

IN THE SUPREME COURT OF IOWA

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

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

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APPELLANT'S APPLICATION FOR FURTHER REVIEW  
OF THE DECISION OF THE IOWA COURT OF APPEALS  
FILED DECEMBER 9, 2015

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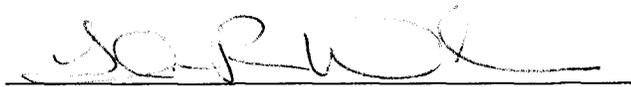
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ATTORNEYS FOR DEFENDANT-APPELLANT

**CERTIFICATE OF SERVICE**

On the 28<sup>th</sup> day of December, 2015, the undersigned certifies that a true copy of the foregoing instrument was served upon 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 St. SW, Mitchellville, IA 50169.

APPELLATE DEFENDER'S OFFICE



**THERESA R. WILSON**  
Assistant Appellate Defender

TRW/sm/12/15

**QUESTIONS PRESENTED FOR REVIEW**

**I. WHETHER, AS A MATTER OF FIRST IMPRESSION, AN AS-APPLIED EXCESSIVE FINES ANALYSIS UNDER ARTICLE 1, SECTION 17 OF THE IOWA CONSTITUTION REQUIRES CONSIDERATION OF THE MILLER FACTORS IF THE CHALLENGER IS A JUVENILE?**

**II. IOWA CODE SECTION 901.5(14) GRANTS A DISTRICT COURT DISCRETION IN SENTENCING JUVENILES CHARGED IN ADULT COURT. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN ORDERING RICHARDSON TO PAY \$150,000 IN RESTITUTION WITHOUT CONSIDERING INDIVIDUALIZED FACTORS?**

**III. ALTERNATIVELY, 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?**

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## **STATEMENT SUPPORTING FURTHER REVIEW**

This case should have been retained by the Iowa Supreme Court because it involves a substantial issue of first impression as to whether restitution under Iowa Code section 910.3B(1) can be mandatorily imposed on a juvenile defendant without consideration of individualized sentencing factors. Iowa Rs. App. P. 6.1101(2)(c), 6.1103(b)(2) (2015). The Iowa Court of Appeals “declined to expand [the ruling in State v. Lyle] beyond its expressed scope,” deferring instead to the Iowa Supreme Court. Opinion p. 3.

In State v. Izzolena, this Court unequivocally held that, while called “restitution,” the \$150,000 mandatory minimum amount provided by Iowa Code section 910.3B is a fine. State v. Izzolena, 609 N.W.2d 541, 549 (Iowa 2000). In State v. Lyle, this Court concluded that the imposition of mandatory minimum prison sentences for juveniles, however brief they may be, violates article I, section 17 of the Iowa Constitution because it deprives district courts of the ability to consider those hallmark factors of youth that necessarily mitigate a

youthful offender’s culpability when fashioning an appropriate sentence for a particular juvenile. State v. Lyle, 854 N.W.2d 378, 400–04 (Iowa 2014).

Richardson urges this Court to apply its well-reasoned analysis in Lyle to *all* mandatory minimum punishments that deprive trial courts of the discretion to craft an appropriate sentence for a juvenile offender. The hallmark characteristics of juvenility do not justify mandatory punishments in some respects but not others; rather, a trial court, as the only entity to have the juvenile before it and to have the power to punish that juvenile, should be able to determine precisely what punishment will achieve the goals of sentencing for that specific juvenile.

Alternatively, Iowa Code section 901.5(14) gives district courts the authority to, “notwithstanding any . . . provision of law prescribing a mandatory minimum sentence,” impose any lesser sentence for a juvenile as the court sees fit. Iowa Code § 901.5(14) (2013). Restitution—or, perhaps more accurately, a *fine*—is part of a sentence and therefore falls within Section

901.5(14). Section 901.5(14) gives a district court the discretion to suspend an otherwise mandatory fine, including the \$150,000 restitution award of section 910.3B.

WHEREFORE, Richardson respectfully asks this Court to grant further review of the Court of Appeals' decision in her case.

## **STATEMENT OF THE CASE**

**Nature of the Case:** This is an appeal by the Defendant-Appellant Daimonay Richardson from restitution ordered in Linn County District Court following her guilty plea on the charge of Murder in the Second Degree – Aiding and Abetting, a class B felony.

**Course of Proceedings:** Richardson accepts the Court of Appeals’ recitation of the course of proceedings.

**Facts:** Richardson was born in 1997. Her father was not involved in raising her 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). Richardson ultimately confessed to the crime. (Ruling, p. 4) (App. p. 44).

## **ARGUMENT**

**I. THIS COURT SHOULD HOLD, AS A MATTER OF FIRST IMPRESSION, THAT AN AS-APPLIED EXCESSIVE FINES ANALYSIS UNDER ARTICLE 1, SECTION 17 OF THE IOWA CONSTITUTION REQUIRES CONSIDERATION OF THE MILLER FACTORS IF THE CHALLENGER IS A JUVENILE.**

**Error Preservation:** The general rule of error preservation is not applicable to void, illegal, unconstitutional

or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014).

**Standard of Review:** Iowa courts “review an allegedly unconstitutional sentence de novo.” State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014).

**Discussion:** At resentencing, the District Court imposed \$150,000 in restitution 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.

State v. 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). 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.” State v. 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.

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.; 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).<sup>1</sup>

In his dissent in Izzolena, Justice Lavorato was specifically troubled 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.” State v. Izzolena, 609 N.W.2d at 555 (Lavorato, J., dissenting).

In decisions issued at the same time as Izzolena, 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. In State v. Rohm, the court specifically considered the seriousness

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<sup>1</sup>. At least one United States Court of Appeals has rejected this retrospective-only approach. United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007). 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).

of the defendant's conduct and her furtherance of the crime in determining that the mandatory fine as applied was not unconstitutionally excessive where she supplied alcohol to a minor who then suffered an alcohol-related death. State v. 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. State v. Klawonn, 609 N.W.2d 515, 518–19 (Iowa 2000). In none of these cases were the challengers juveniles.<sup>2</sup>

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<sup>2</sup>. In Klawonn, the defendant was twenty-four years old. State v. Klawonn, 609 N.W.2d at 517. In Rohm, the defendant had adult children and was at least old enough to purchase alcohol. State v. Rohm, 609 N.W.2d at 507. While Izzolena was not an as-applied case, the defendant was similarly not a juvenile; 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 State v. Izzolena, 609 N.W.2d 541.

From these cases interpreting Iowa's excessive fines clause, two important principles emerge. 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. State v. Izzolena, 609 N.W.2d at 551. Second, 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 id.; State v. Rohm, 609 N.W.2d at 514; State v. Klawonn, 609 N.W.2d at 518–19.

*Age as a necessary factor requiring consideration in challenges under Iowa's excessive fines clause.* In light of recent case law requiring consideration of age as a mitigating factor with respect to a cruel-and-unusual punishments analysis, 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.

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

(2012). “[T]he 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 extended the holding of Miller to prohibit all mandatory minimum sentences for juveniles under the Iowa Constitution. State v. Lyle, 854 N.W.2d 378, 402 (Iowa 2014). 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. Lyle outlines the mitigating factors of youth district courts were to consider in sentencing juveniles. Id. at 403 n.8.

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 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.

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 21 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.

**II. IOWA CODE SECTION 901.5(14) GRANTS A DISTRICT COURT DISCRETION IN SENTENCING JUVENILES CHARGED IN ADULT COURT. THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING RICHARDSON TO PAY \$150,000 IN RESTITUTION WITHOUT CONSIDERING INDIVIDUALIZED 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).

**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).

**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.

*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) because 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) (2013); State v. Jenkins, 788 N.W.2d 640, 644 (Iowa 2010). In addition, Section 910.3B(1) 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. Id. § 910.3B(1).

In 2013, however, the Iowa legislature responded to recent Iowa Supreme Court decisions on the issue of juvenile sentencing. 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.

Id. § 901.5(14). See also State v. Lyle, 854 N.W.2d 378, 388 (Iowa 2014) (interpreting the statute as abolishing mandatory prison sentences for most crimes committed by juveniles).

The language of the statute 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.” State v. Izzolena, 609 N.W.2d 541, 551 (Iowa 2000); State v. Alspach, 554 N.W.2d 882, 883–84 (Iowa 1996). Because section 901.5(14) authorizes a 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.

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 ordering Richardson to pay \$150,000 in restitution.

*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.

“When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose.” State v. 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).

In Lyle, the Iowa Supreme Court announced that “children are constitutionally different from adults for purposes of sentencing.” State v. Lyle, 854 N.W.2d 378, 395 (Iowa 2014).

“[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.

As the Lyle court explicitly stated:

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.

State v. 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.

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.” Id. 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).

For these reasons, the District Court abused its discretion in ordering Richardson to pay \$150,000 in restitution.

**III. ALTERNATIVELY, IOWA CODE SECTIONS 910.2 AND 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, unconstitutional or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014).

**Standard of Review:** Iowa courts “review an allegedly unconstitutional sentence de novo.” State v. 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 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.

In addition to prohibiting excessive fines, 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." State v. 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.

When interpreting Article I, section 17 of the Iowa Constitution, Iowa courts look to federal Eighth Amendment jurisprudence for guidance. State v. Izzolena, 609 N.W.2d at 541, 547 (Iowa 2000). 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); United States v. Bajakajian, 524 U.S. 321, 327, 118 S.Ct. 2028, 2033, 141 L.Ed.2d 314 (1998).

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. State v. 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).

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." State v. Lyle, 854 N.W.2d 378, 402 (Iowa

2014). “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 same fear exists when punishing juveniles with onerous fines. These hefty fines are 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. Iowa Code § 910.2(2) (2013). 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 id. §§ 910.3B(1), 910.7. 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. Id. §§ 910.4-.5.

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.” Cortney E. Lollar, What is Criminal Restitution?, 100 Iowa L. Rev. 93, 107 (2014). The length of incarceration for failure to maintain these obligations may even exceed that of a prison sentence imposed on the underlying offense. Colgan, Reviving the Excessive Fines Clause, at 291.

As one scholar notes, “[t]he cycle of economic sanctions, interest, collections, and incarceration can be financially devastating.” Id. 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. Both Richardson and the District Court deserve the opportunity for the court to reconsider the restitution award in this case as well and preserve the district court’s ability to “[craft] a punishment that serves the best interest of the child and of society.” State v. Lyle, 854 N.W.2d 378, 403 (Iowa 2014).

Forcing a district court to impose restitution—especially a mandatory minimum amount of restitution—without allowing the court to consider any mitigating factors resulting from the defendant’s juvenility at the time the crime was committed is repugnant to both Iowa’s cruel and unusual punishments clause and excessive fines clause. 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.

## **CONCLUSION**

Richardson respectfully requests that the Court vacate the decision of the Court of Appeals, vacate her sentence to the extent it imposes mandatory restitution in the amount of \$150,000, and remand this case to the District Court for resentencing limited to reconsideration of the restitution award. Iowa R. App. P. 6.1206 (2015); State v. Jose, 636 N.W.2d 38, 47 (Iowa 2001).

## **ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was \$ 4.47, and that amount has been paid in full by the Office of the Appellate Defender.

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Dated: 12/21/15

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**IN THE COURT OF APPEALS OF IOWA**

No. 14-1174  
Filed December 9, 2015

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**DIAMONAY RICHARDSON,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Linn County, Mary E. Chicchelly,  
Judge.

Diamonay Richardson appeals the restitution imposed following her guilty  
plea to second-degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Martha E. Trout, Assistant  
Attorney General, for appellee.

Considered by Potterfield, P.J., and Doyle and Tabor, JJ.

**DOYLE, Judge.**

Diamonay Richardson appeals following her guilty plea to second-degree murder, claiming the restitution imposed is unconstitutional because she was a juvenile at the time of the commission of the offense. Richardson contends the amount of restitution she was ordered to pay as a juvenile offender “is excessive in violation of the excessive fines clause of article I, section 17 of the Iowa Constitution.” See Iowa Const. art. I, § 17 (prohibiting the imposition of excessive fines). According to Richardson, in light of

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.

Richardson claims the court should have considered a more lenient restitution award than that mandated under Iowa Code section 910.3B (2013) because she was a juvenile at the time of the commission of the offense. She relies on the United States Supreme Court’s ruling in *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012) (holding a statutory schema that mandates life imprisonment without the possibility of parole cannot constitutionally be applied to a juvenile), the Iowa Supreme Court’s ruling in *State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014) (applying *Miller* under Iowa law), and their progeny to support her claim that the offender’s age and culpability are necessary factors to consider with regard to restitution just as they are necessary factors to consider with regard to mandatory minimum terms of imprisonment.

Richardson also contends the district court erred in assessing restitution under Iowa Code section 910.3B and in “fail[ing] to exercise the discretion granted to it by section 901.5(14) to impose a lesser restitution amount.”

The contentions raised by Richardson are identical to those raised in *State v. Breeden*, No. 14-1789, 2015 WL \_\_\_\_\_ (Iowa Ct. App. Dec. 9, 2015), also filed today. In *Breeden*, we held neither *Miller* nor Iowa’s *Miller* progeny mention restitution or fines. See *Miller v. Alabama*, 132 S. Ct. at 2469; *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013); *State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013); *State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013); *Lyle*, 854 N.W.2d at 382. We further noted the *Lyle* court made clear its holding was limited to “mandatory minimum sentences of imprisonment for youthful offenders.” 854 N.W.2d at 400. We declined to expand that ruling beyond its expressed scope, and stated if the court’s holding was to be expanded to include restitution in the context of a juvenile offender cruel-and-unusual punishment analysis, our state supreme court should be the court to do so. As an intermediate appellate court, “[w]e are not at liberty to overrule controlling supreme court precedent.” *State v. Beck*, 854 N.W.2d 56, 64 (Iowa Ct. App. 2014).

Finally, with regard to Richardson’s claim that the restitution is “unconstitutionally excessive” under the facts and circumstances of her particular case, as we noted in *Breeden*, Richardson has provided no authority to support this claim. “In the context of the harm caused, the gravity of offenses under section 910.3B is unparalleled.” *State v. Izzolena*, 609 N.W.2d 541, 550 (Iowa 2000). “A restitution order is not excessive if it bears a reasonable relationship to

the damage caused by the offender's criminal act." *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001).

We affirm the judgment and sentence entered by the district court.

**AFFIRMED.**



State of Iowa Courts

**Case Number**  
14-1174

**Case Title**  
State v. Richardson

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