

*In The
Supreme Court of the United States*

LAURA SECORD,

Petitioner,

v.

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

Respondent,

and

CITY OF ANGOLA,

Respondent.

**On Writ Of Certiorari
To The United States Courts Of Appeals
For The Second Circuit**

BRIEF FOR THE RESPONDENT

Team No. 10

QUESTION PRESENTED

1. Did the Second Circuit apply the proper standard when determining that Deputy Pfieff had probable cause to arrest someone who was illegally in someone's home?
2. Under the "reasonableness test" used by the Second Circuit to determine bail hearing, is an undocumented alien who is charged with possessing a deadly weapon Due Process rights protected?

TABLE OF AUTHORITY

Supreme Court Opinions

<u>Adams v. Williams</u> , 407 U.S. 143 (1972)	7, 8
<u>Beck v. Ohio</u> , 379 U.S. 89 (1964)	6, 7
<u>Brinegar v. United States</u> , 338 U.S. 160 (1949)	4
<u>Demore v. Hyung Joon Kim</u> , 538 U.S. 510 (2003)	10, 12, 13
<u>Dunaway v. New York</u> , 442 U.S. 200 (1979)	5
<u>Florida v. Harris</u> , 133 S. Ct. 1050 (2013)	4
<u>Illinois v. Gates</u> , 462 U.S. 213 (1983)	6
<u>Maryland v. Pringle</u> , 540 U.S. 366 (2003)	7
<u>Ornelas v. United States</u> , 517 U.S. 690 (1996)	6
<u>Reno v. Flores</u> , 507 U.S. 292 (1993)	10, 15
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968)	8
<u>United States v. Cortez</u> , 449 U.S. 411 (1981)	8
<u>Zadvydas v. Davis</u> , 533 U.S. 678 (2001)	11

U.S. Constitution

U.S. Const. amend. IV	4
U.S. Const. amend. V	10

Federal Court Opinions

<u>Chavez-Alvarez v. Warden York Cty. Prison</u> , 783 F.3d 469 (3d Cir. 2015)	10, 11, 16, 17
<u>Diop v. ICE/Homeland Sec.</u> , 656 F.3d 221 (3d Cir. 2011)	11, 13
<u>Gonzalez v. O'Connell</u> , 355 F.3d 1010 (7th Cir. 2004)	12, 13
<u>Hoang Minh Ly v. Hansen</u> , 351 F.3d 263 (6th Cir. 2003)	17
<u>Leslie v. AG of the U.S.</u> , 678 F.3d 265 (3d Cir. 2012)	11
<u>Lora v. Shanahan</u> , 804 F.3d 601 (2d Cir. 2015)	17
<u>Panetta v. Crowley</u> , 460 F.3d 388 (2d Cir. 2006)	6
<u>Patel v. Zemski</u> , 275 F.3d 299 (3d Cir. 2001)	16
<u>Sopo v. U.S. AG</u> , 825 F.3d 1199 (11th Cir. 2016)	14, 17
<u>United States v. Gaskin</u> , 364 F.3d 438 (2d Cir. 2004)	5
<u>Zalaski v. City of Hartford</u> , 723 F.3d 382 (2d Cir. 2013)	5

State Court Opinions

<u>Araujo-Cortes v. Shanahan</u> , 35 F. Supp. 3d 533 (S.D.N.Y. 2014)	15
<u>Baker v. Johnson</u> , 109 F. Supp. 3d 571 (S.D.N.Y. 2015)	10, 14
<u>Hylton v. Shanahan</u> , 2015 WL 3604328 (S.D.N.Y. 2015)	15
<u>Johnson v. Phillips</u> , 2010 WL 6512350 (S.D.N.Y.2010)	15

United States Code

8 U.S.C. § 1226 (2012)	2, 11
8 U.S.C. § 1226(c)	12, 13
8 U.S.C. § 1226(c) (2012)	11, 16
8 U.S.C. § 1226(c)(1)(C) (2012)	9, 12
8 U.S.C. § 1227(a)(2)(A)(i) (2012)	9, 12

Other

2A C.J.S. <u>Aliens</u> § 1322 (2003)	11, 12
---	--------

TABLE OF CONTENT

QUESTION PRESENTED	ii
TABLE OF AUTHORITY	iii
TABLE OF CONTENT	v
STATEMENT OF THE FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
The Second Circuit Correctly Applied The Standard In Determining Probable Cause Existed To Arrest The Defendant Because The Officers Had A Reasonable Belief That A Crime Had Been Committed Or Was In Progress.....	4
I. Probable cause existed because the officers had a reasonable belief that crime had been committed or was in progress.	5
II. Probable Cause is determined on the basis facts known to the arresting officer at the time of arrest.....	6
III. Absent probable cause an officer may detain a person and conduct a limited search for weapons.....	8
The Second Circuit usage of the “Reasonableness test” to determine when an illegal alien is being held under 8. U.S.C. §1226 is eligible for a bail hearing does not infringe on that aliens constitutional Due Process rights.....	10
I. The Use Of The “Reasonableness Test” By The Second Circuit Protects The Due Process Rights of All Alien.....	11
A. Secord has not made a good faith challenge for her removal.....	12
B. The length of Secord stay has been reasonable.	13

C. There is a prospect of future proceedings for Secord.	15
D. Secord is a risk of flight and a danger to the community.	15
II. The Second Circuit Was Correct In Their Choice To Not Use The Six-Month Limit Because The Supreme Court Does Not Like Bright-Line Rules.....	17
CONCLUSION.....	18

STATEMENT OF THE FACTS

Laura Secord (Secord) a Canadian citizen was born and raised in Toronto, Canada. *Scott v. Secord*, 123 F.4th 1, 8 (2nd Cir. 2016). In the winter of 2013, when Lake Erie was frozen solid walked across the lake and illegally entered the United States (US.). *Id.* at 2. Upon entering the US, she started to work various jobs in the foodservice industry. *Id.*

On December 21, 2015 Laura Secord and some friends illegally entered into a cabin in the city of Angola, while dressed in different costumes. *Id.* A concerned neighbor decided to call the police, because they noticed something weird. *Id.* They noticed lights coming out a cottage. These cottages were primarily used during the summer, seeing light emanating from one during the winter was out of the norm and suspicious. *Id.* The local Erie County Sheriff's office responded to the scene. *Id.*

When Deputy Barnard Pfieff (Pfieff) arrived on the scene he was able to locate the cottage with the light emanating from the inside. *Id.* Pfieff approached the dwelling, and peeked in the window, where he saw several hooded and masked individuals gathering around a table with a candlelight. *Id.* Unsure of what to do, Pfieff returned back to his vehicle, and radioed his Sergeant, Sergeant Swlater (Swalter), and told him what he observed. *Id.* Swalter told Pfieff, "go find out what's going on." *Id.* At that point Pfieff went back to the cottage where he knocked on the door, and identified himself as a member of the sheriff department. *Id.*

Pfieff again looked through the window, and observed the occupants inside scattering and hiding. *Id.* Pfieff opened the unlocked door, and entered the cottage, while doing so he again identified himself as a police officer. *Id.* Again, no one responded to his show of authority. *Id.* Pfieff tried to turn on the closest light switch, but it did not work. *Id.* Pfieff un-holstered his

service weapon and ordered the occupants to come from hiding, six adults' emerged from the darkness. *Id.*

Pfieff ordered them to get on the floor and to put their hands up. He conducted a protective search for weapons and identification. *Id.* Five of the six had some sort of identification, the only person who did not was Secord. *Id.* Others officers arrived on the scene, and they conducted a questioning. *Id.* at 3. A James Fitzgibbon (Fitzgibbon) stated that his Uncle allowed him to use the cottage. *Id.* Fitzgibbon was unable to provide Pfieff with any contact information for the uncle; when Pfieff was able to get in contact with the uncle, he stated that his nephew did not have permission to throw a party. *Id.*

Secord's bag was also searched, brass knuckles were found in her bag. *Id.* Secord was arrested, charged and convicted of criminal possession of a deadly weapon in the fourth degree, and criminal trespass in the second degree which she was sentenced to one year in prison. *Id.* Upon release she was detained by Immigration and Customs Enforcement (ICE) under 8 U.S.C. § 1226 (2012). *Id.* at 4. She filed a habeas corpus pretention through the Legal Clinic at the University at Buffalo School of Law claiming that her six-month detention in the possession of ICE was a violation of her Due Process rights, and also that Pfieff lacked probable cause for the search *Id.* at 3. The Second Circuit Court of Appeals held that the Officer did have enough for probable cause, and her Due Process rights has not been violated by ICE. *Id.* at 5, 7.

SUMMARY OF ARGUMENT

This Court should affirm the United States Court of Appeals for the Second Circuit ruling the Deputy Pfieff had probable cause to conduct an arrest, and the use of the reasonable test does not violate the Due Process rights of Secord.

Erie County Sherriff department received a phone call from a neighbor who saw something suspicious coming from a cottage. Upon arriving on the scene Deputy Pfieff saw hooded and masked individuals in a cottage which are normally empty during the winter. Deputy Pfieff knock on the door, and saw the defendant and others hide. Upon entering, and securing the cottage, he search each occupants in the cottage. Everyone was searched, and no one had authority to be in the cottage. In conducting a search incident to an arrest, Pfieff found a brass knuckle in the defendant's bag.

Secord was detained by ICE, her detainment by ICE was reasonable. Secord who was detained for six-month made a good faith argument to why she should be released citing to the six-month bright line rule, but the Court has said in the past that they want to stay away from bright-line rules.

Secord is being held in a reasonable time for her proceeding to happen. The Court system unfortunate is over-crowded, to no fault of ICE. ICE agents are moving as swiftly, and as speedy as possible in this process. Even though they must not be moving as fast as Secord wants.

There is a high probability that Secord will be heard by the removal board within the next few months. She does have a court date set, so there is a definite future of her removal procedure will occur. Unfortunately, since Secord was charged with possessing a deadly weapon, it will go against the purpose of the provision to release her at this time. Also, since she

does not have any ties to this community, she is a flight risk and a danger to the community. Not only is she is a danger to the community, she is a flight risk.

ARGUMENT

The Second Circuit Correctly Applied The Standard In Determining Probable Cause Existed To Arrest The Defendant Because The Officers Had A Reasonable Belief That A Crime Had Been Committed Or Was In Progress.

The long-prevailing standard of probable cause protects "citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," while giving "fair leeway for enforcing the law in the community's protection."¹ The Fourth Amendment to the United States Constitution guarantees the right of people to be free from unreasonable searches or seizures. U.S. Const. amend. IV. This Court has held, probable cause is a "practical and commonsensical standard" that considers "the totality of the circumstances."² In evaluating whether the State has met the practical and common-sensical standard for probable cause for a search, the United States Supreme Court has consistently looked to the "totality of the circumstances". The Court has rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach.³

Probable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a neat set of legal rules.⁴ As the Second Circuit has emphasized, the standard is a "fluid" one "that 'does not demand hard certainties or mechanistic inquiries'; nor does it 'demand that an officer's good-faith belief that

¹ Brinegar v. United States, 338 U.S. 160, 176 (1949).

² Florida v. Harris, 133 S. Ct. 1050, 1055 (2013).

³ Id. at 1051.

⁴ Id.

some suspect has committed or is committing a crime be correct or more likely true than false.”⁵

"Rather, it requires only facts establishing 'the kind of fair probability' on which a 'reasonable and prudent' person, as opposed to a 'legal technician[],' would rely."⁶ Here, based on the totality of the circumstances, Deputy Pfieff and the other responding officers had probable cause to arrest the petitioner.

I. Probable cause existed because the officers had a reasonable belief that crime had been committed or was in progress.

"Probable cause exists where the facts and circumstances within . . . the officers' knowledge and of ... which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested."⁷ In this case, Deputy Pfieff was dispatched because a neighbor reported suspicious activity at a summer cottage. The cottage was located at the edge of a dark and frozen lake. The call was made in the middle of the winter. Based upon his observation through the window he observed the cottage was occupied by hooded and disguised individuals. These individuals were gathered around the table in the gloom of candlelight. Courts recognize that experience and training may allow a law enforcement officer to discern probable cause from facts and circumstances where a layman might not."⁸

In relying on his specialized knowledge and expertise Deputy Pfieff approached the cottage, knocked on the front door, and identified himself as a law enforcement official. He observed the hooded figures scatter and hide upon hearing his voice and knocking. "When determining whether probable cause existed to support an arrest," a court may "consider those

⁵Zalaski v. City of Hartford, 723 F.3d 382, 389, 390 (2nd Cir. 2013).

⁶ Id. (alteration in original) (quoting Florida v. Harris, 133 S. Ct. 1050, 1055 (2013))

⁷ Dunaway v. New York, 442 U.S. 200, 208 n.9, 99 (1979).

⁸ United States v. Gaskin, 364 F.3d 438, 457 (2nd Cir. 2004).

facts available to the officer at the time of arrest and immediately before it,' and . . . must render [its] decision based on the 'totality of the circumstances.'"⁹ Based on the totality of the circumstances, at the time there were several hooded and masked individuals inside a summer cottage which is usually closed for the winter, sitting around the table in dark with a candle lit. When the law enforcement official identified himself, those hooded figures scattered and hide upon hearing the Deputy's voice and knocking. Deputy Pfieff, a reasonable and prudent law enforcement officer had a good faith belief that a crime of criminal trespass had been committed or being committed had probable cause. Furthermore, Probable cause existed if "at the moment the arrest was made . . . the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing."¹⁰

Moreover, to determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to" probable cause.¹¹ Because Deputy Pfieff had probable cause to believe a crime was in progress or had already been committed.

II. Probable Cause is determined on the basis facts known to the arresting officer at the time of arrest.

The threshold for probable cause is based upon "factual and practical considerations of everyday life' [that] could lead a reasonable person to believe that there is a probability that an illegal act has occurred or is about to occur."¹² "Whether an arrest is valid depends upon whether, at the moment the arrest was made, the officers had probable cause to make it –

⁹ Panetta v. Crowley, 460 F.3d 388, 395 (2nd Cir. 2006).

¹⁰ Beck v. Ohio, 379 U.S. 89, 91 (1964).

¹¹ Ornelas v. United States, 517 U.S. 690, 696 (1996).

¹² Illinois v. Gates, 462 U.S. 213, 231 (1983).

whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the person to be arrested had committed or was committing an offense.”¹³

What the Court later found out about the petitioner cannot be used to show what the officer knew at the time of the arrest. Petitioner's past history at home, employment, family situation, was not something that would be immediately or readily available to officer at the time of arrest. Probable cause did exist for arresting Petitioner, relevant to what the officers knew at the time of the arrest. It is entirely reasonable from these set of facts that a reasonable officer in Deputy Pfeiff position could conclude from the totality of the circumstances that probable cause existed to arrest petitioner for criminal trespass. Based upon the aforementioned factors above these circumstances at the time indicate that an illegality has occurred or is about to occur.

Officers are not required to rule out every possible explanation other than suspect's illegal conduct before making an arrest. However, an arresting officer must be able to articulate concrete facts from which the totality of the circumstances indicates that an arrest is warranted "Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction."¹⁴ Further, finely – tuned standards, such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the probable cause decision."¹⁵ Moreover, the process does not deal with hard certainties, but with probabilities.

Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as fact-finders are permitted to

¹³ Beck, 379 at 92.

¹⁴ Adams v. Williams, 407 U.S. 143, 149 (1972).

¹⁵ Maryland v. Pringle, 540 U.S. 366, 371 (2003).

do the same – and so are law enforcement officers.¹⁶ Here, an officer had objectively reasonable grounds to discredit the Secord claimed belief that her entry into the house was authorized. She was in a vacant home late at night, during the off season, with the lights off, engaging in questionable behavior, without any owner or renter present. She scattered and hid when a uniformed officer knocked and entered the home. They gave police false and conflicting explanations for what they were doing in the house.

Furthermore, Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.¹⁷

III. Absent probable cause an officer may detain a person and conduct a limited search for weapons.

In *Terry v. Ohio*, this Court recognized that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."¹⁸ The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.

On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response.¹⁹ A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.²⁰ When an officer observes

¹⁶ *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

¹⁷ *Adams*, 407 at 149.

¹⁸ *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

¹⁹ *Id.* at 23.

²⁰ *Id.* at 21-22; *Adams*, 407 at 145-56.

suspicious conduct that reasonable leads him to believe that a crime is occurring or about to occur, the officer may identify himself as a police officer and make an initial inquiry. If after this the officer still believes a threat to himself or other exists, the officer may conduct a limited search for weapons. Here, a uniformed police identified himself on two separate occasions as part of investigating a call for suspicious activity. No one identified themselves rather Second and the other occupants hid.

In determining whether a brief investigative stop itself was reasonable and also whether the scope of the search is reasonable in light of the circumstances may warrant temporary seizure in the first place. The officer must be able to articulate those facts that led him to intrude on a person Fourth Amendment rights.

To determine reasonableness, the government's interests of effective law enforcement and officer safety must be weighed against Terry's Fourth Amendment right. Based upon the dispatched officers to investigate a complaint of suspicious activities taking place during the night hours during the off season at a vacation home which is usual unoccupied. Upon approaching the house the officers saw people acting in a way they viewed as unusual. Followed, by some of the guests scattered and hiding when the police arrived. It was reasonable for Deputy Pfieff to briefly detain the individuals for an investigatory stop in light of the circumstances at the time.

The Second Circuit usage of the “Reasonableness test” to determine when an illegal alien is being held under 8. U.S.C. §1226 is eligible for a bail hearing does not infringe on that aliens constitutional Due Process rights.

8 U.S.C. § 1226(c)(1)(C) states, “The Attorney General shall take into custody any alien who is deportable under section 8 U.S.C. § 1227(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year.” Congress created this statute to deal with the high crime rate by aliens.²¹ Aliens were becoming the fastest growing population in the prison system, and it became difficult to identify deportable aliens.²² Even the ones that were in ICE custody and later released; more than 20% deportable aliens failed to show up for their deportation hearing.²³

This statute allows the detention of any alien who have committed a criminal offense that has landed them in prison at least a year period. This Court in the past has stated that this authority for the government to do so is constitutional.²⁴ It is undisputed here that the detention of Second by ICE is within their constitutional power.

The Fifth Amendment of the US states, “No person shall be held to answer for a capital, or otherwise infamous crime ... except in cases arising in ... public danger ... nor shall ... be deprived of life, liberty ... without due process of law.”²⁵ Everyone who is in the US is guaranteed the protection of the Fifth Amendment, no matter if you are a citizen or an alien. “[T]he Due Process Clause applies to all ‘person’ within the United States, including aliens,

²¹ Demore v. Hyung Joon Kim, 538 U.S. 510, 518 (2003).

²² Baker v. Johnson, 109 F. Supp. 3d 571, 580 (S.D.N.Y. 2015).

²³ Id.

²⁴ Chavez-Alvarez v. Warden York Cty. Prison, 783 F.3d 469, 473 (3rd Cir. 2015)(citing *Demore v. Kim*, 638 U.S. 510, 531 (2003)).

²⁵ U.S. Const., amend. V.

whether their presence here is lawful, unlawful, temporary, or permanent.”²⁶ It is undisputed that Secord, as an undocumented alien, is entitled to the Constitutional protection that the Fifth Amendments offers.

The question now is whether the Second Circuit accurately held that the continuance detention of Secord was constitutional. It is our view that the Second Circuit held properly here. We understand that the burden is on the government to establish that the detention of an alien is reasonable because there is a risk of flight or a danger to the community.²⁷ This is a burden that we feel that we do not have to reach because the detention is not unreasonably long. But, we are able to meet this burden.

I. The Use Of The “Reasonableness Test” By The Second Circuit Protects The Due Process Rights of All Alien.

The lower court stated that the Six-month period is unworkable, and they would use the “fact-dependency” inquiry that was stated in *Diop v. ICE/Homeland Security*.²⁸ With this approach the court will look at the totality of the circumstance, which allows them to weigh the facts against each other. You first have to determine that a detention has been unreasonably long, then you must determine whether the unreasonable detention is necessary to satisfy 8 U.S.C. § 1226 purpose.²⁹ The court in *Chavez-Alvarez*, focused on three factors to decide whether the detention has been unreasonably long, which are: A) good faith challenges; B) the length of detention; and C) the prospect of future proceedings.³⁰ If the challenging party is able to

²⁶ *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Reno v. Flores*, 507 U.S. 292, 306 (1993) (stating, “It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”)

²⁷ 2A C.J.S. *Aliens* § 1322 (2003).

²⁸ *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 234 (3rd Cir. 2011); *Leslie v. Atty. General*, 678 F.3d 265, 269 (3rd Cir. 2012).

²⁹ *Diop*, 656 at 234.

³⁰ *Chavez*, 783 at 475-77.

establish these, the burden moves to the government to establish that the alien is a flight risk or a danger to the community.³¹

A. Secord has not made a good faith challenge for her removal.

In *Demore v. Kim*, the alien was a lawful permanent resident (LPR) who was arrested and convicted for first-degree burglary. The alien here did not deny the fact that he was deportable, he instead challenged the constitutionality of 8 U.S.C. § 1226(c). He argued that 8 U.S.C. § 1226(c) violated his Due Process rights. The court held that the detention during the removal process was constitutional.³² Similarly, Secord is challenging the constitutionality of 8 U.S.C. § 1226(c), and how the courts decide to determine if an alien is entitled to a bail hearing. Even though Secord did not concede to the fact that she is deportable, she is. She falls under 8 U.S.C. § 1226(c)(1)(C). Secord was imprisoned for 1 year, and the statute clearly states, “[i]s deportable under 8 U.S.C. § 1227(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year.”³³ Following the framework of *Demore*, it can be established that Secord challenge was not in good faith.

In *Gonzalez v. O’Connell*, the alien was a LPR of the US was arrested, and convicted of possession of a controlled substance and was sentenced to two year in prison. After he served his time he was held by the Immigration and Naturalization Service (INS), where he was held for two months before he filed a petition against his removal because he was not convicted of an aggravated felony. The court held, that even though this was a good faith argument was a good one, the alien’s due process rights were not violated.³⁴ Similar to the alien in *Gonzalez*, Secord

³¹ *Aliens, supra*, § 1322.

³² *Demore*, 538 at 532.

³³ 8 U.S.C. § 1226(c)(1)(C).

³⁴ *Gonzalez v. O’Connell*, 355 F.3d 1010, 1020 (7th Cir. 2004).

has the argument that since she did not commit an aggravated assault she should not be held deportable. The court in *Gonzalez*, quoted *Demore*, in their reasoning, “[d]etention during removal proceedings [pursuant to § 1226(c)] is a constitutionally permissible part of the process.”³⁵

Even though Secord has made a good-faith challenge that her detention is a violation of her constitutional rights, courts have said that the alien must go through the full removal process. Secord has not been through the full removal process so she will not be able to satisfy this part of this factor.

B. The length of Secord stay has been reasonable.

In *Diop v. Ice/Homeland Sec.*, the alien was challenging his stay in ICE custody as unreasonable. The alien here was in detained for over 3 years. The court in *Diop*, held that that stay was unconstitutional.³⁶ Secord is not like the alien in *Diop*, she has not been held for 3 years, it has only been six months. The court stated, “At a certain point, continued detention becomes unreasonable and the Executive Branch’s implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law’s purposes.”³⁷ The continuance holding of Secord does fall within that purpose, ICE is trying to make sure a dangerous alien is not allowed back on the streets. We are not at the point where it becomes unreasonable yet. Secord stay with ICE has not crossed over the reasonableness line.

In *Baker v. Johnson*, the alien was a LPR. The alien here was arrested and convicted for failure to pay the subway fare. About a year after that conviction he was detained by ICE. He

³⁵ *Id.* at 1019.

³⁶ *Diop*, 656 at 235;

³⁷ *Id.* at 231.

was in ICE custody for a total of 11 months. The court held that the 11 months detention in ICE custody did not violate the aliens Due Process rights.³⁸ Unlike the alien in *Baker*, who was held for 11 months, Secord has only been held for six months by ICE. The court here agreed that an unreasonable delay will violate an aliens Due Process rights, but they felt that in that particular situation 11 months was not unreasonable.³⁹ Following this courts rationale we can safely conclude that Secord has not been held for an unreasonable amount of time. Secord has only been detained for six months,

In *Sopo v. Attorney. General*, the alien was seeking asylum from his country. He was granted asylum, and he was admitted into the US. While staying in the US he was charged with bank fraud. ICE served him his notice and detained him directly after his sentence. He was detained for three years. The government caused some of the delay here because they did not reply to the alien quick enough. He challenged his stay as being unreasonable long. The court held that his detention was unconstitutional.⁴⁰ Unlike the government in *Sopo*, the government here have answered all of Secord request in a timely manner. The government cannot be blame for any cause of delay. Unlike the alien in *Sopo*, Secord has not been detained for 3 years. She has only been held for six months. *Sopo*, should not be used as authority here because the facts in that case is different from ours. We have established that Secord has not been held for an unreasonable amount of time.

³⁸ *Baker*, 109 at 586.

³⁹ *Id.*

⁴⁰ *Sopo v. Atty. General*, 825 F.3d 1199, 1220 (11th Cir. 2016).

C. There is a prospect of future proceedings for Secord.

In *Araujo-Cortes v. Shanahan*, the court held that the alien was entitled to a bond hearing.⁴¹ The alien in *Araujo-Cortes*, was convicted for criminal possession of a weapon in the fourth degree. Since he was arrested ICE filed a notice of removal. The alien here has been in ICE custody for the six month. They alien argue that there was no prospect for a future proceeding. The court here held that this was a violation of the aliens' constitutional rights because there was not a definite time on when he would be able to pursue relief.⁴² Similar to the alien in *Araujo-Cortes*, Secord was picked up for a criminal possession of a dangerous weapon to the fourth degree, but that is the only aspect they are similar. Unlike the alien in *Araujo-Cortes*, Secord does have hope of any future proceedings, the court said it could be possibly eleven months. ICE has not violating Secord Due Process right because her process is not indefinite.⁴³ Looking at all the factors we can clearly establish that Secord Due Process rights have not been violated because Secord stay is not indefinite. There is a prospect for future proceedings for her.

D. Secord is a risk of flight and a danger to the community.

Courts have said that the government has the burden of proving that the alien is a flight risk or a danger to the community. ICE has a sufficient government interest that is narrowly tailored which allows them to violate an aliens Fifth Amendment rights.⁴⁴ Their interest is

⁴¹ *Araujo-Cortes v. Shanahan*, 35 F.Supp.3d 533, 549 (S.D.N.Y. 2014); see *Hylton v. Shanahan*, 2015 WL 3604328 *7 (S.D.N.Y. 2015)(stating "Indefinite detention in connection with removal proceedings without an opportunity for a bail hearing, where there is no possibility of actual removal, violates the due process rights of the detained alien.")

⁴² *Araujo-Cortes*, 35 at 549.

⁴³ *Hylton*, 2015 WL 3604328 *7; see also *Johnson v. Phillips*, 2010 WL 6512350 *7 (S.D.N.Y. 2010)(where the petitioner was convicted for carrying a firearm. After his sentenced, he was picked up by ice, where he was in their custody for 90 days. He argued that there was not possibility of being released. The Court held that this stay was constitutional because it was not indefinite.)

⁴⁴ *Reno*, 507 at 316.

keeping the community safe from dangerous criminals, and to make sure the alien does not flee from her deportation proceedings.

In *Patel v. Zemski*, the alien was a LPR from India. He was a store owner, who hired a lot of illegal aliens. He was charged with harboring an undocumented alien. After he was sentenced, ICE sent a notice and detained him. They detained him for 11 months. He did not have a history of violence. The court here held that he was not a risk of flight, and the detention violated his constitutional rights.⁴⁵ Unlike the alien in *Patel*, Secord is a flight risk. Secord could easily cross over to Canada when she wants to. She does not have any family in the US, so she does not have any ties to US or buffalo.

Not only that, but she was arrested with brass knuckles. Anyone who carries brass knuckles is inherently dangerous. That is weapon that can cause serious harm to someone. The court in *Patel*, stated, “To deprive these individuals of their governmental fundamental right to freedom furthers no governmental goal, while generating a considerable cost to the government, the alien, and the alien’s family.”⁴⁶ Even though keeping Secord may be a cost for the government, we have no way to reinsure that she will show up for her deportation hearing or she will not cause harm to anyone in the community. A short term deprivation of Secord liberty does not outweigh the government interest.⁴⁷ She has a history of running away, how are we supposed to guarantee that she would not do so again. The government interest here outweighs her liberty, so there is no violation of Secord Due Process right.

⁴⁵ *Patel v. Zemski*, 275 F.3d 299, 314 (3rd. Cir. 2001)

⁴⁶ *Id.* at 312.

⁴⁷ *Chavez-Alvarez*, 783 at 474.

II. The Second Circuit Was Correct In Their Choice To Not Use The Six-Month Limit Because The Supreme Court Does Not Like Bright-Line Rules.

The Second Circuit Court erred in deciding to not use the bright line rule that they created in *Lora v. Shanaham*, 804 F.3d 601 (2d Cir. 2015). The court in *Lora*, relying on *Zadyvdas*, and *Demore v. Kim*, 538 U.S. 510 (2003), stated that the six-month period of detention is a reasonable time period to detain someone without infringing on their due process rights.⁴⁸ The court had good intention when they first created this rule, but it does not work for the Due Process infringements.

Even though we want to treat similarly situated defendants the same, aliens who are being deported under 8 U.S.C 1226(c) all have different reason to why they are being deported. The court in *Chavez-Alvarez*, stated, “[d]ue process requires us to recognize that, at a certain point which may differ case by case, the burden to an alien’s liberty outweighs a mere presumption that the alien will flee and/or is dangerous.”⁴⁹ The Court has stated that they want to stay away from bright-line rules.⁵⁰ The only way to protect the individual rights of these aliens is to view their situation individuality. Some aliens are inherently more dangerous than the other, allowing this bright-line rule will allow them to be free from custody after six-month, which will defeat the purpose of this particular statute. The Second Court decision not to use the six-month test was correct.

⁴⁸ *Lora v. Shanaham*, 804 F.3d 601, 615 (2nd Cir. 2015).

⁴⁹ *Chavez-Alvarez*, 783 at 474-75; see *Sopo*, 825 at 1214 (stating “[e]ach criminal alien’s removal proceedings raises a unique set of facts and issues, making the length of the proceedings unpredictable, it would be unwise to set a universal or bright-line time line for when mandatory detention shifts from being reasonable to unreasonable.”)

⁵⁰ See *Hoang Minh Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (stating, “A bright-line limitation ... would not be appropriate ... courts must examine the facts of each case to determine whether there has been unreasonable delay in concluding removal proceedings.”)

CONCLUSION

For the reasons discussed above, the Department of Immigration and Customs Enforcement respectfully request that this Court affirm the Second Circuit Court's judgement that the City of Angola had probable cause to conduct a search, and the use of the "reasonable test" protects the Due Process rights of undocumented aliens.