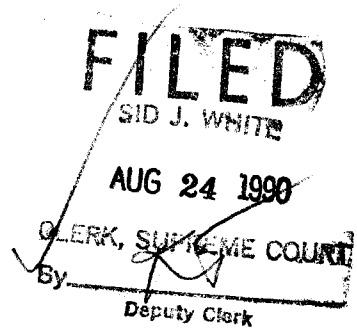
IN THE SUPREME COURT OF FLORIDA



DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Petitioner,

vs. CASE NO. 75,553

LUISA SOLIS,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

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

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RESPONSE TO RESPONDENT'S STATEMENT OF THE CASE AND FACTS AND LEGISLATIVE HISTORY

Respondent Solis unlawfully entered the United States in June 1985. The hearing below on her entitlement to AFDC benefits was held three years later in July 1988. Respondent asserts as fact that INS "does not contemplate enforcing her departure." (Brief at 15 n. 7 citing R. 9, 15A-16B, 27-33, 47-50, 59-62, 80-82, 85.) None of the references demonstrates what INS ultimately contemplates doing.[1]

The "SAVE" response from the INS in March 1990 indicates that INS does pursue the expulsion of aliens in Ms. Solis's class. (See Initial Brief A. 11-12.) Although she argues that the response is in error because the INS was not aware of her marriage to a lawful permanent resident, she does not suggest that this marriage occurred before the hearing in July 1988 or that she informed INS or HRS of the marriage until after the response. The INS SAVE response, thus, is highly relevant to the certified question, if not to Ms. Solis's PRUCOL status in 1990, since it assumes Ms. Solis was simply an unlawful entrant who applied for asylum.

The SAVE program created by section 121 of the Immigration and Reform Act of 1986 ("IRCA"), 42 U.S.C. §1320b-7(d),is explained in the amicus curiae brief of the United

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[1] On page 1 of her brief, Ms. Solis quotes from INS Form I-589, an asylum application, but omits the following underscored words: "You may remain in the United States until a final decision is made on your case (or you are notified otherwise by this Service).

States at 9-11, 24-26. While this program and the negative PRUCOL response from INS came after the administrative decision below, they would certainly counsel against an affirmative answer to the certified question without at least a qualifying reference to the recently established SAVE program and the availability of individual PRUCOL determinations from INS in accordance with the principle that an appellate court applies the law in effect at the time of its decision. See Florida Patient's Comp. Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985). The certified question suggests, and Ms. Solis argues for, a broad brush answer (all aliens who file asylum applications are PRUCOL) rather than recognition of the SAVE program and a determination that considers individual facts and circumstances.

A. **LEGISLATIVE HISTORY**

Respondent refers to certain comments of Senators Chiles and Gurney made in 1972 respecting the eligibility of aliens for SSI. (Resp. Brief at 3.) These comments however pertained strictly to Cuban refugees. See 118 Cong. Rec. S33, 959 (1972). Cuban refugees are a specifically recognized class. See HHS Memorandum, Pet. Initial Brief A. 2, 3. Solis, however, stipulated she was not a refugee (R121). Thus far, "aliens who file for asylum" have not been recognized in themselves as a class or category.

Respondent also asserts that Congress in 1986 provided a "definitive interpretation" of PRUCOL "to include all aliens residing in this country. . . ." Resp. Brief at 3, 4 (E.S.). Her brief does not quote the cited Committee Report but rather inaccurately paraphrases it. In pertinent part, the report states:

> The Committee intends that the Secretary and the States broadly interpret the phrase "under color of law" to include all of the categories recognized by immigration law, policy, and practice in effect at the time, including Cuban-Haitian entrants (as defined in paragraph (1) or 2(A) of section 501(e) of Public Law 96-422, as in effect on April 1, 1983).

H.R. Rep. 727, 99th Cong., 2d Sess. 111 (1986). Although respondent relies in her argument (brief at 10) on her inaccurate paraphrasing, the report clearly referred to categories recognized at a particular time, not "all aliens." There is no legislative history that supports the conclusion that asylum filers were a recognized class or that Congress intended they become one.

Moreover, respondent's interpretation of H.R. Rep. 727 cannot be reconciled with legislation enacted the same year, the Immigration Reform and Control Act of 1986 ("IRCA"). As the brief of the United States points out, IRCA granted lawful temporary resident status to certain aliens who had entered before 1982--long before respondent--on the condition that they would not be eligible for AFDC and other benefits for

five years after obtaining that status. (Brief of United States at 15, 16, 29; Initial Brief of Pet. at A-3, para. 12.) Neither respondent's brief nor those of the amici filed in her behalf address the stark anomaly created by their interpretation of H.R. Rep. 727.

SUMMARY OF THE ARGUMENT

The certified question must be answered in the negative. The case law respondent relies on does not establish that mere applicants for an immigration status are PRUCOL for AFDC or Medicaid. Nor do HHS policies respecting either Medicaid or AFDC eligibility implement such an interpretation. Respondent's reliance on H.R. Rep. 727 is misplaced; it is based on misrepresentation of Congress's language and it conflicts with IRCA.

Mere acquiescence in an alien's presence pending an application does not mean the INS does not contemplate enforcing the alien's departure. Respondent failed to show that INS did not contemplate enforcing her departure. HRS cannot be estopped by an erroneous Medicaid determination.

ARGUMENT

I. ALIENS RESIDING IN THE UNITED STATES PENDING DETERMINATION OF AN APPLICATION FOR ASYLUM ARE NOT AS A CLASS PRUCOL, AND THEREFORE ARE NOT ELIGIBLE FOR AFDC.

Respondent contends that aliens residing in this country pending an application for asylum are uniformly PRUCOL and hence eligible for AFDC. The authority on which she

relies, however, does not support the existence of such a PRUCOL class. In fact, no case cited, federal or state, extends AFDC benefits to an alien simply because he or she has filed an asylum application and not been deported.

Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), cert. denied sub nom. Shang v. Holley, 435 U.S. 947 (1978), was expressly limited to "a minuscule subclass of aliens" who, although unlawfully residing in the United States, were each individually covered by a letter from the Department of Justice stating that the INS did contemplate enforcing the alien's departure. Id. at 849. Solis has no comparable assurance.

Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985), concerned eligibility for Supplemental Security Income and involved construction not of statutory PRUCOL language but rather of language that HHS had agreed to in a consent decree.[2]

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[2] Paragraph 3 of the consent decree provided:

> Aliens who are permanently residing in the United States under color of law and who may be eligible for [SSI] benefits include, but are not limited to: (1) aliens admitted to the United States pursuant to 8 U.S.C. §1153(a)(7); (2) aliens paroled into the United States pursuant to 8 U.S.C. §1182(d)(5); and (3) aliens residing in the United States pursuant to an order of supervision, indefinite stay of deportation or indefinite voluntary departure. Any other alien residing in the United States with the knowledge and permission of the [INS] and whose departure from the United States the [INS] does not contemplate enforcing is also permanently residing in the United

The court in Berger stopped short of interpreting the consent decree language to include all aliens who had filed asylum applications and not been deported prior to resolution of the application. Rather, the court recognized a list of categories of aliens that would be eligible provided INS did not contemplate enforcing the alien's departure. 771 F.2d at 1576, n. 33. Solis does not claim to fall into any of these categories nor shown INS does not contemplate enforcing her departure. Berger specifically rejected the notion that it was conferring SSI eligibility on mere applicants for relief. Id. at 1577, n. 34.

To the extent there are any relevant differences, we submit that this Court should not be guided by Berger rather than Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985). The Berger court did not construe the statutory PRUCOL language but rather a consent decree, and the present HHS interpretation of PRUCOL is reasonable and therefore entitled to this Court's deference. Even should this Court follow Berger, however, the certified question must be answered in the negative because it requires no determination that INS does not contemplate enforcing the alien's departure.[3] As the United States and HRS

States under color of law and may be eligible for [SSI] benefits.

771 F.2d at 1560 (emphasis the court's).

[3] The question certified to this Court is:

Whether an alien residing in this

contend, this determination should be made pursuant to the SAVE program.

H.R. Rep. 727 likewise does not support respondent's expansive interpretation of PRUCOL. First, it refers to the appropriate interpretation of the phrase "under color of law," not "permanently residing." See page 3, ante. Second, it refers not to "all aliens" as respondent argues (brief at 3, 10), but to categories recognized at a particular time. Respondent does not attempt to show what these categories were at that time or contend that she was among them. Third, her interpretation is at odds with the SAVE program. Moreover, H.R. Rep. 727 could have expressly rejected Sudomir but did not. Thus, if anything, the report counsels a negative answer to the question certified.

Respondent also relies heavily on Gillar v. Employment Division, 717 P.2d 131 (Or. 1986), which held that in order for an alien to claim "color of law" status, "the INS must take some affirmative action or must have a policy prohibiting deportation." Id. at 136 (E.S.) The Gillar court found such a policy "in the interrelationship of the 1980 Refugee Act and the corresponding INS regulations." Id. No other court, state or federal, has employed or followed the

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> country pending her application for political asylum is eligible for AFDC benefits as one "permanently residing in the United States under color of law" within the meaning of section 409.026, Florida Statutes.

strained "interrelationships" analysis of Gillar. The decision predates IRCA and the SAVE program, and to follow it would emasculate the program's attempt to facilitate individual status determinations based on INS actions or policies. Moreover, the Gillar court allowed unemployment compensation to the alien because it found no practical difference between him and temporary parolees and conditional entrants who were eligible for benefits under the Oregon law. See 717 P.2d at 133, 139. The Florida law in question, §409.026(1), Florida Statutes, contains no analogous provisions, and respondent has never claimed she is within the parenthetical inclusions of 42 U.S.C. §602(a)(33).

Gillar's rejection of Sudomir was significantly qualified. First, it found the particular situation of the Oregon applicant (who had not entered the U.S. illegally) similar to that of a "temporary parolee," which the Sudomir court recognized as entitled to benefits. Second, and perhaps more important, it recognized a distinction between AFDC sought in Sudomir and employment compensation--those aliens seeking unemployment compensation have worked and contributed to a fund:

> Although there may be some reason for the Sudomir analysis in the field of AFDC, the same rationale does not apply to unemployment claimants. Unlike the AFDC claimant, one who files for unemployment has worked and paid into an account with the expectation that insurance would be available if the need arose. Aliens cannot come to this

> country simply to receive unemployment benefits; they have to work in order to be eligible for benefits.

717 P.2d at 140, n. 13. See Sudomir at 767 F.2d 1463-64.

The instant case involves AFDC, not unemployment compensation. These benefits are not part of the same program, either at the state or federal level. Gillar and the many other unemployment compensation cases respondent cites in support of her PRUCOL argument should not determine eligibility for AFDC. This case involves only the proper construction of §409.026(1), Florida Statutes, and 42 U.S.C. §602(a)(33).

II. ASYLUM APPLICANTS WITH WORK AUTHORIZATION ARE NOT AS A CLASS PRUCOL.

Respondent's second argument, that any alien with work authorization is PRUCOL, is simply another way of contending that all asylum applicants are PRUCOL, since virtually all are granted permission to work. None of the authority relied on holds that work authorization in itself confers PRUCOL status and therefore eligibility for welfare benefits. The opposite could as reasonably be assumed: that INS grants permission to work as an alternative to providing public support.

The cases respondent relies on all concern eligibility for unemployment compensation, not AFDC, and all precede IRCA and SAVE.[4] Cases deciding eligibility for

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[4] In addition to Gillar, supra, respondent cites the following caes, all of which involve unemployment compensation: Division

unemployment compensation should not control eligibility for AFDC. INS permission to work may be an appropriate factor to consider with respect to unemployment compensation but it has nothing to do with AFDC. See Gillar n. 13, quoted supra, and argument. The district court below inappropriately relied on its unemployment compensation decision in Alfred v. Florida Dep't of Labor and Employment Security, 487 So.2d 355 (Fla. 3d DCA 1986), as controlling the instant AFDC decision.

III. MS. SOLIS IS NOT PRUCOL UNDER "ALL THE FACTS AND CIRCUMSTANCES."

Virtually all the case authority respondent relies on for her "all facts and circumstances" test consists of unemployment compensation cases. As argued, supra, a working alien's entitlement to unemployment compensation is categorically different from her claim to AFDC.

Respondent also relies on HHS Medicaid regulations proposed to implement the Berger decision, supra. See 53 Fed. Register 38032 et seq. (1988), proposing amendments to 42 CFR Part 435 (App. 1,6). These proposed amendments apparently have

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of Employment and Training v. Turynski, 735 P.2d 469 (Colo. 1987); Industrial Commission v. Arteaga, 735 P.2d 473 (Colo. 1987); Antillon v. Dep't of Employment Security, 688 P.2d 455 (Utah 1984); Lapre v. Dep't of Employment Security, 513 A.2d 10 (R.I. 1986); Rubio v. Employment Division, 674 P.2d 1201 (Or. 1984); Alfred v. Florida Dep't of Labor and Employment Security, 487 So.2d 355 (Fla. 3d DCA 1986); Flores v. Dep't of Employment and Training, 393 N.W.2d 231 (Minn. Ct. App. 1986); Vasquez v. Rev. Bd. of Indiana Emp. Sec. Div., 487 N.E.2d 171 (Ind. App. 2 Dist. 1985); Ibarra v. Texas Employment Commission, 645 F.Supp. 1060 (E.D. Tex. 1986).

not been finally adopted as they are not found in the current 42 CFR Part 435. The argument necessarily concedes that the certified question must be answered in the negative. HHS interprets the amendments to exclude, unless specifically provided, "applicants for any immigration status." Id. at 38033 (App. 2). This is consistent with Berger's exclusion of "mere applicants for relief." See 771 F.2d 1577, n. 34. Moreover, the proposal recognizes the PRUCOL status of any alien applicant for benefits is to be verified through the SAVE program established under section 121 of IRCA. Id. at 38035 (App. 2). This program was to be operational by October 1, 1988. Id.

What the record in this case shows with regard to Ms. Solis' particular circumstances is merely the fact that, after entering the country illegally, she filed an application for asylum and the INS had taken no action to deport her by the time of the AFDC benefits hearing in July 1988.[5] It is as logical to infer that the INS is simply overwhelmed by numbers as it is to conclude it had made a conscious decision that respondent was likely to be granted asylum. For this Court to hold that the passage of three years makes an alien PRUCOL would be to gut the SAVE program established by IRCA.

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[5] The reason for INS inaction, although not a matter of record, is probably revealed in the amicus brief of the Immigration Lawyer's Association, which states that by 1988 some 21,054 Nicaraguans had applied for asylum. Brief at 9.

Under the 1988 HRS manual, an asylum applicant may be eligible for Medicaid if the INS does not contemplate enforcing the alien's departure. See excerpt from HRS manual, Pet. Initial Brief, A. 14. Unless an applicant falls into one of the qualifying classes, "a contact with INS is required." Id. We have no evidence of a contact with INS in 1988. Neither HHS nor the HRS manual suggests that either the mere passage of time or INS acquiescence in the continued presence of illegal aliens because of their overwhelming numbers, satisfies the stated test. If it did, there would seem to be little if any need for the SAVE program. On the other hand, if INS wishes to affirmatively acquiesce in the presence of certain aliens, i.e., it does not contemplate enforcing their departure, it may effectively so state by its response to SAVE inquiries.

Respondent now argues that because HRS approved her for Medicaid in 1988 it is estopped from denying her AFDC benefits and that PRUCOL must be the same for both AFDC and Medicaid. The state, however, is bound by the federal regulations. There is very little difference between the PRUCOL qualifications for AFDC and Medicaid. Even if we assume that the Berger Medicaid criteria are broader and that they control, there is nothing in the record to show that INS does not contemplate enforcing Solis's departure. In the absence of such evidence, HRS cannot approve AFDC benefits or assume its Medicaid decision was correct. Only an agency's affirmative misconduct, not its mistaken interpretation of the law or its

negligence, affords a basis for estoppel. INS v. Miranda, 459 U.S. 14 (1982); State Dep't of Revenue v. Anderson, 403 So.2d 397 (Fla. 1981).

IV. HHS' INTERPRETATION OF PRUCOL IS PERMISSIBLE AND ENTITLED TO DEFERENCE.

Respondent's argument that HHS' interpretation is contrary to the intent of Congress is based on H.R. Rep. 727. As shown, her construction of H.R. Rep. 727 is misleading and it misstates critical language. Since Congress has chosen not to define PRUCOL (see brief of United States, 1a), but rather has left it to federal agencies "to provide meaning to particular terms of a statute," the agencies's construction is entitled to "considerable weight." Perleva-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1296 (11th Cir. 1990), citing Chevron v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984), and INS v. Abudu, 485 U.S. 94 (1988) (because INS officials exercise especially sensitive political functions, reasons for giving deference to INS decisions apply with even greater force). The court will defer unless there are compelling indications the agency is wrong. 894 F.2d 1296.

HHS' interpretation of PRUCOL to which the Ninth Circuit deferred in Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985), modified only by Action Transmittal No. 88-4 (App. to Pet. Initial Brief, A1-4), is reasonable in its exclusion of aliens initially applying for a status. An automatic right to

benefits would only encourage asylum applications, most meritless. As amici briefs point out, such proceedings can easily be dragged out for six years or more. See, e.g., Abudu, supra. IRCA was intended to discourage illegal immigration and the SAVE program, as part of it, was intended to provide INS's view on whether an alien applicant would likely not be deported. Finally, it would be strange indeed to deny benefits under IRCA to aliens granted amnesty and award them here to others who merely file asylum applications.

As an afterthought, respondent curiously argues that the whole issue is one of state law and that a state may administer a less restrictive program--i.e., extend benefits to persons who are not eligible under federal law. (Solis argued below that HRS was not complying with federal law. R.132.) The amount the federal government contributes to any state's AFDC program is determined under 42 U.S.C. §603, however, and reductions may be made under §603(h) for amounts improperly paid by a state. It cannot be concluded that HHS will contribute to the support of the class Solis seeks to establish as PRUCOL. The INS SAVE response would suggest the contrary. There is no evidence that the Florida Legislature intended to confer benefits from state funds on persons ineligible under federal law. Whether that should be done is strictly a legislative decision.

CONCLUSION

The certified question should be answered in the negative and the decision below reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** has been furnished by U. S. Mail to **Valory Greenfield, Esquire**, 225 Northeast 34th Street, Suite 300, Miami, Florida 33137, and **Frank A. Rosenfeld**, Appellate Staff Attorney, Civil Division, Room 3617, Department of Justice, Washington, D.C. 20530, this 24th day of August, 1990.

LOUIS F. HUBENER
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SolisReplyBrief/lh/ds

APPENDIX