United States of America v. Martoma Doc. 205657013

14-3599
United States v. Martoma

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2016

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

Docket No. 14-3599

UNITED STATES OF AMERICA,

Appellee,

– v. –

MATHEW MARTOMA

Defendant-Appellant.

B e f o r e:

KATZMANN, *Chief Judge*, POOLER and CHIN, *Circuit Judges*.

Dockets.Justia.com

Defendant-appellant Mathew Martoma appeals from a judgment of conviction entered on September 9, 2014 in the United States District Court for the Southern District of New York (Gardephe, *J*.). Martoma was found guilty, after a 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. After Martoma was convicted, this Court issued a decision in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), which elaborated on the Supreme Court's ruling in *Dirks v. S.E.C.*, 463 U.S. 646 (1983), concerning liability for a "tippee" who trades on confidential information obtained from an insider, or a "tipper." *Newman* concluded that the "personal benefit" that a tipper must derive from providing inside information for a disclosure to trigger insider trading liability could not be inferred under the "gift theory" articulated in *Dirks* "in the absence of proof of a meaningfully close personal relationship [between the tipper and tippee] 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.

Martoma initially argued on appeal that the jury in his case had not been properly instructed and that the evidence presented at his trial was insufficient to convict him in light of *Newman*. While Martoma's appeal was pending, the Supreme Court issued a decision in *Salman v. United States*, 137 S. Ct. 420 (2016), which rejected certain aspects of *Newman*'s holding. *Id*. at 428. In supplemental briefing, Martoma argues that his conviction should still be reversed under *Newman* because *Salman* did not overrule *Newman*'s requirement that a 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. *Newman*, 773 F.3d at 452.

We conclude 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. Accordingly, the judgment of the district court is **AFFIRMED**.

POOLER, *Circuit Judge*, dissents in a separate opinion.

ROBERT ALLEN and ARLO DEVLIN-BROWN, Assistant United States Attorneys, (Megan Gaffney, Michael A. Levy, and Margaret Garnett, Assistant United States Attorneys, *on the brief*), *for* Joon H. Kim, Acting United States Attorney for the Southern District of New York, New York, NY, *for Appellee*.

PAUL D. CLEMENT (Erin E. Murphy, Harker Rhodes, and Edmund G. LaCour, Jr., *on the brief*), Kirkland & Ellis LLP, Washington, DC; Alexandra A.E. Shapiro, Eric S. Olney, and Jeremy Licht, Shapiro Arato LLP, New York, NY; Charles J. Ogletree, Jr., Cambridge, MA, *for Defendant-Appellant*.

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

[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.

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

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[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.

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*.

[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 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*

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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 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).

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 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]

[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.

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] 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

[6] The "meaningfully close personal relationship" requirement was paired, moreover, with the additional requirement that the relationship "generate[] 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. The dissent concedes that *Salman* expressly rejected the latter part of this pairing, *See* Dissent Slip Op. at 18.

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 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

[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.

("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 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 "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

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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 (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.

"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 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 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

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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.

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 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

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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.

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.