

# THE SUPREME COURT OF THE UNITED STATES

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No. 1-2017

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LAURA SECORD,  
Petitioner,

v.

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

and

LAURA SECORD,  
Petitioner,

v.

CITY OF ANGOLA,  
Respondent.

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

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BRIEF FOR THE RESPONDENT

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## QUESTIONS PRESENTED

- I. Whether the Second Circuit applied the correct standard to determine if Deputy Pfieff had probable cause to arrest Petitioner; and
- II. 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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## STATUTES INVOLVED

The following statute is relevant to the determination of the present case:

8 U.S.C.A. § 1226

The full text of this statute appears in the Appendix.

## STATEMENT OF THE CASE

### Procedural History

On December 21, 2015, Laura Secord (“Secord”), a Canadian citizen who illegally entered the United States in the winter of 2013, was arrested and charged with criminal trespass and possession of a deadly weapon in Angola, New York. (R. at 1-3.) She was transported to the Erie County Holding Center and remained in custody because of her illegal alien status. (R. at 3.)

At the City Court of Angola, Secord was tried and convicted of criminal trespass in the second degree and criminal possession of a deadly weapon in the fourth degree. (R. at 3.) For these crimes, Secord was sentenced to a year of confinement in the Erie County Correctional Facility in Alden, New York. (R. at 3.)

With the assistance from the Criminal Defense Legal Clinic at the University at Buffalo School of Law, Secord filed a habeas corpus petition in the United States District Court for the Western District of New York. (R. at 3.) The petition raised the issue of a Fourth Amendment violation due to an illegal search and seizure. (R. at 3.) Secord claimed that the arresting officer, Deputy Pfieff (“Pfieff”), lacked probable cause to enter the premises and arrest her along with the others she was trespassing with. (R. at 3.)

Upon awaiting the court’s decision on her petition, Secord’s year-long conviction ended. (R. at 3.) Pursuant to 8 U.S.C. § 1226, she was immediately transferred into the custody of the Department of Homeland Security. (R. at 3-4.)

After being in the custody of Immigration and Customs Enforcement (“ICE”) for six months, Secord filed another habeas corpus petition arguing that her mandatory detention



became unreasonable under the standard the Federal Courts of Appeals of the Second Circuit utilized at the time. (R. at 4.)

The habeas corpus petition pertaining to her detention was granted by the District Court and Secord was released from ICE's custody. (R. at 4.) Her petition concerning her Fourth Amendment issue was also later granted. (R. at 4.)

The City of Angola and the Department of ICE each appealed the petitions. The Federal Court of Appeals for the Second Circuit consolidated the appeals. (R. at 4.)

The Court of Appeals for the Second Circuit reversed the determinations on each petition. (R. at 7.) Secord was order to be remanded back into ICE's custody, and her convictions for criminal trespass in the second degree and criminal possession of a dangerous weapon in the fourth degree were reinstated. (R. at 6-7.) Chief Judge Wechsler delivered the opinion of the court. (R. at 1.)

As to the issue of Secord's ICE detention, the Court of Appeals for the Second Circuit found that the bright line, six-month rule previously employed by the court was impractical and could put the country in danger. (R. at 6.) In regards to her Fourth Amendment issue, the court found that the District Court used an "impossible standard for arresting officers." (R. at 7.) Instead, the court determined that Deputy Pfieff relied on numerous circumstances to sufficiently establish probable cause. (R. at 7.) The Supreme Court of the United States granted Secord's petition for writ of certiorari to decide the issues of probable cause and the reasonableness of her mandatory detention. (R. at 11.)

This timely brief follows.

## Statement of Facts

Secord is a Canadian citizen, and during the winter of 2013, she entered the United States illegally. (R. at 2.) While being in the United States illegally, she worked various jobs. (R. at 2.)

On December 21, 2015, an Erie County Sheriff's officer, Deputy Barnard PfiEFF, responded to a call of unusual behavior inside a summer cottage that lines Lake Erie. (R. at 2.) Since the summer cottages are usually closed for the winter, the resident who made the call found it unusual for there to be a light on inside the cottage. (R. at 2.) Upon PfiEFF's arrival, he noticed a flickering candle light inside the cottage which was unusual based upon the fact the cottage has electricity. (R. at 2.) PfiEFF approached the cottage where he peered into the window and observed several hooded or masked individuals gathered around a table in the gloom of candlelight. (R. at 2.)

Before acting brashly and without assessing the situation, PfiEFF radioed his on-call supervisor, Sergeant Slawter ("Slawter"), and told her what he observed. (R. at 2.) Slawter advised PfiEFF to "go find out what's going on." (R. at 2.) PfiEFF again approached the cottage, this time knocking on the door and identifying himself as a member of the Sheriff's Department. (R. at 2.) Unlike someone who was lawfully occupying this property, the hooded and masked individuals scattered and hid upon PfiEFF's knock and identification. (R. at 2.) PfiEFF using his portable radio alerted his supervisor of the suspicious behavior and called for other officers to respond. (R. at 2.) PfiEFF then opened the door and entered. (R. at 2.) He once again identified himself as from the Sheriff's Department – yet still heard no response. (R. at 2.)

PfiEFF noticed drawings and various documents on a table illuminated by the candle light. (R. at 2.) He un-holstered his sidearm and ordered those inside to come out from hiding. (R. at 2.) Six young adults eventually emerged from hiding, including Secord. (R. at 2.) PfiEFF order

them to the floor with their hands above their heads and searched for weapons and identification. (R. at 2.) Each individual had a New York state driver's license or some other form of identification except Secord. (R. at 2.)

At this time, other sheriff's deputies arrived and began question the suspicious individuals. (R. at 3.) After questioning, the individuals admitted none of them lived in the cottage. (R. at 3.). One of the trespassers, James Fitzgibbon ("Fitzgibbon"), claimed he was the nephew of the owner and had permission to use the cottage. (R. at 3.) Fitzgibbon was unable to produce contact information for the property owner who he claimed was in Florida for the winter. (R. at 3.) Later yielding the contact information for the cottage's owner in Florida, they determined that Fitzgibbon was in fact his nephew, but Fitzgibbon did not have permission to use the cottage, let alone use it for a party. (R. at 3.)

The officers found a pair of brass knuckles in Secord's backpack. (R. at 3.) She was charged with criminal trespass and possession of a deadly weapon. (R. at 3.) The other individuals were arrested and transported to Erie County Holding Center where they were charged with criminal trespass. (R. at 3.) While the others were released on their own recognizance, Secord remained in custody since she was an illegal, criminal alien. (R. at 3.)

## SUMMARY OF ARGUMENT

This Court must uphold the Court of Appeals for the Second Circuit's ruling on probable cause as it conforms with long-standing principles set forth by this Court, and also allows officers to better protect American citizens. This Court has consistently held that probable cause must be flexible, and that a totality of the circumstances inquiry ensures this required flexibility. For over two hundred years this Court has employed this approach and the Second Circuit has also long utilized a totality of the circumstances inquiry. Deviating from this well-established standard would have horrific policy implications for law enforcement officers as it would prohibit them from using their judgment and experience in the field to keep American communities safe.

Another way this Court can ensure the American people's safety is by adopting the Second Circuit's fact-dependent inquiry when determining the reasonableness of a criminal alien's mandatory detention. There are three important reasons that the fact-dependent inquiry is better than a bright-line rule for protecting criminal aliens' due process rights. Firstly, a fact-dependent approach enforces the goals of 8 U.S.C. § 1226 by ensuring that criminal aliens will appear for their removal hearings and not commit more crime in American communities. Secondly, the majority of the federal courts of appeals that have addressed this issue and adopted the fact-dependent approach have successfully utilized the method to protect criminal aliens' due process rights. Finally, a fact-dependent inquiry is supported by the language of the statute and previous Supreme Court decisions when a bright-line, six-month cutoff is rooted in a fallacy.

## ARGUMENT

### I. THE COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECTLY APPLIED A TOTALITY OF THE CIRCUMSTANCES TEST IN DETERMINING THAT DEPUTY PFIEFF HAD PROBABLE CAUSE TO ARREST THE TRESSPASSERS.

#### A. The totality of the circumstances standard is consistent with precedent set forth by this Court and other leading jurisdictions.

To remain consistent with well recognized Fourth Amendment jurisprudence, this Court should affirm the Court of Appeals for the Second Circuit’s decision which found that Deputy Pfeiff established probable cause by evaluating the totality of the circumstances. This Court has long held that probable cause is a very flexible standard which requires police to utilize their experience, judgment, and common sense. *Illinois v. Gates*, 462 U.S. 213, 239 (1983). Probable cause should not be determined by “rigid rules, bright-line tests, and mechanistic inquiries.” *Florida v. Harris*, 133 S. Ct. 1050, 1052 (2013). Probable cause lacks a definite definition on purpose as this Court has forbidden that it be reduced down to an exact science. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

Instead of quantifying probable cause, this Court prefers that police officers utilize a “totality of the circumstances” inquiry before making an arrest. *Id* at 371. Rather than isolating any one factor of suspicion, officers should assess the entire situation and determine if a reasonable person would believe that an offense has been, or will be, committed by the person who is under suspicion. *Illinois v. Gates*, 462 U.S. 213, 230-231 (1983). This provides police officers with the type of flexibility necessary to carry out their duties to serve and protect.

Not only is the totality of the circumstances standard well-established and widely utilized, this Court has been emphasizing a flexible approach for probable cause for over two hundred years. In 1813, in the case of *Locke v. United States*, this Court stated that probable

cause means “less than evidence which would justify condemnation,” but should rather be “made under circumstances which warrant suspicions.” 7 Cranch 339, 348 (1813). Throughout the years, case law has evolved, but this Court has always reinforced keeping probable cause flexible. *See, Brinegar v. United States*, 338 U.S. 160, 176 (1949).

The totality of the circumstances standard set forth by this Court has also been strongly adopted by the Second Circuit. The circuit opined that when determining whether there was probable cause, the court’s inquiry is an objective one that focuses on the facts available to the arresting officer at the time of the arrest. *Jaegly v. Couch*, 439 F.3d 149, 154 (2d Cir. 2006). The Second Circuit states that probable cause exists when, based on the totality of circumstances, the officer has “knowledge of, or reasonably trustworthy information as to, facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested.” *Zellner v. Summerlin*, 494 F.3d 344, 368 (2d Cir. 2007). It is evident from case law that the Second Circuit has adheres to this Court’s precedent concerning a flexible standard for probable cause.

In order to stay true to this Court’s established precedent, the Second Circuit correctly employed a totality of the circumstances inquiry to establish probable cause in the instant case. The facts available to Deputy Pfeiff, when looked at in the totality, clearly displayed that Pfeiff had probable cause to arrest the masked trespassers. The multitude of circumstances supporting Pfeiff’s determination of probable cause are as follows: (1) Pfeiff was responding to a call from a concerned citizen, (2) Pfeiff reported to the scene in the dead of winter, (3) he was not conducting routine surveillance but rather was directed to the summer cottage, (4) people utilize the cottages during the summer, (5) it was nighttime and the lake was frozen over, (6) Pfeiff observed several hooded and masked individuals, (7) the cottage was lit by candle instead of

electricity, (8) the hooded and masked individuals scattered after Pfeiff announced himself as a police officer, and (9) the hooded and masked individuals then hid throughout the cottage. If the inquiry were to stop at this point in the case, and Pfeiff acted on these facts alone, a reasonably prudent person would find probable cause to exist. However, this is not the totality.

Pfeiff had even more suspicious circumstances to bolster his finding of probable cause. Following the masked individuals scattering and hiding, Pfeiff, acting calmly and avoiding a brash decision, alerted his supervisor of the situation. The deputy was told to investigate further. He then entered the cottage upon identifying himself again and asked for the masked individuals to emerge. They eventually appeared and were then questioned. During the questioning, Fitzgibbon claimed to have had permission to occupy the property, however, he was unable to contact the owner nor did he know how to contact him. Fitzgibbon continued on and ultimately admitted he did not possess a key to the property but rather uncovered the rightful owner's hidden key to the property. Once the police were able to get a hold of the property owner, it was clear Fitzgibbon did not have permission to use the cottage for a party, let alone to harbor a criminal alien. Each of these aforementioned points, considered as a whole, provide the totality of the circumstances necessary for probable cause to enable Deputy Pfeiff to arrest Secord and the others. By exercising the totality of the circumstances inquiry in this case, the Second Circuit adhered to this Court's well-established principles.

- B. To force police officers to give special deference to a suspect's claim of innocence would undercut the officers' ability to utilize the totality of the circumstances standard to determine probable cause.

A claim of innocence should not disrupt or conclude a police officer's search for probable cause during their investigation. A probable cause inquiry should not be determined on a basis of

whether the conduct is “innocent” or “guilty” but rather should be determined by the level of suspicion the circumstances suggest. *Illinois v. Gates*, 462 U.S. 213, 245 (1983). A suspect’s professed innocence will simply become one of the circumstances that an officer will take into consideration when looking at the totality of the circumstances, as officers “are neither required nor allowed to sit as prosecutor, judge or jury.” *Krause v. Bennett*, 887 F.2d 362, 372 (2d Cir.1989). Rather, the police officers function is to “apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of the evidence.” *Id.* at 372. A requirement on police to give special weight to claims of innocence contradicts the role of the police function.

The Second Circuit held, in *Finigan v. Marshall*, that the arresting officer, met the probable cause standard in a criminal trespass case even though Finigan, the trespasser, had shared title to the property. 574 F.3d 57, 59 (2d Cir. 2009). The officer knew the following at the time of the arrest: (1) there was a report for burglary at the address by a concerned neighbor, (2) Finigan no longer resided at the address, (3) the other owner had changed the locks as their divorce proceedings carried on, (4) the other owner was away, and (5) Finigan had removed property from the premises. *Id.* at 59. During the investigation, it was clear to the Officer that Finigan had entered the premises on belief that she had legal rights but that her estranged husband had not consented to her entry. Finigan argued that her having shared titled to the home and ownership of the items removed defeated the officer’s probable cause. *Id.* at 60. However, the Second Circuit disagreed and found that the information available to the officer, examined as a totality of the circumstances, constituted probable cause for an arrest for criminal trespass.

Assessing the totality of the circumstances allows officers the flexibility necessary to do their job. Because many situations which confront officers while performing their duties are



more or less ambiguous, probable cause must remain flexible in order to provide officers with the necessary leeway to keep the citizens safe. *Brinegar v. United States*, 338 U.S. 160 (1949).

Requiring that officers credit a suspect's claim of an innocent mental state - even when the officer has an objectively reasonable basis to doubt the suspect's credibility - would create an enormous problem for law enforcement. In this case, the rule the District Court suggests muddies the waters on whether or not a police officer would be able to rely on his experience in the field and extensive training to either give weight to the individual's credibility or not. The Second Circuit notes that following the District Court would undercut the officer's "ability to arrest subjects absent of direct affirmative proof of intent." (R. at 7.) The Court Appeals expressed concerns that the ruling would "radically narrow the ability of officers to use their experience and prudent judgment to assess the credibility of suspects." (R. at 7.)

Imposing a high burden for police officers to meet for probable cause at the time of an arrest, would have a chilling effect on an officer's ability to properly perform their duties. Assessing the credibility of a suspect's claim during a potential trespassing investigation is manifest to said investigation. A bright-line rule giving automatic weight to a claim of innocence would have adverse effects on law enforcement practices as a whole. These implications extend far past the context of trespassing and into many other areas of the criminal code. It is with routine that police officers get dealt an explanation professing innocence in a last-ditch effort from a criminal to keep themselves out of trouble. Should any time a violent offender claims self-defense, does a police officer need to stop their investigation and let the suspect go? When a suspected drug dealer professes he does not know how the drugs ended up in his possession, should a police officer cease the investigation and let the suspect free?

It is important to understand the policy implications of a rule limiting the flexibility of police officers judgement in the field as they serve to protect our communities. A policy of this nature has no place in the real world in which police officers interact with suspects on a routine basis. It is imperative for this Court to forecast how these policies will translate into reality.

If this Court was to give special deterrence to a suspect's claim of innocence Deputy Pfeiff would not have been able to put a stop to the crime the crime occurring in the cottage. According to this Court's established precedent, Pfeiff established probable cause to arrest the masked trespassers. Much like in *Finnigan v. Marshall*, while Deputy Pfeiff was questioning Fitzgibbon, it would be unreasonable to expect the officer to give full credence to Fitzgibbon's story. In both cases, the officers appropriately used their professional judgement and looked at the totality of the circumstances to determine there was probable cause for criminal trespass. Giving special deference to each claim of innocence would have undoubtedly disrupted the police officers' duty to safeguard the community.

It was during Deputy Pfeiff's continued questioning of Fitzgibbon that the police discovered Fitzgibbon did not have permission to use the house and, in fact, used the owner's key that had been left on the property for emergencies. If this Court were to follow the District Court's rule, Pfeiff's investigation would have needed to stop upon Fitzgibbon's claim of entitlement to be on the property. The reality of the situation is that he was not authorized to be there. Not only was he not authorized, but he was harboring an illegal alien in possession of a deadly weapon. Deputy Pfeiff acted in accordance with this Court's well established probable cause standard and it led to the outcome that best serves the safety of the community: the halt to criminal trespassing and the apprehension of an illegal alien in possession of a deadly weapon.

II. THIS COURT SHOULD AFFIRM THE COURT OF APPEALS FOR THE SECOND CIRCUIT’S DECISION TO ADOPT THE FACT-DEPENDENT APPROACH IN ORDER TO PROTECT CRIMINAL ALIENS’ DUE PROCESS RIGHTS WHILE ALSO ENSURING THE SAFETY OF AMERICAN COMMUNITIES.

A. A fact-dependent approach protects the due process rights of criminal aliens and upholds the intent and goals of 8 U.S.C. § 1226.

In order to adhere to the purpose of 8 U.S.C. § 1226, this Court should affirm the Second Circuit’s decision to adopt a fact-dependent inquiry when determining the reasonableness of a criminal alien’s detention. Congress mandated that criminal aliens are to be detained while awaiting their removal proceedings by the Immigration and Naturalization Service (INS). *See* Appendix A. The statute was enacted due to the “wholesale failure by the INS to deal with increasing rates of criminal activity by aliens.” *Demore v. Kim*, 538 U.S. 510, 518 (2003). Criminal activity was so rampant because the INS was unable to even identify most of the deportable criminal aliens in the country. *Id.* at 518. A major cause for this inability to keep track of criminal aliens was that one out of every five criminal aliens did not appear for their removal proceedings. *Id.* at 519. If a criminal alien is not under detention when he or she receives notice of deportation proceedings, the danger is that the criminal alien will flee. *Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003). Justice Kennedy stated in a concurring in *Demore* that § 1226(c) was enacted to ensure that criminal aliens would be “present at their removal proceedings and not on the loose in their communities, where they might pose a danger.” 538 U.S. at 519. The only way to achieve these goals while protecting criminal aliens’ due process rights is to utilize a fact-dependent approach when assessing the reasonableness of a criminal alien’s detention.

A fact-dependent inquiry protects criminal aliens' due process rights by permitting the well-equipped federal courts to analyze the unique set of circumstances surrounding a criminal alien's detention. If a criminal alien feels that his or her mandatory detention is unreasonable under the fact-dependent approach, the criminal alien can file a habeas corpus petition pursuant to 28 U.S.C.A. § 2241. *Sopo v. U.S. Attorney General*, 825 F.3d 1199, 1215 (11th Cir. 2016). A federal court will then hear that petition and determine whether or not the criminal alien's detention is reasonable after considering all of the facts. *Id.* Reasonableness, by its very nature, is an inquiry that requires an analysis of all of the facts and circumstances. *Diop v. ICE/Homeland Security*, 656 F.3d 221, 234 (3d Cir. 2011). The federal courts are in the best position to assess reasonableness because they "have the institutional competence to make fact-specific determinations, and they have great experience applying reasonableness standards." *Sopo*, 825 F.3d at 1217. The fact-dependent approach allows courts to weigh the costs to criminal aliens' due process rights and the goals of the statute. *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469, 474-475 (3d Cir. 2015).

The federal courts of appeals that employ the fact-dependent approach utilize several factors in assessing the reasonableness of a detention. Some of the more prevalent factors are as follows: (1) the amount of time the criminal alien has been detained, (2) the reason(s) behind the length of the detention, (3) if the criminal alien is able to be removed after the final order, (4) if the criminal alien's detention pursuant to § 1226(c) is longer than the amount of time the criminal alien spent in confinement for his or her crime, and (5) if the detention pursuant to § 1226(c) is different than detention in a penal institution. *See Sopo*, 825 F.3d at 1217-1218; *Reid*, 819 F.3d at 500; *Chavez-Alvarez*, 783 F.3d at 478; *Diop*, 656 F.3d at 234; *Ly*, 351 F.3d at 272. If after considering these factors a court finds that the due process rights of a criminal alien have

been infringed upon, the court will forgo the purpose of the statute in order to protect the criminal alien by granting a bail hearing. *Sopo*, 825 F.3d at 1219.

To permit a strict, six-month cutoff would disrupt the intent of § 1226(c) by enticing criminal aliens to purposely delay their proceedings in order to prematurely be released into the public. If a criminal alien knows that her or she must simply wait six months before being automatically granted a bail hearing, that alien will likely abuse the legal process and delay his or her case. *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003). Courts that have adopted the fact-dependent approach do so because the bright-line rule would “encourage deportable criminal aliens to raise frivolous objections and string out the proceedings.” *Id.* It is likely that once the bail hearing is automatically granted and the criminal alien is freed from deportation, he or she will then disappear back into the public where the criminal alien is likely to commit more crime. *Sopo v. U.S. Attorney General*, 825 F.3d 1199, 1216 (11th Cir. 2016). A fact-dependent inquiry prohibits criminal aliens from attempting to exercise any sort of mischievous gamesmanship in order to be prematurely freed.

The Second Circuit properly adhered to the purpose of the statute when it denied Secord a bail hearing after utilizing a fact-dependent inquiry. Secord utilized the opportunity given to her by filing a habeas corpus petition after being detained for a few months. The District Court for the Western District of New York, applying the bright-line rule, determined Secord was to be set free. This would have entirely contradicted the intent of 8 U.S.C. § 1226. Secord has been in the country for less than four years and came alone. Her lack of family and community ties to New York make it even more likely that she will flee and avoid her removal hearing. A bright-line rule would provide Secord with the perfect opportunity to abscond and plot her next crime in another American community. The Court of Appeals for the Second Circuit, utilizing the

appropriate fact-dependent approach, looked at the facts and circumstances of Secord's situation, and correctly determined that she was not entitled to a bail hearing. The Second Circuit's decision upholds and conforms with Congress's intent.

B. The Federal Courts of Appeals utilizing the fact-dependent approach to protect criminal aliens' due process rights have done so successfully.

Looking to the First, Third, Sixth, and Eleventh Circuits as guidance, the fact-dependent approach has proven to be workable for these courts in determining whether a detention violates a criminal alien's due process rights. Many cases in these circuits have come to the conclusion that the criminal aliens' detention was unreasonable while utilizing the fact-dependent approach. In *Reid v. Donelan*, Reid, a Jamaican citizen convicted of numerous crimes such as larceny, assault, and weapon possession, was detained by Immigration and Customs Enforcement (ICE) for fourteen months. 819 F.3d 486, 491 (1st Cir. 2016). The fact-dependent approach allowed the court to weigh the circumstances surrounding Reid's case with the intent of 8 U.S.C. § 1226. The court looked at the length of Reid's detention, compared that detention to his criminal sentence, and checked to see if Reid "engaged in dilatory tactics" during the course of his proceedings. *Id.* at 501. The Court of Appeals for the First Circuit determined that Reid's detention pursuant to § 1226(c) was unreasonable and violated his due process rights. *Id.*

Analogous to *Reid v. Donelan*, other cases that have utilized the fact-dependent approach have come to similar conclusions. See e.g., *Sopo v. U.S. Attorney General*, 825 F.3d 1199, 1220 (11th Cir. 2016) (ruling that a Cameroon citizen's detention of four years without due to his conviction for bank fraud was unreasonable and his due process rights outweighed the justifications for his detention); *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469, 478 (3d Cir. 2015) (finding that a Mexican citizen's detention of over a year due to his

conviction for an aggravated felony was unreasonable and he was entitled to a bail hearing in order to determine whether his detention was still necessary to achieve the goals of § 1226(c)); *Diop v. ICE/Homeland Security*, 656 F.3d 221, 235 (3d Cir. 2011) (opining that a Senegalese citizen's detention of nearly three years due to his conviction for recklessly endangering another person was unreasonable and his due process rights outweighed the prolonged detention); *Ly v. Hansen*, 351 F.3d 263, 273 (6th Cir. 2003) (ruling that a Vietnamese citizen's detention of one and one-half years due to his conviction for bank fraud was not reasonable and violated the criminal alien's due process rights because actual removal was not foreseeable). The bright-line rule of six months would strip courts of the duty of determining reasonableness when these courts have shown they will rule in favor of the criminal alien when the detention infringes upon his or her due process rights.

In the present case, the Court of Appeals for the Second Circuit effectively used the fact-dependent approach to determine that Secord's detention was reasonable. The cases cited above find that a criminal alien's detention becomes unreasonable once that detention goes past the one-year threshold. Courts seemingly acknowledge an implicit cutoff. A year appears to be the maximum in most cases. However, if the circumstances and facts show that the criminal alien gamed the system and caused the delay due to his or her own dilatory tactics or frivolous extensions, then a year-long detention could still be found reasonable.

Secord was only detained for six months. This pales in comparison to cases like *Sopo* or *Diop*. Removal proceedings are unique and complicated processes. The Court of Appeals for the Second Circuit weighed the facts and circumstances of her case and determined that her detention was reasonable. That is not to say that it could eventually become unreasonable, but after only six months, Secord should remain detained.

- C. The fact-dependent approach is supported by the language of the statute as well as previous decisions made by this Court whereas a bright-line rule lacks legal support.

Looking to the language of the statute itself, Congress never mentioned a time cutoff in § 1226(c). This omission cannot be overlooked. A similar statute dealing with aliens during the removal process, 8 U.S.C. § 1231, contains an explicit cutoff within the statute. It pertains to aliens after they have been deemed removable and states that “the Attorney General shall remove the alien from the United States within a period of 90 days.” § 1231(a)(1)(A). If Congress intended § 1226(c), a statute also pertaining to the removal of aliens, to contain a cutoff, it would have explicitly written one into the statute like it did for 8 U.S.C. § 1231.

As mentioned previously, this Court has already examined 8 U.S.C. § 1226 in *Demore v. Kim* and found mandatory detentions of criminal aliens to be constitutional. 538 U.S. at 1721-1722. *Demore* was also significant in that this Court had the opportunity to implement a specific time limit into § 1226(c), but declined to do so. *Reid*, 819 F.3d at 497. The facts of *Demore* involved a detainee who had been held for approximately six months. 538 U.S. at 530-531. If this Court felt that § 1226(c) required a six-month cutoff, *Demore* was the perfect opportunity to implement such a rule. The decision by this Court in *Demore* has foreclosed the opportunity to adopt a bright-line rule. *Id.*

Courts that have adopted the one-size-fits-all approach have incorrectly relied upon this Court’s decision in *Zadvydas v. Davis* – a case decided two years prior to *Demore*. 533 U.S. 678 (2001). *Zadvydas* dealt with a different statute, the previously mentioned 8 U.S.C. § 1231, which already contained a time cutoff. *Id.* at 682. This Court decided that the government could be granted an additional ninety days to the already statute-granted ninety days in § 1231 cases. *Id.* at 701. Courts that have adopted the bright-line, six-month cutoff for § 1226(c) cases cite to



the *Zadvydas* decision. *See, Lora v. Shanahan*, 804 F.3d 601, 615 (2d Cir. 2015), *Rodriguez v. Robbins*, 715 F.3d 1127, 1138 (9th Cir. 2013). However, a careful reading of *Zadvydas* shows that this Court did not actually adopt a six-month cutoff. *Sopo*, 825 F.3d at 1216. *Zadvydas* simply required that the government make a showing after six months that the alien's removal was to occur in the "reasonably foreseeable future." *Reid*, 819 F.3d at 496. If the government sufficiently demonstrates such a showing, the detention could then continue on past six months. *Id.*

The leading case that courts rely on for supporting the bright-line rule did not even establish a rigid, six-month cutoff. The Court of Appeals for the Second Circuit was wise to this and correctly adhered to the already established legal principles by adopting the fact-dependent approach. To do otherwise would contradict the decisions made by Congress and this Court.

## CONCLUSION

The safety of American communities is at stake in this case. The totality of the circumstances standard utilized by the Court of Appeals for the Second Circuit in assessing probable cause adheres to this Court's precedent and provides police officers with the best way to keep American citizens and communities safe.

When it comes to protecting criminal aliens' due process rights, the fact-dependent approach enforces Congress's goals of keeping America safe, has proven to work successfully, and is supported by legal precedent.

For the aforementioned reasons, this Court should affirm the Court of Appeals for the Second Circuit's decisions in both the probable cause issue and the criminal aliens' due process issue.

Respectfully submitted,

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Team 18  
Counsel for the Respondent  
March 20, 2017

## APPENDIX A

### 8 U.S.C.A. § 1226

#### § 1226. Apprehension and detention of aliens

##### (a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--

(1) may continue to detain the arrested alien; and

(2) may release the alien on--

(A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

##### (b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), re-arrest the alien under the original warrant, and detain the alien.

##### (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<sup>1</sup> 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.**

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system--

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available--

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

(emphasis added)