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Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRUCE E. WIMBERLY,

Petitioner - Appellant,

v.

DEAN WILLIAMS,

Respondent - Appellee.

No. 20-1128

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:19-CV-00968-MEH)

Kathleen Shen, Assistant Federal Public Defender, Districts of Colorado and Wyoming, Denver, Colorado (Virginia L. Grady, Federal Public Defender, Denver, Colorado, with her on the briefs), on behalf of the Petitioner-Appellant.

Ann Stanton, Assistant Attorney General (Phillip J. Weiser, Colorado Attorney General, and Ann Luvera, Assistant Attorney General, with her on the brief), Colorado Department of Law, Denver, Colorado, on behalf of the Respondent-Appellee.

Before **BACHARACH**, **EBEL**, and **McHUGH**, Circuit Judges.

BACHARACH, Circuit Judge.

In 1984, Mr. Bruce E. Wimberly pleaded guilty to first-degree sexual assault. The Colorado trial court accepted his plea and considered the sentencing options. One option was a conventional sentence: a determinate prison term up to 24 years. But the Colorado Sex Offenders Act of 1968 provided a second option: an indeterminate term of confinement lasting anywhere from one day to life imprisonment. The court chose the second option, made additional findings required by the statute, and imposed an indeterminate term of confinement ranging from one day to life imprisonment.

More than 24 years have passed. With passage of this time, Mr. Wimberly argues that the Constitution requires his release because he didn't receive a new hearing at the end of the 24-year determinate term (that the trial court chose not to impose). Without a new hearing, Mr. Wimberly claims that his continued confinement violates his rights to equal protection and due process.

The federal district court rejected Mr. Wimberly's arguments, and so do we. The state trial court provided adequate procedural safeguards when imposing the indeterminate term of confinement, and that term could last anywhere from a single day to the rest of Mr. Wimberly's lifetime. The State thus had no constitutional duty to provide a new round of procedural safeguards 24 years into Mr. Wimberly's indeterminate term.

1. Based on the conviction, the state trial court imposes an indeterminate term of one day to life.

Mr. Wimberly's indeterminate term was authorized by the Colorado Sex Offenders Act of 1968, Colo. Rev. Stat. §§ 16–13–201 to 216 (1986). This statute authorized Colorado courts to "commit a sex offender . . . for an indeterminate term" of one day to life "in lieu of the sentence otherwise provided by law." Colo. Rev. Stat. §§ 16–13–203 (1986). The state trial court applied this provision, as permitted, upon findings that

- Mr. Wimberly was a "sex offender," *see* Colo. Rev. Stat. § 16–13–202(4)–(5) (1986), and
- his release would create "a threat of bodily harm to members of the public," Colo. Rev. Stat. § 16–13–211(2) (1986); *see also People v. Kibel*, 701 P.2d 37, 40 (Colo. 1985) (explaining the procedures required to commit a defendant under the Sex Offenders Act).

Mr. Wimberly continues to serve the indeterminate term, and the Colorado Board of Parole has denied his multiple requests for release.

2. The federal district court denies habeas relief.

In federal district court, Mr. Wimberly applied for habeas relief, invoking 28 U.S.C. § 2241 and alleging a denial of equal protection and due process. On the equal-protection claim, he relied on the absence of procedural safeguards available to civilly committed Coloradans. On the due-process claim, Mr. Wimberly relied on the State's failure to provide a

judicial hearing once he'd served 24 years of his indeterminate term.[1] The federal district court denied habeas relief.

3. The maximum of the indeterminate term of confinement is life imprisonment, not 24 years.

The availability of habeas relief turns on the adequacy of process when the trial court ordered confinement, and the adequacy of process turns on whether Mr. Wimberly began a new term once he had served 24 years in prison. If he had not yet served the "maximum sentence" for his crime, no new process was necessary. *See Specht v. Patterson*, 386 U.S. 605 (1967); *Humphrey v. Cady*, 405 U.S. 504 (1972).

Mr. Wimberly contends that he has already served the maximum sentence, defining it as the longest possible *determinate* term: 24 years' imprisonment.[2] The district court rejected this assumption, treating the maximum indeterminate term as life imprisonment.

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[1] Mr. Wimberly also asserted a state-law claim, but we need not address the alleged violation of state law. *See Leatherwood v. Allbaugh*, 861 F.3d 1034, 1043 (10th Cir. 2017) ("This court's role on collateral review isn't to second-guess state courts about the application of their own laws, but to vindicate federal rights.") (quoting *Eizember v. Trammell*, 803 F.3d 1129, 1145 (10th Cir. 2015)) (cleaned up).

[2] When the court accepted the guilty plea, first-degree sexual assault was a class 2 felony and the maximum determinate sentence for class 2 felonies was 24 years' imprisonment. *See* Colo. Rev. Stat. § 18–1–105 (1986).

Because determination of the maximum sentence is a legal conclusion, we conduct de novo review. *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1042 (10th Cir. 2017). Conducting this review, we agree with the district court. Mr. Wimberly's claim assumes that the maximum sentence was 24 years rather than life imprisonment. But this assumption lacks support in the Sex Offenders Act, Colorado Supreme Court opinions interpreting the statute, or the judgment of conviction.

When Mr. Wimberly was sentenced for first-degree sexual assault, the Sex Offenders Act allowed the state trial court to commit a sex offender to the custody of the Colorado Department of Corrections for an indeterminate term from one day to life "*in lieu of the sentence otherwise provided by law*." Colo. Rev. Stat. § 16–13-203 (1986) (emphasis added). "In lieu of" means "in place of" or "instead of." *In lieu of*, *Black's Law Dictionary* 941 (11th ed. 2019) (Garner, ed.-in-chief).

By using the term "in lieu of," the Colorado legislature allowed the trial court to impose either a determinate sentence or the indeterminate sentence—but not both for the same offense. The Colorado Supreme Court has prohibited hybrid sentences incorporating both determinate and indeterminate sentencing options. This prohibition is reflected in *People v. Sanchez*, 520 P.2d 751 (Colo. 1974), where the sentencing court had imposed a sentence of both a range of years and an indeterminate term of

one day to life. *Id.* at 751. The Colorado Supreme Court held that the sentencing court had erred by imposing both alternatives. *Id.*

The Colorado Supreme Court explained that the sentencing court could commit the defendant to an indeterminate term of confinement, adding that "[i]f [the sentencing court] elects to exercise this option, it must do so in lieu of the sentence otherwise provided by law." *Id.* at 753 (internal quotation marks omitted). Given the indeterminate term, the sentencing court could not impose a "concurrent term for the underlying offense." *Id.*; *see also People v. Lyons*, 521 P.2d 1265, 1267 (Colo. 1974) (stating that *Sanchez* "established that the district courts could not give a defendant . . . a sentence of commitment and a sentence of imprisonment") (cleaned up); *People v. Ingram*, 582 P.2d 689, 691 (Colo. App. 1978) ("As *Sanchez* and *Lyons* recognize, concomitant to such power to commit a defendant as a sexual offender is the duty to elect between the sentencing option [of an indeterminate commitment as a sex offender] or a term of imprisonment.") (cleaned up).

In Mr. Wimberly's case, the trial court viewed an indeterminate term of confinement and a specific prison term as discrete sentencing options. The court chose a different option for each count of conviction. For the second count, the written judgment imposed an indeterminate sentence ranging from one day to life:

> It is now the Judgment and Sentence of the Court that the Defendant be *sentenced* to the custody of the Executive Director of the Department of Corrections . . . for a term of from 1 day to life pursuant to sex offenders act, C.R.S. 1973 16-13-102 plus 1 year parole.

R. at 23 (emphasis added; capitalization altered).

Two months earlier, the court had chosen a different sentencing option for Mr. Wimberly on a separate charge of sexual assault. That time, the judgment had specified "a term of 24 years plus 1 year parole." *Id.* at 22 (capitalization altered). The court had not mentioned an indeterminate term. *Id.*

Despite the wording of the newer judgment, Mr. Wimberly resists characterizing his indeterminate term of confinement as a "sentence." He instead regards the indeterminate term as a form of "criminal commitment." In distinguishing between a *sentence* and a *criminal commitment*, Mr. Wimberly points out that Colorado's legislature and the Supreme Court have used the terms "committed" and "commitment" when referring to the Sex Offenders Act. *See, e.g.*, Colo. Rev. Stat. § 16-13-203 ("The district court . . . may . . . *commit* a sex offender to the custody of the [D]epartment [of Corrections] . . . .") (emphasis added).

But Mr. Wimberly misinterprets the statutory term "commitment." Colorado courts regularly interpret the statutory option of indeterminate commitment under the Sex Offenders Act as a

- "sentencing option[]," *People v. White*, 656 P.2d 690, 694 n.3 (Colo. 1983), or

- "sentence." *People v. Kibel*, 701 P.2d 37, 40 (Colo. 1985); *People v. Medina*, 564 P.2d 119, 121 (Colo. 1977); *People v. Breazeale*, 544 P.2d 970, 976 (Colo. 1975).

And when imposing a sentence, courts typically "commit" the defendant to custody. For example, federal district courts routinely impose sentences by using a form that commits the defendant to the custody of the Bureau of Prisons: "The defendant is hereby *committed to the custody* of the Federal Bureau of Prisons to be imprisoned for a total term of . . . ." Administrative Office of the United States Courts, Form 245B, Judgment in Criminal Case (eff. Sept. 1, 2019) (emphasis added).[3]

The dissent likens the indeterminate term of confinement to a form of civil commitment. But civil commitment does not serve as punishment for a criminal conviction. *See Poree v. Collins*, 866 F.3d 235, 245 (5th Cir. 2017) ("Civil commitment is not criminal commitment; unlike a criminal sentence, civil commitment is not a sentence of punishment."); *see also Addington v. Texas*, 441 U.S. 418, 428 (1979) ("In a civil commitment

[3] Mr. Wimberly points out that the United States Supreme Court is the final arbiter on the applicability of the Fourteenth Amendment's Equal Protection and Due Process Clauses. We agree, and Mr. Wimberly's confinement is governed by the Fourteenth Amendment. Here we are simply addressing Mr. Wimberly's insistence that he was criminally committed, rather than sentenced, to an indeterminate term. Characterization of what the state trial court did is a matter of state law; the constitutionality of what that court did is a matter of federal law.

state power is not exercised in a punitive sense" and "can in no sense be equated to a criminal prosecution").

Nor does the statutory scheme fit the meaning of a "criminal commitment." The term "criminal commitment" generally refers to commitment of defendants after their acquittal by reason of insanity. Christopher Slobogin, *Dangerousness & Expertise*, 133 U. Penn. L. Rev. 97, 100–01, 153 n.196 (1984).

Mr. Wimberly was subject to an indeterminate term of confinement because

- he was convicted of a crime (sexual assault) and
- the trial court made the additional findings that he was a sex offender whose release would create a threat of harm to the public.

See pp. 3, 5–6 above; *see also Specht v. Patterson*, 386 U.S. 605, 608–09 (1967) ("The punishment under [a prior version of the Act] is criminal punishment . . . ."). Calling the order a "criminal commitment" doesn't alter the reason for Mr. Wimberly's confinement: He was confined in order to punish him for his conviction of sexual assault—not to address a condition of insanity after an acquittal on criminal charges.

But it doesn't matter whether we call this a *sentence* or a *criminal commitment*. Either way, Mr. Wimberly was ordered in 1984 to remain in "the custody of the . . . Department of Corrections" for a period lasting between one day and the remainder of his lifetime as a punishment for his

crime. R. at 23. Nothing new was necessary after 24 years to trigger Mr. Wimberly's continued confinement.

4. *Specht v. Patterson* does not reduce the maximum term of confinement to 24 years.

In arguing that the maximum sentence was 24 years, Mr. Wimberly relies on *Specht v. Patterson*, 386 U.S. 605 (1967). In *Specht*, the Supreme Court held that an earlier version of the Colorado Sex Offenders Act had violated a defendant's right to due process. *Id.* at 610–11.

Like the current version of the Sex Offenders Act, the earlier version had allowed an indeterminate term of confinement lasting from one day to life imprisonment upon a finding that the defendant

- posed "a threat of bodily harm to members of the public" or
- was a "habitual offender and mentally ill."

Id. at 607. But this earlier version had allowed the indefinite term of confinement based on undisclosed evidence and did not require a hearing. *Id.* at 608. The Supreme Court held that

> [d]ue process . . . requires that [the defendant] 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. And there must be findings adequate to make meaningful any appeal that is allowed.

Id. at 610.

We have interpreted *Specht* to bear on proceedings that are "a kind of a halfway house" "between" a determination of guilt and a "normal

sentencing proceeding." *United States v. Schell*, 692 F.2d 672, 676 (10th Cir. 1982). In these proceedings, trial courts may make findings that allow longer sentences than would otherwise be authorized by the statute of conviction. *Id.* For the longer sentences, however, courts must afford defendants "greater procedural protections than those normally afforded defendants in sentencing proceedings." *Id.*

For example, in *United States v. Schell,* we considered a statute that allowed a longer sentence if the court made additional findings. *Id.* at 674 (discussing 18 U.S.C. § 3575(a)). Applying the statute, the court conducted a hearing, found that the defendant was "a 'dangerous' special offender," and imposed a longer sentence. *Id.* at 674. We upheld the sentence, concluding that the trial court had complied with *Specht*'s due process requirements. *Id.* at 677–79.

Like the defendant in *Schell*, Mr. Wimberly was sentenced under a statute that permits a longer sentence after post-trial findings. These findings came only after the court had provided all of the required procedural protections to Mr. Wimberly. *See* Colo Rev. Stat. § 6-13-210 (1986) (providing rights to an evidentiary hearing, to subpoena witnesses, to call witnesses, and to cross-examine adverse witnesses). Mr. Wimberly has not alleged the denial of these procedural rights or questioned their adequacy. So after providing these procedural rights to Mr. Wimberly, the

trial court could impose an indeterminate sentence of one day to life rather than a determinate sentence of 24 years or less.

Mr. Wimberly points out that in *Specht*, the Supreme Court observed that the conviction had triggered another proceeding to determine whether the defendant "constitute[d] a threat of bodily harm to the public." *Specht v. Patterson*, 386 U.S. 605, 608 (1967). According to Mr. Wimberly and the dissent, the existence of this second proceeding reflects a kind of civil commitment instead of a sentence. So they argue that the maximum sentence is just 24 years.

This argument relies on a misinterpretation of *Specht*. There the Supreme Court "went out of its way to distinguish the [prior version of the] Colorado statute from the general run of indeterminate sentencing provisions." Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. Penn. L. Rev. 297, 324 (1974). So *Specht* has little to say about the procedures required for the current version of the Colorado statute, which authorizes the court to impose an indeterminate term from the outset. *See id.* at 325 ("[U]nless the Court extends the reasoning of *Specht* to indeterminate sentences in general, the effect of the case will be quite limited.").

But even if we were to characterize Mr. Wimberly's confinement as a "criminal commitment," it would

- last for Mr. Wimberly's lifetime (unless he were to obtain parole) and
- constitute a punishment.

See Parts 1–3, above. So *Specht* wouldn't affect the length of confinement that the trial court could order for Mr. Wimberly's conviction.

Specht simply requires procedural protections for a defendant who faces increased punishment following a conviction. *See United States v. Schell*, 682 F.3d 672, 676–77 (10th Cir. 1982); *see also United States v. Davis*, 710 F.2d 104, 106 (3d Cir. 1983) (stating that in *Specht*, the Supreme Court "required additional procedural protections . . . when a convicted individual is sentenced to a longer term of imprisonment pursuant to a statute which requires additional fact-finding by the sentencing judge"); *Hollis v. Smith*, 571 F.2d 685, 693 (2d Cir. 1978) (stating that *Specht* provides that "where a higher sentence requires proof of a fact not established in the criminal trial . . . [,] the sentencing is subject to certain due process guarantees with respect to proof of the critical fact").

In *Specht*, the Court held only that the state's earlier procedures had been inadequate to justify indefinite confinement under the Fourteenth Amendment's Due Process Clause. *Specht v. Patterson*, 386 U.S. 605, 610–11 (1967); *see, e.g.*, *Camillo v. Armontrout*, 938 F.2d 879, 881 (8th Cir. 1991) (discussing the Supreme Court's direction in *Specht* that "in the

context of enhanced sentencing for prior criminal conduct, due process requires the defendant to 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'" (quoting *Specht*, 386 U.S. at 610)); *United States ex rel. Stachulak v. Coughlin*, 520 F.2d 931, 935 (7th Cir. 1975) ("In *Specht* the Court held that an individual could not be sentenced under the Colorado Sex Offenders Act, a statute similar in purpose to the one before us, unless he was accorded the fundamental protections of due process."). To reach this holding, the Court held that the criminal punishment had triggered the Fourteenth Amendment's Due Process Clause. *Specht*, 386 U.S. at 608.

In its discussion, the Court stated that it would apply the Due Process Clause regardless of whether the "commitment proceedings" are "denominated civil or criminal." *Id.* Based on this wording, Mr. Wimberly and the dissent argue that the Supreme Court was characterizing the Colorado scheme as something other than a sentence imposed as punishment for a crime. The Court wasn't and couldn't: The indeterminate term stemmed from a criminal conviction, and the Court naturally (and unremarkably) called the term a "sentence[] . . . for an indeterminate term." *Id.* at 607.

Specht held only that the defendant had inadequate procedural safeguards for the post-trial findings. *Id.* at 610–11. But here, Mr.

Wimberly obtained all of the required safeguards in 1984 (when the state trial court ordered his indeterminate confinement). With those safeguards, Mr. Wimberly might have spent just one day in confinement. Or he might need to spend the rest of his life there. Either way his status wouldn't change, so the Constitution didn't require new procedural safeguards while Mr. Wimberly continued to serve his indeterminate term.

* * *

Mr. Wimberly doesn't argue that the state trial court ordered indefinite commitment without providing the procedural protections required under *Specht*. So his maximum term of confinement was life imprisonment, not 24 years.

5. Because Mr. Wimberly did not get a determinate sentence, his maximum sentence was life imprisonment (not 24 years) and his continued confinement does not violate his right to equal protection or due process.

According to Mr. Wimberly, the State violated his rights to equal protection and due process by

- giving a hearing to civilly committed individuals before they were committed and
- denying judicial review to Mr. Wimberly before continuing his custody after 24 years of imprisonment.

We disagree.

A. Right to Equal Protection

Without a fundamental right or suspect class, the Fourteenth Amendment's Equal Protection Clause requires only a rational basis to give greater safeguards to civil committees than to individuals sentenced under the Sex Offenders Act. *Okla. Educ. Ass'n v. Alcoholic Beverage Laws Enf't Comm'n*, 889 F.2d 929, 932 (10th Cir. 1989).

Mr. Wimberly claims a fundamental right to freedom from bodily restraint. But his conviction stripped him of this right for the duration of his confinement (regardless of whether we call it a *sentence* or *criminal commitment*). *See Jones v. N.C. Prisoners Labor Union, Inc.*, 433 U.S. 119, 129 (1977) ("[T]his Court has repeatedly recognized the need for major restrictions on a prisoner's rights."); *People v. White*, 656 P.2d 690, 694 n.3 (Colo. 1983) ("Although sentencing options under the [Sex Offenders Act] may involve a deprivation of liberty, one validly convicted of a crime does not have a fundamental right to his unrestricted liberty."). And he does not allege membership in a suspect class.

So we consider only whether a rational basis exists for the different procedures governing civil committees and individuals punished under the Sex Offenders Act. In determining whether a rational basis exists, we give great deference to the Colorado legislature. *City of Herriman v. Bell*, 590 F.3d 1176, 1194 (10th Cir. 2010).

Given this deference, we conclude that the Colorado legislature had a rational basis to supply different procedural safeguards for civil committees and individuals punished under the Sex Offenders Act. Individuals punished under the Sex Offenders Act have been convicted of crimes considered particularly heinous; civil committees haven't been convicted of anything. *See People v. Kibel*, 701 P.2d 37, 42 (Colo. 1985) (stating that sex offenders sentenced under the Act have been convicted "of crimes regarded by society as particularly heinous" and civilly committed individuals haven't been convicted of any crimes); *see also* Colo. Rev. Stat. §§ 27–65–107, 109 (allowing short- and long-term civil commitment upon certification of a mental health disorder and resulting danger or grave disability).

And indeterminate terms under the Sex Offenders Act are imposed as punishment. *See Specht v. Patterson*, 386 U.S. 605, 608–09 (1967) ("The punishment under [a prior version of the Colorado Sex Offenders Act] is criminal punishment . . . ."). In contrast, civil commitment isn't used as punishment. *Compare id.*, *with People v. Dash*, 104 P.3d 286, 291 (Colo. Ct. App. 2004) (stating that "'no penal or punitive considerations underlie the state's interest' in civil commitment, which is designed to address not criminal conduct, but instead the present and future mental health and well-being of the mentally ill individual") (quoting *Gilford v. People*, 2 P.3d 120, 125 (Colo. 2000)) (cleaned up). As a result, the State did not

violate Mr. Wimberly's right to equal protection by failing to start proceedings for civil commitment 24 years into his indeterminate term. *See Gwinn v. Awmiller*, 354 F.3d 1211, 1228–29 (10th Cir. 2004) (rejecting an equal-protection claim by a sex offender who had been convicted of robbery because he, "unlike other robbery defendants, had committed a sexual assault" and could rationally be treated differently).

B. Right to Due Process

Nor did the State violate Mr. Wimberly's right to due process. When sentenced to an indeterminate term of one day to life, Mr. Wimberly enjoyed the rights to have an evidentiary hearing, to subpoena witnesses, to call witnesses, and to cross-examine adverse witnesses. Colo. Rev. Stat. § 16–13–210 (1986). The State had no need to provide greater procedural safeguards while Mr. Wimberly continued to serve his indeterminate term. *See Specht v. Patterson*, 386 U.S. 605, 610 (1967) (stating that these procedures are required to provide due process to a defendant sentenced as a sex offender to an indeterminate term).[4]

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[4] The Colorado Parole Board bears a statutory obligation to "review all reports, records, and information concerning [Mr. Wimberly], for the purpose of determining whether [he] shall be paroled." Colo. Rev. Stat. § 16–13–216 (1986). This review must occur within six months after commitment to custody and then at least annually. *Id.* At oral argument, the State acknowledged that if Mr. Wimberly has not received these reviews, he can seek an order to require them under state law. Oral Argument at 44:43–45:03.

6. The Supreme Court's opinions in *Humphrey* and *Baxtrom* do not change the terms of Mr. Wimberly's indeterminate sentence.

Mr. Wimberly and the dissent rely on two Supreme Court opinions involving sentences that lapsed, requiring a new judicial order to continue the confinement: *Humphrey v. Cady*, 405 U.S. 504 (1972) and *Baxtrom v. Herold*, 383 U.S. 107 (1966). These opinions shed little light on our issue, for they require new procedures and judicial determinations to keep a person in prison after the sentence has lapsed.

But Mr. Wimberly's indeterminate sentence has not lapsed, so no new determinations are necessary. The state district court already made the required findings and exercised its statutory discretion in 1984 to keep Mr. Wimberly in prison for his lifetime unless a parole board were to order his release.

In *Humphrey* and *Baxtrom*, the prisoners received sentences for specific terms. In these cases, the questions concerned the prisoners' procedural rights *after* those terms had ended. *See Humphrey*, 405 U.S. at 506–07; *Baxtrom*, 383 U.S. at 108, 110. Neither opinion

- involved someone sentenced or criminally committed to an indeterminate term of commitment "in lieu of the sentence

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The only issue here is whether the Fourteenth Amendment required a judicial hearing once Mr. Wimberly completed 24 years of his indeterminate term. We express no view as to the possibility of remedies under state law, such as mandamus, for deficiencies in the frequency and adequacy of review for parole.

otherwise provided by law" (Colo. Rev. Stat. §§ 16–13–203 (1986)) or

- suggested that a statutory maximum for a determinate term should control when a sentencing court imposes an indeterminate term of confinement after providing the necessary procedural safeguards.

The dissent responds that *Humphrey* and *Baxtrom* still apply, citing the Supreme Court's subsequent statement in *Jackson v. Indiana*. Dissent at 33–35. In that case, the Court stated that "[t]he *Baxtrom* principle also has been extended . . . to commitment in lieu of [a] sentence following conviction as a sex offender." *Jackson v. Indiana*, 406 U.S. 715, 724–25 (1972). But *Jackson* noted that *Baxtrom* had involved "a state prisoner civilly committed *at the end of his prison sentence*." *Id.* at 723 (emphasis added). And as an example of the "extended" application of "the *Baxtrom* principle," *Jackson* cited *Humphrey*. *See Jackson*, 406 U.S. at 724–25.

In *Humphrey*, the defendant had been committed for one year, the maximum term of imprisonment for the underlying offense. *Humphrey v. Cady*, 405 U.S. 504, 507 (1972). The trial court extended the commitment for five years without allowing a jury trial that the state had afforded to defendants in other civil commitment proceedings. *Id.* at 507–08. The Supreme Court concluded that the defendant had stated an equal protection claim "with respect to the subsequent renewal proceedings," reasoning that the commitment orders had stemmed from "new findings of fact"

unshackled from "the nature of the defendant's crime or the maximum sentence authorized for that crime." *Humphrey*, 405 U.S. at 511.[5]

Unlike the commitment orders in *Humphrey*, Mr. Wimberly's indefinite term of confinement stemmed from

- his criminal conviction and
- the trial court's finding that he was a sex offender whose release would threaten the safety of the public.

See Colo. Rev. Stat. § 16-13-202(4)–(5) (1986); Colo. Rev. Stat. § 16–13–211(2) (1986). The dissent characterizes the initial order of confinement as a "criminal commitment." But the name doesn't matter. What matters is that in 1984, the trial court provided all of the required procedural safeguards to Mr. Wimberly and ordered his confinement for the rest of his life unless he were to obtain parole.

Unlike the defendants in *Baxtrom* and *Humphrey*, Mr. Wimberly did not obtain a new commitment at the end of a prison sentence. So neither opinion changes the terms of Mr. Wimberly's indeterminate confinement—no matter what we call it. Even if we call the order a criminal *commitment*, it went into effect in 1984 and Mr. Wimberly then obtained all of the

[5] The Court ultimately held only that (1) the petitioner had raised a substantial constitutional claim and (2) the Court of Appeals should have certified probable cause for a habeas appeal. *Humphrey*, 405 U.S. at 506–08.

required process. His status didn't change once he completed 24 years of his so-called "criminal commitment."

7. Conclusion

Mr. Wimberly was sentenced to prison for an indeterminate term between one day and life imprisonment. At sentencing, the trial court provided due process. The court did not need to provide further process when Mr. Wimberly completed 24 years of his indeterminate term of confinement. We thus affirm the denial of relief on Mr. Wimberly's claims involving a denial of due process and equal protection.

No. 20-1128, Wimberly v. Williams

EBEL, J., concurring.

I am pleased to join the majority opinion in this case. I agree that Mr. Wimberly cannot make out an equal protection claim because he is not similarly situated to civil committees, who have not been committed as the result of a criminal conviction for a serious sex crime. Mr. Wimberly's due process claim also fails because he was given full process and protection when his valid indeterminate sentence, which remains in effect, was first issued. And Mr. Wimberly is not entitled specifically to judicial review of his continued confinement.

I write separately to address a different issue which was not raised in this case, but which creates concern about the fairness of Mr. Wimberly's confinement. When Mr. Wimberly and others like him were sentenced to indeterminate commitment under the Colorado Sex Offenders Act of 1968 (CSOA), Colo. Rev. Stat. §§ 18-1.3-901 to -916, a criterion for the sentence was that at the time of sentencing they posed a threat of bodily harm to members of the public. Id. § 18-1.3-912. And the indeterminateness of the sentence can only mean that that criterion is a fluid and evolving determination rather than a historical fact. Logic suggests that if that factor changes, the basis for the indeterminate sentence no longer exists. Interpreting the statute, then, it seems to me that there should be a process available to Mr. Wimberly and those like him that would periodically provide him with the opportunity to challenge whether he remains a threat to

the public. The oral argument presented by the State in this case suggests that Mr. Wimberly did not have such an opportunity.[1]

The factual record, however, is silent as to whether the periodic parole board evaluations Mr. Wimberly has received contained sufficient analysis of the current threat of bodily harm to the public that he presents to warrant his continued confinement under the indeterminate CSOA sentence. The merits of the previous parole board decisions are not before us. But Mr. Wimberly still has the option of bringing such a claim in state court where he could develop an appropriate record and seek a ruling from the Colorado courts regarding whether he has a right to a periodic review of whether he presents a continuing threat of bodily harm to members of the public.

[1] At oral argument, the State suggested that a thorough evaluation of whether Mr. Wimberly continued to present a threat of bodily harm to members of the public did not take place. In response to questioning about the nature of the parole board's review, the State answered that the board considers factors such as "the actuarial risk of re-offense, victim statements, an individual's program and treatment participation, an individual's behavior in prison, [and] whether the inmate has worked towards completion of education." Oral Argument at 40:00. When a panel member asked if it was correct that the parole board does "nothing different for someone who is serving this indeterminate sentence" as compared to anyone else up for parole, the State confirmed that was correct. Id. at 43:25.

20-1128, *Wimberly v. Williams*

McHUGH, Circuit Judge, dissenting:

Petitioner-appellant Bruce E. Wimberly has been imprisoned for over 37 years, which is more than a decade longer than the maximum permissible sentence for his underlying crimes. Over this past decade, Colorado[1] has denied Mr. Wimberly the procedural protections it affords to civil committees in its custody. The majority sees no constitutional problem with this; but I do. I therefore respectfully dissent.

The majority's conclusion stems from its premise that "it doesn't matter whether we call this a *sentence* or a *criminal commitment*." Maj. Op. at 9. I reject this premise. Mr. Wimberly is presently confined under the Colorado Sex Offenders Act of 1968 ("CSOA" or the "Act"), which, in a section titled "*Indeterminate commitment*," provides that courts "may, . . . *in lieu of the sentence* otherwise provided by law, *commit* a sex offender to the custody of the [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 (emphasis added). In my view, both U.S. Supreme Court precedent and Colorado state law support the conclusion that the CSOA provides for a scheme of criminal commitment, not sentencing.

From my premise that Mr. Wimberly is serving a criminal commitment, I further conclude Mr. Wimberly's present confinement violates the Equal Protection Clause of the Fourteenth Amendment. The U.S. Supreme Court has instructed that no rational basis

[1] I refer to respondent-appellee as "Colorado" or "the State."

exists to treat individuals subject to criminal commitment in lieu of a criminal sentence differently from individuals subject to civil commitment, once the maximum sentence otherwise authorized for their underlying crimes has expired. Colorado is denying Mr. Wimberly the procedural protections it affords to civil committees in its custody, notwithstanding that the maximum sentence authorized for his underlying offenses expired over a decade ago.[2]

I. BACKGROUND

A. Factual History

The facts in this appeal are undisputed. Mr. Wimberly pleaded guilty to multiple criminal offenses in Colorado state court in January 1984. First, Mr. Wimberly pleaded guilty to first degree criminal trespass in Arapahoe County District Court Case No. 83CR228. For that crime, he was sentenced to 2 years in state prison. Eight days later, Mr. Wimberly pleaded guilty to two separate counts of first degree sexual assault under Colorado Revised Statutes § 18-3-402. The presence of aggravating circumstances elevated each count to a class 2 felony. On one of these counts, Mr. Wimberly was sentenced to 24 years in state prison, pursuant to Colorado Revised Statutes § 18-1.3-401(1)(a)(I), (8)(e). At that time, 24 years was the maximum sentence under Colorado law for first degree sexual assault when charged as a class 2 felony. *See, e.g.*, *People v. Vigil*, 718 P.2d 496, 506 (Colo. 1986). On the other sexual-assault count, the

[2] Because I would grant Mr. Wimberly's petition on equal protection grounds, I would decline to consider whether he should also prevail on his due process claims.

sentencing court committed Mr. Wimberly under an alternate scheme, the CSOA, Colorado Revised Statutes §§ 18-1.3-901 to -916,[3] for "an indeterminate term of a minimum of one day and a maximum of his natural life." *Wimberly v. Williams*, No. 19-cv-00968-MEH, 2020 WL 996871, at *1 (D. Colo. Feb. 28, 2020) (unpublished); *see* Colo. Rev. Stat. § 18-1.3-904. Several weeks later, Mr. Wimberly pleaded guilty to one count of first degree burglary, for which he was sentenced to 16 years in state prison.

The state trial court set Mr. Wimberly's 24-year sentence and his term of commitment imposed for his first degree sexual assault convictions to run concurrently to each other and consecutively to his 2-year sentence for criminal trespass. The court set his 16-year sentence for burglary to run concurrently to his determinate sentences and to his indeterminate term of commitment. As a result, Mr. Wimberly was subject to a maximum period of imprisonment of 26 years under his determinate sentences, as well as to an indeterminate, one-day-to-life period of commitment under the CSOA.

Mr. Wimberly was transferred to the Colorado Department of Corrections to begin serving these terms in March 1984. The parole board began reviewing Mr. Wimberly's case in September 1994; the board either deferred or tabled his review on each occasion.

[3] The bulk of the CSOA, originally codified at Colo. Rev. Stat. §§ 16-13-201 to - 215, was relocated. *See* 2002 Colo. Legis. Serv. Ch. 318, § 3 (West). This portion of the Act is now codified at §§ 18-1.3-901 to -916 of the Colorado Revised Statutes. The sole original CSOA provision that survived the 2002 statutory rearrangement was Colorado Revised Statutes § 16-13-216, dealing with "Powers and duties of the [state parole] board." I cite to the CSOA's current position in the Colorado code.

B. Procedural History

In March 2019, Mr. Wimberly filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the federal district court for the District of Colorado, which the district court denied on the merits. *See Wimberly*, 2020 WL 996871, at *7. After a limited remand, it also declined to issue Mr. Wimberly a Certificate of Appealability ("COA").

Mr. Wimberly timely filed a notice of appeal. We granted Mr. Wimberly a COA to address whether "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, July 17, 2020.

II. DISCUSSION

This dissent proceeds in four main parts. I first set forth the appropriate standard of review (Part A) and the general legal standards relevant to my analysis (Part B). In Part C, I analyze whether the CSOA is a scheme of criminal commitment or of criminal sentencing. I believe this constitutes a key threshold question for purposes of our constitutional analysis. Finally, in Part D, I explain why, in my view, Mr. Wimberly's present confinement violates his right to equal protection under the Fourteenth Amendment, entitling him to habeas relief.

A. Standard of Review

When a state prisoner appeals the denial of a 28 U.S.C. § 2241 petition, "we review the district court's legal conclusions de novo and accept its factual findings unless

clearly erroneous." *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1042 (10th Cir. 2017).[4] The district court's legal conclusions are solely at issue in this appeal; accordingly, our review is de novo.

B. General Legal Background

1. Colorado Sex Offenders Act of 1968

At the time Mr. Wimberly pleaded guilty in 1984 to his various offenses, the CSOA was titled "Indeterminate commitment" and provided:

> The district court having jurisdiction may, subject to the requirements of this part 9, *in lieu of the sentence* otherwise provided by law, *commit* a sex offender to the custody of the [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 (emphasis added).

The CSOA requires certain proceedings before an individual may be committed under it. These procedural steps were outlined by the Colorado Supreme Court in *People v. Kibel*:

> 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 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;

[4] Because Mr. Wimberly's petition attacks the execution of his sentence, not its validity, it must be construed as a petition brought under 28 U.S.C. § 2241. *See Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000). The majority does not explicitly set forth the basis for this court's jurisdiction, but it likewise cites *Leatherwood v. Allbaugh*, 861 F.3d 1034 (10th Cir. 2017), a § 2241 case. The parties also agree that § 2241 provides the basis for our jurisdiction.

> 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 (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.

701 P.2d 37, 39–40 (Colo. 1985) (citations and footnote omitted) (quoting Colo. Rev. Stat. § 16-13-207(2) (1978); then quoting *id.* § 16-13-216(1)(a) (1978); then quoting *id.* § 16-13-216(2) (1984 Supp.)).

The CSOA has since been superseded by the Colorado Sex Offender Lifetime Supervision Act of 1998 ("SOLSA"), Colo. Rev. Stat. §§ 18-1.3-1001 to -1012.[5] As a

[5] The SOLSA is titled "Indeterminate sentence" and provides:

> The district court having jurisdiction shall sentence a sex offender to the custody of the department for an indeterminate term for at least the minimum of the presumptive range specified . . . and a maximum of the sex offender's natural life.

Colo. Rev. Stat. § 18-1.3-1004(1)(a).

result, the CSOA applies only to individuals like Mr. Wimberly who were "sentenced for offenses committed prior to November 1, 1998." *Id.* § 18-1.3-902.

2. Colorado Law on Involuntary Civil Commitments

Under Colorado law, if an individual is in state custody pursuant to a long-term involuntary civil commitment, that commitment is subject to judicial review at six-month intervals. *Id.* § 27-65-109(2)–(5). The civil commitment may not be continued without clear and convincing evidence 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 is gravely disabled." *Id.* §§ 27-65-109(4), 27-65-111(1). The individual has the right to request a jury trial and has the right to appeal any adverse decision. *See id*. §§ 27-65-109(3) (jury trial), 27-65-111(3) (appeal).

C. Commitment vs. Sentencing

A critical threshold issue for resolving Mr. Wimberly's constitutional claims is whether the CSOA is a scheme of criminal commitment or criminal sentencing. The majority concludes that the distinction between criminal commitment and a criminal sentence "doesn't matter" because in either instance Mr. Wimberly's confinement is punishment for his crimes. Maj. Op. at 9.

Respectfully, I view this distinction as highly relevant. Unsurprisingly, Mr. Wimberly agrees and contends the distinction is constitutionally significant. But the State also concedes the importance of this distinction. *See* Oral Arg. at 33:18–53 (agreeing that, if the CSOA provides for commitment rather than sentencing, the analysis for Mr. Wimberly's equal protection claim requires comparing how he is treated to how

other involuntary committees in Colorado are treated); *id.* at 36:55–37:14 (in the context of discussing Mr. Wimberly's due process claim, agreeing that "again, everything turns on whether it's a commitment or a sentence, because if it's a commitment, then he does have a liberty interest in being reevaluated periodically in a due-process-compliant procedure"). I explain the import of this distinction in Part II.D, *infra*, as it pertains to the equal protection rights the U.S. Supreme Court has determined committees such as Mr. Wimberly are constitutionally entitled.

Before turning to that issue, however, I first explain why the CSOA is properly understood as providing for criminal commitment rather than criminal sentencing. I begin by considering whether this question is governed by federal constitutional law or Colorado state law. Part II.C.1. I then explain why, under either source of law, the CSOA is properly understood as providing for a commitment. *See* Part II.C.2 (federal constitutional law); Part II.C.3 (state law).

1. Whether the Commitment-Versus-Sentencing Issue Is One of State Statutory Interpretation or Federal Constitutional Interpretation

The parties first dispute whether the U.S. Supreme Court or the Colorado Supreme Court is the ultimate authority on the issue of whether the CSOA is a commitment or a sentencing scheme. The State argues this is a matter of state statutory interpretation and, as such, this court is bound by the Colorado Supreme Court's interpretation of the statute. Mr. Wimberly counters that the issue before this court is what counts as a commitment for purposes of the Fourteenth Amendment's Equal Protection and Due Process Clauses, and the U.S. Supreme Court is the final authority on what the U.S. Constitution means.

The majority characterizes Mr. Wimberly's briefing as arguing simply that the U.S. Supreme Court "is the final arbiter on the applicability of the Fourteenth Amendment's Equal Protection and Due Process Clauses." Maj. Op. at 8 n.3. But it overlooks that the parties also dispute whether federal constitutional law or Colorado state law governs the commitment-versus-sentencing question. *See* Answer Br. at 13 (arguing, *inter alia*, that "[b]ecause the Colorado Supreme Court interprets the CSOA as providing for indeterminate criminal sentencing, rather than some other type of commitment, this [c]ourt is bound by that interpretation"); Pet'r Reply at 4–5 (arguing, *inter alia*, "[w]hether Mr. Wimberly's confinement is subject to the constitutional constraints that apply to involuntary commitments is not, as the state contends, a matter of state statutory interpretation; it is a matter of federal constitutional law. . . . [The Supreme Court] is thus the final word on what counts as commitment for purposes of the Fourteenth Amendment[] . . . ." (citation omitted)). The majority concludes—without explanation—that although "Mr. Wimberly's confinement is governed by the Fourteenth Amendment," we look to state law for purposes of the threshold question of whether that confinement is a commitment or a sentence. Maj. Op. at 8 n.3.

I cannot agree. Instead, I agree with Mr. Wimberly that this issue is one of federal constitutional law. To be sure, we would look to Colorado law to resolve issues as to what the CSOA "means" in terms of what procedures it provides and how the legislature intended that it be implemented. *See, e.g., Dennis v. Poppel*, 222 F.3d 1245, 1257 (10th Cir. 2000) (holding that a federal habeas court is bound to accept a state "court's construction of its state statutes"). But those issues are not in dispute here. Rather, the

threshold question here is whether the confinement provided for in the CSOA counts as a commitment or sentencing for purposes of our federal constitutional analysis. Accordingly, I look to U.S. Supreme Court caselaw as the ultimate authority to answer this question. *See, e.g.*, *James v. City of Boise*, 577 U.S. 306, 307 (2016) (explaining that all state and federal courts are "bound by th[e Supreme] Court's interpretation of federal law," for "if state courts were permitted to disregard this Court's rulings on federal law, '. . . the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states[; t]he public mischiefs that would attend such a state of things would be truly deplorable'" (quoting *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816)).

The U.S. Constitution sets a floor for the protection of constitutional rights that states may not fall below. *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause). Accordingly, even if the Colorado legislature or courts did label a federally-recognized commitment as a "sentence," it could not avoid its obligation to provide the individuals it confined thereunder the rights to which they are entitled under federal constitutional law as defined by the federal courts.

For these reasons, I agree with Mr. Wimberly that the ultimate source of authority for the commitment-versus-sentencing issue is U.S. Supreme Court caselaw. In the next section, I explain why, under that caselaw, the CSOA provides for commitment rather than sentencing. Even if I were to agree with the majority that state law governs this question, however, I would nevertheless reach the same conclusion. *See* Part II.C.3, *infra*.

2. Whether the CSOA Provides for Commitment or Sentencing under U.S. Supreme Court Law

The U.S. Supreme Court has instructed that whether a confinement is an involuntary commitment for purposes of the Equal Protection and Due Process Clauses turns on the procedures and factual findings required to support the initial confinement.[6] Applying that precedent here, I would conclude the CSOA provides for commitment rather than sentencing.

a. Requisite proceedings

In *Specht v. Patterson*, the U.S. Supreme Court considered whether the immediate precursor to Colorado's 1968 Sex Offender Act, as interpreted by the Colorado Supreme Court, constituted a commitment or a sentence for purposes of the Fourteenth Amendment. 386 U.S. 605, 608–09 (1967).[7] The Court addressed a confinement option

[6] The majority suggests Mr. Wimberly contends his confinement is a commitment simply because the statute and Colorado Supreme Court have used the word "commit" when referring to Colorado's Sex Offender Act. *See* Maj. Op. at 7–8. But Mr. Wimberly makes several other, more persuasive arguments in favor of his position—including that whether confinement constitutes involuntary commitment depends on the procedures and factual findings required to support the confinement, not on the mere language used. *See* Pet'r Br. at 11 (relying on *Specht v. Patterson*, 386 U.S. 605 (1967), and arguing "[t]he nature of the proceedings under the CSOA is . . . consistent with that of commitment rather than sentencing"); *id.* at 11–12 (relying on *Humphrey v. Cady*, 405 U.S. 504 (1972), and asserting "[t]he nature of the fact-finding process provided for by the CSOA provides further support for the conclusion that it authorizes a form of commitment"); *id.* at 12 (relying on *Vitek v. Jones*, 445 U.S. 480 (1980), and arguing "the fact that confinement under the CSOA includes the possibility of confinement in a mental hospital for treatment" also supports that it provides for commitment, rather than sentencing).

[7] The precursor statute the *Specht* Court analyzed was Colorado Revised Statutes §§ 39-19-1 to -10 (1963). *See Specht*, 386 U.S. at 607.

materially identical to that in the CSOA and squarely held it was an involuntary commitment for purposes of the Equal Protection and Due Process Clauses. Like the provision at issue in *Specht*, the CSOA "does not make the commission of a specified crime the basis for sentencing. It 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." *Id.* at 608. Specifically, following a defendant's conviction of a specified sex offense, the Act allows the state, the defendant, or the trial court to move for initiation of commitment proceedings. Colo. Rev. Stat. § 18-1.3-906. The Act then calls for an adversarial evidentiary hearing "bearing on the issue of whether the defendant, if at large, constitutes a threat of bodily harm to members of the public." *Id.* § 18-1.3-911(3). If the court finds beyond a reasonable doubt that the defendant constitutes such a threat, it may commit the defendant in lieu of sentencing him. *Id.* § 18-1.3-912(2).[8]

[8] "*Specht* held that, under Colorado's preceding sex offender act, a defendant's constitutional rights were violated by permitting the imposition of an indeterminate commitment without a due process hearing." *People v. Breazeale*, 544 P.2d 970, 976 (Colo. 1975). "The statute was thereafter amended to incorporate these requirements." *People v. White*, 656 P.2d 690, 693 (Colo. 1983). The changes to the CSOA made in response to *Specht*—i.e., the addition of an evidentiary due process hearing—did not reach the portions of Colorado's sex offender statute that led the Supreme Court to interpret it as establishing a species of "commitment proceedings." *Specht*, 386 U.S. at 608. *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* Colo. Rev. Stat. §§ 18-1.3-907, 18-1.3-911 (providing for right to counsel and right to an evidentiary hearing, including the rights to confront witnesses, cross-examine witnesses, and offer evidence).

This procedure sharply contrasts with that provided for in the SOLSA, the statute that succeeded the CSOA. Unlike the CSOA, the SOLSA calls for the mandatory imposition of an indeterminate sentence upon conviction of certain sex crimes, with no intermediate procedural steps and no additional findings of fact. *See People v. Oglethorpe*, 87 P.3d 129, 133–34 (Colo. App. 2003) ("[U]nlike the [CSOA] . . . no additional finding beyond the conviction was required before defendant was subject to indeterminate sentencing" under the SOLSA). That is, unlike the CSOA, the SOLSA simply "make[s] the commission of a specified crime the basis for sentencing." *Specht*, 386 U.S. at 608. Conversely, and as the Court explained in *Specht*, because CSOA confinement requires "a separate criminal proceeding which may be invoked *after* conviction of one of the specified crimes," it represents not an ordinary criminal sentence, but rather a variety of commitment. *Id.* at 609 (emphasis added) (quoting *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 312 (3d Cir. 1966)); *see also Kibel*, 701 P.2d at 42 n.8 ("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."). Thus, although Mr. Wimberly's confinement proceeding 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." *Specht*, 386 U.S. at 608.

Post-hearing CSOA proceedings also support that the Act is a commitment scheme. The state parole board can transfer anyone committed under the Act "to any facility under the jurisdiction of the department [of corrections] or to the department of human services subject to the availability of staff and housing." Colo. Rev. Stat. § 16-13-216(2). This includes the power to transfer defendants to state-run mental health facilities. *See, e.g.*, *Christensen v. People*, 869 P.2d 1256, 1257 (Colo. 1994) (defendant assigned to Colorado State Hospital for therapy following CSOA commitment); *Wilson v. People*, 708 P.2d 792, 795 (Colo. 1985) (defendant committed under CSOA "was initially sent to the Colorado State Hospital at Pueblo, Colorado, for treatment as a sex offender"); *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."); *White v. Rickets*, 684 P.2d 239, 241 (Colo. 1984) ("*Rickets*") (defendant transferred by the parole board to a mental hospital under the CSOA). A criminal statute that allows for a defendant's transfer to a state facility for involuntary psychiatric treatment is best interpreted to create a commitment alternative to standard sentencing, because "involuntary 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).

b. Nature of factual findings

The nature of the factual findings required to support confinement under the Act also indicates it is a type of commitment. In keeping with the application of commitment proceedings to those deemed "mentally ill," *see Jackson v. Indiana*, 406 U.S. 715, 720–

22 (1972), CSOA procedure calls for the state trial court, prior to the required hearing, to "commit the defendant to the Colorado mental health institute . . . , the [U]niversity of Colorado psychiatric hospital, or the county jail" for psychiatric examination. Colo. Rev. Stat. § 18-1.3-908(1)(a)-(b). Specifically, the Act calls for examination of the defendant by two psychiatrists, *id.* § 908(1)(b)-(c), who must each prepare a written report for the court assessing whether the defendant (1) "is mentally deficient"; (2) "could benefit from psychiatric treatment"; and (3) "could be adequately supervised on probation," *id.* § 908(2). After reviewing these reports, as well as one prepared by the probation office, the court has discretion to "terminate proceedings under [the CSOA] and proceed with sentencing as otherwise provided by law." *Id.* § 18-1.3-910. If the court instead opts to proceed with commitment proceedings, the reports prepared under § 908 may be received into evidence at the ensuing adversarial hearing, and the defendant may call or cross-examine his examining psychiatrists. *Id.* § 18-1.3-911(4)-(5). In short, the Act requires "a new finding of fact . . . that was not an ingredient of the offense charged." *Specht*, 386 U.S. at 608. The trial court's subsequent finding on dangerousness thus represents the "kind of determination, involving a mixture of medical and social or legal judgments," that typically attends commitment procedures. *Humphrey v. Cady*, 405 U.S. 504, 510 (1972).[9]

[9] The majority acknowledges that the state trial court was required to make such findings before it could commit Mr. Wimberly to an indeterminate term. *See* Maj. Op. at 3 (explaining the CSOA "authorized Colorado courts to 'commit a sex offender . . . for an indeterminate term' of one day to life . . . upon findings that [he] was a 'sex offender,' and his release would create 'a threat of bodily harm to members of the public.'" (first ellipsis in original) (first quoting Colo. Rev. Stat. § 16-13-203; then quoting *id.*

Mr. Wimberly argues *Specht* is "squarely on point" and controls the outcome here. Pet'r Reply at 2; *see also id.* at 1–7; Pet'r Br. at 10–13. I agree. For its part, the State does not address *Specht* or any of the other U.S. Supreme Court caselaw Mr. Wimberly marshals in support of his argument that the CSOA provides for commitment. The majority concludes that *Specht* "bear[s] on proceedings that are 'a kind of a halfway house' 'between' a determination of guilt and a 'normal sentencing proceeding,'" and that in order to issue longer sentences than would otherwise be allowed by statute, the trial court "must afford defendants 'greater procedural protections than those normally afforded defendants in sentencing proceedings." Maj. Op. at 10–11 (citing *United States v. Schell*, 692 F.2d 672, 676 (10th Cir. 1982)). The majority finds that because Mr. Wimberly was afforded the appropriate procedural safeguards during this "halfway house" proceeding when the state ordered indeterminate confinement, the Constitution does not "require new procedural safeguards," regardless of how long Mr. Wimberly is confined. Maj. Op. at 15. I disagree with this reading of *Specht* for the foregoing reasons.

3. Whether the CSOA Provides for Commitment or Sentencing under Colorado State Law

As discussed in Part II.C.1, U.S. Supreme Court caselaw is the appropriate source of authority to resolve the issue presented.[10] Even if I were to agree with the majority that

§ 16-13-202(4)–(5); then quoting *id.* § 16-13-211(2))). The majority, however, assigns these findings no significance.

[10] Colorado would of course be free to provide *greater* protections to those in its custody than the federal constitution requires, but it may not provide less. *See, e.g., Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) ("[T]he Constitution sets a floor for the protection of individual rights. The constitutional

this court should look to Colorado law instead, however, I would hold this authority, at best, supports a conclusion that the CSOA is ambiguous as to whether it provides for commitment or sentencing. But applying Colorado's tools of statutory construction to the CSOA resolves that ambiguity in favor of Mr. Wimberly's position that the CSOA provides for a criminal commitment.

Colorado argues the CSOA provides for criminal sentencing, rather than commitment, asserting the state's highest court "ha[s] routinely interpreted the CSOA as allowing the imposition of an indeterminate sentence as an alternative to [a] determinate sentence." Answer Br. at 11. Colorado cites four cases in purported support of this proposition: *Kibel*, 701 P.2d 37; *People v. White*, 656 P.2d 690 (Colo. 1983) ("*White*"); *People v. Medina*, 564 P.2d 119 (Colo. 1977); and *People v. Breazeale*, 544 P.2d 970 (Colo. 1975).[11]

These cases, however, are more accurately read as interpreting the CSOA to allow for the imposition of indefinite criminal commitment as a "sentencing *alternative*" to a

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floor is sturdy and often high, but it is a floor. Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution."). Here, Mr. Wimberly's allegation is that Colorado's protections fail to reach the federal constitutional floor.

[11] The majority echoes the State, pointing to these same four cases and observing that they use the word "sentence" or "sentencing option." Notwithstanding that the majority asserts "it doesn't matter whether we call this a *sentence* or a *criminal commitment*," Maj. Op. at 9 (emphasis in original), the majority's analysis of these cases is focused exclusively on whether those words are used, *see id.* at 7–8. As discussed in this section, I read these cases differently, based on considering both the words they use as well as the context in which the words are used. I also consider the Colorado Supreme Court's analysis in these and other cases, in reaching my contrary conclusion.

conventional term of imprisonment under a determinate sentence. *See Breazeale*, 544 P.2d at 976 (emphasis added); *Medina*, 564 P.2d at 121 (same). *Kibel* and *White* together provide perhaps the Colorado Supreme Court's most thorough discussion of the Act. *Kibel*—which followed and interpreted *White*—evinces a clear understanding of commitment and sentencing as distinct concepts, while also making plain that proceedings under the Act fall within the former sphere. Specifically, the Colorado Supreme Court explained that commitment under the CSOA "may be viewed as analogous to other commitments based upon predictions of future harm" and warned such confinement pursuant to the CSOA is "subject to the protection of the state and federal due process clauses." *Kibel*, 701 P.2d. at 42 n.8, 43.

Indeed, Colorado state courts—including the Colorado Supreme Court—have repeatedly recognized that the CSOA allows for commitment as a discretionary alternative to conventional criminal sentencing, and they have explicitly distinguished between these two options. *See People v. Lyons*, 521 P.2d 1265, 1266 (Colo. 1974) ("[W]e hold that under the Act the district court has the option of sentencing or committing a defendant who has been found to be a threat to the public."); *People v. Sanchez*, 520 P.2d 751, 753 (Colo. 1974) (agreeing with defendant that "his indeterminate commitment under the [CSOA] is [i]n lieu of his sentence under the Habitual Criminal Act" and remanding "to the trial court for it to exercise its option of either sentencing the defendant under the Habitual Criminal Act or committing him under the [CSOA]"); *People v. Ingram*, 582 P.2d 689, 691 (Colo. App. 1978) (stating the CSOA gave state trial courts the "power to commit a defendant as a sexual offender,"

which created "the duty to elect between that sentencing alternative or a term of imprisonment").[12]

The distinction drawn by these cases between CSOA commitment and standard criminal sentencing is reinforced by the perceived favorability to the defendant of proceeding under the commitment process of the CSOA in lieu of being sentenced. *See Lyons*, 521 P.2d at 1267 (holding there to be no "automatic right to commitment" under the CSOA, for the Act vests the district court "with the option of committing or sentencing the defendant"); *see also People v. Hall*, 619 P.2d 492, 493 (Colo. 1980) (discussing the probation department's "statistical conclusion that the average length of commitment under the Sex Offenders Act was 24.7 months" and consequent recommendation that the court "instead[] sentence the defendant for a long term under the penalty range authorized for a class two felony"); *Breazeale*, 544 P.2d at 976 (reasoning that while the CSOA's wording appears to allow a defendant to require initiation of a commitment hearing, there is no constitutional right to proceeding under

[12] The majority cites these same cases for the proposition that a Colorado court must choose between "commit[ting] the defendant to an indeterminate term" or sentencing him to a determinate term. Maj. Op. at 5–6 (citing *People v. Lyons*, 521 P.2d 1265, 1267 (Colo. 1974); *People v. Sanchez*, 520 P.2d 751 (Colo. 1974); and *People v. Ingram*, 582 P.2d 689, 691 (Colo. App. 1978)). Mr. Wimberly does not dispute this proposition, and he argues it supports his view that the CSOA provides for commitment, as a distinct alternative to a sentence. Specifically, Colorado state courts must choose between an indeterminate term of commitment and a determinate sentence—courts may not "impose both" alternatives "for the same offense." *Id.* at 5. Here, the Colorado state court chose indeterminate commitment for Mr. Wimberly's second sexual assault conviction. *See id.* at 6 ("In Mr. Wimberly's case, the trial court viewed an indeterminate term of confinement and a specific prison term as discrete sentencing options. The court chose a different option for each count of conviction.").

the Act, which provides trial courts with discretion "similar to the discretion in a court to suspend a sentence or to grant probation").

It is true the Colorado Supreme Court has at times referred interchangeably to commitment and sentencing when discussing an indeterminate term of confinement imposed under the CSOA. At most, this imprecision in the caselaw suggests the state's highest court has deemed the Act ambiguous as to whether the indeterminate confinement of sex offenders is a species of criminal commitment or of criminal sentencing.

When a state statute is ambiguous, "we are permitted to construe . . . and to extrapolate the true meaning of [the] statute[] according to traditional rules of statutory construction." *Phelps v. Hamilton*, 59 F.3d 1058, 1070 (10th Cir. 1995). The traditional rules of statutory construction we look to are those of the state. *See, e.g.*, *Finstuen v. Crutcher*, 496 F.3d 1139, 1148 (10th Cir. 2007) ("[W]e interpret state laws according to state rules of statutory construction."). "The goal of Colorado courts in 'interpreting the meaning or scope of any statutory term . . . is to effectuate the intent of the legislature.'" *Citizens for Responsible Gov't State Pol. Action Comm. v. Davidson*, 236 F.3d 1174, 1190 (10th Cir. 2000) (quoting *People v. McCullough*, 6 P.3d 774, 778 (Colo. 2000)). "[W]e look first to the language of the statute itself to determine the legislative intent." *Id.* (quoting *McCullough*, 6 P.3d at 778). "Where the statutory language is clear and unambiguous on its face, . . . it may be presumed that the legislature meant what it clearly said." *Id.* (quoting *In re Title, Ballot Title & Submission Clause & Summary for 1999–2000 No. 219*, 999 P.2d 819, 820 (Colo. 2000)).

Applying these rules of statutory interpretation to the CSOA leads to the conclusion that it provides for commitment, rather than sentencing. Per the Act's plain statutory text, the Colorado legislature explicitly differentiated between commitment and sentencing, and it deliberately selected the former option for the CSOA. The CSOA's key section is titled "Indeterminate *commitment*," and it provides that "[t]he district court having jurisdiction may, . . . *in lieu of the sentence* otherwise provided by law, *commit* a sex offender to the custody of the department 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 (emphasis added).[13]

The majority states: "By using the term 'in lieu of,' the Colorado legislature allowed the trial court to impose either a determinate sentence or the indeterminate sentence—but not both for the same offense." Maj. Op. at 5. As our full quotation of the statute shows, however, the CSOA expressly provides that the court may "*commit* a sex offender" "*in lieu of the [determinate] sentence* otherwise provided by law," Colo. Rev. Stat. § 18-1.3-904 (emphasis added), not that it may impose a "determinate sentence or [an] indeterminate sentence," Maj. Op. at 5. And the section's title—"indeterminate commitment," Colo. Rev. Stat. § 18-1.3-904—reinforces this conclusion. *Cf. Yates v.*

[13] By contrast, the analogous provision of the successor Sex Offender Lifetime Sentencing Act of 1998 ("SOLSA") is titled "Indeterminate *sentence*" and states that "[t]he district court having jurisdiction *shall sentence* a sex offender to the custody of the department for an indeterminate term for at least the minimum of the presumptive range specified . . . and a maximum of the sex offender's natural life." Colo. Rev. Stat. § 18-1.3-1004(1)(a) (emphasis added).

United States, 574 U.S. 528, 539 (2015) (looking to the caption of a section to help determine its meaning). Thus, in my view, the CSOA clearly provides for an indeterminate commitment, on the one hand, or a determinate sentence, on the other. *See* Maj. Op. at 5 (explaining "'[i]n lieu of' means 'in place of' or 'instead of'" (quoting *Black's Law Dictionary* 941 (11th ed. 2019)). And the state trial court chose the indeterminate commitment option.[14]

In sum, even if Colorado caselaw, rather than decisions of the U.S. Supreme Court, governs, I would reach the same result: the CSOA provides for a scheme of criminal commitment, as an alternative to criminal sentencing.

D. Equal Protection Analysis

Having determined the CSOA provides for commitment as an alternative to sentencing, I now assess whether this distinction carries the constitutional import Mr. Wimberly claims. I would conclude it does, with respect to his equal protection claim.

Mr. Wimberly is currently confined pursuant to his indefinite commitment imposed under the CSOA, rather than pursuant to any criminal sentence. First, the determinate criminal sentences underlying his imprisonment have long since expired.

[14] The majority also argues that the trial court's use of the word "sentenced" on Mr. Wimberly's judgment supports its position on the commitment-versus-sentencing issue. Maj. Op. at 6–7 (quoting ROA at 23). The judgment must be consistent with the statute under which the defendant is convicted, however. If the statute provides for a commitment, the trial judge may not alter the statutory scheme by simply changing a word in the judgment. Thus, in my view, the judgment is not determinative of the question here.

Recall that the state trial court sentenced Mr. Wimberly to a 26-year determinate sentence—namely, to 24 years for his first sexual assault conviction and 2 years for his criminal trespass conviction, set to run consecutively, plus a 10-year *concurrent* sentence for his burglary conviction. Second, the court imposed indefinite commitment for Mr. Wimberly's other sexual assault conviction, set to run *concurrently* with his sentences. The statutory maximum alternate sentence for this sexual assault offense was 24 years. Thus, Mr. Wimberly has completed the 26-year determinate sentence the trial court imposed, and he has also served more than the 24-year statutory maximum sentence allowable for his second sexual assault conviction. Accordingly, Mr. Wimberly is currently confined only due to his term of indefinite commitment imposed under the CSOA, rather than pursuant to any criminal sentence.

As discussed below, Supreme Court precedent provides that no rational basis exists to treat an individual subject to criminal commitment in lieu of a criminal sentence differently from an individual subject to civil commitment, once the maximum permissible sentence for his criminal offenses has expired. I therefore agree with Mr. Wimberly that his present commitment violates the Fourteenth Amendment's Equal Protection Clause, because Colorado is denying him the procedural protections it affords to civil committees in its custody.[15]

[15] Because I would grant Mr. Wimberly relief on the basis of his equal protection claim, I do not reach his due process arguments.

1. Legal Standards

To establish entitlement to relief under 28 U.S.C. § 2241, a petitioner must show that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." *Id.* § 2241(c)(3). Here, Mr. Wimberly argues his present confinement violates the Equal Protection Clause of the Fourteenth Amendment.

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. 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 scrutiny. *See Brown v. Montoya*, 662 F.3d 1152, 1172 (10th Cir. 2011).

a. Standard of scrutiny

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 v. Doe*, 457 U.S. 202, 216–17 (1982) (footnotes omitted). If the legislation does not create classifications that disadvantage a suspect class or impinge upon the exercise of a fundamental right, then the legislation need only be "rationally related to a legitimate state interest." *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008) (quotation marks omitted).

Mr. Wimberly asserts heightened scrutiny should apply, based on his fundamental right in avoiding bodily restraint. He contends, however, that even if rational basis review

applies, he prevails under that standard, as well. The State counters that the CSOA does not involve a suspect classification nor impinge on a fundamental right; accordingly, it argues rational basis review should apply. I need not reach the parties' arguments regarding the appropriate level of scrutiny. Although Mr. Wimberly argues for heightened scrutiny, all of his subsequent arguments are couched in terms of rational basis review. And, as discussed *infra*, I believe Mr. Wimberly persuasively establishes that even under rational basis review, he has been denied equal protection of the laws.

b. Differential treatment

The Equal Protection Clause "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). During the maximum duration of a criminal sentence, those committed under criminal statutes are not similarly situated to those committed under civil statutes—the former are subject to a criminal penalty, while the latter are not. Thus, courts have indicated a rational basis exists for treating criminal committees differently than civil committees during the pendency of the criminal sentence the court might otherwise have imposed. *See Humphrey*, 405 U.S. at 510–11 (stating the contention that criminal commitment does not require the same procedural safeguards as civil commitment "arguably has force" when a criminal commitment "is limited in duration to the maximum permissible sentence"); *Adrian*, 701 P.2d at 47 n.5 ("[P]rior to the expiration of a period of confinement equal to the maximum permissible sentence the defendants could have received for their underlying crimes, there exists a rational basis for denying judicial review to sex offenders."); *accord Kibel*, 701 P.2d at 41–42; *White*, 656 P.2d

at 694. Prior to the expiration of a criminal sentence, then, the Equal Protection Clause does not require those criminally committed to receive the same procedural protections afforded to those committed under civil statutes.

But the same is not true for criminal committees who have been confined for a period greater than the maximum permissible sentence for their underlying crimes. Rather, following the expiration of the maximum permissible sentence, the state's "punitive interest," as manifested in its power to "imprison convicted criminals for the purposes of deterrence and retribution," has been eliminated. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also United States ex rel. Hayden v. Zelker*, 506 F.2d 1228, 1230 (2d Cir. 1974) (noting that an equal protection challenge to a New York sex-offense commitment scheme functionally identical to the CSOA "may raise substantial constitutional problems"); *Kibel*, 701 P.2d at 42 n.8 (in the context of the CSOA, stating "[t]he period following the expiration of the maximum permissible sentence arguably is analytically distinct from the initial period of confinement corresponding to the sentence that the defendant otherwise might have received"). Indeed, because CSOA commitment after expiration of a defendant's maximum permissible sentence is justified only by a court's initial finding of future dangerousness, rather than by any finding of fact tied directly to the underlying crime, "the commitment during this period may be viewed as analogous to other commitments based upon predictions of future harm"—that is, to civil commitments. *Kibel*, 701 P.2d at 42 n.8; *see also Specht*, 386 U.S. at 608–09 (stating that CSOA commitment "is designed not so much as retribution as it is to keep individuals from inflicting future harm").

Supreme Court precedent accordingly provides that no rational basis exists to treat an individual subject to criminal commitment in lieu of a criminal sentence differently, once the maximum sentence authorized for his criminal offense has expired, from an individual subject to civil commitment. The Supreme Court first laid out this principle in *Baxstrom v. Herold*, 383 U.S. 107 (1966). The petitioner there was convicted of assault and sentenced to a maximum of 3 years in state prison. 383 U.S. at 108. While incarcerated, "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.* Near the end of the petitioner's criminal sentence, the state moved to commit him indefinitely under § 384 of the New York Correction Law, which "prescribe[d] the procedure for civil commitment upon the expiration of the prison term of a mentally ill person confined in Dannemora." *Id.* at 110. Section 384 denied prisoners the right to a jury trial, which was a right granted to all others civilly committed under New York's Mental Hygiene Law. *Id.* at 111. Further, although § 384 provided for a judicial hearing on the issue of mental illness, it denied prisoners the right to a judicial determination of *dangerous* mental illness before their commitment, which was a prerequisite for commitment under the Mental Hygiene Law. *Id.* at 112–13. Under § 384, the decision regarding such a placement was left "completely in the hands of administrative officials." *Id.* at 112.

The *Baxstrom* Court held both provisions of § 384 violated the Equal Protection Clause. The "petitioner 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." *Id.* at 110. Having made de novo review by jury trial "generally available" to all others facing commitment, New York could "not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." *Id.* at 111. Additionally, "[w]here the State has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed to an institution of the Department of Correction, [the State] may not deny this right to a person in [petitioner's] position solely on the ground that he was nearing the expiration of a prison term." *Id.* at 114.

In reaching this holding, the *Baxstrom* Court rejected New York's argument that it had "created a reasonable classification differentiating the civilly insane from the 'criminally insane,' which [it] define[d] as those with dangerous or criminal propensities." *Id.* at 111. While this classification "may be a reasonable distinction for purposes of determining the *type* of custodial or medical care to be given," the Court reasoned, "it has no relevance whatever in the context of the opportunity to show *whether a person is mentally ill at all*." *Id.* (emphasis added). For purposes of that latter question, "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." *Id.* at 111–12; *see also Humphrey*, 405 U.S. at 508 (citing *Baxstrom* as holding that a prisoner's criminal record "could not . . . justify depriving him of a jury determination on the basic question [of] whether he was mentally ill and an appropriate subject for some kind of compulsory treatment"); *Jones v. United States*, 463 U.S. 354, 369 n.19 (1983) ("The Court has held

that a convicted prisoner may be treated involuntarily for particular psychiatric problems, but that upon expiration of his prison sentence he may be committed only as would any other candidate for civil commitment.").

The principle of *Baxstrom*, the Supreme Court subsequently articulated, is that "criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others." *Jackson*, 406 U.S. at 724. And "[t]he *Baxstrom* principle also has been extended . . . to commitment in lieu of sentencing following conviction as a sex offender." *Id.* at 724–25 (citing *Humphrey*, 405 U.S. 504); *see also Kibel*, 701 P.2d at 42 n.8 ("[T]he 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.").[16]

[16] In *Lamar v. O'Dell*, a panel of this court addressed a Colorado state prisoner's similar § 2241 challenge to a sentence imposed under the SOLSA, the CSOA's successor statute, on due process and equal protection grounds. 750 F. App'x 714 (10th Cir. 2018) (unpublished). Invoking *Kibel*, the petitioner argued he had "already served his *minimum* 12-year sentence." *Id.* at 717 (emphasis in original). The panel determined that *Kibel* did not support the petitioner's claims because the petitioner failed to identify what he believed was the "*maximum* permissible sentence for his underlying crimes" or allege that "he has served that time." *Id.* (emphasis in original) (quoting the district court in that case approvingly). Here, however, Mr. Wimberly has served the 26-year determinate sentence period and, based on the state court's concurrent sentencing decisions, has also completed the 24-year statutory maximum alternate sentence applicable to the sexual assault offense that led to his commitment. Thus, the reasons we concluded *Kibel* did not support Mr. Lamar's petition are absent here.

In *Humphrey v. Cady*, the Court addressed the Wisconsin Sex Crimes Act. 405 U.S. at 507. This act authorized civil commitment of a criminal defendant, after a discretionary judicial finding that the crime of conviction was sexually motivated, "for treatment in lieu of sentence, for a period equal to the maximum sentence authorized for the defendant's crime." *Id.* Upon the state's request, the Wisconsin state court could authorize a five-year renewal of that commitment period after notice and hearing. *Id.* Additional five-year renewals could be obtained by the state in the same manner without limitation. *Id.* The petitioner in *Humphrey* advanced "substantially the same" argument as the petitioner in *Baxstrom*— "that commitment for compulsory treatment under the Sex Crimes Act, at least after the expiration of the initial commitment in lieu of sentence [(which was equal to the maximum sentence authorized for the defendant's crime)], is essentially equivalent to commitment for compulsory treatment under Wisconsin's" civil commitment statute, the Mental Health Act. *Id.* at 508.

The *Humphrey* Court remanded for an evidentiary hearing on whether the Sex Crimes Act's failure to provide for commitment renewal procedures comporting with the procedures for civil commitment provided under the Mental Health Act violated equal protection. *Id.* at 506. In the process, it disposed of Wisconsin's argument that because commitment under the Sex Crimes Act was "merely an alternative to penal sentencing[,] . . . it does not require the same procedural safeguards afforded in a civil commitment proceeding." *Id.* at 510.

> That 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*. The argument

> can carry little weight, however, 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 510–11 (emphasis added) (footnote omitted).

2. Analysis

I would hold that, under *Baxstrom* and *Humphrey*, Mr. Wimberly has been denied equal protection of the laws because the State continues to confine him under the CSOA beyond the expiration of the maximum sentence authorized for his criminal offenses, without affording him the procedural safeguards it provides to civil committees.

Colorado's statute governing long-term involuntary civil commitment provides for periodic review by a judge or jury at regular intervals. Colo. Rev. Stat. § 27-65-109(2)-(5). To order an initial long-term commitment, the reviewing court, or the jury, must determine "whether the respondent 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." *Id.* §§ 27-65-109(4), 27-65-111(1). If these two conditions—a mental disorder and resulting dangerousness—are found present, the court shall "issue an order of long-term care and treatment for a term not to exceed six months." *Id.* § 27-65-109(4). A commitment order automatically expires at the end of the specified term, unless an extension is sought, which again cannot exceed six months. *Id.* § 27-65-109(5). All extensions are subject to review by a court or a jury, and, as with the initial commitment, the court may not order an extension of the commitment unless the court or jury finds

"that the respondent 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." *Id.*

In contrast, indefinite commitment under the CSOA continues at the sole discretion of the state parole board, *see id.* § 16-13-216(3), which is required only to "review all reports, records, and information concerning" the defendant once per year, *id.* § 16-13-216(1)(a). In other words, while the state's civil commitment statute places the onus on the state to justify an individual's ongoing confinement, and provides for full judicial review of all extensions of that confinement at six-month intervals, the CSOA places the onus on the defendant to justify his right to release, and provides for review only by the state parole board at yearly intervals.

Colorado has violated the Equal Protection Clause by failing to provide the procedural protections afforded to those confined under its long-term civil commitment statute beginning at the point in 2010 when Mr. Wimberly completed the 26-year determinate sentence imposed for his underlying crimes. That Mr. Wimberly's commitment was "triggered by a criminal conviction," and was "merely an alternative to penal sentencing," does not permit his continued differential treatment by the State throughout the period of "post-sentence commitment." *Humphrey*, 405 U.S. at 510–11. Mr. Wimberly's underlying offenses may have justified the denial of "the same 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.* But it cannot justify the continued denial of those safeguards when more than 37 years have elapsed since Mr. Wimberly pleaded guilty to

first-degree sexual assault, and his continued commitment under the CSOA is "in no way limited by . . . the maximum sentence authorized for that crime." *Id.* at 511. Now that the authorized penal term for his offense has ended, there is "no conceivable basis" for distinguishing his commitment "from all other civil commitments," *Baxstrom*, 383 U.S. at 111–12, or at least from all "other commitments based upon predictions of future harm," *Kibel*, 701 P.2d at 42 n.8; *see also Humphrey*, 405 U.S. at 510–11 (stating that an argument that the commitment is "merely an alternative to penal sentencing . . . [and therefore] does not require the same procedural safeguards afforded in a civil commitment proceeding . . . can carry little weight" with respect to renewal proceedings that are "in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime").

The majority concludes *Baxstrom* and *Humphrey* are inapplicable because "[n]either opinion [1] involved someone sentenced or criminally committed to an indeterminate term of commitment 'in lieu of the sentence otherwise provided by law' or [2] suggested that a statutory maximum for a determinate term should control when a sentencing court imposes an indeterminate term of confinement after providing the necessary procedural safeguards." Maj. Op. at 19–20 (quoting Colo. Rev. Stat. § 16-13-203 (1986)).

The majority's first purported distinction fails, for it overlooks the Supreme Court's subsequent statements in *Jackson v. Indiana* that "[t]he *Baxstrom* principle[17]

[17] To reiterate, the "*Baxstrom* principle" is that "criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive

also has been extended . . . to commitment in lieu of sentencing following conviction as a sex offender." 406 U.S. at 724–25 (emphasis added) (citing *Humphrey*, 405 U.S. 504). Thus, contrary to the majority's view, the Supreme Court has indicated the reasoning of *Baxstrom* is directly applicable here, and the State is required to provide Mr. Wimberly the same procedure it provides to civil committees "at the expiration of his penal sentence." *Baxstrom*, 383 U.S. at 110.

I also disagree with the majority's contention that neither *Humphrey* nor *Baxstrom* "suggested that a statutory maximum for a determinate term should control when a sentencing court imposes an indeterminate term . . . ." Maj. Op. at 20. In my view, *Humphrey* is best read to mandate that any extension of a term of commitment beyond the maximum sentence authorized for the underlying crime is constitutionally equivalent to civil commitment. *See Waite v. Jacobs*, 475 F.2d 392, 398 (D.C. Cir. 1973) ("It might be argued . . . that *Humphrey* is directly applicable to the issue of indefinite commitment itself, and that it requires that the initial confinement be limited to the maximum sentence period."). The *Humphrey* Court indicated a criminal conviction could justify disparities in commitment procedures only if the commitment was "*limited* in duration to the maximum permissible sentence," and it 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

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protection against indefinite commitment than that generally available to all others." *Jackson v. Indiana*, 406 U.S. 715, 724–25 (1972).

for that crime." 405 U.S. at 510–11 (emphasis added). Properly considered, *Humphrey*'s reasoning dictates that if a state statute allows a sex crime conviction to trigger indefinite commitment "in lieu of sentence," *id.* at 510—as does the CSOA, *see* Colo. Rev. Stat. § 18-1.3-904—the state must provide the same procedural safeguards afforded to civil committees if it seeks to extend commitment under that statute beyond the period of the maximum sentence authorized for the underlying crime. *See Waite*, 475 F.2d at 398 (positing that "the result in [*Humphrey*] would have been no different if the Wisconsin statute, instead of authorizing a fixed initial term with renewals, had provided that the initial commitment be indefinite"). Stated another way, while the maximum sentence for Mr. Wimberly's underlying sexual assault crime has no *statutory* significance under the CSOA, it nevertheless carries *constitutional* significance. Or, as Mr. Wimberly puts it, "[u]nder *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." Pet'r Br. at 21.

Based on this precedent, I would conclude the Equal Protection Clause required Colorado to provide the same procedural rights to Mr. Wimberly that it provides to its civil committees (1) before extending his CSOA commitment beyond the expiration of the maximum sentence applicable to the sexual assault conviction for which he was committed, and (2) throughout the period of his "post-sentence commitment." *Humphrey*, 405 U.S. at 511. At no point since 2010, when Mr. Wimberly's 26-year determinate sentence expired, has the State granted Mr. Wimberly such protections. That is, Colorado has not provided Mr. Wimberly the rights to: (1) judicial review of his commitment at

six-month intervals, (2) his commitment being ended unless there is clear and convincing evidence that he "has a mental health disorder and, as a result of [this] disorder, is a danger to others or to himself . . . or is gravely disabled," (3) request a jury trial at each hearing, and (4) an appeal of any adverse decision. *See* Colo. Rev. Stat. §§ 27-65-109, 27-65-111. Therefore, I would hold Mr. Wimberly's present commitment violates the Equal Protection Clause.

III. CONCLUSION

I respectfully dissent. In my view, federal constitutional law and Colorado state law demonstrate that Mr. Wimberly's present confinement under the CSOA is a commitment, not a sentence. Now that Mr. Wimberly has served the maximum penal sentence for his crimes, he is entitled to the same procedural protections Colorado provides its involuntary civil committees. Colorado's denial of these protections violates Mr. Wimberly's rights to equal protection under the Fourteenth Amendment of the U.S. Constitution, and he is entitled to habeas relief.

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September 29, 2021

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RE: 20-1128, Wimberly v. Williams
Dist/Ag docket: 1:19-CV-00968-MEH

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Ann Marie Luvera
Ann Stanton

CMW/sds