IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. MYRANDA MARIE RINCON, Defendant-Appellant.	S.CT. NO. 20-1300

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE SAMANTHA GRONEWALD, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 11th day of June, 2021, 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 Myranda Rincon, 1411 Osceola Avenue, Des Moines, IA 50316.

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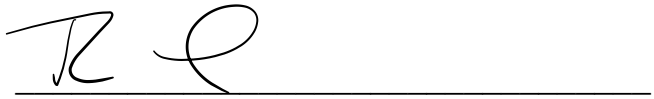

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STATEMENT OF THE CASE

COMES NOW Defendant-Appellant Myranda Rincon, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief. While Rincon's brief adequately addresses the issues presented for review, a short reply is necessary to address disputed facts, as well as arguments raised by the State regarding error preservation, plain view, probable cause, and the automobile exception.

ARGUMENT

First, it's helpful to clarify which issues are still in dispute because the State has conceded or abandoned some of its arguments raised in district court, while raising an issue for the first time on appeal.

- *Rincon's standing to challenge the search of her backpack:* conceded by the State. State Brief at 25 ("Rincon is right that a passenger in a vehicle will typically have standing to challenge a search of their own backpack, and to

assert a privacy interest in its contents."); State Brief at 39 ("To be sure, Rincon had *some* expectation of privacy in her backpack (and would have Fourth Amendment standing).") (emphasis in original).

- *Search incident to arrest (SITA):* abandoned by the State. The State has not renewed the argument made below or responded to the argument in resistance made in Rincon's brief. The State's argument should be deemed waived.
- *Alcohol and methamphetamine in plain view in the vehicle:* conceded by Rincon that open containers and drugs found in plain view in the Malibu could lawfully be seized. Def. Brief at 44-47. However, the facts involving the discovery of the methamphetamine and the question whether open containers in the vehicle give rise to probable cause are in dispute and are addressed in Section II.

- *Marijuana in plain view in Rincon's backpack:* disputed. This argument has been raised by the State for the first time on appeal. It is addressed in Section I.
- *Probable cause with exigency*: disputed. While the State hasn't argued here or below that there is any exigency separate from that associated with the automobile, probable cause and the surrounding facts are in dispute. This is addressed in Section II.
- *Automobile exception:* disputed. This argument is addressed in Section III.

I. The argument that marijuana was in plain view in Rincon's backpack—raised for the first time on appeal—must fail because the character of the evidence was not immediately apparent.

A. The State did not preserve error on its claim that marijuana was in plain view in Rincon's backpack.

Despite multiple opportunities and the State's ample resources, the State did not present the argument in district court that marijuana was in plain view in Rincon's backpack. "Nothing is more basic in the law of appeal and error than the

axiom that a party cannot sing a song to us that was not first sung in trial court." State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999) (finding error not preserved on appellant's claim of prosecutorial misconduct); see also Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). At no time in its pleadings or at the proceedings in district court did the State allege that drugs were in plain view in Rincon's backpack. The State resisted Rincon's motion to suppress and sought reconsideration of the district court's ruling when the court initially ruled in Rincon's favor. (MTS Resistance; Reconsideration Motion) (App. pp.18-26, 40-42). Two hearings were held. (MTS Tr. p. 1 L.1-25; Reconsideration Tr. p. 1 L.1-25). The State had ample opportunity to raise this argument below.

The State's plain-view argument in the district court was regarding the alcohol and methamphetamine found in the

stolen Malibu. (MTS Resistance, ¶¶6-9) (App. p.20). The factual portion of the State's resistance regarding plain view stated, "As Officer Johnson was dealing with the driver, other officers while standing outside of the vehicle observed an open container of alcohol, and two plastic baggies containing methamphetamine sitting inside the front driver's side door handle." (MTS Resistance, ¶6) (App. p.20). Regarding the plain-view argument, the district court found the following: "Having been advised the vehicle was stolen, law enforcement detained and handcuffed the driver of the vehicle. Thereafter, an open container of alcohol and two plastic baggies (later determined to contain methamphetamine) were observed in plain view by law enforcement." (Ruling 4/15/20, p.1) (App. p.34).

In its request for reconsideration of the suppression ruling, the State focused on its argument that Rincon lacked standing to challenge the search of her backpack. (Reconsideration Motion) (App. pp.40-42). The parties argued

their positions at the reconsideration hearing. (Reconsideration Tr. p.2 L.1-p.12 L.21). The State did not urge the trial court to consider that marijuana was in plain view in Rincon's backpack. Instead, the State raises this argument for the first time on appeal. The State's argument should be rejected because the trial court never heard this particular tune.

The evidentiary exception to the error preservation requirement should not be applied in this case. It is accurate that DeVoss acknowledged an exception to the error preservation argument for evidentiary rulings. DeVoss v. State, 648 N.W.2d 56, 62 (Iowa 2002). According to the State, that means that even though it didn't even hint at this plain-view-in-the-backpack argument in district court, it can now raise it on appeal and prevail. State Brief at 18-25. The Court should use its discretion to deny the State's eleventh-hour request.

Normally, the trial court has to be alerted to the issue in the district court. As the Rutledge Court stated:

> On closer reflection we think simple justice demands rigid adherence to the rule. The rule does not proceed, as cynics would have it, from some vague fear of blindsiding a trial judge, but rather from the very real fear of blindsiding the trial process. Long experience has taught us that the bulk of mistakes made at trial can and will be corrected whenever the trial court is alerted to them. The public should not be required to fund a system that would allow trial counsel to, as lawyers often phrase it, "bet on the outcome." After all the lawyer might be the only person in the courtroom alert to an error. It would be flagrantly unjust to allow such a lawyer to sit mute and complain only on appeal following an unfavorable outcome. Our cases are legion that hold error is waived unless preserved by a timely trial objection.

Rutledge, 600 N.W.2d at 326. For instance, in the two cases cited by DeVoss to support its point regarding the evidentiary exception, parties objected to evidence on grounds that were ignored or rejected by the trial court, but the Iowa Supreme Court affirmed on different grounds. DeVoss, 648 N.W.2d at 62 (citing Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 840 (Iowa 1978) (opinion testimony) and State v. Hinkle, 229

N.W.2d 744, 748 (Iowa 1975) (hearsay)). In other words, the appellate court disagreed with the lower court's analysis, but the lower court had been alerted to the error. Id. Likewise, in two Court of Appeals decisions cited by the State to support its argument, State Brief at 20-21, the district court first provided an additional reason to deny a motion to suppress based on the record before it, though the State didn't argue those reasons. See State v. Boll, No. 19-0487, 2020 WL 4200838, at *2 n.2 (Iowa Ct. App. Oct. 9, 2019) (noting the district court denied suppression motion due to reasonable suspicion when the State only urged the community caretaking exception); State v. Rave, No. 09-0415, 2009 WL 3381520, at *2-3 (Iowa Ct. App. Oct. 21, 2009) (finding the trial court denied the suppression motion under the community caretaking exception when the State had argued reasonable suspicion). Obviously in these cases, unlike the instant case, the lower courts were aware of the facts and the grounds urged by the State, even though they decided the

motions on other grounds. That is not always the case, of course, even though fairness would seem to dictate that the district court at least be aware of the facts supporting an argument.

Fairness is one reason error preservation is required. The preservation of error doctrine "is rooted in principles of fairness where neither the state nor the defendant can raise a new claim on appeal that could have been, but failed to be, raised at trial." State v. Dressinger, 958 N.W.2d 590, 598 (Iowa 2021) (citing DeVoss, 648 N.W.2d at 63). The claim that the marijuana was in plain view in Rincon's backpack as it sat on the hood of the DMPD SUV could have been raised below. In the district court, the State had arguably even more access to the reports, videos, and officers than the State does on appeal since parties on appeal are limited to the record made below. Yet, the State stood silent on this issue until appeal, effectuating the "ambush" it now disclaims. State

Brief at 23. Fairness dictates the State's argument be rejected.

Even if the Court finds the evidentiary exception to the rules of error preservation is applicable, it should not be applied here. The evidentiary exception is discretionary. State v. Smith, 876 N.W.2d 180, 184 (Iowa 2016). "[W]e must be careful not to exercise our discretion to decide an issue concerning the admissibility of evidence on an alternative ground when the parties have not had the opportunity to properly develop or challenge the foundation for the evidence." Id. This plain-view argument was not challenged or developed below, as discussed above. The State had ample opportunity and the resources to respond to Rincon's motion to suppress in district court, yet failed to make this claim below and elected not to call the officers to testify to their observations. Rincon asks the Court to use caution here and not apply the evidentiary exception to error preservation.

B. The incriminating character of the bag in Rincon's backpack was not immediately apparent.

The marijuana in Rincon's backpack wasn't in plain view. A plurality of the U.S. Supreme Court first established the test for plain view in Coolidge v. New Hampshire, 403 U.S. 443 (1971). As both parties have acknowledged, plain view requires the State to show that the initial intrusion was justified by a warrant or an exception, the discovery was inadvertent, and the object's incriminating nature was immediately apparent. Coolidge, 403 U.S. at 466-67. In a subsequent decision, a different plurality of the Court backpedaled from the "immediately apparent" requirement, stating that the use of the phrase "was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." Texas v. Brown, 460 U.S. 730, 741 (1983). But a seven-justice majority of the Court later reiterated that the incriminating character of the evidence must be "immediately

apparent." Horton v. California, 496 U.S. 128, 136-37 (1990). Moreover, law enforcement must have probable cause that the evidence is contraband. Arizona v. Hicks, 480 U.S. 321, 326 (1987). Reasonable suspicion will not suffice. Id.

In the instant case, as Officer Steinkamp handcuffed Rincon, Officer Minnehan shone a flashlight on her backpack. Minnehan said, "You got weed in there." Then he walked away. (Exh. 1/Stream 0 00:06:56; Exh. B 00:01:53). Next, Steinkamp alerted the officers to the drugs in the door of the stolen Malibu. Minnehan took a look in the vehicle, then returned to Rincon's backpack and removed the rolled-up bag and began searching. (Exh. 1/Stream 0 00:07:53). Finally, Minnehan showed Officer Johnson the rolled-up bag containing marijuana that he found in Rincon's backpack. (Exh. A 00:07:55). Contrary to the State's assertion that it was "readily identifiable as a rolled-up plastic baggie, full of marijuana," State Brief at 14, Johnson's examination reveals it

was a rolled-up Dunkin' Donuts deposit bag. (Exh. A 01:14:43).

If the character of the Dunkin' Donuts bag had been such that it was immediately apparent that it was contraband, Minnehan would have seized it immediately, as permitted by the plain view doctrine. See State v. Oliver, 341 N.W.2d 744, 745 (Iowa 1983) ("The plain view doctrine provides a basis for upholding a seizure of evidence without a search warrant."). Instead, the dash cam video reveals that he waited until Steinkamp found drugs in the door of the Malibu, presumably believing this gave him authority to search Rincon's backpack and confirm his suspicion (not probable cause) that marijuana was present.

A Dunkin' Donuts deposit bag is not instantly associated with illegal narcotics, unlike the ubiquitous sandwich baggie so often seen in Iowa drug cases, or even a tied-off party balloon. See Brown, 460 U.S. at 733-34. And unlike Brown, there was no testimony in the instant case; the officer in

Brown explained his awareness from narcotics arrests and discussions with other officers that tied-off party balloons were frequently used to carry narcotics. Id. at 742-43. Similarly, in a case decided by the Iowa Court of Appeals, an officer observed a baggie in the defendant's purse as she looked for identification. State v. Taylor, No. 16-1424, 2017 WL 2182978, at *1 (Iowa Ct. App. May 17, 2017). Taylor challenged in a motion to suppress that the incriminating character of the baggie wasn't immediately apparent. Id. at *3. However, the court found the State met its burden when the officer testified he observed a baggie inside her purse that he knows is frequently used to hold illegal substances, in addition to the fact that Taylor attempted to hide the baggie. Id. at *3-4.

In another example, police approached a pair of men because they were suspicious of one holding an eight-by-eleven-inch Ziploc bag, though its contents couldn't be observed. People v. Huntsman, 200 Cal. Rptr. 89, 92 (Cal. Ct.

App. 1984). A subsequent search revealed the Ziploc bag contained smaller baggies of a controlled substance. Id.

The court listed the common uses to which a Ziploc bag could be put, such as to store food and other items. Id. at 95. The court went on:

> Here, Officer Sherrets offered no evidence of any distinguishing features of the plastic bag which may have set it apart from bags not containing contraband. Moreover, the officer's testimony as to his training and experience suggested no special expertise in determining when plastic bags may contain contraband. Nor did Officer Sherrets testify that in his experience eight-by-eleven-inch plastic bags were often used in transactions involving narcotics or stolen property. Indeed, the officer's testimony is silent with respect to whether he had ever before seen narcotics or stolen property packaged in a bag such as the one he observed.

Id. at 95-96. The court distinguished its case from Brown, where there was testimony about the illicit purpose to which party balloons could be used. Id. at 96 (citing Brown, 460 U.S. 730).

In the instant case, there was also no testimony to support the State's contention that the character of the bag

found in Rincon's bag was immediately apparent. We only have the State's assertion and the video of an officer who says, "You got weed in there," but then inexplicably walks away. We don't have testimony from any officer, based on training or experience, that a Dunkin' Donuts deposit bag is a common repository for anything other than the money it was presumably intended to convey to a financial institution.

Moreover, the California Court of Appeals declined the prosecution's request to take judicial notice that eight-by-eleven-inch Ziploc bags are commonly used in narcotics transactions, stating, in part,

> [H]istory has shown that where appellate courts have tried to rely on their own experience (rather than on trial testimony) to establish the lawful or unlawful nature of a common container, the results have sometimes appeared disconcertingly inconsistent, varying, as one might expect, with the personal experiences of the justices deciding a particular case.

Id. at 97-98. This Court might also consider the inadvisability of drawing its own conclusions, in the absence

of testimony, about the unlawful nature of a Dunkin' Donuts deposit bag.

Therefore, even if the Court finds that the State's argument will be addressed, the incriminating character was not immediately apparent and not supported by probable cause. Therefore, the plain view doctrine has not been met, and the marijuana is not admissible under plain view.

II. The district court correctly found the Des Moines Police lacked probable cause to justify a warrantless search of Rincon's backpack.

In its brief, the State argues that Officer Johnson was already aware of the methamphetamine when Officer Steinkamp alerted the other officers to it, and that, coupled with the open containers in the vehicle arose to probable cause justifying the search of Rincon's backpack. State Brief at 31-33. In its ruling, the district court found probable cause did not exist to support the State's claim that Rincon was engaged in criminal activity. (Ruling 4/15/20, pp.4-5) (App. pp.37-38).

A. The videos and Officer Johnson's conduct belie the State's claim that Johnson already knew the drugs were in the door.

On the record before the Court, Officer Steinkamp was the first to observe methamphetamine in the driver's door of the stolen Malibu after all the passengers had exited and were detained. The State offers several points to support its claim that Johnson saw the drugs first but kept it to himself, which are easily refuted. First, the State claims the minutes of testimony say that "Officer Johnson noticed the baggies of methamphetamine *before* the passengers were detained." State Brief at 31-32 (emphasis in original). To be more accurate, the minutes indicate that assisting officers observed an open container and two baggies of methamphetamine while Johnson was speaking with the occupants. (Minutes, p.1) (Conf. App. p.4). The minutes do not say that Johnson saw the methamphetamine. (Minutes, p.1) (Conf. App. p.4). The video footage shows us that all the occupants were out of the vehicle and detained at the point that Steinkamp alerted the others to the drugs in the door. Johnson was right next to

Steinkamp, putting cuffs on Martinez when Steinkamp called out. (Exh. A 00:07:25; Exh. B 00:02:20).

Second, the State maintains that Officer Johnson observed the drugs but didn't alert the passengers because it may not have furthered their investigative interests. State Brief at 31. Yet, Johnson told the passengers right away the Malibu was stolen. (Exh. A. 00:02:13). He let them know he saw the open container sitting on the driver's seat. (Exh. A 00:02:48). And when he saw an open container in Villa Magana's hand, he pointed it out. (Exh. A 00:04:14). While questioning Rincon, Johnson said, "I'm gonna be brutally honest with ya . . ." and told her about the additional methamphetamine the officers found under the tree. (Exh. A 01:06:10). This officer didn't play it close to the vest. He put all his cards on the table. If he'd spotted drugs, he likely would've told the passengers. More importantly, he would have alerted his fellow officers as Steinkamp did because it changed the investigation from a run of the mill stolen vehicle

to narcotics delivery.

Third, the State argues that Johnson didn't react when Steinkamp called out, "You got dope right here in the door!" (Exh. B 00:02:20). State Brief at 32. Why would an officer in the field express surprise over drugs found during a stop? That's hardly remarkable. And, in fact, he did express some surprise—or perhaps frustration—when he walked away from viewing the drugs Steinkamp pointed out and muttered, "Can of worms." (Exh. A 00:08:26). Furthermore, at the time Steinkamp pointed out the drugs, Johnson was interacting with passenger Martinez, who was displeased about being handcuffed. Once he escorted Martinez to the front of the DMPD SUV with the other passengers, tossed his notebook into the SUV, and looked at the drugs Minnehan found in Rincon's backpack, he went to look at the methamphetamine in the car door. (Exh. A 00:07:25; Exh. B 00:02:20). If Johnson already knew the drugs were there, why would he need to take a look?

Finally, the State suggests that Johnson didn't need any help finding the drugs because he already knew they were there. State Brief at 32. Steinkamp made clear where they were by calling out while standing next to the open driver's door, just a few feet from Johnson, who was at the passenger door on the driver's side. (Exh. B 00:02:20). No further clarification was needed.

The body cam footage confirms that Steinkamp was the first to observe the methamphetamine once all the passengers had exited the vehicle and were detained. As we'll see, this does matter because it's part of the analysis of the timing of probable cause if the Court elects to follow State v. Eubanks, 355 N.W.2d 57 (Iowa 1984), as discussed in Section III below.

B. The open containers in the car did not give rise to probable cause to search Rincon's backpack.

As argued below, the State lacked probable cause to search Rincon's backpack. (MTS Brief, p. 6) (App. p.32). The State maintains that the open containers found in the car furnish probable cause, as well as alleging for the first time on

appeal that Rincon was aiding and abetting OWI. State Brief at 32-33. In the district court, the State alleged that Rincon's association with the stolen vehicle that contained an open bottle of alcohol and narcotics gave rise to probable cause. (MTS Resistance, ¶24) (App. p.25). The State's claims are also addressed in Rincon's initial brief. Def. Brief at 47-56. The district court correctly concluded that the State lacked probable cause that Rincon was engaged in criminal activity. (Ruling 4/15/20, pp.4-5) (App. pp.37-38).

1. The State lacks probable cause that Rincon was aiding and abetting OWI. The officers didn't observe anyone committing an OWI in this case; they never observed Melton or anyone else driving or operating the motor vehicle. The Malibu was legally parked with no one in the driver's seat when officers pulled up. (Minutes, p.1) (Conf. App. p.4). The State is hard pressed to prove Rincon aided and abetted an OWI when there was no driver or operator to charge with OWI in the first place.

Additionally, Rincon's mere nearness to the presumptive driver is insufficient to find probable cause. "The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of another person's guilt." Iowa Code § 703.1. Model instructions elaborate on the meaning:

> "Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting". Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting".

Iowa Crim. Jury Instr. 200.8 (June 2019). There is no indication in the record that Rincon knowingly advised or encouraged Melton to drive while intoxicated. See State v. Storms, 10 N.W.2d 53, 54 (Iowa 1943) (finding sufficient evidence the defendant aided and abetted OWI by encouraging

another man to drive defendant's car to buy grass seed while knowing the driver was intoxicated). In fact, she was merely a passenger getting a ride home so she could get to work in the morning. (Exh. A 01:02:35) (Minutes, p.2) (Conf. App. p.5). She offered to do a breath test to show she had not been drinking. (Exh. A 00:02:48). Rincon was merely near the driver's seat by virtue of being a front seat passenger in the vehicle. The State cannot demonstrate probable cause that she was aiding and abetting OWI with this alone.

2. Open containers in a parked vehicle do not support probable cause. Iowa law prohibits drivers and passengers from having open or unsealed containers of alcohol in the passenger compartment of an automobile. Iowa Code §§ 321.284(1), 321.284A(1) (2019). Yet, "[t]he use of the term 'passenger'—'a person who is traveling from one place to another in a car, bus, train, ship, airplane, etc., and who is not driving or working on it'—infers motion of the vehicle." State v. Phillips, No. 16-0319, 2016 WL 7403765, at *4 (Iowa

Ct. App. Dec. 21, 2016) (internal citations omitted). It is true that the Malibu was running when officers approached, but they did not see the car in motion. The car was legally parked on University Avenue without a driver in the vehicle. (Minutes, p.1) (Conf. App. p.4). Without a driver and without motion, there was no violation of the Iowa Code for possessing an open container, as the Iowa Court of Appeals found in Phillips:

> Here, there was no driver, no one in actual physical control of the vehicle, and no motion. Moreover, we highly doubt the legislature intended to crack down on passengers more severely than the actual driver or operator of the motor vehicle by imposing criminal liability without a driver or motion.

Id. Thus, the open containers found in the Malibu do not give rise to probable cause to search the vehicle under the automobile exception.

Moreover, it bears repeating that the State once again lacks testimony to support its claims. The State relies on State v. Brandt, No. 18-2159, 2020 WL 1310303, at *1 (Iowa Ct. App. Mar. 18, 2020), to support its argument that Rincon

could have concealed an open container in her backpack. State Brief at 31, 34. Brandt is distinguishable for two reasons: (1) the officer's testimony, and (2) the passenger's purse that was searched was left behind *in the vehicle*. See id. The officer was searching the car for open containers due to the driver's odor of alcohol and admission there were open containers in the car. Id. The officer searched the passenger's purse because it was "overly filled," standing up, and large enough "you could set a container in there." Id. There is no such testimony in this case to support the reasons for searching Rincon's backpack, and, of course, she removed the backpack from the vehicle when she exited.

The State has failed to demonstrate probable cause justified a search of the vehicle in this case until after the methamphetamine was found in the door by Steinkamp, which was subsequent to the exit and detention of all the passengers from the vehicle. The State's argument that probable cause to search arose before Rincon exited the

vehicle must fail.

III. The automobile exception only applies to containers or effects *inside* the vehicle regardless of the timing of probable cause.

Rincon's argument is straight forward and well established: containers or effects must be *inside* the automobile to be searched under the automobile exception. This argument is supported by Wyoming v. Houghton, 526 U.S. 295 (1999), which is notably absent from the State's analysis of the automobile exception. State Brief at 26-44. While it makes passing reference to Houghton in its brief by citing to other cases that cite to it, the State makes no attempt to address it head on or offer how to reconcile State v. Eubanks with Houghton. Defendant's initial brief already outlines the many times the Houghton opinion indicated the automobile exception applies to containers and effects *within* the vehicle (six times), not to mention Justice Breyer's concurrence explicitly stating the majority opinion only applies to containers found within the automobile. Def. Brief at 72-

77. Houghton, 526 U.S. at 297-304 (majority opinion), 308 (Breyer, J., concurring). And so, this point will not be belabored any further here.

The State's argument, following State v. Eubanks, 355 N.W.2d 57 (Iowa 1984), is the messier concept that the automobile exception's applicability to containers and effects—regardless of whether they are within the automobile or not—depends on when probable cause arises. Both parties urge this Court to adopt a bright line. Rincon asks for a bright line around the automobile, limiting the automobile exception to the vehicle and contents *within* it. Def. Brief at 88. The State asks the Court to follow Eubanks, urging that "officers may search any containers that can conceal the objects of their search if those containers were inside the vehicle when probable cause arose." State Brief at 42.

A bright line around the automobile is cleaner and simpler to apply. The timing of probable cause was easy enough to apply in Eubanks with one occupant and her purse,

but what if you have multiple occupants and their belongings? Sometimes law enforcement will pull people out separately, which necessitates keeping track of when probable cause arose and where the occupants and their belongings were at the time. This case is an apt example as the parties quibble over exactly that.

In State v. Campbell, No. 16-0640, 2017 WL 3283284, at *1 (Iowa Ct. App. Aug. 2, 2017), a deputy impounded the vehicle after issuing citations to the driver for a revoked license and not having valid insurance. The deputy offered to give the driver and passenger Campbell a ride; when a second deputy asked Campbell out of the vehicle, she carried her purse with her. The deputy instructed her to return the purse to the car. During the inventory search, the officers found a small amount of marijuana that the driver admitted was his. The officers then searched Campbell's purse, and found medication for which she did not have a valid prescription. Id. at *1. The Court of Appeals ultimately

found that Campbell's purse was unlawfully seized when the deputy ordered her to return it to the car because there was no articulable suspicion she had engaged in a crime or was armed with a weapon. Id. at *5. However, in the district court, the State argued the purse could have been searched after the driver's marijuana was found because the purse was inside the car at the time. Id. at *1. In a footnote, the court of appeals observed:

> We note this argument is not repeated by the State on appeal. However, the automobile exception permits all containers *inside* a vehicle to be searched at the time when probable cause to search arises, not all containers located in the vehicle at the time the vehicle is stopped. See State v. Eubanks, 355 N.W.2d 57, 60 (Iowa 1984) ("Once the patrolman lawfully stopped the car and had probable cause to search it for contraband, in this case marijuana, he could lawfully open and examine all containers within the vehicle *from the time probable cause appeared*." (emphasis added)). Often the lawful stop of the vehicle and the probable cause to search will occur contemporaneously, as in Eubanks, where the officer smelled marijuana as the officer approached the car. Id. at 58. Thus, Eubanks's removal of her purse after the officer asked her to step out of the vehicle did not insulate the purse from the automobile exception search because the purse was in the vehicle at the time the

> officer smelled the marijuana. Id. at 60 ("Once the patrolman lawfully stopped the car *and* had probable cause to search for contraband, all containers within the car when it was stopped were fair game for the car search. Defendant had no right to insulate her purse or any other container from a lawful warrantless search by the simple expedient of physically removing the purse and its contents from the car *while* the search was in progress." (emphasis added)). In this case, both the stop of the car for the registration violation and the officer's instruction to Campbell to place her purse back in the car, *preceded* the time when probable cause to search the car arose due to the discovery of the marijuana in the center console during the inventory search.
>
> Id. at *6, n.2 (emphasis in original).

Campbell demonstrates an appellate court's application of Eubanks. It will not be as easy for officers in the field to apply when multiple passengers and their effects are involved.

Even if this Court concludes, however, that Eubanks does not conflict with Houghton, and that when probable cause arises is the critical issue, as opposed to the location of the container, it should still find that the evidence must be suppressed in this case. The State has not met its burden to show there was probable cause at the time Rincon exited the

vehicle with her backpack in hand, as discussed above and in the initial brief. The drugs were not found until after she got out of the car, as discussed in Section II. Thus, probable cause did not arise until Rincon had exited the vehicle with her backpack, and the automobile exception does not apply. The evidence should therefore be suppressed.

CONCLUSION

For all of the reasons discussed above and, in her Brief and Argument, Defendant-Appellant Rincon respectfully requests this Court to reverse the suppression ruling and remand this case to the Polk County District Court for further proceedings.

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 $3.82, and that amount has been paid in full by the Office of the Appellate Defender.

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:

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