

IN THE SUPREME COURT OF THE UNITED STATES

---

No. 1-2017

No. 2-2017

---

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 Appeal from the United States  
Court of Appeals for the Second Circuit

BRIEF OF PETITIONER

Team #27

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	ERROR! BOOKMARK NOT DEFINED.
TABLE OF AUTHORITIES.....	ERROR! BOOKMARK NOT DEFINED.
I. STATEMENT OF THE ISSUES.....	4
II. STATEMENT OF THE CASE .....	4
III. STATEMENT OF THE FACTS .....	4
IV. SUMMARY OF THE ARGUMENT.....	7
V. ARGUMENT .....	9
1. THE SECOND CIRCUIT DID NOT APPLY THE CORRECT STANDARD TO DETERMINE IF DEPUTY PFIEFF HAD PROBABLE CAUSE TO ARREST MS. SECORD BECAUSE THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE ARREST WERE NOT PROPERLY CONSIDERED, AND THE RESPONDENTS WERE NOT ABLE TO MEET THEIR BURDEN OF ESTABLISHING THAT ALL MATERIAL ELEMENTS OF THE CRIMINAL OFFENSE OF TRESPASS IN THE SECOND DEGREE WERE MET. ....	10
<i>i. THE SECOND CIRCUIT, WHEN APPLYING THE “TOTALITY OF THE CIRCUMSTANCES TEST,” DID NOT CONSIDER ALL OF THE FACTS AND CIRCUMSTANCES SURROUNDING THE SITUATION AND ARREST OF MS. SECORD.</i> .....	11
<i>ii. MS. SECORD’S CONVICTION MUST BE REVERSED BECAUSE THE RESPONDENTS HAVE NOT MET THEIR PROBABLE CAUSE BURDEN OF PROVING THAT ALL ELEMENTS OF CRIMINAL TRESPASS ARE ESTABLISHED.</i> .....	14
2. THE “REASONABLENESS TEST” USED TO DETERMINE A TIME FOR BAIL HEARINGS BY THE SECOND CIRCUIT DOES NOT PROTECT THE DUE PROCESS RIGHTS OF UNDOCUMENTED ALIENS, AND A BRIGHT LINE RULE SHOULD BE ESTABLISHED TO BE SURE THAT AN ALIEN’S CONSTITUTIONAL RIGHTS ARE PROTECTED.....	15
<i>i. THE “REASONABLENESS TEST” DOES NOT PROTECT DUE PROCESS RIGHTS OF UNDOCUMENTED ALIENS BECAUSE IT GIVES RISE TO INCONSISTENT RESULTS, AND ARBITRARY DETENTION.</i> .....	16
<i>ii. A TIME-BASED BRIGHT-LINE RULE IS NECESSARY AND APPROPRIATE TO PROVIDE UNIFORMITY AND CLEAR DIRECTION TO PROTECT ALIENS’ CONSTITUTIONAL RIGHTS.</i> .....	20
VI. CONCLUSION.....	23

## TABLE OF AUTHORITIES

### Constitutions

USCS Const. Amend. 4 .....	11
USCS Const. Amend. 5 .....	16

### Statutes and Rules

8 U.S.C. § 1226(c)(2) .....	9, 16
NY CLS Penal §140.00(5) .....	14
NY CLS Penal §140.15 .....	14

### Federal Cases

<i>Baptiste v. J.C. Penney Co.</i> , 147 F.3d 1252 (10 <sup>th</sup> Cir. 1998) .....	12
<i>Clark v. Suarez Martinez</i> , 543 U.S. 371 (U.S. 2005) .....	20
<i>Country of Riverside v. McLaughlin</i> , 500 U.S. 44 (1991) .....	21
<i>Diop v. ICE/Homeland Security</i> , 656 F.3d 221 (3d Cir. 2011) .....	17
<i>Florida v. Harris</i> , 133 S. Ct. 1050 (2013) .....	11
<i>Hunter v. Bryant</i> , 502 U.S. 244 (1991) .....	11, 14
<i>Immigration &amp; Naturalization Service v. Lopez-Mendoza</i> , 468 U.S. 1032 (1984) .....	11
<i>Lora v. Shanahan</i> , 804 F.3d 601 (2d Cir. 2015) .....	passim
<i>Ly v. Hansen</i> , 251 F.3d 263 (6th Cir. 2003) .....	19
<i>Maryland v. Pringle</i> , 540 U.S. 366 (2003) .....	11
<i>Reid v. Donelan</i> , 819 F.3d 486 (1st Cir. 2016) .....	17
<i>Rodriguez v. Robbins</i> , 804 F.3d 1060 (9th Cir. Cal. 2015) .....	20
<i>Sopo v. U.S. Attorney Gen.</i> , 825 F.3d 1199 (11th Cir. 2016) .....	20
<i>United States v. Sokolow</i> , 490 U.S. 1 (1989) .....	12
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963) .....	15
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001) .....	passim

### State Cases

<i>City of Columbus v. Parks</i> , 2011-Ohio-2164 (Ohio Ct. App. 2011) .....	14
<i>In the Interest of O.A.</i> , 552 Pa. 666 (1998) .....	12
<i>Johnson v. Orsino</i> , 942 F. Supp. 2d 396 (S.D.N.Y. 2013) .....	18, 19
<i>Martin v. Aviles</i> , 2015 U.S. Dist. LEXIS 82111, (S.D.N.Y. 2015) .....	17
<i>Monestime v. Reilly</i> , 704 F. Supp. 2d 453 (S.D.N.Y. 2010) .....	18, 19
<i>People v. Graves</i> , 76 N.Y.2d 16 (N.Y. 1990) .....	14

## **I. STATEMENT OF THE ISSUES**

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

## **II. STATEMENT OF THE CASE**

On December 21, 2015, petitioner, Laura Secord, was arrested for criminal trespass in the second degree as well as criminal possession of a deadly weapon in the fourth degree. The University of Buffalo Legal Clinic, on behalf of Ms. Secord, filed a habeas corpus petition in the United States District Court for the Western District of New York, alleging that the conviction violated her Fourth Amendment rights against unlawful search and seizure. While the petition was pending, Secord was transferred to the custody of the Department of Homeland Security for deportation. The Law School, on Ms. Secord’s behalf, filed another petition, arguing that her detention by ICE has extended the time allotted by *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015). Both petitions were granted, and the District Court ordered her immediate release from ICE custody as well as the removal of her conviction. Both the City and the Department of ICE both appealed, and the Court of Appeals reversed the District Court’s determinations. The Supreme Court has granted a writ of certiorari to determine the above issues.

## **III. STATEMENT OF THE FACTS**

Laura Secord has faced numerous difficulties in her brief life that has unfortunately led to the case at hand. Secord, a citizen of Canada, was born in Toronto, to parents of Uzbek descent. (J.A. 8) However, she encountered physical and emotional

abuse in her home life causing her to leave home at the young age of 16. (J.A. 8) After leaving home, she was left homeless in the streets of Toronto with only a set of brass knuckles to defend herself from the dangers of living on the streets in a major city. (J.A. 8) After gaining access to a shelter Secord was able to obtain a group of friends that she could consider family. (J.A. 8) Every week she would get together with her friends to play Dungeons and Dragons at the shelter, and later gained more friends through an online group. From playing with the online group she became close with members from the Buffalo area, and thus decided to emigrate in 2013. (J.A. 8) Once Lake Erie was frozen after an unusually cold winter, Secord was able to successfully cross into the United States. (J.A. 8)

Upon her arrival to the United States, Secord was able to secure a job at Tim Hortons, and a place to live. (J.A. 8) During this time she also met up with her online friends, and began playing Dungeons & Dragons weekly at their homes or apartments. (J.A. 8) To mark the Winter Solstice her friends thought it would be fun to play the game somewhere “spooky,” and so James Fitzgibbon offered to take everyone to his uncle’s cottage to play. (J.A. 8) The cottage was vacant, unheated, and approximately 45 minutes away from south Buffalo. (J.A. 9) The group’s plan was to spend the evening at the cottage dressed in costumes to play the game, and enjoy some snacks, beer, and pop. (J.A. 9) Since many of the members had to work the next day they were planning to leave the cottage around midnight. (J.A. 9)

After arriving at the cottage, Fitzgibbon used a key from the patio to allow everyone inside. (J.A. 9) Since Fitzgibbon’s uncle was in Florida at this time, he was expected to check on the cottage every week or so, and so used the key for those visits.

(J.A. 9) Upon entry Fitzgibbon could not figure out how to turn on the lights, and so the candles were used for light instead. (J.A. 9) After the group of six began to play the game dressed as wizards, dwarves, and other characters they heard a knock at the door. (J.A. 9). The knock at the door was from Deputy Barnard Pfieff, who was responding to a resident's report of suspicious activity inside one of the usually closed summer cottages. (J.A. 2). From the pounding on the door the group became "scared out of their wits," and ran to fearing an assailant. (J.A. 9) Deputy Pfieff noticed candle light inside the cottage, which lead him to look through the window of the dwelling to see the group inside gathered around the table in their costumes. (J.A. 2) He was told by his supervisor to see what was going on inside, and at that point identified himself as a member of the Sheriff's Department. (J.A. 2) Once the group realized the deputy was a law officer they came out of hiding. (J.A. 9)

Fitzgibbon attempted to explain to Deputy Pfieff that he had permission to use the cottage, but due to his shock could not remember his uncle's number in Florida. (J.A. 9) It should be noted that there was photos of Fitzgibbon and his family in the cottage, and he showed the deputy exactly where the key was kept. (J.A. 9) Nonetheless, Deputy Pfieff ordered all six members to the floor, hands above their heads, and searched them for weapons and identification. (J.A. 2). All members had identification, except Secord who had only cash. (J.A. 2) At this point, they were all arrested and taken to the police station where they were charged with criminal trespass, and Secord was charged with possession of a deadly weapon as her brass knuckles were found. (J.A. 3). All individuals were released except Secord because of her immigration status. (J.A. 3)

The department was able to contact Fitzgibbon's uncle, who said he did not want his nephew having parties in the cottage for insurance liability reasons. (J.A. 9) Fitzgibbon did attempt to contact the deputy himself prior to this interaction, but received no answer. J.A. (9) Nevertheless, Secord and her friends were all convicted of criminal trespass in the second degree, and Secord was also convicted of possession of a deadly weapon in the fourth degree. (J.A. 3) She was sentenced to a year in prison for each conviction, which were to be served concurrently in New York. (J.A. 3)

While incarcerated Secord was working with a student law clinic to file a habeas corpus petition to the United State District Court for Western District of New York. (J.A. 3) In her petition she alleged her arrest and conviction violated her Fourth Amendment rights against unlawful search and seizure, and that Deputy Pfieff lacked probable cause when he entered the cottage to arrest the group. (J.A. 3) Secord's sentence ended while the petition was pending, and she was then transferred into deportation proceedings in accordance. (J.A. 3-4) She was held in detention for six months, but was released after another petition of habeas corpus that was filed was granted and she was immediately released. (J.A. 4)

#### **IV. SUMMARY OF THE ARGUMENT**

The decision of the United States Court of Appeals for the Second Circuit should be reversed because the Second Circuit applied the incorrect standard when determining if the arresting officer had probable cause to arrest Ms. Secord. Also, without being able to prove all of the elements of criminal trespass, the Respondents did not have the constitutional authority to arrest the Petitioner.

The court should also reverse the decision to send Secord back into ICE custody, and abandon following the “reasonableness test” as it would encroach on constitutional concerns. Aliens, even undocumented ones, have a right to due process under the Fifth Amendment. Likewise, they also have a right to freedom from restraint, and prolonged imprisonment. By following the “reasonableness test” or a case-by-case approach the court would be creating a multitude of issues. First, the approach gives outrageously inconsistent results as to when a bond hearing should be held, or when release is proper. Second, not having a set rule will likely lead to increased detention times for aliens. Third, such uncertainty can create undue harm to the aliens detained, as well as their families.

A bright-line rule should be adopted in order to create more predictability and certainty within the court system. This approach would be the best way in order to avoid constitutional issues. It provides a more concrete set of guidelines, but still is flexible as the individual’s chances of being a flight risk or danger to society are examined before release. Finally, from an administrative standpoint it would provide some degree of certainty to the States so they may ensue procedures with confidence that they fall within constitutional boundaries.



## **V. ARGUMENT**

The Supreme Court of the United States should reverse the United States Court of Appeals for the Second Circuit's decision because the Court of Appeals did not use the correct standard when determining if Deputy Pfieff had probable cause to arrest Secord and because all of the necessary elements of criminal trespass in the second degree were not established by the respondents.

The Court of Appeals did not consider the totality of the circumstances when determining if Deputy Pfieff had probable cause to arrest Secord. The circumstances that were considered were only those which advances the respondent's case, and other important, material, and undisputed facts were not considered. The Court of Appeals also erred because respondents did not meet their burden of establishing all of he necessary elements of the crime for which Secord was arrested and convicted.

This court should also reverse the Court of Appeals decision to send Secord back into ICE custody until such time as the Department can prepare evidence for her bail hearing as her due process rights were threatened from the use of the "reasonableness test." Secord should be released from ICE custody as she has been held in detention for an unreasonable period of time given the circumstances. It should be noted that the Attorney General does have a right to hold undocumented aliens in detention until evidence can be presented as to whether he/she poses a "danger to the safety of other persons . . . and is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(2). However, under the Fifth Amendment's Due Process Clause the Government cannot deprive any person, including

undocumented aliens, of liberty without due process of law. USCS Const. Amend. 5 “Freedom from imprisonment -- from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Included in this clause is the idea that serious constitutional problems would arise if indefinite detention was permitted, as that is a deprivation of human liberty. *Id.* at 699. For this reason, statutes involving detention of aliens has been interpreted to have a limitation based on reasonable time. *Id.* at 682. Yet courts have been split on the meaning of “reasonable time,” and so have been using two different approaches to come its decisions. The case-by-case approach used by the Second Circuit we would argue is not the better approach as it can cause violations of due process, and a bright line rule approach should be used.

**1. THE SECOND CIRCUIT DID NOT APPLY THE CORRECT STANDARD TO DETERMINE IF DEPUTY PFIEFF HAD PROBABLE CAUSE TO ARREST MS. SECORD BECAUSE THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE ARREST WERE NOT PROPERLY CONSIDERED, AND THE RESPONDENTS WERE NOT ABLE TO MEET THEIR BURDEN OF ESTABLISHING THAT ALL MATERIAL ELEMENTS OF THE CRIMINAL OFFENSE OF TRESPASS IN THE SECOND DEGREE WERE MET.**

The arrest of Ms. Secord in the summer cottage was in direct violation of Ms. Secord’s 4<sup>th</sup> Amendment constitutional rights, because the arresting officers did not have the necessary probable cause to legally accomplish the arrest. Ms. Secord should be granted the same constitutional rights, and the respondents should be required to meet the same probable cause burden, regardless of Ms. Secord’s citizenship status. The Supreme Court has assumed that all people, regardless of citizenship status, are granted

constitutional protection. *Immigration & Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032 (1984). The 4<sup>th</sup> amendment grants Ms. Secord the right “to be secure in [her] person[] . . . against unreasonable searches and seizures” without a showing of probable cause. USCS Const. Amend. 4.

*i. THE SECOND CIRCUIT, WHEN APPLYING THE “TOTALITY OF THE CIRCUMSTANCES TEST,” DID NOT CONSIDER ALL OF THE FACTS AND CIRCUMSTANCES SURROUNDING THE SITUATION AND ARREST OF MS. SECORD.*

In order for Deputy Pfieff to have proper grounds to arrest Ms. Secord, the court must determine if probable cause has been established. The Supreme Court has established a reasonable person standard for establishing probable cause, which requires the court to find a “reasonable ground for belief of guilt.” *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013); *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). The court must focus on what a reasonable person would believe, and not rely on “finely tuned” legal standards such as reasonable doubt that a police officer may rely on. *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013).

Using this “reasonable person” standard, the court must determine if probable cause existed when Deputy Pfieff arrested Ms. Secord. Probable cause exists if “at the moment the arrest was made . . . the facts and circumstances within [the officer’s] knowledge and of which [the officer] had reasonably trustworthy information were sufficient to warrant a prudent man in believing” that a crime was being committed. *Hunter v. Bryant*, 502 U.S. 244, 228 (1991).

The Respondents will argue that the Appellate Court considered an adequate variety of facts and circumstances in making its decision. However, the court discussed no case law or precedent holding that examining only certain, specific facts can lead to

establishing criminal guilt. Rather, courts have held that all undisputed and relevant facts must be considered and, when making a probable cause determination, “officers may weigh the credibility of witnesses” but “they may not ignore available and undisputed facts.” *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1259 (10<sup>th</sup> Cir. 1998). It is undisputed in this case that Ms. Secord believed she had the owner’s permission to be in the house, and this information should also be considered when determining if Ms. Secord was guilty of trespass.

First, the court regarded the neighbor’s consideration that the activity within the cottage was odd. While the neighbor’s consideration may have prompted a police visit to the home to be sure that no illegal activity was occurring, this third-party suspicion alone is certainly not enough to rise to the level of probable cause for an arrest. This reasonable suspicion may be enough for the officer to complete an investigation into the matter, but the standard for reasonable suspicion to investigate is less than what is necessary to have probable cause for an arrest. *United States v. Sokolow*, 490 U.S. 1 (1989). Courts have actually gone as far to say that “mere suspicion is not a substitute for probable cause.” *In the Interest of O.A.*, 552 Pa. 666 (1998). The Appellate Court failed to take into consideration the occupant’s intentions for being in the home, as well as their beliefs that the entry into the cottage was consensual.

The court then considered the occupants’ behavior when the officer knocked on the door and identified himself. Under the reasonableness standard, the Appellate Court failed to consider that it would be reasonable for young adults, alone, at night, in a dark cabin, to become fearful when someone knocked on the door. Although the court considered that they initially fled and hid when they heard the knocking, the court fails to

consider all of the relevant facts. After the officer identified himself as police authority, the occupants emerged and allowed the officer inside. They then obeyed Deputy PfiEFF's commands and answered questioning. Under a totality of the circumstances test, the initial behavior as well as the subsequent behavior of the occupants should be equally considered.

Lastly the court considers the occupant's lack of permission to be on the property. The Appellate Court only focuses on Fitzgibbon's initial reaction when the officer arrives. The court only considers that Fitzgibbon used a spare key, as opposed to a personal key, and that Fitzgibbons could not immediately recall, by memory, the number for the owner of the property. It is only reasonable that the court be expected to also consider that Fitzgibbons was visiting and checking on the property weekly for his Uncle. It was also left out of Appellate Court's determination that Fitzgibbons did have permission from his uncle to use the cottage, except for "partying." It was also determined that Fitzgibbons told the other occupants that they were permitted to be in the cottage as long as they did not cause any damage or ruin the inside in any way.

When all factors are considered, Deputy PfiEFF did not have probable cause to arrest Ms. Secord. At the time of the arrest, PfiEFF was aware of all of the above circumstances. Had the arrest occurred immediately upon PfiEFF entering the premises, the outcome may be different. However, PfiEFF searched and questioned the occupants, determined the domicile of the occupants, received backup from other sheriff's deputies, and was made aware of Fitzgibbon's relationship with the owner before arresting Ms. Secord. Under the *Hunter* rule, all of the officer's knowledge (whether gathered on his own accord or provided by a trustworthy source) must be considered in determining if

probable cause existed and that a crime was being committed. *Hunter v. Bryant*, 502 U.S. 244, 228 (1991).

*ii. MS. SECORD'S CONVICTION MUST BE REVERSED BECAUSE THE RESPONDENTS HAVE NOT MET THEIR PROBABLE CAUSE BURDEN OF PROVING THAT ALL ELEMENTS OF CRIMINAL TRESPASS ARE ESTABLISHED.*

In order to show that probable existed, the “prosecution bears the burden of establishing all material elements of a criminal offense with proof beyond a reasonable doubt.” *City of Columbus v. Parks*, 2011-Ohio-2164 (Ohio Ct. App. 2011). Under New York law, a person commits a Criminal Trespass in the Second Degree when “he or she knowingly enters or remains unlawfully in a dwelling.” NY CLS Penal §140.15. According to §140.00(5), a “person ‘enters or remains unlawfully’ in or upon a premises when he is not licensed or privileged to do so.” NY CLS Penal §140.00(5). Therefore, the respondents have the burden of showing that Ms. Secord knowingly entered and remained on the property unlawfully because “lack of privilege to be lawfully present on the property is an essential element of criminal trespass.” *City of Columbus v. Parks*, 2011-Ohio-2164 (Ohio Ct. App. 2011)

New York courts have held that “a person is ‘licensed or privileged’ to enter private premises when [s]he has obtained the consent of the owner or another whose relationship to the premises gives him authority to issue such consent.” *People v. Graves*, 76 N.Y.2d 16, 20 (N.Y. 1990). Looking at the totality of the circumstances of the case, the Court must consider all facts, including those that may be exculpatory or that may tend to negate Ms. Secord’s guilt. When the Court of Appeals applied this totality of the circumstances test, only select facts and circumstances supporting the respondent’s contentions were considered.

Using all of this knowledge and information, the Respondents are unable to show all of the necessary elements for Criminal Trespass in the Second Degree. Considering all of the facts, and not just those used by the Court of Appeals, it is clear that Ms. Secord was not aware that her presence in the cottage was unlawful. The behavior and actions of Fitzgibbons, as someone who could give the necessary consent to use the cottage, could reasonably lead Ms. Secord to believe that the group had express consent, from the owner, to the use the property for their meeting. Because respondents have to meet all of the elements of the crime beyond a reasonable doubt, this high burden cannot be met by the respondents when considering the totality of the facts and circumstances in this case.

Because the respondents are unable to meet their probable cause burden, Ms. Secord's conviction for criminal possession of a dangerous weapon must also be reversed. If the officer did not have probable cause to arrest Ms. Secord, the search incident to the arrest was illegal. Any evidence obtained during this illegal search must be suppressed because "the exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion."

Wong Sun v. United States, 371 U.S. 471, 485 (1963).

**2. THE "REASONABLENESS TEST" USED TO DETERMINE A TIME FOR BAIL HEARINGS BY THE SECOND CIRCUIT DOES NOT PROTECT THE DUE PROCESS RIGHTS OF UNDOCUMENTED ALIENS, AND A BRIGHT LINE RULE SHOULD BE ESTABLISHED TO BE SURE THAT AN ALIEN'S CONSTITUTIONAL RIGHTS ARE PROTECTED.**

This court should reverse the Court of Appeals decision to send Secord back into ICE custody until such time as the Department can prepare evidence for her bail hearing as her due process rights were threatened from the use of the "reasonableness test." Secord should be released from ICE custody as she has been

held in detention for an unreasonable period of time given the circumstances. It should be noted that the Attorney General does have a right to hold undocumented aliens in detention until evidence can be presented as to whether he/she poses a “danger to the safety of other persons . . . and is likely to appear for any scheduled proceeding.” 8 U.S.C. § 1226(c)(2). However, under the Fifth Amendment’s Due Process Clause the Government cannot deprive any person, including undocumented aliens, of liberty without due process of law. USCS Const. Amend. 5 “Freedom from imprisonment -- from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Included in this clause is the idea that serious constitutional problems would arise if indefinite detention was permitted, as that is a deprivation of human liberty. *Id.* at 699. For this reason, statutes involving detention of aliens has been interpreted to have a limitation based on reasonable time. *Id.* at 682. Yet courts have been split on the meaning of “reasonable time,” and so have been using two different approaches to come its decisions. The case-by-case approach used by the Second Circuit we would argue is not the better approach as it can cause violations of due process, and a bright line rule approach should be used.

*i. THE “REASONABLENESS TEST” DOES NOT PROTECT DUE PROCESS RIGHTS OF UNDOCUMENTED ALIENS BECAUSE IT GIVES RISE TO INCONSISTENT RESULTS, AND ARBITRARY DETENTION.*

The reasonableness test is a “fact-dependent inquiry requiring an assessment of all of the circumstances of any given case,” to determine whether detention without a hearing is unreasonable. *Diop v. ICE/Homeland Security*, 656 F.3d 221, 234 (3d Cir.



2011).. There are a multitude of factors that a court can take into consideration under this approach such as “total length of the detention; the foreseeability of proceedings concluding in the near future; the period of the detention compared to the criminal sentence; the promptness (or delay) of the immigration authorities or the detainee; and the likelihood that the proceedings will culminate in a final removal order.” Reid v. Donelan, 819 F.3d 486, 500 (1st Cir. 2016). However, this is not an exhaustive list, but are merely guideposts for courts on what to consider. Id. at 501.

Since the factors to be considered for reasonableness are essentially endless, there clearly is no constant direction for the courts to follow when deciding on if and when a bond hearing is required. This case-by-case approach causes inconsistency and confusion in the court system when there should be more predictability and certainty. Lora v. Shanahan, 804 F.3d 601, 615 (2nd Cir. 2015). For example, in Martin v. Aviles, a Guyanese citizen became lawful permanent resident of the United States, however was facing a narcotics charges and while out on bond failed to appear in court. Martin v. Aviles, 2015 U.S. Dist. LEXIS 82111, (S.D.N.Y. 2015). He was then arrested, charged, found guilty of jumping bail, and thus was sentenced to five years of probation. Id. at 2. Years later defendant was placed into removal proceedings for his conviction of bail jumping, and was subject to mandatory detention while awaiting the outcome of his removal proceedings. Id. at 3. Ultimately, the court found that holding the defendant for over a year without a bond hearing violated his due process rights when looking at various factors. Id.

In *Monestime v. Reilly*, defendant was a Haitian citizen who lawfully entered the United States was arrested numerous times over the years, and convicted of various charges from disorderly conduct to criminal possession of stolen property.

*Monestime v. Reilly*, 704 F. Supp. 2d 453, 455 (S.D.N.Y. 2010). From these convictions defendant was subject to mandatory detention and removable to Haiti. *Id.* After an earthquake in Haiti, the DHS halted removals to Haiti temporarily, and so defendant argued that continued detention was unjustified because of the suspension of deportations to Haiti. *Id.* at 456. After being denied a bond hearing for release, the court found that when assessing multiple factors that the defendant was entitled to a bond hearing after being in detention for eight months. *Id.* at 459.

Further in *Johnson v. Orsino*, a citizen of Jamaica legally entered the United States on a temporary visitor visa. *Johnson v. Orsino*, 942 F. Supp. 2d 396, 399 (S.D.N.Y. 2013). After being convicted of criminal possession of a controlled substance, the defendant was found removable and placed in detention. *Id.* Defendant spent eleven months in detention before he was ordered to be removed to Jamaica, without a bond hearing, which he argued was constitutional. *Id.* at 400. The court found that after a consideration of factors a fifteen-month detention is not unreasonable, but that a bond hearing would eventually need to be scheduled to avoid constitutional issues. *Id.* at 412.

While in this case Secord did not enter the United States lawfully, unlike those in the above cases, that factor is not dispositive of a prolonged detention without a bond hearing. Just like in the cases above, Secord was convicted of a crime that renders her removable and thus mandatory detention is permissible. However, as

can be seen by the cases above there is no way to determine from this case-by-case approach of the reasonableness test what time frame really is reasonable for an alien to sit in detention awaiting a bond hearing. In *Johnson* fifteen months was seen as reasonable, yet in *Monestime* eight months was unreasonable. It is said that Second could be waiting eleven months for a bail request to be heard, and from past decisions of the courts using the reasonableness test it's unclear whether or not that truly is a reasonable amount of time to be detained without such a hearing. Such inconsistencies are likely to cause prolonged detentions, which can be said to be a deprivation of the aliens' fundamental right to freedom of liberty or bodily restraint. Not surprisingly, this approach is going to continue to provide widespread confusion and inconsistent application in practice. Such discrepancies are going to impede on the due process rights of aliens in detention awaiting bond hearings. The court should not want to inflict such uncertainty not only on aliens being detained, but their counsel assisting them, and possibly any family or friends of the alien.

Further, under this approach courts are being given too much power to expand the reasonable period of detention. It has been stated that "hearing schedules and other proceedings must have leeway for expansion or contraction as the necessities of the case and the immigration judge's caseload warrant." *Ly v. Hansen*, 251 F.3d 263, 271 (6th Cir. 2003). So some courts using this approach reason that in order to accommodate the size of their immigration dockets aliens who may not be dangerous or a flight risk may be held in detention for a year or more depending on their location or the caseload of that particular court. This again is going to impede on the constitutional rights of aliens against prolonged detentions, and shows the

inconsistency when using this approach. In order to make the process more predictable, consistent, and administrable the court should abandon the reasonableness test for a more bright-line rule approach.

*ii. A TIME-BASED BRIGHT-LINE RULE IS NECESSARY AND APPROPRIATE TO PROVIDE UNIFORMITY AND CLEAR DIRECTION TO PROTECT ALIENS' CONSTITUTIONAL RIGHTS.*

Adopting for example, a six-month rule ensures that similarly situated aliens will receive similar treatment. *Lora*, 804 F.3d at 615. A bright-line rule has been seen as needed for the “sake of uniform administration.” *Zadvydas*, 533 U.S. at 701. “The clarity of this mandate would benefit not only detained aliens . . . but also courts, which would not have to engage in a weighing of multiple factors merely to decide whether and when a hearing must be provided.” *Sopo v. U.S. Attorney Gen.*, 825 F.3d 1199, 1226 (11th Cir. 2016) (Pryor, J., concurring in part and dissenting in part). Further, bright-line approach would offer a well-defined rule of application, but still has some flexibility as the court is to consider individual circumstances when deciding whether to release those detainees on bond such as if they are a danger to society or a flight risk. *Id.* at 1228. Courts should apply a definite standard that avoids serious constitutional problems altogether, which a bright-line approach would accomplish. *Clark v. Suarez Martinez*, 543 U.S. 371, 384 (U.S. 2005). Without such a bright-line rule it is likely that constitutional problems will arise because of the uncertainty the case-by-case approach provides with prolong detentions, which in turn result in major hardships of the aliens. *Rodriguez v. Robbins*, 804 F.3d 1060, 1072 (9th Cir. Cal. 2015). Other areas of the law have adopted bright-line rule approaches in order to provide more certainty, and clearly state what is acceptable

under the Constitution. *Country of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). (states a bright-line rule that a probable cause hearing within 48 hours is timely under the Fourth Amendment).

In *Zadvydas v. Davis*, Zadvydas alien of Lithuanian descent, but born in Germany was placed in deportation or removal proceedings due to his long criminal record. *Zadvydas*, 533 U.S. at 684. Zadvydas was detained passed his removal period, and thus challenged his continued detention. *Id.* A second alien, Ma, who was from Cambodia fled to the United States with his parents. *Id.* at 685. After being convicted of an aggravated felony Ma was put into deportation proceedings, and was also held in detention passed the removal period. *Id.* The court found that while Congress did not necessarily think removal could always be accomplished in 90 days, it did doubt the constitutionality of detention longer than six months. *Id.* at 701. It was held that indefinite detention of aliens would raise serious concerns under the due process clause, and there was no clear sign of congressional intent to allow an alien ordered removed in confinement indefinitely. *Id.* However, this did not mean that after six months an alien had to be released, as there would be criteria in place to assess if release was warranted. *Id.*

In *Lora*, the defendant was a lawful permanent resident from the Dominican Republic who was convicted of drug related offenses. *Lora*, 804 F.3d at 605. While awaiting removal proceedings he was in detention for four months. *Id.* The court found that in order to avoid constitutional concerns a bright-line rule was necessary, an “implicit temporal limitation.” *Id.* at 607. It was decided by the court that at six months of an alien’s detention he/she must be afforded a bail hearing, and

the government must put on clear and convincing evidence that the alien is a danger to society or a flight risk. Id. at 616. In this case, defendant was released as it was found he was not a flight risk, not dangerous to the community, was employed, and had family in the community. Id. at 605.

This court should not overturn Lora, and follow its approach as well as the one from Zadvydas of adopting a bright line rule. Second like the defendant in Lora has ties to the community, as she has made friends here who can be considered her family. Further, she also has had employment since entering the country in the food industry, and currently is employed at Tim Hortons. Unlike the defendants in Zadvydas, she does not have a criminal record other than this offense. She clearly poses no risk of flight or danger to the community. Since she has been held in detention for a prolonged period of time there is no reason to continue detaining her for another eleven months when a hearing could become available. This impedes her right to freedom of bodily restraint and liberty, which she still retains in this country under the constitution.

## **VI. CONCLUSION**

The Second Circuit erred in reversing the District Court's order to release Ms. Secord from ICE custody and throw out her convictions. Therefore, the Supreme Court should reverse the Second Circuit's decision, and reinstate the District Court's findings, consistent with this brief.

Respectfully submitted,

Team #27

Attorney for Petitioner