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

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. BOWLING'S EIGHTH AND FOURTEENTH AMENDMENT CLAIMS ARE COGNIZABLE UNDER BOTH SECTION 1983 AND SECTION 2254.

Bowling's challenge to the Board's denial of his 2016 parole application is cognizable both as an action under 42 U.S.C. § 1983 and as a 28 U.S.C. § 2254 petition for a writ of habeas corpus. He has also met the procedural requirements to file a claim under either statute by exhausting state remedies prior to filing this case and by bringing his habeas petition in a timely manner.

Though the State raises procedural objections to construing Bowling's complaint as a Section 1983 action, it agrees that "the Court has specifically held that challenges to a State's parole procedures may be raised under Section 1983." Appellee's Br. 16; *see also Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005) (holding that challenges to parole procedures—where the remedy sought would be a new parole hearing rather than speedier release—fall outside the core of habeas corpus and are cognizable under Section 1983). The State further recognizes that if Section 1983 provides the more appropriate cause of action, this Court may construe Bowling's habeas petition as a Section 1983 action. *See* Appellee's Br. 19. In fact, this Court has done precisely that—treated a

habeas petition as a Section 1983 action—in a case heavily relied on by the State in its brief. *See Strader v. Troy*, 571 F.2d 1263, 1269 (4th Cir. 1978); Appellee's Br. 15.

The State's only argument against construing Bowling's petition as a Section 1983 claim runs as follows: It would not be in Bowling's interest to do so because the record does not demonstrate that he administratively exhausted his constitutional challenges with the Board so his case would be dismissed. Appellee's Br. 19–21. Not so. Bowling exhausted the available internal prison remedies prior to filing his claim. Under the Virginia Parole Board rules, "[u]nfavorable parole . . . decisions of the Board may be appealed to the Board Chairman within 60 days of the decision date." VA. PAROLE BD., POLICY MANUAL art. 2.K. 1 (2006), https://vpb.virginia.gov/files/1107/vpb-policy-manual.pdf [https://perma.cc/LF87-P4PL]. Bowling was denied parole on April 21, 2016, and timely appealed the decision to the Board Chair on June 20, 2016—sixty days after the decision date. J.A. 54; Appellant's Mot. to Suppl. The Board Chair, Karen Brown, denied Bowling's appeal on October 4, 2016. Appellant's Mot. to Suppl.

To be sure, Bowling did not file the record of his Board appeal with the district court.[1] But through no fault of his own. Citing *Wilkinson* in its motion to dismiss, the State argued that Bowling's "petition does not present allegations upon which habeas relief may be granted." J.A. 69. The State had every reason to know that the district court could (and should) construe Bowling's *pro se* complaint as raising a Section 1983 claim (the obvious alternative to Section 2254). But the State never mentioned administrative exhaustion before the district court.

Because Bowling exhausted his internal prison remedies, there is no procedural barrier preventing this Court from construing his petition as a Section 1983 claim. Rather, this Court is under an obligation to "ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion . . . in order to avoid an unnecessary dismissal." *Castro v. United States*, 540 U.S. 375, 381 (2003); *see also Carter v. Fleming*, 879 F.3d 132, 137 (4th Cir. 2018) ("[W]hen a plaintiff raises a civil rights issue and files a complaint *pro se*, the court must construe his pleadings liberally.").

[1] Counsel has filed an unopposed Motion to Supplement the Record with documentation of Bowling's appeal.

Though Bowling's petition may be construed as a Section 1983 claim, his claims are also cognizable under Section 2254. Habeas is the traditional and appropriate avenue for Bowling's allegations that the Board's unconstitutional parole procedures have resulted in the State continuing to hold him "in custody in violation of the Constitution." *See* 28 U.S.C. § 2254(a); J.A. 9–12. Bowling's claims may not strike at the "*core* of habeas corpus." *Wilkinson*, 544 U.S. at 82 (emphasis added). But that does not mean that they fall outside the generous ambit of habeas corpus altogether.

The Supreme Court's opinion in *Wilkinson* is not to the contrary. 544 U.S. 74 (2005). *Wilkinson* explained the relationship between Section 1983 and Section 2254 remedies. *Id.* at 78–82. In doing so, the Court carved out one category of claims where Section 1983 relief was barred: claims at the "core of habeas corpus." *Id.* at 79. Outside this "core," state prisoners have a Section 1983 claim to challenge unconstitutional state procedures that would "not necessarily imply the invalidity of confinement or shorten its duration." *Id.* at 82. Such claims "*may* be brought under § 1983." *Id.* at 76 (emphasis added). But nothing in *Wilkinson* addressed whether those claims could also be cognizable

under Section 2254, and this Court has never held that Section 1983 is the only remedy for violations that lie outside the core of habeas.[2] Though Bowling certainly *could* have filed his claims under Section 1983, the availability of this cause of action did not simultaneously close the door to Bowling's habeas petition.[3]

If allowed to proceed under habeas, Bowling's petition was timely filed within the one-year period of limitation prescribed by 28 U.S.C. § 2244(d)(1). Under Section 2244(d)(1)(D), the "factual predicate" of Bowling's claim is *not*, as the State suggests, when the Virginia Parole Board's procedures were last updated. *See* Appellee's Br. 18. The mere existence of the Board's unconstitutional procedures is not grounds for a habeas petition. Rather, the "factual predicate" of Bowling's claim arose

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[2] The State relies on this Court's 1978 opinion in *Strader v. Troy*, 571 F.2d 1263 (4th Cir. 1978) to argue that this Court requires inmates challenging unconstitutional parole procedures to sue under Section 1983. Appellee's Br. 15. But the *Strader* court viewed itself as bound by *Preiser v. Rodriguez*, 411 U.S. 475 (1973). *See Strader v. Troy*, 571 F.2d at 1269. The Court in *Wilkinson* clarified *Preiser*, holding only that these claims "*may* be brought under § 1983." 544 U.S. at 76 (emphasis added).

[3] Two circuits have concluded that Section 1983 and Section 2254 remedies are mutually exclusive, *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 865 (11th Cir. 2017); *Nettles v. Grounds*, 830 F.3d 922, 927 (9th Cir. 2016), but no court has ruled that there is no federal remedy for unconstitutional parole proceedings.

only once the Virginia Parole Board *applied* these unconstitutional procedures to Bowling in 2016. In *Wade v. Robinson*, for example, this Court held that the "factual predicate" of a Virginia inmate's habeas petition was the Virginia Parole Board's revocation of his parole, not the mere promulgation of the Board's parole revocation procedures. 327 F.3d 328, 333 (4th Cir. 2003). Other circuits have reached this same conclusion in the specific context of parole denials. *See, e.g.*, *Day v. Hall*, 528 F.3d 1315, 1316–17 (11th Cir. 2008); *McAleese v. Brennan*, 483 F.3d 206, 217 (3d Cir. 2007).

To be sure, the Virginia Parole Board has applied the same unconstitutional procedures to Bowling every year since 2005. But Bowling's failures to challenge his parole denials from 2005 through 2015 are irrelevant to the timeliness of this petition. Each parole denial represents a new application of the Board's unconstitutional procedures and thus a new "factual predicate" giving rise to a new claim. *See McAleese*, 483 F.3d at 219 (holding that "[e]ach denial of parole was a discrete act" and therefore a challenge to a particular denial must be filed "within the applicable limitations periods with respect to [that particular] act.")

Because Bowling challenges his 2016 parole denial, the one-year limitation period of 28 U.S.C. § 2244(d)(1) began to run on the date Bowling's internal appeal of his parole denial was rejected: October 4, 2016.[4] *See Wade*, 327 F.3d at 333 (holding that under 28 U.S.C. § 2244(d)(1)(D) the limitation period began to run on the date the parole board's decision became final); *Redd v. McGrath*, 343 F.3d 1077, 1082 (9th Cir. 2003) (holding that under § 2244(d)(1)(D) the limitation period began to run on the date the parole board denied administrative appeal). Bowling therefore had until October 4, 2017, to file his claim, and timely filed his habeas petition in the U.S. District Court for the Western District of Virginia on April 4, 2017. J.A. 20. Bowling's petition is thus cognizable under both Section 1983 and Section 2254.

II. BOWLING PLAUSIBLY ALLEGED THAT THE BOARD VIOLATED HIS EIGHTH AMENDMENT RIGHTS.

The State offers three arguments that Bowling does not have an Eighth Amendment right to have the Board consider his diminished culpability for his crime and his demonstrated maturity and

[4] Even if the one-year limitation period began to run on the date the parole denial letter was issued—April 21, 2016—as opposed to the date on which Bowling's internal appeal was denied, his habeas petition was still timely.

rehabilitation while in prison. First, it argues that *Graham* and *Miller* do not apply to Bowling. Appellee's Br. 22–25. Second, it argues that the Eighth Amendment protections of *Graham* and *Miller* apply only to sentencing decisions and not to discretionary parole determinations. *Id.* at 25–27. Third, it argues that the Board considered the mitigating qualities of Bowling's youth when it denied him parole. *Id.* at 32. The flaws of each argument are addressed in turn.[5]

A. *Graham* and *Miller*'s Eighth Amendment protections apply to Bowling.

The State asserts that because Bowling "was convicted of capital murder rather than a nonhomicide crime" and "was not sentenced to life without parole," *Graham* and *Miller* do not apply to him. Appellee's Br. 24–25 (internal quotation marks omitted). It is wrong on both points. As

[5] The State asserts that Bowling's *pro se* habeas petition "argues that the Parole Board's reliance on the nature of his offense violates" the Eighth Amendment. Appellee's Br. 33. This is incorrect. Nowhere in Bowling's petition did he claim that the Eighth Amendment prohibits the Board from considering the nature of his crime at all. Instead, he asserts in his complaint—as counsel did in the opening brief—that the Eighth Amendment prohibits the Board from relying *solely* on the nature of his offense without "properly account[ing] for the significance of his status as a juvenile offender" including his "diminished culpability" and his "increased chances of positive change . . . as [he] matures into adulthood." J.A. 33; Appellant's Br. 20–21.

to the significance of his homicide conviction, the State argues that "[a] juvenile offender [like Bowling] who is convicted of capital murder has no categorical right to an opportunity to obtain release under the Eighth Amendment." *Id.* at 21–22. Contrary to the State's suggestion, Bowling has never claimed that juvenile homicide offenders have a categorical Eighth Amendment right to a sentence that provides an opportunity for release. Nor could he. *Miller* holds that juvenile homicide offenders *can* be sentenced to life without parole if they are deemed incorrigible. *See Miller v. Alabama*, 567 U.S. 460, 479–80 (2012). Thus, the State is correct that Bowling had no categorical right to a parole-eligible sentence.

But the State is wrong that *Graham* is wholly inapplicable to Bowling because he is a juvenile homicide offender. And its claim that "*Miller*'s holding simply does not apply" to Bowling because he "was not sentenced to life without parole" is similarly mistaken. Appellee's Br. 24–25 (internal quotation marks omitted). *Miller* explicitly recognized that *Graham*'s reasoning—and its insistence that "youth matters in determining the appropriateness of a lifetime of incarceration"—applies with equal force to all juvenile offenders, including those who commit

homicide. *See Miller*, 567 U.S. at 473. For this reason, *Miller* held that a juvenile homicide offender cannot be sentenced to spend the rest of his life in prison unless the sentencing court considers the "offender's youth and attendant characteristics" and finds the juvenile incorrigible. *Id.* at 483; *accord* Appellee's Br. 24. The State failed to make any such showing at Bowling's sentencing, and he received a parole-eligible sentence. *See* Appellant's Br. 21. Once the sentencing court deemed Bowling eligible for release on parole, *Graham* and *Miller* both require that this opportunity to obtain release be "meaningful" and consider the mitigating qualities of youth such as "demonstrated maturity and rehabilitation." *See id.* That is the crux of Bowling's argument. *See id.* at 18–21. And it is never addressed in the State's brief.

B. *Graham* and *Miller*'s Eighth Amendment protections require the Virginia Parole Board to consider Bowling's diminished culpability for his crime and his demonstrated rehabilitation while in prison before denying parole.

The State next argues that even if *Graham* and *Miller*'s Eighth Amendment protections apply to Bowling, they apply only to sentencings and not to "back-end parole determinations." Appellee's Br. 26. This argument cannot be correct. Indeed, the State fails to cite a single case—state or federal—that agrees with its position. In the State's view, a

parole board is allowed to circumvent the Constitution by doing precisely what the Eighth Amendment forbids a sentencing court from doing: keeping a juvenile homicide offender in prison for the rest of his life without considering the "offender's youth and attendant characteristics." *See Miller*, 567 U.S. at 483; Appellant's Br. 21. But as the courts to have considered this question have recognized, parole boards cannot be permitted to do what the Eighth Amendment forbids. *See* Appellant's Br. 22 (citing cases). In the face of the cases cited in Bowling's opening brief that have applied *Graham* and *Miller* to parole determinations, and with no cases of its own to support its point, the State resorts to pointing out minor factual differences with no explanation why those differences matter. *See* Appellee's Br. 27–28 n.5.

The State also argues that even if *Miller* applies to parole determinations, "Bowling still got what Miller requires—a discretionary evaluation." Appellee's Br. 26. The State misunderstands *Miller*. Of course, *Miller* requires a discretionary, rather than mandatory, sentencing scheme for juvenile homicide offenders. *See Miller*, 567 U.S. at 479–80. But it does more than just require discretionary consideration. It also prescribes a strict process that these discretionary

evaluations must follow. *See* Appellant's Br. 19–20; *Miller*, 567 U.S. at 483. Just as a sentencing court must consider youth and its attendant characteristics before sentencing a juvenile homicide offender to life without parole, so too the Virginia Parole Board must consider those same characteristics before denying Bowling parole.

C. The district court is the proper forum for consideration of Bowling's Eighth Amendment claim on the merits.

The State next argues that this Court should affirm because "Bowling has and will continue to receive the consideration he seeks." Appellee's Br. 32. Maybe. But maybe not. There simply is not sufficient information in the record to determine the merits of Bowling's Eighth Amendment claim. The district court dismissed this case. J.A. 119. That means the only question on appeal is whether Bowling has *plausibly alleged* that the Virginia Parole Board failed to consider his diminished culpability for his crime and demonstrated rehabilitation while in prison before denying parole. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Juniper v. Zook*, 876 F.3d 551, 564 (4th Cir. 2017) (applying *Twombly*'s plausible allegation standard to dismissal of habeas case); *see also* Appellant's Br. 17. He did. Bowling thus is entitled to a reversal and remand.

Bowling's claim plausibly alleges that the Virginia Parole Board did not consider his youth and its attendant characteristics during his parole review. He provided detailed facts supporting his allegations, and he attached the Board's policies and parole decision letters as further evidence. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). Bowling's *pro se* pleadings in the district court set forth the mitigating facts surrounding his crime that he alleges the Board should have considered. Two forty-year-old men planned the robbery that he committed and that led to the homicide; those two men convinced Bowling to carry out the robbery; and at the time of the offense, Bowling suffered from underdeveloped problem-solving skills and lacked abstract thinking capability. J.A. 24–25. Bowling also set forth facts that demonstrate his rehabilitation and growth while in prison, including his impeccable institutional record, his steady employment during incarceration, and his continued participation in vocational and educational programs. J.A. 34.

In addition, Bowling's allegations are sufficient to support his claim that the Board did not consider this mitigating evidence in denying him parole. For instance, he alleges that the Parole Decision Factors "all center around the violent nature of the underlying crime" and that "there is absolutely no indication that the [Board] evaluates the parole prospects of juvenile offenders any differently than it evaluates the prospects of adult offenders who have committed similar crimes." J.A. 28, 32. Bowling also provided his twelve parole denial letters and explained how they "give no indication . . . that Mr. Bowling's status as a juvenile offender was considered in connection with the parole determination." J.A. 33. Based on the factual content of Bowling's petition, the district court could have reasonably inferred that the Board's parole procedures are constitutionally deficient.

The State argues that the Board's policies and its 2016 parole denial letter demonstrate that it did consider Bowling's youth before denying him parole. Appellee's Br. 29–32. But the policies at most *permit* the Board to consider Bowling's diminished culpability and demonstrated maturation and provide no assurance that it actually did consider them. *See infra* Section III.B.2. And the Board's statement in its 2016 parole

denial letter that it "considered" the Parole Decision Factors does not necessarily mean that it did so. This is particularly true because Bowling alleged (and provided evidence) that the Board does not always consider what it says it has considered. In 2013, the Board told Bowling it was denying him parole in part because he had "poor institutional adjustment and/or record of institutional infractions." *See* Appellant's Br. 27–28. This was not so. The truth was (and still is) that Bowling has not had a single disciplinary infraction since February 2003, as he explained to the Board in his appeal. J.A. 26–27.

Bowling has plausibly alleged that the Board failed to consider the mitigating qualities associated with his status as a juvenile offender. This Court should reverse the judgment of the district court and remand Bowling's Eighth Amendment claim so that Bowling can discover what the Board considered (or did not consider) during his 2016 parole review.

III. THE VIRGINIA PAROLE BOARD ARBITRARILY DENIED BOWLING PAROLE WITHOUT CONSIDERING THE MITIGATING QUALITIES ASSOCIATED WITH HIS STATUS AS A JUVENILE OFFENDER.

The State does not disagree that if Bowling has a constitutional due process liberty interest in an opportunity for release on parole, the Board must consider his status as a juvenile offender while making its parole

decision. Nor does it deny that Bowling has a statutory liberty interest in fair parole proceedings that entitles him to protection under the Due Process Clause. Rather, the State rests its opposition on two arguments: (1) under *Greenholtz*, Bowling has no constitutional liberty interest protected by the Fourteenth Amendment; and (2) even if he does have a constitutional or statutory liberty interest, "Virginia's parole guidelines *do* account for age, maturation, and rehabilitation" and provide sufficient procedures under *Franklin*. Appellee's Br. 37–38. The State is wrong on both points.

A. Bowling has both constitutional and statutory liberty interests.

In the opening brief, Bowling argued that he had a constitutional and a statutory liberty interest, both of which give rise to heightened procedural protections. Appellant's Br. 31. The State agrees that Virginia law provides Bowling with a statutory liberty interest in being fairly considered for parole. *See Franklin v. Shields*, 569 F.2d 784, 797 (4th Cir. 1977); Appellee's Br. 37. It argues only that Bowling has no constitutional liberty interest. Appellee's Br. 37.

Contrary to the one sentence in the State's brief on this issue, Bowling's constitutional liberty interest is not foreclosed by *Greenholtz v.*

Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979). As explained in Bowling's opening brief, *Greenholtz*'s holding that there is no constitutional liberty interest in parole rested on the states' discretion to afford (or not afford) *adult* offenders a system of parole. Appellant's Br. 33–34. But states do not have unfettered discretion in affording a system of parole to juvenile offenders sentenced to parole-eligible life terms. *See id.*; *see also Miller*, 567 U.S. at 479; *Graham v. Florida*, 560 U.S. 48, 75 (2010). The State acknowledges that some juvenile offenders may be exempt from *Greenholtz*'s holding denying adult offenders a "constitutional or inherent right" to parole. *See* Appellee's Br. 37. But it claims that even if this is true for "some juveniles," Bowling "has no categorical entitlement to parole" and thus no constitutional liberty interest. *Id.*

The State misunderstands Bowling's argument. Bowling does not argue that he (or any other juvenile offender, for that matter) is categorically entitled to parole. Instead he argues that he has a constitutional liberty interest in having a meaningful opportunity to obtain parole—and this interest entitles him to protection against arbitrary decision-making by the State. *See* Appellant's Br. 33–34.

Under the Supreme Court's decisions in *Graham* and *Miller*, all juvenile offenders (except the narrow category of incorrigible homicide offenders sentenced to life without parole) are entitled to a "meaningful opportunity to obtain release." *Miller*, 567 U.S. at 479; *Graham*, 560 U.S. at 75. Bowling's sentence provides an opportunity for parole. That sentence indicates that he does not fall within the narrow category of incorrigible homicide offenders. See Appellant's Br. 21. Though not all juvenile offenders possess a liberty interest in obtaining parole, Bowling's "life with parole" sentence places him within the category of juveniles who do not fall under *Greenholtz*'s holding.

B. The State's parole procedures do not protect against arbitrary deprivations of Bowling's liberty interests.

1. *Juvenile offenders' interest in fair parole proceedings requires procedures in addition to those required in* Franklin.

The State correctly observes that Bowling does not allege a violation of any of the parole procedures required by this Court in *Franklin* for adult offenders. *See* Appellee's Br. 38. But the State fails to respond to the core of Bowling's statutory liberty interest argument: that as a juvenile offender, his statutory right to fair parole proceedings

demands *additional* procedural protections beyond what this Court outlined in *Franklin*. Appellant's Br. 37–39.

As this Court has recognized, a statutory liberty interest in parole means the State must adopt certain procedures to ensure that the liberty interest is protected. *Franklin*, 569 F.2d at 791. Juvenile offenders require additional procedures to protect that liberty interest. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (observing that procedural requirements of due process are "flexible" and must be tailored "as the particular situation demands"). The Supreme Court often requires States to afford juveniles greater procedural safeguards than adults, even when the same right is at stake. *See* Appellant's Br. 38–39 (citing *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (Fifth Amendment); *Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth Amendment); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (Fifth Amendment)).

Bowling does not ask "this Court to change the way the members of the Parole Board interpret the circumstances of his case." Appellee's Br. 38. Rather, he argues that additional procedures are necessary to ensure that the Board considers the circumstances of all juvenile offenders' cases fairly and reasonably—accounting for juveniles' diminished culpability,

lack of maturity, and susceptibility to negative influences. Appellant's Br. 37–38. The State has provided no reason that *Franklin*'s prescribed procedures for adult offenders adequately protect a *juvenile* offender's statutory interest in parole from arbitrary decision-making.

2. *The State's failure to ensure that the Board considers the mitigating factors of youth arbitrarily deprives Bowling of his liberty interests.*

The State asserts that Virginia's parole guidelines account for Bowling's "age, maturation, and rehabilitation." Appellee's Br. 37. But the State fails to address Bowling's central due process argument: that the State's use of the same factors for juvenile and adult offenders encourages arbitrary decision-making. Appellant's Br. 35–36. Because Bowling has statutory and constitutional liberty interests at stake, the Due Process Clause requires the Board to non-arbitrarily evaluate his application. *See Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). In order to avoid arbitrariness, the Board must assess accurate facts and make reasonable decisions about whether Bowling has served sufficient time in prison and whether he poses a continuing threat to the community. *See Franklin*, 569 F.2d at 791 (noting that the State "must be concerned that parole be neither granted nor denied on the basis of inaccurate information or erroneous evaluation"). Using the same factors for

juvenile and adult offenders encourages arbitrariness because the Board may identically evaluate juveniles and adults with similar files, without accounting for the mitigating qualities of juvenile offenders' youth.

The State argues that (1) the existing Parole Decision Factors account for a juvenile offender's diminished culpability and demonstrated maturity, and (2) the Board is *required* to consider all fourteen factors during parole review. *See* Appellee's Br. 29–32. Although the Board *may* account for these mitigating qualities under the State's standard parole factors, there is simply nothing in the guidelines that requires it to do so. The State points to six words in the Board's policy manual—the Board "*is* guided by the following factors" in making parole determinations—that it says requires the Board to consider each of these factors. Appellee's Br. 30 (emphasis added by Appellee). It defies logic to suggest that the words "is guided by" in any way *require* the Board to consider all of the Parole Decision Factors when making a parole release decision. Nor does the State try to explain how those words require such action by the Board.

The State points to three parole factors that it claims require consideration of the mitigating factors of youth: the "facts and

circumstances" of the inmate's offense, "changes in motivation and behavior," and the inmate's institutional adjustment. Appellee's Br. 29. Although the Board may account for the mitigating factors of Bowling's youth under these cited factors, nothing written in these factors specifically addresses juvenile offenders' mitigating qualities or requires a different assessment for juvenile offenders. Even the cases that the State cites to demonstrate that the Board assesses these mitigating factors speak of such consideration in discretionary, rather than mandatory, terms. *See, e.g.*, *Vasquez v. Commonwealth*, 781 S.E.2d 920, 934–35 (Va. 2016) (Mims, J. concurring) (observing that Virginia's Policy Manual factors "certainly *allow* the Board to consider age, maturity and rehabilitation as *Graham* instructs" (emphasis added)).

The State next argues that Virginia and Supreme Court cases interpret Virginia law to require the Board to consider Bowling's diminished culpability and demonstrated rehabilitation. Appellee's Br. 32. It asserts that a Virginia Supreme Court case—*Angel v. Commonwealth*—holds that the Parole Decision Factors "account[] for 'demonstrated maturity and rehabilitation.'" Appellee's Br. 30 (citing *Angel v. Commonwealth*, 704 S.E.2d 386, 401–02 (Va. 2011)). *Angel* does

not hold that. *Angel* was a direct appeal of a life without parole sentence imposed on a juvenile non-homicide offender. *See Angel v. Commonwealth*, 704 S.E.2d 386, 391 (Va. 2011). The Virginia Supreme Court held that because Angel was eligible for geriatric parole release when he reached the age of 60, his sentence was not a life-without-parole sentence and thus complied with *Graham*'s meaningful opportunity requirement. *Id.* at 402 (citing VA. CODE ANN. § 53.1-40.01). But the court only addressed the constitutionality of Angel's *sentence* in light of the geriatric parole statute. *See id.* *Angel* says nothing about the constitutionality of Virginia's parole consideration process because that question was not before the court.

The State makes the same claim about a United States Supreme Court case that denied habeas relief on an argument nearly identical to that raised in *Angel*. *See* Appellee's Br. 31 (citing *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1727 (2017)). LeBlanc's claim challenging the constitutionality of his life without parole sentence for a non-homicide offense under *Graham* was rejected by the Virginia courts under *Angel*'s geriatric release holding. *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1727–28 (2017). On habeas review, this Court held that *Angel* was an

"unreasonable application" of *Graham*. *See LeBlanc v. Mathena*, 831 F.3d 256, 268 (4th Cir. 2016).

The Supreme Court disagreed, explaining that for habeas relief to be proper under AEDPA, a state court's ruling must be "not merely wrong" but rather "so lacking in justification" that the court's error is "beyond any possibility for fairminded disagreement." *LeBlanc*, 137 S. Ct. at 1728 (internal citation omitted). Noting that "*Graham* did not decide that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment because that question was not presented," the Court held that even if *Angel* was wrong, its error did not meet AEDPA's "demanding standard" for habeas relief. *Id.* at 1727–29 (citing 28 U.S.C. § 2254(d)(1)). To the extent the Supreme Court discussed Virginia's Parole Decision Factors, it did so only in the context of whether it was "objectively unreasonable for the state court to conclude" that the possibility of geriatric parole release satisfied *Graham*. *See id.* at 1729. The Court made clear that it "expresses no view on the merits of the underlying Eighth Amendment claim" nor does it "suggest or imply that the underlying issue, if presented on direct review, would be insubstantial." *Id.* (internal citations and punctuation omitted).

The Board's factors, as written, do not provide adequate procedural protections to ensure Bowling's parole proceedings are free from arbitrary decision-making. And even if consideration of the mitigating factors of a juvenile offender's youth are incorporated in the Board's evaluation of juvenile offenders, an additional factor must be added to the Board's Policy Manual to explicitly require this. It is not enough for the State to assure this Court that the fundamental procedural protections required by the Fourteenth Amendment are incorporated in its standard parole factors. In order to determine that the Board has "properly afforded" Bowling and all juvenile offenders a fair consideration of the mitigating factors of their youth, the Board should be required *in writing* to consider these factors before denying parole applications. *See Franklin*, 569 F.2d at 797 (noting that without written requirements, "it is impossible to determine whether [the Board] has properly afforded the prisoner his statutory right to be fairly considered for parole").

3. *Bowling is entitled to a remand to determine whether the Board weighed the mitigating factors of his youth during parole review.*

Regardless of whether Virginia's parole factors generally require consideration of "age, maturation, and rehabilitation," Bowling is at least

entitled to a remand because there is no evidence in the record that the Board considered such mitigating factors before denying him parole. *See supra* Section II.C.; Appellant's Br. 36.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order and remand for consideration of the Eighth Amendment issue on the merits. This Court should also reverse the district court and hold that the Board deprived Bowling of his Fourteenth Amendment rights or, at minimum, remand this issue for further factual development.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5231 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Respectfully Submitted,

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December 10, 2018

CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on December 10, 2018, a copy of Appellant's Brief and Joint Appendix was served via the Court's ECF system on: Toby J. Heytens and Matthew R. McGuire.

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