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December 16, 2013

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

Joyce Jay  
Mayor of Wheat Ridge  
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***Re: Incarceration of Poor People for Failure to Pay Fines***

Dear Mayor Jay:

We write because Wheat Ridge Municipal Court (WRMC) 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. WRMC'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 WRMC's misguided and unconstitutional practice.

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

WRMC regularly and automatically issues "pay-or-serve" warrants when a defendant misses a payment on a court-ordered fine. These warrants order the defendant's arrest, at which time he must either immediately pay the full amount due – either in payment for the fine or as a cash-only bond – or must stay in jail for a specified period of time until he "pays off" the fine. This sentence converts the fine into jail time by employing a unique mathematical concept whereby each day a prisoner is incarcerated, he "pays down" his fine at a daily rate, which WRMC 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.

WRMC 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, WRMC does not inquire into or consider in any way whether the individual has the ability to pay the fine. Instead, pay-or-serve arrestees – regardless of their financial situation – are forced to “pay off” their debt through imprisonment. As detailed further below, WRMC's practices result in people being jailed 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 WRMC 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 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 WRMC, 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, WRMC does not treat failure to pay a court-ordered fine as possible contempt of court. Instead, WRMC 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, WRMC orders defendants to be incarcerated on pay-or-serve warrants 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, WRMC 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.”).

***Case studies: Wheat Ridge Municipal Court orders poor people incarcerated for failure to pay.***

The case of Linda Roberts<sup>2</sup> provides just one example of WRMC's irrational and unconstitutional practice of jailing poor people for failure to pay fines. Ms. Roberts is a fifty-five year old disabled woman who was (and remains) destitute when she was arrested on June 7, 2012, for shoplifting \$21 worth of food from a Safeway grocery store. The entirety of Ms. Roberts' income comes from food stamps and a small social security disability check. Ms. Roberts is currently homeless and often does not have sufficient funds to pay for food. After Ms. Roberts pleaded guilty to the shoplifting charge in June 2012, a WRMC judge ordered her to pay \$671 in fines, costs and restitution, with \$300 suspended. The court further ordered that she take a class for which she would have to pay an additional \$80. At sentencing, Ms. Roberts informed the court that she was unable to pay the \$371 that was due, because she was unemployed, disabled, and did not have enough money to make ends meet. The judge, in turn, simply referred Ms. Roberts to the clerk, to whom Ms. Roberts relayed the same information about her inability to pay.

Because Ms. Roberts was impoverished, she failed to pay the money ordered by the court. Despite Ms. Roberts' court file indicating that she was unemployed and on disability at the time she was sentenced, and despite Ms. Robert's assertion to the court that she was too poor to pay the fine, when Ms. Roberts failed to pay, the court reimposed the \$300 suspended fine, added additional fees, and issued a pay-or-serve warrant for Ms. Roberts' arrest. The warrant ordered that Ms. Roberts either pay \$746 or serve 15 days in jail. Thus, after learning in June that Ms. Roberts could not pay \$371, the court in August ordered her to jail unless she came up with twice that amount.

Ms. Roberts was arrested on the warrant on October 31, 2012. When she was brought before the WRMC judge for a brief and perfunctory video appearance, the judge neither asked questions nor made findings regarding Ms. Roberts' ability to pay. Instead, the judge simply rubberstamped the sentence already mandated in the pay-or-serve warrant – that Ms. Roberts either pay cash or serve time in jail, and he indicated that “most people” just serve the time in jail:

Judge: “The fine owed is \$446 and the failure to take the class is \$300. You’ve got three ways out of this, two of them are not very good, and then one of them is what most people do. Post \$746 cash only bond – hardly anybody does that. Somebody on the outside can pay it for you. Or you can serve it at \$50/day.”<sup>3</sup>

Ms. Roberts was forced to serve 15 days in jail because she was unable to pay her debt.

Based on the ACLU's investigation, this set of facts accurately reflects WRMC's persistent failure to fulfill its constitutional obligation to avoid jailing poor people for failing to pay fines that they are too poor to pay. Indeed, we reviewed numerous recordings of video appearances in WRMC by pay-or-serve arrestees and, in each instance, the judge did not inquire

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<sup>2</sup> Case number GA1226705.

<sup>3</sup> ACLU transcription of WRMC audio of Ms. Roberts' Oct. 31, 2012, court appearance.

into whether the defendant had the ability to pay. To the contrary, even when the judge had a strong basis for concluding the arrestee did not have the ability to pay the fine, the individual still served time in jail. For instance, in case number GA1226736, a homeless man pleaded guilty to possession of alcohol in public on October 1, 2012. When he failed to pay his fine, WRMC issued a pay-or-serve warrant for his arrest, despite clear notes in the defendant's file that he was homeless. The warrant ordered the defendant to either pay \$625 or serve 13 days in jail. The defendant was arrested on the warrant on April 11, 2013, and the WRMC conducted a brief hearing by video conference a few days later. During the hearing, the WRMC judge, who acknowledged that the defendant was "homeless" at the time of sentencing, explained:

The balance is \$625 bucks and the way it works is you come up with the \$625, and if you had that kind of money you already would have done it, or you serve it at \$50 a day, so it's 13 days.<sup>4</sup>

When the defendant explained that he was "in the hospital the day the fine was due," the WRMC judge responded: "Yeah, you've still got the 9 days to do."<sup>5</sup> The judge then assured the defendant: "[a]gain, I want to try to put a positive spin on that; you don't have to pay the fine. You get out of the fine." This colloquy, like several others during court appearances of pay-or-serve arrestees we reviewed, reflects the WRMC judge's blatant 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.

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

The ACLU's concern with WRMC's practice of issuing pay-or-serve warrants is heightened by the frequency with which WRMC issues them. In a six month period ending in July 2013, WRMC issued an estimated 190 pay-or-serve warrants – which amounts to three warrants for every two days the court was in session. It is worth noting that 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 ordinances regulating dogs on leashes, possession of alcohol in public, and animal licenses.<sup>6</sup>

Further, as was true in both of the cases discussed above, in many instances, WRMC 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.

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<sup>4</sup> ACLU transcription of WRMC audio of April 11, 2013, court appearance in case number GA1226736.

<sup>5</sup> The court gave the defendant credit for four days served before the court appearance, so his remaining time on the 13-day sentence was 9 days.

<sup>6</sup> See Wheatridge Muni. Code, Sec. 4-8 ("Running at large"); Section 16-127 ("Possession of alcohol in public places"); Section 4-31 ("Dog and cat licenses").

***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>7</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, Wheat Ridge Municipal Court must undertake significant changes in policy and practice.***

In order to stop violating federal and state law, WRMC 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, WRMC should immediately:

- (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

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<sup>7</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.

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 WRMC'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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