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

Joyce Downing  
Mayor of Northglenn  
11932 McCrumb Drive  
Northglenn CO 80233  
[mayor@northglenn.org](mailto:mayor@northglenn.org)

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

Dear Mr. Lau and Ms. Downing:

We write because Northglenn Municipal Court (NMC) 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. NMC'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 NMC's misguided and unconstitutional practice.

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

NMC regularly and automatically issues "pay-or-serve" warrants when a defendant misses a payment on a court-ordered fine.<sup>2</sup> These warrants 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. The unique mathematical concept behind this sentence is that each day a prisoner is incarcerated, he "pays down" his fine at a daily rate, which NMC has set at \$50 per day.

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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.

<sup>2</sup> Tammy Sutton, NMC Supervisor, has confirmed in a letter to the ACLU that individuals who fail to pay a fine are given "no reminder notices and no grace periods" before a pay-or-serve warrant issues for their arrest.

NMC issues pay-or-serve warrants without regard for or inquiry into the individual's ability to pay, and even when court records strongly suggest the defendant is indigent. After a defendant is arrested on a pay-or-serve warrant, NMC does not order a court appearance and does not inquire into whether the individual has the ability to pay the fine.<sup>3</sup> Instead, pay-or-serve arrestees – regardless of their financial situation – are forced to “pay off” their debt through imprisonment. As detailed further below, NMC's practices result in people being imprisoned because they are too poor to pay court-ordered fines.

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

When NMC 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 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

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<sup>3</sup> With no court appearance, persons arrested on pay-or-serve warrants also have no opportunity to raise other possible defenses to incarceration, such as whether the arrest on the pay-or-serve warrant was a case of mistaken identity, or whether a clerical error has failed to record a payment that was actually made.

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 NMC, 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.*

Importantly, 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, NMC does not treat failure to pay a court-ordered fine as possible contempt of court. Instead, NMC regularly sentences poor people to jail time for failure to pay without providing the basic due process protections dictated by *Bearden*, *Turner*, and Colorado law. As a matter of consistent practice, NMC orders defendants incarcerated on pay-or-serve warrants without notice, without a hearing on ability to pay, without an inquiry into ability to pay, and without any express finding that the defendant has the ability to pay. In the absence of such process, NMC inevitably incarcerates some people because they are too poor to pay a fine. *See Doe v. Angelina County*, 733 F. Supp. 245, 254 (E.D. Tex. 1990) (“In the absence of some procedure for determining the reasons for a party’s failure to pay a fine, it is difficult to conceive how a governmental entity will avoid discriminating against indigents on the basis of their respective economic statuses.”).

***A case study: Northglenn Municipal Court orders poor people incarcerated for failure to pay.***

Case number CR 2012-1010 provides just one example of NMC’s irrational and unconstitutional practice of jailing poor people for failure to pay fines. In this case, a 45 year-old man was ordered to jail because he had not paid \$190 in court-ordered fines and costs. The court file reflects that he was a homeless abuser of drugs and alcohol who was planning to sleep by a dumpster when police contacted him. He was cited for possession of a marijuana pipe. After a guilty plea, the court imposed \$190 in fines and costs. On the first day that the defendant missed a payment, NMC ordered him arrested on a pay-or-serve warrant. As is its practice, NMC issued the warrant without any prior notice or hearing, without any inquiry into the defendant’s ability to pay, and likely without reviewing the documents in the court file, which strongly suggested the defendant was destitute. The warrant commanded that the defendant pay \$190 “in cash” or “serve 4 days in jail in lieu of fines and costs.” The defendant was arrested and served the specified four days in jail. During that jail stay, the defendant was never provided an opportunity to see a judge. Based on the ACLU’s investigation, this set of facts is typical of NMC’s persistent failure to fulfill its constitutional obligation to take steps to avoid jailing poor people for failure to pay fines.

Even if this defendant had been given the opportunity to appear in NMC after his pay-or-serve arrest, he very likely would have had to serve out his sentence despite his poverty. That is made clear in an audio recording of a proceeding the ACLU obtained from another NMC case where a mother appeared, on her own initiative, on behalf of her incarcerated daughter.<sup>4</sup> The daughter was serving her second day of a four-day pay-or-serve sentence. The mother explained to the judge that her daughter was struggling with drug abuse and was at risk of losing her job if she remained in jail. The mother said she wanted to help her daughter pay the amount due, and she asked if a payment plan could be set up. The judge, without further inquiry or explanation, simply said: “She’s gonna have to serve the other two days. There’s nothing I can do about that.” This brief colloquy is deeply concerning because it reflects the judge’s disinterest in whether the individual he jailed for failure to pay a debt actually had the ability to pay that debt. Under federal and state law, that question – does this individual have the ability to pay? – should be first and foremost on a judge’s mind before ordering imprisonment for failure to pay.

***Northglenn Municipal Court relies heavily on pay-or-serve warrants.***

The ACLU’s concern with NMC’s practice of issuing pay-or-serve warrants is heightened by the frequency with which NMC issues such warrants. In an eighteen-month period ending in July 2012, NMC issued at least 193 pay-or-serve warrants – which amounts to one warrant for every two days the court was in session. Many of these warrants were issued because the defendant failed to pay a fine related to a minor violation of the municipal code, such as Northglenn’s “Barking Dog” ordinance, its “Dog at Large” ordinance, or its “Weed/Grass Control” ordinance.<sup>5</sup>

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<sup>4</sup> See Case No. CR 2012-0501.

<sup>5</sup> See Northglenn Municipal Code, Sec. 14-2-14 (“It shall be unlawful for any person to own, keep, or have in his possession or harbor any dog which, without provocation, by frequent or habitual howling, barking, or otherwise, shall cause annoyance or disturbance to any persons.”); Sec. 14-2-6(e) (“A person, being the owner or keeper of a

In many instances, NMC issued pay-or-serve warrants when information already in the court's file suggested that the defendant may have been too poor to pay the fine. For example, court records noted that several of the defendants wanted on pay-or-serve warrants were homeless. Likewise, many court files indicated that the targets of pay-or-serve warrants were unemployed and had no vehicle. 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.

***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>6</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, Northglenn Municipal Court must undertake significant changes in policy and practice.***

In order to stop violating federal and state law, NMC 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:

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dog, shall be guilty of dog at large if such dog runs at large within the City."); Sec. 9-11-27(a) ("On developed lots or parcels, it is unlawful and shall be deemed a nuisance for the owner or occupant to allow the property to become overgrown with weeds or grass of any kind or nature.")

<sup>6</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.

- (1) Discontinue issuance of all pay-or-serve warrants; and
- (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.

Of course, any such contempt proceeding related to an individual's failure to pay must include, at a minimum, all procedural protections mandated by the United States Supreme Court in *Turner v. Rogers*. These include notice of an allegation of contempt; notice that the defendant's ability to pay is the critical factor in determining whether he or she will be found in contempt; a hearing on the contempt allegation wherein the court elicits information about the defendant's ability to pay; and a judicial determination 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 NMC'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,



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