

**STATE OF LOUISIANA**

\*

**NO. 2001-KA-1456**

**VERSUS**

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**COURT OF APPEAL**

**AUBREY B. MCSWAIN**

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**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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## **PLOTKIN, J. DISSENTING**

I agree with the majority's decision to remand this case for resentencing since La. R.S. 14:202(C) allows for a sentencing range of 90 days to 6 months for each \$1,000 in misapplied funds. The trial judge erred in this case by sentencing the defendant to three year sentences on counts three and four when the total amount misapplied was approximately \$5,000.

I disagree with the majority's assertion that the amount of restitution imposed was justified. La. R.S. 14:202 (D) provides:

Any person, contractor, subcontractor, or agent of a contractor or subcontractor who knowingly fails to apply construction contract payments as required in Subsection A shall pay to the court, and the court shall transfer to the person whose construction contract payments were misapplied, an amount equal to the sum of the payments not properly applied and any additional legal costs resulting from the misapplication of construction fund payments, including a fee charged by the

clerk of court for handling such payments.

The statute provides only for restitution of money that was actually paid.

The statute does not provide for reimbursement of expenses incurred as a

result of the failure to perform. The \$7,500 that was awarded to each

homeowner does not fit within the definition of the statute. Thus, the trial

judge's determination that \$20,253.52 is due in restitution is excessive. The

\$5,167.52 represents the amount misapplied by the defendant. Therefore,

this amount should be the amount that the defendant is ordered to pay in

restitution. The fact that the defendant lacked remorse does not justify the

higher restitution. The defendant was sentenced under La. R.S. 14:202 and

this article should govern the amount of restitution.