

No. 01-15708-FF

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**UNITED STATES OF AMERICA  
Plaintiff-Appellee**

**v.**

**MICHAEL ALLEN LEE,  
Defendant-Appellant**

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**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA**

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**BRIEF FOR THE UNITED STATES AS APPELLEE**

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No. 01-15708-FF

*United States of America v. Michael Allen Lee*

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CERTIFICATE OF INTERESTED PARTIES AND  
CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for the United States certifies that the following persons and parties have an interest in the outcome of this case:

Ralph F. Boyd, Jr., Assistant Attorney General, US Department of Justice

Roy Conn, III, Civil Rights Division, United States Department of Justice

Honorable Donald L. Graham, United States District Judge

Michael Allen Lee, Defendant/Appellant

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United States Of America, Plaintiff/Appellee

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**STATEMENT REGARDING ORAL ARGUMENT**

The United States does not oppose oral argument in this case.

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## **STATEMENT OF JURISDICTION**

The district court had jurisdiction over this case pursuant to 18 U.S.C. 3231, as the defendant was charged with an offense against the laws of the United States. Lee filed an untimely notice of appeal. However, upon the order of this Court, the district court considered Lee's belated notice of appeal as a motion for an extension of time to file the notice. See also Fed. R. App. P. 4(b)(4). After receiving briefs from the parties and holding a hearing, the district court found that Lee had shown "excusable neglect" for filing a late notice of appeal and granted his motion. This court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3742.

## **STATEMENT OF THE ISSUES**

- I. Whether In Determining Lee's Sentence Under U.S.S.G. 2H1.1(a)(1), The District Court Properly Cross-Referenced The Guideline Applicable To Violations Of 18 U.S.C. 894*
- II. Whether The United States' Recommendation That The Sentencing Court Use The Guideline Applicable To Violations of 18 U.S.C. 894 Violated Its Agreement Not To Seek Any Further Prosecution Of Lee*

## **STATEMENT OF THE CASE**

Michael Allen Lee was indicted for conspiracy to violate the right of George Williams, an African American farm worker, to be free from involuntary servitude in violation of 18 U.S.C. 241 (R. 3). Lee pled guilty to the offense pursuant to a

plea agreement. At sentencing, the district court applied U.S.S.G. 2H1.1 – the guideline applicable to violations of 18 U.S.C. 241. This guideline directs the court to determine “the offense level from the offense guideline applicable to any underlying offense,” U.S.S.G. 2H1.1(a)(1), and if it is greater than the stated levels, to apply it. The court found that Lee committed acts constituting a violation of 18 U.S.C. 894 (Collection of Extension of Credit by Extortionate Means), and cross-referenced the guideline applicable to such violations to calculate Lee’s base offense level. Lee appeals the court’s sentencing determination.

### *Statement of Facts*

As part of his plea agreement, Lee stipulated to the following facts:

Throughout the 1990s, an operation headed by Michael Lee (hereinafter “the Lee Operation”) was subcontracted as a farm labor contractor or “crew leader” by farmers in Central and Southern Florida to assemble crews of farm workers to harvest fruit.

Beginning in or about the fall or winter of 1996 and continuing through in or about April 1997, in and around Fort Pierce, Florida, within the Southern District of Florida and elsewhere, the defendant Michael Lee, William Oscar Smith, aka “Goon”, and Billy C. Rankin conspired and agreed with one another to commit offenses against the United States, namely: to injure, oppress, threaten, and intimidate agricultural farm workers in the free exercise and enjoyment of their rights and privileges secured to them by the Constitution and laws of the United States, that is, the right to be free from involuntary servitude as secured by the Thirteenth Amendment of the United States Constitution, in violation of Title 18, United States Code, Section 241.

Lee and the other defendants recruited homeless and drug addicted men to be agricultural farm workers, who became indebted to Lee through loans extended by Lee for rent, food, cigarettes, beer and other items. This caused the workers to incur debts that they could not conceivably repay. Defendant Lee then used that indebtedness, as well as force and the threat of force, to compel the workers through a climate of fear to stay and work harvesting crops against their will. One of the persons victimized in the Lee Operation was George Williams, an African-American farm worker then in the state of Florida. George Williams joined Lee's Operation as an agricultural farm worker and became indebted to defendant Lee in or about the Spring of 1997 in the manner described above. George Williams left Lee's Operation in or about the Spring of 1997, without fully paying his debt to Lee. Defendant Lee learned that Williams went to work for another labor contractor. On or about April 2, 1997, defendant Lee tracked George Williams to 1706 Avenue D in Fort Pierce, Florida. Defendant Lee was accompanied by defendant William Smith. Defendants Lee and Smith confronted Williams about the money Williams owed defendant Lee. Defendants Lee and Smith then made Williams get into Lee's truck. They drove Williams back to the 49<sup>th</sup> Street residence controlled by Lee in Fort Pierce, Florida. Upon arriving at the residence, defendants Lee and Smith forcibly took Williams inside the house where Williams was physically assaulted by Defendants Lee and Smith in front of several other farm workers in the Lee Operation. Immediately following the assault, defendant Lee told Williams not to leave the house. Several hours later, between midnight and the early morning hours of the next day, Williams left the 49<sup>th</sup> Street residence and reported the incident to the local police and medical professionals.

(R. 22 at 2-3, ¶ 2) (Plea Agreement).<sup>1</sup>

In exchange for Lee's guilty plea, the United States agreed that it would "not

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<sup>1</sup> Mr. Williams was diagnosed with terminal cancer and is now deceased (Second Addendum to Presentence Investigation Report at 6, ¶ 14).

seek any further prosecution of the defendant for any acts or conduct arising out of this case” (*id.* at 3, ¶ 3). The plea agreement also states that Lee was aware that he would be sentenced in conformity with the Federal Sentencing Guidelines and Policy Statements, *id.* at 3, ¶ 4, and includes the following provision:

The defendant is also aware that the sentence has not yet been determined by the court. The defendant understands that any estimate of the probable sentencing range that he may receive from his counsel, the government, or the Probation Office, is a prediction, not a promise, and is not binding on the United States, the Probation Office or the court. The defendant specifically acknowledges that he is aware that the United States and his attorney disagree on which sentencing guidelines apply to the plea to be entered by the defendant in this case. The defendant specifically expressly acknowledges no reliance upon anyone’s calculation of a particular sentence for the offense(s) constituting this plea and recognizes that the court in its discretion may impose the maximum penalties permitted by law.

*Id.* at 6, ¶ 10.

*The Presentence Investigation Report*

The Probation Office submitted a Presentence Investigation Report (PSIR) recommending the court apply U.S.S.G. 2H1.1(a)(1) to calculate Lee’s base offense level (Second Addendum to PSIR at 7, ¶ 19).<sup>2</sup> Concluding that Lee’s offense involved underlying conduct in violation of 18 U.S.C. 894, the PSIR recommended the court cross-reference U.S.S.G. 2E2.1(a) – the guideline

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<sup>2</sup> The PSIR was amended two times before it was submitted to the court.

applicable to such an offense – to determine Lee’s base offense level (*ibid*). The probation officer explained that this conclusion was based on the facts outlined in the offense conduct section of the PSIR, interviews with the FBI Special Agent who investigated Lee’s operation, and confirmation by counsel for the United States that, had the case gone to trial, the government planned to seek a superseding indictment charging Lee with a violation of 18 U.S.C. 894 (*ibid.*).

Lee objected to the recommendation that his sentence be calculated pursuant to U.S.S.G. 2H1.1(a)(1) (R. 65 at 5-8). Citing the Supreme Court’s decision in *United States v. Braxton*, 500 U.S. 344 (1991), Lee argued that the stipulated facts in his plea agreement did not “specifically establish” the elements of a violation of 18 U.S.C. 894 (*id.* at 7). Lee also argued that the government breached the plea agreement by recommending his sentence be determined by applying the guideline for violations of 18 U.S.C. 894 (*id.* at 9-10). Lee reasoned that implicit in the agreement that the government would not seek a superseding indictment charging him with a violation of 18 U.S.C. 894 was “the understanding that Mr. Lee would not be sentenced under § 2E2.1 (extortion) of the federal sentencing guidelines” (*ibid.*). To remedy this “breach,” Lee sought “specific performance of the terms of the plea agreement by the government, which means that he should not be

sentenced in accord with § 2E2.1 of the federal sentencing guidelines as he was not charged with an offense under 18 United States Code, § 894, nor did he plead guilty to one” (*id.* at 10).

Lee, however, subsequently filed a motion to withdraw his guilty plea (R. 64). Lee argued that he was entitled to withdraw his guilty plea because of the government’s alleged breach, *id.* at 3, and because the court committed plain error by failing to adequately inform him of the elements of a violation of 18 U.S.C. 894 prior to accepting his guilty plea (*ibid.* (citing *United States v. Telemaque*, 244 F.3d 1247 (11th Cir. 2001))).

#### *Sentencing Hearing*

On August 14 and 15, 2001, the district court held a hearing to determine Lee’s sentence (R. 81 and 76) (sentencing hearing transcripts). The court denied Lee’s motion to withdraw his guilty plea, noting that “[t]he fact that the defendant thinks that his Guidelines may be interpreted in one way or another is not a sufficient basis to withdraw a plea” (R. 76 at 4). The court also concluded that Lee was advised of all of his rights during the plea colloquy and entered his guilty plea knowingly (*ibid.*).

At the hearing, the court adopted the recommendation in the PSIR that Lee’s

base offense level be calculated pursuant to U.S.S.G. 2H1.1(a)(1) (R. 76 at 24).<sup>3</sup>

This guideline directs the court to determine “the offense level from the offense guideline applicable to any underlying offense,” U.S.S.G. 2H1.1(a)(1), and if it is greater than the stated levels, to apply it. The court previously concluded “that this involuntary servitude offense was based on and involved, significantly, extortion” (R. 76 at 6).<sup>4</sup> Accordingly, the court cross referenced U.S.S.G. 2E2.1– the guideline applicable to violations of 18 U.S.C. 894 – to calculate Lee’s base offense level.

Section 2E2.1 provides a base offense level of 20 with additional increases based on specific offense characteristics. The court increased Lee’s base offense level by two levels, pursuant to U.S.S.G. 2E2.1(b)(2)(A), because Williams

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<sup>3</sup> The court initially stated that the appropriate guideline for calculating Lee’s base offense level was the 1995 version of U.S.S.G. 2H4.1 (Involuntary Servitude) (R. 76 at 5-6). However, examination of the court’s sentencing calculation demonstrates that it used U.S.S.G. 2H1.1(a)(1) (*id.* at 24). Section 2H4.1 directs a sentencing court to determine a defendant’s base offense level as the greater of “(1) 15; or (2) 2 plus the offense level applicable to any underlying offense.” U.S.S.G. 2H4.1 (1995 edition). Had the court actually used that guideline, the base offense level would have been higher because the cross-reference to the guideline for a violation of 18 U.S.C. 894 would still apply.

<sup>4</sup> The court specifically noted that its conclusion was not based on information that the United States was considering filing a superseding indictment against Lee charging him with extortion had the matter gone to trial, nor on the opinion of the FBI Special Agent that the case involved extortion (*id.* at 7-8)



sustained bodily injury, *id.* at 12, and by four levels, pursuant to U.S.S.G. 2E2.1(b)(3)(A), because Williams was abducted (*id.* at 13). The court also added two levels, pursuant to U.S.S.G. 3B1.1(c), because Lee was an organizer or leader in the offense (*id.* at 17). The court then decreased this adjusted offense level by 2 levels, pursuant to U.S.S.G. 3E1.1(a), based on Lee's acceptance of responsibility, and by one level, pursuant to Section 3E1.1(b)(2), because Lee timely notified the government of his intention to plead guilty (*id.* at 18). Based on these calculations, Lee had a total offense level of 25.

The court then granted the United States' U.S.S.G. 5K1.1 motion, based on Lee's assistance to the government regarding the involvement of William Oscar Smith in the offense, and apparently decreased Lee's total offense level by 7 points (*id.* at 26).<sup>5</sup> The sentencing range for a total offense level of 18 and a Category IV criminal history is 41 - 51 months. See U.S.S.G. Sentencing Table. On August 21, 2001, the district court entered a final judgment and commitment order sentencing Lee to a term of 48 months and a three year term of supervised release (R. 66).

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<sup>5</sup> On August 8, 2001, the United States filed a motion for a downward departure of Lee's sentence pursuant to U.S.S.G. 5K1.1 (R. 60). The United States explained that because of Lee's assistance, the government was able to convince Smith to enter a guilty plea and avoid the time and expense associated with a public trial (*ibid.*). During the sentencing hearing, the United States recommended the court decrease Lee's total offense level by at least six to seven levels (R. 76 at 23).

## **STANDARD OF REVIEW**

This Court reviews the district court's application of the Sentencing Guidelines *de novo* and its findings of fact for clear error. *United States v. Camacho*, 261 F.3d 1071, 1073 (11th Cir. 2001). To assess whether a plea agreement was breached, this Court considers whether "the government's conduct is inconsistent with what was reasonably understood by the defendant when entering the plea of guilty." *United States v. Nelson*, 837 F.2d 1519, 1522-23 (11th Cir. 1988). Provided the defendant objects in district court, this court applies a clearly erroneous standard of review to evaluate whether a district court complied with Fed. R. Crim. P. 11 in accepting the defendant's guilty plea. *United States v. Lopez*, 907 F.2d 1096, 1099 (11th Cir. 1990).

## **SUMMARY OF ARGUMENT**

The district court sentenced Lee pursuant to U.S.S.G. 2H1.1 – the guideline applicable to violations of 18 U.S.C. 241 (Offenses Against Individual Rights). This guideline directs the court to determine "the offense level from the offense guideline applicable to any underlying offense," U.S.S.G. 2H1.1(a)(1), and if it is greater than the stated levels, to cross-reference that guideline to determine the

defendant's base offense level. The district court, finding that Lee's offense involved extortion, cross-referenced the guideline applicable to violations of 18 U.S.C. 894 (Collection of Extension of Credit by Extortionate Means) to determine Lee's base offense level. The court's factual determination that Lee violated 18 U.S.C. 894 was not clearly erroneous.

Lee claims that he could not be sentenced to the guideline applicable to a violation of 18 U.S.C. 894 because the stipulation in his plea agreement does not specifically establish the elements of such an offense. Although the guidelines permit a court to apply the guideline section for a more serious offense than the offense of conviction only when the plea contains a stipulation that specifically establishes the more serious offense, see U.S.S.G. 1B1.2(a), Lee was not sentenced pursuant to this provision. Accordingly, it was not necessary to show that the stipulation specifically establishes the elements of a violation of 18 U.S.C. 894. In any event, the stipulation does specifically establish the elements of a violation of the extortion statute.

Lee also contends that he was entitled to withdraw his guilty plea because the United States breached the plea agreement by recommending Lee's sentence be

calculated by cross-referencing to the guideline for extortion offenses. While the United States agreed not to prosecute Lee for offenses other than the violation of 18 U.S.C. 241 to which he pled guilty, it did not make any promises preventing it from recommending the application of any particular sentencing guideline.

### ARGUMENT

*I. In Applying U.S.S.G. 2H1.1(a)(1), The District Court Properly Cross-Referenced The Guideline Applicable To A Violation of 18 U.S.C. 894 Because Lee Engaged In Conduct Constituting Such An Offense*

The district court applied U.S.S.G. 2H1.1 (Offenses Involving Individual Rights) to determine Lee's base offense level (R. 76 at 24) (transcript, August 15, 2001, sentencing hearing). This guideline directs the court to determine "the offense level from the offense guideline applicable to any underlying offense," U.S.S.G. 2H1.1(a)(1), and if it is greater than the stated levels, to apply it. The first application note to this section explains that the phrase "'Offense Guideline applicable to any underlying offense' means the guideline applicable to any *conduct* established by the offense of conviction that constitutes an offense under federal, state or local law." U.S.S.G. 2H1.1, Commentary, Application note 1 (emphasis added).

Limiting its review to the stipulation in Lee's plea agreement, the court found that "this involuntary servitude offense was based on and involved, significantly, extortion" (R. 76 at 6). Accordingly, the court cross-referenced U.S.S.G. 2E2.1 – the guideline applicable to a violation of 18 U.S.C. 894 – to calculate Lee's base offense level. The court's factual determination was proper.

Section 894 provides: "Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means (1) to collect or attempt to collect any extension of credit, or (2) to punish any person for the nonrepayment thereof." The elements of the offense are knowledge; an extension of credit; and the use of extortionate means to collect the debt or impose punishment for failure to repay. The court did not err in finding that Lee's conduct constituted a violation of 18 U.S.C. 894.

An extension of credit is defined by statute to include making a loan. 18 U.S.C. 891(1). The debt or claim may be "acknowledged or disputed, valid or invalid." *Ibid.* Courts have recognized an "extension of credit" arising from deferment of payments on not only legitimate investments, but on illegitimate debts as well. *United States v. Cassano*, 132 F.3d 646, 649-650 (11th Cir.) (citing cases),

cert. denied, 525 U.S. 840 (1998). The stipulation in Lee's plea agreement clearly states that Lee made loans to George Williams and others. (R. 22 at 2, ¶ 2) ("Lee and the other defendants recruited homeless and drug addicted men to be agricultural farm workers, who became indebted to Lee through loans extended by Lee for rent, food, cigarettes, beer and other items. \* \* \* \* George Williams joined Lee's Operation as an agricultural farm worker and became indebted to defendant Lee \* \* \* in the manner described above.") The stipulation, thus, establishes the existence of an "extension of credit."

Second, "extortionate means" are defined by statute as "any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person." 18 U.S.C. 891(7). In the plea agreement, Lee stipulated that he used "indebtedness", as well as force and the threat of force, to compel the workers through a climate of fear to stay and work harvesting crops against their will" in satisfaction of the debt. (R. 22 at 2, ¶ 2). In addition, after George Williams left Lee's operation, Lee and Smith "confronted Williams about the money Williams owed defendant Lee. Defendants Lee and Smith then made Williams get into

Lee's truck. They drove back to the 49th Street residence controlled by Lee in Fort Pierce, Florida. Upon arriving at the residence, defendants Lee and Smith forcibly took Williams inside the house where Williams was physically assaulted by Defendants Lee and Smith in front of several other farm workers in the Lee Operation." (R. 22 at 2-3, ¶ 2). Thus, Lee used violence and threats of violence against the farm workers and, in particular, Williams, to collect the debt or impose punishment for failure to satisfy it. See *United States v. Gambino*, 566 F.2d 414, 418 (2nd Cir. 1977) ("There can be no doubt that Section 894 is violated when force and violence are used to collect an extension of credit."), cert. denied, 435 U.S. 952 (1978).

Finally, to be guilty of using extortionate means to collect an extension of credit, a defendant must be shown to have had the requisite mental state. Section 894(a) expressly specifies that the participation in extortion need only be "knowing." The requirement of knowledge is met where a defendant was aware that a result proscribed by the statute was "practically certain to follow from his conduct, whatever his desire may be as to that result." *United States v. Bailey*, 444 U.S. 394, 404 (1980). Lee's involvement at all steps in the process: to extend

credit; threaten and engage in violence to force satisfaction of the debt; and punish the failure to satisfy it, establish the requisite knowledge.

Lee contends that the district court improperly cross-referenced the guideline applicable to a violation of 18 U.S.C. 894 because the stipulation in the plea agreement failed to specifically establish the elements of such an offense. This assertion is based on a misunderstanding of U.S.S.G. 1B1.2(a) and the Supreme Court's decision in *Braxton v. United States*, 500 U.S. 344 (1991).

Normally, a sentencing court applies the guideline section "applicable to the offense of conviction." U.S.S.G. 1B1.2(a). However, when a conviction obtained by guilty plea "contain[s] a stipulation that specifically establishes a more serious offense than the offense of conviction, [the court shall apply the guideline] applicable to the stipulated offense." *Ibid.* In *Braxton*, the Court reviewed a district court's application of the proviso in Section 1B1.2(a) to determine whether a defendant's concessions in pleading "specifically establish[ed]" an offense more serious than the one to which the defendant pled guilty. *Braxton*, 500 U.S. at 349-350. Here, no similar Section 1B1.2(a) issue exists.



The district court did not arrive at the extortion guideline via the Section 1B1.2(a) exception. Instead, it began at the guideline applicable to the offense of conviction – a violation of 18 U.S.C. 241.<sup>6</sup> That guideline simply contains a cross reference that led to the court’s ultimate sentencing destination. To apply this cross reference, the guideline calls for a sentencing court to make a determination of fact as to whether the defendant’s conduct constituted any other offense. See U.S.S.G. 2H1.1(a)(1). The court was not required to determine whether the elements of such an offense were specifically established by stipulation just because the case

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<sup>6</sup> In a motion to supplement his appellate brief to this Court, Lee cites *United States v. Stubbs*, 279 F.3d 402 (6th Cir. 2002). In *Stubbs*, the sentencing court calculated the defendant’s base offense level by cross-referencing a guideline that listed the base offense level as the statutory minimum for an offense different than the offense to which the defendant pled guilty. The Sixth Circuit held that the sentencing court had committed plain error when it applied this cross-reference because it led to a change “in both the crime of conviction and the statutory sentencing range.” *Id.* at 409. The court also held that the application of the cross-reference provision was not consistent with “the clear and plain language of the guideline.” *Ibid.* In contrast, the application of the cross-reference provision in U.S.S.G. 2H1.1(a)(1) did not alter the sentencing range for a violation of 18 U.S.C. 241. Furthermore, unlike the guideline at issue in *Stubbs*, Section 2H1.1(a)(1) clearly directs a court to consider the cross-reference provision when a defendant’s conduct constitutes an offense other than a violation of 18 U.S.C. 241.

involves a guilty plea. See *United States v. Mun*, 41 F.3d 409, 411-412 (9th Cir. 1994), cert. denied, 514 U.S. 1077 (1995).<sup>7</sup>

Lee also contends that it was inappropriate for the district court to cross-reference the guideline for violations of 18 U.S.C. 894 because “[u]se of a guideline other than the guideline indicated for the statute of conviction is appropriate only when facts alleged in the indictment support a finding of an atypical or a more severe case” (Br. at 20-21).<sup>8</sup> The court’s cross-reference to the guideline applicable to a violation of 18 U.S.C. 894, however, was made pursuant

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<sup>7</sup> Even if this Court concludes that *Braxton* applies, the stipulation in Lee’s plea agreement specifically establishes the elements of a violation of 18 U.S.C. 894.

<sup>8</sup> The “atypical case” language was found in the introduction to Appendix A of the 1995 edition of the Guidelines. The instruction provided, “If, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted (See § 1B1.2).” However, this language was deleted in the 2000 edition of the Guidelines. See U.S.S.G. App. A, Intro. The Sentencing Commission explained that the deletion of this language, as well as certain amendments to U.S.S.G. 1B1.1 and 1B1.2 and its Application Notes, was done to clarify that sentencing courts should not “decline to use the offense guideline referenced in the Statutory Index in cases that were allegedly ‘atypical’ or ‘outside the heartland.’” U.S.S.G. App. C, Amend. 591.

to the guideline indicated for a 18 U.S.C. 241 conviction.

II. *The United States' Recommendation That The Sentencing Court Cross-Reference The Guideline Applicable To Violations of 18 U.S.C. 894 Did Not Violate Its Agreement Not To Seek Any Further Prosecution Of Lee*

III.

“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration,

such promise must be fulfilled.” *Santabello v. New York*, 404 U.S. 257, 262

(1971). In assessing whether the terms of a plea agreement have been violated, this

Court has held that it “must determine whether the government’s conduct is

inconsistent with what was reasonably understood by the defendant when entering

the plea of guilty.” *United States v. Nelson*, 837 F.2d 1519, 1522-23 (11th Cir.

1988).

Lee argues that the United States breached the plea agreement by recommending the court cross-reference the guideline applicable to a violation of 18 U.S.C. 894 when sentencing him (Br. at 22). Lee asserts that “[a]t the time [he] entered his plea of guilty, it was his understanding that the government would not prosecute him under 18 U.S.C. § 894, nor would they seek a sentence for that offense pursuant to § 2E2.1 of the Federal Sentencing Guidelines” (Br. at 22-23).

Such an interpretation of the plea agreement is unreasonable.

Lee correctly notes that the plea agreement includes the promise that “[i]n exchange for the defendant’s plea in this case, the United States agrees that it will not seek any further prosecution of the defendant for any acts or conduct arising out of this case” (R. 22 at 3, ¶ 3). The government has and will comply with that promise not to pursue further charges. There is nothing to support Lee’s contention that this provision also included a promise not to advocate the application of any particular sentencing guideline. Lee’s plea agreement specifically states that his sentence shall “be imposed in conformity with the Federal Sentencing Guidelines and Policy Statements” (R. 22 at 3, ¶ 4). Lee was aware that “the United States and his attorney disagree on which sentencing guidelines apply to the plea to be entered by the defendant in this case” and that “any estimate of the probable sentencing range that he may receive from his counsel, the government or the Probation Office, is a prediction, not a promise, and is not binding on the United States, the Probation Office or the court” (*Id.* at 6, ¶ 10). Read as a whole, it is clear that the government’s promise not to seek further prosecution of Lee was separate and distinct from the sentencing process.

Lee cites cases where this Court held that the government breached a plea agreement by taking a position at the sentencing hearing which was incompatible with the plea agreements. See e.g., *United States v. Johnson*, 132 F.3d 628, 631-632 (11th Cir. 1998) (support for presentence report recommending defendant be held accountable for greater quantity of drugs than was stipulated to in plea agreement), cert. denied, 525 U.S. 915 (1998); *United States v. Taylor*, 77 F.3d 368, 370 (11th Cir. 1996) (support for presentence report recommending sentencing range greater than sentence government promised to recommend in plea agreement). Unlike these cases, however, there was no inconsistency between the government's recommendation that the court cross-reference the guideline applicable to a violation of 18 U.S.C. 894 and its promise to not prosecute Lee for such an offense in addition to his conviction under 18 U.S.C. 241. See *United States v. Ykema*, 887 F.2d 697, 699 (6th Cir. 1989) (government's promise not to bring additional charges did not preclude government from indicating in sentencing report a greater quantity of drugs for determining his base offense than the amount listed in the offense of conviction), cert. denied, 493 U.S. 1062 (1990). Because there was no breach of the plea agreement, Lee was not entitled to withdraw his

guilty plea.

Lee also asserts that he was entitled to withdraw his guilty plea because the district court failed to inform him of the elements of an 18 U.S.C. 894 offense prior to accepting his guilty plea (Br. at 24 n.3). This assertion reflects a misunderstanding of a district court's obligations. Prior to accepting a defendant's guilty plea, a district court must ensure that the defendant understands the nature of the charges to which he is going to plead. Fed. R. Crim. P. 11(c); see also *United States v. Jones*, 143 F.3d 1417, 1418-19 (11th Cir. 1998). The record of Lee's Rule 11 hearing reflects that the district court satisfied this obligation.

Prior to accepting Lee's guilty plea, the district court conducted an extensive colloquy with Lee to be sure he was entering the plea knowingly and voluntarily. The court asked Lee whether he read the plea agreement and discussed its provisions with his lawyer, R. 75 at 7; read the indictment charging him with a violation of 18 U.S.C. 241 and explained the specific elements of such an offense, *id.* at 9-10; and the government read a detailed account of the facts supporting Lee's conviction under 18 U.S.C. 241 (*id.* at 11-14). This Court has previously found that such a colloquy satisfies Rule 11. See e.g., *United States v. DePace*, 120 F.3d 233, 238 (11th Cir. 1997), cert. denied, 522 U.S. 1153 (1998).

Lee's assertion that Rule 11 also required the court to inform Lee of the elements of any underlying offenses that could affect Lee's sentence is without legal support. Although Rule 11 requires a sentencing court to inform a defendant of the mandatory minimum and maximum penalty provided by law and to consider any applicable sentencing guidelines, see Fed. R. Crim. P. 11(c), it "does not require the court to specify which guidelines will be important." Fed. R. Crim. P. 11, 1989 Advisory Committee Notes. In fact, this Court has recognized that at the time of accepting a defendant's guilty plea, a court does not have the benefit of the presentence report and, thus, is not prepared to decide which guidelines may be applicable. See *United States v. Mosley*, 173 F.3d 1318, 1327-1328 (11th Cir. 1999) ( Rule 11 does not require a court to inform a defendant of the applicable sentencing range under the guidelines); *United States v. Bozza*, 132 F.3d 659, 661-662 (11th Cir. 1998) (Rule 11 does not require court to inform defendant of possible sentencing enhancement before accepting plea).

**CONCLUSION**

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on March 15, 2002, two copies of the United States'

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