

THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 2017

DOCKET NO. 1-2017

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 WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE UNITED STATES

Brief for Petitioner

Team #31

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QUESTION PRESENTED

1. Whether the Second Circuit applied the correct standard to determine if Deputy PfiEFF had probable cause to arrest petitioner; and
2. Whether the “reasonableness test” to determine a time for bail hearings articulated by the Second Circuit violates the Due Process rights of undocumented aliens

OPINION BELOW

123 F.4th 1 (2nd Cir. 2016)

CONSTITUTIONAL RULES AND PROVISIONS

U.S. Const. amend. IV

U.S. Const. amend. V

INTRODUCTION

Petitioner Laura Secord, a citizen of Canada and an undocumented alien, is appealing the ruling of the Second Circuit Court of Appeals. Petitioner was charged with criminal trespass of the second degree and possession of a dangerous weapon in the fourth degree after police arrested her at her friend's uncle's cottage. After serving a year in jail, petitioner was moved to the custody of the U.S. Department of Homeland Security Immigration and Customs Enforcement. Petitioner has remained in ICE custody for over six months without a bail hearing.

We ask that this court overturn the decision of the lower court for two reasons. First, there was no probable cause to arrest petitioner. While the lower court applied the correct standard for probable cause, the lower court failed to accurately apply the facts of the current situation to the totality of circumstances test. Second, the "reasonableness standard" the court applied to assess petitioner's detainment under the Due Process Clause does not afford enough protection to the Due Process rights of undocumented aliens. This is because the reasonableness standard fails to prevent the origination of Due Process violations, is unworkable in practice, and is administratively inefficient.

STATEMENT OF FACTS

Petitioner Laura Secord, a Canadian teenager, ran away from home following a life of physical and emotional abuse. (R. at 8). While living homeless in Toronto, petitioner acquired brass knuckles for protection. Id. She became close with other homeless youth during this time playing Dungeons and Dragons at a local shelter. Id. In 2012, she gained access to a larger gaming community playing online at the shelter and public library. Id. Petitioner became especially close with a group of players from Buffalo, New York. Id.

Petitioner immigrated to the United States by walking over Lake Erie after it froze in the winter of 2013. (R. at 2). After finding a minimum-wage job and place to live, petitioner connected with the Buffalo group of players. (R. at 8). She began regularly joining the group to play the game at the players' apartments or homes. Id.

Petitioner never had any issues with law enforcement before December 21st, 2015. (R. at 8). On that day, one of the players, James Fitzgibbon, suggested playing the game at his uncle's cottage in Angola. Id. Fitzgibbon knew the cottage would be empty and unheated since his uncle was in Florida for the winter. (R. at 9). However, Fitzgibbon told the group, including the petitioner, his uncle would be "cool with it" as long as Fitzgibbon "didn't mess the place up" or throw any parties. Id.

After stopping for snacks and to pick up themed costumes, Fitzgibbon drove the entire group to the cottage. (R. at 9). Fitzgibbon opened the front door using a key he obtained from underneath a planter on the cottage's back patio. Id. Because the lights would not turn on, the group lit a few candles they found in the cottage closet. Id. On the walls of the cottage, the photos showed Fitzgibbon depicted with his uncle and the rest of his family. Id. All six players then dressed in their costumes, put out the chips and sodas, and set up the board game on the cottage's kitchen table. Id.

While the teenagers played Dungeons and Dragons in their costumes, one of the other cottage owners called the police to report "suspicious activity". (R. at 2). The other owner assumed the cottage would be empty during the winter off-season. Id. Without following up on the call, Deputy Bernard Pfeiff reported to the cottage. Id. When he arrived, Deputy Pfeiff looked inside the window and saw the flickering candles and teenagers in costumes. Id. Deputy Pfeiff then knocked on the door and announced his presence, startling the entire group, causing

them to scatter into different parts of the cottage. (R. at 9). Without obtaining a warrant, Deputy PfiEFF opened the unlocked cottage door and entered. Id. After unsuccessfully trying to turn on the lights, he ordered everyone out of hiding. (R. at 2). At that point, the group realized Deputy PfiEFF was not an intruder and came out of hiding. (R. at 9).

Fitzgibbon explained to Deputy PfiEFF he had permission to use the cottage from his uncle, the cottage owner, as long as Fitzgibbon did not throw a party. (R. at 9). Fitzgibbon also told Deputy PfiEFF that he had a key to open the front door. (R. at 3). Fitzgibbon even showed officers the location where he had retrieved the key. (R. at 9). Deputy PfiEFF asked Fitzgibbon about how to contact the owner, but Fitzgibbon admitted he did not know how to contact his uncle since his uncle was currently in Florida for the winter. Id.

Without any further investigation, Deputy PfiEFF arrested the petitioner along with the rest of the group and detained them in Erie County Holding Center. (R. at 3). While searching the petitioner's backpack, Deputy PfiEFF found the pair of brass knuckles. Id. An entire week after petitioner's arrest, officers finally contacted Fitzgibbon's uncle. Id. He confirmed Fitzgibbon's account that Fitzgibbon had permission to use the cottage as long as he did not throw any kind of party. Id. The petitioner was convicted on two misdemeanor charges, criminal trespass in the second degree and possession of a deadly weapon in the fourth degree. Id. She was sentenced to one year at the Erie County Correctional Facility. Id.

During the petitioner's sentence, attorney John Lord O'Brian, with a group of law students, filed a habeas corpus petition on her behalf in the United States District Court for the Western District of New York. (R. at 3). While the petition was pending, the petitioner was released from jail and immediately transferred into ICE custody with the Department of Homeland Security. (R. at 3-4). Six months after the transfer, law students filed a second

habeas corpus petition. (R. at 4). Petitioner is still currently in ICE custody at the time of this brief filing. (R. at 4).

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews an Appellate Court’s determination of probable cause for an arrest de novo. Ornelas v. United States, 517 U.S. 690, 691 (1996).

II. WHILE ARTICULATING THE CORRECT GENERAL TEST FOR PROBABLE CAUSE, THE LOWER COURT DID NOT APPLY THE TEST CORRECTLY FOR THREE REASONS.

The Fourth Amendment guarantees “the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures”. U.S. Const. amend. IV. This constitutional protection extends over state action through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 645-646 (1961). Accordingly, the Fourth Amendment protects against unreasonable seizures following an arrest. Maryland v. Pringle, 540 U.S. 366, 370 (2003). Warrantless arrests are valid under the Fourth Amendment so long as the arrest is supported by probable cause. Id. The officer carries the burden to prove probable cause in a false arrest case where no judicial warrant exists. Dickerson v. Napolitano, 604 F.3d 732, 738 (2d Cir. 2010).

Probable cause has no set definition or bright-line rule. Pringle, 540 U.S. at 370-371 (clarifying that “probable cause is a fluid concept...not readily, or even usefully, reduced to a neat set of rules”). Generally, “a police officer has probable cause to conduct a search when ‘the facts available to [him] would warrant a [person] of reasonable caution in the belief’ that contraband or evidence of a crime is present”. Florida v. Harris, 133 S.Ct 1050, 1055 (2013), quoting Texas v. Brown, 460 U.S. 730, 742 (1983). In conducting this analysis, the court

considers the “totality of circumstances” leading up to the arrest. Harris, 133 S.Ct at 1055. All the facts will be examined and understood in the context of a reasonable police officer, rather than by an ordinary lay-person. Illinois v. Gates, 462 U.S. 213, 232 (1983). Finally, the “[arrest] cannot be the mere ratification of the bare conclusions of others”. Id. at 239.

In this case, the lower court correctly articulated the general “totality of circumstances” test to determine probable cause. However, the lower court incorrectly applied the test for three reasons. First, Deputy Pfieff cannot establish he had probable cause to arrest the petitioner, or even to initially enter the cottage, based on all of the undisputed facts. Second, the court incorrectly considered facts established only after the petitioner’s arrest to supplement Deputy Pfieff’s probable cause finding. Third, even if this court does find that probable cause existed at arrest, any probable cause determination cannot be particularized to the petitioner.

A. No reasonable officer could find that Deputy Pfieff established probable cause prior to the arrest based on the totality of circumstances.

Probable cause is determined by considering the totality of circumstances leading up to the arrest. Florida v. Harris, 133 S.Ct. 1050, 1055 (2013). While the test allows “officers [to] weigh the credibility of witnesses in making a probable cause determination, they may not ignore available and undisputed facts”. Baptiste v. J.C. Penny Co., 147 F.3d 1252, 1259 (10th Cir. 1998). All undisputed facts prior to arrest must be incorporated into the officer’s analysis in some way. Id. Further, every element of the charged crime must be independently supported by probable cause. Williams v. City of Alexander, 772 F.3d 1307, 1312 (8th Cir. 2014). If either requirement is not met, the arrest must fail as an illegal seizure under the Fourth Amendment. Id.

1. First, Deputy PfiEFF did not have probable cause to initially enter the cottage.

Before reaching the lower court's decision regarding probable cause to arrest, Deputy PfiEFF did not have probable cause to initially enter the cottage.¹ Deputy PfiEFF first arrived to the cottage based only on a neighbor's report of "suspicious activity". (R. at 2). Deputy PfiEFF never talked to the neighbor or clarified the meaning of "suspicious activity" prior to arriving. *Id.* This court explained that an officer must weigh the reliability of the informant's tip based on all of the relevant evidence. *Adams v. Williams*, 407 U.S. 143, 147 (1972). Moreover, "informant's tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability". *Id.* Here, Deputy PfiEFF did not have any evidence indicating the caller had any knowledge whether the petitioner and her friends had permission to use the cottage. In fact, the evidence shows the caller simply assumed the cottage would be empty because these cottages are usually empty during the off-season. Therefore, Deputy PfiEFF should have accounted for this assumption and discounted the informant's tip accordingly in his probable cause analysis.

Additionally, when Deputy PfiEFF arrived and looked in the cottage window, he could see teenagers wearing costumes, gathered around a board game on the kitchen table. (R. at 10). After Deputy PfiEFF knocked and announced his presence, no one from the group opened the

¹ If this court finds that Deputy PfiEFF did not have probable cause to enter the cottage, this court need not go any further to reverse the lower court's holding on this issue. Probable cause to enter the cottage presents a potentially threshold issue to the question whether Deputy PfiEFF had probable cause to arrest the petitioner. Under the exclusionary rule, evidence stemming from an illegal entry should be excluded as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (holding that "evidence seized during an unlawful search could not constitute proof against the victim of the search"). Therefore, any evidence following the entry to support the petitioner's arrest would be excluded, and the later arrest would violate the Fourth Amendment. Alternatively, even if this court does not suppress the evidence stemming from the illegal entry, the evidence supporting probable cause to enter is much stronger than the evidence supporting probable cause to arrest. Therefore, if Deputy PfiEFF did not have probable cause to enter, this court cannot find Deputy PfiEFF had probable cause to arrest the petitioner.

cottage door. Based on these observations, Deputy Pfieff could not reasonably suspect that anything “suspicious” was occurring. The evidence only suggests that this group was innocently playing their game and did not want to be disturbed. Allowing certain visitors in while keeping others out is reasonably within the prerogative of a person with permission to be on the premises. Therefore, Deputy Pfieff would be required to obtain a warrant prior to any further investigation.

The respondent will argue that Deputy Pfieff did not need to get a warrant prior to entering because he had probable cause to enter based on exigent circumstances. See Segura v. United States, 468 U.S. 796, 808 (1984) (finding exigent circumstances for officers to enter without a warrant to secure the premises from evidence destruction). Because the group scattered at his knock and announce, the respondent will argue that Deputy Pfieff entered the premises to prevent the destruction of any evidence. However, the respondent’s argument must fail because no exigent circumstances existed in this case. Probable cause established by preventing the destruction of evidence has been upheld in very limited circumstances. See, e.g., Missouri v. McNeely, 133 S.Ct. 1552 (2013) (finding natural dissipation of blood alcohol levels did not amount to exigent circumstances); Brigham City v. Stuart, 547 U.S. 398 (2006) (finding exigent circumstances only when officers entered a home after they saw defendant punch someone and the victim coughed up blood). This court has dealt squarely with the issue of evidence destruction in Kentucky v. King. In that case, the court found no exigent circumstances when officers knocked and announced their presence, then heard people shuffling behind the door. Kentucky v. King, 563 U.S. 452, 453-454 (2011). Like the officer in King who assumed evidence was being destroyed from the shuffling noises, Deputy Pfieff had no reason to believe the group was destroying evidence when they scattered. In fact, Deputy Pfieff arrived to the cottage because he thought the group was trespassing. Under trespass theory, the group would

not have any evidence to destroy. Their presence in the home alone would complete the crime. Therefore, exigent circumstances cannot exist, and Deputy Pfieff could not enter the cottage without additional evidence.

2. Second, Deputy Pfieff did not have probable cause to arrest the petitioner.

Even if this court finds Deputy Pfieff had probable cause to enter the cottage, any probable cause to arrest the petitioner terminated the moment Deputy Pfieff walked inside and examined the scene. The undisputed facts show that a group of teenagers, dressed in wizarding costumes, were caught simply playing a board game. (R. at 9). Also, every member of the group believed Fitzgibbon had the owner's permission to use the cottage. Id. Without additional evidence to support the contrary, no reasonable officer could conclude from those facts alone that any criminal activity was taking place inside the cottage.

Here, the lower court failed to consider all of the available relevant evidence when making their initial determination. Instead, the lower court highlighted certain facts favoring probable cause while skimming over or completely ignoring other relevant facts. For example, the majority opinion completely neglects to mention that Fitzgibbon appeared in some of the family photographs on the cottage walls. (R. at 9). This fact, in combination with Fitzgibbon's own statements that he had permission to use his uncle's cottage, makes Deputy Pfieff's finding of probable cause to arrest for trespass simply erroneous.

But the undisputed facts pointing against finding probable cause do not stop there. First, Fitzgibbon knew his uncle kept a spare key for the cottage. (R. at 9). In fact, Fitzgibbon even showed officers the precise location for that key, hidden underneath a planter on the back patio. Id. Second, Fitzgibbon told Deputy Pfieff that his uncle gave him permission to use the cottage as long as Fitzgibbon did not throw any parties. Id. All of this evidence supports the reasonable

inference that Fitzgibbon had a personal relationship with the cottage owner. Accordingly, it is more reasonable than not that the group had the cottage owner's permission, and thus were not trespassing.

In addition to Fitzgibbon's relationship to the cottage owner, the group's actions when Deputy PfiEFF arrived do not support any criminal finding. The group was simply playing Dungeons and Dragons on the kitchen table when they heard a knock at the door. (R. at 9). When Deputy PfiEFF entered the cottage, open Diet Pepsi cans and Doritos were located on the table next to the board game. (R. at 10). Like the group when they initially entered, Deputy PfiEFF also unsuccessfully tried to turn on the lights after the light switch did not work. (R. at 2). Based on the totality of circumstances test, the court must take all of these facts into consideration. Baptiste, 147 F.3d at 1259. However, the lower court failed to conduct this all-encompassing analysis. No reasonable officer could find that the lower court's explanation of the event was accurate when considering all the facts together. The only narrative that this court could reasonably advance involves no criminal liability; it involves one where the group was simply enjoying an innocent game of Dungeons and Dragons in Fitzgibbon's uncle's cottage. Because no reasonable officer could find probable cause to arrest based on all of the facts presented, the probable cause analysis must fail.

The respondent will likely argue this court has continued to emphasize the deferential and common sense standard in determining probable cause. Florida v. Harris, 133 S.Ct. 1050, 1053 (2013); Illinois v. Gates, 462 U.S. 213, 239 (1983). Thus, the low bar to probable cause was satisfied in this circumstance. However, the respondent's argument fails to consider that probable cause must still bar some arrests based on lack of evidence. Finding probable cause prior to arrest cannot be a superfluous step in the process. Instead, its purpose is to force officers

prior to arrest to articulate a concrete reason, backed up by facts, why an arrestee could be found guilty of a crime. See Brinegar v. United States, 338 U.S. 160, 176 (1949) (clarifying that probable cause balances two competing concerns: protecting “citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime” with officers’ “fair leeway for enforcing the law in the community’s protection”). While probable cause is not an impossible or enormous hurdle to overcome, the hurdle still exists and has not been met here.

B. The lower court incorrectly considered facts established after petitioner’s arrest to determine whether Deputy Pfieff established probable cause.

In addition to the substantive limitations on finding probable cause, the court has also imposed significant procedural limitations on what evidence can be considered in the analysis. One such limitation is based on when the evidence is discovered. All determinations of probable cause must be made at the time of arrest. United States v. Di Re, 332 U.S. 581, 595 (1948). As such, any probable cause finding cannot later be supplemented based on what a search or arrest does or does not turn up. Id.

In this case, the lower court improperly considered multiple pieces of evidence that were only discovered during post-arrest investigations. First, the majority opinion states that the “most critical” discovery lending itself to probable cause was the petitioner’s illegal immigrant status. (R. at 7). The petitioner concedes that she is in the United States illegally. However, officers only learned this information after the petitioner was arrested and transported to Erie County Holding Center. (R. at 3). Before Deputy Pfieff arrested the petitioner, he only knew that she did not have a driver’s license, unlike the rest of the group. Id. At no point prior to the petitioner’s arrest did Deputy Pfieff confirm his suspicions about the petitioner’s immigration status.

The respondent will likely argue Deputy Pfieff acted reasonably because petitioner's lack of a driver's license implies her questionable immigration status. However, this reliance is misplaced. A reasonable officer would not have automatically assumed that lacking a driver's license meant that the petitioner was an illegal alien. In fact, many reasonable non-criminal alternatives could explain this occurrence. Therefore, the petitioner's immigration status was improperly considered since it only came to light after the arrest.

Second, the court gave considerable weight to the fact that Fitzgibbon's uncle told officers that he did not give Fitzgibbon permission to use the cottage. (R. at 7). However, the court admits this conversation did not take place until after the petitioner's arrest. (R. at 7) (clarifying that the uncle "later" talked to officers, referencing a week after the arrest took place). Therefore, because this conversation did not take place until an entire week after the petitioner was arrested, it cannot be considered in the court's analysis for probable cause.

Even if the court could consider this post-arrest evidence, the uncle clarified that any revocation of permission to use the cottage hinged on whether Fitzgibbon threw a party. (R. at 7). Since Fitzgibbon did not throw a party, any reference to the uncle's later conversation actually supports the finding that the group had permission to use the cottage. This fact then cuts against Deputy Pfieff's probable cause finding and shows that the lower court improperly weighed this evidence in favor of finding probable cause.

C. Even if probable cause to arrest could be established based on the undisputed facts, the finding was not particularized to the petitioner.

When making a probable cause determination, this court requires officers to find "particularized suspicion" against the arrestee. Texas v. Brown, 460 U.S. 730, 742 (1983). Any articulated suspicion must go beyond the arrestee's mere presence at the scene of a crime. United States v. Di Re, 332 U.S. 581, 593 (1948) (finding that "presumptions of guilt are not

lightly to be indulged from mere meetings”). Accordingly, Deputy Pfieff must articulate facts specifically aimed against the petitioner to support his probable cause finding. Id.

In Ybarra v. Illinois, police officers obtained a warrant to search a tavern and its bartender connected with dealing drugs. Ybarra v. Illinois, 444 U.S. 85, 88 (1979). When officers arrived to the tavern, they conducted cursory pat-downs of all bar patrons, including the defendant. Id. Officers found a cigarette pack filled with drugs on the defendant during this initial pat down. Id. at 89. This court found the search violated the defendant’s Fourth Amendment rights because any probable cause to search established by the warrant was not particularized against the defendant. Id. at 92-93. The court clarified that “a person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person”. Id. at 91. Thus, any probable cause to search the tavern or bartender could not be imputed to search the defendant without any additional information that the defendant was involved in a crime. Id.

Like the defendant in Ybarra who was in the wrong place at the wrong time, the petitioner was simply present in the cottage with her friends when the police arrived. Even if Deputy Pfieff had probable cause to enter, like the officers in Ybarra who entered the tavern with a warrant, he needed additional evidence specifically against the petitioner to establish probable cause to arrest. Her mere presence at the scene is not enough. Without any other specific evidence against the petitioner, probable cause for arrest cannot be established.

The respondent will argue that the petitioner’s sole presence in the cottage is distinguishable from the defendant’s search in Ybarra because presence alone is enough on its face to establish probable cause for trespass. However, respondent’s argument cannot prevail because it fails to consider the well-established exceptions to criminal trespass. Deputy Pfieff

charged the petitioner, along with the rest of the group, with criminal trespass in the second degree. (R. at 3). According to New York law, “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 (Consol. 2017). However, one cannot be guilty of a criminal trespass if they have a license or privilege to enter the property. See People v. Eastmond, 855 N.Y.S.2d 353, 355 (2008). A person has a license or privilege when he has obtained the owner’s permission to be present. Id.

In this case, Fitzgibbon obtained a conditional license to enter the property from his uncle. (R. at 9). Fitzgibbon told officers when they arrived that his uncle gave Fitzgibbon permission to use the property as long as he did not throw any parties. Id. Based on these statements along with the other available evidence, Fitzgibbon likely had permission to use the cottage. So, a reasonable officer could not find that probable cause existed against any member of the group, including the petitioner.

If the court finds probable cause for criminal trespass did exist, the mens rea element cannot be imputed to the petitioner. Prior to arriving at the cottage, Fitzgibbon told the petitioner and the rest of the group that he had permission to use his uncle’s cottage. (R. at 9). The petitioner had no reason to doubt this statement when Fitzgibbon knew the cottage key’s location, and his picture hung on the cottage walls. (R. at 9). When officers arrived, the petitioner and the other members of the group repeated to them that Fitzgibbon had permission to use the property. (R. at 3). Even if Fitzgibbon’s statements were untrue and he did not have permission to use the cottage, petitioner’s reliance on Fitzgibbon’s statements was reasonable. As such, the court cannot impute any criminal intent Fitzgibbon may have had when he entered the cottage to anyone else in the group. Since the officers cannot impute Fitzgibbon’s intent onto

the petitioner, Deputy PfiEFF cannot establish probable cause for every element of criminal trespass against her. Therefore, Deputy PfiEFF did not and could not have a particularized suspicion against the petitioner.²

III. THE REASONABLENESS TEST TO DETERMINE A TIME FOR BAIL HEARINGS DOES NOT ADEQUATELY PROTECT THE DUE PROCESS RIGHTS OF UNDOCUMENTED ALIENS

A. This court has long held that undocumented aliens are afforded Due Process rights.

Undocumented aliens must undergo removal proceedings to determine if they will be deported if taken into custody. 8 U.S.C. § 1226. If the alien has a prior conviction for a qualifying crime, they can be detained throughout the removal process. 8 U.S.C. § 1226(c) (“[t]he Attorney General shall take into custody any alien who...” is removable from this country because he has been convicted of one of a specified set of crimes).

Once in the Attorney General's custody, the first step in the removal process is a bail hearing to determine if the alien is a flight risk or a danger to society. *Id.* (“The Attorney General may release an alien [if] ... the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.”); (R. at 4). If the bail hearing determines the alien meets the detention criteria, the Attorney General may detain the alien throughout the rest of the removal process. *Id.* This brief is concerned with an alien’s detention period prior to their bail hearing and the possible Due Process violations resulting from it.

² The court cannot alternatively use the petitioner’s other charge, illegally possessing brass knuckles, to find particularized suspicion. As mentioned before, probable cause can only be established prior to the arrest. *United States v. Di Re*, 332 U.S. 581, 595 (1948). Therefore, officers cannot consider the brass knuckles to establish probable cause because it was only found during a search incident to arrest.

This court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process. Wong Wing v. United States, 163 U.S. 228, 235 (1896) (The deportation process “would be vain if those accused could not be held in custody pending the inquiry into their true character”). However, as with any detention without a prior hearing, Due Process violations are possible.

It is well-settled that the Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. See Plyler v. Doe, 457 U.S. 202, 210 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976); Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950); See also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law”). While this Court has held “that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings,” indefinite detention of a non-citizen still “raise[s] serious constitutional concerns”. Demore v. Kim, 538 U.S. 510, 526 (2003). This is because “[f]reedom 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”. Zadvydas v. Davis, 533 U.S. 678, 682 (2001); See also Lora v. Shanahan, 804 F.3d 601, 606 (2d Cir. 2015) (quoting Demore and Zadvydas in holding “that mandatory detention for longer than six months without a bond hearing affronts due process”). Therefore, it is imperative that this court adopt a rule minimizing the Due Process concerns implicit in detaining undocumented aliens while they await their individual bail hearings.

Here, the lower court adopted a standard that does not adequately protect the Due Process rights of undocumented aliens. The lower court's reasonableness standard is used when determining if the detention period prior to the bail hearing is a violation of an undocumented alien's Due Process rights. (R. at 5). Prior to the adoption of the reasonableness standard, an undocumented alien in the Second Circuit was automatically guaranteed a bail hearing after six months of detainment. Lora, 804 F.3d at 616 (holding that "in order to avoid the constitutional concerns raised by indefinite detention, an immigrant detained pursuant to section 1226(c) must be afforded a bail hearing before an immigration judge within six months of his or her detention"). Now, the lower court has overturned its prior rule in Lora to instead adopt "a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case". Diop v. ICE/Homeland Sec., 656 F.3d 221, 234 (3d Cir. 2011); (R. at 5). The new reasonableness standard only requires that a bail hearing occur in a "reasonable time given the particular circumstances". (R. at 6).

Unfortunately, the lower court's reasonableness standard fails to adequately protect the Due Process rights of undocumented aliens. The standard is backwards looking since it only addresses past Due Process concerns, and does not prevent new ones from arising. In addition, the reasonableness standard does not provide enough guidance to lower courts, inevitably resulting in inconsistent application of the law and arbitrary detention periods. Last, the reasonableness standard creates administrative burdens by requiring a multi-step process for detainees to go through in order to be granted a bail hearing. These concerns would be adequately addressed if this court adopted a bright-line rule with a temporal limitation on pre-bail hearing detention periods.

1. Employing a post-hoc analysis of the reasonableness of a period of detention does nothing to prevent Due Process violations from occurring in the first place.

The reasonableness standard adopted by the lower court cannot adequately protect detained aliens from suffering Due Process violations because the standard is only backwards-looking. For the reasonableness standard to apply, the court must wait for an alien to be detained. In reality, this means the “reasonableness” of a detention period would not be assessed until and unless a detained alien brings a Due Process claim to the court’s attention after already suffering the alleged violation. Therefore, by its very nature, the reasonableness test cannot prevent overlong detentions and accompanying Due Process violations; it can only address such claims once the alien raises them in court.

2. Adopting a backwards-looking standard could lead to detainment without cause

Because the reasonableness standard is backwards-looking, aliens who have meritorious arguments against their detention will still be detained. These people will be actively precluded from stating their claims until their long-awaited bail hearing, leading to detention without cause in some cases. That is the case at hand. The U.S. Department of Homeland Security Immigration and Customs Enforcement held the petitioner for at least six months awaiting her bail hearing prior to the ruling in the lower court. (R. at 4). As discussed above in detail, petitioner should not even have the conviction that qualifies her for mandatory detainment under the statute.³ Regardless of the merit of petitioner's claim, petitioner still had to undergo detainment for six months without the ability to state her claim of wrongful detention. If, indeed, the court overturns petitioner’s conviction, she will have been wrongly detained for six months. All other undocumented aliens who have legitimate arguments against their detainment will

³ See, *supra*, Section II regarding probable cause to arrest.

encounter similar problems. Thus, the reasonableness test fails to prevent the detainment of undocumented aliens without cause, which shows the standard cannot adequately protect the Due Process rights of the detainees.

3. Increasingly longer detention periods will be seen as “reasonable” as the court system’s administrative issues and time constraints cause more frequent and lengthy delays.

The lower court based much of its argument for the reasonableness standard on the unworkability of a bright-line rule. (R. at 6). The lower court opinion emphasizes no judges were available to hear the petitioner’s case for eleven months, much less the six months required by judicial precedent. (R. at 6); Lora, 804 F.3d at 616 (holding that “in order to avoid the constitutional concerns raised by indefinite detention, an immigrant detained pursuant to section 1226(c) must be afforded a bail hearing before an immigration judge within six months of his or her detention”). In addition, the lower court asserts that ICE agents had “no time...to prepare in any way for a hearing,” even though ICE presumably had at least eleven months to prepare. (R. at 6). Therefore, the lower court argues a rule requiring overburdened immigration courts to grant bail hearings within six months is unworkable. (R. at 6).

However, the reasoning employed by the lower court will lead to undesirable consequences. If the current burden upon the court system is reason enough to warrant longer detentions, the Due Process rights afforded to detainees will not be adequately protected. The length of an undocumented alien’s detention will be dependent on how many detainees there are, rather than anything an alien did to justify the detainment. This result is contrary to the purpose of the statute, which uses detainment to prevent recidivism and truancy from future proceedings. See Demore, 538 U.S. at 518-19 (considering recidivism and truancy as proper government purposes in ruling on the constitutionality of § 1226(c)).

Indeed, the lower court concedes there is great uncertainty concerning how long an alien might have to wait for a judge to conduct their bail hearing or even to review their habeas petition. (R. at 6). This uncertainty is one of the reasons for the lower court's abandonment of a strict temporal limitation. (R. at 6). Given the influx of immigrants indicated in the record and the lengthening of average detentions in the past several years, long waiting periods become a reality for many detained immigrants. (R. at 6); Lora, 804 F.3d at 616 (noting that, "without a six-month rule, endless months of detention, often caused by nothing more than bureaucratic backlog, has real-life consequences for immigrants and their families").

As the court's time and administrative constraints force detainees to wait increasingly longer for relief, the usefulness of the reasonableness standard to address Due Process violations becomes progressively less effective. This proposition holds true in the case at hand. Even after filing a habeas petition and appealing her detention in court, petitioner is still in ICE custody. (R. at 4). She remains in custody for an unknown amount of time, simply because the Second Circuit failed to articulate how long ICE can continue to detain the petitioner prior to granting her a bail hearing. (R. at 4-6). Given that the reasonableness standard fails to address the origination of Due Process violations and will soon be ineffective at addressing past violations, this standard fails to adequately protect the Due Process rights of detainees. Surely a standard that cannot satisfactorily prevent Due Process violations from occurring certainly does not adequately protect the Due Process rights of those already detained.

B. The reasonableness test is unworkable in practice because requiring lower courts to interpret and apply a reasonableness test will lead to inconsistent and unequal results in what constitutes a reasonable period of detention for aliens awaiting bail hearings.

The reasonableness test is too imprecise for lower courts to be able to apply with any consistency. When asked to apply the test on a case-by-case basis, courts even in the same

circuit have consistently exhibited pervasive inconsistency and confusion. See, e.g., Johnson v. Orsino, 942 F.Supp.2d 396 (S.D.N.Y. 2013) (fifteen-month detention found reasonable); Monestime v. Reilly, 704 F.Supp.2d 453, 458 (S.D.N.Y. 2010) (ordering bond hearing after eight months detention); Scarlett v. DHS, 632 F.Supp.2d 214, 223 (W.D.N.Y. 2009) (five years detention found unreasonable); Luna–Aponte v. Holder, 743 F.Supp.2d 189, 194 (W.D.N.Y. 2010) (nearly three years of detention found reasonable). Blatant inconsistencies such as these are inescapable without more clarity for lower courts. The reasonableness test, as it stands, cannot provide this clarity, and thus, is unworkable in practice.

In contrast, a bright-line rule would

“[ensure] that similarly situated detainees receive similar treatment. Such a rule avoids the random outcomes resulting from individual habeas litigation in which some detainees are represented by counsel and some are not, and some habeas petitions are adjudicated in months and others are not adjudicated for years.”

Lora v. Shanahan, 804 F.3d 601, 615 (2d Cir. 2015). It was because of these exact inconsistencies that the Second Circuit adopted a bright-line rule in Lora in the first place. Id. (stating that “with such large [immigration] dockets, predictability and certainty are considerations of enhanced importance and we believe that the interests of the detainees and the district courts, as well as the government, are best served by this approach”). The court in Lora properly recognized the importance of consistency in real-life application. Because the reasonableness standard cannot guarantee consistency in application, it can not adequately protect the Due Process rights of undocumented aliens.

C. The reasonableness test is inefficient because it requires multiple steps for each appealing detainee.

Though the lower court used administrative efficiency as an argument in favor of the reasonableness standard, this reasoning cannot be correct. Administrative efficiency is better

served with a clearer rule and fewer overall proceedings. Under the reasonableness approach, detainees are forced to go through a multi-step process for relief. For example, “every detainee must file a habeas petition challenging detention, and the district courts must then adjudicate the petition to determine whether the individual's detention has crossed the ‘reasonableness’ threshold, thus entitling him to a bail hearing”. (R. at 5). This multi-step process requires more time and resources from the court system than are necessary. In fact, the process articulated by the lower court requires judges to complete two tasks to determine if a detainee is entitled to a bail hearing. This process is in sharp contrast to the single task following an automatic bail hearing granted to each detainee after a set period of time. Requiring a multi-step process is an unnecessary and wasteful drain on judicial resources. Given the lower court’s evidence of how over-burdened the immigration court system has become, the court system would benefit from a rule that saves time and resources, not erroneously requires more of them. (R. at 6). Indeed, adopting a more efficient rule would allow the court to hear more immigration cases, thereby actively preventing possible Due Process violations. Using the reasonableness standard hampers that efficiency, and thus, does not adequately protect the Due Process rights of undocumented aliens.

D. This court has previously recognized that bright-line rules best protect the Due Process rights of undocumented aliens.

Consistent with Zadvydas and Clark, this court has favored bright-line rules when determining the constitutionality of immigrants’ continued and prolonged detention. In Zadvydas, this Court found it necessary “for the sake of uniform administration” to set a “presumptively reasonable period of detention” of six months. Zadvydas v. Davis, 533 U.S. 678, 699-701 (2001). The Court determined six months was appropriate because “Congress previously doubted the constitutionality of detention for more than six months”. Id. at 701

(adopting the presumption that detention beyond six months constitutes an unreasonable period) (citing Juris. Statement of United States in United States v. Witkovich, O. T. 1956, No. 295, pp. 8-9); See Clark v. Martinez, 543 U.S. 371, 386 (2005) (extending Zadvydas to inadmissible noncitizens). This principle was affirmed again in Clark when the Court applied the same six-month limitation. Id. (holding the “same 6–month presumptive detention period [as in Zadvydas] applies in these cases”).

Additionally, a bright-line approach most appropriately ensures compliance with Due Process obligations. Such an approach would require the court to grant an undocumented immigrant a bail hearing automatically after a certain detention period. Rodriguez v. Robbins, 715 F.3d 1127, 1132 (9th Cir. 2013) (holding the statutory mandatory detention is limited to a six-month period). A bright-line approach eliminates the possibility of needlessly prolonged detention periods and will result in consistent application of the law. The bright-line approach, like the one adopted by this court in Zadvydas and Clark, is better suited to achieve due process requirements, and is consistent with this court’s precedent. Id.

Finally, a bright-line rule, as opposed to a case-by-case approach, would also be consistent with—and would meaningfully enforce—this court’s directive that applying a definite standard would avoid serious constitutional problems altogether. See Clark, 543 U.S. at 384 (noting that the Court is not “free to ‘interpret’ statutes as becoming inoperative when they ‘approach constitutional limits’”; See also Rodriguez, 715 F.3d at 1132 (holding “the canon of constitutional avoidance requires us to construe the government’s statutory mandatory detention authority under Section 1226(c) and Section 1225(b) as limited to a six-month period, subject to a finding of flight risk or dangerousness”); Diop v. ICE/Homeland Sec., 656 F.3d 221, 231 (3d Cir. 2011) (applying canon of constitutional avoidance to “conclude that the statute implicitly

authorizes detention for a reasonable amount of time”). Simply adopting a reasonableness standard, without definitive bright-line guidance, would amount to interpreting the statutes to “authorize detention until it approaches constitutional limits”. Clark, 543 U.S. at 384. In fact, this is precisely the approach this Court rejected in Clark. Id.

IV. CONCLUSION

Based on the foregoing reasons, Petitioner Laura Secord respectfully requests this court to reverse the lower court decision and find that Deputy PfiEFF did not have probable cause for petitioner’s arrest and that the reasonableness standard adopted by the lower court fails to adequately protect the Due Process rights of undocumented aliens.