SOUTHERN CENTER FOR HUMAN RIGHTS

83 Poplar Street NW
Atlanta, GA 30303
Ph: 404.688.1202
F: 404.688.9440

BY U.S. MAIL & EMAIL

November 22, 2019

Mayor Edward Terry
1055 Rowland Street
Clarkston, Georgia 30021
ted@cityofclarkston.com

Stephen Quinn
Clarkston City Attorney
125 Clairemont Avenue Suite 420
Decatur, GA 30030
squinn@wmdlegal.com

The Honorable David C. Will
Clarkston Municipal Court
3921 Church St.
Clarkston, GA 30021
dwill@royallaw.net

Re: Unlawful Practices in the Clarkston Municipal Court

Dear Mayor Terry, Mr. Quinn, and Judge Will:

We write to raise concerns about practices in the Clarkston Municipal Court that violate the United States Constitution, Georgia Constitution, Georgia Code, and Uniform Municipal Court Rules. Specifically, our observations of the Municipal Court over the past year show that the Court: (1) fails frequently to inquire into people's ability to pay before imposing large fines; (2) fails to provide adequate interpretive services; (3) imposes pay-or-jail sentences on indigent defendants; and (4) deprives people of "good time" credit in violation of law.

Clarkston represents itself as a city that welcomes refugees and immigrants, and indeed immigrants make up 52.9% of the city's population.[1] Unfortunately, the court practices described in this letter disproportionately affect and penalize Clarkston's immigrant population. We ask you to take immediate steps to remedy the deficiencies identified below for the benefit of Clarkston's immigrant population and all of Clarkston's citizens.

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[1] City of Clarkston Website, www.clarkstonga.gov/interesting-facts (last visited Nov. 12, 2019).

I. The Court Routinely Fails to Inquire into Defendants' Ability to Pay Before Imposing Large Financial Obligations at Sentencing.

Under Georgia law, the sentencing court "*shall* waive, modify, or convert" fines, surcharges, and probation fees if a person has a "significant financial hardship or inability to pay." *See* O.C.G.A. § 42-8-102(e)(2) (emphasis added). This statutory requirement necessarily compels the sentencing court to inquire into a person's ability to pay a fine before sentencing. *See id*. Especially in a city like Clarkston, where 33% of city residents live below the poverty line, it is imperative that the Municipal Court employ some mechanism—such as distribution and consideration of a financial affidavit—to determine whether a particular defendant has a significant financial hardship.

Since at least June 2018, the Municipal Court has routinely failed to comply with O.C.G.A. § 42-8-102(e)(2). Specifically, we have observed many cases in which the Court did not inquire into a defendant's ability to pay and imposed a large fine, despite clear signs (or even express knowledge) that the defendant was homeless and/or indigent. [2]

With an understanding that some individuals appearing before the Court may be homeless, jobless, underemployed, or relying on government assistance as their sole source of income, the Court should inquire into whether such individuals can pay the assessed fines and fees or whether they have "significant financial hardship." *See id*. More specifically, the Court should give defendants a financial affidavit to fill out prior to sentencings, and then conduct ability-to-pay determinations *on the record* and *prior* to sentencing.[3]

II. The Court Fails To Provide Adequate Interpreter Services For Non-English Speaking Defendants.

Clarkston has welcomed over 40,000 refugees in the past 25 years from countries all over the world. Some of Clarkston's refugees have little to no English proficiency. As such, the Court must take steps to ensure that all persons appearing before it can understand and meaningfully participate in the legal process.

[2] In a number of court sessions since June 2018, we have seen the Court send defendants to speak to the solicitor when they indicate they are unable to pay. This practice—which has occurred even when the public defender is in the room—is inappropriate and should be stopped.

[3] When sentencing defendants to pay their fines through probation, the Court describes probation in a misleading fashion as a "payment plan" or "paybation." The Court also routinely fails to distinguish in its pronouncement of sentence between a regular probated sentence and pay-only probation. Consequently, some people who receive probation sentences may not understand that they are not merely on a payment plan; rather, they are required to abide by a long list of probation conditions, or face jail. We question as an initial matter the practice of putting indigent people on probation—with its additional costs, numerous requirements, and prospect of jail for noncompliance—only because they cannot pay a fine. At the very least however, the Court should provide people with clear notice, from the bench and in writing, of the terms of their sentences.

Georgia Municipal Court Rules require access to an interpreter "whenever it becomes apparent from the court's own observations . . . that a participant in a proceeding is unable to hear, speak, or otherwise communicate in the English language to the extent reasonably necessary to meaningfully participate in the proceeding." Ga. Unif. Mun. Ct. R. 14(d). The Rules further caution judges against using unlicensed language interpreters unless "immediacy is a primary concern." Ga. Unif. Mun Ct. R. 14(c).[4]

Furthermore, the Georgia Supreme Court has stated as follows:

> [I]t is an abuse of discretion to appoint someone to serve as interpreter who is neither certified nor registered as an interpreter without ensuring that the person appointed is qualified to serve as an interpreter, without apprising the appointee of the role s/he is to play, without verifying the appointee's understanding of the role, and without having the appointee agree in writing to comply with the interpreters' code of professional responsibility.

Ramos v. Terry, 279 Ga. 889, 893 (2005).

The Clarkston Municipal Court fails to comply with the Rule 14 and Georgia law. Over the last 15 months, we have observed the Court regularly permitting unqualified individuals to act as interpreters without first weighing the need for immediacy in conducting a hearing. Instead of receiving a qualified interpreter, people with limited English proficiency often receive help from family members or courtroom witnesses who happen to be in attendance; or, they are forced to proceed without an interpreter.

The Court's failure to provide adequate interpreters deprives many individuals appearing before the Court of the ability to understand and participate in the criminal proceeding against them. This is evident in the following two examples:

- On June 12, 2019, **G. M.[5]** appeared before the Court on a charge of making an improper left or right turn. The Court found that Mr. M needed a Nepali interpreter and was not "fully comprehending" the consequences of a guilty plea. Instead of

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[4] *See also* Attachment A, Appendix A, (II), *Supreme Court of Georgia Rules on Use of Interpreters for Non-English Speaking and Hearing-Impaired Persons* (stating that "[t]he fact that a person for whom English is a second language knows *some English* should not prohibit that individual from being allowed to have an interpreter.") (emphasis added).

In 2012, the American Bar Association (ABA) passed *The Standards for Language Access in Courts* (the *Standards*) to remedy access to justice issues for people with limited English proficiency. (*See* Attachment B.) The *Standards* suggest that courts establish a process that places an affirmative duty on judges and court personnel to provide language access services if they or the finder of fact *may not be unable to understand a person or if it appears that the person is not fluent in English.* (Attachment B, Standard 3.3.)

[5] In this letter, we identify people with their initials to protect confidentiality. We can provide full names and court files to city and court officials upon request.

continuing the proceedings until a qualified interpreter could be employed, the Court asked the public defender (Mr. Frank Gaither)—who presumably does not speak Nepali—to speak with Mr. M. After attempting to speak with Mr. M, the public defender determined that Mr. M needed an interpreter and reported such to the Court. The Court nevertheless proceeded with the case and instructed the public defender to ask Mr. M if he could pay his fine that day. Mr. M thereafter pled guilty and paid his $153 fine (including $35 in monthly supervision fees) without being provided with an interpreter.

- On October 3, 2018, **K. A.**, a 27-year-old West-African Georgia State University computer science student, appeared before the Court on charges of driving with a suspended license, failing to yield, and removing/affixing tag with intent to conceal. Mr. A's primary languages are Ewe and French. During Mr. A's trial, Mr. Gaither told the Court that he could not understand Mr. A. At one point, Mr. Gaither asked the Court if Mr. A could cross examine the witness in his place, apparently because he could not understand Mr. A's directions regarding the witness. The Court was aware that English was not Mr. A's first language, and it also struggled to communicate with Mr. A. The Court nevertheless did not make a language proficiency determination and did not require use of a qualified interpreter. Instead, the Court proceeded with the trial and sentenced Mr. A to serve 6 months in jail. Mr. A served his sentence and was released on March 31, 2019.

A recent report from the Institute for Justice echoes our observations regarding the Court's failure to provide adequate interpreter services. *See* Attachment C, Dick M. Carpenter II, Ph.D., Kyle Sweetland, and Jennifer McDonald, *The Price of Taxation by Citation,* at 25 *(Oct. 24, 2019),* https://ij.org/wp-content/uploads/2019/10/Taxation-by-Citation-FINAL-USE.pdf (last visited Nov. 12, 2019) ("During our observation in Clarkston . . . a couple of defendants seemed to have trouble understanding procedures due to a language barrier."). The report noted that when a translator was needed, the Court only provided one 25% of the time. *See id.* at 24.

Clarkston Municipal Court must stop using uncertified and unregistered interpreters during plea bargaining and trial. The Court should instead provide certified and registered interpreters who are fluent in languages widely spoken in Clarkston, including but not limited to:

- Amharic
- Arabic
- Burmese
- Dinka
- Karen
- Nepali
- Somali
- Swahili
- Tigrinya

See also Attachment D, Clarkston Speaks, Fall 2016 Report (discussing the lingual diversity of Clarkston). If a person falls within the ambit of Rule 14 and a certified and

registered interpreter is not immediately available, the Court must continue the proceedings until an appropriate interpreter can be found. *See Ramos*, 279 Ga. at 892; Ga. Unif. Mun Ct. R. 14(c).

Finally, providing plea forms in languages other than English and Spanish is necessary. Failure to do so is ill-advised in a city in which 60 different languages and dialects are spoken in 1.1 square miles and where Spanish is not a primary or secondary city language. *See* City of Clarkston Website, www.clarkstonga.gov/interesting-facts (last visited Nov. 12, 2019); *see also* Attachment E, U.S. Census Bureau Report (2018 Census Report showing Spanish spoken by only about 5% of Clarkston's residents age 5 and above).

III. The Court Imposes Unconstitutional Pay-Or-Jail Sentences on Indigent Defendants And Fails To Use Or Consider Alternatives To Confinement During Probation Revocation Hearings.

Courts may not incarcerate indigent people for their failure to pay fines unless there is an express finding that the failure to pay was willful. *See Bearden v. Georgia*, 461 U.S. 660, 668 (1983). Georgia law further requires courts to consider alternatives to incarceration for people facing probation revocation who allegedly fail to pay fines and/or fail to report to probation. O.C.G.A. § 42-8-102(f)(4) (listing alternatives to confinement). It is only if an alternative to confinement is not warranted that "the court may revoke the balance of probation or [sentence the defendant to serve a] period not to exceed 120 days in confinement, whichever is less." *Id.*

Despite clear legal precedent, the Municipal Court routinely revokes indigent defendants' probation without first considering alternatives to confinement. And, in some cases, it conditions their release on their ability to pay money.[6] Below are two examples of these practices:

- On September 5, 2018, **B. S.**, a homeless man diagnosed with schizophrenia, went before the Court for a probation revocation hearing. His underlying convictions were for loitering and giving a false name. Mr. S was facing revocation because of court debt and for previously failing to appear, and he was not represented by counsel. Mr. S told the Court that he was homeless, that his sole source of income was social security disability benefits, and that he could not afford to pay his fines. The Court revoked

[6] Pay-or-jail sentences are illegal when imposed on people who cannot afford to pay. *See Frazier v. Jordan*, 457 F.2d 726 (5th Cir. 1972) (finding that an alternative sentencing scheme of $17 dollars or 13 days in jail was unconstitutional as applied to those who could not immediately afford the fine). Decisions of the former Fifth Circuit issued before October 1, 1981 are binding on this Circuit. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

Mr. S.'s probation and sentenced him to serve 60 days in jail; alternatively, the Court told Mr. S that if he could pay his $1,500 fine before the 60-day sentence concluded, he be released early. Mr. S served 45 days in jail and was released for "time served" on October 20, 2018.

- On February 25, 2019, **D. A.** appeared before the Court after having been arrested on a probation violation on February 20, 2019. The underlying conviction was for driving on a suspended license. Mr. A was allegedly in arrears on his probation payments and had allegedly failed to report to probation. Mr. A was not represented by counsel. The Court told Mr. A he could either serve 60 days in jail or pay $1,520. Specifically, the Court said he, "could be released [early] from jail upon payment of his $1,520 fine." Mr. A told the Court that he did not have the money to pay his fine and had a child on the way. The Court revoked Mr. A's probation and sentenced him to serve 60 days in jail. Mr. A served his sentence day-for-day and was released April 15, 2019.

We urge the Court to refrain from imposing unconstitutional pay-or-jail sentences. We further urge the Court to consider alternatives to confinement in revocation proceedings, especially in circumstances where defendants are unemployed, underemployed, or are homeless.

IV. The Court Orders Defendants' Good Time Service Be Withheld, in Violation of Georgia Law.

Georgia law is clear: the ability to deny a defendant's good time credits lies with the custodian of inmates. O.C.G.A. § 42-4-7(b).

Trial courts are without jurisdiction to usurp this function from the custodian. *See Evans v. State*, 349 Ga. App. 712, 715 (2019) (reversing a trial court's ruling prohibiting good time credit and stating that "[t]he trial court's requirement that [defendant] serve his 24-month sentence 'day-for-day' is erroneous because it usurps the authority of the custodian of a county inmate under O.C.G.A. § 42-4-7(b).").[7]

In our review of court files since June 2018, our office has noted several instances where the Court has denied good time credit to individuals. Here are two examples:

- On February 25, 2019, **D. A.** appeared before the Court for a probation revocation hearing, during which the Court sentenced him to serve 60 days in jail. In violation of Georgia law, the Court also noted on Mr. A's disposition form that he "is to serve 55 days. *No good time credit*." (Attachment F.)

[7] *See also Davis v. State*, 181 Ga. App. 498, 498 (1987); *In re Irvin,* 254 Ga. 251, 253 (1985) ("[T]he sheriff, and not the superior court, is charged with administering the jail.").

- On February 25, 2019, **T. C.** pled guilty to theft by shoplifting. The Court sentenced Mr. C to serve 10 days in jail. The Court noted on Mr. C's disposition form: "*No good time credit*." (Attachment G.)

The Court must refrain from making such orders in the future. It further should review its records to identify other instances in which it forbade good time and correct any such orders that may be found.

Conclusion

We appreciate your attention and welcome the chance to work with you to resolve these issues.

Please respond by December 13, 2019 with a description of your plans to address the issues listed above. Thank you, and we look forward to hearing from you.

Sincerely,

/s/ Ebony Brown
Ebony Brown
Attorney, Southern Center for Human Rights

/s/ Atteeyah Hollie
Atteeyah Hollie
Senior Attorney, Southern Center for Human Rights

/Enclosures

CC: Yterenickia "YT" Bell, *Clarkston City Council Member*,YTBell@cityofclarkston.com
Jamie Carroll, *Clarkston City Council Member*, jcarroll@cityofclarkston.com
Andrea Cervone, *Clarkston City Council Member*, andrea@cityofclarkston.com
Awet Eyasu, *Clarkston City Council Member*, aeyasu@cityofclarkston.com
Ahmed Hassan, *Clarkston City Council Member*, ahassan@cityofclarkston.com
Mario Williams, *Clarkston City Council Member*, mwilliams@cityofclarkston.com