APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 14-3599

UNITED STATES OF AMERICA,
Appellee,
v.
MATHEW MARTOMA,
Defendant-Appellant.

Argued: October 28, 2015 and May 9, 2017
Decided: August 23, 2017
Amended: June 25, 2018

Before: Katzmann, Chief Judge, Pooler and Chin, Circuit Judges

OPINION

Katzmann, *Chief Judge*:

Defendant-appellant Mathew Martoma was convicted, following a four-week jury trial, of one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 and two counts of securities fraud in violation of 15 U.S.C. §§ 78j(b) & 78ff in connection with an insider trading scheme. On appeal, Martoma argues that the jury was improperly instructed and that there was insufficient evidence to sustain his conviction.

Martoma's contentions focus on the "personal benefit" element of insider trading law. In *Dirks v. S.E.C.*, the Supreme Court held that a "tippee"—someone who receives confidential information from a corporate insider, or "tipper," and then trades on the information—can be held liable under the insider trading laws "only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." 463 U.S. 646, 660 (1983). "[T]he test" for whether there has been a breach of the tipper's duty "is whether the [tipper] personally will benefit, directly or indirectly, from his disclosure" to the tippee. *Id.* at 662. *Dirks* set forth several personal benefits that could prove the tipper's breach, including, for example, "a relationship" between the tipper and tippee "that suggests a *quid pro quo* from the latter," the tipper's "intention to benefit" the tippee, and "a gift of confidential information to a trading relative or friend" where "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." *Id.* at 664.

Martoma first argues that the jury in his case was not properly instructed in light of the Second Circuit's decision in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014). Martoma asserts that, under *Newman*, evidence that the tipper made a gift of inside information to a trading relative or friend establishes a "personal benefit" only if tipper and tippee share a "meaningfully close personal relationship." *See Newman*, 773 F.3d at 452. Martoma contends that the jury instructions were flawed because they did not qualify that evidence of a gift to a trading relative or friend establishes a personal benefit only where there is a "meaningfully close personal relationship." Second, Martoma argues that the evidence at trial was insufficient to sustain a conviction under any theory of personal benefit.

We agree that the jury instructions are inconsistent with *Newman*, though not for the reasons Martoma advances. *Newman* held that a personal benefit in the form of "a gift of confidential information to a trading relative or friend," *see Dirks*, 463 U.S. at 664, requires proof that the tipper and tippee shared what the decision called a "meaningfully close personal relationship," *see Newman*, 773 F.3d at 452. The Court explained that this standard "requires evidence of 'a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the [latter].'" *Id.* (quoting *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) (quoting *Dirks*, 463 U.S. at 664)). Thus, Martoma's jury instructions were erroneous, not because they omitted the term "meaningfully close personal relationship," but because they allowed the jury to find a personal benefit in the form of a "gift of confidential information to a trading relative or friend" without requiring the jury to find either that tipper and tippee shared a relationship suggesting a *quid pro quo* or that the tipper gifted confidential information with the intention to benefit the tippee.

We nonetheless conclude that this instructional error did not affect Martoma's substantial rights. At trial, the government presented compelling evidence that at least one tipper received a different type of personal benefit from disclosing inside information: $70,000 in "consulting fees." This evidence establishes the existence of a relationship suggesting a *quid pro quo* between the tipper and tippee. For this reason, Martoma's challenge to the sufficiency of the personal-benefit evidence fails. Moreover, the government presented sufficient evidence for a rational trier of fact to conclude that at least one tipper received a personal benefit by disclosing inside information with the intention to benefit Martoma. Accordingly, we AFFIRM the judgment of the district court.

BACKGROUND

Martoma's convictions stem from an insider trading scheme involving securities of two pharmaceutical companies, Elan Corporation, plc ("Elan") and Wyeth, that were jointly developing an experimental drug called bapineuzumab to treat Alzheimer's disease. Martoma worked as a portfolio manager at S.A.C. Capital Advisors ("SAC"), a hedge fund owned and managed by Steven A. Cohen. In that capacity, Martoma managed an investment portfolio with buying power of between $400 and $500 million that was focused on pharmaceutical and healthcare companies. He also recommended investments to Cohen, who managed SAC's largest portfolio. While at SAC, Martoma began to acquire shares in Elan and Wyeth in his portfolio and recommended that Cohen acquire shares in the companies as well.

In order to obtain information about bapineuzumab, Martoma contacted expert networking firms and arranged paid consultations with doctors knowledgeable about Alzheimer's disease, including two who were working on the bapineuzumab clinical trial. Dr. Sidney Gilman, chair of the safety monitoring committee for the bapineuzumab clinical trial, participated in approximately 43 consultations with Martoma at the rate of around $1,000 per hour.[1] As a member of the safety monitoring committee, Dr. Gilman had an obligation to keep the results of the clinical trial confidential. His consulting contract reiterated that he was not to disclose any confidential information in a consultation. He nevertheless provided Martoma, whom he knew to be an investment manager seeking information to help make securities trading decisions, with confidential updates on the drug's safety that he received during meetings of the safety monitoring committee. Dr. Gilman also shared with Martoma the dates of upcoming safety monitoring committee meetings, which allowed Martoma to schedule consultations with Dr. Gilman shortly after each one. Another consultant, Dr. Joel Ross, one of the principal investigators on the clinical trial, met with Martoma on many occasions between 2006 and July 2008 and charged approximately $1,500 per hour. Like Dr. Gilman, Dr. Ross had an obligation to maintain the confidentiality of information about the

[1] Martoma did not pay Dr. Gilman or any other consultant directly. Instead, SAC would pay the expert networking firm, and the expert networking firm would in turn pay Dr. Gilman and the other consultants.

bapineuzumab clinical trial. Nevertheless, during their consultations, Dr. Ross provided Martoma with information about the clinical trial, including information about his patients' responses to the drug and the total number of participants in the study, that Dr. Ross recognized was not public.

On June 17, 2008, Elan and Wyeth issued a press release regarding the results of "Phase II" of the bapineuzumab clinical trial. The press release described the preliminary results as "encouraging," with "clinically meaningful benefits in important subgroups" of Alzheimer's patients with certain genetic characteristics, but indicated that the drug had not proven effective in the general population of Alzheimer's patients. J.A. 547. The press release further stated that the results of the trials would be presented in greater detail at the International Conference on Alzehimer's Disease to be held on July 29, 2008. Elan's share price increased following the press release.

In mid-July of 2008, the sponsors of the bapineuzumab trial selected Dr. Gilman to present the results at the July 29 conference. It was only at this point that Dr. Gilman was unblinded as to the final efficacy results of the trial. Dr. Gilman was "initially euphoric" about the results, but identified "two major weaknesses in the data" that called into question the efficacy of the drug as compared to the placebo. Tr. 1419-20. On July 17, 2008, the day after being unblinded to the results, Dr. Gilman spoke with Martoma for about 90 minutes by telephone about what he had learned. That same day, Martoma purchased a plane ticket to see Dr. Gilman in person at his office in Ann Arbor, Michigan. That meeting occurred two days later, on July 19, 2008. At that meeting, Dr. Gilman showed Martoma a PowerPoint presentation containing the efficacy results and discussed the data with him in detail.

The next morning, Sunday, July 20, Martoma sent Cohen, the owner of SAC, an email with "It's important" in the subject line and asked to speak with him by telephone. The two had a telephone conversation lasting about twenty minutes, after which Martoma emailed Cohen a summary of SAC's Elan and Wyeth holdings. The day after Martoma spoke to Cohen, on July 21, 2008, SAC began to reduce its position in Elan and Wyeth securities and entered into short-sale and options trades that would be profitable if Elan's and Wyeth's stock fell.

Dr. Gilman publicly presented the final results from the bapineuzumab trial at the International Conference on Alzehimer's Disease in the afternoon of July 29, 2008. Elan's share price began to decline during Dr. Gilman's presentation and at the close of trading the next day, the share prices of Elan's and Wyeth had declined by about 42% and 12%, respectively. The trades that Martoma and Cohen made in advance of the announcement resulted in approximately \$80.3 million in gains and \$194.6 million in averted losses for SAC. Martoma personally received a \$9 million bonus based in large part on his trading activity in Elan and Wyeth.

At Martoma's trial, the district court instructed the jury on the personal benefit element of insider trading law as follows:

> If you find that Dr. Gilman or Dr. Ross disclosed material, non-public information to Mr. Martoma, you must then determine whether the government proved beyond a reasonable doubt that Dr. Gilman and Dr. Ross received or anticipated receiving some personal benefit, direct or indirect, from disclosing the material, non-public information at issue.
>
> The benefit may, but need not be, financial or tangible in nature; it could include obtaining some future advantage, developing or maintaining a business contact or a friendship, or enhancing the tipper's reputation.
>
> A finding as to benefit should be based on all the objective facts and inferences presented in the case. You may find that Dr. Gilman or Dr. Ross received a direct or indirect personal benefit from providing inside information to Mr. Martoma if you find that Dr. Gilman or Dr. Ross gave the information to Mr. Martoma with the intention of benefiting themselves in some manner, or with the intention of conferring a benefit on Mr. Martoma, or as a gift with the goal of maintaining or developing a personal friendship or a useful networking contact.

Tr. 3191.

After Martoma was convicted and while his appeal was pending, this Court decided *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), an insider trading case that considered one of the personal benefits described in *Dirks* and mentioned in Martoma's jury instructions—making a "gift" of inside information to "a trading relative or friend."[2] This Court stated:

> To the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades 'resemble trading by the insider himself followed by a gift of the profits to the recipient,' *see* 463 U.S. at 664, we hold that such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature.

773 F.3d at 452. An initial round of briefing focused in large part on whether Martoma's conviction could stand in light of this passage from *Newman*.

Shortly thereafter, the Supreme Court decided *Salman v. United States*, 137 S. Ct. 420 (2016), another case involving the gift theory. The defendant, relying on *Newman*, urged the Supreme Court to hold that a "'gift of confidential information to a trading relative or friend'" is insufficient to establish insider trading liability "unless the tipper's goal in disclosing inside information [wa]s to obtain money, property, or something of tangible value." *Id.* at 426 (quoting *Dirks*, 463 U.S. at 664). The Supreme Court rejected

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[2] For convenience, we sometimes refer to this as the "gift theory" of personal benefit.

the defendant's argument and "adhere[d] to *Dirks*," *id.* at 427, observing that "[t]o the extent the Second Circuit held that the tipper must also receive something of a 'pecuniary or similarly valuable nature' in exchange for a gift to family or friends, . . . this requirement is inconsistent with *Dirks*," *id.* at 428 (quoting *Newman*, 773 F.3d at 452); *see also id.* ("Here, by disclosing confidential information as a gift to his brother with the expectation that he would trade on it, Maher breached his duty of trust and confidence to Citigroup and its clients . . . .").

The government now takes the position that *Salman* fully abrogated *Newman*'s interpretation of the personal benefit element, whereas Martoma argues that *Newman*'s "meaningfully close personal relationship" standard survived *Salman*. However, because there are many ways to establish a personal benefit, we conclude that we need not decide whether *Newman*'s gloss on the gift theory is inconsistent with *Salman*. At trial, the government presented compelling evidence that Dr. Gilman received a different type of personal benefit: $70,000 in consulting fees, which can be seen either as evidence of a *quid pro quo*-like relationship, or simply advance payments for the tips of inside information that Dr. Gilman went on to supply.[3] The government also introduced sufficient evidence to prove Dr. Gilman received a personal benefit by disclosing inside information with the intention to benefit Martoma. We accordingly conclude that Martoma has provided

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[3] The parties focus primarily on Dr. Gilman because it was Dr. Gilman, not Dr. Ross, who gave Martoma the final efficacy data that led Martoma to reduce SAC's position in Elan and Wyeth.

no basis for his judgment of conviction to be vacated or reversed.

DISCUSSION

As noted above, Martoma challenges both the adequacy of the district court's jury instructions and the sufficiency of the evidence presented at trial. "We review a jury charge in its entirety and not on the basis of excerpts taken out of context." *United States v. Mitchell*, 328 F.3d 77, 82 (2d Cir. 2003) (quoting *United States v. Zvi*, 168 F.3d 49, 58 (2d Cir. 1998)). "A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008). Such a challenge, however, is subject to harmless error review. *See id.* at 58, 61-62. And because Martoma raises his challenge to the jury instructions for the first time on appeal, we review only for plain error. *United States v. Vilar*, 729 F.3d 62, 70 (2d Cir. 2013). Under the plain error standard, an appellant must demonstrate that "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights . . . ; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings."[4] *United States v. Marcus*, 560

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[4] In the past, we have stated that "[w]here . . . the source of an alleged jury instruction error is a supervening decision, we employ a 'modified plain-error rule, under which the government, not the defendant, bears the burden to demonstrate that the error . . . was harmless.'" *United States v. Mahaffy*, 693 F.3d 113, 136 (2d Cir. 2012) (second alteration in original). We have "on at least twenty-two occasions," *Vilar*, 729 F.3d at 71 n.5, observed that the Supreme Court's decision in *Johnson v. United States*,

U.S. 258, 262 (2010) (internal quotation marks and alteration omitted). "[W]e look not to the law at the time of the trial court's decision to assess whether the error was plain, but rather, to the law as it exists at the time of review." *Vilar*, 729 F.3d at 71. Even with respect to an instructional error that "incorrectly omitted an element of the offense," we will not overturn a conviction "if we find that the jury would have returned the same verdict beyond a reasonable doubt," and thus that "the error did not affect [the defendant's] substantial rights." *Nouri*, 711 F.3d at 139-40 (internal quotation marks omitted).

With respect to Martoma's second argument, a defendant challenging the sufficiency of the evidence "bears a heavy burden," and "the standard of review is exceedingly deferential." *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) (internal quotation marks omitted). "In evaluating a sufficiency challenge, we 'must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence.'" *Id.* (quoting *United States v. Chavez*, 549 F.3d 119, 124 (2d Cir. 2008)). "Although sufficiency review is *de novo*, we will uphold the judgment[] of conviction if '*any* rational trier of fact could have found

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520 U.S. 461 (1997), "called into question the modified plain error standard of review," *United States v. Botti*, 711 F.3d 299, 308 (2d Cir. 2013). Here, as in the past, "[b]ecause we would reach the same conclusion under either standard, we need not resolve that question." *United States v. Nouri*, 711 F.3d 129, 138 n.2 (2d Cir. 2013).

the essential elements of the crime beyond a reasonable doubt.'" *Id.* (citation omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "A judgment of acquittal is warranted only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *Jiau*, 734 F.3d at 152 (alteration and internal quotation marks omitted).

I.

We first turn to Martoma's challenge to the district court's jury instructions, which focuses on *Dirks*' statement that the personal benefit necessary to establish insider trading liability in a tipping case can be inferred from a "gift of confidential information to a trading relative or friend." *Dirks*, 463 U.S. at 663-64; *see also Salman*, 137 S. Ct. at 428. Martoma argues that the district court's jury instructions ran afoul of this Court's decision in *Newman* by permitting the jury to conclude that a gift of confidential information given with the goal of "developing or maintaining . . . a friendship" qualifies as a personal benefit. According to Martoma, the jury should have been instructed that the tipper and tippee must share a "meaningfully close personal relationship" in order to find a personal benefit based on a gift of inside information to a friend.

A. The Personal Benefit Requirement

The Supreme Court long ago held that there is no "general duty between all participants in market transactions to forgo actions based on material, nonpublic information." *Chiarella v. United States*, 445 U.S. 222, 233 (1980). However, the "traditional" or "classical theory" of insider trading provides that a corporate insider violates § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (2017), when he "trades in the securities of his corporation on the basis of material, non-public information" because "a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation." *United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997) (alteration in original) (quoting *Chiarella*, 445 U.S. at 228). Similarly, the "misappropriation theory" of insider trading provides "that a person . . . violates § 10(b) and Rule 10b-5[] when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." *Id.* at 652. It is thus the breach of a fiduciary duty or other "duty of loyalty and confidentiality" that is a necessary predicate to insider trading liability. *See id.*[5]

The personal benefit element has its origin in *Dirks*, where the Supreme Court examined how a recipient of inside information who was not himself a corporate insider—*i.e.*, a tippee—can acquire a duty to disclose or abstain from trading. The Supreme Court held that a tippee acquires the duty to disclose or abstain only if the insider disclosed the confidential

[5] Although many of the cases refer to "insiders" and "fiduciary" duties because those cases involve the "classical theory" of insider trading, the *Dirks* articulation of tipper and tippee liability also applies under the misappropriation theory, where the misappropriator violates some duty owed to the source of the information. *See S.E.C. v. Obus*, 693 F.3d 276, 286-88 (2d Cir. 2012); *see also Newman*, 773 F.3d at 445-46.

information in breach of a fiduciary duty to the firm. *Dirks*, 463 U.S. at 660-61. "Whether disclosure is a breach of duty," the Supreme Court explained, "depends in large part on the purpose of the disclosure." *Id.* at 662. The personal benefit requirement is designed to test the propriety of the tipper's purpose. *See id.* at 661-63. This logic is sound. A firm's confidential information belongs to the firm itself, and an insider entrusted with it has a fiduciary duty to use it only for firm purposes. The insider who personally benefits—*i.e.*, whose purpose is to help himself—from disclosing confidential information therefore breaches that duty; the insider who discloses for a legitimate corporate purpose does not. Identifying personal benefits is not, however, the central focus of insider trading law, but simply how courts and juries analyze breaches of fiduciary duty.

The Supreme Court defined personal benefit broadly. As noted above, the test for a personal benefit is whether objective evidence shows that "the insider personally will benefit, directly or indirectly, from his disclosure" of confidential information to the tippee. *Id.* at 662. *Dirks* set forth numerous examples of personal benefits that prove the tipper's breach: a "pecuniary gain," a "reputational benefit that will translate into future earning," a "relationship between the insider and the recipient that suggests a *quid pro quo* from the latter," the tipper's "intention to benefit the particular recipient," and a "gift of confidential information to a trading relative or friend" where "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." *Id.* at 663-64. The tipper's personal benefit need not be pecuniary in nature. *See Salman*, 137 S. Ct. at 428.

We have applied *Dirks* to uphold a wide variety of personal benefits. We held that a jury could infer a personal benefit from the fact that a tipper "hoped to curry favor with his boss," *Obus*, 693 F.3d at 292, and from the fact that another tipper and the tippee "were friends from college," *id.* at 291. We found evidence of a personal benefit sufficient where the tippee gave one tipper "an iPhone, live lobsters, a gift card, and a jar of honey," and where the tippee had another tipper admitted into an investment club where the tipper "had the opportunity to access information that could yield future pecuniary gain" (even though he never realized that opportunity). *Jiau*, 734 F.3d at 153. In another case, we held that the government "need not show that the tipper expected or received a specific or tangible benefit in exchange for the tip," and that the personal benefit element is satisfied where there is evidence that the tipper "intend[ed] to benefit the . . . recipient." *S.E.C. v. Warde*, 151 F.3d 42, 48 (2d Cir. 1998) (internal quotation marks omitted).

As we understand the dissent, our core disagreement is over whether intent to benefit is a standalone personal benefit under *Dirks*. The dissent argues that it is not, claiming instead that the correct formulation is a "relationship . . . that suggests . . . an intention to benefit" the tippee. *See* Dissent, slip. op. at 10-12. The key sentence of *Dirks* is admittedly ambiguous, and we acknowledge that the dissent has offered a plausible reading. *See* 463 U.S. at 664 ("For example, there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient."). But that is not the only reading. The comma separating the "intention to benefit" and "relationship . . . suggesting a *quid pro quo*" phrases can be read to sever any connection between them. The sentence, so understood, effectively reads, "there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or there may be an intention to benefit the particular recipient." And that is the reading this Court adopted in *Warde*, where we read the "intention to benefit" language independently of the language of relationships: "The 'benefit' element of § 10(b) is satisfied when the tipper 'intend[s] to benefit the . . . recipient' or 'makes a gift of confidential information to a trading relative or friend.'"[6] *Warde*, 151 F.3d at 48 (quoting *Dirks*, 463 U.S. at 664). We adhere to *Warde*.

Our understanding is also more consonant with *Dirks* as a whole. Because the existence of a breach "depends in large part on the purpose of the disclosure," *Dirks*, 463 U.S. at 662, it makes perfect sense to permit the government to prove a personal benefit with objective evidence of the tipper's intent,

[6] *Warde*'s use of friendship to find the evidence of intent to benefit sufficient does not prove otherwise. *See* 151 F.3d at 49. *Warde* teaches only that such evidence is relevant and may even be sufficient in an appropriate case. It nowhere suggests that it is necessary. *Cf. S.E.C. v. Payton*, 219 F. Supp. 3d 485, 490 (S.D.N.Y. 2016) (finding evidence of tipper's intent to benefit the tippee sufficient where tipper gave tippee a Post-It note with the stock ticker symbol, told the tippee they "could make some money on" the stock, and said the stock was a "good opportunity"), *aff'd*, 2018 WL 832917 (2d Cir. Feb. 13, 2018) (summary order).

without requiring in every case some additional evidence of the tipper-tippee relationship. *Cf. United States v. Falcone*, 257 F.3d 226, 230 (2d Cir. 2001) (Sotomayor, *J.*) (explaining that "the key factor" in proving a personal benefit is "the tipper's intent in providing the information"). For example, suppose a tipper discloses inside information to a perfect stranger and says, in effect, you can make a lot of money by trading on this. Under the dissent's approach, this plain evidence that the tipper intended to benefit the tippee would be insufficient to show a breach of the tipper's fiduciary duty to the firm due to the lack of a personal relationship. *Dirks* and *Warde* do not demand such a result. Rather, the statement "you can make a lot of money by trading on this," following the disclosure of material non-public information, suggests an intention to benefit the tippee in breach of the insider's fiduciary duty.

We are not persuaded by our dissenting colleague's arguments to the contrary. The dissent contends that proof that the tipper had an intent to benefit the *tippee* does not prove that the *tipper* truly "received" a personal benefit. *See* Dissent, slip op. at 13. The dissent would evidently have there be proof of something more concrete. However, as we have explained, it is settled law that personal benefits may be indirect and intangible and need not be pecuniary at all. The tipper's intention to benefit the tippee proves a breach of fiduciary duty because it demonstrates that the tipper improperly used inside information for personal ends and thus lacked a legitimate corporate purpose. That is precisely what, under *Dirks*, the personal benefit element is designed to test. *See* 463 U.S. at 662. Is evidence that an insider intended to benefit an outsider with valuable confidential information any less probative of the absence of a legitimate corporate purpose than evidence that the tippee gave the tipper trivialities like shellfish and a gift card? *See Jiau*, 734 F.3d at 153.[7]

The dissent argues that its formulation is more faithful to the personal benefit standard because evidence of a relationship suggesting an intent to benefit the tippee "provides reason to believe that the tipper benefits by benefitting, since the tipper is understood as contributing to a relationship from which both tipper and tippee benefit," a rationale that does not apply where there has been no proof of a relationship. Dissent, slip op. at 16. We disagree. That rationale would justify a personal benefit in the form of a relationship suggesting an intention to benefit both tipper and tippee, from which it is straightforward to infer that the tipper personally benefited from the tip. But what *Dirks* in fact refers to is an intention to benefit the tippee alone. *See* 463 U.S. at 664. Whichever way *Dirks* is read, it recognizes that purposely benefitting the tippee with inside information proves that the tipper has received a

[7] In any event, even assuming *arguendo* that a more concrete benefit is required, the tipper's intention to benefit the tippee would still be an appropriate personal benefit. A tipper's disclosure of valuable confidential information with the intent to benefit the tippee can satisfy the personal benefit requirement because it can allow for the inference that the tipper has not acted simply out of the goodness of his heart, but because he expects to receive some future benefit. *Cf. Obus*, 693 F.3d at 292 (finding evidence of personal benefit sufficient where tipper "hoped to curry favor with his boss").

personal benefit in breach of a fiduciary duty. The question is whether *Dirks* requires that to be proved with evidence of a relationship or not. We think it clear that the answer is no. And although few reported decisions have relied on the intent to benefit theory, its legitimacy has until today been uncontroversial. To take an example close to home, it featured in the jury instructions in this very case, *see* Tr. 3191, and no objection was raised, nor was any challenge to this language pressed on appeal.

Finally, we are warned that this approach creates a "subjective" test and allows for convictions based on sheer speculation into the tipper's motives. *See* Dissent, slip op. at 10-11, 21-22. These fears are unwarranted. Intent elements are everywhere in our law and are generally proved with circumstantial evidence. *See, e.g.*, *United States v. Heras*, 609 F.3d 101, 106 (2d Cir. 2010) ("The law has long recognized that criminal intent may be proved by circumstantial evidence alone."); *United States v. Salameh*, 152 F.3d 88, 143 (2d Cir. 1998) ("[A]s a general rule most evidence of intent is circumstantial."). Insider trading is no different. A factfinder may infer the tipper intended to benefit the tippee from the sort of objective evidence that is commonly offered in insider trading cases. To return to the example above, the statement "you can make a lot of money by trading on this" is strong circumstantial evidence of the tipper's intention to benefit the tippee. And the requirement of proof beyond a reasonable doubt remains a formidable barrier to convictions resting on speculation. *See United States v. Torres*, 604 F.3d 58, 66 (2d Cir. 2010).

We are thus satisfied that the personal benefit element can be met by evidence that the tipper's disclosure of inside information was intended to benefit the tippee. And as is clear from the purpose of the personal benefit element, the "broad definition of personal benefit set forth in *Dirks*," and the variety of benefits we have upheld, the evidentiary "bar is not a high one." *Obus*, 693 F.3d at 292.

B. This Court's Decision in *Newman*

It is against that background that we must assess how *Newman* affected this Court's insider trading law. The central question in *Newman* was an issue of scienter on which our district courts had been split: whether a tippee must be aware, not only that the tipper breached a fiduciary duty in disclosing inside information, but also that the tipper received a personal benefit. *Newman*, 773 F.3d at 447-51. The Court persuasively explained that both were required. *Id.* at 449 ("[A] tippee's knowledge of the insider's breach necessarily requires knowledge that the insider disclosed confidential information in exchange for personal benefit."). This important teaching of *Newman* is not before us. We observe that, unlike the defendants in *Newman*, Martoma received confidential information directly from the tipper, and he does not claim that he was unaware of any personal benefit Dr. Gilman received. *Cf. id.* at 448 ("In *Jiau*, the defendant knew about the benefit because she provided it.").

Newman's second holding is the focus of this appeal. After resolving the scienter question, *Newman* considered the sufficiency of the personal benefit evidence for two tippers, where the government relied chiefly on evidence that they were friendly with their tippees. The first tipper and tippee were not "close" friends but "had known each other for years, having both attended business school and worked at Dell together," and the tippee had provided modest "career advice and assistance" to the tipper. *Id.* at 452. The second tipper and tippee were "family friends" that "had met through church and occasionally socialized together." *Id.* The government argued that these relationships were "sufficient to prove that the tippers derived some benefit from the tip." *Id.*

The *Newman* panel rejected the government's argument, holding that the personal benefit "standard, although permissive, does not suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature." *Id.* As the *Newman* Court reasoned, if that were enough, then "practically anything would qualify," and "the personal benefit requirement would be a nullity." *Id.* And in the sentence that forms the basis of Martoma's argument on appeal, *Newman* stated as follows:

> To the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades 'resemble trading by the insider himself followed by a gift of the profits to the recipient,' we hold that such an inference is impermissible in the absence of proof of a meaningfully close personal relationship . . . .

Id. at 452 (citation omitted) (quoting *Dirks*, 463 U.S. at 664). On the facts before it, the *Newman* Court found that standard had not been satisfied. *Id.* at 452-53.

Martoma focuses on this single sentence of *Newman* to argue that a jury may not infer that a tipper received a personal benefit from gifting confidential information in the absence of a "meaningfully close personal relationship." The term "meaningfully close personal relationship" is new to our insider trading jurisprudence, and, viewed in isolation, it might admit multiple interpretations. But *Newman* provided substantial guidance. Immediately after introducing the "meaningfully close personal relationship" concept, *Newman* held that it "requires evidence of 'a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the [latter].'" *Newman*, 773 F.3d at 452 (quoting *Jiau*, 734 F.3d at 153 (quoting *Dirks*, 463 U.S. at 664)). As explained above, each of these is an independently sufficient basis to infer a personal benefit under *Dirks* and its progeny. *See, e.g.*, *Jiau*, 734 F.3d at 153 (*quid pro quo*-like relationship). In other words, *Newman* cabined the gift theory using two *other* freestanding personal benefits that have long been recognized by our case law.[8] And although

[8] Our cases applying *Dirks* demonstrate that the government can prove a personal benefit in several ways that do not require proof of any sort of personal relationship. Consider the underling who disclosed inside information to "curry favor with his boss," *see Obus*, 693 F.3d at 292, or the tipper's admission into an investment club that yielded the possibility of future benefits that were never realized, *see Jiau*, 734 F.3d at 153, or the tipper's receipt of a cell phone, gift card, and various foodstuffs from the tippee, *see id.* In none of these situations was the government required to show any degree of personal closeness between tipper

the dissent urges in strong terms that this reading is mistaken or even improper, its dispute is in truth with the plain language of *Dirks*, as construed by *Warde*. We do no more than read literally *Newman*'s own explanation of its novel standard in light of these decisions, thereby fulfilling our legitimate function to construe and give effect to prior panel decisions.

With that understanding of *Newman*, we conclude that the personal benefit jury instructions in Martoma's trial, issued prior to that decision, were erroneous. The instructions allowed the jury to find a personal benefit based solely on the conclusion that Dr. Gilman tipped Martoma in order to "develop[] or maintain[] . . . a friendship." Under *Newman*, this articulation of the gift theory is incomplete. A properly instructed jury would have been informed that it could find a personal benefit based on a "gift of confidential information to a trading relative or friend" only if it also found that Dr. Gilman and Martoma shared a relationship suggesting a *quid pro quo* or that Dr. Gilman intended to benefit Martoma with the inside information. But, of course, there was no error in the district court's instructions that the jury could also find a personal benefit based on either of those two factors alone, *i.e.*, if it concluded that Dr. Gilman disclosed confidential information "with the intention of conferring a benefit on Mr. Martoma," or "with the intention of benefiting [himself] in some manner." *See* Tr. 3191. Each of these personal benefits is unaffected by *Newman*'s interpretation of the gift theory, and

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and tippee. *Newman*, with its focus on the gift theory, does not require a different result in these cases.

neither requires proof that Dr. Gilman and Martoma share any type of "personal relationship."

Although the jury instructions were inaccurate, we conclude that the error did not affect Martoma's substantial rights. *See Nouri*, 711 F.3d at 139-40. The government produced compelling evidence that Dr. Gilman, the tipper, "entered into a relationship of *quid pro quo*" with Martoma. *See Jiau*, 734 F.3d at 153. Dr. Gilman, over the course of approximately 18 months and 43 paid consultation sessions for which he billed $1,000 an hour, regularly and intentionally provided Martoma with confidential information from the bapineuzumab clinical trial. Martoma kept coming back, specifically scheduling consultation sessions so that they would occur shortly after the safety monitoring committee meetings, when Dr. Gilman would have new information to pass along. Starting at least in August 2007, Dr. Gilman would reschedule his conversations with Martoma if he had no new information to reveal at the time they were scheduled to meet. By that point, the consulting relationship between Dr. Gilman and Martoma involved no legitimate service, *see* Dissent, slip op. at 21; as Dr. Gilman testified at trial, "the purpose of those consultations was for [him] to disclose to [Martoma] confidential information about the results . . . of the last Safety Monitoring Committee [meeting]." Tr. 1274. And because Martoma continued to see Dr. Gilman to receive confidential information, Dr. Gilman continued to receive consulting fees. The fact that Dr. Gilman did not specifically bill for his July 17 and 19, 2008 conversations with Martoma in which Dr. Gilman divulged the final drug efficacy data is also of no moment because, as he admitted at trial, doing so "would [have been] tantamount to confessing that [he] was . . . giving [Martoma] inside information." Tr. 1918. In the context of their ongoing "relationship of *quid pro quo*," Dr. Gilman's disclosures of confidential information were designed to "make good on the substantial pecuniary benefit he had already earned," *Dirks*, 463 U.S. at 663, and as a result, "it is clear beyond a reasonable doubt that a rational jury would have found [Martoma] guilty absent [any] error." *Mahaffy*, 693 F.3d at 136 (internal quotation marks omitted).

The dissent argues that under our analysis, a fact-finder must always find that tipper and tippee had a *quid pro quo*-like relationship whenever a tip is exchanged within a paid consulting relationship. Dissent, slip. op. at 21. Not so. We merely hold that on the compelling facts of this case, it is clear beyond a reasonable doubt that a properly instructed jury would have found Martoma guilty. Nor does our decision mean that a tipper who accidentally or unknowingly reveals inside information can be found guilty. *See id.* at 16. Such a tipper would be protected by the requirement that the tipper know (or is reckless in not knowing) that the information is material and non-public, *see Obus*, 693 F.3d at 286, or by the requirement that the tipper expect the tippee to trade, *see United States v. Gansman*, 657 F.3d 85, 92 (2d Cir. 2011).

II.

We next turn to Martoma's challenge to the sufficiency of the personal benefit evidence and whether, "evaluating . . . the evidence in the light most favorable to the government," a rational jury could have found Martoma guilty of insider trading. *See Coplan*, 703 F.3d at 62. As an initial matter, it follows from our conclusion that the faulty jury instructions were harmless because of the compelling evidence that Dr. Gilman and Martoma shared a relationship suggesting a *quid pro quo* that this evidence was also sufficient to support his conviction. In particular, the jury was free to place no weight on the fact that Dr. Gilman did not bill Martoma for the July 17 and 19, 2008 sessions. We reiterate, however, that while the government presented compelling evidence on this point, the evidentiary bar is "modest." *Jiau*, 734 F.3d at 153.

Moreover, even if a jury were inclined to accept Martoma's argument that there was no *quid pro quo*-like relationship because Dr. Gilman did not bill Martoma for two key sessions, a rational jury could nonetheless find that Dr. Gilman personally benefited by disclosing inside information with the "intention to benefit" Martoma. *See Dirks*, 463 U.S. at 664. We think a jury can often infer that a corporate insider receives a personal benefit (*i.e.*, breaches his fiduciary duty) from deliberately disclosing valuable, confidential information without a corporate purpose and with the expectation that the tippee will trade on it. *See id.* at 659 (explaining that "insiders [are] forbidden by their fiduciary relationship" from giving inside information "to an outsider for the . . . improper purpose of exploiting the information for their personal gain"); *cf. Salman*, 137 S. Ct. at 428 (recognizing that where a tipper discloses information with the "expectation that [the recipient will] trade on it," the information is "the equivalent of . . . cash"). Here, as previously noted, Dr. Gilman knew that

Martoma was an investment manager who was seeking information on which to base securities trading decisions. And Dr. Gilman plainly understood the valuable nature of the information about the bapineuzumab clinical trial, as Martoma had previously paid him $1,000 per hour over the course of 43 consultations to convey his knowledge on the subject, and had visited Dr. Gilman in his Ann Arbor office to receive the key drug efficacy results firsthand. From these facts, a reasonable jury could infer that Dr. Gilman personally benefited by conveying inside information about the trial with the purpose of benefiting Martoma, even if it was not persuaded that the two had a relationship suggesting a *quid pro quo* (or a personal relationship, for that matter).[9] *See Dirks*, 463 U.S. at 667.

For the foregoing reasons, we hold that "a rational trier of fact could have found the essential elements of the crime [of insider trading] beyond a reasonable doubt." *Coplan*, 703 F.3d at 62 (quoting *Jackson*, 443 U.S. at 319).[10]

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[9] As this discussion demonstrates, the dissent's concern that intent to benefit can be shown only with subjective evidence or speculation is unfounded. *See supra* at 26-27. We conclude that the evidence was sufficient to infer that Dr. Gilman intended to benefit Martoma based, not on "subjective" evidence or speculation, but on the circumstantial evidence surrounding the tip.

[10] We further find that even if the district court erroneously excluded the testimony of Steven Cohen under Federal Rule of Evidence 804(b)(1), such error was harmless because much of the testimony was inculpatory. *See United States v. Dukagjini*, 326 F.3d 45, 61 (2d Cir. 2003) ("In order to uphold a verdict in the face of an evidentiary error, it must be 'highly probable' that the error

CONCLUSION

We have considered Martoma's remaining arguments and find them without merit. Accordingly, we AFFIRM the judgment of the district court.

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did not affect the verdict." (quoting *United States v. Forrester*, 60 F.3d 52, 64 (2d Cir. 1995)). Cohen's testimony before the SEC described Martoma as having played a substantial role in his decision both to accumulate large positions in Elan and Wyeth, and then to sell them off. J.A. 91-92, 96-97. This was consistent with other trial evidence that Martoma received credit for SAC's trades in those companies. Tr. 497-99. It is therefore highly improbable that Cohen's vague statements that Martoma told him that he was "getting uncomfortable with the Elan position," J.A. 95, and that he heard that Martoma's reasons for being uncomfortable were "normal" and "typical," J.A. 97, would have affected the jury's verdict.

POOLER, *Circuit Judge*:

I respectfully dissent. Last year, my colleagues filed an opinion in this matter in which they abrogated our prior decision in *United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014). They declared that a non-insider could be convicted of insider trading on a gift theory even if she did not have a meaningfully close personal relationship with the insider from whom she received the confidential information. *See United States v. Martoma*, 869 F.3d 58, 69 (2d Cir. 2017). Applying this reasoning to the case at hand, they held that the jury instructions permissibly allowed for conviction based on speculation about Dr. Gilman's desire to be friends with Martoma. I dissented from that opinion because it improperly abrogated a prior panel decision without en banc review or an intervening Supreme Court precedent, undermined the personal benefit rule central to holding corporate outsiders liable for insider trading, and approved of a conviction based on erroneous jury instructions that affected Martoma's substantial rights.

My colleagues now issue a modified opinion. In it, they purport to agree that our precedent prevents a jury from being charged with inferring that a tip was given as a gift unless it finds that there was a meaningfully close personal relationship between the tipper and the tippee. They no longer declaim *Newman*. They even agree that the jury instructions were in error.

But these apparent concessions are semantic rather than substantial. My colleagues also attempt to redefine "meaningfully close personal relationship" in subjective rather than objective terms, rendering

Newman a relic. To provide support for this move, they improperly construe binding authority. They then hold that the erroneous jury instructions were harmless since the jury could have convicted based on a different theory.

The majority's attempt to undercut the meaningfully close personal relationship requirement is in derogation of circuit precedent and unnecessary to arrive at their disposition. Only by abrogating *Newman* could my colleagues announce a new rule that a jury can infer a personal benefit based on a freestanding "intention to benefit" and that this "intention to benefit" is at the core of the meaningfully close personal relationship standard. Slip op. at 22-28, 30-31. Today's opinion must be interpreted consistently with the rule that, as a three-judge panel, we are unable to abrogate prior circuit decisions. *See In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010) ("This panel is bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.") (internal quotation marks omitted). *Newman* and a consistent line of cases preceding it make clear that a meaningfully close personal relationship cannot be proven without objective evidence about the nature of the tipper-tippee relationship. Bare speculation into insiders' motives has always been insufficient; it remains so today in spite of the majority's dicta.

Therefore, I continue to respectfully dissent.

I. Gifts and the Law of Insider Trading

Dirks, the foundational case on holding a non-insider liable for insider trading, established that a jury's "initial inquiry" must be whether a corporate insider passed on information to the non-insider "for personal advantage" rather than for the advantage of shareholders. *Dirks v. S.E.C.*, 463 U.S. 646, 662-63 (1983). Making the inquiry into "whether the insider receives a direct or indirect personal benefit" by disclosing confidential information "requires courts to focus on objective criteria." *Id.* at 663. The question for a finder of fact is not whether the insider wished ill on shareholders or wished good on the tippee, but whether she received something in return for her tip.

As the Supreme Court explained,[1] making objective evidence of a personal benefit a prerequisite to holding a non-insider tippee liable serves several purposes. It creates "a guiding principle for those whose daily activities must be limited and instructed by the SEC's inside-trading rules" so that participants in securities markets are not left to the whims of prosecutorial enforcement priorities. *Dirks*, 463 U.S. at 664. It protects "persons outside the company such as an analyst or reporter who learns of inside information" from the threat of prosecution for uncovering information about securities issuers just because they also traded on it. *Id.* at 664 n.24 (italics omitted). It limits the government's ability to hold non-insiders liable when insiders "mistakenly think . . . information already has been disclosed or that it is not material enough to affect the market." *Id.* at 662.

Restricting proof of a personal benefit to objective evidence avoids turning the rule into a mere formality.

[1] And as I explained in my previous dissent. *See Martoma*, 869 F.3d at 75-78 (Pooler, J., dissenting).

Absent objective evidence, a slip of the tongue might be presented to a jury as a purposeful tip with a good cover story, an off-the-record comment to a trusted reporter might be portrayed as a means of bribing a journalist for favorable coverage. The difference between guilty and innocent conduct would be a matter of speculation into what a tippee knew or should have known about the tipper's intent. A trader, journalist, or analyst attempting to avoid running afoul of criminal law would have little to guide her behavior. The conservative thing to do would be to avoid seeking inside information too aggressively, even if the whole market could benefit from such investigation. Those who decided to cultivate insider sources would risk prosecution in any case, so they might have fewer scruples about compensating their sources and trading on the information they purchased.

What does objective evidence of a personal benefit consist of? In the easiest case, a tippee has paid the insider for the coveted tidbit. If the government can adduce evidence indicating that money changed hands, it has established all of the objective facts needed to infer that an insider personally benefitted by tipping. In the presence of an obvious quid pro quo, no further facts about the nature of the tipper-tippee relationship will be needed. The insider has effectively made the "secret profits" that securities law has prohibited since its inception, but by selling information to a trader rather than trading on it herself. *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 916 n.31 (1961); *see also United States v. O'Hagan*, 521 U.S. 642, 653 (1997) (characterizing misappropriation as an insider "secretly converting the [corporation's] information for personal gain").

The majority rightly points out that "[t]he tipper's personal benefit need not be pecuniary in nature." Slip op. at 21; *see also id.* at 25. But that does not obviate the requirement that it be provable via "objective evidence." In-kind compensation in goods or services given to the tipper may also constitute a personal benefit, and can be established in court in much the same way monetary compensation can, i.e. with objective evidence pointing to the goods or services received. *See*, *e.g.*, *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) (discussing "an iPhone, live lobsters, a gift card, and a jar of honey"). The government can also prove a benefit on the theory that the tipper received potentially profitable social connections, such as admission into an investment club, so long as the prosecution's case relies on evidence of these connections and their potential value to the tipper. *Id.*

When the alleged benefit to the tipper is less concrete, objective evidence about the *nature of the relationship* between tipper and tippee takes on more importance in identifying the benefit. For instance, unlike with money, goods, services, and connections, one cannot directly trace a "reputational benefit that will translate into future earnings." *Dirks*, 463 U.S. at 663. Instead, one must draw upon circumstantial evidence about the power of a tippee to materially benefit someone in the tipper's position and the inclination of a tippee to view the tipper in a better light based on the tipper's provision of inside information. Evidence about the tipper-tippee relationship will make these conclusions easier, as illustrated by the facts of *S.E.C. v. Obus*, 693 F.3d 276 (2d Cir. 2012). In that case, we concluded that it was sufficient that the tipper, an employee of a hedge fund that "was a large holder" of the stock in question, "hoped to curry favor with his boss," the tippee, who was the principal of that hedge fund. *Id.* at 280, 292. Bosses, of course, have substantial say over subordinates' future earnings, and the boss of a hedge fund trading in a particular stock is likely to value employees that can get him information about that stock.

More directly on point, if the government fails to put forward evidence of any particular quo that was provided in exchange for the quid of inside information, it can still establish objective facts that point to a "relationship between the insider and the [tippee] that *suggests* a *quid pro quo*." *Dirks*, 463 U.S. at 664 (emphasis added). That is, an apparently gratuitous tip can reasonably be understood as recompense for past benefits or as a means of keeping a good thing going so long as there is objective evidence of a history of mutually enriching exchanges or favors between tipper and tippee.

The personal benefit rule is also satisfied by other "relationships between the insider and the recipient" that "suggest an intention to benefit the particular recipient" even when the insider receives no immediately discernible compensation. *Id.* In particular, as relevant here, an apparently uncompensated tip can be said to "resemble trading by the insider himself followed by a gift of the profits to the recipient" when it is given to a "trading relative or friend." *Id.*; *see also Salman v. United States*, 137 S. Ct. 420, 427-28 (2016). Friends and relatives tend to internalize each other's interests, *see* Transcript of Oral Argument at 8, *Salman v. United States*, 137 S. Ct. 420 (2016) (No. 15-628) ("[T]o help a close family member [or friend] is like helping yourself."), to give each other things of value to demonstrate care, or to commit acts of generosity with the assumption that the other would do the same in a rough sort of quid-pro-quo.[2] For any of these reasons, a tipper can be said to benefit himself by giving something valuable to somebody with who he shares a "meaningfully close personal relationship."[3] *Newman*, 773 F.3d at 452.

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[2] Following *Newman*'s suggestion, the majority holds that a jury could conclude that tipper and tippee shared a meaningfully close relationship so long as they shared a relationship suggesting quid pro quo. Slip op. at 30-31 (citing *Newman*, 773 F.3d at 452). But, as the majority rightly points out, *Dirks* and subsequent cases established that a relationship suggesting quid pro quo itself can itself give rise to the inference of a personal benefit to the tipper, without any need to determine whether it gives rise to the intermediate inference of a meaningfully close personal relationship. Slip op. at 30. It would make for a less confusing bit of doctrine to cleanly separate quid-pro-quo and meaningfully close personal relationships, and I do not think *Newman* requires conflating them. But the majority's interpretation is consistent with *Newman*, and, in any case, a jury can infer personal benefit from the former whether or not it gives rise to an inference of the latter.

[3] *Salman* made clear that the tipper need not also "receive something of pecuniary or similarly valuable nature in exchange for a gift to family or friends." 137 S. Ct. at 428 (internal quotation marks omitted). While my colleagues earlier opinion read *Salman* to have eliminated the meaningfully close personal relationship standard entirely, *Martoma*, 869 F.3d at 68-71, they now agree that that aspect of *Newman* remains good law.

Without objective evidence of such a relationship, however, the inference that a gratuitous tip functioned as a gift will not be available. *Newman* made clear that the "gift theory" is not applicable to casual acquaintances or mere members of the same club, church, or alumni association—or, it should go without saying, to perfect strangers—at least not without additional evidence indicating meaningful closeness. 773 F.3d at 452-55. Other boundaries of the concept of meaningful closeness remain to be developed. *See Salman*, 137 S. Ct. at 429 ("…there is no need for us to address those difficult cases today…").

II. The Majority's Error

Last year the majority attempted to rewrite this doctrine explicitly. Today they attempt to do so more subtly. In their now withdrawn opinion, they held that a gratuitous tip could be understood as beneficial to the tipper so long as a jury concludes that a tipper expects the tippee will trade on it. *Martoma*, 869 F.3d at 70-71. Now they hold that an uncompensated tip can be found to personally benefit the tipper so long as the jury concludes that the tipper intended to benefit the tippee. Slip op. at 22-28. All that "meaningfully close personal relationship" means, they inform us, is a tipper-tippee pairing in which the tipper has such an intention.[4] *Id.* at 30-31.

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[4] As discussed supra in note 2, the majority, following *Newman*'s suggestion, holds that a relationship suggesting a quid pro quo is also a meaningfully close personal relationship. I do not find this part of their analysis objectionable (except in the sense discussed in note 2).

This interpretation would eliminate the rule that has been with us since *Dirks* that the government must prove objective facts indicating that the tipper benefitted from her relationship with the tippee. On the majority's proposal, the prosecution could pile up insinuations about the tipper's subjective understanding of the purpose of the tip, and the jury would be charged with resting their inferences about her benefit on those wobbly foundations. The only objective facts the government would have to prove would be the communication of material non-public information. All of the protections of the personal benefit rule—a clear guide for conduct, preventing liability for slip ups and other innocent disclosures—would erode.

It is good news, then, that binding precedent stands for the opposite principle. The only time *Dirks* refers to an "intention to benefit" is when it discusses the need to prove "a *relationship* between the insider and the recipient *that suggests*…an intention to benefit the particular recipient." 463 U.S. at 664 (emphasis added). Reading "intention to benefit" out of context, my colleagues assert that, under *Dirks*, an intention can be inferred without any objective evidence about relationships. Slip op. at 21. But *Dirks* does not say that, and it has never been applied to allow such a freestanding inference of intent in this Circuit or elsewhere. *Salman*, 137 S. Ct. at 427 (applying gift theory to sibling relationship) *Jiau*, 734 F.3d at 153 (discussing gift theory as relationship-based before finding quid pro quo); *Obus*, 693 F.3d at 285 (discussing "trading relative or friend" standard); *United States v. Bray*, 853 F.3d 18, 26-27 (1st Cir. 2017) ("good friends"); *United States v. Parigian*, 824

F.3d 5, 16 (1st Cir. 2016) (friendship and quid pro quo); *S.E.C. v. Rocklage*, 470 F.3d 1, 7 n.4 (1st Cir. 2006) (siblings); *S.E.C. v. Sargent*, 229 F.3d 68, 77 (1st Cir. 2000) ("reconciliation" between friends and reputational benefit); *S.E.C. v. Maio*, 51 F.3d 623, 632-33 (7th Cir. 1995) (exchange of favors within a friendship); *S.E.C. v. Yun*, 327 F.3d 1263, 1280 (11th Cir. 2003) ("a friend and frequent partner in real estate deals").

S.E.C. v. Warde, 151 F.3d 42 (2d Cir. 1998), cited in the majority opinion, is not to the contrary. Slip op. at 22-23. In that case, "[t]he evidence showed that Warde[, the tippee,] was a *good friend* of Edward Downe," the tipper. *Warde*, 151 F.3d at 45 (emphasis added). We found that the "*close friendship* between Downe and Warde *suggests* that Downe's tip was 'inten[ded] to benefit' Warde…" *Id.* at 49 (emphasis added, brackets in original). Thus, we did not find that a freestanding "intention to benefit" would have been sufficient to prove Downe's personal benefit. Instead, we followed the principle that an intention to benefit can only be inferred from objective facts about the nature of the relationship between tipper and tippee. Again, the majority extracts the phrase "intention to benefit" from its context, suggesting that the relationship between tipper and tippee did not matter when it was the central focus of our inquiry.

The majority offers an alternative interpretation in which the sentence at issue in *Dirks* "effectively reads, 'there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or there may be an intention to benefit the particular recipient.'" Slip op. at 23. Perhaps one could read the sentence in that way in isolation, but doing so would certainly not be "more consonant with *Dirks* as a whole" or with the subsequent case law relying on *Dirks*. *Id.* The *Dirks* court included that sentence to provide examples of "objective facts and circumstances that often justify…an inference" that "the insider receive[d] a direct or indirect personal benefit from the disclosure." *Dirks*, 463 U.S. at 663-64. It is difficult to understand why the Court would have mentioned an intention to benefit, which is a subjective fact, as an example of a personal benefit, which is an objective fact. Nearly as difficult to understand is why the *Dirks* court would have provided an intention to benefit a *tippee* as an example of a benefit to the *tipper*. Intending to benefit somebody is not in itself a benefit. That is, not unless one has reason to believe that the person with the intention to benefit benefits from the beneficiary's benefit or one adopts the trivializing view of human psychology wherein everything any individual does is to benefit herself.

Perhaps the majority's theory is that an intention to benefit a tippee is circumstantial evidence that a tipper is receiving some *other* benefit by providing the information. On this theory, so long as objective evidence would allow a jury to infer that a tipper intended to benefit the tippee, the jury should be allowed to infer from that inference that the tipper somehow benefitted by benefitting the tippee without actually having to determine what that benefit might be. This theory fails to deal with the fact that an intention to benefit is not itself an "objective fact or circumstance," as *Dirks* requires, but rather an *inference drawn from* objective facts or circumstances.

Additionally, this theory makes it difficult to understand why the *Dirks* court would have adopted the personal benefit test in the first place. If a jury can conclude that a tipper breached his duty so long as it concludes that she intended to benefit the tippee, why should it have to go through the tortuous process of concluding that the tipper received a personal benefit based on its conclusion that the tipper intended to benefit the tippee? Why should we care about the tipper's benefit at all?

At times the majority seems to suggest that *Dirks* does not really require proof of a personal benefit. Rather, the personal benefit test is mentioned merely as a guide to prosecutors regarding the sort of evidence that will help them establish the tipper's intention to benefit the tippee. Thus, when *Dirks* says that "a breach of duty…depends in large part on the purpose of the disclosure," it is announcing the *real* test for a breach of the duty to shareholders. *Id.* at 662. "Identifying personal benefits is…simply how courts and juries analyze breaches of" this duty. Slip op. at 20. When the government can adduce other evidence that a tipper "lacked a legitimate corporate purpose," Slip op. at 25, then "it makes perfect sense to permit the government to prove a personal benefit with [only] objective evidence of the tipper's intent." Slip op. at 23-24.

But *Dirks* is entirely unambiguous that "the test [for whether duty has been breached] is whether the insider personally will benefit, directly or indirectly, from his disclosure." 463 U.S. at 662. Whatever the insider's purpose in disclosing the information, "[a]bsent some personal gain [to the insider], there has been no breach of duty to stockholders." *Id.* Nowhere does *Dirks* suggest that the need to prove personal benefit can be ignored simply because a tipper's intent or purpose can be independently demonstrated.[5] And *Dirks* expressly declaims the idea that "personal benefit" is merely a synonym for a tipper "not act[ing] simply out of the goodness of his heart." Slip op. at 25 n.7; *Dirks*, 463 U.S. at 663 (stating that proof of personal benefit should not be focused on mind reading). The personal benefit test may well be a way to *get at* a tipper's purpose, but it is the former and not the latter that the prosecution must prove.

None of these puzzles is presented if one reads the relevant sentence in *Dirks* the way I have suggested. It is easy to understand why the *Dirks* court would have mentioned a *relationship suggesting* an intention to benefit, an objective circumstance, when it was providing examples of objective facts and circumstances. Unlike a standalone intention to benefit, a relationship suggesting an intention to benefit provides reason to believe that the tipper benefits by benefitting, since the tipper is understood

[5] I do not deny that "[i]ntent elements are everywhere in our law and are generally proved with circumstantial evidence." Slip op. at 27. I deny that one can replace proof of personal benefit to the tipper with proof of the tipper's intention to benefit the tippee. As I discussed in my previous dissent, insider trading law separately requires that the insider expect the tippee will trade on the information, and this expectation can be proven with circumstantial evidence. *See Martoma*, 869 F.3d at 82 (Pooler, J., dissenting) (citing *Obus*, 693 F.3d at 286-87; *United States v. Gansman*, 657 F.3d 85, 92 (2d Cir. 2011)). The majority's approach comes close to conflating this element of insider trading liability and the separate personal benefit test.

as contributing to a relationship from which both tipper and tippee benefit. *See supra* at 8. And the focus on relationships rather than bare intentions fits neatly with *Dirks*'s cabining of the gift theory to disclosures to "trading relative[s] or friend[s]." 463 U.S. at 664.

This cannot be so, my colleagues protest. They ask us to imagine a situation where a tipper "discloses inside information to a perfect stranger and says, in effect, you can make a lot of money by trading on this." Slip op. at 27. Wouldn't it be absurd if this perfect stranger could not be held liable for insider trading if he went ahead and traded on this information? No, it would not be. At least, not if one takes the personal benefit rule seriously. Ex hypothesi, the fictional tipper in their scenario receives absolutely nothing in return for his disclosure, except, I suppose, the warmth that comes with knowing that somebody else might have made some money because of his actions (or perhaps the schadenfreude that comes with knowing that shareholders were defrauded). But if those sorts of "benefits" were enough, then every disclosure of inside information without affirmative indication of a pure heart would be presumptively beneficial to the tipper. *Dirks* rejected that possibility, and every appellate court to have considered the issue, including us, has consistently done the same. That is the law whether we like or not, but, for what it's worth, I see no reason to worry that truly random acts of enrichment can go unpunished.

Even assuming arguendo that there was any ambiguity on the topic in our precedents, *Newman* removed it by requiring a "meaningfully close personal relationship" in order to prove personal benefit via the gift theory. 773 F.3d at 452. In the majority's withdrawn opinion, they candidly acknowledged that they were abrogating *Newman*, relying on a justification for doing so that they no longer advance. *Martoma*, 869 F.3d at 68-70. Today they do not even attempt to argue they can do so. Instead, they call into question settled law in non-binding dicta. *Newman* remains good law.

III. The Jury Instructions

Turning to the case at hand, I agree with my colleagues' updated view that the jury was erroneously instructed. However, in light of the foregoing, I disagree with their formulation of the proper instruction. A properly instructed jury would have instead been asked whether Dr. Gilman and Martoma shared a relationship suggesting a quid pro quo or were close enough friends that it would be reasonable to understand Dr. Gilman's provision of information to Martoma as a gift. The jury could not conclude that their relationship was meaningfully close based on the mere possibility of a future friendship. Nor could it make a relationship-independent inference about Dr. Gilman's intentions, contrary to the majority's dicta. That is because *Newman*'s interpretation of the gift theory *does* "require[] proof that Dr. Gilman and Martoma share[d] any type of personal relationship." Slip op. at 32 (internal quotation marks omitted).

Moreover, I disagree that the error in the jury instructions was harmless. The majority rightly states that we can only find harmlessness in this context if "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Mahaffy*, 693 F.3d 113, 136 (2d Cir. 2012) (internal quotation marks omitted).[6] This record provides plenty of reasons to doubt that Dr. Gilman and Martoma shared a meaningfully close personal relationship. The government itself repeatedly denied that Dr. Gilman and Martoma had anything other than a "commercial, pecuniary relationship." Recording of Oral Argument at 34:18-34:27, 26:27-26:58, *United States v. Martoma*, No. 14-3599 (2d Cir. Oct. 28, 2015). Dr. Gilman testified that he shared almost nothing about his personal life with Martoma and that Martoma acted friendlier than Dr. Gilman thought appropriate for a professional relationship. Tr. at 1238, 1236. As the government itself pointed out to the district court, there is no evidence that Martoma and Dr. Gilman ever interacted outside of their consulting sessions.

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[6] As I discussed in my previous dissent, I would hold that the modified plain error rule applies here. *Martoma*, 869 F.3d at 87-88 (Pooler, J., dissenting). We have long held that where "the source of an alleged jury instruction is a supervening decision, we employ a modified plain error rule, under which the government, not the defendant, bears the burden to demonstrate that the error was harmless." *Mahaffy*, 693 F.3d at 136 (internal quotation marks omitted). The majority points out that multiple panels in this Circuit have called into question the continued applicability of the modified plain error rule after *Johnson v. United States*, 520 U.S. 461 (1997), without deciding the matter either way. Slip op. at 16 n.4. But *Johnson* did not provide any reason to abandon the well-established modified plain error rule. *Johnson* only "cautioned against any unwarranted expansion of Rule 52(b)," which provides for plain error review in criminal matters in which an issue has not been raised below. 520 U.S. at 466. The modified plain error rule does not expand Rule 52(b). It merely allocates the burden of proof, a matter on which Rule 52 is silent.

Recording of Oral Argument at 34:18-34:27, *United States v. Martoma*, No. 14-3599 (2d Cir. Oct. 28, 2015).

A reasonable jury could also have doubted whether the relationship between Dr. Gilman and Martoma suggested a quid pro quo. Dr. Gilman took no payment for the consulting sessions in which he provided the inside information at issue here, and there is no evidence in the record that his compensation before or after that session was higher than usual. He was in high demand as an expert and a researcher, so there is reason to doubt that he would have risked prosecution just to keep up his consulting relationship with SAC and Martoma. *See* Tr. at 1552-60. A reasonable jury *could have* found a relationship suggesting a quid pro quo, but it was not *required* to. Ruling otherwise would lead to the holding that whenever inside information is revealed within a paid consulting relationship where other, legitimate services are rendered, a fact-finder must infer that the insider was paid to breach his duties. That rule would allow convictions for erroneously revealed information or for information revealed based on a misunderstanding about its materiality or its confidentiality.

IV. Sufficiency of the Evidence

Because the jury instructions amount to reversible error, I would not reach the sufficiency of the evidence question. But even were the majority correct that there was sufficient evidence here, it is incorrect and ill-advised to go on to speculate that the jury could have inferred an intention to benefit merely because "a corporate insider…deliberately disclos[ed] valuable, confidential information without a corporate purpose and with the expectation that the tippee will trade on it." Slip op. at 36.

In addition to undermining *Newman* in the manner already discussed, this musing flirts with the possibility that the personal benefit test that goes back to *Dirks* may no longer be good law. The very reason the government must establish a personal benefit is to allow for the possible conclusion that the insider provided information without a "corporate purpose." *Dirks*, 463 U.S. at 654, 655 n.14. If the government can put forward evidence that an insider did not have a corporate purpose in order to establish that the insider personally benefitted from providing the information, it can convict based on circular reasoning. "Personal benefit" would then no longer have any independent meaning. The government would need only convince the jury to "read [the tipper's] mind[],"*Dirks*, 463 U.S. at 663. The tipper would need not have benefitted in any objective sense so long as the prosecution could convince a jury that she was not thinking of the corporation's interest. *Dirks* stands for the opposite proposition.[7]

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[7] The majority suggests that the abundance of objective evidence in this case demonstrates that my concern about differentiating guilty from innocent conduct based entirely on inferences about intent is "unfounded." Slip op. 35 n.8. If so, then *Dirks*'s and *Newman*'s similar concerns are also unfounded. *see Dirks*, 463 U.S. at 663; *Newman*, 773 F.3d at 452. Anyway, assuming arguendo that the evidence here was more than sufficient, that fact alone does not mean that we should endorse a rule that would allow for convictions based on speculation in cases where the evidence is thinner or more ambiguous. *See supra* at 4-5.

CONCLUSION

Setting our disagreement about the harmfulness of the district court's error to one side, my colleagues could have reached the conclusion they did by following the path our precedent provides. They need only have held that the jury instructions were erroneous because they allowed for conviction absent objective evidence of a meaningfully close personal relationship but harmless because there was objective evidence of a relationship suggesting a quid pro quo. Instead, they have taken a detour to declare that subjective evidence could have worked as well. This detour calls into question well-established principles of insider trading law that we have neither reason nor power to abrogate.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 14-3599

UNITED STATES OF AMERICA,
Appellee,
v.
MATHEW MARTOMA,
Defendant-Appellant.

Filed: Aug. 27, 2018

ORDER

Appellant, Mathew Martoma, filed a petition for rehearing *en banc*. The active members of the Court considered the request for rehearing *en banc* and no active member called for an *en banc* poll.

IT IS HEREBY ORDERED that the petition is denied.*

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

* Judges José A. Cabranes, Debra Ann Livingston and Raymond J. Lohier, Jr., did not participate in the consideration of the petition.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 14-3599

UNITED STATES OF AMERICA,
Appellee,
v.
MATHEW MARTOMA,
Defendant-Appellant.

Argued: October 28, 2015 and May 9, 2017
Decided: August 23, 2017

Before: Katzmann, Chief Judge, Pooler and Chin, Circuit Judges

OPINION

KATZMANN, *Chief Judge*:

Defendant-appellant Mathew Martoma was convicted, following a four-week jury trial, of one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 and two counts of securities fraud in violation of 15 U.S.C. §§ 78j(b) & 78ff in connection with an insider trading scheme. Martoma argues primarily that the evidence presented at trial was insufficient to support his conviction and that the district court did not properly instruct the jury in light of the Second Circuit's decision in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), issued after Martoma was convicted. This appeal is our first occasion to consider *Newman* in the aftermath of the Supreme Court's recent decision in *Salman v. United States*, 137 S. Ct. 420 (2016). We hold that the logic of *Salman* abrogated *Newman*'s "meaningfully close personal relationship" requirement and that the district court's jury instruction was not obviously erroneous. Further, any instructional error would not have affected Martoma's substantial rights because the government presented overwhelming evidence that at least one tipper received a financial benefit from providing confidential information to Martoma. As a result, we AFFIRM the judgment of the district court.

BACKGROUND

I.

Martoma's convictions stem from an insider trading scheme involving securities of two pharmaceutical companies, Elan Corporation, plc ("Elan") and Wyeth, that were jointly developing an experimental drug called bapineuzumab to treat Alzheimer's disease. Martoma worked as a portfolio manager at S.A.C. Capital Advisors, LLC ("SAC"), a hedge fund owned and managed by Steven A. Cohen. In that capacity, Martoma managed an investment portfolio with buying power of between $400 and $500 million that was focused on pharmaceutical and healthcare companies. He also recommended investments to Cohen, who managed SAC's largest portfolio. While at SAC, Martoma began to acquire shares in Elan and Wyeth in his portfolio and recommended that Cohen acquire shares in the companies as well.

In order to obtain information about bapineuzumab, Martoma contacted expert networking firms and arranged paid consultations with doctors knowledgeable about Alzheimer's disease, including two who were working on the bapineuzumab clinical trial. Dr. Sidney Gilman, chair of the safety monitoring committee for the bapineuzumab clinical trial, participated in approximately 43 consultations with Martoma at the rate of around $1,000 per hour.[1] As a member of the safety monitoring committee, Dr. Gilman had an obligation to keep the results of the clinical trial confidential. His consulting contract reiterated that he was not to disclose any confidential information in a consultation. He nevertheless provided Martoma, whom he knew was an investment manager, with confidential updates on the drug's safety that he received during meetings of the safety monitoring committee. Dr. Gilman also shared with Martoma the dates of upcoming safety monitoring committee meetings, which allowed Martoma to schedule consultations with Dr. Gilman shortly after each one. Another consultant, Dr. Joel Ross, one of the principal investigators on the clinical trial, met with Martoma on many occasions between 2006 and July 2008 and charged approximately $1,500 per hour.

[1] Martoma did not pay Dr. Gilman or any other consultant directly. Instead, SAC would pay the expert networking firm, and the expert networking firm would in turn pay Dr. Gilman and the other consultants.

Like Dr. Gilman, Dr. Ross had an obligation to maintain the confidentiality of information about the bapineuzumab clinical trial. Nevertheless, during their consultations, Dr. Ross provided Martoma with information about the clinical trial, including information about his patients' responses to the drug and the total number of participants in the study, that Dr. Ross recognized was not public.

On June 17, 2008, Elan and Wyeth issued a press release regarding the results of "Phase II" of the bapineuzumab clinical trial. The press release described the preliminary results as "encouraging," with "clinically meaningful benefits in important subgroups" of Alzheimer's patients with certain genetic characteristics, but indicated that the drug had not proven effective in the general population of Alzheimer's patients. J.A. 547. The press release further stated that the results of the trials would be presented in greater detail at the International Conference on Alzehimer's Disease to be held on July 29, 2008. Elan's share price increased following the press release.

In mid-July of 2008, the sponsors of the bapineuzumab trial selected Dr. Gilman to present the results at the July 29 conference. It was only at this point that Dr. Gilman was unblinded as to the final efficacy results of the trial. Dr. Gilman was "initially euphoric" about the results, but identified "two major weaknesses in the data" that called into question the efficacy of the drug as compared to the placebo. Tr. 1419-20. On July 17, 2008, the day after being unblinded to the results, Dr. Gilman spoke with Martoma for about 90 minutes by telephone about what he had learned. That same day, Martoma purchased a plane ticket to see Dr. Gilman in person at his office in Ann Arbor, Michigan. That meeting occurred two days later, on July 19, 2008. At that meeting, Dr. Gilman showed Martoma a PowerPoint presentation containing the efficacy results and discussed the data with him in detail.

The next morning, Sunday, July 20, Martoma sent Cohen, the owner of SAC, an email with "It's important" in the subject line and asked to speak with him by telephone. The two had a telephone conversation lasting about twenty minutes, after which Martoma emailed Cohen a summary of SAC's Elan and Wyeth holdings. The day after Martoma spoke to Cohen, on July 21, 2008, SAC began to reduce its position in Elan and Wyeth securities by entering into short-sale and options trades that would be profitable if Elan's and Wyeth's stock fell.

Dr. Gilman publicly presented the final results from the bapineuzumab trial at the International Conference on Alzehimer's Disease in the afternoon of July 29, 2008. Elan's share price began to decline during Dr. Gilman's presentation and at the close of trading the next day, the share prices of Elan's and Wyeth had declined by about 42% and 12%, respectively. The trades that Martoma and Cohen made in advance of the announcement resulted in approximately \$80.3 million in gains and \$194.6 million in averted losses for SAC. Martoma personally received a \$9 million bonus based in large part on his trading activity in Elan and Wyeth.

II.

The procedural history of this case is inextricably intertwined with recent developments in insider trading law. Insider trading is a violation of § 10(b) of the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78j(b), and Rule 10b-5, promulgated by the Securities and Exchange Commission ("SEC") and codified at 17 C.F.R. § 240.10b-5. The Supreme Court has long held that there is no "general duty between all participants in market transactions to forgo actions based on material, nonpublic information." *Chiarella v. United States*, 445 U.S. 222, 233 (1980). However, the "traditional" or "classical theory" of insider trading provides that a corporate insider violates § 10(b) and Rule 10b-5 when he "trades in the securities of his corporation on the basis of material, non-public information" because "a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation." *United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997) (alteration in original) (quoting *Chiarella*, 445 U.S. at 228). Similarly, the "misappropriation theory" of insider trading provides "that a person . . . violates § 10(b) and Rule 10b-5[] when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." *Id*. at 652. It is thus the breach of a fiduciary duty or other "duty of loyalty and confidentiality" that is a necessary predicate to insider trading liability. *See id*.

In *Dirks v. S.E.C.*, 463 U.S. 646 (1983), the Supreme Court held that a "tippee"—someone who is not a corporate insider but who nevertheless receives material nonpublic information from a corporate insider, or "tipper," and then trades on the information—can also be held liable under § 10(b) and Rule 10b-5, but "only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." *Id.* at 660.[2] "[T]he test" for whether there has been a breach of a fiduciary duty or other duty of loyalty and confidentiality "is whether the [tipper] personally will benefit, directly or indirectly, from his disclosure" to the tippee. *Dirks*, 463 U.S. at 662. As examples of "direct or indirect personal benefit[s] from the disclosure," the Supreme Court cited "pecuniary gain or a reputational benefit that will translate into future earnings." *Id.* at 663. The Supreme Court went on to list "objective facts and circumstances that often justify" an inference of personal benefit:

> For example, there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient. The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative

[2] Although many of the cases refer to "insiders" and "fiduciary" duties because those cases involve the "classical theory" of insider trading, the *Dirks* articulation of tipper and tippee liability also applies under the misappropriation theory, where the misappropriator violates some duty owed to the source of the information. *See S.E.C. v. Obus*, 693 F.3d 276, 286-88 (2d Cir. 2012); *see also Newman*, 773 F.3d at 445-46.

> or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.

Id. at 664. Building on this language, we have observed that "[p]ersonal benefit is broadly defined to include not only pecuniary gain, but also, *inter alia*, any reputational benefit that will translate into future earnings and the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend." *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) (alterations, citations, and internal quotation marks omitted).

Accordingly, the district court instructed the jury in Martoma's trial that:

> If you find that Dr. Gilman or Dr. Ross disclosed material, non-public information to Mr. Martoma, you must then determine whether the government proved beyond a reasonable doubt that Dr. Gilman and Dr. Ross received or anticipated receiving some personal benefit, direct or indirect, from disclosing the material, non-public information at issue.
>
> The benefit may, but need not be, financial or tangible in nature; it could include obtaining some future advantage, developing or maintaining a business contact or a friendship, or enhancing the tipper's reputation.
>
> A finding as to benefit should be based on all the objective facts and inferences presented in the case. You may find that Dr. Gilman or Dr. Ross received a direct or indirect personal

> benefit from providing inside information to Mr. Martoma if you find that Dr. Gilman or Dr. Ross gave the information to Mr. Martoma with the intention of benefit[t]ing themselves in some manner, or with the intention of conferring a benefit on Mr. Martoma, or as a gift with the goal of maintaining or developing a personal friendship or a useful networking contact.

Tr. 3191.

After Martoma was convicted and while his appeal was pending, we considered one of the situations described in *Dirks*—giving a "gift" of inside information to "a trading relative or friend"—in greater detail in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2015). The Court noted "that [p]ersonal benefit is broadly defined." *Id.* at 452 (quoting *Jiau*, 734 F.3d at 153) (internal quotation marks omitted). The Court went on, however, to state:

> This standard, although permissive, does not suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature. If that were true, and the Government was allowed to meet its burden by proving that two individuals were alumni of the same school or attended the same church, the personal benefit requirement would be a nullity. To the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades 'resemble trading by the insider

> himself followed by a gift of the profits to the recipient,' we hold that such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature.

Id. at 452 (citation omitted).

Based on this language from *Newman*, Martoma challenged on appeal both the sufficiency of the evidence presented at his trial and the adequacy of the instructions given to the jury. Martoma argued that he and Dr. Gilman did not have a "meaningfully close personal relationship" and that Dr. Gilman had not received any "objective, consequential . . . gain of a pecuniary or similarly valuable nature" in exchange for providing Martoma with confidential information.[3] Further, according to Martoma, even if the evidence was sufficient to support his conviction, the district court's jury instructions were inadequate in light of *Newman* because they did not inform the jury about the limitations on "personal benefit" developed in *Newman*. This inadequate instruction, Martoma argued, warranted a retrial. The initial round of briefing and oral argument focused in large part on whether Martoma's conviction could stand in light of *Newman*.

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[3] The parties focus primarily on Dr. Gilman because it was Dr. Gilman, not Dr. Ross, who gave Martoma the final efficacy data that led Martoma to reduce SAC's position in Elan and Wyeth.

Shortly after we held oral argument, however, the Supreme Court granted certiorari in *Salman v. United States*, *see* 136 S. Ct. 899 (2016), and issued a decision in the case on December 6, 2016. *See* 137 S. Ct. 420 (2016). The defendant in *Salman* argued that a "gift of confidential information to a trading relative or friend," *id*. at 426 (quoting *Dirks*, 463 U.S. at 664), was insufficient to establish insider trading liability "unless the tipper's goal in disclosing inside information [wa]s to obtain money, property, or something of tangible value." *Id*. In other words, the defendant in *Salman* urged the Supreme Court to adopt a standard similar to the ruling in *Newman*. The Supreme Court declined to do so and instead "adhere[d] to *Dirks*," which contained a "discussion of gift giving [that] resolve[d] the case." *Id*. at 427. According to the *Salman* Court:

> *Dirks* specifies that when a tipper gives inside information to "a trading relative or friend," the jury can infer that the tipper meant to provide the equivalent of a cash gift. In such situations, the tipper benefits personally because giving a gift of trading information is the same thing as trading by the tipper followed by a gift of the proceeds. Here, by disclosing confidential information as a gift to his brother with the expectation that he would trade on it, [the tipper] breached his duty of trust and confidence to [his employer] and its clients—a duty [the defendant] acquired, and breached himself, by trading on the information with full knowledge that it had been improperly disclosed.

Id. at 428. The Supreme Court also mentioned the *Newman* decision, observing that "[t]o the extent the Second Circuit held that the tipper must also receive something of a 'pecuniary or similarly valuable nature' in exchange for a gift to family or friends, . . . this requirement is inconsistent with *Dirks*." *Id*. (quoting *Newman*, 773 F.3d at 452).

In light of *Salman*, we requested additional briefing from the parties and scheduled a second round of oral argument to address how *Salman* affects this case.

DISCUSSION

As noted above, Martoma challenges both the sufficiency of the evidence presented at trial and the adequacy of the district court's jury instruction. A defendant challenging the sufficiency of the evidence "bears a heavy burden," and "the standard of review is exceedingly deferential." *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) (citations and internal quotation marks omitted). "In evaluating a sufficiency challenge, we 'must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence.'" *Id*. (quoting *United States v. Chavez*, 549 F.3d 119, 124 (2d Cir. 2008)). "Although sufficiency review is *de novo*, we will uphold the judgment[] of conviction if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (citation omitted). "A judgment of acquittal is warranted only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States v. Jiau*, 734 F.3d 147, 152 (2d Cir. 2013) (alterations and internal quotation marks omitted).

With respect to Martoma's challenge to the district court's jury instruction, "[w]e review a jury charge in its entirety and not on the basis of excerpts taken out of context." *United States v. Mitchell*, 328 F.3d 77, 82 (2d Cir. 2003) (quoting *United States v. Zvi*, 168 F.3d 49, 58 (2d Cir. 1998)). "A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008). Such a challenge, however, is subject to harmless error review. *See id*. at 58, 61-62. And because Martoma raises his challenge to the jury instruction for the first time on appeal, we review only for plain error. *United States v. Vilar*, 729 F.3d 62, 70 (2d Cir. 2013). Under the plain error standard, an appellant must demonstrate that "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights . . . ; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings."[4] *United*

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[4] In the past, we have stated that "[w]here . . . the source of an alleged jury instruction error is a supervening decision, we employ a 'modified plain-error rule, under which the government, not the defendant, bears the burden to demonstrate that the error . . . was harmless.'" *United States v. Mahaffy*, 693 F.3d 113, 136 (2d Cir. 2012). We have "on at least twenty-two occasions," *Vilar*, 729 F.3d at 71 n.5, observed that the Supreme Court's decision in *Johnson v. United States*, 520 U.S. 461 (1997) "called

States v. Marcus, 560 U.S. 258, 262 (2010) (internal quotation marks and alteration omitted). "[W]e look not to the law at the time of the trial court's decision to assess whether the error was plain, but rather, to the law as it exists at the time of review." *Vilar*, 729 F.3d at 71. Even with respect to an instructional error that "incorrectly omitted an element of the offense," we will not overturn a conviction "if we find that the jury would have returned the same verdict beyond a reasonable doubt," and thus that "the error did not affect [the defendant's] substantial rights." *United States v. Nouri*, 711 F.3d 129, 139-140 (2d Cir. 2013) (internal quotation marks omitted).

I.

We first evaluate Martoma's sufficiency challenge. In *Newman*, the Court noted that "the tipper's gain need not be *immediately* pecuniary," and, invoking *United States v. Jiau*, 734 F.3d 147 (2d Cir. 2013), explained that "enter[ing] into a relationship of *quid quo pro* with [a tippee], and therefore ha[ving] the opportunity to . . . yield future pecuniary gain," constituted a personal benefit giving rise to insider trading liability. *Newman*, 773 F.3d at 452. That is exactly what happened in this case. Martoma was a frequent and lucrative client for Dr. Gilman, who was paid $1,000 per hour for approximately 43 consultation sessions. At the same time, Dr. Gilman was regularly feeding Martoma confidential

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into question the modified plain error standard of review." *United States v. Botti*, 711 F.3d 299, 308 (2d Cir. 2013). Here, as in the past, "[b]ecause we would reach the same conclusion under either standard, we need not resolve that question." *United States v. Nouri*, 711 F.3d 129, 138 n.2 (2d Cir. 2013).

information about the safety results of clinical trials involving bapineuzumab. And when Dr. Gilman gained access to the final clinical study efficacy data in July 2008, he immediately passed it along to Martoma. It is true that Dr. Gilman did not bill Martoma specifically for the July 17 and 19, 2008 meetings at which Dr. Gilman provided Martoma with the efficacy data—because, as he admitted at trial, doing so "would [have been] tantamount to confessing that [he] was . . . giving [Martoma] inside information." Tr. 1918. But in the context of their ongoing "relationship of *quid pro quo,*" *Newman*, 773 F.3d at 452, where Dr. Gilman regularly disclosed confidential information in exchange for fees, "a rational trier of fact could have found the essential elements of the crime [of insider trading] beyond a reasonable doubt" under a pecuniary *quid pro quo* theory. *Coplan*, 703 F.3d at 62 (quoting *Jackson*, 443 U.S. at 319).

II.

Because the evidence presented at trial was sufficient to sustain Martoma's conviction, we turn next to his challenge to the district court's jury instruction. His argument on this front focuses on the theory, originating in *Dirks*, that the personal benefit necessary to establish insider trading liability in a tipping case can be inferred from a gift of inside information "to a trading relative or friend." *See Dirks*, 463 U.S. at 663-64; *Salman*, 137 S. Ct. at 428. As noted above, *Newman* held that this inference was "impermissible in the absence of proof of a meaningfully close personal relationship." 773 F.3d at 452. Martoma argues that this requirement survives the Supreme Court's decision in *Salman* and that the jury was not properly instructed on it. Following the logic of the Supreme Court's reasoning in *Salman*, interpreting *Dirks*, we think that *Newman*'s "meaningfully close personal relationship" requirement can no longer be sustained.

A.

The Supreme Court explained in *Dirks* that a tippee who knowingly trades on material nonpublic information obtained from an insider does not necessarily violate insider trading law. *See* 463 U.S. at 658-59. But "[t]he conclusion that recipients of inside information do not invariably acquire a duty to disclose or abstain does not mean that such tippees always are free to trade on the information." *Id*. at 659. Instead, "the tippee's duty to disclose or abstain is derivative from that of the insider's duty." *Id*. at 659. "Thus, some tippees must assume an insider's duty to the shareholders not because they receive inside information, but rather because it has been made available to them *improperly*." *Id*. at 660 (emphasis in original). As a result, "a tippee assumes a fiduciary duty. . . not to trade on material nonpublic information only when the insider has breached his fiduciary duty . . . by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." *Id*. at 660.

Dirks further observed that "[w]hether disclosure is a breach of duty . . . depends in large part on the purpose of the disclosure," namely "whether the insider personally will benefit, directly or indirectly, from his disclosure," because "[a]bsent some personal gain, there has been no breach of duty to stockholders." 463 U.S. at 662; *see also id*. at 659 ("[Tippers] may not give [inside] information to an outsider for the . . . improper purpose of exploiting the information for their personal gain."). In the context of this discussion, *Dirks* gave several examples of situations in which an insider would personally benefit from disclosing inside information: disclosing inside information in a *quid pro quo* relationship, disclosing inside information with "an intention to benefit the particular recipient," and disclosing inside information as "a gift . . . to a trading relative or friend." *Id*. at 664. Contrary to the dissent's claim, *see* Dissent Slip Op. at 23, this discussion did not purport to *limit* to these examples the situations in which a personal benefit can be inferred; the broader inquiry underlying the examples remained "whether the insider personally will benefit, directly or indirectly, from his disclosure." *Id*. at 662.[5]

Newman, however, did view these examples as limiting the situations in which a personal benefit could be inferred. As relevant to this case, *Newman* held that the jury was *never* permitted to infer that a tipper had personally benefitted from disclosing inside information as a gift unless that gift was made to someone with whom the tipper had "a meaningfully close personal relationship," 773 F.3d at 452, seeking to give definition to the "friend" language from *Dirks*.[6]

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[5] The fact that *Dirks* held that the tipper's intent to give a benefit to the tippee was an example of a personal benefit to the *tipper* illustrates just how broadly the Court defined the concept of personal benefit to the tipper.

[6] The "meaningfully close personal relationship" requirement was paired, moreover, with the additional requirement that the relationship "generate[] an exchange that is objective,

But in evaluating this gloss on *Dirks*, it is critical to keep in mind that the ultimate inquiry under *Dirks* is whether a tipper has personally benefitted from a disclosure of inside information such that he has violated his fiduciary duty, and it is not apparent that the examples in *Dirks* support a categorical rule that an insider can never benefit personally from gifting inside information to people other than "meaningfully close" friends or family members—especially because the justification for construing gifts as involving a personal benefit is that "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient," *Dirks*, 463 U.S. at 664, an observation that holds true even if the tipper and tippee were, for example, business school classmates who "had known each other for years" rather than "close friends." *See Newman*, 773 F.3d at 452 (internal quotation marks omitted).

B.

Despite some tension between *Newman* and *Dirks*, "it would ordinarily be neither appropriate nor possible for [a panel] to reverse an existing Circuit precedent." *Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2d Cir. 2009). However, "a three-judge panel may issue an opinion that overrules Circuit precedent . . . where an intervening Supreme Court decision casts doubt on the prior ruling." *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016) (internal quotation marks omitted). The

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consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." 773 F.3d at 452. The dissent concedes that *Salman* expressly rejected the latter part of this pairing, *See* Dissent Slip Op. at 18.

Supreme Court's decision in *Salman* explicitly rejected certain aspects of *Newman*. *See* 137 S. Ct. at 428. While the Supreme Court did not have occasion to expressly overrule *Newman*'s requirement that the tipper have a "meaningfully close personal relationship" with a tippee to justify the inference that a tipper received a personal benefit from his gift of inside information—because that aspect of *Newman* was not at issue in *Salman*—"[e]ven if the effect of a Supreme Court decision is 'subtle,' it may nonetheless alter the relevant analysis fundamentally enough to require overruling prior, 'inconsistent' precedent." *Doscher*, 832 F.3d at 378 (quoting *Wojchowski v. Daines*, 498 F.3d 99, 108 (2d Cir. 2007)).

We respectfully conclude that *Salman* fundamentally altered the analysis underlying *Newman*'s "meaningfully close personal relationship" requirement such that the "meaningfully close personal relationship" requirement is no longer good law. In a case involving a tipper and tippee who were brothers, *Salman* found it "obvious" that an insider would personally benefit from "trad[ing] on [inside] information . . . himself and then giv[ing] the proceeds as a gift to his brother." 137 S. Ct. at 427-28. And *Salman* observed that an insider "effectively achieve[s] the same result by disclosing the information to [the tippee], and allowing him to trade on it," because "giving a gift of [inside] information is the same thing as trading by the tipper followed by a gift of the proceeds." *Id*. at 428; *see also id*. ("Making a gift of inside information to a relative . . . is little different from trading on the information, obtaining the profits, and doling them out . . . ."). For this reason, *Salman* cited *Dirks*'s observation that "'insiders [are] forbidden' both 'from personally using undisclosed corporate information to their advantage' and from 'giv[ing] such information to an outsider for the same improper purpose of exploiting the information for their personal gain.'" *Id.* (quoting *Dirks*, 463 U.S. at 659) (alterations in original).

It is true that *Dirks* and *Salman* largely confine their discussion of gifts to "trading relative[s] and friend[s]," and, as indicated earlier, *Salman* did not specifically hold that gifts to anyone, not just relatives and friends, give rise to the personal benefit needed to establish insider trading liability (presumably because *Salman* involved tips between brothers, comfortably within the "trading relative" language of *Dirks*). However, the straightforward logic of the gift-giving analysis in *Dirks*, strongly reaffirmed in *Salman*, is that a corporate insider personally benefits whenever he "disclos[es] inside information as a gift . . . with the expectation that [the recipient] would trade" on the basis of such information or otherwise exploit it for his pecuniary gain. *Salman*, 137 S. Ct. at 428. That is because such a disclosure is the functional equivalent of trading on the information himself and giving a cash gift to the recipient. Nothing in *Salman*'s reaffirmation of this logic supports a distinction between gifts to people with whom a tipper shares a "meaningfully close personal relationship"—a term left undefined in *Newman*, but which apparently did not reach two people who "had known each other for years, having both attended business school and worked . . . together," 773 F.3d at 452—and gifts to those with whom a tipper does not share such a relationship. If the insider discloses inside information "with the expectation that [the recipient] would trade on it," *Salman*, 137 S. Ct. at 428, and the disclosure "resemble[s] trading by the insider followed by a gift of the profits to the recipient," *id*. at 427 (quoting *Dirks*, 463 U.S. at 664), he personally benefits for the reasons described in *Dirks* and *Salman*.[7] Indeed, *Dirks* seems to have at least implicitly shared this understanding: Although the tippee in *Dirks* did not have a personal relationship of any kind, let alone a friendship, with the tippers who gave him inside information, the Supreme Court applied the gift theory to his case. *See Dirks*, 463 U.S. at 648-49, 667 ("[N]or was [the tippers'] purpose to make a gift of valuable information to Dirks."); *see also Salman*, 137 S. Ct. at 427 ("We then applied this gift-giving principle to resolve *Dirks* itself . . . ."). This approach makes sense in light of the Supreme Court's observation that "'insiders [are] forbidden' both 'from personally using undisclosed corporate information to their advantage' and from 'giv[ing] such information

[7] The dissent posits that some benefits from gift-giving might be unique to close friendships and family relationships. *See* Dissent Slip Op. at 28-29. Notably, none of these benefits bear any relation to the Supreme Court's articulation of why giving a gift to a "trading relative or friend" involves a personal benefit to the gift-giver. The Supreme Court did not, for example, say that an insider benefits personally from making friends and family members happy, or from improving relationships, or from the potential of using the gift in the future. Instead, the Supreme Court observed that giving a gift of inside information personally benefits the insider because the gift is the equivalent of trading on the tip oneself—an obvious pecuniary benefit—and giving a gift of the proceeds. In light of this articulated logic, the dissent's claim that "[i]t is not entirely straightforward that *giving* a gift provides the gift-giver with a benefit," *see* Dissent Slip Op. at 11, is not persuasive.

to an outsider for the same improper purpose of exploiting the information for their personal gain'"—a statement not limited by the relationships of the parties. *See Salman*, 137 S. Ct. at 428 (quoting *Dirks*, 463 U.S. at 659) (alterations in original).

An example illustrates the point. Imagine that a corporate insider, instead of giving a cash end-of-year gift to his doorman, gives a tip of inside information with instructions to trade on the information and consider the proceeds of the trade to be his end-of-year gift. In this example, there may not be a "meaningfully close personal relationship" between the tipper and tippee, yet this clearly is an illustration of prohibited insider trading, as the insider has given a tip of valuable inside information in lieu of a cash gift and has thus personally benefitted from the disclosure.

Thus, we hold that an insider or tipper personally benefits from a disclosure of inside information whenever the information was disclosed "with the expectation that [the recipient] would trade on it," *Salman*, 137 S. Ct. at 428, and the disclosure "resemble[s] trading by the insider followed by a gift of the profits to the recipient," *id.* at 427 (quoting *Dirks*, 463 U.S. at 664), whether or not there was a "meaningfully close personal relationship" between the tipper and tippee.[8] The dissent criticizes us for

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[8] Although we hold that *Newman*'s "meaningfully close personal relationship" *requirement* is no longer good law, we do not hold that the relationship between the tipper and tippee cannot be relevant to the jury in assessing competing narratives as to whether information was disclosed "with the expectation that [the recipient] would trade on it," *Salman*, 137 S. Ct. at 428, and whether the disclosure "resemble[d] trading by the insider followed by a gift of the profits to the recipient," *id.* at 427

"holding that someone who gives a gift *always* receives a personal benefit from doing so" and that "an insider receives a personal benefit when the insider gives inside information as a 'gift' to *any* person." Dissent Slip Op. at 2. But our holding reaches only the insider who discloses inside information to someone *he expects will trade on the information*. This holding is no broader than the logic underpinning the Supreme Court's conclusion in *Salman*. Indeed, as noted above, the Supreme Court has found it "obvious" that an insider would personally benefit from "trad[ing] on [inside] information . . . himself and then giv[ing] the proceeds as a gift to his brother." *Salman*, 137 S. Ct. at 427-28. Our holding comports with *Salman*'s observation that personal benefit to the insider is equally obvious when an insider "effectively achieve[s] the same result by disclosing the information to [the tippee]" for the purpose of "allowing [the tippee] to trade on it." *Id*. at 428.

Contrary to the dissent's suggestion, not all disclosures of inside information will meet this test. For example, disclosures for whistleblowing purposes

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(quoting *Dirks*, 463 U.S. at 664). In the dissent's example of a disclosure of inside information to a reporter, for example, *see* Dissent Slip Op. at 5, a pre-existing personal relationship between the insider and the reporter might tend to show that the information was not disclosed for altruistic reasons but was instead disclosed "with the expectation that [the recipient] would trade on it." *Salman*, 137 S. Ct. at 428. A pre-existing personal relationship might also tend to show, however, that the insider trusted the reporter to scrupulously reveal a corporate fraud to the relevant authorities or the investing public. It is for the jury to decide, based on all of the facts and circumstances in a particular case, what to infer about the tipper's purpose from his relationship with the tippee.

to reveal a fraud, *see Dirks*, 463 U.S. at 649-50, 667, and inadvertent disclosures, *see id.* at 663 & n.23, are not disclosures made "with the expectation that [the recipient] would trade on" them and thus involve no personal benefit to the insider. *Salman*, 137 S. Ct. at 428. There may also be other situations in which the facts do not justify the inference that information was disclosed "with the expectation that [the recipient] would trade on it," *Salman*, 137 S. Ct. at 428, and that the disclosure "resemble[s] trading by the insider followed by a gift of the profits to the recipient," *id*. at 427 (quoting *Dirks*, 463 U.S. at 664). As a result, our holding does not eliminate or vitiate the personal benefit rule; it merely acknowledges that it is *possible* to personally benefit from a disclosure of inside information as a gift to someone with whom one does not share a "meaningfully close personal relationship." Phrased another way, we reject, in light of *Salman*, the categorical rule that an insider can *never* personally benefit from disclosing inside information as a gift without a "meaningfully close personal relationship."

C.

It is, of course, the province of the jury to evaluate competing narratives and decide what actually motivated a tipper to disclose confidential information, and consequently, whether there was a personal benefit to the insider on the facts of a particular case. How can jurors, or this Court on appeal, know that inside information was disclosed "with the expectation that [the recipient] would trade on it," *Salman*, 137 S. Ct. at 428, and that the disclosure "resemble[d] trading by the insider followed by a gift of the profits to the recipient"? *Id*. at 427 (quoting *Dirks*, 463 U.S. at 664). Arguably, *Newman*'s "meaningfully close personal relationship" requirement could be construed as limited to the question of the sufficiency of *circumstantial* evidence in an insider trading case. *See* 773 F.3d at 451-53. But *Newman*'s sufficiency analysis appeared to assume that the personal benefit involved in giving a gift was "the ephemeral benefit of the . . . friendship" of the recipient of the gift. *Newman*, 773 F.3d at 452 (quoting *Jiau*, 734 F.3d at 153); *see also id*. (explaining that the government cannot "prove the receipt of a personal benefit by the mere fact of a friendship"). Because the Court in *Newman* was of the opinion that friendship *itself*, "particularly of a casual or social nature," did not constitute a personal benefit, it required more. 773 F.3d at 452.[9] But as the Supreme Court explained in *Dirks* and reaffirmed again in *Salman*, the personal

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[9] In particular, as described above, *Newman* held that a personal benefit could not be inferred from gift-giving "in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." 773 F.3d at 452. Under this standard, even a gift to one's best friend or spouse was insufficient to convey the requisite personal benefit without some kind of objective exchange involving potential pecuniary value. While the latter requirement was explicitly rejected by the Supreme Court, *see Salman*, 137 S. Ct. at 428, viewing the "meaningfully close personal relationship" requirement in its original context further demonstrates that *Newman* understood the personal benefit involved in gift-giving to be the receipt of friendship and concluded that this "ephemeral" benefit was simply not the kind of benefit that should give rise to insider trading liability. *See* 773 F.3d at 452.

benefit one receives from giving a gift of inside information is *not* the friendship or loyalty or gratitude of the recipient of the gift; it is the imputed pecuniary benefit of having effectively profited from the trade oneself and given the proceeds as a cash gift. *See Salman*, 137 S. Ct. at 427-28; *Dirks*, 463 U.S. at 664. If under *Dirks* and *Salman* it is not correct to characterize the personal benefit at issue in gift-giving as the receipt of friendship, then *Newman*'s discussion of the circumstances in which a jury can infer that a tipper personally benefitted from disclosing inside information as a gift must now be considered inapposite.

The dissent argues that "[w]hat counts as a 'gift' is vague and subjective."[10] Dissent Slip Op. at 2. We reiterate the Supreme Court's observation that "[d]etermining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts." *Salman*, 137 S. Ct. at 429 (quoting *Dirks*, 463 U.S. at 664) (alteration in original). As the dissent points out, many cases may rely on circumstantial evidence of intent. *See* Dissent Slip Op. at 20-21. Because we have concluded that the evidence presented at Martoma's trial was sufficient to convict under a straightforward pecuniary benefit theory, we need not consider the outer boundaries of when a jury is entitled to infer, relying on

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[10] The same might be said of the "meaningfully close personal relationship" test. When asked how "meaningfully close personal relationship" should be defined, Martoma and the government both invoked the basics of *Dirks* and *Salman*, agreeing that a "meaningfully close personal relationship" is the kind of relationship in which gifts are exchanged.

circumstantial evidence, that a particular disclosure was made "with the expectation that [the recipient] would trade on it," *Salman*, 137 S. Ct. at 428, and "resemble[d] trading by the insider followed by a gift of the profits to the recipient," *id.* at 427 (quoting *Dirks*, 463 U.S. at 664). It is worth noting, however, that not all insider trading cases rely on circumstantial evidence. In some cases, the tipper may cooperate with the government and testify against the tippee, providing information on the motivation for disclosing inside information. In other cases, other witnesses might testify about conversations with a tipper that shed light on the tipper's intentions. Thus, while concerns about the sufficiency of circumstantial evidence on the gift theory are not wholly without basis, the response to those concerns lies in appellate review of the sufficiency of the evidence of personal benefit, not in a definition of personal benefit that categorically excludes situations where the requisite personal benefit could be proven. In other words, the fact that some cases of insider trading might be hard to prove beyond a reasonable doubt based on circumstantial evidence (and might consequently be reversed on appeal as supported by insufficient evidence) does not mean that other cases—the doorman hypothetical discussed above, for example—should be outside the bounds of insider trading liability even where the government has put forward adequate proof of personal benefit.

As a final note on this point, the dissent is correct that the legality and ethics of insider trading are not necessarily coextensive. *See* Dissent Slip Op. at 43. But the legality of insider trading *is* coextensive with a corporate insider's fiduciary duty of loyalty to the corporation. *See Dirks*, 463 U.S. at 654, 659-60. The dissent would hold, in effect, that a corporate insider does not violate his or her duty of loyalty by disclosing inside information to an outsider as a gift with no legitimate corporate purpose so long as the gift is to someone with whom the insider does not share a "meaningfully close personal relationship." In our view, for the reasons discussed above, *Salman* and *Dirks* compel a different result.

D.

Having concluded that the evidence was sufficient to support Martoma's conviction and that *Newman*'s "meaningfully close personal relationship" requirement is no longer good law, the remaining question is whether the district court's jury instruction, which Martoma challenges for its failure to include *Newman*'s "meaningfully close personal relationship" requirement, accurately conveyed the elements of insider trading. The jury instruction given at Martoma's trial stated that a "gift [given] with the goal of maintaining or developing a personal friendship or a useful networking contact" constitutes a personal benefit. Tr. 3191. Martoma focuses on the language about *developing* friendships, arguing that gifts given to develop *future* friendships do not give rise to the personal benefit needed to trigger insider trading liability. *Salman* reiterated that when confidential information is given as a gift, it is "the same thing as trading by the tipper followed by a gift of the proceeds" and is thus the functional equivalent of a cash gift. *Salman*, 137 S. Ct. at 428. Whether the recipient of the gift is an existing friend or a potential future friend whom a gift is intended to entice, the logic—that a tipper personally benefits by giving inside information in lieu of a cash gift—operates in a similar manner. For this reason, the aspect of the district court's instruction on gifts with the goal of *developing* friendships, which is at most "subject to reasonable dispute," did not constitute "obvious" error. *Marcus*, 560 U.S. at 262 (internal quotation marks omitted).

Even if the jury instruction was obviously erroneous—which we hold it was not—that error did not impair Martoma's substantial rights in light of the compelling evidence that Dr. Gilman, the tipper, received substantial financial benefit in exchange for providing confidential information to Martoma. As discussed above, Dr. Gilman, over the course of approximately 18 months and 43 paid consultation sessions for which he billed $1,000 an hour, regularly and *intentionally* provided Martoma with confidential information from the bapineuzumab clinical trial. Martoma kept coming back, specifically scheduling consultation sessions so that they would occur shortly after the safety monitoring committee meetings, when Dr. Gilman would have new information to pass along—and starting at least in August 2007, Dr. Gilman would reschedule his conversations with Martoma if he had no new information to reveal at the time they were scheduled to meet. Thus, the consulting relationship between Dr. Gilman and Martoma at that point involved no "legitimate service," *see* Dissent Slip Op. at 43; as Dr. Gilman testified at trial, "the purpose of those consultations was for [him] to disclose to [Martoma] confidential information about the results . . . of the last Safety Monitoring Committee [meeting]." Tr. 1274:6-9. And because Martoma continued to see Dr. Gilman to receive confidential information, Dr. Gilman continued to receive consulting fees. The fact that Dr. Gilman did not specifically bill for his July 17 and 19, 2008 conversations with Martoma in which Dr. Gilman divulged the final drug efficacy data does not alter the inescapable conclusion that in the context of this “relationship of *quid pro quo,*” *Newman*, 773 F.3d at 452, Dr. Gilman’s disclosure of confidential information was designed to “translate into future earnings.” *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) (quoting *Dirks*, 463 U.S. at 663). As a result, “it is clear beyond a reasonable doubt that a rational jury would have found [Martoma] guilty absent [any] error.” *United States v. Mahaffy*, 693 F.3d 113, 136 (2d Cir. 2012).

CONCLUSION

We have considered Martoma’s remaining arguments and find in them no basis for reversal. Accordingly, we AFFIRM the judgment of the district court.

POOLER, Circuit Judge:

Because the majority rejects limitations the Supreme Court set forth in *Dirks v. S.E.C.*, 463 U.S. 646 (1983), and *Salman v. United States*, 137 S. Ct. 420 (2016), and overrules our holding in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), without convening this Court en banc, I cannot join the opinion. And, because those precedents show that Martoma's jury instructions were erroneous in a way that affected his rights at trial, I respectfully dissent.

* * *

This appeal asks what the government must show to convict someone criminally of trading on inside information, or to prevail on similar civil charges. For years, the Supreme Court's decisions have required the government to show that the relevant information came from an insider who divulged it in return for a personal benefit.[1] The Supreme Court has described the "personal benefit" rule as a limiting principle of liability. The rule allows many people—including reporters and stock analysts—not to worry that they

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[1] The majority notes, and I agree, that it is irrelevant for our purposes whether the source of the information is a true corporate "insider" or instead a corporate outsider who has improperly shared information with which he was trusted under the "misappropriation" theory of insider-trading liability, *see United States v. O'Hagan*, 521 U.S. 642, 651-53 (1997). *See United States v. Newman*, 773 F.3d 438, 446 (2d Cir. 2014) ("The elements of tipping liability are the same, regardless of whether the tipper's duty arises under the 'classical' or the 'misappropriation' theory."); *S.E.C. v. Obus*, 693 F.3d 276, 285-86 (2d Cir. 2012). I use the term "insider" interchangeably to refer either to an actual insider or someone who misappropriates information.

will become felons or face civil liability for telling information to others who later happen to trade on it. Without evidence that an insider let details slip in return for a personal benefit for himself or herself, the government cannot convict.

Today, the majority holds that an insider receives a personal benefit when the insider gives inside information as a "gift" to *any* person. In holding that someone who gives a gift *always* receives a personal benefit from doing so, the majority strips the long-standing personal benefit rule of its limiting power. What counts as a "gift" is vague and subjective. Juries, and, more dangerously, prosecutors, can now seize on this vagueness and subjectivity. The result will be liability in many cases where it could not previously lie.

In the past, we have held that an insider receives a personal benefit from bestowing a "gift" of information in only one narrow situation. That is when the insider gives information to family or friends—persons highly unlikely to use it for commercially legitimate reasons. Today's opinion goes far beyond that limitation, which was set by the Supreme Court in *Dirks*, 463 U.S. 646, received elaboration in this Court's opinion in *Newman*, 773 F.3d 438, and was left undisturbed by the Supreme Court in *Salman*, 137 S. Ct. 420. In rejecting those precedents, the majority opinion significantly diminishes the limiting power of the personal benefit rule, and radically alters insider-trading law for the worse.

1. The Personal Benefit Rule

To prevail in an insider-trading case based on a tip from an insider to a trader, the government must prove several elements. *See, e.g.*, *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013). Among them, the government must show that the insider had a fiduciary duty to protect the confidential information and nonetheless disclosed it in return for a personal benefit. *Dirks*, 463 U.S. at 659-64.

The requirement of a personal benefit exists because not "[a]ll disclosures of confidential corporate information are . . . inconsistent with the duty insiders owe to shareholders." *Id.* at 661. The law targets only someone who "takes advantage" of inside information to make "secret profits." *Id.* at 654. For example, the insider who reveals information inadvertently—perhaps letting it slip accidentally during a legitimate business conversation—has not committed insider trading. *See S.E.C. v. Obus*, 693 F.3d 276, 287 (2d Cir. 2012) (noting liability likely would not lie for an inadvertent disclosure); *see also Dirks*, 463 U.S. at 662. Similarly, insiders speaking for public-spirited reasons, such as "a desire to expose . . . fraud," do not commit insider trading. *Dirks*, 463 U.S. at 667. To ensure that these cases, and similar ones, do not result in criminal or civil liability, the law requires the government to show that an insider benefitted personally in return for a tip.[2]

[2] Why must the *insider* who tips receive a personal benefit before the *tippee* may be held liable? Tipping cases differ from situations where someone breaches a duty owed directly to the company by trading. In tipping cases, the tippee generally "has no . . . relationship[]" with the company or its shareholders, and

A. Reasons for the Personal Benefit Rule

In introducing the personal benefit rule in *Dirks*, the Supreme Court explained that it was "essential . . . to have a guiding principle for those whose daily activities must be limited and instructed by the SEC's inside-trading rules," and that, without the personal benefit rule, there would be no such "limiting principle" for insider-trading liability. *Id.* at 664. The Supreme Court elaborated that, "[w]ithout legal limitations, market participants are forced to rely on the reasonableness of the SEC's litigation strategy, but that can be hazardous." *Id.* at 664 n.24. Before the personal benefit rule, the SEC believed that it had the power to enforce insider-trading rules against "persons outside the company such as an analyst or reporter who learns of inside information." *Id.* (emphasis omitted). The Supreme Court, troubled by that possibility, created a rule foreclosing such prosecutions except when an insider has personally benefitted from a disclosure.

The Supreme Court also noted that the question of whether an insider personally benefitted from disclosure would "require[] courts to focus on objective criteria." *Id.* at 663. Rather than courts attempting to "read the parties' minds," *id.*, they would look to

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so "the tippee's duty to . . . abstain [from trading] is derivative from . . . the insider's duty." *Dirks*, 463 U.S. at 655, 659. Without the insider's breach of duty, the tippee who receives the information, and tells it to others or trades on it, also breaches no duty and thus commits no crime. But if the insider does breach his or her duty in return for a benefit, and the crime's other requirements are satisfied, then both insider and tippee are liable.

"objective facts and circumstances that [would] justify . . . an inference" that an insider received a personal benefit, *id.* at 664.

Without the personal benefit rule, many insider-trading cases would require the government to show few objective facts. Consider, for example, a situation where an insider conveys material, nonpublic information to a reporter, and the reporter tells it to a third person who trades on it.[3] Such a situation is entirely plausible for a financial news reporter who speaks to many sources. Suppose that the government, however, brings a civil suit against the reporter. To prevail, the government first must show that the insider is at fault by demonstrating that (1) the insider had a duty to keep the information secret, but did not, that (2) the insider knew, or should have known, that the reporter would benefit from the information, and that (3) the insider personally benefitted from disclosing the information.[4] After the government shows that the insider was at fault, the government must show that (4) the reporter knew, or should have known, of the insider's breach of duty and personal benefit.[5] Last, the government must show

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[3] *See Chiarella v. United States*, 445 U.S. 222, 227 (1980) (stating that insider-trading charge requires that the information disclosed is material and nonpublic).

[4] *See Obus*, 693 F.3d at 288-89 ("A tipper will be liable if he tips . . . to someone he [knows or has reason to know] will likely (1) trade on the information or (2) disseminate the information further for the first tippee's own benefit.").

[5] *See Dirks*, 463 U.S. at 659-64 (discussing necessity of insider's duty and personal benefit); *Obus*, 693 F.3d at 289 ("Tippee liability requires that (1) the tipper breached a duty by tipping confidential information; (2) the tippee knew or had reason to

that (5) the reporter either knew, or should have known, of the third person's intention to trade, and that (6) the reporter received a personal benefit from passing the information to the third person.[6]

These requirements at first appear weighty. Except for the "personal benefits," however, the requirements relate only to each individual's state of mind. In a civil suit, to prove these state-of-mind requirements, the government need not show that the insider *knew* the reporter would benefit, or that the reporter *knew* of the insider's duty and breach or the

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know that the tippee improperly obtained the information (i.e., that the information was obtained through the tipper's breach); and (3) the tippee, while in knowing possession of the material non-public information, used the information by trading or by tipping for his own benefit."); *United States v. Mylett*, 97 F.3d 663, 668 (2d Cir. 1996) ("Rule 10b-5 requires that the defendant subjectively believe that the information received was obtained in breach of a fiduciary duty."); *Newman*, 773 F.3d at 448 (rejecting argument that a tippee's "knowledge of [the tipper's] breach of the duty of confidentiality without knowledge of the [tipper's] personal benefit [from doing so] is sufficient to impose criminal liability."). *Salman* suggested it is required, at least in a criminal case, that "the tippee *knew* that the tipper disclosed the information for a personal benefit *and that the tipper expected trading to ensue*." 137 S. Ct. at 427 (emphasis added). It is not entirely clear whether this statement modified the elements of the offense, given that the tipper's level of knowledge of trading was not at issue in *Salman*.

[6] *See Obus*, 693 F.3d at 288-89 ("A tipper will be liable if he tips . . . to someone he [knows or has reason to know] will likely (1) trade on the information or (2) disseminate the information further for the first tippee's own benefit."). Note that this same requirement must be met for the government to show that the initial tipper improperly gave information to the reporter. *Id.* at 289.

third person's intention to trade. It is enough to show that the insider and the reporter *should have known*.[7] Typically, circumstantial evidence meets this minimal requirement. The government could argue that the insider and the reporter each heard and shared a certain type of information with certain people, and thus should have known of the relevant duties, breaches, and benefits.[8]

In a criminal case, at least in this Circuit, it is not enough for the government to show mere recklessness to fulfill the state-of-mind requirements.[9] The

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[7] *Obus*, 693 F.3d at 286 ("In every insider trading case, at the moment of tipping or trading . . . the unlawful actor must know or be reckless in not knowing that the conduct was deceptive."); *see Dirks*, 463 U.S. at 660 (stating that liability may result when "the tippee knows or should know that there has been a breach" of the insider's duty).

[8] *See Newman*, 773 F.3d at 454 ("The [g]overnment argues that given the detailed nature and accuracy of [the information they received], [the defendants] must have known, or deliberately avoided knowing, that the information originated with corporate insiders, *and* that those insiders disclosed the information in exchange for a personal benefit."); *Mylett*, 97 F.3d at 668 ("[The tippee] knew that he had obtained information from [the insider]. He argues that . . . nothing about [the insider]'s position . . . would logically give rise to the inference that he was disclosing inside information. Because [the tippee] knew that [the insider] was a Vice President of AT & T, this contention is meritless." (internal quotation marks omitted)).

[9] The Supreme Court in *Salman* suggested that all criminal cases now require a showing of knowledge regarding the tipper's duty and breach. *See Salman*, 137 S. Ct. at 423 ("The tippee acquires the tipper's duty if the tippee *knows* the information was disclosed in breach of the tipper's duty, and the tippee may commit securities fraud by trading in disregard of *that*

reporter's conduct must be willful—he must "subjectively believe" duties were breached. *United States v. Mylett*, 97 F.3d 663, 668 (2d Cir. 1996).[10] As in civil cases, however, "[s]uch belief may . . . be shown by circumstantial evidence," and the government often argues as much. *Id.*

The personal benefit requirement limits liability in situations like the one described in the hypothetical above. It requires the government to show that the insider received a benefit for disclosing the information, that the reporter received a benefit for sharing it, and that the reporter had reason to know of both. Assuming that the personal benefit must be demonstrated by objective facts, it limits the government's ability to hold persons liable where they "mistakenly think . . . information already has been disclosed or that it is not material enough to affect the market." *Dirks*, 463 U.S. at 662; s*ee also Obus*, 693 F.3d at 287 (noting liability likely would not lie for an inadvertent disclosure). The personal benefit rule makes it unlikely that persons with innocent intentions will violate the law by sharing information with others: someone is unlikely to receive a benefit from sharing information unless he or she knows the information is material and nonpublic. It also provides

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knowledge." (emphasis added)). It is not clear, however, whether this statement alters the standard for civil cases.

[10] *See United States v. Gansman*, 657 F.3d 85, 91 n.7 (2d Cir. 2011) ("To impose criminal sanctions, the government must prove . . . that the defendant's conduct was willful. Civil liability, on the other hand, may attach if the government proves . . . that the defendant's conduct was merely reckless, rather than willful." (internal citations omitted)).

greater notice to persons hearing information that the information was shared improperly: the awareness that someone benefitted from sharing the information suggests that revealing it was not honorable.

B. Evolution of the Personal Benefit Rule

The development of the personal benefit rule from *Dirks*, to this Court's opinion in *Newman*, and then to the Supreme Court's opinion in *Salman*, is crucial to understanding why the majority's rule in the opinion today goes far beyond the law's previous understanding of what constitutes a personal benefit.

i. *Dirks*

In *Dirks*, the Supreme Court first provided a list of items satisfying the requirement that an insider receive a personal benefit from revealing inside information:

> [C]ourts [must] focus on objective criteria, *i.e.,* whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings. There are objective facts and circumstances that often justify such an inference. For example, there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient. The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble

> trading by the insider himself followed by a gift of the profits to the recipient.

Dirks, 463 U.S. at 663-64 (internal citations omitted). Two of the possible personal benefits, "a pecuniary gain" and "a reputational benefit that will translate into future earnings," correspond closely with the ordinary understanding of a "benefit." The third, "a gift of confidential information," perhaps corresponds less closely. It is not entirely straightforward why *giving* a gift provides the gift-giver with a benefit. But the Court restricted the applicability of that theory to cases where the gift is given to the tipper's "trading relative or friend." Such a limitation makes the theory defensible, because, as Justice Breyer noted at oral argument in *Salman*, "to help a close family member [or friend] is like helping yourself." Transcript of Oral Argument at 8, *Salman v. United States*, 137 S. Ct. 420 (2016) (No. 15-628).

ii. *Newman*

Our opinion in *Newman* built on the gift-giving theory in *Dirks* in two ways.[11] *Newman* first held that, when the government wishes to show a personal benefit based on a gift within a friendship, as permitted by *Dirks*, the friendship must be "a meaningfully close personal relationship":

> To the extent *Dirks* suggests that a personal benefit may be inferred from a personal

[11] *Newman* also rejected the argument that a tippee's "knowledge of [the tipper's] breach of the duty of confidentiality without knowledge of the [tipper's] personal benefit [from doing so] is sufficient to impose criminal liability." 773 F.3d at 448. The majority does not suggest that this proposition of law is in doubt. In any case, it is not at issue in this appeal.

> relationship between the tipper and tippee, where the tippee's trades "resemble trading by the insider himself followed by a gift of the profits to the recipient," we hold that *such an inference is impermissible in the absence of proof of a meaningfully close personal relationship* that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature.

Newman, 773 F.3d at 452 (emphasis added) (internal citations, quotation marks, and brackets omitted). The opinion in *Newman* expressed concern that, without such a limitation, the government would present superficial "friendships" not worthy of the name:

> We have observed that personal benefit is broadly defined to include . . . the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend. This standard, although permissive, does not suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature. If that were true, and the Government was allowed to meet its burden by proving that two individuals were alumni of the same school or attended the same church, the personal benefit requirement would be a nullity.

Id. Newman thus expressed concern that inferring a benefit from a gift within a "casual or social" relationship failed to honor the requirement that "the personal benefit received in exchange for confidential information . . . be of some consequence." *Id.* Like *Dirks*, *Newman*'s first holding was clearly animated by the idea that the personal benefit requirement could not become "a nullity" given its role as a limiting principle of liability. *Id.* It attempted to specify what *Dirks* had left unclear—how close persons must be for a gift between them to count as a benefit to the gift-giver.

Second, *Newman* held that an insider's gift to a friend only amounted to a personal benefit if the gift might yield money (or something similar) for the insider. 773 F.3d at 452. Although *Dirks* said that "[t]he elements of fiduciary duty and exploitation of nonpublic information . . . exist when an insider makes a gift of confidential information to a trading relative or friend," 463 U.S. at 663-64, *Newman* interpreted *Dirks* to require not merely a gift to a friend, but also that it be given in the context of a relationship that "generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Newman*, 773 F.3d at 452.

iii. *Salman*

After *Newman*, the Supreme Court decided *Salman v. United States*. *Salman* involved three persons—Maher and Michael, who were brothers, and Salman, the defendant, who was Maher's brother-in-law and Michael's "friend" and "extended family member." 137 S. Ct. at 423-24. Maher, who had inside information, would disclose it to his brother Michael, who then passed it to Salman. *Id.* Salman traded on it. *Id.* at 424.

The defendant, Salman, "argue[d] that he [could not] be held liable as a tippee because" Maher "did not personally . . . benefit from" giving tips. *Id.* at 424. The case, in other words, turned on whether "Maher, the tipper," received a personal benefit when he "provided inside information to a close relative, his brother Michael." *Id.* at 427. Salman contended that Maher "did not personally receive money or property in exchange for the tips and thus did not personally benefit from them." *Id.* at 424. In short, Salman argued that even though Maher had disclosed information to his (Maher's) brother, Maher did not receive a personal benefit from that disclosure unless he also stood to benefit financially from it. *Id.*

The Supreme Court affirmed the Court of Appeals for the Ninth Circuit, which had rejected Salman's argument. *Id.* The Supreme Court explained that "the Court of Appeals properly applied *Dirks*" in ruling that "*Dirks* allowed the jury to infer that the tipper here breached a duty because he made a gift of confidential information to a trading relative." *Id.* (internal quotation marks omitted). The Supreme Court held that a tipper did not need to receive money or property to benefit personally when disclosing to a friend or relative. *Id.* at 428.

The Supreme Court's opinion in *Salman* overturned *Newman*'s second holding, which required a showing that a tipper would receive something of "pecuniary or similarly valuable nature" even when making a gift to relatives or friends. Regarding *Newman*'s second holding, the Supreme Court wrote the following:

> To the extent the Second Circuit held that the tipper must also receive something of a "pecuniary or similarly valuable nature" in exchange for a gift to family or friends, *Newman,* 773 F.3d at 452, . . . this requirement is inconsistent with *Dirks*.

Salman, 137 S. Ct. at 428 (internal citation omitted). The Supreme Court stated that, "when a tipper gives inside information to a trading relative or friend, the jury can infer that the tipper meant to provide the equivalent of a cash gift." *Id.* (internal quotation marks omitted). Thus, after *Salman*, a gift of information to a "trading relative or friend" is sufficient, without an accompanying monetary or other gain, for a fact-finder to conclude that a tipper received a personal benefit.

The Supreme Court, however, left *Newman*'s first holding untouched. The Supreme Court quoted the first holding of *Newman*, that the inference of a personal benefit from a gift "is impermissible in the absence of proof of a meaningfully close personal relationship." *Salman*, 137 S. Ct. at 425 (quoting *Newman*, 773 F.3d at 452). But the Supreme Court explicitly stated that it overruled *Newman* only "*[t]o the extent*" that it required an insider to "receive something of a 'pecuniary or similarly valuable nature'" as a result of giving a gift to a friend. *Salman*, 137 S. Ct. at 428 (emphasis added). The Supreme Court's statement showed no disapproval of the "meaningfully close personal relationship" language in *Newman*.

Had the Supreme Court discussed the "meaningfully close personal relationship" requirement of *Newman*—which it did not—that discussion would have been dicta. *Salman* considered whether a gift shared between *brothers* could show a personal benefit. *See* 137 S. Ct. at 424. An opinion considering a relationship between brothers does not need to rule on, or even address, how close two persons' friendship must be for them really to be "friends."

To the extent *Salman* discussed the relationship between Maher and Michael, it took pains to emphasize, repeatedly, that they were extremely close:

> Maher enjoyed a close relationship with his older brother, Mounir Kara (known as Michael). . . . At first he relied on Michael's chemistry background to help him grasp scientific concepts relevant to his new job. Then, while their father was battling cancer, the brothers discussed companies that dealt with innovative cancer treatment and pain management techniques.
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> . . . .
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> The evidence at trial established that Maher and Michael enjoyed a "very close relationship." Maher "loved his brother very much," Michael was like "a second father to Maher," and Michael was the best man at Maher's wedding to Salman's sister. Maher testified that he shared inside information with his brother to benefit him and with the expectation that his brother would trade on it. While Maher explained that he disclosed the information in large part to appease

> Michael (who pestered him incessantly for it), he also testified that he tipped his brother to "help him" and to "fulfill whatever needs he had."
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> . . . .
>
> Maher, the tipper, provided inside information to a close relative, his brother Michael.

Id. at 424, 427 (citations omitted). The fact that Michael and Maher were not only brothers, but otherwise were "very close," "enjoyed a close relationship," "loved" each other "very much," that Michael served as "best man at Maher's wedding," and that the two were "close relatives" demonstrates that any discussion in *Salman* of the requirements for the closeness of a friendship was unnecessary to resolve the appeal. The Supreme Court did not need to decide how close a relationship must be for two persons to be "friends" or "meaningfully close," because the relationship between Michael and Maher would have satisfied any conceivable test.

Beyond leaving *Newman*'s first holding untouched, the Supreme Court's decision in *Salman* also declined to adopt the government's theory of the personal benefit rule, which would have broadened the gift-giving doctrine substantially. In *Salman*, the government argued that "a gift of confidential information to anyone, not just a 'trading relative or friend,' is enough to prove securities fraud." *Id.* at 426. Such a holding would have substantially broadened the rule in *Dirks*, which stated that a personal benefit may be inferred when "an insider makes a gift of confidential information to a trading relative or friend." 463 U.S. at 664. The Supreme Court did not adopt the government's view, deciding instead to "adhere to *Dirks*." *Salman*, 137 S. Ct. at 427.

To summarize, *Dirks* held that a gift of information to an insider's relatives or friends could permit an inference of a personal benefit. In *Newman*, we held that such an inference could only be made when (1) the gift was exchanged within a "meaningfully close personal relationship," and (2) a gift created the potential for an insider to receive a pecuniary or similar benefit. *Salman* reversed the second holding of *Newman*, requiring the potential of pecuniary gain, but left untouched the first holding that, in order to allow inference of a personal benefit, gifts must be exchanged within a "meaningfully close personal relationship."

C. The Majority's Change to the Personal Benefit Rule

The majority today articulates a rule that permits inference of a personal benefit whenever an insider makes a "gift" of information to *anyone*, not just to relatives or meaningfully close friends. As the majority puts it, "a corporate insider personally benefits whenever he discloses inside information as a gift with the expectation that the recipient would trade on the basis of such information or otherwise exploit it for his pecuniary gain." Slip Op. at 25 (internal quotation marks, brackets, and ellipsis omitted). Or, put another way, "[i]f the insider discloses inside information . . . and the disclosure resembles trading by the insider followed by a gift of the profits to the recipient, he personally benefits." *Id.*

at 26 (internal quotation marks, citations, and brackets omitted).

The majority declines to provide further guidance on what counts as a "gift." Slip Op. at 33 ("[W]e need not consider the outer boundaries of when a jury is entitled to infer . . . that a particular disclosure . . . resembled trading by the insider followed by a gift of the profits to the recipient." (internal quotation marks and brackets omitted)). Any disclosure of material, non-public information clearly resembles a gift, in that it provides the recipient with something of value. The rule limiting the gift theory to relatives and friends made it largely unnecessary to ask what distinguished a "gift" from a non-gift disclosure, in that most insiders have few reasons beyond gift-giving to share valuable business secrets with close friends or family members. But in other cases, simply telling a jury to distinguish between a disclosure that is a gift, as opposed to one that is not, with no further guidance, invites decision-making that is entirely arbitrary and subjective. It puts the analysis largely on the intentions of the parties, which is likely to be unclear and proven through circumstantial evidence. In short, it undermines the objectivity and limitation that the personal benefit rule is designed to provide. *See Dirks*, 463 U.S. at 662-64.

The majority emphasizes that the vastly-expanded "gift" rule "reaches only the insider [or other tipper] who discloses information to someone *he expects will trade on the information*." Slip Op. at 29 (emphasis in original). This rule is a separate requirement for insider-trading liability in tipping cases, *see Obus*, 693 F.3d at 286-87; *United States v. Gansman*, 657 F.3d 85, 92 (2d Cir. 2011),[12] so the majority's reiteration of it does not add a new limitation to replace the personal benefit rule. It is, moreover, no significant limitation at all. The majority acknowledges that "many cases may rely on circumstantial evidence of intent." Slip Op. at 32. That means, even in a criminal case, that the government needs to show no objective facts to demonstrate a tipper's expectation that a tippee would benefit from the information. And, as noted above, civil cases do not even require that the tipper *actually* thought the tippee would trade, but instead just that the tipper *should have known* that the information would prompt a trade or a further tip.[13] In short, the independent requirement that the government show circumstantial evidence that a defendant knew, or should have known, that a recipient would trade on

[12] *Gansman* notes that "the SEC has recognized a number of situations . . . in which a tippee, but not the tipper, may be liable for insider trading on the theory that the tippee owed a duty of trust or confidence to the tipper and the tipper conveyed confidential information without intending to have it used for securities trading purposes." 657 F.3d at 92. But these are not true "tipping" cases, inasmuch as someone who *legally* entrusts information to another person is not providing a "tip" in any meaningful sense.

[13] *See Obus*, 693 F.3d at 287 (observing that "a tipper cannot avoid liability merely by demonstrating that he did not know to a certainty that the person to whom he gave the information would trade on it," and noting that "recklessness" is "actionable" in civil settings); 291 (concluding, in civil proceeding where a tip was a gift to a friend, that the "evidence easily supports a finding of knowing or reckless tipping to someone who likely would use the information to trade in securities").

information, or otherwise benefit from it, does not rescue the majority's weakening of the personal benefit rule.

The majority also notes that defendants convicted under the greatly-expanded "gift" rule will have the right to "appellate review of the sufficiency of the evidence of personal benefit." Slip Op. at 33. In other words, persons dealing with inside information should not worry that they may be ensnared by ambiguous circumstances, because after they are convicted, they will enjoy a review proceeding where they "carry a heavy burden" to show that, "drawing all inferences in favor of the prosecution and viewing the evidence in the light most favorable to the prosecution," *no* rational trier of fact could have found that a disclosure was a gift. *See United States v. Santos*, 449 F.3d 93, 102 (2d Cir. 2006) (internal quotation marks omitted). It is unclear why the majority believes that the cure for convictions that may rely entirely on circumstantial evidence is a proceeding where that same circumstantial evidence is evaluated in the light least favorable to the defendant.[14]

The majority's rule is inconsistent with *Newman*'s "meaningfully close personal relationship" requirement, which the majority explicitly overrules.

[14] The majority also notes that "not all insider trading cases rely on circumstantial evidence." Slip Op. at 33. That observation will be cold comfort for defendants convicted based on circumstantial evidence alone. Rules of criminal liability should not rely on our hope that, in some cases, the government will present far more evidence than is required. We should instead be concerned with the minimum that the government must show to convict a criminal defendant.

The majority claims that *Salman* "cast[] doubt" on the rule. Slip Op. at 23. The majority takes this view even though *Salman* explicitly abrogated *Newman* only in a single, narrower respect; even though *Salman* had no occasion to discuss friendships since the case was about brothers; and even though *Salman* emphatically declared the Supreme Court's intention to adhere to *Dirks*, which was the basis of *Newman*. The source of the majority's doubt is mysterious.

The majority also makes a bolder claim: that the limitation described in *Dirks*—that a personal benefit may only be inferred from a gift when the gift is between friends or relatives—is no longer good law. Slip Op. at 26-27 (noting that "[i]f the insider discloses inside information . . . and the disclosure resembles trading by the insider followed by a gift of the profits to the recipient, he personally benefits," and suggesting that the rule is "not limited by the relationships of the parties," and that the rule may apply even without "a personal relationship of any kind, let alone a friendship" between tipper and tippee (internal quotation marks and brackets omitted)). The majority reaches this conclusion even though, as noted, *Salman* spoke only of gifts raising the inference of a personal benefit when "a tipper gives inside information to a *trading relative or friend*," 137 S. Ct. at 428 (emphasis added), and even though *Salman* specifically noted the government's view that all gifts (no matter to whom) count as benefits, but did not adopt that view.

i. The Majority's Reading of *Salman* and *Dirks*

The majority seizes on several features of *Salman* to contend that the decision called into question the "meaningfully close personal relationship" requirement of *Newman* and the "friends and relatives" limitation of *Dirks*. First, the majority quotes *Salman* as saying that "'insiders [are] forbidden' both 'from personally using undisclosed corporate information to their advantage' and from 'giv[ing] such information to an outsider for the same improper purpose of exploiting the information for their personal gain,'" and suggests that this statement is not limited to gifts between relatives and friends. Slip Op. at 25, 27. This quotation, however, comes from a parenthetical in *Salman* summarizing *Dirks*, which, when read in context, does not suggest that liability can be sustained by gifts other than those to relatives and friends:

> *Maher effectively achieved the same result by disclosing the information to Michael, [his brother,] and allowing him to trade on it. Dirks* appropriately prohibits that approach, as well. *Cf.* 463 U.S., at 659 (holding that "insiders [are] forbidden" both "from personally using undisclosed corporate information to their advantage" and from "giv[ing] such information to an outsider for the same improper purpose of exploiting the information for their personal gain"). *Dirks specifies that when a tipper gives inside information to* "*a trading relative or friend,*" the jury can infer that the tipper meant to provide the equivalent of a cash gift.

137 S. Ct. at 428 (emphasis added) (brackets in original). The majority quotes the Supreme Court's parenthetical, leaving unstated its previous sentences applying the theory to a family member, and its next sentence summarizing *Dirks* as permitting an inference of benefit when the insider gives a gift to "a trading relative or friend." Given this language, the Supreme Court cannot have meant, by writing the above-quoted passage, to rule on whether gifts permit the inference of a benefit when they are given to persons other than trading relatives or friends.

Although the Supreme Court repeatedly stated in *Dirks* and *Salman* that a personal benefit may be inferred from an insider's "gift . . . to a trading relative or friend," the majority believes those statements were not meant "to *limit*" the "gift" theory to gifts between relatives or friends. Slip Op. at 21. But the majority does not explain why, if the Supreme Court meant that *any* gift could create the inference of a benefit, it would have repeatedly referred only to gifts among friends and relatives. Such an intention would be particularly puzzling given the sheer number of times in *Salman* the Supreme Court listed this qualification, including the following:

> A tipper breaches such a fiduciary duty, we held [in *Dirks*], when the tipper discloses the inside information for a personal benefit. And, we went on to say, a jury can infer a personal benefit . . . where the tipper receives something of value in exchange for the tip or "makes a gift of confidential information to *a trading relative or friend*."
>
> . . .

> In particular, we held [in *Dirks*] that "the elements of fiduciary duty and exploitation of nonpublic information also exist *when an insider makes a gift of confidential information to a trading relative or friend*."
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> . . .
>
> *Dirks* makes clear that a tipper breaches a fiduciary duty by making a gift of confidential information to "*a trading relative*," and that rule is sufficient to resolve the case at hand.
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> . . .
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> *Dirks* specifies that when a tipper gives inside information to "*a trading relative or friend*," the jury can infer that the tipper meant to provide the equivalent of a cash gift.

137 S. Ct. at 423, 427, 428 (emphasis added). In the majority's view, the Supreme Court's references to "a trading relative or friend," stated in *Dirks* and repeated nearly a half-dozen times in *Salman*, are just superfluous.

The majority additionally notes that the Supreme Court "applied" the gift theory in *Dirks*, where there was no "personal relationship of any kind" between Dirks and the insiders, and suggests that *Dirks* "implicitly" agreed with the position that the gift theory is "not limited by the relationships of the parties." Slip Op. at 26-27. It is true that, in *Dirks*, the Supreme Court stated that the insiders' "purpose [was not] to make a gift of valuable information to Dirks." *Dirks*, 463 U.S. at 667. But the Supreme Court did not say that, *had* the insiders given a gift, it would have been sufficient to support liability. The intent to give a gift is a necessary but not sufficient condition for liability under the gift theory; having determined that it was absent, the Supreme Court did not need to discuss the parties' relationship.

ii. The Majority's Argument Based on the Theory that Gifts Resemble an Insider's Trade Followed by a Gift of Profits

The majority also emphasizes the following passage in *Salman*:

> In particular, [in *Dirks*,] we held that "the elements of fiduciary duty and exploitation of nonpublic information . . . exist *when an insider makes a gift of confidential information to a trading relative or friend*." In such cases, "the tip and trade resemble trading by the insider followed by a gift of the profits to the recipient."

137 S. Ct. at 427 (citations and brackets omitted; emphasis in original). Omitting the Supreme Court's italicized statement that the rule applies to gifts between relatives and friends, the majority focuses only on the latter sentence: "In such cases, the tip and trade resemble trading by the insider followed by a gift of the profits to the recipient." *Salman*, 137 S. Ct. at 427; *see* Slip Op. at 24, *see also id.* at 26. The majority states that this sentence means that "the personal benefit one receives from giving a gift of inside information is *not* the friendship or loyalty or gratitude of the recipient of the gift; it is the imputed pecuniary benefit of having effectively profited from the trade oneself and given the proceeds as a cash gift." Slip Op. at 31-32 (emphasis in original).

Accordingly, the majority believes a benefit may be imputed to a gift-giver even when the recipient is not a friend or relative. The *only* question should be whether "the tip and trade resemble trading by the insider followed by a gift of the profits to the recipient." Slip Op. at 24 (brackets omitted); *see also id.* at 26.

There are several problems with this line of argument. First, the majority does not consider that there may be *two* limitations on whether a particular disclosure confers a "personal benefit," and that each limitation need not spring from the same reasoning. It is perfectly reasonable to say that gifts can, *in principle*, confer a personal benefit to the giver, but that *most* gifts actually confer little or no such benefit. And a main area in which it is reasonable to see gifts as creating a benefit for the gift-giver is when the gifts go to family or close friends.

Gifts to family or friends are more likely to confer a benefit upon the gift-giver because, as noted above, "to help a close family member [or friend] is like helping yourself." Transcript of Oral Argument at 8, *Salman v. United States*, 137 S. Ct. 420 (2016) (No. 15-628). This is true for several reasons. First, a person often benefits directly when making significant gifts to friends and relatives. A family member who receives a new car or apartment (or even a book) might share it with the gift-giver; similarly, providing a stock tip to a relative may obviate the need to give the type of loan sometimes expected of close kin. A gift-giver may also benefit because of his or her genuine enjoyment of the recipient's happiness. And last, the gift-giver may benefit from improved relations with friends or relatives. When gifts pass to relatives or friends, there is thus far greater reason than usual to believe that the gift-giver has benefitted personally, as the same benefits rarely accompany a gift to a casual acquaintance or a stranger.[15]

Moreover, permitting a personal benefit to be inferred only from those gifts between relatives and friends avoids much of the potential for liability based on innocent conduct that might flow from a broader "gift" rule. As noted above, insiders typically have no legitimate commercial reason to share business secrets with friends and family. An inference that information passed by the insider to a friend or relative was intended as a gift, rather than for business reasons, is thus far more defensible than a similar inference based on a gift between strangers or colleagues.

In demanding that the "gift" rule be justified by a single line of reasoning, the majority ignores the fact that logically independent limitations often cabin legal rules that would otherwise be unworkable because they extend too far. For example, in tort law, the doctrine that persons are liable for harms brought about by their actions is limited by what consequences

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[15] The majority counters that these benefits do not relate to the Supreme Court's statement that "the tip and trade resemble trading by the insider followed by a gift of the profits to the recipient," *Salman*, 137 S. Ct. at 427. *See* Slip Op. 26 n.7. But the majority's criticism ignores the Supreme Court's "friends and relatives" limitation on the "gift" theory, which must also be given significance. The particular benefits explained above show why gifts to relatives and friends are distinctive, and why such gifts occupy a limited area within the universe of gifts where a benefit to the gift-giver may typically be presumed.

they might reasonably have foreseen, and other rules of proximate causation. *Palsgraf v. Long Island R. R. Co.*, 248 N.Y. 339 (1928). In contract law, the principle that the parties' agreement at the time of the contract sets their duties is limited by a freestanding rule of impracticability. *See* Restatement (Second) of Contracts § 261 (Am. Law Inst. 1981). In the law of insider trading, the Supreme Court appears to have made a similar rule. It stated the principle that gifts may confer a benefit to the gift-giver because of their similarity to trading and gifting the profits, but limited that rule's reach to situations where the recipient is a relative or friend. And the limitation to friends and relatives prevents the gift rule from extending much too far: if interpreted broadly, the term "gift" could cover nearly any disclosure, and thus eliminate the personal benefit rule entirely.

Finally, even if tension exists between the principles that (1) a gift of information may provide an insider a benefit, and (2) that such a benefit may be inferred only from gifts to family and friends, such tension has existed since *Dirks*, where both of these statements appear. *Dirks*, 463 U.S. at 664. Our opinion in *Newman* chose between the two (arguably) competing rationales, and emphatically stated that we would infer a benefit only where gifts are exchanged within meaningfully close personal relationships. 773 F.3d at 452. Nothing in *Salman* breaks new ground on the point. Thus, there is nothing new that suggests we should reverse *Newman*'s decision without a hearing en banc.

iii. The Majority's Theory was Not Adopted in *Salman*

I note, also, that the majority's opinion exactly mirrors the government's view pressed in *Salman*: that "a gift of confidential information to anyone, not just a 'trading relative or friend,' is enough to prove securities fraud." *Salman*, 137 S. Ct. at 426. The Supreme Court, however, did not adopt that view. *Id.* at 427. It is curious indeed that the majority would understand *Salman* to require us to take a position that the Supreme Court explicitly considered but did not adopt.

Accordingly, I would hold (1) that *Salman* does not overrule *Newman*'s "meaningfully close personal relationship" requirement, and (2) that *Salman* does not overrule the limitation described in both *Dirks* and in *Salman* itself—that an inference of personal benefit may be based on an insider's gift to relatives or friends, but not a gift to someone else.

2. Martoma's Jury Charge Was Plainly Erroneous, and the Error was not Harmless

Having determined that *Newman* is still applicable, I next consider, under the standard articulated in *Newman*, whether Martoma's jury instruction was plainly erroneous, and, if so, whether the error was harmless. We review for plain error because Martoma did not object to the jury instruction on grounds related to the rule in *Newman*. *See* Fed. R. Crim. P. 52 ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). His slip-up was, of course, eminently understandable, given that the rule in *Newman* did not yet exist at the time of Martoma's trial.

The plain-error standard requires "that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected [Martoma's] substantial rights . . . and (4) the error seriously affects the fairness, integrity[,] or public reputation of judicial proceedings." *United States v. Prado*, 815 F.3d 93, 100 (2d Cir. 2016).

A. The "Modified Plain Error Rule" Applies

I would apply our "modified plain error" rule in these circumstances. *See United States v. Viola*, 35 F.3d 37, 41-43 (2d Cir. 1994). In the past, we have held that "[w]here . . . the source of an alleged jury instruction error is a supervening decision, we employ a 'modified plain-error rule, under which the government, not the defendant, bears the burden to demonstrate that the error was harmless.'" *United States v. Mahaffy*, 693 F.3d 113, 136 (2d Cir. 2012) (quoting *United States v. Bahel*, 662 F.3d 610, 634 (2d Cir. 2011)).

A number of panels of this Court have suggested, without deciding, that our "modified plain error rule" may not have "survived the Supreme Court's decision in *Johnson v. United States,* 520 U.S. 461 (1997)." *Bahel*, 662 F.3d at 634; *see also United States v. Boyland*, No. 15-3118, 2017 WL 2918840, at *7 (2d Cir. July 10, 2017) ("[W]e have acknowledged doubt as to the continued viability of the modified plain error test but have not had the need to address it."); *United States v. Botti*, 711 F.3d 299, 308-09 (2d Cir. 2013) (discussing whether *Johnson* overruled the modified plain error test).

We should adhere to the modified plain error rule when considering a supervening legal change for two reasons. First, we are bound by post-*Johnson* precedents of our Court that apply the rule. The panel in *Mahaffy* recited the modified plain error rule in 2012—over a decade after *Johnson*—and stated that the rule applied when "the source of an alleged jury instruction error is a supervening decision." 693 F.3d at 135-36. The panel then relied on the rule in vacating a conviction. *Id.* The panel in *United States v. Monteleone* also relied on the rule, and that case, too, was decided after *Johnson*. 257 F.3d 210, 223 (2d Cir. 2001).

Second, neither *Johnson* nor its reasoning challenges our modified plain error rule. In *Johnson*, the Supreme Court considered an appeal of a perjury conviction. *Johnson*, 520 U.S. at 463. During Johnson's trial, the district court ruled that the element of materiality, which was required to sustain a conviction under the perjury statute, was a question for the judge and not the jury. *Id.* at 464. That decision was "in accordance with then-extant Circuit precedent." *Id.* But after Johnson's conviction, the Supreme Court ruled in *United States v. Gaudin*, 515 U.S. 506 (1995), that materiality in perjury prosecutions was a question for the jury, not the judge. *Johnson*, 520 U.S. at 464.

Johnson did not object at trial to the district judge's ruling that materiality was a question for the judge. She argued on appeal, however, that she should be excused from showing that the district court's decision was plainly erroneous instead of merely erroneous, because the error was "'structural,' and so . . . outside [Federal Rule of Criminal Procedure] 52(b) altogether." *Id.* at 466. The Supreme Court rejected this argument, explaining that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Id.* The Supreme Court noted that Rule 52(b), which sets out the standard for plain error, "by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case." *Id.* The Supreme Court also "cautioned against any unwarranted expansion of Rule 52(b)," discouraging especially "the creation out of whole cloth of an exception to [Rule 52(b)], an exception which we have no authority to make." *Id.*

Even with its strong language, *Johnson* does not affect our modified plain error rule. *Johnson* rejected an attempt to ignore the language of Rule 52(b), which reads as follows:

> **(b) Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Crim. P. 52. The defendant in *Johnson* asked the Supreme Court to go beyond the language of Rule 52(b) by holding that she was not required to show "plain" error, as the rule requires, to gain review of a right "not brought to the court's attention." But the modified plain error rule in our Circuit does not lessen the degree of error a defendant must show to gain review. Instead, the modified plain error rule allocates the burden for considering whether a plain error "affects substantial rights." Rule 52(b) says nothing about that burden. Nor did *Johnson*: the Supreme Court explicitly declined to decide whether the error affected the defendant's substantial rights, given that the government would have prevailed for other reasons. 520 U.S. at 469.

Consequently, I would apply the modified plain error rule in this context.[16]

B. Martoma's Jury Instruction was Plainly Erroneous

The jury instructions given at Martoma's trial permitted conviction if the jury found that the tippers "gave the information to Mr. Martoma . . . as a gift with the goal of . . . developing a personal friendship." Tr. at 3191. As the majority opinion appears to acknowledge, *see* Slip Op. at 35, to say that someone gave a gift "with the goal of . . . *developing* a personal friendship" means that a personal friendship does not yet exist. The instruction thus allows the government to convict based on a gift between persons who are not friends, but might become friends later.

Newman held that a personal benefit cannot be inferred from gift-giving "in the absence of proof of a meaningfully close personal relationship." 773 F.3d at 452. *Salman* did not abrogate that rule. And whatever counts as a "meaningfully close" relationship, a non-existent friendship clearly is not one. The instruction is thus plainly erroneous under *Newman*.

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[16] The panel in *United States v. Botti* wrote that *Johnson* raised questions for the modified plain error rule because, in *Johnson*, "the Court applied plain error review without mentioning modified plain error review," and "[t]he Court never placed the burden of proof on the Government." 711 F.3d at 309. But there is no reason to think that the defendant in *Johnson* argued for such a rule. It is thus unsurprising that the Supreme Court did not apply it.

C. The Error was Not Harmless

The government bears the burden to show that the error was harmless, and "[a]n error is harmless in this context if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Mahaffy*, 693 F.3d at 136 (internal quotation marks omitted).

The government argues that the error was harmless because evidence at trial demonstrated a personal benefit to Gilman, the source of the information, in two ways. The government argues, first, that the information was a gift within a friendship between Gilman and Martoma, and second, that Gilman received a pecuniary benefit in return for passing Martoma the information.[17]

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[17] The government also argues that Ross received pecuniary benefits for speaking with Martoma. But the government states in its briefs that Martoma received from Ross the information he had already heard from Gilman. Gov't's Jan. 6, 2017 Br. at 8 n.5 ("Ross gave Martoma . . . . the same information that Gilman provided to Martoma, and on which Martoma traded; the only difference was that Gilman gave the information to Martoma first . . . ."). Although Martoma received additional confidential information from Ross at earlier times, the government does not argue that the earlier information was material, or that it played a role in Martoma's trading. If Martoma's receipt of the material information from Gilman was legal, and it served as the basis of his trades, then it would not matter that he heard the same information from Ross later.

The government suggests that the information from Ross "caused more illegal trades . . . when Ross's information confirmed what Gilman had already supplied." Appellee's Br. at 21. But the government provides no explanation of why a jury could not have believed that Martoma traded because of what

Although a jury was entitled to find at Martoma's trial that either the government's pecuniary or friendship argument satisfied this test, the government has not carried its "burden to demonstrate that the error was harmless." *Mahaffy*, 693 F.3d at 136.

First, it is not clear that Martoma and Gilman had the kind of meaningfully close personal relationship required by *Newman*. A jury *could* have seen their relationship that way. Gilman said that it "was touching" that Martoma had spent time trying to find him on one occasion, Tr. at 1240, and testified that Martoma "wanted to be friends" and "seemed to want to be closer than I thought a client should be to a consultant," Tr. at 1236. Gilman also stated that he thought he and Martoma "were friends" eventually. Tr. at 1488. But jurors could also see an ordinary, if pleasant, transactional relationship between a hedge fund trader and a medical expert. For example, the government asked at trial whether Gilman "enjoy[ed] consulting with [Martoma] more than other hedge fund clients," and Gilman responded, "I enjoyed other consultations as well, but I enjoyed speaking with him, yes." Tr. at 1236. Gilman also stated that Martoma told him many details from his (Martoma's) life, but when the government asked Gilman, "What did you talk to him about in your own life?" Gilman responded, "Not much." Tr. at 1238.

Moreover, at various stages in this case, the government has expressly denied that Martoma and

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Gilman had already told him instead of what he learned from Ross.

Gilman had any kind of meaningfully close personal relationship. At the first oral argument in this case, the government stated the following:

> Judge Chin: Is it possible that the jury convicted because they found that Dr. Gilman provided the information to develop or maintain a friendship?
>
> Government: *I suggest that that is not possible, your honor*. And the reason is because any friendship . . . that Dr. Gilman may have had with Mr. Martoma, and I think the defense suggests that's very small, was part of, and inextricably intertwined with, their pecuniary relationship.

Recording of Oral Argument at 26:27-26:58, *United States v. Martoma*, No. 14-3599 (2d Cir. October 28, 2015) (emphasis added). The government also described the relationship as "clearly a commercial, pecuniary relationship," given that Gilman was a "doctor[] who never spoke to Martoma before he started paying . . . and never spoke again once he stopped." Recording of Oral Argument at 34:18-34:27, *United States v. Martoma*, No. 14-3599 (2d Cir. October 28, 2015). In light of the government's own view of the issue, it would seem incorrect to hold that a reasonable jury could not have thought the same: that Martoma and Gilman did not share a meaningfully close personal relationship.

Although it is a much closer question, I would also hold that the government has failed to show that a rational jury must find that Gilman received a pecuniary benefit for disclosing the inside information on which Martoma traded. I do not disagree with the majority that, in the context of a "relationship of *quid pro quo*," *Newman*, 773 F.3d at 452, a jury *may* infer that an insider received a personal benefit from revealing information. But the jury is not required to find as much, and it is not clear that, in this case, a reasonable factfinder could not have thought otherwise.

At trial, Gilman testified that he did not bill for the sessions in July of 2008 during which he gave Martoma the information leading to Martoma's trades. Tr. at 1918. Whether Gilman was paid for his disclosures in July of 2008 thus relates to whether one believes either that SAC paid Gilman earlier in anticipation of the release of the July 2008 information or that Gilman released the information in order that he might be paid by SAC in the future.

The government cites no clear evidence that SAC paid Gilman either before or after July 2008 in return for revealing the information in question, rather than simply paying Gilman for his other consultations with Martoma. And the evidence at trial offered serious reason to doubt that Gilman took illegal actions because he wanted, as a general matter, to keep payments flowing from SAC. Testimony showed that Gilman was in high demand as an expert. From 2006 to 2010, Gilman earned at least $300,000 per year in consulting fees. Tr. at 1555-56, 1560. This income resulted from services Gilman provided to more than a dozen pharmaceutical and financial companies. Tr. at 1552-54. Gilman testified that, combining his consulting with his position as a professor at the University of Michigan, he "work[ed] about 80 hours a week on average." Tr. at 1560. Gilman also testified that he did not recall intentionally revealing confidential information to any of his other clients. Tr. at 1628-29. This suggests that Gilman had no shortage of well-paid consulting work from companies other than SAC, and did not need to disclose confidential information to receive significant payment from those other companies. It is unclear, given this background, why Gilman would have broken the law to keep SAC as a customer.

The government also conceded at oral argument in this appeal that no one ever asked Gilman a direct question as to whether he told Martoma inside information in exchange for a monetary benefit. In the absence of such testimony, and particularly in light of Gilman's abundant consulting opportunities, a reasonable jury need not have concluded that Gilman released the information in anticipation of payment. Instead, a jury could have believed SAC's payments were for information Gilman told Martoma during other sessions—information that was either public, non-material, or did not prompt a trade, and thus was not a violation of insider-trading laws. *See, e.g.*, Tr. at 1231 (noting that Gilman began speaking with Martoma in January 2006); 1242 (Gilman's testimony that he did not reveal confidential information until "the fall to winter of 2006-7"). I would not rule, particularly absent direct testimony on the point, that whenever inside information is revealed within a paid consulting relationship where other, legitimate service is rendered, a fact-finder must infer that the insider was paid to breach his duties.[18]

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[18] The plain-error rule also requires us to determine that "the error seriously affects the fairness, integrity or public reputation

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I note, in closing, that securities law is a field in which legal and ethical obligations are not coterminous. Leading scholars emphasize that insider-trading rules are under-inclusive in reaching conduct that disserves the public. *See*, *e.g.*, Jesse M. Fried, *Insider Trading via the Corporation*, 162 U. Pa. L. Rev. 801, 808-10, 813-14, 816-20, 826-34 (2014) (emphasizing that the law does not bar trades based on non-material information, and describing potential and actual harm to the public because of individual and corporate trades based on inside information). This is not surprising, as the Supreme Court has noted, given that securities regulation is built on statutes and that its principles apply broadly to many transactions in the marketplace:

> We do not suggest that knowingly trading on inside information is ever socially desirable or even that it is devoid of moral considerations. . . . Depending on the circumstances, and even where permitted by law, one's trading on material nonpublic information is behavior that may fall below ethical standards of conduct. But in a statutory area of the law such as securities regulation, where legal principles of general application must be applied, there may be

of judicial proceedings." *Prado*, 815 F.3d at 100. The evidence in this case is not so strong that the change in the law was irrelevant to whether Martoma would have been convicted. And the fairness of proceedings is undermined when a defendant is convicted based on evidence that might not have persuaded a jury under rules that emerged soon after the trial ended.

> significant distinctions between actual legal obligations and ethical ideals.

Dirks, 463 U.S. at 661 n.21 (internal quotation marks and citation omitted). Adhering to the Supreme Court's precedent may challenge us when it leaves unethical conduct unpunished. But there is great wisdom in the Supreme Court's limitations on broad rules, particularly when those rules might otherwise allow punishment of the absentminded in addition to persons with corrupt intentions. Today, however, the majority severely damages the limitation provided by the personal benefit rule, and casts aside Circuit precedent and Supreme Court rulings to do so.

For the reasons stated, I respectfully dissent.

Appendix D

Relevant Statutory and Regulatory Provisions

15 U.S.C. § 78j(b)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, of any facility of any national securities exchange—

…

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

17 C.F.R. § 240.10b-5

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of

[1] So in the original. Probably should be followed by a comma.

the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.