

1 the friends would trade on the inside information or
2 that he was reckless as to whether the friend would
3 trade on the inside information, he knew this was a
4 person who was in the stock market?

5 And as to the tippee, what would you have to
6 prove? That the tippee knew that the insider knew that
7 he was going to trade on the information? What would
8 you have to prove?

9 MR. DREEBEN: As -- as to the tip -- as to
10 the tipper, we submit that an element of the Cady,
11 Roberts duty is that the insider anticipated that the
12 person to whom he gave the information would trade.
13 Now, he --

14 JUSTICE KAGAN: Is anticipated the same as
15 he knew he would?

16 MR. DREEBEN: Yes. I think that knowledge,
17 anticipation, understanding is the language that the
18 Second Circuit has used to describe it all -- all fits
19 the bill.

20 We're talking here about a gift of the
21 information --

22 JUSTICE KAGAN: But it's not enough. It's
23 like, well, I think he might or --

24 MR. DREEBEN: No, it's not enough.

25 JUSTICE KAGAN: -- or, you know, I'm sort of

1 betting that he would, but I don't really know.

2 MR. DREEBEN: Now, in a criminal case, we
3 need to show a breach of the fiduciary duty. We're also
4 going to have to show an intent to defraud, fraudulent
5 intent, and we're going to have to show willfulness in
6 order to obtain a criminal conviction.

7 JUSTICE SOTOMAYOR: So why do you want to
8 put knowledge of the -- knowledge that it will be used
9 for trading as part of the breach of fiduciary duty? If
10 you do that, then you have to prove that the tippee knew
11 that the tipper thought it would be traded.

12 MR. DREEBEN: Yes, and I don't think that's
13 a very difficult burden because in most of these
14 situations, it's obvious why it's being done.

15 JUSTICE SOTOMAYOR: Why can't you put it in
16 the intent to defraud?

17 MR. DREEBEN: It goes to intent to
18 defraud --

19 JUSTICE SOTOMAYOR: So why -- why make it
20 part of the breach --

21 MR. DREEBEN: Because Dirks did. Dirks did.
22 Dirks adopted the Cady, Roberts formulation of the
23 breach of duty, which to go back to it again, it is of
24 the transmission of information that was made available
25 only for a corporate purpose, for personal benefit, with

1 the intent and knowledge that the individual is going to
2 trade. Now, it doesn't --

3 JUSTICE BREYER: It doesn't say it -- it has
4 a sentence here which is exactly what's hanging me up
5 and exactly what I thought you were going to answer
6 before you got cut off.

7 The sentence is: "The elements exist also
8 when an insider makes a gift of confidential information
9 to a trading relative or friend."

10 MR. DREEBEN: Yes.

11 JUSTICE BREYER: That doesn't sound as if
12 the writer of those words had in mind any person in the
13 world. Now, in each instance you have to know that that
14 person would, in fact, use the information to trade, but
15 it doesn't say any person in the world. It says a
16 trading relative or friend.

17 MR. DREEBEN: Yes, but --

18 JUSTICE BREYER: So I want --

19 MR. DREEBEN: -- this isn't a portion of the
20 opinion, Justice Breyer.

21 JUSTICE BREYER: No.

22 All right. So I should read the whole
23 opinion, and --

24 MR. DREEBEN: No, I'm -- it's a portion of
25 the opinion in which Justice Powell is giving examples

1 of the concrete circumstances, objective criteria that
2 will allow the government to establish that the purpose
3 of the disclosure was for personal benefit as opposed to
4 what the SEC was concerned about, that people would use
5 ostensible business justifications to explain why the
6 information was being given out and the SEC was
7 concerned this is going to create a quagmire of
8 subjective analysis. And the Court's response was to
9 give examples in which the objective criteria would help
10 establish. And the confirmation of this, I think,
11 Justice Breyer, is that at the end of the opinion, the
12 portion that Justice Kagan read earlier today, it's on
13 page 667, it's where the Court analyzes why Secrist and
14 the other insiders at Equity Funding had not occasioned
15 liability for Dirks.

16 JUSTICE BREYER: What can I read -- now I
17 want you to tell me what I can read to get the
18 explanation of Dirks that the majority of lower courts
19 have followed. It seems to me the Second Circuit has
20 not read it as you're reading it.

21 MR. DREEBEN: Correct.

22 JUSTICE BREYER: For after all, they came to
23 the opposite conclusion. And are there circuits that
24 have read it just as you had, said you walk down the
25 street. You find anybody, you don't even know him, but

1 he does keep saying trading, trading, trading, trading,
2 and you tell him, and therefore you know that he will
3 likely trade. Now, in other words, an anonymous person,
4 very far, just what you're arguing, what are the
5 circuits that follow that?

6 MR. DREEBEN: I'm not -- this case does not
7 involve that situation. This case involves --

8 JUSTICE BREYER: No, I realize this case --
9 I'm trying to get it clear in my mind.

10 MR. DREEBEN: This involves the classic,
11 prototypical situation that actually arises in the real
12 world and gets prosecuted.

13 There are very few cases that involve this
14 hypothetical of somebody distributing inside
15 information --

16 JUSTICE BREYER: I'm not worried about that.
17 I'm not worried so much about this case. I a.m. worried
18 about line drawing, and you want to draw a line so that
19 friend, relative, doesn't matter, and -- and before I
20 write those words, I'd like to know what circuit courts
21 have followed that approach?

22 MR. DREEBEN: So I think that there aren't a
23 lot of cases that don't involve friends or family
24 members. I think the -- the case that most closely
25 tracks the analysis that I think best explains Dirks is

1 the Seventh Circuit in SEC v. Maio. It's cited in our
2 brief. It does involve two people who were close
3 friends, because ordinarily those are the circumstances
4 in which people decide to risk criminal liability to
5 give out inside information so that somebody else can
6 profit.

7 But the Court makes the statement in it that
8 there was no corporate reason, there's no legitimate
9 reason why one friend who's an insider at the
10 corporation is giving information to a third person, he
11 didn't have to give information at all. So why did he
12 do it except for what the Court concluded fits within
13 the Dirks language?

14 CHIEF JUSTICE ROBERTS: What if you have a
15 situation where close friends or whatever and one says,
16 I want to tell you what I've been working on, it's
17 pretty interesting, but tells him, says, but whatever
18 you do, don't go buy stock. You can't do that. That's
19 against the law.

20 MR. DREEBEN: Right. And that is a
21 situation --

22 CHIEF JUSTICE ROBERTS: So you're not going
23 to prosecute that situation when the tippee goes and
24 makes \$100,000 on it?

25 MR. DREEBEN: The tipper in that situation

1 is disclosing information in the context where he has
2 made an express statement, and I'm assuming
3 understandings between the two that the information
4 would not be used. The tipper is not liable for insider
5 trading.

6 The tippee who then trades may be charged
7 under the misappropriation theory for having taken
8 information from a relationship of confidence or an
9 express statement and an agreement not to use the
10 information, and the fraud there is between the tipper
11 and the tippee, not between, as here, the tipper and the
12 people to whom the tipper owes a fiduciary duty.

13 This is explained in the SEC's Rule 10b5-2,
14 which helps define the kinds of relationships that
15 support a misappropriation theory of liability.

16 But I think, Mr. Chief Justice, what this
17 illustrates is we are not urging a theory in which
18 tippers are per se liable every time inside information
19 is disclosed. This isn't a revival of the information
20 theory that was rejected in *Dirks*. And I think what
21 makes that most clear is that there are situations in
22 which inside information can be legitimately revealed,
23 even when it is known that it will occasion trading, and
24 it doesn't violate the insider's fiduciary duty.

25 JUSTICE SOTOMAYOR: Mr. Dreeben, I think

1 you're taking this way out of existing law. Are you
2 going to suggest that tippees aren't routinely
3 prosecuted when tippers don't know that they are going
4 to trade? I think they are, and most often it's because
5 you claim that they should have known it was
6 confidential information.

7 MR. DREEBEN: In a criminal case, we're not
8 claiming that. The SEC in a civil case --

9 JUSTICE SOTOMAYOR: There's plenty --
10 there's a legion of cases I read for this -- preparing
11 for this argument where the government has said --

12 MR. DREEBEN: I don't think that there are,
13 Justice Sotomayor, because I don't think that that's
14 what we're -- we're certainly not making that submission
15 in this case. And I think that the cases that we are
16 trying and the jury instructions that we are obtaining
17 contemplate that the disclosures to a trading relative
18 or friend. And that is the heart of the gift theory.
19 So I don't think that I'm departing from the way that
20 the --

21 JUSTICE SOTOMAYOR: So you're going to let
22 go of the guy that Justice Alito -- the guy on the
23 street who looks dejected is not my friend or a close
24 relative, but I give him a tip and say, go trade on
25 this. It will make you a lot of money.

1 That person -- that tipper would not be
2 liable.

3 MR. DREEBEN: He would, Justice Sotomayor,
4 for the very reason you yourself articulated. In that
5 situation, there's a gift of information to someone with
6 the intent that the person trade. Now doesn't --

7 JUSTICE SOTOMAYOR: So it's irrelevant
8 whether it's a friend or family member?

9 MR. DREEBEN: My submission is that the best
10 way to understand Dirks is that it goes to a breach of
11 fiduciary duty, which would not be limited to two
12 categories like that. And I don't think that Justice
13 Powell, in articulating this species of personal
14 benefit, was attempting to rely on it. I was trying to
15 explain this before to Justice Breyer.

16 At the end of the opinion where the Court
17 precisely says that Secrist is not liable because he
18 didn't make any financial advantage, it goes on to say,
19 nor did he make a gift of valuable information to Dirks.

20 Now the Court didn't say, well, Dirks wasn't
21 a close friend. Dirks wasn't a relative. Therefore
22 he's out of the picture.

23 The Court applied gift analysis in that
24 situation precisely because the line that the Court was
25 trying to draw was between the appropriate use of

1 corporate information and the inappropriate use.

2 JUSTICE KAGAN: Mr. Dreeben, I get your --
3 your theory and why it doesn't make any particular
4 difference. And indeed, in that same paragraph where
5 the Court says relatives or friends, the Court, just a
6 sentence before, just talks about an intention to
7 benefit a recipient --

8 MR. DREEBEN: Yes. Right.

9 JUSTICE KAGAN: -- without any sense of who
10 that recipient has to be.

11 On the other hand, as you say, almost all of
12 these cases are relatives and friends.

13 MR. DREEBEN: Yes.

14 JUSTICE KAGAN: And things might look
15 different if we had a case that was not a relative or
16 friend. And why not separate out that strange, unusual,
17 hardly-ever-prosecuted situation and say we're not
18 dealing with that here? We have nothing to say about
19 it.

20 MR. DREEBEN: I'm fine with that. We are
21 not seeking the Court to go beyond Dirks. These are the
22 cases that actually do arise in the real world. There
23 is one case that involves a guy who was an insider who
24 tipped his barber, and the district court said, well,
25 the barber and the insider weren't close enough, so that

1 it didn't count under Dirks. I think that's wrong. I
2 don't think that there's a good principle for it. But
3 the court --

4 JUSTICE SOTOMAYOR: So is there a difference
5 between friend and acquaintance, as you're talking?
6 Tell me.

7 MR. DREEBEN: So this is precisely the
8 reason why I think it doesn't make sense, from a point
9 of view of principle or application, to draw a
10 distinction that's based on words in the opinion that
11 the court didn't actually articulate when it applied
12 them to the very situation before it. There is more
13 nebulous features about relationships, once you confine
14 it to undefined terms as friends or -- or relatives.

15 But this case clearly doesn't indicate --
16 implicate that at all. It's in the heartland of the
17 insider trading prohibition. It's one brother to
18 another brother. There's a very close relationship.
19 The record is replete with all of that.

20 The Court doesn't have to deal with further
21 outlier cases, and it doesn't have to reconceptualize
22 Dirks, or even interpret it in the way that I have
23 synthesized its analysis, in order to conclude that a
24 strict pecuniary gain limitation is inimical to the
25 purposes of the securities laws and inconsistent with

1 the doctrine that the Court has announced and applied
2 for 33 years.

3 And with the exception of the Second Circuit
4 in the Newman case, lower courts haven't had any
5 difficulty applying it. There has been a couple of
6 outlier cases, as I mentioned, involving barbers. But
7 almost all of these cases involve situations in which
8 there's a pretty good explanation for why the tipper
9 would be providing information for the tippee in breach
10 of a fiduciary duty.

11 And in cases when there is a legitimate
12 corporate purpose alleged for the disclosure, which
13 conceivably may have been the concern of the Newman
14 court, Dirks already addressed that, too. It said that
15 when there's an ostensibly legitimate business
16 justification proffered for the disclosure, people are
17 not going to be wandering around in the dark trying to
18 sort out a subjective intent. There will be objective
19 factors from which the relevant purpose, the personal
20 purpose, can be inferred.

21 And that's the portion of the opinion in
22 which the Court goes through examples of what those
23 objective circumstances will be. It includes the
24 intention to benefit a particular person, and it very
25 specifically includes the gift situation. If the Court

1 feels more comfortable given the facts of this case of
2 reaffirming Dirks and saying that was the law in 1983,
3 it remains the law today, that is completely fine with
4 the government.

5 I think that there are cases in which it
6 would be clearer and more beneficial to adopt the rule
7 that if there's no corporate purpose, the disclosure to
8 anyone is a breach of a fiduciary duty. But if the
9 Court is more at home with the language that was
10 actually used in Dirks and wants to reaffirm it, it
11 should do so.

12 Clearly, Congress is aware of this line of
13 cases. It has never disturbed it. It has actually
14 incorporated the words "insider trading" into Section
15 10(b). It's not like this is a stranger to Congress.
16 And when it applied the 10(b) prohibitions to security
17 swap agreements, this is a well known area of the law.
18 And the submission of the government is that the Court
19 should reaffirm it.

20 JUSTICE GINSBURG: And so a tip here like
21 the one we're concerned with, the requirement is that
22 that tippee know that the information came from a
23 insider? Is that --

24 MR. DREEBEN: Yes. He has to know it came
25 from an insider in breach of a fiduciary duty and for

1 personal benefit, as I've been articulating it.
2 Conscious avoidance can be used to establish that
3 knowledge. The person doesn't have to know all of the
4 details of exactly what the breach of fiduciary duty
5 was. There has to be enough information so that the
6 government can prove beyond a reasonable doubt that the
7 tippee didn't know. And --

8 JUSTICE SOTOMAYOR: Is recklessness used?

9 MR. DREEBEN: Recklessness is not enough for
10 a criminal case, no. We need -- we need to show
11 knowledge in order to establish the breach of fiduciary
12 duty. We can and we do rely on conscious avoidance. To
13 the extent that the tipper understood that the tippee
14 would trade, that's a requirement of knowledge. It's
15 not a requirement that the person intend that the tippee
16 trade. It's just an understanding and knowledge that it
17 would happen.

18 The tippee has to have the knowledge of the
19 breach. Oftentimes this can be inferred from
20 circumstantial evidence. This is a perfect example of
21 it. The Petitioner in this case was the -- was the
22 brother-in-law of the insider. He knew that the
23 information was coming out of Citigroup. He knew that
24 there was no legitimate reason for it to be disclosed
25 from his brother.

1 And in submission, finally, the Court
2 believes that -- the government believes that the Court
3 should affirm the judgment in this case. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Ms. Shapiro, you have four minutes
6 remaining.

7 REBUTTAL ARGUMENT OF ALEXANDRA A. E. SHAPIRO

8 ON BEHALF OF THE PETITIONER

9 MS. SHAPIRO: The government's argument to
10 this Court illustrates precisely the dangers with
11 leaving a statute -- without having a statutory
12 definition. The government now says, for the first time
13 in its merits briefs and in its argument to this Court,
14 that somehow Section 10(b) and Dirks embody a duty of
15 loyalty standard that's nowhere in either the statute or
16 the Dirks case.

17 Indeed, they never argued this to the
18 district court, not to the Ninth Circuit, not in the
19 brief in opposition, nor in the Newman case. And the
20 facts of Newman are actually inconsistent with the
21 standard that the government purports to propose,
22 because the government claims that it will insist that
23 the insider has to have an intention that the tippee
24 trade. And if you look at the facts of Newman, you'll
25 see that the undisputed evidence was that with respect

1 to the Nvidia company tipper, there was no evidence that
2 that insider knew his acquaintance from church was going
3 to trade on the information. And likewise, there wasn't
4 any evidence that the other insider was aware that
5 anyone would trade.

6 And the other -- the example of the other
7 insider also illustrates that sometimes it's not so
8 clear whether someone has a corporate purpose or a
9 personal purpose, because sometimes purposes are mixed.
10 In that instance, the insider was speaking with an
11 analyst who was checking his financial model, and as the
12 evidence in the case shows -- this happens every day in
13 the markets -- the government argued that he was also
14 seeking career advice from the other individual who was
15 a college friend, but there's no indication there that
16 he knew he was going to trade.

17 And furthermore, the government's argument
18 is completely inconsistent with Dirks. The facts of
19 Dirks, and it was undisputed on the record, are that the
20 insider secrets disclosed the information. He was
21 seeking to expose a fraud, but he intended that Dirks
22 would share the information with his institutional
23 clients so that they could trade and drive the price of
24 the stock down. And the Court expressly rejected in
25 footnote 27 a test almost identical to what the

1 government is proposing here. "The SEC," the Court
2 said, "appears to contend that an insider invariably
3 violates the fiduciary duty of the corporation
4 shareholders by transmitting nonpublic corporate
5 information to an outsider when he has reason to believe
6 that the outsider may use it to the disadvantage of the
7 shareholders." And the Court rejected that argument.

8 And later in the footnote, the Court talks
9 about the dissent's argument. And the dissent argued,
10 the Court said, by perceiving a breach of fiduciary duty
11 whenever inside information is intentionally disclosed
12 to securities traders, the dissenting opinion will
13 achieve the same result that the Court had rejected in
14 Chiarella and rejected again; that is, effectively, a
15 parity of information rule. So the government test is
16 inconsistent with Dirks.

17 Furthermore, as I believe Mr. Dreeben
18 mentioned, one of the points in the section of the
19 opinion that discusses the test is the concern that
20 courts shouldn't have to read the party's minds as to
21 this element of the offense as opposed to scienter, and
22 to the extent the government claims that there's an
23 intentionality element to the breach of duty, that would
24 violate that suggestion in the Dirks case as well.

25 And finally, with respect to the whole

1 remote tippee concept in Petitioner in this case, in
2 this case Petitioner had no idea why Maher Kara was
3 disclosing information to his brother. The only thing
4 the record shows is that there was testimony that
5 Michael told him the information came from the brother.
6 There was no evidence he had any idea why, and as I
7 believe Justice Sotomayor pointed out earlier, there
8 were three different reasons at various points that
9 information was disclosed. One was so that he could
10 educate himself about the science of the work that he
11 was doing. One was so that they could discuss potential
12 drugs for their ailing father. And then there was the
13 third phase.

14 But there was no evidence whatsoever that
15 Petitioner had any idea why the information was being
16 disclosed.

17 And finally, with regard to the point about
18 the congressional statute, the fact of the matter is, if
19 Congress could be said to have --

20 CHIEF JUSTICE ROBERTS: Finish your
21 sentence.

22 MS. SHAPIRO: -- if Congress could be said
23 to have ratified anything, all it could be said to have
24 ratified is that there is an insider trading ban.
25 There's no indication that Congress ever ratified the

1 Dirks gift language.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 11:06 a.m., the case in the
6 above-entitled matter was submitted.)

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