F.3d 608, 622 (2d Cir. 2003); *United States v. LaSpina*, 299 F.3d 165, 178 (2d Cir. 2002); *United States v. Italiano*, 894 F.2d 1280, 1283 (11th Cir. 1990).

In determining whether an indictment has been materially broadened or substantially amended, the Second Circuit considers whether the "additional pleadings allege violations of a different statute, contain different elements, rely on different evidence, or expose the defendant to a potentially greater sentence." *Salmonese*, 352 F.3d at 622. "No single factor is determinative; rather, the 'touchstone' of our analysis is notice, *i.e.*, whether the original indictment fairly alerted the defendant to the subsequent charges against him and the time period at issue." *Id.*

Applying the *Salmonese* factors, it is plain that the indictment here has not broadened or substantially amended the

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to expedite the resolution of the case because he wanted the Second Circuit to decide whether retrial was barred because of insufficient evidence to satisfy the *Skilling* standard. The Second Circuit rejected his argument, and he cannot now reasonably argue that he was not the appellant. Moreover, the 60-day provision applies only where an appeal follows a dismissal of an indictment by the district court. That was not the case here.

charges in the original indictment.

As defendant acknowledges, both this indictment and the original indictment allege violations of the same statutes, the mail and honest services fraud statutes, 18 U.S.C. §§ 1341, 1346, and the two counts of this indictment carry the same penalties as the original indictment.

The third factor – whether this indictment relies on different evidence – also favors the government because both indictments rely on the same evidence. The sequence of actions, *see Italiano*, 894 F.2d at 1285, revolve around defendant's solicitation and receipt of payments; his failure to perform legitimate work for the payments or, in the case of the horse, acceptance of payments for a virtually worthless animal; and his taking of official action benefitting Abbruzzese. Both indictments allege the same payments from the same source, and the same two mailings in furtherance of the scheme.

The original indictment alleged that defendant took official action benefitting the payors, ¶ 59, while this indictment adds more detail, specifying official actions taken, ¶ 27. But the government's decision to provide additional detail does not broaden or amend the charges. *See United States v. LaSpina*, 299 F.3d 165, 178 (2d Cir. 2002) (count which "added allegations that [defendant] had received income in 1992 and 1993 from the . . . kickback scheme" did not broaden charges even though it alleged a new source

of unreported income because source of unreported income is not an essential element of offense); *see also United States v. McMillan*, 600 F.3d 434, 446-47 (5th Cir. 2010) (same where pending indictment provided more explicit detail about same charges); *United States v. Rutkoske*, 506 F.3d 170, 176 (2d Cir. 2007) (same where pending indictment provided additional overt acts); *United States v. Munoz-Franco*, 487 F.3d 25, 53 (1st Cir. 2007) (same where pending indictment contained "allegations of additional loan projects and overt acts"); *United States v. O'Bryant*, 998 F.2d 21, 24-25 (1st Cir. 1993) (same where additional detail "flesh[ed] out the ossature of corruption").

In fact, if the superseding indictment had merely repeated the allegation that defendant took official action benefitting Abbruzzese without detailing any of the actions taken by defendant, then it would have been sufficient. This is so because both bribes and kickbacks are complete when the payment is solicited or received, and the taking of official action is not an element of the offense. *United States v. Brewster*, 408 U.S. 501, 526 (1972); *Howard v. United States*, 345 F.2d 126, 128 (1st Cir. 1965).

The second *Salmonese* factor – whether the superseding indictment contains different elements – also favors the government. *Skilling* resulted in only one change to the second element of honest services fraud. Before *Skilling* that element stated, "for the purpose of depriving another of the intangible

right of honest services," *see, e.g., United States v. Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003) (en banc), while after *Skilling* the clause "through bribes or kickbacks" has been added to limit the statute's application to schemes involving bribes and kickbacks.[8] *Skilling*, 130 S.Ct. at 2928; *Bruno*, 661 F.3d at 740 (same); *United States v. Bahel*, 662 F.3d 610, 631, 634-36 (2d Cir. 2011) (same). *See also United States v. Milovanovic*, 678 F.3d 713, 727-28 (9th Cir. 2012) (same).

Both indictments allege that defendant devised a scheme to defraud the State of New York and its citizens of the intangible right to his honest services. As suggested by the Second Circuit, 661 F.3d at 740, the superseding indictment includes "through bribery and kickbacks," and an allegation that payments would be in return for official acts as opportunities arose. ¶ 7.

Far from broadening the charges, the new language actually narrows them. *See United States v. Welbon*, 2000 WL 519095, at *2 (9th Cir. 2000) (unpublished) (charges narrowed, not broadened, where money laundering charge under 18 U.S.C. § 1956 replaced with a charge under 18 U.S.C. § 1957 because § 1957 imposes a $10,000 monetary baseline thereby limiting the number of potential

[8]Before *Skilling*, the elements were: (1) that the defendant devised a scheme or artifice to defraud, (2) for the purpose of depriving another of the intangible right of honest services, (3) that the scheme involved a material misrepresentation or omission; and (4) use of the mails or interstate wires in furtherance of the scheme. *United States v. Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003) (en banc).

prosecutions).

Moreover, it is not clear that an honest-services fraud indictment must include either of the new allegations.[9] No such allegation is required for a Hobbs Act charge, which also has a quid pro quo requirement. *See United States v. Aliperti*, 867 F.Supp. 142, 145 & n. 4 (E.D.N.Y. 1994) (indictment charging Hobbs Act violation need not allege a quid pro quo). The phrase "intangible right of honest services," is a legal term of art, *Skilling*, 130 S.Ct. at 2928, and, like Hobbs Act extortion, the quid pro quo requirement is embedded in that legal term of art,[10] *see Aliperti*, 867 F.Supp. at 144-45 & nn. 3 & 4 (concluding that *Evans v. United States*, 504 U.S. 255 (1992), does not require a quid pro quo allegation in indictment); *see also United States v. Malone*, No. 02:03-CR-00500, 2006 WL 2583293, at *2 (D. Nev. Sept. 6, 2006) (observing, in a pre-*Skilling* honest-services fraud case involving the payment of campaign contributions, that a "quid pro quo is not a separate element of the wire fraud offense, but makes up part of the 'scheme or artifice to defraud'").

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[9]There has been no holding that the original indictment was insufficient under *Skilling* or that the implicit allegation was insufficient. *Bruno*, 661 F.3d at 740.

[10]As the Supreme Court has observed in the context of the obscenity statute, the definition of a legal term of art is "not a question of fact, but one of law," and allegations about the "various component parts of the constitutional definition" are not required in an indictment. *United States v. Hamling*, 418 U.S. 87, 118, 119 (1974).

Finally, as several courts held the last time the Supreme Court cut back on the honest services theory of prosecution, a change of theory does not broaden or substantially amend an indictment. For example, in *Italiano*, the Eleventh Circuit reversed an honest-services mail fraud conviction and dismissed the "fatally flawed" indictment because of the intervening *McNally* decision. 894 F.2d at 1281-82. Following defendant's conviction on a new indictment alleging a deprivation-of-property theory, the Eleventh Circuit rejected his argument that the change of theory had broadened the charges. *Id.* at 1283, 1284-86. District courts reached the same result.[11] *See United States v. Davis*, 714 F.Supp. 853, 864 (S.D. Ohio 1988) ("[a]lthough the government had to abandon the intangible rights theory, it does not follow that a simple change of theory automatically bars reindictment."); *United States v. Lytle*, 677 F.Supp. 1370, 1377 (N.D. Ill.1988) (new indictment valid where original intangible rights fraud indictment dismissed following *McNally*).

The original indictment provided sufficient notice. It informed defendant that he would have to account for his role in soliciting and receiving payments from Abbruzzese, and, during the same time frame, taking official action benefitting Abbruzzese.

[11]Defendant relies on *United States v. Zvi*, 168 F.3d 49 (2d Cir. 1999), but there the indictment contained additional charges alleging violations of a different statute with different elements and a potentially greater sentence and relied on different evidence. *Id.* at 55. None of those factors apply here.

That indictment also put defendant on notice that the government alleged that he solicited payments from persons over whom he exercised decisionmaking discretion, that he did not perform legitimate services commensurate with the payments to him, and that he had solicited the payments under circumstances in which it reasonably could be inferred that they were intended to influence him in violation of state law. It also quoted from N.Y. Pub. Off. Law § 73(5), which prohibits the solicitation and acceptance of gifts "under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him."

Relying on documents filed by the government and statements made by the government during trial articulating the undisclosed conflict-of-interest theory, defendant claims he did not have notice. Bruno Br. at 22. Defendant focuses on the following quotation from the government's closing:

> AUSA Pericak: We're not talking about a quid pro quo here. We're not - we did not set out to prove, we are not trying to prove, we don't have to prove that in return for a payment, Senator Bruno did a specific thing.

Tr. at 3926-27. Contrary to defendant's argument, this statement did nothing more than ensure that the jury understood no proof of "this for that" was required. This is perfectly appropriate. Cf. *Ryan v. United States*, 688 F.3d 845, 850 (7th Cir. 2012) (explaining that "when the prosecutor denied that it was necessary to show a quid pro quo, he was not arguing that it was unnecessary

to show bribery; he was arguing that Ryan's lawyers had defined bribery too narrowly.").

Moreover, the same thing can be said at the next trial. The government will not be required to prove that in return for a payment, defendant did a specific thing, because payments in exchange for performance of official acts "as the opportunities arise" is sufficient. *United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007). Indeed, the government will not be required to prove that defendant performed any official act at all, because the crime is complete when payment is solicited or received. *See United States v. Brewster*, 408 U.S. 501, 526 (1972) ("[T]he Government need not show any act of [the public official] subsequent to the corrupt promise for payment, for it is taking the bribe, not performance of the illicit compact, that is a criminal act."); *Howard v. United States*, 345 F.2d 126, 128 (1st Cir. 1965) ("The gist of the crime [41 U.S.C. §§ 51-54] therefore is receipt of a prohibited payment with knowledge that it is made for the purpose of inducing the award of a subcontract;" the crime is complete when the kickback is accepted "regardless of whether or not improper action is thereafter taken").

Defendant's notice argument also ignores the original indictment and jury instructions given at the first trial. Although the original indictment did not allege that defendant violated state law, in response to defendant's motion to dismiss,

the government represented that the evidence would establish a state law violation. JA202. In addition, the government sought and this Court gave jury instructions (1) identifying "kickbacks on commissions" as among the private economic interests which might lead to a conflict of interest, Tr. at 4118, and (2) directing the jury to consider whether (a) defendant "solicited payments from entities over which he exercised decisionmaking discretion," and (b) he "performed legitimate work commensurate with any payments to him" "[i]n determining whether the defendant acted with the intent to deprive the public of its right to his honest services." Tr. at 4120.

Finally, evidence was admitted at trial relevant to quid pro quo. *See, e.g.*, Tr. at 1656 (The Court: "I understand that it was the Government's position, articulated in the indictment and articulated in the opening statement, that there was no quid pro quo. And yet, they have incessantly opened the door to suggestions that there was, in fact, a quid pro quo.") In fact, it was the government's position that it did not have to prove "this for that;" not that it could not. In addition, the government has never taken the position that it could not prove that defendant accepted the payments understanding that they would be in return for official action as opportunities arose. As clarified during the sentencing, such evidence was relevant to intent. *See* Sentencing Tr. at 42-43 (The Court: "It would be your position,

nonetheless, that evidence tending to show that there was some influence on the decisions would be admissible as relevant evidence even on the conflicts of interests case, and it was for that reason that you sought to introduce that evidence? AUSA COOMBE: Yes, your Honor. And it was particularly important in this case.")

In sum, the original indictment provided defendant with sufficient notice. Neither the new explicit allegation (replacing the implicit allegation in the original indictment that defendant solicited the payments understanding that they would be in return for official action as opportunities arise does not broaden or amend the charges), nor the addition of detail about official actions taken by defendant has broadened the indictment. As a result, the superseding indictment relates back to the original indictment and is timely under the statute of limitations.

III. Double Jeopardy Does Not Bar Retrial Based On The Discredited "Abandonment" Theory.

Although the Second Circuit has already rejected the defendant's argument that the Double Jeopardy Clause bars retrial because of insufficient evidence, *Bruno*, 661 F.3d at 741, he nevertheless asks this Court to dismiss the indictment on double jeopardy grounds. His argument relies on a discredited and rejected "abandonment" theory articulated in *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir.1988).

A. Defendant Waived This Argument on Appeal.

Defendant mentioned this abandonment theory in his brief to the Second Circuit, Bruno Br., 2010 WL 5474601, at *38-*39 & n. 7, but he did not pursue the argument or seek a specific ruling on it, and it is therefore waived. *See United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) ("where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so").

B. Retrial is Barred Only When a Jeopardy-Terminating Event Has Occurred, and the Second Circuit Has Already Concluded That No Such Event Occurred Here.

The relevant double jeopardy jurisprudence is clearly established. "The protection of the Double Jeopardy Clause 'applies only if there has been some event, such as an acquittal, which terminates the original jeopardy.'" *United States v. McCourty*, 562 F.3d 458, 473 (2d Cir. 2009) (quoting *Richardson v. United States*, 468 U.S. 317, 325 (1984)) (additional citations omitted). "[U]nder most circumstances, the Double Jeopardy Clause does not bar retrial of a defendant whose conviction is reversed because of an error in the trial proceedings." *Bruno*, 661 F.3d at 741. "The principal exception to this rule is a reversal for insufficiency of the evidence." *Id.* A reversal based on insufficiency of the evidence "has the same effect as a not guilty

verdict" and bars retrial because "it means that no rational factfinder could have voted to convict the defendant." *Id.* (citations/quotations omitted).

Here, the Second Circuit reversed the conviction because of error in the jury instructions resulting from a change in the law and dismissed the indictment because it did not explicitly charge in conformance with the changed law. Under well-settled principles, there has been no jeopardy-terminating event, *e.g.*, *United States v. Miller*, 952 F.2d 866, 870-71 (5th Cir. 1992). The Double Jeopardy Clause is therefore inapplicable. In fact, the Second Circuit, in evaluating the only potential jeopardy-terminating event, found that the evidence was sufficient under *Skilling*, and held that the Double Jeopardy Clause did not bar retrial. *Bruno*, 661 F.3d at 745.

C. **The Discredited Abandonment Theory is Inconsistent with Double Jeopardy Jurisprudence.**

Even assuming, for the sake of argument, that defendant's argument should be considered on its merits, it is inconsistent with double jeopardy jurisprudence.

Courts applying the abandonment theory assumed that when a conviction was reversed due to an intervening change in the law, the Double Jeopardy Clause barred the government from relying on a legal theory it could have, but did not, advance before the change in the law. *See United States v. Gray*, 705 F.Supp. 1224, 1232 (E.D. Ky. 1988) (concluding, where intangible rights conviction

reversed following *McNally* and prosecution had failed to present "money or property" theory to the jury, that retrial barred); *United States v. Slay*, 717 F.Supp. 689, 696 (E.D. Mo. 1989) (same) (citing *Gray*).

Given the absence of a jeopardy-terminating event, the theory was short lived, and it was later specifically and persuasively rejected as being inconsistent with the double jeopardy analysis of *Richardson*. *See United States v. Miller*, 952 F.2d 866, 872 (5th Cir. 1992) ("The central concept of *Richardson* is that there is no double jeopardy unless the original jeopardy has *terminated*; and it is abundantly clear that a reversal for instructional error is no more a termination of jeopardy than a mistrial where the jury is unable to agree.") (emphasis in original). *See also United States v. Wittig*, 575 F.3d 1085, 1101-02 (10th Cir. 2009) (following *Richardson* and rejecting *Saylor*); *United States v. Runnels*, 1994 WL 7614, at * 4 (6th Cir. 1994); *United States v. Davis*, 873 F.2d 900, 906 (6th Cir. 1989) (same); *United States v. Davis*, 714 F. Supp. 853, 859-60 (S.D. Oh. 1988) (same).

Where there has been a reversal of a conviction because of a defective legal theory, double jeopardy does not bar retrial on the correct theory. *Miller*, 952 F.2d at 870-71. *See also United States v. Davis*, 873 F.2d 900, 900-07 (6th Cir. 1989); *see id.* at 906-07 (because the conviction was not reversed due to insufficient evidence the government "is not precluded from indicting defendant

[ ] on a permissible theory of mail fraud.") (quotation omitted).

D. Even Assuming That the *Saylor* Analysis Is Not Completely Foreclosed by *Richardson*, It Does Not Apply Here Because the Government Relied on Valid Second Circuit Law.

Even assuming for the sake of argument, however, that the *Saylor* analysis is not completely foreclosed by *Richardson*, it is distinguishable here for the same reason that it was in *Davis*:

> the *Saylor* prosecutor was asleep at the switch (or so we assumed) when he failed to request that the jury be charged on the conspiracy theory, but no comparable fault could be attributed to the *Davis* prosecutor in deciding to base the indictment of Mr. Davis on an "intangible rights" theory alone. That decision was perfectly legitimate when made, the intangible rights theory having been endorsed by this court only weeks before in the very case that was ultimately to produce the *McNally* decision. *United States v. Gray*, 790 F.2d 1290 (6th Cir.1986), rev'd sub nom. *McNally v. United States*, 483 U.S. 350 (1987). This court has been wrong before, of course, but the prosecutor is not to be faulted for assuming we were right.

Davis, 873 F.2d at 905.

The same is true here. The undisclosed-conflict-of-interest theory had been endorsed by the Second Circuit, *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc), and the government properly relied on that law. As a result, even under the *Saylor* analysis, the Double Jeopardy Clause does not bar retrial. *Davis*, 873 F.2d at 905; *Runnels*, 1994 WL 7614, at *4.

IV. Conclusion

For the above reasons, defendant's motion should be denied.

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Respectfully submitted,

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