

Case No. 1-2017

SUPREME COURT OF THE UNITED STATES

APRIL 1, 2017

LAURA SECORD, Petitioner

-against-

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

and

LAURA SECORD, Petitioner

-against-

CITY OF ANGOLA, Respondent.

ON CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

BRIEF FOR PETITIONER

Team Number 5
Attorneys for Petitioner

QUESTIONS PRESENTED

- (1) Whether the Second Circuit applied the correct standard to determine if Deputy Pfieff had probably 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.

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Laura Secord (hereinafter “Laura”) convicted of criminal trespass in the second degree and criminal possession of a dangerous weapon in the fourth degree by the City of Angola Court in December of 2015. She was sentenced to a year in prison. The two sentences being served concurrently in the Erie County Correctional Facility in Alden, New York. While serving her sentence in Alden, by and through legal counsel, Laura filed a habeas corpus petition in the United States District Court for the Western District of New York, alleging that her conviction violated her Fourth Amendment rights against unlawful search and seizure. While that petition pended, Laura completed her sentence and was transferred immediately to the Department of Homeland Security in accordance with 8 U.S.C. § 1226.

Laura remained in the custody of the Immigration and Customs Enforcement (hereinafter “ICE”) office for the following six months. By and through legal counsel, she filed another habeas corpus petition arguing that her detention had passed the bright line established in *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015). The petition was granted, and Laura was immediately released from ICE custody. Her petition to vacate her conviction was granted as well. The City and the Department of ICE appealed to the United States Court of Appeals for the Second Circuit.

The Second Circuit rejected its own ruling in *Lora*, and instead adopted the approach of the Third and Sixth Circuits, preferring a fact-dependent inquiry on a case-by-case basis above a bright line six-month rule establishing reasonable length of detention for undocumented aliens awaiting bail hearings. The Second Circuit also rejected the District Court’s finding that the arresting officer did not have probable cause to arrest Laura. Thus, the Second Circuit reversed

the determinations of the District Court and ordered Laura to be remanded into ICE custody. Laura timely appealed to this court, and this court granted certiorari.

JURISDICTION

Jurisdictional statement is waived pursuant to Competition Rule III(b)(v).

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. § 1226(c)(1)(C)

The Attorney General shall take into custody any alien who is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year.

8 U.S.C. § 1231(a)(1)(A)

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the “removal period”).

8 U.S.C. § 1231(a)(6)

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

STATEMENT OF CASE

Petitioner, Laura, is a Canadian citizen who was born in Toronto. (Record 1, 2, 8) Laura dealt with an emotionally and physically abusive home life growing up. (Record 8) She fled at age 16 and became homeless. (Record 8) During this period of homelessness, she acquired brass knuckles that she kept on her person for protection. (Record 8) Young woman living on the streets faced dangers in major cities. (Record 8) She established a “family” in the area; a group of friends who met to play Dungeons and Dragons (hereinafter “D & D”) together at a shelter every week. (Record 8) In 2012, Laura discovered a larger group of D & D friends online. (Record 8) She could access the group at the shelter and library. (Record 8) Laura grew close to the players in the area surrounding Buffalo, New York. (Record 8) In 2013, Laura hitchhiked to Fort Erie and entered the United States by crossing a frozen Lake Erie. (Record 2, 8) It was an unusually cold winter that froze Lake Erie completely. (Record 2, 8)

Laura immediately found a residence and became employed at a Tim Horton’s near the lake. (Record 2, 8) She connected with the Buffalo group of D & D players and joined them regularly for games. (Record 8) Laura had no problems with the law until December 2015. (Record 8) On December 21, 2015, she and her Buffalo D & D friends decided to play their game on the Winter Solstice in a “spooky” location. (Record 2, 8) One player, James Fitzgibbon

(hereinafter “James”), suggested his uncle’s cottage in Angola, New York. (Record 8, 9) James’ uncle went to Florida for the winter so he knew no one would be there. (Record 9) The cottage was unheated and located approximately 45 minutes south of Buffalo along the lake. (Record 9) James told everyone that his uncle would be “cool with it” if they “didn’t mess the place up.” (Record 9). James drove everyone to the cottage. (Record 9) They decided to wear costumes so they stopped at Party City to purchase costumes. (Record 9) They also stopped at a gas station in Evans for snacks and refreshments. (Record 9) Several of them had to work the following morning so they planned an evening of playing D & D then head home around midnight. (Record 9)

Upon arrival, James opened the front door using a key to let the group in. (Record 9) James knew where the key was kept on the patio, as it was his responsibility to check on the property about every week while his uncle was gone. (Record 9) James was unable to figure out how to turn the electricity on in the cottage. (Record 9) The group lit some candles they found in a closet, got into costume, and began their D & D game. (Record 9) They quickly became immersed in their game. (Record 9)

An Angola resident noticed light in the cottage where the D & D friends were playing. (Record 2) The cottages were usually closed for the winter. (Record 2) The resident reported to the local police that suspicious activity was taking place at the cottage. (Record 2) Deputy Barnard Pfieff of the Erie County Sheriff’s office was dispatched to the scene. (Record 2) When he arrived, Deputy Pfieff saw candle light inside the cottage. (Record 2) He approached the cottage and peered through a window. (Record 2) Deputy Pfieff saw six hooded or masked individuals since they were dressed as wizards, dwarves, and other characters. (Record 2, 9) The group was around a table playing D & D. (Record 2, 9) Deputy Pfieff went to his vehicle,

radioed his supervisor, and told her what he saw. (Record 2) She told him, “Go find out what’s going on.” (Record 2) Deputy Pfieff returned to the cottage, knocked on the door, and identified himself, which the knock terrified the group. (Record 2, 9) “Scared out [of] their wits” they all ran to hiding spots around the cottage because they didn’t know who was knocking. (Record 9) Laura even testified at her trial that when the pounding on the door occurred she “jumped out [of] her skin.” (Record 9) Deputy Pfieff watched through a window when he knocked and identified himself. (Record 2) He saw everyone in the cottage scatter. (Record 2, 9) Deputy Pfieff radioed in what he saw using his portable radio and called for backup. (Record 2) He then opened the unlocked door and entered the cottage. (Record 2) Deputy Pfieff identified himself as law enforcement as he entered, but had not gotten a response yet. (Record 2) He tried turning on the lights, but realized they did not work. (Record 2) Deputy Pfieff saw the game laid out on the table in the candle light. (Record 2) He then un-holstered his sidearm and ordered that anyone inside the cottage show themselves. (Record 2)

After it became clear that the person entering the cottage was a law enforcement officer, the group came out from hiding. (Record 9) Deputy Pfieff then ordered them to get down on the floor and place their hands above their heads so he could search them for weapons and identification. (Record 2) Everyone had identification, but Laura, who only had cash on her. (Record 2) Other deputies arrived and questioning began. (Record 3) They said they did not live there, but James had permission to use the cottage. (Record 3) James informed Deputy Pfieff that he had permission to use the cottage, and it belonged to his uncle. (Record 3, 9) Due to shock, James could not recall his uncle’s phone number immediately, but he did later; however, his uncle did not answer. (Record 9) James showed the deputies where the key was located and photos of his family that were in the cottage. (Record 3, 9) The Department was able to contact

James' uncle, and the uncle stated that James was to check the property and not allowed to throw a party. (Record 9)

During the arrest, James explained that his uncle was in Florida for the winter. (Record 3, 9) Deputy Pfieff placed all six individuals under arrest and transported them to the Erie County Holding Center. (Record 3) All six individuals were charged with criminal trespass. (Record 3) Laura was also charged with possession of a deadly weapon for the brass knuckles, which was found in her backpack where she kept them. (Record 3) All the others were released on their own recognizance except for Laura. (Record 3) Due to her immigration status, Laura was held in custody. (Record 3)

Laura was sentenced to one year in prison. (Record 3) After serving her sentence, she was immediately transported to the custody of ICE to await a bail hearing on her removal. (Record 3, 4) After the District Court granted Laura's habeas corpus petitions concerning both the probable cause for her arrest and the length of her detention, Laura's convictions were overturned, and she was released from ICE custody. (Record 3, 4) The Government appealed this decision to the United States Court of Appeals for the Second Circuit, who reversed the decisions of the lower courts and remanded Laura into ICE custody. (Record 4)

After being remanded into ICE custody, Laura petitioned this Court to reconsider the following issues:

- (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.

SUMMARY OF THE ARGUMENT

First, the Second Circuit did apply the correct standard to determine if Deputy PfiEFF had probable cause to arrest Laura. However, application of the facts to conclude probable cause is incorrect. Second, the “reasonableness test” articulated by the Second Circuit violates both the substantive and procedural due process rights afforded to undocumented aliens via the Fifth Amendment of the United States Constitution.

ARGUMENT

I. ALL FACTS MUST BE USED FOR CORRECT APPLICATION OF THE TOTALITY OF THE CIRCUMSTANCES TO DETERMINE PROBABLE CAUSE.

The Supreme Court has held “totality of the circumstances” is the standard to determine probable cause. *Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013). When all the facts are interpreted for the petitioner, it is clear probable cause to enter the cottage and arrest Laura was incorrect.

A. Totality Of The Circumstances Is The Correct Standard To Determine Probable Cause; However, There Was No Probable Cause To Lead To The Arrest Of Laura.

Probable cause is determined by using the totality of the circumstances, but Laura should not have been arrested. To determine probable cause, practical and common sense must be used in conjunction with the totality of the circumstances. *Id.* Using the long-standing principal of probable cause, citizens are protected “from rash and unreasonable interferences with privacy and from unfounded charges of crime.” *Maryland v. Pringle*, 540 U.S. 366, 370 (2003). See also *Brinegar v. United States*, 338 U.S. 160, 176 (1949). “Reasonable ground[s] for belief of guilt” must be found for probable cause. *Maryland*, 540 U.S. at 371. Furthermore, “the belief of guilt must be particularized with respect to the person to be searched or seized.” *Id.* See also *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). The events leading up to an arrest must be considered to

determine if there is probable cause for the arrest. *Maryland*, 540 U.S. at 371. The “historical facts [must be] viewed from the standpoint of an objectively reasonable police officer” to determine probable cause. *Id.* (Quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996)). Therefore, if “an objectively reasonable police officer” has considered the facts leading up to the arrest and believes there is probable cause for the arrest, then the arrest occurs. *Maryland*, 540 U.S. at 374.

Had Deputy Pfieff been objectively reasonable when assessing the totality of the circumstances, he would not find probable cause to arrest Laura. In *Pringle*, citizen’s privacy is to be protected from rash and unreasonable interferences. Furthermore, reasonable belief of guilt must be found of the person for probable cause to arrest. Laura’s privacy was not protected from rash and unreasonable interferences. She was in the privacy of a cottage she reasonable believed she could be in. Deputy Pfieff acted unreasonably given the totality of the circumstances. Looking at the facts, Deputy Pfieff should not have found reasonable belief of guilt for Laura. Laura acted no differently than the others in the cottage. She was dressed in a costume, playing a board game, and hid like the others because they were startled when Deputy Pfieff knocked on the door and announced himself. It would have been reasonable for Deputy Pfieff to knock and announce himself again. Then if no one answered he could try the door of the cottage and enter. Deputy Pfieff did not use practical and common sense with assessing the totality of the circumstances. Furthermore, Deputy Pfieff acted unreasonably and had no reason to believe Laura as guilty. Due to Deputy Pfieff not using common sense and being reasonable with evaluating the totality of the circumstances, probable cause cannot be found, and Laura should not have been arrested.

B. Deputy Pfieff Did Not Have Probable Cause To Believe Criminal Trespass Was Occurring, And An Arrest When Totality Of The Circumstances Is Observed Is Invalid.

When the totality of the circumstances is evaluated, Deputy Pfieff did not have probable cause to enter the cottage and make any arrests because he believed criminal trespass was occurring. During an arrest, probable cause exists if “at the moment the arrest was made ... the facts and circumstances within [an officer’s] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing” a crime was being committed by the suspect(s). *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Probable cause exists when there is probable cause for all elements of the crime and available and undisputed facts are not ignored. *Williams v. City of Alexander*, 772 F.3d 1307, 1312 (8th Cir. 2014); *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1259 (10th Cir. 1998).

The elements of criminal trespass are (1) premises, (2) building, which includes any structure for overnight lodging, (3) dwelling, (4) night, and (5) enter or remain unlawfully. N.Y. Stat. Law § 140.00 (McKinney 2017). To be guilty in the second degree of criminal trespass, a person must knowingly enter or remain unlawfully in a dwelling. N.Y. Stat. Law § 140.15 (McKinney 2017).

Dzevad Hurem told officers he had paid rent to Nasreen Quadri’s husband. *Hurem v. Tavares*, 793 F.3d 742, 744 (2015). Hurem had keys to the apartment, but no proof of the rental agreement as in no receipt, lease, or other paperwork. *Id.* Hurem did have Quadri’s husband’s contact phone number, but he denied being paid rent. *Id.* Hurem was arrested when he refused to leave the apartment. *Id.* Looking at the totality of the circumstances at the time of the arrest,

probable cause existed with the available facts. *Hurem*, 793 F.3d at 746 (2015). Thus, the court held the arrest valid. *Id.*

Given the undisputed facts and the totality of the circumstances, there is no probable cause to believe criminal trespass was occurring. Laura did not meet all the elements of the criminal trespass. She did not enter and remain unlawfully in a dwelling. Laura and the others in the group believed they had permission to be in the cottage. Record at 10. The occupants hid, and did not flee. Scattering to hid from being startled is not probable cause to enter the cottage. If criminal trespassing was occurring, it is more likely the occupants would have fled. There is no evidence of time between Deputy Pfieff identifying himself and entering. It is likely Deputy Pfieff could have identified himself again to give the occupants a chance to come out of hiding. Once Deputy Pfieff entered the cottage, everyone came out and cooperated. *Hurem* is similar to our case since Hurem had a key and believed he had permission to be in the apartment. However, Hurem could not produce permission to be in the apartment other than a key and phone number. In our case, James, the nephew of the owner, had a key and knew the hiding place for it. At first, James could not remember his uncle's phone number. He was able to produce his uncle's phone number, and his uncle concurred permission for James to be at the cottage. Deputy Pfieff should have realized there was no probable cause since not all the elements for criminal trespass were present. He ignored available and undisputed facts. Deputy Pfieff should not have ignored undisputed facts and assessed the totality of the circumstances; thus, he would have found no probable cause to enter the cottage because he believed criminal trespass was occurring.

II. THE “REASONABLENESS TEST” ARTICULATED BY THE SECOND CIRCUIT VIOLATES THE FIFTH AMENDMENT DUE PROCESS RIGHTS OF UNDOCUMENTED ALIENS.

A. The Second Circuit’s “Reasonableness Test” Is Unconstitutional Because It Violates The Substantive Due Process Rights Of Undocumented Aliens Through Deprivation Of Their Liberty Interest.

1. The Scope Of The Due Process Clause

The Fifth Amendment of the United States Constitution explicitly states that no person shall “be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend.

V. Both the Fifth and Fourteenth Amendments guarantee due process of law, including substantive due process which forbids any infringement on liberty interests by the government unless that infringement is narrowly tailored to serve a specific compelling state interest. *Reno v. Flores*, 507 U.S. 292, 303 (1993).

The Due Process Clause of the Fifth Amendment applies to “all persons” within the United States. U.S. Const. amend. V. Therefore, at the point an alien enters the United States, they are legally afforded the protections of the Due Process Clause, whether their presence is “lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001).

While aliens are within U.S. boundaries, they possess a liberty interest protected by the U.S. Constitution, which shall not be infringed upon without Due Process of law and only for a narrowly tailored state interest. *Id.* Laura was within the United States' borders at the moment of her arrest, through the service of her sentence, and remains in U.S. ICE custody today. Therefore, she possesses a liberty interest that is protected by the Fifth Amendment of the United States Constitution.

2. History And Purpose Of 8 U.S.C. § 1226

Reasonableness should be measured in terms of the statute's basic purpose. *Zadvydas*, 533 U.S. at 699. Title 8 U.S.C. § 1226(c) outlines scenarios in which the Attorney General shall take an alien into custody. 8 U.S.C. § 1226 (West 2017). The Supreme Court in *Zadvydas* analyses the history of 8 U.S.C. § 1226(c) from its inception through its modern interpretation. *Zadvydas*, 533 U.S. at 699. Through this analysis, the Supreme Court finds nothing in the statute's history that "demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention." *Id.*

The purpose of 8 U.S.C. § 1226(c) is to secure the alien's presence at the moment of removal. *Id.* at 2504. Therefore, if that removal is no longer reasonably foreseeable, "the court should hold continued detention unreasonable." *Id.* The Supreme Court in *Zadvydas* recognized the liberty interest at stake throughout the removal process of an alien within United States borders. *Id.* at 2505. To avoid that serious constitutional threat, the court concluded that continued detention can only be permitted when there is "significant likelihood of removal in the reasonably foreseeable future." *Id.*

On page 6 of the Record, the Second Circuit articulates the crux of the constitutionality of Laura's detention: "The first available judge even to *hear* a bail request could not be scheduled until eleven months after Secord began her detention." Record at 6. In other words, the soonest possible time, which the initial determination of removal proceedings could begin for Laura, was almost a year after her ICE detention began. Not only is this double the length of the bright-line rule established by the same court in *Lora v. Shanahan*; it absolutely signifies that any potential removal of Laura from the United States will not be in the reasonably foreseeable future.

Per 8 U.S.C. § 1231(a)(6), while Laura’s conviction was valid, her detention could potentially have been constitutional if the Attorney General determined that she was a risk to the community or that she was unlikely comply with her order of removal. 8 U.S.C. § 1231 (West 2017). However, on page 6 of the Record, the Second Circuit explicitly states that the department “could not prepare a case to present to the immigration judge about Secord’s dangerousness or flight risk.” Record at 6. The one statutory avenue that the government could have pursued to legally and constitutionally detain Laura, if successful, was not explored and cannot be explored in the reasonably foreseeable future. Therefore, Laura’s continued detention was a violation of her due process rights that protect her liberty interest.

The Second Circuit recommends a “reasonableness test” that would require each case to be assessed by a district court who would apply a “fact-dependent inquiry requiring an assessment of all the circumstances of any given case.” Record at 5. This recommendation frustrates the already problematic issue of back-up in the judicial system regarding immigration issues. The U.S. Supreme Court anticipated this issue in *Zadvydas* and stated explicitly that to limit occasions when courts will need to do this; it is “necessary to recognize some presumptively reasonable period of detention.” *Zadvydas*, 533 U.S. at 699. To reject this decision, along with the Court of Appeals decision in *Lora v. Shanahan* to establish a finite limit to lawful detention, the Second Circuit has ensured further judicial back-up and infringement on the liberty interests of undocumented aliens. *Lora*, 804 F.3d at 601.

B. The Second Circuit’s “Reasonableness Test” Is Unconstitutional Because It Violates The Procedural Due Process Rights Of Undocumented Aliens As It Permits Indefinite Detention.

1. 8 U.S.C. § 1231(a)(1) 90 Day “Removal Period”

8 U.S.C. § 1231(a)(1)(A) states “when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the ‘removal period’.” 8 U.S.C. § 1231 (West 2017). There are several ways to determine the start of an alien’s removal period. 8 U.S.C. § 1231(a)(1)(B)(iii) establishes that when the alien is detained or confined, the date the alien is released from that confinement is the effective initiation date of the removal period. *Id.* This means that the day Laura completed her sentence at the Erie County Correctional Facility in Alden, New York, began the tolling of her 90-day removal period. As the Second Circuit states on page 2 of the Record, Laura is still awaiting an outcome of removal proceedings to this day, and her removal was not secured within the 90-day removal period. Record at 2.

2. 8 U.S.C. § 1231(a)(6) Inadmissible Or Criminal Aliens

8 U.S.C. § 1231(a)(6) allows detention of an alien beyond the removal period if that alien: (1) has been ordered to be removed who is inadmissible under § 1182 of Title 8; (2) is removable under §§ 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of Title 8; or (3) has been determined to be a risk to the community or unlikely to comply with the order of removal. 8 U.S.C. § 1231 (West 2017). The case at issue applies to the third scenario, and Laura was never determined to be a risk to the community or unlikely to comply with an order of removal. This is the proceeding the government claims would be conducted, at the very soonest, eleven months after the beginning of Laura’s ICE detention. Record at 6.

For the same reasons that the “reasonableness test” articulated by the Second Circuit is a violation of substantive due process rights of undocumented aliens, it is also a violation of the procedural due process rights of undocumented aliens. Not only is their liberty interest infringed upon throughout this process; the “reasonableness test” would allow the government to circumvent the procedures outlined by statute, or at very best to attenuate them so greatly from one another that the purpose of securing their presence at the moment of removal is greatly outweighed by the constitutional risks. *Zadvydas*, 533 U.S. at 680. To insist that an alien remain in custody for significant time beyond the removal period to simply wait for a determination on their flight or danger risk, it appears to serve merely a punitive purpose, which the U.S. Supreme Court has held to be unconstitutional. *Id.* at 695. This indefinite detention is forbidden by the Constitution as it violates the procedural due process rights of undocumented aliens. *Id.* at 2496.

CONCLUSION

For the foregoing reasons, and in the interest of justice, the judgment should be reversed.

Respectfully Submitted,
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