

No. 20-6645

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

JOE CERVANTES, JR. — PETITIONER
(Your Name)

vs.

CHARLES L. RYAN, et al., — RESPONDENT(S)
ARIZONA ATTORNEY GENERAL MARK BRNOVICH

ON PETITION FOR A WRIT OF CERTIORARI TO

THE NINTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

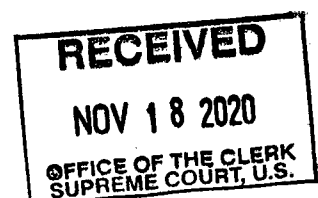
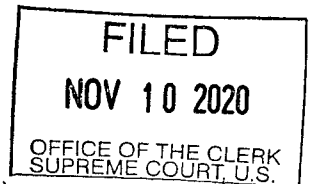
PETITION FOR WRIT OF CERTIORARI

JOE CERVANTES, JR. / ADC# 257150
(Your Name)

ASPC-EYMAN-MEADOWS UNIT
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(Address)

FLORENCE, ARIZONA 85132
(City, State, Zip Code)

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QUESTION(S) PRESENTED

Because Arizona's Dangerous crimes against children statute and statutes for underlying offenses therein do NOT give reasonable notice of the dangerous nature of the conduct necessary to constitute a dangerous crime against children, Cervantes was convicted of dangerous crimes against children based solely upon NON-dangerous offenses. Cervantes had NO knowledge of the dangerous nature of the charges — NOR the opportunity for objection to them — because the State made a FALSE statement of a material fact to Cervantes that the offenses were dangerous because the accusers were under fifteen years of age. Following a jury trial where the State FAILED to proffer any evidence of a dangerous offense the judge — NOT the jury — found Cervantes guilty of dangerous crimes against children in violation of §13-604.01. Cervantes promptly raised his claims by Petition for Writ of Habeas Corpus after the basis was discovered. His claims could NOT have been raised in any previous proceeding, because the basis was NOT then known and could NOT have been known through reasonable diligence, because Cervantes had NO reason to suspect that the statutes were VOID for vagueness and that the State had FALSELY misinformed, misled, and deceived him regarding the nature and cause of the charges. The state courts ERRED by concluding that his claims are precluded because they could have been raised on direct appeal or in a previous petition. The federal courts ERRED by concluding that his claims are barred by the one year statute of limitations of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This case thus presents the following questions.

1. Does "AEDPA" deprive federal courts of the power and obligation to review claims — NOT previously known and could NOT have been known through reasonable diligence but were promptly raised after the basis was discovered — that a defendant was convicted under VOID state statutes which violate federal constitutional law and that did NOT apply to the alleged conduct of the conviction?
2. Did both the Ninth Circuit and district court ERR in concluding that "AEDPA" barred the void for vagueness claims, and denial of jury trial and notice of charges claims, the basis of which was NOT previously known by Cervantes?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix 6 to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix F to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 12, 2020.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 6, 2020, and a copy of the order denying rehearing appears at Appendix H.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI _____ *passim*

U.S. Const. amend. XIV _____ *passim*

A.R.S. § 13-105(13) _____ 4

A.R.S. § 13-604.01 _____ *passim*

A.R.S. § 13-704 _____ *passim*

A.R.S. § 13-1405 _____ *passim*

A.R.S. § 13-1406 _____ 7

A.R.S. § 13-1409 _____ 6

A.R.S. § 13-1419 _____ 6

A.R.S. § 13-3553 _____ 7

STATEMENT OF THE CASE

I. STATE COURT PROCEEDINGS.

The State of Arizona obtained illegal convictions for dangerous crimes against children by misapplying void state statutes to NON-dangerous offenses charged.

A. TRIAL PROCEEDINGS.

The court made a FALSE statement of a material fact to the jury that: "The State has charged the defendant with committing the following crimes: Sexual conduct with a minor, 21 separate charges; sexual exploitation of a minor, two separate charges; sexual assault, two separate charges." (RT:8-12-2010, at 60) To the contrary, on each count the State charged dangerous nature sentence enhancement allegations of dangerous crimes against children in violation of "A.R.S. §13-604.01". (APPENDIX A: Indictment)

Not only does the indictment demonstrate that the State had charged the defendant with dangerous crimes against children involving sexual conduct with a minor, sexual exploitation of a minor, and sexual assault; it demonstrates that the State had knowledge of the FALSITY of the statement — regarding the nature of the charges — made to the jury with the intent that it should be acted upon. This constitutes FRAUD.

However, the indictment FAILS to state any fact or circumstance of a dangerous offense. (APPENDIX A) Here, the State made a FALSE statement of a material fact — with knowledge of its FALSITY — to the defendant and defense counsel that the alleged offenses were dangerous because the accusers were under fifteen years of age. This demonstrates cause which prejudiced the defendant because he believed the State's FALSE statement to be true and he was forced to proceed to trial without any knowledge of his BURDEN OF DISPROVING that the alleged offenses were dangerous or opportunity for objection to it.

DANGEROUS CRIMES AGAINST CHILDREN

Under Arizona law, a dangerous offense is "an offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person." A.R.S. §13-105(13).

Section 13-704, A.R.S., provides an enhanced sentencing scheme for dangerous offenses. Section 13-604.01, A.R.S., provides an enhanced sentencing scheme for dangerous crimes against children. Arizona's supreme court holds that an allegation of dangerousness essentially "ADDS to the underlying offense an element that subjects the defendant to increased penalties." State v. McCray, 218 Ariz. 252, 7J 19 (2008).

Arizona's supreme court holds that a dangerous crime against children is a dangerous offense in which the defendant's conduct was "focused on, directed against, aimed at, or targeted a victim under the age of fifteen." State v. Sepahi, 206 Ariz. 321, 324 (2003). That is, a dangerous crime against children is twofold: the offense was of a dangerous nature pursuant to section 13-704 AND the offense was committed against a minor under fifteen years of age pursuant to section 13-604.01. See State v. Fernandez, 216 Ariz. 545, 548 (App. 2007) (Dangerous crimes against children conviction requires guilty verdict "finding...the offenses to be dangerous AND finding...the offenses to be dangerous crimes against children"). Section 13-604.01 is an enhancement of section 13-704.

This demonstrates that, when the State misrepresented that the alleged offenses were dangerous because the accusers were under fifteen years of age, the State intentionally and knowingly misinformed, misled, and deceived the defendant in violation of his right to be informed of the nature and cause of the charges. This was contrary to this Court's decision in Cole v. Arkansas, 333 U.S. 196 (1948) ("notice of the specific charge [is] among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal"). This also constitutes FRAUD.

Section 13-604.01, A.R.S., is Arizona's Dangerous crimes against children statute which provides in part that: Dangerous crime against children "means any of the following that is committed against a minor who is under fifteen years of age: ... Sexual assault... Sexual conduct with a minor... Sexual exploitation of a minor..." A.R.S. §13-604.01(M). This language is ambiguous and "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." State v. Cota, 99 Ariz. 233, 236 (1965) (In Banc).

Specifically, it merely provides the meaning of the words "against children", however, it does not provide the meaning of the words "dangerous crime". See Bilke v. State, 206 Ariz. 462, 464, ¶ 11 (2003) ("The court must give effect each word of the statute"). Only by applying the fair meaning of the words "dangerous crime," the Arizona legislature defined in a separate statute, leads to the conclusion that §13-604.01 is an enhancement of §13-704 and refers to a "dangerous offense" committed against a child. See A.R.S. §13-105 (defining "Crime", "Offense", and "Dangerous offense").

This demonstrates that the State had knowledge that §13-604.01 refers to dangerous offenses committed against children and that §13-604.01 is void for vagueness. That is, the State knew the defendant "could not violate the criminal statute under which he was indicted." Mejak v. Granville, 212 Ariz. 555, 559, ¶ 21 (2006) (En Banc).

Arizona's dangerous crimes against children statute is void for vagueness because it does not provide persons of ordinary intelligence reasonable notice, and it fails to provide explicit standards for those who apply it, of the "dangerous" nature of the conduct necessary to constitute dangerous crimes against children, allowing Arizona to presume that anyone who commits a NON-dangerous offense listed therein against a minor under fifteen years of age is AUTOMATICALLY GUILTY of a dangerous crime against children, and then Arizona puts the BURDEN ON THE ACCUSED to disprove that the offense was dangerous.

SEXUAL CONDUCT WITH A MINOR

Under Arizona law, if the victim "is in the custody of the state department of corrections, the department of juvenile corrections, a private prison facility or a city or county jail or...is under the supervision of either department or a city or county," that "unlawful sexual conduct with an offender who is under fifteen years of age is a class 2 felony," NOT a dangerous crime against children. A.R.S. §13-1419(A)(C). If the victim was coerced by "an adult probation department employee or juvenile court employee," that "unlawful sexual conduct with a victim who is under fifteen years of age is a class 2 felony," NOT a dangerous crime against children. A.R.S. §13-1409(A), (B).

This both demonstrates that sexual conduct with a minor who is under fifteen years of age is not an inherent dangerous crime against children; and demonstrates that the State intentionally and knowingly misinformed, misled, and deceived the defendant when the State misrepresented to him that the alleged offenses were dangerous because the accusers were under fifteen years of age.

Section 13-1405, A.R.S., is Arizona's Sexual conduct with a minor statute which provides in part that: "A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age." A.R.S. §13-1405(A). "Sexual conduct with a minor who is under fifteen years of age is a class 2 felony and is punishable pursuant to section 13-604.01." A.R.S. §13-1405(B).

Arizona's court of appeals holds that sexual conduct with a minor under fifteen years of age is NOT inherently a dangerous crime against children in explaining that: "sexual conduct with a person under the age of eighteen but at least fifteen years old, is a class six felony, which carries with it a sentencing range from six months imprisonment to 1.5 years; but, sexual conduct with a minor under the age of fifteen is a class 2 felony carrying with it a sentencing range of FOUR to TEN years. §§13-1405(B), 13-702(A)(1), (5). In other words, proof that the victim is under the age of fifteen automatically exposes the defendant to a MAXIMUM prison term over six times greater than what he or she would be exposed to absent such proof. §13-1405(B). Additionally, this fact makes the offense PUNISHABLE as a dangerous crime against children under §13-604.01." State v. Ortega, 220 Ariz. 320, ¶¶25 (App. 2008).

Each statute for sexual conduct with a minor (§13-1405), sexual exploitation of a minor (§13-3553), and sexual assault (§13-1406) is VOID for vagueness because the phrase "PUNISHABLE pursuant to section 13-604.01" contained therein (§§13-1405(B), 13-3553(C), 13-1406(B)) does NOT give fair warning of the dangerous nature of the conduct necessary to authorize sentences under §13-604.01 upon conviction. This is contrary to both A.R.S. §13-101(2) and Ward v. Illinois, 431 U.S. 767, 774 (1977) (explaining

that an unconstitutional statute CANNOT serve as a predicate for a defendant's conviction).

In the instant case, before the trial started the jury was instructed that: "The crime of sexual conduct with a minor requires proof that the defendant intentionally or knowingly engaged in sexual intercourse or oral sexual contact with a person under 18 years of age." (RT:8-12-2010, at 62) However, NO instructions were read to the jury after the close of evidence. This demonstrates that the jury was instructed on the class six felony which carries a sentencing range from six months imprisonment to 1.5 years.

The jury found Defendant guilty on all counts. The trial court sentenced Defendant to a presumptive, aggregate term of thirteen consecutive terms of LIFE imprisonment without a possibility of parole for thirty-five years plus 234 years imprisonment.

The trial court CONCEDES that at sentencing the judge, NOT the jury, determined for each offense that: "This is a class two felony, nonrepetitive but DANGEROUS AGAINST CHILDREN IN THE FIRST DEGREE. This is IN VIOLATION OF...13-604.01." (RT:9-20-2010, at 12) That is, the jury was NEVER informed of the charges and it was the judge who found Defendant guilty. This is contrary to Appendix N.V., 530 U.S. 466, 475-76 (2000) and U.S. v. O'Brien, 130 S.Ct. 2169, 2174 (2010) (All elements of a crime MUST be proved beyond a reasonable doubt TO A JURY, even if referred to as sentencing factors.). This constitutes reversible fundamental error.

B. STATE HABEAS PROCEEDINGS.

On December 21, 2017, Defendant filed in the Yavapai County Superior Court a Petition for Writ of Habeas Corpus after the basis was discovered on and after December 1, 2017. Defendant's claims could NOT have been raised in any previous proceeding, because the basis was NOT then known and could NOT have been known through reasonable diligence, because he had NO reason to suspect that the statutes were VOID for vagueness and that the State had FALSELY misinformed, misled, and deceived him regarding the nature and cause of the charges. Defendant raised four claims that:

1. The State of Arizona imprisoned Defendant, without due process of law, and

the State has brought NO criminal case "at law" (i.e., indictment FAILS to state an offense) against Defendant under the provisions of the Arizona Constitution. This denied Defendant the right to not be deprived of life, liberty, or property without due process of law, and violated Section 4 of Article 2 of the Arizona Constitution, and Amendments 6 and 14 to the U.S. Constitution.

2. The State of Arizona provided Defendant NO constitutional notice of the nature and cause of any charge. This denied Defendant the right to be informed of the nature and cause of the accusation, and violated Section 24 of Article 2 of the Arizona Constitution, and Amendments 6 and 14 to the U.S. Constitution.
3. The State of Arizona provided Defendant NO constitutional counsel. This denied Defendant the right to counsel, and violated Section 24 of Article 2 of the Arizona Constitution, and Amendments 6 and 14 to the U.S. Constitution.
4. The State of Arizona has provided Defendant NO constitutional speedy and public trial, by an impartial jury. This denied Defendant the right to trial by jury, and violated Section 24 of Article 2 of the Arizona Constitution, and Amendments 6 and 14 to the U.S. Constitution.

The Yavapai County Superior Court construed the habeas petition as a Petition for Post-Conviction Relief and dismissed it reasoning that the "claims are precluded because they could have been raised on direct appeal or in a previous petition." (Appendix C) The Arizona court of appeals granted review and denied relief. (Appendix D) Arizona's supreme court subsequently denied review without opinion. (Appendix E)

C. FEDERAL HABEAS PROCEEDINGS.

Defendant commenced the current case by filing his original Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on December 27, 2017 that asserted the Sixth/Fourteenth Amendment claims described above. Defendant argued he is entitled to equitable tolling because of defects in the indictment (FAILS to state an offense) and notice of the charges, denial of right to jury trial, convictions,

obtained under VOID statutes — all previously unknown to Defendant — and the FAILURE to consider his claims would constitute a fundamental miscarriage of justice.

On May 6, 2019, the District Court issued an Order denying the Petition solely on the ground that Defendant's newly discovered claims were procedurally defaulted. (Appendix F)

On June 12, 2020, the Court of Appeals issued a panel opinion affirming the judgment of the District Court. (Appendix G) Defendant's timely motion for reconsideration en banc was denied on August 6, 2020. (Appendix H)

REASONS FOR GRANTING THE PETITION

The unconstitutionality of an underlying statute calls into question the State's jurisdiction and power to prosecute the defendant in the first place. Consequently, review of an unconstitutional statute, which has dire consequences for due process and broad implications for other defendants, should not be frustrated by a procedural bar.

Both the Court of Appeals' and the District Court's dispositive holding — that Defendant's lack of notice of the charges claim, denial of jury trial claim, and convictions obtained under VOID statutes claim was subject to procedural default because Defendant did NOT discover the basis and raise his claims within the one year statute of limitations of "AEDPA" — was contrary to this Court's decisions in both Coleman v. Thompson, 501 U.S. 722 (1991) and N.C.v. Pearce, 395 U.S. 711, 739 (1969) ("Due process... is a guarantee that a man should be tried and convicted ONLY in accordance with VALID laws of the land. If a conviction is NOT valid under these laws, statutory and constitutional, a man has been DENIED due process and has a constitutional right to have the conviction set aside, without being deprived of life, liberty, or property.").

I. Defendant's Federal Void-for-vagueness claim is NOT subject to procedural default, for two related reasons that turn on his Due Process/Equal Protection right to notice of the nature and cause of the charges with regard to that claim.

As discussed above, in the Statement of the Case, because Arizona's relevant statutes contain the phrase "and is punishable pursuant to section 13-604.01"—when they SHOULD CONTAIN THE PHRASE "and [if it was a DANGEROUS OFFENSE] is punishable pursuant to section 13-604.01"—Arizona takes its section 13-604.01 DANGEROUS CRIMES AGAINST CHILDREN sentence enhancement of its DANGEROUS OFFENSES sentence enhancement under section 13-704 and MISAPPLIES section 13-604.01 to NON-dangerous offenses. Arizona then intentionally and knowingly makes a FALSE statement of a material fact to the accused—that the offense was DANGEROUS because the accuser was UNDER FIFTEEN YEARS OF AGE—in order to obtain illegal convictions for dangerous crimes against children based solely upon NON-dangerous offenses.

Defendant agrees that claims may be procedurally defaulted if not raised within the one year limitations of AEDPA, unless the defendant can demonstrate "cause and prejudice to excuse his default" (or show that failure to reach the merits would "result in a fundamental miscarriage of justice"). Coleman v. Thompson, 501 U.S. 722, 750 (1991); Wainwright v. Sykes, 433 U.S. 72, 90 (1977). In this case, however, there are two related reasons why Defendant's VOID-for-vagueness claim was NOT subject to procedural default: (A) there is cause and prejudice to excuse any "adequate" default; and (B) the procedural ground on which the state and federal courts denied Defendant's claim was NOT "adequate."

A. There is CAUSE and PREJUDICE to excuse any procedural default of Defendant's VOID-for-vagueness claims.

As noted above, and set forth in the Statement of the case, Arizona's Section

13-604.01 dangerous crimes against children statute, and statutes for underlying offenses listed therein do NOT provide reasonable notice that a DANGEROUS OFFENSE is necessary to constitute a DANGEROUS CRIME AGAINST CHILDREN and to authorize sentences pursuant to section 13-604.01 upon conviction. This demonstrates "CAUSE". The State made a FALSE statement of a material fact to Defendant that the offenses were DANGEROUS because the accusers were under fifteen years of age. This also demonstrates "CAUSE".

This PREJUDICED the Defendant because he believed the State's FALSE statement to be true and proceeded to trial — where the State SHIFTED THE BURDEN to Defendant to disprove that the alleged offenses were dangerous — where Defendant had NO knowledge of his BURDEN OF DISPROVING that the alleged offenses were dangerous or opportunity for objection to it. That is, Defendant was consequently convicted of dangerous crimes against children by a judge — NOT a jury — based solely upon NON-dangerous offenses. Defendant's claims could NOT have been raised in any previous proceeding, because the basis was NOT then known and could NOT have been known through reasonable diligence, because he had NO reason to suspect that the statutes were VOID for vagueness and that the State had FALSELY misinformed, misled, and deceived him regarding the nature and cause of the charges. This demonstrates "PREJUDICE".

Convicting Defendant for dangerous crimes against children under VOID State statutes MISAPPLIED to NON-dangerous offenses results in a fundamental miscarriage of justice. This constitutes cause and prejudice for any procedural default of the Defendant's federal void-for-vagueness claim that the indictment FAILS to state an offense.

B. The procedural ground on which the state and federal courts denied Defendant's claim was NOT "adequate".

As discussed above, NOT only did Arizona deny Defendant his due process rights to notice of the specific charge and to a jury trial, Arizona convicted Defendant

under VOID State statutes that violate federal constitutional law and did NOT reach the alleged conduct with which the Defendant was charged. This is contrary to this Court's decisions in N.C. v. Pearce, 395 U.S. 711, 739 (1969), and Menna v. N.Y., 423 U.S. 61, 63 (1975) ("[P]lea of guilty to a charge does NOT WAIVE a claim that - judged on its face - the CHARGE IS ONE WHICH THE STATE MAY NOT CONSTITUTIONALLY PROSECUTE.").

It is well settled that the unconstitutionality of a criminal statute implicates the State's "POWER to 'constitutionally prosecute' a defendant. Class v. U.S., 138 S.Ct. 798, 805 (2018). If the statute pursuant to which a defendant was convicted is "repugnant to the constitution," the "prosecution against him has NOTHING upon which to rest, and the ENTIRE PROCEEDING AGAINST HIM IS A NULLITY." Ex parte Royall, 117 U.S. 241, 248 (1886). See Ex parte Yarbrough, 110 U.S. 651, 654 (1884) ("If the law which defines the offense and prescribes its punishment is VOID, the COURT WAS WITHOUT JURISDICTION, and the PRISONERS MUST BE DISCHARGED."); also U.S. v. Stevens, 559 U.S. 460, 480 (2010) ("We would NOT uphold an unconstitutional statute merely because the Government promised to use it responsibly."); and McDonnelly v. U.S., 136 S.Ct. 2355, 2372-73 (2016) ("We CANNOT construe a criminal statute on the assumption that the Government will use it responsibly.").

"[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, CAN NEVER BE FORFEITED OR WAIVED." U.S. v. Cotton, 535 U.S. 625, 630 (2002).

Because the State lacked JURISDICTION and POWER to prosecute Defendant in the first instance, the state and federal courts' preclusion ruling therefore is NOT an "adequate" ground for procedural-default purposes. Arizona's law violates due process plain and simple. The court's conclusions that Defendant had either forfeited or waived his due process rights to be tried and convicted ONLY in accordance with valid laws are not just erroneous but also unreasonable.

Defendant's Petition for Writ of Habeas Corpus SHOULD HAVE BEEN GRANTED.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joe Cervantes Jr.

Date: 11-4-2020