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April 29, 2008

The Honorable Andrew S. Armatas
1437 Bannock Street, Room 108
Denver, CO 80202
By email to aarmatas@ci.denver.co.us

The Honorable James B. Breese
1437 Bannock Street, Room 108
Denver, CO 80202
By email to james.breese@denvergov.org

Dear Judge Armatas and Judge Breese:

I write to follow up on our discussion at the meeting in Judge Armatas's chambers on April 15, 2008. At that meeting, I raised concerns about the potential problems that could be prompted by mass arrests of protesters and others during the Democratic National Convention ("DNC").

I explained that I understood that the Denver Police Department (DPD) was planning to make full custodial arrests, even for minor violations, instead of exercising the discretion accorded by Colorado law¹ and favored by Denver Police Department policy² to issue citations and notices to appear. Indeed, at a meeting about DNC-related issues last summer, Deputy Chief Battista described the current policy as follows: "For protests, we don't cite and release." The Police Department followed that policy a couple months later in October, 2007, when 80 persons protesting the Columbus Day parade were subjected to full custodial arrests. The policy is apparently new. Several years earlier, the Columbus Day protesters were cited and released (and they had appeared in court).

At the meeting, you confirmed my understanding that Denver law enforcement authorities were planning for potential mass arrests. You invited me to put some of the ACLU's concerns in writing. This letter is the result.

¹ See Colo. Rev. Stat. § 16-3-105(b) (officer has the discretion to ticket and release a person at any time when "[t]he offense for which the person was arrested and is being held is a misdemeanor or petty offense and the arresting officer or a responsible command officer of the arresting authority is satisfied that the person arrested will obey a summons commanding his appearance at a later date").

² Several DPD policies encourage officers to issue a citation or summons, instead of making a full custodial arrest, whenever possible. See DPD Operations and Procedures Manual ("OPM") Rule and Regulation 303 ("[o]fficers shall not make arrests for offenses when a warning or citation would suffice"); OPM § 104.23(1) ("[w]hen an arrest is made for a City Ordinance violation other than traffic and the situation does not merit jailing the violator, the officer may order the violator directly into court to answer the charges"); OPM § 104.01(10)(c) ("[f]or other minor misdemeanors, the officers should generally order-in rather than jail unless there is resistance or interference to the officer"). These policies are available online at: www.denvergov.org/Police/.

A. Denver Should Adopt of Policy Favoring “Cite and Release” Whenever Possible

As a threshold matter, during the DNC, Denver should adopt a policy that Denver officers, as well as officers recruited as reinforcements from other jurisdictions, should “cite and release” alleged violators whenever possible. If there is a legitimate law enforcement need to remove alleged violators from the immediate site, they could be transported to another location to be cited and released, without any need for a full custodial arrest.

If Denver elects to carry out full custodial arrests during the DNC and mass arrests take place, there is a tremendous potential for violations of arrestees’ constitutional and statutory rights. Indeed, such violations are a virtual certainty given the limitations of Denver’s staffing and physical infrastructure. My concerns are based on what criminal defense lawyers have explained to me about Denver’s limitations, as well as the experience of New York City during the 2004 Republican National Convention.

B. Mass Custodial Arrests at the 2004 Republican National Convention

During the 2004 Republican National Convention in New York City, more than 1800 persons were arrested, many of them caught up by police officers wielding lines of plastic netting to arrest entire crowds of people. Those arrests ensnared innocent bystanders, passers-by, legal observers, and media representatives as well as protesters suspected of violating the law. The sheer numbers of persons arrested overloaded the system. My counterparts at the New York Civil Liberties Union received numerous complaints regarding delays in processing, substandard conditions of confinement, and problems in gaining access to telephone, attorneys, and necessary medical care. These complaints are documented and described in a comprehensive report that is available on the internet.³

The New York fiasco prompted lawsuits⁴ --one of which is a class action filed on behalf of more than a thousand--in which multiple plaintiffs sought injunctive relief and monetary damages, not only for false arrest, but also for 1) overcrowding; 2) failure to provide adequate medical care and access to medication; 3) denial of communication with and access to attorneys; 4) failure to provide access to adequate food and water; 5) unsanitary conditions of confinement; 6) other unconstitutional conditions of confinement including lost property; 7) unreasonable and inordinate delays in releasing persons after processing was complete; and 8) the improper entry of fingerprints and other data in government databases.

If mass custodial arrests take place during the DNC, I understand that plans are already being formulated to process and house arrestees in the City and County Building instead of the City jail, the Pre-Arrestment Detention Facility (PADF). While I appreciate the City’s recognition that the PADF is not adequate for processing large numbers of DNC arrestees, the alternative plan nevertheless poses a substantial risk of widespread violations of the rights of arrestees. Without monumental changes in staffing and infrastructure, Denver’s attempt to arrest and

³ New York Civil Liberties Union, Rights and Wrongs at the RNC: A Special Report about Police and Protest at the Republican National Convention, available at <www.nyclu.org/pdfs/rnc_report_083005.pdf>.

⁴ *E.g. Shiller v. City of New York*, 04-Civ-7922 (S.D.N.Y.); *MacNamara v. City of New York*, 04-Civ-8216 (S.D.N.Y).

process large numbers of arrestees poses unacceptable risks to prisoners' health, safety, and to their statutory and constitutional rights as described below.

C. Transportation

The first problem is transport. Because the DNC will take place in August when temperatures frequently approach or exceed 100 degrees, transport vehicles need to be equipped with adequate air conditioning to ensure the health and safety of arrestees. Stuffing handcuffed and/or shackled prisoners into transport vehicles that bake in the hot sun is not only inhumane; it may pose an unjustifiable risk to the health and lives of medically vulnerable prisoners.

D. Attorney Access

As soon as a person is taken into custody, Colorado law mandates that the custodian allow the prisoner to consult with an attorney:

Any person committed, imprisoned, or arrested for any cause, whether or not such person is charged with an offense, shall be allowed to consult with an attorney-at-law of this state whom such person desires to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable.

Colo. Rev. Stat. § 16-3-403. In the usual case, prisoners do not have an attorney who wants to meet with them immediately, and indigent prisoners do not immediately have the right to a court-appointed attorney.

The DNC arrests, however, will not be the usual case. The People's Law Project and the National Lawyers Guild have been working for months to enlist hundreds of attorneys who are ready to volunteer to represent persons who may be arrested during the DNC.

Each of these attorneys will arrive at the City and County Building, demanding compliance with the statute quoted above, as well as the following:

All peace officers or persons having in custody any person committed, imprisoned, or arrested for any alleged cause shall *forthwith* admit any attorney-at-law in this state, upon the demand of the prisoner or of a friend, relative, spouse, or attorney of the prisoner, to see and consult the person so imprisoned, alone and in private, at the jail or other place of custody, if such person so imprisoned expressly consents to see or to consult with the attorney.

Colo. Rev. Stat. § 16-2-404(1) (emphasis added). The friends, relatives, spouses, and attorneys of any protesters arrested—and any bystanders, legal observers, and media representatives scooped up with them—will arrive at the City and County Building to insist that the custodians comply with the law. It is not clear how, if at all, the City will arrange unfettered access to counsel for hundreds of prisoners when if the City and County Building is converted into a detention and processing center. It seems likely that the City and County of Denver is simply not

equipped to handle this situation, and that it will not be possible to provide each attorney and each prisoner with the legally-required private place for consultation.

The Colorado statute requiring that attorneys be permitted to meet with prisoners also provides for a monetary penalty:

Any peace officer or person violating the duty imposed by this section or section 16-3-403 shall forfeit and pay not less than one hundred dollars nor more than one thousand dollars to the person imprisoned or to his attorney for the benefit of the person imprisoned, to be recovered in any court of competent jurisdiction.

Colo. Rev. Stat. § 16-3-404(2). If the current plans for mass arrests are carried out, Denver will surely be liable for multiple violations of this statute.

The prospect of mass arrests will also deprive prisoners of their right to communicate with attorneys and family members by telephone. The Colorado statute provides as follows:

Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or by communicating in any other reasonable manner. Such communication shall be permitted at the earliest possible time after arrival at the police station, sheriff's office, jail, or other like confinement facility to which such person is first taken after arrest.

Colo. Rev. Stat. § 16-3-402(1). In order to comply with the statutory mandate that prisoners promptly be permitted to communicate with an attorney and a family member, any plan for mass arrests requires that Denver install dozens, maybe hundreds, of additional telephones in the City and County Building.

In addition, the Sheriff's Department must revise its current policy of limiting telephone calls to collect calls. This policy prevents arrestees from making calls to cell phones, because cell phones cannot accept collect calls. Abandoning this policy is especially necessary in the case of the DNC, where many of the potential arrestees are likely to be out-of-town visitors. The persons they will need to call are likely to be other out-of-town visitors, who may be reachable only on their cell phones. Without a change in the "collect calls only" policy, large numbers of out-of-town arrestees will be at risk of being unreasonably prevented from contacting attorneys and family, in violation of the statute, and they will be unable to provide information about the arrest or the need for bail.

E. Conditions of Confinement

The plan for converting courtrooms to detention facilities requires planning for safe, humane, and sanitary conditions. Arrestees will require adequate food, water, bathrooms (including toilet paper and feminine hygiene products), clothing for those with missing or severely ripped or soiled clothing, and "slippers" for those missing footwear. In addition, if those arrested are

housed overnight, toothbrushes, toothpaste, and shower facilities will all be necessary in addition to beds and bedding.

Also, it is paramount that Denver provide adequate medical staff to handle physical injuries and mental health issues. Access to adequate medication is of course essential for the safety of the arrestees. Denver would need to evaluate arrestees for physical injuries, pre-existing health problems (diabetes, convulsive disorders, etc), medication needs, and mental illness, and arrange for appropriate care. Some arrestees will need prescription medications that are in the possession of family members who were not arrested. Denver will have to arrange a system to receive the medications from family members and then deliver them to the appropriate prisoner. Failure to deliver appropriate and necessary medications could result in serious deterioration and damage to a prisoner's health.

F. Processing and Length of Detention

Without major changes in procedures and increases in staffing and infrastructure, the processing of persons arrested *en masse* will result in unconstitutional delays and protracted detentions. The potential for delay arises in a number of different "steps" in the arrest process.

First, the City would have to ensure adequate personnel and equipment so hundreds of people could be efficiently fingerprinted, their "mug shots" taken, property secured, their presence in the facility documented, and the amount of the bond from the bond schedule entered into the computer. If the city intends to run NCIC background checks for each arrestee, it would require significant numbers of computer terminals and operators to handle the task. At a minimum, the City would have to ensure that it takes no more than an hour or two for any processing prior to allowing an arrestee to post his or her bond.

Second, a major change in the system would be necessary in order to provide arrestees with their right to a prompt release once their bond has been posted. This will require staff to process bond paper work, update computers, convert cash in prisoners' property to checks, process the "book-in" fee, and return property to people as they leave the facility.

The current system already deprives arrestees of their right to a prompt release after posting bail. When only eighty persons were arrested for protesting the Columbus Day parade in 2007, arrestees waited six, eight, ten, even twelve hours to be released on bail, even after their bond money had been accepted and posted.⁵ Indeed, the Sheriff's Department proved itself unable to comply with its own policy that requires release within three hours for arrestees who can pay their own bond.⁶ Denver cannot process a mere eighty arrestees without inordinate delays in release that that may amount to false imprisonment and violations of constitutional rights. Without a major increase in staffing and a streamlining of the procedures, Denver's plan for mass arrests is a recipe for compounding these violations of rights on an exponential scale.

⁵ These inordinate delays in releasing the Columbus Day arrestees, even after they had posted bail, prompted 41 arrestees to file a Notice of Claim, pursuant to Colo. Rev. Stat. § 24-10-109, with the City Attorney's Office. The claim was also made on behalf of a class of all others similarly situated.

⁶ The Denver Sheriff's Office's manual for the PADF, in Section 934, states that "no one will be held more than three (3) hours after all charges have been satisfied via bond."

Third, arrestees who cannot, or refuse to, post bond would need to be transported to courtrooms without undue delay for arraignment on charges and for a finding of probable cause. This would require an enormous expenditure of human resources, including deputies (to transport people within the building) and court staff to process paperwork, create files, and to schedule future court dates.

The ACLU believes that in the case of minor violations, the Denver Police Department should issue a summons or citation instead of carrying out full custodial arrests. By unnecessarily making full custodial arrests on a mass basis, the Denver Police Department will overtax the ability of the Sheriff's Department and the courts to handle the influx of arrestees. The inevitable result will be violations of statutory and constitutional rights, while subjecting medically vulnerable arrestees to potentially serious risks to their health and even their lives.

The ACLU urges the judges of the Denver County Court to do what they can to make other Denver agencies aware of the potential consequences of the "no cite and release" policy that the Denver Police Department apparently intends to pursue during the Democratic National Convention.

Sincerely,

A handwritten signature in cursive script that reads "Mark Silverstein".

Mark Silverstein
Legal Director, ACLU of Colorado

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