

No.

IN THE SUPREME COURT OF THE UNITED STATES
2021 TERM

MAURICE ATKINSON
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

THOMAS, THOMAS & HAVER, LLP


John F. Yaninek, Esquire
PA Attorney ID #55741
PO Box 999
Harrisburg, PA 17108
(717) 441-3952 - Phone
(717) 237-7105 - Fax
Attorney for Petitioner, Maurice Atkinson

QUESTIONS PRESENTED

- I. Whether Maurice Atkinson was denied his Sixth Amendment right to a public trial when the courtroom was completely closed to the public pursuant to the district court's *sua sponte* written Order?
- II. Whether the Due Process Clause of the Fourteenth Amendment was violated when the prosecutor knowingly introduced false testimony against Maurice Atkinson?
- III. Whether the Trial Judge erred in applying a two level enhancement for obstruction of justice where there was no intent to obstruct justice on the instant offense of conviction?
- IV. Whether a two level enhancement for body armor was improperly applied when there was no evidence that Maurice Atkinson was ever in possession of body armor or having knowledge of anyone using body armor during drug sales?

TABLE OF CONTENTS

Question Presented.....	i
Table of Authorities.....	iii
Opinions Below.....	v
Jurisdiction.....	vi
Constitutional Provisions Involved.....	vii
Statement of the Case.....	1
Reasons for Granting the Writ.....	10
Conclusion.....	11
Certificate of Membership in Bar.....	12
Certificate of Service.....	13
Certificate of Declaration of Mailing Rule 29.2.....	14
Index to Appendices.....	15

Table of Authorities

Federal Cases

<u>Burger v. United States,</u>	
295 U.S. 78 (1935)	4
<u>Calcraft v. Texas,</u>	
355 U.S. 28 (1957)	3
<u>Gomez v. United States,</u>	
490 U.S. 858 (1989)	2
<u>Mooney v. Holohan,</u>	
294 U.S. 103 (1935)	4
<u>Napue v. Illinois,</u>	
360 U.S. 264 (1959)	3
<u>Presley v Georgia,</u>	
558 U.S. 209 (2010)	2
<u>United States v. Hugo Galaviz,</u>	
687 F.3d 1042 (2012)	7
<u>United States v. LNU,</u>	
575 F.3d 298 & n. 7 (3d Cir. 2009)	2
<u>United States v. Stofsky,</u>	
527 F.2d 237 (2d Cir. 1975)	4
<u>Waller v. Georgia,</u>	
467 U.S. 39 (1984)	2

Federal Statutes

18 U.S.C. § 1962	1
21 U.S.C. § 841	1
21 U.S.C. § 846	
28 U.S.C. §1254	vi
28 U.S.C. §1651	vi

Other

Sixth and Fourteenth Amendments of the United States Constitution	10
U.S.S.G. § 3C1.1	6

No.

IN THE SUPREME COURT OF THE UNITED STATES
2021 TERM

MAURICE ATKINSON
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

MAURICE ATKINSON respectfully petitions the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals which affirmed the United States District Court in this case.

OPINIONS BELOW

On September 10, 2020, the United States Court of Appeals for the Third Circuit issued a published opinion. A copy of the opinion is attached to this Petition as Appendix “1A”. A copy of the Order is attached to this Petition as Appendix “2A”. A copy of the Court’s Order denying a Rehearing En Banc on November 10, 2020 is also attached as Appendix “3A”.

JURISDICTION

A Writ of Certiorari is sought from an order of the United States Court of Appeals for the Third Circuit dated September 10, 2020 and subsequently November 10, 2020 denying Petitioner's en banc rehearing.

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the court of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. §1651(a) which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate to aid of its respective jurisdiction and agreeable to the usages and principles of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment:

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Petitioner Maurice Atkinson was found guilty after a two-month criminal jury trial in the Middle District of Pennsylvania.
2. Petitioner Maurice Atkinson was convicted on November 16, 2015 of:
 - 1) Conspiracy: Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. § 1962(d);
 - 2) Conspiracy: Distribution of five (5) kilograms and more of cocaine; two hundred-eighty (280) grams and more of crack cocaine, heroin and marijuana, 21 U.S.C. § 846; and
 - 3) Distribution of five (5) kilograms and more of cocaine, two hundred-eighty (280) grams and more of cocaine base (crack), heroin and marijuana, 21 U.S.C. § 841(a)(1).
3. Maurice Atkinson was sentenced to a life term of imprisonment.

SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL

4. The jury trial before the Honorable Yvette Kane began on September 21, 2015.
5. On the September 18, 2015, before trial was to begin, the district court entered an order closing the courtroom to the public for the entirety of *voir dire*.
6. In its entirety, the Order read:

AND NOW, on this 18th day of September 2015, IT IS HEREBY ORDERED THAT due to courtroom capacity limitations, only (1) court personnel, (2) defendants, (3) trial counsel and support staff, and (4) prospective jurors shall be allowed in the courtroom during jury selection.

No other individuals will be present except by express authorization of the Court.

7. The Sixth Amendment right extends to jury selection because it is a “critical stage of the criminal proceeding” and “is the primary means by which a court may enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice … or predisposition about the defendant’s culpability....” Gomez v. United States, 490 U.S. 858, 873 (1989).

8. Unless an exceptional circumstance existed, the courtroom could not be ordered closed during *voir dire*.

9. If exceptional circumstances exist, the court must make express and specific findings adequate to support the closure, applying the four-part test set forth in Waller v. Georgia, 467 U.S. 39, 48 (1984).

10. Pursuant to the test in Waller:

[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id., quoted in Presley, 558 U.S. 209, 213-14; see also United States v. LNU, 575 F.3d 298, 305-06 & n. 7 (3d Cir. 2009).

11. The district court did not comply with any of the constitutional requirements set forth in Waller before ordering that the courtroom would be closed.

12. None of the parties requested the courtroom be closed so the court did not determine whether closing the courtroom would “advance an overriding interest

that [was] likely to be prejudiced" or whether the closure was "no broader than necessary to protect that interest."

13. The district court also did not consider other reasonable alternatives to completely closing the courtroom.

14. The Order's caveat that "[n]o other individuals will be present *except by express authorization of the Court*" (emphasis added) was not enough to avoid the resulting Sixth Amendment violation.

15. The closure of the courtroom was particularly serious in this case because the judge had knowledge of the decision to close and because the courtroom was fully closed to all members of the public, not limited to a partial closure.

16. For the foregoing reasons, the district court's *sua sponte* Order closing the courtroom to the public for the entirety of *voir dire* constituted an obvious and severe violation of Petitioner Maurice Atkinson's Sixth Amendment right to a public trial.

FALSE TESTIMONY

17. The Supreme Court has held that "a conviction obtained through the use of false evidence, known to be such by representatives of the State must fall under the Fourteenth Amendment." Napue v. Illinois, 360 U.S. 264, 269 (1959).

18. When this happens, reversal of the defendant's conviction is a near certainty because courts do not employ a strict materiality test or harmless error analysis. Calcraft v. Texas, 355 U.S. 28 (1957) (reversing conviction and death sentence where sole witness lied about his romantic involvement with the victim - - lies the

government condoned and covered up); see also United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. 1975) (holding that a prosecutor's culpability in covering up a witness' lies "will mandate a virtual automatic reversal of a criminal conviction").

19. The presentation of false evidence in a courtroom is intolerable because it perpetuates a fraud on the judge and jury and undermines the "rudimentary demands of justice." Mooney v. Holohan, 294 U.S. 103, 112 (1935).

20. The fraud is so insupportable because of its corrosive effect on the judicial process and because the instrument of deceit is a prosecutor "whose obligation in a criminal prosecution is not that it shall win a case, but that justice shall be done." Burger v. United States, 295 U.S. 78, 88 (1935).

21. Based on information provided by the United States to the defense, Maurice Atkinson was incarcerated from April 18, 2008 to July 18, 2011 (Trial Transcript Vol. 25, p. 5297-5298, Appx. 64a-65a).

22. Despite knowing that Maurice Atkinson was incarcerated for all of 2009, the prosecution allowed Darvin Allen to testify falsely that Maurice Atkinson (aka Mo) was present at a March 15, 2009 meeting of the Southside gang members for purposes of retaliation for a bar incident.

23. Darvin Allen testified that Atkinson was present during both the planning phase at a home and the execution phase by being in the car.

BY MR. CONSIGLIO:

Q: Let's move forward to 2009, if we can. I want to draw your attention to Foo...

(Trial Transcript Vol. 7 p. 1346, Appx. 36a).

Continue to testimony on (Trial Transcript Vol. 7, p. 1352, lines 1-9, Appx. 42a).

Q: Was anybody else who was with you when you were talking to Foo directly at the particular moment in his house?

A: And that I can recall, there was a couple of us up there. It was like, Juany, Bang Em, and **Mo** was up there in front of Ms. Mildred's house on Cottage place.

Q: What happened after that shooting?

A: We retaliated after that shooting.

Q: Can you describe for the jury what retaliation you particularly were involved in?

A: We went out the parkway area looking for parkway members. And we was in a Mitsubishi Galant, silver. It was me, Juany, Bang Em, and Mo. Then we saw Skylar Handy and we engaged in gunfire.

(Trial Transcript Vol. 7, p.1352, lines 1-9, Appx. 42a).

24. After the false testimony involving Maurice Atkinson (aka Mo) being involved in the 2009 shooting, Atkinson's Counsel approached sidebar and alerted the Court that Atkinson's prison records clearly indicated that he was incarcerated for the entirety of 2009 and the testimony elicited by the prosecution was false (Trial Transcript Vol. 7, p. 1366-1370, Appx. 56a-60a). In addition to the

government providing Maurice Atkinson's incarceration records showing that he was incarcerated in 2009, his Defense Counsel explicitly told everyone including the prosecutors and case agent present that Atkinson was in state prison from April 18, 2008 to April 18, 2012 in his Opening Statement (Trial Transcript Vol. 3, p. 451, lines 1-4, Appx. 34a).

25. It was obvious that this 2009 incident that Allen describes could not have included Maurice Atkinson because he was incarcerated in state prison for nearly a year prior to, and during, its occurrence.

26. Despite Counsel's objection and the obvious falsity of the testimony, the Court did not provide any guidance to the jury on dealing with this false testimony and ignored the situation.

27. Therefore, it should be clear that this was a case about winning and not justice being done.

28. The false testimony elicited by the prosecutor violated Maurice Atkinson's Fourteenth Amendment Right to due process.

**ERROR IN APPLYING A TWO LEVEL
ENHANCEMENT FOR OBSTRUCTION OF JUSTICE**

29. During a trial the United States Probation Office served a revised "final" Presentence Investigation Report on Friday, January 5, 2017, which included adjustments for obstruction of justice pursuant to U.S.S.G. § 3C1.1.

30. The adjustment for obstruction of justice Section 3C1.1 provides that a Defendant's offense level should be enhanced two levels if he "willfully... attempted

to obstruct... the administration of justice with respect to... the sentencing of the instant offense of conviction."

31. The enhancement to Atkinson's offense level relates to an alleged prison assault that occurred on a fellow inmate, Carl Theodore Hodge, in Dauphin County Prison on September 9, 2017.

32. This assault allegedly came after Hodge had agreed to cooperate with federal authorities on or about July 25, 2017.

33. Hodge testified that he had been involved in a dispute with Atkinson's Co-Defendant Rolando Cruz, Jr. over a cellular phone that had been smuggled into Dauphin County Prison.

34. This phone had originally been in the possession of Co-Defendant Mark Hernandez and given to Hodge to hide from prison officials.

35. Hodge testified that he failed to return the phone which caused controversy between him and Co-Defendants Hernandez and Cruz, and he was subsequently assaulted in the prison shower by Atkinson and a number of unidentified individuals.

36. The 8th Circuit in United States v. Hugo Galaviz, 687 F.3d 1042 (2012) has clearly explained the rationale behind 3C1.1 in that the guidelines specifically require a willful attempt to obstruct the sentencing process for it to be applicable.

37. Even assuming the facts in the record are true, there can be no finding that Atkinson's involvement was related to some idea that Hodge was a witness against him at upcoming sentencing.

38. Therefore, it was an error to impose a two level enhancement for obstruction of justice on Atkinson.

**ERROR IN APPLYING A TWO LEVEL ENHANCEMENT
FOR BODY ARMOR**

39. The use of body armor was not involved in anything related to Maurice Atkinson or where he could have had knowledge of its existence. Body armor was found years after Atkinson was in prison and had no relationship to him.

40. The Court stated: "Okay. I agree it was appropriately calculated. I do not recall any testimony where this defendant wore body armor, but there is ample testimony that his co-conspirators wore it and were arrested with body armor present." (Sentencing Transcript, p. 51, Appx. 99a).

41. There was no evidence of Atkinson ever being in possession of body armor or having knowledge of anyone using body armor during drug sales. (Atkinson Sentencing Transcript p. 50, Appx. 98a).

42. Further, Defendant Rice who sold drugs around the same time and with Atkinson did not get a two level body armor enhancement which was noted as a sentencing disparity even by the prosecutor. (Atkinson Sentencing Transcript p. 60, lines 11- 15, Appx. 101a).

43. Atkinson should not have been given an enhancement if another co-defendant unbeknownst to him was in the possession of body armor even if there was a conspiracy.

Wherefore, Petitioner respectfully requests that this petition be granted and the Court hear his case on the merits.

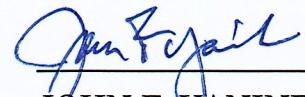
REASON FOR GRANTING THE WRIT OF CERTIORARI

The reason for granting the Writ of Certiorari is very simple: The Sixth and Fourteenth Amendments of the United States Constitution guarantee certain rights to the criminally accused: the right to the assistance of counsel during the trial/jury selection, the right to a public trial, the right to a trial by jury, and the fundamental right to due process. This Court should accept this case and review the issues presented within this Petition.

CONCLUSION

For the reasons stated, Petitioner, Maurice Atkinson, respectfully requests that his Petition for Writ of Certiorari be granted, and the Court accept his case for review.

Respectfully submitted,

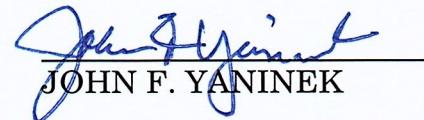


JOHN F. YANINEK
Counsel for Petitioner,
Maurice Atkinson

Date: April 15, 2021

CERTIFICATE OF MEMBERSHIP IN BAR

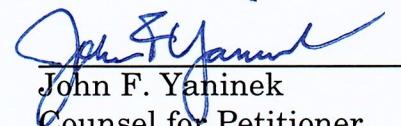
I, JOHN YANINEK, counsel for Petitioner, hereby certify that I am a member of the Bar of this Court.


JOHN F. YANINEK

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Supreme Court was mailed this day of April, 2020, to the following:

Solicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001



John F. Yaninek
Counsel for Petitioner,
Maurice Atkinson

No.
IN THE SUPREME COURT OF THE UNITED STATES
APRIL 2021 TERM

MAURICE ATKINSON
Petitioner

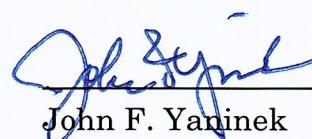
v.

UNITED STATES OF AMERICA
Respondent

**DECLARATION PURSUANT TO RULE 29.2
OF THE RULES OF THE SUPREME COURT**

I declare under penalty of perjury under the laws of the United States of America that the Petition for Writ of Certiorari of Maurice Atkinson was mailed to the Clerk's Office of the United States Supreme Court in Washington D.C., postage paid and fees paid (USC-426), First Class Mail.

DATE: April 15, 2021



John F. Yarinek
Counsel for Petitioner,
Maurice Atkinson

INDEX TO APPENDIX

- 1A. United States Court of Appeals for the Third Circuit - unpublished opinion dated September 10, 2020.
- 2A. United States Court of Appeals for the Third Circuit – Judgment dated September 10, 2020.
- 3A. United States Court of Appeals for the Third Circuit - Order denying a rehearing en banc dated November 10, 2020.