NSCLC
National Senior Citizens Law Center
PROTECTING THE RIGHTS OF LOW-INCOME OLDER ADULTS

October 18, 2011

Ms. Angela Kline, Director

Program Development Division

Food and Nutrition Service

Re: Proposed Rule: Clarification of Eligibility of Fleeing Felons, 76 Fed. Reg. 51907 (Aug. 19, 2011)

RIN 0584-AE01

Dear Ms. Kline,

These comments are submitted jointly on behalf of the National Senior Citizens Law Center and the Western Center on Law & Poverty.

The National Senior Citizens Law Center (NSCLC) has for almost forty years advocated on issues of particular concern to low income older Americans with an emphasis on health and economic security. The Supplemental Nutrition Assistance Program (SNAP) is especially important for the health and economic security of this target population.

Western Center on Law and Poverty (WCLP) serves as a support center for California's legal aid community and leads the way in large-scale impact litigation, administrative advocacy, budget advocacy and legislative advocacy in an effort to ensure that low-income Californians can easily access safe and affordable housing, adequate health care, and a broad spectrum of safety net services, including food assistance through the Supplemental Nutrition Assistance Program (SNAP), known as CalFresh in California.

NSCLC and WCLP have engaged in extensive advocacy surrounding the provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)[1], often inaccurately referred to as the "fleeing felon" provisions. NSCLC has played a leading role in litigation concerning the implementation of such provisions by the Social Security Administration and serves as class counsel in *Martinez v. Astrue*, No. 08-cv-04735 CW (N.D. Cal.) (dealing with the "fleeing to avoid" portion of the statutes) and in

[1] Public Law 104-193

Clark v. Astrue, 602 F.3d 140 (2nd Cir. 2010), 274 F.R.D. 462 (S.D.N.Y., 2011) (probation and parole violation portion of the statutes). NSCLC was also lead counsel on the appeal in *Fowlkes v. Adamec*, 432 F.3d 90 (2nd Cir. 2005) and in *Garnes v. Barnhart*, 352 F.Supp.2d 1059 (N.D. Cal. 2004) and provided significant assistance to attorneys in several of the other reported cases.

As we began to hear more and more reports of people losing benefits because of these provisions, it became clear that the impact was most keenly felt by some of the nation's most vulnerable citizens. It was often associated with homelessness, sometimes as a cause, sometimes as a result. Many of those affected had significant cognitive or other serious mental impairments and no means to resolve their situation. In most cases, the underlying charge was from a state other than the one in which the individual resided and the individual did not have the financial means to return.

While the proposed rules are a definite improvement over the hodgepodge of state rules currently in place and demonstrate a sensitivity to some of our concerns, they remain flawed and do not go far enough to resolving the problems in this seriously troubled program.

We recognize that USDA was placed in a difficult situation in having to draft these regulations since the statute requires state agencies to make determinations based on criminal law concepts, an area in which state agency administrators and employees are not likely to have even rudimentary expertise. For that reason, the best approach, when consistent with the statutory language, is to have a carefully focused bright-line standard that minimizes the role of individual agency employee discretion.

We recommend that USDA, for its definition of "fleeing felon," adopt the standard approved by the court in *Martinez v. Astrue*, in which an individual is subject to a loss of benefits under the fleeing portion of the statute only if there is an outstanding warrant with one of three National Crime Information Center (NCIC) codes relating to Escape (4901), Flight to Avoid (4902) or Flight-Escape (4999). These three NCIC codes are the ones most closely associated with the statutory standard of flight to avoid prosecution or custody or confinement after conviction. Also, the *Martinez* settlement is consistent with the amendments contained in the Food Conservation and Energy Act of 2008(FCEA), Public Law 110-246. The only substantive change to PRWORA made by the FCEA was to add the requirement that the law enforcement agency be "actively seeking" the individual. Thus the FCEA does not contemplate that more people would be losing benefits than under PRWORA.

In addition, adoption of the *Martinez* standard has the dual advantages of (1) minimizing the scope of individual agency employee discretion and (2) efficiency. The Background material accompanying the proposed rule provides good illustrations of how too much individual discretion in this area is likely to lead to untoward results. For example, the Background material asserts that awareness of an existing warrant can be inferred from an individual having been interviewed by law enforcement officers about the felony in question. 76 Fed. Reg. at 51909. Yet, if one was not subsequently notified of the filing of criminal charges or of the issuance of a warrant, isn't it just as reasonable for the individual to infer that no charges were filed? After all, it is not at all uncommon for law enforcement agencies to interview several potential suspects and other witnesses before deciding who to charge. In other instances, they may interview someone before even making a determination that a crime was actually committed. .

Similarly, the suggestion that moving to a new residence after the warrant has been issued could be used as an indicator of intent to avoid arrest offers fertile ground for inappropriate exercises of discretion. While a move within a day of a robbery may be a good indicator of intent to flee to avoid prosecution, most moves are simply irrelevant to a determination of intent to flee in a highly mobile society. This is especially the case with low income family units such as those who are likely to be receiving SNAP benefits. Many people apply for benefits when they lose a job, a loss which may also spur them to seek a less expensive place to live. Most of those who were identified by the Social Security Administration as having outstanding warrants not only moved to a different address, but most lived in a different state as well.

Adoption of the *Martinez* standard would be more efficient and far less expensive to administer. Efficient operation is always a factor to consider, but it is especially important in the current climate in which state governments across the country are laying off employees. Undoubtedly, this was a factor that the Social Security Administration must have considered when it agreed to the use of the NCIC codes to determine if an individual is fleeing. The efficient and accurate administration of the rule will no doubt also reduce the number of administrative hearings that would otherwise result from the ineffective exercise of discretion.

Probation and Parole Violations – Unfortunately the proposed regulation fails to provide any guidance to state agencies on how to determine whether an individual is violating a condition of his or her probation or parole. Obviously, one cannot begin to determine whether an individual is violating a condition of probation or parole without knowing what specific conditions were placed on that individual's sentence of probation or

release on parole. One would also have to know the law of the particular jurisdiction in which the individual was sentenced in order to reach a conclusion as to whether or not the individual's actions or failure to act were sufficient to constitute a violation of his or her probation or parole. Clearly, it is well beyond the capacity of the state agencies for the state agency itself to make such determinations even for their own state, let alone for each of the fifty states and the federal government.

Since the proposed rule is silent on how the agency is to determine whether an individual is violating a condition of his or her probation or parole, it is not likely to end up with a consistent standard and the dominant approach is likely to be the approach most of the states have been taking all along, *i.e.*, relying on nothing more than a warrant issued for the purpose of bringing someone in for a determination of whether or not he or she is violating a condition of his or her probation or parole. A warrant is typically issued on the basis of probable cause to believe that an individual may be violating a condition of probation or parole. Thus, as is often the case, if the clerk has not received payment of a court-imposed fine or a required fee for supervision, the failure to pay would alone be sufficient probable cause to justify issuance of a warrant. However, the individual will not be found in violation if he or she lacks the financial ability to pay, as is likely to be the case with members of households that are financially eligible for SNAP benefits.

Reliance on a warrant as a basis for establishing a violation of probation or parole has been held to be inconsistent with the identical provisions of the Social Security Act. "The issue before us is whether the fact of a warrant, issued on the basis of 'probable cause' or 'reasonable suspicion' to believe that one is violating a condition of probation or parole, is equivalent to a determination that one is in fact violating a condition of probation or parole. We find that it is not and therefore that the Administration's practice is contrary to the plain meaning of the Act." *Clark v. Astrue*, 602 F.3d 140, 147 (2nd Cir. 2010); 274 F.R.D. 462 (S.D.N.Y. 2011) (certifying nationwide class).

The best solution is to require a determination by a court (in the case of probation violations) or other appropriate tribunal (in the case of parole violations) before a state agency can determine that an individual is violating a condition of probation or parole. Any other approach imposes an impossible obligation on state agencies, will result in improper and inconsistent denial of needed benefits and is likely to end up with years of litigation.

In conclusion, we believe that the best approach is the use of the *Martinez* settlement standard for "fleeing" cases and the requirement of a finding by a court or other appropriate tribunal in order to determine whether an individual is violating a condition of probation or parole, both combined with appropriate measures to assure that law enforcement is "actively seeking" the individual. We believe this approach will be the most effective in promoting the statutory aim of nationwide consistency, will minimize inappropriate denials of benefits and will be the easiest for the states to administer.

Respectfully submitted,

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