WHEAT RIDGE MUNICIPAL COURT 7500 W 29th Avenue, Wheat Ridge, CO 80033	
Plaintiff: CITY OF WHEAT RIDGE by and on behalf of THE STATE OF COLORADO v. **Defendant:** WILBURN TAYLOR	
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Mr. Taylor's Motion to Vacate Judgment of Conviction

Defendant Wilburn Taylor, through his attorneys Haddon, Morgan and Foreman, P.C., in cooperation with the ACLU Foundation of Colorado, moves under Colorado Municipal Court Rule of Procedure 235(c) to vacate his judgment of conviction.

Introduction

This postconviction motion arises out of Mr. Taylor's conviction in this court for contempt of court following his failure to pay court costs imposed by this court after he was convicted of attempting to solicit money from passersby. Mr. Taylor's contempt conviction was obtained and he was sentenced in violation of the United States and Colorado constitutions and Colorado laws.

The conviction was obtained in violation of section 18-1.3-702, C.R.S. (2014), which governs the imposition in all courts, including municipal courts, of contempt for nonpayment of fines. It was obtained in violation of Colorado Rule of Civil Procedure 107, which governs criminal contempt proceedings. And it was obtained in violation of the federal and state constitutions' due process and equal protection clauses as well as the Colorado Constitution's prohibition against imprisonment for debt.

The Court should vacate Mr. Taylor's contempt conviction.

Facts

In March 2014 Mr. Taylor was 33 years old, jobless and impoverished. EXHIBIT 1 ¶¶ 1, 5. For years he has struggled with mental illness, including severe schizophrenia. *Id.* ¶ 1; EXHIBIT 2, at 6.

That month, after visiting his psychiatrist at the Jefferson County Mental Health Center, Mr. Taylor stopped at the I-70 off-ramp on Kipling Street. EXHIBIT 1 ¶ 3. He intended to create and display a sign requesting money from individuals for food and other necessities. *Id.*

Officer Cook of the Wheat Ridge Police Department encountered Mr. Taylor shortly afterward. Mr. Taylor told Officer Cook that he was planning on asking motorists for money. Officer Cook observed that Mr. Taylor "was holding a pen and it appeared he was preparing to write a message asking for money prior to my arrival." EXHIBIT 3.

Based on this, Officer Cook issued Mr. Taylor a summons and complaint alleging a violation of Wheat Ridge's solicitation ordinance, § 16-113 of the Wheat Ridge Municipal Code. EXHIBIT 4. The ordinance provides in relevant part, "It shall be unlawful for any person to solicit or attempt to solicit ... contributions of any kind from the occupant of any vehicle on any highway ... including any entrance to or exit from such highway." § 16-113(b).

The summons set the initial appearance in the case, No. GA14-34553, for May 5, 2014. After Mr. Taylor failed to appear, the court issued a bench warrant for Mr. Taylor's arrest and set bond at $100 and imposed $75 in costs. EXHIBIT 5, at [1].

On June 25, 2014, Mr. Taylor was in custody on the bench warrant, and he appeared *pro se* in court via video for his arraignment. EXHIBIT 5, at [1]. No prosecutor was present. *See id.* The court conducted plea negotiations with Mr. Taylor:

> THE COURT: ....
>
> So Mr. Taylor, what I'll do if you plead guilty, I'm going to read the police report, see what you're doing then I'll look at your criminal history. If you don't have any of these panhandling convictions, I'm just going to give you a small fine and tell you don't come back to Wheat Ridge and panhandle anymore.
>
> THE DEFENDANT: That would be fine, Your Honor....
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> ....
>
> THE COURT: So guilty or not guilty?
>
> THE DEFENDANT: Guilty, Your Honor.

EXHIBIT 2, at 4. The court imposed a suspended fine of $100. *Id.* at 6. It also imposed court costs of $100. *Id.*

Mr. Taylor indicated he had no means to pay the court costs and suffers from a severe mental disability. In response, the court suggested he obtain a job through a temp agency:

> THE DEFENDANT: Well, you know, I am like really strapped obviously. I'm (indiscernible) to panhandling to get some extra cash because I have no (indiscernible) from—
>
> THE COURT: You don't look—you look like a man that could work though. I mean, you don't look disabled or unable to work.
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> THE DEFENDANT: No, I do suffer from severe schizophrenia though.
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> THE COURT: Yeah and a lot of guys go to Labor Ready or Aramark (phonetic) or whatnot, temp services.

THE DEFENDANT: Yeah.

Id. at 6.

The court said Mr. Taylor was required to pay "in two months on August 25." *Id.* at 7. When Mr. Taylor inquired whether the deadline is "like four months or so," the court said, "No, it's more like two months. You've got to get out and get some work...." *Id.* The court then warned Mr. Taylor, "if you don't pay it I'll issue another warrant and you and I will be going through this all again down the road so make sure you do take care of it." *Id.*

The court caused Mr. Taylor to sign a Municipal Court form titled "Request for Stay of Execution/Promise to Pay." *See* EXHIBIT 6. Under "Address" in the form, Mr. Taylor wrote "Homeless." *Id.* He did not list an address, a city or a phone number. *Id.* In the form, the Municipal Court directed Mr. Taylor to "pay total due of $100 **or** appear in court on Monday, August 25, 2014 @ 8:30 a.m." *Id.* (capitalization altered). Mr. Taylor was unable to pay the $100. EXHIBIT 1 ¶ 5.

When Mr. Taylor had not paid the fine by August 25 and failed to appear on that date, the court on August 28 issued a bench warrant for his arrest and set a $175 bond. EXHIBIT 7. In setting the bond amount, the court also assessed additional court costs of $75 so that the total court costs owed by Mr. Taylor amounted to $175. *See* EXHIBIT 5, at [1].

On November 24, 2014, Mr. Taylor was in custody on the bench warrant, and he appeared *pro se* in court via video. EXHIBIT 5, at [2]. No prosecutor was present. *See id.*; EXHIBIT 8. The court did not inform Mr. Taylor that it had added additional court costs of $75 or that the total court costs he owed had increased to $175. *See* EXHIBIT 8. Mr. Taylor indicated that although he wanted to be released from jail, he had no ability to post the $175 bond; and as he did at the July hearing, he indicated he would encounter significant difficulties in paying the court costs:

> THE COURT: If you thought you had the ability to pay, I would consider releasing you on the matter or alternatively I'll convert it to a *four-day jail sentence at $50 a day and give you credit for time served of two days so*

you can serve another two days and be done with the matter[1] or I can give you additional time to pay the fines and costs.

THE DEFENDANT: I'd like additional time, sir.

THE COURT: All right.

THE DEFENDANT: Will I be released today if I—if I take that option?

THE COURT: Yes.

THE DEFENDANT: I would like that option, sir.

THE COURT: So when are you going to get this paid then?

THE DEFENDANT: I will try to make budget for it by four months but that's all I'll be able to do but I will try to speed (indiscernible).

THE COURT: No, we're not going to wait four months to get this paid off. You're going to have to figure out a faster payment schedule than that.

THE DEFENDANT: I'll see what I can do, sir, but I don't have any access to (indiscernible).

EXHIBIT 8, at 2-3 (emphasis supplied). The court concluded: "I'm going to give you a month to either pay it or to come back to court and ask for more time .... If not paid by [December 18 at 1 p.m.] then you must be back in court December 18th at 1:00 to request additional time to pay." *Id.* at 3. The court then released Mr. Taylor on a $175 PR bond. *Id.* at 4.

As in June, the court caused Mr. Taylor to sign a Municipal Court form titled "Request for Stay of Execution/Promise to Pay." EXHIBIT 9. Under "Address" in the

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[1]The italicized language is the only indication by the court that the amount owed by Mr. Taylor had increased since June 2014. The court did not indicate why Mr. Taylor would have to spend a total of four full days in jail at $50 a day to pay for $175 in court costs.

form, Mr. Taylor wrote "N/A" for "not applicable." *See* EXHIBIT 9. He listed his city as Lakewood. He listed his telephone number as "N/A." *Id.* In the form, the Municipal Court directed Mr. Taylor to "pay total due of $175 **or** appear in court on Thursday, December 18, 2014 @ 1:00 p.m." *Id.* (capitalization altered). This form is the only judicial notice to Mr. Taylor that the amount he owed from June had increased from $100 to $175; it does not indicate why there was an increase in the amount owed to the court.

Mr. Taylor remained jobless and impoverished during the following months. EXHIBIT 1 ¶ 5. He was unable to pay the $175 amount due. *Id.* Mr. Taylor failed to appear on December 18. On December 23, the court issued a bench warrant for Mr. Taylor's arrest and set a $250 bond. In setting the bond amount the court also apparently assessed additional court costs of $100 so that the total court costs now owed by Mr. Taylor had increased to $275. *See* EXHIBIT 5, at [2].

On February 25, 2015, while Mr. Taylor was in custody on the bench warrant, the court served on him a contempt citation because of his failure to pay the previously-assessed court costs.[2] EXHIBIT 10.

On the same day, Mr. Taylor appeared *pro se* in court *via* video for a bond hearing and contempt advisement. EXHIBIT 5, at [3]. No prosecutor was present. *See id.*; EXHIBIT 11. The court did not inform Mr. Taylor that it had assessed additional court costs of $100 or that the total court costs he owed had increased to $275. *See* EXHIBIT 11.

The court began by telling Mr. Taylor it would advise him "on a contempt citation" and "tell you some things you can do.... One of these things is probably pretty

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[2]The sanctions available for the two types of contempt—remedial and punitive contempt—serve different purposes. *See* C.R.C.P. 107. Sanctions imposed for remedial contempt are intended to force compliance with a lawful order or compel performance of an act within the person's power or present ability to perform. *See* C.R.C.P. 107(a)(5). Sanctions for punitive contempt are intended to punish, and consist of an unconditional fine, fixed sentence of imprisonment, or both, for conduct found to be offensive to the court's authority and dignity. *See* C.R.C.P. 107(a)(4). In the case at bar, the court pursued punitive contempt only. *See* EXHIBIT 10 (providing written advisement on rights afforded to persons under C.R.C.P. 107(d)(1) who are charged with punitive contempt).

attractive." EXHIBIT 11, at 2. The court notified Mr. Taylor, among other things, that "[p]unishment for contempt can consist of a fine or a sentence of imprisonment not to exceed 15 days." The court advised that he had the right if indigent to an appointed attorney; he had the right to remain silent; he was presumed innocent; and he had the right to require proof beyond a reasonable doubt. *Id.* at 2-3.

The court then engaged in plea negotiations with Mr. Taylor, encouraging him to plead guilty because "a lot of guys" faced with "only three days" of jail as punishment for nonpayment of fines "are just doing" the jail time; otherwise, he would have to wait "60 days" for the contempt hearing:

> *So here's how it works, Mr. Taylor. I give you the chance if you want to do a little bit of jail, to do a little bit of jail and take care of the fine, so if you admit you didn't pay your fine yet had the ability to pay the fine, I would give you three days in jail* or the other thing you can do is have a hearing on this issue and the hearing would be set out about 60 days and between then and now I'd put you on a payment plan, but *I will tell you a lot of guys, when it's only three days, a lot of guys are just doing it* and I'd give you credit from yesterday so you've got two more days to do ....

EXHIBIT 11, at 3 (emphasis supplied). After Mr. Taylor said he had no questions, the court asked, "What do you want to do?" *Id.* at 4. Mr. Taylor accepted the court's plea deal, responding: "I'll do the three days." *Id.* The court commented:

> Mr. Taylor, so here's what you're saying is that you pled guilty back whenever you did to something and then you had some court costs and that's what you didn't pay so you didn't—you pled guilty in June and then you had a couple months to pay and didn't then I think Judge Davis saw you again and gave you more time then you didn't pay and here you are, so here's how it works.

Id. at 4. The court then imposed sentence: "Three days are imposed, whatever he owes I'm just going to—three days imposed, credit for one day, two to go, Mr. Taylor[,] and then you are done with this case." *Id.*; EXHIBIT 12.

Mr. Taylor served a total of three days in jail on the contempt conviction. *See* EXHIBIT 1 ¶¶ 5, 7.

In accordance with C.M.C.R. 235(c), this Motion is brought within six months of Mr. Taylor's conviction for contempt on February 25, 2015.

Argument

The Colorado Municipal Court Rules of Procedure ("Municipal Rules") recognize their kinship with the Colorado Rules of Criminal Procedure ("Criminal Rules"). C.M.C.R. 260 provides that the Municipal Rules "are *additions* to Colorado Rules of Criminal Procedure" (emphasis supplied). Additionally, while they govern only municipal court proceedings, the Municipal Rules generally track the procedures prescribed in the Criminal Rules. Accordingly, the Colorado Supreme Court has held that when interpreting a provision in the Colorado Municipal Court Rules of Procedure, courts look to the counterpart provision in the Colorado Rules of Criminal Procedure. *See Mulkey v. Sullivan*, 753 P.2d 1226, 1232 (Colo. 1988).

C.M.C.R. 235(c) provides:

> A person convicted of a municipal ordinance violation may move the court for post-conviction review on the grounds that said conviction was obtained or sentenced imposed in violation of the constitution or laws of the United States, or of the constitution or laws of this state, or of the municipality's charter or ordinance.

C.M.C.R. 235(c) does not specify the procedure to be used in deciding motions brought under the rule. Accordingly, it is appropriate to look to Criminal Procedure Rule 35(c). *See Mulkey,* 753 P.2d at 1228-29.

Based on Crim. P. 35(c) and pursuant to the purpose of the Municipal Rules to secure simplicity in procedure and elimination of unjustifiable expense and delay, the following procedure should govern this C.M.C.R. 235(c) proceeding:

1. The court shall promptly review the postconviction motion.

2. In conducting the review, the court should consider among other things whether the motion is timely, whether it fails to state adequate factual or legal grounds for relief, whether it states legal grounds for relief that are not meritorious, whether it states factual grounds that, even if true, do not entitle the party to relief, and whether it states factual grounds that, if true, entitle the

party to relief, but the files and records of the case show to the satisfaction of the court that the factual allegations are untrue.

3. If the motion and the files and record of the case show to the satisfaction of the court that the defendant is not entitled to relief, the court shall enter written findings of fact and conclusions of law in denying the motion. The court shall complete its review within 35 days of filing.

4. If the court does not deny the motion under the previous paragraph, the court shall cause a complete copy of said motion to be served on the prosecuting attorney if one has not yet been served by counsel for the defendant.

5. If the defendant has counsel, the court shall direct the prosecution to respond to the defendant's claims within 28 days and the defendant to reply to the prosecution's response within 14 days.

6. Thereafter, the court shall grant a prompt hearing on the motion unless, based on the pleadings, the court finds that it is appropriate to enter a ruling containing written findings of fact and conclusions of law. At the hearing, the court shall take whatever evidence is necessary for the disposition of the motion. The court shall enter written or oral findings either granting or denying relief within 35 days of the conclusion of the hearing or provide the parties a notice of the date by which the ruling will be issued.

7. If the court finds that defendant is entitled to postconviction relief, the court shall make such orders as may appear appropriate to restore a right which was violated, such as vacating and setting aside the judgment, imposing a new sentence, granting a new trial, or discharging the defendant. The court may stay its order for discharge of the defendant pending appellate court review of the order.

I. Mr. Taylor's conviction was obtained in violation of section 18-1.3-702.

Section 18-1.3-702 prescribes the due process that must be afforded when any court of record in the state of Colorado, "including but not limited to municipal courts,"[3] seeks to enforce orders requiring a defendant to pay a "monetary amount." The statute applies to an order of a court that the defendant pay an entire monetary amount at the time of sentence, at some later date, or as directed by a court employee, such as a collections investigator. § 18-1.3-702(1)(a)(I)-(III).

A. The court failed to give sufficient notice to Mr. Taylor.

Subsection (2) of the statute provides that when a court imposes a sentence that:

> includes payment of any monetary amount, the court *shall instruct the defendant as follows*:
>
> (a) If at any time the defendant is unable to pay the monetary amount due, the defendant must contact the court's designated official or appear before the court to explain why he or she is unable to pay the monetary amount; and
>
> (b) If the defendant has the ability to pay the monetary amount as directed by the court or the court's designee but willfully fails to pay, the defendant may be imprisoned for failure to comply with the court's lawful order to pay pursuant to the terms of this section.

§ 18-1.3-702(2) (emphasis supplied).

On June 25, 2014, the court found Mr. Taylor guilty of solicitation and imposed court costs of $100. The court did not provide any of the notices required under subsection (2) of section 18-1.3-702. The court merely said, "Mr. Taylor, if you don't pay it I'll issue another warrant and you and I will be going through all this again down the road so make sure you do take care of it." EXHIBIT 2, at 7.

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[3] § 18-1.3-702(5).

On November 24, 2014, the court required Mr. Taylor to pay an additional $75 in court costs. The court again failed to provide the notices required under section 18-1.3-702(2). Instead, the court said it would consider jailing Mr. Taylor for four days and crediting Mr. Taylor $50 a day as full payment of the court costs. EXHIBIT 8, at 2. It also warned Mr. Taylor that if he did not pay the $175 in court costs or return to court on December 18, 2014, "a new bench warrant is going to issue for your arrest, you're going to owe the court another $175 on the bond and you're not going to be released upon a [PR] bond again in the future." *Id.* at 4. None of these statements qualified as the notice required under section 18-1.3-702(2).

On December 23, 2014, after Mr. Taylor failed either to pay all court costs or appear in court on December 18, the court added $100 in court costs to the monetary amount he owed. Mr. Taylor was not in court on December 23. Thereafter, the court failed to give the section 18-1.3-702(2) notices. Nor were such notices given to Mr. Taylor on February 25, 2015, when he appeared before the court after being cited for contempt for failure to pay the court-ordered costs. *See* EXHIBIT 11.

B. The court failed to comply with the requirement of section 18-1.3-702 and C.R.C.P. 107 that it notify Mr. Taylor of his rights in a contempt proceeding.

Section 18-1.3-702(3)(b) provides that when a court commences contempt proceedings for nonpayment of a monetary amount, "the court, including a municipal court, shall provide all procedural protections mandated" in C.R.C.P. 107. As the statute notes, the procedural protections listed in C.R.C.P. 107 are required by the terms of the rule itself.

Among the procedural protections mandated by C.R.C.P. 107 are notice to the defendant that he has "the right to have the action heard by another judge" and "the right to testify at trial."[4] C.R.C.P. 107(d). The court did not notify Mr. Taylor of these rights.

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[4]The court did advise Mr. Taylor that he had "the right to make a statement on your own behalf." EXHIBIT 11, at 3. This is different from the right to testify. C.R.C.P. 107(d) requires the court to advise the defendant both of "the right to testify at trial" and,

(footnote cont'd on next page)

Additionally, under section 18-1.3-702(3) and C.R.C.P. 107 the defendant is entitled to notice that the alleged contumacious act is the willful failure to pay a court-ordered monetary amount without undue hardship, and not the mere failure to pay. *See In re Marriage of Nussbeck*, 974 P.2d 493, 497 (Colo.1999). Notice to the defendant in the contempt proceedings of his alleged contumacious acts and his rights in such proceedings "play[s] a very important role in enabling [him] to understandingly shape his course and prepare his defense," *Wright v. District Court of Second Judicial Dist.*, 192 Colo. 553, 555, 561 P.2d 15, 16-17 (1977). The court failed to inform Mr. Taylor that his alleged contumacious act was willful failure to pay while having the ability to pay without undue hardship.

A fortiori, the court violated section 18-1.3-702(3)(b) and C.R.C.P. 107(d).

C. The court violated section 18-1.3-702 by incarcerating Mr. Taylor when he was unable to pay the court costs without undue hardship.

Subsection (3)(a) of the due process statute prohibits incarceration for failure to pay a monetary amount "[w]hen a defendant is unable to pay a monetary amount due without undue hardship to himself or herself or his or her dependents." Subsection (3)(c) prohibits a court from finding a defendant in contempt of court, or from incarcerating the defendant, for failure to pay a monetary amount

> unless the court has made *findings on the record*, after providing notice to the defendant and a hearing, that the *defendant has the ability to comply with the court's order to pay a monetary amount* due without undue hardship to the defendant or the defendant's dependents and that the *defendant has not made a good-faith effort to comply with the order.*

(Emphasis supplied.)

During the court appearances in June and November 2014, Mr. Taylor provided information to the court that he was homeless, jobless, suffered from "severe

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after a contempt finding, "the right to make a statement in mitigation prior to the imposition of sentence." The court advised Mr. Taylor of the latter right; it did not advise him of the former.

schizophrenia," was "really strapped" for cash, and needed significant time to acquire enough money to pay the court costs. In fact, as the court knew, Mr. Taylor's original offense was for soliciting money from others.

Before entering a judgment of conviction and incarcerating Mr. Taylor on the contempt citation, the court failed to provide notice to Mr. Taylor that he was not in contempt if he was unable to pay the court costs without undue hardship to him. The court did not find on the record that Mr. Taylor had the ability to comply with the orders to pay court costs without undue hardship. And the court did not find on the record that Mr. Taylor had failed to make a good faith effort to comply with the orders to pay court costs. In fact, at all times he was under the court's order to pay a monetary amount in this case, he was jobless and impoverished and had no ability to pay without undue hardship. *See* EXHIBIT 1 ¶ 5.

Accordingly, the finding of contempt against Mr. Taylor violated the clear mandate of section 18-1.3-702, and the order incarcerating him was illegal.

II. The court violated Mr. Taylor's constitutional rights by finding him in contempt for failure to pay the court costs.

A claim that a municipal court has violated the due process and equal protection clauses is properly brought under C.M.C.R. 235(c). *See People v. Shepard,* 151 P.3d 580, 585 (Colo. Ct. App. 2006).

Article II, Section 25, of the Colorado Constitution guarantees the right to equal protection and due process. *E.g., People v. Diaz*, 347 P.3d 621, 626 n.6 (Colo. 2015). The Fourteenth Amendment to the United States Constitution also guarantees the right to equal protection and due process. *E.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

A. Mr. Taylor's guilty plea to the contempt charge was not voluntary, knowing and intelligent; the court entered judgment on the plea in violation of due process.

The court's failure to give Mr. Taylor notice under section 18-1.3-702 that he could not be convicted and punished for his inability—without fault—to pay the court costs also violated his rights under the due process clauses of the state and federal constitutions. A plea of guilty cannot be either a voluntary or a knowing and intelligent

admission of guilt unless the defendant receives "'"real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process."'" *Lacy v. People*, 775 P.2d 1, 4 (Colo. 1989) (quoting *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941))).

To establish the defendant understood the nature of the charge against him, "the record must affirmatively demonstrate the defendant's understanding of the *critical elements of the crime* to which the plea is tendered." *Id.* at 5 (emphasis supplied). Colorado Rule of Criminal Procedure 11(b)(1) provides that a court "shall not accept a plea of guilty without first determining ... [t]hat the defendant understands the nature of the charge and the elements of the offense to which he is pleading." The rule governs the acceptance of guilty pleas in municipal courts, which must "adhere strictly to the rule's requirements in order to show that a plea is voluntarily and intelligently made," *Mulkey v. Sullivan*, 753 P.2d 1226, 1229 (Colo. 1988).

Prior to accepting the unrepresented Mr. Taylor's guilty plea to contempt, the court failed to advise of the elements of the crime of contempt and failed to determine that Mr. Taylor understood the elements. The elements of punitive contempt are: "(1) the existence of a lawful order of the court; (2) contemnor's knowledge of the order; (3) contemnor's ability to comply with the order; and (4) contemnor's willful refusal to comply with the order." *In re Marriage of Nussbeck*, 974 P.2d 493, 497 (Colo.1999). In addition to failing to advise Mr. Taylor of these elements, the court did not inform Mr. Taylor that under section 18-1.3-702 he could not be convicted of contempt unless he had the ability to pay the court costs without undue hardship and willfully refused. Before pleading guilty Mr. Taylor did not know these were the elements of contempt. EXHIBIT 1 ¶ 8. Had he known this, he would not have pleaded guilty to contempt. *Id.*

B. The court violated Mr. Taylor's rights to equal protection and due process by convicting and punishing him for contempt because of his inability to pay the court costs.

It is settled that a state court may not incarcerate a criminal defendant simply because she is indigent and cannot pay a monetary amount imposed by the court. *See, e.g., Tate v. Short,* 401 U.S. 395, 398 (1971). The court may not constitutionally find a defendant in contempt of court and incarcerate him on the assumption that, or without

inquiry into the question whether, she can pay the monetary amount. *See id.*; *see generally Bearden v. Georgia*, 461 U.S. 660, 664-69, 673 (1983).

Bearden is instructive. As a condition of probation, the defendant Bearden was required to pay $750 in fines and restitution. He was unable to pay after he was laid off from his job. The Georgia state court revoked his probation and sentenced him to serve the remaining portion of his probationary period in prison. Noting that it "has long been sensitive to the treatment of indigents in our criminal justice system," 461 U.S. at 664, the United States Supreme Court held that a state court violates the Equal Protection and Due Process clauses by revoking probation for failure to pay court-imposed monetary amounts "absent evidence and findings that the defendant was somehow responsible for the failure," *id.* at 665. *Id.* at 665-69. "We hold ... that in revocation proceedings for failure to pay a fine or restitution, a sentencing court *must inquire into the reasons for the failure to pay.*" *Id.* at 672 (emphasis supplied).

Following Mr. Taylor's panhandling conviction, the court retained jurisdiction over him to monitor and enforce payment of the assessed court costs. So, for example, in June the court stayed execution of the order requiring payment of court costs and gave Mr. Taylor additional time to pay. When Mr. Taylor had not paid the court costs by February 2015, however, this court—like the Georgia court in *Bearden*—sentenced Mr. Taylor to jail. The court made no inquiry into his ability to pay the court costs. It simply assumed, without justification, that Mr. Taylor had the ability to pay. That assumption disregarded an abundance of evidence indicating that Mr. Taylor had no ability to pay the court costs. *See, e.g.,* EXHIBIT 2, at 6; EXHIBIT 6. In finding Mr. Taylor guilty of contempt and sentencing him to jail, the court violated his right to equal protection and due process.

III. The court violated the Colorado Constitution's prohibition against imprisoning debtors.

Article II, Section 12, of the Colorado Constitution prohibits the imprisonment of a person for debt. The prohibition does not apply to a defendant adjudged to be in contempt for failure to pay a court-imposed monetary amount "when the contemnor had the ability to pay" but willfully refuses to do so. *Nussbeck*, 974 P.2d at 498.

Section 12 prohibits the court's imprisonment of Mr. Taylor. As discussed above, before sentencing Mr. Taylor to imprisonment, the court had substantial evidence he had no ability to pay. Imposing a term of imprisonment under these circumstances directly violated Article II, Section 12, of the Colorado Constitution.

IV. The court violated Mr. Taylor's right to counsel.

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. "Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the defendant are secured. Without counsel, the right to a trial itself would be 'of little avail ....'" *United States v. Cronic*, 466 U.S. 648, 653(1984) (footnote omitted). As the United States Supreme Court held in *United States v. Powell*, 287 U.S. 45, 68-69 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad.... Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

(Quoted in *Cronic*, 466 U.S. at 653 n.8.) It is for these reasons the Supreme Court has recognized that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *Cronic*, 466 U.S. at 654 (footnote and internal quotations omitted).

C.R.C.P. 107(d)(1) provides that the defendant charged with punitive contempt "shall be advised of the right to be represented by an attorney and, if indigent and if a jail sentence is contemplated, the court will appoint counsel." Since the court in the case at

bar intended to imprison Mr. Taylor for failure to pay court costs, it was required to appoint a lawyer to represent him.

On February 25, 2015, the court rotely notified Mr. Taylor, "You have the right to be represented by an attorney and if you're indigent, I would appoint an attorney to represent you." EXHIBIT 11, at 3. The court did not explain that Mr. Taylor was entitled to an attorney not only to represent him at any trial on the contempt charge but also to advise him and to represent him in pretrial proceedings, including in any proceeding in which he was offered a plea bargain. *See Iowa v. Tovar*, 541 U.S. 77, 87 (2004) ("A plea hearing qualifies as a 'critical stage'" of the criminal process where the Sixth Amendment right to counsel attaches). The court failed to advise Mr. Taylor "of his right to be counseled regarding his plea." *Id.* at 81. The court did not inquire whether he understood his right to counsel. And the court failed to determine whether he was waiving his right to counsel. *See id.* at 88 ("[A] waiver of counsel [is] intelligent when the defendant knows what he is doing and his choice is made with eyes open.") (internal quotation marks omitted).

In fact, Mr. Taylor did not understand his right to counsel. He believed the right to counsel extended only to the trial of the contempt charge. EXHIBIT 1 ¶ 6. He did not know—and the court's rote advisal failed to explain—that he was entitled under *Tovar* to have a lawyer advise him about the elements of contempt and the evidence supporting conviction—or the lack of such evidence—before entering into a plea bargain and pleading guilty to contempt. *See id.*

Without a proper advisement on his right to counsel, Mr. Taylor could not have knowingly, voluntarily and intelligently waived his right to counsel before pleading guilty. The violation of his right to counsel exacerbated the court's violation of section 18-1.3-702 and his right to due process. As the United States Supreme Court held in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), when a defendant faces the risk of incarceration in contempt proceedings for nonpayment of court-ordered monetary amounts and she is not afforded counsel, the court must provide her with procedural safeguards. These include giving the defendant notice that ability to pay "is a critical issue in the contempt proceeding," an opportunity for her to respond to statements and questions about her financial status, and "an express finding by the court that the defendant has the ability to pay." 131 S. Ct. at 2519. Where as here the court does not provide counsel (or does not

secure a constitutional waiver of the right to counsel) and also fails to provide the procedural safeguards, it violates due process by finding the defendant in contempt and incarcerating the defendant.

V. The court violated Mr. Taylor's right to fundamental fairness and Colorado law by engaging in plea discussions and by inducing him to plead guilty to criminal contempt of court.

A municipal judge has the authority to find a litigant in contempt of court. *Tipton v. City of Lakewood,* 198 Colo. 18, 20, 595 P.2d 689, 691 (1979); *Thrap v. People*, 192 Colo. 341, 343, 558 P.2d 576, 578 (1977). The source of this authority is not the municipality or its laws but the judicial authority conferred upon the municipal judge in section 13-10-112, C.R.S. (2014), by the state legislature. *See Tipton,* 198 Colo. at 20, 595 P.2d at 691; *Thrap*, 192 Colo. at 343, 558 P.2d at 578.

Accordingly, when a municipal judge presides over contempt proceedings, he must comply with the Code of Criminal Procedure, i.e., Title 16 of the Colorado Revised Statutes, the Colorado Rules of Criminal Procedure, and the rules governing contempt proceedings, *see* § 18-1.3-702(3)(b) ("[w]hen instituting contempt of court proceedings, the court, *including a municipal court*, shall provide all procedural protections mandated in" C.R.C.P. 107 or Colorado Rule of County Court Civil Procedure 407[5]) (emphasis supplied).

In criminal cases the judge plays an essential role to ensure the impartial and objective administration of justice. *Crumb v. People,* 230 P.3d 726, 731 (Colo. 2010). When a judge becomes involved in plea discussions, thereby bringing to the discussions "the full force of the judicial office," she is "no longer a judicial officer or a neutral arbiter." *Id.* Judicial participation "transforms the judge from a neutral arbiter to an advocate for the resolution the judge has suggested to the defendant. *Id.* "Because of the disparity in power between the defendant and the judge, judicial participation in plea negotiations undermines the fundamental fairness of the proceedings." *Id.* For these reasons, the Colorado Supreme Court more than 40 years ago emphasized that judicial participation in

[5]Because C.R.C.P. 107 and County Rule 407 are identical, we refer to them collectively as "C.R.C.P. 107."

plea discussions is forbidden: "In our view, participation by the trial judge in the plea bargaining process must be condemned." *People v. Clark*, 183 Colo. 201, 204, 515 P.2d 1242, 1243 (1973).

"Numerous jurisdictions," the supreme court said, "have ruled that a judge cannot take certain actions, such as threaten a defendant with a more severe sentence if the defendant refuses to plead guilty, make a tacit offer of leniency, even if that offer is accompanied by caveats, compare the potential consequences of pleading guilty versus going to trial, or become a legal advisor to the defendant, [*United States v. Cano-Varela*, 497 F.3d 1122, 1134 (10th Cir. 2007)]; *see also United States v. Bradley*, 455 F.3d 453, 462 (4th Cir. 2006) (finding error where the trial court, among other comments, advised the defendants they might 'be better off pleading to the indictment')." *Crumb*, 230 P.3d at 731 (selective citations omitted); *see id.* ("The judge should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered. The rationale supporting this rule is that it protects the constitutional presumption of innocence, and avoids placing judicial pressure on the defendant to compromise his or her rights.") (internal quotations, citation and emphasis omitted).

The Colorado General Assembly and the supreme court have codified the proscription. Section 16-7-302(1), C.R.S. (2014), provides, "The trial judge shall not participate in plea discussions." Colorado Rule of Criminal Procedure 11(f)(4) provides, "The trial judge shall not participate in plea discussions." A claim that the trial judge violated section 16-7-302(1) and Crim. P. 11(f)(4) is properly raised in a postconviction motion under C.M.C.R. 235(c). *See People v. Kirk*, 221 P.3d 63, 64-65 (Colo. Ct. App. 2009).

Separate and apart from section 16-7-302 and Crim. P. 11's proscriptions against judicial participation in plea discussions, "[d]ue process of law requires that in order to provide the basis for a judgment of conviction, a guilty plea must be made voluntarily." *Lacy*, 775 P.2d at 4. To that end, C.M.C.R. 211(b)(2) requires courts to reject a plea of guilty unless that court has determined "[t]hat the plea is voluntary and is not the result of undue influence or coercion on the part of anyone." *Accord* Crim. P. 11(b)(2). When a judge offers leniency in sentencing if the defendant pleads guilty, that judge is unconstitutionally exercising "undue influence" on and coercing the defendant to plead

guilty rather than go to trial. *See Crumb*, 230 P.3d at 731; *see also United States v. Baker*, 489 F.3d 366, 376 (D.C. Cir. 2007) (noting that Rule 11's "strict prohibition exists because judicial participation in plea discussions is inherently coercive").

At Mr. Taylor's advisement hearing on the contempt citation, the court engaged in direct plea negotiations with him. After advising Mr. Taylor that "it has been made to appear to the Court that you failed to pay ... costs as previously ordered," the court then said:

> *So here's how it works, Mr. Taylor. I give you the chance if you want to do a little bit of jail, to do a little bit of jail and take care of the fine, so if you admit you didn't pay your fine yet had the ability to pay the fine, I would give you three days in jail* or the other thing you can do is have a hearing on this issue and the hearing would be set out about 60 days and between then and now I'd put you on a payment plan, but *I will tell you a lot of guys, when it's only three days, a lot of guys are just doing it* and I'd give you credit from yesterday so you've got two more days to do ....

EXHIBIT 11, at 3 (emphasis supplied).

The "disparity in power between the defendant and the judge," *Crumb,* 230 P.3d at 731, was particularly stark in the case at bar: Mr. Taylor, who had disclosed to the court his "severe schizophrenia" and impoverishment, already had been arrested and was incarcerated before the hearing and appeared *pro se* before the court. It was clear he could not post a bond to be released from jail while awaiting a contempt trial. The court's suggestion to and inducement of Mr. Taylor to plead guilty to criminal contempt deprived him of fundamental fairness, violated the supreme court's admonition and section 16-7-302's and Crim. P. 11(f)(4)'s prohibition against a trial judge's participation in plea discussions. The court suggested that if Mr. Taylor pleaded guilty, it would impose a lenient sentence, three days in jail versus the maximum fifteen days in jail. It suggested that if Mr. Taylor insisted on a trial, he would have to wait 60 days without stating whether he would remain in jail until the trial. And the court suggested that it was common for contempt defendants to "just" plead guilty and serve the time because "it's only three days." But for the court's suggestion and inducement, Mr. Taylor would not have pleaded guilty to contempt. *See* EXHIBIT 1 ¶¶ 6-8.

Conclusion

The court should conduct a hearing under C.M.C.R. 235(c) if material facts are contested, and vacate Mr. Taylor's conviction for contempt.

August 25, 2015.

Respectfully submitted,

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Certificate of Service

I certify that on August 25, 2015, a copy of the foregoing *Mr. Taylor's Motion to Vacate Judgment of Conviction* was served *via* U.S. mail upon the following:

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Brenda Rodriguez