

IN THE SUPREME COURT OF IOWA  
Supreme Court No. 14-1174

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STATE OF IOWA,  
Plaintiff-Appellee,

vs.

DAIMONAY RICHARDSON,  
Defendant-Appellant.

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

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**APPELLEE'S BRIEF**

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FINAL

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**STATEMENT OF THE ISSUES PRESENTED FOR  
REVIEW**

**I. The \$150,000 Restitution Award Required by Iowa  
Code Section 910.3B is Constitutional as Applied to  
Juveniles.**

*Graham v. Florida*, 560 U.S. 48 (2010)

*Kelly v. Robinson*, 479 U.S. 36 (1986)

*Miller v. Alabama*, 132 S. Ct. 2455 (2012)

*Roper v. Simmons*, 543 U.S. 551 (2005)

*United States v. Bajakajian*, 524 U.S. 321 (1998)

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

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*Victim Restitution in the Criminal Process: A Procedural  
Analysis*, 97 Harv. L.Rev. 931 (1984)

**II. Iowa Code Section 901.5(14) Was Not Intended to Apply to Restitution and Is Not Retroactive. It Is Irrelevant to the Defendant's Claims.**

*Miller v. Alabama*, 132 S. Ct. 2455 (2012)

*State v. Alspach*, 554 N.W.2d 882 (Iowa 1996)

*State v. Dann*, 591 N.W.2d 635 (Iowa 1999)

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### **III. Neither the Cruel or Unusual Punishment Clause or the Excessive Fines Clause Warrant Relief As Applied to this Defendant.**

*Reilly v. Anderson*, 727 N.W.2d 102 (Iowa 2006)

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

*State v. Klawonn*, 609 N.W.2d 515 (Iowa 2000)

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

*State v. VanHoff*, 415 N.W.2d 647 (Iowa 1987)

Iowa Const. Art. I, § 17

Iowa Code 910.7, 910.9 (2013)

Associated Press, *Iowa Offenders Pay a Fraction of Restitution Owed*, *The Courier* (Waterloo-Cedar Falls) (July 16, 2012) (reporting the State collected less than 12% of restitution owed), available at [http://wfcourier.com/news/local/govt-and-politics/iowa-offenders-pay-a-fraction-of-restitution-owed/article\\_a3ca904c-cf39-11e1-ac3e-001a4bcf887a.html](http://wfcourier.com/news/local/govt-and-politics/iowa-offenders-pay-a-fraction-of-restitution-owed/article_a3ca904c-cf39-11e1-ac3e-001a4bcf887a.html).

## **ROUTING STATEMENT**

The issues presented in this appeal are ones of first impression: whether the \$150,000 restitution award imposed for conviction of a felony that resulted in the death of another is constitutional as applied to juveniles; whether the district court properly considered the application of Iowa Code section 901.5(14) to the restitution award; and whether Iowa Code sections 910.2 and 910.3B(1) violate the cruel and unusual punishment and excessive fines clause of article I, section 17 of the Iowa constitution when applied to juveniles. *See generally* Defendant's Br.; Iowa Code § 910.3B. These issues warrant retention in the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(c ), (f).

## **STATEMENT OF THE CASE**

### **Nature of the Case**

Daimonay Richardson appeals the order of restitution requiring her to pay \$150,000 to the estate of Ronald Kunkle. The Honorable Mary E. Chiccelly presided at the sentencing hearing.

### **Course of Proceedings**

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

## **Facts**

On or about May 19, 2013, the defendant Daimonay Richardson and her boyfriend, D'Anthony Curd, went to Ronald Kunkle's apartment with the intention of robbing and murdering him. Doyle and Denlinger Minutes; App. 12-15. Curd knew Kunkle and had seen him in possession of \$2000 and suggested to Richardson that they go to Kunkle's apartment, steal the money, and murder him. Doyle and Denlinger Minutes; App. 12-15. In anticipation of their nefarious plan, Richardson and Curd armed themselves with steak knives from the nearby apartment where Richardson had been living and hid the knives in their clothing. Doyle and Denlinger Minutes; App. 12-15. Richardson and Curd went to Kunkle's apartment, were welcomed inside, and the trio began playing beer pong. Doyle and Denlinger Minutes; App. 12-15. Richardson initiated the attack by stabbing Kunkle in the neck two to three times. Doyle and Denlinger Minutes; App. 12-15. Curd stabbed Kunkle numerous times in the side, back and chest. Doyle and Denlinger Minutes; App. 12-15.

Curd dragged Kunkle's body to the bathroom and tried to put him in the tub. Doyle and Denlinger Minutes; App. 12-15. Curd put a towel around Kunkle's face, turned on the exhaust fan, and cracked a

window. Doyle and Denlinger Minutes; App. 12-15. Richardson found some bleach in the apartment and poured it on the couch and over Kunkle's body. Doyle and Denlinger Minutes; App. 12-15. Richardson and Curd searched the apartment but were unable to find the \$2000. Doyle and Denlinger Minutes; App. 12-15. They threw the bleach in a dumpster behind the apartment building, changed clothes, and threw their bloody clothes away. Doyle and Denlinger Minutes; App. 12-15.

Curd and Richardson used Kunkle's bank card at a Kum and Go on three occasions on May 19, 2013. Pavelka Min.; App. 11-12. Curd also tried to open an account in Kunkle's name. Doyle and Denlinger Minutes; App. 12-15.

On June 10, 2013, a foul odor and flies at Kunkle's apartment led Linn County sheriff's deputies to discover Kunkle's badly decomposed body. Pavelka Min.; App. 11-12. When officers examined the crime scene, it was apparent that Kunkle had been stabbed and his body had been moved; there was blood in various locations in the apartment. Pavelka Min.; App. 11-12.

The Iowa State Medical Examiner conducted an autopsy on Kunkle's body. Pavelka and Gooden Mins.; App. 11-12, 15. The

medical examiner determined that Kunkle died as a result of multiple stab wounds to the head, neck, torso, and right thigh. Gooden Min.; App. 15. She identified seven separate stab wounds to the Kunkle's head and neck and thirty separate stab wounds to his torso. Gooden Min.; App. 15. Additional facts will be discussed below as relevant to the State's case.

## ARGUMENT

### I. **The \$150,000 Restitution Award Required by Iowa Code Section 910.3B is Constitutional as Applied to Juveniles.**

#### **Preservation of Error**

Given this Court's case law, the State is unable to contest error preservation. *See State v. Lyle*, 854 N.W.2d 378, 382–83 (Iowa 2014), *reh'g denied* (Sept. 30, 2014), *as amended* (Sept. 30, 2014).

#### **Standard of Review**

The defendant asserts a constitutional challenge and review is *de novo*. *State v. Izzolena*, 609 N.W.2d 541, 545 (Iowa 2000); *State v. Klawonn*, 609 N.W.2d 515, 518 (Iowa 2000).

## Merits

This appeal involves a challenge to one of the Iowa Code’s unique<sup>1</sup> statutory features: the \$150,000 restitution award imposed following conviction for a felony resulting in the death of another. See Iowa Code § 910.3B. This Court has held that “[t]he [restitution] award is a ‘fine’ within the [meaning of] Eighth Amendment of the United States Constitution and article I, section 17 of the Iowa Constitution.” *State v. Izzolena*, 609 N.W.2d 541, 549 (Iowa 2000). This Court, interpreting a different clause of Article I, section 17, has also invalidated mandatory-minimum prison sentences for juvenile offenders. See generally *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014); *State v. Null*, 836 N.W.2d 41 (Iowa 2013); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013). The questions presented here address the intersection of *Izzolena* and modern juvenile-sentencing precedent.

In her brief, the defendant urges that the \$150,000 restitution award violates the Iowa Constitution as applied to juveniles, and to

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<sup>1</sup> This Court said 15 years ago that it was “unable to find any state in the nation with a similar statute for restitution.” *State v. Izzolena*, 609 N.W.2d 541, 550 (Iowa 2000). It appears this is still the case.

her in particular. Defendant’s Proof Br. at 15-21. The defendant does not actually set forth a test by which we should evaluate whether the \$150,000 restitution award comports with the Iowa Constitution. *See generally* Defendant’s Br. at 15-21. However, it seems she accepts the principles contained in *Bajakajian*, where the Supreme Court of the United States used a “gross disproportionality” analysis under the Eighth Amendment. *See generally* Defendant’s Proof Br. at 15-21; *United States v. Bajakajian*, 524 U.S. 321, 336 (1998). She further argues that *Miller v. Alabama* requires that age be factored into this analysis. Defendant’s Proof Br. at 15. For the reasons that follow, *Miller* does not invalidate the \$150,000 restitution award, and the award is not grossly disproportionate as applied to the defendant.

**A. The principles at the heart of juvenile-sentencing cases do not warrant reducing the \$150,000 restitution award.**

In part, Division I of the defendant’s brief is an attempt to import principles from cruel and unusual punishment juvenile-sentencing cases—like *Miller*, *Null*, *Ragland*, *Pearson*, and *Lyle*—into an analysis under the Excessive Fines Clause of the Iowa Constitution. *See* Defendant’s Proof Br. at 15-21. This approach is result-oriented, rather than driven by legal principles. It should be

rejected because gravity and culpability are different concepts and because section 910.3B serves a rehabilitative interest.

**1. *The Excessive Fines Clause analysis turns on gravity, not culpability. An offender's age has nothing to do with the gravity of an offense.***

In her brief, the defendant urges that consideration of her age was “a necessary factor” when imposing the \$150,000 restitution award. Defendant’s Proof Br. at 15. Adopting this position would require this Court to walk back its earlier case law. *Izzolena* and *Klawonn* both recognize that how a fine “impacts a particular offender is not the focus of the test.” *Izzolena*, 609 N.W.2d at 551; *see Klawonn*, 609 N.W.2d at 519. The focus is, instead and only, on the gravity of the offense as compared to the amount of the fine or restitution obligation. *Izzolena*, 609 N.W.2d at 551 (the test to determine whether a restitution award violates the Excessive Fines Clause is whether the penalty is “grossly disproportional to the gravity of the defendant’s offense”); *Klawonn*, 609 N.W.2d at 519; *accord State v. Mayberry*, 415 N.W.2d 644, 647 (Iowa 1987) (noting the question of whether restitution is “excessive” turns on whether “it bears a reasonable relationship to the damage caused”).

The principles discussed in cases like *Miller*, *Null*, *Ragland*, *Pearson*, and *Lyle* deal with the culpability of the offender, not the gravity of the offense. See, e.g., *State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013), *as corrected* (Aug. 27, 2013) (describing the “teachings” of the juvenile-sentencing cases, including “that juveniles have less culpability than adults”). These concepts—culpability and gravity—are not interchangeable.

Consider *State v. Null*, 836 N.W.2d 41, 45 (Iowa 2013). There, the gravity of Null’s act—taking the life of another human being—is undisputed and unmatched. *Id.* at 46; see *Izzolena*, 609 N.W.2d at 550 (“In the context of the harm caused, the gravity of offenses under section 910.3B [including murder] is unparalleled.”); see also *Klawonn*, 609 N.W.2d at 518 (noting that even speeding is a “grave offense” when done recklessly). Null’s culpability, on the other hand, is more debatable. *Null*, 836 N.W.2d at 56 (specifically discussing the “[q]uestion of diminished culpability”). This Court has said juveniles have diminished culpability, but this Court’s case law does not touch on the gravity of their offenses or the harms that they caused to society and their victims.

Put simply, we are talking about different things when we discuss culpability and prison sentences versus the gravity of the offense and restitution. Because the proportionality of a fine is tied to the gravity of the offense, not the culpability of the offender, neither *Miller* nor our state line of juvenile-sentencing cases supports the defendant's argument.

**2. *The juvenile-sentencing cases focus on juvenile offenders' prospects for rehabilitation. The \$150,000 restitution award furthers that rehabilitative goal.***

A fundamental pillar on which the juvenile-sentencing cases rest is that juveniles have better prospects for rehabilitation than adults and it is uncommon that a juvenile will be irreparably corrupt. *E.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012) (noting imposition of life-without-parole sentences is “at odds with a child’s capacity for change”); *Graham v. Florida*, 560 U.S. 48, 77 (2010), as modified (July 6, 2010) (discussing “the few incorrigible juvenile offenders [compared to] the many that have the capacity for change”); *Roper v. Simmons*, 543 U.S. 551, 573 (2005) (noting it is “the rare juvenile offender whose crime reflects irreparable corruption”); *State v. Lyle*, 854 N.W.2d at 386 (describing *Miller* as protecting “the offender’s right to be sentenced accurately according

to their culpability and prospects for rehabilitation”). It is this premise that, in the preceding cases, has led to abolition of lengthy mandatory prison sentences for juvenile offenders. This reasoning cuts against—rather than supports—the defendant’s argument here, because restitution is a rehabilitative tool that furthers a juvenile’s prospects for re-entering society as a productive member.

This Court has repeatedly recognized that restitution, including the \$150,000 award under section 910.3B serves a rehabilitative purpose:

Restitution forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.

*State v. Mayberry*, 415 N.W.2d 644, 646-47 (Iowa 1987) (quoting *Kelly v. Robinson*, 479 U.S. 36, 49 n. 10, 107 S.Ct. 353, 360 n. 10, 93 L.Ed.2d 216, 228 n. 10 (1986) (citing Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L.Rev. 931, 937-41 (1984))). In other words, “Restitution goes beyond revenue

recovery and is designed to instill responsibility in criminal offenders.” *State v. Izzolena*, 609 N.W.2d 541, 548 (Iowa 2000); accord *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004) (“Restitution has a two-fold purpose: (1) to protect the public by compensating victims for criminal activities; and (2) to rehabilitate the offender by instilling responsibility in the offender.”).

If we accept the premise that juvenile offenders are more capable of change and have better prospects for rehabilitation than adults, then we must also accept the necessity of providing the tools by which they can begin making amends and reintegrating into society. Nothing this defendant can do will bring back the man she helped murder. In the General Assembly’s judgment, part of repaying her debt to society and the victim’s heirs is through payment of the \$150,000 restitution award. Making progress toward paying this debt will help instill responsibility in the defendant, force her to acknowledge the irreparable harm she has caused society and the victim’s family, and show that she has the potential to contribute to society. The restitution award meshes with the goals of the *Miller/Null* line of cases and should not be invalidated.

**B. The \$150,000 restitution award is not grossly disproportionate as applied to this defendant.**

The \$150,000 restitution award is not grossly disproportionate to the gravity of the defendant's offense; second-degree murder. Because it is not grossly disproportionate to the crime, it passes constitutional muster.

In assessing whether a fine is grossly disproportionate under the Excessive Fines Clause, a court “must compare the amount of the [fine] to the gravity of the defendant's offense.” *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998). In assessing the gravity of the offense, courts should look to not only to the conduct of the offender, but also the resulting harm. *See id.* at 337–38. “[A]ny case-specific analysis [under the Excessive Fines Clause should] primarily focus on the amount of the punishment as it relates to the particular circumstances of the offense.” *State v. Izzolena*, 609 N.W.2d 541, 551 (Iowa 2000).

This Court has already recognized that the \$150,000 award only applies to “extremely serious” crimes: felonies that cause a death when the offender acts with a highly culpable mens rea—at bare minimum the “willful or wanton disregard for the rights of other persons[.]” *Izzolena*, 609 N.W.2d at 550. Homicide is the gravest

offense recognized by society. *See id.* at 550 (“The primacy of human life among all other moral values is virtually undisputed by the world's major religions, and the taking of innocent life is considered the greatest universal wrong.”). “In the context of the harm caused, the gravity of offenses under section 910.3B is unparalleled.” *Id.* at 550 (Iowa 2000). The defendant’s conduct here, for which she ultimately pled guilty to second-degree murder, is no exception.

The defendant’s brief cites to the testimony of the forensic psychologist who testified on her behalf and the twenty-one adverse developmental factors that he asserts reduce her moral culpability. These factors include her age, general dysfunction in her family, a prior sexual assault, and a predatory co-defendant, to name just a few. Def. Brief at 19-21. The defendant’s history is unfortunate, and probably bears on her culpability—but it has nothing to do with the gravity of her offense. One’s personal tragedies do not lessen the harm caused by one’s criminal acts. That she actively participated in and encouraged the brutal stabbing death of her victim when she herself was an abuse victim does not make the stab wounds any less fatal or the resulting death any less permanent.

The same is true of age: a defendant's age does not lessen the gravity of the offense. A victim does not become less dead because the murder has committed by someone under the age of 18. That an offender is allegedly less culpable at age 15, or 16, or 17 than 18 is irrelevant to whether the \$150,000 restitution award fits the conduct of felonious acts resulting in death. Neither the value of human life nor the compensation owed for a death scale with an offender's culpability. Thus, this Court need go no further than reaffirm *Izzolena* to turn back the defendant's claim. Because the gravity of the defendant's offense was not grossly disproportionate to the \$150,000 restitution award, the district court should be affirmed.

**II. Iowa Code Section 901.5(14) Was Not Intended to Apply to Restitution and Is Not Retroactive. It Is Irrelevant to the Defendant's Claims.**

**Preservation of Error**

The State does not contest error preservation. *See State v. Lyle*, 854 N.W.2d 378, 382–83 (Iowa 2014) (on error preservation).

**Standard of Review**

The defendant's claims about section 901.5(14) are purely statutory and are therefore reviewed for correction of errors at law. *E.g., State v. McCoy*, 618 N.W.2d 324, 325 (Iowa 2000).

## **Merits**

In the second Division of her brief, the defendant argues that the district court abused its discretion because it could have suspended the \$150,000 restitution award in whole or in part pursuant to Iowa Code section 901.5(14) (2013) and was not aware it could do so. This claim misconstrues section 901.5(14) in a number of ways. First, the defendant asks this Court to read the statute contrary to its clear legislative intent. Second, the defendant ignores the General Assembly's mandate that specific provisions overrule general ones. And third, even if we set aside these principles of statutory construction, the district court was aware of section 901.5(14) and factored that into its decision to impose \$150,000 in restitution.

**A. The clear legislative intent of section 901(5)(14) deals only with prison sentences, not restitution obligations.**

The defendant asks this court to find the district court erred in failing to consider the provisions of Iowa Code section 901.5(14) when it ordered her to pay \$150,000 in restitution to the estate of Ronald Kunkle. Sent. Ruling (7/18/14); App. 56. The defendant cannot

demonstrate the district court erred because this section does not apply to restitution.

Iowa Code section 901.5(4) 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 condition as the court may require.*

Iowa Code § 901.5(14)(emphases added). Thus, the issue boils down to whether the legislature, when enacting this provision, intended that it also apply to restitution. The State submits it did not.

“The polestar of all statutory construction is the search for the true intention of the legislature.” *State v. Dann*, 591 N.W.2d 635, 638 (Iowa 1999). While Iowa may not have robust legislative history, statutes are not enacted a vacuum. What is now section 901.5(14) followed only a year after *Miller* and addresses, in part, *Miller’s* concerns. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012) (declaring mandatory LWOP sentences unconstitutional for juveniles); S.F. 288

(85th G.A., 2013) (modifying, among other things, the imposition of mandatory LWOP for juvenile murderers).

*Miller* says nothing about restitution or fines. *See generally Miller*, 132 S. Ct. 2455. Nor does the triad of cases that followed in *Miller*'s wake. *See generally State v. Null*, 836 N.W.2d 41 (Iowa 2013); *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013), *as corrected* (Aug. 27, 2013); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013).

There is no basis whatsoever to believe the General Assembly intended to limit the imposition of the \$150,000 restitution award against juvenile murderers. To accept the defendant's argument, this Court would have to find the legislature intended the revisions to apply to restitution without ever having said so, implicitly or explicitly. It should not do so. *See State v. Nicoletto*, 845 N.W.2d 421, 431 (Iowa 2014) (“[I]t is not the province of this court to speculate about probable legislative intent without regard to the wording of the statute, and any determination must be based upon what the legislature actually said rather than on what it might have said or should have said.”) *abrogated by* 2014 Iowa Acts ch. 1114, §1 (codified at Iowa Code § 709.15(f)).

**B. The specific provision for the \$150,000 restitution award in section 910.3B overrules the general sentencing provisions in section 901.5(14).**

Statutes that arguably conflict should be read in harmony, where possible. *See State v. Dann*, 591 N.W.2d 635, 638 (Iowa 1999).

Where statutes cannot be read in harmony, we turn to other principles of statutory construction. One of these is that, when a general provision conflicts with a specific one, the specific prevails. *See Iowa Code* § 4.7 (2015). Section 901.5(14) is a general provision, regulating multiple aspects of juvenile sentencing for an array of crimes. *See Iowa Code* § 901.5(14) (2013). Section 910.3B is much more specific and relates to a precise restitution award imposed in a small category of felonies that result in death. *See Iowa Code* § 910.3B (2013). To the extent these provisions are in conflict, section 901.5(14) yields to 910.3B and there is no authority to suspend the \$150,000 restitution award for juvenile murderers.

The defendant contends, however, that the language of section 901.5(14) refers to the “overall sentence, not just a term of incarceration and presumably applies to restitution.” Def. Brief at 25. Restitution is considered a “phase” of sentencing but has never been equated to the length of the sentence that a defendant must serve as is

contemplated by section 901.5(14). *State v. Alspach*, 554 N.W.2d 882, 883 (Iowa 1996). It is considered a phase of sentencing because that is when restitution is imposed. Iowa Code § 910.3. The rationale of restitution in the context of criminal law is similar to a civil recovery for torts. *See State v. Mayberry*, 415 N.W.2d 644, 645-46 (Iowa 1987) (a wrong has been done; a person injured or property damaged; the victim deserves to be fully compensated for the injury the actor caused). That is the very basis for the award under section 910.3B; to compensate the estate or heirs of the victim who died as a result of the defendant's felonious acts. Iowa Code § 910.3B. The specific language of section 910.3B controls and the general provisions of 901.5(14) are inapplicable.

**C. Even if section 901.5(14) arguably applies to restitution, such as the \$150,000 award, the district court was aware that it could impose a lesser sum and elected not to do so.**

Even if this court were to somehow find that section 901.5(14) applies, the district court was aware of this and decided, in its discretion, to impose \$150,000. At the time the defendant entered her guilty plea, the Honorable Mary E. Chiccelly, who also presided at sentencing stated:

All right. Now, Miss Richardson, as your counsel was right to point out, as a consequence to pleading guilty, *you may also be required* to pay restitution to the victims of your offense, including a minimum of \$150,000 restitution to the victim's estate. Do you understand that?

Plea Tr. p. 7, line 23 through p. 8, line 3; App. 20 (emphasis added).

The court did not state that she “will” be required to pay the minimum \$150,000 but that she “may” be required to pay it. From this language, it is clear that the court thought that it may, but was not required to impose the statutory minimum of restitution under section 910.3B.

Moreover, the sentencing process covered several days.

5/28/14 Hearing Tr. p. 1, lines 1-25, 5/30/14 Hearing Tr. p. 1, lines 1-25; App. 22, 25. The court heard from the State's witnesses, the defendant's witnesses, including the forensic psychologist, and the defendant herself. 5/28/14 Hearing Tr. p. 2, line 1 through p. 3, line 17, 5/30/14 Hearing Tr. p. 3, lines 1-16; App. 23-24, 26. The court was acutely aware of the nature of the hearing and the findings it was to make in accordance with *Miller* decision. 7/18/14 Hearing Tr. p. 5, line 16 through p. 16, line 2; App. 28-40. In fact, the court read its lengthy ruling to the parties at the July 18, 2014 hearing. 7/18/14

Hearing Tr. p. 5, line 16 through p. 16, line 2; App. 28-40. The court noted that her ruling “reflects what I believe is particularly fitting to this Defendant under these circumstances of this case. . . “ 7/18/14 Hearing Tr. p. 14, line 22 through p. 16, line 2; App. 39-40. Even though the court knew it was not required to impose a fifty-year sentence, it did so because of the “particular and specific” facts of this case. 7/18/14 Hearing Tr. p. 14, line 22 through p. 16, line 2; App. 39-40. The court ultimately suspended twenty-five years of the fifty-year sentence and made the defendant eligible for parole immediately. 7/18/14 Hearing Tr. p. 10, line 18 through p. 11, line 18; App. 34-35. The court did not suspend any of the restitution award under section 910.3B because it found that the facts of this case warranted the full amount of restitution under section 910.3B. When, as in this case, the court is aware of the provisions of section 901.5(14) and went to great lengths to fashion the appropriate sentence for this juvenile offender and the protection of the community, it cannot be said that the court abused its discretion when it ordered her to pay the full amount of restitution under section 910.3B. The district court must be affirmed.

### **III. Neither the Cruel or Unusual Punishment Clause or the Excessive Fines Clause Warrant Relief As Applied to this Defendant.**

#### **Preservation of Error**

The State does not contest error preservation. *See State v. Lyle*, 854 N.W.2d 378, 382–83 (Iowa 2014) (on error preservation).

#### **Standard of Review**

The defendant asserts a constitutional challenge and review is de novo. *State v. Izzolena*, 609 N.W.2d 541, 545 (Iowa 2000); *State v. Klawonn*, 609 N.W.2d 515, 518 (Iowa 2000).

#### **Merits**

In Division III of her brief, the defendant argues that Article I, section 17 of the Iowa Constitution invalidates various sentencing statutes “to the extent they mandate any restitution as part of the sentence of the juvenile.” Defendant’s Proof Br. at 33. She relies first on the Cruel and Unusual Punishments Clause, then on the Excessive Fines Clause. *See generally* Defendant’s Br. at 33–53. Neither claim warrants any relief for this defendant and both claims are largely addressed elsewhere in the brief.

**A. The Cruel and Unusual Punishments Clause does not apply to restitution generally, or the \$150,000 award in particular. And even if it did, the \$150,000 award is not cruel and unusual as applied to this defendant.**

It appears the defendant's assertions that the Cruel and Unusual Punishments Clause are largely a repackaging of her claims in Division I—she argues for applying *Miller* and the *Null* triad cases because restitution is “punishment.” Defendant's Proof Br. at 39-49. The State's responsive arguments need not be repeated at length. In short, *Miller* and the *Null* triad turn on culpability and applying their reasoning to a “gravity of the offense” proportionality analysis does not make sense. *See* Division I *supra*. Restitution is also materially different than incarceration because it directly furthers rehabilitative interests, including the defendant's reintegration into society. *See* Division I *supra*.

In her brief, the defendant uses a number of affectations to avoid conceding that restitution is materially different in purpose than incarceration. *See, e.g.*, Defendant's Proof Br. at 39 (noting, italics original, that restitution is not “*precisely* comparable to incarceration”); at 42-43 (contending that “a burdensome fine does not implicate precisely identical limitations on one's liberty as actual

incarceration”). She then takes these affectations one final step and asserts that, “In some ways, the real threats caused by excessive fines can be more daunting than the deprivation of freedom accompanying a prison sentence.” Defendant’s Proof Br. at 43. The notion that a criminal offender is more daunted by the requirement to make minimum payments toward a restitution plan, as compared to a mandatory prison sentence, is absurd on its face.

In order to comply with a plan of restitution, an offender needs only make minimal payments toward the total amount owed. *State v. VanHoff*, 415 N.W.2d 647, 649 (Iowa 1987) (reasonable ability to pay is based on inmate’s ability to pay the current installment rather than the total amount due). The State understands amounts of \$50 or \$25 dollars per month to be common.<sup>2</sup> The defendant offers no reason to believe these amounts are cruel and unusual punishment or that this amount has a materially different impact on a former juvenile

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<sup>2</sup> The State is unaware of any publicly available source that discusses Iowa offenders’ average monthly restitution payments. In broad strokes, media accounts support the State’s observation that the amounts paid by most offenders is minimal. *See, e.g.*, Associated Press, *Iowa Offenders Pay a Fraction of Restitution Owed*, The Courier (Waterloo-Cedar Falls) (July 16, 2012) (reporting the State collected less than 12% of restitution owed), available at [http://wfcourier.com/news/local/govt-and-politics/iowa-offenders-pay-a-fraction-of-restitution-owed/article\\_a3ca904c-cf39-11e1-ac3e-001a4bcf887a.html](http://wfcourier.com/news/local/govt-and-politics/iowa-offenders-pay-a-fraction-of-restitution-owed/article_a3ca904c-cf39-11e1-ac3e-001a4bcf887a.html).

offender (who is an adult at release) than other offenders. But even if these amounts were cruel and unusual, a convicted defendant has the ability to challenge the restitution plan in court, including a petition to reduce the amount owed in monthly payments. *See generally* Iowa Code 910.7, 910.9 (2013). With this backdrop, there is no reason to question the constitutionality of section 910.3B as applied to this defendant. It is also important to note that she did not act alone. Her co-defendant, upon conviction, would be jointly and severally liable for the \$150,000 award to the Kunkle estate or heirs at law. *Reilly v. Anderson*, 727 N.W.2d 102, 109 (Iowa 2006) (when persons are liable because they acted in concert, all persons are jointly and severally liable). She would not be strapped with the requirement that she pay entire amount by herself.

The defendant also complains in her brief that juveniles often must seek minimum-wage employment upon release from incarceration, and this makes paying restitution hard. *See* Defendant's Proof Br. at 54. The defendant's lack of opportunities is the product of her own choices—here, the decision to help kill an acquaintance. This deserves no sympathy from the courts or anyone else. Further, a juvenile offender who takes advantage of a lengthy

prison stay may obtain education certificates and find gainful employment, should she put in the effort to rehabilitate herself. Also, to the extent the defendant repeatedly refers to her age—apparently referring to her age at offense, not her age today—it must cut both ways. Juvenile offenders are often released from prison at a younger age than older offenders who commit the same crime: this gives a former juvenile offender more time to pay off her obligations to society, including restitution.

The \$150,000 restitution award mandated by the Code is not an albatross worn around this defendant’s neck for eternity. Nothing presented by the defendant mitigates the gravity of her offense, even if her culpability is more debatable. The district court did not err in assessing the \$150,000 restitution award as a result of the defendant’s felonious acts that resulted in the taking of human life.

**B. The defendant’s minimally presented challenge under the Excessive Fines Clause does not warrant invalidating her sentence.**

The defendant offers just a few paragraphs in support of her Excessive Fines Clause argument. Defendant’s Proof Br. at 49-50. This claim has no merit for many of the reasons discussed in Division I. As discussed at length there, excessiveness turns on the gravity of

the offense. *See* Division I *supra*. Taking a human life is the gravest offense in our society. *See* Division I *supra*. This should end the inquiry.

To the extent this Court indulges the defendant's argument a second time, the \$150,000 also passes any proportionality analysis for the same reasons discussed in Division I. The \$150,000 award is akin to common student-debt obligations or the insurance policy for a teen driver. This is not unreasonable or grossly disproportionate to the taking of a man's life—the most grave of all offenses.

### **CONCLUSION**

The State respectfully requests this Court affirm the district court's order as it pertains to restitution.

## REQUEST FOR NONORAL SUBMISSION

While this is an issue of first impression and should be decided by the Supreme Court, it is one that can be addressed adequately based on the briefing. Oral argument is unnecessary. In the event oral argument is scheduled, the State asks to be heard.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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