

rjm 12/02/86

SUPPLEMENT TO POOL MEMORANDUM

To: Justice Powell

December 2, 1986

From: Ronald

No. 86-422, Carpenter v. United States

Petrs challenge their convictions for securities fraud and for mail and wire fraud. The scheme involved trading on the price changes that could be expected to occur following publication in the Wall Street Journal of information about various securities.

As the pool memo writer explains, the mail and wire fraud contention (question 2) is probably not certworthy. The basic claim is just that the lower courts have gone too far; there is no conflict. Personally, I am troubled by such an ex-

pansion of federal criminal jurisdiction. You expressed similar misgivings last term in Sedima (the RICO case). But considering the lack of conflict, this question probably should be denied.

The securities question is quite substantial. CA2 upheld a criminal conviction for securities fraud based on use of information that was not acquired from any person having an inside relationship with the company in question. The only relevant fraud was with respect to the Wall Street Journal's policies. Those policies have nothing to do with securities. I find it difficult to reconcile the result below with your opinion in Chiarella v. United States, 445 U.S. 222 (1980), which specifically rejected reliance on "parity of information" in this area.

The biggest reason not to grant is the absence of conflict. Of course, this issue will not arise with frequency except in CA2, as history demonstrates. CA2 has had a similar rule since 1981, which no other CA has yet had occasion to address. Considering the importance of the issue to the securities industry, I think you should grant on this question.

I recommend a grant on question 1.