

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: JUAN MELENDEZ, Petitioner v. UNITED STATES  
CASE NO: 95-5661  
PLACE: Washington, D.C.  
DATE: Tuesday, February 27, 1996  
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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X  
3 JUAN MELENDEZ, :  
4 Petitioner :  
5 v. : No. 95-5661  
6 UNITED STATES :

7 - - - - -X  
8 Washington, D.C.  
9 Tuesday, February 27, 1996

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 11:10 a.m.

13 APPEARANCES:

14 PATRICK A. MULLIN, ESQ., Hackensack, New Jersey; on behalf  
15 of the Petitioner.  
16 IRVING L. GORNSTEIN ESQ., Assistant to the Solicitor  
17 General, Department of Justice, Washington, D.C.; on  
18 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 95-5661, Juan Melendez v. The United  
5 States.

6 Mr. Mullin, you may proceed whenever you're  
7 ready.

8 ORAL ARGUMENT OF PATRICK A. MULLIN

9 ON BEHALF OF THE PETITIONER

10 MR. MULLIN: Thank you, Mr. Chief Justice.

11 Mr. Chief Justice, and may it please the Court:

12 In this case, there is no dispute that the  
13 Government made a motion which asked the district court  
14 for a sentence that reflected the petitioner's substantial  
15 assistance.

16 The issue before this Court is whether that  
17 Government motion was sufficient to permit a sentence  
18 which both departed from the guidelines and was also below  
19 a statutory minimum.

20 Petitioner submits that the Government's motion  
21 was sufficient, and bases his position on the language in  
22 the pertinent statutory and Sentencing Guidelines  
23 provisions.

24 QUESTION: It's agreed, is it not, Mr. Mullin,  
25 that the Government's motion was not filed under section



1 3553 (e)?

2 MR. MULLIN: That -- no, Mr. Chief Justice, I  
3 don't agree with that. The motion that was filed by the  
4 Government was brought under section 5K1.1, but it  
5 encompassed the requirements under section 3553(e) that  
6 permitted --

7 QUESTION: Well, the question presented, and I  
8 believe it was presented in your petition, is -- let me  
9 get the petition. It's, once the prosecutor moves for a  
10 sentencing departure in recognition of a defendant's  
11 substantial assistance to law enforcement, does a Federal  
12 court have authority to impose a sentence beneath both the  
13 guideline range and a minimum term set by statute, even  
14 when the Government does not seek the latter degree of  
15 departure?

16 You say, then, the Government did move under  
17 section 3553(e)?

18 MR. MULLIN: Oh, no, no, I'm not saying that  
19 they brought -- that they specific -- they specify their  
20 application as being under section 3553(e), Mr. Chief  
21 Justice. What I'm saying is that the court had authority  
22 to --

23 QUESTION: Well then the Government -- at least  
24 the Government's motion by its terms was not made pursuant  
25 to 3553(e), you agree with --

1 MR. MULLIN: Oh, that is correct, Mr. Chief  
2 Justice, yes. Their motion was brought by letter, I would  
3 note, but was accepted as a form of notice of motion by  
4 both parties as specifying that a motion was being brought  
5 under section 5K1.1 of the guidelines.

6 It is our position that that motion permitted  
7 Judge Sarokin in the District Court of New Jersey to  
8 depart not only from the applicable guideline range, which  
9 in that case was 135 to 168 months, but also below the 10-  
10 year statutory minimum that was in place in that case, or  
11 in this case.

12 The three provisions enacted in the Anti-Drug  
13 Abuse Act of 1986 establish a regime to reward substantial  
14 assistance by defendants. Section 3553(e) imposes a  
15 Government motion requirement for sentences below  
16 statutory minimums. In section 994(n), Congress directed  
17 the Sentencing Commission to, and I'm quoting from the  
18 statute now, which -- it is found at the appendix A1 --  
19 assure that the guidelines reflect the general  
20 appropriateness of imposing a sentence lower than would  
21 otherwise be imposed.

22 QUESTION: Whereabouts is that found, Mr.  
23 Mullin?

24 MR. MULLIN: I'm sorry, Mr. Justice, in my  
25 brief, my first brief to the Court. In A1 I specifically

1 cite, at the bottom of the page, the statute.

2 QUESTION: Thank you, and would you tell us  
3 again what you're quoting from the statute?

4 MR. MULLIN: Moving down to the first line,  
5 Congress directed -- let me state the language. Assure  
6 that the guidelines reflect the general appropriateness of  
7 imposing a sentence lower than would otherwise be  
8 imposed -- and this is the key language -- including a  
9 sentence that is lower than that established by statute as  
10 a minimum sentence.

11 And it's petitioner's position that the Congress  
12 directed the Commission to establish a regime to regulate  
13 the substantial assistance motions to include, and as it  
14 states here, not only departures from the applicable  
15 guideline range but also departures below mandatory  
16 minimums.

17 QUESTION: Well, that's quite consistent with  
18 3553(e), isn't it, that the Commission was to have a role  
19 in both of those kinds of departures?

20 MR. MULLIN: That's correct, Mr. Chief Justice.  
21 In the second sentence of 3553(e), and again I have that  
22 on A1 of my brief --

23 QUESTION: Well, counsel, do you agree that the  
24 Commission certainly could have set up an implementation  
25 of the statutes that would have set up this kind of two-

1 tier approach that the Government urges?

2 MR. MULLIN: Justice O'Connor, I agree with you.

3 QUESTION: But you simply say to us that that  
4 isn't how the Commission implemented it.

5 MR. MULLIN: That is correct.

6 QUESTION: And set up instead a one-tier --

7 MR. MULLIN: That is correct, yes. That's what  
8 the Commission did.

9 The Commission took the motion requirement under  
10 section 3553(e) together with its directives under 994(n)  
11 and created a one motion, or a single motion approach, and  
12 required that once the Government brings a single motion,  
13 then the court has the authority to depart not only from  
14 the applicable guideline range, but also below statutory  
15 minimums, and this can be found not only in section 5K1.1,  
16 but also in the commentary to section 5K1.1 and other  
17 commentary found throughout the guidelines.

18 QUESTION: Mr. Mullin, what is the clearest  
19 indication that that is indeed what the Commission meant,  
20 because I found that there was at least some ambiguity.

21 MR. MULLIN: The clearest indication I would  
22 state, Justice Ginsburg, is found in Note 7 to section  
23 2D1.1.

24 Section 2D1.1 -- and I apologize to the Court.  
25 I failed to put it in my appendix. I really should have.

1 QUESTION: You certainly should have.

2 MR. MULLIN: And I apologize to the Court for  
3 failing to do that, but section 2D1.1 deals with drug  
4 cases.

5 Most of the cases that involve mandatory  
6 minimums that come before the Federal courts --

7 QUESTION: Are we now -- 2D1, are we talking  
8 about something that you did manage to put in your  
9 appendix, or is that the one that you left out?

10 MR. MULLIN: Chief Justice, I didn't put it in  
11 my appendix. I did note it in the relevant language in my  
12 reply brief, on page -- well, it's noted in -- on page 30  
13 of my brief, so it is in there. I'm sorry. It's not in  
14 my appendix, but it is in page 30.

15 QUESTION: In the reply brief, or brief?

16 MR. MULLIN: Of my original brief.

17 In Note 7, as I was stating, section 2D1.1 deals  
18 with drug cases. Most of the mandatory minimum cases at  
19 the Federal courts entertained are drug cases. That's the  
20 reality of it, and Note 7 deals with this issue of  
21 departure below mandatory minimums, and the language I  
22 think is very instructive as to what it says and what it  
23 doesn't say.

24 Note 7 says that a mandatory minimum sentence  
25 applies, this mandatory minimum sentence may be "waived,"



1 and a lower sentence imposed, including a sentence below  
2 the applicable guideline range as provided in 28 U.S.C.  
3 section 994, by reason of a defendant's substantial  
4 assistance in the investigation and prosecution of another  
5 person who has committed an offense.

6 And then it cites section 5K1.1 for that  
7 proposition. Nowhere in this note is there any reference  
8 to section 3553(e). If the Commission were looking to  
9 create a two-track system, or if the Commission were  
10 looking to not get involved in departures below mandatory  
11 minimums, and to basically not accept the authority that  
12 is given to them by the Congress, they would not have put  
13 that in there, section 3553, and they did not.

14 QUESTION: Does 994(n) not refer to 3553?

15 MR. MULLIN: I don't believe it does, judge.  
16 Justice, I'm sorry. Justice.

17 QUESTION: Well, section 994(n) doesn't refer by  
18 number to 3553(e), I take it, but it does say the  
19 commission shall ensure that the guidelines reflect the  
20 general appropriateness of imposing a lower sentence,  
21 including a sentence that's lower than established by  
22 statute as a minimum sentence, to take account of a  
23 defendant's substantial assistance.

24 MR. MULLIN: Yes.

25 QUESTION: And 3553(e) is titled, Limited



1 Authority to Impose a Sentence Below a Statutory Minimum,  
2 suggesting that that may be the only source of authority  
3 to impose a sentence below the mandatory minimum to me.

4 MR. MULLIN: Well, it was -- yes. It was passed  
5 as the exception to the otherwise rule that a court can't  
6 depart, or can't sentence below mandatory minimums, so it  
7 does create the authority for that.

8 But what it requires is a Government motion  
9 based upon a defendant's substantial assistance.

10 QUESTION: I'm not sure what your point about  
11 the guidelines is. The statute itself requires a  
12 Government motion, right?

13 MR. MULLIN: Correct.

14 QUESTION: Now, are you saying that the  
15 guidelines could dispense with the necessity for a  
16 Government motion despite the fact that the statute says  
17 you need it?

18 MR. MULLIN: Absolutely not.

19 QUESTION: Then what do the guidelines achieve?  
20 Can the guidelines say that even where there is not such a  
21 motion we will deem such a motion to exist?

22 MR. MULLIN: No, they cannot, Justice Scalia.

23 QUESTION: Well then, what is it that you claim  
24 the guidelines do?

25 MR. MULLIN: What the guidelines do is require

1 that the Government bring a motion based upon a  
2 defendant's substantial assistance, and that is what  
3 section 3553(e) requires, before there can be departure  
4 below a mandatory minimum, and it's the petitioner's  
5 position that under section 5K1.1 the Commission devised a  
6 scheme where only one motion has to be brought for a  
7 departure both from the applicable guideline range as well  
8 as below statutory minimums, so there is the motion  
9 requirement met under section 3553.

10 QUESTION: You are saying that the guidelines  
11 have the power to say that a motion to move downward in  
12 the guidelines, to depart from the guidelines is, ipso  
13 facto, a motion under 3553. Isn't that what you're  
14 saying?

15 MR. MULLIN: That's correct. It envelops --

16 QUESTION: Well, that isn't correct as a  
17 statement of law, is it? I mean, as a statement of law  
18 the Commission can't monkey around at all with the  
19 statute, has nothing to do with it. The Commission's job  
20 is simply to say what the circumstances are under which  
21 you can depart from a guideline.

22 MR. MULLIN: That's correct, Justice Breyer.

23 QUESTION: All right, and if that's true, they  
24 could say, I'll tell you one situation in which you can  
25 depart downward from a guideline. One situation -- and

1 there may be others, but one situation in which you can  
2 depart downward from a guideline, 99 percent of which have  
3 nothing to do with mandatory minimum statutes, one  
4 situation is where the Government makes the same kind of  
5 motion and shows the same kind of assistance that they'd  
6 have to show if this were a statutory case and they were  
7 interested in the statute.

8 That's the situation in which you can depart  
9 from a guideline for that reason. That would have been  
10 within the Commission's power.

11 MR. MULLIN: That's correct.

12 QUESTION: All right. Then how does that affect  
13 your case? If, as I read this, the Commission said just  
14 that, we'll tell you -- we'll tell you when you can depart  
15 downward from the guideline on the question of substantial  
16 assistance.

17 Judge, you can do that if you are in the same  
18 kind of situation where, if there were a mandatory  
19 minimum, which most of the time there isn't, it would  
20 suffice to get you below the mandatory minimum. The  
21 Commission might well have thought that.

22 Now, how does that affect your case, because  
23 they're telling you that in this case it isn't that kind  
24 of situation. That kind of motion wasn't made, and I  
25 guess the Government has the right not to make that kind

1 of motion.

2 MR. MULLIN: Well, the Government here brought a  
3 motion under section 5K1.1. Once --

4 QUESTION: But they didn't do it right. It's a  
5 motion, according to them, that doesn't satisfy 5K1.1, if  
6 5K1.1 means what I think it means.

7 MR. MULLIN: Well, section 5K1.1, as I -

8 QUESTION: 5K1.1 says if you want to move under  
9 5K1.1, bring a mandatory statutory type motion, and  
10 they're telling you they didn't do it.

11 MR. MULLIN: As I read section 5K1.1, it doesn't  
12 require that, though, Justice --

13 QUESTION: Oh, yes it does. I'm trying -- I  
14 mean, I think it does, all right. I think it's saying  
15 you've got to bring a mandatory, statutory type motion.  
16 I'm trying to show you something. If they didn't bring  
17 that motion, what happens next, if they're right about  
18 that?

19 MR. MULLIN: Well, if there's no -- if  
20 there's --

21 QUESTION: If they never brought a 5K1.1.

22 MR. MULLIN: If they never brought the 5K1.1 --

23  
24 QUESTION: Yes.

25 MR. MULLIN: -- then the court has no authority

1 to depart.

2 QUESTION: That's right.

3 MR. MULLIN: Yes.

4 QUESTION: And so now what happens to your  
5 client?

6 MR. MULLIN: At that point he has, at best,  
7 under this scenario, a 135-month sentence.

8 QUESTION: Why?

9 MR. MULLIN: Because that's the bottom of the --

10 QUESTION: Didn't they make a promise that they  
11 would bring such a motion?

12 MR. MULLIN: They had -- they said they would  
13 bring a motion if there was substantial assistance.

14 QUESTION: Yes, and didn't they break that  
15 promise if they didn't do it?

16 MR. MULLIN: Well, that gets into the Wade case,  
17 and what this Court decided in Wade.

18 QUESTION: To just -- all right, I'll take it up  
19 with them, but I -- what I -- I'm not certain about this  
20 case. If it's the case that 5K1.1 means you have to bring  
21 a statutory type motion to get any departure, it could be  
22 up to them whether they did or they didn't do it, but if  
23 they didn't do it, aren't they in violation of the plea  
24 agreement?

25 MR. MULLIN: Well, they're -- to the extent that



1 the Government agreed in the plea agreement here to bring  
2 a motion for departure under section 5K1.1, and didn't  
3 state, as they didn't in this plea agreement, that they  
4 would seek a cap on the reduction, I agree with Your Honor  
5 that they certainly are either in violation of the  
6 agreement or in effect may have waived their right to  
7 argue.

8 QUESTION: Well, you didn't raise any question  
9 like that in your petition for certiorari, did you?

10 MR. MULLIN: I did not.

11 QUESTION: No.

12 MR. MULLIN: That is correct.

13 QUESTION: So what are we supposed to do if  
14 that's the -- that's why -- I mean, suppose I did think  
15 that was the correct interpretation, how should I decide  
16 this case?

17 MR. MULLIN: Well, the Government moves -- its  
18 position is that section 3553(e) motion is necessary. The  
19 Third Circuit found it that way, so I think what -- this  
20 Court is charged with the responsibility of determining  
21 whether an application under section 5K1.1 involves  
22 departures from the guideline range and from mandatory  
23 minimums. And it is our position that once that motion is  
24 brought, the sentencing court has the authority to depart  
25 not only from the guideline range but also below any



1 statutory minimum that may be in effect.

2 QUESTION: I have a question that I don't think  
3 will bear on the outcome of the case, but I think it's a  
4 necessary predicate for understanding the scheme here.

5 Suppose that the court in a guidelines case  
6 where there's no mandatory minimum imposed by statute,  
7 it's just a question of departing from the guidelines or  
8 not, suppose the court said, I think this defendant has  
9 cooperated with the Government, and the Government said,  
10 well, Your Honor, we're not making a motion for downward  
11 departure, and the court said, I disagree with that, he  
12 has cooperated with the Government, can the court depart  
13 downward absent the motion from the Government in a  
14 guidelines case?

15 MR. MULLIN: Absolutely not. Section 5K1. --

16 QUESTION: Where does the Commission get the  
17 authority to tell the court that the court cannot depart  
18 downward in such an instance?

19 MR. MULLIN: Under section 994(n), Congress  
20 directed the Commission to avouch that to create a scheme  
21 for dealing with rewarding substantial assistance, and  
22 Congress came up with, or the Commission came up with this  
23 scheme for departure.

24 QUESTION: And you think 994(n), you concede  
25 that 994(n) authorizes the Commission to require a

1 Government motion before there can be a downward departure  
2 under the guidelines for cooperation?

3 MR. MULLIN: 994(n) does not. 994(n) is silent  
4 as to the mechanism in which the Commission can establish  
5 the scheme.

6 QUESTION: All it says is that the Commission  
7 shall ensure the guidelines reflect the general  
8 appropriateness of imposing a lower standard to take into  
9 account a defendant's substantial assistance. I don't  
10 know where that gives authority for the executive to be  
11 involved in the judicial function of sentencing.

12 Now, I recognize that this is true under the  
13 statute, because the statute requires this.

14 MR. MULLIN: Yes.

15 QUESTION: And I suppose you can say, well, the  
16 Commission is simply borrowing from the statute to assume  
17 that the Justice Department has a sufficient interest here  
18 that there can be no departure absent its motion, but I  
19 seriously question whether or not the judge is prohibited  
20 from downward departure absent the Government's motion in  
21 a guidelines case.

22 QUESTION: Well, I would think perhaps that 5K1  
23 that you were just quoting, that requires a Government  
24 motion, does it not?

25 MR. MULLIN: Yes, it does. That's the way the

1 Commission devised the --

2 QUESTION: But it doesn't -- 5K1.1 doesn't say  
3 it's the exclusive way to get a downward departure for  
4 substantial assistance. None of the 5K's say they're  
5 exclusive, and the beginning of the guideline specifically  
6 says at the beginning, in discussing departures, that the  
7 Commission -- specifically says it, that the -- with  
8 specific exceptions, and it doesn't mention 5K1.1 is one  
9 of them.

10 The Commission does not intend to limit the  
11 kinds of factors, whether or not mentioned anywhere else  
12 in the guidelines, that could constitute grounds for  
13 departure in an unusual case, so that to me has left open  
14 this question.

15 QUESTION: But limiting factors is quite  
16 different from saying whether or not there has to be a  
17 motion. You agree that 5K1.1 requires a motion.

18 QUESTION: Yes.

19 MR. MULLIN: Yes. 5K1.1 as drafted requires a  
20 motion.

21 QUESTION: Justice Kennedy doesn't think that --

22 QUESTION: I -- could I ask you this  
23 hypothetical case? Supposing in the plea agreement the  
24 Government says, we will not make such a motion, but we do  
25 agree that if you call these following facts to the

1 attention of the court, we will confirm their accuracy, we  
2 will acknowledge that these are true, and there's no  
3 motion.

4 They then go to the judge at the time of  
5 sentencing, say, and the defendant asks for a downward  
6 departure on the basis of substantial cooperation and  
7 says, these facts are sufficient to establish what we  
8 think is going to justify a lower sentence. Would the  
9 judge have the authority to impose a lower sentence?

10 MR. MULLIN: No.

11 QUESTION: He does not.

12 MR. MULLIN: Under section 5K1.1 there has to be  
13 a Government motion. Without the motion, the court  
14 doesn't have the --

15 QUESTION: You read it as being exclusive, just  
16 the opposite of what Justice Breyer said.

17 QUESTION: It's a very good question. It's  
18 never been answered as to the extent to which, in a very,  
19 very, very unusual case a judge might depart for  
20 substantial assistance outside the framework of 5K1.1, so  
21 I take it that's never been answered, and I don't know  
22 that we'd have to answer it here.

23 MR. MULLIN: I'm not aware of any case that has  
24 addressed --

25 QUESTION: No.

1 MR. MULLIN: -- that issue, no.

2 So it's the petitioner's position that in  
3 section 994(n) Congress directed the Commission to  
4 establish a framework for departures from the guideline  
5 range and from mandatory minimums, and that section 5K1.1  
6 in fact did it.

7 A motion was brought here under section 5K1.1  
8 for departure, and it's our position Judge Sarokin had the  
9 authority to depart below the mandatory minimum range.

10 QUESTION: Mr. Mullin, suppose the Commission  
11 should say, we understand there's some confusion about  
12 this downward departure for cooperation, so now we're  
13 going to speak clearly, and we're going to say the  
14 discretion is with the prosecutor, 1) to go below the  
15 guidelines, 2) to go below the mandatory minimum.

16 The discretion is not with the judge. The judge  
17 cannot act unless -- cannot go below the guidelines unless  
18 there is a motion to that effect, cannot go below the  
19 mandatory minimum unless there's a request to that effect,  
20 so it's not a question of whether one motion or two, but  
21 who has the discretion.

22 If the Sentencing Commission made it clear that  
23 it thought it had -- the prosecutor had the discretion on  
24 both questions, do you have any case left? Are you making  
25 a statutory argument independent of the Commission's



1 authority?

2 MR. MULLIN: Is Your Honor's question -- if I  
3 can rephrase it, is Your Honor's question if the  
4 Commission decided to establish a two-track system for a  
5 motion, one motion from the guidelines and a second motion  
6 below?

7 QUESTION: Not numbering the motions. Motions  
8 doesn't matter. Who has the discretion if the Sentencing  
9 Commission said, we think the prosecutor and not the judge  
10 has the discretion to initiate a departure from the  
11 guidelines, and/or a departure from the mandatory minimum?

12 MR. MULLIN: Under those circumstances, then we  
13 would have a different case than we have now. It would  
14 be -- whatever -- whether it's 5K --

15 QUESTION: So essentially, then, you're arguing  
16 that we have an ambiguous statutory scheme, the Sentencing  
17 Commission could go either way on it, whatever way it goes  
18 the court should follow?

19 MR. MULLIN: Yes, I don't know if it was -- I  
20 don't know if ambiguous is the right term, but the  
21 Congress said to the Commission, here's what we want you  
22 to do, do it, and what the Commission did under 5K1.1 was  
23 to establish a scheme, and it was a single motion scheme  
24 that they set up to deal with departures for substantial  
25 assistance.



1 QUESTION: I gather the court of appeals had  
2 some doubt as to whether it -- the Commission could have  
3 gone either way on this question. I think they expressed  
4 the view that very likely, even if the Commission had  
5 wanted to exercise its discretion to set up a single track  
6 system, they thought it might lack that power under 35 --  
7 whatever it is.

8 MR. MULLIN: 53(e).

9 QUESTION: 53(e).

10 MR. MULLIN: They raised some question about it,  
11 but then they focused on what the Commission actually did.

12 QUESTION: Mr. Mullin, you're not relying on any  
13 language in the operative portion of 5K1.1. You're just  
14 relying on the application note, which simply notes that  
15 under circumstances set forth in 3553 and 994, substantial  
16 assistance would justify a sentence below the statutory  
17 required minimum, but the text of 5K1.1 simply says, upon  
18 motion of the Government, blah, blah, blah, blah, the  
19 court may depart from the guidelines. That's all that the  
20 operative provision says it may depart from.

21 MR. MULLIN: Justice Scalia, that is correct,  
22 and that is the operative language, departure from the  
23 guidelines.

24 There is nothing in that section which limits  
25 where the departure can take place, and 5K1.1 --

1 QUESTION: Right, nothing that limits it, but  
2 nothing that approves departure from something else,  
3 either. It approves a departure from the guidelines upon  
4 motion.

5 MR. MULLIN: That is correct, but bear in  
6 mind --

7 QUESTION: And then as a reminder, it's set  
8 forth in the application note. Under circumstances set  
9 forth in 3553, circumstances which include a motion by the  
10 Government, substantial assistance may justify a sentence  
11 below a statutory required minimum.

12 MR. MULLIN: But please bear in mind that policy  
13 statements under section 1B1.7 of the guidelines had the  
14 same effect has the commentary, so when I cite to the  
15 commentary, it has the same impact as the policy statement  
16 here does, and it's --

17 QUESTION: I'm sure it's just as authoritative,  
18 but the question that we're discussing here is whether the  
19 operative portion of 5K1.1 was meant to establish a one-  
20 tier system, as you call it --

21 MR. MULLIN: Yes.

22 QUESTION: -- to make one motion do the work of  
23 two, and for that purpose, whatever the application notes  
24 say, it seems to me you look to the text of it, and that  
25 text does not suggest that it's a two-tier system. It

1 just says, upon motion the court may depart from the  
2 guidelines.

3 It could have said, from the guidelines and from  
4 any applicable statutory minimum, but that's not what it  
5 said.

6 QUESTION: How could it have said the latter,  
7 since the Commission has no authority whatsoever to govern  
8 the statutory part.

9 QUESTION: Well, and also, aren't -- departures  
10 from the mandatory minimum are a subcategory of departures  
11 from the guidelines.

12 MR. MULLIN: That's correct.

13 QUESTION: Yes.

14 MR. MULLIN: That's correct.

15 QUESTION: So the term guidelines itself  
16 embraces both the broader category and the subcategory.

17 MR. MULLIN: That is correct, and section 5G1.1  
18 is a perfect example. Where you have a guideline sentence  
19 below the mandatory minimum under section 5G1.1 the  
20 guideline sentence becomes the minimum, so they are used  
21 in -- it is a subcategory, and I agree with Your Honor.

22 I would ask that I be permitted to reserve some  
23 time for rebuttal.

24 QUESTION: Very well, Mr. Mullin.

25 MR. MULLIN: Thank you.

1 QUESTION: Mr. Gornstein, we'll hear from you.

2 ORAL ARGUMENT OF IRVING L. GORNSTEIN

3 ON BEHALF OF THE RESPONDENT

4 MR. GORNSTEIN: Mr. Chief Justice, and may it  
5 please the Court:

6 Our position is that a district court has the  
7 authority to impose a sentence below the statutory minimum  
8 only when the Government files a motion requesting such a  
9 sentence, so that when the Government moves for a  
10 departure from the guidelines to reflect the defendant's  
11 cooperation, but does not move for a sentence below the  
12 statutory minimum, a district court does not have the  
13 authority to impose a sentence below the statutory  
14 minimum.

15 We think that result is compelled by the text of  
16 18 U.S.C. 3553(e), which is on page 2 of our brief.

17 QUESTION: Is the one a subgroup of the other?  
18 Is every departure from the guidelines -- when you approve  
19 a departure from the guidelines do you automatically  
20 approve a departure from the statutory minimum?

21 MR. GORNSTEIN: No, you do not.

22 QUESTION: No, but the converse is what's the  
23 subcategory -- yes.

24 MR. GORNSTEIN: The converse is true, but to  
25 address Justice Stevens' point, what the Commission has

1 said in application Note 1 is that the only time you can  
2 do that is under the circumstances set forth in 18 U.S.C.  
3 3553(e), so it sends you back to the statute, and what you  
4 have to decide is what is the meaning of the statute, and  
5 it says that, upon motion of the Government, a court shall  
6 have the authority to impose a sentence below a level  
7 established by statute as a minimum sentence so as to  
8 reflect a defendant's substantial assistance.

9 QUESTION: Well, could the Commission expressly  
10 adopt a rule that says, we will deem a Government motion  
11 asking the court to consider the defendant's substantial  
12 assistance to be a motion that satisfies 3553(e) as well  
13 as any guideline?

14 MR. GORNSTEIN: We do not think it could. We  
15 think that 3553(e) means that there has to be a Government  
16 request for a sentence below the statutory minimum. If  
17 there is not that kind of request, the Commission cannot  
18 deem it one.

19 I would say -- I would distinguish that from the  
20 situation where the Commission set up a guideline system  
21 and said we will only open up a guidelines departure for  
22 assistance if the Government first comes in and says, we  
23 move for a sentence below the statutory minimum, but the  
24 Commission clearly did not do anything like that.

25 QUESTION: It didn't?



1 MR. GORNSTEIN: No, it didn't.

2 QUESTION: Because I thought that what it could  
3 have said was this. Couldn't it have said the following?  
4 There is a thing, a certain animal. We'll call this  
5 animal what happens when you want to go below a statute.  
6 The animal has two parts. The Government makes a motion,  
7 and the Government says, a special assistance, and there's  
8 a statute that describes in words just what that is.

9 Doesn't the Commission have the authority to  
10 say, we will tell you when you can depart from a  
11 guideline, you can depart from a guideline when you have  
12 the statutory animal? Doesn't it have the authority to  
13 tell people when it can depart downward for substantial  
14 assistance, and doesn't it have the authority to choose  
15 that those times are when you have the kind of animal that  
16 would allow you to depart from the statute?

17 MR. GORNSTEIN: I think I would distinguish the  
18 two situations, again, where the Commission --

19 QUESTION: I understand that they're different.  
20 I understand that.

21 MR. GORNSTEIN: And what I would say that what  
22 the Commission cannot say is that a motion for a departure  
23 from the guidelines is, ipso facto --

24 QUESTION: Of course you're right. Now --

25 MR. GORNSTEIN: Okay, and now --



1 QUESTION: Now, but then the question becomes,  
2 did it choose to allow the departure from the guidelines  
3 only where, under 5K1.1, there is the statutory animal?  
4 The evidence that they give is that they used almost  
5 identical words. The words of 5K1.1 are identical to the  
6 statute, almost, with irrelevant differences.

7 The second piece of evidence is the note you  
8 cited refers to circumstances set forth both in 3553(e),  
9 which is the statute, and 994(n), which is the guideline,  
10 so there are two pieces of evidence that they meant the  
11 same animal, and I see no evidence that they didn't mean  
12 it.

13 MR. GORNSTEIN: I -- we disagree.

14 QUESTION: Well, I know that, but I'm looking  
15 for the argument.

16 MR. GORNSTEIN: And now I'll explain why.

17 First of all, just by using the term,  
18 substantial assistance, the terms mean the same thing, but  
19 --

20 QUESTION: Oh, no, it's more words than that.

21 MR. GORNSTEIN: Well, let me start just, that  
22 was part of what was similar, and I'll take one bit of it  
23 at a time.

24 Just by using the term, substantial assistance,  
25 that is a necessary condition, but not a sufficient one

1 for filing a motion to depart from the statutory minimum.  
2 The Government must go on to decide whether, in light of  
3 that substantial assistance, the seriousness of the  
4 defendant's conduct, the level of operation, and a host of  
5 other factors, whether that warrants a motion by the  
6 Government to seek a sentence below the statutory minimum.

7 Now, there are many cases in which the  
8 Government, where there is a difference between the  
9 guidelines range, which is significantly above the  
10 statutory minimum because a defendant may have a long  
11 criminal history, he may be dealing in quantities that are  
12 much larger, and --

13 QUESTION: May I interrupt -- may I, just with  
14 this one thought, concentrating on the words, substantial  
15 assistance, you are in effect arguing there are two kinds  
16 of substantial assistance, one that justifies a departure  
17 from the statute, and the other just justifies a guideline  
18 departure, but there's nothing in the text of either  
19 document that describes two kinds of substantial  
20 assistance.

21 MR. GORNSTEIN: And I'm not saying there are two  
22 kinds. I'm saying the same kind of substantial assistance  
23 might lead the Government to move only for a guidelines  
24 departure or only -- for both a guidelines departure and a  
25 departure from the statutory minimum in light of the

1 serious -- if -- the Government might, for example, say,  
2 this conduct is so serious that we are not going to move -  
3 - we are not going to seek to get this defendant's  
4 cooperation by moving for --

5 QUESTION: Yes, but the -- well, let me just  
6 interrupt you. The seriousness of the defendant's  
7 conduct, it seems to me, has already been evaluated in the  
8 guidelines, and the general purpose here is to say, to  
9 what extent shall we go below what would normally be the  
10 correct evaluation of the seriousness of the conduct?

11 MR. GORNSTEIN: But on the statutory minimum  
12 sentences the Government is perfectly free to take into  
13 account that the defendant has engaged in serious conduct  
14 and, notwithstanding that he may be giving substantial  
15 assistance, we're not going to reward that substantial  
16 assistance for somebody who has a 16 to 20-year guideline  
17 sentence with something that goes below the statutory  
18 minimum.

19 QUESTION: Mr. Gornstein, I was surprised to  
20 hear you agree with Justice Breyer that the Commission  
21 could establish a rule, we will allow no departure below  
22 the guidelines unless there is also a departure below the  
23 minimum. Isn't -- you said --

24 MR. GORNSTEIN: That --

25 QUESTION: -- the Commission could do that.

1 MR. GORNSTEIN: The Commission could do that. I  
2 think that --

3 QUESTION: Would that be in accordance with the  
4 requirement of section 994(n) that it assure -- assure --  
5 that the guidelines reflect the general appropriateness of  
6 imposing a lower sentence than would otherwise be imposed,  
7 including a sentence that is -- including a sentence that  
8 is lower -- to take into account a defendant's substantial  
9 assistance.

10 I would think to say arbitrarily, well, unless  
11 the Government is willing to go below the minimum, we're  
12 not going to reduce this -- allow the sentence to be  
13 reduced at all, even within the guidelines, above the  
14 minimum. I don't think that would comply with (n).

15 MR. GORNSTEIN: Well, we think the Commission  
16 would have that authority under 994(n), because we think  
17 it would satisfy the charge that it provide -- that it's  
18 generally -- for the general appropriateness of departures  
19 before the guidelines, because in --

20 QUESTION: What relevance does the Government's  
21 unwillingness to go below the minimum have to do with the  
22 appropriateness of reducing it within the guidelines above  
23 the minimum? I can't -- I just don't see the --

24 MR. GORNSTEIN: Well, I think that in a large  
25 category of cases the Government would be willing to do

1 both, so you are talking about a discrete category of  
2 cases --

3 QUESTION: Well, I know that, but --

4 MR. GORNSTEIN: -- where the Government --

5 QUESTION: -- that's no justification for  
6 treating them irrationally.

7 MR. GORNSTEIN: Well, I think that it doesn't  
8 have much to recommend it, and we wouldn't advise the  
9 Commission to do something like that --

10 QUESTION: Well, I wouldn't advise you to accept  
11 the proposition, because number 1, it hurts your case, and  
12 number 2, it doesn't seem to me to be there in the  
13 statute.

14 QUESTION: Mr. Gornstein, you argued a moment  
15 ago that because of the seriousness of the conduct, the  
16 Government might very well say, well, we'll go below the  
17 guideline but not below the minimum, and you say we  
18 shouldn't be placed in a position in which we're forced to  
19 do that.

20 But your argument seems to assume that if there  
21 is, we'll say, a one-motion procedure and if you speak the  
22 magic words, substantial assistance, in for a penny, in  
23 for a pound, that's not true.

24 I mean, the Government, on that assumption, does  
25 not have to stand moot after its motion is filed. The



1 Government can come in and say, look, judge, don't go  
2 below the statutory minimum.

3 The reason you shouldn't go below the statutory  
4 minimum is, the conduct is this serious, for reasons A, B,  
5 and C, and the second reason is, that isn't the deal we  
6 made. The deal we made with this guy was that we would  
7 file the motion, and we would then come in and say just  
8 what I'm saying. Go below the guideline, but don't go  
9 below the statutory minimum.

10 MR. GORNSTEIN: The difficulty there, Justice  
11 Souter, is there are -- the difference in perspective  
12 between the Government and the court. In many instances,  
13 there is a difference in perspective, and the -- where  
14 they're going to reach differing conclusions about the  
15 value of that assistance.

16 QUESTION: Which was -- as it was under the old  
17 law, as it were.

18 MR. GORNSTEIN: And -- but I -- and I --

19 QUESTION: That's always been true. When you  
20 came in, the Government might sort of run away with your  
21 deal in a way that was favorable to the defendant.

22 MR. GORNSTEIN: But I think what that translates  
23 into is the behavior of the prosecutor as he makes the  
24 deal.

25 If -- there -- if you're in a situation where

1 the prosecutor thinks that by filing any sort of motion at  
2 all it's going to open up a departure below the statutory  
3 minimum as well as the guidelines, then there will be a  
4 significant number of cases in which the prosecutor will  
5 be unwilling to make any deal at all.

6 QUESTION: Yes, but couldn't you --

7 QUESTION: Your argument at any rate is that  
8 Congress left that to the prosecutor and not to the court.

9 MR. GORNSTEIN: That's right. Apart from the  
10 policy considerations that --

11 QUESTION: But isn't there a possible answer to  
12 that, and that's why both Justices -- I don't know if this  
13 why Justice Kennedy asked the question, but his question  
14 raises this.

15 Supposing you lost the case, and I'm not  
16 suggesting you will, would it not thereafter still be  
17 possible for you to say in a plea bargain, we're not going  
18 to make any motions, but if -- but we will agree to tell  
19 the judge that you had done the following cooperative  
20 things, and then the defendant could ask the judge for a  
21 departure saying, I've given substantial assistance, and  
22 is there anything in the statute that would prevent the  
23 judge from going ahead and taking that into account  
24 without any motion at all?

25 MR. GORNSTEIN: Well, yes, 3553(e) would

1 certainly preclude the court from --

2 QUESTION: He couldn't go below the minimum --

3 MR. GORNSTEIN: That's right.

4 QUESTION: -- no, no, but he could go below the  
5 guidelines.

6 MR. GORNSTEIN: Well, no, 5K1.1 requires a  
7 Government motion to go below the guidelines.

8 QUESTION: That's true --

9 QUESTION: Well, it says he may do. It doesn't  
10 say it must do it.

11 MR. GORNSTEIN: Well, we read 5K1.1 --

12 QUESTION: You read that as disabling that  
13 possible solution which would protect your interest and  
14 keep the scheme alive that you're arguing for.

15 MR. GORNSTEIN: Well, 5K1.1 simply doesn't leave  
16 that option open.

17 QUESTION: Okay.

18 MR. GORNSTEIN: And our interest is better  
19 protected by affirming the judgment in the court of  
20 appeals in this case.

21 QUESTION: Mr. Gornstein --

22 QUESTION: I have a feeling it really doesn't  
23 make any difference who wins this case.

24 QUESTION: What is the authority of the  
25 Commission to limit the power of the district judge to

1 depart under the guidelines downward based on an  
2 encouraged factor without the motion -- without the  
3 consent of the United States?

4 MR. GORNSTEIN: Without the consent --

5 QUESTION: Without the consent of the United  
6 States, in a guidelines case. I understand about the  
7 mandatory minimum.

8 MR. GORNSTEIN: Well, I think 994(n) gives the  
9 Commission authority, general authority to decide how to  
10 proceed with substantial --

11 QUESTION: No, it just says it should provide  
12 assurance, I think is what it says.

13 MR. GORNSTEIN: That's right, but I think beyond  
14 that the Commission generally has authority --

15 QUESTION: To assure that the guidelines reflect  
16 the general appropriateness. I don't find in there a veto  
17 power given to the United States Attorney on a downward  
18 departure under the guidelines.

19 MR. GORNSTEIN: No. I think all it does is give  
20 the Commission the responsibility to decide how that  
21 should be done, and here the Commission decided that that  
22 should be done with a motion.

23 QUESTION: That there be a veto power in the  
24 United States Attorney's Office.

25 MR. GORNSTEIN: That's correct.

1 QUESTION: I don't find that under the statute.

2 QUESTION: Mr. Gornstein, my understanding that  
3 those instructions are what the U.S. Attorney -- the U.S.  
4 Attorneys all over the country are telling district judges  
5 you do not have authority for any downward departure for  
6 substantial cooperation unless we ask you to.

7 MR. GORNSTEIN: That's correct.

8 QUESTION: And I -- one question I had about the  
9 current status of the Sentencing Commission's thinking on  
10 this subject, is there not ongoing some kind of review  
11 within the Commission of substantial cooperation  
12 departures?

13 MR. GORNSTEIN: There is not.

14 QUESTION: There is not?

15 MR. GORNSTEIN: There is a study currently under  
16 way not addressing this particular problem, but the  
17 Commission has a study underway studying how substantial  
18 assistance departures have worked out in practice, and  
19 there is a preliminary report, not a final report, that --

20 QUESTION: But it doesn't touch this problem at  
21 all.

22 MR. GORNSTEIN: No, it does not.

23 QUESTION: Is there any indication -- I mean,  
24 there are circuits, most of them, perhaps, or some of them  
25 that just have the one motion rule, the Second Circuit, I



1 think, right?

2 MR. GORNSTEIN: There are four circuits that  
3 have ruled against us in this case.

4 QUESTION: And has there turned out to be a  
5 problem, a practical problem that's led you perhaps to  
6 think of asking the Commission to create a kind of  
7 substantial assistance light, a 5K1.1 light, if you were  
8 to -- you know, that --

9 MR. GORNSTEIN: We actually have been involved  
10 legislatively, but that is on hold pending the outcome of  
11 this case.

12 QUESTION: Has the Commission considered it  
13 at -- I mean, you could -- there's nothing -- it's not  
14 illogical to have a 5K1.1 light. I mean, it is -- that's  
15 maybe a good thing to do, but is there anything we can  
16 look at where you -- that's public? I mean --

17 MR. GORNSTEIN: We have not gone to the  
18 Commission with this. I think what -- we think the rule  
19 is right now that there is a window, and that that would  
20 only need to be changed if this Court ruled against us in  
21 this case.

22 QUESTION: Could you tell me, counsel, are there  
23 many cases in which this undertaking, this promise by the  
24 Government to move downward, either under the guidelines  
25 or the sentence, is made in the field during part of the

1 investigation, or is this usually just done with a plea  
2 bargain after the defendant has counsel, et cetera?

3 MR. GORNSTEIN: Right. It's done at the plea  
4 bargaining stage.

5 QUESTION: Never in the field in this --

6 MR. GORNSTEIN: I wouldn't -- I don't want to  
7 say never. I think almost always --

8 QUESTION: Almost always.

9 MR. GORNSTEIN: -- at the plea bargaining stage.

10 QUESTION: If you're finished, I do have a --  
11 suppose I did think -- I mean, I put these questions more  
12 forcefully, often, than I -- when I'm actually uncertain,  
13 but if it turned out that I did think that the 5K1.1 is  
14 meant to pick up the statutory animal, you know, what I've  
15 been saying, still, it would be up to the Government to  
16 say what kind of motion they've made. So how would --  
17 what would be the outcome in this case?

18 You see, I mean, it's -- you're absolutely right  
19 that the Commission can't control --

20 MR. GORNSTEIN: That the consequence --

21 QUESTION: Yes.

22 MR. GORNSTEIN: -- if you're saying that it  
23 requires a motion to go below the statutory minimum --

24 QUESTION: Yes, but that --

25 MR. GORNSTEIN: -- then the consequence in this

1 case is the court had no authority, and then --

2 QUESTION: So we would affirm, but then you  
3 might be in violation of the plea agreement. Is that how  
4 it would work?

5 MR. GORNSTEIN: I think our plea agreement only  
6 committed us to file a motion under the guidelines.

7 QUESTION: That's --

8 MR. GORNSTEIN: Which we did. In our view we  
9 did.

10 QUESTION: What I'm trying to figure out is, if  
11 you took the view, if it turned out that 5K1.1 is meant to  
12 say you have to have a certain animal, and that is the  
13 statutory animal, and you tell us you don't have that  
14 animal therefore you don't have the 5K1.1 animal, if  
15 that's what we thought, if that's what I thought, I can't  
16 figure out how this case should come out.

17 MR. GORNSTEIN: Well, first of all, the question  
18 of the plea agreement is not here, because the --

19 QUESTION: Yes, that's right.

20 MR. GORNSTEIN: -- petitioner has never raised  
21 an issue in either the district court, the court of  
22 appeals, or anywhere else that there's been a breach of  
23 the plea agreement.

24 QUESTION: That's right.

25 MR. GORNSTEIN: If we were going to address what

1 the plea --

2 QUESTION: I don't want to address it.

3 MR. GORNSTEIN: Okay.

4 QUESTION: I just want to know, how would we  
5 decide --

6 QUESTION: No, but --

7 MR. GORNSTEIN: It's not here.

8 QUESTION: How in your opinion --

9 QUESTION: -- we should -- how should I decide  
10 this?

11 MR. GORNSTEIN: If the issue were here, or not?  
12 If the issue were here, and we were deciding,  
13 did the Government breach its plea agreement? The answer  
14 is no, it didn't, because it filed the relevant motion.

15 Now, it may be that that turned out to be  
16 worthless under the circumstances of this case. But  
17 that's okay. There's nothing wrong with the Government  
18 doing something that's worthless on some occasions as long  
19 as that's what the agreement required it to do. And that  
20 would be the case under your hypothetical.

21 QUESTION: Is the office of the Commission to  
22 issue a policy statement helping courts interpret what  
23 motions are, that there's a presumption that if you make  
24 the motion without distinguishing between the two that it  
25 means both guidelines and statutes, but that you still

1 have the option to be more specific?

2 MR. GORNSTEIN: We don't think that the  
3 Commission does have that role. We think the Commission's  
4 responsibility is with respect to 3553(e) motions it comes  
5 in after the Government makes its motion for a sentence  
6 below the statutory minimum. It's at that point that the  
7 Commission's responsibility takes over in deciding what  
8 the sentence will be after that.

9 With respect to 5K1.1, yes, the Commission  
10 probably has authority with respect to the guidelines to  
11 decide what sort of motion should be filed.

12 QUESTION: May I ask how you would deal with the  
13 following motion: motion of the Government for a sentence  
14 which will appropriately reflect the defendant's  
15 substantial assistance with the Government --

16 MR. GORNSTEIN: That would be a very --

17 QUESTION: -- and attach -- yes, but supposing  
18 that was the way it was phrased, would the judge have any  
19 authority or not --

20 MR. GORNSTEIN: No.

21 QUESTION: -- to go below -- you think not.

22 MR. GORNSTEIN: Right, because I think that the  
23 statutory minimum penalties are so important, and were  
24 deemed so important by Congress, that you really need a  
25 very explicit and clear statement by the Government that



1 it is seeking a sentence below the statutory minimum.

2 I think that's what 3553(e) contemplates, that  
3 specific judgment that we think that this is not just  
4 substantial assistance. And it's not just substantial  
5 assistance that warrants a departure from the guidelines  
6 or a reduced sentence. It is substantial assistance that,  
7 in our judgment, makes it appropriate for this defendant  
8 to receive a sentence below the statutory minimum.

9 QUESTION: Do you think the Justice Department  
10 ought to have sort of a Miranda warning in its plea  
11 agreements: "Watch out, there are two kinds of  
12 departures."?

13 MR. GORNSTEIN: Well, I think after the Court  
14 decides this case, everyone will know.

15 (Laughter.)

16 QUESTION: Well, would you object to having a  
17 Miranda warning in every plea agreement just in case  
18 someone doesn't?

19 MR. GORNSTEIN: We would object to including  
20 that sort of thing.

21 QUESTION: Why would you object to informing the  
22 defendant of the fact that he may be trapped by your plea  
23 agreement?

24 MR. GORNSTEIN: It's not a matter of objecting.  
25 As a matter of policy, it's a good idea, but the question

1 comes up in those rare cases where that warning wasn't  
2 given what should happen, and we think that what should  
3 happen should be dictated by the statute in that  
4 situation.

5 If the Court has nothing further --

6 QUESTION: Thank you, Mr. Gornstein.

7 Mr. Mullin, you have 3 minutes remaining.

8 REBUTTAL ARGUMENT OF PATRICK A. MULLIN

9 ON BEHALF OF THE PETITIONER

10 MR. MULLIN: Yes, Mr. Chief Justice, I know I  
11 have a couple of minutes.

12 I just want to address a point raised by Justice  
13 Breyer. I believe that Your Honor was questioning the  
14 Solicitor General about statistical evidence showing the  
15 effect of the departures under section 5K1.1 not only  
16 below the guidelines but also below mandatory minimums.

17 I believe the annual report of the Commission,  
18 the Sentencing Commission, reflects those statistics, and  
19 if this Court wishes I can certainly produce an additional  
20 submission to that effect.

21 I would note, and again it's not in my papers,  
22 but of the research that I've done in a couple of the  
23 circuits, the Ninth Circuit and the Second Circuit that  
24 have ruled in favor of petitioner, the number of  
25 departure -- number of departure applications by the

1 Government has gone up, and has gone up significantly  
2 since those decisions were made.

3 But again, if the Court wishes for me to provide  
4 that information, I'd be delighted to do it in each one of  
5 the circuits where this decision was made in favor of the  
6 petitioner.

7 Otherwise, I'll simply rely upon my briefs and  
8 on the arguments that I submitted before this Court today,  
9 and ask that you rule in favor of Mr. Melendez.

10 Thank you.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Mullin.

12 The case is submitted.

13 (Whereupon, at 11:59 a.m., the case in the  
14 above-entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

JUAN MELENDEZ, Petitioner v. UNITED STATES

CASE NO:      95-5661

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Ann Marie Federico

(REPORTER)