No. 18-6170

United States Court of Appeals

FOR THE FOURTH CIRCUIT

THOMAS FRANKLIN BOWLING,
Petitioner-Appellant,

v.

DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Virginia

PETITION FOR REHEARING AND REHEARING EN BANC OF DENIAL OF MOTION TO VACATE OPINION AND JUDGMENT

Statement of Purpose

Appellant Thomas Bowling respectfully requests that this Court grant rehearing or rehearing en banc of the panel's May 24, 2019 order denying the motion to vacate the April 2, 2019 opinion and to remand to the district court with instructions to dismiss the case as moot. In compliance with Local Rule 40(b), counsel asserts that the denial of the motion to vacate involves a question of exceptional importance because it addresses the extent to which published opinions that are rendered moot before a petition for a writ of certiorari can be sought should remain binding circuit precedent.

Procedural Background

Appellant Thomas Bowling alleged in his complaint that the Virginia Parole Board failed to consider the mitigating qualities of his youth at the time of the offense when it denied him parole. He requested that the Board be required to consider the mitigating qualities of youthfulness at the time of the offense in deciding whether to grant him parole. This Court granted a certificate of appealability on the issue of "[w]hether the district court erred in denying Bowling's claim that the Virginia Parole Board's [parole denial] decisions result in

violation of the Eighth and Fourteenth Amendments" and appointed undersigned counsel. This precise issue had not previously been considered by this Court or by any other United States Court of Appeals.

On April 2, 2019, after briefing and oral argument, this Court issued a published opinion answering that question in the negative and holding that the protections provided by the Supreme Court's Eighth Amendment juvenile sentencing cases "have not yet reached a juvenile offender who has and will continue to receive parole consideration." *Bowling v. Director, Virginia Dept. of Corrections*, 920 F.3d 192, 198 (4th Cir. 2019). Four weeks later, on April 30, 2019, the Parole Board granted Mr. Bowling parole, thus rendering his case moot.

Because Mr. Bowling did not have an opportunity to file a petition for a writ of certiorari before the case was rendered moot by the unilateral action of the Commonwealth, he filed an unopposed motion with this Court to vacate the published opinion and remand the case to the district court with directions to dismiss it as moot. *See*, *e.g.*, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (noting the general practice is to vacate the opinion when a case has become moot before

the Supreme Court has a chance to review it). Without explanation, the panel denied that unopposed motion on May 24, 2019. Mr. Bowling now seeks rehearing or rehearing en banc of that denial.

Argument in Support of Petition

Mr. Bowling asserted, and the Commonwealth has not disagreed, that this case became moot when Mr. Bowling was granted parole on April 30, 2019. A petition for a writ of certiorari would have been timely as long as it was filed by July 1, 2019, and Mr. Bowling planned to file such a petition. The panel's decision to leave in place a published, binding precedent that Mr. Bowling can no longer bring before the Supreme Court runs contrary to the well-established general practice of vacating the judgment and having the case dismissed as moot. *See*, *e.g.*, *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (noting the "established practice" of vacating judgments that have been rendered moot before the time for Supreme Court review has passed); *Munsingwear, Inc.*, 340 U.S. at 39 (1950) (citing the long history of cases handled in that way); *cf. Catawba Riverkeeper Found. v. N.C. Dep't of Transp.*, 843 F.3d 583, 590 (4th Cir. 2016) (noting this Court's

"customary practice" vacating the moot aspects of a lower court's judgment).

This case falls squarely within the general principle of *Munsingwear* because the "twin considerations of fault and public interest" favor vacatur. *See Catawba Riverkeeper Found.*, 843 F.3d at 590. Turning first to considerations of fault, Mr. Bowling had no control of the process that rendered his case moot. The Commonwealth's decision to grant parole to Mr. Bowling made this case moot. And it is "established practice" to vacate a judgment and "remand with a direction to dismiss" when a party who prevailed in the lower court takes unilateral action precluding further appellate review. *See Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (internal citation omitted). Mr. Bowling of course agrees with, and appreciates, the Parole Board's decision to grant him parole. But it was not a decision within his control, and it would "certainly be a strange doctrine that would permit a [party] to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment." *Id.* (internal quotation marks omitted).

Second, the public interest weighs in favor of vacatur. The grant of parole by the Board mooted the only issues raised in the case and addressed by this Court—whether the Eighth and Fourteenth Amendments require the Board to consider his youth at the time of the offense. And although Mr. Bowling fully intended to petition for certiorari, the four weeks between the issuance of the opinion and the grant of parole did not permit him an opportunity to do so. As the Supreme Court has recognized, the fact that a case has become moot prior to certiorari does not limit a federal court's discretion to vacate the judgment. *See id*. at 1793 (listing cases subject to vacatur although the case became moot prior to the petition for certiorari being filed). This is particularly so because even the Commonwealth has not argued that the opinion should remain binding precedent given that the case became moot before a petition for a writ of certiorari could be filed.

The Supreme Court could, of course, correct this Court's error leaving in place a judgment and opinion that became moot before the Court could consider the petition. And it has done so previously. *Azar*, 138 S. Ct. at 1792–93. But the unique circumstances of this case—a binding published opinion in a case presenting a novel issue that

became moot through the unilateral actions of the prevailing party less than a month after the opinion was issued—make it appropriate for this Court to grant rehearing and set forth the standards that should guide the vacatur of published opinions that become moot under these circumstances.

Accordingly, Mr. Bowling respectfully requests that this Court grant the petition for rehearing or rehearing en banc, vacate the judgment and opinion of the panel, and remand to the district court with instructions to vacate its opinion and judgment and dismiss the case as moot.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Fed. R. App. P. 40(b)(1) because it contains 1090 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f).

Respectfully Submitted,

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June 7, 2019

CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on June 7, 2019, a copy of Appellant's Petition for Rehearing and Rehearing En Banc was served via the Court's ECF system on:

Toby Heytens and Brittany Jones, Virginia Office of the Attorney General.

Respectfully Submitted,

/s/ Erica Hashimoto

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