

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2015-001914

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APR 05 2018

SC Court of Appeals

THE STATE,..... APPELLANT,

v.

RICHARD P. KROCHMAL,.....RESPONDENT.

Unpublished Opinion 2018-UP-126, filed March 21, 2018

Petition for Rehearing

On March 21, 2018, this Court issued an opinion in which it affirmed the decision of the circuit court's order authorizing Respondent to be paid for committing his crimes. State v. Krochmal, Unpub. Op. No. 2018-UP-126 (S.C. Ct. App. filed March 21, 2018). Appellant respectfully petitions for rehearing per Rule 221, SCACR.

This Court's opinion cites S.C. Code Ann. § 17-25-322(B), (1), (2), (3), (4), and (5) (2014) as factors that a sentencing court may generally consider. The circuit

court addressed the factors and indicated they were not relevant.

[T]he Court may apply the factors outlined in 17-25-322(A) to determine the pecuniary damage or loss to the victim, and use the legislature's prescribed manner and method of determining restitution found in 17-25-322 (B)(1),(2),(3),(4),and (5). **In the present case before this court, the factors listed in (B)(1),(2).(3),(4), and (5) do not seem relevant.**

R. p. 10. (emphasis added).

There has been no argument presented that the circuit court abused its discretion by finding those factors irrelevant in this case. While the circuit court found the discretionary factors set forth in part (B) of S.C. Code Ann. § 17-25-322 (2014) to be inapplicable, the non-discretionary part (A) remains: "the court shall order the defendant make restitution or compensate the victim for any pecuniary damages." S.C. Code Ann. § 17-25-322(A) (2014).

There is no valid fee agreement.

This Court's opinion affirms the circuit court's adoption of the following argument advanced by the Respondent: "the only monetary loss suffered by the victims consists of the amount of money that they were charged in excess of the fee agreement." R. p. 20.¹ The restitution calculation affirmed by this Court consists of the following simple formula:

$$\boxed{\text{Restitution Amount} = \{\text{fees Respondent actually charged}\} - \{\text{amount per fee agreement}\}}^2$$

This Court's opinion overlooks the undisputed fact that there is no valid fee agreement rationalizing that the victims paid Respondent for the very criminal conduct that was the factual basis for the guilty plea. Respondent's own expert

¹ See also, R. p. 31, lines 3-9.

² As applied: \$30,100 = \$159,800 - \$129,700. R. p. 104.

witness testified that his calculation presupposed that the agreement was valid. R. p. 74, line 16. To adopt Respondent's fiction that there is a valid fee agreement for the indictment period nullifies the very existence of his criminal convictions for Securities Fraud.

Lenz v. Walsh, is not applicable for criminal restitution.

In Lenz v. Walsh, this Court applied an equitable analysis as explained in the fifth and final inclusive factor: "and (5) equity and the principles of restitution do not require that unlicensed contractors be completely uncompensated or that contracting homeowners receive the completed construction without cost." Lenz v. Walsh, 362 S.C. 603, 608, 608 S.E.2d 471, 473 (Ct. App. 2005). Unlike the purely civil claims at issue in this Court's opinion in Lenz, Respondent's criminal convictions trigger the application of S.C. Const. art. I, 24(A)(9) authorizing the victims to "receive prompt and full restitution from the person or persons convicted of the criminal conduct that caused the victim's loss..." S.C. Const. art. I, 24(A)(9) (emphasis added). Applying the civil analysis of Lenz denies victims of crimes the very rights afforded to them under our State Constitution and the companion criminal restitution statutes. See generally State v. Morgan, 417 S.C. 338, 790 S.E.2d 27, (Ct. App. 2016) (citing S.C. Code Ann. § 16-3-1110 (2015) and S.C. Code Ann. § 17-25-322 (2014)).

WHEREFORE, because the circuit court erred as a matter of law ordering that a convicted criminal is entitled to be paid for committing crimes, Appellant requests this Court grant the Petition for Rehearing and rehear the case as criminal conduct cannot be rewarded.

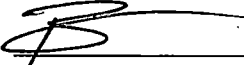
Respectfully submitted,

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Columbia, South Carolina

April 5, 2018.

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PROOF OF SERVICE

I certify that I have served the *Petition for Rehearing* by depositing a copy of it in the United States Mail; postage prepaid, on Thursday, April 05, 2018, addressed to his attorneys of record:

ROBERT MICHAEL DUDEK
Appellate Defender
South Carolina Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211

Thursday, April 05, 2018.

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ALAN WILSON
ATTORNEY GENERAL

April 5, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Via Hand Delivery

RE: STATE v. RICHARD P. KROCHMAL,
Appellate Case No. 2015-001914

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SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing in the above matter are the following:

- (1) Original plus six (6) copies of the *Petition for Rehearing*.
- (2) Proof of Service of the above items to Respondent's attorney of record.

Sincerely,

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