

10-1885

United States v. Joseph L. Bruno

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

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4
5 August Term, 2010

6
7 (Argued: June 17, 2011

Decided: November 16, 2011)

8
9 Docket No. 10-1885

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13 UNITED STATES OF AMERICA,

14
15 *Appellee,*

16
17 v.

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19 JOSEPH L. BRUNO,

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21 *Defendant-Appellant.*

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23 Before: B.D. PARKER and CHIN, *Circuit Judges*, and KORMAN, *District Court Judge*.*

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27 Appeal from a judgment of the United States District Court for the Northern District of
28 New York (Sharpe, J.) convicting Defendant-Appellant of two counts of honest services mail
29 fraud, in violation of 18 U.S.C. §§ 1341 and 1346.

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31 VACATED and REMANDED.

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35 ABBE DAVID LOWELL (Paul M. Thompson, Jeffrey W.
36 Mikoni, *on the brief*), McDermott Will & Emery
37 LLP, Washington, D.C., *for Defendant-Appellant*.
38

* The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

1 Elizabeth C. Coombe (William C. Pericak, Brenda K.
2 Sannes, *on the brief*), Assistant United States
3 Attorney for the Northern District of New York, *for*
4 Richard S. Hartunian, United States Attorney for
5 the Northern District of New York, Albany NY, *for*
6 *Appellee*.
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9 BARRINGTON D. PARKER, *Circuit Judge*:

10 Joseph L. Bruno, the defendant-appellant and former Majority Leader of the New York
11 State Senate, appeals his conviction in the United States District Court for the Northern District
12 of New York (Sharpe, J.) for honest services mail fraud. *See* 18 U.S.C. §§ 1341, 1346. The
13 prosecution arose from Bruno's failure to disclose conflicts of interest arising from his receipt of
14 substantial payments from individuals seeking to do business with the State. An eight-count
15 Indictment alleged that Bruno devised "a scheme and artifice to defraud the State of New York
16 and its citizens of the intangible right to his honest services by (a) contacting for personal
17 compensation and enrichment, and (b) entering and attempting to enter into direct and indirect
18 financial relationships with, persons or entities who were pursuing interests before the
19 Legislature or state agencies, and by concealing, disguising, and failing to disclose the existence
20 of such compensated contacts and financial relationships, and the resulting conflicts of interest."

21 Bruno moved before trial to dismiss the Indictment on the ground that the honest services
22 statute was unconstitutionally vague as applied to cases charging only the nondisclosure of
23 conflicts of interest. The district court denied the motion, and the case proceeded to trial.
24 Following a month-long trial and seven days of deliberations, the jury convicted Bruno of two
25 counts of honest services fraud (Counts Four and Eight), acquitted him of five counts (Counts
26 One, Two, Five, Six, and Seven), and could not reach a verdict on one count (Count Three) as to

1 which the district court subsequently declared a mistrial. The district court sentenced Bruno
2 principally to two years imprisonment. This appeal followed.

3 While Bruno's appeal was pending, the Supreme Court decided *United States v. Skilling*,
4 130 S. Ct. 2896 (2010), and held that 18 U.S.C. § 1346, the honest services statute, criminalizes
5 only fraudulent schemes effectuated through bribes or kickbacks and does not criminalize mere
6 failures to disclose conflicts of interest. *Id.* at 2933.

7 As the government acknowledges that the convictions under Counts Four and Eight must
8 now be vacated, this appeal focuses on whether Bruno may be retried under the standard
9 announced in *Skilling* on those Counts as well as on Count Three. At oral argument, the
10 government conceded that at a retrial its evidence would be the same. Bruno asks that we
11 analyze the sufficiency of the government's evidence in the first trial because, if the evidence
12 were insufficient, double jeopardy would, Bruno contends, bar retrial on the counts in question.
13 Although we hold that *Skilling* requires us to vacate the convictions on Counts Four and Eight,
14 because our review of the record convinces us that the government adduced sufficient evidence
15 under the *Skilling* standard, double jeopardy does not bar retrial on those two counts. We also
16 hold that double jeopardy does not bar retrial on Count Three because, regardless of the
17 sufficiency of the evidence, the Double Jeopardy Clause does not preclude a retrial on a charge
18 that resulted in a hung jury. Accordingly, we vacate the counts of conviction and remand for
19 further proceedings consistent with this opinion.

20 BACKGROUND

21 Viewed in a light most favorable to the government, its proof established as to Count
22 Four that between March 2004 and December 2004, Bruno received approximately \$200,000 in

1 consulting fees from two companies owned by an Albany business man, Jared E. Abbruzzese,
2 and his business partner, Wayne Barr, Jr. As to Count Eight, the government's evidence
3 established that Bruno received \$40,000 from Abbruzzese in the form of a payment disguised as
4 proceeds from the sale of a racehorse. The government's theory was that these payments were
5 intended to influence Bruno in his official capacity.

6 Specifically, the government's proof established that Abbruzzese held an interest in
7 Evident Technologies Inc., a nanotechnology company, and that he sought to be compensated by
8 Evident to help it obtain State funding. By September 2002, Abbruzzese had successfully
9 assisted Evident in obtaining \$1.5 million in funding from the State of New York. Under the
10 terms of a grant from the State, Evident was to receive three annual \$500,000 installments. The
11 timing of the installment payments was, however, controlled by Bruno as Senate Majority
12 Leader. Immediately following the announcement of the Evident Grant, Bruno authorized the
13 payment of \$250,000, half the promised amount of the first annual installment.

14 As compensation for Abbruzzese's assistance, Evident issued a warrant to Niskayauna
15 Development, LLC ("Niskayauna"), a company controlled by Abbruzzese, allowing it to
16 purchase up to 85,423 shares of Evident common stock. Under the terms of the warrant, the
17 shares would vest in three installments: the first upon the issuance of the warrant and the second
18 and third when Evident received the two subsequent installments under the grant.

19 Although Evident was promised two additional annual installments, as of October 2003,
20 Bruno had not authorized them. Abbruzzese arranged a meeting in December with Bruno's
21 office to discuss the past due payments. Bruno did not attend but the Secretary to the Senate
22 Finance Committee, who reported directly to Bruno, did and told Abbruzzese that he could not

1 tell him whether or not the money would be forthcoming. Subsequently, Evident's CEO, Clint
2 Ballinger, placed frequent calls to the Secretary inquiring about Bruno's approval of the past due
3 installments.

4 In early February 2004, returning from a trip with Abbruzzese, Bruno brought up the
5 possibility of entering into a consulting agreement with Communication Technology Advisors
6 LLC ("CTA") and Capital & Technology Advisors LLC ("C&TA"), two companies owned by
7 Abbruzzese and Barr. Abbruzzese told Bruno that he would consider the idea. A few days later,
8 Bruno called Abbruzzese and suggested that Abbruzzese pay him \$30,000 a month for
9 consulting services. After Abbruzzese rejected Bruno's initial offer, the parties agreed that
10 Bruno would receive \$20,000 a month—\$10,000 a month for CTA and \$10,000 a month for
11 C&TA.

12 On February 12, 2004, five days after Bruno first suggested the consulting arrangement,
13 Bruno directed the Secretary to "move the money" to Evident. The Secretary did so by
14 executing a document called a "Senate Majority Initiative Form," which required Bruno's
15 approval and which authorized an additional payment of \$250,000. The following week, Bruno
16 formally entered into Consulting Agreements with CTA and C&TA for the previously agreed
17 payments. The Agreements vaguely provided that CTA and C&TA "shall enjoy [Bruno]'s
18 consulting services with respect to appropriate matters which are mutually agreeable to [Bruno]
19 and [the companies]." The Agreements also gave Bruno sole discretion to determine the
20 schedule on which he would provide his services.

21 From March 2004 through December 2004, Bruno, through his consulting company
22 Capital Business Consultants ("CBC"), received a total of \$200,000 from CTA and C&TA.

1 Bruno's companies, including CBC, were run from his Senate office by his staff who, at Bruno's
2 direction, performed the companies' administrative and bookkeeping work. In his 2004 annual
3 statement of financial disclosures, Bruno stated that he was employed by CBC as a consultant
4 and received fees for his consulting services.

5 At trial, the government undertook to prove that this arrangement was not for consulting
6 services but was intended to conceal payments to Bruno for expediting his approval of the
7 Evident grant installments. For example, the government's evidence showed that, against the
8 advice of Francis Gluschowski, the Deputy Counsel to the Senate Majority, Bruno neither kept
9 any records of the work he did for CTA and C&TA nor generated any written work product.
10 Also, Bruno's Executive Assistant, Patricia Stackrow, could not identify any work Bruno did in
11 return for the payments he received. Furthermore, Barr testified that he had no expectations
12 regarding Bruno's role as a consultant and that he was not aware of any work Bruno may have
13 done in return for the consulting payments. Although Abbruzzese admitted that he did not
14 require or receive any written work product or time records from Bruno, he testified that Bruno
15 helped him become a "better people person" and a better manager. He also testified that Bruno
16 was "very powerful" and that when people saw him with Bruno it "would influence people in
17 how they saw the company," partly because Bruno was the Senate Majority Leader.

18 In April 2004, about a month after receiving his first consulting payments from C&TA
19 and CTA, Bruno recommended Barr's appointment to the New York Racing Association Board
20 of Trustees ("NYRA Board" or "Board"). Governor Pataki ultimately accepted Bruno's
21 recommendation and appointed Barr to the Board. That same month, Bruno, Abbruzzese, and

1 another individual, Jerry Bilinski, entered into a partnership to breed thoroughbred racehorses.
2 The horses included two thoroughbred mares and their foals, one named Christy's Night Out.

3 Pursuant to the C&TA and CTA Agreements, Bruno's employment was set to expire in
4 December 2004. In Bruno's termination letter, dated December 9, 2004, Barr thanked Bruno
5 "[o]n behalf of C&TA and CTA . . . for [his] fine help with respect to various golf course
6 opportunities in Florida, general telecommunications advice, and in particular, introduction to
7 Lenny Fassler."

8 That same month, Abbruzzese, who served as chairman of the board of directors of a
9 company known as Motient Corporation, directed Motient to hire CBC. Pursuant to an
10 agreement dated December 20, 2004, Motient agreed to pay CBC \$20,000 a month for
11 "consulting services . . . including, without limitation, general advice with respect to the
12 telecommunications regulatory environment, as well as telecommunications business
13 opportunities that exist for Motient." The Motient Agreement commenced on January 1, 2005
14 and lasted through June 30, 2005.

15 In July 2005, immediately following the termination of the Motient Agreement, Barr, at
16 the direction of Abbruzzese, sent an email to Rob Macklin, General Counsel of Motient and
17 Secretary of TerreStar Networks Inc., another company controlled by Abbruzzese, noting that
18 CBC's consulting work was more appropriate for TerreStar. At that point, Terrestar entered into
19 an agreement with CBC. The terms of the Terrestar Agreement were similar to the terms of the
20 CTA, C&TA, and Motient Agreements: Bruno was paid \$20,000 per month for consulting
21 services "with respect to appropriate matters which [were] mutually agreeable to [him] and

1 Terrestar” and Bruno was given “sole discretion to determine [his] own schedule in providing
2 services to Terrestar.”

3 Although the Terrestar Agreement was set to expire on December 31, 2005, Terrestar
4 decided to terminate the Agreement in August because its new CEO had developed concerns as
5 to whether Bruno was actually providing services to the company. Because of this early
6 termination, Bruno did not receive \$80,000 of anticipated income. Abbruzzese testified that in
7 an effort to make good on the TerreStar contract, he committed to buy Bruno’s one-third interest
8 in Christy’s Night Out for \$80,000. Abbruzzese testified that although he did not believe the
9 horse was worth that amount, he did not believe the horse was “worthless.” The government, on
10 the other hand, presented evidence that the horse was, at best, worth only a small fraction of that
11 amount. Ultimately, Abbruzzese simply gave the horse away.

12 In 2005, Evident was required to seek new office space and the Senate Staff worked with
13 Evident’s CEO to find it. Their efforts were successful as a consequence of a \$2.5 million grant
14 from the State, personally sponsored and approved by Bruno, under which Evident was able to
15 relocate to a building on the campus of Russell Sage College. The Russell Sage Grant was used
16 to renovate an existing building to provide office space to Evident and two other companies.
17 Because Abbruzzese “had assisted in the discussions with [] Bruno” regarding the Russell Sage
18 Grant, Evident’s Board of Directors voted to authorize the final third of Abbruzzese’s warrant to
19 vest on November 2, 2005. Although Abbruzzese’s third warrant was not scheduled to vest until
20 Evident received the last installment of the 2004 Evident Grant, Abbruzzese requested that the
21 Russell Sage Grant count as vesting the final third of his warrant because he believed that “the
22 State was not go[ing] to honor its full commitment.”

Five days after Abbruzzese's warrant vested, Abbruzzese wrote Bruno a check for \$40,000—half of the amount he originally promised to pay for Christy's Night Out. Although Abbruzzese still owed Bruno \$40,000 for the horse, in an agreement dated March 1, 2006, Bruno forgave the debt in exchange for Abbruzzese's one-third interest in the six horses owned by the partnership. By all accounts this was a bad deal for Abbruzzese; two of the partnership's horses eventually sold for over \$244,000 and the partnership owed (but never paid) Abbruzzese \$44,219 for the sale of a colt in 2005. Abbruzzese testified that he "did poorly" in this transaction, but that the transaction allowed him to "ma[ke] good on the Terrestar contract [and] . . . ma[ke] good on getting out of all the horse dealings with Jerry Bilinski." According to Abbruzzese, he "made good on severing all [his] economic ties for \$40,000." Bruno did not disclose the horse partnership or Abbruzzese's \$40,000 payment in his annual statements of financial disclosure.

DISCUSSION

On appeal, Bruno argues that we should: (1) vacate his conviction for honest services mail fraud in light of *Skilling*, (2) dismiss the Indictment because it does not charge a valid crime; (3) review the sufficiency of the evidence under *Skilling*'s new standard; and (4) enter a judgment of acquittal on Counts Three, Four, and Eight because under *Skilling* the evidence is insufficient to convict on those counts. We address each issue in turn.

I. Whether the Conviction should be Vacated: *Skilling v. United States* and Bruno's Honest Services Fraud Conviction (Counts Four and Eight)

A. *Skilling v. United States*

Skilling arose from the prosecution and conviction of Jeffrey Skilling, Enron's former Chief Executive Officer, for conspiracy to commit honest services wire fraud. 130 S. Ct. at

1 2907. The Court examined the scope of § 1346 and held that “[t]o preserve the statute without
2 transgressing constitutional limitations,” the honest services statute criminalizes only fraudulent
3 schemes to deprive another individual of his honest services through bribes or kickbacks. *Id.* at
4 2928, 2931. The Court expressly rejected the government’s argument that § 1346 also
5 encompasses undisclosed self-dealing by a public official. Finding that the government did not
6 allege that Skilling accepted bribes and/or kickbacks, the Court vacated his conviction. *Id.* at
7 2934-35.

8 **B. The Effect of *Skilling* on Bruno’s Honest Services Conviction**

9 Bruno argues, and the government concedes, that his honest services fraud conviction on
10 Counts Four and Eight must be vacated because, in light of *Skilling*, the district court’s charge
11 incorrectly stated the law. After our review of the record, we agree. Pursuant to the law in effect
12 at the time, the district court instructed the jury that “the indictment charges that Mr. Bruno
13 committed honest services fraud by failing to disclose material conflicts of interest and related
14 material information,” and that “[a] conflict of interest exists when” the public’s interest “in the
15 proper administration of the official’s office” and “the official’s interest in his private economic
16 affairs . . . clash or appear to clash.” However, the district court did not require the jury to find
17 that Bruno accepted bribes or kickbacks to be convicted of honest services fraud. In light of
18 *Skilling*, this failure to limit honest services fraud to bribes and kickbacks was error. *See United*
19 *States v. Riley*, 621 F.3d 312, 324 (3d Cir. 2010) (finding plain error “where the fraudulent act is
20 the non-disclosure of a conflict of interest,” and the jury was not instructed on the distinctions
21 drawn by *Skilling*). Accordingly, we vacate Bruno’s conviction on Counts Four and Eight.

II. Whether the Indictment should be Dismissed

Bruno also argues that the Indictment should be dismissed “because the only charges made in the Indictment fail to charge a valid crime” under *Skilling*. Pretrial, the government took the position that its thirty-five page Indictment did not charge a bribery or kickback theory of honest services fraud, but rather, a failure to disclose a material conflict of interest theory. See JA 170-71. On appeal, the government’s position has shifted somewhat. Now the government contends that the Indictment can be read as also charging Bruno with a bribery or kickback theory of honest services fraud and that, in any event, it is unnecessary for this Court to reach the issue of the sufficiency of the Indictment because the government, without broadening the charges, intends to seek a superseding indictment based on the same underlying evidence and alleging the same statutory violations.

We need not decide whether, as the government now contends, the Indictment can be read as also charging a bribery or kickback theory. While 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. See *United States v. Bahel*, 2011 WL 5067095, at *19 (2d Cir. Oct. 26, 2011). It would be preferable and fairer, of course, 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.

III. Whether We Should Consider the Sufficiency of the Evidence

Next, invoking double jeopardy principles, Bruno argues that, in addition to vacating his convictions and dismissing the Indictment, we should review the sufficiency of the evidence on

1 Counts Three, Four, and Eight under the standard set forth in *Skilling* to determine whether a
2 retrial under a bribery or kickback theory would violate the Double Jeopardy Clause.
3 Specifically, Bruno contends that because the government adduced insufficient evidence at his
4 first trial to support a conviction under *Skilling*'s interpretation of § 1346 jeopardy terminated
5 and he may not be retried.

6 **A. The Double Jeopardy Clause**

7 The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be
8 subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.
9 Under this Clause, after a defendant is placed in jeopardy for a specific offense, and jeopardy
10 terminates with respect to that offense, the defendant may not be tried or punished a second time
11 for the same offense. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003).

12 As both parties agree, under most circumstances the Double Jeopardy Clause does not
13 bar retrial of a defendant whose conviction is reversed because of an error in the trial
14 proceedings. *See Burks v. United States*, 437 U.S. 1, 14-16 (1978); *see also United States v.*
15 *Tateo*, 377 U.S. 463, 466 (1964). The principal exception to this rule is a reversal for
16 insufficiency of the evidence. *See Burks*, 437 U.S. at 18. A reversal based on insufficiency of
17 the evidence has the same effect as a not guilty verdict "because it means that no rational
18 factfinder could have voted to convict the defendant." *Tibbs v. Florida*, 457 U.S. 31, 41 (1982).

19 Although the parties agree that a ruling that the evidence is insufficient to convict
20 terminates jeopardy and bars a retrial, the parties disagree as to whether we should consider the
21 sufficiency of the evidence (1) where a jury has hung on a particular count and (2) where a

conviction has been reversed due to a subsequent change in the law. We address each issue in turn.

B. Hung Jury Count: Count Three

We first turn to Count Three, which relates to checks Vytex Wireless Inc., mailed to Bruno in 2003 and 2004 pursuant to a series of consulting agreements. Because the jury failed to reach a verdict with respect to Count Three, the district court declared a mistrial as to that Count. Bruno contends that we should review the sufficiency of the evidence of Count Three even though the jury failed to reach a verdict. We disagree.

The law is well settled that where a court declares a mistrial because of the failure of a jury to reach a verdict, there is no double jeopardy bar to retrial of the defendant on that count. *See Richardson v. United States*, 468 U.S. 317, 326 (1984); *see also United States v. Ustica*, 847 F.2d 42, 48 (2d Cir. 1988) (citing cases). This is because the government, like the defendant, is entitled to resolution of the case by a verdict from the jury. “The interest in giving the prosecution one complete opportunity to convict those who violated its laws justifies treating the jury’s inability to reach a verdict as a nonevent that does not bar retrial.” *Yeager v. United States*, 129 S. Ct. 2360, 2366 (2009) (internal quotation marks omitted).

This analysis does not change even if the prosecution’s evidence was insufficient to support a conviction. *See Richardson*, 468 U.S. at 326 (“Regardless of the sufficiency of the evidence at petitioner’s first trial, he has no valid double jeopardy claim to prevent his retrial.”). Because the government would not be barred on double jeopardy grounds from retrying Bruno

1 on Count Three if the evidence presented at trial was insufficient to sustain a conviction, we are
2 not required to engage in a sufficiency of the evidence analysis as to that Count.²

3 **C. Counts of Conviction: Counts Four and Eight**

4 Next, we turn to the counts of conviction—Counts Four and Eight. Although we have
5 already determined that the conviction must be vacated, Bruno argues that we must also review
6 the sufficiency of the evidence to sustain a conviction under the standard set forth in *Skilling* in
7 order to determine whether he can be retried. The government, in turn, argues that a sufficiency
8 analysis is not appropriate where, as here, the law changes after conviction.

9 Bruno does not contend that there was insufficient evidence to convict him of honest
10 services fraud under the erroneous charge given to the jury. Nor does he contend that the only
11 error was the improper jury charge. Instead, Bruno asserts that the case against him—from its
12 inception up to his conviction—was built around a theory of honest services fraud invalidated by
13 *Skilling*. Thus, Bruno argues, he is entitled to a judgment of acquittal if there is insufficient
14 evidence in the record of the first trial to support a conviction under a bribery or kickback theory
15 of honest services fraud subsequently required by *Skilling*, even though the theory was not
16 asserted in the Indictment or charged to the jury.

17 This distinction is important because although we have previously held that sufficiency
18 of the evidence review is appropriate when a conviction has been reversed for trial error, *see*,

² There may be circumstances where acquittal on some counts can preclude retrial on other counts on which the same jury hangs. *See Yeager*, 129 S. Ct. at 2370. However, Bruno does not make this argument on appeal. Any future arguments regarding issue preclusion or other potential bars to reprosecution must necessarily be resolved as they arise if the government decides to file a superceding indictment. Today we decide that the hung count, standing alone, does not shield Bruno from reprosecution on Count Three.

1 *e.g., United States v. Ford*, 435 F.3d 204 (2d Cir. 2006); *United States v. Wallach*, 979 F.2d 912
2 (2d Cir. 1992), we have not previously considered whether such review is appropriate where, as
3 here, the error is due to an intervening change in the law. In *Ford*, we stated that sufficiency
4 review was necessary “in order to determine whether a retrial is permissible” where there was an
5 error in the judge’s jury instructions. 435 F.3d at 214. Similarly, in *Wallach*, after reversing a
6 conviction because of prosecutorial misconduct, we observed that “reversal of a conviction on
7 grounds other than sufficiency does not avoid the need to determine the sufficiency of the
8 evidence before a retrial may occur.” 979 F.2d at 917. However, unlike this case, in *Ford* and
9 *Wallach* the government was on notice regarding the elements of the crime it needed to prove to
10 obtain a conviction and those elements were not later altered by a change in the applicable law.
11 In those circumstances, we concluded that it was reasonable to assess the sufficiency of the
12 evidence because the error occurred after the government had an opportunity to present the
13 evidence it needed to satisfy the correct standard.

14 The government, relying on out of Circuit authority, urges us not to conduct a sufficiency
15 review because, although such a review is not prohibited, it would be unfair to conduct one
16 against a standard that did not exist at the time of the trial. The government urges that in change
17 of law cases the appropriate remedy is to remand for a new trial because any insufficiency in the
18 evidence “is not because of the government’s failure of proof but because of the changes brought
19 by [the new law].” *United States v. Ellyson*, 326 F.3d 522, 534 (4th Cir. 2003); *see also United*
20 *States v. Robison*, 505 F.3d 1208, 1225 (11th Cir. 2007) (remanding for retrial because the
21 district court’s decision to “erroneously define[] [an element of the crime] and ma[k]e it clear to
22 the parties far in advance of trial that it would continue to use its erroneous definition throughout

1 the case . . . deprived the government of any incentive to present evidence that might have cured
2 any resulting insufficiency”).³ These courts reasoned that barring retrial because the government
3 failed to proffer sufficient proof to satisfy a standard that did not exist at the time of conviction
4 would be unfair to the government. Remanding for retrial, on the other hand, would allow the
5 government the opportunity to muster evidence sufficient to satisfy the new standard.

6 Although we recognize that in some cases there may be sound reasons for refusing to
7 consider the sufficiency of the evidence when there has been a subsequent change in the law,
8 they do not apply here. At oral argument the government conceded that it would present no new
9 evidence if Bruno were retried and that it presented at trial all its evidence regarding quid pro
10 quo now required by *Skilling*. Thus, unlike the authority on which the government relies, this is
11 not a case where considering the sufficiency of the evidence would deny the government an
12 opportunity to present its evidence. The government’s only argument against a sufficiency
13 review is that, in the future, there may be other cases where prosecutors do not have the same
14 incentive to present all of their evidence. We concern ourselves only with the issues on this
15 appeal and leave other ones for another day. Accordingly, we accept Bruno’s invitation to
16 evaluate the sufficiency of the evidence.

³ See also *United States v. Weems*, 49 F.3d 528, 531 (9th Cir. 1995) (“The government had no reason to introduce such evidence because, at the time of trial, under the law of our circuit, the government was not required to prove that a defendant knew that structuring was illegal”); *United States v. Wacker*, 72 F.3d 1453, 1465 (10th Cir. 1995) (“[T]he government here cannot be held responsible for ‘failing to muster’ evidence sufficient to satisfy a standard which did not exist at the time of trial.”). But see *United States v. Miller*, 84 F.3d 1244, 1258 (10th Cir. 1996), *overruled on other grounds*, *United States v. Holland*, 116 F.3d 1353 (10th Cir. 1997) (stating that remand for retrial is proper “only if the jury could have returned a guilty verdict if properly instructed”); *United States v. Smith*, 82 F.3d 1564, 1567 (10th Cir. 1996) (conducting sufficiency of the evidence review and determining that evidence was insufficient to support conviction under proper standard).

1 **IV. Whether Double Jeopardy Protection Bars Retrial because of Insufficiency**
2 **of the Evidence: Counts Four and Eight**

3
4 Because of the intervening decision in *Skilling*, this case reaches us in a somewhat
5 unusual procedural posture. We are required to view the evidence at the first trial as though
6 Counts Four and Eight were pled in conformity with what *Skilling* now requires. In so doing, we
7 still apply well settled principles. We review a challenge to the sufficiency of the evidence *de*
8 *novo*. *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir. 1997). We credit every available
9 inference in the government’s favor and conclude that a retrial is not barred by the Double
10 Jeopardy Clause if any rational trier of fact could have found Bruno guilty beyond a reasonable
11 doubt under the bribery or kickback theory required by *Skilling*.

12 Bruno’s sufficiency claim is limited in scope. Bruno argues that the government failed to
13 provide sufficient proof of a quid pro quo, an essential element of a bribery theory of honest
14 services fraud. *See United States v. Ganim*, 510 F.3d 134, 148-49 (2d Cir. 2007). We disagree.
15 A quid pro quo is a government official’s receipt of a benefit in exchange for an act he has
16 performed, or promised to perform, in the course of the exercise of his official authority. *Id.* at
17 141. “This is especially true in cases involving governmental officials or political leaders, whose
18 affairs tend more than most to be subjected to public scrutiny. As a result, a jury can in such
19 cases infer guilt from evidence of benefits received and subsequent favorable treatment, as well
20 as from behavior indicating consciousness of guilt.” *United States v. Friedman*, 854 F.2d 535,
21 554 (2d Cir. 1988). Acts constituting the agreement need not be agreed to in advance. A
22 promise “to perform such acts as the opportunities arise” is sufficient. *See Ganim*, 510 F.3d at
23 142. The key inquiry is whether, in light of all the evidence, an intent to give or receive
24 something of value in exchange for an official act has been proved beyond a reasonable doubt.

1 We find that there is sufficient evidence in the record for a reasonable jury to find a quid
2 pro quo under Count Four. The government's evidence would permit a reasonable jury to find
3 that Bruno performed virtually non-existent consulting work for substantial payments. As
4 detailed above, between March and November 2004, Bruno received \$200,000 in consulting fees
5 from CTA and C&TA, companies owned by Abbruzzese and Barr. Witnesses associated with
6 Bruno and Abbruzzese, including Barr, could identify no work Bruno was doing to justify the
7 consulting fees. Furthermore, the fact that, during his employment with CTA and C&TA, Bruno
8 did not produce any written work product or keep any time records could be accepted by a
9 rational jury as evidence that the payments were sham ones.

10 Second, a reasonable jury was entitled, although not required, to find that the
11 government's evidence showed that Bruno attempted to cover up the extent of his relationship
12 with Abbruzzese, including the exorbitant consulting fees that Bruno was receiving from his
13 companies. Although the CTA and C&TA Agreements only named Bruno in his personal
14 capacity, all the payments were made to CBC, Bruno's consulting company—an entity that used
15 state employees and resources to function. Furthermore, when asked by Gluschowski whether
16 Abbruzzese had any business before New York State, Bruno replied that he was not aware of any
17 even though Bruno knew Abbruzzese was seeking funding on behalf of Evident. *See United*
18 *States v. Urciuoli*, 613 F.3d 11, 14 & n.2 (1st Cir. 2010) (finding sufficient evidence to support
19 bribery charge because, among other things, evidence showed that defendant "sought to hide the
20 extent of [his company's] relationship with [a senator]" by hiding the fact that the senator had
21 lobbied for the company and by covering up the compensation that the senator received from the
22 company).

1 The government's evidence of the timing of the payments in relation to the actions taken
2 by Bruno could also be accepted by a rational jury in support of the conclusion that Bruno
3 understood that the consulting payments were made in return for official action. Prior to Bruno's
4 suggestion that Abbruzzese hire him as a consultant, Abbruzzese had been trying unsuccessfully
5 to convince Bruno to authorize further installments of the Evident Grant. Five days after
6 Abbruzzese verbally agreed to pay Bruno \$20,000 a month, Bruno authorized another \$250,000
7 payment of the Evident Grant. Six days later, Bruno and Abbruzzese signed the formal
8 Consulting Agreements for CTA and C&TA. A few months after that, Bruno appointed Barr,
9 Abbruzzese's business partner, to the NYRA board. Although other inferences are certainly
10 possible, our concern at this point is with those a jury was entitled to draw.

11 From this and other evidence, a rational jury could find that Abbruzzese's purpose in
12 hiring Bruno as a consultant was for Bruno to use his office to further the interests of
13 Abbruzzese and Evident. *See United States v. Triumph Capital Group, Inc.*, 544 F.3d 149, 162
14 (2d Cir. 2008) (stating that an agreement to pay a public official's associates "for work they did
15 not perform . . . provided strong support for the jury's finding that [the payor] intended to
16 influence an official act and to defraud the people of the State of Connecticut of their right to
17 [the public official]'s honest services."). That jury could also conclude that Bruno used his
18 official authority on behalf of Abbruzzese and Evident; and that the compensation Bruno
19 received was for his exercise of that authority. *See United States v. Biaggi*, 909 F.2d 662, 684
20 (2d Cir. 1990) ("We have recognized, especially with respect to public officials, that evidence of
21 the receipt of benefits followed by favorable treatment may suffice to establish circumstantially
22 that the benefits were received for the purpose of being influenced in the future performance of

1 official duties, thereby satisfying the quid pro quo element of bribery”). As a result, a reasonable
2 jury could conclude that Bruno deprived New York citizens of his honest services by accepting
3 payments that were intended to and did influence his conduct as a public official.

4 There is also sufficient evidence of a quid pro quo for a reasonable jury to convict Bruno
5 on Count Eight. Taking the evidence in the light most favorable to the government, a jury could
6 find that Abbruzzese’s \$40,000 payment for Christy’s Night Out was an illegitimate gift
7 disguised as a horse payment. As detailed above, the government provided credible evidence
8 that the horse was not worth anything like the \$80,000 that Abbruzzese promised Bruno or the
9 \$40,000 that Abbruzzese ultimately paid. Given the illegitimacy and timing of the payment,
10 Abbruzzese’s efforts to disguise the payment, and Bruno’s failure to disclose the transaction, a
11 reasonable jury could find that Abbruzzese only made the payment to “make good” on the
12 TerreStar Agreement that was prematurely terminated. A jury could also conclude that the
13 arrangement was structured to pay for Bruno’s continued assistance to Abbruzzese and Evident,
14 such as the authorization of the Russell Sage Grant which provided Evident with much needed
15 office space and indirectly benefitted Abbruzzese by allowing the third installment of his warrant
16 to vest. As with Count Four, this evidence is enough for a reasonable jury to find that Bruno’s
17 actions deprived New York citizens of his honest services as a New York senator under the
18 standard announced in *Skilling*. Accordingly, we hold that double jeopardy does not bar retrial
19 because of insufficiency of the evidence on the counts of conviction.⁴

⁴ We note that our holding only deals with whether the Double Jeopardy Clause bars retrial because of insufficiency of the evidence. As with Count Three, arguments regarding other potential bars to reprosecution are not before us. See note 2 *supra*.

1 **CONCLUSION**

2 For the foregoing reasons, Bruno's conviction is **VACATED** and the case is
3 **REMANDED** for further proceedings consistent with this opinion.