



Cathryn L. Hazouri, Executive Director • Mark Silverstein, Legal Director

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Senior Advisor on Policy and Initiatives  
Office of the Mayor, City and County of Denver  
1437 Bannock St., Room 350  
Denver, CO 80202

By email to [REDACTED]

Michael Battista  
Deputy Chief of Police  
1331 Cherokee St.  
Denver, CO 80204

By email to [REDACTED]

Alvin J. LaCabe, Jr.  
Manager of Safety  
City and County of Denver  
1331 Cherokee St., Suite 302  
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By email to [REDACTED]

Dear Ms. Archuleta, Chief Battista, and Manager LaCabe:

I write to call your attention to events during the weekend of October 6-7 that raise serious questions about whether Denver law enforcement authorities are sufficiently prepared to respect and protect the constitutional rights of protesters who may engage in peaceful civil disobedience at the upcoming Democratic convention in 2008.

The annual Columbus Day parade took place on Saturday, October 6, and numerous persons came downtown to protest the celebration of the Columbus Day holiday. The appearance of protesters is certainly no surprise to Denver law enforcement agencies. The Columbus Day parade has regularly prompted protests and, in some years, mass arrests. This year, protesters sat down in the street in a symbolic effort to block the parade, and Denver police arrested 83 persons for this nonviolent act of civil disobedience.

The arrestees were in police custody before noon. Almost all of the persons detained were prepared to post bail immediately, either with cash that they carried, with credit cards that Denver accepts for bail, or through friends and family who waited with cash or credit cards. Nevertheless, virtually no one was released until after midnight, and many of the arrestees were not released on bail until after sunrise on Sunday morning.

Many persons were not permitted to post bond until they had already spent eight hours in custody. After posting bail money, many persons were held an additional eight, ten, or even twelve hours before they were released.

These long delays are either the result of egregious bureaucratic inefficiency or a deliberate (and indefensible) decision to punish the arrestees with jail time before they have been convicted or sentenced. In either case, these delays portend the possibility of massive civil liberties violations in connection with the upcoming Democratic National Convention, unless Denver authorities take decisive action to ensure that this does not happen again. The number of arrests on Columbus Day is surely small compared to the number of possible participants if there is large-scale civil disobedience in connection with a demonstration during the Democratic Convention.

At a meeting on July 26 in which the three of you participated, I raised the question of the Denver Police Department's plans for dealing with the possibility of large-scale civil disobedience during the Democratic Convention. I asked about issuing tickets instead of carrying out full custodial arrests. Chief Battista replied that a decision to "cite and release" would require a new policy decision. Chief Battista characterized the current policy as follows: "For protests, we don't cite and release."

That current policy is apparently new. In 2004, the last time a large number of Columbus Day protesters were accused of violating the law, the Denver Police Department did not carry out full custodial arrests. Instead, the protesters who engaged in civil disobedience received citations and notices to appear in court.

Chief Battista indicated that the current policy of carrying out full custodial arrests was adopted on the recommendation of the City Attorney's Office. If I understood Chief Battista's explanation correctly, the City Attorney's Office concluded that the previous "cite and release" practice somehow undermined the strength of the City's efforts to prosecute. Chief Battista indicated that requiring the arrestees to go through the bonding process is viewed as assisting the City's case in court.

I cannot agree with the proposition that a practice of "cite and release" weakens the City's case in court, nor that carrying out full custodial arrests strengthens the City's case. At trial, the issue is whether the accused engaged in actions that violate the law. It is legally irrelevant whether a defendant received a notice to appear instead of posting bond, just as it is legally irrelevant whether a defendant remains in custody at the time of trial. Similarly, the amount of a defendant's bond is not relevant or admissible evidence at trial.

Moreover, it is improper for the police to allow prosecutorial trial strategy to control the decision whether to issue a summons instead of carrying out a full custodial arrest. The legislature has identified the primary consideration in the decision whether to issue a summons: whether the arresting officer or a responsible command officer is "satisfied that the person arrested will obey a summons commanding his appearance at a later date." C.R.S. § 16-3-105(b). The police authorities know very well that the vast majority of the protesters arrested on Columbus Day will respect a summons and will appear in court. Instituting full custodial arrests to satisfy the

dubious preference of City prosecutors violates the intent of the legislators who contemplated that police would exercise their discretion appropriately.

That legislative intent is confirmed by analogous statutory provisions that address the initiation of criminal charges in cases in which the defendant has not been arrested. *See* C.R.S. §§ 16-5-206, 207. Section 207 establishes a mandatory presumption of a summons instead of a full custodial arrest for petty offenses, class 3 misdemeanors, and for other charges that carry a maximum penalty of six months in jail. The statute lists only three exceptions to this mandatory presumption; they apply only when there is an objective reason to doubt that a summons will succeed in getting the defendant to court. C.R.S. § 16-5-207(1). The statute further provides that, except for the most serious felonies, “the general policy shall favor issuance of a summons instead of a warrant for the arrest of the defendant.” C.R.S. § 16-5-207(2). The only exception to this express legislative policy is when there are reasonable grounds to believe that the defendant will flee or will not respond to a summons. *Id.* Thus, it is not proper for the City and County of Denver to maintain the blanket policy of full custodial arrests that Chief Battista articulated on July 26 and that the City evidently followed on October 6.

The City’s policy of “no cite and release” when protesters are accused of violating the law must be changed, not only because the rationale advanced for that policy violates the spirit and intent of Colorado statutes, but also because the City’s implementation of that policy poses an unjustifiable risk of violating the constitutional rights of the persons arrested.

The persons arrested for protesting the Columbus Day parade were charged with misdemeanors for which a court-approved bond schedule sets the amount of money that must be posted. Almost all of the persons arrested had the required amount of money available, either at the time they were arrested or very shortly thereafter. Law enforcement authorities are justified in subjecting the arrestees to a “brief period of detention to take the administrative steps incident to arrest.” *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975). Once those brief administrative steps incident to arrest are completed, however, law enforcement authorities are obligated to accept the bond money and release the arrestee. Law enforcement is not authorized to prolong the period of detention for no reason, nor for impermissible purposes such as teaching the arrestees a lesson or to inflict punishment before conviction. A prisoner who has posted bond must be released as soon as reasonably feasible.

As the events of October 6 and 7 made clear, however, the persons arrested for peaceful civil disobedience were not released after a few brief administrative steps. On the contrary, many were held for six to eight hours or more before Denver sheriff’s deputies accepted bail money. Even after the Sheriff’s Department finally accepted an arrestee’s bond money, the arrestees often had to wait hours and hours more—in some cases all night long—before they were released.

In the absence of a compelling justification, these prolonged detentions of persons who were entitled to release on bail constitute false imprisonment; unreasonable seizures in violation of the Fourth Amendment and Article II, Section 7 of the Colorado Constitution; and unconstitutional punishment without due process of law, in violation of the Fourteenth Amendment and Article II, Section 25 of the Colorado Constitution.

It is possible that the Sheriff's Department may attempt to attribute the delay in processing the arrestees on October 6 to the number of persons arrested that morning. The Sheriff's Department was aware, however, that the Denver Police Department had changed its prior "cite and release" practice, and certainly the Sheriff's Department was aware that the Columbus Day protests might include civil disobedience with dozens of participants. Supervisors surely planned their staffing accordingly. Volume alone cannot explain the processing delays that kept numerous persons locked up for hours after they had posted bail. Once a particular prisoner has posted bail, how could it take Sheriff's deputies six or eight or twelve hours to locate the prisoner, unlock the cell, and release him or her?

Even if all the delays in releasing arrestees could reasonably be attributed to a conscientious jail staff simply being overwhelmed by the task of processing bail for 83 arrestees, this only reinforces the need for Denver to rethink the "no cite and release" policy that Chief Battista articulated. The Democratic Convention is expected to attract thousands of protesters from around the country. The Denver Police Department must be prepared for the possibility that hundreds or perhaps even thousands of persons might participate in organized acts of peaceful civil disobedience. Maintaining a "no cite and release" policy in such a situation—especially in light of the jail's inability to process a mere 83 arrestees in an efficient manner—is a recipe for violations of civil and constitutional rights on a massive scale.

Denver can do better. Denver should abandon the policy of requiring full custodial arrests when protesters are arrested for misdemeanors. In addition, Denver should investigate why persons arrested on Columbus Day had to wait as long as twelve hours for release after they had posted bail. Denver should take whatever steps are necessary to ensure that persons entitled to release on bail are released promptly.

Sincerely,



Mark Silverstein  
Legal Director, ACLU of Colorado

Cc: Luis Corchado, Denver City Attorney's Office, at [REDACTED]  
Vincent DiCroce, Denver City Attorney's Office, at [REDACTED]  
Mary Malatesta, Deputy Manager of Safety, at [REDACTED]