

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

United States Court of Appeals  
Fifth Circuit

**FILED**

November 2, 2011

No. 10-20650  
Summary Calendar

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

FRED JESSIE COLE, JR.,

Defendant - Appellant

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

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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

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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