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. 19-cv-968-MEH

ANSWER BRIEF

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ORAL ARGUMENT IS NOT REQUESTED

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STATEMENT OF RELATED CASES

Mr. Wimberly previously appeared in this Court in *Fleischaker v. Owens*, Case No. 02-1113, a prisoner civil rights action brought against several state and prison officials, including then-Acting Executive Director of the Colorado Department of Corrections in his official capacity. Undersigned counsel is not aware of any other prior or related appeals.

Respondent-Appellee Dean Williams (Mr. Williams), Executive Director of the Colorado Department of Corrections, through his counsel, the Colorado Attorney General, respectfully submits this Answer Brief.

JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Colorado had subject-matter jurisdiction over Petitioner-Appellant Bruce E. Wimberly's petition for writ of habeas corpus under 28 U.S.C. § 2241. The district court denied Mr. Wimberly's petition on the merits on February 28, 2020. This Court received and docketed Mr. Wimberly's notice of appeal on March 31, 2020. On May 26, 2020, the Court directed a limited remand to the district court to consider whether to issue a certificate of appealability for Mr. Wimberly's appeal. After the district court declined to issue one, this Court granted a certificate of appealability on July 17, 2020. The Court therefore has appellate jurisdiction over this petition for writ of habeas corpus under 28 U.S.C. §§ 2241 and 1291.

STATEMENT OF THE ISSUES

Mr. Wimberly pleaded guilty to first degree sexual assault in January 1984. After the trial court found beyond a reasonable doubt that Mr. Wimberly constituted a threat of bodily harm to members of the public, he was sentenced to an indeterminate term of incarceration under the Colorado Sex Offenders Act of 1968 instead of to the determinate term of incarceration he would have received absent such a finding.

1. Does continued incarceration of Mr. Wimberly on an indeterminate sentence applied under the Colorado Sex Offenders Act of 1968, beyond the maximum prison term he might have served had he been sentenced under a determinate sentencing scheme, violate the equal protection clause of the Fourteenth Amendment?

2. Does Mr. Wimberly's continuing incarceration under the Colorado Sex Offenders Act of 1968 violate the due process clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

A. The Colorado Sex Offenders Act of 1968

Mr. Wimberly brings this petition to challenge his continued confinement pursuant to his indeterminate sentence under the Colorado Sex Offenders Act of 1968 (CSOA). The CSOA applies to individuals, including Mr. Wimberly, "sentenced for offenses committed prior to November 1, 1998." § 18-1.3-902, C.R.S. The CSOA authorizes trial courts, in their discretion, either to sentence defendants convicted of certain sex offenses to the determinate sentence ordinarily provided under Colorado law, or to order that they be committed to the Colorado Department of Corrections (CDOC) "for an indeterminate term having a minimum of one day and a maximum of his or her natural life." § 18-1.3-904, C.R.S. To order commitment under the CSOA, a trial court must find beyond a reasonable doubt that the defendant "constitutes a threat of bodily harm to members of the public . . . ." § 18-1.3-912(2), C.R.S.

The CSOA requires certain proceedings before a defendant may be committed under it. The court must hold an evidentiary hearing and

receive evidence concerning the danger the defendant poses to the public. §§ 18-1.3-908, -911, C.R.S. The defendant has the right to subpoena and examine witnesses, and to cross-examine the prosecution's witnesses. *Id.* If the court finds beyond a reasonable doubt that the defendant poses a threat of bodily harm to members of the public, it may commit the defendant under the CSOA to an indeterminate term in lieu of the sentence otherwise provided by law. § 18-1.3-904, C.R.S. Six months after commitment and every twelve months thereafter, the parole board must review all reports, records, and information concerning the defendant. § 16-13-216(1)(a), C.R.S. The parole board may then parole the defendant or transfer the defendant to any facility under the jurisdiction of the CDOC if the board deems it to be in the best interests of the defendant and the public. § 16-13-216(2), (4), C.R.S.

B. Mr. Wimberly's criminal convictions and procedural history

Mr. Wimberly pleaded guilty to first-degree criminal trespass in Arapahoe County District Court Case No. 83CR228 and was sentenced

to two years' imprisonment on January 5, 1984.[1] ROA, Vol. I, at 21, 65.[2]

On January 13, 1984, Mr. Wimberly was sentenced after pleading guilty to two separate first-degree sexual assault charges, class 2 felonies, in Denver District Court Case Nos. 83CR1538 and 83CR1747. ROA, Vol. I, at 22-23, 65. In Case No. 83CR1538, he was sentenced to a determinate sentence of twenty-four years' imprisonment, the maximum determinate sentence for a class 2 felony with a finding of aggravated circumstances, to be served concurrently with the sentence imposed in Case No. 83CR1747 and consecutively with his sentence in Arapahoe County Case No. 83CR228. ROA, Vol. I, at 22, 65; *see also* § 18-1.3-401(1)(a)(I), (8)(a). In Case No. 83CR1747, the case at issue in this petition, he was sentenced to an indeterminate term of a minimum of one day to a maximum of his natural life pursuant to the CSOA, § 16-13-201, C.R.S. (relocated in 2002 to § 18-1.3-901, C.R.S.), to run

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[1] Although some documents in the record state that Mr. Wimberly was sentenced on January 5, 1983, this appears to be a typographical error. Other records indicate that Mr. Wimberly pleaded guilty and was sentenced on January 5, 1984. *See* ROA, Vol. I, at 21 (mittimus signed by trial court judge on January 5, 1984).

[2] Citations to the record volume and page number in this Answer Brief conform to the citation convention in 10th Cir. R. 28.1(A)(2).

consecutively with his sentence in Arapahoe County Case No. 83CR228. ROA, Vol. I, at 23, 65.

On January 31, 1984, Mr. Wimberly pleaded guilty to first-degree burglary, a class 3 felony, in Arapahoe County Case No. 83CR915. ROA, Vol. I, at 24, 65. He was sentenced to sixteen years' imprisonment, to be served concurrently with his sentence in Denver District Court Case No. 83CR1747. ROA, Vol. I, at 24, 65.

Mr. Wimberly was transferred to the CDOC on March 13, 1984, to begin serving his sentence. ROA, Vol. I, at 65. Once he reached his parole eligibility date, he appeared before the Colorado Board of Parole regularly from September 1994 through April 15, 2010. ROA, Vol. I, at 65-66. At that time, he had served over twenty-six years on his sentence. ROA, Vol. I, at 66. Each time he was reviewed by the Parole Board, his parole application was deferred. ROA, Vol. I, at 66. Between April 2011 and April 2019, Mr. Wimberly was reviewed by the Parole Board seven times and was either deferred or tabled each time. ROA, Vol. I, at 66.

Mr. Wimberly filed a petition for writ of habeas corpus on April 1, 2019. ROA, Vol. I, at 5. In his amended petition, he argued that his continued incarceration under the CSOA beyond the expiration of his determinate sentences violates the equal protection clause because he is not being afforded the same procedural protections as individuals subject to involuntary civil commitment under Colorado law. ROA, Vol. I, at 39. He also argued that his continued incarceration without judicial review violated his rights under the due process clause. ROA, Vol. I, at 44.

The district court ordered Respondent Mr. Williams to show cause why Mr. Wimberly's petition for writ of habeas corpus should not be granted. ROA, Vol. I, at 55. Pursuant to the district court's show-cause order, Mr. Williams filed a response opposing the petition, and Mr. Wimberly filed a reply. ROA, Vol. I, at 56-63, 73-82. The district court dismissed the action with prejudice. ROA, Vol. I, at 100. Specifically, the court concluded that the State had a rational basis for treating sex offenders differently from civilly committed individuals, and that the

periodic parole board review afforded to Mr. Wimberly under the CSOA satisfied due process. ROA, Vol. I, at 91-100.

Mr. Wimberly timely appealed the district court's order. ROA, Vol. I, at 103-04. After a limited remand, this Court granted Mr. Wimberly a certificate of appealability to address whether his indeterminate commitment beyond the expiration of his maximum underlying criminal sentence violates 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 granted Mr. Wimberly's request to proceed in forma pauperis and appointed counsel to represent him. *Id.* at 25-26.

SUMMARY OF ARGUMENT

Mr. Wimberly argues that his continued incarceration under the CSOA violates his rights to equal protection and due process. Because Mr. Wimberly fails to establish that his continued incarceration is unconstitutional, the district court's order denying his petition should be affirmed.

After pleading guilty to a sex offense and being found to be a danger to the public, Mr. Wimberly received an indeterminate sentence under the CSOA instead of the determinate sentence he otherwise would have received under Colorado's felony sentencing statutes. Mr. Wimberly contends that his continued incarceration, beyond the maximum determinate sentence he might have received had he not been sentenced under the CSOA, violates the equal protection clause because he is treated differently from individuals facing involuntary civil commitment. However, because Mr. Wimberly is serving a criminal sentence after being convicted of a sex offense and was found beyond a reasonable doubt to be dangerous, he is not similarly situated to individuals subject to involuntary civil commitment. Even if he were, the State's differential treatment of convicted sex offenders sentenced under the CSOA and civilly committed individuals is rationally related to the State's interest in protecting the public from sex offenders who have been found to be dangerous.

Mr. Wimberly's indeterminate sentence under the CSOA also satisfies due process. The parole board review procedures afforded to

Mr. Wimberly under the CSOA have been found to satisfy due process, and he has not demonstrated that due process requires judicial review of his continued incarceration. Moreover, Mr. Wimberly does not have a fundamental right to release from prison, where he is serving a sentence after being convicted of a crime.

For these reasons, the Court should affirm the district court's denying Mr. Wimberly's petition for writ of habeas corpus.

ARGUMENT

I. The district court properly denied Mr. Wimberly's petition for writ of habeas corpus because he has not demonstrated that he is being denied equal protection or due process under the Fourteenth Amendment.

A. Standard of review and applicable law.

A state prisoner in this Circuit may bring a petition for writ of habeas corpus under 28 U.S.C. § 2241 if he or she is challenging the execution of a prison sentence. *See Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000). To establish entitlement to relief, a petitioner challenging the execution of a state prison sentence must show that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3); *Fristoe v. Thompson*, 144

F.3d 627, 630 (10th Cir. 1998). The petitioner bears the burden to show by a preponderance of the evidence that he is entitled to the requested relief. *Ali v. Franklin*, 554 F. App'x 702, 704 (10th Cir. 2014) (citing *Beeler v. Crouse*, 332 F.2d 783, 783 (10th Cir. 1964)).

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

B. Mr. Wimberly is serving an indeterminate sentence under Colorado law.

Mr. Wimberly pleaded guilty to a sex offense and was sentenced under the CSOA to an indeterminate term of incarceration. His indeterminate confinement is a valid criminal sentence under Colorado law.

Colorado state courts have routinely interpreted the CSOA as allowing the imposition of an indeterminate sentence as an alternative to determinate sentence, not as allowing a form of commitment that is somehow distinct from a sentence. *See, e.g.*, *People v. Kibel*, 701 P.2d 37, 40 (Colo. 1985) (referring interchangeably to a court's discretion to

"commit [a] defendant under the CSOA" and to the defendant's "indeterminate sentence under the CSOA") *People v. White*, 656 P.2d 690, 694 n.3 (Colo. 1981) (describing indeterminate commitment under the CSOA as a "sentencing option[]"); *People v. Medina*, 564 P.2d 119, 121 (Colo. 1977) ("There is no constitutional or statutory right to be sentenced under the [CSOA]. In fact, imposition of an indeterminate sentence under the Act is totally within the discretion of the trial court.") (internal citation omitted); *People v. Breazeale*, 544 P.2d 970, 976-77 (Colo. 1975) (referring repeatedly to the CSOA as involving sentences to imprisonment).

Mr. Wimberly likens his continued incarceration to a civil commitment and attempts to distinguish it from other sentences to imprisonment because the CSOA uses the term "commitment" instead of "sentence." *See* Appellant's Corrected Suppl. Opening Br. [hereinafter "Suppl. Br."] at 10-12. Mr. Wimberly analogizes proceedings under the CSOA to civil commitment proceedings because they require new findings of fact. *Id.* at 11. For these reasons, Mr. Wimberly argues that the Court should find that Mr. Wimberly's incarceration is a type of

commitment other than a criminal sentence and demands procedural protections beyond those afforded in criminal sentencing.

The Court respectfully should decline to do so. A state's highest court's interpretation of a state statute is binding upon a federal court. *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 273 (1940); *see also Lustgarden v. Gunter*, 966 F.2d 552, 553 (10th Cir. 1992) ("It is a well-established principle that . . . a state court's interpretation of a state statute is controlling in federal court."). The Colorado Supreme Court's interpretation of Colorado law is dispositive as to its meaning and application, and it is controlling in federal court. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (confirming that state courts are "the ultimate expositors of state law" and that federal courts are "bound by their constructions except in extreme circumstances").

Because the Colorado Supreme Court interprets the CSOA as providing for indeterminate criminal sentencing, rather than some other type of commitment, this Court is bound by that interpretation.

C. Mr. Wimberly fails to demonstrate that his indeterminate sentence under the CSOA violates the Equal Protection Clause of the Fourteenth Amendment.

Mr. Wimberly is serving an indeterminate sentence under the CSOA. His continued incarceration pursuant to that statute does not violate the equal protection clause of the Fourteenth Amendment. The district court therefore properly denied Mr. Wimberly's petition for habeas corpus.

1. Mr. Wimberly's equal protection claim is subject to rational basis review.

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Equal protection of the laws "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) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). To establish an equal protection claim, a plaintiff must allege that (1) similarly situated individuals were treated differently, and (2) the differential treatment

is not justified under the appropriate standard of review. *See Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1047 (10th Cir. 2009).

"It is well settled that economic and social legislation generally is presumed valid." *Okla. Educ. Ass'n v. Alcoholic Beverage Laws Enf't Comm'n*, 889 F.2d 929, 932 (10th Cir. 1989). Accordingly, courts generally "sustain such legislation if the classifications drawn by the statute are rationally related to a legitimate state interest." *Id.* But if legislation creates "classifications that disadvantage a suspect class, or that impinge upon the exercise of a fundamental right," the equal protection clause "requir[es] the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler*, 457 U.S. at 216-17; *see also ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008) ("[U]nless a statute being challenged on equal protection grounds 'jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic,' it will be 'presumed to be valid and will be sustained if the classification drawn by the statute is rationally

related to a legitimate state interest.'") (quoting *Coal. for Equal Rights, Inc. v. Ritter*, 517 F.3d 1195, 1199 (10th Cir. 2008)).

Here, no suspect classification is at issue. As the district court correctly noted and Mr. Wimberly does not dispute, sex offenders are not members of a suspect class. ROA, Vol. I, at 92 (citing *Lustgarden*, 966 F.2d at 555).

Nor does the CSOA impinge on a fundamental right such that strict scrutiny would apply to his equal protection claim. Mr. Wimberly contends that heightened scrutiny should apply to his equal protection claim because he has a fundamental right to "[f]reedom from bodily restraint . . . ." Suppl. Br. at 13. This is flawed for two reasons. First, as a person convicted of a crime and serving a valid indeterminate sentence, Mr. Wimberly does not have a fundamental right to freedom from restraint. *See White*, 656 P.2d at 694 n.3 ("Although sentencing options under the C.S.O.A. may involve a deprivation of liberty, one validly convicted of a crime does not have a fundamental right to his unrestricted liberty.").

Second, even if Mr. Wimberly did have a fundamental right to release from his indeterminate sentence, he has not alleged that any similarly situated persons are afforded this right while the CSOA denies it to him. For strict-scrutiny review to apply to an equal protection claim, the challenged legislation's classification must deny some individuals a fundamental right while affording it to similarly situated individuals. *Plyler*, 457 U.S. at 216-17; *see also Evans v. Romer*, 882 P.2d 1335, 1360 n.3 (Colo. 1994) (Erickson, J., dissenting) ("When fundamental rights are denied to everyone, it raises due process concerns. When fundamental rights are denied to some individuals only, it raises equal protection concerns."). Here, Mr. Wimberly argues that he is similarly situated to individuals civilly committed under § 27-65-101 *et seq.*, C.R.S. Involuntary civil commitment *necessarily* denies individuals freedom from bodily restraint, under a separate statutory mechanism. *See* §§ 27-65-107, -109, C.R.S. Because Mr. Wimberly does not allege that he is being denied a fundamental right that is granted to the group of similarly situated persons, his equal protection claim is not

subject to heightened scrutiny. Accordingly, rational-basis review applies to his claim.

2. Mr. Wimberly is not similarly situated to individuals subject to involuntary civil commitments. Even if he were, his differential treatment would be justified by a rational connection to a legitimate state interest.

Mr. Wimberly argues that his confinement violates his right to equal protection under the law because he is being treated differently from individuals subject to involuntary civil commitments. Because he is not similarly situated to civilly committed individuals, however, his argument fails.

Individuals subject to involuntary civil commitment are not confined as a result of, or based upon, a criminal conviction. Before an individual may be civilly committed for involuntary mental health treatment, a professional must have certified that the individual "has a mental health disorder and, as a result of the mental health disorder, is a danger to others or to himself or herself or is gravely disabled." § 27-65-107(1)-(2), C.R.S.

An indeterminate sentence under the CSOA, in contrast, is imposed only on certain persons after being convicted of enumerated sex offenses. *See* §§ 18-1.3-904, 18-1.3-903(4)-(5), C.R.S. Following a qualifying conviction and during the sentencing phase, the trial court may hold an evidentiary hearing to find whether an indeterminate sentence is appropriate. §§ 18-1.3-908, -911, C.R.S. If, after that evidentiary hearing, the trial court finds beyond a reasonable doubt that a convicted sex offender "constitutes a threat of bodily harm to members of the public, the court shall commit the defendant" to an indefinite prison term of one day to life. §§ 18-1.3-912, 18-1.3-904, C.R.S.

Civilly committed individuals necessarily have a greater liberty interest in freedom from restraint than those who are confined pursuant to criminal convictions. The General Assembly intended Colorado's involuntary civil commitment laws "[t]o deprive a person of his or her liberty for purposes of care or treatment only when less restrictive alternatives are unavailable and only when his or her safety or the safety of others is endangered." § 27-65-101(1)(b), C.R.S.

Indeterminate sentencing under the CSOA, in contrast, is imposed as a punishment for certain criminal acts. *See Sprecht v. Patterson*, 386 U.S. 605, 608-09 (1967) ("The punishment under the [predecessor to the CSOA] is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm."). As the Colorado Supreme Court has explained:

> 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 released.

White, 656 P.2d at 694.

Even if Mr. Wimberly were similarly situated to civilly committed individuals, his differential treatment is rationally related to a legitimate state interest. "A rational basis equal protection analysis is highly deferential to state legislatures." *City of Herriman v. Bell*, 590 F.3d 1176, 1194 (10th Cir. 2010). Rational basis review does not "authorize 'the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in

areas that neither affect fundamental rights nor proceed along suspect lines.'" *Heller v. Doe*, 509 U.S. 312, 319 (1993) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). Accordingly, courts will strike down a law under rational basis review only if it "rests on grounds wholly irrelevant to the achievement of the State's objective." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978).

The State has a rational basis for differentiating between convicted sex offenders and individuals subject to involuntary civil commitment. As the Colorado Supreme Court has noted, sex offenders incarcerated pursuant to the CSOA have "been found guilty of crimes regarded by society as particularly heinous." *Kibel*, 701 P.2d at 42. Civilly committed individuals, in contrast, have not been convicted of *any* crimes. *See id.*

Accordingly, the State "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." *Id.* In furtherance of this interest, the legislature provided for an indeterminate sentencing

scheme that trial courts, in their discretion, could impose in lieu of a determinate sentence only after an individual has been (1) convicted of one or more enumerated sex offenses, and (2) found beyond a reasonable doubt in a separate proceeding to be a danger to society. §§ 18-1.3-904, 18-1.3-912, C.R.S.

Mr. Wimberly relies on dicta from *Kibel* to argue that his incarceration under the CSOA denies him equal protection. There, the Colorado Supreme Court mused that a sex offender's indeterminate confinement beyond the maximum determinate sentence he or she otherwise might have received could be "analytically distinct" from indeterminate confinement up to that maximum determinate sentence. *Kibel*, 701 P.2d at 42 n.8. The court added that the extended period of confinement might be seen as analogous to other forms of commitment because it "is based in part upon a finding of future dangerousness . . . ." *Id.* It cited *Humphrey v. Cady* in support for this possibility, describing it as the Supreme Court's "indicat[ion] 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." *Id.* (citing *Humphrey v. Cady*, 405 U.S. 504, 510-11 (1972)). The court then declined to resolve whether a defendant's indeterminate incarceration under the CSOA beyond the maximum determinate sentence otherwise provided for was, indeed, "analytically distinct" from the earlier indeterminate incarceration. *Id.* at 42.

Humphrey, however, concerned a Wisconsin confinement law that differs markedly from the CSOA in its execution. Under the Wisconsin Sex Crimes Act (WSCA), a convicted sex offender could be initially committed for treatment in lieu of sentencing only "for a period equal to the maximum period authorized for the crime." *Humphrey*, 405 U.S. at 507. After that initial period of commitment, the State could petition the trial court for successive five-year renewal periods upon a showing that discharging the individual would be "dangerous to the public because of (his) mental or physical deficiency, disorder or abnormality." *Id.* The *Humphrey* petitioner argued that his continued commitment after his initial period of confinement expired violated his equal protection rights because, unlike the law governing civil mental health

commitments, the WSCA did not provide for a jury determination of whether a sex offender met the standards for commitment under a five-year renewal period after the expiration of his initial confinement. *Id.* at 508. The Supreme Court determined that while initial commitment in lieu of a sentence did not require the same procedural safeguards afforded to civilly committed individuals, those procedural safeguards may be required "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 511.

The *Humphrey* Court analogized the renewal orders to the form of civil commitment at issue in *Baxstrom v. Herold*, 383 U.S. 107 (1966). In *Baxstrom*, the petitioner was involuntarily committed to a mental institution upon the expiration of his criminal sentence without the opportunity for a jury review. *Id.* at 108-09. The Court held that he was denied equal protection by the statutory procedure under which a person may be involuntarily committed upon the expiration of his criminal sentence with lesser procedural safeguards than those afforded

to civilly committed individuals. *Id.* at 110. The Court found "no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Id.* at 111-12.

Both *Humphrey* and *Baxstrom* concerned civil commitment proceedings arising at the end of either a prison sentence or a commitment for treatment in lieu of a prison sentence. Those proceedings are entirely different from, and provided far fewer procedural safeguards than, the proceedings at issue here. The *Baxstrom* statute, for example, allowed for involuntary civil commitment of an inmate once his prison sentence expired upon only the petition of a state hospital director and a hearing without appointed counsel or the opportunity for jury review afforded to non-incarcerated civilly committed individuals. *Baxstrom*, 383 U.S. at 110 & n.2. The *Humphrey* statute likewise provided for involuntary civil commitment after an initial period of confinement upon notice and a hearing, in which the state need only establish the need for treatment by a preponderance of evidence. *Humphrey*, 405 U.S. at 507.

In contrast, the CSOA provides ample procedural safeguards to defendants sentenced under it. Trial courts must advise defendants before accepting a guilty plea to a sex offense under the CSOA that they may be committed for an indeterminate period under § 18-1.3-904, C.R.S. Defendants undergoing CSOA proceedings have the right to counsel, and will have counsel appointed if they are indigent. § 18-1.3-907, C.R.S. Defendants undergo examinations by two psychiatrists, who make independent written reports to the trial court with their opinions of whether the defendant constitutes a threat of bodily harm to the public. § 18-1.3-908, C.R.S. The probation department also prepares a report similar to a presentence report under § 16-11-102, C.R.S. § 18-1.3-909, C.R.S. The defendant and counsel are served with the psychiatric reports and the probation report in advance of an evidentiary hearing. § 18-1.3-911, C.R.S. At the evidentiary hearing, defendants have the right to call and examine witnesses, and to cross-examine the district attorney's witnesses. *Id.* After the evidentiary hearing, the trial court may sentence the defendant indeterminately under the CSOA 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." § 18-1.3-912(2), C.R.S. These procedural safeguards are far more exacting than those provided to the *Baxstrom* and *Humphrey* petitioners.

Moreover, unlike the statutes at issue in *Humphrey* and *Baxstrom*, the CSOA does not provide for an initial period of confinement that may be followed by an involuntary civil commitment. It provides for a single period of confinement for an indeterminate amount of time. The CSOA's indeterminate sentencing is in no way tied or limited to the maximum determinate sentence otherwise available under Colorado's criminal sentencing laws. It makes no distinction between an initial period of confinement and subsequent periods of confinement. Unlike the *Humphrey* and *Baxstrom* petitioners, Mr. Wimberly has not reached the expiration of a maximum sentence or initial period of confinement because the very nature of his *indeterminate* sentence under the CSOA is that it has no defined maximum or initial period. He is therefore not similarly situated to those individuals subject to the statutory schemes at issue in *Humphrey*

and *Baxstrom*, nor is he similarly situated to individuals who have been involuntarily civilly committed under Colorado law.

Mr. Wimberly counters that this difference is immaterial, arguing that if the constitutionally infirm statutes at issue under *Humphrey* and *Baxstrom* provided their petitioners with some additional form of review before they were civilly committed upon the expiration of their sentence or initial commitment period, then surely the CSOA must be unconstitutional if it does not provide for review upon the expiration of an initial commitment period. But it is precisely the *Baxstrom* and *Humphrey* statutes' structure of an initial commitment period followed by a form of post-confinement civil commitment that necessitated the additional review. Because the CSOA established an indeterminate sentencing scheme for sex offenders found beyond a reasonable doubt to be dangerous to the public, rather than an initial determinate period of confinement followed by the possibility of involuntary civil commitment, an indeterminate sentence under the CSOA does not become involuntary civil commitment after a period of time has passed. That other jurisdictions' legislatures made different policy decisions

concerning criminal sentencing and civil commitment does not invalidate the Colorado legislature's power to implement arguably stricter criminal sentencing policies. *See Heller*, 509 U.S. at 319.

Mr. Wimberly's continued indeterminate incarceration under the CSOA is rationally related to the State's legitimate interest in protecting the public from dangerous sex offenders. Because he has not shown an equal protection violation, the district court's order dismissing his petition should be affirmed.

D. Mr. Wimberly's indeterminate sentence under the CSOA satisfies the due process clause of the Fourteenth Amendment.

In the district court, Mr. Wimberly argued that his continued incarceration under the CSOA without the procedural protections afforded to civilly committed individuals violated his right to due process. Mr. Wimberly fails to establish that his periodic review by the parole board is insufficient to satisfy procedural due process, or that the State is infringing upon a fundamental right that implicates substantive due process. The district court's dismissal of his petition should therefore be affirmed.

1. Procedural due process

The due process clause of the Fourteenth Amendment prohibits the deprivation of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Under a procedural due process analysis, courts consider (1) "whether there exists a liberty or property interest which has been interfered with by the State," and (2) "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

Mr. Wimberly argues that he has a liberty interest in "[f]reedom from bodily restraint," and that he has not been afforded appropriate procedural rights to support his continued incarceration. Suppl. Br. at 23, 25. Specifically, Mr. Wimberly argues that his continued incarceration does not satisfy minimum procedural requirements, including an evidentiary hearing with assistance of counsel or findings made by clear and convincing evidence that support his incarceration, and that periodic parole review is procedurally inadequate. *Id.* at 25-26.

With respect to the minimum procedural requirements, Mr. Wimberly is factually incorrect. The CSOA provides for precisely these procedures and a stricter evidentiary burden than the clear-and-convincing standard Mr. Wimberly cites. §§ 18-1.3-908, -911, C.R.S.; *see also* § 18-1.3-912 (requiring a finding of dangerousness beyond a reasonable doubt before a defendant may be sentenced indeterminately under the CSOA). Mr. Wimberly makes no argument that he was denied these procedures when he pleaded guilty to a sex offense and was sentenced under the CSOA.[3] He simply believes he should receive these procedural protections again in lieu of periodic parole board review.

Yet Mr. Wimberly has made no showing that he has a protected entitlement to another evidentiary hearing. "Liberty or property interests require more than 'a unilateral hope'; they require 'a

[3] Mr. Wimberly's original opening brief, filed pro se, included an attachment indicating that he waived his right to an evidentiary hearing under the CSOA and requested immediate sentencing in Denver District Court Case No. 83CR1747. *See* Appellant's Combined Opening Br. and Appl. for a Certificate of Appealability at 13 (May 20, 2020). The district court made no findings of fact as to this matter, and the validity of any such waiver is not at issue in this petition.

legitimate claim of entitlement.'" *Sutton v. Mikesell*, 810 F. App'x 604, 611 (10th Cir. 2020) (quoting *Kentucky Dep't of Corr.*, 490 U.S. at 460). Mr. Wimberly argues that he is entitled to the evidentiary hearing he describes because it is afforded to civilly committed individuals. But for the reasons stated in Part I.C.2, *supra*, Mr. Wimberly is not similarly situated to civilly committed individuals. The procedural protections afforded to individuals subject to involuntary civil commitment therefore are not an appropriate benchmark for Mr. Wimberly.

Moreover, Mr. Wimberly fails to show that periodic parole board review under the CSOA is procedurally inadequate. The CSOA directs the parole board to "review all reports, records and information concerning" a sex offender sentenced under the CSOA at least once a year "for the purpose of determining whether said person shall be paroled." § 16-13-216(1)(a), C.R.S. As the district court noted, the Colorado Supreme Court has repeatedly held that periodic parole board review under the CSOA satisfies due process. ROA, Vol. I, at 99 (citing *White*, 656 P.2d at 693; *Kibel*, 701 P.2d at 43-44).

To the extent Mr. Wimberly argues that his due process rights have been violated because his parole board reviews have not resulted in his release from incarceration, his argument fails because he has no protected liberty or property interest in parole. "[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. In other words, *the scheme does not create a liberty interest entitled to due process protection under the United States Constitution*." *Beylik v. Estep,* 377 F. App'x 808, 812 (10th Cir. 2010) (citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979)) (internal citations omitted; emphasis added). This is no less true in the CSOA context. § 16-13-216(3), C.R.S. (granting "exclusive control over the parole and reparole of all persons committed pursuant to [the CSOA]").

Mr. Wimberly fails to establish that his procedural due process rights have been violated. Accordingly, the Court should affirm the district court's dismissal of his petition.

2. Substantive due process

Under a substantive due process analysis, courts consider (1) whether a fundamental right is at stake; (2) whether the right, either fundamental or not, has been infringed; and (3) whether the government has shown that the law interfering with the right is (a) narrowly tailored to achieve a compelling government purpose if the infringed right is fundamental, or (b) rationally related to a legitimate government interest if the right is not fundamental. *Abdi v. Wray*, 942 F.3d 1019, 1028 (10th Cir. 2019).

No fundamental right is at stake here. While incarcerated individuals "do not shed all constitutional rights at the prison gate," the Supreme Court has recognized that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Sandin v. Conner*, 515 U.S. 472, 485 (1995) (internal citations and quotation marks omitted). In the prison context, liberty interests protected by the due process clause are generally limited to freedom

from restraint that "imposes atypical and significant hardship on inmates in relation to ordinary incidents of prison life." *Id.* at 484.

Mr. Wimberly has been convicted of a crime and sentenced to an indeterminate term of incarceration under the CSOA. He therefore does not have a fundamental right to unrestricted liberty from incarceration. *See Pettigrew v. Zavaras*, 574 F. App'x 801, 814 (10th Cir. 2014) ("The Supreme Court has held that a convicted petitioner has no right to release from prison before the expiration of a valid sentence."); *see also White*, 656 P.2d at 694 n.3 ("Although sentencing options under the C.S.O.A. may involve a deprivation of liberty, one validly convicted of a crime does not have a fundamental right to his unrestricted liberty.")

Because no fundamental right is at stake, Mr. Wimberly's incarceration under the CSOA satisfies substantive due process if it withstands rational basis review. The CSOA undoubtedly is rationally related to a legitimate legislative objective. The Colorado Supreme Court has held that the primary purpose of the CSOA is to protect "members of the public from proven dangerous sex offenders." *White*, 656 P.2d at 693. That objective does not disappear simply because a

petitioner's indeterminate sentence under the CSOA may result in a longer period of incarceration than the petitioner otherwise would face under a determinate sentence. Accordingly, Mr. Wimberly's indeterminate sentence does not violate his substantive due process rights.

CONCLUSION

For the foregoing reasons, Mr. Williams respectfully requests that the Court uphold the district court's decision and deny Mr. Wimberly's petition for a writ of habeas corpus.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Mr. Williams does not believe that oral argument would significantly aid the decisional process, given the limited record and the nature of the issue before this Court. Therefore, pursuant to Fed. R. App. P. 34(a)(1) and 10th Cir. R. 34.1, Mr. Williams does not request oral argument in this matter.

Respectfully submitted January 8, 2021.

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(B), I certify that this brief is proportionally spaced and contains 6,416 words. I relied on my word processor to obtain the count. Additionally, this brief is written in Century Schoolbook font, Type Size 14.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

Dated: January 8, 2021.

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CERTIFICATIONS

This is to certify that any required privacy redactions have been made and, if required to file additional hard copies, the digital submission is, with the exception of those redactions, an exact copy of those hard copies.

The digital submission has been scanned for viruses with CrowdStrike Falcon Sensor, version 6.14.12806.0, updated December 16, 2020, and according to the program is free of viruses.

A copy of this Unopposed Motion for Extension of Time to File Answer Brief was filed on January 8, 2021 via CM/ECF, which will send notification of such filing to all participants in the case who are registered CM/ECF users:

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