



Nathan Woodliff-Stanley, Executive Director  
Mark Silverstein, Legal Director

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**SENT VIA U.S. Mail and E-Mail**

Herb Atchison  
Mayor of Westminster  
City Manager's Office  
4800 W 92<sup>nd</sup> Avenue  
Westminster, CO 80030  
[herb.atchison@netzero.com](mailto:herb.atchison@netzero.com)

***Re: Incarceration of Poor People for Failure to Pay Fines***

Dear Mayor Atchison:

We write because Westminster Municipal Court (WMC) is ordering impoverished Coloradoans imprisoned when they are unable to pay their court-ordered fines.<sup>1</sup> Incarceration under these circumstances returns Colorado to the days of debtors' prisons, which were long ago abolished in this country. WMC's practice of jailing poor people for debt not only violates the federal and state constitutions, but also serves to entrench poverty, generates additional costs to the court and jail systems, and is ultimately counterproductive to the governmental interest in collecting fines to compensate victims and defray costs. By this letter, the American Civil Liberties Union Foundation of Colorado (ACLU) asks that you take immediate action to put an end to WMC's misguided and unconstitutional practice.

***Westminster Municipal Court is jailing indigent Coloradoans for failing to pay fines they are too poor to pay.***

WMC has a policy and practice of issuing "Writs of Commitment – Failure to Pay" (hereinafter "writs of commitment") when a defendant misses a payment on a court-ordered fine. These writs of commitment state that the defendant has been adjudged guilty of contempt of court for failure to comply with the court's order to pay a fine. They order the defendant's arrest, at which time he must either immediately pay the full amount of the fine or must stay in jail for a specified period of time until he "pays off" the fine. Pursuant to a standing order of the Westminster Municipal Court, the writ of commitment converts the fine to ten days of jail time,

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<sup>1</sup> In this letter, "fines" refers to any monetary obligation ordered by the court, including but not limited to fees, fines, costs, assessments and/or restitution.

regardless of the amount due.<sup>2</sup> As a result, prisoners who owe WMC fines as low as \$90 have spent ten days imprisoned for failure to pay the fine.

Remarkably, WMC “adjudges” defendants “guilty” of contempt of court and issues this pay-or-go-to-jail writ without providing notice, without a hearing, without regard for or inquiry into the individual’s ability to pay, and even when court records strongly suggest the defendant is impoverished. Persons arrested on writs of commitment are forced to “pay off” their debt through imprisonment, regardless of their financial circumstances. As detailed further below, WMC’s practices are wildly out of line with the constitutional mandates of the due process clause and inevitably result in people being jailed because they too poor to pay a court-ordered fine.

***Incarcerating indigent people for failure to pay a fine violates the United States and Colorado Constitutions.***

When WMC sentences poor people to jail for failure to pay a fine, it violates the United States Constitution. The Supreme Court has long recognized that “if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.” *Bearden v. Georgia*, 461 U.S. 660, 667 (1983); *see also Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that “jailing an indigent for failing to make immediate payment of any fine” violates the Equal Protection Clause).

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 it violates the Equal Protection and Due Process Clauses to imprison a probationer who, through no fault of his own, had been unable to pay his debts. 461 U.S. at 667. To protect poor people from being jailed for inability to pay, the 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.

Recently, in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), the Supreme Court laid out more specific guidelines regarding the procedures the Due Process Clause requires courts to adopt to avoid incarcerating indigent persons for failing to make court-ordered payments. 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. *Id.* at 2520. Further, courts must hold a hearing at which the defendant responds to questions seeking information about ability to pay. *Id.* Finally, a court may not resort to incarceration for failure to

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<sup>2</sup> WMC Order 2001-4, signed by WMC Presiding Judge John A. Stipech, states: “It is hereby ordered that a defendant being held in custody on a Writ of Commitment for Failure to Pay shall be held for a period of ten (10) days. No credit shall be given for time served on other charges unless ordered by the Court.”

pay unless it has made an express finding that the defendant has the ability to pay the amount owed. *Id.*

Colorado law provides equally strong protections against jailing indigent people for failure to pay. Over two decades ago, the Colorado Supreme Court invalidated a “body execution statute” which authorized the imprisonment of a reckless tortfeasor who was unable to pay a judgment. *Kinsey v. Preeson*, 746 P.2d 542 (Colo. 1987). The court recognized that jailing an indigent defendant for failure to pay serves no legitimate purpose and instead irrationally punishes the poor for being poor. The court explained:

The purpose of the body execution statute, to coerce a judgment debtor into paying the judgment, cannot be effected against an indigent debtor. The only real effect of the body execution against an indigent debtor is that of punishment. Such a punishment can be avoided by a solvent debtor but becomes mandatory against an indigent debtor. Thus, the body execution statute is invidiously discriminatory and unconstitutional . . . .

746 P.2d at 550.

Additionally, the Colorado Constitution mandates that “[n]o person shall be imprisoned for debt.” COLO. CONST., Art. II, Sec. 12. Courts such as WMC, however, are not powerless in the face of a defendant’s willful failure to pay a court-ordered fine. The Colorado Supreme Court has made clear that the “constitutional provision against imprisonment for debt does not prohibit the punishment of a contempt by imprisonment for refusing to obey the lawful orders or decrees of court.” *Harvey v. Harvey*, 384 P.2d 265, 266 (Colo. 1963). In such a case, the defendant “is not imprisoned for debt, but because of his refusal to obey the lawful order of the court.” *Id.*

It is true that WMC purports to “adjudge” a defendant “guilty” of contempt before sending him to jail, but the court’s appearance of compliance with *Harvey* is only superficial. WMC’s actual practice makes a mockery of the most fundamental dictates of the due process clause – that before a person is judged guilty, and certainly before he is sentenced to jail, he will have notice of the allegations against him and a hearing before the court. WMC provides no such process and, instead, summarily judges defendants “guilty” of contempt and issues writs of commitment automatically upon a defendant’s failure to pay a fine.

Perhaps more importantly, WMC fails to address the most critical question – does the defendant have the ability to pay the fine? It is well established that a court may not find an individual in contempt when he does not have the ability to comply with the court’s order. *See, e.g., Turner v. Rogers*, 131 S. Ct. 2507, 2511 (2011); *Hicks v. Feiock*, 485 U.S. 624, 638 n. 9 (1988); *Shillitani v. United States.*, 384 U.S. 364, 371 (1966). Poor people who do not have the money to pay their fines do not have the ability to comply with the court’s order to pay and, therefore, cannot be found in contempt of court. That is why *Turner*, a contempt-of-court case, requires notice, a hearing on ability to pay, and an express finding by the judge on ability to pay. 131 S. Ct. at 2511. Such “procedures [] assure a fundamentally fair determination of the critical

incarceration-related question, whether the [defendant] is able to comply with the [court] order” to pay. *Id.* at 2512.

Despite the clear constitutional mandate, WMC’s practice is to find poor people in contempt of court and sentence them to jail time for failure to pay without considering, much less making findings about, the defendant’s ability to pay the fine. WMC persists in this practice even in the face of strong evidence that some defendants who fail to pay their fines are destitute.

***Case study: Westminster Municipal Court orders poor people incarcerated for failure to pay.***

The case of Jared Thornburg<sup>3</sup> provides just one example of WMC’s irrational and unconstitutional practice of jailing poor people for failure to pay fines. On March 27, 2012, Mr. Thornburg appeared in WMC and pleaded guilty to driving a defective vehicle, a non-jailable offense. Mr. Thornburg had recently been seriously injured in a workplace accident. As a result, he was laid off from his oil drilling job and lost his employer-provided housing, leaving him penniless and homeless when he entered his plea. Nonetheless, the WMC judge ordered Mr. Thornburg to immediately pay \$165 in fines and costs. Mr. Thornburg informed the court that he could not pay that day due to recent unemployment but would attempt to get the money together in the near future. The WMC court clerk told Mr. Thornburg that if he failed to pay the entire amount by the next day, a warrant would issue for his arrest.

Because Mr. Thornburg was destitute, he did not pay the amount due. On April 4, 2012, WMC issued a writ of commitment stating that Mr. Thornburg “has been adjudged guilty of Contempt” and ordered that Mr. Thornburg either pay \$245<sup>4</sup> or serve 10 days in jail. The finding of guilt, the sentence, and the writ of commitment were all issued without notice to Mr. Thornburg, without a hearing, without the judge ever having considered whether Mr. Thornburg’s failure to pay was due to indigence, and despite Mr. Thornburg having credibly reported to the judge and court clerk that he lacked the capacity to pay immediately. Mr. Thornburg was arrested on May 19, 2012 and was forced to serve ten days in jail, despite the fact that he was too poor to pay the amount due. During the jail stay, Mr. Thornburg was never brought before a judge. That Mr. Thornburg was imprisoned for failure to pay a fine for a non-jailable traffic offense highlights the irrationality and fundamental unfairness of WMC’s practice.

Notably, Mr. Thornburg is only one of a number of persons whom WMC found “guilty” without a hearing and ordered to jail on a writ of commitment despite information already in the court’s file suggesting that the individual may have been too poor to pay the fine. Court records show that the persons WMC has ordered to jail (without notice or hearing) include defendants who were unemployed, had no vehicle, and/or were likely homeless. While such factors may not conclusively establish that the defendant lacked the ability to pay, they certainly should raise the court’s concern that the failure to pay was due to poverty and should not, therefore, result in imprisonment. WMC’s practices described herein reflect a fundamental failure to fulfill the court’s constitutional obligation to take steps to avoid jailing poor people for failure to pay.

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<sup>3</sup> Case Number 2012-001972-TP.

<sup>4</sup> The increased amount owed was due to additional fees charged to Mr. Thornburg related to failure to pay.

***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 constitutional prohibition, there are many fiscal and policy reasons why poor people should not be incarcerated when they cannot pay a debt.<sup>5</sup> 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 fines 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 imprisoned or under continued court supervision. Perversely, because of late fees, payment plan fees, and collections fees, the poor often end up paying much more in fines and fees than defendants who have the means to pay their fine.

Jailing an indigent defendant does nothing to advance the city's interest in collecting fines and, in fact, wastes taxpayer money and resources. Imprisoning an impoverished person for debt does not get the fine paid. Indeed, there is net *loss* to the taxpayer when a jail imprisons a defendant at a cost of more than \$70 a day in order for that defendant to "pay off" his fine. This system lacks fiscal sense: when writs of commitment unconstitutionally convert fines into jail sentences, the court loses the chance to recoup any of the defendant's fine. In contrast, a realistic payment plan, or a sentence of probation coupled with an order to perform community service, could actually generate a net benefit, rather than a cost, for society.

***To comply with federal and state law, Westminster Municipal Court must undertake significant changes in policy and practice.***

In order to stop violating federal and state law, WMC must take immediate proactive measures to ensure that it does not jail indigent persons for failure to pay a fine. To comply with constitutional mandates, WMC should immediately:

- (1) Discontinue issuance of all "Writs of Commitment – Failure to Pay";
- (2) Adopt a policy ensuring that no one is incarcerated for failure to pay a fine absent a judicial determination that the individual is in contempt of court for *willful* failure to comply with the court's order to pay; and
- (3) Ensure that any such contempt proceeding for failure to comply with a court order to pay includes, at a minimum, all procedural protections mandated by the Supreme Court in *Turner v. Rogers*, which are notice of the allegation of contempt; notice that the defendant's ability to pay is the critical factor in determining whether he or she

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<sup>5</sup> These fiscal and policy issues are discussed in depth in two recent national reports. 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 December 13, 2013; 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/](http://www.brennancenter.org/content/resource/criminal_justice_debt_a_barrier_to_reentry/), accessed December 13, 2013.

will be found in contempt; a hearing during which the court elicits information about the defendant's ability to pay; and a judicial finding on the record regarding whether the defendant has the ability to pay.

We hope and expect this letter will serve as a catalyst for immediate and dramatic change to WMC's practices that result in poor people being imprisoned for failure to pay fines. As we are sure you will agree, 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 ask that you respond to our letter no later than **January 10, 2013**.

Sincerely,



Rebecca T. Wallace  
Staff Attorney, ACLU OF COLORADO



Mark Silverstein  
Legal Director, ACLU of Colorado

cc John A. Stipech  
Presiding Judge, Westminster Municipal Court  
[jstipech@cityofwestminster.us](mailto:jstipech@cityofwestminster.us)

Marty McCullough  
Westminster City Attorney  
[mmcullough@cityofwestminster.us](mailto:mmcullough@cityofwestminster.us)