UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Petitioner

v. Index No. 1-2017

LAURA SECORD,

Respondent

and

CITY OF ANGOLA,

Petitioner

v. Index No. 2-2017

LAURA SECORD,

Respondent

Opinion of the Court

WECHSLER, Chief Judge

Overview. Laura Secord, a citizen of Canada, was arrested, tried, and convicted of criminal trespass in the second degree and criminal possession of a dangerous weapon in the fourth degree by the City of Angola Court in 2015. She was sentenced to a year in prison. While in prison, she filed a habeas corpus petition with the United States District for the Western District of New York, alleging her arrest violated the protections of the Fourth Amendment. While that petition was pending, and upon her release from the county prison in 2016, she was delivered to the Immigration and Customs Enforcement (ICE) regional office in Buffalo, to be processed for deportation. She remained in ICE detention for six months. Upon another habeas petition, she was released from ICE custody, in accordance with our decision in Lora v. Shanahan, et al, 804 F.3d 601 (2d Cir. 2015). She remains in the

United States, while her removal proceeding continues to drag on. For the reasons below, we reverse both determinations.

Factual Background. Laura Secord is a Canadian citizen. Sometime during the winter of 2013, she walked across Lake Erie, which was frozen at the time, and entered the United States illegally. She remained in the United States, working various jobs in the foodservice industry.

On December 21, 2015, a resident of Angola, New York, noticed lights inside one of the summer cottages that line Lake Erie in that area. As the cottages are usually closed for the winter, he called the local police department and reported suspicious activity. An officer from the Erie County Sheriff's office, which provides police protection to the City of Angola, was dispatched to the scene. Upon arrival at the cottage, Deputy Barnard Pfieff identified flickering candle light inside the property. He approached the dwelling and peered inside a window. He observed several hooded or masked individuals, gathered around a table in the gloom of the candlelight. Returning to his vehicle, he radioed his on-call supervisor, Sergeant Slawter, and told her what he observed. She told him to "Go find out what's going on." Deputy Pfieff again approached the cottage, and knocked on the front door, identifying himself as a member of the Sheriff's Department. Peering through a window in the door, he observed the hooded figures scatter and hide upon hearing his voice and knocking. Deputy Pfieff, using his portable radio, informed his supervisor of what he observed, and called for other officers to respond. Deputy Pfieff then opened the unlocked door. Once again, he informed the individuals that he was from the Sheriff's Department. He heard no response. Noticing a light switch in the entryway, he tried to turn on the lights. They did not turn on. In the dim light from the candles, he noticed drawings and other documents on the table. Deputy Pfieff un-holstered his sidearm and ordered those inside the dwelling to come out from hiding.

Six young adults emerged from hiding, including Respondent, Laura Secord. All were disguised in one way or another. Deputy Pfieff ordered all of them to the floor, with their hands above their heads. He searched them for weapons and identification. All of the individuals had New York State driver's licenses or other identification, except for Secord, who had only cash on her person.

By this time, other sheriff's deputies arrived. Upon questioning, the masked individuals admitted that none of them lived in the cottage, but claimed that one of them, James Fitzgibbon, was the nephew of the owner, and had permission to use the cottage. Fitzgibbon produced a key for the front door. When pressed, he admitted that he did not possess a key, but had retrieved this key, a spare, from under a planter on the back patio. Fitzgibbon had no contact information for the uncle, who he claimed was in Florida for the winter. The individuals were arrested and transported to the Erie County Holding Center, where they were subsequently charged with criminal trespass. A pair of brass knuckles was found in Petitioner's backpack, and was also charged with possession of a deadly weapon. While the others were released on their own recognizance, Secord remained in custody due to her immigration status.

A neighborhood canvass later in the week by the arresting officers yielded contact information for the cottage's owner in Florida. He turned out to be, in fact, Fitzgibbon's uncle. The uncle admitted that his nephew did not have permission to use the cottage for any kind of party.

Secord, along with the others, was subsequently tried and convicted of criminal trespass in the second degree in the City Court of Angola. Secord was also convicted of criminal possession of a deadly weapon in the fourth degree, as she admitted that the brass knuckles were hers, and that she had brought them with her when she entered the country illegally. She was sentenced to a year in prison for the two convictions, to be served concurrently, in the Erie County Correctional Facility in Alden, New York.

Procedural Background. While in Alden, Secord contacted the Criminal Defense Legal Clinic at the University at Buffalo School of Law. Law students from the clinic, under the supervision of John Lord O'Brian, a licensed attorney, filed a habeas corpus petition on her behalf in the United States District Court for the Western District of New York. The students alleged in the petition that her arrest and conviction violated her Fourth Amendment rights against unlawful search and seizure, as Deputy Pfieff lacked probable cause to enter the cottage, and to arrest the individuals for criminal trespass and criminal possession of dangerous weapons.

While that petition was pending, Secord's sentence for the conviction ended, and she was immediately transferred into the

custody of the Department of Homeland Security for deportation proceedings, in accordance with 8 U.S.C § 1226. She remained in ICE custody for sixth months, until the law students filed yet another habeas corpus petition on her behalf, this time arguing that her detention by ICE had gone past the bright line we set in *Lora v. Shanahan,* 804 F.3d 601, 616 (2d Cir. 2015). That petition, assigned to a different judge, was granted, and the District Court ordered her immediate release from ICE custody. Later, Secord's petition to throw out her conviction was also granted. The City and the Department of ICE both appealed separately, and we joined the appeals for judicial economy.

For the reasons that follow, we reverse the District Courts' determinations and order Secord to be remanded to the custody of ICE.

Mandatory release. We first look at the District Court's order to release Secord from ICE custody. While the Court correctly followed the guidance offered in this Court's recent decision, *Lora v. Shanahan*, we find that decision improvident and impractical. For the reasons articulated below, we also find that Secord should be remanded back into ICE custody until such time as the Director can present evidence as to whether she poses a "danger to the safety of other persons […] and is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(2). While we set no bright line for such hearing, it must be held within a period reasonable under the circumstances.

In *Lora*, this Court noted the variety of ways the Federal Circuits handled the due process concerns associated with bail hearings for aliens awaiting removal proceedings. It is well-settled that the Fifth Amendment entitles aliens to due process in deportation proceedings. *Reno v. Flores,* 507 U.S. 292 (1993). "[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis,* 533 U.S. 678, 693 (2001) (considering a challenge to post-removal detention). As noted, more than a decade ago, in *Zadvydas,* the Supreme Court signaled its concerns about the constitutionality of a statutory scheme that ostensibly authorized indefinite detention of noncitizens. *Id.* Two years later, when the Court upheld the constitutionality of section 1226(c) in *Demore v. Kim,* it emphasized that, for detention under the statute to be reasonable, it must be for

a brief period of time. *See, e.g.,* 538 U.S. 510, 528 (2003) (finding detention permissible because, as compared to *Zadvydas,* "the detention here is of a much shorter duration"). Justice Kennedy explained in his concurrence that "[w]ere 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.* at 532–33 (Kennedy, J., concurring).

These cases clearly establish that mandatory detention under section 1226(c) is permissible.

However, while all circuits agree that section 1226(c) includes some "reasonable" limit on the amount of time that an individual can be detained without a bail hearing, courts remain divided on how to determine reasonableness.

This Court, in *Lora*, adopted a bright line approach, following the precedent set forth by the Ninth Circuit. *See Rodriguez v. Robbins,* 715 F.3d 1127, 1133 (9th Cir. 2013). Under that approach, we held that "the preferred approach for avoiding due process concerns […] is to establish a presumptively reasonable six-month period of detention." *Lora*, 804 F.3d at 615. That approach has proved unworkable in practice, and we hereby reject that approach in favor of the approach taken by the Third and Sixth Circuits.

That approach calls for a "fact-dependent inquiry requiring an assessment of all of the circumstances of any given case," to determine whether detention without an individualized hearing is unreasonable. *Diop v. ICE/Homeland Security,* 656 F.3d 221, 234 (3d Cir. 2011); *see also* *Chavez–Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 475 n. 7 (3d Cir. 2015) (explaining "the highly fact-specific nature" of the balancing framework). Under this approach, every detainee must file a habeas petition challenging detention, and the district courts must then adjudicate the petition to determine whether the individual's detention has crossed the "reasonableness" threshold, thus entitling him to a bail hearing.

This approach, in practice, has proved more effective at preventing illegal aliens from being released prematurely back into the population. Each case can be assessed by the appropriate district court, weighing all the relevant circumstances. Therefore, we hereby hold that the reasonable period of ICE detention prior to a bail hearing calls for a fact-dependent inquiry requiring an assessment of all the circumstances of any given case.

In the case at hand, this approach leads us to the conclusion that Secord's release was improvidently granted. The six-month window has simply proved unworkable given the current press of immigration removal proceedings faced by the Department's immigration judges. For example, the first available judge even to *hear* a bail request could not be scheduled until eleven months after Secord began her detention. Furthermore, ICE officials simply had no time, as evidenced by the papers in opposition to Secord's habeas petition, to locate witness, obtain statements, or prepare in any way for a hearing. The Department, though no dilatory tactics or unfair delay, simply could not prepare a case to present to the immigration judge about Secord's dangerousness or flight risk.

According to news reports and other evidence presented to the District Court, the removal docket is particularly strained for those cases arising in Buffalo, due to its proximity to the Canadian border. But other ICE offices within this Circuit are similarly burdened. Recent sweeps for illegal aliens have only exacerbated the problem, and the likelihood of ICE being forced to release dangerous aliens into our country is clear and present. While Secord may not, at first blush, appear to be a danger to society, we cannot stand by and allow our decision to open the floodgates to terrorists.

Therefore, we hold that *Lora*'s bright line six-month period is impractical, and a bail hearing held within a reasonable time given the particular circumstances of the case does not run afoul of the Due Process Clause's protections.

The District Court's decision is therefore REVERSED, and Secord should be remanded immediately back into ICE custody until such time as the Department can prepare evidence for her bail hearing. In any event, such time shall not be unreasonable under the circumstances.

Probable cause. The District Court erred in finding the Erie County Sheriff's Department lacked probable cause to arrest Secord and the other trespassers. The District Court determined that nothing Deputy Pfieff or the other officers learned at the scene suggests that Secord and the others knew or should have known they were entering the cottage against the true owner's will. As far as Deputy Pfieff knew, the Court concluded, "the group had the permission of Fitzgibbon's uncle to use the cottage for their gathering." That knowledge, according to the Court, vitiated the probable cause the Deputy asserted to arrest the suspects on the

charge of trespass. The Court thus determined that their convictions for trespass in the fourth degree should be overturned. Further, because the brass knuckles were discovered following her arrest, Secord's conviction for possession of that weapon must also be overturned. We disagree.

The District Court's decision sets an impossible standard for arresting officers. It undercuts their ability to arrest subjects in the absence of direct, affirmative proof of intent. This would radically narrow the ability of officers to use their experience and prudent judgment to assess the credibility of suspects. The District Court's decision would render moot the very purpose of the "totality of the circumstances" inquiry. As the Supreme Court has held, probable cause is a "practical and commonsensical standard" that considers "the totality of the circumstances." *Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013).

Here, there were numerous circumstances that supported Deputy Pfieff's determination of probable cause. First, the neighbor who reported suspicious activity, out of season, at a summer cottage at the edge of a dark and frozen lake in the middle of the night. Second, his observation through the window that the cottage was occupied by hooded and disguised individuals, gathered by candlelight. Third, that upon identifying himself as an officer of the law, he observed the occupants scatter and hide. Fourth, that Fitzgibbon, although claiming permission, had no knowledge of how to contact the owner. Fifth, Fitzgibbon's admission that he did not possess a key to the property, but had uncovered it hidden on the patio. Sixth, the uncle later admitted that Fitzgibbon did not have his permission to use the cottage as he claimed. And last, but perhaps most critical, the discovery that Fitzgibbon and others were harboring an illegal alien on the property. All of these circumstances make it impossible for us to hold as a matter of law that Deputy Pfieff, and the other responding officers, lacked probable cause to arrest Secord and the others.

Therefore, the District Court's order is REVERSED, and Secord's convictions for criminal trespass in the second degree and criminal possession of a dangerous weapon in the fourth degree are REINSTATED.

* * *

Justice ATKINSON, dissenting:

I dissent from the folly this Court has pursued with this decision. First, I reject my brother Justices' decision to overturn *Lora*. The decision in *Lora* was the product of long and careful deliberation, weighing the competing interests of the State against the protections afforded to all under the Due Process Clause of the Fourteenth Amendment. By abandoning the six-month bright-line test we articulated in *Lora*, the Court has effectively sentenced those facing deportation to imprisonment without end. Absent a clear deadline, the Department of Homeland Security can keep undocumented immigrants detained at its whim, subject only to its own determination of what is reasonable under the circumstances. This is an affront to our prior decision, and to years of settled law concerning the right to a timely bail determination. For the reasons already articulated in *Lora* concerning the need for a firm cut-off for a bail hearing for those in ICE custody, I dissent from the first part of the Court's decision.

With regard to the Court's decision concerning probable cause, I also dissent. Let me begin by relaying some of the facts left out from the majority's decision. Laura Secord is, in fact, a Canadian citizen. She was born in Toronto, to parents of Uzbek extraction. She faced emotional and physical abuse at home throughout her life, until, at age 16, she ran away. For a time, she lived on the streets of Toronto. During this period of homelessness, she acquired the brass knuckles, which she kept with her at all times due to the dangers facing a young woman living on the streets in a major city. Her only "family" during this period was a group of friends who met every week at a shelter to play Dungeons and Dragons. Sometime in 2012, she discovered a larger group of Dungeon and Dragons friends online, which she could access at the shelter and at the library. Over time, she grew close to a group of D&D players in the Buffalo area. Secord decided to emigrate in 2013. After an unusually cold winter, Lake Erie froze completely, and Secord hitchhiked to Fort Erie, from where she was able to cross into the United States over the ice.

She got a job working at a Tim Hortons near the lake, and she soon found a place to live. She connected with the group of D&D players, and began regularly join them in games at their homes or apartments. She had no trouble with the law until December 2015. Her friends decided it would be fun to mark the Winter Solstice by playing a D&D game somewhere "spooky." James Fitzgibbon, one of the players, volunteered his uncle's cottage in

Angola. He knew no one would be there, as it was unheated, and his uncle was in Florida for the winter. He offered to drive everyone to the cottage, which is located about 45 minutes south of Buffalo, along the lake. He told the group his uncle would be "cool with it," as long as they "didn't mess the place up." The group also decided to dress in costume for the event, stopping at a Party City store on the way to Angola. Along the way, they also picked up some snacks, beer, and pop at a gas station in Evans. They planned to spend the evening at the cottage, but to head back home by midnight, as several of them had work the next day.

When they arrived at the cottage, Fitzgibbon let them in through the front door, using a key he retrieved from the patio. While it is true that his uncle asked him "not to have any parties" at the cottage while he was in Florida, he was expected to check on the property every week or so. He used the key on the patio for these visits. Fitzgibbon could not figure out how to turn on the electricity to the cottage, so the group lit some candles they had found in a closet. The group, six in number, dressed in costume as wizards, dwarves, and other characters, soon grew immersed in the game. When Deputy Pfieff knocked on the door, they were "scared out their wits." Secord testified at her trial that she "jumped out her skin" when someone began pounding on the door. Terrified, they all ran to different parts of the cottage, hiding from who they assumed was a diabolical attacker. When it became clear that Deputy Pfieff was a member of law enforcement, and not a hobgoblin, the group of friends emerged from hiding.

Fitzgibbon did explain to Deputy Pfieff that he had permission from his uncle to use the cottage, but he could not, due to his shock, recall his uncle's number in Florida until later; and even then, when called by the Sheriff's Department, there was no answer. There were, however, pictures of Fitzgibbon and his family in the cottage, and he showed the deputies where he kept the key to check on the cottage. When the Department was finally able to contact the uncle, he agreed that he asked Fitzgibbon to check on the property, but that he asked him "not to have any parties" as he worried about his insurance liability.

These details were left out of the majority's opinion for what I will charitably assume was a concern for brevity. To my mind, however, they prove that no reasonable officer could find he had probable cause to arrest Secord or any of the other young adults. This was simply a group of friends playing a board game in a

spooky, out-of-the-way location as a lark. It was not a cabal of terrorists plotting the next 9/11, despite what the majority suggests.

The Supreme Court has held that probable cause to arrest exists if "at the moment the arrest was made[,] the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that" the suspects committed a crime. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). The touchstone of any probable cause analysis is whether there exists "a reasonable ground for belief of guilt." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). "[T]he belief of guilt must be particularized with respect to the person to be searched or seized." *Id.* Further, "[f]or probable cause to exist, there must be probable cause for all elements of the crime." *Williams v. City of Alexander,* 772 F.3d 1307, 1312 (8th Cir. 2014) While "officers may weigh the credibility of witnesses in making a probable cause determination, they may not ignore available and undisputed facts." *Baptiste v. J.C. Penney Co.,* 147 F.3d 1252, 1259 (10th Cir. 1998)

Here, the undisputed facts were these: First, Secord and the others believed they had the owner's permission to use the house. In fact, I would argue Fitzgibbon himself believed he had permission, so long as he did not host a party. Second, in clear view to Deputy Pfieff when he looked through the window, these individuals were playing a board game at the kitchen table of the cottage. Third, they were dressed in costumes as witches and ghouls. Fourth, there were bowls of Doritos and other snacks on the table, and some of the players were drinking Diet Pepsi.

In my opinion, these open and obvious facts should have told Deputy Pfieff these young people were having quiet, peaceful, and law-abiding fun. That he chose to ignore them does not give rise to probable cause to arrest them. I believe that lack of probable cause rendered their arrest a violation of the Fourth Amendment, and their convictions should be thrown out as a result. I therefore DISSENT.

Supreme Court of the United States

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.

No. 1-2017
February 20, 2017
Case below: 123 F.4th 1 (2nd Cir. 2016).

Opinion

Petition for writ of certiorari granted on the following questions:

1. Whether the Second Circuit applied the correct standard to determine if Deputy Pfieff had probable cause to arrest Respondent; and

2. Whether the "reasonableness test" to determine a time for bail hearings articulated by the Second Circuit protects the Due Process rights of undocumented aliens.