

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

Case No. 23-cr-80141-DMM

**UNITED STATES OF AMERICA,
Plaintiff**

v.

**EMMAUEL BULLY, JR.,
Defendant.**

**EMMANUEL BULLY, JR.'S MEMORANDUM IN SUPPORT
OF DOWNWARD DEPARTURE AND SETENCING MEMORANDUM**

COMES NOW THE DEFENDANT, **EMMANUEL BULLY, JR.**, through the undersigned counsel, who files the following Sentencing Memorandum setting forth additional factors that seek the Court's consideration when determining what type and length of sentence that is sufficient, but not greater than necessary, to comply with the statutory directive set forth in 18 U.S.C. §3553(a) and states:

I. BACKGROUND

1. Emmanuel Bully, Jr, "Bully," was born on April 09, 1979, in Port-au-Prince, Haiti.
2. Bully moved (lawfully) to Brooklyn, New York, United States from Haiti when he was four years old and has been a United States Citizen since March 15, 2006.
3. He immigrated to the United States with his parents, Vernelia ("Vernelia") and Emmanuel Bully Sr. ("Bully Sr."), and his younger brother, Mike Davis Bully ("Mike").
4. Bully Sr. is 79 years old and was a longtime blackjack dealer at the Hard Rock Hotel & Casino until his retirement. Now, battling the final stages of dementia, he resides in Boynton Beach with only Vernelia to care for him; she herself is 68 and still employed by Publix Supermarket after more than 20 years of dutiful service.

5. Meanwhile, Mike is 39, resides in Philadelphia, Pennsylvania, and is employed as a senior director for a medical insurance company. He is married with three children.

6. Bully is in regular contact and communication with Mike, who visits Florida frequently for work and to visit his family.

7. Bully and Mike are often relied upon by Vernelia to assist in the difficult task of caring for Bully Sr.

8. Bully had worked for himself as a tax consultant and preparer since 2008 prior to the pandemic and the conduct leading up to this action.

9. However, as the final PSI report confirms, Bully had been suffering from alcohol abuse and experimenting with other drugs, for well over a decade, in response to the anxiety and depression he was suffering from, for at least 10 years, at the time of the conduct he is taking responsibility for in this matter.

10. Indeed, as the final PSI makes clear (paragraphs 59 through 66), Bully experienced significant anxiety and depression, which subsequently led to him self-medicating with drugs and alcohol.

11. As will become readily apparent in the paragraphs below, it is respectfully submitted that a downward departure is warranted in Bully's case, because this was truly an isolated event that was precipitated by the COVID-19 pandemic which exacerbated Bully's preexisting, anxiety, depression, and substance abuse.

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II. GUIDELINES

12. Mr. Bully's conduct, for which he has accepted responsibility, is an isolated incident that was only precipitated by the COVID-19 pandemic, coupled with his preexisting mental health issues, that Bully had already been coping with by using alcohol and drugs.

13. It is respectfully submitted that a substantial reduction is warranted, and a sentence of non-incarceration would even be justified in these circumstances, due to Bully's timely plea, acceptance of guilt and responsibility, and his need and desire to seek help for his anxiety, depression, and alcohol abuse.

14. According to the National Health Institute ("NIH"), "Both SARS-CoV-2 and the COVID-19 pandemic have significantly affected the mental health of adults and children. In a 2021 study, nearly half of Americans surveyed reported recent symptoms of an anxiety or depressive disorder, and 10% of respondents felt their mental health needs were not being met. Rates of anxiety, depression, and substance use disorder have increased since the beginning of the pandemic."¹

15. Moreover, the NIH also contends that there are disproportionate effects on mental health in the United States resulting from the pandemic; stating that even though "the COVID-19 pandemic can affect the mental health of anyone, some people are more likely to be affected than others. People who are more likely to experience symptoms of mental illnesses or disorders during the COVID-19 pandemic include: people from racial and ethnic minority groups, mothers and pregnant people, people with financial or housing insecurity, children, people with disabilities, people with preexisting mental illnesses or substance use problems, and health care workers."²

¹ See - <https://covid19.nih.gov/covid-19-topics/mental-health>

² See - Id.

16. Moreover, the “people who belong to more than one of these groups may be at an even greater risk for mental illness.” As per the final PSI report, Bully falls into three out of the seven NIH high risk categories.³

17. Bully’s substance abuse directly contributed to his car crash in 2010 that resulted in serious spinal injuries, for which he still requires physical therapy.

18. It also directly contributed to his DUI arrest in 2011 (the “DUI”).

19. After the DUI, Bully did not have any more legal troubles and refrained from any irresponsible or illegal behavior.

20. However, when the pandemic began, and the world was thrust into uncertainty, Bully was still suffering from anxiety, depression, and substance use, which, in his case, had reached the point of abuse.

21. Not only did Bully suffer from the top three pandemic-related issues of anxiety, depression, and substance abuse as reported by the NIH, but he also satisfied three of its seven risk categories, by: (a) being a person from an ethnic and racial minority group, (b) being a person with financial insecurity, and (c) being a person with a substance abuse disorder.

22. Thereby placing him at substantially more risk for mental illness and substance abuse. Both of which Bully already suffered from.

23. The unprecedented (in our lifetime) COVID-19 pandemic caused extreme isolation for Bully, which only exacerbated his feelings of depression, anxiety (uncertainty), and increased his substance use, which would lead to the improper conduct he has taken responsibility for here.

³ See - Id.

III. Variance from Recommendation for Incarceration range of 27-33 months.

24. The guidelines are just one of a number of sentencing factors set forth in 18 U.S.C. §3553(a). See *U.S. v. Booker*, 543 U.S. 220, 264-65, (2005). The primary directive in §3553(a) is for sentencing to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2.” Section 3553(a) states that such purposes are:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant” (§ 3553(a)(1));

(2) the need for the sentence imposed-

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence of criminal conduct;

(C) to protect the public from further crimes of the defendant and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

25. In determining the minimally sufficient sentence, §3553(a)(3) further directs sentencing courts to consider the following factors:

3) “the kinds of sentences available” (§3553(a)(3));

4) the kinds of sentencing and sentencing range established for the category of the offense (§3553(a)(4));

5) And any pertinent policy statement issued by the Sentencing Commission... (§3553(a)(5))

6) “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” (§3553(a)(6));

7) “the need to provide restitution to any victims of the offense.” (§3553(a)(7)).

26. The Court, in determining whether to impose a term of imprisonment and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, **recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.** See 18 U.S.C. §3582(a).

27. Under U.S.C. §3661, “no limitation shall be placed on the information concerning the background, character, and conduct of the defendant which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” This statutory language certainly overrides the (now-advisory) policy statements in Part H of the sentencing guidelines, which list as “not ordinarily relevant” to sentencing a variety of factors such as the defendant’s age, educational and vocational skills, mental and emotional conditions, drug or alcohol dependence, and lack of guidance as a youth. See U.S.S.G. §5H1.

28. A sentencing court must now consider all of the §3553(a) factors, not just the guidelines, in determining a sentence that is sufficient but not greater than necessary to meet the goals of sentencing. And where the guidelines conflict with other sentencing factors set forth in §3553(a), these statutory sentencing factors should generally trump the guidelines. See *United States v. Denardi*, 892 F.2d 269, 276-77 (3d Cir. 1989) (Becker, J., concurring in part, dissenting in part) (arguing that since § 3553(a) requires sentence be no greater than necessary to meet four purposes of sentencing, imposition of sentence greater than necessary to meet those purposes violates statute and is reversible, even if within guideline range).

29. § 3553(a) (5) allows for the court to consider “any pertinent policy statement” regarding amendments by Congress (“regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments...).

30. On Dec. 21, 2018, the First Step Act of 2018 was signed into law. The Act expresses the most recent policy statement of Congress. Specifically, the law articulates that “the Department of Justice (DOJ) to establish a risk and needs assessment system to evaluate the recidivism risk of prisoners; to guide housing, grouping, and program assignments; and to incentivize and reward participation in and completion of recidivism reduction programs and productive activities” (Summary S.756-115th Congress (2017-2018).

31. The Presidential Statement upon the signing of the First Step Act articulated the policy that the reforms will “prepare inmates to successfully rejoin society and enact commonsense sentencing reforms to make our justice system fairer for all Americans... These historic reforms will address problems that have plagued our justice system for years. Currently, approximately 77 percent of State inmates and 38 percent of Federal inmates are rearrested within five years of their release”. (See Whitehouse briefings statement issued Dec. 21, 2018).

IV. Application of the Statutory Sentencing Factors to the Facts of the Case: The Nature and Circumstances of the Offense and the History of the Offender

32. Length of Time Before First Crime. Bully has been a responsible and hard-working immigrant and citizen before getting mixed up in the offense for which he takes responsibility before this Court.

33. Departure from the recommendations to a punishment not involving additional incarceration is warranted due to the length of time until the first offense. *U.S. v. Ward*, 814 F. Supp. 23 (E.D. Va., 1993).

34. Aberrant Behavior. This matter is the Bully's first of this nature and constitutes "aberrant conduct." See *U.S. v. Morales*, 972 F.2d 1007, 1011 (9th Cir. 1993) (court may downward depart for "aberrant conduct" where there is no criminal history); See also *U.S. v. Takai*, 941 F.2d 738, 744 (9th Cir. 1991) (multiple incidents over six-week period still constituted a single act of aberrant behavior).

35. Excellent Employment History. Defendant has maintained self-employment since 2008 in the United States and worked himself through school, including Florida Atlantic University. Such continuous employment warrants a downward departure. See *U.S. v. Thompson*, 74 F.Supp.2d 69 (D. Mass. 1999); *U.S. v. Jones*, 158 F.3d 492 (10th Cir. 1998) (the district court did not abuse its discretion in departing downward by three levels when, as one of eleven factors, it considered the defendant's "long impressive work history ...where good jobs are scarce." Even though under §5H1.5 is ordinarily a discouraged basis, here the circumstance was unusual); See also *U.S. v. Higgins*, 967 F.2d 841 (3d Cir. 1992) (young age and stable employment will justify a downward departure if "extraordinary"; remanded to see if judge realized he had power); *U.S. v. Alba*, 933 F.2d 1117 (2d Cir. 1991) (long-standing employment at two jobs); *U.S. v. Jagmohan*, 909 F.2d 61 (2d Cir. 1990) (exceptional employment history and nature of the crime); *U.S. v. Big Crow*, 898 F.2d 1326, 1331-32 (8th Cir. 1990) (excellent employment record).

36. Loss of Business, Assets, And Source Of Income. *U.S. v. Gaiind*, 829 F. Supp. 669 (S.D.N.Y. 1993) (the destruction of a defendant's only business, involving testing material for the EPA, warranted a downward departure in false statement case because the elimination of the defendant's inability to engage in similar or related activities and the substantial loss of assets and income were a source of individual and general deterrence).

37. Sua Sponte Departure By Court. *U.S. v. Vizcaino*, 202 F.2d 345, 348 (D.C. Cir. Cir. 2000) (implicitly recognizing the authority of district court to depart *sua sponte* but finding no plain error not to do so); *U.S. v. Ekhtator*, 17 F.3d 53 (2d Cir. 1994) (even where D agreed not to ask for downward departure, court may do so *sua sponte* if unusual family circumstances; remanded); *U.S. v. Williams*, 65 F.3d 301, 309-310 (2d Cir. 1995) (“we wish to emphasize that the Sentencing Guidelines do not displace the traditional role of the district court in bringing compassion and common sense to the sentencing process . . . In areas where the Sentencing Commission has not spoken . . . district courts should not hesitate to use their discretion in devising sentences that provide individualized justice”).

V. ZERO-POINT OFFENDER ADJUSTMENT

38. It is respectfully submitted that Bully merits a sentence reduction that provides the benefits of the Zero-Point Offender Adjustment, proposed in Part C, § 4C1.1 (the “Zero-Point Adjustment”), (Effective November 1, 2023), which is allowed in his plea agreement and more adequately reflects Bully’s non-existent prior criminal history. The Zero-Point Adjustment reduces the recommended advisory guidelines by two levels. To qualify, defendants must not have: any prior criminal history; received a terrorism adjustment under § 341-4; used violence or credible threats of violence in connection with the offense; caused death or serious bodily injury because of the offense; caused a death or serious bodily injury because of the offense; committed a sex offense; personally caused a substantial financial hardship; possessed, received, purchased, transported, transferred, sold, or disposed of a firearm or other dangerous weapon (or induced another person to) in connection with the offense; committed a civil rights offense covered under § 2H1.1 (offenses involving individual rights); committed a hate crime; received an adjustment under § 3A1.1 (hate crime motivation or vulnerable victim), § 3A1.5 (serious human rights

offense), or § 3B1.1 (aggravating role); or engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848. Here, Bully meets all these criteria except one; he scores one criminal history point because of the DUI in 2011. However, it is respectfully submitted that because the DUI is both so far removed in time and so wholly unrelated to the current conduct for which Bully has accepted responsibility, that it would be just and proper under the circumstances to provide a sentence reduction that reflects the Zero-Point Adjustment.

VI. ACTUAL LOSS WOULD BEST SERVE THE INTEREST OF JUSTICE

39. It is respectfully submitted that Bully should receive a sentence reduction that takes into account that when submitting the subject applications, which contained false information, Bully had no knowledge whatsoever of the definitive amount he would receive or ultimately “requested”. Therefore, the intended loss in this matter does not accurately reflect Bully’s intent when submitting the subject applications. Moreover, since the Eleventh Circuit’s decision in *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc), court’s are required to only consider actual loss at sentencing. As explained by Judge Rodolfo A. Ruiz II, United States District Court Judge, of the Southern District of Florida:

Certainly, the Court recognizes **pre-*Dupree* caselaw from the Eleventh Circuit “require[d] district courts to consider the intended loss amount when calculating the loss attributable to the defendant.”** *Verdeza*, 69 F.4th at 794 (citing *United States v. Orton*, 73 F.3d 331, 333 (11th Cir. 1996)); *see also United States v. Moss*, 34 F.4th 1176, 1190 (11th Cir. 2022) (looking to intended loss when applying § 2B1.1). *Moss* and *Orton*, however, relied on the commentary to the Guidelines—not the text. *See Moss*, 34 F.4th at 1190; *Orton*, 73 F.3d at 333. **But the Eleventh Circuit’s mandate in *Dupree* is clear: if the Guidelines are unambiguous, this Court does not reach the commentary.** *Dupree*, 57 F.4th at 1276–77. Additionally, while the traditional tools of construction can include the “structure, history, and purpose” of a regulation, *see Kisor*, 139 S. Ct. at 2415, the Court finds no need to consider the “context and purpose of” § 2B1.1. *You*, 74 F.4th at 397. Generally, a court’s inquiry “must begin, and usually end, with the text.” *See United*

States v. Stevens, 997 F.3d 1307, 1314 (11th Cir. 2021) (quoting *Boca Ciega Hotel, Inc. v. Bouchard Transp. Co.*, 51 F.3d 235, 237 (11th Cir. 1995)). Where the text of a provision is “plain and unambiguous, there is no need for further inquiry.” *See id.* (quoting *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1146 (11th Cir. 2018)); *see also Dupree*, 57 F.4th at 1279 (“We conclude that the text of § 4B1.2(b) unambiguously excludes inchoate crimes. Under *Kisor*, that concludes our analysis, and we have no need to consider, much less defer to, the commentary[.]”). **Here, § 2B1.1 is unambiguous. So, the Court cannot consider the commentary and is bound by § 2B1.1’s plain text.**

See *United States of America vs. Minal Patel, a/k/a “Minalkumar Patel,”* Case No. 19-CR-80181-RAR; Sentence Order Regarding Loss Amount 08/23/2023 [D.E. 547] (the “Ruiz II Opinion”). [Emphasis added]. A true and correct copy of the Ruiz II Opinion is attached hereto and marked as Exhibit “A” for the Court’s ease of reference.

40. Although not binding upon this Court, it is respectfully submitted that Bully merits a sentence reduction that reflects the actual loss instead of the intended loss for the reasons set forth in the Ruiz II Opinion.

VII. CONCLUSION

Bully’s individual characteristics and the nature of the offense for which he is before the court for sentencing warrants consideration of a sentence not involving any additional incarceration. Allowing Bully to work and make restitution would be accomplished without a sentence requiring incarceration and would allow him to seek the mental health and substance abuse therapy he undoubtedly needs. Moreover, Bully has gained substantial insight from this experience, provided full disclosure of his conduct, accepted responsibility, and there is no likelihood of recidivism, as evidenced by his lack of prior criminal history. Therefore, it is respectfully submitted that the statutory sentencing objectives are satisfied without incarceration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served on December 4, 2023, and will be served upon filing with the Clerk of Court using the CM/ECF system.

Respectfully submitted,

/s/ Jason Bravo

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Exhibit “A”

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-CR-80181-RAR

UNITED STATES OF AMERICA

vs.

MINAL PATEL, a/k/a “Minalkumar Patel,”

Defendant.

SENTENCING ORDER REGARDING LOSS AMOUNT

When it comes to the United States Sentencing Guidelines, they don’t always mean what they say. That’s because the United States Sentencing Commission has incorporated interpretive commentary intended to assist district judges in the application of the Guidelines to a specific offense. Nowhere is this dichotomy about what the Guidelines *say* versus what they *mean* more apparent than in § 2B1.1, titled “Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States.” Within § 2B1.1, the Guideline provides a graduated scale that enhances a defendant’s total offense level based on the monetary amount of “loss.” *See* § 2B1.1(b)(1) (“If the loss exceeded \$6,500, increase the offense level as follows . . .”).

At first blush, this seems quite straightforward. The more “loss” caused by a defendant, the greater the enhancement. But not so fast. The commentary defines “loss” not as the amount of loss **actually** caused by a defendant’s actions. Instead, Application Note 3(A) of the Guidelines commentary expands the ordinary meaning of “loss” by instructing judges that “loss is the greater of actual loss **or intended loss.**” (emphasis added). So, what is a district court to do when the commentary expands the plain meaning of the Guidelines in such a way?

The answer to that question recently changed with the Eleventh Circuit’s decision in *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc). In *Dupree*, the Eleventh Circuit discussed the effect of the Supreme Court’s decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), on the Supreme Court’s earlier decision in *Stinson v. United States*, 508 U.S. 36 (1993). *Stinson* provided that the Sentencing Commission’s commentary on the Guidelines “was binding on federal courts unless the commentary was ‘plainly erroneous or inconsistent with the guideline itself, a federal statute, or the Constitution.’” *United States v. Verdeza*, 69 F.4th 780, 793–94 (11th Cir. 2023) (alteration accepted) (quoting *United States v. Wilson*, 993 F.2d 214, 216 (11th Cir. 1993), *overruling recognized by Verdeza*, 69 F.4th at 793). But that changed when the Eleventh Circuit applied “*Kisor*’s gloss on [*Auer v. Robbins*, 519 U.S. 452 (1997)] and [*Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)]” to *Stinson*. *Dupree*, 57 F.4th at 1275. In applying *Kisor* to *Stinson*, the Eleventh Circuit “overruled [Circuit] precedent on how the Guidelines and the commentary interact.” *Verdeza*, 69 F.4th at 793. Now, when a court in this Circuit is faced with a discrepancy between the Guidelines and the commentary, it must first “exhaust all the ‘traditional tools’ of construction” to determine if a guideline is genuinely ambiguous. *Dupree*, 57 F.4th at 1275 (quoting *Kisor*, 139 S. Ct. at 2415). If a guideline is unambiguous, “there is no plausible reason for deference” to the commentary, and the court must apply the guideline’s unambiguous meaning. *See id.* (quoting *Kisor*, 139 S. Ct. at 2415).

Kisor’s effect on *Stinson* is an issue that is dividing a growing number of circuits. *See United States v. Vargas*, 74 F.4th 673, 678 & nn. 2–3 (5th Cir. 2023) (en banc) (citing cases). Indeed, courts have split on the exact issue presented in this case. *Compare United States v. Banks*, 55 F.4th 246, 257 (3d Cir. 2022) (“The ordinary meaning of ‘loss’ in the context of § 2B1.1 is ‘actual loss.’”); *United States v. Kennert*, No. 22-1998, 2023 WL 4977456, at *4 (6th Cir. Aug. 3,

2023) (Murphy, J., concurring) (recognizing that “just because ‘loss’ can refer to [] different harms does not mean that it can refer to nonexistent ones too”), with *United States v. You*, 74 F.4th 378, 397 (6th Cir. 2023) (applying *Kisor* framework to the Guidelines but concluding “loss” is ambiguous). For its part, the Government argues that (1) *Dupree* does not control this case because the meaning of loss is ambiguous; and (2) recent Eleventh Circuit caselaw has signaled that courts should consider intended rather than actual loss when applying § 2B1.1. See United States’ Sentencing Mem., [ECF No. 527], at 8–10. As explained on the record at Defendant’s sentencing hearing, the Court disagrees with both arguments. See Paperless Minute Entry, [ECF No. 542]. Noting the growing disagreement among courts on how to apply § 2B1.1, the Court issues this supplemental decision to thoroughly explain its reasoning.

The Court begins with the Government’s second point: that recent Eleventh Circuit caselaw signals § 2B1.1 is more appropriately read to encompass intended loss. The caselaw cited does not support this conclusion. The Government points to three recent decisions in which the Eleventh Circuit, when reviewing for plain error, did not disrupt district court sentences that relied on reading § 2B1.1 to include intended loss. See *Verdeza*, 69 F.4th at 794; *United States v. Crowther*, No. 21-12255, 2023 WL 3813509, at *3 (11th Cir. June 5, 2023); *United States v. Corker*, No. 22-10192, 2023 WL 1777195, at *4 (11th Cir. Feb. 6, 2023). But the Court does not find that these decisions compel reading the guideline to include intended loss. In all three cases, the Eleventh Circuit emphasized it was only reviewing for plain error, which in this circuit requires the exact issue to have been “specifically and directly resolved by . . . on point precedent from the Supreme Court or” the Eleventh Circuit. *United States v. Sanchez*, 940 F.3d 526, 537 (11th Cir. 2019). As recognized by the Eleventh Circuit, “whatever else *Dupree* did, it did not ‘specifically and directly resolve’ the question of whether § 2B1.1’s definition of ‘loss’ is ambiguous.”

Verdeza, 69 F.4th at 794 (alteration accepted). Because neither *Dupree*, *Verdeza*, *Crowther*, or *Corker* decided whether § 2B1.1 is ambiguous, they are not controlling on this issue. The Court must now turn, then, to determining whether § 2B1.1 is ambiguous.

Section 2B1.1 requires courts to “apply the greatest” amount of “[l]oss” at sentencing. § 2B1.1(b)(1). To determine if this may possibly encompass intended loss, the Court must “apply[] [the] traditional tools of statutory interpretation” and ascertain the “plain language definition” of “loss.” *Dupree*, 57 F.4th at 1277. As stated by the Third Circuit when reviewing the same issue, “loss” only has one possible meaning: actual loss. *See Banks*, 55 F.4th at 257–58. Dictionary definitions of “loss” vary in scope—but all clearly contemplate a loss actually suffered by the victim. *Id.* To give just a few definitions, “loss” ordinarily refers to “the act or fact of *losing*,” “a person or thing or an amount *that is lost*,” and a “*decrease* in amount, magnitude, or degree.” WEBSTER’S THIRD NEW INT’L DICTIONARY, at 1338 (1993) (emphases added); *see also Banks*, 55 F.4th at 257–58 (providing additional definitions). None of these definitions provide room for considering “nonexistent” losses. *Kennert*, 2023 WL 4977456, at *4 (Murphy, J., concurring). Indeed, where the loss is merely “intended” it never materialized, as no “amount . . . [was] lost.” WEBSTER’S THIRD NEW INT’L DICTIONARY, at 1338. By instructing courts to consider intended loss, the commentary expands the concept of “loss” beyond its ordinary meaning. Thus, as explained at sentencing, this Court finds § 2B1.1 unambiguously requires courts to only consider actual loss.¹

¹ The Court notes, however, that while § 2B1.1 requires a court to only use actual loss when calculating a defendant’s offense level, nothing prohibits a court from considering intended loss pursuant to 18 U.S.C. § 3553(a). Courts continue to have “considerable discretion in deciding whether the § 3553(a) factors justify a variance and the extent of one that is appropriate.” *See United States v. Oudomsine*, 57 F.4th 1262, 1266 (11th Cir. 2023) (quoting *United States v. Shaw*, 560 F.3d 1230, 1238 (11th Cir. 2009)).

Certainly, the Court recognizes pre-*Dupree* caselaw from the Eleventh Circuit “require[d] district courts to consider the intended loss amount when calculating the loss attributable to the defendant.” *Verdeza*, 69 F.4th at 794 (citing *United States v. Orton*, 73 F.3d 331, 333 (11th Cir. 1996)); *see also* *United States v. Moss*, 34 F.4th 1176, 1190 (11th Cir. 2022) (looking to intended loss when applying § 2B1.1). *Moss* and *Orton*, however, relied on the commentary to the Guidelines—not the text. *See Moss*, 34 F.4th at 1190; *Orton*, 73 F.3d at 333. But the Eleventh Circuit’s mandate in *Dupree* is clear: if the Guidelines are unambiguous, this Court does not reach the commentary. *Dupree*, 57 F.4th at 1276–77. Additionally, while the traditional tools of construction can include the “structure, history, and purpose” of a regulation, *see Kisor*, 139 S. Ct. at 2415, the Court finds no need to consider the “context and purpose of” § 2B1.1. *You*, 74 F.4th at 397. Generally, a court’s inquiry “must begin, and usually end[], with the text.” *See United States v. Stevens*, 997 F.3d 1307, 1314 (11th Cir. 2021) (quoting *Boca Ciega Hotel, Inc. v. Bouchard Transp. Co.*, 51 F.3d 235, 237 (11th Cir. 1995)). Where the text of a provision is “plain and unambiguous, there is no need for further inquiry.” *See id.* (quoting *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1146 (11th Cir. 2018)); *see also Dupree*, 57 F.4th at 1279 (“We conclude that the text of § 4B1.2(b) unambiguously excludes inchoate crimes. Under *Kisor*, that concludes our analysis, and we have no need to consider, much less defer to, the commentary[.]”). Here, § 2B1.1 is unambiguous. So, the Court cannot consider the commentary and is bound by § 2B1.1’s plain text.

In sum, as explained on the record at sentencing, Defendant’s objection to the use of intended loss—namely, the total amount billed to Medicare by Defendant as opposed to the actual amount paid out by Medicare—is **SUSTAINED**. *See* Def.’s Mem. in Aid of Sentencing, [ECF No. 530], at 11–15; Def.’s Objs. to the Presentence Investigation Report, [ECF No. 526], at 4–5.

Therefore, the calculations found in paragraph 71 of Defendants' Presentence Investigation Report, [ECF No. 525], were adjusted accordingly at sentencing to reflect the proper loss figure under § 2B1.1. *See* Paperless Minute Entry, [ECF No. 542]. Instead of the intended loss amount of \$463,889,078, which generated a 28-level increase under § 2B1.1(b)(1)(O), the Court relied on the actual loss amount of \$187,369,693.38, which generated a 26-level increase under § 2B1.1(b)(1)(N).

DONE AND ORDERED in Miami, Florida, this 23rd day of August, 2023.

A handwritten signature in black ink, appearing to read 'Rodolfo A. Ruiz II', written over a horizontal line.

RODOLFO A. RUIZ II
UNITED STATES DISTRICT JUDGE