

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) S.CT. NO. 14-1174
)
 DAIMONAY RICHARDSON,)
)
 Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
HONORABLE MARY E. CHICCELLY, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

MARK C. SMITH
State Appellate Defender

RACHEL C. REGENOLD
Assistant Appellate Defender
rregenold@spd.state.ia.us
appellatedefender@spd.state.ia.us

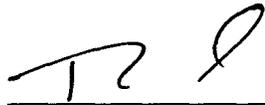
STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

On the 16th day of October, 2015, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Daimonay Richardson, No. 6974028, Iowa Correctional Institution for Women, 420 Mill Street SW, Mitchellville, Iowa 50169.

APPELLATE DEFENDER'S OFFICE



Rachel C. Regenold

Assistant Appellate Defender
State Appellate Defender Office
Fourth Floor, Lucas Building
Des Moines, IA 50319
(515) 281-8841
rregenold@spd.state.ia.us
appellatedefender@spd.state.ia.us

RR/d/6/15
RR/lr/10/15

TABLE OF CONTENTS

	<u>Page</u>
Certificate of Service and Filing.....	i
Table of Authorities.....	iii
Statement of the Issues Presented for Review.....	1
Routing Statement.....	5
Statement of the Case.....	5
Argument	
Division I.....	8
Division II.....	21
Division III.....	31
Conclusion.....	51
Request for Nonoral Argument.....	52
Attorney's Cost Certificate.....	52
Certificate of Compliance.....	53

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page:</u>
Austin v. U.S., 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993)	34
Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989)	34
Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)	27
Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 36, 50 22 L.Ed.2d 346 (1972)	35
Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2407, 183 L.Ed.2d 407 (2012) 15-17, 22, 26, 28-29, 32, 46-47, 50-51	
Paroline v. U.S., ___ U.S. ___, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014)	10
State v. Alspach, 554 N.W.2d 882 (Iowa 1996)	25, 51
State v. Ayers, 590 N.W.2d 25 (Iowa 1999)	23
State v. Evans, 672 N.W.2d 328 (Iowa 2003)	21
State v. Formaro, 638 N.W.2d 720 (Iowa 2002)	21
State v. Hildebrand, 280 N.W.2d 393 (Iowa 1979)	27
State v. Izzolena, 609 N.W.2d 541 (Iowa 2000)	9-10, 12-14, 18, 24, 33-34, 38
State v. Jenkins, 788 N.W.2d 640 (Iowa 2010)	23

State v. Johnson, 513 N.W.2d 717 (Iowa 1994)	27
State v. Jose, 636 N.W.2d 38 (Iowa 2001)	51
State v. Klawonn, 609 N.W.2d 515 (Iowa 2000)	13-14, 18
State v. Lee, 561 N.W.2d 353 (Iowa 1997)	22
State v. Loyd, 530 N.W.2d 708 (Iowa 1995)	27
State v. Lyle, 854 N.W.2d 378 (Iowa 2014)	8-9, 17, 24, 27-28, 31, 36-38, 46, 48
State v. Ragland, 836 N.W.2d 107 (Iowa 2013)	9, 31
State v. Rohm, 609 N.W.2d 504 (Iowa 2000)	12-13, 18
State v. Short, 851 N.W.2d 474, 483 (Iowa 2014)	39
State v. Thomas, 520 N.W.2d 311 (Iowa Ct. App. 1994)	8, 21, 31
State v. Thomas, 547 N.W.2d 223 (Iowa 1996)	26
State v. Washington, 356 N.W.2d 192 (Iowa 1984)	22
State v. Wright, 340 N.W.2d 590 (Iowa 1983)	21
U.S. v. Bajakajian, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed 314 (1998)	11, 34
United States v. Jose, 499 F.3d 105 (1st Cir. 2007)	11
<u>Constitutional Provision:</u>	
Iowa Const. art. I., section 17	9

Statutes and Court Rules:

Iowa Code § 901.5 (2013).....27

Iowa Code § 910.2(1) (2015) 23-24

Iowa Code § 910.3B(1) (2015).....43

Iowa Code § 910.4 (2015).....43

Iowa Code § 910.5 (2015).....43

Iowa R. App. P. 6.4 (2013).....21

Iowa R. App. Pro. 6.1206 (2015).....50

Other Authorities:

Cortney E. Lollar, What is Criminal Restitution?,
100 Iowa L. Rev. 93, 108 (2014) 39, 43-44, 46

Nicholas M. McLean, Livelihood, Ability to Pay, and
the Original Meaning of the Excessive Fines Clause,
40 Hastings Const. L.Q. 833, 824 (Summer 2013) 11

John F. Stinneford, Rethinking Proportionality
Under the Cruel & Unusual Punishments Clause,
97 Va. L. Rev. 899, 958 (2011)39

Virginia Declaration of Rights, § 9 (1776), available at
[http://www.archives.gov/exhibits/charters/virginia_](http://www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html)
[declaration_of_rights.html](http://www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html).....39

Beth A Colgan, Reviving the Excessive Fines Clause,
102 Cal. L. Rev. 277, 295 (2014)..... 43-45

Anthony F. Granucci, Nor Cruel & Unusual
Punishments Inflicted: The Original Meaning,
57 Cal. L. Rev. 839, 847 (1969).....49

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Iowa Code section 910.3B(1) mandates a restitution award of at least \$150,000 to the victim's heirs in a felony death case. Richardson, a juvenile, pled guilty to Murder in the Second Degree for the death of Ronald Kunkle. Is the restitution award of \$150,000 that Richardson was ordered to pay excessive in violation of the excessive fines clause of article I, section 17 of the Iowa constitution?

Authorities

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014)

State v. Ragland, 836 N.W.2d 107, 113 (Iowa 2013)

State v. Izzolena, 609 N.W.2d 541, 549 (Iowa 2000)

Paroline v. U.S., ___ U.S. ___, ___, 134 S.Ct. 1710, 1726, 188 L.Ed.2d 714 (2014)

U.S. v. Bajakajian, 524 U.S. 321, 337-39, 118 S.Ct. 2028, 2038, 141 L.Ed 314 (1998)

United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007)

Nicholas M. McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833, 824 (Summer 2013)

State v. Rohm, 609 N.W.2d 504, 514 (Iowa 2000)

State v. Klawonn, 609 N.W.2d 515, 518-19 (Iowa 2000)

Miller v. Alabama, ___ U.S. ___, ___, 132 S.Ct. 2407, 2464, 183 L.Ed.2d 407 (2012)

II. Iowa Code section 901.5(14) grants the district court discretion in sentencing juveniles charged in adult court. The district court did imposed \$150,000 in restitution without considering individualized factors. Did the district court abuse its discretion in assessing to Richardson restitution in the amount of \$150,000?

Authorities

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

Iowa R. App. P. 6.4 (2013)

State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002)

State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983)

State v. Evans, 672 N.W.2d 328, 331 (Iowa 2003)

State v. Washington, 356 N.W.2d 192, 197 (Iowa 1984)

State v. Lee, 561 N.W.2d 353, 354 (Iowa 1997)

State v. Ayers, 590 N.W.2d 25, 32 (Iowa 1999)

Iowa Code § 910.2(1) (2015)

State v. Jenkins, 788 N.W.2d 640, 644 (Iowa 2010)

State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014)

State v. Izzolena, 609 N.W.2d 541, 549 (Iowa 2000)

State v. Alspach, 554 N.W.2d 882, 883–84 (Iowa 1996)

State v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996)

Iowa Code § 901.5 (2013)

State v. Hildebrand, 280 N.W.2d 393, 395 (Iowa 1979)

State v. Loyd, 530 N.W.2d 708, 713 (Iowa 1995)

State v. Johnson, 513 N.W.2d 717, 719 (Iowa 1994)

Eddings v. Oklahoma, 455 U.S. 104, 115–17, 102 S.Ct. 869, 877–78, 71 L.Ed.2d 1, 11 (1982)

III. In the alternative to Division II, do Iowa Code sections 910.2 & 910.3B(1) violate the cruel and unusual punishments clause and the excessive fines clause of article I, section 17 of the Iowa constitution to the extent they impose a mandatory fine on juveniles without requiring consideration of the Miller factors?

Authorities

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014)

State v. Ragland, 836 N.W.2d 107, 113 (Iowa 2013)

Iowa Const. art. I., section 17

State v. Izzolena, 609 N.W.2d 541, 549 (Iowa 2000)

Austin v. U.S., 509 U.S. 602, 609, 113 S.Ct. 2801, 2806, 125 L.Ed.2d 488 (1993)

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265, 109 S.Ct. 2909, 2915, 106 L.Ed.2d 219 (1989)

U.S. v. Bajakajian, 524 U.S. 321, 327, 118 S.Ct. 2028, 2033, 141 L.Ed.2d 314 (1998)

Furman v. Georgia, 408 U.S. 238, 332, 92 S.Ct. 2726, 2774, 22 L.Ed.2d 346 (1972)

John F. Stinneford, Rethinking Proportionality Under the Cruel & Unusual Punishments Clause, 97 Va. L. Rev. 899, 958 (2011)
State v. Short, 851 N.W.2d 474, 483 (Iowa 2014)

Virginia Declaration of Rights, § 9 (1776), available at http://www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html

Cortney E. Lollar, What is Criminal Restitution?, 100 Iowa L. Rev. 93, 108 (2014)

Iowa Code § 910.3B(1) (2015)

Iowa Code § 910.4 (2015)

Iowa Code § 910.5 (2015)

Beth A Colgan, Reviving the Excessive Fines Clause, 102 Cal. L. Rev. 277, 295 (2014)

Miller v. Alabama, ___ U.S. ___, ___, 132 S.Ct. 2407, 2468, 183 L.Ed.2d 407 (2012)

Anthony F. Granucci, Nor Cruel & Unusual Punishments Inflicted: The Original Meaning, 57 Cal. L. Rev. 839, 847 (1969).

Iowa R. App. Pro. 6.1206 (2015)

State v. Alspach, 554 N.W.2d 882, 883–84 (Iowa 1996)

State v. Jose, 636 N.W.2d 38, 47 (Iowa 2001)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Specifically, this appeal raises questions regarding whether restitution under Iowa Code section 910.3B(1) can be mandatorily imposed on a juvenile criminal defendant without consideration of individualized sentencing factors.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the Defendant-Appellant, Daimonay Richardson, from the judgment and conviction entered in the District Court for Linn County, following a guilty plea on the charge of Murder in the Second Degree – Aiding and Abetting, a class B felony, in violation of Iowa Code sections 707.1, 707.3, and 703.1 (2013).

Course of Proceedings in the District Court: After juvenile court waived jurisdiction over Richardson on October 29, 2013, the State filed a trial information on November 13,

2013, charging Richardson with Murder in the First Degree, a class A felony, in violation of Iowa Code sections 707.1, 707.2(1), and 707.2(2) (2013). (Order Waiving Jurisdiction; Information) (App. pp. 1-10). Richardson entered a plea of not guilty on November 26, 2013. (Arrest Order) (App. pp. 17-18).

Richardson entered a guilty plea to Murder in the Second Degree, a class B felony, on February 7, 2014. (Order Accepting Plea) (App. p. 21). The district court held a sentencing hearing over a few days and issued its written ruling on July 18, 2014. (Ruling) (App. pp. 41-56). The district court ordered Richardson to pay restitution in the amount of \$150,000 to the estate of Ronald Kunkle, pursuant to Iowa Code section 910.3B. (Ruling, p. 16) (App. p. 56). Richardson filed a timely notice of appeal on July 18, 2014. (Notice) (App. p. 57).

Facts: Daimonay “Dana” Richardson was born in 1997. Her father was not involved in raising Richardson and her main caregiver was her maternal grandmother. When Richardson

was approximately age ten, her mother moved Richardson and her siblings to Iowa from Chicago, cutting off contact with their grandmother. Richardson began having behavioral problems at home and at school. (Ruling, p. 2) (App. p. 42).

Richardson was sexually assaulted at the age of twelve and not long afterwards, her grandmother died of cancer. Richardson began to abuse drugs and alcohol and had to repeat the seventh grade. Richardson met D'Anthony Curd, who, at the age of eighteen, was nearly four years older than Richardson. Curd encouraged her to skip school and to use alcohol and drugs. Her behavior worsened under Curd's influence and she was no longer welcome in the family home. (Ruling, p. 3) (App. p. 43).

She lived under a bridge for a couple weeks before moving in with Julia Butters, who allowed her to live there in exchange for providing care for Butters' children. Ronald Kunkle lived in the same apartment building as Butters. On or about May 18, 2013, Richardson, at age fifteen, assisted Curd in stabbing Kunkle to death. (Ruling, p. 3) (App. p. 43). His body was not

found for a few weeks. (Ruling, pp. 3-4) (App. pp. 43-44).

While investigating the murder, officers spoke with Richardson on August 19, 2013, and she ultimately confessed to the crime. (Ruling, p. 4) (App. p. 44).

Additional relevant facts will be discussed below.

ARGUMENT

I. Iowa Code section 910.3B(1) mandates a restitution award of at least \$150,000 to the victim's heirs in a felony death case. Richardson, a juvenile, pled guilty to Murder in the Second Degree for the death of Ronald Kunkle. The restitution award of \$150,000 that Richardson was ordered to pay is excessive in violation of the excessive fines clause of article I, section 17 of the Iowa constitution.

Error Preservation: The general rule of error preservation is not applicable to void, illegal, or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). “An unconstitutional sentence is an illegal sentence. Consequently, an unconstitutional sentence may be corrected at any time.” State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014) (internal citations omitted).

Standard of Review: Iowa courts “review an allegedly unconstitutional sentence de novo.” Lyle, 854 N.W.2d at 382 (citing State v. Ragland, 836 N.W.2d 107, 113 (Iowa 2013)).

Discussion: At resentencing, the district court imposed the \$150,000 restitution amount as part of Richardson’s sentence pursuant to Iowa Code section 910.3B (2013). (Ruling) (App. p. 56). Under the circumstances of this case, the \$150,000 mandatory minimum restitution amount is unconstitutionally excessive in violation of the excessive fines clause of Article I, section 17 of the Iowa Constitution.

Challenges under Iowa’s excessive fines clause. Article I, section 17 of the Iowa Constitution provides in part that “excessive fines shall not be imposed.” In State v. Izzolena, the Iowa Supreme Court unequivocally held that

the restitution award under [Iowa Code] section 910.3B does not only serve a remedial purpose but also serves other purposes normally associated with punishment such as retribution and deterrence. The award is a “fine” within the Eighth Amendment of the United States Constitution and article I, section 17 of the Iowa Constitution.

Izzolena, 609 N.W.2d 541, 549 (Iowa 2000); see also Paroline v. U.S., ___ U.S. ___, ___, 134 S.Ct. 1710, 1726, 188 L.Ed.2d 714 (2014) (recognizing the punitive nature of criminal restitution, and holding that “despite the differences between restitution and a traditional fine, restitution still implicates the prosecutorial powers of government”) (internal quotation marks omitted). After “[c]onsidering the nature of the offense, resulting harm, and the great deference afforded the legislature,” the Izzolena court concluded that “section 910.3B does not on its face violate the Excessive Fines Clause of our state and federal constitutions.” Izzolena, 609 N.W.2d at 551. Importantly, however, the court reserved the question of whether, under the specific circumstances of an individual case, a mandatory restitution award of \$150,000 could violate the excessive fines clause. Id. (“We also do not decide whether any specific circumstance of this case would render the restitution award as applied to Izzolena violative of the Excessive Fines Clause.”).

Importantly, the court noted that, in an as-applied challenge to the excessive fines clause, the analysis “would primarily focus on the amount of the punishment as it relates to the particular circumstances of the offense. The manner in which the amount of a particular fine impacts a particular offender is not the focus of the test.” Id. (internal citation omitted); see also U.S. v. Bajakajian, 524 U.S. 321, 337–39, 118 S.Ct. 2028, 2038, 141 L.Ed 314 (1998) (holding that the inquiry is retrospective, but considering factors outside of merely the type of crime committed in determining whether a fine is excessive, including the defendant’s state of mind, the maximum possible sentence he could have received, and the specific circumstances surrounding his commission of the offense).¹

¹ However, at least one Unites States Court of Appeals has rejected this retrospective-only approach. In United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007), the First Circuit interpreted Bajakajin to require consideration of “whether the [fine] in question would deprive [the individual] of his livelihood.” See also Nicholas M. McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833, 824 (Summer 2013) (Arguing that the majority of federal courts of appeals have misread Bajakajin,

In his dissent in Izzolena, Justice Lavorato was greatly troubled with the majority's holding "that a \$150,000 fine is per se constitutionally acceptable in every case." Izzolena, 609 N.W.2d at 555 (Lavorato, J., dissenting). Justice Lavorato specifically found troubling that "the majority's per se approach (1) gives no consideration as to how the offense occurred and (2) prevents any consideration of the degree of culpability," ultimately calling the decision "contrary to proportionality principles [and] unfair." Id.

In decisions decided at the same time as Izzolena, however, the Iowa Supreme Court did engage in at least a minimal fact-specific inquiry to determine whether the restitution award of section 910.3B is excessive as applied to individual defendants. For example, in State v. Rohm, the court specifically considered the seriousness of the defendant's conduct and her furtherance of the crime in determining that the mandatory fine as applied to Rohm was not unconstitutionally excessive where she supplied alcohol to a

and that the Jose approach is "significantly more faithful to the history and purpose of the Excessive Fines Clause").

minor who then suffered an alcohol-related death. Rohm, 609 N.W.2d 504, 514 (Iowa 2000). In State v. Klawonn, the court similarly considered the surrounding circumstances and gravity of the offense in concluding that the fine was not unconstitutionally excessive where Klawonn struck another vehicle with his own at an intersection, resulting in the death of the other driver. Klawonn, 609 N.W.2d 515, 518–19 (Iowa 2000).

From these cases interpreting Iowa’s excessive fines clause, two important principles emerge concerning how the clause is applied. First, mandatory fines—at least those in the amount of \$150,000—are not per se excessive where someone dies as the result of the defendant’s felonious conduct. Izzolena, 609 N.W.2d at 551. Second, and importantly, however, the standard for challenging a fine for excessiveness as applied to a particular defendant’s situation requires a retrospective analysis of the circumstances surrounding both the offense and the individual at the time the offense was

committed. See Izzolena, 609 N.W.2d at 551; Rohm, 609 N.W.2d at 514; Klawonn, 609 N.W.2d at 518–19.

Age as a necessary factor requiring consideration in challenges under Iowa’s excessive fines clause. As the Izzolena court cautioned, the excessive-fines analysis is limited only to a retrospective consideration of the specific circumstances surrounding the crime and the defendant at the time the crime occurred, and does not permit consideration of how the fine will impact that defendant in the future. Izzolena, 609 N.W.2d at 551. In light of this excessive-fines framework, and recent Iowa and federal case law requiring consideration of age as a mitigating factor with respect to a cruel-and-unusual-punishments analysis, analysis under Iowa’s excessive fines clause requires that, where the defendant is a juvenile, the court must consider the age of the defendant at the time the offense is committed. The Court should affirmatively recognize that the age of the defendant is a factor that must be considered among the several circumstances surrounding the offense in

determining whether a fine is excessive under Article I, section 17 of the Iowa Constitution.

In Miller v. Alabama, the United States Supreme Court explained why juvenility is a critical factor weighing heavily against mandatory life sentences without parole for minors:

[Our prior case law in this area] establish[es] that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, they are less deserving of the most severe punishments. Those cases relied on three significant gaps between juveniles and adults. First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievabl[e] deprav[ity].

Miller, ___ U.S. ___, ___, 132 S.Ct. 2407, 2464, 183 L.Ed.2d 407

(2012) (internal citations and quotation marks omitted). The

Miller court explained that its reasoning did not rest simply in common sense, but was supported by scientific literature,

concluding that minors’ “transient rashness, proclivity for risk, and inability to assess consequences . . . both lessened a child’s moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed.” Id. at ___, 132 S.Ct. 2465 (internal quotation marks omitted). The United States Supreme Court’s trend in case law on this issue endorses the view that “the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” Id.

The Miller court laid out several necessary factors that courts must consider in sentencing juveniles that arise from the very status of being a juvenile. Specifically, and relevant here, Miller requires courts to consider the offender’s “chronological age and its hallmark features” of “immaturity, impetuosity, and failure to appreciate risks and consequences;” the offender’s family and home environment and the circumstances of the offense, including the degree of the offender’s participation and

the effect of peer pressure; and the inability of youth to function in the legal system. Id. at ___, 132 S.Ct. at 2468.

In Lyle, the Iowa Supreme Court recognized these hallmark differences between juveniles and adults and has affirmatively proclaimed that the Iowa Constitution requires considering juvenility and its characteristics in sentencing juveniles, extending the holding of Miller to prohibit all mandatory minimum sentences for juveniles. Lyle, 854 N.W.2d at 402. In so holding, the court recognized that the understanding that juveniles lack many of the qualities that enable them to appreciate the potential consequences of their conduct is “ancient,” yet “continues to be forceful today.” Id. at 397. The court concluded “the sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child’s categorically diminished culpability.” Id. at 398.

While the Miller and Lyle courts applied these factors in the context of the constitutional prohibition on cruel and

unusual punishments, these factors are just as relevant and necessary when considering the surrounding circumstances of the offense under a challenge to a fine on the grounds that it is excessive. It is true that Richardson's involvement in Kunkle's death is undoubtedly blameworthy, but one key factor separates her from the defendants in Izzolena, Rohm, and Klawonn: Richardson was a minor at the time she committed the crime.² Richardson's status as a juvenile inherently triggers a more in-depth analysis under section 17's excessive fines clause than had Richardson been an adult at the time offense occurred.

Several pertinent factors render the \$150,000 fine imposed on Richardson unconstitutionally excessive. Dr. Mark Cunningham, a forensic psychologist, testified to

² In Klawonn, the defendant was twenty-four years old. Klawonn, 609 N.W.2d at 517. In Rohm, the defendant had adult children and was at least old enough to purchase alcohol. Rohm, 609 N.W.2d at 507. In Izzolena, the facts and circumstances of the case lead to the inference that the defendant was an adult—she was intoxicated while operating a vehicle, and the opinion does not make any reference or special notation that she was a minor or that she was waived from juvenile court into adult court. See generally Izzolena, 609 N.W.2d 541.

twenty-one adverse developmental factors that reduced Richardson's moral culpability. (Ruling, pp. 9-10) (App. pp. 49-50). These factors were:

1. Age 15 at time of offense
2. Trans-generational family dysfunction
3. Hereditary predisposition to alcohol and drug use
4. Alcoholism of father
5. Abandonment of father
6. Failure of mother to effectively bond to her
7. Learning disability
8. Emotional and supervisory neglect
9. Amputation of relationship with psychological parent [grandmother] as a pre-adolescent
10. Death of psychological parent
11. Residential transience
12. Household transitions and instability
13. Sexual assault
14. Premature sexualization
15. Target of peer harassment and bullying
16. Early teen onset of alcohol and drug abuse
17. Inadequate mental health interventions
18. Expulsion from maternal household
19. Victimization in predatory relationship with codefendant
20. Domination by the predatory codefendant in the murder
21. Heavy substance abuse, including synthetic cannabinoid proximate to offense.

(Ruling, p. 10) (App. p. 50). The district court found that while the murder was "bloody and brutal," Richardson's "very chaotic,

traumatic, and unstable young life” made her “a prime candidate” to be lured into Curd’s murder plot. (Ruling, p. 13) (App. p. 53). Dr. Cunningham explained that Richardson’s age explained her “impulsivity and lack of appreciation of consequences and risks associated with her behavior.” (Ruling, p. 13) (App. p. 53).

In light of Richardson’s age at the time at issue and the circumstances surrounding her aiding and abetting the commission of second-degree murder, a fine of \$150,000 is excessive in violation of the excessive fines clause of Article I, section 17 of the Iowa Constitution. Richardson respectfully requests that the restitution award be vacated and this case remanded to the district court for a determination of a more appropriate amount of restitution after a full and independent consideration of all of the circumstances surrounding Richardson’s commission of the offense, including her age at the time and the accompanying Miller factors.

II. Iowa Code section 901.5(14) grants the district court discretion in sentencing juveniles charged in adult court. The district court did imposed \$150,000 in restitution without considering individualized factors. The district court abused its discretion in assessing to Richardson restitution in the amount of \$150,000.

Error Preservation: The general rule of error preservation is not applicable to void, illegal, or procedurally defective sentences. Thomas, 520 N.W.2d at 313.

Standard of Review: Review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 6.4 (2013); State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002). A sentence imposed in accordance with applicable statutes will be overturned only for an abuse of discretion or a defect in the sentencing procedure. State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983). An abuse of discretion is found when the court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. State v. Evans, 672 N.W.2d 328, 331 (Iowa 2003).

Discussion: At sentencing, the district court assessed to Richardson restitution in the amount of \$150,000, consistent

with Iowa Code sections 910.2 and 910.3B(1) (2013). However, the district court failed to exercise the discretion granted to it by section 901.5(14) to impose a lesser restitution amount and otherwise failed to consider the Miller factors with respect to the restitution award. In so doing, the district court abused its discretion in sentencing Richardson.

The district court was unaware of its ability to enter a restitution award less than \$150,000. In sentencing Richardson to pay restitution in the amount of \$150,000, the district court was not aware that it could have assessed restitution in an amount less than \$150,000 pursuant to Iowa Code section 901.5(14) on the grounds that Richardson was a juvenile convicted of a class B felony. In failing to consider a lesser restitution amount the district court abused its discretion.

Where a court fails to exercise discretion granted by law, a remand for resentencing is required. State v. Washington, 356 N.W.2d 192, 197 (Iowa 1984); State v. Lee, 561 N.W.2d 353, 354 (Iowa 1997). “Obviously, if a court is unaware that it has

discretion, we can hardly say it exercised discretion.” State v. Ayers, 590 N.W.2d 25, 32 (Iowa 1999).

Iowa Code section 910.2 requires, in part, that “[i]n all criminal cases in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered, the sentencing court shall order that restitution be made by each offender to the victims of the offender’s criminal activities” Iowa Code § 910.2(1) (2015); see State v. Jenkins, 788 N.W.2d 640, 644 (Iowa 2010) (accentuating the point that section 910.2 “is mandatory under Iowa law,” and that “judges have no discretion in Iowa to decline to impose restitution.”). In addition, Iowa Code section 910.3B(1) (2013) mandates that in all cases resulting in felony convictions where someone died as a result of the defendant’s actions, the defendant shall be assessed no less than \$150,000.00, owed to the victim’s estate.

In 2013, however, the Iowa legislature responded to recent Iowa Supreme Court decisions on the issue of juvenile sentencing. Iowa code section 901.5(14) now provides:

Notwithstanding any provision in section 907.3 or any other provision of law prescribing a mandatory minimum sentence for the offense, if the defendant, other than a child being prosecuted as a youthful offender, is guilty of a public offense other than a class “A” felony, and was under the age of eighteen at the time the offense was committed, the court may suspend the sentence in whole or in part, including any mandatory minimum sentence, or with the consent of the defendant, defer judgment or sentence, and place the defendant on probation upon such conditions as the court may require.

As the Iowa Supreme Court later noted, “[w]hile this statute does not change the minimum-term requirement for juveniles if a *prison sentence* is imposed by the court, it does abolish mandatory *prison sentencing* for most crimes committed by juveniles.” Lyle, 854 N.W.2d at 388 (emphases added).

The language of the statute, however, refers to the overall *sentence*, not just a term of incarceration, and presumably applies to restitution orders entered as part of the district court’s final disposition. As our courts regularly acknowledge, restitution in criminal cases is imposed as part of the overall “sentence.” See, e.g., Izzolena, 609 N.W.2d at 551 (“Restitution under section 910.3B is a part of the sentencing process.

While Iowa Code section 910.7 permits a defendant to challenge a restitution award in a subsequent restitution hearing, this does not change the fact the restitution award *is a part of the initial sentence.*) (emphasis added) (internal citations omitted); State v. Alspach, 554 N.W.2d 882, 883–84 (Iowa 1996) (acknowledging that “restitution is a phase of sentencing,” and holding that indigent defendants are entitled to court-appointed counsel when challenging “restitution imposed as part of the original sentencing order, or supplemental orders, under Iowa Code section 910.3”). Therefore, because section 901.5(14) authorizes the district court to “suspend the sentence in whole or in part, including any mandatory minimum sentence,” district courts are not bound by Iowa Code section 910.2 mandating the imposition of restitution “in all criminal cases,” nor by section 910.3B(1), requiring a minimum restitution award of \$150,000.

Imposing restitution in the amount of \$150,000 reflects that the district court was not aware that the law now permits departures from the mandatory minimum requirements

imposed by sections 910.2 and 910.3B(1). In failing to consider its authority to impose a lesser sentence under section 901.5(14) and otherwise failing to exercise its discretion, the district court abused its discretion in assessing to Richardson restitution in the amount of \$150,000.

The district court did not consider the Miller factors in assessing restitution to Richardson in the amount of \$150,000. In sentencing Richardson to pay restitution in the amount of \$150,000, the district court did not consider the mitigating circumstances of Richardson's youth as announced by the Miller court. In failing to do so, the district court abused its sentencing discretion.

“When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose.” Thomas, 547 N.W.2d 223, 225 (Iowa 1996). In considering sentencing options, the court is to determine, in its discretion, which of the authorized sentences will provide both the maximum opportunity for the rehabilitation of the defendant and for the protection of the community from further

offenses by the defendant and others. Iowa Code § 901.5 (2013); State v. Hildebrand, 280 N.W.2d 393, 395 (Iowa 1979). “[T]he district court is to weigh all pertinent matters in determining a proper sentence including the nature of the offense, the attending circumstances, the defendant’s age, character, and propensities or chances of reform.” State v. Loyd, 530 N.W.2d 708, 713 (Iowa 1995) (quoting State v. Johnson, 513 N.W.2d 717, 719 (Iowa 1994)).

In Lyle, the Iowa Supreme Court announced that “children are constitutionally different from adults for purposes of sentencing.” Lyle, 854 N.W.2d at 395. “[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” Id. at 392 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115–17, 102 S.Ct. 869, 877–78, 71 L.Ed.2d 1, 11 (1982)).

As the Lyle court explicitly stated:

[T]he mere theoretical availability of unguided sentencing discretion, no matter how explicitly codified, is not a panacea. As we said in Null, Miller

requires “more than a generalized notion of taking age into consideration as a factor in sentencing.” Null provides a district court must expressly recognize certain concepts and “should make findings why the general rule [that children are constitutionally different from adults] does not apply.” In Ragland, we noted the sentencing court “*must consider*” several factors at the sentencing hearing, including:

- (1) the “chronological age” of the youth and the features of youth, including “immaturity, impetuosity, and failure to appreciate risks and consequences”;
- (2) the “family and home environment” that surrounded the youth;
- (3) “the circumstances of the ... offense, including the extent of [the youth's] participation in the conduct and the way familial and peer pressures may have affected [the youth]”;
- (4) the “incompetencies associated with youth—for example, [the youth's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the youth's] incapacity to assist [the youth's] own attorneys”; and
- (5) “the possibility of rehabilitation.”

Clearly, these are all *mitigating factors*, and they cannot be used to justify a harsher sentence.

Lyle, 854 N.W.2d at 403 n.8 (internal citations omitted).

Because children are constitutionally different, and applying the rationale of the Miller and Lyle line of cases, this Court should hold that Article I, section 17 of the Iowa

Constitution requires a district court to make Miller findings in *all cases* in which a juvenile is being sentenced as an adult. Alternatively, even if such findings are not *constitutionally* required under section 17's cruel and unusual punishments provision, this Court should hold that such findings are necessary to a sentencing court's *proper exercise of its sentencing discretion* when a juvenile is sentenced as an adult; a sentencing court's failure to consider the Miller factors and make the Miller findings in sentencing a juvenile as an adult amounts to an abuse of discretion.

Restitution under section 910.3B(1) is part of the sentencing proceeding. In assessing to Richardson restitution in the amount of \$150,000, the district court did not "expressly recognize" the mitigating factors of Richardson's youth or "make findings why the generalized rule [that children are constitutionally different from adults] does not apply." Lyle, 854 N.W.2d at 403 n.8. Rather, the court merely imposed restitution without providing any reasons for doing so. (Ruling, p. 16) (App. p. 56). It also cannot be said that the

district court imposed the restitution as a part of its “overall sentencing scheme,” as there is a clear demarcation between the court’s consideration of Richardson’s sentence using the Miller factors and its assessment of restitution. (Ruling) (App. pp. 41-56).

In imposing restitution in the amount of \$150,000, the district court did not consider Richardson status as a juvenile at the time she committed the offense, including all of necessary characteristics of juvenility as stated by the Miller court. In failing to do so, the district court abused its discretion in sentencing Richardson to pay restitution in the amount of \$150,000.

For these reasons, the district court abused its discretion in ordering Richardson to pay restitution in the amount of \$150,000. Richardson respectfully requests that the Court vacate the restitution order and remand this case to the district court for resentencing on the issue of restitution.

III. In the alternative to Division II, Iowa Code sections 910.2 & 910.3B(1) violate the cruel and unusual punishments clause and the excessive fines clause of article I, section 17 of the Iowa constitution to the extent they impose a mandatory fine on juveniles without requiring consideration of the Miller factors.

Error Preservation: The general rule of error preservation is not applicable to void, illegal, or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). “An unconstitutional sentence is an illegal sentence. Consequently, an unconstitutional sentence may be corrected at any time.” State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014) (internal citations omitted).

Standard of Review: Iowa courts “review an allegedly unconstitutional sentence de novo.” Lyle, 854 N.W.2d at 382 (citing State v. Ragland, 836 N.W.2d 107, 113 (Iowa 2013)).

Discussion: If the Court finds that Iowa Code section 901.5(14) does *not* permit district courts to suspend mandatory restitution awards in whole or in part for juveniles convicted of class B felonies or lesser crimes, then Iowa Code sections 910.2 and 910.3B(1) violate Article 1, section 17 of the Iowa

Constitution to the extent they mandate any restitution as part of the sentence for a juvenile.

The district court considered the factors announced in Miller with respect to Richardson's prison sentence, but did not consider those factors with respect to the \$150,000 restitution. (Ruling) (App. pp. 41-56). In failing to consider the Miller factors with respect to the mandatory minimum restitution award provided by sections 910.2 and 910.3B(1), the district court sentenced Richardson in violation of Article I, Section 17 of the Iowa Constitution.

Cruel & Unusual Punishments Clause. Article I, section 17 of the Iowa Constitution provides in part that "cruel and unusual punishment shall not be inflicted." In State v. Lyle, the Iowa Supreme Court held that, under section 17, "all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional." Lyle, 854 N.W.2d at 400. While Lyle's ultimate holding may be limited to terms of imprisonment, its reasoning is no less applicable to the mandatory imposition of fines on juveniles and compels the

conclusion that mandatory fines imposed on juveniles likewise violates the Iowa Constitution's prohibition on cruel and unusual punishment.

When interpreting Article I, section 17 of the Iowa Constitution, Iowa courts look to federal Eighth Amendment jurisprudence for guidance. Izzolena, 609 N.W.2d at 547. In reaching its conclusion that Iowa Code section 910.3B(1) constitutes a fine within the meaning of section 17, the Izzolena court considered the historical purpose of the Eighth Amendment's Excessive Fines Clause:

Th[e] history and common understanding of the language used to articulate the Excessive Fines Clause reveals that the clear concern of the framers of our constitution was *to limit the government's power to punish*. . . . Thus, the test developed to determine whether a particular sanction falls within the Excessive Fines Clause as a 'fine' is whether it is, at least in part, *punishment*."

Id. at 548 (emphases added). As the United States Supreme Court has recognized, "[t]he Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the government's power to extract

payments, whether in cash or in kind, ‘as *punishment* for some offense.’” Austin v. U.S., 509 U.S. 602, 609, 113 S.Ct. 2801, 2806, 125 L.Ed.2d 488 (1993) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265, 109 S.Ct. 2909, 2915, 106 L.Ed.2d 219 (1989)); see also U.S. v. Bajakajian, 524 U.S. 321, 327, 118 S.Ct. 2028, 2033, 141 L.Ed.2d 314 (1998) (“We have . . . explained that at the time the Constitution was adopted, the word ‘fine’ was understood to mean a payment to a sovereign as punishment for some offense.” (internal quotation marks omitted)).

The Izzolena court found that the \$150,000 mandatory minimum restitution amount contained in Iowa Code section 910.3B(1) was not facially excessive in violation of Iowa’s excessive fines clause. Izzolena, 609 N.W.2d at 551.

However, even if a fine is not necessarily excessive in violation of Iowa’s excessive fines clause, the imposition of a mandatory fine on a juvenile warrants consideration under Iowa’s cruel and unusual punishments clause pursuant to Lyle.

Under both federal and Iowa law it is unquestionable that “fines” levied by the government are a form of punishment. It follows that Iowa’s excessive fines clause, read in conjunction with the cruel and unusual punishments clause, both operate to achieve a common goal: Ensuring the State does not abuse its authority in meting out punishment. Indeed, “[t]he entire thrust of the Eighth Amendment is, in short, against ‘that which is excessive.’” Furman v. Georgia, 408 U.S. 238, 332, 92 S.Ct. 2726, 2774, 22 L.Ed.2d 346 (1972) (Marshall, J., concurring) (“[A] penalty may be cruel and unusual because it is excessive The decisions previously discussed are replete with assertions that one of the primary functions of the cruel and unusual punishments clause is to prevent excessive or unnecessary penalties It should also be noted that the ‘cruel and unusual’ language of the Eighth Amendment immediately follows language that prohibits excessive bail and excessive fines.”).

It is abundantly clear that sentencing a juvenile to a term of imprisonment—a form of punishment—is not inherently

unconstitutional. Rather, what the Lyle court found repugnant to section 17 was the mandatory nature of the incarceration; to blindly sentence a youthful offender to a minimum prison term despite the psychological maturity level of juveniles “fails to account for too much of what we know is child behavior.” Lyle, 854 N.W.2d at 402. “There is no other area of the law in which our laws write off children based only on a category of conduct without considering all background facts and circumstances.” Id. at 401.

The Lyle court affirmatively denounced the notion that mandatory punishments were cruel and unusual only where the juvenile has committed the most heinous of crimes. The court further dispelled any belief that the length of the prison sentence dictates whether the sentence is cruel or unusual; rather, it is the fact that the punishment itself is mandatory:

[T]he heart of the constitutional infirmity with the punishment imposed in Miller was its mandatory imposition, not the length of the sentence. The mandatory nature of the punishment establishes the constitutional violation. Yet, article I, section 17 requires the punishment for all crimes be graduated and proportioned to [the] offense. In other words,

the protection of article I, section 17 applies across the board to all crimes. Thus, if mandatory sentencing for the most serious crimes that impose the most serious punishment of life in prison without parole violates article I, section 17, so would mandatory sentences for less serious crimes imposing the less serious punishment of a minimum period of time in prison without parole. All children are protected by the Iowa Constitution. The constitutional prohibition against cruel and unusual punishment does not protect all children if the constitutional infirmity identified in mandatory imprisonment for those juveniles who commit the most serious crimes is overlooked in mandatory imprisonment for those juveniles who commit less serious crimes. Miller is properly read to support a new sentencing framework that reconsiders mandatory sentencing for all children. Mandatory minimum sentencing results in cruel and unusual punishment due to the differences between children and adults. This rationale applies to all crimes, and no principled basis exists to cabin the protection only for the most serious crimes.

Lyle, 854 N.W.2d at 401–02 (internal citations and quotation marks omitted).

The mandatory sentence at issue in Lyle was in fact relatively short—a mere seven-year mandatory minimum—compared to the lengthier sentences at issue in Lyle's predecessors. Id. at 381. But the lesser magnitude of the sentence did not govern the constitutional analysis; rather,

of sole concern was its mandatory imposition. As the Lyle court stated:

Ultimately, we hold a mandatory minimum sentencing schema, like the one contained in section 902.12, violates article I, section 17 of the Iowa Constitution when applied in cases involving conduct committed by youthful offenders. We agree categorical rules can be imperfect, but one is necessary here. We must comply with the spirit of Miller, Null, and Pearson, *and to do so requires us to conclude their reasoning applies to even a short sentence that deprives the district court of discretion in crafting a punishment that serves the best interests of the child and of society.* The keystone of our reasoning is that youth and its attendant circumstances and attributes make a broad statutory declaration denying courts this very discretion categorically repugnant to article I, section 17 of our constitution.

Lyle, 854 N.W.2d at 402–03 (emphasis added) (internal citations and quotation marks omitted).

Fines, or government-imposed required payments, are likewise a form of punishment, Izzolena, 609 N.W.2d at 548–49, even if not *precisely* comparable to incarceration. That fines, apart from other forms of punishment, are addressed in a distinct clause in section 17 separated by a comma does not mean that fines are anything other than punishments, and as

such may be similarly imposed in cruel and unusual ways. Therefore, while the mere fact that a fine is imposed does not demand the conclusion that the fine is also cruel and unusual, other aspects of that fine—for example, that it is mandatory despite any consideration of mitigating circumstances, such as the offender’s age—may constitute cruel and unusual punishment under section 17.

As one scholar has explained, while it may seem redundant that such a provision as section 17 prohibits the same punishment under two separate clauses, “this redundancy is consistent with the drafting practices of eighteenth- and nineteenth-century legislatures.” John F. Stinneford, Rethinking Proportionality Under the Cruel & Unusual Punishments Clause, 97 Va. L. Rev. 899, 958 (2011). In short, having two separate clauses, rather than just one, was necessary at the state level “to reduce the risk of [the] overly

narrow construction of constitutional rights.” Id.³

As another scholar comments, while it is undisputed that “deprivation is at the heart of punishment,” punishment “can also involve obligations.” Cortney E. Lollar, What is Criminal Restitution?, 100 Iowa L. Rev. 93, 108 (2014).

³ Stinneford explains this redundancy using an example from the Virginia Declaration of Rights, from which Iowa lawmakers have borrowed language, see State v. Short, 851 N.W.2d 474, 483 (Iowa 2014), whose prohibition on cruel and unusual punishments mirrors section 17:

For if the Declaration of Rights’ Cruel and Unusual Punishments Clause were interpreted to forbid excessive punishments, then a single disproportionate fine could simultaneously be characterized as an excessive fine, a cruel and unusual punishment, and a fine not given “according to the degree of fault.” Yet this is precisely how the Supreme Court of Appeals of Virginia interpreted these provisions. As described above, the Supreme Court of Appeals of Virginia held in Jones v. Commonwealth that a joint fine imposed on a criminal offender violated the Excessive Fines Clause, the Cruel and Unusual Punishments Clause, and the statutory requirement of proportionality in sentencing.

Stinneford, supra, at 959; see also Virginia Declaration of Rights, § 9 (1776), available at http://www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html (“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

The displacement of this civil law obligation into the criminal process transforms criminal restitution into something more than just an obligation requiring the yield of unlawful gains to a different entity; rather, criminal restitution becomes a binding obligation between the defendant and the state intended to communicate moral condemnation, placing it squarely under the auspices of punishment.

Id. at 109. “As a result, punishment can involve either a legally imposed deprivation or a legally imposed obligation.” Id.

Recognizing the broad constitutional truism that the purpose of the entire Eighth Amendment itself is against “that which is excessive,” it is without question that the imposition of a fine constitutes punishment; and as such, the cruel and unusual punishment analysis required by section 17 for mandatory prison sentences for juveniles is no less applicable to mandatory non-incarceration punishments.

Importantly, the differences between incarceration and non-incarceration punishments do not justify treating them differently under the Iowa Constitution. Section 17 prohibits cruel and unusual punishments—not only cruel and unusual prison sentences. Merely because a burdensome fine does not

implicate precisely identical limitations on one's liberty as actual incarceration would does not render its mandatory imposition on a juvenile any less offensive to section 17 than imposition of a mandatory prison term. In some ways, the real threats caused by excessive fines can be more daunting than the deprivation of freedom accompanying a prison sentence.

Most prison sentences have definite end dates; and for most prisoners not serving life terms, there will be some time at which their involvement with the criminal justice system (at least with respect to their past crimes) will end. The length of the sentence also corresponds to the severity of the crime, and that term may be lessened by the Department of Corrections for numerous reasons. Frequently, prisoners are released on parole before the full term of their sentence has expired. Further, prisoners are oftentimes given the opportunity to participate in many programs that foster rehabilitation and help reintroduce them into society, such as work-release.

Restitution, however, is often inescapable, even despite an inability to pay. Under section 910.2(2), the court may order

community service in place of restitution where the defendant is unable to pay. However, this mechanism does not exist for the required payment of restitution under section 910.3B(1).

While section 910.7 provides for reassessment of the restitution payment plan, the amount due is mandatory and is not dischargeable in any bankruptcy proceeding. See Iowa Code § 910.3B(1) (2015). Restitution in criminal cases is a condition of probation, work release, and parole, and failure of an offender to comply may constitute contempt or a violation of work release or parole, and may result in additional prison time. Iowa Code §§ 910.4 & 910.5 (2015). For many offenders who are assessed extensive fines, full repayment may never come to fruition, and they will forever remain tethered to the possible repercussions of nonpayment. Beth A Colgan, Reviving the Excessive Fines Clause, 102 Cal. L. Rev. 277, 295 (2014). “A criminal restitution order can remain outstanding even after every other aspect of a criminal sentence has been completed, and it alone can be the source of a person’s continued disenfranchisement or failure to obtain certain employment opportunities.” Lollar,

supra p. 46, at 107. The length of incarceration for failure to maintain these obligations may even exceed that of a prison sentence imposed on the underlying offense. Colgan, *supra* p. 49, at 291.

As one scholar notes, “[t]he cycle of economic sanctions, interest, collections, and incarceration can be financially devastating.” Id.

In addition to the direct financial burden, the initial and ongoing imposition of economic sanctions has been associated with difficulties in obtaining and maintaining employment, a necessity that is already difficult for individuals with a criminal record to obtain. . . . And for those lucky enough to find employment, the ability of the government and private parties to garnish a considerable percentage of wages for economic sanctions can significantly decrease an already limited amount of income coming into the home Economic sanctions against a juvenile may also reduce families’ total income, because courts may require the parent to pay or face incarceration.

Id. (internal footnotes omitted). Colgan further found that “criminal debt [is associated] with decreased child support payments, family disunification, and an inability to meet basic

needs, all of which complicate reentry and integration into the community.” Id. at 294.

Importantly, juvenile offenders generally are not in the same position as adult offenders to afford restitution payments due to an inability to achieve a comparable level of earning capacity. Juveniles, save for the incredibly rare exceptions, categorically do not possess any advanced education and have not had the opportunity to establish a career to the same extent as an adult. Where an adult offender may possibly return to his former line of work upon release, juvenile offenders are often left with no option but to pursue minimum-wage employment with little or no opportunity for growth. Given their early criminal convictions and having little to no ability to network or establish themselves in the marketplace, juveniles may even have a more diminished capacity to obtain gainful employment at the outset.

While none of these prospective considerations demand finding that all fines assessed against juveniles are cruel and unusual punishments, they are nonetheless absolutely

necessary for district courts to consider when levying restitution as a form of punishment against juveniles. “The increasingly expansive and amorphous scope of criminal restitution cries for constitutional limits on the amount of restitution imposed” *Lollar, supra* p. 46, at 153. This is especially relevant when those who are being assessed such expansive fines are children.

Denying a district court the ability to formulate, after a consideration of all of the attendant circumstances, a restitution award that fits an individual juvenile defendant deprives the district court of the discretion to “[craft] a punishment that serves the best interest of the child and of society.” *Lyle*, 854 N.W.2d at 403. For these reasons, the mandatory restitution required by Iowa Code sections 910.2 and 910.3B(1) constitutes “punishment” within the meaning of the cruel and unusual punishments clause of Article 1, section 17 of the Iowa Constitution. Therefore, when imposing restitution on juveniles pursuant to these sections, the district court must consider the Miller factors in crafting an overall

punishment that both fits a defendant's actions and takes into consideration the specific characteristics of her youth.

Unlike an as-applied challenge under Iowa's excessive fines clause, a challenge under the cruel and unusual punishments clause with respect to the mandatory sentencing of juveniles necessarily entails both retrospective *and* prospective considerations when assessing the appropriateness of the sentence. In addition to considering the defendant's age, family history, circumstances of the offense, degree of participation, effect of peer pressure, and competency in understanding the legal system, Miller also requires the court to consider the most appropriate rehabilitative remedy and fashion a sentence that will best achieve rehabilitation. Miller, ___ at ___, 132 S.Ct. at 2468.

Richardson incorporates herein the discussion of the Miller factors as applied to the circumstances of her case set forth in Division 1. In assessing the restitution award in the amount of \$150,000, the district court did not consider the Miller factors at all. (Ruling) (App. p. 56). In failing to

consider the Miller factors at sentencing specifically with respect to the amount of restitution assessed, the district court's imposition of a restitution award of \$150,000 in this case violated the cruel and unusual punishments clause of Article 1, section 17 of the Iowa Constitution.

Excessive Fines Clause. In the alternative, if the Court finds that the imposition of a mandatory fine on a juvenile does not constitute a cruel and unusual punishment, then the Court should consider whether the excessive fines clause of Article I, section 17 of the Iowa Constitution likewise prohibits the mandatory assessment of fines to juveniles. As discussed in Division III.C.1, the same rationale for applying Lyle's prohibition on mandatory prison sentences applies equally to the mandatory imposition of all punishments, including fines. Richardson therefore respectfully requests that the Court extend Lyle's reasoning beyond section 17's cruel and unusual punishments clause to its excessive fines clause.

As one scholar has posited, at the root of both clauses is a prohibition on punishment that is grossly excessive to the crime

committed; the later adoption of the specific “cruel and unusual” language in the first clause nonetheless still prohibits punishments, whether incarceration or otherwise, that are unjustly excessive.⁴ This compliments Justice Marshall’s sentiment in Furman that “[t]he entire thrust of the Eighth Amendment is, in short, against ‘that which is excessive.’” Furman, 408 U.S. at 332, 92 S.Ct. at 2774, 22 L.Ed.2d at 346 (Marshall, J., concurring).

For all of the reasons discussed above, any amount of restitution that is mandatorily imposed on a juvenile, without allowing the district court to perform an individual analysis of that juvenile and the specific circumstances surrounding the commission of the crime, is an inherently excessive fine in

⁴ “[P]rior to adoption of the Bill of Rights in 1689 England had developed a common law prohibition against excessive punishments in any form. Whether the principle was honored in practice or not is an open question. It was reflected in the law reports and charters of England. It is indeed a paradox that the American colonists omitted a prohibition on excessive punishments and adopted instead the prohibition of cruel methods of punishment, which had never existed in English law.” Anthony F. Granucci, Nor Cruel & Unusual Punishments Inflicted: The Original Meaning, 57 Cal. L. Rev. 839, 847 (1969).

violation of Article I, section 17 of the Iowa Constitution.

Because the district court failed to adequately apply the Miller factors in this case with respect to the restitution award, the district court punished Richardson in violation of Article I, section 17 of the Iowa Constitution. Richardson respectfully requests that the Court vacate the restitution award assessed against her and remand this case to the district court for a reevaluation of whether, and to what extent, restitution is appropriate in this case using the factors announced in Miller.

Finally, the proper scope of remand should be limited to reconsideration of the restitution award in this case. Iowa Rule of Appellate Procedure 6.1206 provides that “if it appears from the record that the material facts were not fully developed at the trial or if in the opinion of the appellate court the ends of justice will be served,” the appellate court may remand “all or part of the case” to the district court for further proceedings. See Iowa R. App. P. 6.1206 (2015). Richardson does not challenge her sentence with respect to her prison sentence, as the district court properly applied the Miller factors in fashioning that

sentence. Therefore, the proper remedy, should the Court rule in Richardson's favor, is to remand this case to the district court for the limited purpose of reassessing the amount of restitution ordered against Richardson consistent with the factors announced in Miller. Cf. Alspach, 554 N.W.2d at 884 (ordering a limited remand solely for a hearing on restitution); State v. Jose, 636 N.W.2d 38, 47 (Iowa 2001) (same).

CONCLUSION

Richardson respectfully requests that the Court vacate her sentence to the extent it imposes restitution in the amount of \$150,000, and remand this case to the district court for resentencing limited to reconsideration of the restitution award, on the grounds that the amount is excessive in violation of the excessive fines clause of Article 1, section 17 of the Iowa Constitution. In the alternative, Richardson respectfully requests that the Court vacate her sentence to the extent it imposes restitution in the amount of \$150,000, and remand this case to the district court for resentencing limited to reconsideration of the restitution award, on the grounds that

the district court abused its discretion in sentencing Richardson *or* that the mandatory imposition of restitution, with a mandatory minimum of \$150,000 in this case, violates Article 1, section 17 of the Iowa Constitution.

NONORAL SUBMISSION

Counsel requests not to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 4.92, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

RACHEL C. REGENOLD
Assistant Appellate Defender
State Appellate Defender Office
Fourth Floor, Lucas Building
Des Moines, IA 50319
(515) 281-8841
rregenold@spd.state.ia.us
appellatedefender@spd.state.ia.us

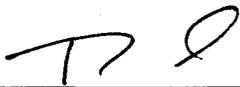
**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATIONS, TYPEFACE REQUIREMENTS AND
TYPE-STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[X] this brief contains 8,463 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or (2)

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[x] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Bookman Old Style, font 14 point.



Dated: 10-14-15

Rachel C. Regenold
Assistant Appellate Defender
State Appellate Defender Office
Fourth Floor, Lucas Building
Des Moines, IA 50319
(515) 281-8841
rregenold@spd.state.ia.us
appellatedefender@spd.state.ia.us