

No. 20-\_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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PATRICK MURACA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Criminal Justice Act

QUESTIONS PRESENTED

1. Whether a trial court must provide a definition for a term of operative significance when it is requested by a deliberating jury?
2. Whether the Court of Appeals properly relied on its own precedent to determine that the district court correctly declined to define the term "capitalization," and answer whether capitalization can include intellectual property, when requested by the jury, even when the Court of Appeals itself acknowledged that the better practice would be to define all operative terms for the jury?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were the United States of America against Patrick Muraca.

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**PETITION FOR A WRIT OF CERTIORARI**

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

**OPINION BELOW**

The United States Court of Appeals for the Second Circuit, by unpublished summary order, reproduced in the appendix at App. 1, affirmed the judgment of the United States District Court for the Southern District of New York. The ruling of the district court is reprinted at App. 4.

**JURISDICTION**

The summary order of the court of appeals was entered on May 6, 2020. This petition for a writ of certiorari is being timely filed within ninety days of the summary order, in compliance with Rule 13.3 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

#### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

United States Constitution, Amendment V, provides the following, in pertinent part:

No person shall be deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment VI, provides the following, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

### **STATEMENT OF THE CASE**

1. The prosecution related to allegations that Petitioner, who had a decades-long background in the medical technology field, and founded two biotechnology companies—NanoMolecularDX LLC (“NMDX”) and MetaboRX LLC (“Metabo”)—solicited investments through false representations, and misappropriated the invested funds for his personal use. In addition, the Government alleged that Petitioner made false statements after having initially obtained the investments, and otherwise fabricated evidence. Following a seven-day jury trial, Petitioner was found guilty of one count each of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2; and making a false statement, in violation of 18 U.S.C. § 1001. With respect to the false statement count, however, the jury found only one of the seven alleged false statements to have been proved.

2. During jury deliberations, numerous notes were returned to the judge with respect to “capitalization” and “intellectual property,” and extended colloquy was held regarding the jury’s questions. Chief among them for appeals purposes was a note asking for the definition of “capitalization”—a term that had been used in documents sent to Metabo investors, and which was discussed in the prosecutor’s summation—and whether capitalization could

include intellectual property. This was significant to the case because Petitioner had obtained number biotechnology patents for NMDX and Metabo, which the defense maintained were the most important asset of the businesses, and thus asserted had properly been included as "capitalization" of Metabo.

As discussed below, the district court, after hearing extensive argument from counsel and receiving overnight letter briefing, expressly declined to provide a definition of the term:

I have to tell you that I agree with the government on the issue of defining terms that were used in documents in this case. I mean, if those were questions - let me rephrase that.

Those were questions that you could have asked of the witnesses and chose not to. I don't think it is appropriate for me to answer what the evidence in this case shows as to what was or wasn't funding or capitalization. Neither of those words are statutory terms in the context of this case. I don't think they are defined by an established set of legal criteria. See the Russo case, 74 F.3d 1393. I do think it is within the province of the jury and not the court to determine the meaning of those terms in the context of this case. (A. 5)

The district court subsequently stated that:

I am just saying that if something is not before the jury, it is not appropriate for the court to instruct the jury as to the definition of a term in a specific document before it that is not a legal term.

If I had case law suggesting it was appropriate to do so, then I would consider your

request, but I don't. Instead, you know, I have the Russo case, which suggests that it is inappropriate to do so in a case with a somewhat similar issue. (A. 17)

3. Petitioner raised several issues on appeal, including that the district court's refusal to answer the deliberating jury's questions regarding the definition of "capitalization" allowed the jury to reach a verdict based on an incorrect and misleading understanding of a central concept to the case, in violation of the principles underlying Bollenbach v. United States, 326 U.S. 607, 613 (1946), where the circumstances showed that there was a good chance that the jury would not have otherwise convicted Petitioner, as well as that the sentence was unreasonable and that the district court had improperly calculated the forfeiture amount.

4. The Court of Appeals rejected all of Petitioner's arguments. In doing so, the court stated the following, in pertinent part:

As to Muraca's challenge to the district court's response to the jury note, "[t]he trial court enjoys considerable discretion construing the scope of a jury inquiry and in framing a response tailored to the inquiry." United States v. Rommy, 506 F.3d 108, 126 (2d Cir. 2007). "If a supplemental charge is legally correct, the district court enjoys broad discretion in determining how, and under what circumstances, that charge will be given." United States v. Civelli, 883 F.2d 191, 195 (2d Cir. 1989).

We disagree with Muraca that the district court abused its discretion in responding to the jury note asking for a definition of "capitalization." The district court properly relied on our decision in United States v. Russo, 74 F.3d 1383 (2d Cir. 1996), and declined to provide an extra-record definition of the financial term. The district court correctly determined that the term was not "defined by an established set of legal criteria," App'x 95, but rather was used by witnesses, and it would not be appropriate for the court to define it for the jury. (A. 2)

#### **REASONS FOR GRANTING THE PETITION**

##### **The Court Should Grant Certiorari To Make Clear That A Trial Court Must Provide A Definition For A Term Of Operative Significance When It Is Requested By A Deliberating Jury.**

1. Although this Court has long recognized that, in the case of a note from a deliberating jury, "[w]hen a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy," Bollenbach v. United States, 326 U.S. 607, 613 (1946), the Court has not yet taken the opportunity to decide how this principle applies in a case in which a deliberating jury requests the definition of an operative term used at trial. Here, the district court refused to provide an answer to a direct question from the jury about the definition of "capitalization," and whether it could include intellectual property, an inquiry that went

directly to the central issue of whether Petitioner had made false representations to investors.

The district court instead instructed the jury to rely on what the defense maintained was inaccurate witness testimony regarding the meaning of the term, and said nothing about whether it could include intellectual property, which ultimately led the jury to convict based on an erroneous understanding of a central concept.

The unusual circumstances of this case, and the importance and applicability of this legal question to virtually any criminal trial, make this an appropriate case for this Court to grant Certiorari and make clear that the principles enunciated in Bollenbach apply to these circumstances.

2. In Bollenbach v. United States, 326 U.S. 607, the Court reversed a defendant's conviction where the district court initially refused to answer, then gave an inaccurate response to a question from a deliberating jury, and stated that, where the jury clearly indicated its confusion, "[d]ischarge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria").

This Court has not yet had an opportunity to discuss how this principle applies when the jury asks for a definition of an operative term used at trial. In Weeks v. Angelone, 528 U.S. 225 (2000), which arose in the context of a capital murder prosecution, the Court addressed a series of juror questions during the penalty phase of their deliberations that expressly related to the possibility of parole. Ultimately, the Court determined that the trial court's responses, in which it instructed the jurors that they were to impose the penalty they believed appropriate, without further consideration of what might occur subsequently, were legally accurate, and that the trial court was not constitutionally required to instruct the court on particular mitigating factors, were appropriate. Id. at 234. In distinguishing Bollenbach, the Court noted that "Bollenbach involved a supplemental instruction by the trial court following an inquiry from the jury—in that respect it is like the present case—but the instruction given by the trial court in Bollenbach was palpably erroneous," unlike the legally correct instruction given by the trial court there. 326 U.S. at 611.

3. Circumstances similar to those here have arisen on several occasions in the various courts of appeals, although none in a case where the issue was as clearly distilled as in

the Petitioner's case. In United States v. Anderton, 629 F.2d 1044 (5th Cir. 1980), the Fifth Circuit reversed the defendant's conviction and remanded for a new trial under circumstances closely resembling those here. The Anderton prosecution involved a defense of entrapment, where the jury had sent a note asking whether an individual "[c]ould ... have been considered acting as an agent of the government official?" 629 F.2d at 1046. The district court refused the defense request to provide an answer with respect to agency, and instead instructed the jury that "[i]n answer to your question, you are advised that this is a factual issue to be decided by the jury under the facts heard in court and the Court's instructions as to the law." Id.

This was error, the Fifth Circuit held, because "[t]he primary purpose of jury instructions is to define with substantial particularity the factual issues, and clearly to instruct the jurors as to the principles of law which they are to apply in deciding the factual issues involved in the case before them," and "[i]n a trial in which the government's key witness was a 'Special Agent,' it was just too much to expect an unguided lay jury to define the word without assistance from the court." Id. at 1048.

In contrast, in United States v. Russo, 74 F.3d 1383 (2d Cir. 1996), the Second Circuit dealt with a variation in which

the defense had requested—without any indication from the jury itself that it sought clarification—that the district court provide the jury with a definition of “stock parking,” a term used by the prosecution to characterize the defendant’s alleged stock fraud scheme. The district court denied the request on several bases, including that “we do not believe the government’s definition of ‘parking’ varied sufficiently to confuse the jury or mislead the defense,” and that “‘parking’ was simply used by the government as a means to describe some of the fraudulent activities of the appellants and requires no more guidance to the jury than other factual allegations,” since it was “not a legal term requiring jury explanation[; r]ather, it is a business term that describes conduct.” Id. at 1393.

The Russo court particularly noted that the defense’s proposed instruction was misleading and confusing in the context of the evidence. Id.; see also United States v. Johnson, 892 F.2d 707, 710 (8th Cir. 1989) (distinguishing Anderton where trial court refused to submit jury instruction on the definition of “knowingly,” and noting whereas the term in Anderton carried a “rather esoteric meaning,” “knowledge” is “a word of common usage and thus within the ordinary understanding of a juror,” and giving a definition “would not aid the jury and might lead to unnecessary confusion”).

Notably, the Russo court did mention in a footnote the Fifth Circuit's decision in Anderton, stating that "[t]he Fifth Circuit has noted that '[t]he better practice would be to instruct the jury on the meaning of all terms of operative significance,' [but w]hile that may be a worthy aspiration, it is evidently not the law of this circuit as appellants cite no Second Circuit cases for the proposition that all significant terms must be defined in instructions to the jury and we find none." Id. at 1393, n.5, quoting Anderton, 629 F.2d at 1049.

In United States v. Johnson, 892 F.2d 707, 710 (8th Cir. 1989), the court distinguished Anderton in the context of the trial court's refusal to submit a jury instruction on the definition of "knowingly." Id. at 710. The Eighth Circuit explained that whereas in Anderton the word "agent," "carr[ied] a rather esoteric meaning," under the Eighth Circuit's own precedent, "'knowledge' is 'a word of common usage and thus within the ordinary understanding of a juror,'" and the same conclusion properly applied to the word "knowingly." 892 F.2d at 710. Notably, the court added that "[d]efining this term would not aid the jury and might lead to unnecessary confusion. There is no indication in the decision, however, that the request for a definition for "knowingly" came in response to a jury note, and it seems

reasonable to conclude that there was no such note there. Had there been, the court's statement that a definition of the term would not aid the jury would have been nonsensical.

Likewise, in United States v. Trice, 823 F.2d 80, 92 (5th Cir. 1987), the court rejected the argument that "the court's charge was deficient because it failed to define 'advance,'" because "under section 1014 "advance" has no technical or restricted meaning in this context," and [i]n the trial of this case, the term 'advance' had been used innumerable times in the presentation of evidence and in jury argument," and was "consistently used to describe the disbursement of loan funds from Lancaster to T & H." Id. at 92.

4. The reliance on Russo by the district court and court of appeals, ignoring their duty to ensure that the jury accurately understood and applied the facts and law, was misplaced for several important reasons. First, as the district court here acknowledged (A. 9), there had been no request from the jury in Russo for a definition of "parking" or any other term, nor was there any indication from jury that it was confused as to the meaning, and the defense request that the term be defined by the court came strictly from the defense. 74 F.3d at 1394.

The term at issue in Russo, "stock parking," was itself a specialized term of art, as opposed to the fundamental financial concept of "capitalization," which was a neutral term that could easily be found in a dictionary, and in any event was more a characterization conferred by the government to describe the particular stock manipulation scheme at issue than a legal or financial term of general applicability. (A. 8)

Moreover, in Russo, the prosecution presented the testimony of an expert witness "to describe the breadth and impact of the manipulation scheme," and who "testified about K & C's trading patterns, using charts and lists of stock movement to demonstrate how Lopat and EAS were kept off the market through unauthorized trades and parking." Id. at 1388-89.

Perhaps most notably, the Russo Court's express acknowledgement that "[t]he better practice would be to instruct the jury on the meaning of all terms of operative significance," was a "worthy aspiration" but for the fact that the Second Circuit was unable to identify precedent in its own decisions to warrant taking that entirely reasonable step. The Court now has that opportunity.

The district court failed in its duty to provide guidance on an easily defined term in response to an indication from

the jury that they sought assistance, and to make matters worse, the court allowed the jury to rely instead on the inaccurate and incomplete testimony of a prosecution witness regarding his understanding of those terms. Notably, in contrast to Russo,--and contrary to the holding of the Court of Appeals below--the term “capitalization” is in fact found in Black’s Law Dictionary, with four discrete definitions, including “[t]he total amount of long-term financing used by a business, including stocks, bonds, retained earnings, and other funds.” “Capitalization,” Black’s Law Dictionary (10<sup>th</sup> ed. 2014). Likewise, a definition for “intellectual property,” is provided, namely “[a] category of intangible rights protecting commercially valuable products of the human intellect[; t]he category comprises primarily trademark, copyright, and patent rights ... .” “Intellectual Property,” Black’s Law Dictionary (10<sup>th</sup> ed. 2014). Those terms are not mere jargon like “stock parking,” which is essentially a shorthand term to describe a certain kind of improper activity, and are in fact subject to an established set of legal criteria.

As the Second Circuit itself recognized in Russo, but for the absence of controlling law, the preferred practice would be for a trial court to instruct a jury on the definition of all operative terms. 74 F.3d at 1395. This

case, in which the failure to grant such an instruction undoubtedly contributed to the verdict, provides the Court with an ideal opportunity to address and remedy this issue. Jurors, and society as a whole, need to be confident that criminal convictions are based on jury verdicts where the jurors are properly advised of the facts and legal principles upon which they reach their decisions. The Court should grant certiorari to make clear that district courts must fulfill its duty under Bollenbach to provide that necessary information in response to juror inquiries.

### **Conclusion**

The petition for a writ of certiorari should be granted.

Dated: New York, New York  
October 1, 2020

Respectfully submitted,

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