THE REVIEW OF
SECURITIES & COMMODITIES REGULATION
AN ANALYSIS OF CURRENT LAWS AND REGULATIONS AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 53 No. 7 April 15, 2020

SENTENCING IN RECENT INSIDER TRADING CASES: WHAT JUDGES HAVE SAID AND DONE

Amidst several years of doctrinal confusion about what does and does not constitute illegal insider trading, less attention has been paid to what actually happens at the conclusion of insider trading prosecutions when defendants appear in court for sentencing. It is notable that judges have used harsh language at sentencings to describe the seriousness of insider trading, but then have imposed sentences below the minimums provided in the Sentencing Guidelines. What accounts for this discrepancy? In this article, the authors assess recent insider trading sentencing proceedings and evaluate the factors that may be contributing to the outcomes.

By Brian A. Jacobs and Joshua Bussen *

On September 25, 2018, following his trial conviction for insider trading, Dr. Edward Kosinski appeared in the United States District Court for the District of Connecticut for sentencing.[1] Dr. Kosinski, a cardiologist, had previously participated as a principal investigator in a clinical drug trial. After he had started participating in the drug trial, he began buying common stock in the company conducting the trial. By May 2014, he owned $250,000 of that company's stock. On June 29, 2014, as a part of the study, Dr. Kosinski received information about several allergic reactions to the drug at issue and learned that the study coordinators would be putting a hold on new enrollments. This information was secret and had not been announced publicly. The next day, with the company's stock valued at about $7.00 per share, Dr. Kosinski sold his entire stake in the company. Three days later, after the company announced that it would pause the study to conduct a safety analysis, the price dropped to $2.81 per share. Thus, Dr. Kosinski avoided a loss of about $160,000 by trading on material, non-public information.

At trial in federal court, the jury found Dr. Kosinski guilty of securities fraud. When he appeared for sentencing, United States District Judge Vanessa L. Bryant excoriated his behavior. The court noted that his conduct was "serious" and a "violation of trust."[2] The court found it particularly offensive that Dr. Kosinski— whose net worth was approximately $20 million — would commit fraud for less than $200,000. The court railed against insider trading as a whole, stating: "[this] is the kind of offense that occurs in the privacy of the

[1] *United States v. Kosinski*, 16 Cr. 148 (VLB) (D. Conn.), Docket Entry 135 (Sentencing Transcript, Sept. 25, 2018).

[2] *Id.* at 69.

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RSCR Publications LLC Published 22 times a year by RSCR Publications LLC. Executive and Editorial Offices, 2628 Broadway, Suite 29A, New York, NY 10025-5055. Subscription rates: $1,197 per year in U.S., Canada, and Mexico; $1,262 elsewhere (air mail delivered). A 15% discount is available for qualified academic libraries and full-time teachers. For subscription information and customer service call (937) 387-0473 or visit our website at www.rscrpubs.com. General Editor: Michael O. Finkelstein; tel. 212-876-1715; e-mail mofinkelstein@gmail.com. Associate Editor: Sarah Strauss Himmelfarb; tel. 301-294-6233; e-mail sarah.s.himmelfarb@gmail.com. To submit a manuscript for publication contact Ms. Himmelfarb. ISSN: 0884-2426.

upper echelons of our society. It's not the kind of crime that is committed on the streets of the inner city. It's the kind of crime that is committed in million-dollar mansions, in office buildings, outside of the glare of the public, in places totally unsuspected of criminality. And so it is a crime that is rarely detected, it is rarely prosecuted. And when it is detected and prosecuted and an individual is convicted, the consequence of that conviction speaks volumes to the public." The court further explained the need for general deterrence and how sentences in insider trading cases helped prevent others from committing similar crimes. The court calculated the sentencing range based on the United States Sentencing Guidelines, and noted that the Guidelines called for a minimum term of imprisonment of 33 months and a maximum of 41 months.[3] Then, with little further explanation — beyond reference to Dr. Kosinski's age, lack of criminal history, and prior work for patients — the court sentenced him to six months in prison, less than a fifth of the low end of the Guidelines range.[4]

The *Kosinski* case is not an anomaly. Based on a review of recent sentencings in insider trading cases, judges often highlight the seriousness of the offense, calling insider trading "serious,"[5] "significant,"[6] "inexcusable,"[7] "extraordinarily bad on a number of levels,"[8] and noting that "[i]t involve[s] real damage to the financial markets,"[9] "destroys confidence in the markets,"[10] and is done "totally out of pure greed."[11] Yet, according to the United States Sentencing Commission's statistics, for the most recent year for which data is available, only *one* defendant to whom the insider trading guideline applied received a sentence within the Guidelines range, while the rest received below-Guidelines sentences. The rate at which below-Guidelines sentences are imposed in cases under the insider trading Guidelines, as discussed below, is far higher than in cases under the general fraud guideline.

At the same time, the current state of insider trading law in the United States "is, to use the technical legal term, a mess."[12] Starting with the Second Circuit's decision in *United States v. Newman*[13] in late 2014, and continuing through the Supreme Court's decision in *Salman v. United States*[14] in 2016, and the Second Circuit's multiple opinions in *United States v. Martoma*[15] in 2017, courts have wrestled with the meaning of the element that requires the Government to prove a "personal benefit" to a tipper in insider trading cases it prosecutes under the antifraud provisions of the Securities Exchange Act of 1934.[16] The "personal benefit" element may not be further clarified by courts anytime soon,[17] and worse, whatever clarity existed in the doctrine was upended further at the end of 2019, with the Second Circuit's decision in *United States v.*

[3] *Id.* at 75.

[4] *Id.* at 76, 80.

[5] *See, e.g.*, *United States v. Yan*, 17 Cr. 497 (KBF) (S.D.N.Y.), Docket Entry 23 (Sentencing Transcript, Mar. 30, 2018); *Kosinski*, *supra* note 1; *United States v. Xie*, 17 Cr. 92 (JWD) (M.D. La.), Docket Entry 232 (Sentencing Transcript, Dec. 20, 2018).

[6] *United States v. Chang*, CR-18-34-LHK (N.D. Cal.), Docket Entry 70 (Sentencing Transcript, June 13, 2018).

[7] *United States v. Berke*, 17 Cr. 450 (KPF) (S.D.N.Y.), Docket Entry 65 (Sentencing Transcript, Apr. 17, 2018).

[8] *United States v. Little*, 17 Cr. 450 (KPF) (S.D.N.Y.), Docket Entry 59 (Sentencing Transcript, Feb. 22, 2018).

[9] *Id.*

[10] *Berke*, *supra* note 7.

[11] *Chang*, *supra* note 6.

[12] *Insider Trading, Annual Review, 2018*, Morrison & Foerster LLP, at 16, *available at* https://media2.mofo.com/documents/190118-insider-trading-2018.pdf.

[13] 773 F.3d 438 (2d Cir. 2014).

[14] 137 S. Ct. 420 (2016).

[15] 869 F.3d 58 (2d Cir. 2017) (*Martoma I*), *opinion amended and superseded by* 894 F.3d 64 (2d Cir. 2018) (*Martoma II*).

[16] David Miller & Grant MacQueen, *Martoma – The Latest Critical Insider Trading Decision*, LAW360 (June 27, 2018), *available at* https://www.law360.com/articles/1057759/martoma-the-latest-critical-insider-trading-decision.

[17] Brian A. Jacobs, *How Institutional Dynamics Have Shaped Insider Trading Law*, 51 REV. SEC. COMMODITIES REG. 247 (2018).

Blaszczak. In *Blaszczak*, the Second Circuit held that when prosecutors use the general wire and securities fraud statutes in Title 18 — Sections 1343 and 1348 — to prosecute insider trading, rather than the Exchange Act, prosecutors need not even try to establish the "personal benefit" element that has bedeviled courts in recent years.[18] And not to be left out, the House of Representatives recently passed the Insider Trading Prohibition Act,[19] which attempts to address the doctrinal confusion, but which could simply lead to more and different questions.[20] Notwithstanding this doctrinal confusion, judges do not mention it at sentencing, instead highlighting different factors to support below-Guidelines sentences.

In this article, after discussing the evolution of the Guidelines' approach to insider trading sentences, we analyze recent sentencings in insider trading cases, look at the factors that courts have considered, and discuss what courts have actually said during the proceedings, in an effort to assess the reasons that may be driving sentencing outcomes.

I. BACKGROUND: SENTENCING IN INSIDER TRADING CASES

In 1980, a group of legal commentators published a study on white-collar sentencing after extensive interviews with federal judges, many of whom had the heaviest white-collar crime dockets in the country.[21] They found that white-collar defendants often were afforded "special empathy" at sentencing due to their status in the community.[22] Judges believed that the corresponding consequences of a criminal conviction — namely, loss of career and social status — were sufficient punishment.[23] Thus, "[w]hite collar offenders . . . receive[d] notoriously lighter sentences than street offenders in federal court."[24] In response, the Sentencing Reform Act was passed "to create the U.S. Sentencing Commission, which in turn promulgated the Federal Sentencing Guidelines."[25] The Guidelines went into effect in the fall of 1987.[26] In recognition of the relatively light sentences that white-collar defendants had received in the past, the fraud guideline that the Commission created was "driven by [ ] economic loss."[27] "In effect, the Commission and the guideline equalized the white-collar fraud offenses with blue-collar theft offenses."[28]

After the 2008 financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which was signed into law in July 2010.[29] In the Act, there is a directive to the Sentencing Commission to "review and, if appropriate, amend" the Guidelines for securities fraud offenses to "appropriately account for the potential and actual harm" such offenses cause the public and financial markets.[30] In response, the Commission amended the Guidelines to increase sentencing ranges for a number of financial crimes, including insider trading.

Under the current version of the Guidelines, the base offense level for insider trading is eight.[31] That base offense level increases to 14 if the offense involved "an organized scheme to engage in insider trading."[32] In determining whether the offense involved an organized scheme, the Guidelines instruct courts to consider the following factors: (1) the number of transactions; (2) the

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18 947 F.3d 19, 34-37 (2d Cir. 2019). It remains to be seen whether *Blaszczak* prompts the Second Circuit to go en banc or the Supreme Court to grant *certiorari*.

19 Insider Trading Prohibition Act, H.R. 2534 (2019).

20 Rahul Mukhi, Shannon Daugherty & Destiny D. Dike, Cleary Gottlieb Steen & Hamilton LLP, A Look inside H.R. 2534: Insider Trading Prohibition Act, Harvard Law School Forum on Corporate Governance (July 25, 2019), *available at* https://corpgov.law.harvard.edu/2019/07/25/a-look-inside-h-r-2534-insider-trading-prohibition-act/.

21 Kenneth Mann et al., *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479, 481 (1980) (footnote omitted).

22 Daniel Richman, *Federal White-collar Sentencing in the United States: A Work in Progress*, 76 L. & CONTEMP. PROBS. 53, 55 (2013).

23 *Id.* (citing Mann et al., *supra* note 21, at 482-86).

24 Samuel W. Buell, *Is the White-collar Offender Privileged?*, 63 DUKE L.J. 823, 833 (2014).

25 *Id.*

26 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.).

27 Mark W. Bennett, Justin D. Levinson, Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 Iowa L. Rev. 939, 950 (2017) (quoting Richman, *supra* note 22, at 53, 56) (internal quotation marks omitted).

28 *Id.* at 950-51.

29 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

30 *Id.* at 2078.

31 U.S.S.G. § 2B1.4(a).

32 *Id.* § 2B1.4(b)(2).

dollar value of the transactions; (3) the number of securities involved; (4) the duration of the offense; (5) the number of participants in the scheme (although an organized scheme may exist even with one participant); (6) the efforts undertaken to obtain material, nonpublic information; (7) the number of instances in which material, nonpublic information was obtained; and (8) the efforts undertaken to conceal the offense.[33]

Section 2B1.4 further instructs courts to increase the offense level, if the gain exceeded $6,500, by the corresponding number of levels in the fraud loss table in Section 2B1.1. Unlike in fraud cases, which look first to victims' losses under Section 2B1.1 for the applicable enhancement, the Guidelines use *gain* as the measure of harm in insider trading cases because "victims and their losses are difficult if not impossible to identify," so that "the total increase in value realized through trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information, is employed instead of the victims' losses."[34]

The Guidelines' treatment of insider trading has been subject to criticism. Shortly after the Sentencing Commission increased the sentencing ranges for insider trading in the wake of Dodd Frank, commentators criticized these amendments for "establish[ing] an even higher sentencing plateau for insider trading defendants — and financial industry professionals in particular — even as many judges were already departing downward from the existing, gain-driven Guidelines."[35] The key problem with the insider trading guideline, made worse by the amendments, is that "the factor most responsible for increasing sentencing minimums under the Guidelines, the defendant's monetary gain, is often not the most relevant to judges when assessing culpability."[36]

Against the backdrop of such criticism, it is not a surprise that many insider trading defendants receive below-Guidelines sentences; the question is why insider trading defendants receive below-Guidelines sentences at a higher rate than defendants convicted of other white-collar crimes.

II. RECENT INSIDER TRADING SENTENCING STATISTICS

The United States Sentencing Commission compiles federal sentencing information and produces an *Annual Report* and *Sourcebook of Federal Sentencing Statistics*.[37] According to the Commission's most recent Sourcebook for fiscal year 2018,[38] 42.9 percent of defendants sentenced under the general fraud guideline in Section 2B1.1 received a sentence within the Guidelines range.[39] By contrast, for the 31 defendants sentenced under Section 2B1.4 of the Guidelines — the guideline that applies to insider trading — only *one* defendant received a sentence within the Guidelines range (or 3.2 percent of the 31 total defendants). According to prior sourcebooks, defendants sentenced under 2B1.4 enjoyed similarly low rates of Guidelines sentences in prior years as well.[40] Thus, it is no exaggeration to say that insider trading defendants sentenced under Section 2B1.4 receive Guidelines sentences at a substantially lower rate than defendants sentenced under the other economic crime sections.

After the Guidelines amendments that followed Dodd-Frank that increased the sentencing ranges for insider trading cases, the average sentences handed out appeared to increase for a time. A Reuters analysis in 2014 showed that over the prior five-year period, insider trading defendants had received average sentences of 17.3 months, up from 13.1 in the five years before that, or a 31.8 percent increase.[41] Shortly thereafter, Mathew Martoma received a sentence of nine years' imprisonment, leading one commentator to ask in 2015

[33] *Id.* § 2B1.4, comment. (n.1).

[34] *Id.* § 2B1.4, comment. (backg'd).

[35] Christopher P. Conniff, Steven S. Goldschmidt & Helen Gugel, *Sentencing Guidelines for Insider Trading: Recent Amendments Create Greater Disparity*, FEDERAL SENTENCING REPORTER, VOL. 26, NO. 1, at 43 (Oct. 2013).

[36] *Id.* at 45.

[37] U.S. Sentencing Commission's 2018 Sourcebook of Federal Sentencing Statistics, *available at* https://www.ussc.gov/research/sourcebook-2018.

[38] The Commission's fiscal year for 2018 runs from October 1, 2017 to September 30, 2018.

[39] Table E-7, Sentence Imposed Relative to the Guideline Range for Economic Offense Offenders Fiscal Year 2018, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/TableE7.pdf.

[40] The Commission's Sourcebooks for prior years are *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/.

[41] Nate Raymond, Insider traders in U.S. face longer prison terms, Reuters analysis shows (Sept. 2, 2014), *available at* https://www.reuters.com/article/us-insidertrading-prison-insight/insider-traders-in-u-s-face-longer-prison-terms-reuters-analysis-shows-idUSKBN0GX0A820140902.

"why sentences for insider trading are reaching levels once considered impossible for something that was not even prosecuted until the late 1970s."[42] Studies by the Wall Street Journal and Bloomberg News corroborated this trend, similarly finding an increase in the sentences imposed on insider trading defendants around this time.[43]

In recent years, however, the average insider trading sentence appears to be dropping somewhat: For the calendar year 2018, of the 31 insider trading defendants sentenced, the average sentence was 14.3 months,[44] which is materially lower than the 17.3 average Reuters reported just a few years ago. Time will tell whether we are in the midst of a broader downward trend.

Regardless of whether the average sentence for insider trading is dropping again, insider trading defendants sentenced under Section 2B1.4 of the Guidelines still receive below-Guidelines sentences at far higher rates than defendants convicted of other white-collar crimes. The question is why.

III. WHAT JUDGES HAVE SAID ABOUT THE SERIOUSNESS OF THE OFFENSE

Under Section 3553(a) of Title 18, United States Code, judges must consider a variety of factors when sentencing defendants to ensure that the sentence is "sufficient, but not greater than necessary." In particular, the judge must consider the nature and circumstances of the offense, and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense to promote respect for the law and to provide just punishment for the offense; and to afford adequate deterrence to criminal conduct. Judges must also consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. At recent insider trading sentencings, judges have consistently highlighted the extraordinary seriousness of insider trading crimes, while at the same time showing a willingness to impose below-Guidelines sentences.

In the Eastern District of New York, Judge Joan M. Azrack sentenced defendant Tibor Klein, whose Guidelines range was 37 to 46 months.[45] Judge Azrack highlighted how Mr. Klein's conduct "was not a single act or single poor decision," but rather "was a concerted effort over time to profit from an insider trading scheme." Worse, when "confronted, Defendant Klein did not immediately take responsibility, and he lied to the SEC and the Government." Nevertheless, after a brief reference to Mr. Klein's "family circumstances" and the loss of his ability to earn a living as a financial advisor, Judge Azrack sentenced Mr. Klein principally to a term of six months' imprisonment, to be followed by six months' house arrest.

In the Southern District of New York, Judge Katherine Polk Failla sentenced defendant Walter C. Little, a Florida lawyer whose Guidelines range was 37 to 46 months and who pled guilty to illegally trading on information that belonged to his firm's clients.[46] Judge Failla said that Mr. Little's conduct

> "is extraordinarily bad on a number of levels. It persisted for well over a year. It involved real damage to the financial markets and to their integrity. As Mr. Little certainly understands, there were so many oaths that were broken in the course of committing this offense. Not just his confidentiality oaths or the oath he committed when he joined the Florida Bar, but the oaths that he made to the firm for which he worked, the annual certifications he made regarding material nonpublic information, the implicit oaths that he had to the clients of the firm, and as he recognized, and I really appreciated his candor in this regard, there really is no excuse for the conduct in which he engaged."

On balance, after considering Mr. Little's mental health issues, Judge Failla imposed a below-Guidelines sentence of principally 27 months' imprisonment.

In the District of New Jersey, Judge Michael A. Shipp sentenced Daniel Perez, whose Guidelines range was 18 to 24 months.[47] Judge Shipp explained that "the public may lose faith in the integrity of the market if insider trading schemes like these continue to persist." He noted that "there was a conscious decision on the part of

[42] Peter J. Henning, Punishments for Insider Trading Are Growing Stiffer, New York Times Dealbook (Sept. 9, 2014), *available at* https://dealbook.nytimes.com/2014/09/09/punishments-for-insider-trading-are-growing-stiffer/.

[43] Conniff *et al.*, *supra* note 35, at 44.

[44] *Insider Trading, Annual Review, 2018*, *supra* note 12.

[45] *United States v. Klein,*16 Cr. 442 (JMA) (E.D.N.Y.), Docket Entry 183 (Sentencing Transcript, Feb. 12, 2018).

[46] *Little*, *supra* note 8.

[47] *United States v. Perez*, 17 Cr. 538 (MAS) (D.N.J.), Docket Entry 24 (Sentencing Transcript, Aug. 10, 2018).

the defendant to engage in such activity on not one, but on two occasions," and that "[i]nsider trading is an all-too-common occurrence and is not only difficult to detect, but also difficult to prosecute." Nevertheless, recognizing that the defendant was "truly remorseful," Judge Shipp imposed a below-Guidelines sentence principally of probation for one year.

In the Northern District of California, Judge Lucy H. Koh sentenced Peter Chang, whose Guidelines range was 46 to 57 months, to a below-Guidelines term of 24 months, saying "this is a significant crime" and "was totally out of pure greed."[48]

In the District of Massachusetts, Judge William G. Young sentenced Robert Gadimian, whose Guidelines range was 37 to 46 months, to 27 months' imprisonment, saying, of the trust people had placed in him, "that you threw that all away for greed. Nothing more. Greed."[49] Judge Young went on to explain that the offense conduct threatened "[o]ur whole system of capital formation and investment," which "depends on honesty," and which requires a "sanction" that is "real" and "rigorously imposed."

Many other recent insider trading sentencings follow the same pattern of including remarks on the extraordinary seriousness of the offense, and yet ultimately imposing below-Guidelines sentences on a diverse range of defendants who do not share any one characteristic that would explain this outcome.

IV. HOW JUDGES HAVE JUSTIFIED BELOW-GUIDELINES SENTENCES

Recent insider-trading case law provides little explicit guidance as to what may be driving the broader pattern of below-Guidelines sentences described above. But a close reading of what judges have said and not said in recent cases provides clues as to the motivating factors.

As noted, judges have readily acknowledged at recent sentencings the harm that makes insider trading a serious offense, explaining how "[i]t involve[s] real damage to the financial markets and to their integrity,"[50] how "the public may lose faith in the integrity of the market if insider trading schemes like these continue to persist,"[51] and how "[o]ur whole system of capital formation and investment"[52] depends upon honesty in the markets. A recent report by the Bharara Task Force on Insider Trading — an expert review of the state of insider trading law — similarly described the seriousness of the offense: "The rationale for prohibiting insider trading is straightforward — protecting the fairness and integrity of our securities markets and holding wrongdoers accountable."[53]

But at recent insider trading sentencings, in addition to looking at the general seriousness of the offense of insider trading, courts have also looked at the seriousness of the conduct of the specific defendant before them. The ultimate sentencing decisions in these recent cases appear to turn in part on whether the offense at issue was, at one end of the spectrum, an isolated, rash decision, or at the other, a calculated pattern of misconduct over a long period of time.

By way of reference, several years ago, a former attorney named Matthew Kluger received what remains the longest sentence ever imposed for insider trading, a Guidelines sentence of 12 years' imprisonment. In Mr. Kluger's case, Judge Katharine S. Hayden in the District of New Jersey noted a number of insider trading cases in which defendants received below-Guidelines sentences, but distinguished them, stating, "[i]n this case [the] conduct is not just a trade, not just a series of trades over one company. . . . but 17 years of trades and money laundering and obstruction of justice. . . . And therefore I don't find the stories of the cases that yielded below guideline sentences [] particularly instructive. Mine is a more thuggish, a more thuggish, more direct example of taking other people's stuff."[54]

In several recent cases, judges have looked to whether, on the one hand, the defendant's conduct involved something akin to what Judge Hayden described as "just a trade" or some other element that mitigates culpability, or on the other hand whether the conduct involved a more calculated course of conduct over a period of time. For example, in *United States v. Bonthu*, the court explained, in the course of giving a below-Guidelines sentence of home confinement, that the defendant's decision to engage in a couple of trades

[48] *Chang*, *supra* note 6.

[49] *United States v. Gadimian*, 16 Cr. 10285 (WGY) (D. Mass.), Docket Entry 93-1 (Judge's Findings, June 20, 2018).

[50] *Id.*

[51] *Perez, supra* note 47.

[52] *Gadimian*, *supra* note 49.

[53] *Report of the Bharara Task Force on Insider Trading* at 3 (Jan. 2020), *available at* https://www.bhararataskforce.com/.

[54] *United States v. Kluger*, 11-858 (KSH) (D.N.J.), Docket Entry 53 (Sentencing Transcript, June 4, 2011).

seemed “more rashness than moral turpitude,” stemming from “unfortunately the infection of capitalism,” in conduct that was “aberrational.”[55] Assessing a similar factor, in *United States v. Yan*, Judge Katherine B. Forrest observed — in the course of imposing a 15-month sentence in the middle of the Guidelines range of 12-18 months — that “[t]his is not one where you proceeded on a lark, just trying to see, hey, how does this work?”[56]

Other recent cases similarly highlighted aspects of defendants’ conduct that mitigate its seriousness. For example, in *United States v. Yu*, Judge Shipp explained, before imposing a below-Guidelines sentence of probation, that “involving another individual in an insider trade shows Mr. Yu did not fully understand the gravity of what he was doing and also demonstrates the seriousness of the offense.”[57] In another case, *United States v. Fishoff*, Judge Shipp imposed a more serious sentence of 30 months’ imprisonment — still below the Guidelines range of 46 to 57 months — noting that until recently, insider trading in the context of secondary offerings (as occurred in the case) was “considered a gray area.”[58] In *United States v. Chan*, Judge Indira Talwani imposed a sentence of 36 months’ imprisonment, below a Guidelines range of 63 to 78 months, saying on the one hand that the defendant tried to “cheat the system” not “on just one occasion but repeatedly,” which is a “serious challenge to the market,” but at the same time recognizing that the defendant wasn’t “driven by” anything “antisocial” or “intentions of greater wrongdoing.”[59]

On the whole, although no single factor appears to drive courts to impose below-Guidelines sentences in insider trading cases, recent sentencings do show courts wrestling with the degree to which a defendant’s conduct could be said to be “rash,” “aberrational,” or a “lark,” versus ongoing, deliberate, and systematic.

V. CONCLUSION

In advance of imposing below-Guidelines sentences, courts in the past year have called insider trading serious,”[60] “significant,”[61] “inexcusable,”[62] and “extraordinarily bad on a number of levels,”[63] among other things. Yet, insider trading defendants have nevertheless received below-Guidelines sentences at a higher rate than defendants sentenced under other sections of the Guidelines. Based on a review of recent sentencings, one factor driving the sentencing outcomes appears to be an effort by sentencing judges not only to articulate and account for the seriousness of the offense of insider trading generally, but also the degree to which the individual defendant’s conduct was a serious example of insider trading. ■

[55] *United States v. Bonthu*, 18 Cr. 237 (AT), Docket Entry 19 (Sentencing Transcript, Oct. 17, 2018).

[56] *Yan*, *supra* note 5.

[57] *United States v. Yu*, 17 Cr. 349 (MAS) (D.N.J.), Docket Entry 14 (Sentencing Transcript, Aug. 10, 2018).

[58] *United States v. Fishoff*, 15 Cr. 586 (MAS) (D.N.J.) (Sentencing Transcript, Nov. 5, 2018).

[59] *United States v. Chan*, 16-10268-IT (D. Mass.), Docket Entry 396 (Sentencing Transcript, Nov. 5, 2018).

[60] *See, e.g.*, *Yan*, *supra* note 5; *Kosinski*, *supra* note 1; *Xie*, *supra* note 5.

[61] *Chang*, *supra* note 6.

[62] *Berke*, *supra* note 7.

[63] *Little*, *supra* note 8.