Team 22

2017 Herbert Wechsler National Criminal Law Moot Court Competition

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STATEMENT OF THE ISSUES

1. The Fourth Amendment of the United States Constitution protects against "unreasonable searches and seizures" except upon "probable cause." This court has held that in *Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013) that probable cause is a "practical and commonsensical standard" and considers the "totality of the circumstances." Is it unreasonable for an officer to believe that a crime is being committed when a cottage that is vacant for the winter is suddenly occupied by a group of people in masks and disguises?
2. Congress may impose greater restrictions upon the liberty of aliens than citizens. This includes the detention of criminal aliens without a bail hearing for a "reasonable time" prior to deportation. Some courts have established a "bright line" test to determine whether the length of confinement is "reasonable," resulting in perfunctory release of potentially dangerous aliens. Is it reasonable to require the "mandatory release" into society of deportable criminal aliens?

STATEMENT OF FACTS

On December 21, 2015, a citizen of Angola, New York called the local police department when they noticed lights in a cottage that was known to be closed for the winter. Deputy Barnard Pfieff was dispatched to the scene by the Erie County Sheriff's office to investigate the reported suspicious activity.

When Deputy Pfieff arrived at the cottage, he observed hooded and masked individuals gathered together with candlelight as the only light source. Deputy Pfieff radioed his supervisor, Sergeant Slawter, and relayed what he had observed in the cottage. The Sergeant told Pfieff to "Go find out what's going on."

Pfieff approached the cottage a second time, this time deciding to knock on the front door and announce that he was a member of the Sheriff's Department. Upon knocking and announcing his presence, he could see through the window of the door that the people inside immediately scattered. Pfieff then called for officers to respond to the scene on his portable radio, and opened the unlocked door.

Once inside, he again announced that he was a member of the Sheriff's Department. There was no response. Pfieff then un-holstered his gun and ordered the people in the cottage to come out of hiding. Six young adults, who were all disguised in one way or another, emerged from hiding. Deputy Pfieff promptly ordered them to get on the floor with their hands on their head and searched them for weapons and identification. All individuals had driver's licenses from the state of New York except for the petitioner, Laura Secord.

At this time, more sheriff's deputies had arrived. After questioning these impromptu inhabitants, the deputies determined that one of the individuals claimed to be the nephew of the owner of the cottage. James Fitzgibbon said that his uncle owns the cottage and Fitzgibbon was checking up on the cottage while his uncle was away. When asked how he gained access to the cottage, Fitzgibbon admitted that he found a key on the back patio that unlocked the front door. Fitzgibbon also could not give any contact information to confirm that his uncle allowed him to have access to the cottage.

All of the individuals that were found in the cottage were arrested and transported to the Erie County Holding Center where they were charged with criminal trespass. A pair of brass knuckles was found in the petitioner's backpack and she was additionally charged with possession of a deadly weapon. The rest of the individuals were released on their own recognizance while petitioner remained in custody due to issues with her immigration status.

A canvass by the police department later yielded contact information for the owner of the cottage. Fitzgibbon was, in fact, the nephew of the owner, but Fitzgibbon was not allowed to use the cottage for any kind of party.

The petitioner admitted that the brass knuckles were hers and that she brought them with her when she entered the country illegally from Canada. She was convicted of criminal trespass in the second degree and possession of a deadly weapon in the fourth degree. Secord was subsequently sentenced to a year in prison for the two convictions which were to be served concurrently in the Erie County Correctional Facility in Alden, New York.

Secord entered the United States by walking across a frozen Lake Erie, an act in violation of the laws of the United States. She is an "undocumented alien." Following her criminal convictions, and the subsequent period of incarceration in the county prison, Secord was transferred to Immigrations and Customs Enforcement (ICE) custody for deportation proceedings.

Large numbers of criminal aliens, both undocumented and documented, are required to be held by ICE, and the system has become so overwhelmed that it would not be possible to even schedule a bail hearing before an immigration judge until eleven months after Secord's detention with ICE began.

Secord has no real contacts in the United States. Secord crossed ice of Lake Erie because she was homeless and without family in Canada, where she is a citizen, to take up with the very gang of budding criminals with whom she was later arrested.

It is tempting to presume that Secord is not a particularly dangerous criminal. However, while she was not convicted of a specific violent act, she illegally transported an illegal deadly weapon into the United States, and maintained possession of it while her simple presence in the

country was a violation of law. She then elected to criminally enter the property of a citizen with that illegal deadly weapon. These crimes were of sufficient severity for the State of New York to incarcerate Secord for an entire year. More fundamentally, there is nothing at all which would assure Secord's appearance at a deportation hearing: she presents an inherent and inarguable flight risk.

SUMMARY OF THE ARGUMENT

The decision of the appellate court should be upheld since it was reasonable for Deputy Pfieff to believe that a crime was being committed considering the totality of the circumstances. Deputy Pfieff had probable cause since there was a report of suspicious activity at a vacant cottage, there were disguised and hooded occupants inside the cottage, the occupants of the cottage scattered and hid upon a knock on the door, none of the occupants had any information about contacting the owner, and the key to gain access was found on the back patio.

As to the detention of aliens, the appellate court's decision rests upon solid ground and properly balances the rights of aliens with the authority of Congress to act to protect the citizenry from the threat of criminal aliens. The issue, since this Court's last ruling which established the requirement of a bail hearing at a reasonable time following detention, has intensified. A swell of criminal aliens in border circuits has overwhelmed the system, and increased the lengths of detention prior to deportation, and has also heavily strained the ability of immigration judges to hold bail hearings in short periods of time, leading itself to a strain upon the district courts to hear *habeas* petitions. The "bright line" test has failed, in part because the system could not keep up with it, and also in part because it ran the risk of both freeing dangerous, undocumented, criminal aliens into society. The ruling should stand.

ARGUMENT

I. Deputy Pfieff Had Sufficient Probable Cause to Arrest Laura Secord

A. *New York Substantive Law*

Deputy Pfieff charged the individuals with criminal trespass of the second degree under New York Penal Law which states that a person is guilty of criminal trespass if "he or she knowingly enters or remains unlawfully in a dwelling." N.Y. Penal Law § 140.15. "'Dwelling' means a building which is usually occupied by a person lodging therein at night." N.Y. Penal Law § 140.00.

A New York City Criminal Court ruled that the definition of a dwelling can even include a vestibule that separates the apartment from the street "so long as there is reasonable cause to believe that the defendant had no legal right to be in the building." *People v. Scott*, 797 N.Y.S.2d 847, 849 (N.Y. Crim Ct. 2005).

Criminal trespass in the second degree is established when evidence shows that a defendant "knowingly enter[ed] or remain[ed] unlawfully in a dwelling" N.Y. Penal Law § 140.15. One knowingly enters or remains unlawfully in a dwelling when he or she "is not licensed or privileged to do so." N.Y. Penal Law § 140.00 [5].

An individual is licensed or privileged to enter a dwelling when "he [or she] has obtained the consent of the owner or another whose relationship to the premises gives him [or her] authority to issue such consent." *People v Graves*, 555 N.E.2d 268, 269 (N.Y. 1990). However, a person who "honestly believes that he is licensed or privileged to enter[ ] is not guilty of any degree of

criminal trespass." *People v. Jackson*, 38 A.D.3d 1052, 1053-54 (N.Y. App. Div. 2007) (quoting, *People v. Basch*, 325 N.E.2d 156, 156 (N.Y. 1975)).

Under New York law this cottage is considered a dwelling since it is a building that is usually occupied by a person lodging there at night. *See, Scott*, 797 N.Y.S.2d at 849. Secord was unlawfully in the dwelling. Fitzgibbon, it was ultimately determined, did have authority to be in the cottage, but he did not have authority to have parties in the cottage. R. at 7. And he did not have authority to grant any of his friends access to the cottage.

The facts of the case do not support the notion that Secord "honestly believed" that she had license or privilege to be in the cottage. She knew that Fitzgibbons did not live at that cottage. R. at 7. She knew that Fitzgibbons only gained access fumbling around until he found a hidden key. R. at 7. Finally, Fitzgibbons did not even know how to turn the lights on in the cottage and resorted to using candlelight instead as a light source. R. at 9.

As to the second charge, a person is guilty of criminal possession of a weapon in the fourth degree in New York if "He or she possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles" or "possesses any dangerous or deadly weapon and is not a citizen of the United States." N.Y. Penal Law § 265.01.

It is undisputed that Laura Secord was carrying brass knuckles when she was arrested on December 21, 2015 and was not a citizen of the United States at the time of her arrest. Therefore, she is guilty of possession of a weapon in the fourth degree.

B. *Officer Pfieff had probable cause to believe that a crime was being committed*

The issue before the court is a factual inquiry about whether the threshold of probable cause and exigent circumstances was met on December 21, 2015 to justify a warrantless search and arrest.

In addressing the probable cause inquiry, probable cause is "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). This Court has determined that "A police officer has probable cause to conduct a search when 'the facts available to [him] would "warrant a [person] of reasonable caution in the belief"' that contraband or evidence of a crime is present." *Florida v. Harris*, 133 S. Ct. at 1055 (quoting, *Texas v. Brown*, 460 U.S. 730, 742 (1983)). Further, 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." *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Further, "[i]n evaluating whether the State has met this practical and common-sensical standard, we have consistently looked to the totality of the circumstances." *Harris*, 133 S. Ct. at 1055.

In order to give some protections to citizens, "the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the

need to invade that privacy in order to enforce the law." *McDonald v. United States*, 335 U.S. 451, 455 (1948).

"Evidence required to prove guilt is not necessary. But the attendant circumstances must be sufficient to give rise in the mind of the arresting officer at least to inferences of guilt." *Draper v. United States*, 358 U.S. 307, 322, (1959).

Reasonableness is one of the main considerations that courts consider when judging the legality of the officer's actions. In considering whether an officer was acting in a reasonable manner, the seriousness of the crime is one factor that is taken into consideration.

Welsh v. Wisconsin, is a case that discusses what gravity will be given to minor offenses. 466 U.S. 740 (1984). In *Welsh*, the police entered a house without a warrant to arrest Welsh for drunken driving, which, on first offense, was a noncriminal violation, punishable by a fine. *Id*. at 746. The only exigent circumstance was that there may be a variance in Welsh's blood alcohol level if they waited to obtain a warrant. *Id*. at 753. In holding the entry of Welsh's home unlawful, the Supreme Court held that the gravity of the offense for which a person is arrested has a crucial bearing on whether circumstances were exigent enough to justify a warrantless home arrest.

Because the probable cause standard cannot be reduced to a cut and dried formula, probable cause supports an arrest so long as the arresting officers had probable cause to arrest the suspect for any criminal offense, regardless of their stated reason for the arrest. *See, Devenpeck v. Alford*, 543 U.S. 146, 153-55 (2004).

The Supreme Court addressed the issue of entry into a home by saying that "police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home." *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002).

"It is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant." *Kentucky v. King*, 563 U.S. 452, 455 (2011).

Officers are also allowed to be on private property when they are on the property as part of the performance of their duties. "When the performance of his duty requires an officer to enter upon private property, his conduct, otherwise a trespass, is justifiable." *Giacona v. United States*, 257 F.2d 450, 456 (5th Cir. 1958). "Moreover, even if the officers were trespassing on private property, a trespass does not of itself constitute an illegal search." *Atwell v. United States*, 414 F.2d 136, 138 (5th Cir. 1969).

The 4th Circuit has also held that no Fourth Amendment violation occurs when the police "knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants." *Rogers v. Pendleton*, 249 F.3d 279, 289 (4th Cir. 2001).

In *Edens v. Kennedy*, , the 4th Circuit reasoned that if an officer is allowed to go around to the back door and the front door, it is not unreasonable to allow them to look in the window if they can see inside.112 Fed. App'x. 870 (4th Cir. 2004).

United States v. Hopper, is an analogous case in which the officers did not see the no trespassing signs and walked up to the front and back doors of the house. 58 F. App'x 619, 621 (6th Cir. 2003). Since the curtilage of the house was not put to special use and there was not a fence to keep them out, they were permitted to walk up to the door of the house and knock on it. *Id.* at 623.

This point was brought up in a concurring opinion in *United States v. Johnson*, where the court stated, "[t]he salient question is, was the trespasser in a place where he was encroaching on

a reasonable expectation of privacy that comes within the fair intendment of the Fourth Amendment." 561 F.2d 832, 845 (D.C. Cir. 1977)

United States v. Christmas, is another case out of the 4th Circuit explaining that a "community might quickly succumb to a sense of helplessness if police were prevented from responding to the face-to-face pleas of neighborhood residents for assistance." 222 F.3d 141, 145 (4th Cir. 2000). This line of reasoning makes sense because officers would not be able to perform at their job if they were only allowed to go on private property with a search warrant.

In judging the reasonableness of a 911 call, more weight is given to a 911 call if that can be proved to be correct. For example, in the case of a resident who called 911 on a minor saying that the minor was intoxicated and suicidal, the 4th Circuit ruled that relying solely on the 911 call was not permitted because the minor was not behaving in a manner consistent with the 911 call. *Bailey v. Kennedy*, 349 F.3d 731 (4th Cir. 2003). The police officers had no evidence to support the assertion in the 911 report that the minor was suicidal so they could not take any further action. *Id*. The Supreme Court has also ruled that "searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980).

It is settled law that warrantless searches "are per se unreasonable, subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). However, there is an exception for a search incident to a lawful arrest that applies only to "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 763 (1969). In this case, after Deputy Pfieff made a valid arrest, he conducted a search incident to arrest and uncovered the brass knuckles on the Petitioner.

Courts have been clear that looking through a window is permissible if they are not encroaching on a reasonable expectation of privacy or committing trespass. Here, the officer had a reason to be there since he was called from a resident. And there is not a reasonable expectation of privacy when someone is trespassing in another person's dwelling.

This Court has made it clear that there is no uniform way to define probable cause and has made a totality of the circumstances standard to find if probable cause has been met.

First, in this case Deputy Pfieff knew that a call had been received from a resident of Angola. R. at 2. That resident had called the police department because there was light coming from a cottage that was supposed to be vacant at that time. *Id*. This was suspicious activity for the cottage at that time of year. *Id*.

When he arrived at the property, he looked in the window to find a group of people dressed in masks and disguises gathered around candlelight. *Id*. The candlelight could indicate to the officer that they did not want their activities to be detected, or that they were so unfamiliar with the cottage that they did not even know how to use the lights. Either of those reasons make it reasonable for an officer to inquire further. After knocking on the door and announcing that he was a police officer, the group of people scattered and hid. *Id*.

These were the circumstances that occurred before the officer even initiated the arrest. He knew that the cottage was not occupied this time of year, he knew that there were people inside disguising their identities with masks around candlelight, and he saw that scatter and hide.

Upon arrest, the officer found out that they had gained access to the cottage by grabbing a key from the patio. *Id*. And James Fitzgibbons, who claimed to be the nephew of the owner, could not provide any information to the officers about how to contact the owner. *Id*.

The totality of the circumstances show that there was certainly enough for the officer to have probable cause to believe that a crime was occurring on the premises when he showed up that day.

C. *Exigent circumstances were present to justify the arrest*

In addition to probable cause being present, exigent circumstances must also exist to fall under an exception to the 4th Amendment of the United States Constitution. Courts have differed on their interpretation of what is considered exigent circumstances.

To determine whether there were exigent circumstances, we must "analyze the situation from the perspective of the officers at the scene" and must ask whether the officers had "an objectively reasonable belief that exigent circumstances existed." *United States v. Marshall*, 157 F.3d 477, 482 (7th Cir. 1998).

For example, in *United States v. Rohrig*, a noise complaint from the neighbors about loud music was not the type of danger intended to be covered by the exigent circumstances exception. 98 F.3d 1506 (6th Cir. 1996). Nevertheless, the court allowed a warrantless entry by the police officers through an unlocked door to stop a continuing breach of the peace. *Id*. The court summarized its reasoning by saying “we would find it extremely difficult to adjudge the conduct of the Canton police officers as ‘unreasonable’ without pointing to something those officers should have done differently.” *Id.* at 1525.

In *United States v. Wihbey*, the court found that a possible several hour delay in securing an arrest warrant justified entry into defendant’s home with no warrant because the defendant would get suspicious if his co-defendant did not return to defendant’s home quickly. 75 F.3d 761, 766 (1st Cir. 1996)

The standard out of the 6th Circuit is that warrantless entry into a house is allowed if "it would defy reason to suppose that [the officers] had to secure a warrant before investigating, leaving the putative burglars free to complete their crime unmolested. It is only 'unreasonable' searches and seizures that the fourth amendment forbids." *Singer*, 687 F.2d at 1144; *United States v. Johnson*, 9 F.3d 506, 510 (6th Cir. 1993).

In the present case, exigent circumstances existed because there was a crime in progress. There was a group of people inside a cottage with masks and disguises on. R. at 2. It would be unreasonable to ask for the police officer to go before a judge and get a warrant. A police officer must be allowed to make decisions and judgements out in the field. Requiring him to leave the scene or get a warrant would unnecessarily curb the officer's ability to do his job.

The Constitution protects against unreasonable searches and seizures, but given the present circumstances, this is a reasonable search. It would defy reason to force an officer to obtain a warrant in this situation. It is very difficult to say what the officer could have done differently given the situation he found himself in.

What the officer at that moment knew was that a group of people who were not permitted to be on the property were scattering and hiding. This not only raised suspicion but also raised the possibility that one or more of the suspects may escape. When people who are illegally on a property attempt to hide upon an officer announcing his presence, this creates an exigent circumstance.

Contrast the present case with the fact pattern in *United States v. Elkins*, 300 F.3d 638 (6th Cir. 2002). In *Elkins,* officers had time in the middle of the day to obtain a warrant and did not do it. *Id*. at 645. There were no exigent circumstances since the suspect lived at the house, was

watching TV, and there was no indication that the suspect was going to leave anytime soon. *Id*. at 644.

Another distinguishing case is *Carter v. Butts Cnty*., 821 F.3d 1310 (11th Cir. 2016) in which a couple showed documentation to show that they belonged on property so it was determined that the police did not have probable cause to arrest them.

Here, Fitzgibbons had ample opportunity to prove that he was allowed on the property but could not prove it to the officer. Any prudent and reasonable person would believe that a crime was being committed, most likely a burglary. If a prudent and reasonable person knew that 911 had been called due to suspicious activity, knew that people were inside the cottage when the cottage was supposed to be empty, and knew that the people scattered upon an officer knocking and announcing his presence, that person would not be expected to halt and go get a warrant. The evidence available to the officer at that time indicated that a crime was in progress.

Exigent circumstances need to be evaluated on a case by case basis. That being the case, courts have developed a reasonableness analysis for exigent circumstances in the form of a totality of the circumstances balancing process. In *Dorman v. United States*, the court specified seven illustrative factors to be considered in evaluating the reasonableness of the warrantless entry:(1) "whether a grave offense is involved (2) if the "suspect is reasonably believed to be armed" (3) "a clear showing of probable cause" (4) "strong reason to believe the suspect is on the premises"(5) likelihood that the suspect will escape if not swiftly apprehended (6) "peaceable" entry preferred and (7) "time of entry". 435 F.2d 385, 392-93 (1970). Numerous courts have cited *Dorman* or utilized the *Dorman* criteria as providing guidance on the issue of exigent circumstances.

Using this reasonableness analysis, exigent circumstances were present. First, the gravity of the offense did not end up being serious, but a prudent and reasonable person would have concluded that a burglary was being committed. Second, there was no reason to believe that anyone was armed. Third, a clear showing of probable cause was present since the cottage was supposed to be abandoned and the people scattered when the officer knocked. Fourth, the suspects were plainly on the premises. Fifth, there was a high likelihood that they could escape if not swiftly apprehended. Sixth, peaceable entry took place through an unlocked door and there was no forced entry. Finally, the time of entry weighs in favor of the officer since at night it would be difficult if not impossible to obtain a warrant.

II. The Reasonableness Standard Set by The Court Below Is Sufficient to Protect The Due Process Rights Of Criminal Aliens

It has been over a decade since this Court's ruling in *Demore v. Hyung Joon Kim* which found the pre-removal detention of criminal aliens held under 8 U.S.C. § 1226(c) to be constitutional based upon its "definite termination point. . .". 538 U.S. 510, 529 (2003). In that time, the weight of criminal aliens upon the system, as noted in *Demore*, has done nothing but increase, especially in certain circuits. *Compare, Id*. at 518, *with, e.g., Lora v. Shanahan*, 804 F.3d 601, 616 (2nd Cir. 2015).

Further, the interpretation of this Court's construction of 8 U.S.C. § 1226(c) has been combined with this Court's ruling on *post-removal* release in *Zadvydas v. Davis* in such a way as to *require the mandatory release* of dangerous criminal, deportable, undocumented aliens with no contacts with the community to assure their attendance at removal proceedings into society. 533 U.S. 678, 699 (2001).

All the circuits have construed this Court's ruling in *Demore* to mean that §1226(c) detention is constitutional if there is some "reasonable" limit to how long a criminal alien may be detained without a bail hearing prior to deportation. *See, Lora,* 804 F.3d at 614. Prior to this case, the 2nd Circuit had followed the 9th Circuit's reasoning on this issue, and had imposed a six-month period of presumptively reasonable detention without a bail hearing for criminal aliens awaiting deportation proceedings, after which release would occur irrespective of the alien's status or the circumstances of the case. *Id*. at 617; *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013). The 2nd Circuit has now overturned that unworkable provision, and instead shifted to the more pragmatic approach taken by the 6th and 3rd Circuits. *See, Hoang Minh Ly v. Hansen*, 351 F.3d 263, 273 (6th Cir. 2003); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 235 (3rd Cir. 2011).

A. *A mandatory release provision contorts a law which textually prohibits any release into one that effectively* requires *release after a set time*

There is no question that the detention and removal of criminal aliens is a serious matter. Even a decade ago in *Demore*, the Court discussed the growing impact of criminal aliens, and the difficulty of the existing system to deal with the problem. *See*, 538 U.S. at 518. While the Court has held that constitutional Due Process is applicable to aliens, there is considerable confusion as to exactly what process criminal aliens, particularly those for whom there is no hope of bail, as here, are due prior to a removal proceeding. *See, Id*. at 529. Further, the Court has also ruled upon the due process rights of aliens who have already been ordered removed and are detained during the removal process. *See, Zadvydas,* 533 U.S. at 701. The discord between *Zadvydas* and *Demore* is the root of the current circuit split on the issue.

In this case, the confusion has become so profound that the District Court elected to release Secord following six-months of ICE detention apparently based upon nothing more than her having been detained for more than six-months. The 2nd Circuit, agreed that the District Court had

correctly applied its "bright line" mandatory release rule, but also found that the effect of the rule was, "improvident and impractical." *See,* R. at 4. This is despite there being nothing in the statute which would permit the release of an undocumented alien such as Secord, nor there being anything in *any* of this Court's rulings which would require such a perfunctory release. Secord has little in the way of an established life which would make her likely to appear for a removal proceeding, and as such any bail hearing in her case would be futile.

1. The six-month test applied in *Zadvydas* does not apply to pre-removal detention under § 1226(c)

This Court's ruling in *Zadvydas* was predicated on the notion that the detention was of a potentially permanent nature. 533 U.S. at 698-99. The ruling is also based the inability of the government to *actually remove* the alien from the country. *Id*. at 701. This differs wildly from this Court's ruling in *Demore*, which is predicated upon the notion that the detention in question does in fact have a determinate end- the removal proceedings. 538 U.S. at 529. In any event the nature and status of the detainee vary dramatically from this case.

In *Zadvydas*, this Court was ruling on two related cases. 533 U.S. at 684. The first is the case of Kestutis Zadvydas, a Lawful Permanent Resident who was deportable based upon a long criminal record. *Id*. Due in part to his being born in a "displaced persons camp" in Germany following World War Two, the immigration authorities were unable to determine his citizenship, or find a country willing to accept him. *Id*. This meant that after Zadvydas was released from prison and taken into immigration custody, he faced a potential permanent confinement. *Id*. at 685. Unlike Secord, there was no horizon of release awaiting Zadvydas; he was going to likely remain in custody for the rest of his life, on no charges, whereas Secord will eventually have a removal proceeding and be returned to the nation of her citizenship, Canada.

The second related case in *Zadvydas*, is that of Kim Ho Ma, who is a refugee from Cambodia. Like Zadvydas above, Ma was in the United States legally through the refugee process and had then proceeded to be ordered removed due to a manslaughter conviction stemming from his involvement in gang related violence. *Id*. Again, like Zadvydas, Ma would likely never be deported because his home country, Cambodia, does not maintain a repatriation agreement with the United States. *Id*. at 686. In contrast, there is no question as to Secord's citizenship, or of her ability to be deported, there is only the length of time that she needs to wait for the process to be completed.

Nonetheless, the Court in *Zadvydas* did not make any sort of "mandatory release" ruling. *Id*. at 701. In fact, the ruling was the opposite, "[t]his 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id*. at 701.

Zadvydas is apples and oranges as far as a ruling on the status of Secord goes, and the underlying rationale for imposing the six-month period does not exist in the cases of aliens detained as deportable criminals. Indeed, this Court in *Zadvydas* specifically distinguished its discussion of the statute there, and the criminal alien detention statute here, "the statute before us applies not only to terrorists and criminals, but also to ordinary visa violators. . . "and, "post-removal-period detention, unlike detention pending a determination of removability or during the subsequent 90-day removal period, has no obvious termination point." *Id*. at 697.

2. A bright line test is directly contrary to *Demore* and risks releasing criminal aliens into the united states

Unlike in *Zadvydas*, this Court in *Demore* did rule directly on the question of criminal alien detention. *Demore*, 533 U.S. at 529-30. This Court upheld the provisions of 8 U.S.C. § 1226(c) as compliant with constitutional due process requirements; even though the criminal alien in question *had been detained for longer than six-months without a bail hearing*. *Id*. at 530.

This Court in *Demore* was careful to explain the difference between the detention which required process in *Zadvydas*, and the situation of a criminal alien being detained while awaiting removal proceedings. *Id*. at 527. Nonetheless, the Court did find that there were situations where due process did indeed apply, such as a hearing to determine the validity of the determination that the alien was deportable as a criminal alien. *Id*. at 513-14; *see also*, *In re Joseph*, 22 I. & N. Dec. 799, 802 (B.I.A. 1999). At present, it appears that Secord has not done that, while she has challenged the validity of the underlying conviction. R. at 3. In any event, once she has been determined to be a criminal alien *Demore* does not provide her with any additional process, because, "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Demore*, 538 U.S. at 531.

Nonetheless, there is still the possibility, raised by Justice Kennedy in his concurrence, that such a period of detention might become "unreasonable or unjustified," and so be prohibited. *Id*. at 532. "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." *Id*. It is this sentence that has become the basis for the circuits which impose a reasonableness standard, to the detention of criminal aliens as recently adopted by the 2nd Circuit in this case. *See, Diop*, 656 F.3d at 233; *see also*, *Ly*. 351 F.3d at 270.

The *Demore* case is at once both distinguishable and representative of the present case. In *Demore,* the alien, Kim, was a Lawful Permanent Resident, a status which is, "the most favored category of aliens and that they have the right to reside permanently in the United States, to work here, and to apply for citizenship." 538 U.S. at 515. Indeed, the 9th Circuit, though it was overturned, was specific in ruling that it was Kim's Lawful Permanent Resident which required the immigration authorities to, "provid[e] a "special justification" for no-bail civil detention sufficient to overcome a lawful permanent resident alien's liberty interest." *Hyung Joon Kim v. Ziglar*, 276 F.3d 523, 535 (9th Cir. 2002).

Even where there is a resort to the "bright line" rule of six-months, it has never been intended to impose anything like what the District Court did in the present case, imposing an automatic, "mandatory release." R. at 4. Instead, "the injunction requires individualized decision-making—in the form of bond hearings. . ." *Rodriguez v. Robbins*, 715 F.3d 1127, 1139 (9th Cir. Cal. 2013). "Further, such prolonged detention of aliens is permissible only where the Attorney General finds such detention individually necessary by providing the alien with an adequate opportunity to contest the necessity of his detention." *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 951 (9th Cir. 2008).

Part of the problem with setting such a "bright line," as the court below found, and this Court recognized in *Demore,* is that it is impractical if not impossible for the government to comply with and that, "permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully." 538 U.S. at 528.

Further, individualized petitions by detained aliens are effective in determining the appropriateness of the detention. Part of the 2nd Circuit's reasoning in *Lora*, which it overturned

in the present case, in establishing a "bright line test" was that it would alleviate the, "pervasive inconsistency and confusion exhibited by district courts. . . when asked to apply a reasonableness test on a case-by-case basis. . ." to detained criminal aliens. 804 F.3d at 615. Of course, every case is different, and requiring, for instance, the immigration authorities to conduct a pointless bond hearing in a case where the criminal alien had already been ordered removed, and was appealing the order, would only further hamper providing bond hearings to those who are truly deserving, such as Lawful Permanent Residents. *See, Johnson v. Orsino*, 942 F. Supp. 2d 396, 409 (S.D.N.Y. 2013)(upholding the detention without bond of eighteen months following a removal order which was then appealed); *see also, Aponte v. Holder*, 743 F. Supp. 2d 189, 197 (W.D.N.Y. 2010) (upholding a three year detention without bond hearing where the criminal alien was deportable, and was delaying through appeals).

On the other hand, the district courts in the 2nd Circuit had, prior to Lora, found several cases of shorter duration detention to warrant a bond hearing. Again, status matters, when faced with a Lawful Permanent Resident who had committed two misdemeanors years before, the court ruled that eight months was a prolonged detention, and that a bond hearing was required. *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010). This case is similar in some ways to the present case, but it differs in the status of Secord. Monestime entered the country legally, and maintained a legal presence here, and therefore could be expected to show up for a removal proceeding, Secord is here illegally, and is unlikely to show up for her removal proceeding. *Id*. at 455. Moreover, Monestime's criminal acts occurred over eight years in the past, and due to then recent calamity in his native Haiti was facing a period of detention of two years or more before there was a possibility that he could be deported. *Id*. at 458. Secord can be sent back to Canada immediately.

Further, this Court found that Kim's detention was permissible, even though it was for six-months, and that the Lawful Permanent Alien status was not sufficient to establish a substantive due process case. *Demore*, 538 U.S. at 515. Secord, in the present case is neither a Lawful Permanent Resident, or any other sort of lawful immigrant, but is instead an undocumented criminal alien whose fate, deportation to Canada where she holds citizenship, is not at all in question.

3. Secord is simply delaying her inevitable deportation and is herself responsible for the length of her detention

Secord is delaying the inevitable, "merely gaming the system. . . " with no realistic remedy available to her to avoid deportation. *See Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469, 476 (3rd Cir. Pa. 2015). Unlike in *Chavez-Alvarez,* where the court determined that the alien's actions were not in bad faith, Secord has raised nothing but her *habeas* petition, based upon nothing more than the 2nd Circuit's prior "bright line" test. *See*, *Id*.; R. at 4. In this, she is much like Kim, in that she has created the circumstances of her own detention.

Secord shares something else with Kim, which is not found in the *Zadvydas* case: she can leave. Canada can take her, and unlike the situation with Cambodia, there is repatriation with Canada. *See*, *Zadvydas*, 538 U.S. at 686. Her fate there would not be much different than here, other than that she would be living legally within the country. As the 6th Circuit put it in discussing a similar case with a refugee from Vietnam, the, "case is distinguishable to the extent that Kim was a deportable alien for whom deportation, to South Korea, was a real possibility, and he could avail himself of such liberty at any time. That is not the case with Ly." *Ly*, 351 F.3d at 270. Again, unlike Secord, Ly was a legal alien who ran afoul of the law and was subject to detention pending removal, though he was denied Lawful Permanent Resident status. *Id*. at 265. More than that, his

period of detention was truly indeterminate because the only place where he could be expected to be deported to was Vietnam, which has no repatriation treaty with the United States. *Id*.

These different circumstances highlight the point that the *Demore* case simply did not specify a "bright line" standard. Further, such a standard would be wholly unreasonable under the circumstances presented by Secord because she has no legal presence in the country, is deportable to a country where the United States does in fact have a repatriation treaty, has absolutely no grounds whatsoever for being permitted to stay in the United States, and as such she can affect her own release at will.

B. *Lawful Permanent Residents, and Other Documented Aliens Are Entitled to Greater Constitutional Protections Than Undocumented Aliens*

One thing that is true of both *Zadvydas* and *Demore* is that the aliens in question were all in the country legally, whereas Secord is not. There is no question about Secord being entitled to due process, however there is very much a question as to what form that process ought to take, and if it is "reasonable." It is worth exploring the various distinctions that the Court has made over the years, not only between those who enter the country legally and those who do not, but the very fine line that has at times separated the requirement of due process for even lawful resident aliens, even when they are incarcerated.

The Court in *Wong Wing v. United States*, long ago upheld detention to affect the implementation of the "Chinese Exclusion Acts," but declined to permit that detention to be sat "hard labor" prior to ultimate deportation without ordinary criminal process, such as a trial by jury. 163 U.S. 228, 235 (1896). Further the Wong Court found that it was within the power of Congress to deport both those aliens who had entered the country legally, and those who had not. *Id*. In other words, "the Due Process Clause applies to all "persons" within the United States, including aliens,

whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 538 U.S. at 693.

Nonetheless, there can be little doubt that lawful status conveys with it a greater protection of liberty and property than does an undocumented status. Indeed, the dividing line between an alien who has "not entered" the country, and one who is within the country can be quite fine. For instance, upon attempting to enter the United States there is no process whatsoever due to an alien. *See*, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). In *Plascencia*, a legal permanent resident alien, Ms. Placencia (Plascencia), had entered the United States, but then left the United States and attempted to return with multiple undocumented aliens, and was captured at the border. *Id*. The immigration authorities attempted to conduct an exclusion hearing, whereby Plascencia, despite her status as a legal permanent resident, would be denied re-entry in to the United States and deported. *Id*. Ultimately, the Court found the Plascencia was not due the process of a deportation hearing, however she was to be afforded due process in the exclusion from re-entry hearing. *Id*. at 37.

It is well for Plascencia that she was not outside of the country for a longer time. In *Shaughnessy v. United States ex rel. Mezei*, a former lawful resident alien was denied re-entry into the United States after a prolonged trip abroad. 345 U.S. 206, 209 (1953). The alien in *Mezei* was not only denied re-entry due to the length of his excursion abroad, but was held in indefinite custody on Ellis Island, New York since there was no country that would accept him. Id. at 515. The Court there rationalized this indefinite detention of a Lawful Permanent Resident based upon the notion that it was a "legislative grace" to allow aliens to disembark ships and get on the island, but that that did not permit any "additional rights." *Id*.

The ruling in *Mezei* goes far, far beyond the reasonableness test established here. And even in opposing such a flagrant denial of judicial review Justice Jackson in his dissent compared it to Nazi Germany's denial of due process to concentration camp victims. *Id*. at 225-26. That being said, however, Justice Jackson also wrote that, "[d]ue process does not invest any alien with a right to enter the United States, nor confer on those admitted the right to remain against the national will. Nothing in the Constitution requires admission or sufferance of aliens hostile to our scheme of government." *Id*. at 223-24. Secord's detention is most certainly not like a detention without cause, and without reason, as seen in *Mezei*. Instead, the government has established a set criteria through which aliens may be detained prior to their removal proceedings, and has further judicially permitted the exercise of the writ of *habeas corpus* whereby the an alien, even an undocumented alien, may challenge their confinement. *See,* 8 U.S.C. §1226(c); *Demore,* 538 U.S. at 528.

As the facts of this case indicate, there is no basis to think that Secord would prevail were she to be afforded a bond hearing. She meets the criteria of §1226(c) in that she is both an alien, and has committed crimes sufficient to warrant her removal. While she might, arguably, not present a danger to society, she does, present a clear flight risk, and so would not met the standard for release in any event. *See*, *Demore*, 538 U.S. at 528.

This is not only because Secord is an undocumented alien, who deliberately entered this country illegally, but because she has little in the way of roots established in this country. R. at 2. She worked various odd jobs in the food service industry. *Id*. Though she had apparently managed to establish a residence, her only real "family" was the very group of young people with whom she was arrested. R. at 8. The "bright line" test devised by the 2nd Circuit, should have required bond hearing with the government having to show, as it doubtlessly could here, that there was a risk of flight or a danger to safety. *Lora*, 804 F.3d at 615. In practice, the trial court here did order a bond

hearing, but instead ordered Secord released, apparently based upon its understanding of the test. R. at 4. This defeats one of the stated purposes of the "bright line rule, which is to decrease confusion. *Lora*, 804 F.3d at 615. This sort of arbitrary release contorts a statute that textually bars any release of criminal aliens, into one which requires their release with no showing of cause on the part of the criminal alien, other than the mere passage of time. The 2nd Circuit, having tried the "bright line" approach crafted by the 9th Circuit, was correct in finding that it was simply unworkable.

III. Conclusion

For the foregoing reasons, Respondent asks this Court to uphold the ruling of the 2nd Circuit below, and find that there a "bright line" test is not required to preserve the rights of convicted criminal aliens detained prior to removal proceedings.