

Kevin Gillen
Deputy Yellowstone County Attorney
Yellowstone County Courthouse, Room 701
P.O. Box 35025
Billings, Montana 59107-5025
(406) 256-2870
kgillen@co.yellowstone.mt.gov

Attorney for Derrek Skinner and Pedro Hernandez

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

MIGUEL ANGEL)	
REYNAGA HERNANDEZ,)	Cause No. CV 18-40-BLG-SPW
)	
Plaintiff,)	PEDRO HERNANDEZ’S
)	BRIEF IN SUPPORT OF
vs.)	MOTION FOR SUMMARY
)	JUDGMENT
DERREK SKINNER <i>et al</i> ,)	
)	FILED UNDER SEAL
Defendants.)	STIPULATION AND ORDER,
)	ECF NO. 36, ¶ 6, pp. 6-7

Introduction

Miguel Hernandez filed a complaint that alleged Derrek Skinner, a former Deputy Yellowstone County Sheriff, and Pedro Hernandez, a former Yellowstone County Justice of the Peace, violated his right against unreasonable searches and seizures under the 4th Amendment of the United States Constitution. ECF No. 1. Skinner and Pedro Hernandez filed an answer that denied the allegations. ECF No. 18. Pedro Hernandez filed a motion for summary judgment. ECF No. 37. Pedro

Hernandez argues in the motion: (1) he did not violate Miguel Hernandez's right against unreasonable searches and seizures, (2) if he did violate the right, he is entitled to qualified immunity, (3) he did not act with the required mental state to have punitive damages assessed against him and (4) injunctive and declaratory relief are not available against him. *Id.* Pedro Hernandez files this brief in support of the motion.

Facts

On October 2, 2017, Pedro Hernandez, a Yellowstone County Justice of the Peace, presided over a protective order hearing. Miguel Hernandez appeared at the hearing as a potential witness. Pedro Hernandez excluded all witnesses including Miguel Hernandez from the courtroom. During the hearing, a witness testified Miguel Hernandez was illegally in the United States of America. Pedro Hernandez telephoned the Yellowstone County Sheriff's Office to have a deputy sheriff respond to the courtroom to investigate the immigration status of Miguel Hernandez. Pedro Hernandez did not order Miguel Hernandez to be arrested. Derrek Skinner, a Deputy Yellowstone County Sheriff, responded to the courtroom. Pedro Hernandez told Skinner that he had heard testimony that Miguel Hernandez was illegally in the United States of America and requested Skinner investigate the allegation. Pedro Hernandez did not order Skinner to arrest Miguel Hernandez. Skinner left the courtroom. When Pedro Hernandez left the courthouse for lunch, he saw Skinner and Miguel Hernandez in front of the courthouse. Pedro Hernandez asked Skinner what was happening with

Miguel Hernandez. Skinner told Pedro Hernandez he was waiting for a decision from United States Immigration and Customs Enforcement, ICE, as to what to do with Miguel Hernandez. Pedro Hernandez left for lunch. Pedro Hernandez did not order Skinner to arrest Miguel Hernandez. This is the last interaction Pedro Hernandez had with Miguel Hernandez. Miguel Hernandez had entered the United States of America without permission. Miguel Hernandez committed a crime with his entry into the United States of America.

This is only a brief summary of what occurred. A more detailed account of what occurred can be found in Pedro Hernandez's Statement of Undisputed Facts.

Summary Judgment

A court should grant a motion for summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(a), Fed.R.Civ.P. Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The moving party for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). Where the moving party will have the burden

of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *See Id.* On an issue where the nonmoving party will have the burden of proof at trial, the moving party need only point out there is an absence of evidence to support the nonmoving party's case. *See Celotex* at 325 and 2554. If the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, set forth specific facts showing a genuine issue for trial. *See Id.* at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The standard to grant a motion for summary judgment is similar to the standard for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–52, 106 S. Ct. 2505, 2511–12, 91 L. Ed. 2d 202 (1986). Summary judgment is an integral part of the Federal Rules of Civil Procedure and not a disfavored procedural shortcut. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986).

Unreasonable Searches and Seizures

Law

A person has a right against unreasonable searches and seizures by the government. *U. S. Const. amend. IV*. The government violates a person's right against unreasonable searches and seizures when it detains the person for an investigatory stop without reasonable suspicion that the person is or has engaged in criminal

activity. *See Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The government may detain a person for a reasonable period to determine whether the person is or has engaged in criminal activity. *See United States v. Sharpe*, 470 U.S. 675, 686–87, 105 S. Ct. 1568, 1575–76, 84 L. Ed. 2d 605 (1985). If the government determines the person has engaged in criminal activity, it develops probable cause to believe the person committed a crime, it may arrest the person. *See United States v. McCarty*, 648 F.3d 820, 838–39 (9th Cir. 2011), as amended (Sept. 9, 2011). If the government determines the person has not engaged in criminal activity, it does not develop probable cause to believe the person committed a crime, it should release the person. *Id.* When the government detains a person it may perform a cursory search of the person for weapons if the government believes that person may be armed and dangerous. *Terry, supra.*

It is a crime to enter the United States of America without permission. 8 U.S.C. § 1325(a). A person who enters the United States of America without permission commits a crime. *Id.* The person is subject to criminal prosecution. *Id.* The government can perform an investigatory stop of a person to determine whether the person has entered the United States of America without permission. *See Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 464 (4th Cir. 2013); *Gonzales v. Peoria*, 722 F.2d 468, 475-76 (9th Cir. 1983) *overruled on other grounds*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999). It is not a crime to stay in the United States

of America longer than allowed after the person has entered with permission. 8 U.S.C.A. § 1227. A person who stays in the United States of America longer than allowed after the person has entered with permission does not commit a crime. *Id.* The person is subject to civil prosecution. *Id.*

Analysis

Rachel Flagen testified Miguel Hernandez was illegally in the United States of America. Pedro Hernandez contacted the Sheriff's Office to investigate the immigration status of Miguel Hernandez. Pedro Hernandez did not order anyone to arrest Miguel Hernandez. Pedro Hernandez told Skinner, the deputy, Flagen testified that Miguel Hernandez was illegally in the United States of America. There are audio recordings of what Flagen said in the hearing, Walker Affidavit Exhibit 1, 17:44-17:47, Pedro Hernandez said to the Sheriff's Office in the hearing, *Id.* Exhibit 1, 45:50-46:54, 48:50-49:20, and what he said to Skinner in the next hearing, *Id.* Exhibit 2, 06:40-08:10. In neither hearing does Pedro Hernandez order anyone to arrest Miguel Hernandez. *Id.* Exhibits 1 & 2. Skinner detained Miguel Hernandez to determine whether ICE wanted to detain Miguel Hernandez. While Skinner had Miguel Hernandez detained outside of the courthouse, waiting for a response from ICE, Pedro Hernandez, while going to lunch, saw Skinner and asked Skinner how the investigation was proceeding. Skinner told Pedro Hernandez he was waiting for a response from ICE as to whether it wanted to detain Miguel Hernandez. Pedro

Hernandez talked to Jana Hernandez and then went to lunch with his wife. There is a video recording of what occurred outside of the courthouse. The recording shows Pedro Hernandez talking to Skinner, talking to Jana Hernandez and then walking away from the courthouse and down the alley where his vehicle was parked. Erpenbach Affidavit Exhibit 4, 11:21-11:24. Pedro Hernandez knows of no legal authority that makes it a violation of the right against unreasonable searches and seizures to contact law enforcement to investigate a possible crime. Pedro Hernandez never ordered anyone arrested. Had Pedro Hernandez ordered Skinner to arrest Miguel Hernandez, Skinner would have immediately driven Miguel Hernandez to the Facility. Skinner would not have contacted ICE to determine whether it wanted to detain him. When Pedro Hernandez saw Skinner outside the courthouse, he would have asked Skinner why he had not transported Miguel Hernandez to the Facility. He would not have asked Skinner how the investigation was proceeding.

Qualified Immunity

Law

Qualified immunity protects government officials from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Qualified immunity shields an official from liability even if the official's actions resulted from a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Groh v.*

Ramirez, 540 U.S. 551, 567, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (Kennedy, J., dissenting). The purpose of qualified immunity is to strike a balance between the competing need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. *Id.* Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). When a court determines whether an official is entitled to qualified immunity it should consider (1) whether the official has violated a constitutional right and (2) whether the right was clearly established at the time of the official's alleged violation. *Pearson*, 555 U.S. at 232, 129 S.Ct. 808. A court should deny qualified immunity to an official when (1) the official has violated a constitutional right and (2) the right at issue was clearly established at the time of the violation that a reasonable official would have understood his conduct in that particular situation would violate the right. *Id.*

Analysis

After Flagen testified Miguel Hernandez had illegally entered the United States of America, it was reasonable for Pedro Hernandez to believe he could summon law enforcement so law enforcement could determine whether Miguel Hernandez had illegally entered the United States of America and not violate Miguel Hernandez's right to unreasonable searches and seizures under the United States Constitution.

There is no legal authority that a person who contacts law enforcement to investigate a possible crime violates the right against unreasonable searches and seizures. Pedro Hernandez did not detain Miguel Hernandez. He did not order anyone to detain Miguel Hernandez. He did not order anyone to arrest Miguel Hernandez. Pedro Hernandez just requested law enforcement to investigate Miguel Hernandez.

Punitive Damages

Law

A jury may award punitive damages to punish a defendant and to deter similar acts in the future. A jury may award punitive damages when a defendant acts with malice, oppression or in reckless disregard of a plaintiff's rights. *Dang v. Cross*, 422 F.3d 800, 806–09 (9th Cir. 2005). A defendant acts with malice if the act is motivated by ill will or spite, or if the purpose of the act is to injure the plaintiff. *Id.* A defendant acts with oppression if the defendant injures, damages or violates a plaintiff's rights with unnecessary harshness or severity, such as by misusing or abusing authority or power or by taking advantage of some weakness or disability or misfortune of the plaintiff. *Id.* A defendant acts in reckless disregard of a plaintiff's rights if, under the circumstances, it reflects complete indifference to a plaintiff's safety or rights, or if the defendant acts in the face of a perceived risk that its actions will violate a plaintiff's rights under federal law. *Id.* It is unclear whether punitive damages have to be proved by a preponderance of the evidence or by clear and convincing evidence. *See Green v. Montana Dep't of Pub. Health & Human Servs.*, No. CV 12-62-H-DLC,

2014 WL 12591835, at *5 (D. Mont. June 13, 2014). Many courts have used the preponderance of evidence standard because the lack of authority to require the clear and convincing evidence standard. *Id.*

Analysis

There is no evidence that Pedro Hernandez acted with malice, oppression or in reckless disregard that would make him responsible for punitive damages. He heard evidence of a potential crime and believed his oath of office to uphold the laws of the State of Montana and the United States of America required him to report the potential crime to law enforcement. He did not report the potential crime because of ill will or spite, or with the purpose to injure Miguel Hernandez. He did not misuse or abuse his authority when he reported the potential crime. He did not act with a complete indifference to Miguel Hernandez's rights or a risk that Miguel Hernandez's rights would be violated when he reported the potential crime.

Injunctive and Declaratory Relief

Law

Injunctive relief either requires a party to abstain from or perform particular conduct. Declaratory relief either declares particular conduct proper or improper. In general, to obtain injunctive relief a party must show (1) irreparable harm, (2) inadequate remedies at law, (3) a remedy in equity is required and (4) public interest would not be disserved. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57, 130 S. Ct. 2743, 2756, 177 L. Ed. 2d 461 (2010). With an injunction to abstain

from particular conduct, a party must show there is a likelihood that the violation is capable of repetition. *Nordstrom v. Ryan*, 762 F.3d 903, 911 (9th Cir. 2014); *Fikre v. Fed. Bureau of Investigation*, 142 F. Supp. 3d 1152, 1164 (D. Or. 2015). There is a likelihood that the violation is capable of repetition when a policy or a practice of the entity caused the violation. *Id.* When a damages claim based on an alleged past constitutional violation is intertwined with a declaratory judgment claim based on the same alleged past constitutional violation, the declaratory judgment claim serves no purpose. *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 847, n.5 (9th Cir.), opinion amended on denial of reh'g, 312 F.3d 416 (9th Cir. 2002).

Analysis

Miguel Hernandez did not file a complaint against Yellowstone County and declined to pursue the official capacity claims against Jeanne Walker, Pedro Hernandez's successor, that would actually have been a claim against the County. Pedro Hernandez did not act pursuant to a County policy when he requested law enforcement to investigate the immigration status of Miguel Hernandez. Because the County is not a party to the case, the injunction or declaration would not run to it.

Pedro Hernandez is retired. Pedro Hernandez is no longer a Yellowstone County Justice of the Peace. An injunction or declaration against him would have little effect. There would be little possibility that a similar situation would occur with him.

Miguel Hernandez will not be able to prove he suffered an irreparable harm or that the remedies at law are inadequate.

Miguel Hernandez filed both a damages claim and a declaratory judgment claim based on the same alleged past constitutional violation. A determination of the damages claim by necessity will also determine the declaratory judgment claim. The declaratory judgment claim is unnecessary.

Conclusion

The Court should grant Pedro Hernandez's motion for summary judgment. There is no genuine issue of material fact and he is entitled to judgment as a matter of law. He did not violate Miguel Hernandez's right to unreasonable searches and seizures. He requested law enforcement to investigate Miguel Hernandez's immigration status based on the sworn testimony of a witness that Miguel Hernandez was illegally in the United States of America. Even if he violated the right, he is entitled to qualified immunity. There is no legal authority that what he did would violate the right. He did not act with malice, oppression or in reckless disregard that would make him responsible for punitive damages. Injunctive and declaratory relief are not available against him.

Dated this 27th day of February, 2019.

/s/ Kevin Gillen
Kevin Gillen
Deputy Yellowstone County Attorney

Certificate of Compliance

Pursuant to Civil Local Rule 7.1(d)(2)(E), I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word 2016 is 2,784 words, excluding Certificate of Service and Certificate of Compliance.

Dated this 27th day of February, 2019.

/s/ Kevin Gillen

Kevin Gillen

Deputy Yellowstone County Attorney

Certificate of Service

I certify that on the date below I served a copy of Pedro Hernandez's Brief in Support of Motion for Summary Judgment to:

1,2 CM/ECF
 Hand Delivery
 Mail
 Overnight Delivery Service
 Fax
 E-mail

1. Clerk, U.S. District Court
2. Shahid Haque
Border Crossing Law Firm
7 West 6th Avenue, Ste. 2A
Helena, MT 59624

Matt Adams, Leila Kang, Anne Recinos and Aaron Korthuis
Northwest Immigration Rights Project
615 Second Avenue, Ste. 400
Seattle, WA 98104
Attorneys for Miguel Angel Reynaga Hernandez

Dated this 27th day of February, 2019.

/s/ Kevin Gillen
Kevin Gillen
Deputy Yellowstone County Attorney