

No. 1-2017

**IN THE SUPREME COURT OF THE UNITED STATES**

**March Term, 2017**

LAURA SECORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE RESPONDENT

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### **QUESTIONS PRESENTED**

- I. Under the Fourth Amendment, does a police officer who is called to a vacant summer cabin have probable cause to enter that cabin when he sees several masked individuals scattered into the darkness and hide as soon as he identifies himself as an officer?
- II. Under the Due Process Clause, does detaining a criminal alien for the period of time necessary to hold removal proceedings violate the criminal alien's rights when the detention exceeds six months, the criminal alien is actually removable, and the delay in the proceedings is not the result of purposeful government inaction?

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### **OPINIONS BELOW**

The order of the United States District Court for the Western District of New York, granted the Petitioner, Laura Secord's, habeas corpus petitions and ordered her release from ICCE custody. This is printed in the record at Record R-3,4. The opinion of the Court of Appeals for the Second Circuit reversed the order of the district court at Record-4. *City of Angola. v. Secord* (2nd Cir. 2015); *Winfield Scott v. Laura Secord* (2<sup>nd</sup>. Cir. 2015).

### **JURISDICTION**

The judgment of the Court of Appeals for the Second Circuit was entered on September 20, 2016. The petition for the writ of certiorari was filed on January 20, 2017 and this Court granted the petitioner certiorari on February 20, 2017. This Court has jurisdiction to review this case under 28 U.S.C. § 1254 (2006), which provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ."

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

1. The pertinent part of the Fourth Amendment to the United States Constitution provides:  
"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.
2. The pertinent part of the Fifth Amendment to the United States Constitution provides:  
"No personal shall be held to answer for a... crime... nor be deprived of ... liberty... without due process of law." U.S. Const. amend. V.
3. The pertinent part of the Fourteenth Amendment to the United States Constitution provides: "... Nor shall any state deprive any person of ... liberty... without due process

of law.” U.S. Const. amend. XIV.

### **STATEMENT OF THE CASE**

This Court is being asked to affirm the Second Circuit’s ruling on the following two issues: (1) a misguided attempt to construe a Fourth Amendment violation and (2) an alleged violation of due process. First, a Fourth Amendment violation was clearly not implicated because the totality of the circumstances undoubtedly established that the officer had probable cause to arrest the criminal alien. Second, the reasonableness test does not violate the due process clause because exams each detention on a case by case basis.

The criminal alien in this case is a citizen of Canada who illegally entered the United States in 2013. The criminal alien unlawfully entered to pursue a network of individuals she met online. Since unlawfully being in the U.S. she has worked various odd jobs in the food service industry.

On December 21, 2015, a neighbor noticed lights on inside a summer cottage on Lake Erie that is usually closed and deserted in the winter. Upon seeing this, the neighbor alerted the police department of the suspicious activity. An officer from the Erie County Sheriff’s office was dispatched to the scene. Upon arrival at the cottage, Officer PfiEFF noticed a flickering candle inside. While still outside the summer cabin, Officer PfiEFF investigated the situation further and observed several hooded and masked individuals gathered around a table in the flood of the candlelight.

At this point, PfiEFF returned to his vehicle and radioed to his superiors who ordered him to find out what was going on and if there was a community concern. PfiEFF proceeded to merely knock on the front door and identify himself as a police officer. As soon as he identified himself as an officer the hooded and masked adults scattered and hid throughout the cabin. Using his portable radio, PfiEFF called for backup. Concerned for public safety, PfiEFF opened the unlocked

door and attempted to turn the light switch on; however, it was broken. Trying to navigate through the dark cabin, Pfieff unholstered his sidearm and ordered the disguised individuals to come out from hiding.

Six disguised adults emerged from hiding, including the criminal alien, Laura Secord. Still the only police officer at the scene, Pfieff ordered them all on the floor so that he could identify who they were. All of the individuals produced identification, except the criminal alien. Upon questioning, the masked individuals admitted that “none of them lived in the cottage.” However, one of the trespassers claimed that they were permitted to be there because it was his uncle’s cabin. However, the trespasser could not produce any contact information for the so-called uncle. Moreover, the officer found a pair of brass knuckles inside the criminal alien’s back backpack. The individuals were subsequently arrested and transported to the Erie County Holding Center, where they were charged with criminal trespass and the criminal alien was additionally charged with possession of a deadly weapon.

The criminal alien was convicted for her charges and sentenced to two years in prison to be served concurrently in the Erie County Correctional Facility in Alden, New York. While serving her sentence the criminal alien contacted the Criminal Defense Legal Clinic at Buffalo School of Law. Law students under the supervision of John Lord O’Brain filed a habeas corpus petition on her behalf in the United States District Court for the Western District of New York alleging her arrest and conviction violated her Fourth Amendment rights against unlawful search and seizure. The students alleged Deputy Pfieff lacked probable cause to enter the dwelling and arrest the criminal alien for trespass and possession of a dangerous weapon.

As that petition was pending the criminal alien’s sentence for the convictions ended and she was immediately released into ICE’s custody until deportation proceedings could be held in



accordance with 8 U.S.C. § 1226. After having been in ICE's custody for six months the students filed another petition for habeas corpus arguing this detention went beyond the bright line six month rule set in *Lora v. Shanahan*, 804 F.3d 601, 616 (2nd Cir. 2015).

As a result of these petitions the district court ordered her immediate release from ICE's custody and threw out her previous convictions. Due to this decision, the City and ICE appealed to the Second Circuit Court of Appeals. The Second Circuit reinstated her convictions by finding the officer did have probable cause. The Second Circuit also held that the criminal alien should be remanded back into ICE's custody immediately. In so holding the Second Circuit overruled *Lora*, finding the six-month bright line rule to be unworkable and instead adopting a reasonableness test which examines each habeas petition on a case by case basis.

### **SUMMARY OF THE ARGUMENT**

Criminal aliens who enter the United States unlawfully and proceed to trespass inside a family's private summer cabin, in the middle of the night, do not warrant Fourth Amendment protection. Further, when that criminal alien subsequently is convicted for crimes which lead to a sentence of a year in prison, the criminal alien can be taken into ICE's custody and detained for a reasonable period of time until removal proceedings can be held without violating the criminal alien's due process rights. Accordingly, this Court should affirm the Second Circuit's decision and find that the criminal alien is guilty of second degree criminal trespass and criminal possession of a dangerous weapon in the fourth degree. This court should further affirm the Second Circuit's decision to abandon a bright-line six month detention rule in favor of a rule which decides the reasonableness of a criminal alien's detention on a case by case basis.

The U.S. Court of Appeals for the Second Circuit properly reversed the district court's decision and found that the criminal alien was guilty of second degree criminal trespass and

fourth degree criminal possession of a dangerous weapon. There are two issues present before this Court. The first issue is whether the Second Circuit applied the correct probable cause standard. The second issue is whether the Second Circuit's reasonableness test protect due process rights.

This Court should affirm the Second Circuit's ruling regarding the probable cause issue for the following reasons: first, the police officer undeniably had probable cause to arrest the criminal alien because the totality of the circumstances would warrant any reasonable person to conclude that the alien was committing a crime inside the dark summer cabin that was supposed to be empty for the season. Second, this courts longstanding precedent makes it clear that the appropriate standard for probable cause is nontechnical and requires a common-sense approach. Therefore, under the alleged circuit split, the police officer still clearly established probable cause because the well-delineated standard to take the totality of the circumstances into account, not to specifically prove probable cause for every element of the underlying crime.

Next, this court should affirm the Second Circuit's ruling regarding the reasonableness test for the following reasons: first, because other circuits utilizing the reasonableness test have not hesitated to find unreasonable detentions that occur over a lengthy period of time. Second, because the criminal alien's removal is reasonably foreseeable, the purpose of statute at issue in this case, actual removal, is being served by the criminal alien's detention. Third, because the government has an important, legitimate interest in protecting society from dangerous criminal aliens who are likely to break the law again and in ensuring the criminal aliens actually attend their removal proceedings. Finally, because the delay in the removal proceedings is not due to purposeful government inaction rather it is due to large numbers of these proceedings which are pending. Therefore, for the foregoing reasons this Court should affirm the decision of the Second

Circuit.

**I. The Second Circuit properly found that the criminal alien was guilty of criminal trespass because the officer unequivocally established probable cause to enter the deserted and dark home when he saw several masked individuals inside.**

This Court should find that the officer had probable cause to arrest the criminal alien because the summer home was supposed to be deserted; however, there were several masked partiers inside that lacked clear permission to actually be in the home. The Fourth Amendment states “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. The Constitution does not forbid all searches and seizures, but merely unreasonable searches and seizures. *Elkins v. United States*, 364 US 206, 206 (1960). Furthermore, the Fourth Amendment proscribes that all unreasonable searches and seizures, and searches conducted outside judicial process, without prior approval by judge or magistrate, are per se unreasonable—subject only to few specially established and well delineated exceptions. *Mincey v Arizona*, 437 US 385, 385 (1978). Historically, probable cause is a perfectly constitutional and well-delineated exception to the warrant requirement.

Under this Courts well-established Fourth Amendment jurisprudence, probable cause to arrest exists if at the moment the arrest was made, the facts and circumstances available to the officer at the time were sufficient to warrant a reasonable man in believing that the suspects committed a crime. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). It follows that the assessment of probable cause is an objective one. *Id.* The longstanding 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." *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

The United States Supreme Court has widely recognized that probable cause presents "a flexible, common-sense standard" that "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' that evidence of a crime is present. *Texas v. Brown*, 460 U.S. 730, 742 (1983). The touchstone of any probable cause analysis is whether there exists "a reasonable ground for belief of guilt." *Brinegar* at 175. It follows that the concept of probable cause is designed to protect 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. *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (concluding that there was probable cause to arrest all three individuals in a drug traffic stop because a reasonable inference could be made that any or all had knowledge of and control over the cocaine).

Fundamentally, the focus of probable cause is on "probabilities," not "hard certainties." *Florida v. Harris*, 133 S. Ct. 1050 (2013). Specifically, probable cause merely requires only a "fair probability," or a "substantial chance," that a search will reveal incriminating evidence or show that a crime has been committed. *Illinois v. Gates*, 462 U.S. 213, 246. However, "the belief of guilt must be particularized with respect to the person to be searched or seized." *Id.*

In the case at bar, this Court should find that the police officer's established probable cause because, at a minimum, a fair probability existed to suspect that the criminal alien was committing a crime. Like the police officer in *Harris*, in this case the police officer presented a sufficient amount of evidence that would lead any reasonable person to conclude a fair probability existed to arrest the criminal alien. Specifically in *Harris*, the officer noticed that the

defendant was visibly nervous, rapidly breathing, and unable to sit still. These facts, coupled with the fact that the officer's drug dog signaled that the defendant was carrying drugs was sufficient to warrant a search of the vehicle. Importantly, this Court noted in *Harris* that an exhaustive record establishing probable cause was unwarranted.

The record in this case is even more exhaustive than the *Harris* record. First, the officer was called to a summer cottage that “are usually closed for the winter” because a neighbor saw a light on and suspected suspicious activity. Record R-2. Upon arriving at the scene, the officer noticed through the window that the cottages were in fact occupied with several masked and disguised adults. Record R-7. Next, and once the officer identified himself as the police, the trespassers scattered and hid. Finally, one of the trespasser alleged that he had permission to use the cottage because it was his uncles; however, “the uncle admitted that his nephew did not have permission to use the cottage for any kind of party.” Record R-3. Therefore, this Court should rule in accordance with its well-established precedent and find that the officer had probable cause to arrest the criminal alien because the fair probability of incriminating activity was clear.

This Court should reject any attempt by the Petitioner to establish a heightened probable cause standard. A heightened probable cause standard is widely out of step with this Courts precedent, because the case law makes clear that a beyond a reasonable doubt or preponderance of the evidence standard has no place in the probable cause decision. Therefore, this Court should find that the officer unquestionably established probable cause to arrest the criminal alien because there was undeniably a fair probability that the alien was committing a crime.

**A. This Court should find that probable cause was established because the officer was called to a dark and deserted cabin, and upon arrival noticed several masked individuals inside—all of whom ran and hid when he identified himself as a police officer.**

This Court is urged to affirm the Second Circuit's decision and find that probable cause

was clearly established because the totality of the circumstances warranted any reasonable police officer to believe the criminal alien was committing a crime. In testing whether an officer has probable cause to conduct a search, all that is required is the kind of “fair probability” on which “reasonable and prudent [people] act.” *Illinois v. Gates*, 462 U.S. 213, 235 (1983). To evaluate whether the State has met this practical and common-sensical standard, this Court has consistently looked to the totality of the circumstances and rejected rigid rules, bright-line tests, and mechanistic inquiries. *Id.*

Significantly, the totality of the circumstances test requires that “the whole picture” be taken into account. *Alabama v. White*, 496 U.S. 325 (1990). Importantly, the totality of the circumstances approach to probable cause is evaluated by examining the *collective* information in the possession of the police at the time of the arrest or search including. *Id.* (emphasis added). This Court has established a number of factors that may be taken into account when determining if probable cause has been met including the following: the timeliness of the situation, the observation and evaluation of real evidence, the admissions of criminal conduct by the suspected, the false or implausible answers to routine questions by the suspected, the presence at a crime scene or in a high-crime area, the associations of the suspected with known criminals, and flight or furtive conduct. *Id.*

When weighing flight as a factor to establish probable cause, this Court has held that “deliberately furtive actions and flight at the approach of strangers or law officers are strong indicators of a guilty mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.” *Sibron v. New York*, 392 U.S. 40, 66-67 (1968).

Furthermore, this Court has frequently found that a person’s admission of criminal

conduct to a law enforcement officer provides probable cause to arrest. *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (holding that once the petitioner admitted ownership of a sizable quantity of drugs, the police clearly had probable cause to place the petitioner under arrest).

Moreover, this Court has consistently found that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion to establish probable cause and that reckless flight is an act of evasion. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (holding that a defendant fleeing upon seeing police officers patrolling an area known for heavy narcotics trafficking was sufficient to establish probable cause to conduct a search).

Additionally, this Court found that the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior, and that officers are justified in suspecting that defendants are involved in criminal activity based on his presence in an area. *Id.* Moreover, officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. *Id.*

In this case, the Court should find that probable cause was unequivocally established because the totality of the circumstances make it clear that a reasonable officer would suspect that criminal activity was taking place. Here, it is an entirely reasonable inference from the plethora of facts, viewed from the standpoint of an objectively reasonable police officer, that probable cause was overwhelmingly established. The *Wardlow* court found two factors that contributed in determining probable cause existed: the evasive behavior of the defendant and the heavily drug trafficked area in which the defendants were acting. In this case, these two factors were also significantly present. First, as soon as the officer identified himself as the police, the criminal alien and other trespassers scrambled away and hid in the darkness of the home. Just

like the defendant in *Wardlow*, the criminal alien was also purposefully trying to avoid any contact with the police. Record R-7.

Furthermore, like in *Wardlow*, the relevant characteristics of the location played an imperative role in establishing probable cause here. In this case, the characteristics of the location were even more extreme. The officer was called to a dark and deserted summer home in the middle of the night and in the dead of winter. *Id.* The home had zero working lights and the officer was presented with a situation in which he was significantly outnumbered by six masked adults. *Id.* In *Wardlow*, the officer's established probable cause because the defendant was operating in a known heavily drug trafficked area. When all of the factors are collectively viewed in this case, it presents an even more obvious situation in which probable cause should be found. Therefore, this Court should find that the totality of the circumstances undoubtedly establish the standard for probable cause has been met.

Any attempt by the Petitioner to take any of the foregoing facts as mutually exclusive would be a complete mischaracterization of the well-delineated and longstanding precedent of the totality of the circumstances test. The totality of the circumstances test requires that all of the be viewed collectively. Accordingly, this Court should find that when viewing the facts collectively the officer sufficiently met the totality of the circumstances test.

**B. This Court should follow the plurality of the circuits and find that probable cause does not need to be established for every element of the underlying crime because it drastically deviates from this Courts well-established precedent.**

This Court should find that probable cause does not need to be established for every element of the underlying crime because it would directly undermine this Court's well-established probable cause standard. This so-called "all-elements" approach to probable cause drastically deviates from this Court's long-standing precedent and would create an



unprecedented heightened standard to probable cause. Under this Court's well-established probable cause jurisprudence, it has repeatedly cited *Brinegar* for the proposition that probable cause requires a probability assessment, that is non-technical. *Brinegar*. Furthermore, "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." *Gates* at 232. In discussing its probable cause jurisprudence, this Court recently noted its historical rejection of "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things- considered approach. *Harris* at 1055-56.

Importantly, this Court has repeatedly held that the lack of specific evidence that a defendant has committed, or is suspected of committing a crime, is irrelevant. *Thornton*; *Adams v. Williams*, 407 U.S. 143 (1972). It follows that, probable cause does not require specific evidence be proven for every element of the offense. *Thornton*. (holding that the officer did not need specific evidence to prove that the defendant did not have a concealed carry permit when he noticed a sawed-off firearm protruding out of the defendant's seat while he was passed out in his vehicle). Both *Adams* and *Thornton* conclude that a court should "evaluate generally the circumstances at the time of the arrest to decide if the officer had probable cause for his action. Significantly, this Court has consistently found that the evidentiary threshold for establishing probable cause is much lower than the beyond a reasonable doubt standard. *Id.*

In this case, the Court should find, consistent with its precedent, that the standard for probable cause is the totality of the circumstances approach and not that probable cause must be established for every element of the underlying crime. Like in *Thornton*, here it would also be unnecessary to establish probable cause for every element of the underlying crime because that applies a very technical standard to probable cause which is not warranted by this Court.

Accordingly, this Court should find that its longstanding nontechnical and totality of the circumstances approach continues to be the appropriate standard for probable cause and, therefore, find that the criminal alien is guilty of criminal trespass and possession of a deadly weapon.

The Petitioner attempts to assert that probable cause must be established for every single element of the underlying crime. This Court must reject this claim because it completely undermines this Court's longstanding precedent. To say that the courts remain confused concerning the sufficiency of evidence needed to establish probable cause is distorted. The totality of the circumstances approach presents courts with the flexibility to determine probable cause on a case by case basis by looking at all the circumstances collectively. This provides both uniformity and essential flexibility because the nature of probable case cases require such a standard. Therefore, this Court should affirm the Second Circuit's decision because it is aligned with this Courts precedent and find that probable cause was sufficiently established.

## **II. The Circuit Split.**

8 USCS § 1226(c) outlines the government's authority to apprehend and detain criminal aliens. It further outlines when the Attorney General may release the criminal alien. The language of that section is as follows:

### **(C) DETENTION OF CRIMINAL ALIENS**

#### **(1) CUSTODY**

THE ATTORNEY GENERAL SHALL TAKE INTO CUSTODY ANY ALIEN WHO--

(A) IS INADMISSIBLE BY REASON OF HAVING COMMITTED ANY OFFENSE COVERED IN SECTION 1182(A)(2) OF THIS TITLE,

(B) IS DEPORTABLE BY REASON OF HAVING COMMITTED ANY OFFENSE COVERED IN SECTION 1227(A)(2)(A)(II), (A)(III), (B), (C), OR (D) OF THIS TITLE,

(C) IS DEPORTABLE UNDER SECTION 1227(A)(2)(A)(I) OF THIS TITLE ON THE BASIS OF AN OFFENSE FOR WHICH THE ALIEN HAS BEEN SENTENCE TO A TERM OF IMPRISONMENT OF AT LEAST 1 YEAR, OR

(D) IS INADMISSIBLE UNDER SECTION 1182(A)(3)(B) OF THIS TITLE OR DEPORTABLE UNDER SECTION 1227(A)(4)(B) OF THIS TITLE, WHEN THE ALIEN IS RELEASED,

WITHOUT REGARD TO WHETHER THE ALIEN IS RELEASED ON PAROLE, SUPERVISED RELEASE, OR PROBATION, AND WITHOUT REGARD TO WHETHER THE ALIEN MAY BE ARRESTED OR IMPRISONED AGAIN FOR THE SAME OFFENSE.

(2) RELEASE

THE ATTORNEY GENERAL MAY RELEASE AN ALIEN DESCRIBED IN PARAGRAPH (1) ONLY IF THE ATTORNEY GENERAL DECIDES PURSUANT TO SECTION 3521 OF TITLE 18 THAT RELEASE OF THE ALIEN FROM CUSTODY IS NECESSARY TO PROVIDE PROTECTION TO A WITNESS, A POTENTIAL WITNESS, A PERSON COOPERATING WITH AN INVESTIGATION INTO MAJOR CRIMINAL ACTIVITY, OR AN IMMEDIATE FAMILY MEMBER OR CLOSE ASSOCIATE OF A WITNESS, POTENTIAL WITNESS, OR PERSON COOPERATING WITH SUCH AN INVESTIGATION, AND 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. A DECISION RELATING TO SUCH RELEASE SHALL TAKE PLACE IN ACCORDANCE WITH A PROCEDURE THAT CONSIDERS THE SEVERITY OF THE OFFENSE COMMITTED BY THE ALIEN.

At issue in this case is whether there is a time limit in regards to when the Attorney may release a criminal alien. The illegal alien in this case falls under 8 USCS § 1226(c)(1)(C) as she was convicted of criminal trespass in the second degree and of possession of a deadly weapon in the fourth degree for which she served a year in the Erie County Correctional Facility in Alden, New York. Record-3. All courts agree that illegal aliens are entitled the same rights under the Due Process Clause as are regular citizens. *Reno v. Flores*, 507 U.S. 292, 306 (1993). As such, they are not to be detained indefinitely.

Two methods of determining when release is mandatory under these circumstances have emerged. The first method, adopted by the minority of circuits, including the Ninth Circuit and, until the opinion, below the Second Circuit, is a bright-line rule requiring release once the criminal immigrant has been in the government's custody for six months. The second method, adopted by the majority of circuits, including the First Circuit, Third Circuit, Fourth Circuit, Sixth Circuit, and the Eleventh Circuit, requires the courts to examine each detention on a case-by-case basis to determine whether that detention is reasonable upon the criminal alien's filing of a petition for a writ of habeas corpus.

**III. This court should adopt the second method and find the examination of detentions on a case-by-case basis does not violate the due process clause.**

The due process clause as found in the Fifth Amendment is as follows:

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. USCS Const. Amend. 5.

The due process clause as found in the Fourteenth Amendment is as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. USCS Const. Amend. 14, § 1.

These clauses entitle every person within the territory of the United States freedom from the government's ability to deprive that individual of his or her liberty without giving that individual their right to due process of law. The reasonableness test provides criminal aliens the opportunity to show an unreasonable detention and obtain release by filing a petition for a writ of habeas corpus. Once the petition has been filed, the courts examine the detention to determine if the purpose of the detention is for nefarious reasons on the part of the government, if the length of time the criminal alien is detained is unreasonable, and whether the criminal alien is actually removable.

**A. Because Circuits which have adopted the second method have frequently found detentions which are substantially lengthy to violate the Due Process Clause, this Court should find the reasonableness test does not violate Due Process Rights.**

This Court offered guidance on this matter in *Denmore v. Hyung Joon Kim*, 538 U.S. 510 (2003). “[T]his Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process. As we said more than a century ago, deportation proceedings ‘would be vain if those accused could not be held in custody pending the inquiry into their true character.’” *Id.* at 523. That case involved the INS detaining an alien who was a citizen of the Republic of South Korea and was convicted of first-degree burglary and “petty theft with priors.” *Id.* at 513. The alien in the case argued that the mandatory detention during the removal proceedings violated the Due Process Clause. *Id.* at 523. The court rejected his argument holding that the detention of an alien during this process for a reasonable period of time is not unconstitutional. *Id.* at 530. In his concurrence, Justice Kennedy intimated that were there to be an unreasonable delay on the part of the government to hold removal proceedings based on the facts of a particular case, that some detentions could become unreasonable. “Were there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons. That is not a proper inference, however, either from the statutory scheme itself or from the circumstances of this case.” *Id.* at 532, 533. As such, it is reasonable to infer that Justice Kennedy felt the reasonableness of the detention should be examined on a case by case basis to determine whether the Due Process Clause is violated by such a detention.

“Reasonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all the circumstances of any given case.” *Diop v. ICE/Homeland Sec.* 656 F.3d 221, 234 (3<sup>rd</sup>

Cir. 2011). In *Diop*, the court examined a criminal alien's appeal when his petition for a writ of habeas corpus to determine whether his detention by ICE was still reasonable was dismissed by the District Court. *Id.* at 226. The court noted the role the government played in the continued detention. *Id.* The court found the immigration judges numerous errors and the government's failure from the beginning to provide evidence sustaining the criminal alien's detention resulted in an unreasonable delay. *Id.* The court next found the length of time, approximately 3 years, of the detention to be unconstitutional. *Id.* at 235. As such the court vacated the District Court's decision and held that the government must justify the continued detention at a hearing where it would bear the burden of proof. *Id.*

The court in *Diop* refused to adopt a one-size-fits-all approach such as the six month bright line rule. *Id.* at 234. Instead the court held that each case must be examined for the reasonableness of the circumstances. *Id.* In examining the reasonableness of the circumstances, this court found that in cases involving the lengthy detention of criminal aliens that the government must justify those detentions with proof that the criminal alien's detention is necessary to prevent a risk of danger to the community or to ensure the criminal alien's appearance at the removal proceedings. *Id.*

“[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.” *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d. 469, 474-475 (3<sup>rd</sup> Cir. 2015). The court in *Chavez-Alvarez* again addressed an appeal of a District Court's denial of a petition for a writ of habeas corpus by a criminal alien. *Id.* at 470. Here, unlike in *Diop*, the delay in the removal proceedings was a result of the actions of the criminal alien. *Id.* at 475. He was arguing complicated issues, which required significant time to argue and decide. *Id.*

Regardless, however, the court found the three year detention to be a violation of the criminal alien's due process rights. *Id.* at 478. The court noted that the criminal alien's first six months of detention balanced in favor of the government but that at the time the criminal alien had been detained for a year the balance tipped in favor of the criminal alien's liberty. *Id.* As such, the court reversed and remanded to the District Court with instructions to grant the petition for a writ of habeas corpus. *Id.* at 470-471. In considering the criminal alien's release during the bond hearing, the court again reiterated that the government bore the responsibility of showing the continued detention was necessary to achieve the goals of the statute. *Id.* at 478.

The Eleventh Circuit, too, noted that the length of time of the detention is a guiding factor in assessing the reasonableness of that detention. *Sopo v. United States*, 825 F.3d 1199, 1217 (11<sup>th</sup> Cir. 2016). In that case the court examined a criminal alien's detention of four years due to the IJ's errors and the criminal alien's refusal to file a new asylum form and requests for continuances. *Id.* at 1221. The court ultimately concluded, however, that the government's delays were more egregious. *Id.* Further, the court found that the criminal alien's detention could be found unreasonable based on the length of the detention alone. *Id.* at 1220. "The sheer length of Sopo's detention on its own is enough to convince us that his liberty interest long ago outweighed any justifications for using presumptions to detain him without a bond inquiry." *Id.* at 1220. The court offered guidance to future courts when it said "[l]ooking to the outer limit of reasonableness we suggest that a criminal alien's detention may often become unreasonable by the one-year mark, depending on the facts of the case." *Id.* at 1217. The court provided further factors to consider in addressing reasonableness including why the removal proceedings have taken so long, whether removal is possible, whether the alien's detention exceeds the time the alien spent in prison for the crime rendering the alien removable, and whether the facility for the

detention is different from a penal institution for criminal detention. *Id.* at 1218. The court vacated and remanded the District Court's denial of a petition for a writ of habeas corpus. *Id.* at 1221. The court differed, however, from the Third Circuit in that during the bond hearing the burden of proving the criminal alien is not a danger to society or a flight risk shifted to the criminal alien and not the government. *Id.*

In the current case, the criminal alien has been in detention for a period of six months while she served a full year for the crimes which led to ICE detaining her. Record-1. The length of the detention is the result of a clog in the judicial system which makes holding the removal proceedings more difficult. Record-6. The detention is not a result of purposeful government inaction or of inaction on the part of the criminal alien. Record-6. Further, unlike the criminal aliens in the majority of the cited cases, the criminal alien in this case is not a legal resident. Record-2. The criminal alien in this case illegally entered the United States and is currently a citizen of Canada. Record-2. For these reasons, the criminal alien's detention is reasonable and the criminal alien's due process rights have not been violated in that the criminal alien was able to file a petition for a writ of habeas corpus to determine whether her detention was still necessary to comply with the terms of §1226(c). Record-4. Because the criminal alien's detention is reasonable in that the time frame has not been overly lengthy, this court should find the reasonableness test does not violate the criminal alien's due process rights.

**B. Because the criminal alien's removal is reasonably foreseeable, this Court should find due process rights are not violated by detaining a criminal alien until their removal proceedings and their actual removal as the detention is a part of the actual removal process and thus serves the purpose of §1226(c).**

This Court found that an alien whose removal is not foreseeable cannot be detained indefinitely without violating the Due Process Clause and further that the government must



establish that removal is foreseeable within a six month period. “After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the “reasonably foreseeable future” conversely would have to shrink.” *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). This Court addressed in *Zavydas* the detention of two criminal aliens. The first alien was from Germany but was of Lithuanian descent. *Id.* at 684. He was detained by INS after serving a sentence for possession with intent to distribute cocaine. *Id.* He was ordered to be deported but neither country would accept him because he was not a citizen of the respective countries and his wife’s country refused to accept him as well. *Id.* The second criminal alien was from Cambodia and was also ordered to be deported after he was detained by INS following his serving of a sentence for manslaughter. *Id.* at 685. Cambodia, however, would not accept him because it did not have a repatriation treaty with the United States. *Id.* at 686. Because the removal of the two criminal aliens was not reasonably foreseeable this Court found that detention to be unwarranted. *Id.* at 701. This Court said, however, that this six month presumption does not mean that every criminal alien must be released after six months. *Id.* This Court said that an alien may be detained until it is determined that there is no reasonable foreseeable future removal. *Id.*

Other courts have employed a similar line of reasoning as that found in *Zavydas*. In cases involving criminal aliens whose removable is not foreseeable and permanent detention is a possibility, the Sixth Circuit have found continued detention to be unreasonable. *Hoang Minh Ly v. Hansen*, 351 F.3d 263, 270 (6<sup>th</sup> Cir. 2002). The court in *Ly* addressed the case of a criminal alien who had been in detention pending removal for a period of eighteen months. *Id.* The

criminal alien was a citizen of Vietnam and was taken into custody following criminal sentences for credit card fraud and bank fraud. *Id.* at 265. His removal was not foreseeable, however, because the United States and Vietnam do not have a repatriation treaty. *Id.* at 266. For these reasons the court said, “the liberty interest of deportable criminal aliens is adequately served by the reasonableness limitation on the period of incarceration,” however in this case the criminal alien was not deportable so the incarceration was a violation of his liberty interest. *Id.* at 270. Finally the court noted that the detention of a criminal alien who was not removable did not serve the interests of the statute because the ultimate goal under the statute is removal. *Id.* at 271.

This Court distinguished the case of *Denmore* from that of *Zavydas* when rendering its decision. *Denmore v. Hyung Joon Kim*, 538 U.S. 510, 527 (2003). This Court found that *Zavydas* concerned a criminal alien whose detention was possibly permanent because the actuality of the removal was not reasonably foreseeable. *Id.* at 529. In *Denmore*, however, the criminal alien himself acknowledged that he was deportable, and thus removal was in fact foreseeable. *Id.* at 522. The court also found that unlike in *Zavydas*, the future detention of the criminal alien would be of a much shorter duration than that of the criminal alien in *Zavydas* because the criminal alien’s removal in *Denmore* was reasonably foreseeable. *Id.* at 528. As such, this Court in *Denmore* created a distinction between criminal aliens whose removal was reasonably foreseeable and criminal aliens whose removal was not reasonably foreseeable when dealing with Due Process Clause concerns. Because the criminal alien’s removal was foreseeable, his due process rights were not violated when he was detained for a reasonable time to ensure his actual removal. *Id.* at 531.

Other circuit courts have followed this Court’s reasoning in *Denmore* and likewise distinguished certain cases from that of *Zavydas*. The First Circuit noted the underlying

reasoning within this Court's decision in *Zavydas*. "[t]he Court read an implicit reasonableness limitation into the statute and then noted that judges evaluating such cases 'should measure reasonableness primarily in terms of the statute's basic purpose.'" *Reid v. Donelan*, 819 F.3d 486, 496 (1<sup>st</sup> Cir. 2016). The criminal alien in *Ried* was detained by ICE after he was released from criminal custody following an extensive criminal record including: larceny, assault, drug and weapon possession, failure to appear, interfering with an officer, driving on a suspended license, selling drugs, violation of probation, and burglary. *Id.* at 491. The criminal alien filed a habeas petition after being in ICE custody for a year and a half. The court declined to adopt the bright-line 6 month rule and instead adopted a reasonableness rule which determined whether the detention continued to serve the interests of the statute. *Id.* at 498. As such the court found that the detention only continued to be reasonable when it was a part of the deportation process itself. *Id.* at 499. This court also listed factors that future courts could consider including the length of the detention, the foreseeability of removability, the period of detention as compared to the criminal sentence, the promptness or delay of the government and the criminal alien, and the likelihood that the proceedings will result in a final order for removal. *Id.* at 500. Because the criminal alien in *Reid* had been detained for fourteen months, the court found his continued detention to be unreasonable. *Id.* at 501.

In the current case, the removal of the criminal alien is reasonably foreseeable. The criminal alien is a citizen of Canada. Record-2. The criminal alien will likely not contest this fact. Further, it is likely that Canada would be willing to accept its own citizen back into its country via repatriation. As such, the purpose of the statute is being served in that the criminal alien's detention is a part of the actual deportation process and the actual deportation will likely be achieved.

**C. Because the government has a vested interest in protecting the community and ensuring criminal aliens show up for the removal proceedings, a case by case determination of reasonableness does not violate the Due Process Clause.**

According to the Migration Policy Institute, in 2015, 1.38 million foreign-born individuals moved to the United States. Further, in 2015, according to the Center for Immigration Studies, in 2015, ICE freed 19,723 criminal aliens, who had a total of 64,197 convictions among them. These included 8,234 violent convictions and 208 homicide convictions.

This Court has referred to statistics such as this when making its conclusions. In *Denmore*, this Court noted that Congress adopted the provision at issue specifically to deal with the failure of the INS to deal with the increasing rates of criminal activity by aliens. *Denmore v. Hyung Joon Kim*, 538 U.S. 510, 518 (2003). One statistic used by this Court was the fact that criminal aliens were the fastest growing segment of the federal prison population and that at that time they constituted 25% of all federal prisoners and further that their numbers were rapidly growing within state prisons as well. *Id.* The court also noted that according to a 1986 study that 77% of criminal aliens were arrested once more even after being identified as deportable and nearly half (45%) were arrested multiple times before deportation proceedings even began. Finally as the Ninth Circuit noted in *Rodriguez v. Robbins*, according to the most recently available statistics, over 429,000 detainees were held by ICE in the year 2011 and on average over 33,000 were detained on any given day. *Rodriguez v. Robbins*, 715 F.3d 1127, 1131 (9<sup>th</sup> Cir. 2013).

Because of these statistics, this court should conclude that the criminal alien in this case is both a flight risk and a danger to society. Under the given facts, it is reasonable to conclude that the criminal alien has no real ties to the community and thus no real reason to stay for her

removal proceedings were she released from ICE's custody. She has no family, few friends, and has worked a series of jobs easily attainable in other places. Record-2. In fact, the criminal alien only came to this country due to her online activity which led her to form connections within a specific network. Record-8. It is reasonable to assume that the criminal alien could have formed bonds with others within this network and thus would have other communities which she could flee to and live.

Further based the nature of her crimes, this court should conclude that the criminal alien could pose a risk to society. The criminal alien was convicted of possession with a deadly weapon in the fourth degree. Record-3. While to this Court's knowledge the petitioner has never been in trouble with authorities in the past, the very fact that she carries a deadly weapon on her person is enough to determine she has the capability of being violent. Record-8. This Court simply does not have enough information to adequately judge the criminal alien's past behavior. Because of the government's overwhelming interest in ensuring the protection of society and of ensuring the criminal alien's presence at her removal proceedings, this Court should find the reasonableness test serves the best interest of society and thus does not violate the Due Process Clause.

### **CONCLUSION**

For the foregoing reasons, this Court should affirm the Second Circuit's decision and find that the criminal alien is guilty of second degree criminal trespass and possession of a deadly weapon in the fourth degree.

Respectfully submitted,  
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