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. 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

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

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

[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

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. 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…").

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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.

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.

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

[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).

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

[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

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 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.

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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.

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

[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.

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. 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]

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

[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.

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.