



Stephen Meswarb, Co-Acting Executive Director
Mark Silverstein, Legal Director, Co-Acting Executive Director

October 10, 2012

Chief Justice Michael Bender
Colorado Supreme Court
101 W. Colfax Avenue, Suite 800
Denver, CO 80202

Judge John Dailey
Chair, Criminal Procedure Committee
c/o Colorado Court of Appeals
101 W. Colfax, Suite 800
Denver, CO 80202

Re: Incarceration of Indigent Defendants for Failure to Pay Legal Debts

Dear Chief Justice Bender and Judge Dailey:

We are writing to Your Honors to request the opportunity to meet with you to discuss our concerns regarding the unconstitutional incarceration of truly indigent Coloradans for their failure to pay court-ordered fees, fines, costs, assessments and/or restitution (together, “legal financial obligations” or “LFOs”). By this letter, we urge Your Honors to consider a change to the Colorado Rules of Criminal Procedure and/or the issuance of a Chief Justice Directive to address this problem.

Over the last several months, the American Civil Liberties Union of Colorado (ACLU) has been investigating reports that Coloradans are being jailed for their failure to pay LFOs without any prior judicial inquiry into whether the individual has the ability to pay. Our investigation has confirmed that in some Colorado courtrooms, individuals are being incarcerated solely for their failure to pay LFOs without any judicial inquiry into whether the individual has the ability to pay. As a result, some Coloradans who plainly do not have the ability to timely pay their LFOs are spending time behind bars simply because they are poor. Incarceration under these circumstances is forbidden by the United States Constitution. Further, as a policy matter, incarceration of the poor for failure to pay an LFO serves to entrench poverty, generates additional costs to the court and jail system, and is ultimately counterproductive to the governmental interest in collecting LFOs to compensate victims and defray costs.¹

¹ See American Civil Liberties Union, *In For a Penny: The Rise of America’s New Debtors’ Prisons* (October 2010), pp. 6-9, 29-41, available at: <http://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons>, accessed October 10, 2012; Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010), pp 10-11, 25-26, available at: http://www.brennancenter.org/content/resource/criminal_justice_debt_a_barrier_to_reentry/, accessed October 10, 2012.

We have had the pleasure to speak several times with Carol Haller, Deputy State Court Administrator and Legal Counsel at the State Court Administrator's Office, to discuss our concerns. During these discussions, Ms. Haller frankly acknowledged that there may be some confusion amongst the judiciary as to what process, if any, a court must provide to a defendant before incarcerating that person for failure to pay an LFO. She suggested that it would be appropriate to write to both of Your Honors describing the problem and reaching out to you to work cooperatively to find a solution.

By this letter, we request that Your Honors meet with the ACLU to discuss a change to the Rules of Criminal Procedure and/or an issuance of a Chief Justice Directive requiring, *inter alia*, all Colorado courts to provide the due process recently outlined in the Supreme Court case of *Turner v. Rogers*, 131 S. Ct. 2507 (2011), before incarcerating any person for failure to pay an LFO. This process includes: (1) notification that the defendant's ability to pay is critical to determining whether he will be incarcerated for failure to pay; (2) judicial inquiry into the defendant's ability to pay; (3) an opportunity for the defendant to present evidence to the court related to his financial circumstances; and (4) an express finding on the record that the defendant has the ability to pay, as well as the basis for that finding.

***Supreme Court Precedents Establish that Incarcerating Poor People for
Failure to Pay a Fine Violates the Constitution***

As the Supreme Court has repeatedly recognized, to deprive a defendant of his freedom "simply because, through no fault of his own, he cannot pay" an LFO is "contrary to the fundamental fairness required by the Fourteenth Amendment." *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983). Incarceration on this basis re-establishes debtor's prison, which has long been outlawed in this country.

In *Bearden*, Danny Bearden was sentenced to three years of probation and ordered to pay \$750 in fines and restitution, which was due almost immediately. Mr. Bearden, who was illiterate, made an initial payment, but he then lost his job and was unable to find work again. As a result, he was unable to make payments. Without any judicial consideration of his ability to pay, his probation was revoked because he owed \$550. He spent two years behind bars until the Supreme Court ruled that imprisoning a probationer who, through no fault of his own, had been unable to pay his debts, despite making real efforts to do so, violated the Equal Protection Clause. The Supreme Court held that a sentencing court "must inquire" into a defendant's reasons for nonpayment, and if a defendant cannot pay despite a good faith effort to do so, the court "must consider" other measures of punishment. 461 U.S. at 672. Only after such an inquiry could the court "incarcerate a defendant without intruding upon fundamental fairness." *Id.*

Recently, in *Turner*, the Supreme Court laid out more specific guidelines regarding what sort of process courts must provide before resorting to incarceration for failure to pay an LFO.

The Court explained that a defendant must “receive clear notice that his ability to pay would constitute the critical question” in determining whether he would be incarcerated for failure to pay, and that the failure to afford such notice violates due process. *Id.* at 2520. Further, courts must allow the defendant to appear at a hearing to respond to questions seeking financial information. *Id.* Finally, before resorting to incarceration for failure to pay, a court must make an express finding that the defendant has the ability to pay. *Id.*

***Some Coloradoans are Being Incarcerated Because
They are Too Poor to Pay Their Fines***

Our investigation has shown that currently in Colorado many individuals spend time in jail for failure to pay an LFO without the benefit of a constitutionally required judicial inquiry into the individual’s ability to pay. Because our access to information is limited, we do not know the full extent of the problem. We do, however, know that many Colorado courts routinely issue arrest warrants for failure to pay (hereinafter “FTP warrants”) without any judicial inquiry into whether the defendant has the ability to pay. As a result, some truly indigent Coloradoans are jailed on FTP warrants simply because they do not have the ability to pay an LFO. We understand that in at least one county, individuals arrested on an FTP warrant may spend over a week in jail just waiting to see a judge.

We also know that in one or more jurisdictions, some judges are instituting “pay or serve” sentences without first making a judicial inquiry into whether the defendant has the financial capacity to pay. As you may know, a “pay or serve” sentence is one in which the defendant has to either immediately pay the entirety of the fine or must stay in jail until he “pays” the fine off. The unique mathematical concept behind this sentence is that each day a prisoner is incarcerated, he “pays” down his LFO by something akin to the amount the jail is spending in taxpayer money to incarcerate the defendant that day. Recently, we also learned that in at least one jurisdiction, when a defendant fails to pay an LFO, some judges issue a “hold and serve” warrant, which directs law enforcement to arrest the defendant and incarcerate him for a certain number of days, without any judicial inquiry into whether the defendant has the ability to pay the fine.

Some of these defendants incarcerated for failure to pay LFOs genuinely lack the ability to pay. Incarceration under these circumstances – whether for seven hours or seven days – violates the letter and spirit of Supreme Court cases such as *Bearden* and *Turner*. We reach out to you to work together to put an end to these troubling practices.

***There are Important Policy and Fiscal Reasons to Ensure Coloradoans are Not
Jailed Simply Because They are Too Poor to Pay Their Debt***

Beyond the clear constitutional mandate that courts are not to incarcerate individuals for failure to pay an LFO absent a judicial inquiry into whether the individual has the ability to pay, there are many fiscal and policy reasons why poor people should not be incarcerated simply

because they cannot pay a debt. Incarcerating the poor for their inability to pay creates a two-tiered system of justice in which the poorest defendants are punished more harshly than the ones with means. Although courts attempt to collect LFOs from indigent and affluent defendants alike, those who can afford to pay their legal debts avoid jail, complete their sentences, and can move on with their lives. Those unable to pay end up incarcerated or under continued court supervision. Perversely, because of late fees, payment plan fees, and collections fees, they also often end up paying much more in fines and fees than defendants who have the means to pay their LFOs.

From a fiscal perspective, incarcerating indigent defendants who cannot pay their LFOs wastes taxpayer money and resources. Far from operating as a tool for recouping costs, the issuance and execution of FTP warrants, as well as incarceration on these warrants, creates significant additional costs. As the Supreme Court has recognized, incarcerating a defendant “who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming.” *Bearden*, 461 U.S. at 672. In fact, incarceration often causes defendants to lose current employment or hinders their efforts to gain employment, thereby prolonging or entrenching their indigence and reducing the likelihood that they will ever be able to pay part or all of their LFO.

Moreover, it is clear that there is net fiscal *loss* to the taxpayer in low-fine cases in which the jail houses a defendant at a cost that ranges from approximately \$50 per day to in excess of \$90 per day, in order for that defendant to “pay off” his fine. That taxpayers should “pay” for defendants to “pay off” their fine through incarceration simply does not make fiscal sense. Further, when defendants are incarcerated on pay and serve sentences, the court loses the chance to recoup any of the defendant’s LFO. In contrast, a realistic payment plan or a sentence of probation coupled with an order to perform community service can actually generate a net benefit, rather than a cost, for society.

***Colorado Rules and Statutes are Insufficient to
Safeguard the Rights of Indigent Individuals***

Section 18-1.3-702(2) of the Colorado Revised Statutes provides apparent authority for courts to incarcerate individuals for failure to pay LFOs. Yet, no Colorado statute or rule expressly requires courts to assess an individual’s ability to pay *before* incarcerating that person for such failure. Section 18-1.3-702(4) comes closest to addressing the issue. It imposes on the court a duty to release individuals incarcerated for failure to pay “[i]f it satisfactorily appears to the district court” that the confined individual “has no estate whatever with which to pay such fine and costs.” While this statute provides the potential for some relief for those indigent defendants who are already incarcerated, it does not satisfy the constitutional mandate that truly indigent individuals not be incarcerated for *any* period of time for failure to pay an LFO.

Additionally, the statute does not establish that it is the *court’s* duty to inquire into the defendant’s ability to pay prior to incarcerating that defendant for failure to pay. Instead, the

statute places the onus on the defendant to raise the issue of his indigency to the court. This is particularly troubling in Colorado because many individuals accused of low-level crimes and sentenced to only a fine do not have a right to a public defender and realistically never have the advice of counsel. Moreover, the courts, as a matter of course, do not inform these *pro se* defendants that their ability to pay the fine is the critical issue with regard to whether the individual may be incarcerated for such failure, nor are these defendants informed that they may present evidence to the court regarding their ability, or inability, to pay the LFO. Without this admonition by the court, and without the guidance of counsel, many defendants convicted of non-jailable or misdemeanor offenses and sentenced to only a fine are subject to the very real risk of being jailed for failure to pay their LFO without first having had a meaningful opportunity to explain their financial circumstances to the court.

It is our understanding from Ms. Haller that the above cited statute has led to confusion amongst some of the Colorado judiciary regarding the process due to defendants prior to incarceration for failure to pay an LFO. It may be that this statute misleads some members of the judiciary into believing that following C.R.S. § 18-1.3-702(4) provides constitutionally adequate protection for indigent defendants, when plainly it does not. These circumstances cry out for a uniform, centralized standard that provides clear guidance to courts as to what federal law requires before incarcerating a defendant for failure to pay.

Possible Solutions

We believe that there are many possible solutions to the problems outlined in our letter, and we have detailed two such solutions below. We also recognize that it is very likely there are additional solutions of which we are unable to conceive without more specific insight into the workings of the criminal courts in Colorado. As a starting point, however, we propose two solutions we believe might best address the issue at hand: (1) discontinue issuing failure to pay warrants; and (2) implement a Rule change or Chief Justice Directive mandating both additional advisements to defendants sentenced to a fine and a judicial inquiry into ability to pay prior to incarceration for failure to pay. We welcome other solutions that Your Honors may bring to the table and hope that we will have the opportunity to work with you both to collaboratively solve this problem.

1. Discontinue Issuing Failure to Pay Warrants

One of the most straightforward ways to address the issues raised herein is to follow the Denver County Court's recent lead and to order all Colorado courts to stop issuing FTP Warrants. Denver County Court Presiding Judge John Marcucci issued an Executive Order discontinuing the issuance of such warrants as of February 8, 2012. *Attach. 1, Executive Order*. In June of this year, at an *En Banc* Meeting of Denver County Court judges, it was decided that all 12,500 still-active FTP warrants would be cancelled. *Attach. 2, Minutes of En Banc Meeting*. Denver County Court made this change at least in part for fiscal reasons. *Attach. 3, 2013 Decision Package*. By discontinuing issuance of FTP warrants, Denver projects a revenue gain

of \$449,103 for fiscal year 2013. Of course, in addition to the fiscal savings, this decision has the significant added benefit of bringing Denver County Court into compliance with the Constitutional mandate in *Bearden*, at least so far as incarceration based on failure to pay warrants is concerned. We urge Your Honors to consider implementing this change, which will help safeguard the rights of indigent Coloradoans and likely save significant taxpayer money.

2. Rule Change or Chief Justice Directive

To bring the Colorado judiciary in line with constitutional mandates, we also urge Your Honors to consider an addition to the Colorado Rules of Criminal Procedure and/or issuance of a Chief Justice Directive mandating all Colorado courts to:

1. Advise all defendants, at the time an LFO is imposed, that
 - a. they may be incarcerated if they fail to pay;
 - b. their ability to pay is the critical factor in determining whether they will be incarcerated for failure to pay; and
 - c. if at the time the LFO is imposed, or at some point in the future, the defendant believes he lacks the ability to pay he may present evidence of his indigence to the court.
2. Inquire into defendant's ability to pay before issuing an arrest warrant or otherwise incarcerating a defendant for failure to pay an LFO, and, where supported, make a finding on the record that defendant has the ability to pay the fine.

We leave it to you to determine whether such a mandate is better placed in a Chief Justice Directive rather than a Rule change. We note that on August 19, 2011, Justice Bender amended Chief Justice Directive 98-01, which outlines criteria that should be used to assess indigence in civil matters, where defendants seek to have court costs waived due to inability to pay. The directive instructs courts to consider: the individual's income, liquid assets, and expenses. These same criteria could be applied to assess ability to pay before individuals are incarcerated for failure to pay as well.

We hope that this letter provides you with a helpful starting point to begin considering what types of changes are needed to ensure that the judiciary is adequately protecting the constitutional rights of indigent Coloradoans. We are certain you will agree that in a system committed to equal justice for all, accountability cannot mean that people of means pay fines, while the poor go to jail. While poor people, like other defendants, must be held accountable, it is both unjust and unconstitutional to punish them more severely than their wealthier counterparts. We hope that you will grant us the opportunity to meet with you to discuss the

Chief Justice Michael Bender
Judge John Dailey
October 10, 2012
Page 7 of 7

issues raised in this letter. In any case, we ask that you respond to our letter no later than **October 24, 2012**.

Sincerely,



Mark Silverstein
Legal Director, ACLU of Colorado



Rebecca T. Wallace
Staff Attorney, ACLU of Colorado

encl. Attach. 1, Executive Order
Attach. 2, Minutes of En Banc Meeting
Attach. 3, 2013 Decision Package

Attachment 1: Executive Order



Denver County Court

City and County Building
1437 Bannock St., #108
Denver, CO 80202

Hon. John M. Marcucci
Presiding Judge

EXECUTIVE ORDER

Effective Friday February 8th, 2012 the Presiding Judge of the Denver County Court Orders the discontinuance of the future issuance of failure to pay warrants by the Judicial Officers and Administrative Staff of the Denver County Court. The Court Administration shall exercise all due diligence to implement internal programs to stop said warrants from being placed on State and National warrants lists. For those issued automatically by systems currently in place the Court shall identify and vacate same until such time as the systems are corrected to create Compliance with this Executive Order.

Additionally, Court Administration will commence a process to identify those failure to pay warrants currently in effect from prior Judicial Orders and propose a process, including fiscal impact, of vacating said Orders. Once determined the Court will consider *en banc* the implementation of an additional Executive Order vacating, as best as possible, all current failure to pay warrants.

This Executive Order is executed under the direction of the following quoted language of the *en banc* meeting minutes of February 8th, 2012 and after reviewing current collections effectiveness with modern processes, the minimal effectiveness of this jail use, the many fiscal and social costs of arrest and incarceration as well as to foster an overall more positive approach to justice.

"The Judge's voted and approved the discontinuation of failure to pay warrants. The level of success of this policy change will be reviewed at the September En Banc."

BY THE COURT:



Hon. John M. Marcucci
Presiding Judge
Denver County Court



Attachment 2: Minutes of En Banc Meeting

Minutes of En Banc Meeting
Parr-Widener Room
Friday, June 22, 2012

COUNTY COURT JUDGES ATTENDING

Andrew Armatas
Johnny Barajas
Larry Bohning
James Breese
Diane Briscoe

Doris Burd
Brian Campbell
Clarisse Gonzales
Kerry Hada
Alfred Harrell

Claudia Jordan
John Marcucci
Aleene Ortiz-White
Raymond Satter

COUNTY COURT MAGISTRATES ATTENDING

Kate Boland
Alan Bucholtz
Catherine Cary

Elisabeth Fedde
Don Gentry
John Hoffman

Phil James
Mark Muller
Howard Slavin
Terri Tomsick

OTHERS ATTENDING

Matt McConville
Major Koonce
Chief Wilson

Terrie Cooke
Captain Gillespie
Beth Wise

Chris Zaleski
Sergeant Grannum

The meeting opened at 11:40 a.m.
Minutes from the May meeting were approved.

PRESIDING JUDGE ANNOUNCEMENTS:

- An Order will be entered that will vacate all the current FTP warrants which number approximately 12,500. Integral Recoveries will continue their efforts to collect on the outstanding fines and costs.

Meeting adjourned at 12:45 p.m.

Meeting Recorder: Terrie Cooke

Attachment 3: Decision Package

2013 Decision Package

Color Coding:

Formula/locked cell
Agency enters data
Auto populates data

Department: County Court
Agency: County Court
Contact Person: Terrie Cooke
Phone: 720-865-7801

Primary Mayor's Priority: Sustainability
Secondary Mayor's Priority: _____
**Use drop down list to select Citywide Strategic Outcome*
Primary Program Affected: Court Services
**Use drop down list to select a program from the Program Inventory*

Excel Tab No.: **DP3**

Fund	Control Org
G1010	0501100

Department priority #: **R3**

(Assign priority numbers with an "R" first for reductions and an "E" first for expansions. For example, R1, R2 and E1, E2, etc.)

Duration: **Permanent**

Use Drop Down List

Proposal Description

Title of Proposal: Eliminate 'Pay or Serve' Concept

2012 Change to Expenditures (+/-): <u>(\$419,792)</u>	2013 Change to Expenditures (+/-): <u>(\$1,007,500)</u>	Expenditure Total: <u>(\$1,427,292)</u>
2012 Change to FTEs (+/-): <u>0.00</u>	2013 Change to FTEs (+/-): <u>0.00</u>	FTE Total: <u>0.00</u>
2012 Change to Revenue (+/-): <u>\$131,992</u>	2013 Change to Revenue (+/-): <u>\$317,111</u>	Revenue Total: <u>\$449,103</u>

Please provide a brief description of the proposal, including outcomes. If this is an expansion request, please describe what factors are driving the need for additional resources and the consequences if not approved.
Cancel all active Fail to Pay (FTP) warrants. In doing so, defendants would no longer be arrested and their fines and costs would not be waived as a result of receiving credit for time served (CTS).

Are there alternatives to this proposal and/or is it scalable? If yes, describe. **No.**

Please use the space below to provide additional information such as assumptions and back-up calculations or other information you believe should be considered.
 In 2011, there were approximately 3,875 FTP warrants that were executed. Once arrested, these individuals would spend a night in jail and then appear before the judge the following day. The judge would review the case and waive all fines and costs due to the defendant receiving credit for time served. The credit for time served is \$90.00 per day, but generally, the actual amount of fines and costs being waived is approximately \$327. With the elimination of FTP warrants, there would no longer be credit for time served on FTP cases. As such, the defendants would be forced to pay their original fines and costs. If the number of FTP warrants that were executed in 2011 had actually paid their fines and costs rather than receiving CTS, the court could have receipted up to \$1,267,125 (3,875 x \$327). Assuming the court wasn't able to receipt any of the \$1,267,125 and instead the cases were sent to Integral, with Integral's 25% collection rate, the court could have expected to receipt \$317,111. Currently, there are a total of 12,490 active FTP warrants that are going to be cancelled. The total fines and costs outstanding for these cases is \$5,661,741 - \$4,084,230 of which is General Funds. Assuming the same number of individuals are arrested in 2012 and 2013 as were in 2011, and using an average of \$327 per case, the court can expect additional revenue of \$131,992 in 2012 and \$317,111 in 2013. Since these cases are already in default, the court can estimate the additional revenue will be realized within a month of cancelling the FTP warrant and referring the case to Integral. The court will begin cancelling the warrants in late June, which puts us at August 1st, 2012 as a start date for new revenue.

Proposal Impacts on Operations and Services

Please describe the impact of the proposal on the strategies and metrics. If you are able to make operational changes to avoid an impact on metrics, please state this in the description.

Impact 1			
Strategy-Identify the strategy that will be impacted			
The Court's collection rate would increase.			
Metric	2011 Actual	2012 Estimated	2013 Projected, if proposal is accepted
Metric 1 Collection Rate		77%	
Metric 2			
Metric 3			

Impact 2, if applicable			
Strategy-Identify the strategy that will be impacted			
[Type a description of the impact on the stated strategy here]			
Metric	2011 Actual	2012 Estimated	2013 Projected, if proposal is accepted
Metric 1			
Metric 2			
Metric 3			

Impact 3, if applicable			
Strategy-Identify the strategy that will be impacted			
[Type a description of the impact on the stated strategy here]			
Metric	2011 Actual	2012 Estimated	2013 Projected, if proposal is accepted
Metric 1			
Metric 2			
Metric 3			

<p>Will this proposal have an impact on other Departments' programs (internally or externally) or increase the need for technology or other City resources? If yes, please explain/quantify.</p>	<p>Yes. This proposal will have a positive impact on the Sheriff's Department due to the number of individuals that will no longer be arrested for a fail to pay warrant. In 2011, there were approx. 3,875 warrant arrests at a cost of about \$260 per arrest (personnel, processing, jail bed, food, etc.). Assuming this same number of individuals are not arrested in 2013, there would be jail bed savings of approximately \$1,007,500.</p>
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