Case No. 20-1128

In the United States Court of Appeals
for the Tenth Circuit

Bruce E. Wimberly,
Petitioner-Appellant,

v.

Dean Williams,
Respondent-Appellee.

On Appeal from the United States District Court
For the District of Colorado
The Honorable Michael E. Hegarty, United States Magistrate Judge
D.C. No. 1:19-cv-968-MEH

Appellant's Corrected Supplemental Opening Brief

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Oral argument is requested.

October 26, 2020

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Prior or Related Appeals

Mr. Wimberly previously appeared in this Court in *Fleischaker v. Owens*, Case No. 02-1113, a pro se prisoner civil rights action that was procedurally terminated without judicial action on March 3, 2003.[1]

[1] The party in that case is Bruce **A.** Wimberly, whereas the party in this case is Bruce **E.** Wimberly. However, the two individuals have the same DOC number (#51389).

Statement of Jurisdiction

The district court had jurisdiction over this petition for a writ of habeas corpus under 28 U.S.C. § 2241. Mr. Wimberly timely appealed the decision denying the petition on the merits. *See* R:103-04; Fed. R. App. P. 4(a)(1)(A), (c)(1). This Court granted a certificate of appealability on July 17, 2020. This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 2241.

Issues Presented

Mr. Wimberly pleaded guilty to first degree sexual assault, in violation of Colorado Revised Statutes § 18-3-402(5), in January 1984. Due to the presence of aggravating circumstances, the offense was a class 2 felony punishable by up to 24 years imprisonment. Instead of being sentenced to a determinate term of imprisonment, however, Mr. Wimberly was committed to the custody of the Department of Corrections for an indeterminate term of one day to life, pursuant to the Colorado Sex Offenders Act of 1968. Colo. Rev. Stat. §§ 16-13-201-216 (1986).

Mr. Wimberly has now been in custody for the underlying offense for approximately 37 years, well beyond the expiration of the statutory maximum sentence. In that time, he has been afforded no opportunity for judicial review, and there has been no determination as to whether he remains mentally ill or abnormal and is, as a result of that condition, dangerous. A certificate of appealability has been granted with respect to the following issues:

1. Does Mr. Wimberly's continued commitment following the expiration of the statutory maximum sentence for his offense, without being afforded the procedural protections afforded to civil committees, violate the Equal Protection Clause?

2. Does Mr. Wimberly's continued commitment following the expiration of the statutory maximum sentence for his offense, without being afforded the opportunity for judicial review to determine whether he remains mentally ill or abnormal and dangerous, violate the Due Process Clause?

Statement of the Case

A. The Colorado Sex Offenders Act of 1968 authorized the indefinite commitment of certain individuals convicted of sex offenses.

This case concerns a commitment imposed under the Colorado Sex Offenders Act of 1968 (CSOA). At the time Mr. Wimberly was convicted, the law authorized Colorado district courts "to commit any person convicted of a sex offense to the custody of the Department of Corrections . . . for an indeterminate term of one day to life," after the following proceedings:

> Upon the motion of the district attorney, the defendant, or the court, within twenty days of conviction, the court must commence CSOA proceedings. The court advises the defendant orally and in writing of certain procedural rights, and commits him for an examination by two psychiatrists. The examining psychiatrists submit written reports to the court, setting forth their opinions as to 1) whether the defendant, if at large, poses a threat of bodily harm to members of the public; 2) whether the defendant is 'mentally deficient'; 3) whether the defendant could benefit from psychiatric treatment; and 4) whether the defendant could be adequately supervised on probation. The probation department also submits to the court a report on the defendant. After receiving these reports, the court may terminate CSOA proceedings and sentence the defendant for his substantive offense.
>
> If the court proceeds under the CSOA, a hearing is held, at which the court receives evidence concerning the public danger posed by the defendant. The defendant has the right to subpoena and examine witnesses, to receive a list of prosecution witnesses ten days before the hearing, and to cross-examine these witnesses as well as the psychiatrists and probation officers who have submitted reports. The court then may commit the defendant under the CSOA if it finds beyond a reasonable doubt that the defendant poses a threat of bodily harm to members of the public. Six months following

> this commitment, and every twelve months thereafter, the state parole board . . . must review all reports, records, and information concerning the defendant. The board may parole the defendant, or transfer the defendant to any facility under the jurisdiction of the department, if the board deems it to be in the best interests of said person and the public. The board must make a written ruling after each review.

People v. Kibel, 701 P.2d 37, 39 (Colo. 1985) (internal quotation marks and citations omitted); *see also* Colo. Rev. Stat. §§ 16-13-201-216 (1986).[2] The CSOA has since been superseded by the Colorado Sex Offender Lifetime Supervision Act of 1998, Colo. Rev. Stat. § 18-1.3-1001 *et seq.*, and it only applies "to persons sentenced for offenses committed prior to November 1, 1998," *id.* § 18-1.3-902.

B. Mr. Wimberly remains incarcerated long after the expiration of the maximum penalty for underlying offense, without any finding whether he remains mentally ill or abnormal and, as a result, dangerous.

Appellant Bruce E. Wimberly pleaded guilty to multiple offenses in Colorado state court in January 1984.[3] In particular, he pleaded guilty to:

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[2] In writing this brief, undersigned counsel relied on the version of the Colorado Sex Offenders Act of 1968 printed in the 1986 bound volume of the Colorado Revised Statutes. According to the source notes, this is the same version of the law that was in effect when Mr. Wimberly was sentenced in 1984.

[3] The district court and state district court pleadings mistakenly state that Mr. Wimberly pleaded guilty to first degree criminal trespass in Arapahoe County case number 83CR228 on January 5, 198**3**, *see* R:57, R:88, apparently reproducing a typographical error in the underlying judgment, *see* R:85. Examination of that document, however, makes clear that it was in fact entered on January 5, 198**4**. It was signed by the presiding judge on January 5, 1984, and it was stamped as received by the Department of Corrections on March 16, 1984. *See id.*

- one count of first degree sexual assault in Denver County case number 83CR1747, for which he was committed to the custody of the Colorado Department of Corrections (DOC) for an indeterminate term of one day to life, pursuant to the Colorado Sex Offenders Act of 1968 (CSOA);
- one count of first degree sexual assault in Denver County Case Number 83CR1538, for which he was sentenced to 24 years imprisonment;
- one count of first degree burglary in Arapahoe County case number 83CR915, for which he was sentenced to 16 years imprisonment; and
- one count of first degree criminal trespass in Arapahoe County case number 83CR228, for which he was sentenced to two years imprisonment.

R:65-72. The indeterminate one-day-to-life term of commitment in 83CR1747 was imposed concurrently with the 24-year sentence imposed in 83CR1538 and the 16-year sentence imposed in 83DCR915; and consecutively to the two-year sentence imposed in 83CR228. *See id.*

Mr. Wimberly has now been in the custody of the Colorado DOC for approximately 37 years. *See* R.74; *see also id.* at 65. He has long outserved the 26-year determinate sentence imposed for his trespass, sexual assault, and burglary convictions in case numbers 83CR228, 83CR1538, and 83CR915, which expired in 2010. *See* R.66. His current imprisonment is pursuant to his indeterminate one-day-to-life commitment only.

Mr. Wimberly has also long outserved the maximum sentence authorized for the first degree sexual assault offense for which the indeterminate commitment was imposed. He was convicted of first degree sexual assault as a class 2 felony, R.69, which carried a statutory maximum sentence of 24 years imprisonment, *see People v. Vigil*, 718 P.2d 496, 506 (Colo. 1986). Like his determinate sentence, the 24-year statutory maximum sentence authorized for the offense would have expired in 2010.

In the time since the 24-year maximum term for his offense expired, Mr. Wimberly has remained in the custody of the DOC without receiving any judicial review or other determination that he is mentally ill or abnormal and, as a result of that condition, dangerous. Rather, his case has been reviewed by the Parole Board on seven occasions, and deferred or tabled each time. *See* R.66.

C. Mr. Wimberly petitions for a writ of habeas corpus.

On April 1, 2019, Mr. Wimberly filed this action, seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2241. R.5. Relevant here, his amended petition argued that his continued incarceration following the expiration of the maximum underlying sentence, and without judicial hearing to determine whether he still constitutes a threat to the public, is unconstitutional for two reasons. *See* R.39. First, he argued that his incarceration violates the equal protection clause because, "following the expiration of a period equal to the maximum permissible sentence for the underlying crime, sex offenders must be afforded the same procedural protections as civil committees, and other groups whose commitment serves the states [sic] interest in public protection." R.39. Second, he argued that his continued incarceration, without judicial review or other opportunity to be heard, was a deprivation of liberty in violation of the due process clause. *See* R.44.

In response to an order directing it to address procedural defenses, *see* Order to File Preliminary Response at 1-2, *Wimberly v. Williams*, No. 19-cv-968, ECF No. 8 (D. Colo. May 9, 2019) (directing the state "to file a Preliminary Response limited to addressing . . . procedural defenses," and to "attach as exhibits all relevant portions of the

state court and/or administrative records"), the state indicated that it did not intend to assert "timeliness under 28 U.S.C. § 2244(d), exhaustion of state court or administrative remedies, the applicability of 28 U.S.C. § 2244(a), [or] any other procedural defenses," R.52. The state also declined the opportunity to bring any relevant state court or administrative records to the attention of the district court. *See id.*

The district court then ordered the state to "show cause in writing and filed with the Court . . . as to why the amended application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 . . . should not be granted." R.55.

The state filed a response opposing the petition on the merits, *see* R.56-63, Mr. Wimberly filed a reply, R.73, and the case proceeded to a decision on the merits before a magistrate judge.[4]

The magistrate judge denied the petition on the merits, dismissed the action with prejudice, and denied leave to appeal in forma pauperis. R.100. Following a limited remand from this Court, it also declined to issue a certificate of appealability. *See* Order, *Wimberly v. Williams*, No. 19-cv-968-MEH, ECF No. 33 (D. Colo. May 28, 2020).

The magistrate judge rejected Mr. Wimberly's equal protection claim. It began by finding that rational basis review applied, as sex offenders were not a protected class,

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[4] The parties consented to magistrate judge jurisdiction. *See* Election Concerning Consent/Non-Consent to United States Magistrate Judge Jurisdiction, *Wimberly v. Williams*, No. 19-cv-968-MEH, ECF No. 16 (D. Colo. July 18, 2019).

and "[n]othing in the Constitution can be read to guarantee citizens" any "liberty interest in not being restrained, or in a judicial determination of whether he should be continue to be restrained." R.92-93. It then concluded that the state had a rational basis for treating sex offenders differently than civil committees, relying on Colorado Supreme Court decision concerning differential treatment of sex offender committees *prior* to the expiration of the statutory maximum sentence for the underlying offense. *Id.* at 94 (citing *Kibel*, 701 P.2d at 42; *People v. White*, 656 P.2d 690, 694 (Colo. 1983)).

The magistrate judge acknowledged that the United States Supreme Court and Colorado Supreme Court have both indicated "the rational basis for distinguishing sex offenders from other persons committed because they constitute a public danger may disappear once the maximum sentence for the underlying crimes has expired." R.95 (quoting *Kibel*, 701 P.2d at 42 n.8); *see also Humphrey v. Cady*, 405 U.S. 504, 510-11 (1972) (finding that renewal of criminal commitment following expiration of maximum sentence for underlying offense without protections afforded to civil committees violated equal protection). However, the magistrate judge distinguished these cases on the ground that Mr. Wimberly's indefinite commitment "under the CSOA is not measured by the period of the maximum underlying sentence, and no new procedures are triggered or rights statutorily provided when that period expires." R.96-97.

The magistrate judge also rejected Mr. Wimberly's due process claim. Again relying on Colorado Supreme Court decisions regarding commitment prior to the expiration of the maximum sentence for the underlying offense, the magistrate judge found

that "the periodic parole board review afforded under the CSOA satisfies due process." R.99 (citing *White*, 656 P.2d at 693; *Kibel*, 7901 P.2d at 43-44).

Mr. Wimberly timely appealed. R.103-04; *see also* Fed. R. App. P. 4(a)(1)(A), (c)(1).

On July 17, this Court found that Mr. Wimberly "ha[d] made the requisite 'substantial showing of the denial of a constitutional right[,]' 28 U.S.C. § 2253(c)(2)," and therefore granted him a certificate of appealability to pursue the following issue: "that his indeterminate commitment beyond the expiration of his maximum underlying criminal sentence violates both the equal protection and due process clauses of the Fourteenth Amendment." Order at 1-2, *Wimberly v. Williams*, Case No. 20-1128 (July 17, 2020). The Court also granted Mr. Wimberly's requests to proceed in forma pauperis and for the appointment of counsel, and directed appointed counsel to file this supplemental opening brief. *Id.* at 25-26.

Summary of Argument

Mr. Wimberly's continued commitment is unconstitutional for two reasons.

First, it violates the equal protection clause. Once the maximum sentence for his underlying offense expired, the state was no longer justified in treating him differently than other individuals facing involuntary commitment. By depriving him of the procedural safeguards routinely afforded other committees, the state denied him equal protection of the law.

Second, it violates the due process clause. Freedom from physical restraint is at the core of the liberty protected by the due process clause. While the fact of his criminal

conviction may have justified his detention prior to the expiration of the statutory maximum sentence for the offense, it cannot do so now that the sentence has long since expired. Under these circumstances, his continued involuntary commitment is constitutional only if based upon a judicial determination, by clear and convincing evidence, that he presently suffers from a mental abnormality or illness that renders him dangerous to himself or others. Because he has received no such process, his commitment offends the due process clause.

Because Mr. Wimberly is "in custody in violation of the Constitution," 28 U.S.C. § 2241(c)(3), the decision of the district court should be reversed, and his application for a writ of habeas corpus should be granted.

Argument

I. Standard of Review

When reviewing the denial of a habeas petition under § 2241, this Court "review[s] the district court's legal conclusions de novo and accepts its factual findings unless clearly erroneous." *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1042 (10th Cir. 2017).[5]

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[5] The "deferential standard of review contained within § 2254" that applies to state adjudications on the merits does not apply here for two reasons. *Leatherwood*, 861 F.3d at 1042-43. First, the record includes no state proceedings adjudicating Mr. Wimberly's claims on the merits, and the state declined the opportunity to attach any such proceedings. Second, the deferential AEDPA standard is "only properly invoked when an individual in state custody collaterally attacks the validity of a state conviction and/or sentence" under § 2254; it does not apply where, as here, the petitioner challenges the execution of his sentence under § 2241. *Leatherwood*, 861 F.3d at 1042-43.

II. Mr. Wimberly's continued incarceration pursuant to the CSOA is a form of commitment subject to the protections of the equal protection and due process clauses.

Mr. Wimberly's continued incarceration is a species of commitment that is "subject both to the Equal Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause." *Specht v. Patterson*, 386 U.S. 605, 608 (1967). That much is clear from the text of the CSOA, as well as the nature of the proceedings and confinement for which it provides.

The text of the CSOA describes a form of criminal commitment. In a section titled "[i]ndeterminate *commitment*," it authorizes the state district court, "*in lieu of the sentence* otherwise provided by law, [to] *commit* a sex offender to the custody of the [DOC] for an indeterminate term having a minimum of one day and a maximum of his natural life." Colo. Rev. Stat. § 16-13-203 (1986) (emphases added).[6] The state legislature thus clearly expressed the intent to create a form of criminal commitment, instead of criminal sentencing. *Cf. Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) ("defer[ring] to the legislature's stated intent" in characterizing a commitment scheme as "civil" rather than "criminal").

[6] By contrast, the analogous provision of the successor Sex Offender Lifetime Supervision Act of 1998 ("SOLSA"), provides for an "[i]ndeterminate *sentence*," and further states that "[t]he district court having jurisdiction shall *sentence* a sex offender to the custody of the department. . . ." Colo. Rev. Stat. § 18-1.3-1004(1)(a) (emphases added).

The nature of the proceedings under the CSOA is also consistent with that of commitment rather than sentencing. The CSOA "does not make the commission of a specified crime the basis for sentencing," but rather makes such a conviction "the basis for commencing another proceeding under the Act." *Specht*, 386 U.S. at 608 (discussing prior version of CSOA). Specifically, commitment in lieu of sentencing is authorized only "[i]f the court finds beyond a reasonable doubt that the defendant, if at large, constitutes a threat of bodily harm to members of the public." Colo. Rev. Stat. § 16-13-211(2) (1986). The CSOA thus requires "a new finding of fact . . . that was not an ingredient of the offense charged," which in turn leads to a new form of "criminal punishment," albeit one "designed not so much as retribution as it is to keep individuals from inflicting future harm." *Specht*, 386 U.S. at 608-09. Because incarceration under the CSOA thus requires "a separate criminal proceeding which may be invoked" after conviction, it is not an ordinary sentence but rather a species of commitment proceeding "subject both to the Equal Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause." *Id.* at 608-09.

The nature of the fact-finding process provided for by the CSOA provides further support for the conclusion that it authorizes a form of commitment. Specifically, the CSOA requires the finding of dangerousness to be based in part on the results of a psychiatric examination. Once the CSOA has been invoked, "the court shall forthwith commit the defendant to Colorado state hospital, the university of Colorado psychiatric hospital, or the county jail" for psychiatric examination. Colo. Rev. Stat. § 16-13-

207(1)(a), (b), (c) (1986). The psychiatrists' reports are required to opine on such matters as "[w]hether the defendant is mentally deficient" and "[w]hether the defendant could benefit from psychiatric treatment." *Id.* § 16-13-207(c)(2). It is on the basis of this information that the court is to determine whether the "defendant, if at large, constitutes a threat of bodily harm to members of the public." *Id.* § 16-13-211(2). This is the kind of determination—"involving a mixture of medical and social or legal judgments"—that is involved in commitment procedures. *Humphrey v. Cady*, 405 U.S. 504, 520 (1972).

So does the fact that confinement under the CSOA includes the possibility of confinement in a mental hospital for treatment. Under the CSOA, the state parole board is authorized to "order the transfer of any person committed . . . to any facility under the jurisdiction of the [DOC]," Colo. Rev. Stat. § 16-13-216(2) (1986), including state-run mental health facilities for mental health treatment, *e.g.*, *People v. Adrian*, 701 P.2d 45, 47 (Colo. 1985) ("[T]he state parole board, under the provisions of the CSOA . . . transferred the defendant to the Colorado State Hospital."). "[I]nvoluntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual." *Vitek v. Jones*, 445 U.S. 480, 493 (1980). Its availability for those confined under the CSOA is further proof that the statute provides for commitment, rather than sentencing.

For all these reasons, this Court should find that Mr. Wimberly's indeterminate confinement under the CSOA is the result of commitment proceedings. As such, his confinement, "whether denominated civil or criminal[,] [is] subject both to the Equal

Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause." *Specht*, 386 U.S. at 608.

III. Mr. Wimberly's continued commitment violates the equal protection clause of the Fourteenth Amendment.

Mr. Wimberly's continued commitment under the CSOA, without the procedural protections offered to civil committees under Colorado law, violates the equal protection clause of the Fourteenth Amendment.

A. Because Mr. Wimberly has a fundamental right in avoiding bodily restraint, the state must have a particularly convincing reason to justify its discriminatory commitment procedures.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). It has therefore long been "clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Id.* (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)). Given the "fundamental nature" of the liberty interests at stake, heightened scrutiny applies to this equal protection claim. *Id.*; *see also id.* at 86 (plurality opinion) ("Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason" for discriminating between classes of individuals with respect to commitment procedures). The district court was thus wrong to conclude that "[n]othing in the Constitution can be read to guarantee citizens" any "liberty interest in not being restrained, or

in a judicial determination of whether he should continue to be restrained," and that the equal protection claim was therefore subject only to rational basis review. R.93.

However, even if rational basis review did apply, Mr. Wimberly would prevail on his equal protection claim. As explained in more detail below, "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term"—or indeed, who has long since surpassed it—"from all other civil commitments." *Baxstrom v. Herold*, 383 U.S. 107, 111-12 (1966). The continued commitment of Mr. Wimberly beyond the expiration of the maximum sentence authorized for his offense, without affording him the procedural safeguards available to other civil committees, violates the equal protection clause.

B. A criminal conviction cannot justify diminished procedural safeguards against involuntary commitment following the expiration of the statutory maximum sentence for the underlying offense.

The equal protection clause permits a convict to be treated differently than other civil committees only so long as his commitment "is imposed in lieu of sentence, *and is limited in duration to their maximum permissible sentence*." *Humphrey*, 405 U.S. at 510-11 (emphasis added). That justification, however, no longer applies following the expiration of the maximum sentence authorized for the underlying offense. At that point, "there is no conceivable basis" for distinguishing a commitment originally imposed because of a criminal conviction from other civil commitments, *Baxstrom*, 383 U.S. at 111-12 (holding that disparate commitment proceedings for inmates nearing the end of their sentences violated equal protection), as "the basis for [the] original confinement"—*i.e.*, the

state's interest in punishing the underlying offense—"no longer exists," *Foucha*, 504 U.S. at 86 (plurality opinion). Once the maximum sentence for the underlying offense has expired, a convicted prisoner "may be treated involuntarily for particular psychiatric problems only as would any other candidate for civil commitment." *Jones*, 463 U.S. at 369 n.19. The fact that he was previously convicted of a crime cannot "justify less procedural and substantive protection against indefinite commitment than that generally available to all others." *Jackson v. Indiana*, 406 U.S. 715, 724 (1972).

In *Baxstrom v. Herold*, 383 U.S. 107 (1966), the Supreme Court held that individuals who have been convicted of crimes may not be involuntarily committed at the expiration of their sentences based on proceedings that are less protective than those afforded to civil committees. The petitioner Johnnie Baxstrom "was convicted of second degree assault in April 1959 and was sentenced to a term of two and one-half to three years in a New York prison." *Id.* at 108. While he was serving that sentence, "he was certified as insane" and "transferred from prison to Dannemora State Hospital, an institution under the jurisdiction and control of the New York Department of Correction and used for the purpose of confining and caring for male prisoners declared mentally ill while serving a criminal sentence." *Id.* Shortly before his prison sentence was to expire, Mr. Baxstrom was involuntarily committed pursuant to § 384 of the New York Correction Law, which applied only to inmates confined at Dannemora nearing the expiration of their sentences. *See id.* at 109-10. Under that law, there was no requirement

that Mr. Baxstrom be adjudicated "dangerously mentally ill" or afforded the right to a jury trial, as otherwise required for involuntary commitment. *See id.* at 110-11.

The Supreme Court held that Mr. Baxstrom "was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York," and "without a judicial determination that he is dangerously mentally ill." 383 U.S. at 110. Having made these procedural protections "generally available" to individuals facing commitment proceedings, the state "may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." *Id.* at 111. In reaching this conclusion, the Supreme Court rejected the state's argument that it "has created a reasonable classification differentiating the civilly insane from the 'criminally insane,' which [it] defined as those with dangerous or criminal propensities." *Id.* The Supreme Court acknowledged that this proffered distinction could "of course . . . be a reasonable distinction for purposes of determining the type of custodial or medical care to be given." *Id.* However, it concluded that there was "no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments" with respect to the procedural protections afforded. *Id.* at 112.

The Supreme Court extended the logic of *Baxstrom* to cases like this one—where the challenged commitment was initially imposed in lieu of sentencing, and has continued beyond the statutory maximum sentence authorized for the underlying offense—

in *Humphrey v. Cady*, 405 U.S. 504 (1972). That case involved the petitioner's commitment pursuant to the Wisconsin Sex Crimes Act. *Id.* at 506. Under that law, if a court found that a crime had been motivated by "a desire for sexual excitement," it could institute proceedings to "commit the defendant to the Department [of Public Welfare] for treatment in lieu of sentence, for a period equal to the maximum sentence authorized for the defendant's crime." *Id.* The law further provided that, after expiration of the maximum sentence, "the Department [could] petition for an order renewing the commitment for five years," and that "[f]urther five-year renewals [could] be similarly obtained without limitation." *Id.* Unlike similarly situated civil committees, individuals subject to commitment under the Wisconsin Sex Crimes Act were not entitled to a jury determination that they met the standards for confinement, even after the expiration of the maximum sentence for the underlying offense. *Id.* at 508.

The Supreme Court held that the petitioner's continued confinement under these circumstances posed serious constitutional problems. Critically, the Supreme Court characterized the petitioner's commitment, pursuant to a state statute providing for commitment in lieu of sentencing, as presenting "substantially the same" issues as *Baxstrom*. 405 U.S. at 508. It rejected the argument that the state was justified in treating the petitioner differently than other committees because the commitment "[was] triggered by a criminal conviction" and "[was] merely an alternative to penal sentencing" that therefore "[did] not require the same procedural safeguards afforded in a civil commitment proceeding." *Id.* at 510. The Court found that this argument "arguably has force

with respect to an initial commitment under the Sex Crimes Act, which is imposed in lieu of sentence, and is limited in duration to the maximum permissible sentence." *Id.* at 510-11. However, it "carr[ied] little weight . . . with respect to the subsequent renewal proceedings, which result[ed] in five-year commitment orders based on new findings of fact, and [were] in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime." *Id.* at 511. Once the maximum sentence authorized for the offense has expired, the Court reasoned, the fact that a person had been convicted of a crime could no longer justify treating him differently than others facing involuntary commitment.

C. Mr. Wimberly has been denied equal protection of the law.

Under *Baxstrom* and *Humphrey*, Mr. Wimberly's commitment, which has continued beyond the expiration of the maximum sentence authorized for his offense, and without his being afforded the procedural safeguards available to civil committees, violates the equal protection clause.

Under Colorado law, a long-term involuntary civil commitment is subject to judicial review at six-month intervals, and may not be continued without clear and convincing evidence that the committee "has a mental health disorder and, as a result of the mental health disorder, is a danger to others or to himself . . . or is gravely disabled." Colo. Rev. Stat. § 27-65-109. At each hearing, the individual who has been committed has the right to counsel, the right to a jury trial, and the right to appeal any adverse decision. *See id.* §§ 27-65-109, 27-65-111. A CSOA commitment, by contrast, may be

extended based on the sole discretion of the parole board, which is required only to periodically "review all reports, records, and information concerning said person, for the purpose of determining whether said person shall be paroled." Colo. Rev. Stat. § 16-13-216(1)(a) (1986). Since the statutory maximum sentence authorized for Mr. Wimberly's offense expired in approximately 2010, the parole board has reviewed his case just seven times and "deferred" or "tabled" it each time. *See* R.66.

Mr. Wimberly's continued commitment beyond the expiration of the statutory maximum sentence for his offense, and without the benefit of these procedural protections, violates the equal protection clause. The fact that his initial commitment was "triggered by a criminal conviction" as "merely an alternative to penal sentencing" can no longer justify his different treatment. *Humphrey*, 405 U.S. at 510. His underlying offense may have justified the denial of "procedural safeguards afforded in a civil commitment" with respect to "an *initial* commitment" that was "imposed in lieu of sentence, and is *limited in duration to the maximum permissible sentence*." *Id.* at 510-11 (emphases added). However, it cannot justify the continued denial of these basic procedural safeguards to Mr. Wimberly today, with respect to a commitment that clearly is not "limited by . . .the maximum sentence authorized for [the] crime." *Id.* at 511. Now that the authorized penal term for his offense has long since ended, there is "no conceivable basis" for distinguishing his commitment from all other commitments. *Baxstrom*, 383 U.S. at 112; *see also Kibel*, 701 P.2d at 42 n.8 ("[T]he rational basis for distinguishing sex offenders from other persons committed because they constitute a public danger may disappear

once the maximum sentence for the underlying crimes has expired"). Mr. Wimberly has thus been denied equal protection of the law.

For purposes of the equal protection clause—and contrary to the conclusion reached by the district court—the distinctions between the CSOA and the statutory schemes at issue in *Humphrey* and *Baxstrom* are immaterial. According to the reasoning of the district court, those Supreme Court precedents do not apply to this case because "no new procedures are triggered or rights statutorily provided" when a CSOA commitment is continued beyond the expiration of the statutory maximum sentence. R.96-97. Both the Wisconsin Sex Crimes Act at issue in *Humphrey* and the provision of New York state law at issue in *Baxstrom*, the district court observed, did require certain procedures to be followed in order to extend a commitment beyond the expiration of the statutory maximum sentence. *See id.* The district court therefore declined to apply *Humphrey* and *Baxstrom* in this case. *See id.* at 96-97.

The district court misunderstood the significance of the statutory maximum sentence in those cases. The maximum sentence authorized for the underlying offense is constitutionally significant to any commitment imposed in lieu of sentencing, regardless of whether it is explicitly referenced in the challenged commitment statute. *Cf. Foucha*, 504 U.S. at 77 (finding that state court erred in characterizing requirement that insanity acquittee who had recovered his sanity be released "as merely an interpretation of the pertinent statutory law in the District of Columbia and as having no constitutional sig-

nificance"). Under *Humphrey*, the statutory maximum sentence for the underlying offense determines when a criminal conviction can be used to justify treating criminal commitments differently than civil commitments. During the period that a state could lawfully incarcerate an individual as punishment for the underlying offense, a criminal commitment is "merely an alternative to penal sentencing" that does not necessarily "require the same procedural safeguards afforded in a civil commitment proceedings." 405 U.S. at 510-11.[7] "This alternative sentence does not violate the [committee's] constitutional rights so long as the time served does not extend beyond the maximum sentence for the underlying crime." *Grindle v. Miller*, 400 A.2d 787, 790 (N.H. 1979).

But after the "maximum sentence authorized" for the offense has expired, a criminal commitment can no longer be understood as "merely an alternative to penal sentencing." *Humphrey*, 405 U.S. at 510-11. Because the punitive purpose "for [the] original confinement no longer exists," the conviction is no longer relevant to the question of what procedural safeguards against commitment should be provided. *Foucha*, 504 U.S. at 86 (plurality opinion). As a person nears the end of his penal term, the relevance of his conviction to his commitment procedures diminishes. If there is "no conceivable

[7] That is not to say that a state may provide *no* procedural safeguards against the commitment of somebody who is already subject to punitive incarceration. *See Vitek*, 445 U.S. at 487-88.

basis" for treating him differently from other civil committees at the end of his sentence, there is less than none for doing so when, as here, the maximum statutory sentence has long ago expired. *Baxstrom*, 383 U.S. at 111-12.

The district court's reasoning was also backwards. The differences between the commitment schemes at issue in *Humphrey* and *Baxstrom* do not undermine Mr. Wimberly's equal protection claim—they bolster it. The commitment schemes at issue in *Humphrey* and *Baxstrom* offered, if anything, *more* procedural protections to committees than the CSOA. The Wisconsin Sex Crimes Act at issue in *Humphrey*, for example, required that the person facing commitment be afforded the opportunity for judicial review of the question whether he remained "dangerous to the public because of [his] mental or physical deficiency, disorder or abnormality," before his commitment was extended beyond the expiration of the statutory maximum sentence authorized for his offense, although it did not afford the right to trial by jury available to other civil committees. *Humphrey*, 405 U.S. at 507. The New York law at issue in *Baxstrom* similarly required that new proceedings be initiated in order to extend a commitment beyond the expiration of a defendant's sentence, although it did not require a finding that the person being committed was "dangerously mentally ill" or provide the right to trial by jury. *See Baxstrom*, 383 U.S. at 110-11.

The CSOA, by contrast, allows a commitment to be extended with far *fewer* procedural protections than either law—let alone than the laws governing civil commitment in Colorado, *see* Colo. Rev. Stat. § 27-65-109. Whereas the petitioner in *Humphrey*

was deprived mainly of the right to a jury trial, Mr. Wimberly has been denied judicial review altogether. *See* Colo. Rev. Stat. § 16-13-216(1)(a) (1986) (providing for indefinite continuation of CSOA commitment with only periodic review by the parole board). The denial of equal protection in this case is accordingly *greater* than that alleged in *Humphrey* and *Baxstrom*. Examination of the distinctions between the CSOA and the state statutes at issue in *Humphrey* and *Baxstrom* thus confirms that Mr. Wimberly's present commitment, without being afforded the same opportunity for judicial review to which other committees are entitled, violates the equal protection clause.

IV. Mr. Wimberly's continued commitment violates the due process clause of the Fourteenth Amendment.

Mr. Wimberly's continued commitment, beyond the expiration of the maximum sentence authorized for his offense, and without any opportunity for judicial review of the question of whether he suffers from a mental illness or abnormality that renders him dangerous to himself or others, violates the due process clause.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha*, 504 U.S. at 80. It is therefore "clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Id.* (quoting *Jones*, 463 U.S. at 361). And while "[a] State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution," the state has no such interest here, as the maximum sentence authorized for the underlying offense has

long since expired. *Id.* Instead, Mr. Wimberly's continued indefinite incarceration can only be justified as an involuntary commitment. *See id.* ("The State may also confine a mentally ill person if it shows 'by clear and convincing evidence that the individual is mentally ill and dangerous.'" (quoting *Jones*, 463 U.S. at 362)); *see also id.* at 86 (plurality opinion) ("[T]he State must establish insanity and dangerousness by clear and convincing evidence in order to confine an insane convict beyond his criminal sentence, when the basis for his original confinement no longer exists.").

Due process imposes substantive limits on involuntary commitment. *See Foucha*, 504 U.S. at 80. Any such commitment must be predicated upon a finding that the individual is mentally ill or abnormal and, as a result of that condition, dangerous to himself or others. *See Hendricks*, 521 U.S. at 358; *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) ("[T]here is no constitutional basis for confining [mentally ill] persons involuntarily if they are dangerous to no one and can live safely in freedom."). Both mental illness or abnormality and resulting dangerousness are required in order to "limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." *Hendricks*, 521 U.S. at 358. Once this substantive basis for commitment no longer exists—*i.e.*, once the committee has either "recovered his sanity or is no longer dangerous"—he must be released. *Foucha*, 504 U.S. at 77; *e.g.*, *O'Connor*, 422 U.S. at 575 ("[E]ven if his confinement was initially permissible, it could not constitutionally continue after [the constitutional basis] basis no longer existed").

Given the magnitude of the liberty interests at stake, and the corresponding risk posed by erroneous decisions, the due process clause also requires the state to afford committed individuals certain procedural rights. *See Addington v. Texas*, 441 U.S. 418, 425 (1979). The substantive findings supporting the commitment must be made by clear and convincing evidence. *See id.* at 431-33. To ensure that this heightened standard of proof is met, any commitment proceedings must, at a minimum, include an evidentiary hearing, at which the person facing commitment has the opportunity to present his own evidence and challenge that supporting commitment with the assistance of counsel. *Cf. Vitek*, 445 U.S. at 494-95 (outlining the "minimum procedures" required by due process "before transferring a prisoner to a mental hospital," including "[a] hearing," "[a]n independent decisionmaker," "legal counsel, furnished by the state, if the inmate is financially unable to furnish his own," and "[e]ffective and timely notice of all the foregoing rights"). Furthermore, because a committee must be released when the substantive basis for his commitment no longer exists, *see Foucha*, 504 U.S. at 77-78, these procedures must be provided on an ongoing, periodic basis, *see Parham v. J.R.*, 442 U.S. 584, 607 (1979) (holding that in the context of juvenile involuntary commitments, "it is necessary that the . . . continuing need for commitment be reviewed periodically by a similarly independent procedure"). Otherwise, the requirement to "release the committed when they deserve to be let out" could be rendered "toothless" merely by a state's refusal to "ever consider the continued propriety of commitment." *J.R. v. Hansen*, 803 F.3d 1315, 1321 (11th Cir. 2015).

Mr. Wimberly's commitment does not satisfy any of these substantive or procedural requirements. Since the maximum statutory sentence for his underlying offense expired a decade ago—and with it, any punitive justification for his incarceration—he has remained in the custody of the DOC based solely on the parole board's occasional decision to defer or table his case. *See* R.66. The parole board's review, such as it is, has been confined to the questions of whether Mr. Wimberly's release is in the "best interests" of Mr. Wimberly and the public, and whether he would "constitute a threat of bodily harm to members of the public" if released. Colo. Rev. Stat. § 16-13-216(5) (1986). There has been, in other words, no determination as to whether Mr. Wimberly remains mentally ill or abnormal and is, as a result of that condition, dangerous, as is required to sustain an involuntary commitment.

The parole board review afforded by the CSOA is also procedurally inadequate. There has been no finding that Mr. Wimberly is mentally ill or abnormal and therefore dangerous at all—let alone one based upon proof by clear and convincing evidence, made after a procedurally adequate adjudicative hearing at which Mr. Wimberly had the opportunity to present evidence and received the assistance of counsel. *Cf. Vitek*, 445 U.S. at 494-95; *Hendricks*, 521 U.S. at 353 (upholding Kansas sex offender civil commitment scheme, pursuant to which involuntary commitment was subject to annual judicial review, and "the confined person could at any time file a release petition" to obtain a judicial determination as to whether he remained mentally abnormal and therefore dangerous to the community). Instead, the parole board's decision is based only on its own

review of the records and reports in his case. *See* Colo. Rev. Stat. § 16-13-216(1)(a) (1986). These procedures fall far short of what the due process clause requires for such a "massive curtailment of liberty." *Vitek*, 445 U.S. at 491.

The inadequacy of the parole board process is particularly plain when the passage of time is taken into account. Mr. Wimberly was convicted of the underlying offense in January 1984, over 36 years ago; he is now 65 years old and in poor health. *See* R.69, R.76.[8] Whatever inference of dangerousness that could have once been drawn from the fact of his offense is now long stale. The psychiatric examinations and probation officer's report that originally supported the state judge's conclusion that Mr. Wimberly posed a danger to the public due to his psychiatric makeup are likewise decades old. This information may once have been sufficient to justify Mr. Wimberly's involuntary commitment. But it cannot possibly suffice to establish that Mr. Wimberly remains mentally ill and, as a consequence, dangerous today.

Under these circumstances, Mr. Wimberly's continued indefinite commitment, beyond the expiration of the maximum sentence authorized for his offense, and without any opportunity for judicial review to determine whether he remains mentally ill or abnormal and is dangerous as a result, violates the due process clause.

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[8] Mr. Wimberly states in his reply in support of his application for a writ of habeas corpus that he is 64 years old. *See* R.76. According to the Colorado Department of Corrections website, he is now 65.

Conclusion

For these reasons, Mr. Wimberly respectfully requests that this Court reverse the decision of the district court and grant his petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241.

Statement Regarding Oral Argument

Counsel believes that oral argument will assist the Court in adjudicating the issues presented, and therefore requests the opportunity to present oral argument.

Respectfully submitted,

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Certifications

I hereby certify that the following is true and correct to the best of my knowledge and belief, formed after a reasonable inquiry:

(1) This brief is proportionally spaced and contains 7,317 words and therefore complies with the applicable type-volume limitations.

(2) Any required privacy redactions have been made.

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(5) On October 26, 2020, I electronically filed the foregoing using the CM/ECF system, which will send notification of this filing to opposing counsel:

Ann Luvera, Office of the Attorney General for the State of Colorado
Email: ann.luvera@coag.gov

/s/ Kathleen Shen
Kathleen Shen
Assistant Federal Public Defender

IN THE UNITED STATES COURT
OF APPEAL FOR THE TENTH CIRCUIT

Bruce A. Wimberly v. Dean Williams

Case No. 20-1128

Attachment A

February 28, 2020, Order Denying Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00968-MEH

BRUCE E. WIMBERLY,

Applicant,

v.

DEAN WILLIAMS, Executive Director of CDOC,

Respondent.

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

Michael E. Hegarty, United States Magistrate Judge.

Before the Court is Applicant Bruce E. Wimberly's amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 ("Application"). ECF 7. The Court must construe Applicant's pleadings liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110. For the reasons that follow, the Application is denied.

I. Background

On January 5, 1983, Applicant was sentenced to two years' imprisonment in Arapahoe County District Court Case No. 83CR228 after pleading guilty to first degree criminal trespass. ECF 17-1 at 1, 4. Thereafter, on January 13, 1984, Applicant was sentenced in Denver District Court to two separate first degree sexual assault charges after entering guilty pleas in Case Nos.

Attachment A

83CR1538 and 83CR1747. *Id.* at 1. In Case No. 83CR1747, Applicant was sentenced to an indeterminate term of a minimum of one day and a maximum of his natural life pursuant to the Colorado Sex Offenders Act of 1968 ("CSOA"), Colo. Rev. Stat. § 16-13-201 (relocated in 2002 to Colo. Rev. Stat. § 18-1.3-901 *et seq*.), to run concurrent with his sentence in Case No. 83CR1538 and consecutive with his sentence in Arapahoe County Case No. 83CR228. *Id.* at 1, 5. In Case No. 83CR1538, Applicant was sentenced to a term of twenty-four years, to run concurrent with his sentence in Case No. 83CR1747 and consecutive with his sentence in Arapahoe County Case No. 83CR228. *Id.* at 1, 6. On January 31, 1984, Applicant pled guilty to first degree burglary in Arapahoe County Case No. 83CR915 and was sentenced to sixteen years, to run concurrent with his sentence in Denver District Court Case No. 83CR1747. *Id.* at 1, 8.

On March 13, 1984, Applicant was transferred to the Colorado Department of Corrections ("CDOC") to begin serving his indeterminate sentence. *Id.* at 1. Applicant was eligible for parole release after reaching his parole eligibility date ("PED"). *Id.* Once he had reached his PED, Applicant was presented by the CDOC to the Colorado Board of Parole regularly from September 1994 through April 15, 2010, at which point he had served over twenty-six years on his sentence. *Id.* at 1-2. Each time he was reviewed by the Parole Board he was deferred. *Id.* at 2. Applicant thereafter was reviewed by the Parole Board seven times between 2011 and 2019. *Id.* His most recent review was on April 17, 2019, which resulted in deferral. *Id.* His next parole hearing date is in April 2020. *Id.*

In this action, Applicant alleges that his rights to equal protection and due process are being violated because he is being held beyond the expiration of the maximum sentence applicable to his underlying crimes without a judicial determination of whether he remains a threat to the public. Applicant requests relief in the form of a judicial hearing in Denver District Court for a

determination of whether he remains a threat to the public and, depending on the Denver court's finding, either release from prison or placement in a mental health treatment facility.

In earlier proceedings in this action, Respondent was directed to file a Preliminary Response addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d), exhaustion of state court or administrative remedies, and any other procedural defenses. In his Preliminary Response (ECF 13), Respondent stated he did not intend to assert the above-mentioned affirmative defenses.

II. Discussion

A. 28 U.S.C. § 2241

The writ of habeas corpus is available if a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). A section 2241 habeas proceeding is "an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). A Section 2241 application must be filed in the district where the prisoner is confined. *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996).

B. The Colorado Sex Offenders Act of 1968

Applicant challenges the execution of the indeterminate sentence imposed under the CSOA in Denver District Court Case No. 83CR1747. The CSOA applies "to persons sentenced for offenses committed prior to November 1, 1998." Colo. Rev. Stat. § 18–1.3–902. The CSOA gives state district courts the discretion to either sentence a sex offender to imprisonment, or order that he or she be committed to the custody of the Colorado Department of Corrections "for an indeterminate term having a minimum of one day and a maximum of his or her natural life." Colo. Rev. Stat. § 18–1.3–904. For a court to order commitment under the CSOA, the defendant must

be found to be a danger to society beyond a reasonable doubt. Colo. Rev. Stat. § 18-1.3-912. The court must receive evidence on the issues of whether the defendant is mentally deficient, whether he or she could benefit from psychiatric treatment, whether he or she could be adequately supervised on probation, and whether the defendant, if at large, would constitute a threat of bodily harm to the public. Colo. Rev. Stat. §§ 18-1.3-908, 18-1.3-911. If the court "elects to exercise this option, it must do so in lieu of the sentence otherwise provided by law." *People v. Sanchez*, 520 P.2d 751, 753 (Colo.1974) (internal quotation marks and citation omitted). Thereafter, six months following the commitment, and every twelve months thereafter, the state parole board must "review all reports, records, and information" concerning the defendant. Colo. Rev. Stat. § 16-13-216(1)(a). The parole board may then parole the defendant or transfer him or her to "any facility under the jurisdiction of the department, if the board deems it to be in the best interests of said person and the public." Colo. Rev. Stat. § 16-13-216(2), (4).

The CSOA has been repeatedly upheld as constitutional on due process, equal protection, and Eighth Amendment grounds. *See People v. White*, 656 P.2d 690, 693–95 (Colo. 1983) (collecting cases); *see also Specht v. Patterson*, 386 U.S. 605, 607, 610–11 (1967) (holding that the predecessor to the CSOA, which contained a similar indeterminate sentencing provision, did not comport with due process because, unlike the CSOA, it did not provide for a full evidentiary hearing before sentencing).

C. Equal Protection Claim

Applicant asserts a violation of his equal protection rights because he is being treated differently than "civil committees," by which he appears to mean individuals serving indeterminate

sentences under civil commitment statutes, who are afforded periodic judicial review -- as opposed to parole board review -- to determine if they still pose a risk to the public. *See* ECF 7 at 4.

The equal protection clause of the Fourteenth Amendment forbids states from "deny[ing] to any person within [their] jurisdiction[s] the equal protection of the laws." U.S. Const. amend. XIV, § 1. This "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To state an equal protection claim, a plaintiff must allege that: (1) similarly-situated individuals were treated differently; and (2) either the differential treatment was based on a suspect classification or fundamental right and not supported by a compelling governmental interest, or, if the differential treatment was not based on a suspect classification or fundamental right, the differential treatment was not justified by a rational connection to a legitimate state interest. *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1047 (10th Cir. 2009).

Here, the alleged differential treatment is not based on a suspect classification, since sex offenders are not members of a suspect class. *See Lustgarden v. Gunter*, 966 F.2d 552, 555 (10th Cir. 1992).

Respondent argues that no fundamental right is involved, since the possibility of parole release does not qualify as a fundamental right. *See* ECF 17 at 6 (citing *Pettigrew v. Zavaras*, 574 F. App'x 801, 814-15 (10th Cir. 2014)). Applicant replies that "I am not requesting release on parole, but . . . [rather] a complete release to freedom without parole or commitment to the proper mental health treatment facility, if found to still constitute a threat to the public." ECF 23 at 7. To the extent that Applicant may be contending that his right to "personal liberty," in other words, his right to be free from restraint through incarceration, is a fundamental right (*see* ECF 7 at 9), the

argument fails. The phrase "fundamental right" in the equal protection context refers to those particular rights, embodied in the U.S. Constitution, which the Supreme Court has recognized as having fundamental importance. *Oklahoma Educ. Ass'n v. Alcoholic Beverage Laws Enforcement Comm'n*, 889 F.3d 929, 932 (10th Cir. 1989). Examples of such rights include rights to privacy in certain reproductive decisions, the right to interstate travel, the right to associate to advance political beliefs, and the right to vote. *Id.* Any argument by Applicant that he has a fundamental right to release from incarceration, or to a judicial determination of whether he should be released, is simply a repetition of his contention, set forth in his subsequent due process claim, that he has a liberty interest in not being restrained, or in a judicial determination of whether he should continue to be restrained, for due process purposes. Nothing in the Constitution can be read to guarantee citizens such a right. *See id.* at 933, citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33-34 (1973) (explaining that fundamental rights are those "explicitly or implicitly guaranteed by the Constitution").

Because the differential treatment asserted by Applicant is not based on a suspect classification or a fundamental right, it violates equal protection only if it is not rationally connected to a legitimate state interest. *See Kleinsmith*, 571 F.3d at 1047. Rational basis review is "highly deferential to state legislatures," and requires the court to indulge "a strong presumption of validity" to state laws. *City of Harriman v. Bell*, 590 F.3d 1176, 1194 (10th Cir. 2010). Rational basis review is not a license for the court "to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). Instead, the court must uphold the statute if there is "any reasonably conceivable state of facts" that could justify the differential treatment and may find a violation only if the classification "rests on grounds *wholly*

irrelevant to the treatment of the state's objective." *Bell*, 590 F.3d at 1194 (citation omitted) (emphasis in original).

In *People v. Kibel*, the Colorado Supreme Court found a rational basis for distinguishing between convicted sex offenders committed under the CSOA and civil committees:

> [S]ex offenders, unlike civil committees or mentally ill prisoners, ha[ve] been found guilty of crimes regarded by society as particularly heinous. The state therefore has a greater interest in protecting the public from sex offenders than from the other categories of committed persons, and the less stringent procedural protections afforded sex offenders are rationally related to this interest.

People v. Kibel, 701 P.2d 37, 42 (Colo. 1985) (citations omitted). The Colorado Supreme Court similarly explained in *People v. White*:

> Those committed civilly and other mentally ill criminals neither committed the same acts nor were they similarly situated as those persons who are committed under the C.S.O.A. In the case of a convicted sex offender, criminal guilt has been established and the state may properly take cognizance of the continuing presence of a threat to public safety rather than emphasizing the defendant's interest in his early release. As civilly committed individuals have committed no crime, the rationale for their continued confinement is less compelling, and they are generally accorded more procedural protections. Thus, the distinction drawn in the statutes between release procedures for those criminally convicted under the sex offenders act and others civilly committed does not violate equal protection.

656 P.2d 690, 694 (Colo. 1983).

In *dicta*, the *Kibel* court discussed a potential distinction between a lack of periodic judicial review before, versus after, the expiration of the maximum prison term that the defendant sentenced under the CSOA otherwise might have received for the underlying crime.[1] The court stated:

> The period following the expiration of the maximum permissible sentence arguably is analytically distinct from the initial period of confinement corresponding to the

[1] Respondent does not appear to dispute that Applicant has served the maximum term of the sentence applicable to the underlying crimes. *See* ECF 17 at 1.

> sentence that the defendant otherwise might have received. Sex offenders are confined for an indeterminate period because, upon their conviction of sex offenses as defined in the CSOA, a court finds in independent proceedings that they pose a danger to members of the public. [Colo. Rev. Stat.] §§ 16-13-207(2), 16-13-211; *see Specht v. Patterson*, 386 U.S. 605, 608, 87 S.Ct. 1209, 1211 18 L.Ed.2d 326 (1967). Without such a finding of danger to the public, sex offenders could be sentenced only to determinate prison terms. Because the extended period of confinement is based in part upon a finding of future dangerousness, the commitment during this period may be viewed as analogous to other commitments based upon predictions of future harm. *Ohlinger v. Watson*, 652 F.2d 775, 778 n. 8 (9th Cir. 1980) (indeterminate sentence for sex offender analogous to civil commitment). For this reason, the United States Supreme Court has indicated that the rational basis for distinguishing sex offenders from other persons committed because they constitute a public danger may disappear once the maximum sentence for the underlying crimes has expired. *Humphrey v. Cady*, 405 U.S. 504, 510-11, 92 S.Ct. 1048, 1052-53, 31 L.Ed.2d 394 (1972).

Kibel, 701 P.2d at 42 n.8.

Humphrey, on which the *Kibel dicta* relied, concerned the Wisconsin Sex Crimes Act ("WSCA"), which allowed the commitment of a convicted sex offender for treatment in lieu of sentencing "for a period equal to the maximum period authorized for the crime." *Humphrey*, 405 U.S. at 507. After the expiration of that period, the Wisconsin Department of Health and Social Services could petition the court for a five-year renewal of the commitment. *Id.* The court could then renew the commitment for five years if it found, after a hearing, that discharging the individual would be "dangerous to the public because of (his) mental or physical deficiency, disorder or abnormality." *Id.* (internal quotation marks omitted). Further five-year renewals could be similarly obtained. *Id.* The renewal orders could be based on "new findings of fact," and the renewal proceedings were "in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime." *Id.* at 511.

The petitioner in *Humphrey* argued that his commitment under the WCSA after the expiration of the initial commitment term was essentially equivalent to civil commitment under

the Wisconsin Mental Health Act (WMHA), that a person committed under the WMHA had a statutory right to have a jury determine whether he or she meets the standards for commitment, and that his commitment *renewal* under the WCSA without such a jury therefore violated his equal protection rights. *Id.* at 508; *see also id.* at 501 n.7 (noting that the petitioner did not claim the right to a jury at the *initial* commitment). The respondent countered that because commitment under the WCSA is triggered by a criminal conviction and is merely an alternative to penal sentencing, it does not require the same procedural safeguards afforded in a civil commitment proceeding. The Supreme Court determined that while the respondent's argument "has force with respect to an initial commitment under the [WCSA], which is imposed in lieu of sentence, and is limited in duration to the maximum possible sentence," it "can carry little weight . . . with respect to the subsequent renewal proceedings, which result in five-year commitment orders based on new findings of fact, and are in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime." *Id.* at 510-511. The Court went on to state that renewal orders under the WCSA "bear substantial resemblance to the post-sentence commitment that was at issue in *Baxstrom* [*v. Herold*]," *id.* at 511, in which the Supreme Court had determined that a petitioner was denied equal protection by a New York statutory procedure under which a person could be civilly committed at the expiration of his or her penal sentence without the jury review available to all other persons civilly committed in New York. *See Baxstrom v. Herold*, 383 U.S. 107, 110-112 (1966).

By contrast, here, the term of the maximum sentence for the underlying crime has no statutory significance under the CSOA. The commitment term under the CSOA is not measured by the period of the maximum underlying sentence, and no new procedures are triggered or rights

statutorily provided when that period expires. The expiration of the period of the maximum sentence for the underlying crime mattered in *Humphrey* because it marked the end of the offender's compulsory commitment under the WCSA, unless the state petitioned for a renewal, new proceedings unlimited by the nature of the defendant's crime were held, and the court granted the petition based on new findings of fact. As such, the *Humphrey* Court concluded only that the petitioner was due the same procedures as civil committees with respect to the new proceedings, which could take place only after the commitment term which had been imposed in lieu of sentence expired, at the end of the maximum sentence period for the underlying crime. Under the CSOA, there is only an initial commitment, which is imposed in lieu of sentence, indeterminate, and does not expire at the end of the maximum sentence period for the underlying crime. The distinction made in *Humphrey* between pre- and post-expiration of the maximum sentence term for the underlying crime thus does not apply here.

For similar reasons, the CSOA's review procedures are also unlike the commitment procedures at issue in *Baxstrom*. The commitment proceedings in *Baxstrom* were akin to civil proceedings because they took place after the petitioner had finished the criminal sentence imposed by the court. *See Baxstrom*, 383 U.S. at 110-112. Here, Applicant has not completed a sentence; his commitment under the CSOA is indeterminate. As such, *Baxstrom* does not support Applicant's position.

For these reasons, the expiration of the maximum sentence period for Applicant's underlying crimes does not undermine the well-established rational basis for the differing treatment of individuals committed under the CSOA and those committed under civil statutes, as articulated by the Colorado Supreme Court in *Kibel* and *White*.

In his Reply, Applicant presents the additional argument that "all sex offenders [should be] sentenced and treated the same and receive the same type of sentences pursuant to the level of their felony convictions"[;] in other words, all sex offenders "should be given a determinate sentence and mandatory parole with the requirements that they participate in the mandatory treatment programs required in prison before being considered for their mandatory period of parole, as set forth in the statutes." ECF 23 at 5. Applicant cites no authority in support of this contention. Under the CSOA, the state district court has statutory discretion to either sentence a convicted sex offender to imprisonment or, if it finds beyond a reasonable doubt that the offender is a danger to the public, order his or her indeterminate commitment. Colo. Rev. Stat. § 18–1.3–904. There is a rational basis for the treatment of offenders under the CSOA because they have been found beyond a reasonable doubt to pose a danger to the public. Applicant's argument lacks merit.

D. Due Process Claim

Applicant also claims that the lack of periodic judicial review of his commitment violates his due process rights. The due process clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The due process clause has both substantive and procedural components. *Albright v. Oliver*, 510 U.S. 266, 272 (1994). The Court "examine[s] procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

The Colorado Supreme Court has repeatedly held that the periodic parole board review afforded under the CSOA satisfies due process. *See White*, 656 P.2d at 693; *Kibel*, 701 P.2d at 43-44. As the court in *Kibel* explained:

> Here, the defendants' interest in regaining their liberty through fair and deliberate release mechanisms is at the core of interests requiring due process protection. *See [People v.] Chavez,* 629 P.2d [1040] at 1046 [Colo. 1981]. Yet, it cannot be said that substituting a judicial decision-maker for the parole board would necessarily decrease the risk that release in appropriate circumstances would be withheld erroneously from sex offenders. Like the court, the parole board is a neutral body with no interest in the outcome of the cases before it. *See State ex rel. Terry v. Percy*, 95 Wis.2d 476, 290 N.W.2d 713, 716 (1980) (due process requirements met when reexamination of sex offender confinement performed by neutral decision-maker and reviewed by Department of Health and Social Services). Moreover, a court already has determined, prior to commitment, that the sex offender constitutes a danger to society beyond a reasonable doubt, § 16-13-211(2); the parole board therefore does not make an initial determination of dangerousness, but rather is called upon only to monitor the offender for changes in character. We therefore reaffirm that "the mandated review by the board of parole within six months after the individual is committed and every year thereafter satisfies continuing procedural due process requirements." *White,* 656 P.2d at 693.

Kibel, 701 P.2d at 43-44. Although the *Kibel* court acknowledged that it was not deciding whether due process might require judicial review after the expiration of the term of the maximum underlying sentence, *see id.* at 44 n.11, this Court discerns no reason why a parole board would suddenly become more likely than a judicial decisionmaker to erroneously withhold release after the period corresponding to the maximum sentence for the underlying crime expires. For the reasons enunciated in *Kibel*, the Court determines that the procedures provided in the CSOA do not violate due process.

To the extent that Applicant also may be asserting a due process violation based on the lack of parole board review prior to his PED, the Court notes that Applicant previously asserted that claim in *Bruce Edward Wimberly v. Joe Ortiz, et. al,* No. 04-cv-00632-ZLW (D. Colo. Mar. 31,

2004). The claim, and the entire action, were dismissed as untimely under the one-year limitation period in 28 U.S.C. § 2244(d). *See Wimberly*, No. 04-cv-00632-ZLW, Order and Judgment of Dismissal, May 28, 2004. "The doctrine of res judicata, or claim preclusion, bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) (internal quotation marks omitted). "[A] dismissal on limitations grounds is a judgment on the merits" for purposes of claim preclusion. *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128–29 (10th Cir. 1991). As such, any re-assertion of such a claim by Applicant is barred in this action.

III. Conclusion

Based on the foregoing, it is hereby

ORDERED that Applicant's amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF 7) is **denied.** It is

FURTHER ORDERED that this action is **dismissed with prejudice.** It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is **denied.** The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status will be denied for the purpose of appeal. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Applicant files a notice of appeal he also must pay the full $505.00 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24.

Dated at Denver, Colorado, this 28th day of February, 2020.

BY THE COURT:

Michael E. Hegarty
United States Magistrate Judge

Attachment A