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 Reply Brief

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For purposes of the constitutional claims raised by this appeal, Mr. Wimberly's confinement under the Colorado Sex Offenders Act of 1968 is an involuntary commitment. The Supreme Court addressed a materially identical confinement—under a prior version of the same law—in *Specht v. Patterson*, 386 U.S. 605 (1967), and squarely held that it was an involuntary commitment for purposes of the equal protection and due process clauses. The state's various efforts to depict Mr. Wimberly's confinement as an ordinary criminal sentence are without merit.

When Mr. Wimberly's ongoing confinement is viewed through this framework, its constitutional defects are plain. His continued confinement violates the equal protection clause because, having long surpassed the statutory maximum sentence for the underlying offense, his criminal conviction can no longer justify treating him differently than others who have been involuntarily committed. And contrary to the state's arguments, the findings made by the trial court prior to his initial commitment over 37 years ago cannot provide a constitutionally sufficient substantive basis for his ongoing commitment, nor can periodic parole board review satisfy the requirements of procedural due process. For all these reasons, the district court should be reversed.

I. Mr. Wimberly is serving a commitment subject to both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.

Under a simple and straightforward application of governing Supreme Court precedent, Mr. Wimberly's current incarceration is an involuntary commitment subject

to the equal protection and due process limitations that apply to that form of confinement. The state's argument that Mr. Wimberly is not serving any form of commitment but only an ordinary criminal sentence, *see, e.g.*, State Br. 11-13, is meritless.

Specht v. Patterson, 386 U.S. 605 (1967), is squarely on point. The petitioner in that case had been "convicted for indecent liberties under one Colorado statute that carrie[d] a maximum sentence of 10 years . . . but not sentenced under it," receiving instead an "indeterminate term of from one day to life" under a prior version of the Colorado Sex Offenders Act "without notice and full hearing." *Id.* at 607. The lower federal courts had rejected the petitioner's habeas claim, and the United States Supreme Court reversed. Critically, the Supreme Court reasoned that the petitioner's confinement pursuant to the Colorado Sex Offenders Act had resulted from "commitment proceedings" which, "whether denominated civil or criminal [were] subject both to the Equal Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause." *Id.* at 608. In reaching that conclusion, the Supreme Court relied upon the fact that "[t]he Sex Offenders Act [did] not make the commission of a specified crime the basis for sentencing," but rather "ma[de] one conviction the basis for commencing another proceeding under another Act to determine whether a person constitute[d] a threat of bodily harm to the public, or [was] a habitual offender and mentally ill." *Id.* The Supreme Court therefore held that the confinement was a species of commitment subject to both the equal protection and due process clauses of the Fourteenth Amendment. *Id.*

Under *Specht*, Mr. Wimberly's current confinement is a form of commitment for purposes of equal protection and due process. Mr. Wimberly is confined pursuant to the Colorado Sex Offenders Act of 1968 ("1968 Act"). Like the predecessor statute at issue in *Specht*, the 1968 Act "does not make the commission of a specified crime the basis for sentencing," but rather makes "one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public." 386 U.S. at 608. Specifically, the 1968 Act provides that "[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, the court shall *commit* the defendant," and that such commitment shall be imposed "*in lieu of* the sentence otherwise provided by law." Colo. Rev. Stat. § 16-3-211(2), 203 (1986) (emphasis added).[1] Under a straightforward application of *Specht*, Mr. Wimberly's current confinement is a type of commitment for purposes of the due process and equal protection clauses.

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[1] The 1968 amendments to the Colorado Sex Offenders corrected certain procedural deficiencies identified by the Supreme Court in *Specht* the year before—but only with respect to the *initial* commitment. *Compare Specht*, 386 U.S. at 610-11 (holding that due process requires that an individual in commitment proceedings "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own"); *with* Colorado Sex Offenders Act of 1968, ch. 57 § 1, 1968 Colo. Laws. 157, 157-59 (providing for right to counsel and opportunity to be heard, including right to confront witnesses, cross-examine witnesses, and offer evidence). The amendments did *not* address the problems posed by commitment beyond the expiration of the statutory maximum sentence for the underlying offense, which are at issue in this case.

Specht also makes clear that Mr. Wimberly's confinement is, constitutionally speaking, an involuntary commitment—even though it was a consequence of his criminal conviction. In *Specht*, the Supreme Court recognized that the challenged confinement was the result of a criminal conviction and was a "criminal punishment," albeit one "designed not so much as retribution as . . . to keep individuals from inflicting future harm." 386 U.S. at 608-09. Even so, it refused to treat the confinement as an ordinary criminal sentence because the underlying conviction was not "the basis for sentencing" but rather "the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill." *Id.* at 608. This made it a "commitment proceeding[]" for purposes of the equal protection and due process clauses, regardless of its characterization as "civil or criminal." *Id.* The same is true here. Although Mr. Wimberly's confinement was triggered by a criminal conviction and could be characterized as a "criminal punishment," it is, constitutionally speaking, a type of commitment because his conviction was not "the basis for sentencing" (which would have been limited to 24 years' imprisonment), but instead served as "the basis for commencing another proceeding" under another law to determine whether he "constitute[d] a threat of bodily harm to the public." *Id.*

The state's reliance (at State Br. 11-13) on Colorado Supreme Court cases for the proposition that Mr. Wimberly's confinement is nevertheless an ordinary criminal sentence is misplaced. Whether Mr. Wimberly's confinement is subject to the constitutional

constraints that apply to involuntary commitments is not, at as the state contends (at State Br. 13), a matter of state statutory interpretation; it is a matter of federal constitutional law. And it is the United States Supreme Court, not the Colorado Supreme Court, that decides what the United States Constitution means. *Specht* is thus the final word on what counts as commitment for purposes of the Fourteenth Amendment's equal protection and due process clauses. Notably, the state's answer brief does not make any attempt to distinguish Mr. Wimberly's confinement from the confinement at issue in *Specht*—and it cannot do so. For purposes of determining what constitutional protections apply, Mr. Wimberly's confinement is indistinguishable from the confinement at issue in *Specht*.

In any event, the Colorado Supreme Court cases cited by the state (at State Br. 11-12) actually *confirm* that Mr. Wimberly's confinement pursuant to the 1968 Act is a form of commitment, constitutionally speaking. In *People v. Kibel*, 701 P.2d 37 (Colo. 1985), the Colorado Supreme Court held that confinement pursuant to the 1968 Act is a kind of "[c]ommitment" that is "subject to the protection of the state and federal due process clauses." *Id.* at 43; *see also id.* at 41-43 & n.8 (analyzing equal protection challenge to confinement as an involuntary commitment). *People v. White*, 656 P.2d 690 (Colo.

1983), likewise recognizes that confinement pursuant to the 1968 Act is a "commitment" for purposes of the due process and equal protection clauses. *See id.* at 693-94.[2]

The state's argument (at State Br. 11-12) that Mr. Wimberly's confinement is not really a commitment for constitutional purposes because the Colorado Supreme Court has sometimes referred to confinement under the 1968 Act as a "sentence" holds no water. The question of whether a confinement is treated as an involuntary commitment for purposes of the equal protection and due process clauses depends on the procedures and factual findings required in order to support the confinement. *See Specht*, 386 U.S. at 608-09. It does not depend on whether it has ever been labeled a "sentence." *Cf. Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998) (when assessing constitutionality of state tax scheme, "the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed"); *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (when determining whether state sentencing scheme complies with Sixth Amendment right to jury trial, "the relevant inquiry is one not of form, but of effect"). Indeed, the Supreme Court held that confinement pursuant to the prior version of the Colorado Sex Offenders Act

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[2] The remaining cases cited by the state (at State Br. 12) are wholly inapposite. In *People v. Breazeale*, 544 P.2d 970 (Colo. 1975), the defendant argued that he *should* have been committed under the 1968 Act instead of sentenced to a term of imprisonment, while the defendant in *People v. Medina*, 564 P.2d 119 (Colo. 1977), argued that the trial court erred by failing to advise him that he might be committed under the 1968 Act. Neither *Breazeale* nor *Medina* involves the constitutional questions presented by this appeal.

was, constitutionally speaking, an involuntary commitment in *Specht*—notwithstanding the fact that it also described such confinement as a kind of "sentence." *See* 386 U.S. at 607 (stating that the appellant had been "*sentenced* under the Sex Offenders Act") (emphasis added). The same is true here. Mr. Wimberly's confinement pursuant to the 1968 Act is, constitutionally speaking, an involuntary confinement, regardless of whether it has ever been referred to as a kind of "sentence."

The state's insistence that Mr. Wimberly's confinement is not a commitment but an ordinary criminal sentence is also at odds with the language and structure of the 1968 Act itself. The statute explicitly states that it provides for "[i]ndeterminate *commitment*," which may be imposed "*in lieu of*"—that is, instead of—an ordinary criminal sentence. Colo. Rev. Stat. § 16-13-203 (1986) (emphasis added). As the Supreme Court observed in *Specht*, that self-described "commitment" is to be imposed following "a separate criminal proceeding which may be invoked after conviction of one of the specified crimes." 386 U.S. at 609. That proceeding, moreover, requires "precisely the same kind of determination, involving a mixture of medical and social or legal judgments," that other commitment proceedings require—*i.e.*, a consideration of the defendant's psychiatric health and behavior to determine whether poses a danger to others. *Humphrey v. Cady*, 405 U.S. 504, 510 (1972). The plain language and structure of the statute thus support the United States Supreme Court's and Colorado Supreme Court's conclusion that confinement pursuant to the 1968 Act is an involuntary commitment.

For all these reasons, the Court should reject the state's contention that Mr. Wimberly's current confinement is an ordinary criminal sentence, but instead analyze his claims through the constitutional framework established for involuntary commitments.

II. Mr. Wimberly has been deprived of equal protection of the law.

Straightforward application of Supreme Court precedent also compels the conclusion that Mr. Wimberly's continued incarceration violates the equal protection clause. Now that the statutory maximum sentence for his underlying offense has expired—and with it, any basis for concluding that his commitment is in any way "limited by the nature of [his] crime or the maximum sentence authorized for that crime," *Humphrey*, 405 U.S. at 511—there is no legitimate basis for depriving him of the procedural protections routinely afforded other individuals who have been involuntarily committed. Under these circumstances, his continued commitment, without the procedural rights ordinarily afforded to other involuntarily committed individuals, violates the equal protection clause.

A. Because the statutory maximum sentence for his underlying offense has expired, Mr. Wimberly's criminal conviction can no longer justify depriving him of the procedural protections routinely afforded to others who have been involuntarily committed.

The state's insistence (at State Br. 18) that Mr. Wimberly is "not similarly situated to civilly committed individuals" because of his criminal conviction is foreclosed by Supreme Court precedent. In *Humphrey v. Cady*, 405 U.S. 504 (1972), and *Baxstrom v.*

Herold, 383 U.S. 107 (1966), the Supreme Court outlined the circumstances under which a criminal conviction could be used to justify differential treatment of individuals facing involuntary commitment—and they make clear that Mr. Wimberly's conviction provides no basis for differential treatment, now that the statutory maximum sentence has expired.

The Supreme Court has squarely rejected the proposition that a past criminal conviction can justify lesser procedural protections for commitment following the expiration of the statutory maximum sentence. In *Baxstrom*, the Supreme Court held that, when it comes to determining what procedural protections should be available to a person facing involuntary commitment, "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." 383 U.S. at 111-12. In *Humphrey*, it extended the logic of *Baxstrom* to commitments that—like the one at issue here—were originally imposed in lieu of ordinary criminal sentencing and later extended beyond the expiration of the statutory maximum sentence authorized for the underlying offense, holding that this presented "substantially the same" constitutional question. 405 U.S. at 508. Whether the challenged commitment was originally imposed in lieu of criminal sentencing and has extended beyond the statutory maximum sentence, or else was imposed at the conclusion of service of a criminal sentence, the equal protection clause recognizes "no conceivable basis" for distinguishing it from all other involuntary commitments. *Baxstrom*, 383 U.S. at

111-12. Put another way, once the statutory maximum sentence has expired, the conviction "no longer exists" as a valid basis for his confinement. *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992).

Humphrey in particular is directly on point. Like the 1968 Act, the Wisconsin Sex Crimes Act at issue in *Humphrey* authorized a person convicted of a crime to be committed in lieu of ordinary sentencing, if certain factual findings were made. *See Humphrey*, 405 U.S. at 507. The initial period of commitment was "for a period equal to the maximum sentence authorized for the defendant's crime," and the commitment could thereafter be renewed at five-year intervals, based on procedures that did not include the jury right afforded to others facing involuntary commitment. *Id.* at 507-08. Following a five-year renewal, the petitioner challenged his commitment on equal protection grounds. *See id.* at 507. After the court of appeals affirmed the dismissal of his claim "solely on the ground that [it] lacked merit," the Supreme Court reversed, finding that the equal protection claim was "substantial enough to warrant an evidentiary hearing." *Id.* at 506, 508. Relevant here, the Supreme Court held that the deprivation of the "same procedural safeguards afforded in a civil commitment proceeding" could not be justified based on the petitioner's underlying criminal conviction because his commitment was "in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime." *Id.* at 511.

Under *Humphrey*, Mr. Wimberly's ongoing commitment—which bears no relationship to his underlying criminal conviction but has extended over a decade beyond

the expiration of the statutory maximum sentence for the offense—violates the equal protection clause. Like the commitment at issue in *Humphrey*, Mr. Wimberly's commitment was imposed in lieu of criminal sentencing, based not only on the fact of his underlying conviction but also on judicial findings concerning his need for psychiatric treatment and dangerousness. *Compare Kibel*, 701 P.2d at 39-40, *with Humphrey*, 405 U.S. at 510 & n.6. And like the commitment at issue in *Humphrey*, Mr. Wimberly's commitment is "in no way limited by the nature of [his] crime or the maximum sentence authorized for that crime." *Id.* at 511. Because the statutory maximum sentence for the underlying offense has long since expired, Mr. Wimberly's conviction does not justify the ongoing refusal to afford him the same procedural protections made available to other involuntarily committed individuals.[3]

Because Mr. Wimberly's prior conviction cannot justify the state's refusal to afford him the same procedural protections afforded to other persons committed by the state of Colorado, there is "no conceivable basis" for distinguishing his commitment from other involuntary commitments. *Baxstrom*, 383 U.S. at 111-12. Under these circumstances, the state's ongoing refusal to afford him the same procedural rights af-

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[3] The state also asserts (at 21) that Mr. Wimberly is not similarly situated to civilly committed individuals because, unlike him, "[c]ivilly committed individuals . . . have not been convicted of *any* crimes." But nothing in the Colorado civil commitment statutes preclude their application to an individual who has a criminal record.

forded in other commitment settings violates the constitutional guarantee of equal protection of the law. *See In re Andrews*, 334 N.E.2d 15, 22-23 (Mass. 1975) (holding that equal protection requires that individuals committed as sexually dangerous persons be afforded the same procedural rights as those committed under other statutes "when such commitment extends beyond the limits of the maximum sentence which was imposed on the [sexually dangerous person] following his conviction"); *Grindle v. Miller*, 400 A.2d 787, 790-91 (N.H. 1979) (holding that commitment imposed as an alternative to criminal sentencing was constitutional only so long as it did "not extend beyond the maximum sentence for the underlying crime," at which point it could be prolonged only through civil commitment procedures).

B. The state's attempts to distinguish *Humphrey* and *Baxstrom* are meritless.

There is no merit to the state's repeated assertion (at State Br. 16, 20, 27, 28) that *Humphrey* and *Baxstrom* do not apply because Mr. Wimberly is serving a criminal sentence, rather than an involuntary commitment. As previously discussed, *see supra* § I, the government's position that Mr. Wimberly's confinement is "an indeterminate sentence" (as opposed to an involuntary commitment) is contrary to United States Supreme Court and Colorado Supreme Court precedent, and cannot be reconciled with the text and structure of the 1968 Act.

The state's suggestion (at 27-28) that Mr. Wimberly's commitment is valid *because* it is indeterminate likewise withstands no scrutiny. According to the state, Mr. Wimberly's commitment is distinguishable from those at issue in *Humphrey* and *Baxstrom* because it "is in no way tied or limited to the maximum determinate sentence otherwise available under Colorado's criminal sentencing laws," State Br. 28. But this turns *Humphrey* on its head. In that case, the Supreme Court indicated that a criminal conviction could justify disparities in commitment procedures *only* if the commitment was "limited in duration to the maximum permissible sentence," and further stated that a criminal conviction could not justify differential treatment with respect to commitment proceedings that "[were] in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime." 405 U.S. at 510-11. The fact that Mr. Wimberly's commitment bears no relationship with the maximum sentence for the underlying offense does not, as the state contends, justify the differential treatment—it is what makes it unconstitutional.

Nor do the "ample procedural safeguards" available under the 1968 Act, *see* State Br. 23-26, salvage the constitutionality of Mr. Wimberly's indefinite commitment. Those procedures were available to Mr. Wimberly only at his *initial* commitment proceedings. No equivalent procedures are available to him now, 37 years after he was originally committed. It is this *continued* commitment, beyond the expiration of the statutory maximum sentence, that is the subject of this litigation. And unlike individuals committed under the state's other commitment laws, Mr. Wimberly has no right to

judicial review of the validity of his commitment at all, let alone the opportunity to obtain release by proving, with the assistance of counsel, that he no longer has a mental health disorder that causes him to be dangerous to himself or others. *Compare* Colo. Rev. Stat. § 16-13-216(1986) (providing no opportunity for review of commitment imposed under 1968 Act, other than periodic review by parole board); *with* Colo. Rev. Stat. § 27-65-109 (authorizing judicial review of civil commitment at six-month intervals). Under *Humphrey* and *Baxstrom*, these disparities violate equal protection.

III. Mr. Wimberly's continued commitment violates the due process clause.

Finally, Mr. Wimberly's ongoing commitment, which has continued for over a decade beyond the expiration of the statutory maximum sentence without any opportunity for judicial review, violates both procedural and substantive due process.

A. The procedural protections available to Mr. Wimberly are constitutionally inadequate.

The only procedural mechanism available to Mr. Wimberly to challenge his *current* confinement is periodic parole board review. That parole board review does not provide Mr. Wimberly with any opportunity to challenge the substantive basis of his commitment with the assistance of counsel. Under longstanding Supreme Court precedent, these procedural protections fall short of what the due process clause requires.

The Supreme Court has long recognized that involuntary commitment "for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (citing, *e.g.*, *Humphrey*, 405 U.S. 504;

Specht, 386 U.S. 605). The substantive findings necessary to support involuntary commitment must be made by clear and convincing evidence, *see Addington*, 441 U.S. at 431-33, and the commitment proceedings must further include an evidentiary hearing at which the person facing commitment has the opportunity to present his own evidence and challenge the evidence of the state with the assistance of counsel, *see Vitek v. Jones*, 445 U.S. 480, 494-96 (1980). Because a confinement that "was initially permissible . . . [cannot] constitutionally continue after [the] basis no longer exist[s]," *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975), there must be an opportunity for periodic review of the "continuing need for commitment . . . by a similarly independent procedure," *Parham v. J.R.*, 442 U.S. 584, 607 (1979) (addressing procedural requirements for involuntary commitment of children); *cf. Kansas v. Hendricks*, 521 U.S. 346, 353 (1997) (describing Kansas Sexually Violent Predator Act, which requires annual review by the committing court, as well as review at any time upon petition by the confined person).

The parole board review afforded by the 1968 Act—which is undisputedly the only procedural mechanism available to Mr. Wimberly *now*—falls far short of this constitutional standard. Mr. Wimberly has no right to counsel and no right to an evidentiary hearing. The parole board's decision to continue Mr. Wimberly's commitment need not be supported by "clear and convincing evidence" required by due process. *Addington*, 441 U.S. at 433. Indeed, the parole board review provided by the 1968 Act does not even address the right question. Instead of asking whether Mr. Wimberly remains mentally ill or abnormal and therefore dangerous, as is required to sustain an involuntary

commitment, *see Hendricks*, 521 U.S. at 358, the parole board considers 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). That is, the parole board makes no finding as to whether Mr. Wimberly suffers from a mental illness, and whether it is that mental illness that renders him dangerous. In each of these ways, Mr. Wimberly's commitment violates procedural due process.

The state falsely asserts (at State Br. 31) that the 1968 Act in fact *does* provide for the procedural protections he now requests. In support, it points to statutory provisions providing individuals facing commitment under the 1968 Act with the right to counsel and the right to an evidentiary hearing prior to commitment. *See* State Br. 31 (citing Colo. Rev. Stat. §§ 18-1.3-908, 911, 912). But those procedural protections were only available to Mr. Wimberly at the time of his *initial* commitment, over 37 years ago; no equivalent procedures are available to him now. It is the absence of any procedural right to challenge his *current* confinement—which has continued for over a decade beyond the expiration of the statutory maximum sentence for his offense without any *recent* opportunity for judicial review—that is the subject of this appeal. *See* Wimberly Op. Br. 26-27. The procedural protections that were available to him at the time of his initial commitment over 37 years ago are irrelevant.

The state gets the law exactly backwards when it argues that Mr. Wimberly has no liberty interest in avoiding further confinement because "[t]he grant of parole is

wholly discretionary under Colorado's statutory parole scheme and thus does not create a legitimate expectation of release on the part of Colorado state prisoners," State Br. 33; *see also* State Br. 31-32 (suggesting that no liberty interest is at stake here because "[l]iberty or property interests require more than a unilateral hope"). Mr. Wimberly is serving an involuntary commitment, *see supra* § I, and it is well established that commitment "for any purpose constitutes a significant deprivation of liberty that requires due process protection," *Addington*, 441 U.S. at 425; *see also Specht*, 386 U.S. at 609-10. That is particularly true now that the statutory maximum sentence for the underlying offense has expired, and with it any basis for treating his confinement as the equivalent of a criminal sentence. *See Foucha*, 504 U.S. at 86 (reasoning that after the expiration of a "criminal sentence," "the basis for [a convict's] original confinement no longer exists"). Under these circumstances, the due process clause requires procedural protections that *do* provide Mr. Wimberly with a legitimate expectation of release, if he can show that he is no longer mentally ill or dangerous. The "wholly discretionary" nature of the state's parole proceedings—which, as the state tacitly acknowledges, provide him with no effective opportunity to challenge the substantive basis of his ongoing confinement—proves, rather than undermines, his procedural due process claim.

The state also fundamentally misunderstands the nature of Mr. Wimberly's procedural due process claim. Mr. Wimberly's *procedural due process* argument is not, as the state contends (at State Br. 32), "that he is entitled to the evidentiary hearing he describes because it is afforded to civilly committed individuals." That is his *equal protection*

claim. *See supra* § II. The procedural due process argument is that Mr. Wimberly is entitled to an evidentiary hearing because that is what the constitution requires with respect to such a significant curtailment of liberty. *Cf. Vitek*, 445 U.S. at 494-95 (outlining procedures required in order to commit an individual already serving a prison sentence); *Hendricks*, 521 U.S. at 353 (describing Kansas Sexually Violent Predator Act, which provides for annual judicial review of ongoing commitment, as well as review upon petition by the committed person). In any event, and as previously discussed, *see supra* § II, Mr. Wimberly is similarly situated to individuals who have been civilly committed because his commitment is "in no way limited by the nature of [his] crime or the maximum sentence authorized for that crime." *Humphrey*, 405 U.S. at 511.

B. There is no constitutionally sufficient substantive basis for Mr. Wimberly's ongoing commitment.

Mr. Wimberly's involuntary commitment also does not satisfy the substantive requirements that the due process clause places on involuntary commitments.

The state's assertion that his substantive due process claim fails because "[n]o fundamental right is at stake here," State Br. 34, is at odds with on-point and controlling Supreme Court precedent. It is well established that, because "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Foucha*, 504 U.S. at 80 (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)).

Notwithstanding the state's repeated and untenable assertions to the contrary, *see* State Br. 34-36, Mr. Wimberly is not currently serving a criminal sentence for the underlying offense, and so cases holding that there is "no right to release from prison before the expiration of a valid sentence" have no bearing on this claim. As previously explained, *see supra* § I, Mr. Wimberly's confinement is a form of involuntary commitment for purposes of the due process clause, rather than an ordinary criminal sentence. Moreover, the maximum sentence for the underlying offense *has* expired—the statutory maximum sentence for first degree sexual assault was 24 years' imprisonment at the time of Mr. Wimberly's underlying conviction, *see People v. Vigil*, 718 P.2d 496, 506 (Colo. 1986), and he has now been incarcerated for over 37 years—and so even under the state's logic, he has a due process right to avoid further confinement.

Substantive due process permits involuntary commitment only upon "clear and convincing evidence . . . that the person sought to be committed is mentally ill" and "that he requires hospitalization for his own welfare and protection of others." *Foucha*, 504 U.S. at 75-76. Once this substantive basis for commitment no longer exists—that is, once the committed person "has regained his sanity or is no longer a danger to himself or society"—he must be released. *Id.* at 77-78 (quoting *Jones*, 463 U.S. at 370); *see also O'Connor*, 422 U.S. at 575 ("[E]ven if [the petitioner's] involuntary commitment was initially permissible, it could not constitutionally continue after [the substantive] basis no longer existed.").

In this case, however, there has been no finding, let alone one supported by clear and convincing evidence, that Mr. Wimberly is *currently* mentally ill and is therefore a danger to himself or others. There has been no determination whatsoever regarding Mr. Wimberly's mental state or dangerousness for over three decades. The periodic parole board review provided for by the 1968 Act does not even purport to address this substantive question. Because Mr. Wimberly's involuntary commitment is not based on clear and convincing evidence that he is currently mentally ill and therefore dangerous to himself or others, it violates the substantive component of the due process clause.

Conclusion

For these reasons, Mr. Wimberly respectfully requests that this Court reverse the decision of the district court and remand with instructions to grant the writ.

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:

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/s/ Kathleen Shen
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