NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

COLEMAN TUTON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

I. Does the general alert of a drug-detection canine to the luggage compartment of a commercial passenger bus—but not to any particular piece of luggage therein—authorize law enforcement to conduct a warrantless search of every piece of luggage found in that compartment?

II. Does either the independent source doctrine or the attenuation doctrine permit the admission of cocaine discovered after an officer performs an unconstitutional search of a suitcase, locates a hidden compartment therein, and then immediately calls for a drug dog to come sniff the luggage before attempting to gain access to the compartment?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

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OPINION BELOW

On June 25, 2018, the court of appeals entered its opinion and judgment affirming the district court's denial of the motion to suppress filed by Coleman Tuton. *United States v. Tuton*, 893 F.3d 562 (8th Cir. 2018). A copy of the opinion is attached at Appendix ("App.") A.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2018. On July 6, 2018, an order was entered extending the deadline for filing a petition for rehearing to July 23, 2018. A petition for en banc or panel rehearing was timely filed by Mr. Tuton on July 23, 2018. On September 13, 2018, an order was entered denying the petition for rehearing. *See* App. C. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Petitioner refers this Honorable Court to the following constitutional provision:

U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. Coleman Tuton was charged with, and entered a conditional plea of guilty to, possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Tuton was a passenger on a commercial bus headed from southern Texas to Chicago, Illinois, that was stopped for following too closely behind a tractor-trailer on Interstate 30 in Miller County, Arkansas. According to Arkansas State Police Corporal Chris Goodman, the driver seemed nervous and said that he was headed for Milwaukee, Wisconsin, although the manifest showed that all four passengers aboard the bus were headed to Chicago. Corporal Goodman then decided to turn the traffic stop into a drug-interdiction investigation.

After obtaining consent from the driver to search the bus, Corporal Goodman found a black suitcase in the luggage compartment underneath the bus that he said was separated from other bags. Corporal Goodman also said that he did not see a name tag on the suitcase, so he opened and searched it. While doing so, he discovered that the suitcase had what he believed to be a false bottom. While attempting to gain access to the hidden compartment underneath the false bottom, he found a luggage tag attached to the suitcase indicating that it belonged to Mr. Tuton; the tag had apparently been trapped underneath the bag's collapsed handle. Corporal Goodman ceased his search of the bag at that point and called for a drug-detection dog to be brought to the scene. He also apparently communicated the fact that he had found a suitcase with a suspected hidden compartment over the police radio.

Corporal Rocky Rapert arrived on the scene with his narcotics dog, Hemi, approximately twelve minutes after the initiation of the traffic stop. Corporal Goodman asked Corporal Rapert if he would have Hemi sniff Mr. Tuton's suitcase, but Corporal Rapert decided instead to run Hemi along the entire luggage area of the bus. According to Corporal Rapert, Hemi alerted to the odor of narcotics in the undercarriage of the bus near the back wall of the luggage compartment. Hemi failed, however, to give a final indication in accordance with his training; according to Corporal Goodman, this meant that Hemi was unable to pinpoint the source of the odor he detected. Despite Corporal Rapert having directed Hemi to sniff the luggage, he failed to alert or show any interest in the luggage, instead returning to sniff the back wall of the compartment.

The officers proceeded to search all seven pieces of luggage present in the luggage compartment. During the search of Mr. Tuton's bag, officers found approximately three kilograms of cocaine in the suspected hidden compartment. Tuton was arrested, given the *Miranda* warnings, and interviewed by officers of the Drug Enforcement Administration. He was subsequently named in a one-count indictment charging him with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

2. Mr. Tuton filed a motion to suppress the evidence seized during the search of the bus, along with any evidence or statements obtained as a result of any unlawfully seized evidence. A hearing was held on this motion, after which Tuton and the Government were allowed to submit supplemental briefing. The motion was

ultimately denied, and Tuton entered into a conditional plea agreement. Tuton pleaded guilty to the indictment and was sentenced to 46 months imprisonment, 3 years of supervised release, and a $100 special assessment.

3. Mr. Tuton appealed the denial of his motion to suppress, arguing that Corporal Goodman did not have reasonable suspicion to justify the expansion of the traffic stop into a drug-interdiction investigation. Tuton also argued that Corporal Goodman's initial search of his suitcase was a violation of his Fourth Amendment rights, and that this unlawful search—and specifically the discovery of the hidden compartment in the suitcase—tainted the rest of the investigation; the subsequent canine sniff was improperly used as a post hoc justification for the initial illegal search. Finally, Tuton argued that the canine sniff that occurred in this case was unreliable and did not generate probable cause to believe that contraband would be found in his suitcase. As Hemi did not show any interest in the luggage, but only in the compartment itself, Tuton argued that the officers acted unreasonably in searching all of the luggage under the bus, including his suitcase, in violation of the Fourth Amendment.

4. In a 2-1 panel decision, the Eighth Circuit Court of Appeals found that Mr. Tuton had not been unlawfully seized when the traffic stop was prolonged because the bus driver consented to a search of the bus. *United States v. Tuton*, 893 F.3d 562, 567-68 (8th Cir. 2018). The panel majority also rejected Tuton's argument that Corporal Goodman's initial unlawful search of Tuton's suitcase tainted the investigation and required suppression of the later-discovered evidence. *Id.* at 568-

70. Tuton argued that the close temporal proximity between Corporal Goodman's discovery of the false bottom in the suitcase, discovery of Tuton's name tag, ceasing his search of the bag, calling for a canine unit, and directing dog handler Corporal Rapert to a bag with a false compartment supported the conclusion that the dog sniff was tainted by the unconstitutional discovery of the false compartment. *Id.* at 568. While the panel majority found this argument to have "considerable force," it rejected it because of Corporal Goodman's testimony that he would have called for a canine unit if he had not discovered the false bottom in Tuton's bag, which testimony it found the district court to have "necessarily credited." *Id.* at 568-69. The panel majority also questioned the district court's conclusion that Corporal Goodman's initial search of the bag was unlawful. *Id.* at 569. The court ultimately concluded that it did not have to decide whether the initial search of the bag was objectively reasonable, instead concluding that even if Corporal Goodman had acted unreasonably, his conduct after discovering the mistake was lawful, and "all the evidence suggests that the [mistake] was an isolated incident of negligence that occurred in connection with a bona fide investigation." *Id.* at 570 (quoting *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016)). Under such circumstances, the majority concluded, the exclusionary rule does not apply.

Mr. Tuton also challenged the validity of Hemi's alert, particularly arguing that his general alert to the luggage compartment of the bus rather than to any piece of luggage did not provide probable cause to search all of the luggage on the bus. Tuton emphasized that Hemi was given the opportunity to sniff each individual piece

of luggage, but showed no interest in any of them, instead returning to the back wall of the luggage compartment to sniff there. Accordingly, Tuton argued that the sniff did not indicate a fair probability that contraband would be found in his suitcase, or in any particular piece of luggage on the bus—if it provided probable cause to search anywhere, it was elsewhere in the luggage compartment or in another part of the bus itself. The panel majority rejected these arguments and found that, based on the totality of the circumstances, probable cause existed to justify the search of Tuton's suitcase. *Tuton*, 893 F.3d at 571. The decision of the district court denying Tuton's motion to suppress was affirmed.

Mr. Tuton filed a timely petition for rehearing that was denied on September 13, 2018. App. 25a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. This Court should consider the important question of whether the alert of a drug-detecting canine to a commercial passenger bus provides probable cause to search all of the luggage contained therein.

In the instant case, the Eighth Circuit held that law enforcement officers acted reasonably in searching all of the luggage aboard a commercial passenger bus after the drug-detecting canine, Hemi, alerted to the presence of narcotics in the luggage compartment in the undercarriage of a commercial passenger bus. As discussed above, Hemi did not alert to any particular piece of luggage, and he failed to give a final indication in accordance with his training—meaning that he was unable to pinpoint the source of the odor. Although Corporal Rapert directed Hemi to sniff the

luggage, he showed no interest and instead returned to sniff the back wall of the compartment itself.

The Government argued that Hemi's alert was reliable and established probable cause to search every piece of luggage on the bus, and based this argument upon this Court's holding in *California v. Acevedo*, 500 U.S. 565 (1991), that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." *Id.* at 580. In *Acevedo*, the Court abrogated its prior holding in *Arkansas v. Sanders*, 442 U.S. 753 (1979), that "the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." *Id.* at 766. While the Government suggested that Mr. Tuton was advocating for a return to the rule under *Sanders*, that is not the case. Tuton recognizes that a warrantless search of luggage located in a vehicle is permissible under current law, but emphasizes that such a search must be supported by probable cause to believe that contraband or evidence of a crime may be found *in the luggage*. While the Government essentially argued that the alert of a trained drug-detection dog to any part of a vehicle provides probable cause to search every piece of luggage contained within that vehicle, that is not the law.

In most cases, canine sniffs performed during the course of a traffic stop involve ordinary passenger vehicles such as cars, trucks, or vans. In such cases, the dog is deployed to sniff around the exterior of a relatively small, closed vehicle. When a dog indicates it has detected an odor on the outside of a closed vehicle, it is often

reasonable to conclude that the odor is coming from some unspecified location inside the vehicle, which could include any compartments, containers, or other luggage stored in the vehicle.[1]

The instant case is completely distinguishable from such typical cases. Here, Corporal Goodman received permission from the bus driver to open up the luggage compartment and search the undercarriage of the bus. The dog had unfettered access to the compartment—indeed, the first thing Hemi did when Corporal Rapert deployed him was to jump into the luggage compartment. Hemi was able to sniff each individual piece of luggage and had the opportunity to pinpoint which of the bags, if any, may have contained narcotics. Instead of indicating the presence of drugs in any of the luggage, Hemi continued to return to the back wall of the compartment to sniff there. Because Hemi did not alert to the luggage, the officers lacked probable cause to search the luggage.

In all of the cases Mr. Tuton has been able to identify that have involved canine sniffs on commercial buses that led to seizures or searches of passenger luggage, the dog actually indicated to the luggage seized or searched rather than to the bus in

[1] The "automobile exception" to the warrant requirement "is understood as simply embracing the now-settled doctrine that it is permissible to conduct a warrantless search of an automobile, and any containers found therein, provided that, at the time of the search, there is probable cause to believe that contraband or evidence is secreted at some unspecified location within the automobile." *United States v. Lisbon*, 835 F. Supp. 2d 1329, 1365 n.29 (N.D. Ga. 2011) (citing *Acevedo*, 500 U.S. 565; and *United States v. Ross*, 456 U.S. 798 (1982)). "Of course, if the police have probable cause to believe that contraband is located in a specific area of the automobile, then a warrantless search of the entire automobile is impermissible." *Id.* (citing *Sanders*, 442 U.S. 753).

general or to a compartment of the bus. *See United States v. Tubens*, 765 F.3d 1251 (10th Cir. 2014) (two drug dogs deployed to search the luggage compartment of a Greyhound bus each alerted to a single suitcase); *United States v. Ojeda-Ramos*, 455 F.3d 1178 (10th Cir. 2006) (dog deployed on the cargo bay of a Greyhound bus alerted to a single blue suitcase); *United States v. Ventura*, 447 F.3d 375 (5th Cir. 2006) (dog allowed to sniff inside luggage compartment underneath commercial bus alerted to two particular bags); *United States v. Williams*, 365 F.3d 399 (5th Cir. 2004) (dog alerted to a black backpack which was either in a seat or in the overhead bin of the bus); *United States v. Outlaw*, 319 F.3d 701 (5th Cir. 2003) (dog alerted to black, hard-shelled suitcase in the luggage bin beneath the bus); *United States v. Ward*, 144 F.3d 1024 (7th Cir. 1998) (dog alerted to an unclaimed, suspicious piece of luggage removed from the luggage compartment of a Greyhound bus by law enforcement); *United States v. Tugwell*, 125 F.3d 600 (8th Cir. 1997) (dog was deployed to search the checked luggage on a Greyhound bus and alerted to one gray suitcase); *United States v. Gant*, 112 F.3d 239 (6th Cir. 1997) (dog alerted to two bags on a Greyhound bus after they were removed from the overhead compartment by law enforcement and placed on the seats below); *United States v. Daniels*, 99 F.3d 1144 (8th Cir. 1996) (unpublished) (dog performing sniff of bus passengers' carry-on luggage alerted to defendant's bag); *United States v. Guzman*, 75 F.3d 1090 (6th Cir. 1996) (two drug dogs independently alerted to defendant's carry-on bag after it was removed from a Greyhound bus); *United States v. Hernandez*, 7 F.3d 944 (10th Cir. 1993) (dog alerted to unclaimed backpack removed from overhead storage compartment of a Greyhound

bus); *United States v. Graham*, 982 F.2d 273 (8th Cir. 1992) (dog alerted to one particular suitcase after several were taken down from a bus's overhead storage rack); and *United States v. Harvey*, 961 F.2d 1361 (8th Cir. 1992) (dog alerted to two bags after they were removed from the overhead storage compartment and placed on the dog's level).

In one other notable case, when a drug dog alerted in the luggage bin in the undercarriage of the bus nearest to the rear tires, but did not alert to the luggage itself, the officers concluded that narcotics might be hidden elsewhere aboard the bus, such as in the bathroom at the back of the passenger compartment. *United States v. Garcia-Garcia*, 319 F.3d 726, 728 (5th Cir. 2003). When the dog was taken aboard the bus to perform a further sniff, he alerted to a particular passenger, and packages of narcotics were found taped to the passenger's person underneath his clothing. *Id.* Mr. Tuton is not aware of any case (other than his own) in which a drug dog's general alert to the luggage compartment of a commercial bus was held to provide probable cause to search all of the luggage contained therein.

There is good reason to treat commercial buses differently than ordinary private vehicles. The luggage compartment of a commercial bus presents a confluence of the privacy interests of multiple unconnected individuals. In a case involving multiple people traveling together in an ordinary vehicle, this Court recognized that "a car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." *Wyoming v. Houghton*, 526 U.S. 295, 304-05 (1999). This factor

was cited in support of the Court's holding that probable cause to search a car for contraband also permits the inspection and search of passengers' belongings found in the car that are capable of concealing the object of the search. In *Houghton*, the driver of the car admitted that he used a hypodermic syringe plainly observed by law enforcement in his shirt pocket to take drugs, thus creating probable cause to search the entire car for drugs—including a purse belonging to a passenger found in the back seat. The court noted the increased probability that a passenger in a car is engaged in a common enterprise with the driver, as well as the possibility that the driver might easily be able to hide contraband in a passenger's belongings, as factors that diminished the passenger's expectation of privacy in her purse. *Id.* at 304-05. On a commercial bus, there will ordinarily be no reason to conclude that the all of the passengers are engaged in a common enterprise in this manner, and no reason to think that one passenger might have hidden contraband in luggage belonging to another; there should therefore be no according reduction in the passengers' individual expectations of privacy in their luggage.

"Probable cause exists where there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Donnelly*, 475 F.3d 946, 954 (8th Cir. 2007) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). While an alert from a trained drug-detecting canine can provide probable cause justifying a search of a vehicle, Hemi's alert in this case did not indicate a fair probability that contraband would be found in Mr. Tuton's suitcase, or in any particular piece of luggage on the bus. Again, Hemi showed no interest in any of the

luggage itself. If his behavior provided probable cause to search anywhere, it was elsewhere in the luggage compartment or in another part of the bus itself. In *Acevedo*, the Court reaffirmed the principle announced in *Ross* that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." *Acevedo*, 500 U.S. at 580 (quoting *Ross*, 456 U.S. at 824). The inverse is also true: probable cause to believe that some specific part of a vehicle contains contraband does not justify a search of all containers in the vehicle. Again, as the Court stated in *Acevedo*, "[t]he police may search an automobile and *the containers within it where they have probable cause to believe contraband or evidence is contained*." *Id.* (emphasis added).

Based on these general principles, the dissent below disagreed with the panel majority's conclusion that Hemi's alert provided Corporal Goodman with independent probable cause to search all of the bags in the luggage compartment of the bus. The dissent noted that the facts of each case must be examined when determining whether a dog's alert provides probable cause to search, and went on the describe the relevant circumstances of the instant case:

> But, here, Hemi did not sniff the outside of a personal vehicle. Rather, Hemi had complete access to the entire inside of the luggage compartment of a commercial bus containing bags owned by multiple travelers, each with his or her own individual, reasonable expectation of privacy. Inside that compartment were seven bags. And yet, even when he was allowed to sniff each of them individually, Hemi showed no interest in any of the bags. Instead, he returned repeatedly to the back wall of the luggage compartment. Of course, as the government witnesses posited, it is possible that Hemi was overwhelmed by the odor because he was operating in an unfamiliar environment. But that possibility undermines, rather than enhances, the reliability of Hemi's alert on any particular spot. In light of Hemi's alert to the luggage

> compartment, his disinterest in the bags, and his strong interest in the compartment's rear wall, it is my view that Goodman lacked probable cause to conduct a search of each individual piece of luggage in the compartment.

Tuton, 893 F.3d at 573 (Kelly, J., dissenting).

Mr. Tuton believes that his position is in keeping with the current state of the law which, as discussed by this Court in *Ross*, is that "[t]he scope of a warrantless search of an automobile . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found." 456 U.S. at 824. The Eighth Circuit's decision below, on the other hand, represents a misapplication or overextension of this rule, as it held the general alert of a drug dog to the luggage compartment of a commercial passenger bus provides adequate justification for searching every piece of luggage found therein—despite the dog not showing any interest in the luggage itself. As far as Tuton can determine, the Eighth Circuit is the only circuit to have sanctioned the search of all of the luggage in the undercarriage of a commercial bus based on the general alert of a drug dog in this manner. While the panel majority stated that its conclusion that Hemi's alert provided probable cause to search the seven pieces of luggage in the luggage compartment "obviously does not mean that hundreds of bags in the luggage compartment of another bus could be searched without consent or a warrant based on a drug dog's general alert," Tuton agrees with the dissent's assertion that such a scenario "does not strike me as more than a stone's throw down the road." *Tuton*, 893 F.3d at 571; *id.* at 573 n.7 (Kelly, J., dissenting). In this case, the privacy interests of Tuton and his innocent fellow passengers were violated; the Eighth Circuit's decision

paves the way for such privacy violations to continue without a sufficient showing of probable cause. This Court should grant review to bring clarity and provide direction in this important area of Fourth Amendment law.

II. This Court should consider whether a subsequent dog sniff called for by an officer who performed an unconstitutional search of a suitcase permits the admission of cocaine found in a hidden compartment of that same suitcase under the independent source doctrine or the attenuation doctrine.

The court of appeals noted that the district court, in denying Mr. Tuton's motion to suppress, applied the independent source doctrine and concluded that "Hemi's profound alert provided a lawful, independent source of probable cause to justify search of the bags in the compartment . . . ." *Tuton*, 893 F.3d at 567. The district court also mentioned attenuation, noting that, "[alternatively, any possible causal connection . . . is so attenuated that any taint of the unlawful search is purged." *Id.* at 568. "[T]he independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source." *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (citing *Murray v. United States*, 487 U.S. 533, 537 (1988)). This doctrine will apply "[s]o long as a later, lawful seizure is genuinely independent of an earlier, tainted one . . . ." *Murray*, 487 U.S. at 542. It is typically applied when a later search is conducted pursuant to a warrant, and in order to find the warrant-authorized search "genuinely independent," the unlawful search must not have affected (1) the officer's "decision to seek the warrant" or (2) the magistrate's "decision to issue the warrant." *Id.* Tuton submits that the independent source doctrine does not apply on the facts of the instant case, first because no warrant was sought, and second because the dog sniff cannot be said

to have been "genuinely independent" from the unlawful search—Corporal Goodman called for the canine unit immediately after discovering the hidden compartment in Tuton's suitcase, and the discovery necessarily affected his decision. *See Tuton*, 893 F.3d at 572 (Kelly, J., dissenting) ("Under these circumstances, when his decision was necessarily informed by the knowledge he had obtained through the initial search, Goodman's after-the-fact, hypothetical assertion [that he would have called for a canine unit anyway] is insufficient to purge the taint.").

The attenuation doctrine likewise does not permit admission of the evidence under these facts. The courts below erred by not fully considering the three factors required under this doctrine. Under the attenuation doctrine, "[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" *Strieff*, 136 S. Ct. at 2061 (quoting *Hudson v. Michigan*, 547 U.S. 586, 593 (2006)). The three factors that guide a court's analysis under the attenuation doctrine are: (1) the "temporal proximity" between the unconstitutional conduct and the discovery of evidence, (2) "the presence of intervening circumstances," and (3) "the purpose and flagrancy of the official misconduct." *Id.* at 2061-62 (quoting *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)).

On the facts of the instant case, the first factor weighs in favor of suppression. This Court's "precedents have declined to find that this factor favors attenuation unless 'substantial time' elapses between an unlawful act and when the evidence is

obtained." *Strieff*, 136 S. Ct. at 2062 (quoting *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (*per curiam*)). Here, as in *Strieff*, the contraband was located only minutes after Corporal Goodman performed his unconstitutional search of Mr. Tuton's suitcase.

Mr. Tuton submits that the second factor also supports suppression. The only thing that could be considered an "intervening circumstance" here was the dog sniff—which, again, Corporal Goodman called for only after discovering the hidden compartment in Tuton's suitcase. Rather than a truly independent intervening circumstance, the dog sniff was really just a continuation of Corporal Goodman's tainted investigation of the suitcase. This is not a case like *Strieff*, in which there was an independent warrant already in existence that allowed for the arrest and search of the defendant. Also, as discussed above, Hemi did not alert to the suitcase—or to any of the luggage—but kept returning to the back wall of the luggage compartment to sniff there. The dog sniff therefore cannot even be said to have provided a sufficient basis for searching the luggage—it was only when Hemi's alert was viewed in light of Corporal Goodman's improper knowledge that Tuton's bag had a hidden compartment that it made sense to again search that suitcase. This second factor is perhaps the one most in need of this Court's attention—can a canine sniff requested by an officer who performs an illegal search be properly considered an "intervening circumstance" for purposes of application of the attenuation doctrine? Tuton is not aware of any other case that has directly addressed this question. Only this Court can provide definitive guidance on this issue.

The third factor, "the purpose and flagrancy of the official misconduct," also supports suppression. While the court of appeals made some effort to address this factor (although not specifically as part of an attenuation analysis), it erred in reaching the conclusions it did. While the district court determined that Corporal Goodman's search of Mr. Tuton's suitcase was unlawful, the court of appeals improperly concluded that Goodman conducted the search in "good faith." The district court made no finding regarding Goodman's "good faith," and the court of appeals was not in a position to make such a determination based only on the record before it. Corporal Goodman acted unreasonably in assuming that the bag had been abandoned and beginning a search without making any additional inquiry. Opening a suitcase and rummaging through it without probable cause and without consent is purposeful and flagrant conduct of the sort that the exclusionary rule is designed to deter.

The policy behind the exclusionary rule is the effective deterrence of unlawful searches and seizures. *United States v. Taheri*, 648 F.2d 598, 600 (9th Cir. 1981) (citing *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 413 (1966); *Linkletter v. Walker*, 381 U.S. 618, 636 (1965)). When a subsequent, purportedly independent source of probable cause actually "amount[s] to no more than a post hoc justification for using information that had already been illegally obtained," the exclusionary rule is properly applied. *Id.* "To permit evidence to be admitted under these circumstances would encourage police officers to ignore the dictates of the fourth amendment in conducting initial investigations." *Id.* In the instant case, the dog

sniff was used as a post hoc justification for allowing Corporal Goodman to search the false compartment that he already found during his initial unlawful search of Mr. Tuton's suitcase. The lower courts' failure to apply the exclusionary rule under these circumstances will encourage law enforcement officers to conduct indiscriminate initial searches without regard to the presence of absence of probable cause, and then, when contraband is located, to call in a drug dog to perform a sniff to supply probable cause to justify the search after the fact. This sort of "search first, sniff later" policy must not be tolerated or encouraged. The evidence obtained from Mr. Tuton's suitcase should have been suppressed.

CONCLUSION

For all of the foregoing reasons, Petitioner Coleman Tuton respectfully requests that this Court grant the petition for a writ of certiorari, and accept this case for review.

DATED: this 12th day of December, 2018.

Respectfully submitted,

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