No. 18-6170

IN THE 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 U.S. District Court
for the Eastern District of Virginia

BRIEF OF RESPONDENT-APPELLEE

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November 26, 2018

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Director, Virginia Department of Corrections,
(name of party/amicus)

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(appellant/appellee/petitioner/respondent/amicus/intervenor)

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Matthew R. McGuire Date: 9/5/2018

Counsel for: Defendant-Appellee

CERTIFICATE OF SERVICE

****

I certify that on 9/5/2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Matthew R. McGuire
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

This case is best understood in terms of what it is not. This case does not involve a juvenile offender who was convicted of a non-homicide offense. It does not involve a juvenile offender who was sentenced to life in prison without the possibility of parole. Indeed, it does not even involve a juvenile offender who challenges the constitutionality of the sentence that was handed down when he was still a juvenile. Instead, this case is about a now-adult inmate, convicted of homicide and sentenced to life *with* the possibility of parole, who challenges the *outcome* of a parole board's *discretionary* decision to deny him parole. There is no Eighth or Fourteenth Amendment violation on these facts. If that were not enough, numerous procedural hurdles stand in the way of an adjudication of the merits. Each independently justifies affirmance. We therefore ask this Court to affirm the district court's dismissal.

JURISDICTIONAL STATEMENT

This district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Is Bowling's challenge to the criteria and procedures used to make discretionary release determinations cognizable under 28 U.S.C. § 2254?
2. Is Bowling's claim procedurally barred, either because it is untimely or because Bowling has failed to exhaust his administrative remedies?
3. Has Bowling stated a claim for relief under the Eighth Amendment?
4. Has Bowling stated a claim for relief under the Due Process Clause of the Fourteenth Amendment?

STATEMENT

1. In 1987, petitioner-appellant Thomas Bowling and four associates developed a plan to rob the Fisca Gas Station in Lynchburg, Virginia on Christmas Eve. *Bowling v. Commonwealth*, 403 S.E.2d 375, 377 (Va. Ct. App. 1991). Bowling was 17 years old at the time. JA 23.

Steven Johnson—who, like Bowling, was a juvenile—testified that a man named Dock Hall had approached him and James Brown several days beforehand about robbing the Fisca Station "to make some money." *Hall v. Commonwealth*, 403 S.E.2d 362, 365 (Va. Ct. App. 1991). When Johnson and Brown agreed, Hall and another friend (the driver) arranged to pick up Johnson, Brown, and Bowling. *Id.* On the drive, Brown told Johnson that Bowling had agreed to go inside and rob the store. *Bowling*, 403 S.E.2d at 377.

As the group neared the Fisca Station, the driver parked near an adjacent movie theatre to reiterate the plan. *Hall*, 403 S.E.2d at 365. Hall told Bowling to approach Glenn West, the store's manager and "suggested that Bowling call West by name in the hopes that West would open the safe without any trouble." *Id.* The driver also handed Bowling a firearm and told him that it was loaded. When Bowling asked

what to do "if [he had] to jinx [the store manager]," Hall responded that Bowling should not shoot West unless he had to. *Bowling*, 403 S.E.2d at 377.

Bowling then exited the van and crossed the street toward the Fisca Station. Shortly thereafter, Bowling returned, telling the group that several customers had come into the store before he could carry out the plan. *Bowling*, 403 S.E.2d at 377. "Hall asked Bowling if he would try again," and Bowling agreed. *Hall*, 403 S.E.2d at 365.

This time, Bowling encountered West outside the station waiting for a ride home from his wife. *Hall*, 403 S.E.2d at 365. When West asked Bowling if he needed help, Bowling asked West if "he was the manager and whether he was able to open the safe." *Id.* at 364. West told Bowling that he was the manager, but that he could not open the safe because it had a time-delay lock. *Id.* At that point, Bowling pointed a gun at West, telling West that he would kill him unless West opened the safe. *Id.*

"West begged [Bowling] not to shoot him, told him again that he was unable to open the safe, and offered him $50 cash that he had in his pocket." *Hall*, 403 S.E.2d at 364. Bowling "responded, 'Well, I guess I

will have to kill you then,' and shot West in the stomach." *Bowling*, 403 S.E.2d at 377. Bowling fled, taking the money that West had offered. *Bowling*, 403 S.E.2d at 378. West managed to call 911 and was taken to the hospital, where he died more than six hours later, at approximately 2:50 a.m. on Christmas Day. *Id.* at 376–77.

2. Following a bench trial, a state trial court found Bowling guilty of capital murder, robbery, marijuana possession, and two counts of unlawful use of a firearm. JA 111. The court sentenced Bowling to two life sentences plus six years and thirty days. *Id.*

3. Bowling first became eligible for "discretionary parole" on April 26, 2005, and the Virginia Parole Board (Parole Board) "has considered his release every hearing quarter since" then. JA 111.[1]

Here, as in all cases, the Parole Board considers a list of Parole Decision Factors that are contained in the Parole Board Policy Manual. JA 74. Those factors include:

1) whether release "would be compatible with public safety";

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[1] The Virginia state legislature has eliminated parole for offenses committed after January 1, 1995. Va. Code Ann. § 53.1-165.1. In addition, Bowling "is not eligible for mandatory parole release" because he received "multiple life sentences." JA 111.

2) the probability that the inmate will live a "law-abiding life" upon release;

3) whether release "would have a substantial adverse effect on institutional discipline";

4) the type, nature, and length of the inmate's sentence;

5) the "facts and circumstances" of the offense, including any "mitigating and aggravating factors;"

6) the inmate's prior criminal record;

7) the inmate's "personal and social history";

8) the inmate's "institutional experience," including use of available programs and "general adjustment;"

9) any "changes in motivation and behavior";

10) the inmate's plans upon release;

11) community resources available to the inmate upon release;

12) any scientific or psychological data regarding the inmate's mental state or risk to the public;

13) impressions obtained from an in-person interview; and

14) information obtained from interested parties, such as the inmate's family or the victim.

JA 79–82 (formatting omitted). Although the Parole Board always considers these fourteen factors, see JA 79, it has discretion to weigh them as the situation requires, see JA 82.

4. In November 2016, Bowling sought a writ of habeas corpus from the Virginia Supreme Court. JA 36. In his petition, Bowling argued that the Parole Board was "affirmatively obligated" by the Eighth and Fourteenth Amendments "to consider a defendant's youth and youth's attendant characteristics and circumstances, as a factor in the parole evaluation." Petition, *Bowling v. Virginia Dep't of Corr.*, No. 161623, at *6 (Va. Nov. 1, 2016);[2] see JA 28 (raising same argument before the district court).

The Virginia Supreme Court dismissed Bowling's petition in an unpublished and unsigned order. JA 36. The court stated that Bowling's "claims concerning denial of discretionary parole are not cognizable in a petition for a writ of habeas corpus," citing its own previous decision in *Carroll v. Johnson*, 685 S.E.2d 647 (Va. 2009). JA 36. In *Carroll*, the Virginia Supreme Court explained that habeas relief is available only

[2] Bowling's original petition to the Virginia Supreme Court does not appear in the Joint Appendix.

when an inmate seeks an order that "will, as a matter of law and standing alone, directly impact the duration of a petitioner's confinement." 685 S.E.2d at 652. In contrast, habeas is not available for "challenges to parole board decisions . . . because an order entered in the petitioner's favor . . . will not result in an order . . . that, on its face and standing alone, will directly impact the duration of the petitioner's sentence." *Id.* at 652.

5. Unsuccessful in state court, Bowling filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court Western District of Virginia. See JA 6, 28.

The district court determined that it "need not resolve" whether Bowling's claims were cognizable in habeas because it concluded that "Bowling's constitutional challenges fail under both [28 U.S.C.] § 2254 and [42 U.S.C.] § 1983." JA 113. The district court acknowledged that the Supreme Court "has carved out important Eighth Amendment protections for juveniles regarding sentencing and parole," JA 113, but it rejected Bowling's argument that the Eighth Amendment requires a "meaningful opportunity to obtain release" for juvenile offenders (like Bowling) convicted of homicide, JA 115. The court explained that the

Eighth Amendment requires that a juvenile homicide offender's *sentence*—even a sentence of life without the possibility of parole—be the product of discretion. JA 115. But because Bowling "has been eligible for parole since 2005," the district court reasoned, "Bowling's sentence was not life-without-parole; and Bowling is not entitled to relief under the Eighth Amendment." JA 115. The district court likewise concluded that Virginia's parole procedures provided sufficient due process protections to satisfy the Fourteenth Amendment. JA 116–17.

6. Bowling filed a pro se appeal to this Court. JA 121. This Court granted a certificate of appealability and appointed counsel to represent Bowling.

SUMMARY OF ARGUMENT

The district court's dismissal order should be affirmed because Bowling's claims suffer from multiple and independently fatal flaws.

First, Bowling has not stated a claim cognizable under his only cause of action—a petition for a writ of habeas corpus—because he expressly acknowledges that acceptance of his claim on the merits would not necessarily result in his release or a reduction of his remaining incarceration.

Second, whether construed as a habeas petition under 28 U.S.C. § 2254 or a civil rights complaint under 42 U.S.C. § 1983, Bowling's claims fail for procedural reasons. Under § 2254, Bowling's claims are time-barred under the applicable statute of limitations. And, under § 1983, Bowling's claims fail because Bowling has not exhausted administrative remedies as required by the Prison Litigation Reform Act.

Third, Bowling's Eighth and Fourteenth Amendment claims also lack merit. Most fundamentally, the Parole Board already provides the relief that Bowling seeks—consideration of his age and subsequent maturation. In any event, as a juvenile offender convicted of homicide,

Bowling was constitutionally entitled to a hearing where a judge or jury could consider his age among other factors *before* imposing sentence. But Bowling was (and is) not entitled to a meaningful opportunity to obtain release *after* the court imposed that sentence. Finally, Bowling has received more than sufficient process to protect his statutory interest in parole, and the relief he desires—a change to the evaluative criteria used by the Parole Board—is not procedural in nature.

STANDARD OF REVIEW

This Court's "review of the district court's dismissal of [Bowling's] habeas petition is de novo." *Gordon v. Braxton*, 780 F.3d 196, 200 (4th Cir. 2015). In reviewing the state court's denial of habeas relief, the Commonwealth agrees that this Court's review of any federal issues is also de novo because there is no state court decision addressing the merits of Bowling's claims. See 28 U.S.C. § 2254(d); *Morva v. Zook*, 821 F.3d 517, 527 (4th Cir. 2016). As always, however, this Court is "bound by [a state supreme court's] interpretation of state law." *United States v. King*, 673 F.3d 274, 279 (4th Cir. 2012) (quoting *Johnson v. United States*, 559 U.S. 133, 138 (2010)).

ARGUMENT

I. Bowling is not eligible for habeas relief, and his petition should not be converted into a Section 1983 complaint

Bowling's claims are not cognizable on federal habeas review because success on those claims would not result in his release from custody. In any event, even an otherwise-proper habeas petition would be time-barred under the circumstances. This Court likewise should not convert Bowling's habeas petition into a complaint under 42 U.S.C. § 1983 because any such complaint would fail on arrival because Bowling has not exhausted his administrative remedies.

A. Bowling's claims are not cognizable under Section 2254 because he does not seek release from state custody

"[T]he traditional function of the writ [of habeas corpus] is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). For that reason, habeas provides the proper framework where an inmate is challenging "the very fact or duration of his physical imprisonment." *Id.* at 500.

But that is not what Bowling is challenging here. To the contrary, Bowling acknowledges that, even under his own view of things, he "is not guaranteed release on parole." Appellant Br. 30. Instead, Bowling attacks the criteria that Virginia uses to make discretionary parole

determinations. See *id.* at 12 (arguing that "the Board did not evaluate Bowling as a juvenile offender" and "fail[ed] to weigh the mitigating qualities associated with Bowling's status as a juvenile offender"). Because such a claim does not speak to the "fact or duration" of Bowling's confinement, it may not be raised via a habeas petition.

Indeed, this Court has already held that such a claim must be raised under 42 U.S.C. § 1983 rather than via a habeas petition under 28 U.S.C. § 2254. In *Strader v. Troy*, 571 F.2d 1263 (4th Cir. 1978), for example, the Court rejected a habeas petition challenging a Virginia inmate's parole eligibility. Like Bowling, the inmate in *Strader* did not assert that "he [wa]s entitled to parole and should be released" or even that "he w[ould] be entitled to parole, now or ever." *Id.* at 1269. Instead, Strader challenged the factors that informed the decision whether to grant parole—there, whether "the parole board should consider his eligibility for parole without regard to his four allegedly invalid Virginia convictions." *Id.* Such a claim, this Court held, "must be treated as a suit under 42 U.S.C. § 1983 and not as a petition for a writ of habeas corpus." *Id.*; see also *Rodriguez v. Ratledge*, 715 Fed. Appx. 261, 265–66 (4th Cir. 2017) (per curiam); *Hawkins v. Clarke*, 689 Fed. Appx. 736

(4th Cir. 2017) (per curiam); *Braddy v. Wilson*, 580 Fed. Appx. 172, 173 (4th Cir. 2014) (per curiam).[3] The same is true here.

The Supreme Court's decisions are to the same effect. For one thing, the Court has specifically held that challenges to a State's parole procedures may be raised under Section 1983. *Wilkinson v. Dotson*, 544 U.S. 74, 76 (2005) (holding that prisoners' claims "that Ohio's state parole procedures violate the Federal Constitution . . . may be brought under § 1983"). The Court has also said that "when"—as here—"a prisoner's claim would not necessarily spell speedier release, that claim does not lie at the core of habeas corpus and may be brought, *if at all*, under § 1983." *Skinner v. Switzer*, 562 U.S. 521, 535 n.13 (2011) (internal quotation marks and citation omitted) (emphasis added); see *id.* at 534 (emphasizing that the Court was aware of "no case

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[3] This Court's unpublished decision in *Hawkins* is directly on point as well. The petitioner in that case alleged that the "[P]arole Board's repeated denial . . . of parole based solely on the unchanging circumstances of the commitment offenses and social/criminal history ha[d] impermissibly transformed [Hawkins'] sentence to life imprisonment without the possibility of parole in violation of [his] right to due process." Petition, *Hawkins v. Clarke*, No. 15-cv-00382-JLK-RSB, Dkt. 1 at *8 (W.D. Va. July 9, 2015). This Court summarily affirmed the district court's dismissal of Hawkins' habeas petition, noting that Hawkins "made no claim in his § 2254 petition that, if successful, would result in his speedier release from incarceration." 689 Fed. Appx. at 737 n.2.

[recognizing] habeas as the sole remedy, *or even an available one*, where the relief sought would 'neither terminat[e] custody, accelerat[e] the future date of release from custody, nor reduc[e] the level of custody'") (alterations in original, citation omitted, and emphasis added); accord *Wilkinson*, 544 U.S. at 86 (Scalia, J., concurring) (concluding that petitioners' parole challenges were not cognizable in habeas because "the mandating of a new parole hearing [] may or may not result in release").

B. Even if Bowling had a cognizable habeas claim, it would be time-barred

Regardless of whether Bowling may use a habeas petition to challenge the factors used in the parole review process, this Court should nonetheless affirm the district court's dismissal of Bowling's habeas petition because the undisputed facts make clear that it was not timely filed.

Federal law provides a detailed statute of limitations for habeas claims filed by state prisoners. See 28 U.S.C. § 2244(d)(1). As relevant here, that one-year period runs from "the latest of" "the date on which the constitutional right asserted was initially recognized by the Supreme Court" or "the date on which the factual predicate of the

claim . . . could have been discovered through the exercise of reasonable diligence." *Id.* § 2244(d)(1)(C) & (D).

Bowling's claims are time-barred under either prong. The most recent constitutional decision that Bowling relies upon is the prohibition on mandatory life-without-parole sentences announced in 2012 in *Miller v. Alabama*, 567 U.S. 460 (2012). Likewise, the factual predicate for Bowling's claim—the Parole Board's Policy Manual, which sets forth the factors used to guide parole determinations—materialized, at the latest, in 2006, when the Board last updated its terms. See Va. Parole Bd., Policy Manual (2006), https://vpb.virginia.gov/files/1107/vpb-policy-manual.pdf. Because Bowling did not file even his first habeas petition (the one with the Virginia Supreme Court) until November 16, 2016, he is well outside the one-year period under either framework, and this Court should affirm the district court's dismissal of his habeas petition on either basis. Cf. 28 U.S.C. § 2244(d)(2) (providing that "[t]he time during which a properly filed application for State post-conviction or other

collateral review . . . is pending shall not be counted toward" the one-year time period for filing a federal habeas petition).[4]

C. The Court should not construe Bowling's petition as a complaint under Section 1983 because any such complaint would need to be dismissed for failure to exhaust internal prison remedies

"[W]hen a plaintiff raises a civil rights issue and files a complaint pro se, the court must construe his pleadings liberally." *Carter v. Fleming*, 879 F.3d 132, 137 (4th Cir. 2018). As part of that liberal construction courts may, in appropriate cases, construe a habeas petition as a complaint under Section 1983. See, *e.g.*, *Strader*, 571 F.2d at 1269. That said, such a course would be unwarranted here. Bowling has not met the prerequisites for filing such a case under the Prison

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[4] The district court erred in suggesting that Section 2244(d)(1)(A) permitted Bowling to challenge the 2016 parole denial. See JA 113 n.3 (inadvertently citing 28 U.S.C. § 2254(d)(1)(A) but referring to the statute of limitations under § 2244(d)(1)(A)). That provision allows a petitioner to run the limitations period from "the date on which *the judgment* became final by the conclusion of direct review or the expiration of the time for seeking such review." (emphasis added). But as Section 2244(d)(1)'s introductory language makes clear, "the judgment" being referenced there is "the judgment of a State court"—that is, the underlying judgment of conviction that forms the basis for the inmate's incarceration. Here, that "judgment" was entered more than 30 years ago, in 1988. JA 111.

Litigation Reform Act of 1995 (PLRA). So, if this Court were to construe Bowling's habeas petition as a Section 1983 complaint, Bowling would face immediate dismissal and possible prejudice to his right to file future claims.

Since the enactment of the PLRA of 1995 and the Antiterrorism and Effective Death Penalty Act of 1996, the procedures governing habeas petitions and those governing Section 1983 complaints brought by state prisoners have diverged in fundamental ways. These differences include the proper defendant to be named, the associated filing fees, restrictions on future filings, the means of exhaustion, and the level of deference applied along the way. Compare 42 U.S.C. § 1997e, with 28 U.S.C. § 2254. Procedural differences of this magnitude limit the feasibility of a seamless transition between the two causes of action. Indeed in many—if not most—cases, the effort to read one claim as the other will ultimately result in harm to the petitioner or plaintiff. See *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2000) (holding that courts should not recharacterize a prisoner's pro se filing when doing so would be to the prisoner's disadvantage).

This case provides a prime example. The PLRA requires prisoners to exhaust internal administrative remedies before bringing a Section 1983 complaint. See 42 U.S.C. § 1997e ("No action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."). But Bowling has not satisfied that prerequisite to suit under Section 1983, because the record before the district court does not indicate that he appealed his 2014, 2015, or 2016 parole denials. Therefore, if Bowling's current habeas petition were converted into a Section 1983 complaint, that complaint would face immediate dismissal and could potentially count as a "strike" that would limit Bowling's ability to file future claims in state or federal court. See 42 U.S.C. § 1915(g); Va. Code Ann. § 8.01-692. For that reason, this Court should affirm the district court's dismissal of Bowling's habeas petition rather than construing it as a complaint under Section 1983.

II. Bowling's Eighth Amendment and Due Process Clause claims also fail on the merits

To succeed on the merits, Bowling must convince the Court to take three leaps. *First*, that the Supreme Court's holding in *Graham v.*

Florida, 560 U.S. 48 (2010), applies to juvenile offenders who have committed homicide, despite express statements in both *Graham* and *Miller v. Alabama*, 567 U.S. 460 (2012), to the contrary. *Second*, that *Miller* imposes substantive limitations on *parole* determinations made when the offender is an adult—not just predictive *sentencing* decisions made when the juvenile is still a juvenile. And *third*, that the Virginia Parole Board's holistic review of an inmate's record fails to provide a meaningful opportunity to obtain release under *Graham*.

Bowling falls short on all accounts.

A. A juvenile offender who is convicted of capital murder has no categorical right to an opportunity to obtain release under the Eighth Amendment

1. The Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions" in proportion to their offense. *Roper v. Simmons*, 543 U.S. 551, 560 (2005). To address that problem, the Supreme Court has wielded two tools: (1) categorical bars on particular types of punishment for certain offenses or offenders, see, *e.g.*, *Coker v. Georgia*, 433 U.S. 584 (1977) (barring use of death penalty for rape); and (2) individualized review of the proportionality of a specific offender's punishment given his or her offense, *e.g.*, *Woodson v.*

North Carolina, 428 U.S. 280 (1976) (holding that mandatory sentence of death without consideration of individual circumstances violates the Eighth Amendment).

The first category includes limitations on the punishments that a State may impose on juvenile offenders convicted of non-homicide offenses. In *Graham*, the Supreme Court held that the inherent mitigating qualities of youth combined with the limited severity of crimes not involving homicide together justified a categorical bar on life-without-parole for this group of offenders. See 560 U.S. at 69 ("The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."). For this group (juvenile offenders convicted of non-homicide crimes), *Graham* held that although a "State is not required to guarantee eventual freedom," it must impose a sentence that provides "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

Although *Miller* also addressed juvenile offenders (this time, those convicted of homicide), it did so in the context of the second type of

Eighth Amendment claim—individualized proportionality review. In *Miller*, the Supreme Court considered the constitutionality of state sentencing regimes under which two fourteen-year-old offenders had received mandatory life sentences without the possibility of parole. The Court concluded that these *mandatory* sentencing regimes violated the Eighth Amendment because they prevented the sentencing court from conducting an individualized review of the juveniles' offenses and personal characteristics before imposing sentence. *Miller*, 567 U.S. at 476–77 ("Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one."). *Miller* thus holds that juvenile offenders—even those convicted of homicide—must have the opportunity to receive "individualized consideration *before*" they may be *sentenced* "to life imprisonment without possibility of parole." *Id.* at 480; accord *id.* at 489 (referring to "individualized *sentencing*" determinations) (emphasis added).

2. Bowling shares little in common with the cases upon which he relies. Most obviously, Bowling was not sentenced to "life without

parole"—much less "mandatory life without parole"—so *Miller*'s holding simply does not apply to him. *Miller*, 567 U.S. at 465 ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"). The same is true of *Graham,* where the Court framed the question as "whether the Constitution permits a juvenile offender to be sentenced to life in prison *without parole* for a nonhomicide crime." 560 U.S. at 52–53 (emphasis added). And *Graham* is doubly inapplicable because Bowling was convicted of capital murder rather than "a nonhomicide crime." *Id.* at 53. Those differences alone are enough to reject Bowling's Eighth Amendment claim.

3. But there is more. Unlike the juveniles in *Miller*, Bowling is challenging *parole* determinations that were made on the basis of his full adult record rather than the *sentence* that was meted out to him as a juvenile. Just as important, Bowling challenges a *discretionary* determination rather than a *mandatory* term of imprisonment. See *Miller*, 567 U.S. at 489 (holding that "the *mandatory-sentencing* schemes before us violate . . . the Eighth Amendment[]") (emphasis added).

These differences matter. Even when it applies, *Miller* requires only a discretionary sentencing decision—an opportunity for the judge or jury to account for the defendant's youth before passing judgment. But Bowling does not challenge his sentence. And even assuming (solely for the sake of argument) that *Miller* also applies to back-end parole determinations made when a formerly juvenile offender is now an adult inmate, Bowling *still* got what *Miller* requires—a discretionary evaluation. Bowling's parole denial was not mandatory. Rather, it was the discretionary choice of the Parole Board. For all of those reasons, there has been no Eighth Amendment violation here.

4. Bowling insists that "[i]t runs counter to the logic of *Graham* and *Miller* to permit state parole boards to deny parole based only on the serious nature of the offense without considering juvenile offenders' diminished culpability at the time of the offense and demonstrated maturity since then." Appellant Br. 20. Regardless of whether that is so when it comes to juvenile non-homicide offenders, Bowling's argument runs into an immediate and fatal problem when applied to juvenile homicide offenders like him: As Bowling acknowledges, *Miller* does not foreclose the possibility of life sentences *without* parole for this group.

See Appellant Br. 19 (acknowledging that "discretionary sentences of life without parole remain constitutional for some juvenile homicide offenders") (emphasis omitted); accord *Miller*, 567 U.S. at 480 (stating that "we do not foreclose a sentencer's ability to make [the] judgment in homicide cases" that a juvenile merits a sentence of life without the possibility of parole).

That admission, though necessary, is fatal to Bowling's claim here. *Graham* announced "[a] categorical rule against life without parole for juvenile nonhomicide offenders." *Graham*, 560 U.S. at 79. If, as Bowling admits and *Miller* concludes, a court *may* sentence a juvenile convicted of homicide to life without the possibility of parole in some circumstances, *Miller* could not have extended *Graham*'s "categorical rule" to homicide offenders. As a matter of logic, if Virginia could have imposed a sentence of life without parole in Bowling's case, it may also impose a sentence of life with the possibility of parole—even if the parole determinations do not provide the "meaningful" opportunity for release that *Graham* requires for juvenile non-homicide offenders.[5]

[5] Two of the four decisions that Bowling cites from other jurisdictions involve juveniles convicted of non-homicide offenses. See Appellant Br. 22 (citing *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1001

B. The Virginia Parole Board already provides juvenile offenders like Bowling a "meaningful opportunity to obtain release"

1. Virginia courts have interpreted the Parole Board's Manual to require consideration of demonstrated maturation and rehabilitation

The essence of Bowling's Eighth Amendment argument is that the Parole Board was constitutionally required to consider the fact that he was a juvenile when he shot West (the store manager) and that he has matured since then. But the Parole Board *already* considers these factors, and Virginia courts have interpreted the Parole Board's Manual to require the Board to do so. Bowling's challenge therefore amounts to a demand that the Parole Board do what it already has done and will continue to do in making discretionary release determinations.

(E.D. N.C. 2015) (burglary, assault, and a series of other felony offenses); *Greiman v. Hodges*, 79 F. Supp. 3d 933, 943 (S.D. Iowa 2015) (kidnapping)). A third decision has since been abrogated by the court of issuance because it "improperly applied *Graham* and *Miller*." *Franklin v. State*, No. SC14-1442, 2018 WL 5839174, at *2 (Fla. Nov. 8, 2018) (discussing *Atwell v. State*, 197 So.3d 1040, 1048–50 (Fla. 2016)). And the only two federal court decisions also involved very different circumstances than those presented here. See, *e.g.*, *Hayden*, 134 F. Supp. at 1002–03 (describing a parole-review process that lacked notice and opportunity to be heard and where the people making the parole determination "are not aware, and do not consider, whether a particular offender was a juvenile at the time of his/her offense").

In making its discretionary release decisions, the Parole Board uses a set of fourteen factors outlined in its Policy Manual. See JA 79; see also JA 44 (rejecting Bowling's May 2012 request and listing the fourteen Policy Manual factors); JA 46 (same for May 2013); JA 48 (same for July 2013); JA 50 (same for April 2014); JA 52 (same for February 2015); JA 54 (same for April 2016). Those factors include the "facts and circumstances" of the inmate's offense of conviction, including any "mitigating and aggravating factors"; any "changes in motivation and behavior" since the offense occurred; and the inmate's institutional adjustment and use of available programs. JA 80–81.

These guidelines require the Parole Board to account for the applicant's age at the time of the offense, as well as any evidence of maturation or rehabilitation. The first factor covers age. An inmate's age at the time of the offense certainly counts as a "fact" or "circumstance" of relevance. And if age suggests diminished culpability, it would also qualify as a mitigating factor that the Parole Board would consider. The next two factors—changes in motivation and institutional adjustment—directly address subsequent maturation and rehabilitation.

Although the Board's overall balancing of these factors is discretionary, the decision to consider them is not. See JA 79 ("The Virginia Parole Board . . . *is* guided by the following factors[.]") (emphasis added). The Parole Board is thus not free to ignore the Policy Manual's factors, though it can vary the weight assigned to each one.

This is not just a common-sense reading of the factors listed in the Parole Board's Policy Manual. It is also how the Virginia Supreme Court and the United States Supreme Court have interpreted them. In *Angel v. Commonwealth*, 704 S.E.2d 386 (Va. 2011), the Virginia Supreme Court concluded that the "normal parole consideration process" accounts for "demonstrated maturity and rehabilitation." *Id.* at 401–02;[6] see also *Vasquez v. Commonwealth*, 781 S.E.2d 920, 934–35 (Va. 2016) (Mims, J. concurring) (noting that the Policy Manual factors

[6] Although *Angel* addressed the use of geriatric release as an alternative to parole for juvenile offenders convicted of a crime other than homicide, the court considered the "normal" parole factors because those factors governed whether the Parole Board would grant geriatric release to offenders that satisfied the statutory age criteria. See 704 S.E.2d at 402 (concluding that "the factors used in the normal parole consideration process apply to" geriatric release).

"certainly allow the Board to consider age, maturity and rehabilitation as *Graham* instructs").

The United States Supreme Court agrees. In unanimously reversing this Court's grant of habeas relief to a juvenile non-homicide offender in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (per curiam), the Supreme Court emphasized that Virginia's normal parole process accounts for "the individual's history and . . . conduct during incarceration, as well as the prisoner's inter-personal relationships with staff and inmates and changes in attitude toward self and others." *Id.* at 1729 (internal alterations and quotations omitted); see also *id.* at 1730 (Ginsburg, J., concurring in the judgment) (joining "the Court's judgment on the understanding that the Virginia Supreme Court, in *Angel v. Commonwealth* . . . interpreted Virginia law to require the parole board to provide [a] meaningful opportunity [to obtain release based on demonstrated maturity and rehabilitation] under the geriatric release program" by incorporating the "normal parole factors" into the consideration process).

Thus, to the extent Bowling argues that the factors governing Virginia parole determinations do not account for age, maturation, or

rehabilitation, he is wrong as a matter of Virginia law. Likewise, if the Policy Manual's factors could be ignored at will, neither *Angel* nor *LeBlanc* could have concluded that they reliably account for maturation and rehabilitation. Therefore, to the extent Bowling challenges Virginia's parole factors on the grounds that they do not *require* the Parole Board to consider age, maturation, or rehabilitation, he falters once more, and once more his obstacle is state law.

As Bowling's rejection letters indicate, the Board considered all fourteen factors—including those related to age, maturation, and rehabilitation—in his case. See JA 44 (rejecting Bowling's May 2012 request and listing the fourteen Policy Manual factors as factors that the Board considered); JA 46 (same for May 2013); JA 48 (same for July 2013); JA 50 (same for April 2014); JA 52 (same for February 2015); JA 54 (same for April 2016). Because there is no indication that the Board plans to revise its Policy Manual, Bowling has and will continue to receive the consideration he seeks. For this reason alone, this Court should affirm.[7]

[7] Bowling agrees that the Parole Board considered the Policy Manual's factors in his case. See Appellant Br. 24 ("[The Parole Board] based [Bowling's] parole denial on the same fourteen 'Parole Decision

2. A parole review process that considers mitigating factors (including the offender's age and maturation) alongside aggravating factors (such as the seriousness of the offense) does not violate the Eighth or Fourteenth Amendments

Bowling's pro se habeas petition also argues that the Parole Board's reliance on the nature of his offense violates the Eighth and Fourteenth Amendments because the nature of his crime will never change.[8] Not so.

Factors' it uses for adult offenders."). Bowling's assertion that the Parole Board did not consider his age or subsequent maturation thus rests on a misunderstanding of what those factors encompass—a question Virginia's courts have already answered. In any event, the Parole Board's letters expressly mention the relevant factors. See, *e.g.*, JA 100 (listing the "facts and circumstances of the offense(s) including mitigating and aggravating factors," "institutional adjustment," and "changes in attitude toward self and others" alongside the other eleven factors as criteria that the Parole Board "considered" in determining whether or not Bowling should receive discretionary release). The fact that the Board did not cite these factors as reasons for denying parole can be explained by the simple fact that they are not reasons for denying parole. They are mitigating factors that the Board evaluated and ultimately determined did not overcome the evidence weighing against a grant of parole in Bowling's case.

[8] Bowling counsel appears to have dropped this argument on appeal, arguing instead that the Board's failure to consider his age and maturation generated the constitutional error. Nevertheless, for the sake of completeness, we address Bowling's original claim as well.

For the reasons that have already been explained, the Commonwealth disagrees that juvenile homicide offenders are constitutionally entitled to the additional protections outlined in *Graham*. See *supra* 22–27. But, even if that were not so, *Graham* requires, at most, a "meaningful opportunity to obtain release," not release itself. See 560 U.S. at 82 ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime."); accord Appellant Br. 30 ("To be sure, Bowling is not guaranteed release on parole.").

A "meaningful opportunity to obtain release" is not the same thing as a likelihood of actual release in any particular case. For that reason, even if the seriousness of an offender's crime (or any other factor) functionally foreclosed parole because no Parole Board member would ever favor release under the totality of the circumstances, neither the Eighth nor the Fourteenth Amendment would require the Parole Board to close its eyes to those bad facts in order to give the inmate a real "chance" at release.

Bowling's proposed approach would make little sense. For example, it would mean that the Parole Board could not consider an

inmate's long history of disciplinary infractions if such infractions would functionally foreclose that inmate's opportunity for release. Likewise, it would bar the Parole Board from considering the nature of the inmate's offense whenever such consideration might be dispositive—in other words, in only those most egregious cases.[9] See *Graham*, 560 U.S. at 59 ("[P]roportionality is central to the Eighth Amendment."); *Roper v. Simmons*, 543 U.S. at 560 ("[P]unishment for crime should be graduated and proportioned to [both the offender and] the offense.") (internal quotations omitted). The Constitution does not mandate that irrational outcome.

In any event, here, Virginia's parole factors offer Bowling both a meaningful opportunity and a real chance to obtain release. While it is true that Bowling's crime may never change, the relative weight assigned to it may. So long as the Parole Board continues to consider the other factors (maturity, rehabilitation, etc.), the nature of Bowling's offense will not stand as a categorical bar to discretionary release. See

[9] The assertion that the Parole Board cannot rely on the nature of a juvenile offender's crime also stands at odds with Bowling's admission that an "irredeemable" offender whose homicide "reflects irreparable corruption" may constitutionally receive a life sentence without any opportunity for release whatsoever. Appellant's Br. 19–20.

JA 76 (affidavit from Chair of the Virginia Parole Board stating that "there is a possibility that in time, [Bowling's] conduct and positive adjustment while in prison, when considered with all other factors, will outweigh the concerns that the Board has for the offense").

A holistic review of a person's record—made when that person is an adult—is not the same thing as a predictive judgment about a person's ability to rehabilitate themselves over the course of their life made when that individual is only seventeen years-old. Virginia's parole review process—a process that considers both the mitigating aspects of the offender's adult record (including age at the time of the offense and subsequent maturation) and the aggravating factors (such as the seriousness of the offense)—does not violate the Eighth or Fourteenth Amendments.

C. Virginia has provided more than adequate process to safeguard any state-law interest in parole

Bowling also argues that "the Virginia Parole Board arbitrarily deprived him of his due process liberty interest when it denied him parole under guidelines . . . that do not account for his diminished criminal culpability as a juvenile offender and his demonstrated maturity and rehabilitation in prison." Appellant Br. 4. But, as

explained above, Virginia's parole guidelines *do* account for age, maturation, and rehabilitation. That alone suffices to defeat Bowling's due process claim. In any event, Virginia provides all the process that Bowling might be due.

1. As the Supreme Court has repeatedly held, there is no "constitutional or inherent right" to parole. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979). Bowling resists this conclusion on the grounds that juveniles are different. But even if some juveniles might be different, Bowling is not. Bowling committed homicide, and therefore, under *Miller*, has no categorical entitlement to parole. See *Miller*, 567 U.S. at 480. Thus, just as in *Greenholtz*, the State has the discretion to afford (or not afford) Bowling parole. *Greenholtz*, 442 U.S. at 7.

2. To be sure, Virginia law gives Bowling a *statutory* interest in "the present right to be considered for parole." *Franklin v. Shields*, 569 F.2d 784, 788 (4th Cir. 1977).[10] Bowling thus has a right to "the minimum requirements of procedural due process appropriate for the

[10] Notably, this interest does not cover the "right to be released or even . . . an unqualified right of future release." *Franklin*, 569 F.2d at 788 n.4.

circumstances." *Id.* at 790. Under this Court's decision in *Franklin*, that right includes publication of the criteria governing parole decisions, a hearing, access to the information in the prisoner's files (absent a security justification to withhold them), the opportunity to present witnesses and documentary evidence, and a written statement of reasons for denial. *Id.* at 791–97. But see *Greenholtz*, 442 U.S. at 14–16 (finding that the statutory liberty interest in parole under Nebraska's law required only an opportunity to be heard and notice of the reasons in the case denial and not an in-person hearing or statement of the evidence relied upon to reject the application).

Bowling does not request any of the above-mentioned procedures. Indeed, the relief Bowling seeks is not procedural at all. Bowling does not request better notice, a more robust hearing, or a more fulsome statement of reasons. Instead, he asks this Court to change the way the members of the Parole Board interpret the circumstances of his case. The Due Process Clause is not the proper vehicle for obtaining such relief.

D. The district court never passed on the admissibility of Bowling's prior parole decisions, but in any event, those decisions have no bearing on the outcome of Bowling's claims

Bowling ends his brief with a one-paragraph argument that the district court "erred by refusing to consider [Bowling's] parole denials from 2005 through 2015 as evidence of the Board's arbitrary procedures and decisions." Appellant Br. 40. But the district court did not rule on the admissibility of Bowling's pre-2016 parole denials. Instead, it held only that the statute of limitations barred any direct challenge to those denials, JA 113 n.3, 117—a determination that was unquestionably correct. See *supra* Part I(B).

In any event, Bowling has not demonstrated how these previous parole decisions have any bearing on his current claims. Virginia either did or did not provide Bowling with the protections required by the Eighth or Fourteenth Amendments in connection with its denial of his request for discretionary parole. The number of times Virginia did or did not do so has no relevance.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 7,229 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2018, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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