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; CITY OF ANGOLA,
Respondents.

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

BRIEF FOR PETITIONER – TEAM 23

QUESTIONS PRESENTED

1. Whether the Second Circuit applied the correct standard to determine if Deputy Pfieff had probable cause to arrest Respondent; and

2. Whether the "reasonableness test" to determine a time for bail hearings articulated by the Second Circuit protects the Due Process rights of undocumented aliens.

TABLE OF CONTENTS

Questions Presented 2

Table of Contents 3

Table of Authorities 5

Statement of the Facts 7

Summary of the Argument. 9

Argument 12

I. THE COURT OF APPEALS ERRED WHEN THEY DETERMINED THAT THER WAS PROBABLE CAUSE TO ARREST THE PETITIONER.
. 12

A. The Court of Appeals further erred when they did not consider the totality of the circumstances when determining whether or not Deputy Pfieff had probable cause to arrest the Petitioner.
. 12

B. The Court of Appeals erred in concluding that there was probable cause at the time of the Petitioner's arrest to support the *mens rea* element of criminal trespass in the second degree or even that there was probable cause a crime was being committed.
. 13

C. The Court of Appeals erred when they determined that there was probable cause regardless of the fact that Deputy Pfieff ignored exculpatory evidence which was directly relevant to the totality of the circumstances.
. 15

II. THE "FACT-DEPENDENT INQUIRY" TO REASONABLENESS ARTICULATED BY THE SECOND CIRCUIT COURT OF APPEALS DOES NOT PROTECT THE DUE PROCESS RIGHTS OF UNDOCUMENTED ALIENS.
. 16

A. Detainees who are not otherwise subject to mandatory detention should receive immediate hearings.
. 17

1. If an alien does not commit a crimes of moral turpitude, that alien cannot be detained under § 1226(c).

. 17

2. If it is foreseeable that an alien will not be removed, mandatorily detaining the alien is unreasonable.
. 18

III. EVEN IF *LORA* AND THE BRIGHT-LINE RULE IS REJECTED, PETITIONER SHOULD STILL PREVAIL.

. 18

Conclusion 19

TABLE OF AUTHORITIES

CASES: **PAGE:**

Baptiste v. J.C Penny Co., 147 F.3d 1252, 1259 (10th Cir. 1998) 9, 12, 15, 16

Beck v. State of Ohio, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964) 9, 12, 13, 14

Davis v. City of N.Y., 373 F. Supp. 2d 322, 330 (S.D.N.Y. 2005) 9, 12

Demore v. Hyung Joon Kim, 538 U.S. 510, 518, 123 S. Ct. 1708 (2003) 10, 11

Diop v. ICE/Homeland Sec., 656 F.3d 221, 230 (3d Cir. 2011) 16

Efstathiadis v. Holder, 752 F.3d 591 (2d Cir. 2014) 17

Logsdon v. Hains, 492 F.3d 334 (6th Cir. 2007) 9, 10, 12, 15, 16

Lora v. Shanahan, et al, 804 F.3d 601 (2d Cir. 2015) 7, 11, 16, 18

Ly v. Hansen, 351 F.3d 263, 273 (6th Cir. 2003) 18

Maryland v. Pringle, 540 U.S. 366, 371(2003) 9, 12, 13

Reno v. Flores, 507 U.S. 292, 306, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) 10

Williams v. City of Alexander, 772 F.3d 1307, 1312 (8th Cir. 2014) 9, 12, 13, 14, 15

Zadvydas v. Davis, 533 U.S. 678, 682, 690, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) . . . 11, 18

STATUTES: **PAGE:**

8 U.S.C. § 1226 10

8 U.S.C.S. § 1226 . . . . . .10, 16

8 U.S.C.S. § 1226(a) 11, 16

8 U.S.C.S § 1226(c) 10, 16, 18

8 U.S.C.S § 1226(c)(1) 10, 11, 18

N.Y. Penal Law § 140.15 (2010) 14, 18

N.Y. Penal Law § 265.01 (2008) 18

OTHER AUTHORITIES:

23 A.L.R. Fed. 480 (Originally published in 1975) 17

U.S. Const. amend. IV. 9

David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003, 1024 (2002). 17, 18

Pet'r's Br. 1 7

Pet'r's Br. 2 . . . . . .8, 13, 14

Pet'r's Br. 3 . . . . . .8, 9, 15, 16

Pet'r's Br. 5 11,17

Pet'r's Br. 8 7

Pet'r's Br. 9 . . . . . .7, 8, 9, 10, 14, 16, 17

Pet'r's Br. 10. . . . . 9, 10, 13

STATEMENT OF THE FACTS

In 2015, the Petitioner in this case, Laura Secord was convicted of criminal trespass in the second degree and criminal possession of a dangerous weapon in the fourth degree. Pet'r's Br. 1. She served a year in county prison, and was subsequently transferred to the custody of Immigration and Customs Enforcement (ICE) at their Buffalo field office. She was held in ICE detention for six months while ICE was processing her deportation. *Id.* During this time, she filed two habeas corpus petitions with the United States District for the Western District of New York. *Id.* The basis for the first petition she filed, was that her arrest violated her Fourth Amendment Rights since the arresting officer did not have probable cause for the arrest. *Id.* The basis for the second petition she filed was based on her detention by ICE for a period of six months as per the Court of Appeals decision in *Lora v. Shanahan, et al*, 804 F.3d 601 (2d Cir. 2015). The District Court granted both petitions, and Secord was released from ICE custody but remained in the United States while awaiting removal proceedings. The Court of Appeals later reversed both decisions. Pet'r's Br. 1.

After a very troubling childhood, Secord decided to enter the United States, from Canada by crossing Lake Erie during one very cold winter when the lake had frozen completely over. *Id* at 2. Secord had grown up in an extremely abusive family in Toronto Canada, and still remains a Canadian citizen. *Id.* at 8. However, even coming from an awful home situation Secord does not have any criminal history. *Id*. When Secord was sixteen she could no longer endure the emotional and physical abuse at her home, so she ran away and began living on the streets in Toronto. *Id.* In order to protect herself as a young woman in a large city without a home, she brought a pair of brass knuckles, and kept them with her everywhere she went. *Id.*

The only highlight of her life at this time, was a small group of friends that would play Dungeons and Dragons at the local shelter. *Id*. She considered these people her "family." *Id*. Awhile after she started to play Dungeon and Dragons, Secord found a larger group of players online. *Id*. She began using the computer both at the shelter and the local library to contact these new found friends of her. *Id.* The group that she would interact with the most lived in Buffalo, New York. *Id*. After becoming close friends with this group, Secord decided to brave the extremely harsh weather conditions, and walk across the ice on Lake Erie to meet her friends in Buffalo. *Id.*

Since Secord entered the United States in 2012, she had not interaction with law enforcement until December of 2015. *Id*. Shortly after arriving, Secord started working at Tim Hortons, and was finally able to support herself so she was no longer homeless. *Id*. During this entire time, she continued to play Dungeon and Dragons at the homes of various other players. *Id*. In this game, the Winter Solstice is important, and it was on December 21st of 2015 that one of the players, James Fitzgibbon, wanted to celebrate it. *Id.*

Fitzgibbon had been taking care of his uncle's cabin in Angelo, New York (about 45 minuets from Buffalo) over the winter while his uncle was in Florida. *Id* at 9. He would go and "check-in" on the property once a week. *Id.* The only condition Fitzgibbon uncle gave him about using the cabin was that he was not allowed to have any parties there. *Id*. Not thinking that a group of six people playing a card game constituted as a party, Fitzgibbon invited the other Dungeon and Dragons players to come over to the cabin. *Id.* Knowing that they were planning on being at the cabin until around midnight, the group stopped along their way to the cabin and purchased

costumes to play the game, snacks, beer and soda. *Id.* When they arrived, Fitzgibbon used his key to let them in to the house. *Id.* While neither the electricity or the heat worked in the cabin, the group lit some candles, and started playing the card game while sitting around the dining room table. *Id.* As part of the game, they put on the costumes that they had purchased along the way to the cabin. *Id.*

During this time, the local police department received a phone call from a resident of Angola, New York, stating that they saw some lights on in one of the cabins on the lake. *Id* at 2. The resident thought this was strange since most of the cabins were vacant during the winter time. *Id.* Deputy Pfieff from the Erie County Sheriff's office was sent to the cabin to investigate the call. *Id.* Upon arriving at the property, Deputy Pfieff could see the candle light, and approached the window where he could see a group of six people dressed in costumes playing cards at the dining room table. *Id.*

Deputy Pfieff was unsure of what was happening at the cabin so he talked to his supervisor to explain the situation. His supervisor instructed him to enter the property. *Id.* When Deputy Pfieff knocked on the door and identified himself as a police officer, he terrified Secord and the other young adults. *Id.* at 9. Not thinking logically, the young adults were concerned that there was someone trying to attack them, and they ran to hide in different parts of the cabin. *Id.* Deputy Pfieff witnessed this; he than entered the cabin through the unlocked door and once again identified himself as law enforcement. *Id.* at 2. Before entering the cabin, Deputy Pfieff called for backup. *Id.* Since the young adults could now properly hear him they realized that he was in fact law enforcement, and such they came out of hiding. *Id.* At this time, all six of the young adults, including Secord were still wearing the costumes they had on while playing the game. *Id.*

Once Deputy Pfieff entered the house, he was able to see the cards and drawings on the table, along with other pictures. *Id*. However, even still he ordered all six of the individuals to lay on the ground with their hands on top of their heads, while he searched them for identification and weapons. *Id.* Secord was the only one that was not able to provide identification. *Id.*

Slowly the other police officers started to arrive on scene, and together than began to question each of the individuals. *Id.* at 3. During this questioning, the individuals all stated that while they did not live in the cabin they had permission to be there, given that Fitzgibbon was the nephew of the owner. *Id.* Fitzgibbon explained in detail that while he did not live in the house they had permission to be there, and corroborated this statement by showing the officers where he would keep the key while taking care of the cabin for the winter. *Id.* Fitzgibbon was also in many of the pictures that were hanging on the wall, and the pictures showed him at the cottage with his family. *Id.* at 9. Unfortunately, Fitzgibbon did not have any contact information for his uncle in Florida. *Id.* at 3.

In-spite of this evidence, the Deputy Pfieff and the other officers arrested the six individuals for criminal trespass and too them to the Erie County Holding Center. *Id.* Following this arrest, the officers searched Secord's backpack and found a pair of brass knuckles. *Id.* As such, Secord was also charged with possession of a dangerous weapon. *Id.* Everyone except for Secord was released, Secord remained in holding because of her immigration status.

SUMMARY OF THE ARGUMENT

The first issue presented here is whether the Court of Appeals erred in determining that there was probable cause to arrest the Petitioner, Laura Secord, for Criminal Trespass in the Second Degree. The Petitioner argues that they did err in their determination. When determining whether or not sufficient probable cause exist to conduct a warrantless request, the standard the court must is the totality of the circumstances approach. The court must consider whether or not at the time of the arrest, the totality of the circumstances allow a reasonable officer to form a conclusion that a crime had been or will be completed by the suspect. *Maryland v. Pringle*, 540 U.S. 366, 371(2003); *Beck v. State of Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *Williams v. City of Alexander*, 772 F.3d 1307, 1312 (8th Cir. 2014); *Logsdon v. Hains*, 492 F.3d 334 (6th Cir. 2007); *Davis v. City of N.Y.*, 373 F. Supp. 2d 322, 330 (S.D.N.Y. 2005); *Baptiste v. J.C Penny Co.*, 147 F.3d 1252,1259 (10th Cir. 1998). However, when the totality of the circumstances in this case viewed, it is clear that there was no probable cause establish at the time of the Petitioner's arrest and therefore, Deputy Pfieff violated the Petitioner's Fourth Amendment Right. The Fourth Amendment to the Constitution allows in part as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Probable cause exists where a reasonable officer would be able to determine that a felony was happening or had happened based on the totality of the circumstances. *See Beck*, 379 U.S. 89, 85 S. Ct. 223. When Deputy Pfieff arrived at the property he saw a group of six people sitting a dining room table playing a card game, dressed in costumes, while drinking soda and eating chips. Pet'r's Br. 9-10. Deputy Pfieff then went into the house and after a short time the young adults that were there told him that they were playing a card game, and he could see the game set up on the table with the food and drinks on it. *Id*. at 10. Thus, when looking at the totality of the circumstances, it is clear that it is not reasonable for an officer to think that a crime was being committed or had been committed.

The Supreme Court further has held that in order for there to be sufficient probable cause, there must be sufficient probable cause to establish every element of the crime that the suspect is being arrested for. *Williams*, 772 F.3d 1307 at 1312. Here, the main element of the crime that is lacking is the *mens rea* to show that the Petitioner knew or should have known that she was unlawfully on the property. *See* N.Y. Penal Law § 140.15 (McKinney). The Petitioner herself stated, along with the other who were present, that she believed that the entire group had permission to be on the property. Pet'r's Br. 3. The court has concluded that when an arresting officer has direct knowledge that the suspect is lacking the *mens rea* for the crime, they do not have sufficient probable cause. *Williams*, 772 F.3d 1307 at 1312.

Additionally, an arresting officer is not allowed to ignore any evidence that is brought to their attention at the time of the arrest, especially if it is exculpatory evidence. *Logsdon*, 492 F.3d

334 at 342. Here, the Court of Appeals erred when they did not consider the fact that Deputy Pfieff had constructive knowledge showing that there is a reasonable determination that the entire group had permission to be on the property. Furthermore, arresting officers are not allowed to ignore the statements of witness which are corroborated by evidence. *Id.* When the Petitioner and the others that were with her informed the officer that they had permission to be there, and those statements were corroborated by the fact that there were pictures on the property of one of the suspects and that suspect knew where the key to the property was; the officer was required to take that evidence into consideration. Pet'r's Br. 9.

Therefore, it is clear that the Court of Appeals erred when they did not use a totality of the circumstances approach and thus determined that there was probable cause to arrest the Petitioner, and thus Deputy Pfieff violated her Fourth Amendment right when he arrested the Petitioner without probable cause or a warrant.

The second issue presented here is whether the "reasonableness test" to determine a time for bail hearings articulated by the Second Circuit protects the Due Process rights of undocumented aliens. Petitioner argues that it does not. 8 U.S.C.S. § 1226 (LexisNexis, Lexis Advance through PL 115-9, approved 3/13/17) denotes the apprehension and detention of aliens, with section (c)(1) specifically laying out the guidelines as to when the Attorney General may take into custody any alien.

8 U.S.C.S. § 1226(c)(1) states:

> Custody. The Attorney General shall take into custody any alien who [is inadmissible or deportable pursuant to sections (A), (B), (C), or (D),] when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, [or] whether the alien may be arrested or imprisoned again for the same arrest.

Id.

Congress adopted the mandatory detention provision of § 1226(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 in response to thwarted attempts of the Immigration and Naturalization Service ("INS") to deal with "increasing rates of criminal activity by aliens," and the inability to remove aliens and stop them from committing more crimes before they were removed. *Demore v. Hyung Joon Kim*, 538 U.S. 510, 518, 123 S. Ct. 1708 (2003). Unreasonable monetary costs of the confinement of criminal aliens, the failure to detain criminal aliens during their deportation proceedings, and staggering rates of criminal aliens being deported and "swiftly reenter[ing] the country illegally," led Congress to reform immigration laws. *Id.* at 519-21. Studies suggested that Congress detain criminal aliens during their removal proceedings to best ensure their successful removal. *Id.* at 521. "It was following those Reports that Congress enacted 8 USC § 1226 [8 USCS § 1226], requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Id.*

The mandatory detention provision proved to be effective but like any attempt Congress postures to enforce bodily restraint, the attempt contemplated many constitutional concerns. Many non-citizens challenged the actuality of mandatory detention. Since "[i]t is well-settled that the Fifth Amendment entitles aliens to due process in deportation proceedings," *Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993), "detention of a non-citizen 'raise[d] serious

constitutional concerns' in that "[f]reedom from imprisonment – from government custody, detention, and other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects[.]" *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 682, 690, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001)). To avoid the significant constitutional concerns surrounding the application of § 1226(c) the Second Circuit adopted a "bright-line rule" that the mandatory detention provision must be read to contain an "implicit temporal limitation," whereas a six-month period [of detention was presumptively reasonable] "subject to a finding [that the criminal alien was] a flight risk or [was a dangerous individual.]" *See Lora*, 804 F.3d at 614. The Second Circuit, considering the Supreme Court precedent, held that the interests at stake in the Second Circuit were best served by a bright-line approach, in light of "the pervasive confusion over what constitutes a 'reasonable' length of time that an immigrant can be detained without a bail hearing, the current immigration backlog, and the disastrous impact of mandatory detention on the lives of immigrants who are neither a flight risk nor dangerous[.]" *Id.* at 614-15.

Petitioner argues that the Second Circuit incorrectly rejected *Lora* and its six-month bright-line rule to reasonable detention when it instead adopted the approach taken by the Third and Sixth Circuits, which reversed the District Court's determination that petitioner be immediately released from ICE. The Court held that "[the latter] approach calls for a 'fact-dependent inquiry requiring an assessment of all circumstances of any given case,' to determine whether detention without an individualized hearing is unreasonable." Pet'r's Br. 5. It stated that this approach is more effective at preventing illegal aliens from being released prematurely back into the population, and held that "the reasonable period of Immigration Custom Enforcement ("ICE") detention prior to a bail hearing calls for a fact-dependent inquiry requiring an assessment of all the circumstances of any given case." *Id.* This approach allows for mandatory detention beyond six-months – sometimes indefinite detention – to any undocumented citizen regardless of if they are a flight risk or pose a danger to society. *See Demore*, 538 U.S. 510 at 724.

Petitioner contends that the latter approach does not protect the due process rights of undocumented aliens because it causes an unacceptable imbalance in due process standards between non-citizens whom are subject to mandatory detention and non-citizens whom are not; the latter approach subjects both sets of individuals to the same procedural standards, although the former are justifiably detained and the latter are not. Undocumented aliens who are subject to detention pending a removal decision may continue to be detained at the discretion of the Attorney General. *See* 8 U.S.C.S § 1226(c)(1). All others, however – for instance, petitioner and those undocumented aliens who have not committed any of the attributable offenses to the mandatory detention provision – should not be mandatorily detained or required to forego the same process to obtain bail hearings. These individuals should only be required to comply with the requirements of 8 U.S.C.S. § 1226(a), and should be afforded immediate bail hearings without prolonged detention. Petitioner contends that her due process rights were violated when the Second Circuit rejected *Lora* and remanded her back into the ICE's custody. Petitioner urges this Court to reaffirm the former approach – the bright-line approach – because it requires the government to detain the individual indefinitely *only* upon providing clear and convincing evidence that the immigrant poses a flight risk, or is a dangerous individual; this approach comports with the standards approved by Congress, this Court, and the Due Process Clause.

ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN THEY DETERMINED THAT THER WAS PROBABLE CAUSE TO ARREST THE PETITIONER.

The Petitioner is entitled to have her conviction for criminal trespass in the second degree overturned given that there was no probable cause for her warrantless arrest. The Fourth Amendment grants individuals the right to be free from any improper arrest and detention. U.S. Const. amend. IV ("The right of people to be secure in their persons … against unreasonable seizures … shall not be violated."). The only time that a warrantless arrest is valid is when there is a probable cause; The determination for probable cause is based off of the totality of the circumstances that the officer has knowledge of at the time of the arrest, and thus he can conclude that a reasonable person would think a crime had been committed. *Pringle,* 540 U.S. 366, 371; *Beck,* 379 U.S. 89, 85 S. Ct. 223; *Williams,* 772 F.3d 1307, 1312; *Logsdon,* 492 F.3d 334; *Davis,* 373 F. Supp. 2d 322, 330; *Baptiste,* 147 F.3d 1252, 1259. At the time of the Petitioner's arrest, Deputy Pfieff was told that the Petitioner believed that she had permission to be on the property, and he was shown various different pieces of evidence to corroborate that statement including: a photo of one of the suspects with the owner of the cabin, knowledge that one of the suspects was related to the owner, and that the relative of the owner was the one who let the group into the cottage. Therefore, when Deputy Pfieff made a warrantless arrest of the Petitioner, he violated her fourth Amendment right and lacked probable cause because he did not have a reasonable suspicion that a crime was being committed.

A. The Court of Appeals further erred when they did not consider the totality of the circumstances when determining whether or not Deputy Pfieff had probable cause to arrest the Petitioner.

The analysis for whether or not probable cause existed is based off of the totality of the circumstances. *Davis,* 373 F. Supp. 2d 322, 330. As the Supreme Court stated, the facts must portray a "reasonable ground for belief of guilt." *Pringle,* 540 U.S. 366, 371. Probable cause is best understood as a fluid concept, that is not bound by a set of ridged legal rules; in *Beck* the Supreme Court went on to say: "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing interest. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." 379 U.S. 89 at 91.

The court will use a totality of the circumstances approach to determine probable cause. *Davis,* 373 F. Supp. 2d 322, 330. For example, in *Davis* the court determined that there was no probable cause given the fact that the officers did not meet the specific language of the statute. *Id.* at 331. The accused there, had climbed up a fire escape onto the roof of a building to hang a sign protesting the treatment of AIDS. *Id.* at 323. The police officer observed the defendant climbing up the building, assumed that they were planning on robbing the building and subsequently arrested them; the defendant was also charged them with criminal trespass. *Id*. The court found that there was no probable cause for the criminal trespass charge, given that they never entered the building. *Id.* at 331.

Alternatively, there is sufficient probable cause when given the totality of the circumstances a reasonable officer would be able to conclude that a felony was being or is being committed by the suspect. *Pringle,* 540 U.S. 366, 371. For example, in *Pringle* the court determined that the officers did have sufficient probable cause to arrest the defendant given that he was riding in a small car with two other people when they found five plastic glassine baggies containing cocaine. *Id.* The defendant was riding in the front passenger seat of the car when it was stopped for speeding. *Id* at 366. When the driver went to get the registration for the car out of the glove box, the officer noticed that there was rolled up wads of money. *Id.* The arresting officer than asked the driver and owner if the car if he could search the car and the driver consented to the search. *Id.* It was during that search that the officers recovered the cocaine. *Id.* The court reasoned that given the totality of the circumstances, it would be reasonable for an officer to determine that a crime was being committed given the amount of cocaine and money that they recovered. *Id.* at 372. The court further stated, that it was also reasonable for the officers to arrest all three individuals given that any one of them could have been responsible for the cocaine. *Id.* Ultimately the court concluded that there was probable cause. *Id.*

Unlike in *Pringle* where the court determined that there was enough evidence to show that a felony was being committed, here, there was no evidence that a felony was being committed. 540 U.S. 366, 372. The neighbors reported that it was unusual for lights to be on the cabin at this time of year, that statement does not in the slightest give reasonable belief that a felony is being committed. Pet'r's Br. 2. In addition to not being able to establish the elements of criminal trespass at the time of the arrest, Deputy Pfieff did not have a reasonable foundation that any felony was happening based on the facts that he knew at the time of the arrest.

Alternatively, the respondent may argue that the Petitioner's state of mind, and the fact that her and the others that were there with her did not matter because of they were still there against the will of the owner. However, not only is *mens rea* an essential part of the statute, but in addition, the respondent has offered to proof as to what the actual will of the owner is. Pet'r's Br. 10. Fitzgibbon has stated, and it had been confirmed by the owner of the property that he had permission to be on the property as long as he was not throwing a party. *Id.* It is unlikely that anyone would consider having six people over to play a card game a party. Therefore, no only did the Petitioner not believe she was committing a crime, but additionally, no felony actually occurred. *Id.* at 2.

B. The Court of Appeals erred in concluding that there was probable cause at the time of the Petitioner's arrest to support the *mens rea* element of criminal trespass in the second degree or even that there was probable cause a crime was being committed.

According to the Supreme Court, an officer has probable cause to conduct a warrantless arrest if at the time of the arrest, given all the facts, the officer can conclude that a reasonable man would think that the suspect had committed a crime. *Beck,* 379 U.S. 89 at 85. The facts and circumstances that the officer considers must be sufficient in and of themselves to lead a reasonable person to think that a crime had been or will be committed. *Id*. Furthermore, the officer would have to establish that there was probable cause to support each element of the suspected crime. *Williams,* 772 F.3d 1307, 1312. In New York, "A person is guilty of criminal trespass in the second degree

when: he or she knowingly enters or remains unlawfully in a dwelling[.]". N.Y. Penal Law § 140.15 (Mckinney, 2010).

There was no sufficient probable cause where the only facts that the arresting officer had at the time of the arrest, was a description of the defendant's physical appearance and past arrest records. *Beck*, 379 U.S. 89 at 96. For example, in *Beck* the defendant had been stopped while driving his vehicle, placed under arrest, and later searched. *Id.* at 89. During the search, the officers found illegal clearing house slips. *Id*. When applying the probable cause analysis, the court looked at the facts that the arresting officer had at the time of the arrest; in this case, the officer testified that he had been given a photo of the defendant and knew that the defendant had been suspected to be involved in illegal activity. *Id.* at 91. In addition, the arresting officer had set out that day to arrest the defendant. *Id.* at 94. The arresting officer testified that he had gotten "reports" from a source that the defendant was involved in criminal activity but could not establish if they were reliable. *Id.* at 91. The court concluded that this trivial amount of facts that were presented by the prosecution was not enough to establish that a reasonable person viewing these facts would think that the suspect had committed a crime. *Id*. at 96. Furthermore, the court reasoned, that whether or not there was enough facts to determine whether or not someone could've reasonably been a suspect of a crime is a decision for a trier of fact to make. *Id*. Thus, the court reversed the lower courts decision and determined that there was no probable cause for the arrest, and therefore the search which resulted in illegal clearing house slips was not admissible. *Id*.

Additionally, there is no probable cause if the facts did not support all elements of the crime, including *mens rea*. *Williams*, 772 F.3d 1307, 1312. For example, in *Williams* the defendant had been charged with theft, and one element of the crime was that defendant had to "purposefully deprive the city of their property." *Id.* at 1311. The defendant was an employee of the city and had received two pay checks for the same pay period. *Id.* at 1307. The second check was issued after he had filed a claim that he had lost the first one. *Id.* at 1309. Almost a year after the second check had been issued, the defendant cashed the first check, claiming that he didn't realize that it was the missing check. *Id*. There had been a hearing prior to this case, with the municipal committee, where they determined that he did in fact not realize that he was cashing the lost check, and the defendant paid the city back for the amount of the duplicate check. *Id*. The court concluded that the defendant made an honest mistake, and that the issue had been resolved. *Id.* at 1311. Therefore, he was lacking the *mens rea* to purposefully deprive the city of their property, and there was no probable cause for arrest. *Id*.

Here, there was not sufficient probable cause because like in *Beck* the arresting officer did not have enough facts at the time of the arrest to conclude that the Petitioner was criminally trespassing. 379 U.S. 89 at 96. The facts that Deputy Pfieff considered at the time of the arrest to establish probable cause was that he had received a phone call from another homeowner, that there were people in cabin. Pet'r's Br. 2. Similar to the reports that the officer testified about in *Beck*, here, the other homeowner had no knowledge of whether or not the guest at the cabin had permission to be there or not. 379 U.S. 89 at 94; Pet'r's Br. 2. Additionally, Deputy Pfieff arrived at the home to see young adults sitting around a table playing cards, not participating in a criminal activity such as robbing the house or having a party. *Id. at 9.* When he entered the home without permission, he was told by Fitzgibbon that they had permission to be there. *Id.* Thus, when viewing these facts, it is unlikely that a reasonable person would be able to conclude that the Petitioner was

committing any crime let alone the crime of criminal trespass, establishing that there is not sufficient probable cause.

Furthermore, Deputy Pfieff also did not have probable cause based on these facts to establish that all elements of the Criminal Trespass statute were met, including the *mens rea* element as discussed in *Williams*. 772 F.3d 1307, 1312. Similar to the facts in *Williams*, Deputy Pfieff could not have determined that the Petitioner was "knowingly remaining unlawfully in the dwelling" given the fact that the Petitioner herself, claimed that they had permission to use the cabin. 772 F.3d 1307, 1308; Pet'r's Br. 3, Given the fact that she honestly believed, as the defendant in *Williams* did that she had permission to be at the cottage, and that the arresting officer was aware of this belief, it is then clear that Deputy Pfieff did not have the fact to establish all elements to the crime. 772 F.3d 1307, 1312.

C. The Court of Appeals erred when they determined that there was probable cause regardless of the fact that Deputy Pfieff ignored exculpatory evidence which was directly relevant to the totality of the circumstances.

Moreover, once the officer has established probable cause there is no further duty to investigate, however, when initially deciding whether there is probable cause, the officer must take into consideration "both the inculpatory and exculpatory evidence" that is available to them. *Logsdon*, 492 F.3d 334. An arresting officer "may not ignore available and undisputed facts". *Baptiste*, 147 F.3d 1252, 1259. There is no burden of the officer to investigate every claim of innocence, however, the officer "cannot turn a blind eye toward potentially exculpatory evidence." *Id*.

Ignoring witness statement that provides additional facts to the allege crime that the suspect committed is to be taken into consideration when deciding the totality of the circumstances. *Logsdon*, 492 F.3d 334 at 342. For example, in *Logsdon*, the court concluded that the arresting officer did not have probable cause because he ignored what could have potentially been exculpatory information by a witness who was at the scene. *Id*. The accused in there was a pro-life protester who entered the property of a Women's clinic to talk to a patient who requested his advice. *Id*. at 337. The clinic called the police saying that the accused was on their property without permission. *Id*. When the officers arrived, they would not listen to anything that the patient/witness had to say and instead simply arrested the accused with no other evidence. *Id*. The court reasoned that an officer cannot disregard information that would change the totality of the circumstances. *Id.* at 342. Given the fact that this witness most likely would have stated that he invited the accused on to the property, it would have changed the knowledge that the officer had at the time of the arrest. *Id*. Furthermore, the court concluded that it is not up to the officer to "turn a blind-eye" to whatever evidence he decided. *Id.* Thus, the court conclude that the arresting officer had violated the Fourth Amendment right of the accused, as such there was no probable cause for his arrest. *Id*.

Additionally, and arresting officer does not have the ability to ignore any facts that undisputed for any reason. *Baptiste*, 147 F.3d 1252, 1259. For example, in *Baptiste* the police officers were called to a J.C. Penny store after one of their customers had been accused of shoplifting. 147 F.3d 1252, 1254. When the officers arrived they based their arrest on what the security guards told them. *Id.* However, there was video evidence that supported the customer's series of events more than the security guards. *Id.* at 1255. The officers disregarded the video evidence and her

statements, and still conducted the arrest. *Id*. The court reasoned that there was no probable cause here because if a reasonable police officer were to view the same evidence – including the video evidence – than there would be ability for them to assume that a crime happened. *Id.* at 1259. Thus, the court determined, given the totality of the circumstances, there was no probable cause for the arrest. *Id*.

Moreover, given the totality of the circumstances no reasonable officer would be able to conclude that the Petitioner and the others were trespassing. *Logsdon,* 492 F.3d 334 at 342. Unlike in *Logsdon*, it wasn't even the owner of the property that was complaining of trespass. *Id.;* Pet'r's Br. 3. Also, when Deputy Pfieff went inside the home, he was able to see photos of Fitzgibbon at the property with the owner. *Id.* at 9. Fitzgibbon informed Deputy Pfieff that he permission to be on the property, and further established that by showing him where the key to the property was kept. *Id.* at 9. Similar to the officer ignoring the witness statement in *Logsdon,* Deputy Pfieff ignored all of these statements made by Fitzgibbon that are exculpatory statements that have be taken into the totality of the circumstances analysis. 492 F.3d 334 at 342. A reasonable officer taking into consideration all of these facts, would not be able to determine that the Petitioner and the others were trespassing. Similar to *Baptiste,* the Petitioners statement, along with the statement of the other people with her is directly corroborated by the evidence that was presented at the time of the arrest. 147 F.3d 1252, 1259.

For the foregoing reasons, the Petitioner request that this Court determine that there was no probable cause for her arrest for criminal trespass in the second degree. Subsequently, this decision would also vitiate her charge of Possession of a Deadly Weapon given the fact that it was the fruit from an unlawful search.

II. THE "FACT-DEPENDENT INQUIRY" TO REASONABLENESS ARTICULATED BY THE SECOND CIRCUIT COURT OF APPEALS DOES NOT PROTECT THE DUE PROCESS RIGHTS OF UNDOCUMENTED ALIENS.

The "reasonableness test" to determine a time for bail hearings articulated by the Second Circuit promotes an imbalance in due process standards because it does not protect the due process rights of undocumented aliens who are not subject to mandatory detention under 8 U.S.C.S § 1226(c). For this reason, this Court should reverse the Second Circuit's decision. Subsection (a) of the statute provides that "on a warrant issued by the Attorney General, an alien *may* be arrested and detained pending a decision whether the alien is to be removed from the United States." *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 230 (3d Cir. 2011) (emphasis added). It then authorizes the Attorney General to release an alien on bond "except as provided in subsection (c)." *Id.* Subsection (c) in turn, states that "[t]he Attorney General *shall* take into custody," "when released" following his sentence, "any alien who . . . is deportable by reason of having committed," among other crimes, one "involving moral turpitude" or one "relating to a controlled substance." *Id.* (emphasis added). Subsection (a) consents the Attorney General to use discretion to possibly arrest and detain undocumented aliens and release them on bond. Subsection (c), however, apprehends undocumented aliens mandatorily during their removal proceedings on the basis that the aliens waived their liberty rights when they committed offenses susceptible to § 1226(c) guidelines. Detainees who have not committed these offenses, but are detained for a prolonged period of time anyway, are held unjustifiably, and because of that due process affords them more protections.

Petitioner should not have been detained in accordance to the guidelines of subsection (c). Petitioner should not have been exposed to mandatory, prolonged detention, and should not have waited over six months to obtain a bail hearing. It is because of this reasoning that petitioner argues that this Court should reaffirm the *Lora* standard to determine a reasonable time to detain an alien without a bail hearing.

A. Detainees who are not otherwise subject to mandatory detention should receive immediate hearings.

The fact-independent inquiry adopted by the Second Circuit requires every detainee to file a habeas corpus petition to challenge detention, then wait for a ruling by a district court to determine whether their detention crossed the line of reasonableness. *See* Pet'r's Br. 5. The district court's ruling is the determinative factor as to whether the detainee's detention is unreasonable or not. *Id.* This process however, is flawed because "[d]etention while removal proceedings and appeals therefrom are pending can and often does last for years." David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003, 1024 (2002). Furthermore, detainees who have not committed a crime of moral turpitude or who have not committed a crime involving controlled substances are not, by virtue of the definition of subsection (c), subject to mandatory detention so they should not be treated as such. The mandatory detention provision imposing mandatory detention once an alien is ordered removed offends due process because it "somewhat contradictorily requires that all aliens ordered removed be detained during the ninety-day removal period, but further provides that 'under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible … or deportable [on specified grounds].' " Cole, *supra* at 1024.

Professor Cole elaborates further:

> The latter proviso seems to suggest, at least by negative implication, that detention during the removal period is not in fact mandatory for any but those aliens falling into the category who may not be released under any circumstance. But to the extent that this statute imposes mandatory detention on any aliens who pose neither a flight risk nor a danger, it furthers no legitimate immigration purpose, and is unconstitutional.

Id.

Professor Cole accurately illustrates that detainees like the petitioner who are being held under these circumstances are held for no legitimate purpose because quite frankly, no legitimate purpose can be found to fulfill the statute if there is no indication that the detainee with not show up to his or her removal proceedings or has the propensity to commit another crime if released.

1. If an alien does not commit a crimes of moral turpitude, that alien cannot be detained under § 1226(c).

Petitioner's charges which triggered her mandatory detention consisted of criminal trespass in the second degree and criminal possession of a deadly weapon in the fourth degree. These are hardly crimes of moral turpitude. "The term 'moral turpitude' has never been clearly or certainly defined by the courts, apparently because it is a term which encompasses moral rather than legal

standards." 23 A.L.R. Fed. 480 (Originally published in 1975). The most common definition of moral turpitude cited by the courts is "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Id.* In fact, the Second Circuit held in *Efstathiadis v. Holder*, 752 F.3d 591 (2d Cir. 2014), that whether a prior conviction constitutes a "crime involving moral turpitude" warranting removal under the Immigration and Nationality Act turns on whether the crime is inherently base, vile, or depraved. "Criminal trespass in the second degree is a class A misdemeanor . . . [a] person is guilty of criminal trespass in the second degree when . . . he or she knowingly enters or remains unlawfully in a dwelling[.]" N.Y. Penal Law § 140.15. Criminal trespass in the second degree is certainly not inherently vile, base or depraved like the more serious offenses of kidnapping, fraud, arson or burglary – which is a higher degree of criminal trespass.

Criminal possession of a weapon in the fourth degree is also a class A misdemeanor. N.Y. Penal Law § 265.01. Petitioner possessed a pair of brass knuckles which were obtained from her by way of a search incident to an arrest. Again, possessing a weapon, albeit dangerous if the weapon is in the hands of a dangerous individual, is not inherently vile or base. It is well-established that the United States is the land of the free and part of which is inherently instilled in Americans by nature is the right to bear arms and in turn protect ourselves from harm. Petitioner's mere possession of brass knuckles does not by any means fit the exaggerated description of depravity or vileness.

2. If it is foreseeable that an alien will not be removed, mandatorily detaining the alien is unreasonable.

Foreseeability of the likelihood that an alien will be removed plays a minor role in whether it is reasonable to mandatorily detain an alien. In *Zadvydas*, the court there held that if after six months there is no significant likelihood of removal in the foreseeable future, the alien must be released. 533 U.S. 678 at 701. The court stated that "the actual removability of a criminal alien . . . has bearing on the reasonableness of his detention prior to removal proceedings." *Id*. at 690. Since immigration detention is designed to hold aliens where necessary in order to assure their removal from the country, once they cannot be removed, or once it is clear and present that it is highly unlikely that they will removed, the immigration purpose for the detention drops out. See Cole, *supra* at 1017-1018. Hence, the Supreme Court suggested in its holding that once it is foreseeable that an alien likely will not be removed from the country, detaining that alien is unreasonable. In a Sixth Circuit opinion, the court held that "[w]hen actual removal is not reasonably foreseeable, deportable aliens may not be indefinitely detained without a government showing of a "strong special justification," constituting more than a threat to the community, that overbalances the alien's liberty interest." *Ly v. Hansen*, 351 F.3d 263, 273 (6th Cir. 2003). Petitioner was not a deportable alien; but this opinion proposes that even if she were, even then she would not be detainable without the government for showing that its interest overrode hers. Petitioner's circumstances simply cannot be classified in the same manner.

III. EVEN IF *LORA* AND THE BRIGHT-LINE RULE IS REJECTED, PETITIONER SHOULD STILL PREVAIL.

Even if this Court holds that Lora and the bright line-rule is the incorrect standard for reasonableness to determine a time for bail hearings, petitioner should still prevail. As stated earlier, petitioner did not commit a crime of moral turpitude under § 1226 (c), nor did she commit any other attributable offense pertaining to that provision. If the court looks to facts of petitioner's case, petitioner was not a flight risk, nor was she dangerous to the community. Petitioner faced emotional and physical abuse while living with her parents in Toronto, Canada. Pet'r's Br. 9. She ran away from home and for a time, lived on the streets of Toronto. Pet'r's Br. 9. Petitioner acquired for protection brass knuckles during this period of homeless. *Id.* Petitioner eventually found sanctuary in a group of friends who met with her every week to play their favorite board game and it was during one of these game-night meetings that she was arrested and subsequently detained. *Id.* Petitioner was and still is not a flight risk. She fled her home in Canada to avoid parental abuse and is not likely to return. Petitioner is not a danger to the community. She had a steady job and had never been in trouble with the law for the two years she resided in the United States before her arrest. It is foreseeable that petitioner likely will not be removed, will show up for her removal proceedings and will stay out of trouble during those proceedings. Petitioner's arrest is clearly an isolated incident, which makes her an excellent candidate for release on bond. Looking to the totality of petitioner's circumstances, prolonged detention of petitioner is unreasonable. For these reasons, petitioner would likely prevail.

CONCLUSION

For the foregoing reasons, the Petitioner requests that this Court conclude that there was no probable cause for her arrest for criminal trespass in the second degree and criminal possession of a deadly weapon in the fourth degree. Additionally, the Petitioner requests that this Court reaffirm the six-month bright-line rule as the standard to determine a reasonable time for bail hearings of mandatorily detained undocumented aliens.