

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 -----

4 August Term, 2020

5 (Argued: June 9, 2021

Decided: December 27, 2022)

6 Docket Nos. 18-2811, 18-2825, 18-2867, 18-2878

7 _____
8 UNITED STATES OF AMERICA,

9 *Appellee,*

10 - v. -

11 DAVID BLASZCZAK, THEODORE HUBER, ROBERT OLAN,
12 CHRISTOPHER WORRALL,

13 *Defendants-Appellants.*
14 _____

15 Before: KEARSE, WALKER, and SULLIVAN, *Circuit Judges.*

16 Appeals, following vacatur and remand by the United States Supreme Court
17 for further consideration, in light of *Kelly v. United States*, 140 S. Ct. 1565 (2020), of this
18 Court's prior affirmance of judgments of the United States District Court for the Southern
19 District of New York convicting some or all of the defendants on substantive counts of

1 conversion of government property in violation of 18 U.S.C. § 641, wire fraud in violation
2 of 18 U.S.C. § 1343, and securities fraud in violation of 18 U.S.C. § 1348; and convicting
3 certain of the defendants on various counts of conspiring to engage in conduct violating one
4 or more of the above sections, all originating from misappropriation of confidential
5 information from the Centers for Medicare & Medicaid Services ("CMS"), see *United States*
6 *v. Blaszczyk*, 947 F.3d 19 (2d Cir. 2019), *vacated and remanded*, 141 S. Ct. 1040, 2021 WL 78042,
7 2021 WL 78043 (Jan. 11, 2020). On this remand: (A) defendants contend that their argument
8 that the CMS information at issue does not constitute "property" or a "thing of value" within
9 the meaning of the above statutes is supported by the Supreme Court's decision in *Kelly*;
10 (B) the government, concurring in that contention, confesses error as to the substantive
11 counts and as to a count charging only conspiracy to violate §§ 1343 and 1348 (Count Two);
12 and it agrees that either the defendants' convictions on those counts should be reversed, or
13 the cases should be remanded to the district court so that the government can dismiss those
14 counts pursuant to Fed. R. Crim. P. 48(a); and (C) the government seeks affirmance on the
15 remaining conspiracy counts (Counts One and Seventeen).

16 Given the Supreme Court's decision in *Kelly* and the prosecutorial discretion
17 to which the Executive Branch of the government is entitled, we grant the government's
18 request to remand the cases to the district court for dismissal of the substantive counts and
19 Count Two. As to Counts One and Seventeen, the verdicts do not reveal whether the jury

1 found that the charged defendants conspired to commit offenses as to which the government
2 has confessed error or instead found that they conspired to engage in other charged criminal
3 conduct. Accordingly, we vacate the convictions on these two counts and remand for such
4 further proceedings as may be appropriate.

5 Remanded for dismissal of the substantive counts and Count Two; vacated and
6 remanded for further proceedings on Counts One and Seventeen.

7 Judge Walker joins the majority opinion and concurs in a separate concurring
8 opinion, in which Judge Kearse joins.

9 Judge Sullivan dissents, in a separate opinion.

10 ERIC J. FEIGIN, Deputy Solicitor General, United States
11 Department of Justice, Washington, D.C. (Elizabeth B.
12 Prelogar, Acting Solicitor General, United States
13 Department of Justice, Washington, D.C.; Audrey
14 Strauss, United States Attorney for the Southern District
15 of New York, Ian McGinley, Joshua A. Naftalis, Won S.
16 Shin, Assistant United States Attorneys, New York, New
17 York, on the brief), *for Appellee*.

18 DONALD B. VERRILLI, JR., Washington, D.C. (Elaine J.
19 Goldenberg, Jonathan S. Meltzer, Dahlia Mignouna,
20 Jacobus P. van der Ven, Munger, Tolles & Olson,
21 Washington, D.C., David Esseks, Eugene Ingoglia,
22 Alexander Bussey, Allen & Overy, New York, New York,
23 on the brief *for Defendant-Appellant Robert Olan*; Daniel M.
24 Sullivan, James M. McGuire, Holwell Shuster &
25 Goldberg, New York, New York, Stephen Fishbein, John
26 A. Nathanson, Shearman & Sterling, New York, New
27 York, on the brief *for Defendant-Appellant Christopher*

1 Worrall; Alexandra A.E. Shapiro, Daniel J. O'Neill, Eric S.
2 Olney, Shapiro Arato Bach, New York, New York, Barry
3 H. Berke, Dani R. James, Kramer Levin Naftalis &
4 Frankel, New York, New York, on the brief for *Defendant-*
5 *Appellant Theodore Huber*; Colleen P. Cassidy, Barry D.
6 Leiwant, Federal Defenders of New York, New York,
7 New York, on the brief for *Defendant-Appellant David*
8 *Blaszczak*), for *Defendants-Appellants*.

9 KATHERINE R. GOLDSTEIN, New York, New York (Akin
10 Gump Strauss Hauer & Feld, New York, New York, on
11 the brief), *Court-appointed Amicus Curiae, in support of*
12 *reinstatement of this Court's decision of affirmance*.

13 Peter Neiman, New York, New York (Nicholas Werle, Wilmer
14 Cutler Pickering Hale and Dorr, New York, New York,
15 Jessica Lutkenhaus, Wilmer Cutler Pickering Hale and
16 Dorr, Washington, D.C.; Lindsay A. Lewis, Committee of
17 the National Association of Criminal Defense Lawyers,
18 New York, New York, of counsel), *submitted a brief for*
19 *Amicus Curiae National Association of Criminal Defense*
20 *Lawyers in support of reversal*.

21 Roman Martinez, Washington, D.C. (Michael Clemente, Latham
22 & Watkins, Washington, D.C., Jason M. Ohta, Latham &
23 Watkins, San Diego, California; Stephen R. Cook, Brown
24 Rudnick, Irvine, California, Justin S. Weddle, Weddle
25 Law, New York, New York, of counsel), *submitted a brief*
26 *for Amicus Curiae Jeffrey Wada in support of Defendants-*
27 *Appellants and reversal*.

28 Michael H. McGinley, Philadelphia, Pennsylvania (Michael P.
29 Corcoran, Dechert, Philadelphia, Pennsylvania, of
30 counsel), *submitted a brief for Amicus Curiae The Alternative*
31 *Investment Management Association in support of reversal*.

1 KEARSE, *Circuit Judge*:

2 This appeal returns to us on remand from the United States Supreme
3 Court for further consideration, in light of *Kelly v. United States*, 140 S. Ct. 1565 (2020),
4 of this Court's prior affirmance of judgments of the United States District Court for
5 the Southern District of New York convicting defendants David Blaszcak, Theodore
6 Huber, Robert Olan, and Christopher Worrall of conversion of government property
7 in violation of 18 U.S.C. § 641 and wire fraud in violation of 18 U.S.C. § 1343; and
8 convicting Blaszcak, Huber, and Olan of securities fraud in violation of 18 U.S.C.
9 § 1348 ("Title 18 securities fraud"), conspiracy to commit wire fraud and Title 18
10 securities fraud in violation of 18 U.S.C. § 1349, and conspiracies in violation of
11 18 U.S.C. § 371 to, *inter alia*, convert government property and defraud the United
12 States, all originating from misappropriation of confidential information from the
13 Centers for Medicare & Medicaid Services ("CMS"), *see United States v. Blaszcak*, 947
14 F.3d 19 (2d Cir. 2019) ("*Blaszcak I*"), *vacated and remanded*, 141 S. Ct. 1040, 2021 WL
15 78043 (Jan. 11, 2021). On this remand: (A) defendants contend that their argument
16 that the CMS information at issue does not constitute "property" or a "thing of value"
17 within the meaning of the above statutes is supported by the Supreme Court's decision
18 in *Kelly*; (B) the government, concurring in that contention, confesses error as to those
19 substantive counts and as to a conspiracy count premised only on crimes concerning

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