No. 19-6710

IN THE

Supreme Court of the United States

THOMAS FRANKLIN BOWLING,
Petitioner,

v.

DIRECTOR, VIRGINIA DEP'T OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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THE STATE FAILS TO JUSTIFY THE FOURTH CIRCUIT'S DEPARTURE FROM ESTABLISHED *MUNSINGWEAR* PRACTICE

This Court regularly grants *Munsingwear* vacatur when, as here, circumstances beyond petitioner's control moot the case. This Court should exercise its supervisory power to grant Bowling relief. Each of the State's scatter-shot efforts to distance this case from the Court's consistent precedent falls flat.

The State faults Bowling for earning parole from Virginia's Parole Board. But the Board—not Bowling—exercised complete discretionary control over the parole decision. Mootness resulting from such happenstance justifies *Munsingwear* relief. The State also argues this Court should deny Bowling's petition because he asked the Fourth Circuit to vacate its decision before asking this Court to do the same. Bowling's diligence in seeking vacatur is not grounds for denying relief, and the State cites no case even *suggesting* it is. Indeed, this Court has granted *Munsingwear* relief after a lower court denied vacatur. The State's argument that the Fourth Circuit had public interest reasons to deny vacatur ignores that the court offered *no* reason. Bowling presents a straightforward *Munsingwear* claim in a case on which this Court likely would have granted review had it not become moot. He is entitled to vacatur.

1. The State argues Bowling's "active[] participat[ion] in the parole process" was responsible for the Board's parole grant thus disentitling him to relief. *See* Resp. Br. 9-10. But Bowling's actions, the "principal condition" this Court considers for *Munsingwear* vacatur, did not cause mootness. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994). Instead, the Board's action granting

parole mooted the case. When mootness "frustrates" a party's right to appeal, this Court's "normal practice" is to "vacate the judgment below." *Camreta v. Greene*, 563 U.S. 692, 698, 712 (2011).

Happenstance—"circumstances not attributable to the parties"—provides sufficient reason to vacate. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997); *see also Camreta*, 563 U.S. at 713 (vacating lower court opinion where mootness caused by happenstance of party "moving across country and becoming an adult"). Bowling's case stands firmly on the "happenstance side of the line" because no action attributable to him contributed to mootness. *See Alvarez v. Smith,* 558 U.S. 87, 95 (2009) (holding *Munsingwear* relief appropriate even where non-prevailing party contributed to mootness by settling unrelated cases with plaintiffs). The Board granted Bowling parole, and Virginia law empowers the Board *all* authority to grant or deny parole release. *See* Va. Code Ann. § 53.1-136. Thus, *Munsingwear* vacatur is warranted because the Board bore responsibility for the decision that mooted the underlying case—it was never within Bowling's control.

Recognizing the Board granted parole, the State asserts the Board was not a party so the parole grant was not a prevailing party's action.[1] *See* Resp. Br. 10–11.

[1] The State asserts the Director of the Virginia Department of Corrections, rather than the Board, is the named defendant so the Board is not a prevailing party. *See* Resp. Br. 10–11. That is technically accurate, but the State defended the Board's discretionary decision to deny parole before the district and circuit courts. *Bowling v. Dir., Va. Dep't of Corr.*, 920 F.3d 192, 196 (4th Cir. 2019). The Fourth Circuit also recognized Bowling challenged the Board's actions: "This appeal arises from the Virginia Parole Board's ("the Parole Board") repeated denial of parole to Thomas Franklin Bowling." *Id.* at 194.

But this Court has held *Munsingwear* relief applicable when mootness results from either happenstance *or* "unilateral action of the party who prevailed in the lower court." *Bancorp*, 513 U.S. at 23. Even if the Board was not a prevailing party, the State errs by ignoring the "normal rule" of vacatur when "happenstance" prevents review of a "consequential decision." *See Camreta*, 563 U.S. at 713. Indeed, this Court has regularly granted *Munsingwear* vacatur when a non-party bore responsibility for mootness. *See Eisai Co. v. Teva Pharmaceuticals USA, Inc.*, 564 U.S. 1001 (2011) (vacating judgment where third party's independent action rendered the case moot); *al-Marri v. Spagone*, 555 U.S. 1220 (2009) (vacating judgment after executive branch official obtained approval to "release petitioner from military custody and transfer him"); *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007) (vacating preliminary injunction denial rendered moot by district court final judgment). *Munsingwear* relief is based on the underlying theory that "[v]acatur expunges an adverse decision that would be reviewable" absent mootness. *Camreta*, 563 U.S. at 712 n.10. The Fourth Circuit's "adverse ruling" should be expunged because mootness due to happenstance occurred before Bowling could seek this Court's "review of the merits." *See Bancorp*, 513 U.S. at 25.

2. The State faults Bowling for not identifying an example of this Court granting *Munsingwear* relief after a circuit court has denied vacatur. *See* Resp. Br. 8. It argues Bowling's reliance on *Azar v. Garza*, 138 S. Ct. 1790 (2018), therefore is misguided because the lower court in *Azar* had not declined to vacate its judgment.

Id. at 10, n.4. Not true. This case is identical to *Azar* in every respect relevant to this Court's established *Munsingwear* analysis.

In *Azar*, this Court vacated the D.C. Circuit's en banc order because the prevailing party's action "rendered the relevant claim moot" before the losing party could file a petition for a writ of certiorari or an emergency stay application. *Azar*, 138 S. Ct. at 1792. This Court exercised supervisory power to grant *Munsingwear* relief even though the claim "became moot before certiorari." *Azar*, 138 S. Ct. at 1793. Similarly, in *Indiana State Police Pension Trust v. Chrysler LLC*, this Court granted *Munsingwear* relief after the lower court denied stay of an assets' sale, allowing that sale to become final and the case moot before this Court could consider granting certiorari on the merits. 558 U.S. 1087 (2009). These cases illustrate this Court's established practice of granting *Munsingwear* relief when, as here, a case becomes moot by happenstance before this Court has had an opportunity to review the judgment.

Although the State could find no case "where this Court reversed a lower court's decision to decline vacatur," *see* Resp. Br. 8, this Court has previously exercised its supervisory power to do so. *See Eisai*, 564 U.S. at 1001 (granting *Munsingswear* relief after the Federal Circuit denied vacatur in a case that became moot while the losing party sought rehearing in the Federal Circuit).[2] This Court should likewise grant vacatur here because the Fourth Circuit's unexplained denial

[2] This Court granted relief in a per curiam order, but the petition documents the procedural history related to mootness. *See* Petition for Writ of Certiorari, *Eisai*, 564 U.S. 1001 (No. 10-1070).

of vacatur either is irrelevant or was error. The court's vacatur denial is irrelevant if it had no authority to grant relief because its mandate had issued. And if it had authority to act, it abused that discretion by denying relief because vacatur is the appropriate remedy when a petitioner has not taken action that moots the case. *See supra* at 2. The State attempts to penalize Bowling for exercising diligence by seeking relief in the Fourth Circuit before heading to this Court. *See* Resp. Br. 8. But Bowling did not "voluntarily forfeit[] his legal remedy" by pursuing on all fronts the relief he is due. *See Bancorp*, 513 U.S. at 25; *see also United States v. Munsingwear*, 340 U.S. 36, 41 (1950) (denying relief where a party "slept on its rights" by not moving for vacatur).

The State asserts that unlike the prevailing party in *Azar*, it did not benefit from mootness. *See* Resp. Br. 10, n.4. But this Court has granted *Munsingwear* relief when the prevailing party did not benefit from mootness and has never considered that circumstance disqualifying. *See supra* at 3. This Court should not stray from its ordinary practice.

3. The State's argument that the lower court had appropriate reasons to deny Bowling's unopposed motion for vacatur fails. As the State recognizes, the "order denying vacatur is unpublished and contains no reasoning whatsoever." *See* Resp. Br. 6. Any conjecture about possible reasons the Fourth Circuit denied vacatur therefore are irrelevant. The State's speculation that the Fourth Circuit has an interest in preserving its merits opinion because it "order[ed] full briefing, hear[d]

oral argument, and issu[ed] a published opinion," *see* Resp. Br. 11, provides no basis for that court's subsequent unexplained denial of vacatur.

Even if relevant, the reasons raised by the State are inadequate to deny vacatur. The State argues the "court of appeals' decision . . . appropriately accounted for the public interest," and the court's opinion is better left untouched because judicial precedents are of value to the legal community based on a presumption of correctness. *Id*. But given the absence of orderly procedure—the case became moot through no fault of Bowling—the lower court's judgment cannot serve the public interest. *Cf. Bancorp*, 513 U.S. at 27 (explaining that "[t]o allow a party who steps off the statutory path to employ the secondary remedy of vacatur" would "disturb the orderly operation of the federal judicial system"). The reasons advanced by the State provide the Fourth Circuit no grounds to have denied Bowling's request for *Munsingwear* vacatur.

4. Bowling's underlying case presented a split of authority about the application of this Court's juvenile-specific Eighth Amendment jurisprudence to parole proceedings. The State argues that the "strength of [Bowling's] underlying case" for review on the merits is irrelevant to *Munsingwear* analysis. *See* Resp. Br. 12. Perhaps. If the State is correct, Bowling is entitled to relief just as in *Azar*, *Chrysler*, *Eisai*, and *Harper* where this Court granted *Munsingwear* relief without expressly addressing the underlying merits.

The State does not dispute Bowling presented a certiorari-worthy issue. *See* Pet. Br. 7–10. Bowling thus is entitled to *Munsingwear* relief even if he is required

to show a strong claim for review. *See* Pattie Millett, *Practice Pointer: Mootness and* Munsingwear *Vacatur*, SCOTUSBLOG (June 10, 2008), https://www.scotusblog.com/2008/06/practice-pointer-mootness-and-munsingwear-vacatur/ (noting "the petition for a writ of certiorari must make a strong case for review on the merits"). The Fourth Circuit's merits opinion directly conflicts with the Iowa Supreme Court's decision in *Bonilla v. Iowa Board of Parole* that parole authorities must consider youth and attendant characteristics when making release determinations. 930 N.W.2d 751 (Iowa 2019). This Court's grant of certiorari in *Mathena v. Malvo*, No. 18-217, demonstrates an interest in resolving the reach of *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).[3] This case would have provided an alternative vehicle for the Court to resolve this issue had it not become moot due to happenstance.

CONCLUSION

The Court should grant the petition for writ of certiorari, summarily reverse the denial of vacatur, and remand for dismissal as moot.

[3] On February 24, 2020, the Virginia Governor signed a bill making Malvo parole-eligible, *see* H.B. 35, 2020 Leg., Reg. Sess. (Va. 2020), and the parties in *Mathena v. Malvo* jointly requested a stipulated dismissal. This Court dismissed on February 26, 2020. That same legislation provided the relief Bowling sought in the lower courts—proper consideration by the Board of youth at the time of the offense.

Respectfully submitted,

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