

No. 1-2017

IN THE
Supreme Court of the United States

LAURA SECORD, Petitioner

v.

**WINFIELD SCOTT, in his Official Capacity as Director, Department of
Immigration and Customs Enforcement, Respondent**

and

LAURA SECORD, Petitioner

v.

CITY OF ANGOLA, Respondent

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE PETITIONER

**Team 17
Counsel for Petitioner
March 20, 2017**

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QUESTIONS PRESENTED

- I. Whether the Second Circuit applied the correct standard to determine if Deputy Pfieff had probable cause to arrest Respondent; and
- II. Whether the "reasonableness test" to determine a time for bail hearings articulated by the second Circuit protects the Due Process rights of undocumented aliens.

STATEMENT OF THE CASE

Statement of Facts

In the winter of 2013, Canadian citizen Laura Secord (“Secord”) emigrated to the United States with the hopes of beginning a new life free from abuse, loneliness, and homelessness. (R. at 8.) Secord, a native of Toronto, was born to parents of Uzbek extraction who physically and emotionally abused her until she ran away at age 16. (R. at 8.) Secord spent the remainder of her teenage years homeless, alone, and facing countless dangers on the streets of a large and busy city. (R. at 8.) As a fragile young woman living on the streets, Secord acquired brass knuckles to protect herself from the dangers she faced on a daily basis. (R. at 8.)

Throughout this difficult time in her life, Secord’s only sense of normalcy and belonging came from a group of friends who met at a shelter each week to play the game Dungeons and Dragons (“D&D”). (R. at 8.) Through Internet access at the shelter and library, Laura was able to broaden her horizons and find a larger community of D&D players who lived in the northwest region of New York. (R. at 8.) Knowing that she had a solid support system in the Buffalo area, Secord decided that moving to the U.S. would be the best way for her to pick up the pieces of her life and start anew. During the remarkably frigid winter of 2013, Secord hitchhiked to Fort Erie and then crossed into the U.S. over the thick ice covering Lake Erie. (R. at 8.) Secord connected with her Buffalo friends, got a job at Tim Hortons, and found a place of her very own to finally call home. (R. at 8.) Finally, her life was looking up.

Secord’s luck changed on December 21, 2015. To mark the Winter Solstice, Secord and her D&D friends decided to play their favorite game somewhere “spooky.” (R. at 8.) James Fitzgibbon (“Fitzgibbon”), a member of the group, offered his uncle’s Angola cottage near the lake. (R. at 9.) Fitzgibbon was expected to look after the vacant cottage throughout the winter

season while his uncle spent time in Florida. (R. at 9.) He told his friends that his uncle would not mind them using the cottage so long as they did not throw a party. (R. at 9.) The group set out that December evening, stopping along the way to buy snacks, drinks, and elaborate wizard and dwarf costumes to add a level of “spookiness” to their game playing. (R. at 9.)

Once they arrived, Fitzgibbon retrieved his spare key from the back patio of the cottage and let the group in through the front door. (R. at 9.) Fitzgibbon could not figure out how to work the electricity, so the group used some candles from the closet to light up the table. (R. at 9.) The friends quickly became wrapped up in their game and played into the night. (R. at 9.) Sometime thereafter, the group was startled by a pounding on the front door of the cottage. Already spooked because they were playing in the dark in an abandoned area by the lake, the friends scattered throughout the cottage and hid from what they could only assume was someone coming to attack or rob them. (R. at 9.)

After several minutes in hiding, Deputy Barnard Pfieff (“Pfieff”) opened the unlocked door of the cottage, announced himself, and drew his side-arm, ordering the friends to come out of hiding. (R. at 2.) Once made aware that the pounding was that of law enforcement, the group emerged. (R. at 9.) Pfieff ordered the group to the ground where they were searched for weapons and identification, which turned up New York state driver’s licenses on all individuals except for Secord. (R. at 2.) Fitzgibbon, clearly shaken, was unable to recall his uncle’s phone number to prove to officers he had permission to be in the cottage. (R. at 3.) Despite numerous photographs of Fitzgibbon and his family throughout the cottage, officers took the group into custody. (R. at 3.) All were subsequently charged with criminal trespass in the second degree. (R. at 3.) After her arrest, Secord’s brass knuckles, which she acquired for protection during her years on the streets, were found in her backpack by law enforcement. (R. at 3.) Pending trial, the

others were released on their own recognizance while Secord's immigration status kept her in custody. (R. at 3.)

After a happy and successful two years in the U.S., Secord's life changed drastically. She and the others were tried and convicted of criminal trespass in the second degree in the City Court of Angola. (R. at 3.) Secord admitted that she brought the brass knuckles into the country with her and consequently, she was also convicted of criminal possession of a deadly weapon in the fourth degree. (R. at 3.) Secord was sentenced to one year for each conviction, to be served concurrently, in the Erie County Correctional Facility. (R. at 3.) After finally finding her way, Secord was yet again hopeless and alone.

Procedural History

Following the arrest, Secord, and others present in the cabin, were tried in the City Court of Angola and convicted of criminal trespass in the second degree. (R. at 3.) Due to her honesty that the brass knuckles belonged to her for protection, Secord was also convicted of criminal possession of a deadly weapon in the fourth degree. (R. at 3.) Secord was sentenced to a year in prison for the two convictions, to be served concurrently, and began serving time in the Erie County Correctional Facility in Alden, New York. (R. at 3.)

While Secord served her conviction, the Criminal Defense Legal Clinic at the University at Buffalo School of Law filed a habeas corpus petition in the United States District Court for the Western District of New York on Secord's behalf. (R. at 3.) The petition alleges that her arrest and conviction violate Secord's Fourth Amendment rights due to the fact that Pfieff lacked probable cause to enter the cabin and arrest Secord for criminal trespass and criminal possession of a deadly weapon. (R. at 3.) As that petition was pending, Secord served her sentence and was transferred into the Department of Homeland Security's custody for deportation proceedings. (R.

at 4.) After six months in Immigration and Customs Enforcement ("ICE") custody, the law students of the Criminal Defense Legal Clinic at the University at Buffalo School of Law filed another habeas corpus petition on Secord's behalf, as the detention by ICE had surpassed the bright line test used in the Second Circuit, as set forth in *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015). (R. at 4.) The district court granted the petition, and ordered Secord be released from ICE custody immediately. (R. at 4.) Subsequently, Secord's first petition to throw out her conviction was also granted. (R. at 4.) The City of Angola and ICE both appealed, and the United States Court of Appeals for the Second Circuit reversed the district court's determinations and ordered Secord to be remanded to the custody of ICE. (R. at 4.) The cases were joined for judicial economy, and is now one case on appeal before this Court.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Second Circuit incorrectly found that Pfeiff had probable cause to arrest Secord and seize her brass knuckles. The Fourth Amendment protects against unlawful searches and seizures. In making a determination of probable cause for arrest, the totality of the circumstances must be considered. Here, the totality of the circumstances does not warrant probable cause. Secord was in the cabin per the authority of Fitzgibbon. Fitzgibbon was the nephew of the cabin owner, he knew where the key was, and he was asked to watch over the cabin. He indicated to Secord that they had permission to be inside the cabin, and there was no reason for her to believe differently. Therefore, she was not on the premises unlawfully. In looking at these circumstances, Pfeiff could not have reasonably believed she was guilty of trespass and did not have probable cause to arrest Secord. The lack of probable cause proves that the arrest of Secord was unconstitutional. Under Fourth Amendment protections, the exclusionary rule bars any evidence seized during an unlawful arrest. The brass knuckles in Secord's backpack were uncovered as a fruit of this illegal arrest. Therefore, Secord also cannot be convicted of possession of a deadly weapon.

In addition, the Second Circuit erred in reversing Secord's granted habeas corpus petition and remanding her back into ICE custody. The Second Circuit strayed from their very own precedential decision set forth in *Lora v. Shanahan* and incorrectly held that the "reasonableness test" should apply to Secord's case. 804 F.3d 601 (2d Cir. 2015). The correct standard for determining bail hearings for aliens, as established by the Second Circuit in *Lora*, is the six-month bright line rule. The Due Process Clause of the Fifth and Fourteenth Amendments applies to all persons within the United States throughout all stages of legal proceedings, regardless of their status. Further, 8 U.S.C. § 1226, the mandatory detention authorizing statute, does not

permit the indefinite or permanent detention of an alien. In order to adhere to the Constitutional protections of the Due Process Clause, an alien must be granted an individualized hearing at which the Government has the burden of proving that the alien would be a danger or a flight risk if he/she was not continuously detained. If this burden cannot be met, the alien must be released on bail. Secord cannot be considered dangerous, nor is she a flight risk. Secord fled from an abusive family and was homeless, alone, and in danger on the streets for years. Her only protection as a young teenage female was a pair of brass knuckles she acquired for safety. Secord's only "family" is her group of friends in Buffalo that she emigrated to the U.S. to be with – she has nowhere to flee. Secord has been in ICE detention for over six months at this time and has no idea when she will get her day in court due to the backlog in the system. As such, her detention is now indefinite while she awaits an individualized hearing. In accordance with the Due Process Clause of the Constitution, 8 U.S.C. § 1226, and the bright line rule, Secord must be granted a bail hearing immediately. Her continued detention is against the bright line standard and unconstitutional.

ARGUMENT

This Honorable Court should reverse the United States Court of Appeals for the Second Circuit. Pfeiff lacked probable cause to arrest Secord. Fitzgibbon was the nephew of the cabin owner, had permission to be inside, and told Secord as such. There was no reason for Pfeiff to reasonably believe that Secord was present unlawfully. Further, as a fruit of an unlawful arrest, the brass knuckles cannot be used as evidence against Secord. Additionally, pursuant to the six-month bright line rule, Secord must be given an individualized bail hearing and released from ICE custody immediately. Indefinite detention violates her constitutional rights, and does not carry out Congress' intent behind the mandatory detention statute, 8 U.S.C. § 1226.

I. WHILE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECTLY IDENTIFIED A “TOTALITY OF THE CIRCUMSTANCES” STANDARD TO BE USED IN A PROBABLE CAUSE DETERMINATION, IT IMPROPERLY APPLIED THIS STANDARD AND ERRED IN FINDING PROBABLE CAUSE BECAUSE THE FACTS AS A WHOLE DO NOT EVIDENCE THAT DEPUTY PFIEFF HAD REASON TO BELIEVE SECORD HAD COMMITTED A CRIME.

In applying the proper “totality of the circumstances” standard for a determination of probable cause, the United States Court of Appeals for the Second Circuit incorrectly concluded that there was probable cause to arrest Secord and seize her brass knuckles. In a probable cause determination, the totality of the circumstances must be taken into account. All of the facts and circumstances within the officer's knowledge must lead to a reasonable belief that each individual being investigated is satisfying all elements of a crime. Here, the totality of the circumstances does not show that Secord was knowingly and unlawfully trespassing under the elements of criminal trespass. Additionally, since the lack of probable cause makes the arrest itself unconstitutional, the exclusionary rule, extended through the fruit of the poisonous tree

doctrine, renders any evidence seized during the arrest, such as Secord's brass knuckles, inadmissible. Therefore, this Honorable Court should reverse and overturn Secord's convictions.

A. Under a totality of the circumstances standard, the Court cannot make a determination of probable cause as the facts in their entirety would not lead a reasonable man to believe that Secord was breaking the law.

The Fourth Amendment of the United States constitution protects individuals against unlawful searches and seizures. U.S. Const. amend. IV. For the last several decades, it has been a well-established standard that probable cause is proven by a “totality of the circumstances” standard that is “practical and commonsensical” (R. at 7, citing *Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013)). Distinguishing the meaning of “totality of the circumstances,” this Court has held that “probable cause to arrest exists if ‘at the moment the arrest was made[,] the facts and circumstances within [the officer’s] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspects committed a crime.’” (R. at 10, citing *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)); *see also Carroll v. US*, 276 U.S. 132 (1925). This standard relies on more than just mere suspicion. A prudent person or officer must reasonably believe a crime is about to be committed based on the facts and circumstances readily known to him, not just a "hunch."

At the root of all probable cause definitions is the notion of a reasonable ground for a belief that a crime has been committed. In a probable cause determination, the court assesses “probabilities” which are “not technical” but rather “factual and practical considerations” of ordinary life on which “reasonable and prudent men, not legal technicians, act.” *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Essentially, probable cause can be found when the entirety of the facts and circumstances are enough to “warrant a prudent man in believing that the petitioner had committed or was committing an offense.” *Beck v. State of*

Ohio, 379 U.S. 89, 91 (1964). *Brinegar v. United States* affirms this, pointing out that to allow less “would be to leave law-abiding citizens at the mercy of the officer’s whim.” 338 U.S. at 176.

Other circuits' courts of appeals have deliberated on pertinent issues in making a probable cause determination. Of particular relevance is the United States Court of Appeals for the Tenth Circuit’s deliberation of whether an officer may rely exclusively on the statements of a witness, rather than conducting an independent investigation, to establish probable cause for a warrantless arrest. The Second Circuit's dissenting opinion cites to *Baptiste v. J.C. Penney*, where the Tenth Circuit found that, while officers may weigh witness credibility when determining probable cause, they cannot ignore “available and undisputed facts.” 147 F. 3d 1252, 1259 (10th Cir. 1998). In that case, department store security guards suspected a customer of shoplifting. *Id.* at 1254. Upon arrival of a local police officer, the officer conducted his own independent observation of the alleged shoplifting through watching security video footage and talking to the suspect, rather than solely listening to the security guards suspicion. *Id.* at 1255. By taking into account all of the available facts, the officer was able to determine that there was not probable cause to arrest the suspect for shoplifting. *Id.* See also *City of Lawton, Okla. V. Lusby*, 474 U.S. 805 (10th Cir. 1986) (holding that, although witness testimony may be taken into account, police officers cannot ignore clearly present evidence or delegate their duty to investigate and make a probable cause determination based on that third-party investigation.)

Here, in looking at the totality of the circumstances, the facts as a whole do not establish probable cause to arrest Secord. Pfeiff can consider the credibility of the man who reported activity in the usually vacant cabin. However, pursuant to *Baptiste v. J.C. Penney*, the remaining facts should have heavily outweighed this statement. The individuals inside the cabin

testified that they were terrified when they heard a knock at the door, as they had been playing a somewhat spooky game and were already on edge. As soon as Pfeiff entered the cabin and identified himself as a police officer, the group recognized the severity of the situation and stepped forward. Fitzgibbon stated that the cabin belonged to his uncle, but that he was in charge of looking after the property during the winter. He also knew where the spare key was kept. Multiple photographs around the cabin featured Fitzgibbon, further proving his relationship to the premises and corroborating his story and right to be inside the cabin. Additionally, when later contacted, the uncle confirmed that Fitzgibbon was his nephew whom he asked to watch over the cabin. While the uncle admittedly stated that he did not permit Fitzgibbon to throw any parties, six individuals playing a board game around the kitchen table can hardly be considered a party. The available and undisputed facts of the situation cannot be ignored. Any reasonable man, having both heard this story and viewed the evidence that Fitzgibbon's uncle owned the cabin and permitted his entry, would not believe that trespass had taken place.

1. The elements of criminal trespass cannot be proven and, as such, probable cause is lacking.

For a finding of probable cause to occur, “there must be probable cause for all elements of the crime.” (R. at 10, citing *Williams v. City of Alexander*, 772 F.3d 1307, 1312 (8th Cir. 2014)). According to New York statute, in relevant part, “a person is guilty of criminal trespass in the second degree when he or she *knowingly enters or remains unlawfully* in a dwelling.” NY CLS Penal § 140.15(1) (emphasis added). An individual enters or remains unlawfully when he is “not licensed or privileged to do so.” NY CLS Penal § 140.00(5). Generally, an individual is licensed or privileged to enter private property “when [s]he has obtained the consent of the owner or another whose relationship to the premises gives him authority to issue such consent.” *In re Lonique M.*, 939 N.Y.S. 2d 341, 343 (App. Div. 2012).

While it is true that Secord knowingly entered the cabin and remained inside, it cannot be proven that she did so unlawfully. Fitzgibbon invited the group to the cabin, and told them that his uncle gave him permission to be on the property. Given that Fitzgibbon knew where the key was kept and appears in several photographs around the cabin, it was very clear he had a relationship with the property. The facts would lead Secord to reasonably believe Fitzgibbon had the authority to issue consent to enter the cabin. Through Fitzgibbon's consent, Secord was privileged to enter the cabin. Secord had no reason to believe that she was there unlawfully. Her only knowledge came from what Fitzgibbon told her, and Fitzgibbon told her he had authority to use the cabin. Further, Fitzgibbon told the police officer that they had permission from his uncle to be there. Upon contact, the uncle confirmed this story. Therefore, nothing in the facts evidences that Pfeiff could reasonably believe that Secord was there unlawfully. The elements of criminal trespass are clearly not satisfied and, therefore, a finding of probable cause would be improper.

2. Regardless of the guilt or innocence of the other individuals involved, there is no probable cause for arrest with respect to Secord.

As established, probable cause looks at “a reasonable ground for belief of guilt.” *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (holding that front seat passenger in a car filled with money and cocaine more than likely was part of the drug crime). More specifically, that belief “must be particularized with respect to the person to be searched or seized.” *Id.* Although the court in *Maryland v. Pringle* did find probable cause, the vital takeaway is the notion that there must be probable cause established with respect to the probability that each person committed the crime, regardless of probable cause relating to other individuals present. *Id.* at 373. *See also Ybarra v. Illinois*, 44 U.S. 85 (1979) (stating that a search or seizure of a person must be justified by probable cause particularized with respect to that

person, and cannot be avoided by merely establishing probable cause to search another individual who is with the person or the premises where the person may be).

In this case, as far as Secord knew, she had permission to be inside the cabin. Fitzgibbon told his friends he was watching the cabin and indicated that they were allowed to be there. There was no way for Secord to know any differently. Fitzgibbon knew where the key to the cabin was, and was seen in photographs around the cabin. Secord had no reason to doubt whether or not she was permitted within the cabin. More importantly, given this evidence, the officer had no reason to believe that Secord knew she was trespassing. None of the facts indicate that Secord did not know they may not have had permission, and thus there is no reasonable ground for a belief of guilt with respect to Secord. Therefore, the officer could not establish probable cause for Secord in particular, despite any possible finding of probable cause to arrest others in the group. As the standard established, a reasonable ground for belief of guilt must be particularized *to each individual*. A potential finding of probable cause in regards to the others arrested at the cabin should have no impact on Secord's innocence.

B. Under the exclusionary rule, extended through the fruit of the poisonous tree doctrine, without a finding of probable cause, all evidence seized pursuant to an unlawful arrest is inadmissible.

In 1914, this Court held that, in regards to federal cases, the Fourth Amendment prohibited the use of evidence obtained through an illegal search and seizure. *Weeks v. United States*, 232 U.S. 383, 398 (1914). In *Weeks*, the Court found that the Fourth Amendment would be virtually meaningless if it did not protect against all evidence obtained through an invasion of privacy. *Id.* However, this ruling was confined to federal cases only, and never binding on the states. Nearly fifty years later, this Court decided *Mapp v. Ohio* and extended the *Weeks* rule to state cases as well. 367 U.S. 643, 655 (1961) (finding evidence that led to a conviction for possession of

obscene and lewd materials seized during a search of the house to be inadmissible as it was the product of a unlawful and warrantless search). *Mapp v. Ohio* held that "all evidence obtained by searches and seizures in violation of the Constitution, is, by that same authority, inadmissible in a state court." *Id.* Based upon the finding in *Mapp*, this Court determined that, given the Fourteenth Amendment and the Due Process Clause, the Court could no longer allow the exclusionary rule set forth in *Weeks* to be for optional use by the state courts.

It is well-settled that the fruit of the poisonous tree doctrine extends the exclusionary rule beyond direct products of governmental illegality, to secondary evidence that is a "fruit" or result of the illegal action. *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 392 (1920). Essentially, the evidence obtained during an unconstitutional search, or "the Government's own wrong," cannot be admitted. *Id.* See also *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (holding that evidence seized in defendant's bedroom was found "by the exploitation of an illegality" and was thus to be excluded as a "fruit" of the agents' unlawful entry and arrest).

Pursuant to the application of the exclusionary rule and the fruit of the poisonous tree doctrine, Secord's conviction for the brass knuckles must also be vitiated. Given the lack of probable cause, Secord's arrest and subsequent convictions were unconstitutional. Therefore, due to the illegality of the arrest, Deputy Pfeiff's search and seizure of Secord's backpack was also unconstitutional. Under the fruit of the poisonous tree doctrine, the brass knuckles seized from within that backpack are barred as evidence against Secord due to the fact that were a "fruit" of an unlawful search. The discovery of the brass knuckles cannot be separated from the unlawful search of the cabin that led to Secord's unconstitutional arrest.

**II. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
ERRED IN REVERSING SECORD'S GRANTED HABEAS CORPUS PETITION
AND REMANDING HER INTO ICE CUSTODY BECAUSE THE DUE PROCESS
RIGHTS OF UNDOCUMENTED ALIENS ARE BEST SERVED BY THE SIX-
MONTH BRIGHT LINE RULE.**

Secord's Due Process rights were violated when the Second Circuit reversed her habeas corpus petition and remanded her back into ICE custody. All individuals within the borders of the United States are entitled to the protections of the Due Process Clause, and Secord is no different. Determining a time for bail hearings under the "reasonableness test" articulated by the Second Circuit offends the Due Process rights of undocumented aliens. The reasonableness test creates the possibility of an indefinite and possibly permanent detention, which does not serve the purposes of the detention authorizing statute, 8 U.S.C. § 1226, or the intent of Congress. A six-month bright line rule for holding individualized hearings proves more reasonable, fair and effective. If the Government cannot prove by clear and convincing evidence that an alien is dangerous or a flight risk, the alien must be released on bail. Here, Secord, poses no danger and is not a flight risk. She does not possess violent tendencies and her whole life is in Buffalo. If Secord is kept in detention any longer without a hearing, her constitutional rights will continue to be violated at the hands of the Government. In accordance with the statute and bright line rule, this Honorable Court should overturn the Second Circuit decision and grant a bail hearing immediately.

A. The Due Process Clause applies to all persons within the United States.

The Due Process Clause of the Fifth and Fourteenth Amendments is a fundamental principle that lies at the heart of American values. Laura Secord, like every other individual within the borders of the United States, is entitled to all of the protections of the Constitution and its amendments. "No person shall . . . be deprived of life, liberty, or property without due process

of law . . .” U.S. Const. amend. V. It is well-established that the Due Process Clause applies to all persons within the United States, including aliens, despite “whether their presence is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001). This protection extends to those aliens who are facing removal proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993).

The Immigration and Nationality Act mandates detention pending removal proceedings for aliens who have committed certain crimes. 8 U.S.C. § 1226(c). However, 8 U.S.C. §1226, which authorizes such detention, has been interpreted by this Court to include a temporal limitation based upon a degree of "reasonableness" to avoid the constitutional concerns surrounding Due Process. *Zadvydas*, 533 U.S. at 682. Never has the statute been interpreted to permit unlimited discretion authorizing an indefinite and possibly permanent detention. *Zadvydas*, 533 U.S. at 679-680 (considering a challenge to post-removal detention). In fact, §1226’s mandatory detention provision is only meant to govern the detention of “deportable criminal aliens *pending their removal proceedings*.” *Demore v. Kim*, 538 U.S. 510, 512 (2003). This Court further emphasized the importance of an expedited process that was brief and had a “definite termination point.” *Id.* At a certain point, usually the six-month mark, continued detention is considered unreasonable absent a showing by the Government at an individualized hearing that furthering the detention would be “consistent with the law’s purposes of preventing flight and dangers to the community.” *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 232 (3d Cir. 2011); *see also Demore*, 538 U.S. 510; *Lora v. Shanahan*, 804 F.3d 601; *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013); *Casas-Castrillon v. Department of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2008). If the Government does not meet its burden at that hearing, the alien is entitled to release on bond. *Zadvydas*, 533 U.S. at 701.

When Secord entered the United States in the winter of 2013, her legal circumstances changed and she gained the protections set forth in the Constitution because she was within U.S. borders. Though she entered illegally, as opined in *Zadvydas*, the Due Process Clause became applicable to Secord. Since her remand back into ICE custody, Secord is again being deprived of her Due Process right to liberty. As demonstrated through decisions of this Court, various circuit courts of appeals, including Secord's very own circuit court of jurisdiction, Secord is entitled to the protections under the Due Process Clause and has been since the winter of 2013. The District Court for the Western District of New York was correct to order Secord's release after her six-month stay in ICE custody without an individualized bond hearing.

In order to satisfy the purposes of the statute and adhere to the law regarding Due Process, an alien in custody must be provided with an individualized hearing and subsequently released unless the Government meets its burden of showing the alien is dangerous or a flight risk. In this case, Secord cannot be considered dangerous or a flight risk. Secord is a young woman who acquired brass knuckles as a result of living alone on the street. Her conviction for possession of a deadly weapon, which would be barred by the exclusionary rule, does not reveal that Secord is a dangerous individual. Her background does not show a history of violence or criminal actions. It only shows that Secord has been a victim of hardship for quite some time. In addition, Secord fled her abusive home at the age of 16. She was homeless for years and then moved to the United States where she formed her very own "family." All that Secord knows and loves is in the Buffalo area. She has no one else. She has nowhere to go. There is no potential of a flight risk in Secord's case. As such, the Government cannot prove that the continued detention of Secord is in line with the purposes of the statute and she is entitled to release on bond. The

only way to “reasonably” uphold the Constitutional value of Due Process is to grant Second a hearing and release.

B. Without following the bright line rule, a possibility of indefinite detention exists, which is not authorized by statute or Congressional intent.

Though “reasonable” may be considered an ambiguous standard, Congress did not intend for 8 U.S.C. § 1226 to authorize indefinite detention. In fact, the majority of courts have interpreted the statute to apply to a brief six-month period. 8 U.S.C. § 1226 has never been interpreted to permit unlimited discretion authorizing an indefinite and possibly permanent detention. *Zadvydas*, 533 U.S. at 679-680; *see also Lora*, 804 F.3d 601. “A statute permitting indefinite detention of an alien would raise a serious constitutional problem . . . Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects.” *Id.* at 690. This Court has opined that when Congress makes its intent clear within a statute, the court is to give effect to that expressed intent. *Id.* at 696 (quoting *Miller v. French*, 530 U.S. 327, 336 (2000)). However, there is “nothing in the statute’s legislative history” that clearly demonstrates a “congressional intent to authorize indefinite, perhaps permanent, detention.” *Id.* at 680. If Congress intended to authorize long-term detention, it would have clarified through more definite terms. *Zadvydas*, 533 U.S. 697.

While *Zadvydas* focused primarily on post-removal detention, detailed in 8 U.S.C. § 1231, this Court addressed the history of detention statutes under several immigration acts and found nothing to support indefinite detention within any of the applicable statutes. *Id.* at 699. *See also Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (opining that regardless of the authorizing statute, detention becomes prolonged at the six-month mark). Despite the debate

over what constitutes a “reasonable” time period of detention, this Court and all circuits who have decided the issue have limited detention before an individualized hearing must be held to a brief duration, typically around the 180 day mark (approximately six months). *See Clark v. Martinez*, 543 U.S. 371 (2005); *Demore*, 538 U.S. 510; *Zadvydas*, 533 U.S. 678; *Lora*, 804 F.3d 601; *Rodriguez*, 715 F.3d 1127; *Casas-Castrillon*, 535 F.3d 942; *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006). Even in cases where a bright line universal rule was not established, six months is still the most “reasonable” time period before a hearing is required because statistically, § 1226 cases are almost always completed well before the six-month mark. *Demore*, 538 U.S. at 529 (holding that in 85% of cases of § 1226 detention, removal proceedings are completed in an average of 47 days and in remaining 15% that includes appeals, the average time is four months until removal proceeding’s completion).

Here, Secord is sitting in limbo, unsure of what her future holds and when her detention will end. Currently, the removal dockets in the Western District of New York and the Second Circuit as a whole are overloaded with cases due to the close proximity to the Canadian border. Secord is detained because the court system is encumbered by the continuing increase in cases under 8 U.S.C. § 1226 and the district court fears a terrorist slipping through the cracks. Though an understandable concern, it is unconstitutional to detain an individual indefinitely. Secord was already in ICE custody for over six months before her second habeas petition was granted. Now, she has been taken back into custody to sit and wait on the Government to prepare evidence for a hearing. With the overwhelming removal docket pushing hearings to 11 or more months at this time, Secord has no idea when she will even have the chance to go before a judge. She has already served her sentence *and* the “reasonable” period of ICE detention. At this point, any

further detention without a prompt and effective bond hearing is depriving Secord of Due Process.

C. The Second Circuit has already established that the six-month bright line rule is best suited to the specific interests of the Circuit through careful consideration and deliberation.

Through a complex study of applicable case law in other jurisdictions and an analysis of the statute, the court in *Lora v. Shanahan* established that an implicit time limitation of a reasonable six-month time period must be read into 8 U.S.C. § 1226. 804 F.3d at 616. *Lora*'s precedential decision did not come easily. As a case of first impression in the Second Circuit, *Lora* was the product of complicated facts and a thorough discussion of all possible options. *Id.* at 614. The Second Circuit chose to follow the approach set forth by the United States Court of Appeals for the Ninth Circuit in *Rodriguez*, which established that “statutory mandatory detention authority under Section 1226(c) . . . [is] limited to a six-month period, subject to a finding of flight risk or dangerousness.” *Id.* (quoting *Rodriguez*, 715 F.3d at 1133). The Second Circuit relied on two major U.S. Supreme Court decisions, *Demore* and *Zadvydas*, to justify their reasoning, “taken together, [*Demore* and *Zadvydas*] suggest that the preferred approach for avoiding due process concerns in this area is to establish a presumptively reasonable six-month period of detention.” *Id.* at 615. The Second Circuit stated that due to the “pervasive inconsistency and confusion” surrounding the “reasonableness test” and the current immigration backlog within the circuit, the best way to ensure similar treatment, predictability and certainty was to adopt a six-month rule. *Lora*, 804 F.3d at 615.

In this case, the Second Circuit is still facing a disastrous backlog in their immigration removal docket. Secord is sitting in ICE custody *because* of the backlog. The Second Circuit has strayed from their previous bright line decision due to unjustified fears about Secord's

capabilities to flee and commit crime again. The Court in *Lora* made clear that continued detention of immigrants who were “neither a flight risk nor dangerous” was detrimental to immigrants’ lives and Due Process rights. *Id.* at 614-615. As previously mentioned, Secord is neither of these things. She has created a life for herself in Buffalo and has nowhere else to go. Further, she is not a dangerous criminal. Her possession of brass knuckles is a result of years spent on the streets as a vulnerable young girl. None of the facts indicate that she is dangerous or a flight risk. The Second Circuit adopted the bright line rule to protect this country’s values and to now turn away from a precedential, first-impression decision in the circuit undermines the value of the Constitution and the importance of decisions of this magnitude. Frankly, to stray now would be irrational and irresponsible.

CONCLUSION

This Honorable Court should reverse the Second Circuit's decision in regards to each of the two claims. Deputy Pfeiff lacked probable cause to enter the cabin and arrest Secord. Given the fact that Fitzgibbon gave Secord authority to be on the premises, the totality of the circumstances should not have provided Pfeiff with a reasonable belief that Secord had committed a crime. Additionally, Secord's brass knuckles cannot be used as evidence against her as they were the fruit of an unlawful search and arrest and are therefore inadmissible. Furthermore, the six-month bright line rule was established to protect the Due Process rights of undocumented aliens. Secord cannot constitutionally be detained without an individualized hearing to determine if her detention is in line with the purposes of 8 U.S.C. § 1226. As such, a bail hearing must be granted immediately to uphold her Constitutional rights. Petitioner respectfully asks this Court to reverse.

Respectfully submitted,

Team 17
Counsel for Petitioner
March 20, 2017

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