**Insider Trading Before the Supreme Court: *Dirks* and *Salman***

By: Thomas O. Gorman [[1]](#footnote-1)

One of the most closely watched cases of the coming Supreme Court term is *Salman v. U.S.,*  S. Ct. No. 15-628, the Ninth Circuit’s insider trading decision penned by Judge Rakoff of the U.S. District Court for the Southern District of New York. The issue for decision is the meaning of the “personal benefit” test established by the High Court in *Dirks v. SEC,* 463 U.S. 646 (1983). While the case is important because of its potential impact on the liability of remote tippees, it takes on added significance in view of the Second Circuit’s pre-*Salman*  decision in *U.S. v. Newman,* 773 F. 3d 438 (2d Cir. 2014),  *cert. denied.,*  No. 15-137 (U.S. Oct. 5, 2015). There the court used *Dirks* to draw a line in the sand as to remote tippee liability which the Manhattan U.S. Attorney’s Office and the SEC have decided as significantly undermining insider trading enforcement.

This article examines the arguments presented by the parties and the argument before the High Court. It concludes with an analysis of those arguments.

**I. *Factual background***

 The case centers on three relatives: Brothers Michael and Maher Kara and their brother-in-law Bassam Salman. Maher secured a position with Citigroup’s healthcare group as a vice president. He advised biotechnology and pharmaceutical companies on mergers, acquisitions and financing strategies. He rose to the position of director and was based largely in New York. Michael operated a hazardous waste business in California, home turf for the family. Mr. Salman worked as a grocery wholesaler in Chicago throughout the relevant period. He engaged in securities as did Michael.

The insider trading charges center on four transactions: 1) the sale of Bone Care International, Inc. to Genzyme Corporation in the spring of 2005; 2) the acquisition of Andrex Corporation in early 2006; 3) the acquisition of United Surgical Partners International, Inc. by a private equity firm in mid-2006; and 4) the purchase of Biosite Incorporated in early 2007.

The two brothers had a complex relationship. When Maher first joined the Citi healthcare group he had no experience in the sector. He periodically sought Michael’s advice because of his college science background. As his career progressed Maher continued to discuss business with his brother, using him as a sounding board. Maher repeatedly gave his brother clear instructions that the information they discussed was confidential.

Over time Michael began asking more pointed questions. In 2005 and 2006 he pestered his brother about healthcare companies. At times Maher avoided the phone calls. At times his nagging was so persistent that Maher disclose information to him to “get him off my back.” Periodically Maher would remind his brother that the information was confidential. Michael never disclosed that he was trading on the information.

Michael and his brother-in-law began discussing stocks in late 2004. Michael furnished Mr. Salman with recommendations based on his own research as well as information from his brother. Mr. Salman’s trading essentially paralleled that of Michael.

Maher and Michael testified at the trial of Mr. Salman on behalf of the government. Michael testified that his brother told him Bone Case would be acquired. Maher was working on the deal. Michael traded and advised Mr. Salman to invest. Maher also worked on the Andrex deal. After he was removed from the deal by his supervisor, he told Michael that he was extremely upset. Michael then invested in Andrex, without the knowledge of his brother. He also recommended that his brother-in-law purchase shares. Mr. Salman bought call options. Maher also told Michael about the USPI deal after persistent questioning; Michael traded and told Mr. Salman about it. He also traded. Finally, Maher told Michael about the Biosite deal after being implored to do him a favor. When Maher told his brother not to trade Michael responded “don’t worry.” He then traded and told Mr. Salman who also traded. There is no evidence that Maher knew the information was shared by Michael with anyone.

At the conclusion of the trial the court instructed the jury that to convict Mr. Salman of insider trading it needed to find that (1) insider Maher personally benefitted from the disclosure of material, nonpublic information and (2) that Mr. Salman knew that the insider had personally benefitted from the disclosure. The term “personal benefit” was defined to include “the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend.” The court informed the jury that it was not required to find that Mr. Salman knew “the specific benefit given or anticipated by the insider in return for disclosure of inside information; rather, it is sufficient that [Salman] had a general understanding that the insider was improperly disclosing inside information for personal benefit.” The jury returned a verdict of guilty on all counts.

The Ninth Circuit affirmed. On appeal Mr. Salman argued that *Newman*  required the reversal of his convictions. Specifically, he claimed that under *Dirks* and *Newman*  the personal benefit instruction given by the district court was insufficient. Since there was no evidence that Mr. Maher engaged in an exchange with Michael that yielded even a potential pecuniary gain, under *Newman* the verdict should be set aside. The Ninth Circuit rejected this claim, holding that to the extent *Newman* went that far, the circuit declined to follow.

**II. *Petitioner’s Opening Brief***

The Petitioner asks the Court to draw a clear line demarking illegal tipping, an argument that evokes the underpinnings of *Dirks* and *Newman.* The issue for decision is framed as: Whether *Dirks* requires “proof of an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature” or “is it enough that the insider and the tippee shared a close family relationship . . .” The approach is backstopped by the rule of lenity, limitations on the power of the federal courts in the area of defining criminal conduct and the constitutional due process notice and separation of powers provisions.

Petitioner begins with the familiar canon that only Congress can define criminal conduct. The Court has repeatedly held that Section 10(b) does not create any general duty to refrain from trading on inside information or entitle investors to a parity of information. Under the Court’s approach the “line between lawful trading and criminal activity . . . is determined by whether the insider . . . disclosed the information to obtain some personal benefit. If he did not, there was no Section 10(b) violation, and the ‘tippee” was free to trade.” In drawing this line the focus was on the “improper exploitation of a fiduciary relationship for personal profit.”

Section 10(b) does not specifically address the question of insider trading. This has been an important limiting principle since the Court first addressed the question of Section 10(b) and insider trading in *Chiarella v U.S.,* 445 U.S. 222 (1980). There, in drawing a line between the legal and the prohibited, the Court eschewed a parity of information theory, recognizing that “’not every instance of financial unfairness constitutes fraudulent activity under Section 10(b).’” The Court then concluded that the judicially implied insider trading offense “applies only where the person who trades has a fiduciary relationship with the issuer of the securities.”

*Dirks* built on that determination three years later, emphasizing that “‘only some persons, under some circumstances, will be barred from trading while in possession of material nonpublic information.’” The Court went on to hold that since a tippee generally owes no duty to the company, trading only violates the statute if the insider breached his fiduciary duty and the tippee knew it. But not every breach of fiduciary duty violates the statute. Rather, the *Dirks* Court concluded, there is a violation only when the breach was for personal benefit or gain. This rule provides a “guiding principle” for market participants.

The test for assessing the benefit is an objective one in keeping with the notion of establishing a guiding principle. The focus is on pecuniary gain or a reputational benefit that will translate into future earnings. As examples the Court cited “‘cash, reciprocal information, or other things of value.’” In citing these examples, Petitioner argued that *Dirks* viewed the term “gain” as synonymous with “benefit,” focusing on the idea that the insider is exploiting corporate information for “profit.” Thus the “quid pro quo” of the exploitation is for tangible benefits potentially flowing to the insider, not those which are intangible. The fraud thus turns on the insider’s pecuniary motive. This approach is consistent with the Court’s later Section 10(b) jurisprudence as well as cases under provisions like the honest services fraud statute. *See, e.g. McNally v. U.S.,* 483 U.S. 350 (1987).

*Salman* does not involve securities fraud, according to Petitioner: “Maher did not trade on the information, and he did not provide it to get a kickback. On the contrary, Maher gained nothing of value from his disclosures, and had no financial motive. His motive was to get a bullying brother ‘off his back.’” Indeed, the government has conceded that Maher’s “‘breaches of fiduciary duty were in large part the result of Michael Kara’s persistence in seeking inside information.’” While their relationship was one of love and trust, Michael also manipulated and deceived his brother.

Defining personal benefit as pecuniary gain is consistent with the Court’s earlier decisions as well as constitutional limitations, according to Petitioner. First, it has long been held that criminal statutes must be construed strictly under the due process clause as well as the rule of lenity. Second, it would be a violation of due process to take someone’s life, liberty or property using a criminal standard that is vague and fails to give ordinary people fair notice. Third, to the extent the personal benefit concept incorporates intangibles, it is ambiguous and thus must be resolved in favor of Petitioner. This is consistent with the Court’s jurisprudence limiting the scope of the implied right of action under Rule 10(b)-5 which is grounded in constitutional separation of powers principles. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164 (1994); *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.,* 552 U.S. 148 (2008).

Finally, the standard used by the Ninth Circuit in *Salman* undermines *Dirks’* limiting principle: “Any suggestion that the personal benefit requirement could be established by psychic gratification, such as the satisfaction derived from giving a gift, would render the requirement impermissibly vague.” In this case “[a]ny benefit Maher might have received is purely emotional, and it is unclear what that benefit could have been.” Indeed, using the gift concept as a proxy for the personal benefit element fails to give law enforcement a minimal guideline. This is evident from the over three decades of cases following *Dirks*  in which the DOJ and the SEC “effectively nullified the personal benefit requirement by invoking the ‘gift’ talisman whenever there is no tangible economic benefit to the tipper.” Enforcement on this basis results in the kind of arbitrary and discriminatory actions the due process clause was designed to prevent. “In sum, a pecuniary benefit is the paradigmatic benefit described not only in *Dirks* but also in this Court’s other insider trading cases . . .” The decision of the Ninth Circuit should be reversed.

**III. *Respondent’s Brief***

The Solicitor General and the SEC present the issue for decision this way: “Whether, under *Dirks v. SEC,* 463 U.S. 646 (1983) a tipper personally benefits, and thereby breaches his fiduciary duty, by disclosing confidential information to a tippee as a gift for use in securities trading.” In analyzing this issue the SEC contends that the “essential quality of a gift of confidential corporate information – and the reason why a gift of such information for trading breaches the insider’s fiduciary duty – is that it serves personal, not corporate, purposes. Thus, when the objective facts show that information was provided as a gift for securities trading, and no corporate purpose exists for the disclosure, the personal-benefit is satisfied.”

The government’s brief begins and ends with *Dirks.* There is little mention of the Second Circuit’s decision in *Newman.*  A corporate insider violates Section 10(b) of the Exchange Act, according to the government, by trading in the securities of his corporation on the basis of material, non-public information. Under the classic theory of insider trading those securities transactions are a deceptive device within the meaning of the statute because it “violates the relationship of trust and confidence that exists between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation.” (internal citations omitted). The misappropriation theory is also built on deception, but tied to an outsider feigning loyalty to the duty owed to the source of the information.

 Following these principles, the *Dirks* Court concluded that analyst Ray Dirks did not violate the securities laws by disclosing material non-public information as he did not trade and sought only to expose a fraud. The Court disapproved of the “broad theory” which it viewed as implicit in the SEC’s censure of Dirks. That theory would have required equal access to information by all traders. “Nevertheless, the Court confirmed, a corporate insider violates Rule 10b-5 when he possesses information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and takes advantage of that information by trading without disclosure.” (internal quotations omitted). That action is contrary to the duty of the insider to the shareholders.

The duty of a tippee is derivative of the insider, *Dirks* explained. The tippee who received inside information assumes the fiduciary duty of the insider. The critical question becomes whether the insider will personally benefit from the disclosure. That question must be resolved by considering the objective facts. For example, there may be a relationship where the exchange is a *quid pro quo.* Likewise, when an insider makes a gift of inside information to a “trading relative or friend,” a situation in which “‘[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient’” may exist (quoting *Dirks,* 463 U.S. at 664).

Based on these principles, the *Dirks* personal benefit test is met when the insider discloses corporate information without a corporate purpose, according to the SEC. The personal benefit requirement is a means of determining if the insider has breached his or her fiduciary duty. The insider has access to inside information only for a corporate purpose – access is not provided for personal use. Thus, an “insider who trades for himself on material, non-public information inherently acts contrary to a corporate purpose, to the detriment of shareholders. That trading is a breach of his fiduciary duty. The same is true when an insider, while not trading himself, provides the information to a tippee for that person to trade.” Under *Dirks* the insider may not furnish the information to the tippee to do what he cannot – trade. Thus the “existence of ‘personal benefit’ is simply the flip side of the absence of a corporate purpose . . . and so a personal benefit exists when a corporate purpose does not,” according to the SEC.

*Dirks* also says that “a personal benefit ‘exist[s] when an insider makes a gift of confidential information to a trading relative or friend,’” (quoting *Dirks*  at 664). In that circumstance, as well, the insider acts for a personal purpose and – given that the tip is a ‘gift’ precisely because the tipper understands that the tippee intends to trade on the information and make money from it – sets a third party against the shareholders’ interest.” The critical point is that the insider breaches his fiduciary duty by disclosing the inside information to a “favored person, and does so knowing or expecting that the information will be used for securities trading.”

Under *Dirks* “a gift of information for trading intrinsically involves a personal gift.” *Dirks* emphasized that a gift of information with the expectation that the recipient will convert it into cash is the functional equivalent of the insider trading himself. Thus, in order “for a gift of information to trigger liability, the government need not show that the insider personally profited (or expected to) in a financial sense. The point of a gift is to transfer something of value without a *quid pro quo . . .*  Thus, if the evidence establishes that the insider gave a gift of information for trading and that a business justification for the disclosure is absent, the fact finder need not investigate the exact nature of the personal reasons that drove the tipper to decide to confer such a gift.” And, the insider may benefit in intangible ways. The critical question is thus whether the tipper is “serving a corporate purpose, not . . . what the gifting tipper obtains for himself . . .”

Finally, the *Dirks*  personal benefit test applies to a gift to any person. The “relative or friend” language in the opinion was not presented as a limiting principle.

The government argues that Petitioner’s arguments are not consistent with *Dirks.* First, his claim that insider trading does not involve deception is directly contrary to the Court’s earlier decisions. Second, Petitioner’s claim that the personal benefit must be for a pecuniary gain misreads *Dirks* which states that “a gift of confidential information is sufficient to establish that the tipper has personally benefited and thereby breached his duty.” Third, the *Dirks* standard is not vague. To the contrary, it has been well understood for thirty years until the “erroneous” decision in *Newman.*

**III. *Petitioner’s Reply Brief***

The opening paragraph of the brief focus on these themes: “The government’s brief illustrates the dangers of common-law crimes. A personal benefit test that extends beyond pecuniary gain presents vagueness dangers, so the government asks the Court to refashion the judge-created tipping crime by replacing the personal benefit element with a broader ‘lack of corporate’ requirement. The government invites the Court to create this new rule long after Petitioner acted, thus ensuring that he had no notice of the proposed retroactive judicial expansion of the crime.”

First, the government’s position is “squarely at odds with *Dirks,”* according to Petitioner. That decision did not fashion the “corporate purpose” test advanced by the government. Section 10(b) liability for tipping does not hinge on “whether the insider had a corporate purpose for making his disclosure.” To the contrary, under *Dirks*  the question is whether the “insider personally *will benefit,*  directly or indirectly from his disclosure. Absent some *personal gain,*  there has been no breach of duty to stockholders,” according to Petitioner (emphasis in original). Lack of a corporate purpose is not the question. Only personal gain triggers liability under *Dirks.*

This approach is tied to the Court’s *quid pro quo* theory of liability that the insider is in effect selling the information selectively “for cash, reciprocal information, or other things of value for himself” (internal quotes omitted). The personal benefit test hinges on whether the insider receives a benefit from the disclosure such as a pecuniary gain or “a reputational benefit that will translate into future earnings.”

The predicate for the *Dirks*  approach is the Section 10(b) requirement of deception. As the Court made clear in *Santa Fe v. Green,*  430 U.S. 462 (1977), a breach of fiduciary duty is not sufficient to violate the Section. Rather, there must be manipulation or deception. The tip must thus be “a *fraudulent*  breach” that “takes advantage of information intended to be available only for a corporate purpose *and not for the personal benefit of anyone.”* Viewed in this context, a disclosure is fraudulent only when the tipper’s motive is pecuniary. The government’s claim that disclosing the information when the tippee will trade is inconsistent with this notion. Indeed, under this test *Dirks*  would have come out the other way because the Court only found that the tipping insider did not receive a personal benefit, not that those receiving the information would not trade.

Second, the government’s claim that the pecuniary gain standard is inconsistent with the gift language of *Dirks*  is incorrect. In view of the emphasis in *Dirks* on pecuniary gain, the Court “could not have intended to equate ‘gift’ with situations in which the tipper receives nothing with personal benefit to the tipper.” Also incorrect is the government’s contention that the phrase “trading relative or friend” which apples to “gift” does not mean what it says and fails to limit the notion of gift. That suggestion leaves the concept open ended, ignoring the fact that *Dirks* established a limiting principle.

Third, the government’s position is inconsistent with the text of the statute, its history and constitutional limiting principles. There is nothing in the text of Section 10(b) about insider trading. While the government cites to various amendments to the statute, those provisions do not address the situation here. Likewise, the legislative history to those sections does not support that position.

Finally, the open ended position of the government highlights the need to narrowly construe the personal benefit test. Here the “government seeks unbounded license to prosecute people for trading with an informational advantage . . . [which is] why the Constitution commits the power to define crimes to the legislature, and why it requires Congress to provide clear notice about what conduct is barred . . . The need for a narrow construction is even greater here, because §10(b) does not expressly prohibit *any*  insider trading” (emphasis original). Under similar circumstances in other areas such as “honest services fraud” the Court has rejected attempts to utilize broad concepts to impose criminal liability. *See, e.g. McNally v. U.S.,* 483 U.S. 350 (1987). That same approach is required here – the personal benefit test must be cabined to its *Dirks* defined contours, not left as the open ended concept suggested by the government which would impose the long rejected “parity of information” rule.

Under the facts here there is no legal basis for imposing liability using the government’s “novel lack-of-corporate-purpose” approach. Indeed, there is “no legal basis to expand the tipping crime to cover ‘remote tippees” who have not participated in the tipper’s breach of duty. The government does not dispute Salman’s lack of involvement in the breach . . .” And, the jury was not instructed on the “lack of corporate purpose” standard. Thus, the conviction must be reversed.

**IV. *Oral Argument***

Oral argument in *Salman*  highlighted the themes threaded through the briefs of the parties and the Court’s 1983 opinion in *Dirks,* centering on the question of gifts of inside information. Petitioner Salman hewed to the notion that the personal benefit and any gift must result in a pecuniary benefit to the insider. Petitioner cautioned that the Court should tread carefully in crafting elements of an insider trading cause of action in a criminal case as it has in construing other federal criminal statutes such as in the honest services fraud area. Respondent, in contrast, argued that transmitting inside information to one who intends to trade is impermissible. Both parties claimed the mantel of *Dirks*  while the Court time and again returned to its earlier opinion, gently chiding the advocates they their positions were out of step with that decision.

Petitioner, represented by Alexandra Schapiro, began by citing *McNally* and *Skilling,*  two honest services fraud cases, and  *McDonald,*  the Court’s reversal of former Virginia governor Bob McDonald’s corruption conviction last term, for the proposition that Congress, not the courts should define vague statues like Exchange Act Section 10(b) which fails to mention insider trading. The Court was not receptive. Justice Ginsburg immediately went to the core of the case: “Suppose in this case the person with the . . . inside information, the brother with the inside information, had himself traded in the securities, and then gave the proceeds to his . . . older brother? Would that have violated 10(b)?” Petitioner responded to the hypothetical, drawn nearly verbatim from *Dirks,* that it would. Justice Kennedy immediately picked up the theme noting that “[t]his is standard accomplice stuff.”

Petitioner tried to return to the key theme of her argument: “if the insider – as occurred in this case, and it’s undisputed in this case – did not act for any financial gain, did not make any money at all, that’s what’s not covered” by Section 10(b) and *Dirks.*  Justice Sotomayor then turned to the question of what constitutes a gift: “Isn’t that always the quid pro quo of a gift, that you believe that if you give someone a gift, it’s going to cost you one way or another?” While that may be true Petitioner noted, under that test “virtually anything would – any disclosure would then amount to a gift, and this Court has been crystal clear that – that not any disclosure leads to a violation.”

Justice Sotomayor agreed that every communication of inside information is not a violation of the law. Rather, there has to be “a personal benefit, or a personal purpose, that there has to be a reason you’re doing it, not accidentally, not – unknowingly, but something you’re doing because you want to receive some benefit from it.” Justice Breyer picked up this theme, tying the notion of receiving a benefit from a gift to family members, noting that “the statute books [are] filled with instances where the public wants to know . . . how your family might benefit.”

Justice Kagan then returned the argument to what became a central theme: “So there’s a lot of language in *Dirks* which is very specific about, it’s not only when there’s a quid pro quo from the tippee to the tipper, but when the tipper makes a gift to the tippee, and in particular a relative or friend.” While Petitioner agreed with this point, Ms. Schapiro, tried to turn back to her central theme – there has to be a pecuniary benefit. Justice Kennedy was unconvinced, noting that “*Dirks*  says there’s a benefit in making a gift . . .” Justice Kagan agreed noting that here “I’m stealing corporate information. It’s essentially a kind of embezzlement or conversion. I’m stealing information to give a gift to somebody I know. It might be, as in this case, a family member. It might be a friend. And I benefit from that because . . . I personally benefit. It’s the exact opposite of using corporate information for corporate purposes. I’m using it for my own personal benefit.”

Petitioner continued to press for a “clear line,” a central theme of *Dirks.* Justice Breyer brushed aside the issue of vague statutes such as honest services fraud, citing the antitrust laws as a “very vague statute.” The real question here, according to Justice Kennedy, is not whether there is a breach – that is a given – but how “far out does liability extend?” Petitioner’s line was financial – the gift must be financial. When pressed further by Justice Stomayor who asked for an alternative, Petitioner admitted there was none. If “*Dirks* is the test” noted Justice Ginsburg, “then this case falls within it because it’s a gift, right?” Petitioner disagreed.

Justice Kagan seemed to sum up the Court’s view, stating: “Ms. Schapiro, here [it] is not a question of expanding it [*Dirks*] further. You’re asking us to cut back significantly from something that we said several decades ago, something that Congress has shown no indication that it’s unhappy with . . . And you’re asking us essentially to change the rules in a way that threatens that integrity . . .” of the markets.

Picking up on comments from the Justices, the government, represented by Deputy Solicitor General Michael Dreeben, began by claiming that a “pecuniary gain” limitation to the personal benefit test would be harmful to the integrity of the securities markets, permitting an insider to “parcel it [inside information] out to favored friends, family members and acquaintances [who] could all use it in trading . . .”

Exploring the limits of the gift theory, Chief Justice Roberts then noted that “not everything is a gift . . . social acquaintances, you know, that people say we’re all going away for the weekend, why don’t you join us? I can’t, I’m working on this Google things, or something like that, and it means something to the other people. You wouldn’t call that a gift. You’d call it a social interchange . . . And it seems to me that, however you read *Dirks . . .* certainly doesn’t go beyond gifts.” The Government did not disagree. The difference is that there has to be a breach where the information was made available to the insider for a corporate purpose and the insider is providing it to someone for a personal purpose.

Justice Breyer proceeded to examine the limits of the Government’s view by asking “If you give it [inside information] to anyone in the world, and – whom you happen to know, and you believe that that person will trade on it, that is for a personal advantage” to which the Government responded “Yes.” The breath of this comment lead Justice Alito to state that “[i]t doesn’t seem to me that your argument is much more consistent with *Dirks*  than Ms. Shapiro’s.” Mr. Dreeben responded, arguing that disclosing information that was entrusted for a corporate purpose to any person for trading violates the insider trading laws. The limit to this position, the government told the Court, is if “there’s no knowledge that the individual to whom you’re going to give the information is trading, there’s no breach of the *Cady*, *Roberts* [seminal SEC administrative decision in the area] duty. This is because *Dirks* is bottomed, according to the government, on the traditional corporate duty of loyalty – a point the Government reiterated but which was not picked up by any of the Justices.

When assessing the knowledge of the insider regarding the prospect that the outsider would trade, the government contended that the duty is breached if the “insider anticipated that the person to whom he gave the information would trade.” Anticipated is the same as knowledge, the government told Justice Kagan in response to a question. Later the government augmented this point, noting that the doctrine of conscious avoidance could also be used to establish knowledge.

The limits of the government’s theory – and the difference between DOJ criminal cases and SEC civil enforcement actions – was explored in an exchange between Justice Sotomayor and the government:

Justice Sotomayor: “ I think you’re taking this way out of existing law. Are you going to suggest that tippees aren’t routinely prosecuted when tippers don’t know that they are going to trade? I think they are, and most often it’s because you claim that they should have known it was confidential information.”

The government: “In a criminal case, we’re not claiming that. The SEC in a civil case--”

Justice Sotomayor: “There’s plenty – there’s a legion of cases I read for this – preparing for this argument where the government has said--”

The government: “I don’t think that there are, Justice Sotomayor, because I don’t think that that’s what we’re – we’re certainly not making that submission in this case. And I think that the cases that we are trying and the jury instructions that we are obtaining contemplate that the disclosures to a trading relative or friend. And that is the heart of the gift theory. So I don’t think that I’m departing from the way that the --”

Justice Sotomayor: “So you’re going to let go of the guy that Justice Alito – the guy on the street who looks dejected is not my friend or a close relative, but I give you a tip and say, go trade on this. It will make you a lot of money. That person – that tipper would not be liable.”

The government: “He would, Justice Sotomayor, for the very reason you yourself articulated. In that situation, there’s a gift of information to someone whith the intent that the person trade.”

As the argument drew to a close Justice Kagan asked the government if they could limit the gift issue for now to relatives and friends, leaving the broader question for later. The government agreed.

**V. *Analysis***

While each party claimed to have advanced a position which closely followed *Dirks,*  the arguments highlighted the fact that neither the position of the Petitioner nor that of the government faithfully applied the Court’s seminal decision. To the contrary, as questioning from the Justices made clear, Petitioner is requesting that the scope of *Dirks*  be contracted. The government is asking that *Dirks*  be expanded and the effect of that decision to establish a clear, bright line be obliterated.

Despite the positions of the parties, during the argument the Justices repeatedly indicated that *Dirks*  and its holding regarding gifting inside information to relatives or close friends will stand. While neither the Justices nor the advocates discussed the kind of evidence necessary to establish this point, or the *Dirks*  demand for objective criteria, those requirements seem likely to stand as well as the core holding of the decision requiring a personal benefit and limiting gifts to relatives and close friends. Despite the insistence of the government that the Court eliminate its restriction on gifts in favor of a standard which prohibits any transmission of inside information where there is reason to believe that the recipient may trade, discussion during the argument seemed to make clear that the Justices do not favor that rule. At best there could be some reservation suggesting that the question of gifts to non-family members and friends is reserved for later consideration.

Finally, discussion during the argument seemed to suggest that the facts of Mr. Salman’s case fall squarely within the rule of *Dirks.*  While the Court could remand the decision for consideration by the lower court in view of the opinion, it may simply affirm the verdict but not the rationale of the circuit court. Neither the approach of the Ninth Circuit nor that of the Second Circuit in *Newman* was discussed during the argument. In view of that, as well as the overall argument, it seems apparent that the Court intends to reaffirm *Dirks*  and perhaps clarify its basic holding without regard to the opinions in either circuit court case.

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