

The Supreme Court Grants Certiorari In *Salman*

January 20, 2016 | [Insider Trading](#), [The GEE Blog](#)



Brian E. Casey
Partner

Score one for the tea leaf readers. For the last past year, since the Second Circuit issued its watershed insider trading opinion in *United States v. Newman*, we have followed the fall-out from that decision and speculated whether the time was ripe for the Supreme Court to address this issue again. In the government's petition for Supreme Court review, it argued that *Newman* gutted *Dirks* and created numerous negative consequences for the country's financial markets.

[Back in August](#), we suggested that the Court might choose not to grant certiorari in *Newman* because it appeared not to be an optimal vehicle for addressing whether insider trading can arise simply from a close family relationship between the insider and tippee. We noted then that, in its cert. petition, the government opted not to raise one of the two independent reasons for the Second Circuit's decision, *i.e.*, the court's conclusion that a remote tippee must know that the tipper supplying the inside information acted for personal benefit.

As a general rule, the Supreme Court only takes cases where the question presented is outcome-determinative, and the government's decision not to raise this issue meant that a decision by the Supreme Court would likely have no effect on the Second Circuit's vacation of Newman's conviction. We also speculated that it might be more likely that the Court would grant certiorari in *Salman v. United States*, a case in which the Ninth Circuit relied on a more prosecution-friendly interpretation of *Dirks* and which was likely to head to the Court in November. When the Court denied the government's petition in *Newman* [last October](#), we suggested that the denial in *Newman* may have increased the likelihood that the Court would grant cert. in *Salman* once that petition was filed. And now, the Court has done just that. On Jan. 19, the Court granted *Salman*'s petition for certiorari and will address the following question: Does the personal benefit to the insider that is necessary to establish insider trading under *Dirks* require proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as *Newman* held, or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in *Salman*?

The government scarcely contested *Salman*'s argument that this issue is cert-worthy. Indeed, it would have looked somewhat foolish since *Salman* parroted much of the Government's arguments in its *Newman* petition. Instead, the government's principal argument against granting cert. on this issue was that nothing had changed since the Court denied cert. in *Newman*. Of course, the subtext is that, according to the government's own petition in *Newman*, this means that enforcement of the prohibition against insider

RELATED PRACTICE AREAS

Financial and Regulatory Litigation
Government Litigation
Securities and Capital Markets
White Collar and Investigations

RELATED TOPICS

Newman

trading is in disarray to the detriment of the Nation's securities markets, and there is a clear circuit split on how to interpret *Dirks*. The government's lack of a strong argument against granting cert. in *Salman* probably indicates that it too wants to see this issue addressed. Forebodingly for the government, about two-thirds of cases accepted by the Court are reversed. We'll see what transpires. A briefing schedule has not yet been issued, nor has an argument date been set.