No. 11-57075

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD GEORGE,

Plaintiff-Appellant,

v.

THOMAS EDHOLM, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

Honorable George H. Wu, District Judge
Case No. 2:06-cv-0200-GW (AJW)

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

Officers Freeman and Johnson dedicate the majority of their answering brief to arguing the facts. As they tell the story, they did not instruct Edholm to search for the drugs in George's rectum, [Ans. Br. 8, 17], or assist Edholm in recovering the drugs from there, [Ans. Br. 16]. Instead, the rectal cavity search was a life-saving medical procedure, which Edholm undertook based on his "independent assessment" of George's condition. [Ans. Br. 12]. The officers merely transported George to the hospital "for medical clearance prior to booking," [Ans. Br. 17], and their sole purpose was to ensure George's safety and comply with department policy. [Ans. Br. 19]. It was never their intent to use Edholm to recover the evidence they suspected was hidden in George's rectum. Thus, in their view, they and Edholm were not working cooperatively toward the common goal of recovering the contraband from George's body cavity. And even if they had been, it would not have made any difference: Edholm would have undertaken the same course of treatment either way. [Ans. Br. 17-18].

There are two principal problems with the officers' story. To begin with, *each and every* element of it is disputed in the evidence. Their version of events is therefore one they must tell to a *jury* and not a court. In an effort to dodge that necessary conclusion, the officers argue that the Court should simply disregard George's testimony. But George's state-

ments are not remotely the kind of facially implausible and self-contradictory testimony that may be disregarded on summary judgment. When it comes to "his word against mine" cases like this one, the resolution of conflicting testimonial accounts is a quintessential jury function.

Apart from that, the officers' story is largely irrelevant. It does not matter whether they were required as a function of department policy to obtain "medical clearance" for George before booking him, or whether Edholm would have undertaken the same course of treatment without the officers' involvement. The only question so far as the conspiracy issue is concerned is whether a rational jury could conclude that the evidence, taken as a whole, demonstrates that the defendants had a tacit understanding to work cooperatively toward the common objective of removing the contraband from George's rectum. One plainly could.

The evidence otherwise shows that the brutal rectal cavity search was a violation of George's clearly established constitutional rights. In fact, the Fifth Circuit recently held that a search nearly *identical* to the one that took place here was unconstitutional. *See United States v. Gray*, 669 F.3d 556, 564-565 (5th Cir. 2012). Clearly established constitutional law mandates the same conclusion in this case. The judgment below should be reversed.

ARGUMENT

A. There are genuine disputes of material fact concerning the existence of a civil conspiracy.

1. There is evidence of a conspiracy.

The officers do not take issue with our recitation of the governing legal standard: a Section 1983 plaintiff need not show that the "participant[s] in [a] conspiracy" each knew "the exact details of the plan" and instead need establish only that they "share[d] the common objective of the conspiracy." *Crowe v. Cnty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010). And it is enough to "attribut[e]" a private party's conduct to state actors when the state actors have "provide[d] significant encouragement," for the challenged conduct. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). The existence of a conspiracy of this sort is a "fact-intensive . . . inquiry" (*Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 924 (9th Cir. 2011)) that ordinarily "should be resolved by the jury." *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1301-1302 (9th Cir. 1999).

As we demonstrated in the opening brief (at 18-22), there is ample evidence from which a rational jury could conclude that the defendants were engaged in a conspiracy under this standard. First, there is Johnson's testimony that the officers took George to the hospital for the express

(even if not exclusive) purpose of recruiting a doctor to remove the suspected drugs from George's rectum:

> A: If we suspected somebody had cocaine in the rectum, we would transport them to the hospital in an attempt to have it removed.
>
> Q: And why would you attempt to have it removed?
>
> A: Because as police officers we wouldn't remove it. A doctor would do that.
>
> Q: Why would a doctor have to remove it?
>
> A: Police officers are not allowed to touch, you know, the buttocks or breasts or genitals of somebody, and so it's more of a medical procedure to have.

[ER154-155] (objections omitted). Thus, when Johnson was asked directly whether "there [was] any other reason that [George] was taken to the Pomona Valley Medical Center in March 2004 other than [the] suspected seizure," he candidly admitted that "*[w]e believe that he had cocaine that he shoved up his rectum*." [ER169] (emphasis added). From this testimony, a rational jury could (indeed, would *have to*) conclude that the officers took George to the hospital precisely for the purpose of enlisting a doctor to help them search for and remove the evidence from George's rectum. This strongly suggests that the officers, once they were at the hospital, were working together with Edholm to achieve exactly that goal.

There is also evidence that the officers actively encouraged Edholm to conduct the search of George's rectum. After affirming that he told Ed-

holm that George was suspected of cocaine packing, Johnson was asked at his deposition whether he requested that Edholm remove the cocaine. He answered in this way:

> A request, no. But it was kind of—I don't know how to put this—but it's kind of a given. We saw him shove something up his anus, and so we told the doctor this, and *I'm sure the doctor, like us, would like to have that removed* because it's quite possible that this person could die with this in his anus.

[ER184-185] (emphasis added). A jury could conclude from this testimony that the officers shared their suspicion with Edholm that George had cocaine in his rectum for the purpose of encouraging Edholm to conduct a rectal exam. Sharing this information with Edholm ensured that he, "*like [the officers], would like to have [the contraband] removed*." [ER185] (emphasis added).

Of course, George's testimony paints an even clearer picture of the officers' encouragement of Edholm to conduct the search. George claims to have heard Freeman affirmatively command Edholm: "You need to get this out [of] his ass. He's got something up his ass, Goddamn it, I know he does," [ER286], and "I know he's got something up his ass. You need to get that out. I know he does." [ER307].

There is also evidence that the officers actively worked together with Edholm to help him undertake the search of George's body cavity. First,

there is evidence that the officers handcuffed George to the gurney, [ER281], as they typically do in such cases, [ER163]. There also is George's testimony that the officers helped place George in position for the initial digital rectal exam: Edholm "said" to the "police officers" to "roll [George] over" and "[t]he police officers did it." [ER284]. George testified further that the officers forcibly held George down once George began to resist. [ERR282-283]. That account is generally consistent with Johnson's testimony that officers frequently participate in the restraint of police detainees at the hospital, including by handcuffing them, restraining their hands and arms, and holding them down. [ER162-164].

The evidence shows that Edholm, for his part, understood that his role was to handle George, not as a *private patient* seeking medical treatment, but as a *police detainee* who had to be cleared for booking. Edholm explained that officers bring detainees to the emergency room "on a regular basis" to obtain a doctor's certification that the detainee is "okay to be booked." [ER57]. Understanding this to be the purpose of George's visit in this case, Edholm conferred initially *not* with his putative patient, but with the police officers. [ER281]. And the treatment that Edholm undertook (against George's wishes) "was based on" not just his examination of George, but also "information from the police." [ER112]. Although Edholm would not characterize George's treatment as done at the "direction of the

police," he confirmed that it was done "in conjunction" with "information from the police." [ER111-112].

There is further circumstantial evidence that Edholm understood that his job was to recover evidence of a crime from George's body cavity, convey it to the police, and clear George for booking. The medical report, for example, reflects that when Edholm "removed the drug packet," he "handed it directly to the Pomona Police Officer upon removal from the patient's anus." [ER51]. And the report concludes by noting in the "MEDICAL DECISION MAKING" section that "[George] has now been medically cleared to be booked," and again in the "DIAGNOSES" section that George is "Okay to book." [ER52]. That Edholm handed the evidence directly to the officers and subsequently cleared George for booking tend to confirm that Edholm had these objectives in mind all along.

Other elements of the medical report further corroborate the existence of a conspiracy among the defendants to achieve the common goal of recovering the evidence. As we explained in the opening brief (at 20-21), doctors do not ordinarily anesthetize their patients to force unwanted procedures on them simply because they are "noncompliant" or "refuse[] . . . full treatment." [ER51-52]. Yet Edholm believed there was a "need," [ER51], to place George in "chemical restraints," [ER79]. That strongly suggests that Edholm was not "treating" George, but working with autho-

rization from and at the direction of the police officers to retrieve evidence of a crime from George's rectal cavity. *Crowe*, 593 F.3d at 875.

There is no serious question that all of this, taken together, is sufficient for a jury to find that the officers "provide[d] significant encouragement" (*Brentwood Acad.*, 531 U.S. at 296) for Edholm to conduct the search and that each defendant "share[d] the common objective of the conspiracy" (*Crowe*, 608 F.3d at 440) to recover the evidence from George's body cavity. We made exactly this point in the opening brief (at 16-22), but the officers offer no direct response to our review of the evidence.

2. The officers' efforts to avoid the conflicting evidence are fruitless.

Rather than addressing the substantial evidence we cited in the opening brief, the officers instead offer a scattershot of misleading factual contentions and mistaken legal arguments. None is persuasive.

a. The officers begin by arguing that the Court should simply disregard George's testimony. [Ans. Br. 10-11, 19]. As they see it, "the only evidence" that George "presented in opposition" to their motion for summary judgment is his own account of events, which they describe as "subjective," "conclusory, speculative," "uncorroborated and self-serving." [Ans. Br. 10-11, 19-20]. Thus they say that George's testimony "is insufficient to raise genuine issues of fact and defeat summary judgment." [Ans. Br. 19].

That is flat wrong. At its core, this case presents a straightforward we-said-they-said disagreement concerning what happened at the hospital. The outcome-determinative question in this case is simply whose version of events is *more believable* in light of the circumstantial evidence and the general credibility of the witnesses. That each side's story is relayed principally in their own testimony is hardly surprising. Certainly, George's testimony recounting what he claims to have happened—which, as we have just explained, is fully consistent with the circumstantial evidence—is no more subjective or self-serving than the officers' account. Courts have disregarded a party's testimony on summary judgment only when it is so fundamentally inconsistent with other evidence and common experience as to suggest that "the plaintiff has deliberately committed perjury." *Johnson v. Wash. Metro. Area Transit Auth.*, 883 F.2d 125, 128 (D.C. Cir. 1989); *see also, e.g.*, *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996). This is not remotely such a case.

On the contrary, a rational jury easily could believe George's story over the officers'. And the sort of "credibility determinations" and "drawing of legitimate inferences from the facts" that must be undertaken to resolve the discrepancies between George's and the officers' accounts are quintessential "jury functions." *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011). In short, in a case like this one, the Court must view the

evidence in the light most favorable to the nonmoving party, which means crediting *George's* version of events, and not the officers'.

b. The officers nevertheless insist that the evidence more persuasively supports their story over George's. They assert, for example, that they and Edholm "undisputed[ly]" had *different* objectives at the hospital. Whereas Edholm's "goal in treating George was to administer what he considered to be life-saving measures," [Ans. Br. 12], the officers' only reason for taking George to the hospital was to ensure his "safety," obtain "treat[ment] for his immediate health condition," and get medical clearance for booking pursuant to department policy, [Ans. Br. 12-13, 19]. That is incorrect: as we explained above, a jury could conclude that the officers and Edholm shared the goal of recovering the drugs from George's rectum.

On this point, the "written jail procedures" on which the officers heavily rely, [Ans. Br. 1, 13, 32], are a red herring. We do not dispute the general proposition that when officers believe a detainee is in need of medical attention, they should take steps to ensure the detainee's wellbeing before placing him in jail, even if it means going to the hospital. Our argument, instead, is that the evidence suggests the officers did not believe George was in need of medical attention *for his seizure*: both officers thought that George "was faking [it] to cover . . . up" a "bag of cocaine base" hidden "between [his] butt cheeks." [ER128]. *See also* [ER231].

We also do not dispute the general proposition that when officers suspect that a detainee has hidden drugs in his rectum, they should—prior to placing him in jail—take steps to investigate (within clearly established constitutional limits) and, if their suspicions are confirmed, to recover the contraband. And, indeed, the evidence suggests that *recovery of the drugs* was the true reason the officers took George to the hospital.

That the officers had this drug-recovery objective in mind suggests that they shared a common goal with Edholm and tends to confirm that they helped and encouraged him to achieve it. The commonality of the defendants' goals at the hospital, and their mutual encouragement of one another to achieve them, means that the defendants were engaged in a civil conspiracy, and that all three were acting under color of law. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 931, 941 (1982). It also means that the officers *themselves* are liable for any constitutional violations committed in the course of both their *and* Dr. Edholm's efforts to recover the drugs. *E.g.*, *United States v. Bingham*, 653 F.3d 983, 997 (9th Cir. 2011).

It therefore is irrelevant whether the officers had other purposes for taking George to the hospital, or if Edholm had other objectives for removing the drugs. The officers could have intended *both* to ensure George's safety pursuant to department policy *and* to recover the drug evidence; and Edholm could have intended *both* to treat George medically *and* to as-

sist the officers in their law enforcement objectives. *Cf. Ingram v. United States*, 360 U.S. 672, 679 (1959) (a "conspiracy, to be sure, may have multiple objectives"). That a "procedure" may have a "medical purpose" does not mean that it does not *also* have an "evidence-gathering purpose," and thus "cannot insulate [the procedure] from Fourth Amendment scrutiny" as a search. *State v. Payano-Roman*, 714 N.W.2d 548, 555 (Wis. 2006). We again made this legal argument in our opening brief (at 25-28), and the officers again decline to respond.

The officers attempt instead to distinguish the Wisconsin Supreme Court's decision in *Payano-Roman* on its facts. [Ans. Br. 23]. Their efforts are unavailing. It makes no difference that the officers, and not the hospital staff, administered the laxatives to the suspect in that case. To be sure, the court there found it relevant that the "police officers participated in the search" (714 N.W.2d at 554), but there is evidence that the officers participated in this case, too. George has claimed consistently that Freeman and Johnson turned him onto his side and held him down while Edholm conducted the initial digital rectal examination, [ERR282-284], to say nothing of Freeman's instructions to Edholm to conduct the search. And either way, the officers' conduct in *Payano-Roman* has no bearing on the ultimate legal determination reached in that case: police officers and "medical staff" whom they enlist to aid them can be "engaged in a joint en-

deavor with a dual purpose" to provide "medical treatment" *and* "recover[ ] evidence of a crime." 714 N.W.2d at 554. That describes this case exactly.

c. Next, citing exclusively their own testimony, the officers insist that "neither Freeman nor Johnson instructed Dr. Edholm to extract the foreign object from George's rectum," and that Edholm "*would not have followed such an instruction even if it had been given*." [Ans. Br. 17]. Once again, their contentions are both wrong and irrelevant.

Whether Freeman instructed Edholm to remove the drugs from George's rectum is matter of genuine dispute. George says he did. [ER286, 307]. Freeman says he did not. [ER248]. And Edholm doesn't remember. [SER48]. It is for a jury to decide whom to believe. And, of course, Freeman's instructions are just one element of the evidence showing that the officers encouraged Edholm to undertake the search and that Edholm was influenced by the officers' words and conduct. *See supra*, pp. 5-9.[1]

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[1] In our opening brief (at 20), we cited *Sanchez v. Pereira-Castillo*, 590 F.3d 31 (1st Cir. 2009), for the general proposition that doctors act under color of law when they are "strongly encouraged" by state officials to undertake a medical procedure. The officers say *Sanchez* is distinguishable because "the plaintiff was not experiencing a medical emergency" there, and the doctor was "coerced." [Ans. Br. 20-21]. Those are distinctions without a difference. Again, a searches can have two, concurrent objectives. *Payano-Roman*, 714 N.W.2d at 554-555. And although it is true that the First Circuit found that the correctional officers in *Sanchez* coerced the doctor, that hardly means the court held outright coercion required. It is settled that mere encouragement is enough. *Brentwood*, 531 U.S.at 296.

A rational jury also could reject the officers' interpretation of Edholm's testimony as establishing that Edholm would not have followed Freeman's instructions. To begin with, Edholm said only that he "*usually* [does not] just do things to comply with the police" and could not "think of a police officer who's ever told me how to examine a patient." [SER49-50] (emphasis added). That is not the unequivocal disavowal that the officers make it out to be. And ordinary experience teaches that citizens obey commands from police officers, particularly when those commands are forceful. A jury therefore could reject the officers' claim that Edholm would not have complied with Freeman's orders. That Edholm's conduct was consistent with Freeman's instructions as George recounted them makes the possibility of that rejection all the more likely.

More to the point, as we explained in the opening brief (at 25-26), it makes no difference whether or not Edholm would have followed the same coercive treatment plan absent Freeman's instructions. The question, for conspiracy purposes, is simply whether the evidence indicates the defendants had an unspoken "understanding" showing "they embraced [a] common purpose." *United States v. Daychild*, 357 F.3d 1082, 1098 (9th Cir. 2004). The counterfactual question of what would have happened *absent* the conspiracy simply does not factor in.

On this same reasoning, the Supreme Court has made clear that private parties who "act in close cooperation and coordination in a joint effort" with state authorities "are not removed from the purview of § 1983 simply because they are professionals acting in accordance with professional discretion and judgment" that might require the same conduct even absent the cooperation. *West v. Atkins*, 487 U.S. 42, 51-52 (1988). To be sure, the officers are correct, [Ans. Br. 23], that the Supreme Court in *West* found "professional discretion and judgment" not "entirely irrelevant to the state-action inquiry." *West*, 487 U.S. at 51-52 & n.10. But they ignore that the Court *expressly rejected* their contention that a doctor does not "act[] under color of state law where he is exercising independent professional judgment," and explained that professional judgment is relevant only insofar as the State has *not* provided "direction" or "'significant encouragement'" for the challenged action. *Id.* (quoting *Blum*, 457 U.S. at 1004). Here, there is evidence of just such direction and encouragement.

d. Finally, the officers suggest that no rational jury could find that "Freeman and Johnson held [George's] legs down in order to assist Dr. Edholm" because (1) George "did not even know if Johnson was one of the people holding his legs" and (2) he testified that the officers were holding his legs only during the initial digital rectal exam but not "at the time the anesthesia was administered and Dr. Edholm commenced the procedure to

actually remove the cocaine from his rectum." [Ans. Br. 18]. Both contentions are mistaken.

First, a jury—the only decisionmaker qualified to evaluate the believability of George's testimony in this case—could conclude that Johnson helped Freeman hold George down. True, George testified toward the end of his deposition that he did not "know the[] names" of those who, in addition to Freeman, were holding his legs. [ER308]. But earlier he testified that "Freeman . . . *and the other officer* h[e]ld me down." [ER283] (emphasis added). There is no dispute that Johnson was the only other officer present after Freeman arrived. [ER181]. A jury therefore could conclude that "the other officer" holding George down was Johnson.

There also is no serious question that the officers' efforts in holding George down constituted active assistance with Edholm's search of George's body cavity. On this score, the officers say the evidence shows they were holding George down only during the initial *digital* exam, not during or after the administration of the general anesthetic drugs. [Ans. Br. 18].[2] They further suggest that because the instrument-assisted search

[2] We do not concede that the officers were actively involved only with the initial rectal probe. George testified that the officers were holding his legs while he was kicking because he "knew what they was going to do to me . . . [and] didn't want them to do what . . . they were going to do to me." [ER308]. This testimony followed George's account that Edholm told him

under general anesthesia was "the procedure to actually remove the cocaine from his rectum" (*id.*), the initial digital exam is somehow irrelevant or does not count for constitutional purposes. That is ridiculous, for at least two reasons.

First, the initial digital exam—taken entirely alone—was a significant offense to George's dignity and a clear violation of his Fourth Amendment rights. As to the initial exam, George testified that Edholm inserted "his hands right up [his] rectum" in search of the drugs and in the presence of at least five other people. [ER284-285]. He described the procedure as extremely painful and said that he felt "violated." [ER282, 284]. It blinks reality to say, as the officers repeatedly do, [Ans. Br. 7, 15, & n.4, 28, 34], that Edholm's physical entry with his hands into George's rectal cavity was "minimally-invasive." *See also* [Ans. Br. 28] (characterizing the digital search as "a less intrusive procedure").

To the contrary, a digital search of a suspect's rectal cavity is an "extreme" affront to "the highest degree of dignity," "constituting a drastic and total intrusion of the personal privacy and security values shielded by the fourth amendment from unreasonable searches." *United States v.*

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that he was going to "put an IV into [George's] arm" and "was going to put [him] under." [ER303]. A jury could infer that George was resisting and the officers were holding him down in anticipation of the administration of the anesthesia.

Gray, 669 F.3d 556, 565 (5th Cir. 2012) (quoting *Rodriques v. Furtado*, 950 F.2d 805, 811 (1st Cir. 1991)). As this Court has succinctly put it, "digital rectal searches are highly intrusive and humiliating." *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988). Thus even if the evidence showed that the officers held George down only for the initial digital search, and then affirmatively withdrew from the conspiracy, that alone would be enough to establish a violation of George's Fourth Amendment rights.

But—second—there is *no* evidence that the officers withdrew from the conspiracy after the initial digital rectal probe. The officers' initial help in holding George down, together with their express verbal encouragement, is therefore sufficient to impute Edholm's *entire* course of conduct in pursuing the conspiracy's objectives—including the search under general anesthesia—to the officers and the State. *See Bingham*, 653 F.3d at 997 ("co-conspirators" are "liable for reasonably foreseeable overt acts committed by others in furtherance of the conspiracy they have joined").

In the final analysis, the question "[w]hether defendants were involved in an unlawful conspiracy is generally a factual issue and should be resolved by the jury." *Mendocino*, 192 F.3d at 1301; *cf. Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528, 531 (9th Cir. 1985) ("Questions involving a person's state of mind . . . are generally factual issues inappropriate for resolution by summary judgment."). Just so here. For their part, the offic-

ers have demonstrated only that they have an account of the events at the hospital that differs from George's. It is a story they must tell a jury.

B. There is evidence that the rectal cavity search violated the Fourth and Fourteenth Amendments.

1. Physical body cavity searches under circumstances like these violate the Fourth Amendment.

The officers agree, [Ans. Br. 26], that when an arrestee is suspected of having hidden drugs in his or her gastrointestinal tract, the Fourth Amendment bars a warrantless physical intrusion into the suspect's body to recover the evidence absent an objectively reasonable belief that such intrusion is necessary to save the suspect's life. As we explained in the opening brief (at 29, 38-39), when less intrusive alternatives are otherwise available to recover evidence, those alternatives must be utilized.

That was the Fifth Circuit's very recent conclusion in *Gray*—a case involving facts strikingly similar to those here. There, the officers observed behavior they believed consistent with drug packing while booking and searching the arrestee in that case, Rondrick Gray. *Gray*, 669 F.3d at 560. Gray was not cooperative, so the officers sought and obtained a search warrant to search Gray's rectum at a hospital and "in accordance with recognized medical procedures." *Id*. Hospital staff took an x-ray and performed an initial, inconclusive digital rectal exam. *Id*. Because Gray remained "evasive and uncooperative," doctors administered sedatives

intravenously. *Id.* They then used a "protoscope" (similar to an anoscope) to inspect Gray's rectal cavity. *Id.* at 560-561. The doctor appreciated a foreign body, "performed a second digital rectal examination," "removed a plastic bag from Gray's rectal cavity," and "handed the bag to an SAPD officer." *Id.* at 561.

Consistent with the many other cases cited in the opening brief (at 30-40), the Fifth Circuit held the search unconstitutional. Applying the clearly-established test of *Winston v. Lee*, 470 U.S. 753 (1985), the court noted that the search was "a great[] affront to Gray's dignitary interest":

> [T]he procedure targeted an area of the body that is highly personal and private. In our society, the thought of medical technicians, under the direction of police officers, involuntarily sedating and anally probing a conscious person is jarring. Such a procedure is degrading to the person being probed—both from his perspective and society's.

Gray, 669 F.3d at 564-565. Noting that the rectal cavity search was similar to a search of other sensitive body cavities, the court continued:

> "[T]he invasion here was extreme, constituting a drastic and total intrusion of the personal privacy and security values shielded by the fourth amendment from unreasonable searches. Searches of this nature instinctively give us cause for concern as they implicate and threaten the highest degree of dignity that we are entrusted to protect."

Id. at 565 (citations omitted) (quoting *Rodriques*, 950 F.2d at 811).

On the other side of the scale, the court acknowledged that "[s]ociety's interest" in recovered evidence of a crime is "of great importance."

Gray, 669 F.3d at 565. But the court observed that "there were other available avenues for obtaining this evidence, such as a [laxative] or an enema," which it found to balance strongly against "society's great interest in conducting the procedure used in this case." *Id*. (emphasis omitted).

"On balance," the court concluded, "the proctoscopic search [was] unreasonable due to the exceeding affront to Gray's dignitary interest and society's diminished interest in that specific procedure in light of other less invasive means." *Id*. The court reached that conclusion even though the officers in that case *had obtained a search warrant*. *Id*. at 560.

Precisely the same conclusion is required here—even more so because the officers in this case did *not* have a search warrant. *See* [Opening Br. 32 & n.6]. The officers obfuscate the warrant issue by claiming that "[i]t was not necessary . . . to obtain a search warrant before transporting George to the hospital . . . because their objective was to seek medical attention for George and not to utilize Dr. Edholm as an auxiliary to police search procedures." [Ans. Br. 29]. But the officers' purpose in taking George to the hospital is plainly irrelevant to the warrant question. Our point was simply that a warrant is required for body cavity searches, a body cavity search took place here, and thus, a search warrant was required. As to that self-evident proposition, the officers do not disagree.

2. Whether there was a medical emergency is a question of fact for the jury.

The officers respond to all of this by arguing, in the main, that there is undisputed evidence that George would have died without Edholm's immediate, aggressive intervention, and that there were no reasonable alternatives to the coercive approach taken. In an apparent belief that Lewis Carroll had it right (*see The Hunting of the Snark* 3 (1876) ("I have said it thrice: What I tell you three times is true.")), the officers thus repeatedly describe George's condition as life threatening: Edholm "considered George's condition life-threatening," [Ans. Br. 7, 14, 27]; "George would have died" without the procedure [Ans. Br. 8]; it was Edholm's "opinion that George's condition was 'life-threatening,'" [Ans. Br. 9]; Edholm administered "life-saving measures," [Ans. Br. 12], "life-saving treatment," [Ans. Br. 20], "treatment of George's life-threatening condition," [Ans. Br. 26], and a "medically required life-saving procedure," [Ans. Br. 27]; and the "procedure" was "justified by George's lift-threatening condition," [Ans. Br. 33]. But in repeating this same defendant-favorable interpretation of the facts over and over again, the officers simply ignore the substantial evidence indicating precisely the opposite—evidence that must be credited at this stage in the litigation.

The objective evidence concerning George's condition at the hospital is equivocal at best. As we noted in the opening brief (at 34), Edholm readily acknowledged that George's symptoms were consistent not just with "cocaine intoxication," but also with simply experiencing "severe pain." [ER81-84]. George unquestionably was experiencing severe pain. [ER284]. The officers offer no explanation for this alternative account of George's elevated vital signs.[3]

The officers also emphasize that "George's drug screen was positive for cocaine," [Ans. Br. 8], which they say necessarily means George already was absorbing cocaine through his rectum. But that simply is not so. There is evidence that George had ingested cocaine before arriving at the hospital, and that the officers told this to the hospital staff. [ER49] ("Per PD: pt. ingested cocaine & put some into his rectum."); *see also* [ER267, 271]. In any event, Edholm admitted that he "did not have the drug screen confirmation back prior to treatment." [ER91-92]. The screen results thus cannot provide an *ex post* justification for Edholm's decision to undertake the coercive rectal cavity search before learning of them.

Apart from George's elevated vital signs—which were consistent with simply experiencing severe pain—the only other evidence the officers'

[3] Edholm suggested that George's high blood pressure presented a health risk, [ER94], but he confirmed that he simply treated George with "blood pressure medicine to get his blood pressure under control." [ER93].

point to is Edholm's own testimony. *E.g.*, [Ans. Br. 14, 23] (citing [ER85, 91-92, 94, 96]).[4] But Edholm did *not* testify that he suspected the bag of drugs had ruptured in George's rectum, or that George faced an imminent risk of death, as the officers suggest. Quite the contrary, Edholm testified only that "*[i]f* the golf ball size amount of cocaine in his rectum *had* ruptured, [George] *likely* would have died that evening." [ER96] (emphasis added). He further testified that he *always* uses "aggressive" physical search techniques in drug packing cases, rather than letting the drugs "pass naturally," because "if you don't get the drugs out, then they *can* rupture," *potentially* causing "a massive overdose." [ER106] (emphasis added). Thus, a rational jury could reject the officer's contention that Edholm made a case-specific judgment that "George would have died on March 13, 2004, had the packet of rock cocaine not been removed from George's rectum in the manner which it was removed." [Ans. Br. 8]. One could conclude, instead, that Edholm was acting on a general, unsubstantiated concern that the bag *might* rupture—a circumstance present in literally *every* drug packing case.

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[4] Edholm's testimony concerning the specifics of the search is of questionable value. He repeatedly testified that he had no specific recollection of the events at issue here and responded to questions concerning specifics only by referring to the medical report. *E.g.*, [ER56, 80].

The officers conspicuously do not disagree that the mere presence of drugs in a suspect's gastrointestinal tract, together with an unsubstantiated concern that the container might rupture, is insufficient to justify a warrantless body cavity search like this one. *See* [Opening Br. 35-40] (citing *United States v. Nelson*, 36 F.3d 758 (8th Cir. 1994); *State v. Hodson*, 907 P.2d 1155 (Utah 1995); *People v. Bracamonte*, 540 P.2d 624 (Cal. 1975) (en banc)). As we argued in the opening brief (at 39), the mere *possibility* that a bag of drugs hidden within a "rectal cavity" *might* "rupture[] and release[] narcotics" justifies detaining an individual "where medical personnel and facilities [are] immediately available in the event that this occur[s]." *United States v. Aman*, 624 F.2d 911, 913 (9th Cir. 1980). The officers challenge none of this.

In sum, there is no undisputed indication that Edholm had an objectively reasonable basis to believe that the drugs had ruptured in George's rectal cavity or that George *actually* was in imminent danger of dying. The medical report reflects no such belief, and Edholm testified that he was simply worried that the bag of drugs *might* rupture. [ER96, 106]. Viewing the evidence in the light most favorable to George and drawing "all justifiable inferences" in his favor (*Crowe*, 608 F.3d at 427), a jury could find that Edholm's humiliating search of George's rectum was motivated solely by a general and unsubstantiated concern that the bag of drugs might rup-

ture—a concern Edholm acknowledged is present in *every* such case. A jury therefore could find that "there were other available avenues for obtaining th[e] evidence" (*Gray*, 669 F.3d at 565) under the circumstances, including letting the drugs pass naturally. [ER102-106, 159-160, 249]. The defendants were obligated to pursue these alternatives.[5]

A final point bears mention. On two occasions, the officers purport to quote page 39 of our opening brief as saying that "no one disputes that the medical staff had reason to believe that George had a plastic bag containing cocaine in his rectum, *or that he presented at the hospital with cocaine intoxication*." [Ans. Br. 13-14, 26] (emphasis added). That is a blatant misquotation. What we actually said on page 39 was that "no one disputes that the medical staff had reason (even if not probable cause) to believe that George had a plastic bag containing cocaine in his rectum," *full stop*. [Opening Br. 39]. We have never conceded on the present record that it is undisputed that George "presented at the hospital with cocaine intoxica-

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[5] The officers assume away the dispute when they contend that the cases we cited in the opening brief involved searches "undertaken solely for the purpose of retrieving evidence" and not medical emergencies representing "an imminent risk to [the suspect's] life." [Ans. Br. 30]. Whether there was such a risk in *this* case is genuinely disputed; the Court must therefore assume, for purposes of the officers' motion, there was *no* such risk here.

tion." On the contrary, that is one of the central factual disputes that we have maintained throughout this appeal is a question for the jury.[6]

C. The defendants are not entitled to qualified immunity.

With respect to qualified immunity, the officers simply mischaracterize the constitutional right at issue. First they say that there is no clearly established rule of law prohibiting them from "obtain[ing] medical clearance for George prior to continuing with the booking process and pursuant to jail procedures." [Ans. Br. 32]. Next they claim that it is not clearly established that "law enforcement officials are constitutionally prohibited from briefly restraining a detainee at the direction of qualified medical personnel, with the purpose of minimizing injury to the detainee." [Ans. Br. 34]. These characterizations of the legal rules at issue here are silly.

The only question for qualified immunity purposes is whether the rights that the officers are alleged to have violated were clearly estab-

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[6] What the officers appear actually be quoting is page 49 from the opening brief in the *prior* appeal in this case. That also is improper. When this case last came before this Court, the record was woefully under-developed and consisted of little more than George's verified complaint and the officers' incomplete and self-serving answers to George's requests for admissions. What the record reflected *then*—before George was represented by counsel and prior to any of the numerous depositions and additional documentary discovery that has taken place since—has no bearing *now* on the propriety of the district court's renewed grant of summary judgment.

lished at the relevant time.[7] The rights at issue here, *which must be framed in terms of the evidence viewed in favor of George*,[8] are clear. This is not a straw-man case about George's rights to be free from "medical clearance" procedures or "brief restraint at the direction of qualified medical personnel." It is, instead, about George's Fourth and Fourteenth Amendment rights (1) to be free from a warrantless, coercive search of his rectal cavity and (2) to refuse unwanted medical treatment.

These rights *were* clearly established at the relevant time, as was the law establishing the officers' liability for violating them in this case. It had long been the law, for example, that the application of either "coercive power" or "significant encouragement" by state officers could make the state liable for the acts of a private party. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Likewise, it had long been the law that unwarranted searches of body cavities violate the Fourth Amendment: *Rochin v. California*, 342 U.S. 165 (1952), *Schmerber v. California*, 383 U.S. 757 (1966), and *Wins-*

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[7] The officers are wrong that "[e]ven if . . . the right allegedly violated was clearly established, the Court also determines whether the officers' conduct was the result of a reasonable mistake." [Ans. Br. 31]. If the officers' conduct was "the result of a reasonable mistake," there was no constitutional violation in the first place. *See, e.g.*, *Stephenson v. Doe*, 332 F.3d 68, 78-79 (2d Cir. 2003) (citing *Saucier v. Katz*, 533 U.S. 194, 205 (2001)).

[8] For this reason, the cases the officers cite concerning "necessity" and "emergency situations," [Ans. Br. 33-34], are irrelevant.

ton v. Lee, 470 U.S. 753 (1985), had settled that question, as *Gray* manifestly demonstrates. So, too, had *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990), settled the question that forced medical treatment "represents a substantial interference with . . . liberty." *Id.* at 229. The officers' quibbling efforts to distinguish these cases are fruitless.[9]

Of the four cases the officers cite supposedly "upholding reasonable searches of the rectum," [Ans. Br. 33], all but one is an inapposite border search case: "[N]ot only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border." *United States v. Montoya de Hernandez*, 473 U.S. 531, 539-540 (1985) (citations omitted). The one decision not dealing with a border search is a fifty-year-old intermediate state appellate decision predating all of the relevant cases we

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[9] The officers' citation to *Sullivan v. Bornemann*, 384 F.3d 372 (7th Cir. 2004), is particularly off-base. There, it was "undisputed" that the medical procedure at the hospital "was performed solely to assure Sullivan's medical well-being" and "was not ordered by law enforcement officers to [recover evidence] establish[ing] Sullivan's guilt or innocence." *Id.* at 376-377. Indeed, the "results of the test . . . were never [even] used in Sullivan's criminal proceedings." *Id.* at 377. The Seventh Circuit thus recognized that it was not actually a search case, but a mis-pleaded excessive force claim. *Id.* at 376.

cited in the opening brief. These decisions do nothing to undermine the crystal clarity of the unconstitutionality of the search that took place here.

CONCLUSION

The judgment should be reversed as to all of the defendants, and the case remanded for trial.

Dated: August 23, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Plaintiff-Appellant certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,995 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: August 23, 2012

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CERTIFICATE OF SERVICE

I hereby certify that that on August 23, 2012, three copies of the foregoing brief were served by overnight courier upon counsel of record for Officers Greg Freeman and Darryl Johnson and directly upon Dr. Thomas Edholm. Digital versions of the same were served electronically via the Court's CM/ECF system and email.

Dated: August 23, 2012

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