No. 07-400

In the Supreme Court of the United States

ROBERTO MORENO-GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether proof that petitioner conspired to transport cash proceeds of drug trafficking hidden in cars located on a car hauler destined for Mexico was sufficient to establish that he conspired to transport money in a manner "designed," at least "in part," to "conceal or disguise" either "the nature, the location, the source, the ownership, or the control" of those proceeds, within the meaning of 18 U.S.C. 1956(a)(2)(B)(i).

2. Whether the requirements of 18 U.S.C. 2518(8)(a) were satisfied when the government used a computer operated system to record intercepted phone conversations on "magneto optical disks," and then sealed these disks (rather than the computer's hard drive) under the direction of the district court.

3. Whether the district court abused its discretion in admitting expert testimony from a Drug Enforcement Agent on the use of code words by a Mexican drug trafficking organization.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 484 F.3d 1311 (11th Cir. 2007).

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2007. A petition for rehearing was denied on June 15, 2007 (Pet. App. 65-66). The petition for a writ of certiorari was filed on September 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiring to distribute cocaine, methamphetamine, and marijuana, in violation of 21 U.S.C. 846; possession of a firearm in furtherance of a drug

trafficking crime, in violation of 18 U.S.C. 924(c)(1); and conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). He was sentenced to 480 months of imprisonment, to be followed by three years of supervised release. Pet. App. 3-4; Aug. 17, 2005 Dist. Ct. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-21.

1. Petitioner was the United States-based leader of a large drug trafficking organization that imported cocaine, methamphetamine, and marijuana from Mexico for distribution in the Atlanta area. Pet. App. 5; Presentence Investigation Report (PSR) para. 15, 18. In 2002, the Drug Enforcement Administration (DEA) began investigating this organization, and the authorities ultimately intercepted numerous telephone calls pursuant to Title III wiretaps. Pet. App. 5; PSR 15. Those calls revealed, *inter alia*, that the conspirators were purchasing tractor-trailers, cars, and trucks, which they were using to transport drugs and money. In particular, on at least two occasions, the organization hid drug proceeds in cars placed on car haulers destined for Mexico. Pet. App. 5, 8; Gov't C.A. Br. 17-18, 54-56. The cars were purchased with drug proceeds, and the organization used the names of third parties to conceal ownership of the cars. Pet. App. 17; PSR para. 26, 28.

In June 2003, the government intercepted telephone calls in which petitioner discussed shipping $1 million into Mexico using a car hauler. PSR para. 26, 28. After the authorities tried unsuccessfully to locate the car hauler, they intercepted telephone calls indicating that the money had reached McAllen, Texas. Gov't C.A. Br. 18 n.21, 55, 57. Two weeks later, an intercepted call revealed that the organization was again preparing to ship money via the car hauler. This time, law enforcement

agents located and stopped the car hauler, and seized $989,203. PSR para. 29.

2. A grand jury in the United States District Court for the Northern District of Georgia indicted petitioner and approximately 29 others. Pet. App. 2. Petitioner was charged with conspiring to distribute cocaine, methamphetamine, and marijuana, in violation of 21 U.S.C. 846; possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); and conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). The money laundering count charged that petitioner conspired to violate 18 U.S.C. 1956(a)(2)(B)(i), which makes it a crime to transport funds to a place outside the United States knowing that the funds represent the proceeds of a specified unlawful activity, and knowing that the transportation was designed "to conceal or disguise the nature, the location, the source, the ownership, or the control" of the proceeds.[*] Indictment 2-5 (Counts 1-2), 20-22 (Count 37).

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[*] Section 1956(a)(2) makes it a crime, punishable by up to twenty years of imprisonment, to:

> transport[], transmit[], or transfer[], or attempt[] to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—
>
> (A) with the intent to promote the carrying on of specified unlawful activity; or
>
> (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

Before trial, a co-defendant moved to suppress the fruits of the Title III electronic surveillance, arguing that the government acted improperly when it sealed a "magneto optical disk" (MOD) rather than the computer hard drive onto which the conversations were first recorded. Pet. App. 59-61. Petitioner adopted that motion (*id.* at 25-26, 59), which the court referred to a magistrate judge. Relying on the stipulated record of an evidentiary hearing in another case, the magistrate judge determined that "[t]he Voice Box System [used by the government in this case] converts the incoming analog signals from the telephone conversation into a digital format and records the digital data on the hard drive of a computer. Within a few seconds of the call, a copy of that digital file is automatically written onto a 'magneto optical disk.' * * * The contents of the calls cannot be altered and are not degraded during the transfer from the computer's hard drive to the MOD." *Id.* at 61 (internal citations omitted). The magistrate judge then concluded (*id.* at 62) that this procedure satisfied the requirement in 18 U.S.C. 2518(8)(a) that "[t]he contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter [Chapter 19 of Title 18] shall, if possible, be recorded on tape or wire or other comparable device * * * in such a way as will protect the recording from editing or other alterations." 18 U.S.C. 2518(8)(a).

The magistrate judge rejected the claim that the computer hard drive itself should have been sealed, rea-

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(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

18 U.S.C. 1956(a)(2).

soning that "[b]ecause of the practical difficulties of removing and using a computer hard drive, and the fact that the incoming data in the Voice Box system is automatically and electronically put on MODs within seconds of the calls without possibility of alteration, the MODs should be considered duplicate originals." Pet. App. 62. The magistrate judge also noted that Section 2518(8)(a) did not require the sealing of original recordings, and he concluded that the MOD disk satisfied the statutory requirement that the intercepted communications be recorded on a "tape or wire or other comparable device" in a manner that will prevent alterations. *Ibid.* After petitioner failed to file any objections to the magistrate judge's report and recommendations, the district court adopted that report and denied the motion to suppress. *Id.* at 7-8; Feb. 9, 2005 Dist. Ct. Order.

3. The court of appeals affirmed. Pet. App. 1-21. Petitioner claimed, *inter alia*, that the evidence was insufficient to support his money laundering conviction because "nothing about the manner in which the money was packed and transported demonstrated any effort to disguise the nature or source of the money as drug proceeds." Pet. C.A. Br. 48. The court of appeals rejected that argument. Pet. App. 16-18. The court concluded that petitioner's scheme to transport drug proceeds in car haulers was designed, at least in part, "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds," because (1) "hiding the money inside cars on car hauler trailers was an attempt to conceal the money's association with an illegal enterprise;" (2) "defendants hid the money in the cars to prevent the authorities from finding it;" and (3) "the transportation plan allowed the owner of the money to place it in the hands of a third party, which makes it

difficult to determine both the owner and the source of the money." *Id.* at 18.

As for petitioner's claims that Section 2518(8)(a) required sealing of the computer hard disk on which the intercepted conversations were recorded, and that the district court erred in admitting expert testimony on the use of drug codes in the intercepted conversations, the court of appeals affirmed without discussion. Pet. App. 7-8, 15, 21.

DISCUSSION

1. Petitioner contends that his money laundering conspiracy conviction should be reversed because 18 U.S.C. 1956(a)(2)(B)(i) does not criminalize "the mere act of concealing and transporting illicit funds without proof that concealment was for the purposes of creating the appearance of legitimate wealth." Pet. 6. This Court recently granted a writ of certiorari in *Cuellar* v. *United States*, No. 06-1456 (Oct. 15, 2007), to consider the meaning of the term "conceal or disguise" in Section 1956(a)(2)(B)(i). Accordingly, with respect to this question, the petition for a writ of certiorari should be held pending this Court's resolution of *Cuellar*, and then disposed of as appropriate in light of the decision in that case.

2. Petitioner contends (Pet. 15-22) that the intercepted conversations were not properly recorded and sealed in accordance with 18 U.S.C. 2518(8)(a) because the government sealed the MODs rather than the computer's "original" hard drive. Petitioner does not dispute that the MODs were an accurate duplicate of the hard drive, and nothing in Section 2518(8)(a) requires that sealed recordings be "originals." Indeed, no court has interpreted the statute to contain such a require-

ment. Accordingly, petitioner's claim lacks merit and warrants no further review.

a. Section 2518(8)(a) requires that intercepted conversations "shall, if possible, be recorded on tape or wire or other comparable device," and that "[t]he recording * * * shall be done in such a way as will protect the recording from editing or other alterations." These requirements serve to "ensure the reliability and integrity of evidence obtained by means of electronic surveillance." *United States* v. *Ojeda Rios*, 495 U.S. 257, 263 (1990). The magistrate judge found, and petitioner did not dispute, that the MOD is a "comparable device" to a tape or wire recording, and that the MODs produced by the Voice Box System "cannot be altered and are not degraded during the transfer from the computer's hard drive." Pet. App. 61. The magistrate judge also found that MODs are "duplicate originals" of the computer hard drive because they are "automatically and electronically [created] within seconds of the calls without possibility of alteration." *Id.* at 62. Accordingly, the magistrate judge concluded that the sealing of these disks satisfied Section 2518(8)(a)'s requirement that "[s]uch recordings shall be made available to the judge issuing [the order authorizing a wire intercept] and sealed under his direction." *Id.* at 60. The court of appeals correctly affirmed that judgment.

Petitioner has not challenged the magistrate judge's factual finding, see Pet. C.A. Br. 12 n.1, but rather maintains (Pet. 16-22) that MODs cannot satisfy Section 2518(8)(a) because they are not "original" recordings. As the Seventh Circuit noted in rejecting an identical claim, "the word 'original' appears nowhere in [Section 2518(8)(a)]." *United States* v. *McLee*, 436 F.3d 751, 764 (2006). Rather, the statute only requires that any re-

cordings be sealed so as "to ensure the reliability and integrity of evidence obtained by means of electronic surveillance." *Ojeda Rios*, 495 U.S. at 263. Petitioner does not dispute that MODs constitute recordings; nor does he dispute that the MODs were sealed in accordance with *Ojeda Rios*. Accordingly, his claim that the MOD recordings did not satisfy Section 2518(8)(a) warrants no further review.

b. Petitioner's contention (Pet. 15-16, 20-22) that the decision below conflicts with *Ojeda Rios* and numerous courts of appeals decisions also lacks merit. In *Ojeda Rios*, this Court articulated the requirements for the government to provide a "satisfactory explanation" for a delay in sealing, 495 U.S. at 262-267; the Court made no mention of whether a recording must be an "original" to satisfy Section 2518(8)(a). The appellate cases petitioner cites show only that, in dealing with various claims under Section 2518(8)(a), courts sometimes use the term "original" to describe the recording placed under seal. See, *e.g.*, *United States* v. *Maldonado-Rivera*, 922 F.2d 934, 952 (2d Cir. 1990) (in another delayed sealing case, court noted that "[t]he government also presented expert testimony that the sealed tapes were originals, not copies, and that they had not been edited or tampered with"), cert. denied, 501 U.S. 1233 (1991); *United States* v. *Mora*, 821 F.2d 860, 862 (1st Cir. 1987) (in case alleging untimely sealing, court noted that "[t]he original recordings were not presented for judicial sealing until June 26, 1985"). These decisions do not hold that the statute requires the sealing of "originals"; nor do they suggest that an MOD created seconds after a phone call is intercepted and recorded without possibility of alteration cannot satisfy Section 2518(8)(a). Indeed, the only court to address whether a properly

sealed MOD satisfies Section 2518(8)(a) agreed that it does. See *McLee*, 436 F.3d at 763-765. Because the decision of the court of appeals conflicts with no other court of appeals decision, petitioner's claim warrants no further review.

3. Finally, petitioner challenges (Pet. 23-30) the admission at trial of exert testimony by DEA Agent Robert Murphy concerning use of drug codes in the intercepted conversations. Petitioner maintains that Agent Murphy's testimony was impermissibly "based on summaries prepared by a non-expert, without a literal translation of the Spanish," and was admitted "without requiring [Agent Murphy] to employ any methodology in reaching his opinion." Pet. 23. Those contentions lack merit, as does petitioner's claim that the admission of Agent Murphy's testimony conflicts with decisions of other courts of appeals.

a. Petitioner challenges (Pet. 24) the adequacy of the translated English transcripts on which Agent Murphy based his testimony on grounds that the transcripts did not contain adequate "literal translation[s] of the Spanish" words employed by the speakers. Pet. 23. That fact-bound challenge was not raised in the court of appeals, see Pet. C.A. Br. 27-28 (challenging only Agent Murphy's expertise and methodology), and accordingly is not properly presented for this Court's review. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); accord *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

b. Petitioner challenges Agent Murphy's qualification as an expert because, "while all conversations he evaluated were in Spanish, [Agent Murphy] did not

speak Spanish." Pet. 28. Although petitioner correctly notes that the intercepted conversations took place in Spanish, Agent Murphy did not base his opinions on the conversations themselves, but rather on English translations and summaries. *Ibid*. As the Seventh Circuit noted in rejecting a similar challenge to expert drug code testimony, "We can find no legal authority for the proposition that [an agent's] lack of fluency in the Spanish language should prohibit [him] from interpreting drug code language obtained from English translations of Spanish conversations. Instead, this court and other circuits have previously permitted agents to rely upon English translations to interpret drug code language." *United States* v. *Ceballos*, 302 F.3d 679, 687 (2002), cert. denied, 537 U.S. 1136 (2003). Petitioner cites no case that contradicts this reasonable conclusion; accordingly, his claim warrants no further review.

c. Petitioner's fact-bound challenge (Pet. 28-30) to whether Agent Murphy's training and methodology qualified him as an expert also lacks merit. Agent Murphy testified that he had more than ten years of experience investigating drug crimes, had received extensive training in narcotics and wiretap investigation techniques, had particularized experience investigating Mexico-based drug trafficking organizations, and applied that experience and training in reviewing the thousands of lines of translated conversations for language patterns indicative of drug codes. Gov't. C.A. Br. 81-84. Contrary to petitioner's contention (Pet. 25-30), those qualifications and methods are entirely consistent with the qualifications and methods found adequate in the cases petitioner cites. See, *e.g.*, *United States* v. *Wilson*, 484 F.3d 267, 276 (4th Cir. 2007) (finding expert's "general method and principles in applying his experience

and specialized knowledge to decipher the conspiracy's drug vernacular * * * sufficiently reliable"); *United States* v. *Griffith*, 118 F.3d 318, 323 (5th Cir. 1997) (finding expert "qualified by knowledge and experience to interpret drug dealers' jargon" based on expert's "eight-and-one-half years as a DEA agent" and "ample opportunity to listen to drug dealers converse and to decipher the nuances of their conversations"); *United States* v. *Delpit*, 94 F.3d 1134, 1145 (8th Cir. 1996) (finding expert qualified to provide drug code testimony based on expert's "nearly 30 years of on-the-job experience" and "review[] [of] many of the wiretapped conversations"). Because the alleged conflict between these cases and the decision at hand is illusory, petitioner's fact-specific claim does not warrant this Court's review.

CONCLUSION

With respect to the first question presented, the petition should be held pending the decision in *Cuellar* v. *United States*, No. 06-1456, and then disposed of in accordance with the Court's decision in that case. With respect to the second and third questions presented, the petition should be denied.

Respectfully submitted.

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NOVEMBER 2007