

**No. 19-35513**  
**No. 19-35514**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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MIGUEL ANGEL REYNAGA HERNANDEZ,

*Plaintiff-Appellee,*

v.

DERREK SKINNER, in his individual capacity,

and PEDRO HERNANDEZ, in his individual capacity,

*Defendants-Appellants.*

On Appeal from the United States District Court  
For the District of Montana; No. 1:18-cv-00040-SPW  
Hon. Susan P. Watters

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**DEFENDANTS-APPELLANTS' REPLY BRIEF**

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## **Introduction**

Pedro Hernandez and Derrek Skinner filed a notice of appeal to reverse the District court's decision denying them qualified immunity and granting partial summary judgment in favor of Miguel Hernandez. Doc. No. 1. Pedro Hernandez and Skinner filed their opening brief and excerpts of the record. Doc. Nos. 16-18. Miguel Hernandez filed his answering brief and supplement to excerpts of the record. Doc. Nos. 23-24. Miguel Hernandez argues the Court should uphold the District court's decision and deny the appeal. Pedro Hernandez and Derrek Skinner now file this consolidated Reply.

### **Miguel Hernandez's Argument Summary**

According to Miguel Hernandez, the Court should affirm the District court's decision to deny Pedro Hernandez and Derrek Skinner qualified immunity, arguing the District court did not err when it denied Pedro Hernandez and Skinner qualified immunity. Doc. No.23 p. 9.

### ***Miguel Hernandez's Argument Answering Pedro Hernandez***

In his Answering Brief, Miguel Hernandez argued the Court should affirm the District court's decision to deny Pedro Hernandez qualified immunity. Doc. No. 23. Miguel Hernandez does not address whether Pedro Hernandez's conduct, the request itself violated his right against unreasonable searches and seizures. Doc. No. 23, pp. 33-43.

Miguel Hernandez argues the District court did not err when it determined Pedro Hernandez was an integral participant in the alleged violation. Doc. No. 23, pp. 34-37. Pedro Hernandez requested an investigation, advised Skinner of the testimony he had heard, did not allow Miguel Hernandez's wife to warn Miguel Hernandez that there would be an investigation, requested Skinner to advise him of the results of his investigation and the investigation occurred in the vicinity of the courthouse he worked in. Doc No. 23, p.27-28. Miguel Hernandez does not explain how Pedro Hernandez directed Skinner to detain or arrest him. He does not present any evidence that Pedro Hernandez directed Skinner to detain or arrest him or asserted any form of control over the outcome of the investigation. Regardless of the lack of evidence, Miguel Hernandez argues the District court was correct when it determined that Skinner detained and arrested him at the direction of Pedro Hernandez. Doc. No. 23, pp. 34-37.

The District court did not err when it denied Pedro Hernandez qualified immunity. Miguel Hernandez argues that whether the Court has clearly established the particulars of the doctrine of integral participant or not is not relevant to determining the issue of qualified immunity. Doc. No. 23, pp. 37-40. This is not Pedro Hernandez's argument as to why the District court erred when it denied him qualified immunity. Doc. No. 36, pp. 14-16, 18-19. His argument was *Melendres* and *Boyd* did not place him on notice that his request would violate Miguel

Hernandez's right. *Id.* He does not address how *Melendres* and *Boyd* placed Pedro Hernandez on notice that his request for an investigation would violate his right. Doc. No. 23, pp. 33-43.

The Court should not overrule the integral participant doctrine. Doc. No. 23, pp. 33. It is not contrary to the general principle of personal liability that a person is responsible for his actions and only responsible for the actions of others in limited situations. The integral participant doctrine is not a form of vicarious liability. Doc. No. 23, pp. 40-43.

***Miguel Hernandez's Argument Answering Derrek Skinner***

In his Answering Brief, Miguel Hernandez argued the Court should affirm the District court's decision to deny Skinner qualified immunity. Doc. No. 23, pp. 19-22. The facts and circumstances presented to Skinner did not establish probable cause Miguel Hernandez might have committed the crime of illegal entry into the United States. Doc. 23 p. 1. Illegal presence in the United States is not enough cause to perform an investigatory stop for illegal entry into the United States. Doc. No. 23, p. 18.

Local law enforcement can only enforce criminal immigration law absent an agreement with ICE to enforce civil immigration law. Doc. No 23, p. 21. A person illegally present in the United States is only an indication of a violation of civil immigration law. *Id.* It is not indicative of a violation of criminal immigration law.



*Id.* It does not create a reasonable suspicion of criminal activity to allow for an investigatory stop. *Id.* According to Miguel Hernandez, “neither federal nor state law authorizes local officers in Montana to *seize* an individual for the sole purpose of investigating their immigration status.” (emphasis added). Doc. 23, p. 22. Miguel Hernandez does not specifically address reasonable suspicion.

Local law enforcement without an agreement with ICE to enforce civil immigration law cannot detain a person illegally in the United States because it is only indicative of a violation of civil immigration law. Doc. 23 pp. 18-19. The sheriff’s office Skinner worked for did not have an agreement with ICE to enforce civil immigration law. Doc. 23 pp. 28-29. According to Miguel Hernandez, Skinner did not have the authority to enforce civil immigration law. Doc. No. 23, pp. 19-22.

According to Miguel Hernandez, the Court should not overrule *Melendres*. Doc. No. 23, pp. 22-29. He does not provide any explanation as to how it is based on precedent. As mentioned above he believes illegal presence is only indicative of a civil immigration violation and not of a criminal immigration violation. It is not logical to believe a person illegally in the United States might have illegally entered the United States. The same reason why illegal presence does not establish probable cause to arrest a person for illegal entry is why illegal presence does not establish reasonable suspicion for an investigatory stop to determine whether a person illegally entered.

The facts and circumstances presented to Skinner did not establish probable cause Miguel Hernandez might have committed the crime of illegal entry into the United States. Doc. 23 p. 11. The testimony, identification with a Mexican identification card, inability to speak English and inability to articulate his immigration status did not establish probable cause he might have illegally entered the United States, a crime. *Id.* These facts only indicated he might have committed a civil immigration violation. Doc. No. 23 pp. 11-12.

According to Miguel Hernandez, Skinner could not rely on the request by ICE to arrest him. Doc. No. 23, pp. 29-33. Skinner arrested him before ICE requested Skinner arrest him, whether ICE requested Skinner to arrest him does not matter. *Id.* The probable cause ICE had to arrest him could not be imputed to Skinner because he was not working in concert with ICE. Skinner had to be working in concert with ICE to have the probable cause imputed to him. It did not matter whether ICE requested Skinner to arrest him. Skinner could not enforce civil immigration law. The sheriff's office Skinner worked for did not have an agreement with ICE to enforce civil immigration law. Doc. No 23, pp. 35-37.

### **Pedro Hernandez's Argument**

The district court erred when it denied Pedro Hernandez qualified immunity. He did not violate Miguel Hernandez's right against unreasonable searches and seizures when he requested law enforcement investigate Miguel Hernandez's status

in the United States. Pedro Hernandez based his request for an investigation on testimony he heard Miguel Hernandez was illegally in the United States. He did not direct the detention or arrest of Miguel Hernandez. There are no facts to support this conclusion. The facts only support he requested an investigation. His request for an investigation did not make him an integral participant in the investigation. He did not participate in the investigation. He did not detain or arrest Miguel Hernandez. He did not direct the detention or arrest of Miguel Hernandez. *Melendres v. Arpaio*, 784 F.3d 1254, and *Boyd* did not place him on notice that his request would violate Miguel Hernandez's right. If the Court concludes Pedro Hernandez was an integral participant, it should overturn the doctrine as contrary to the premise a person is only responsible for his own actions, not the actions of others.

**I. Miguel Hernandez has not identified any facts to support the district court's conclusion that Pedro Hernandez directed his detention and arrest.**

Pedro Hernandez did not violate Miguel Hernandez's right against unreasonable searches and seizures when he requested the investigation. He requested an investigation. ER 36 ¶ 1. He did not have the authority to require or direct an investigation. Pedro Hernandez did not direct the investigation. ER 36-38. The request itself did not violate Miguel Hernandez's rights and Miguel Hernandez does not make any argument that the request violated his rights.

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Pedro Hernandez was not an integral participant in the alleged violation. Pedro Hernandez did not participate in the alleged violation. ER 36-38. Skinner conducted the detention and arrest. ER 36-38. Pedro Hernandez did not direct the detention or arrest. *Id.* Skinner did not consult with him as to the detention or arrest. *Id.* He was not present when Skinner detained or arrested Miguel Hernandez. *Id.* The record does not support the District court's determination Skinner detained or arrested Miguel Hernandez based on Pedro Hernandez's direction. ER 36-38. There is no evidence he ordered Skinner to detain or arrest Miguel Hernandez. There is no evidence that Skinner consulted with him as to the detention and arrest of Miguel Hernandez. He only requested an investigation and advised Skinner of what he knew. ER 45. Pedro Hernandez's request for an investigation, communication with Skinner as to the testimony he had heard, prohibition on Miguel Hernandez's wife to warn Miguel Hernandez of the pending investigation, request to Skinner to be advised of the results of the investigation and the investigation occurred in the vicinity of the courthouse where he worked did not make him an integral participant in the detention and arrest of Miguel Hernandez. ER 36-38.

Skinner did not act as if Pedro Hernandez had ordered him to arrest Miguel Hernandez. He did not immediately handcuff Miguel Hernandez and transport him to the detention facility. ER 44. When Pedro Hernandez saw Skinner and Miguel Hernandez, outside the courthouse, when Pedro Hernandez was going to lunch, he

asked Skinner about his investigation. ER 37-38. Skinner told him about the investigation. *Id.* He did not ask Skinner why he had not transported Miguel Hernandez to the detention facility. *Id.* He did not tell Skinner what to do. *Id.*

**II. Pedro Hernandez's participation in the violation does not rise to the level of participation in cited cases.**

Pedro Hernandez's alleged participation in the detention and seizure does not rise to the level of participation in those cases cited by Miguel Hernandez where the Court found a person to be an integral participant. In *Boyd v. Benton Cty.*, 374 F.3d 773, (9th Cir. 2004), the Court found that all police officers who participated in the execution of a search warrant where some of the police officers used excessive force with the use of a flash grenade were integral participants in the use of force. *Id.* at 778. Every police officer in the execution of the search warrant knew of the plan to use the grenade. *Id.* None of the police officers objected to the use of the grenade. *Id.* All the police officers actively participated in the execution of the search warrant. Pedro Hernandez did not plan or participate in the detention or arrest of Miguel Hernandez. ER 36-38.

Pedro Hernandez had no knowledge or control over the actions or outcomes after he requested an investigation. ER 36-38. In *Bonivert v. City of Clarkston*, 883 F.3d 865, (9th Cir. 2018), the Court found that police officers who helped plan and execute an entry into a house that violated the right against unreasonable searches and seizures and excessive use of force were integral participants in the violation.

Pedro Hernandez did not plan or participate in the detention or arrest of Miguel Hernandez. ER 45-47. In *Keates v. Koile*, 883 F.3d 1228 (9th Cir. 2018), the Court found that a parent had adequately pled some social workers may have been integral participants in the decision to remove a child and had not adequately pled some social workers may have been integral participants to remove the child. The social workers the Court found may have been integral participants because they had some participation in the decision to remove the child. *Id.* At 1240. Pedro Hernandez did not participate in the detention or arrest of Miguel Hernandez. ER 36-38.

Pedro Hernandez did not participate in the detention or arrest of Miguel Hernandez. ER 36-38. In *Hopkins v. Bonvicino*, 573 F.3d 752, 760–61 (9th Cir. 2009), arrestee Hopkins brought § 1983 action against city and city police officers, alleging that officers violated his civil rights by entering his home without warrant, arresting him without probable cause, and using excessive force. *Id.* The Court affirmed the denial of summary judgment with respect to two officer's motion for summary judgment for qualified immunity, while holding that one other officer, Officer Nguyen is entitled to qualified immunity. *Id.* at 760. The Court rejected Hopkins' argument that because Officer Nguyen was part of a conversation where the plan of action to enter the home was developed; he should be denied qualified immunity. *Id.* at 770. The Court found that because the decision to actually enter the home was not made or discussed during that conversation and was conducted

without Officer Nguyen present; Officer Nguyen participated in neither the planning nor the execution of the unlawful search and therefore, that Officer Nguyen is entitled to qualified immunity on the unlawful search claim. *Id.* Pedro Hernandez was not part of any conversation, planning or execution related to the outcome of the investigation of Miguel Hernandez nor was he present for the detention or arrest of Miguel Hernandez. ER 36-38.

**III. Miguel Hernandez has not provided an explanation as to how Pedro Hernandez should have known based on *Melendres* and *Boyd* his request for an investigation would violate his right against unreasonable searches and seizures.**

Pedro Hernandez should not have known his request for an investigation would violate Miguel Hernandez's right. There is no authority that a request to investigate would violate a person's right against unreasonable searches and seizures. The District court provided no authority Pedro Hernandez should have known that his request for an investigation would violate Miguel Hernandez's right. According to the District court, based on *Melendres*, that dealt in part with whether illegal presence in the United States creates a reasonable suspicion to detain a person for an investigatory stop, and *Boyd*, that dealt in part with the integral participant doctrine, Pedro Hernandez should have known that his request for an investigation would violate Miguel Hernandez's right. ER 23-24. The District court provided no explanation as to how *Melendres* and *Boyd* should have placed him on notice that his request for an investigation would violate Miguel Hernandez's right. *Id.* Miguel

Hernandez provided no explanation as to how *Melendres* and *Boyd* should have placed Pedro Hernandez on notice that his request for an investigation would violate his right.

“The “clearly established” standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is “clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). This requires a high “degree of specificity.” *Mullenix v. Luna*, 577 U.S. —, —, 136 S.Ct. 305, 309, 193 L.Ed.2d 255 (2015) (*per curiam*). We have repeatedly stressed that courts must not “define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.” *Plumhoff, supra*, at 2023 (internal quotation marks and citation omitted). A rule is too general if the unlawfulness of the officer's conduct “does not follow immediately from the conclusion that [the rule] was firmly established.” *Anderson, supra*, at 641, 107 S.Ct. 3034. In the context of a warrantless arrest, the rule must obviously resolve “whether ‘the circumstances with which [the particular officer] was confronted ... constitute[d] probable cause.’ ” *Mullenix, supra*, at 309 (quoting *Anderson, supra*, at 640–641, 107 S.Ct. 3034; some alterations in original).” *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018).

In *Melendres*, the Court found the district court correctly granted a preliminary injunction that did not allow the police to perform an investigatory detention of a person to determine whether a person had committed the crime of illegal entry into the United States based solely on the person's presence in the United States. *Melendres* at 1258. It was alleged that Defendants implemented patrols where Latino persons were singled out for stops, detentions, searching and questioning by Defendants in violation of constitutional rights. *Id.* at 1258. The



Court found the District court did not abuse its discretion in challenging the constitutionality of a county sheriff's office's policy of stopping and detaining Latino drivers and passengers pretextually to allegedly enforce federal and state immigration-related laws. *Id.* at 1267. The factual differences in *Melendres* is far too removed from the facts in this matter to place Pedro Hernandez on notice.

In *Boyd*, the Court found that all police officers who participated in the execution of a search warrant where some of the police officers used excessive force with the use of a flash grenade were integral participants in the use of force. *Id.* at 777–78. Every police officer in the execution of the search warrant knew of the plan to use the grenade. None of the police officers objected to the use of the grenade. *Id.* at 780. All the police officers actively participated in the execution of the search warrant. *Id.* *Boyd* did not place Pedro Hernandez on notice that his request for an investigation would violate Miguel Hernandez's right. The factual difference between *Boyd* and the present situation are too great. *Boyd* dealt with an excessive use of force claim in which all the police officers knew of the plan to use the grenade. None of the police officers objected to the use of the grenade. All the police officers actively participated in the execution of the search warrant. The present situation deals with an unreasonable search and seizure claim. Pedro Hernandez did not know of Skinner's plan to investigate the claim. ER 46 ¶ 1. Pedro Hernandez did not actively participate in the detention or arrest of Miguel Hernandez. ER 36-38. *Boyd*

does not clearly indicate what Pedro Hernandez did would violate Miguel Hernandez's right or make him an integral participant with the alleged violation by Skinner.

It is not immediately clear from *Melendres* and *Boyd* that Pedro Hernandez's conduct, his request for an investigation, would violate Miguel Hernandez's right. The district court provided no explanation as to how the decisions in *Melendres* and *Boyd* should have placed him on notice that his request for an investigation would violate Miguel Hernandez's right. The District court employed too general of a rule to determine whether Pedro Hernandez violated a clearly established right.

**IV. If the Court concludes Pedro Hernandez was an integral participant, it should overturn the doctrine as contrary to the premise a person is only responsible for his own actions, not the actions of others.**

The integral participant doctrine is not based on logic. It is contrary to the general principle of personal liability that a person is responsible for his actions and only responsible for the actions of others in limited situations. The integral participant doctrine is a form of vicarious liability. The doctrine of "[I]ntegral participation does not require that each officer's actions themselves rise to the level of a constitutional violation." *Boyd at 780*. While the integral participant doctrine may ensure some level of personal involvement in the unlawful conduct, the doctrine does not ensure the level of involvement will rise to that of a constitutional violation, making a person responsible for the constitutional violations of others. Miguel

Hernandez claims integral participant is not contrary to the premise a person is only responsible for his own actions, not the actions of others. It is precedent. The Court *en banc* would have to overturn it.

Vicarious liability is not permitted in a § 1983 action. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978), holding that a municipality can be liable under § 1983 when executing a government policy or custom inflicts the injury, but not merely because the municipality's employees or agents inflict the injury. Liability in § 1983 actions is personal, and officials are liable only for their own actions. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). “Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.” *Id.* at 676. The integral participant doctrine contravenes *Monell's* rule against vicarious liability because it allows a court to find an officer personally responsible for others' unconstitutional conduct under § 1983 without regard to whether the individual officer acted culpably, or whether the officer's acts proximately caused the injury.

**V. There is no genuine issue of material fact.**

There is no genuine issue of material fact as to what Pedro Hernandez did. He requested an investigation. ER 36 ¶ 1. He advised Skinner of the testimony he had heard. ER 45 ¶ 1. He did not direct Skinner's investigation. *Id.* Skinner did not

consult him as to how he should conduct the investigation. ER 36-38. He left the investigation solely to the discretion of Skinner. *Id.* He was not present when Skinner detained Miguel Hernandez in the hallway and was not a bystander. *Id.* He was only briefly present when Skinner detained Miguel Hernandez outside of the courthouse. ER 36 ¶ 1. He asked Skinner about the investigation. *Id.* He was briefly a bystander outside of the courthouse. *Id.* He was not present when Skinner decided to arrest Miguel Hernandez at the request of ICE. *Id.* He was not even a bystander when Skinner decided to arrest Miguel Hernandez. *Id.* There are video recordings of Skinner's interaction with Miguel Hernandez and Pedro Hernandez is only briefly present in one of the recordings outside of the courthouse. ER 36-38.

Miguel Hernandez's assertion Pedro Hernandez was present at the scene of the incident is unsupported by the evidence. These acts did not direct Skinner to detain or arrest Miguel Hernandez. Neither the district court nor Miguel Hernandez identify when Pedro Hernandez directed Skinner to detain or arrest Miguel Hernandez. They cannot identify when he directed Skinner to detain or arrest Miguel Hernandez because it did not happen. The district court's conclusion Skinner detained and arrested Miguel Hernandez at the direction of Pedro Hernandez are not supported by the facts. There are no facts to support the conclusion.

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### **Derrek Skinner's Argument**

The district court erred when it denied Derrek Skinner qualified immunity. Skinner did not violate Miguel Hernandez's right against unreasonable searches and seizures when he detained and subsequently arrested Miguel Hernandez. He had a reasonable suspicion that Miguel Hernandez might have committed the crime of illegal entry into the United States as indicated by his alleged illegal presence in the United States that allowed him to detain Miguel Hernandez to investigate the possible crime. Illegal presence is indicative of the possibility of illegal entry. There is a logical connection between the two. The general standard for investigatory detentions is a logical belief a crime might have been committed based on the facts known to the police officer. *Melendres* is contrary to the general standard for investigatory detentions. It is not based on logic or precedent. The Court should overturn *Melendres*.

- I. *Melendres* is such a drastic departure from the generally accepted standard for investigatory detentions and as Skinner had little experience with immigration issues, it was reasonable for him to believe that he could employ the general standard to detain Miguel Hernandez.**

Miguel Hernandez has not provided a logical or precedential basis for *Melendres*. His logical basis is because illegal presence does not establish probable cause to arrest a person for illegal entry into the United States, illegal presence does not establish reasonable suspicion for an investigatory detention of a person to

determine whether the person might have committed the crime of illegal entry into the United States. Illegal presence in the United States does not establish probable cause to arrest a person for illegal entry because a person might be illegally in the United States because the person overstayed a visa, not a crime. Illegal presence in the United States does establish the possibility that the person might have committed the crime of illegal entry into the United States that should allow an investigatory detention to investigate the possible crime. To perform an investigatory detention, the police do not have to eliminate all possible non-criminal scenarios.

Probable cause is the standard addressed in most precedent. In *Gonzales v. City of Peoria*, 722 F.2d 468, 476–77 (9th Cir. 1983), overruled by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999), the Court found that illegal presence by itself does not establish probable cause to arrest a person for illegal entry. *Id.* at 476-77. The Court did not find that illegal presence is not an indication a person might have illegally entered that would prohibit an investigatory stop to determine whether the person illegally entered. *Id.* In *Martinez-Medina v. Holder*, 673 F.3d 1029 (9th Cir. 2011), the Court once again found that illegal presence by itself does not establish probable cause to arrest a person for illegal entry. *Id.* at 1036. The Court did not find that illegal presence is not an indication a person might have illegally entered that would prohibit an investigatory stop to determine whether the person illegally entered.

A reasonable officer could have been confused by statements in *Lopez–Mendoza* and *Martinez*. A close reading of those cases demonstrates that neither meant to suggest that an alien's mere unauthorized presence is itself a crime. Both cases, rather, were referencing specific criminal statutes, *see Lopez–Mendoza*, 468 U.S. at 1038, 104 S.Ct. 3479 (citing 8 U.S.C. §§ 1302, 1306, 1325); *Martinez v. Nygaard*, 831 F.2d at 828 & n. 4 (citing 8 U.S.C. § 1304(e)), none of which criminalizes mere unlawful presence. *Martinez-Medina* held that an illegal arrest does not make the identification of a person inadmissible or suppressible. However, these cases are so specific to statute, it would be difficult for a reasonable officer to think these cases apply more generally.

Miguel Hernandez's precedential basis are *Gonzales*, *Martinez–Medina* and *Terry*. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889 (1968) *Gonzales* and *Martinez–Medina* held illegal presence does not establish probable cause to arrest a person for illegal entry into the United States. They did not hold illegal presence does not establish reasonable suspicion for an investigatory detention of the person to determine whether the person committed the crime of illegal entry into the United States. Given Skinner's lack of experience in immigration law, it was reasonable for him to believe he could employ the generally established standard.

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**II. The Court should overrule *Melendres* as the case is not based in precedent or grounded by logic.**

Miguel Hernandez has not provided a logical or precedential basis for *Melendres*. His logical basis is because illegal presence does not establish probable cause to arrest a person for illegal entry into the United States, illegal presence does not establish reasonable suspicion for an investigatory detention of a person to determine whether the person might have committed the crime of illegal entry into the United States. Illegal presence in the United States does not establish probable cause to arrest a person for illegal entry because a person might be illegally in the United States because the person overstayed a visa, not a crime. Illegal presence in the United States does establish the possibility that the person might have committed the crime of illegal entry into the United States that should allow an investigatory detention to investigate the possible crime. To perform an investigatory detention, the police do not have to eliminate all possible non-criminal scenarios. His precedential basis are *Gonzales*, *Martinez–Medina* and *Terry*.

*Gonzales* and *Martinez–Medina* held illegal presence does not establish probable cause to arrest a person for illegal entry into the United States. They did not hold illegal presence does not establish reasonable suspicion for an investigatory detention of the person to determine whether the person committed the crime of illegal entry into the United States. *Terry* held the police may conduct a cursory search for weapons when they have a reasonable suspicion a person might be



engaged in criminal activity and armed. It did not hold illegal presence does not establish reasonable suspicion for an investigatory detention of the person to determine whether the person committed the crime of illegal entry into the United States. It is precedent. The Court *en banc* would have to overturn it. The process to overturn it has to begin somewhere.

**III. Skinner had reasonable suspicion to detain, and probable cause to arrest Miguel Hernandez.**

The facts and circumstances presented to Skinner establish a reasonable suspicion Miguel Hernandez might have committed the crime of illegal entry into the United States that should have allowed him to perform an investigatory stop. He knew there had been testimony that Miguel Hernandez was illegally in the United States. ER 50. Miguel Hernandez identified himself with a Mexican identification card. ER 51. Miguel Hernandez did not identify himself with a United States passport. *Id.* Miguel Hernandez did not identify himself with an identification card issued from a state in the United States. *Id.* Miguel Hernandez did not identify himself with a Mexican passport with a visa to enter the United States. *Id.* Miguel Hernandez could not articulate his immigration status. *Id.* Miguel Hernandez did not tell him he was a United States citizen. *Id.* Miguel Hernandez did not tell him he was a Mexican citizen in the United States with a valid visa. *Id.* Miguel Hernandez did not tell him he was a Mexican citizen in the United States with an expired visa. *Id.* Skinner was confronted with a Mexican citizen in the United States apparently

without a visa. This was enough to allow him to contact ICE to determine what, if anything, should be done with him. ICE verified his suspicion and requested him to arrest Miguel Hernandez. ER 43. At the request of ICE, he transported Miguel Hernandez to the Yellowstone County Detention Facility. ER 43 ¶ 1. Miguel Hernandez did not identify any facts that Skinner detained him longer than necessary to determine whether he had committed a crime as indicated by his illegal presence in the United States. Skinner checked with dispatch for arrest warrants. He determined there were no warrants.

Skinner did not arrest Miguel Hernandez before ICE requested Skinner arrest him. ER 44. Skinner did not believe he had probable cause to arrest him until ICE made the request. *Id.* If ICE did not make the request, Skinner would have released him. *Id.* If Skinner had arrested him when he handcuffed him and placed him in the vehicle, he would have immediately transported him to the detention facility. He would not have bothered to contact dispatch for an arrest warrants check or contacted ICE to determine whether it wanted to detain Miguel Hernandez. Skinner did not have to be working with ICE to have the probable cause ICE had to arrest Miguel Hernandez imputed to him. ICE just needed the probable cause and to have made the request to Skinner. Skinner did not enforce civil immigration law when he arrested Miguel Hernandez. He enforced criminal immigration law when he arrested him. Skinner arrested him at the request of ICE for a violation of criminal

immigration law, illegal entry into the United States. *Id.* Skinner did not arrest him because he overstayed a visa. *Id.*

Skinner checked with ICE as to whether it wanted Miguel Hernandez. ICE requested Skinner arrest him. Based on the request, Skinner arrested him without delay. Skinner's investigatory detention was as short as possible. *United States v. Sharpe*, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985); *Thomas v. Dillard*, 818 F.3d 864, 874 (9th Cir. 2016); *Abdel-Shafy v. City of San Jose*, No. 17-CV-07323-LHK, 2019 WL 570759, at \*5 (N.D. Cal. Feb. 12, 2019). He has not provided any authority a police officer has to work in collaboration with another police officer to allow a police officer to act on the request of another police officer to arrest a person. *Ramirez* does not stand for this proposition. *United States v. Ramirez*, 473 F.3d 1026 (9th Cir. 2007). He has not provided any authority that when a police officer makes a request to another police officer all the police officers involved have to have concurrent jurisdiction to make a valid request. Even if the premise was true, Skinner had the authority to enforce criminal immigration law, such as illegal entry into the United States, the reason he arrested Miguel Hernandez on behalf of ICE. The probable cause of ICE who requested the arrest is imputed to Skinner, the police officer who conducted the arrest. The District court provided no explanation as to why under the particular facts of the case this imputed probable cause did not apply. ER 18-19.

Miguel Hernandez claims the Court decided *Melendres* several years before the detention and arrest and therefore, Skinner should have known based on *Melendres* that the detention would violate Miguel Hernandez's right. Because *Melendres* is such a drastic departure from the generally accepted standard for investigatory detentions and Skinner had little experience with immigration issues, it was reasonable for him to believe that he could employ the general standard to detain Miguel Hernandez.

### **Conclusion**

Miguel Hernandez entered the United States without permission. He committed a crime when he entered the United States. He did not have a visa to enter the United States. Pedro Hernandez heard testimony that Miguel Hernandez was illegally in the United States. He requested law enforcement investigate the allegation. He told Skinner he had heard testimony Miguel Hernandez was illegally in the United States. He did not participate in the investigation. Skinner investigated the allegation. He detained Miguel Hernandez. During the detention, he determined Miguel Hernandez was a Mexican citizen, Miguel Hernandez did not have a visa to enter the United States, Miguel Hernandez could not explain his presence in the United States and Miguel Hernandez did not have any arrest warrants. He contacted ICE about Miguel Hernandez. ICE advised him to arrest Miguel Hernandez. He

arrested Miguel Hernandez at the request of ICE. At the request of ICE, he enforced criminal immigration law. He did not enforce civil immigration law.

Pedro Hernandez did not violate Miguel Hernandez's right against unreasonable searches and seizures with his request for an investigation. He did not direct the detention or arrest of Miguel Hernandez. He was not an integral participant in the detention and arrest. *Melendres* and *Boyd* did not place him on notice his request would violate Miguel Hernandez's right. Skinner did not violate Miguel Hernandez's right with his detention and arrest of him. He had a reasonable suspicion of criminal activity to detain him and probable cause to arrest him. Illegal presence gives rise to a reasonable suspicion of illegal entry that allows for an investigatory detention for illegal entry. *Melendres* is not based on logic or precedent. He could rely on ICE that it had probable cause to arrest Miguel Hernandez. He did not have to be working in collaboration with ICE before the request to rely on the request. The Court should reverse the District court's decision to deny Pedro Hernandez and Skinner qualified immunity.

Dated: October 4, 2019

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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Dated: October 4, 2019

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