

## S.D.N.Y. Vacates Insider Trading Guilty Pleas, Shows How It's Done

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As you probably know if you're reading this, in December the Second Circuit upended insider trading law for "tipping" cases by (1) giving some structure to the definition of the personal benefit that must come to the original tipper, and (2) requiring that tippees farther down the chain know that the original tipper's personal benefit was. The ripple effects from the decision in *United States v. Newman* have come quickly and have already been dramatic.

On January 22<sup>nd</sup>, Judge Carter in the Southern District of New York looked at an insider trading case before him, hung it up next to *Newman*, and decided the four guilty pleas it contained couldn't hold together. But how do you even do that? After you've pled guilty isn't it pretty much over? Not quite. Here's how Judge Carter put it:

Under Rule 11(b)(3) of the Federal Rules of Criminal Procedure, a district court judge has an obligation up through the entry of judgment to vacate a previously-accepted guilty plea and enter a plea of not guilty on behalf of a defendant if it becomes clear that there is no longer a sufficient factual basis for the plea. See, e.g., *United States v. Culbertson*, 670 F.3d 183, 191 n.4 (2d Cir. 2012) (citing *United States v. Smith*, 160 F.3d 117, 121 (2d Cir. 1998)). The Second Circuit has said that, in determining whether such a factual basis exists, judges should "match[] the facts in the record with the legal elements of the crime." *United States v. Calderon*, 243 F.3d 587, 589-90 (2001) (citing *United States v. Smith*, 160 F.3d 117, 121 (2d Cir. 1998)). Facts considered to be in the record can include not only the defendant's allocution, but also any representations made by counsel for the defense and the government on the record and the allegations in the indictment. *Smith*, 160 F.3d at 121.

For most criminal cases, the legal elements of the crime are not going to be in great flux. Here, though, so much of insider trading law has been left up to the courts, it's not shocking that an appellate court made a left turn that wasn't anticipated when the indictments were issued (here, in late 2012).

Incidentally, last Thursday the government dismissed the charges entirely. They could be refiled if the Second Circuit or the Supreme Court pares back *Newman*, but it is a happy day for these defendants.