**NO. _____**

# IN THE
# Supreme Court of the United States

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SEAN ATH,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

**I.**

Whether the United States Court of Appeals properly applied the "substantial evidence" test in concluding there was sufficient evidence to affirm Petitioner's convictions?

**II.**

Whether the decision of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's convictions conflicts with the decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Rahseparian,* 231 F.3d 1257 (10th Cir. 2000)?

## PARTIES TO THE PROCEEDINGS

Sean Ath is the Petitioner. The United States is the Respondent.

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## BASIS FOR JURISDICTION IN THE SUPREME COURT

Petitioner, Sean Ath (Ath), requests the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit entered February 21, 2020. This Court has jurisdiction under to 28 U.S.C. §1254(1).

The United States District Court for the District of South Carolina had jurisdiction under 18 U.S.C. § 3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction under 28 U.S.C. § 1291.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Supreme Court Rule 10(a):

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

Ath was charged with conspiracy to possess with intent to distribute 50 grams or more of methamphetamine, use of a communication facility (the U.S. Mail) to facilitate the charged drug conspiracy, aiding and abetting the use of a communication facility, possession with intent to distribute 50 grams or more of methamphetamine, and aiding and abetting the possession with intent to distribute 50 grams or more of methamphetamine.

At the close of the government's case, Ath moved under Fed. R. Crim. P. 29(a) for a judgment of acquittal on all charges, arguing there was insufficient evidence to support a conviction on any of the charges. The district court denied Ath's motion.

Ath was convicted of all charges after which Ath renewed his Fed. R. Crim. P. 29(a) motion, which the district court denied.

At trial, the government presented evidence that on October 11, 2012, and October 23, 2014, the postal service intercepted and seized, i.e., did not deliver, packages addressed to 199 Black Street, Spartanburg, South Carolina, which was Ath's address at the time, containing, respectively, 3 pounds and 1.4 kilograms of marijuana.

The government also presented evidence that on September 6, 2016, an unknown African American woman presented Ath's driver's license (or a driver's license bearing Ath's driver's license number) to make a cash deposit of $3,200.00 at a Bank of America branch in Spartanburg, South Carolina.

The only direct evidence presented by the government on Ath's counts of conviction was a September 7, 2016 "controlled" mail delivery to Ath's residence of a package intercepted by law enforcement containing over 50 grams of methamphetamine.

The delivery was recorded on video which showed an undercover Postal Inspector stopping at Ath's home at 199 Black Street, getting out of his mail truck and knocking on the door of the house. Less than a minute later, the undercover Postal Inspector returns to the mail truck and steps back in. About 20 seconds later, Ath walks into view and walks behind the mail truck, out of view of the video. About 24 seconds later, Ath emerges from behind the mail truck carrying the package. Ath walks onto his front porch, puts the package down, opens the screen

door, unlocks the front door, picks up the package and goes into the house.

About 38 seconds later, Ath walks out his front door without the package, checks his mailbox (located on the street), and walks generally in the direction from which he first entered the video picture, walking out-of-sight of the video about a minute after he walked out of the house.

About a minute after Ath walks out-of-sight, a car driven by defendant, Virig Chheng (Chheng), drives up to the 199 Black Street address. Chheng gets out of the car and enters the home. About a minute later, Ath walks back into the picture and enters the home with a young child. Ath then leaves the house to stand on the porch, re-enters the house, leaves again and sits on the porch. With Ath sitting on the porch, Chheng leaves the house carrying the package and drives away, followed apparently by a law enforcement surveillance team of two cars. Ath gets up and begins to calmly walk across the street with the child at his side, getting about to the middle of Black Street, when a law enforcement officer appears to point a weapon at him and detains him.

These events took approximately 15 minutes.

Testifying at trial was a single cooperating witness, defendant, Vilay Phabmisay (Phabmisay). Phabmisay testified extensively

regarding defendants, Chheng and Soeuth Ath (Soeuth), and their involvement with the drug conspiracy. Regarding Ath, Phabmisay said only (1) he did not know him, and (2) he had no communications with him, but that he had "heard" of him and "heard" Ath was living in South Carolina.

A search of Ath's home turned up nothing of evidentiary value. A drug dog was run through Ath's home and did not alert. Ath's cell phone was searched with his consent and nothing of evidentiary value was found – no text messages or telephone calls to co-defendants, for example. There was no evidence Ath accessed the postal service website to track the September 7, 2016 controlled delivery package. Searches of the residences of the true conspirators revealed nothing regarding Ath.

After the September 7, 2016 "controlled delivery," Ath was interviewed by law enforcement. The interview was not recorded. The agent who testified regarding the interview said Ath told him he had not taken the package into his house and then said he had taken it into his house, but took it out again and put it on the porch.

## ARGUMENT

### Question I.

> Whether the United States Court of Appeals properly applied the "substantial evidence" test in concluding there was sufficient evidence to affirm Petitioner's convictions?

In affirming Ath's convictions, the Fourth Circuit concluded that the evidence regarding the 2012 and 2014 intercepted packages addressed to 199 Black Street, other intercepted packages addressed to other locations presumably in the proximity of 199 Black Street, Phabmisay's testimony he had heard of Ath and heard Ath was living in South Carolina, the use of Ath's driver's license to deposit funds the day before the September 7, 2016 controlled delivery, which followed a pattern used by the conspirators previously, the controlled delivery and Ath's assertedly false exculpatory statements following that delivery amounted to substantial evidence sufficient to sustain Ath's convictions.

Although the Fourth Circuit Court of Appeals cited the correct standard for considering an attack on the sufficiency of the government's evidence, it misapplied that standard.

In determining whether there is enough evidence to sustain Ath's convictions, the Court must view the evidence, and all *reasonable* inferences which can be drawn from that evidence, in the light most favorable to the government. *United States v. Graham,* 796 F.3d 332, 373 (4th Cir. 2015), *aff'd en banc* 824 F.3d 821 (4th Cir. 2016) (Emphasis added).

The 2012 and 2014 intercepted marijuana packages cannot reasonably support an inference that Ath knew the package delivered September 7, 2016 contained illegal narcotics. These packages were never delivered to Ath's address. The other intercepted packages addressed presumably to residences nearby 199 Black Street are even less probative of Ath's knowledge of the drug conspiracy or the contents of the September 7, 2016 controlled-delivery package.

There is no testimony from anyone associated with the charged drug conspiracy connecting Ath to that conspiracy. The only conspirator who testified, Phabmisay, said (1) he did not know Ath, and (2) he had no communications with Ath (JA Vol. II, p. 625). Phabmisay's testimony that he "heard" of Ath and "heard" he lived in South Carolina, is meaningless.

The government asserted, and the Fourth Circuit agreed, that on September 6, 2016, a "valid driver's license issued to Ath … was presented as identification by an *unknown individual* in connection with a $3,200.00 cash deposit transaction into one of [conspirator] Phabmisay's…" accounts. The inference to be drawn from this "fact" is that Ath gave his South Carolina driver's license to a still unknown African-American woman to have her deposit the funds to purchase the narcotics delivered to his house on September 7, 2016, i.e., Ath's driver's license was used to make the September 6, 2016 deposit, with his permission, concurrence or at least knowledge.

Whatever was presented to the bank teller on September 6, 2016 was not in evidence. The only evidence of what was presented is Government Exhibit Number 44 – the bank's record of what was presented to the bank teller - and the bank's surveillance picture of the person making the deposit.

Without the direct evidence of the "valid" license itself, the jury would have to infer from the bank's records that the license was valid and, to conclude this inference was part of the quantum of making up the substantial evidence necessary to support Ath's conviction, a reviewing court would have to conclude this inference, based on the facts in evidence, was reasonable.

This inference is neither logical nor reasonable.

The evidence is undisputed that Ath did not make the September 6, 2016 deposit; it was made by an African-American woman. Ath is an Asian male.

South Carolina driver's licenses must have the licensee's color picture. *See* S.C. Code Ann. § 56-1-140(A) (Supp. 2018) ("The license must bear …[a] laminated colored photograph of the licensee…).

Accordingly, no logical or reasonable inference can be made from these facts that a "valid" South Carolina driver's license belonging to an Asian male was used by an African-American female to make the September 6, 2016 cash bank deposit.

In addition, the expiration date noted on the bank records of the September 6, 2016 "license" differs from what is shown on Ath's certified South Carolina Driver License Record, Government Exhibit Number 8. The expiration date of whatever it was that was presented to the bank teller on September 6, 2016 was noted to be April 1, 2023. The expiration date on Ath's official South Carolina Driver License Record, which comes straight from the South Carolina Department of Motor Vehicles (SCDMV), is April 1, *2021*.

*De minimis non curat lex* – the law does not care for, or notice, very small or trifling matters. The expiration date could be taken as a small matter. Neither the government nor the Fourth Circuit, however, treated Ath's driver's license as trifling, the government referring to it at least six times as either as having been "presented" to the Bank of America teller on September 6, 2016, or having been provided by Ath himself, when he was interviewed by law enforcement on September 7, 2016.

Given the presentation by an African-American female of a supposed driver's license belonging to Ath, an Asian male, and the inconsistency regarding the expiration dates shown on the bank's records as opposed to SCDMV's records, the inference that Ath's "valid" South Carolina driver's license was presented to the bank teller on September 6, 2016, is not logical or reasonable.

The government's argument on this point falls apart with the conclusion that no logical inference can be drawn that whatever was presented to the bank teller on September 6, 2016 was Ath's official valid driver's license.

However, even if a reasonable inference could be drawn from the evidence that Ath's "valid" driver's license was presented for the September 6, 2016 deposit, the further inference, that the African-American female who presented that license did so with Ath's permission, concurrence or knowledge, is unreasonable.

The identity of the African-American woman shown making the September 6, 2016 deposit is unknown, so there is no evidence, direct or circumstantial, of any connection between her and Ath. There is no evidence, therefore, from which to infer Ath's permission, concurrence or knowledge of the use of his "valid" driver's license by an African-American woman to make the $3,200.00 deposit.

Finally, to sustain the "reasonable inference" basis argument on this point, both these inferences – (1) that a "valid" Ath driver's license was presented by the African American woman, and (2) the use of his "valid" driver's license was with Ath's permission, concurrence or knowledge - have to be stacked one on top of the other.

Juries, like courts, should not be allowed to "pile inference upon inference," *United States v. Comstock,* 560 U.S. 126, 146 (2010). This is

what the government called upon the Fourth Circuit to do, which it did by accepting the September 6, 2016 driver's license/bank deposit as evidence supporting Ath's convictions.

The bank record of the September 6, 2016, $3,200.00 deposit proves nothing except that on that date, an unknown African-American female presented something appearing to be a South Carolina driver's license bearing Ath's driver's license number in order to make a cash deposit. Ath did not make the $3,200.00 September 6, 2016 deposit, an unidentified African-American woman did, and the bank record of that deposit proves nothing regarding Ath.

The only direct evidence bearing on Ath's guilt is the "controlled" delivery of the sealed package on September 7, 2016.

A search of Ath's home on the day of the "controlled" package delivery turned up nothing of evidentiary value regarding Ath.

A drug dog was walked through Ath's home on the day of the "controlled" package delivery and did not alert.

Ath's cell phone was searched, with his consent, and nothing of evidentiary value was found – for example, no text messages or telephone calls to or from a single conspirator were found.

There was no evidence Ath accessed the postal service website to track the September 7, 2016 "controlled" delivery package.

Searches of the residences of the actual conspirators revealed nothing of evidentiary value regarding Ath.

The video shows Ath coming out from behind the mail truck holding the unopened package. He places the package down, on his porch, appears to remove his keys to open the front door, opens the front door and, retrieving the package, walks inside. Ath then leaves the house, without the package, returning after the car drives up and parks in front of the house. Ath walks inside the house, exits and stands on the porch, re-enters the house, exits the house again, and sits on the porch.

There is nothing illegal about accepting a package from a postal worker, whether it is addressed to you or not. Nor is there anything illegal about taking the package into your home, and leaving the front door unlocked. There is simply no reasonable inference or inferences which can be drawn from these actions to support Ath's convictions.

Finally, Ath's asserted false exculpatory statements were neither false, nor exculpatory.

The government argued and the Fourth Circuit agreed that Ath "falsely" said he did not take the sealed package containing methamphetamine into his house after he took it onto his porch, and that he then said he took the package into his house and then returned it to his porch.

Guilty knowledge or consciousness of guilt can be inferred from false exculpatory statements. *United States v. Zandi,* 769 F.2d 229, 235 (4th Cir. 1985), cited in the Government's Brief at 23.

However, courts have limited the probative value of false exculpatory statements because the most probable and obvious inference to be drawn from such statements is the defendant, being confronted with questioning law enforcement agents, "surmised he was implicated in some sort of criminal activity." *Rahseparian* at 1264, quoting *United States v. Nusraty,* 867 F.2d 759, 765 (2nd Cir. 1989). *See also United States v. Morales,* 577 F.2d 769, 772- 773 (2nd Cir. 1978) ([T]he government had to show that appellant knew she possessed drugs, not that she was aware that she might be involved in some criminal activity.").

Once a statement is determined to be a "false exculpatory statement," it can have some probative value from which a state of mind – consciousness of guilty – can be inferred. *Id.* However, "[f]alse exculpatory statements are not admissible as evidence of guilt, but rather as evidence of consciousness of guilt." *Id.* quoting *United States v. Di Stefano,* 555 F.2d 1094, 1104 (2nd Cir. 1977).

Ath's assertedly false exculpatory statements were neither false nor exculpatory.

The controlled delivery video shows Ath coming out from behind the mail truck holding the unopened package - an inculpatory act Ath not only did not deny, but admitted. He places the package down, *on his porch;* appears to remove his keys to open the front door *of his home;* opens the front door; and, retrieving the package, walks inside *with the package in hand*. These two additional inculpatory acts Ath, again, not only did not deny, but admitted. Ath then walks outside, leaving the package inside, returning after a car drives up and parks in front of the house. Ath walks back inside the house, then exits the house again, and stands on the porch. He then re-enters the house, exits the house again, and sits on the porch.

The testifying agent said Ath told him he had not taken the package into the house, he had only put it on his porch, but then said he had taken the package into the house, and then taken it out of the house and put in on the porch.

Ath did not deny receiving the package, taking physical possession of the package, taking it on to his porch and then into his house.

"Exculpatory" means "…[o]f statements, etc. [a]dapted or intended to clear from blame or charge of guilt…." The Oxford English Dictionary, Vol. III at 389 (Oxford Univ. Press 1961).

There is nothing exculpatory about Ath admitting taking physical possession of the package, taking the package onto the porch of his home, and then taking the package into his home. There is no difference, exculpatorily speaking, between leaving the package on his porch and taking the package into his house.

Further, Ath telling law enforcement he had left the package on this porch and not taken the package into the house, and then saying he took the package into his house, but took it out again, is not denying he had the package in his actual possession, which is the key question. The most which can reasonably be inferred from these statements is that Ath, after having had an assault weapon pointed at him in the presence of a child walking with him, his house searched, a drug dog walked through the house, and then being confronted with "challenging" law enforcement officers, "peppering" him with questions, "knew that he was caught up in a situation involving criminal activity." *United States v. Rahseparian,* 231 F.3d 1257, 1264 (10th Cir. 2000), quoting *United States v. Nusraty,* 867 F.2d 759, 765 (2nd Cir. 1989). *See also United States v. Morales,* 577 F.2d 769, 772- 773 (2nd Cir. 1978) ([T]he government had to show that appellant knew she possessed drugs, not that she was aware that she might be involved in some criminal activity.").

These statements do not allow, nor can they support, a reasonable inference that Ath had guilty knowledge of the charged conspiracy; the methamphetamine in the sealed, unopened package, its intended distribution; the use of the mail in furtherance of a drug transaction, or his aid and abetment of these offenses. *Id.*

Even if an inference of consciousness of guilt could be drawn from Ath's statements, false exculpatory statements by themselves cannot prove the government's case. *Rahseparian* at 1263. "[A] defendant's attempt to fabricate evidence after an alleged violation of the law is not sufficient to establish guilt." *Id.* quoting *United States v. Zang,* 703 F.2d 1186, 1191 (10th Cir. 1982), and citing *United States v. Teffera,* 985 F.2d 1082, 1087 (D.C. Cir. 1993) (false exculpatory statements that are the sole incriminating evidence are insufficient to show defendant know of illegal activities).

There being no other evidence sufficient to establish Ath's guilt of the charged offenses, the assertedly false exculpatory statements cannot save the government's case.

**Question II.**

> Whether the decision of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's convictions conflicts with the decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Rahseparian,* 231 F.3d 1257 (10th Cir. 2000)?

In *Rahseparian,* a father and his two sons were charged with conspiracy, mail fraud and money laundering stemming from a fraudulent telemarketing scheme. All were convicted, and the sons' convictions were affirmed on appeal. The father's convictions, however, were reversed on the Tenth Circuit's conclusion the government's evidence could not sustain the guilty verdict.

The government's evidence in *Rahseparian*, as the court described it, was "entirely circumstantial." An employee of the sons' company testified that he and one son directed their customers to send their checks, representing the scheme's ill-gotten gains, to a mailbox rented by a copy shop whose records showed the contact person for the mailbox had the same first name as the father. The government showed that when received, the ill-gotten gain checks were deposited into a business checking account in the name of the father, and another business checking account was established in the names of one son and the father. The employee testified that the father called one of his sons every day, or every other day, to ask "how many checks to expect and

how much they were." There was also testimony that the father picked up the checks from the rented mailbox and deposited them into the account referenced above. Finally, following the investigation of the scheme, the father, when questioned by law enforcement, blatantly and transparently lied, saying first, he knew nothing of the company which was the source of the checks he was calling his son every day about, picking up at the rented mailbox and depositing in the bank account in his name. He then changed his story saying he cashed the ill-gotten gain checks for a fictional person for whom he did fictional catering. The father falsely denied knowing anything about the rented mailbox, retrieving mail from it, or setting up the checking account. *Id.* at 1260 – 1261.

The Tenth Circuit concluded this evidence could not sustain the father's convictions because it was insufficient to establish the knowledge element required by the conspiracy and mail fraud charges and, since the money laundering charge was based on the mail fraud charges, it too failed. *Id.* at 1263 and 1267.

Here, unlike the employee testimony in *Rahseparian* directly implicating the father, there is no testimony from anyone associated with the charged drug conspiracy connecting Ath to that conspiracy. Phabmisay, the only conspirator who testified, said (1) he did not know Ath, and (2) he had no communications with Ath. That Phabmisay had

"heard" of Ath and "heard he was living in South Carolina" is evidence of Phabmisay's connection with Ath's co-defendant and brother, Soueth Ath, not with Ath.

The Fourth Circuit concluded the "circumstances of the controlled delivery are critical evidence of Ath's knowledge of the conspiracy, as they exceed mere acceptance of a package for his son-in-law [co-defendant, Virig Chheng]." *Ath* at 186. While citing *Rahseparian,* the Fourth Circuit appears, though not explicitly, to distinguish *Rahseparian,* saying "… the evidence [in *Rahseparian*] showed that the defendant [father] handled his sons' banking, not his knowledge of their fraudulent business." *Id.*

There is, however, no substantive distinction between the two cases. The Fourth Circuit made much of the circumstances of the controlled delivery, saying that Ath "looked at the package, which was not addressed to him;" "took the package into his house and left the premises … without locking the door;" whereupon "Chheng appeared and entered" Ath's house "without a key;" retrieving the unopened controlled delivery package, behavior which, the court concluded, "a reasonable jury could determine … signifies [Ath's] knowledge of a plan to accept the drugs [in the package] and hand them off to Chheng…" *Id.*

The *Rahseparian* court found insufficient to establish the knowledge element the facts that: (1) the mailbox rented in the father's

first name, was where the ill-gotten gain checks were delivered; (2) those same ill-gotten gain checks were picked up by the father from that mailbox; (3) who then deposited them into the account(s) opened by the father and the father and his fraudster son; and (4) who called one of his fraudster sons every day, or every other day, to ask "how many checks to expect and how much they were."

There is no difference between what the *Rahseparian* father did and what Ath did. In fact, the evidence against Ath was far less than against the *Rahseparian* father. All Ath did was accept a package delivered to his home which, while bearing his address, did not bear his name, a package, unopened, that was thereafter picked-up by his son-in-law. The *Rahseparian* father rented the post office box used for the delivery of the checks representing the fraudulently obtained money, he set up the bank account(s) where the fraud money was deposited, he picked up the fraudulently obtained checks from the mail box he set up and deposited them in the bank accounts he also set up, all the while calling one of his fraudster sons, once a day or maybe once every other day, to ask how many checks to expect and how much the checks were for.

There is no substantive factual difference between the two cases.

This leaves the September 6, 2016 deposit and the asserted false exculpatory statements.

Ath respectfully submits the September 6, 2016 deposit proves nothing, and no reasonable inference of knowledge on his part can be drawn from that event.

Regarding the false exculpatory statements, the father in *Rahseparian* blatantly lied about his involvement with his son's enterprise, but those clearly false exculpatory statements were not enough to sustain the father's convictions.

Here, as demonstrated above, Ath's asserted false exculpatory statements were neither false, nor exculpatory.

The most which can reasonably be inferred from these statements is that Ath, after having had an assault weapon pointed at him, his house searched, a drug dog walked through the house, and then being confronted with "challenging" law enforcement officers, "peppering" him with questions, "knew that he was caught up in a situation involving criminal activity." *Nusraty* at 765. These statements do not allow, nor can they support, a reasonable inference that Ath had guilty knowledge of the charged conspiracy, the methamphetamine in the sealed, unopened package, its intended distribution; the use of the mail in furtherance of a drug transaction, or his aid and abetment of these offenses. *Id.*

The so-called false exculpatory statements are nothing of the kind, and no reasonable inference can be drawn from them showing consciousness of guilt on Ath's part.

Even if an inference of consciousness of guilt could be drawn from Ath's statements, false exculpatory statements by themselves cannot prove the government's case. *Rahseparian* at 1263. "[A] defendant's attempt to fabricate evidence after an alleged violation of the law is not sufficient to establish guilt." *Id.* quoting *United States v. Zang,* 703 F.2d 1186, 1191 (10th Cir. 1982), and citing *United States v. Teffera,* 985 F.2d 1082, 1087 (D.C. Cir. 1993) (false exculpatory statements that are the sole incriminating evidence are insufficient to show defendant knew of illegal activities).

**REASONS FOR GRATING THIS PETITION**

Although the Fourth Circuit cited the correct cases and used the correct language in setting out its scope of review, it misapplied that standard by concluding the evidence, though devoid of reasonable inferences pointing to Ath's' guilt, was sufficient to sustain his conviction.

While the Fourth Circuit cited *Rahseparian,* and did not explicitly distinguish that case, the Fourth Circuit misapprehended *Rahseparian* teachings in that the fact pattern in *Rahseparian* was fundamentally the same as in *Ath*, yet the Tenth Circuit came to the different, and correct, conclusion that the evidence was insufficient to support *Rahseparian's* conviction.

## CONCLUSION

Based on the foregoing, petitioner respectfully requests his case be considered for a grant of a petition for certiorari to correct the errors of the Fourth Circuit as set forth above.

Respectfully submitted,

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