IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	SUPREME COURT 17-0622
	)	
JUSTIN ANDRE BAKER,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE JOEL A. DALRYMPLE AND
GEORGE L. STIGLER, JUDGES

APPELLANT'S REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 31st day of January, 2018, 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 Justin Baker, 307 Kingsley Ave., Waterloo, IA 50701.

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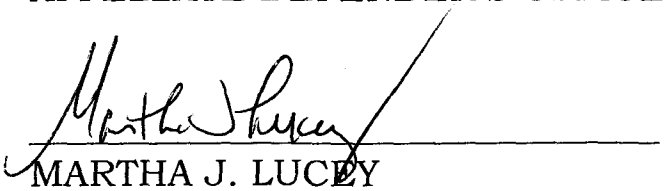

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(Not addressed in the reply brief)

STATEMENT OF THE CASE

COMES NOW the defendant-appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the plaintiff-appellee's brief.

ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT GRANTING THE MOTION TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE.

A. The seizure of Baker's vehicle was not supported by articulable reasonable suspicion.

The State asserts Baker was not seized when Bose turned on his lights because he did not immediately submit to the show of authority relying on California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547 (1991). St. Brief pp. 20-22. The State's reliance on the United States Supreme Court's ruling in Hodari D. is misplaced. Hodari D. is inapplicable because it involved deciding whether an interaction with an officer was a consensual encounter or an illegal seizure. In Hodari D., officers were patrolling a high crime area in an unmarked police vehicle. Hodari D., 499 U.S. at 622. They saw several

juveniles, including Hodari, run away after seeing their car. Id. at 622–23. One officer got out of the car and chased Hodari on foot; while running, the officer witnessed Hodari throw a small rock. Id. at 623. Hodari was eventually restrained, and the rock was later established to be cocaine. Id. First, the United States Supreme Court concluded that the officer chasing the defendant was not a "seizure" within the meaning of the Fourth Amendment. Id. The Court further concluded that even if it assumed the officer's pursuit of the defendant was a show of authority for Fourth Amendment purposes, because the defendant did not submit to that authority until after he had discarded the cocaine, the federal constitution did not compel the suppression of the cocaine. Id. at 629.

Because Hodari D. involves an entirely different and unusual scenario regarding the occurrence of a seizure, it is inapplicable to the present case. The Iowa Supreme Court has noted that a "seizure occurs 'only when the officer, by

means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" State v. Harlan, 301 N.W.2d 717, 719 (Iowa 1981) (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)). Moreover, the Iowa Supreme Court has quoted language Hodari D. approvingly in one context and stated that "a seizure does not occur if a reasonable person would feel free to disregard the police and go about his business." State v. Wilkes, 756 N.W.2d 838, 843 (Iowa 2008) (citations omitted) (internal quotation marks omitted). Common sense makes it clear that a reasonable person does not feel free to disregard the police when an officer in a marked vehicle turns on its lights and sirens in an attempt to effectuate a traffic stop.

The use of sirens and flashing lights in order to pull over a moving vehicle is a seizure. See Harlan, 301 N.W.2d at 720. ("The use of sirens, flashing lights or other signals to pull a moving vehicle to the side of the road might also constitute a show of authority that is a seizure."); Wilkes, 756 N.W.2d at

844 ("Further, the use of ordinary headlights at night is simply not coercive in the same manner as the activation of emergency lights which invoke police authority and imply a police command to stop and remain."). See also State v. Tyler, 830 N.W.2d 288, 292 (Iowa 2013) ("A traffic stop is unquestionably a seizure . . . .") (citations omitted). As one Court has stated:

> Upon turning on the blue lights of a vehicle, a police officer has clearly initiated a stop and has seized the subject of the stop within the meaning of the Fourth Amendment of the Federal Constitution . . . . Thus, *in order for the stop in this case to be constitutionally valid, at the time that [the officer] turned on his vehicle's blue lights, he must have had reasonable suspicion,* supported by specific and articulable facts, that [the defendant] had committed, or was about to commit, a criminal offense.

State v. Binette, 33 S.W.3d 215, 218 (Tenn. 2000) (emphasis added). Therefore, contrary to the State's position, Baker was seized at the time the officer activated his lights in order to pull over Baker's vehicle.

Hodari D. is inapplicable to this case because it concerns a traffic stop. However, if the State's interpretation of when a

seizure occurs under the Fourth Amendment is correct as applied to this case, this Court should decline to adopt that approach under Article I, section 8 of the Iowa Constitution and find that a seizure occurs when the officer exhibits his intent to conduct a traffic stop by engaging his lights and siren.

Even where a party has not advanced a different standard for interpreting a state constitutional provision, the Court may apply the standard more stringently than federal case law. State v. Bruegger, 773 N.W.2d 862, 883 (Iowa 2009). When a defendant raises both federal and state constitutional claims, the Court has discretion to consider either claim first or consider the claims simultaneously. State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010). When independently evaluating the Iowa Constitution's guarantee against unreasonable searches and seizures, the Iowa Supreme Court has generally examined several factors, including related decisions from other states, the rationale of the federal decisions, the scope

and meaning of Iowa's search and seizure clause, and whether the federal interpretation is consistent with Iowa law. State v. Cline, 617 N.W.2d 277, 285 (Iowa 2000), overruled on other grounds by State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001); Ochoa, 792 N.W.2d at 268–91.

While article I, section 8 uses nearly identical language as the Fourth Amendment and was generally designed with the same scope, import and purpose, the Iowa Supreme Court jealously protects its authority to follow an independent approach under the Iowa Constitution. Ochoa, 792 N.W.2d at 267 (citations omitted). This Court's approach to independently construing provisions of the Iowa Constitution that are nearly identical to the federal counterpart is supported by Iowa's case law. See, e.g., id.; Cline, 617 N.W.2d at 285.

The Iowa Supreme Court has held: "The linguistic and historical materials suggest the framers of the Fourth Amendment, and by implication the framer of article I, section

8 of the Iowa Constitution intended to provide a limit on arbitrary searches and seizures." Ochoa, 792 N.W.2d at 273. "As a general matter, the drafters of the Iowa Constitution placed the Iowa Bill of Rights at the beginning of the constitution, for apparent emphasis." Id. at 274. "This priority placement has led one observer to declare that, more than the United States Constitution, the Iowa Constitution 'emphasizes rights over mechanics.'" State v. Baldon, 829 N.W.2d 785, 809–10 (Iowa 2013)(Appel, J., concurring) (quoting Donald P. Racheter, The Iowa Constitution: Rights over Mechanics, in The Constitutionalism of American States 479, 479 (George E. Connor & Christopher W. Hammons eds., 2008)).

The federal interpretation of the Fourth Amendment with regards to a traffic stop is not a seizure until the individual submits to the officer's authority is not consistent with Iowa law. The Iowa Constitution has a "strong emphasis on individual rights." State v. Short, 851 N.W.2d 474, 482 (Iowa

2014). The Iowa Supreme Court has stated that warrantless searches and seizures that did not fall within one of the "jealously and carefully drawn exceptions" are unreasonable. Ochoa, 792 N.W.2d at 285; State v. Strong, 493 N.W.2d 834, 836 (Iowa 1992). It has also repeatedly determined the Iowa Constitution provides significant protection of individual rights than the United States Constitution does. Short, 851 N.W.2d at 506 (holding a valid warrant is required for law enforcement's search of a home under the Iowa Constitution); Cline, 617 N.W.2d at 292–93 (holding the good faith exception is incompatible with the Iowa Constitution); State v. Fleming, 790 N.W.2d 560, 567–68 (Iowa 2010) (finding the search of a rented room violated the Iowa Constitution when the warrant for that area was not supported by probable cause); Baldon, 829 N.W.2d at 802 (finding a parole agreement containing a prospective search provision was insufficient to establish voluntary consent); Ochoa, 792 N.W.2d at 291 (holding the warrantless search of a parolee's room by a general law

enforcement officer without particularized suspicion violated the state constitution); State v. Tague, 676 N.W.2d 197, 206 (Iowa 2004) (finding a traffic stop did not meet the reasonableness test of article I, section 8); State v. Kern, 831 N.W.2d 149, 177 (Iowa 2013) (finding the warrantless search of a parolee's home unconstitutional under Iowa Constitution); State v. Coleman, 890 N.W.2d 284, 301 (Iowa 2017) (finding the Iowa Constitution requires an officer to let the driver go "when the reason for a traffic stop is resolved and there is no other basis for reasonable suspicion"). The application of the Iowa Constitution to the present case will provide Baker and Iowa citizens a "fundamental guarantee" of protection against unreasonable seizures. See Cline, 617 N.W.2d at 292.

Moreover, the United States Supreme Court's decision in Hodari D. has been highly criticized by courts and commentators alike. See, e.g., Ronald J. Bacigal, The Right of the People To Be Secure, 82 Ky. L.J. 145 (1993); Wayne R. LaFave, Flight and the "force . . . or submission" test, 4 Search

& Seizure § 9.4(d) (5th ed. October 2017) (citations omitted) ("The result reached in Hodari D., aptly characterized by one commentator as the latest manifestation of the Court's surreal and Orwellian view of personal security in contemporary America is incorrect . . . ." (internal quotation marks omitted)); State v. Beauchesne, 868 A.2d 972, 978–79 (N.H. 2005) (citations omitted) (collecting cases and listing their criticisms of the Hodari D. decision and reasoning). Several other courts have declined to follow the United States Supreme Court's holding in Hodari D. in interpreting their respective state constitutions.[1] See, e.g., In re Welfare of E.D.J., 502 N.W.2d 799, 781–83 (Minn. 1993) (rejecting Hodari D. and adhering to the standard articulated by the U.S. Supreme Court in cases

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[1] Notably, it appears that all of the states that have rejected Hodari D. and offered greater protection under their individual constitutions have done in so while dealing with factual scenarios similar to Hodari D.—an officer chasing or approaching an individual on the street or in a parked car, and never in the context of a traffic stop. This also supports the position that the Hodari D. decision is inapplicable to this case.

prior to Hodari of "objectively and on the basis of the totality of the circumstances, whether a reasonable person in the defendant's shoes would have concluded that he or she was not free to leave" under the Minnesota Constitution); Joseph v. State, 145 P.3d 595, 596 (Alaska Ct. App. 2006) (rejecting Hodari D. and applying the exclusionary rule to an unlawful attempt by law enforcement to detain the defendant); State v. Oquendo, 613 A.2d 1300, 1309–10 (Conn. 1992) (citations omitted) ("Under our state constitution what starts out as a consensual encounter becomes a seizure if, on the basis of a show of authority by the police officer, a reasonable person in the defendant's position would have believed that he was not free to leave."); Flonnory v. State, 805 A.2d 854, 857 (Del. 2001) (citation omitted) (noting the Delaware courts have rejected Hodari D., concluding the Delaware Constitution offered more protection than the Fourth Amendment); State v. Quino, 840 P.2d 358, 362 (Hawaii 1992) ("[W]e decline to adopt the definition of seizure employed by the United States

Supreme Court in Hodari D. and instead, choose to afford greater protection to our citizens by maintaining the Mendenhall standard."); Baker v. Commonwealth, 5 S.W.3d 142, 145 (Ky. 1999) ("We . . . decline to extend the holding of Hodari D. either to the facts of this case or to the current applicable law as it defines seizure."); State v. Tucker, 626 So.2d 707, 712–13 (La. 1993); Commonwealth v. Stoute, 665 N.W.2d 93, 96 (Mass. 1996); State v. Clayton, 45 P.3d 30, 34 (Mont. 2002); Beauchesne, 868 A.2d at 978–981; State v. Tucker, 642 A.2d 401, 405 (N.J. 1994) ("To conform our doctrine now to Hodari D. would require too radical a change in our search-and-seizure law. We shall continue to define a seizure under New Jersey constitutional law in accordance with our existing precedent, . . . and we decide this case on state constitutional grounds."); State v. Puffenbarger, 998 P.2d 788, 792–94 (Or. Ct. App. 2000) (finding a seizure occurred under the state constitution when the show of authority by law enforcement interfered with the defendant's personal freedom

of movement); Commonwealth v. Matos, 672 A.2d 769, 771–76 (Pa. 1996) ("[W]e reject Hodari D. as incompatible with the privacy rights guaranteed to the citizens of this Commonwealth under Article I, Section 8 of the Pennsylvania Constitution."); State v. Randolph, 74 S.W.3d 330, 336–38 (Tenn. 2002); State v. Young, 957 P.2d 681, 687 (Wash. 1998) ("We reject the introduction of Hodari D. and its mixed subjective/objective test into article I, section 7 jurisprudence because of the drastic change it makes in seizure law. Taking into account whether the citizen yields to the show of authority improperly changes the focus of the seizure inquiry from the conduct of the police to the state of mind of the citizen.").

States that have rejected the Supreme Court's decision in Hodari D. have done so for several reasons. First, the majority opinion in Hodari D. is a "marked departure" from the standard of what constitutes a seizure under the Fourth Amendment that the Supreme Court promulgated in its prior decision, United States v. Mendenhall, 446 U.S. 544, 554, 100

S.Ct. 1870, 1877 (1980). Randolph, 74 S.W.3d at 336. Next, the Hodari D. Court's "analysis fails to apply common law principles under which an arrest would not be distinguished from an attempted arrest in determining whether a person has been seized." Id. Lastly, the reasoning behind the decision "is flawed for practical reasons and subject to potential abuse by officers who pursue a subject without reasonable suspicion and use a flight or refusal to submit to authority as a reason to execute an arrest or search." Id. (citation omitted).

For these same reasons, this Court should reject the Hodari D. approach on when a seizure has occurred and provide greater protection to its citizens under the Iowa Constitution. Accordingly, this Court should find that under a totality of the circumstances here, Baker was seized when the officer turned on his overhead lights and attempted to pull his vehicle over because a reasonable person in his situation would not have felt free to disregard the police and go about

his business. See Binette, 33 S.W.3d at 218; Mendenhall, 446 U.S. at 554, 100 S.Ct. at 1877.

To the extent the Court concludes Hodari D. supports the conclusion that Baker was not seized for Fourth Amendment purposes until he stopped his vehicle, this Court should follow the several other courts that have found Hodari D. inconsistent with their respective state constitutions, reject its application to seizures under Iowa law, and find Baker was seized under the Iowa Constitution when the officer turned on his overhead lights.

B. The search warrant was not supported by probable cause.

Preservation of Error.

The purpose of the error preservation requirement is to ensure the district court had the opportunity to first address claimed errors. Error preservation is based upon fairness. The Court will address issue based on the grounds raised during the trial court proceedings Devoss v. State, 648 N.W.2d 56, 60-61 (Iowa 2002). Error was preserved regarding

the challenge to the material omissions in the search warrant application generally referred to as a Franks violation. Baker joined Caldwell's motion to suppress. (Motion to Continue & Join Codefendant's Motion to Suppress)(App. pp. 18-19).

Prior the suppression hearing the parties clarified the challenges to the evidence:

[Caldwell's attorney]: Your Honor, the – our arguments would also be the other parts of that search warrant as well, which we believe there were material facts left out of the search warrant application which would be in addition to facts related to the warrantless entry into my client's home.

It's hard to separate everything when we realize Ms. Caldwell was not part of Mr. Baker's stop and search, but it was used in the search warrant so it would be our intention to argue that any kind of violation there would also affect her.

(MTS Tr. p. 4L9-19).

[Defense counsel]: Plus incorporating [Caldwell's attorney's] argument that the warrant included certain material omissions. And specifically the part we're talking about there, Judge, is they say that in 2015 Mr. Baker had been arrested in the state of Nevada. I originally thought that was the county of Nevada. And it's true that he literally was arrested, but there were never any charges filed, and we think that's a material omission. And even if it's not a material omission, it's stale. That's from, you know, 2015, so we're challenging that as a basis to obtain a search warrant as well.

(MTS Tr. p. 6L10-21).

At the close of the evidence, Caldwell's counsel argued:

Regarding the warrant itself, we do have a case that we think applies. It's State versus Green, which is 540 N.W.2d 649, and it does address the question of alleged misrepresentations and omissions in the warrant application. And what -- what's important, I guess, for the Court to consider here, we accept that that's our burden to show that there was a problem with the warrant. What it does say in the decision is in determining whether misrepresentation was intentional or material, the surrounding facts are relevant and may be considered by the Court.

What I'd like to do is just go through the search warrant application. The Court has taken judicial notice of that. I think Officer Girsch's testimony was really telling. When I asked him, you didn't tell the judge in the search warrant that no charges were ever filed against Mr. Baker regarding the Nevada incident, his comment was, "well, we never said to the Court that he was convicted."

It's very clear that's that little nuance argument that is clear that they're picking and choosing the information that goes to the Court. And that's a consistent theme throughout the search warrant application. When you start with the first thing in the application, it says from the 3rd to the 9th of April, Justin Baker was driving by and saw Officer Girsch and reacted suspiciously. He acted like he didn't want me to see him.

The officer was undercover. He was not in a marked squad car. He was not identified as a Waterloo police officer, part of the drug task force. There would be no reason for Mr. Baker to believe that somehow Officer Girsch was surveilling him.

And if that was the case, his reaction immediately following where he just comes back and goes into the driveway isn't consistent with that. That fact is not in -- the fact that Officer Girsch was undercover and not identified as a drug task force officer is not in the search warrant application.

The Court has the -- heard the evidence that they did background searches on Mr. Baker and Ms. Caldwell. Ms. Caldwell they were able to say she lives here, she's got electric, MidAmerican records, everything shows that she lives there. All they say about Mr. Baker is, well, we have some indication that he listed it as an address one time. They don't say he's got three or four different residences here in Waterloo, one in Texas. They don't provide the Court the full scope of information to allow for a reason, a decision regarding probable cause.

Again, regarding the criminal history, they searched the criminal history for Mr. Baker. They said we checked, he's got weapons, he's got drugs, he's got willful injury. All of that information was accessible to them and they didn't provide it to the judge. They didn't provide it to the Court when they decided or when they presented the evidence whether or not for relevant information.

(MTS Tr. p. 102L14-p. 104L21).

CONCLUSION

Justin Baker respectfully requests this Court reverse his convictions, order the evidence obtained from the seizure of his vehicle and the Ricker Street residence suppressed and remand for further proceedings. If the State is unable to

proceed to a retrial in FECR213018, Baker respectfully requests this Court order resentencing on any remaining misdemeanor charges because the sentences were imposed as part of an overall sentencing package. State v. Harrington, 805 N.W.2d 391, 395-96 (Iowa 2011). Alternatively, Baker respectfully requests this Court vacate his sentences and remand for resentencing.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Reply Brief and Argument was $2.97, and that amount has been paid in full by the Office of the Appellate Defender.

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

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 3,449 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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Dated: 1/29/18

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