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Jo Anne B. Barnhart
Commissioner of Social Security
P.O. Box 17703
Baltimore, MD 21235-7703

re: Nonpayment of Benefits to Fugitive Felons and Probation or Parole Violators
NPRM, 70 Fed. Reg. 72411 (Dec. 5, 2005)

Dear Commissioner Barnhart:

Since its founding in 1972, the National Senior Citizens Law Center (NSCLC) has focused on issues affecting the well-being of low-income elders and people with disabilities. Since the Social Security and Supplemental Security Income (SSI) programs are the primary income source for a majority of America's elders and people with disabilities, NSCLC has always had a strong interest in the success of these programs. An important part of NSCLC's mission is to provide technical assistance and support to legal services and other advocates across the country. We first became aware of problems in implementation of the so-called "fugitive felon" program as a result of calls from homeless advocates and advocates in HIV programs describing the desperate situations many of their clients found themselves in. We soon came to a growing realization that this program had an especially harsh impact on the most vulnerable sectors of the elderly and disability communities. It also became apparent that African-Americans were disproportionately represented among those losing benefits. Thus, we decided it was necessary to make it a priority to assist attorneys and other advocates representing individuals faced with the loss of benefits under the "fugitive felon" program. As a result, NSCLC has developed extensive familiarity and expertise in the operation and impact of the program.

We are concerned that these deeply flawed regulations will result in needless suffering for some of America's most vulnerable citizens. They should be withdrawn because 1) a major part of it has already been determined to be contrary to law in *Fowlkes v. Adamec*, 432 F.3d 90 (2nd Cir. 2005), 2005 WL 3292551 (Dec. 6, 2005)[1], 2) implementation will result in administrative chaos and inefficiency, as the agency endeavors to make individualized determinations for which it is ill-equipped, 3) the criteria for discretionary good cause are far too narrow and fail to implement the Commissioner's broad authority to do justice in a variety of situations in which the suspension of benefits would be unfair or inconsistent with the purpose of the SSI or Social Security program, 4) the strict 90 day time limit for establishing mandatory

[1] National Senior Citizens Law Center was appellate counsel for plaintiff in *Fowlkes*.

good cause violates the Social Security Act, 5) the 90 time limit for establishing mandatory and discretionary good cause is not realistic given the complexities involved in resolving warrants and, as applied to individuals with mental impairments, may violate Sect. 504 of the Rehabilitation Act of 1973, and 6) the proposed rules will place in jeopardy the very people the Social Security and SSI programs were designed to help.

Intent to Flee - The statute authorizes the Commissioner to withhold SSI and Title II benefits in any month in which an individual is "fleeing to avoid prosecution or custody or confinement after conviction" for a felony. The proposed rules propose to "clarify" the statutory language "fleeing to avoid." They propose to do so by deleting any reference to the statutory language in the regulations, apparently fearful that the language chosen by Congress was all too clear to begin with. Instead they adopt a standard for withholding benefits based on the mere existence of an outstanding arrest warrant for a felony, a standard with no basis in the statute. The day after the NPRM was published in the Federal Register, the U.S. Court of Appeals for the Second Circuit ruled that this interpretation, which is already found in the Program Operations Manual System (POMS), is contrary to the plain language of the statute. In *Fowlkes*, the court squarely held "The statute does not permit the Commissioner to conclude simply from the fact that there is an outstanding warrant for a person's arrest that he is 'fleeing to avoid prosecution.' 'Fleeing' in § 1382(e)(4)(A) is understood to mean the conscious evasion of arrest or prosecution. Thus, there must be some evidence that the person knows his apprehension is sought. The statute's use of the words 'to avoid prosecution' confirms that for 'flight' to result in a suspension of benefits, it must be undertaken with a specific intent, i.e., to avoid prosecution." *Fowlkes*, 432 F.3d at 96-97. (Citations omitted). See also, *Garnes v. Barnhart* 352 F.Supp.2d 1059 (N.D. Cal. 2004); *Hull v. Barnhart*, 336 F.Supp.2d 1113 (D. Oregon 2004); *Blakely v. Comm.*, 330 F.Supp.2d 910 (W.D. Mich. 2004); *Thomas v. Barnhart*, 2004 WL 1529280 (D.Me. 6/24/04), aff'd 2004 WL 1770151.

Thus, it is clear that, at least in the Second Circuit, there must be a finding of the individual's specific intent before SSA can withhold benefits on the basis that the person is "fleeing to avoid prosecution." The better course for the agency would be to redraft this portion of the regulation incorporating an intent standard rather than issuing a final regulation which from the outset cannot be applied nationwide.

Warrant or order based on a finding - The *Fowlkes* decision also makes it all the more important for the agency to rethink its position with regard to another aspect of the proposed regulations. Under the current SSI regulation, 20 C.F.R. § 416.1339(b), before any benefits can be suspended or denied, there must be a warrant or order "issued by a court or other duly authorized tribunal on the basis of an appropriate finding that the individual —

(A) Is fleeing, or has fled, to avoid prosecution ... ;

(B) Is fleeing, or has fled, to avoid custody or confinement after conviction ... ;

(C) Is violating, or has violated, a condition of his or her probation or parole"

This provision was placed in the current SSI regulation because the Commissioner has "no way of determining whether or not an individual is aware that he or she is wanted for a criminal offense and is knowingly fleeing from prosecution." 65 Fed. Reg. 40492 (June 30, 2000).

Although this significant change is nowhere discussed in the NPRM, the proposed rule would eliminate this salutary requirement on the mistaken theory that the mere existence of a warrant for the individual's arrest is sufficient basis for invoking the nonpayment provisions of the statute.

What is the result of this proposal to eliminate reliance on a finding by a "court or other duly authorized tribunal" when viewed in conjunction with the *Fowlkes* decision? The result, at least in the states of the Second Circuit, will be that the Commissioner will be required to make thousands of the very determinations that, by her own admission, she is woefully unequipped to make. In the absence of such a finding, she will have to conduct an investigation of the facts of each case before she will be able to send out a suspension notice. As the Commissioner stated in her brief in *Fowlkes*, "Requiring the Commissioner to inquire into, and possibly adjudicate, the subjective intent of felons is the antithesis of an efficiently administered taxpayer-funded benefits program." Appellee's Supplemental Brief, 22. Noting that 38,000 individuals were identified as "fugitive felons" receiving SSI payments in FY 2003, she stated, "The large number of fugitive felons thus identified as SSI recipients establishes the necessity of an efficient methodology for the resulting adjudication of their claims. With the expansion of the program to Title II, those numbers will certainly increase." *Id.*, 22-23.

Given the volume of cases and the total lack of experience and training of SSA employees in making these determinations of individual intent the result will be inefficiency and chaos if the Commissioner goes ahead with this proposed regulation. However, there is an easy solution. If the Commissioner simply retains the provision of the current regulation to require a finding by a "court or other duly authorized tribunal" before invoking the nonpayment provision of the law, the result will be an efficient system in compliance with the statute as interpreted by the courts.

Elimination of the requirement for a finding by a court or other duly authorized tribunal is likely to result in even more chaos when it comes to probation and parole violations since SSA employees will not only be faced with the daunting task of determining the conditions of probation or parole and then investigating the facts surrounding the alleged violation, but will also be faced with the requirement to learn and apply the standards of the 50 different states and other jurisdictions for determining whether someone is violating a condition of probation or parole.

Good Cause - The rigid criteria proposed for discretionary good cause need to be broadened and made more flexible to better accommodate unforeseen situations in which suspension or denial of payments would be unjust. Also, the time allowed for establishing good cause needs to be extended beyond the 90 days provided in the proposed regulations.

Discretionary Good Cause - The proposed regulations provide two options for establishing discretionary good cause, both of which have a set of prerequisites, each of which must be met. The extraordinarily rigid criteria in the proposed regulations distort the intent of the discretionary good cause provision which was to provide the Commissioner with the broad

authority to do justice in a variety of situations where the suspension of benefits would be unfair or otherwise contrary to the purpose of the Social Security or SSI program. The only statutory limitation placed on the Commissioner's discretion to allow good cause is in those situations where the alleged offense or the probation or parole violation is violent or drug-related. Otherwise she is given complete discretion based on a showing of "mitigating circumstances." The legislative history contains a non-exhaustive list of four possible mitigating factors. Nowhere is there a suggestion that these are the only appropriate factors to be considered. The Explanation of the Manager's Amendment refers to "mitigating factors such as," thus making it clear that the list that follows only contains examples and is not intended to be restrictive.

The proposed good cause regulations do not cover many situations where all people of good will would agree that good cause is appropriate. For example, Judge Mary C. Morgan, California Superior Court (San Francisco Co.) has submitted comments on these proposed regulations in which she refers to a case that came before her in 2004. The case she refers to involves a San Francisco man with a severe case of AIDS, hypoxia and evidence of impaired brain function who was able to breath only through a long plastic tube surgically inserted in his throat and attached to an oxygen tank on his wheelchair. He had lost his SSI and as a consequence was threatened with loss of his breathing equipment as well. Judge Morgan promptly vacated the warrant, *nunc pro tunc*. While this occurred before the good cause provisions went into effect, it is obvious that vacatur of the warrant would have qualified him under mandatory good cause. He was fortunate in that his case was an atypical one, that of a San Francisco man with a San Francisco warrant. Thus the people who were assisting him were able to secure effective local representation from lawyers who knew how to go about getting the warrant vacated and who had credibility in the local courts. This is unusual since most cases involve warrants from distant jurisdictions. What if his warrant were from Texas? It is far less likely that he would have been able to find someone to represent him in a distant location, let alone succeed in getting the warrant vacated or in getting a statement from a prosecutor that Texas did not intend to seek his extradition. Do we have any doubt as to whether a fair and humane system should find good cause in such a situation? Of course not! His fragile physical state alone or his inability to travel should have qualified him for good cause. Yet the current rules would deny good cause in this case even taking into account his impaired brain function because according to his attorney the warrant was issued just the year before.

Of course, the proposed regulations could be redrafted to take this specific example into account. However, that is not sufficient since other situations are bound to arise which nobody has thought of. However, the proposed discretionary good cause rules could be cured by the addition of a third discretionary good cause category authorizing the Commissioner to allow good cause on the basis of a balancing test, weighing a variety of factors which would be enumerated in the regulation. For example, there could be a provision such as the following: "In instances where the alleged offense or the alleged violation of probation or parole was neither violent, nor drug-related, the Commissioner may also find good cause based on mitigating circumstances which would render the suspension of benefits unjust or contrary to the purposes of the Social Security Act. Such mitigating circumstances to be considered include: 1) the nature, severity and circumstances of the alleged offense, 2) the length of time since the

individual last pled guilty or was convicted of a felony, 3) the age of the individual when the alleged offense was committed, 4) advanced age, 5) terminal or other grave illness of the individual or the individual's immediate family, 6) possible severe adverse impact on other household members, 7) physical or financial inability to travel to resolve the warrant or 8) whether the individual is at serious risk of homelessness or a health emergency." Such a provision would enable the Commissioner to do justice where it cannot easily be done at the present time such as in the case of a severely disabled person whose only contact with the criminal justice system was an adolescent joyride and law enforcement authorities refuse to act either to vacate the warrant or to report that they will not extradite.

We believe the addition of a third discretionary good cause category, using a balancing approach as described above, is the best solution. However, if the Commissioner rejects this approach, she should at least consider ameliorating some of the harshness of the two discretionary good cause categories she proposes. Proposed §§ 404.71(b)(2) & (3) & 416.1339(b)(2) & (3) require that the individual not have been convicted of or pled guilty to another felony since the date of the warrant. The consequences of this requirement are highly unequal and in some cases unduly harsh. Consider two individuals with nonviolent, non-drug-related charges for whom law enforcement agencies have stated they will not extradite. One is age 35 and the other is age 55. SSA proposes to suspend the benefits of the 35 year old because of a warrant from two years ago when he was age 33. He has not pled guilty to or been convicted of another felony since that time. Assuming he meets the other requirements, he should be eligible for good cause under either proposed §§ 404.71(b)(2) or 416.1339(b)(2). On the other hand lets assume that SSA proposes to suspend the benefits of the 55 year old because of a 30 year old warrant from when he was 25 years old. Let us further assume that he was subsequently convicted of a felony 28 years ago at age 27. However, since that time he has turned his life around and has had no further contact with the law. Under this provision he must be denied good cause. This result is simply irrational and unjust. This harsh result could be prevented by replacing the requirement that the individual have no felony conviction or guilty plea to a felony subsequent to the date of the warrant with a provision requiring that the individual have no subsequent felony conviction or guilty plea to a felony within the last 5 years. Also, the look-back period should be calculated from the present date rather than from the date that SSA notified the individual of the warrant.

Similarly the requirement of §§ 404.971(b)(3) and 416.1339(b)(3) that the warrant that is the basis for suspending the benefits have been issued 10 or more years ago is unduly harsh when applied to a population consisting exclusively of people whose medical condition impairs their mental capacity to resolve the warrant. Considering the population to which it would apply, this provision should simply be eliminated to avoid gross injustice. It must also be remembered that many, if not most, of the individuals in this category would qualify under §§ 404.971(b)(1) or (2) or 416.1339(b)(1) or (2) if it were not for the medical condition which impairs their mental capacity to resolve the warrant. There is thus a question of whether this harsh requirement violates § 504 of the Rehabilitation Act of 1973.

90 Day Time Limit for Establishing Good Cause - The strict 90 day time limit for

establishing either mandatory or discretionary good cause before benefits are suspended is not realistic in many situations and will cause the needless interruption of benefits in many cases where the individual will ultimately be determined to be entitled to a restoration of benefits. As applied to people with mental impairments, this time limit may also violate § 504 of the Rehabilitation Act of 1973.

Generally, in order to establish good cause it will be necessary to resolve the underlying warrant in one fashion or another. In most cases, the warrant will have been issued in a state other than the one in which the individual resides, often on the opposite side of the country. Simply establishing the necessary contacts for resolving the warrant in a distant location takes time. On top of that, in many parts of the country, prosecutors and public defenders are overworked and court calendars are congested. It takes time to get the prosecutor and public defender to look at the matter and then it can take considerable additional time to get the matter before a judge who may ultimately be responsible for resolving the matter. It becomes virtually impossible to resolve the matter within 90 days when the warrant is old and the physical court files and the prosecutor's file must be retrieved from archives at a remote location. This is an especially difficult problem in larger metropolitan areas. See, Comments of Michael P. Judge, Chief Public Defender of Los Angeles County and Comments of Hon. Mary Morgan, Judge, San Francisco Superior Court.

Also, the arbitrary 90 day time limit as applied to the mandatory good cause categories violates the mandate of the Social Security Protection Act to pay benefits if the specified conditions for mandatory good cause are met. Pub. Law No. 108-203 § 203(a)(5).

Advance Notice of Suspension - The Title II POMS currently provide for notifying the beneficiary prior to sending a suspension notice that SSA has determined that the individual falls within the nonpayment provisions of the statute and advising the beneficiary as to how good cause may be established. The advance notice is required to further state that if the individual requests a determination of good cause, benefits will continue for an additional 90 days and that if the individual does not contact the agency within 30 days, a suspension notice will be issued. The proposed Title II regulation contains no reference to an advance notice or to benefit continuation where good cause is requested. We realize that this does not mean that SSA intends to eliminate this practice. However, we believe it would be wise to clarify this procedure by including it in the regulation itself with the proviso that the 90 day period be extended as discussed above.

The proposed regulations should be withdrawn and new regulations should be drafted in light of the decision in *Fowlkes* and taking into account the suggestions offered in these comments.

Sincerely,