No. 20-_____

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK MURACA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

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Attorney for Petitioner
Pursuant to Criminal Justice Act

19-149
United States v. Patrick Muraca

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 6th day of May two thousand twenty.

Present: JOHN M. WALKER, JR.,
ROSEMARY S. POOLER,
GERARD E. LYNCH,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 19-149

PATRICK MURACA,

Defendant-Appellant.

Appearing for Appellant: Brendan White, White & White, New York, N.Y.

Appearing for Appellee: David Abramowicz, Assistant United States Attorney (Katherine Reilly, Thomas McKay, *on the brief*), *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Abrams, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is **AFFIRMED**.

Defendant-Appellant Patrick Muraca appeals from the January 11, 2019 judgment in the United States District Court for the Southern District of New York (Abrams, *J.*) sentencing him principally to 27 months' imprisonment, 3 years' supervised release, $132,780 in restitution, and $1,165,280 in forfeiture. Following a jury trial, Muraca was convicted of one count of wire fraud, in violation of 18 U.S.C. §§ 1342 and 2, and one count of making false statements, in violation of 18 U.S.C. § 1001. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

On appeal, Muraca argues that (1) the district court committed reversible error by refusing to provide a definition of "capitalization" in response to a jury note during deliberations; (2) his sentence of 27 months' imprisonment is substantively unreasonable; and (3) the forfeiture amount imposed as part of his sentence was not sufficiently supported by the record.

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.

Muraca also argues that his sentence was substantively unreasonable. We review a district court's sentence under a "deferential abuse-of-discretion standard." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (internal quotation marks and citation omitted). In reviewing claims of substantive unreasonableness, we consider "the totality of the circumstances, giving due deference to the sentencing judge's exercise of discretion," and we "will . . . set aside a district court's *substantive* determination only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions." *Id.* at 189-90 (internal quotation marks and citations omitted). And, while we do not presume that a Guidelines sentence is reasonable, in the "overwhelming majority of cases," it is. *United States v. Rodriguez*, 715 F.3d 451, 451 (2d Cir. 2013) (internal quotation marks and citation omitted).

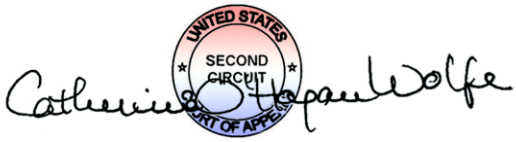
On the record before us, Muraca's sentence is not substantively unreasonable. The district court adopted the Guidelines range proposed by Muraca and sentenced him within that range. We disagree that the sentence of 27 months' imprisonment, in light of the extent and nature of

the financial fraud found by the jury, is so high as to "shock the conscience." *United States v. Rigas*, 583 F.3d 108, 124 (2d Cir. 2009).

Finally, Muraca argues that the district court made insufficient findings to support the forfeiture amount it imposed. Muraca did not object at his sentencing hearing, so this issue is subject to plain error review. *United States v. Uddin*, 551 F.3d 176, 181 (2d Cir. 2009). 18 U.S.C. § 981(a)(1)(C) provides that "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of" certain predicate offenses, including wire fraud, is "subject to forfeiture." The district court stated at sentencing that Muraca "was convicted of raising the [$]1,165,280 through fraudulent means and then commingling those funds," App'x 233, and that forfeiture in that amount was appropriate. This finding was supported by evidence adduced at trial, where the jury convicted Muraca of wire fraud. The district court did not commit error, plain or otherwise, in ordering Muraca to forfeit $1,165,280.

We have considered the remainder of Muraca's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 17 Cr. 0739 (RA)

PATRICK MURACA,

Defendant.

----------x

New York, N.Y.
August 8, 2018
8:30 a.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
BY: DAVID ABRAMOWICZ
KATHERINE REILLY
CHRISTOPHER DiMASE
Assistant United States Attorneys

BENNETT EPSTEIN
SARAH SACKS
Attorneys for Defendant

- also present -

Sam Lachow, government paralegal
SA Jordan Anderson, FBI

(Trial resumed; jury not present)

MR. EPSTEIN: Your Honor, we have one document we would like to add to the collection.

THE COURT: OK.

MR. EPSTEIN: I indicated in a letter that I sent to chambers last night that was e-mailed, and that I hope your Honor prints out and marks so it is a part of the record here, that we had definitions, one we've already provided to you. This is a definition from reliable sources and I am handing a copy to the government. We would also like that marked as part of our submissions on the issue of the definitions.

THE COURT: 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.

MR. EPSTEIN: Well, your Honor, you're essentially

saying that we dropped the ball in our defense on a vital issue. That is number one.

THE COURT: I'm not saying that. I just don't think it is for me to define terms in documents in this case for this jury.

MR. EPSTEIN: The jury didn't ask for the definition of terms in the document.

THE COURT: That's not true. The funding term, they specifically referred to Government Exhibit 611. They are looking at that term in that document and trying to figure out what it means.

MR. EPSTEIN: Yes. A reliable source definition of that term is something that the court should and must give to the jury. The court just can't leave it if the jury doesn't know the definition of the term. We're giving a neutral definition of the term. We are not saying as it applies to this document.

The definitions that we've offered are from reliable sources and are neutral definitions. They are definitions that are in common usage within the business world, and I don't think that we had a responsibility in our examination of the witnesses to ask them about a definition which is a dictionary definition.

THE COURT: Did you read the Russo case that the government cited?

MR. EPSTEIN: I have not had a chance to do that.

THE COURT: Why don't you do that. I'll read a portion here for the record.

The appellant's next contend that the government changed its definition of stock "parking" throughout the case, creating a confusion that the district court should have remedied through a jury instruction. They argue that the failure to give such an instruction deprived them of a fair trial in numerous ways, including permitting the jury to convict on an erroneous definition and denying a valid theory of the defense.

While we recognize that the government was not wholly consistent in describing -- part of this is not relevant here, I want to provide the context for, I think, critical language here.

While we recognize that the government was not wholly consistent in describing the conduct that constitutes stock parking, we find that the appellant's argument is unveiling. As an initial matter, we do not believe the government's definition of parking varied sufficiently to confuse the jury or mislead the defense. Although the words used to describe parking changed during the course of the trial, the essential concept behind the government's theory of manipulation remained constant.

I am going to skip the next two sentences which was

specific to that case. Then it continues:

Moreover, we agree with the government that parking is used in this prosecution is not a legal term requiring jury explanation, rather it is a business term that describes conduct which may or may not rise to the level of a 10b-5 violation. Unlike the concepts of agent and guilt which are offered by the appellant are examples of terms which require a jury instruction. Parking is not defined by an established set of legal criteria.

I think that that is true for capitalization and funding as well. Those are not legal terms.

MR. EPSTEIN: What the court is saying is that a term of art that was used, that was the subject of expertise, such as stock parking that was the subject matter of a contention in that case, should not be further defined because it was something that involved expertise or a particular coloring of terminology.

This is a term just like agent. This is a neutral term that was not the subject of expert testimony or a permanently of art. This is a completely neutral term. If the jury asked for --

THE COURT: There was some testimony about capitalization and was there about funding as well?

MR. RILEY: Your Honor, there was testimony about that page of the document and what the witness understood it to

mean. He didn't testify specifically about the term funding, but he did testify about what he understood those set of statements to mean.

THE COURT: Right.

I also just want to read a footnote from this Russo case. It says:

The Fifth Circuit has noted that the better practice would be to instruct the jury on the meaning of all terms of operative significance. It cites a Fifth Circuit case. While 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.

I recognize it is a little bit different because here there has been a question from the jury, but I think particularly with respect to the definition of funding, when they are asking a question about a definition in a particular document, that it would be inappropriate for me to define that term --

MR. EPSTEIN: Your Honor --

THE COURT: -- as it is included in a particular document.

MR. EPSTEIN: Your Honor could instruct them that I can't instruct you as to what the meaning of the term is in that document, however, the terms have common business

definitions and those definitions include the following.

In other words, you can flag for the jury that I am not telling you what it says or what it means in that document, but it is a term of general usage, unlike stock parking, which is something that, you know, I don't think is not a term of general usage.

But these are terms of general usage and that even though I am not attempting to define what it meant in a document, ladies and gentlemen of the jury, but the common definition of capitalization refers to assets and the common definition --

THE COURT: There are different definitions, right?

The government searched online and there are lots of different definitions for capitalization and funding.

MR. EPSTEIN: Every one of them, every one of them, every definition refers -- capitalization refers to the fair market value of an asset. Every definition says that.

THE COURT: Do you want to respond, Ms. Riley?

MR. RILEY: Your Honor --

THE COURT: Just bring the microphone closer.

MR. RILEY: Absolutely.

I don't think that is what capitalization means. I think there are many different definitions, as we have pointed out already. I also think that these questions are very clearly directed to the documents.

I mean, to look at the funding note, for example, not only does it refer to a specific page of the exhibit, it doesn't say I don't know what funding means. It is not a word in the English language I'm familiar with. It says does it include IP. The capitalization note was the same.

I think it is also telling that the only place capitalization appears in the trial in a place that the jury heard is in witnesses talking about specific exhibits. So I think that makes clear that the two notes are of a piece. They are trying to figure out what these terms mean in these exhibits, and I think it would be inconsistent with the case law to provide definitions of those.

MS. SACKS: If I may, Judge?

THE COURT: Yes.

MS. SACKS: Just addressing the point that you have in your draft about, however, if you would like me to point you to the relevant portions of trial transcript.

THE COURT: I'm sorry, yes. Sorry. That draft should not have been handed out. That's OK.

MS. SACKS: I just wanted to address that issue, and to the extent that there was a suggestion yesterday that we provide the jury with Mr. DiCesare's testimony.

First of all, it is not what the jury asked for. They did not ask for a witness's opinion. By sending that back, it is signaling to the jury that they should give that testimony

weight, right, to answer their question, when it is the jury that needs to decide the weight of any one witness's testimony and the truth of it. His testimony there, which was his opinion, happened to be wrong.

THE COURT: But that is why I was not inclined to send out that particular language. I was inclined to say it would not be appropriate for the court to define business terms such as capitalization or funding that are discussed in particular documents and/or testimony in evidence. If you would like me to point you to -- maybe I won't say relevant -- if you would like me to point you to portions of the trial transcript or record that addressed those terms, I would be happy to.

MS. SACKS: Judge, we object to that because we think that that is signaling for the jury here this is truthful testimony and you should give this testimony weight. And, again, we have shown that this witness's opinion about what that might have meant to him doesn't answer the question of what the writer of that document intended.

THE COURT: I'll take that out. I think it would not be appropriate for the court to define business terms of just capitalization or funding that are discussed in particular documents and/or testimony in evidence.

MR. RILEY: That's fine with the government, your Honor.

THE COURT: Yes.

MR. EPSTEIN: Well, can the court add that you're entitled, however, to use your own knowledge and experience in arriving at a definition of those terms?

THE COURT: Again, I think --

MR. EPSTEIN: If the court can't define it, then what are we going to do, leave it in space somehow?

THE COURT: But the problem here is that these are not legal terms that they need defined by the court. They are terms that were used by these witnesses, you say wrongly. You say a witness misunderstood it, but that goes to the issue.

If I then define a term in a different way than a witness had an understanding or how it is supposed to be defined in a particular document, I don't think that that would be appropriate for me to marshal the evidence, to go to the last page of Exhibit 611 and define a term in that document for them. I don't think that that is appropriate, especially when there are numerous definitions of those words in reliable sources.

MR. EPSTEIN: What every one of those definitions of capitalization refers to is an asset. It is an accounting term as to what the fair market value of an asset is and whether the asset should be capitalized for expensed. But every term -- and this is for the record, because this may become certainly an issue that Fifth Circuit footnote will now come to the fore in this case -- this is a term of which every definition refers

to assets. The same thing with funding. Every definition of funding refers to available source of money. That's why funding is different than cash.

THE COURT: I am going to turn back to the government. Tell me the definitions that you saw that did not include those terms.

MR. RILEY: Sure, your Honor.

For starters, we submitted a definition for capitalization in our written submission yesterday that talks about money and not assets generally. It specifically refers to a company as it is starting up and money that comes in.

I read aloud on the record yesterday --

THE COURT: Tell me where these different definitions are from, if you recall.

MR. RILEY: I read aloud yesterday a portion from a financial dictionary online. That dictionary itself provided several different definitions, including the one that we cited in our written submission.

We also consulted an online business dictionary which talked about the accumulation of debt and equity that makes up a company's funding sources.

Excuse me, your Honor, just taking a look at some of what we looked at.

There is also discussion in some of the definitions about the provision of capital for a company. So I think they

don't all refer to the modernization of assets. I also think it is important to note that the specific jury note didn't talk about IP in and of itself, it talked about the projected value of IP, which I don't think we've seen in any of the definitions of capitalization that we've looked at.

In terms of funding, your Honor, I think we didn't go through sort of multiple dictionaries to look at different definitions of funding because I think that note doesn't really ask, we don't know what the word funding means. I think what it asks is, what does it mean on that page of that exhibit and does it include IP, which I think isn't really a definitional issue. It is really what does it mean in this context and can it include this very specific thing.

MR. EPSTEIN: Judge, I think the whole point is that capitalization can include money and can include assets. We're not saying that it doesn't include money, but the capitalization of a company includes both its cash and its assets. Intellectual property is clearly an asset, and that is another question the jury has asked.

THE COURT: You think I should answer for the direct question, can it include the projected value of IP?

MR. EPSTEIN: I think absolutely. Absolutely it can. It's the fair market value of the IP, which could be projected value, but it is the fair market value of the -- the fair market value of IP is an asset and --

THE COURT: I think that is something for the jury to decide based on the evidence presented before it, and if it is something that one side or the other wanted the jury to appreciate, that the projected value of IP was such an asset, that it should have been elicited at trial.

MR. EPSTEIN: But it is a definition. It is a definition. IP is an asset by every single definition. IP is considered an asset.

I think now what your Honor is doing is leaving the jury completely in the dark as to terms that are of vital importance to the defendant in this case. I obviously strenuously object to that. I think that if this case results in an appeal, that that is going to be probably point one, because it is probably very, very vital in this case that the documents that the defendant submitted have some basis, have some basis in truth.

The government's argument here was that these documents were a scam, that they were false. Those terms are at the heart of those documents. The court is cutting the heart out of defendant's credibility with respect to those documents by not giving them the common definitions of those terms.

THE COURT: You've made your record. Thank you.

Is there anything else you would like to say for the record, Ms. Riley?

MR. RILEY: Your Honor, I would just add these aren't legal terms. They are not terms that there is a standard legal definition for, and I think it is telling that defense counsel keeps talking about the arguments he is going to make on appeal, but he hasn't yet cited a single case suggesting that it is appropriate for the court to define terms about documents in evidence.

THE COURT: We looked for some last night. We were unable to find any case that suggested that it was appropriate for me to do so.

MR. EPSTEIN: I guess that's because I am incompetent, just as I was incompetent when I failed to define those terms with the witness for the court. I failed to put Mr. Bartlett or Mr. Dictionary on the stand to define those terms.

That is fine, Judge.

THE COURT: Mr. Epstein, I'm not suggesting 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.

MR. EPSTEIN: I think the Russo case is plainly

distinguishable based on the term in that case, and that the footnote about the Fifth Circuit is entirely correct and should carry the day in a case like this. I don't think it can compare stock parking, which is a very esoteric term of art, to a terms like capitalization and funding.

THE COURT: That is the answer I am going to give. I've tweaked it a little bit to say it would not be appropriate for the court to define business terms such as capitalization and funding that are discussed in particular documents or testimony in evidence.

I have, at defendant's request, taken out the reference to testimony. I think it is already clear to them that if they want to hear testimony, they can ask for it. That is with respect to questions nine and 15.

With respect to question ten, the question is, does the information (receipts) shown to the bookkeeper, if it were clear to us the jury to be false and/or altered, constitute misleading and/or defrauding the investor. In other words, is the bookkeeper testimony accounting information relevant to investors/investments?

Answer, what I was going to say is: If you find that the defendant provided false information or receipts to Stephanie Roy, the bookkeeper, you may consider that evidence with regard to either the defendant's conduct in furtherance of the scheme to defraud investors or the defendant's