IN THE SUPREME COURT OF FLORIDA

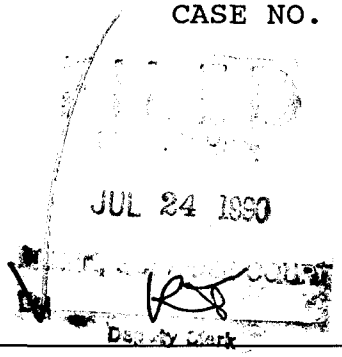
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Petitioners,

vs. CASE NO. 75,553

LUISA SOLIS,

Respondent.
_____/



RESPONDENT'S ANSWER BRIEF

On Certified Question from the
District Court of Appeal, Third District

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF THE CASE AND FACTS

Ms. Solis and her children entered this country without inspection, filed applications for political asylum and received work authorizations. R. 9. The grant of work authorization indicates that their asylum requests are not frivolous. 8 C.F.R. §208.4. Ms. Solis has worked and attempted to support her family during their residence in this country. R. 20-21, 96. The Solis family applied for Aid to Families with Dependant Children (AFDC) and Medicaid. They were approved for Medicaid but denied AFDC benefits. R. 10.

Immigration and Nationalization Service (INS) policy permits asylum applicants to remain here pending final disposition of their asylum requests. Indeed, the Request for Asylum, INS Form I-589, Para. 4, specifically informs applicants, "You may remain in the United States until a final decision is made on your case..." (Respondent's Appendix 1); See also 8 C.F.R. §208.8(f)(4). Thus far, the Solis family has resided in this country unmolested for five years.

After this appeal was filed, Petitioner (HRS) submitted a G-845 form to INS requesting information regarding Ms. Solis' immigration status. This form must be submitted with detailed information regarding the alien so that INS can make an accurate case-by-case determination. Petitioner's Initial Brief, App. 6. Nevertheless, HRS did not inform INS that Ms. Solis is married to a lawful permanent resident who has filed an alien relative petition on her behalf. Opposition of United States to Respondent's Motion to Strike at 14, n.6. It also appears that INS was

not provided with information reflecting the Solis family's grant of work authorization and pending request for political asylum. Petitioner's Initial Brief, App. 10.

A. LEGISLATIVE HISTORY

The term "permanently residing in the United States under color of law" [PRUCOL] is contained as an eligibility requirement in the Florida statutes governing AFDC, Medicaid, and unemployment compensation. §§ 409.026, 443.101(7), Fla. Stat. Federal statutes also require PRUCOL status for receipt of AFDC, Medicaid, Supplemental Security Income (SSI), and unemployment compensation. 26 U.S.C. §3304(a)(14)(A); 42 U.S.C. §602(a)(33); 42 U.S.C. §1381; 42 U.S.C. §1396; 20 C.F.R. §416.1618; 42 C.F.R. §435.402; 45 C.F.R. §233.50.

Respondent has found no legislative history regarding Florida's statutory PRUCOL requirements. However, federal legislative history reflects the congressional intent that PRUCOL be "broadly" interpreted. H.R. REP. NO. 727, 99th Cong., 2nd. Sess. 111 (1986), reprinted in 1986 U.S. CONG. & ADMIN. NEWS, 3607, 3700-01.

PRUCOL requirements first appeared in 1972 as a limitation on SSI eligibility. 42 U.S.C. §1382c(a)(1)(B). As originally proposed in the House, the SSI program was to be restricted to citizens and legal permanent residents. H.R. REP. NO. 231, 92d Cong., 1st Sess. 5322 (1971). Significantly, the senators from Florida opposed this restriction arguing that this State would be burdened with the sole support of indigents who reside here as a

result of federal immigration policies. 118 CONG. REC. S33,959 (daily ed. Oct. 5, 1972) (statements of Senators Chiles and Gurney). The Florida senators proposed amendments which eventually evolved into the current PRUCOL provision of the SSI statute. These amendments were "designed to prevent a great and unintended economic hardship being placed upon...Florida." Id.

Congress has refused to limit the broad construction of PRUCOL. In 1985, Congress refused to pass legislation which would have limited PRUCOL eligibility to a few classifications of aliens. H.R. REP. NO. 3810, 99th Cong., 1st Sess. 121(c) (1985). The next year, Congress rejected efforts to insert a restrictive PRUCOL definition into the Immigration Reform and Control Act of 1986 [IRCA]. Compare H.R. 3810, 99th Cong., 1st Sess. §121(c) (1985) to H.R. 3810, 99th Cong., 2d Sess. §121(c) (1986); see also Rubin, Walking a Gray Line: The "Color of Law" Test Governing Noncitizen Eligibility for Public Benefits, 24 San Diego L.Rev. 411, 422 (1987); Calvo, Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs, 16 N.Y.U. Rev. L. & Soc. Change 395, 412 (1987-88); and Addendum to Brief for the United States of America as Amicus Curiae at 1a.

In 1986, after refusing to restrict PRUCOL in IRCA, Congress finally provided a definitive interpretation of that term. Congress admonished the Secretary and the States to "broadly interpret" PRUCOL to include all aliens residing in this country pursuant to immigration law, policy, or practice. H.R. 727, 99th

Cong., 2d Sess. 111 (1986). This statement is the most recent and clearest indication of legislative intent.

SUMMARY OF THE ARGUMENT

An alien applicant for Aid to Families with Dependent Children [AFDC] in Florida must be "permanently residing in the United States under color of law." §409.026. Asylum applicants meet this standard because immigration policy prohibits their deportation during the adjudication of their asylum claims. 8 C.F.R. §208.8 (f)(4). They reside in this country pursuant to immigration law, policy, or practice.

The court below, relying on its decision in Alfred v. Florida Dep't of Labor and Employment Security, 487 So.2d 355 (Fla. 3d DCA 1986), and the Second Circuit's decision in Holley v. Lavine, 553 F. 2d 845 (2d. Cir. 1977), cert denied sub nom. Shang v. Holley, 435 U.S. 947 (1978), correctly holds that Ms. Solis and her children satisfy the PRUCOL requirements of §409.026(1), Fla. Stat. They reside in this country "with government knowledge and approval ... until changed by other official INS action." Alfred, 487 So. 2d at 357. Thus, the family's "eligibility [for PRUCOL] must be presumed to continue until their status is changed by affirmative INS action." Id. at 359.

The court below correctly declines to follow Sudomir v. McMahon, 767 F.2d 1456, 1461 (9th Cir. 1985). In a 2-1 decision, the divided Sudomir court holds that PRUCOL requires an official determination or authorization from the Immigration and Naturalization Service (INS) stating that the alien is legitimately present

for an indefinite period of time. This minority view conflicts with congressional intent and the agencies' own regulations interpreting PRUCOL.

The majority view expressed by the legislative history, courts, and commentators, is that all aliens residing in this country pursuant to immigration law, policy, or practice are PRUCOL for receipt of public benefits. Asylum applicants meet this standard. This Court should reject Sudomir and follow the line of cases beginning with Holley.

This Court should hold that the same standard for determining PRUCOL eligibility should be applied in the AFDC program as it is for Medicaid and unemployment compensation in Florida. That standard is: on all the facts and circumstances in the particular case, it appears that INS is otherwise permitting the alien to reside in the United States indefinitely. Under this standard, Ms. Solis was found eligible for Medicaid and is likewise eligible for AFDC as a PRUCOL alien. Ms. Solis and her children are permanently residing in the United States under color of law and are eligible for AFDC.

ARGUMENT

This country's immigration policy is in a constant state of flux, and it is not possible to predict whether the Solis family, or any other asylum applicant, will ultimately be allowed to remain here.[1] However, this is not the issue in this case because the

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[1]As the United States Supreme Court states:

PRUCOL determination cannot be "based on the likelihood of ultimate favorable action by the INS." Rubin, supra, at 446. The issue is whether these asylum applicants, who reside here for extended periods with the knowledge and permission of INS, are permanently residing under color of law [PRUCOL].[2]

I. ALIENS RESIDING IN THIS COUNTY PENDING AN APPLICATION FOR POLITICAL ASYLUM ARE ELIGIBLE FOR AFDC AS "PERMANENTLY RESIDING IN THE UNITED STATES UNDER COLOR OF LAW"

An alien is PRUCOL when "residency is with government knowledge and approval and is 'permanent' until changed by other official INS action." Alfred, 487 So. 2d at 357. Asylum applicants meet this standard. They reside in this country under an INS policy which prohibits their deportation pending adjudication of their asylum claims. See INS Form I-589, Para. 4 (App. 1); 8 C.F.R. §208.8 (f)(4). They reside in this country pursuant to immigration law, policy, or practice and are PRUCOL. H.R. 727, 99th Cong., 2d Sess. 111 (1986).

> [T]here is no assurance that a child subject to deportation will ever be deported....In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.

Plyler v. Doe, 475 U.S. 202, 226 (1982).

[2]The related public policy issue is which governmental entity should bear the costs associated with these aliens' presence in this country. This policy issue is addressed in the amici' briefs.

Many courts addressing this issue have broken the PRUCOL requirement into its component parts. These courts have subjected the alien to two tests: He must reside in this country "under color of law" and he must reside here "permanently." These two tests will be addressed separately.

A. ASYLUM APPLICANTS RESIDE IN THIS COUNTRY "UNDER COLOR OF LAW"

The first, and most frequently cited federal court case interpreting PRUCOL is Holley v. Lavine, 553 F.2d 845 (1st Cir. 1977). The court states:

> 'Under color of law' means that which an official does by virtue of power, as well as what he does by virtue of right. The phrase encircles the law, its shadows, and its penumbra....There is no more common instance of action 'under color of law' than the determination of an official charged with enforcement of the law that he, as a matter of public policy, will exercise his discretion not to enforce the letter of a statute....

Id. at 849-850.

Here, INS in its discretion, declines to strictly enforce the immigration law and permits asylum applicants to remain in the country pending resolution of their claims. Thus, they reside here "under color of law."

Indeed, Sudomir, 767 F.2d 1456, cited by HRS, specifically holds that "[a]sylum applicants...reside in the United States 'under color of law'...." Id. at 1461. See also Berger v. Heckler, 771 F. 2d 1556, 1571 (2nd Cir. 1985); Gillar v.Employment Division, 717 P.2d 131, 136 (Or. 1986); Cruz v. Commissioner of Public Welfare, 478 N.E. 2d 1262 (Mass. 1985); Vespremi v. Giles,

427 N.E.2d 30,31 (Ohio App. 1980). The United States (HHS) cites no authority for its argument that "under color of law" requires "at least some official act by the INS." (Brief of United States at 23.) Asylum applicants reside in the country "under color of law."

B. ASYLUM APPLICANTS RESIDE IN THE COUNTRY "PERMANENTLY"

Asylum applicants also meet the second prong of the PRUCOL test: they reside in this country "permanently." The courts have unanimously looked to the Immigration and Nationality Act (INA) which defines "permanent" as:

> [A] relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or the individual, in accordance with law.

8 U.S.C. §1101(a)(31).

Asylum applicants reside in this country under an INS policy which prohibits their deportation pending adjudication of their asylum claims. See INS Form I-589 (App. 1); 8 C.F.R. §208.8 (f)(4). Their relationship with this country is "continuing" although it "may be dissolved eventually" by denial of their asylum claims.

Holley, 553 F.2d at 850, relying on the INA definition of "permanent," holds that an alien is PRUCOL where INS does not contemplate deportation "at this time." Such an alien resides here "permanently." Likewise, Berger, 771 F.2d at 1576, holds that the concept of "permanent" more closely resembles "lasting" or "enduring" than "forever." Berger refuses to limit "permanence" to those cases where the alien, like Ms. Holley, has a written

assurance from INS that it had no present intent to enforce her departure. On the contrary, the Berger court specifically rejects HHS' position that PRUCOL requires "an official determination or authorization." Id. at 1575. This Court should follow Berger.[3]

The Alfred court, like the Holley and Berger courts, relies on Section 101 of the INA, and finds that a relationship may be "permanent" even though it may be dissolved later. Alfred, 487 So.2d at 357 (citing 8 U.S.C. §1101(a)(31)). Alfred holds that even "deportable aliens are 'permanently' residing in the United States under color of law until a final determination of deportability is made following a hearing...." Id. at 357. "[PRUCOL] eligibility must be presumed to continue until their status is changed by affirmative INS action." Id. at 359.[4] See also Vasquez v. Rev. Bd. of Indiana Emp. Sec. Div., 487 N.E.2d 171,175 (Ind. App. 2 Dist. 1985), holding that an asylum applicant is permanently residing until "the denial of [the] petition for asylum and/or legal proceedings of deportation."

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[3] HHS seeks to distinguish Berger based on a misunderstanding of footnote 33. In that note the court states that certain "mere applicants" for relief from deportation are PRUCOL because INS does not contemplate enforcing their departure. Berger, 771 F. 2d at 1576-77, n.33. See Rubin, supra, at 431. This is precisely the case with asylum applicants. They are in a category protected from deportation and are PRUCOL.

[4] An alien is PRUCOL "for the purpose of benefits where his application for lawful status is pending...." Alfred, 487 So.2d at 358 (citing St. Francis Hospital v. D'Elia, 422 N.Y.S.2d 104 (N.Y. App. Div. 1979), aff'd, 422 N.E.2d 830 (1981)); Papadopoulos v. Shang, 414 N.Y.S. 152 (N.Y. App. Div. 1979)).

Likewise, in Gillar, 717 P.2d at 138, the Supreme Court of Oregon, sitting en banc, holds that asylum applicants are "permanently residing." The court holds:

> An alien awaiting action on an asylum application is present in the United States with no defined end or defined purpose. Thus, an asylum applicant fits within the statutory definition of "permanent" rather than the statutory use of "temporary."

The Gillar decision, following the recent trend, rejects the Sudomir majority opinion.

1. THIS COURT SHOULD FOLLOW THE SUDOMIR DISSENT

Sudomir is the only case cited by either HRS or HHS which holds that asylum applicants do not "permanently" reside in this country. Respondent urges this Court not to follow this "minority, more restrictive view." Calvo, supra, at 416.

The divided Sudomir court rendered its decision prior to the new legislative history which mandates that PRUCOL be "broadly" interpreted to include all aliens residing in this country pursuant to "immigration law, policy, and practice." H.R. 727, 99th Cong., 2d Sess. 111 (1986). The dissent in Sudomir correctly anticipates this new legislative mandate for broad interpretation and finds that asylum applicants' residence in this country is "of continuing or lasting nature." Sudomir, at 1467 (Canby, J. dissenting). Noting that INS may take up to six years to decide

asylum applications, and that over one-fourth are decided in the applicants favor,[5] the dissent states:

> Most important, plaintiffs' status is easily 'distinguished from temporary,' as the statute specifies.... None of the temporary relationships is similar in character to that of plaintiffs, whose applications for asylum are necessarily premised on their being 'unable or unwilling' to return to their countries. See 8 U.S.C. §1101 (a)(42). Plaintiffs are here in an indefinite status awaiting a ruling on their application for yet another status of indefinite duration.

Id. at 1467-1468.

Commentators, like the courts, have been persuaded by the Sudomir dissent. One author notes critical faults in the majority's reasoning:

> Despite evidence that the INS policy permits an asylum applicant continued residence while her application is pending, the court refused to interpret permanently residing under color of law in accord with the INS policy. The court also ignored the immigration law's definition of 'permanent' upon which the Second Circuit in Holley based its reasoning.

Calvo, supra, at 415.

Another commentator notes that the majority's main premise is faulty. Contrary to the majority's assertion, an asylum applicant's "continued presence" is not "dependent upon the possibility of having his application for asylum acted upon favorably." Rubin, supra, at 432. Instead, "'Continued presence' is

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[5]More recent statistics show that over 39% of all asylum applications are granted and over half of all Nicaraguans' claims are decided favorably. United States Department of Justice, Immigration and Naturalization Service, 1988 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, at 56-57.

ensured by INS policy....Because their continued presence is guaranteed throughout the lengthy asylum process by INS policy,... asylum applicants must be deemed 'permanently residing.'" Id.

Thus, this Court should join the Oregon Supreme Court and adopt the rationale of the Sudomir dissent. This Court should affirm the lower court's ruling that asylum applicants are PRUCOL.

II. ASYLUM APPLICANTS WITH WORK AUTHORIZATION ARE PRUCOL

Even if this Court finds that asylum applicants do not satisfy PRUCOL requirements, it should hold that applicants with work authorization are PRUCOL. The Solis family has received work authorization (R. 9) which indicates that INS has reviewed their asylum applications and found that they are not frivolous. 8 C.F.R. §208.4.

If this Court holds that PRUCOL requires affirmative INS action, the grant of work authorization satisfies this requirement. The Supreme Court of Oregon holds, "It is clear that where the INS has issued work authorization to an alien, the alien is present 'under color of law.'" Gillar, 717 P. 2d at 136, citations omitted. See Flores v. Department of Employment and Training, 393 N.W.2d 231,234 (Minn. App. 1986).

Moreover, Sudomir is distinguishable on the issue of work authorization. It holds that mere asylum applicants, though residing "under color of law," are not "permanently" residing, because their presence "has not been legitimated by an affirmative act." 767 F. 2d at 1462. In contrast, Ms. Solis' presence has been legitimated by an affirmative act, the grant of work authori-

zation. The Sudomir aliens did not have work authorization. Id. at 1458. See Division of Employment and Training v. Turynski, 735 P. 2d 469, 472 (Colo. 1987) distinguishing Sudomir and holding that aliens with work authorization and extended voluntary departure are PRUCOL; Industrial Commission v. Arteaga, 735 P. 2d 473, 482 (Colo. 1987) holding that applicants for adjustment of status who have been granted work authorization are PRUCOL. Thus, even if this Court adopts the Sudomir majority's requirement of "an affirmative act," it should hold that the grant of work authorization satisfies this requirement. Asylum applicants with work authorization are PRUCOL.

III. UNDER ALL THE FACTS AND CIRCUMSTANCES, THE SOLIS FAMILY IS PRUCOL

This court should hold that, under the facts and circumstances of their case, the Solis family is PRUCOL, even if it does not hold that all asylum applicants are PRUCOL. In Berger, 771 F.2d 1556, the Second Circuit holds that PRUCOL requires an individualized determination. PRUCOL is satisfied where:

> [O]n all the facts and circumstances in that particular case, it appears that INS is otherwise permitting the alien to reside in the United States indefinitely.

Id. at 1577, n.33.

Courts applying this test have considered criteria such as, length of stay and ties to this country, INS' inaction over an extended period, and the grant of work authorization, as relevant "facts and circumstances." Velasquez v. Secretary of Department of Health and Human Services, 581 F. Supp. 16 (E.D. N.Y. 1984);

Rubio v. Employment Division, 674 P. 2d 1201 (Or. 1984); St. Francis Hospital, 422 N.Y.S.2d 104; and Papadopoulos, 414 N.Y.S.2d 152.

Three state supreme courts have also adopted the facts-and-circumstances PRUCOL test. Based on an individualized review of an alien's case, the Supreme Judicial Court of Massachusetts holds that PRUCOL is satisfied where, "during the relevant time the INS has been aware of the plaintiff's continued residence and that it could have proceeded to deport her but has not done so." Cruz, 478 N.E.2d at 1266. Likewise, the Supreme Court of Rhode Island holds that an alien is PRUCOL because INS acquiesced in the alien's continued residence by taking no steps to deport her. Lapre v. Department of Employment Security, 513 A.2d 10, 13 (R.I. 1986). Similarly, the Supreme Court of Utah holds that PRUCOL is satisfied "because the INS knew of and acquiesced in [the alien's continued residence in this country] by exercising its discretion not to enforce the law." Antillon v. Department of Employment Security, 688 P.2d 455, 459 (Utah 1984).

The common sense approach of the Massachusetts, Rhode Island, and Utah Supreme Courts is equally applicable to the Solis family. Indeed, it is under this analysis that the Solis family was approved for Medicaid. R. 10, 18, 94. HHS' Medicaid policy provides that an alien is PRUCOL when:

> [O]n all the facts and circumstances in that particular case, it appears that INS is other-

> wise permitting the alien to reside in the United States indefinitely.[6]

HHS Medicaid Manual, Appendix 8 to this brief.

While now arguing that the record does not support the Solis family's Medicaid approval, HRS acknowledges that the Medicaid PRUCOL standard is more liberal than the AFDC standard. See Petitioner's Initial Brief at 13. HRS' policy manual states:

> Eligibility under PRUCOL is different for AFDC direct assistance and AFDC-related Medicaid because the federal regulations governing these programs differ....Eligibility under PRUCOL is much broader for AFDC-related Medicaid cases....

HRS Manual, Petitioner's Initial Brief, App. 14.

This Court should hold that the facts-and-circumstances-standard must be applied to AFDC as it is to Medicaid. Under this more liberal facts-and-circumstances-standard, the Solis family is PRUCOL.[7] As the hearing officer below held, "[t]he department approved Medicaid benefits based on this broader interpretation...." R. 10.

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[6]This language is identical to the SSI PRUCOL standard set by Burger, 771 F.2d at 1577, N.33. HHS has also published proposed Medicaid regulations which, citing Berger, adopt the identical facts-and-circumstances test. 53 Fed. Reg. 38033 (1988). HRS has implemented this policy. See Petitioner's Initial Brief, App. 14.

[7] HRS cannot satisfactorily explain how it found Ms. Solis PRUCOL for Medicaid, but upon the same facts and circumstances, she is not PRUCOL for AFDC. Instead, HRS now argues that Ms. Solis is not PRUCOL for Medicaid. The record is not fully developed on the Medicaid PRUCOL issue because HRS never contended below that its Medicaid determination was wrong. In fact, the record establishes that HRS believes its Medicaid decision for Ms. Solis is correct (R. 114, 119, 122). The record shows that INS knows of the Solis family's presence and does not contemplate enforcing their departure (R. 9, 15A-16B, 27-33, 47-50, 59-62, 80-82, 85).

A. THE SAVE RESPONSE DOES NOT REFLECT THE SOLIS' FACTS AND CIRCUMSTANCES

HRS relies on INS' G-845 form (SAVE Response) to argue that the Solis family is not PRUCOL. In fact, this form (Petitioner's Initial Brief, App. 10-11) was improperly prepared and the SAVE response does not accurately reflect INS' intentions toward the Solis family.

HHS requires state agencies to provide relevant information regarding the alien so that INS can, on a "case-by-case basis," determine the "likelihood that the alien will be able to qualify for some form of relief which would prevent or indefinitely delay deportation." (Petitioner's Initial Brief, App. 6). Yet here HRS failed to inform INS Of Ms. Solis' marriage to a lawful permanent resident and her pending relative petition. (See Opposition of United States as Amicus Curiae to Respondent's Motion to Strike at 14, n. 6.) It also appears that HRS failed to inform INS that the Solis family applied for asylum and received work authorization.[8]

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[8]The SAVE form (Petitioner's Initial Brief, App. 10-11) must be submitted with INS documents which reflect the alien's status. INS checks the validity of these documents. While the Solis' G-845 does not reflect which documents were appended, the following portions of the form were left blank in the INS response:

> 3. This document appears valid and relates to an alien authorized employment....
>
> 4. This document appears valid and relates to an alien who has an application pending for (specify INS benefit):_____.

INS also left blank the section which states, "This document is not valid...." Thus, it appears that HRS failed to submit docu-

Because INS did not have critical information, its response, the G-845 form, is unreliable. HRS agrees that the SAVE response is fatally flawed. "Petitioner concedes that more recent information might result in a different [SAVE] determination...." Petitioner's Response to Respondent's Motion to Strike at 6. The SAVE response does not reflect INS' intentions toward the Solis family or the facts and circumstances of their case.[9]

IV. HHS' INTERPRETATION OF PRUCOL IS NOT PERMISSIBLE AND NOT ENTITLED TO DEFERENCE

A. HHS' INTERPRETATION IS CONTRARY TO CONGRESSIONAL INTENT

An agency's statutory construction is subject to a two-step review. "If the intent of Congress is clear, that is the end of the matter." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). Only if Congressional intent is unclear, will courts defer to a reasonable agency interpretation. Id. at 843-44.

Here, the "unambiguously expressed intent of Congress" must control. Id. at 843. Inquiry into congressional intent requires a review of legislative history. Edwards v. McMahon, 834 F.2d 796, 799 (9th Cir. 1987) (quoting Washington Hosp. Center v. Bowen, 795

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ments showing that the Solis family had applied for asylum and received work authorization.

[9]The SAVE response also does not pertain to the relevant time period. The Solis family seeks welfare benefits for the period from 1988, when they applied for benefits, through December 1989 when welfare eligibility ended because Ms. Solis' earnings exceeded the AFDC payment level. The G-845 form dealing with the period beginning in March 1990 is simply not relevant.

F.2d 139, 143 (D.C. Cir. 1986)). Here, Congress has clearly expressed its intent "that the Secretary [of HHS] and the States broadly interpret the phrase 'under color of law' to include all of the categories recognized by immigration law, policy, or practice...." H.R. REP. NO. 727, 99th Cong., 2d Sess. 111. INS policy and practice specifically allows asylum applicants to remain in this country. See INS Form I-589 (App. 1), 8 C.F.R. §208.8 (f). Indeed, HHS acknowledges that, "INS has a policy of not seeking to deport them [asylum applicants] while their applications are pending." Amicus Brief for the United States at 15.

While the cited legislative history refers to the Medicaid PRUCOL requirement, it is equally applicable to the AFDC program. The PRUCOL language of both statutes is identical. Both statutes are contained in Chapter 7 of the Social Security Act, and the programs work in tandem. For example, all AFDC recipients are automatically eligible for Medicaid. 42 U.S.C. §1396a(a)(10)(A). As the United States Supreme Court has just held:

> The substantial relation between the two programs [AFDC and Child Support] presents a classic case for application of the 'normal rule of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning."'

Sullivan v. Stroop, 58 U.S.L.W. 4790,4792 (June 12, 1990), citations omitted.

Here too, identical terms must be given identical construction. AFDC PRUCOL must be broadly construed to cover all aliens residing in this country under immigration law, policy, or practice.

HRS relies on Sudomir, 767 F.2d 1456, for the proposition that its PRUCOL definition rests on a permissible construction of the statute. While the majority of that divided court did partially[10] uphold HHS' construction, it found that, "the issue is a close one." Id. at 1461.

It is critical to note, however, that Sudomir was decided before Congress mandated that the Secretary "broadly interpret" PRUCOL. H.R. 727, 99th Cong., 2d Sess. 111 (1986). HHS has not broadened its PRUCOL policy to implement this congressional intent. Moreover, HHS' requirement of an official and individualized determination by INS conflicts with the congressional mandate that PRUCOL must include all aliens residing in this country pursuant to immigration law, policy, or practice. Id. "To the degree that [a PRUCOL] standard requires the INS to affirmatively grant a particular status, it unreasonably narrows the scope of color of law...demanding affirmative action by the INS requires a superfluous act." Rubin, supra, at 432, footnote omitted. HHS' restrictive PRUCOL interpretation is contrary to the clear intent of Congress. Sudomir, decided before this Congressional mandate, is not persuasive.

B. HHS' AFDC PRUCOL INTERPRETATION IS UNREASONABLE

Even if this Court finds that Congressional intent is unclear, it should not defer to HHS' interpretation. Courts must

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[10] The court held that asylum applicants reside here "under color of law," specifically rejecting that portion of the Secretary's argument that asylum applicants do not reside under color of law. Id. at 1461.

defer only to reasonable agency interpretations. Chevron, U.S.A., 467 U.S. at 843-844. Here, HHS' AFDC PRUCOL interpretation is unreasonable because it conflicts with that agency's own official interpretations of the term. 20 C.F.R. §416.1618; 53 Fed. Reg. 38033 (1988). For purposes of Medicaid[11] and SSI, an alien is PRUCOL if known to INS and INS does not contemplate enforcing the alien's departure; or, if from all the facts and circumstances it appears that INS is otherwise permitting the alien to reside indefinitely. These interpretations of PRUCOL are entirely consistent with each other[12] and with the Third District Court's decision below and in Alfred, 487 So.2d at 357.

Inexplicably, HHS' official interpretations of Medicaid and SSI PRUCOL conflict with its informal interpretation[13] of AFDC PRUCOL. As HRS' policy states:

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[11]The Medicaid and AFDC PRUCOL requirement is contained in §409.026, Fla. Stat. The Solis family receives Medicaid (R. 148) because HRS' Medicaid PRUCOL standard is less restrictive than its AFDC standard. Petitioner's Initial Brief at 13. HRS has not explained this inconsistency and the decision below requires that the identical standard be applied.

[12] In fact, the proposed Medicaid regulations specifically embrace Berger, 771 F.2d 1556, the case upon which the SSI regulations are founded. 53 Fed. Reg. 38032-38033.

[13]An informal agency interpretation is not entitled to deference. Where HHS has not formalized its position by regulation, "[t]he states have been allowed to develop their own [AFDC] definitions...." Barnes v. Cohen, 749 F. 2d 1009, 1017 (3rd Cir. 1984). A state may disregard federal agency interpretations: "Without specific direction from Congress, a state may adopt its own [PRUCOL] rules to comply with the federal statute." Ibarra v. Texas Employment Commission, 645 F. Supp. 1060, 1070 (E.D. Tex. 1986).

> Eligibility under PRUCOL is different for AFDC direct assistance and AFDC-related Medicaid because the federal regulations governing these programs differ.

Petitioner's Initial Brief, at 13, App. 12 (HRS Manual) (emphasis added).

Such inconsistency is both logically and legally indefensible. As the United States Supreme Court has just held, "identical words used in different parts of the same act are intended to have the same meaning." Sullivan, 58 U.S.L.W. at 4792, citations omitted. This Court should reject HHS' conflicting and confusing AFDC PRUCOL interpretation and embrace the uniform approach adopted by the court below.

C. THIS IS A STATE LAW ISSUE

The issue before this Court is the interpretation of §409.026, Fla. Stat. Because this is a state law issue, deference to a federal agency is inappropriate.[14] AFDC is a cooperative state-federal program, and while a state cannot establish eligibility criteria which are more restrictive than federal standards, it may administer a less restrictive program. See Carleson v. Remillard, 406 U.S. 598, 600 (1972), which invalidates a state eligibility criteria "that excludes persons eligible for assistance under the federal AFDC standards." In a cooperative state-federal program, a state may impose less restrictive eligibility standards. Ibarra, 645 F. Supp. at 1070.

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[14]HRS has not interpreted PRUCOL but has merely, "deferred to the federal agency's construction...." Petitioner's Initial Brief at 12.

Even where Florida statutes are modeled after federal law, this Court will disregard federal interpretations where Florida's "public policy dictates a different outcome." Palm Beach Junior College v. United Faculty, 475 So. 2d 1221,1225 (Fla. 1985). In Gillar, 717 P. 2d 131, the Oregon Supreme Court interpreted its state PRUCOL statute. While noting the existence of a parallel federal PRUCOL requirement, the court refused to follow the federal interpretations, which do "not relieve this court of the responsibility to interpret the statutory test under state law." Id. at 135, n.6. Likewise, Barnes, 749 F. 2d at 1017, interprets state law rather than "reach the issue of the proper interpretation of the federal [AFDC] statute." Here, as in Gillar, 717 P. 2d at 135, the "state supreme court does have to reach a final decision as to the state law...."

The PRUCOL requirement for receipt of both Medicaid and AFDC benefits is found in the same state statute. §409.026. Under HRS' rules, Ms. Solis meets Medicaid PRUCOL requirements, yet fails to meet AFDC PRUCOL requirements. This Court should reject the piecemeal approach to PRUCOL which uses one standard for Medicaid and a more restrictive standard for AFDC. This Court should interpret the state PRUCOL requirements of §409.026 in a uniform manner.

The court below correctly followed its own prior decision in Alfred. PRUCOL includes aliens whose "residency is with government knowledge and approval and is 'permanent' until changed by other official INS action." Alfred, 487 So.2d at 357. Though

Alfred is an unemployment case, the PRUCOL language is the same in both laws. §§ 409.026, 443.101(7). "Where the legislature uses exact words in different statutory provisions, the court may assume they were intended to mean the same thing." St. George Island, Ltd. v. Rudd, 547 So. 2d 958, 961 (Fla. 1 DCA, 1989)(citing Goldstein v. Acme Concrete Corp., 103 So. 2d 202 (Fla. 1958)). The District Court was correct in following Alfred and its decision should be affirmed. This Court should interpret all state PRUCOL requirements uniformly.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative: an alien residing in this country pending her application for political asylum is eligible for AFDC benefits as one "permanently residing under color of law" within the meaning of §409.026, Florida Statutes. This Court should affirm the decision of the court below, and hold that Ms. Solis is permanently residing under color of law for the purpose of receiving AFDC benefits.

In the event that this Court chooses not to answer the certified question, or answers the certified question in the negative, this Court should nevertheless affirm the decision of the court below, and hold that Ms. Solis is permanently residing under color of law for the purpose of receiving AFDC benefits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 23 day of July 1990 to: Louis Hubener, Esquire, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1502 Tallahassee, Florida 32399-1050; Scott D. LaRue, Assistant General Counsel, Department of Health and Rehabilitative Services, 1323 Winewood Blvd., Bldg. One, Room 407, Tallahassee, FL 32399-0700; Frank A. Rosenfeld, Appellate Staff Attorney, Civil Division, Room 3617, Department of Justice, Washington, D.C. 20530; Thomas Zamorano, Esq. on behalf of Miami Coalition for the Care to the Homeless, Inc., c/o 225 N.E. 34 Street, Suite 300, Miami, FL 33137; Victor Panoff, Esq. on behalf of the American Immigration Lawyers Association, c/o 224 Datura Street, Suite 301, West Palm Beach, FL 33401.

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INDEX TO APPENDIX