

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

United States Court of Appeals
Fifth Circuit

FILED

November 2, 2011

Lyle W. Cayce
Clerk

No. 10-20650
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

FRED JESSIE COLE, JR.,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:10-CR-26-1

Before SMITH, BARKSDALE, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Fred Jessie Cole, Jr., challenges the restitution order imposed following his guilty-plea conviction for health-care fraud, aiding and abetting. Cole contends the district court committed reversible plain error by ordering him to pay \$937,567.54 because that amount was not based on Medicaid's actual loss. Cole contends the court failed to consider the number of units he actually delivered. *See United States v. Klein*, 543 F.3d 206, 215 (5th Cir. 2008) (“[Cole’s] gross is not equivalent to [Medicaid’s] loss” (citing 18 U.S.C. § 3663A)). The

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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Government concedes error and requests our court vacate the restitution order and remand for resentencing.

CONVICTION AFFIRMED; SENTENCE IN PART AFFIRMED;
RESTITUTION ORDER VACATED; REMANDED for resentencing consistent
with this opinion.