1:21-cv-172

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

JEREMIAH VAN TASSEL v. JOSH SHAPIRO, MICHAEL CLARK

Memorandum of Law in Support of 2254 Petition

Comes the Petitioner in the above captioned action, Jeremiah Van Tassel, and would show this Court the following:

Background

Petitioner did not discover that his counsel had not appealed his case to the Supreme Court of Pennsylvania until he received the letter attached hereto as Exhibit A, dated May 19, 2021.

It appears that counsel did prepare a petition to the Pennsylvania Supreme Court, attached hereto as Exhibit B, but then never submitted it. That brief is adopted and incorporated herein by reference.

Legal Claims

Ineffective Assistance of Counsel

As Exhibit B plainly illustrates, Petitioner was given a Hobson's Choice: proceed with counsel completely unwilling to meet any sort of defense or proceed pro se.

Petitioner had ineffective assistance of counsel, both before trial and before the Pennsylvania Supreme Court.

Walter Booker, Superintendent of the Mississippi State Penitentiary at Parchman ("the State"), appeals the district court's decision granting appellee Simeon Hughes' ("Hughes") motion for a writ of habeas corpus because he received ineffective assistance of appellate counsel in violation of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988). We affirm.

Hughes v. Booker, 203 F 3d 894 (5th Cir. 200)

Hughes filed his habeas petition after April 24, 1996, and it therefore subject to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Lindh v. Murphy,* 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Because we agree with the district court that the Mississippi Supreme Court's decision was "on the merits," under AEDPA, we may not grant collateral relief unless the Mississippi Supreme Court's opinion:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d).

A criminal defendant has a constitutional right to effective assistance of counsel in his first appeal as of right. *See Evitts v. Lucey*, 469 U.S. 387, 393-95, 105 S.Ct. 830, 834, 83 L.Ed.2d 821, ___ (1985). In *Penson v. Ohio*, the Supreme Court distinguished between two types of claims involving denial of assistance of appellate counsel. First, where a petitioner argues that counsel failed to assert or fully brief a particular claim, he must show that his attorney's performance was both deficient and prejudicial. *See Penson*, 488 U.S. at 84, 109 S.Ct. 352-54, 102 L.Ed.2d 300 (citing *Strickland v. Washington*, 466 U.S. 668, 689-94, 104 S.Ct. 2052, 2065-67, 80 L.Ed.2d 674, ___ (1984)). Second, where the complained-of performance of counsel constituted an actual or constructive complete denial of the assistance of counsel, prejudice is presumed. *See id.*, 488 U.S. at 88-89, 109 S.Ct. at 354, 102 L.Ed.2d at ___ ("the actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice") (citation omitted); *see also Sharp v. Puckett*, 930 F.2d 450, 451-52 (5th Cir. 1991).

Hughes v. Booker, 203 F 3d 894 (5th Cir. 200)

As Exhibit A and B illustrate, Petitioner had ineffective assistance of counsel from the lower court all the way to the Pennsylvania Supreme Court. As for the trial court:

> Under our precedent concerning district courts' obligation to inquire when a defendant lodges complaints regarding counsel's representation, the facts here present a close case. Initially, the District Court appears to have made little or no effort to probe Diaz's request that Kalinowski be replaced. Typically, if a district court fails to make "*any* on-the-record inquiry as to the reasons for the defendant's dissatisfaction with his existing attorney," it abuses its discretion. *McMahon v. Fulcomer*, 821 F.2d 934, 944 (3d Cir. 1987) ; *Goldberg*, 67 F.3d at 1098 ; *Welty*, 674 F.2d at 190. We have not made that obligation dependent upon the number of times a defendant has made this request. We have specifically instructed that a Court must "engage in at least some inquiry," "[e]ven when the trial judge suspects that the defendant's contentions are disingenuous, and motives impure." *McMahon*, 821 F.2d at 942 (citation omitted)
>
> *United States v. Diaz*, 951 F. 3d148 (3rd Cir. 2020)

Vouching

As the briefs submitted by counsel reflect, the judge (not the prosecutor), vouched for the main prosecution witness.

The problem here, not raised by appellate counsel, is that there was an avalanche of vouching engaged in by the prosecutor. That avalanche is described and enumerated by reference to the trial transcripts, which transcripts Petitioner will be more than happy to provide if he is given an evidentiary hearing.

See Exhibit C, attached hereto.

The law on vouching is quite clear:

Plaintiff should be excused from the exhaustion of state remedies requirements:

In his federal habeas petition, Werts claims his right to due process was violated by certain improper comments made by the prosecutor during opening and closing arguments. With regard to the vouching statements, this claim was not raised at trial, on direct appeal or in the state collateral review proceedings. Werts raises it for the first time in his federal habeas petition. Thus, although Werts has failed to exhaust his state remedies as to the vouching statements, he would be without a state corrective process if he were required to bring this claim in state court now. Indeed, he would be procedurally barred from obtaining state relief as his claim would be deemed waived under the PCRA, 42 Pa. Cons. Stat. Ann. § 9544(b) and/or barred by the one year statute of limitations under the PCRA, 42 Pa. Cons. Stat. Ann. § 9545(b). Under these circumstances, it would be futile to require exhaustion. Therefore, Werts is excused from the exhaustion requirement as to the vouching statements.

Werts v. Vaughn 228 F. 3d 178 (3rd Cir. 2000)

As for the case law concerning vouching:

In U.S. v. Young, the Supreme Court explained the danger of this kind of prosecutorial vouching. The Court stated:
The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges . . . and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence. (dissent)
470 U.S. at 18-9.

Werts v. Vaughn 228 F. 3d 178 (3rd Cir. 2000)

Vouching is a type of prosecutorial misconduct. It constitutes an assurance by the prosecuting attorney of the credibility of a government witness through personal knowledge or by other information outside of the testimony before the jury. *United States v. Walker*, 155 F.3d 180, 184 (3d Cir. 1998) (citing *Lawn v. United States*, 355 U.S. 339, 359 n. 15, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958)). In order to find vouching, two criteria must be met: (1) the prosecution must assure the jury that the testimony of a Government witness is credible, and (2) this assurance must be based on either the prosecutor's personal knowledge or other information that is not before the jury. *Walker*, 155 F.3d at 187.

Lam v. Kelchner 304 F. 3d 256 (3rd Cir. 2002)

WHEREFORE, Petitioner moves this Court to grant him the relief he requests.

Respectfully Submitted,

Jeremiah Van Tassel

Jeremiah Van Tassel

6 JULY 2021

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

John A. Vaskov, Esquire
Deputy Prothonotary

Patricia A. Nicola
Chief Clerk

414 GRANT STREET, SUITE 801
PITTSBURGH, PA 15219-2410
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May 19, 2021

Mr. Jeremiah Lyle Van Tassel
NL0329
10745 Route 18
Albion, PA 16475-0001

Re: Commonwealth of Pennsylvania v. Jeremiah Lyle Vantassel
Superior Court No. 1859 WDA 2019
Erie County No. CP-25-CR-0002154-2016

Dear Mr. Van Tassel:

We received your letter dated May 13, 2021, requesting information about the status of the matter identified above. The Superior Court decided the appeal on July 13, 2020. A copy of the docket sheet is enclosed. No petition for allowance of appeal was filed.

Very truly yours,

Office of the Prothonotary

cc: William J. Hathaway, Esq.

Exhibit A

IN THE SUPREME COURT OF PENNSYLVANIA

sitting at Pittsburgh

W.D. ALLOCATUR NO.

COMMONWEALTH OF PENNSYLVANIA.

v.

JERIMIAH LYLE VANTASSEL.
Petitioner

PETITION FOR ALLOWANCE OF APPEAL

Appeal from the judgment order entered by the Superior Court of Pennsylvania on July 13, 2020 at docket number 1859 WDA 2019 affirming the court order entered by the Erie County Court of Common Pleas on November 20, 2019 at docket number 2154 of 2016

William J. Hathaway, Esquire
1903 West 8th Street, PMB #261
Erie, Pennsylvania 16505
(814) 456-4433
PA I.D. No. 56196

Date: August 12, 2020

Exhibit B

I. REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS.

The opinion issued by the Superior Court of Pennsylvania dated July 13, 2020 is appended hereto.

II. TEXT OF THE ORDER IN QUESTION.

JUDGMENT OF SENTENCE AFFIRMED as per the appended Opinion.

III. QUESTIONS PRESENTED FOR REVIEW.

A. Whether the Petitioner was deprived of his right to counsel in that he was compelled and coerced into proceeding pro se at trial in that he was placed in the posture of having no other viable options notwithstanding the provision of the protections of a colloquy relative to the wavier of counsel?

B. Whether the Petitioner was deprived of a fair trial in that the trial Court displayed a credibility assessment relative to the Petitioner and the minor victim to the jury based on the trial Court instructing the jury that the victim had no reason to lie while further repeatedly citing that the appellant conversely had reasons to lie in that he was facing incarceration?

IV. CONCISE STATEMENT OF THE CASE

On April 19, 2018, following a three-day jury trial during which VanTassel represented himself, he was found guilty of one count of Rape of a Child; Sexual Assault; Involuntary Deviate Sexual Intercourse With a Child; Aggravated Indecent Assault; Corruption of Minors and three counts of Indecent Assault. The criminal charges were predicated on the alleged course of sexual conduct involving a nine-year old from the latter part of 2015 through May of 2016. The alleged course of conduct transpired at the Petitioner's residence in North East Township while he was acting as a caregiver for the child. On June 5, 2018, the Petitioner was sentenced to an aggregate

term of incarceration of 16 ½ to 33 years consisting of sentences within the standard range of the sentencing guidelines. No post-sentence motion or direct appeal was filed.

On April 3, 2019, VanTassel filed a pro se PCRA Petition citing the deprivation of his right to counsel and further challenging a jury instruction issued by the trial court which he asserts served to unduly comment on the credibility of himself relative to the minor victim. Pursuant to court order dated April 9, 2019, PCRA counsel was appointed on behalf of the Petitioner. On July 29, 2019, a supplemental pleading was filed by counsel setting forth the foregoing claims relative to abrogation of the right to counsel and unfair commentary by the trial court on credibility determinations thereby usurping the province of the jury as weighers of credibility.

On October 2, 2019, the lower Court issued a Notice of Intent to Dismiss PCRA. On October 23, 2017, the Petitioner filed a pro se pleading, which the Court accepted and evaluated as objections to the Notice of Intent to Dismiss. On November 21, 2019, the lower Court issued a Final Order denying the instant PCRA Petition. A timely appeal was then taken on behalf of the Petitioner at docket number 1859 WDA 2019. On July 13, 2020, the Superior Court of Pennsylvania issued an opinion affirming the lower Court order.

A. THE PETITIONER'S RIGHT TO COUNSEL WAS ABROGATED AS HE WAS PLACED IN THE UNTENABLE POSITION OF HAVING TO PROCEED PRO SE AT TRIAL.

The Petitioner was deprived of his right to counsel during a critical stage of the litigation of the instant case, that being for a period of time prior to trial and then during the course of the jury trial. Notwithstanding, the multiple pro se colloquies and the Petitioner acceding to represent himself on the record, he was essentially coerced and

induced into proceeding pro se by the Court action in failing to afford him with any other viable option than to proceed with counsel who had declined to offer any vigorous and good faith defense on his behalf. This in toto was tantamount to depriving VanTassel of his right to counsel at the jury trial as he was placed in the untenable position of accepting counsel who told him there was nothing he could do for him or proceeding to trial representing himself.

The procedural history of the case in regard to the provision of counsel unto the Petitioner discloses that initially on May 3, 2017 while represented by privately retained counsel, Eric Hackwelder, the Petitioner had entered no contest pleas to five of the counts and the remaining counts were nolle prossed per a negotiated plea agreement. On June 15, 2017, Attorney Hackwelder filed a Motion to Withdraw as Counsel and further apprising the Court that VanTassel sought to withdraw his no contest pleas and that counsel sought to withdraw based upon a total breakdown of the attorney-client relationship. The lower Court granted the motion per court order issued June 16, 2019. The lower Court conducted a pro se colloquy on July 18, 2017 wherein the Petitioner denoted his intention to proceed pro se and thereby executed a Right to Counsel Waiver. The lower Court found the waiver to be knowing, voluntary and intelligent and permitted the waiver of counsel. In contravention of this designation, in July, 2017, VanTassel applied for legal representation through the Erie County Public Defender's Office. The lower Court appointed Attorney Ken Bickel on July 24, 2017 with the notice of appointment filed of record on August 28, 2017. The sentencing proceeding scheduled for August 30, 2017 was continued to afford newly appointed counsel with the opportunity to resolve the pending request of the Petitioner to withdraw his no contest

pleas. Pursuant to court order dated October 23, 2017, the lower Court granted leave unto VanTassel to withdraw the subject no contest pleas and the case was listed for trial.

On October 31, 2017, the Petitioner filed written pleadings directing that he wanted to proceed pro se and seeking to release Public Defender due to irreconcilable differences. On November 14, 2017, in light of those pleadings, Attorney Bickel filed a Motion to Withdraw, which motion was granted by the Court. On November 27, 2017, the Petitioner filed a Motion to Appear Pro-Per/Pro-Se, which then prompted the Court to conduct a second colloquy wherein VanTassel stated his intention to proceed pro se. Hence, the Petitioner thereafter represented himself during the course of the three-day jury trial and at time of sentencing.

The mere fact that *Grazier* colloquies were conducted and the Petitioner stated an intention to proceed pro se does nothing to offset the fact that he ultimately was placed in the untenable position of having to select between a disinterested and presumably ineffectual counsel or proceeding pro se. It can fairly be gleaned that the initial privately retained counsel sought to withdraw given a breakdown in the attorney-client relationship upon the Petitioner stating an intention to withdraw his no contest pleas entered per a plea agreement. In an effort to effectuate that intention after the withdrawal of Attorney Hackwelder, the initial waiver of counsel colloquy was pursued. However, subsequent to that colloquy and the Court's acceptance of that election by the Petitioner, Mr. Vantassel then petitioned for representation by the Office of Public Defender. This action should have informed the Court that the election to proceed pro se by the Petitioner was suspect in nature and that he actually still sought legal counsel for purposes of obtaining the withdrawal of his pleas and to proceed to trial. The lower Court then appointed Attorney

Bickel to represent the Petitioner with counsel successfully securing the withdrawal of the no contest pleas. However, VanTassel avers that this attorney-client relationship broke down or more aptly never came to fruition. Attorney Bickel purportedly apprised VanTassel "that there was nothing he could do for him." The Petitioner was as a result not very sanguine about the prospects of Attorney Bickel representing him after this declaration of disinterest in zealously representing the appellant at trial. The Petitioner's only prudent recourse was to seek the withdrawal of counsel under these circumstances. The Court then engaged him in a second waiver of counsel colloquy and then essentially compelled the appellant to proceed pro se at trial. The Petitioner cannot act in bad faith and continue to drag out the trial process and engage in counsel shopping. However, in this instance where newly appointed counsel emphatically advised the Petitioner that there was nothing he could do for him, VanTassel was placed in an untenable position of effectively having to proceed pro se. The lower Court did not inquire into the underlying specifics of the breakdown in the attorney-client relationship between the Petitioner and Attorney Bickel, which if pursued would have disclosed a credible basis for the appointment of new counsel if the Court inquired of Attorney Bickel as to whether he proffered that bleak assessment to the Petitioner and if so to admonish counsel that he retained an obligation to zealously represent the Petitioner if he elected to proceed to trial. The mere engagement of pro se colloquies and the Petitioner acceding to represent himself at trial fails to offset the fact that the appellant's only other option was to accept counsel who by his own admission was disinterested. This entire circumstance was tantamount to the Court expressly denying VanTassel his right to counsel.

B. THE TRIAL COURT MADE AN IMPROPER COMMENTARY ON THE RELATIVE CREDIBILITY OF THE APPELLANT AND THE

MINOR VICTIM IN THE FORM OF A SUSPECT CRAFTING OF A JURY INSTRUCTION

The Petitioner was deprived of a fair trial in that the lower Court served to taint and prejudice the proceeding by displaying credibility assessment relative to the Petitioner and the minor victim to the jury during the course of the trial. It is alleged that the Court instructed the jury that the victim had no reason to lie while further repeatedly citing that the Defendant conversely had reasons to lie in that he was facing incarceration. This served to undermine the truth-determining process in influencing the jury who were the triers of fact and solely tasked with adjudging credibility.

The jury instruction at issue stated as follows:

> Now, the testimony of victim, that testimony standing alone, if it's believed by you,is sufficient proof upon which the Defendant can be found guilty of these crimes. The testimony of a victim in a case such as this, it need not be supported by the other evidence to sustain a conviction. Thus you may find the defendant guilty if the testimony of victim convinces you beyond a reasonable doubt that the defendant is guilty.
>
> Now,the defendant also took the stand as a witness and in considering the Defendant's testimony you are to follow the general instructions I just gave to you concerning the credibility of any witness. And you should not disbelieve the defendant's testimony merely because he is a defendant. But in weighing his testimony, however, you may consider the fact that he has a vital interest in the outcome of this case; of course he does, he's the defendant. You may take the defendant's interest into account, just as you would the interest of any other witness along with all other facts and circumstances bearing on credibility ands making up your minds of what weight to give Mr. VanTassel's testimony. (Trial transcript, Day 3, 79-80)

This Court's key inquiry is whether the instruction on a particular issue adequately, accurately, and clearly presents the law to the jury, and is sufficient to guide the jury in its deliberations. Commonwealth v. Hamilton, 766 A.2d 874 (Pa.Super. 2001). The Petitioner avers that the subject jury instruction as crafted by the trial Court fails to satisfy and abide by this legal standard. The trial Court served to directly influence the

jury's weighing and evaluation of credibility of witnesses including most importantly the relative credibility between the minor victim and the appellant who testified in his own defense. The implication of this instruction is to comment on VanTassel possessing motivation not to provide truthful testimony in emphasizing that the jury may consider his vital interest in avoiding conviction and the ensuing sanction and incarceration arising therefrom. Hence, the inference that can be drawn from the composition and communication of the instruction is that VanTassel had a motive to lie and fabricate. To the contrary, the instruction then emphasizes and imparts to the jury that the testimony of the minor victim is sufficient standing alone even in the context of contraindicative evidence or questions as to the credibility of the minor witness. The trial court in fashioning and issuing this jury instruction unfairly commented on the relative credibility of the most significant witnesses at trial, namely the accuser and the accused, and thereby improperly invaded the province of the jury as triers of fact and weighers of credibility. The trial process was so potentially undermined by this prejudicial conduct that the trial was tainted and the verdicts rendered suspect. The only remedy is the provision of a new trial without the unfair commentary on the motives of the Petitioner to lie in his testimony.

V. CONCISE STATEMENT OF REASONS RELIED UPON FOR ALLOWANCE OF APPEAL.

The decision of the Superior Court of Pennsylvania has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court.

VI. CONCLUSION

WHEREFORE, in consideration of the foregoing, the Petitioner, Jeriniah Lyle VanTassel, respectfully requests that this Honorable Court exercise its jurisdiction and grant allowance of appeal as to the instant case.

Respectfully submitted,

William J. Hathaway, Esquire
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Erie, Pennsylvania 16505
(814) 456-4433
PA I.D. No. 56196

Attorney for Petitioner,
Jeriniah Lyle VanTassel

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

Affidavit of Jeremiah Van Tassel

I, Defendant Jeremiah Van Tassel, do affirm that the facts in this statement is true and correct to the best of my knowledge and belief. Petitioner has not submitted the trial transcript that this affidavit refers as the transcript is several hundred pages long but will do so willingly if given an evidentiary hearing.

That Ass't D.A. Ms. Elizabeth Hirz (hereinafter Hirz) vouched for the State's witness numerous times as reflected in the transcript..

Day Three, page 44, lines 15- 25. Hirz is clear that this is a matter of who the Jury believes. No evidence is necessary.

Page 45, line one. Hirz seems to immediately start vouching for the witness. Line 5- 6, Hirz does this in no uncertain terms. On lines 13, and 15- 18, Hirz speaks on what makes someone "credible". On lines 20- 25, Hirz restates witness testimony and, in so doing, vouches for three separate circumstances of the witness' testimony.

Page 46, line 3. Hirz seeks to discredit Defendant with her opinion. On lines 7- 14, three more circumstances are restated. Line 15 has Hirz clearly vouching for her witness. Lines 17- 24 has Hirz restating three more circumstances and seeking to discredit Defendant with her opinion of what did or did not happen. **Exhibit C**

Page 47, lines 1- 3, Hirz restates witness testimony. Line 4 is vouching for witness and lines 5- 8 is more restating. Lines 9-13 Hirz vouches twice more. Lines 14-16 more restating. Line 17, vouching. Line 20, seeking to mislead the Jury as I do not recall ever calling prosecution witness Tayla "naïve". In fact, the very opposite is true. Line 22- 23 and 25 has more vouching.

Page 48 is nothing but vouching, vouching by restating testimony and adding the opinion of Hirz.

Page 49, lines 1- 8. These are Hirz opinions, not facts. Lines 19- 25 misleads the Jury as to what Tayla knew could happen,

Page 50, lines 2- 14, 18 & 21- 22 are merely Hirz' opinions.

Page 51, lines 1, Here Hirz changes the testimony of Jean Vanallsburg to mislead. Lines 5- 6 is more vouching. Lines 13- 16 is Hirz offering her opinion as if it was Tayla's Testimony, in another attempt to mislead the jury.

Day Three (3)

Pg 45, line 1, 5-6, 13, 15- 18, 20-25

Pg 46, line 3, 7-9, 10- 14, 15, 17- 24

Pg 47, lines 1- 3, 4, 5-8, 9- 13, 14- 16, 17, 20, 22-23, 25

Pg 48: The entire page

Pg 49, lines 1- 8 are opinions, 19- 25 misleading as to what Tayla knew

Pg 50, lines 2- 14, 18, 21- 22

Pg 51, line 1, 5- 6, 13- 16

Pg 53, lines 100- 11

Pg 54, Lines 2- 3, 12, 15

Pg 55, lines 11- 12, 18-19

Pg 60, lines 2- 3, 7, 13-14, 21, 24

Pg 61, lines 3- 7, 11-14

Pg 63, line 9

Pg 64, lines 6- 7

Pg 65, Line 5

Pg 67, lines 24- 25

Pg 53, lines 10- 11, clear vouching

Pg 54, lines 2- 3, 12, 15, more vouching

Pg 55, lines 11- 12, 18-19

Pg 60, Lines 2- 3, 7, 13- 14, 21, 24 Hirz seeking to enflame and mislead while calling me a liar

Pg 61, lines 3- 7, 11- 14 Inflammatory comments

Pg 63, line 9 Changing testimony to enflame the jury

Pg 64, lines 6- 7, more vouching

Pg 66, line 5, more inflammatory comments

Pg 67, Hirz' opinion, not what Tayla said.

Hirz' closing argument is filled with vouching for her witness, Hirz' opinions inflammatory comments about the Defendant and stating things Hirz knew did not happen or where said to mislead the Jury.

/s/ Jeremiah Van Tassel
Jeremiah Van Tassel

Sworn to under
penalty of perjury
28 U.S.C. § 1746

6 JULY 2021