No. 08-56497

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 J. Spencer Letts, District Judge
Case No. 2:06-cv-0200-JSL (AJW)

APPELLANT'S REPLACEMENT BRIEF

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. The district court entered its final judgment disposing of all claims on July 9, 2008 and extended the time to file a notice of appeal to and including September 8, 2008. Plaintiff-Appellant Clifford George ("George") filed a timely notice of appeal on September 4, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in granting summary judgment to Defendants on George's claims that Defendants:

    a. detained him without articulable suspicion of criminal activity and prior to learning of his parole status;

    b. conducted a warrantless and suspicionless "parole compliance search" of his apartment; or

    c. forcibly anesthetized him and conducted a warrantless search of the inside of his rectal cavity,

all in violation of his clearly established constitutional rights?

2. Did the district court clearly err in finding that Defendant Thomas Edholm was not served?

STATEMENT OF THE CASE

George filed this *pro se* 42 U.S.C. § 1983 civil rights complaint against Defendants Greg Freeman, Darrel Johnson, Thomas Edholm, and two Jane Does

(collectively, "Defendants"). Following discovery, the district court granted summary judgment to Defendants on all claims. This appeal followed.

STATEMENT OF FACTS

A. Factual background

On March 13, 2004, Plaintiff Clifford George ("George") was standing outside his mother's apartment in Pomona, California, where he was living at the time. [ER 4, 64].[1] Two police officers, Defendants Greg Freeman and Darrel Johnson, were patrolling the area and approached George. *Id*. When George turned from the officers and began to leave the scene, the officers "yelled" at him to stop. [ER 64]. George complied with this "order." *Id*. When asked, he explained that he had been standing outside his mother's apartment speaking with a friend and that he tried to leave the scene when he saw the officers because he was frightened of the police. *Id*. The officers asked whether he was on probation or parole, and George answered that he was on parole. *Id*. One of the officers then conducted a "pat-down" search of George's person, [ER 4, 128], and asked where he lived. [ER 4, 64]. George explained that he was staying with his mother. [ER 4, 65].

[1] The magistrate judge initially held that George's certified complaint was not admissible as a sworn affidavit, [ER 172–173], but the district court sustained George's objection to that ruling. [ER 208–209]; *see also infra* pp. 12–13. Accordingly, the complaint is properly part of the record as a sworn affidavit.

On the basis of George's status as a parolee alone, Freeman (then joined by two additional officers) entered and searched George's mother's apartment, while Johnson stood at the door. [ER 4, 65, 80]. There is no dispute that the officers had no search warrant, no probable cause, and no contemporaneous consent, and that there were no exigent circumstances that otherwise might have justified the search of the apartment. During the search, Freeman discovered a firearm and ammunition in a hallway closet. [ER 4, 65]. George's brother, Jeremiah English (who had been inside the apartment during George's initial encounter with the officers), admitted that the weapon was his. [ER 4, 65–66]. The officers arrested English for illegal possession of a firearm, and George for residing in an apartment with a firearm, in alleged violation of his parole.[2] [ER 4, 65]. The officers took George, his brother, and one other man to the Pomona city jail for booking. [ER 4, 65].

George was subsequently taken to the jail's "strip tank" for a strip search. [ER 4, 65]. After removing his clothes, George had a "medical reaction" or "panic

[2] Officer Freeman's police report states that he arrested George "for a parole violation due to the fact that a loaded firearm was recovered in his residence." [ER 65]. The report does not cite which provision of the penal code George was alleged to have violated, however, and it is not clear how *English*'s possession of a firearm might have constituted a violation of *George*'s parole. The report later states that George was charged with "parole violation, 3056 PC," [ER 66], but California Penal Code § 3056 states simply that "Prisoners on parole shall remain under the legal custody of the department and shall be subject at any time to be taken back within the inclosure of the prison." In any event, the alleged parole violation was eventually dropped. [ER 111].

attack," and began seizing on the floor. [ER 4]; *see also* [ER 81, 96]. Officer Freeman's incident report states that, while George was on the floor convulsing, Freeman saw George "reach[] under his body" to "conceal an item" in his "anus." [ER 65–66]. Jail personnel subsequently summoned the paramedics, [ER 4, 81, 96], who determined that there was no medical emergency. [ER 4–5] ("there [was] nothing medically wrong with him"); [ER 82, 97] ("plaintiff was [no longer] having a seizure").

Although George was no longer seizing and there was no apparent medical emergency, he was transported against his will to the Pomona Valley Hospital "to be treated for his immediate health condition." [ER 66]; *see also* [ER 5, 81–82, 96].[3] Once he was at the hospital, two nurses examined George and confirmed that there was no medical emergency that required immediate treatment. [ER 5–7]. At some point after the nurses conducted their intake examination, George was examined by defendant Dr. Thomas Edholm. Officers Freeman and Johnson, who were then present at the hospital, informed Edholm that they believed George had swallowed cocaine and had a bag of cocaine in his rectum. [ER 89–90, 104–105]. The certified complaint states that the officers then told Edholm that "[w]e need it

[3] Although the Freeman and Johnson "[d]enied" that they took George to the hospital "without his consent," the factual basis that they asserted for that denial consisted solely of the unsupported legal conclusion that "consent was unnecessary." [ER 82, 97].

out now," [ER 5], but the officers deny having said that. [ER 82, 97]. The emergency department report reflects Edholm's contemporaneous observations that George had "mild psychomotor agitation," high blood pressure, a fast heart rate, and was sweating – all of which Edholm took as an indication of "cocaine intoxication" [ER 21–23]. The report noted that George "denied all complaints," "deni[ed] any drug use," and refused consent to be examined or treated. [ER 20–22]. While some evidence in the record indicates that George complained of feeling "weird," [ER 21] ("Later, he says, he feels 'weird.'"), other evidence contradicts that claim, [ER 129] ("I never informed the defendant that I was [w]eird.").[4]

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[4] The magistrate judge initially held that George's answers to Freeman and Johnson's request for admissions were inadmissible as untimely, [ER 171], but the district court sustained George's objection to that decision. [ER 209–210]; *see also infra* pp. 12–13. Although the district court suggested that Rule 72(a) might "preclude[]" it "from reviewing the Magistrate Judge's denial of Plaintiff's Motion [to Withdraw Admissions]," [ER 209], that concern was without foundation. Nothing in the text of either Rule 72(a) or the 1976 amendments to the Federal Magistrates Act (which Rule 72(a) implements) limits the district court's power to review the non-dispositive decisions of a magistrate judge, even in the absence of a timely objection. On the contrary, 28 U.S.C. § 636(b)(1)(A) states that a district court may "reconsider *any* pretrial matter" decided by a magistrate judge "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." (Emphasis added).

Rather than limiting the power of the district court, Rule 72(a) applies by its terms to the parties. *See* Fed. R. Civ. P. 72(a) ("A *party* may serve and file objection to [a magistrate judge's non-dispositive] order within 14 days . . . . A *party* may not assign as error a defect in [a magistrate judge's non-dispositive] order not timely objected to [before the district court]." (emphasis added)). As to

continued . . .

With nothing more to indicate a medical emergency than presentation with apparent "cocaine intoxication," [ER 23], and a statement from the police that George may have placed a bag of cocaine in his rectum, [ER 21, 82, 97], Edholm determined that "aggressive management" was necessary. [ER 22]. He had hospital security forcibly restrain George, [ER 98, 105], and proceeded to anesthetize and intubate him against his will. [ER 22]. With George under full general anesthesia and the officers looking on, Edholm then performed a forcible rectal cavity search on George, first by examining George's rectal cavity digitally and subsequently by using a speculum to open and inspect George's rectal cavity. *Id*. He recovered a "drug packet" with forceps. [ER 22]; *see also* [ER 82, 97] (describing the packet as a "plastic bag containing cocaine base"). Edholm then digitally reexamined George's rectum to confirm that there was no "additional foreign bodies." [ER 22].

. . . continued

the parties, the Rule operates as a forfeiture of the right to seek later appellate review of an order that is either not objected to or is objected to out of time. *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1173–1174 (9th Cir. 1996).

To the extent that Defendants may attempt to invoke Rule 72(a) as a reason to deny appellate consideration of the "Notice of Plaintiff Returned Admission," the rule plainly has no application here. The district court having reversed the magistrate's order, we are not "assign[ing] as error a defect in the [magistrate judge's non-dispositive] order" (Fed. R. Civ. P. 72(a)) as a basis for relief on appeal. Accordingly, Rule 72(a) is inapplicable at this stage of the litigation, and George's "Notice of Plaintiff Returned Admission," [ER 127–130], is properly part of the record.

After George was resuscitated from anesthesia and released to the police, he was charged with possession of cocaine base for sale, in violation of California Health & Safety Code § 11351.5. [ER 111]. Although the record materials do not indicate with certainty what happened in the criminal proceedings against George, it appears that his lawyer moved to suppress the evidence obtained in the rectal cavity search and that the motion was denied. [ER 111–112]. George subsequently pled no contest and waived his "appellate rights" to challenge the court's apparent denial of the suppression motion. *Id*. ("The defendant waives his appellate rights on the motion pursuant to Penal Code Section 1538.5."); Cal. Penal Code § 1538.5 (governing motions to suppress evidence obtained in violation of "federal or state constitutional standards"). George was sentenced to eight years in prison, [ER 111], and is currently incarcerated at Folsom State Prison.

B. Procedural background

George filed the present *pro se* 42 U.S.C. § 1983 complaint against Edholm, Freeman, Johnson, and two unknown nurses,[5] [ER 2–3], alleging in relevant part that (1) the defendant officers "arbitrarily stopped plaintiff for questioning," [ER 4]; (2) the defendant officers entered and searched his apartment "without a search warrant," [ER 4]; and (3) Edholm, the nurses, and the officers, together

[5] The nurses were later identified in discovery as Megan Del Degan and Paula Hussie. *See* [ER 179].

acting under color of law, conspired to and did forcibly restrain him, sedate him, and conduct a rectal cavity search under the false pretense of a medical emergency, [ER 4–7], all in violation of the Fourth, Eighth, and Fourteenth Amendments.[6] [ER 8]. The complaint seeks a declaratory judgment and compensatory and punitive damages.

1. Proceedings before the magistrate judge

The case was referred to a magistrate judge, [ER 219] (Dkt. No. 2), who immediately issued a case management order setting a discovery cutoff date of September 3, 2006. Defendants Freeman and Johnson served their First Request for Admissions, Set One (the "RFAs") on June 30, 2006. [ER 74–76]. George's answers to the RFAs were initially due on August 2, 2006. *See* Fed. R. Civ. P. 36(a). Some time before the due date, George sent a letter to counsel for Freeman and Johnson requesting that they stipulate to an extension of time, to August 31, 2006, for him to serve his answers. [ER 114]. Counsel refused the request and agreed to a seven-day extension, to August 9, 2006. *Id.* Around the same time, on July 27, 2006, George filed a "Request for Extension of Time to File Responses to

[6] George also asserted that Defendants violated his First Amendment rights, but he does not press that claim on appeal. Although the Supreme Court has suggested that the right to "refuse[] medical treatment" may "implicat[e] [the] First Amendment" when such treatment is "forbidden by [the patient's] religious beliefs," *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 270 (1990), George has not alleged that his refusal of medical treatment arose from any such religious beliefs.

Various Motions" before the magistrate judge. [ER 33–35]. The magistrate judge denied the motion as moot because "no . . . motions have been filed by defendants," but granted George an extension of time to file a status report, to August 18, 2006. [ER 37]. George ultimately mailed his answers to the RFAs to Freeman and Johnson on August 18, 2006. [ER 127–131].

Defendants Freeman and Johnson subsequently moved for summary judgment. The bulk of their motion argued that the magistrate judge should consider their June 30, 2006 RFAs admitted by default under Rule 36(a) because George had not timely filed his answers by August 9, 2006. [ER 38–55]. Indeed, the motion turned, at base, upon the assertion that "Plaintiff's failure to respond to Defendant's Requests for Admissions, resulting in automatic admission of the above, removed any genuine issues as to any material fact in this case." [ER 53].

Responding to Defendants' assertion that the court should treat the RFAs as admitted, George filed a motion to withdraw his admissions. [ER 115–124]. The magistrate judge denied the motion, [ER 144–146], reasoning that treating the RFAs as admitted would not of itself resolve the merits because Defendants "of necessity" had to "rel[y] on other facts and other evidence as well" to demonstrate a lack of a genuine issue for trial. [ER 145].

The magistrate judge subsequently recommended granting the motion for summary judgment. [ER 165–180]. He observed at the outset that George's

answers to Defendants' RFAs were "irrelevant because plaintiff's motion to withdraw his deemed admissions already has been denied." [ER 171]. The magistrate judge also refused to admit George's complaint as a sworn affidavit, finding that the words "Plaintiff declare under penalty of perjury, and for those statement, I believe them to be true and correct to the best of my knowledge, as I set my hands this very 11 day of the Month of 15, 05" did not suggest personal knowledge. [ER 172–173] (noting that to be considered a sworn affidavit, a complaint must be executed subject to a statement that "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct").

Having narrowed the evidence in the record, the magistrate judge proceeded to the merits of the apartment and rectal cavity search claims.[7] [ER 174–177]. Concerning the parole compliance apartment search, the magistrate judge concluded succinctly that George's "parole conditions obviated the requirements of probable cause or consent to search his residence," [ER 174], and that summary judgment should be granted on that claim because "Plaintiff has not pointed to any *evidence* controverting defendants' version of the facts." [ER 175] (emphasis original). Concerning the forced anesthesia and rectal cavity search, the magistrate concluded that George's "noncomplian[ce]" and "refus[al] to allow the procedure

[7] The magistrate judge did not expressly address George's claim that the defendant officers "arbitrarily stopped plaintiff for questioning." [ER 4].

to proceed" justified the doctor's decision to place George under general anesthesia. [ER 176]; *see also* [ER 176–177] (approving Edholm's "conclu[sion] that plaintiff required 'complete relaxation' for GI and rectal decontamination," and that "plaintiff's condition 'required aggressive management' in the face of his noncompliance"). Ultimately finding that "the evidence in the record does not reasonably permit the inference that plaintiff had 'nothing medically wrong' with him and that defendants fabricated a medical emergency to induce Dr. Edholm to remove the cocaine," [ER 177], the magistrate judge recommended granting summary judgment to Freeman and Johnson on that claim. *See* [ER 179] ("[Freeman and Johnson] have shown that no genuine issue of material fact exists as to whether they violated plaintiff's constitutional rights. Accordingly, [they] are entitled to qualified immunity.").

Although Edholm never moved for summary judgment, the magistrate judge *sua sponte* recommended granting summary judgment to Edholm as well. The magistrate judge found that there was no genuine dispute that Edholm had not acted under color of law because there was no evidence that "a conspiracy existed among defendants Freeman and Johnson . . . and Dr. Edholm" to deprive George of his constitutional rights. [ER 179]. Thus, according to the magistrate judge, "the same evidence that entitles [Freeman and Johnson] to summary judgment under section 1983 dooms plaintiff's claims against Dr. Edholm." *Id*. The magistrate

judge applied the same reasoning to the Jane Doe nurses, holding that "[e]ven if plaintiff had amended the complaint to identify registered nurses Megan Del Degan and Paula Hussie as the 'unknown medical staff' members, his claims against them would fail because they are not state actors, and because there is no evidence that they conspired with Freeman and Johnson." *Id*.

Although Edholm also never moved for dismissal for lack of timely service, the magistrate judge also *sua sponte* held that George never served Edholm with a summons and the complaint. [ER 180]; *but see* [ER 203] (evidence of service by mail on Edholm). Noting that failure to perfect service of process is grounds for dismissal *without* prejudice, the magistrate judge cited his belief that Edholm had not been served as a reason to dismiss the claim against Edholm *with* prejudice. [ER 180].

2. George's objections and the district court's decision

George timely objected to the magistrate judge's report and recommendation, [ER 222] (Dkt. No. 40), arguing in relevant part that the magistrate judge erred by (i) refusing to consider the complaint as a sworn affidavit in the record, [ER 187–188]; (ii) denying George's motion to withdraw admissions, [ER 191–192, 197]; (iii) *sua sponte* finding the Edholm had not been served, [ER 193–194]; (iv) granting summary judgment on the apartment search claim without any evidence to suggest that the conditions of his parole permitted

such a search, [ER 196–197]; and (v) generally failing to place the burden to produce evidence on Defendants and failing to view the evidence in the light most favorable to George, [ER 195–198].

The district court sustained the first two of George's objections. Addressing the verified complaint objection first, the district court observed that because "[*p*]*ro se* complaints are far more prone to errors in pleading, and thus are held to 'less stringent standards than formal pleadings drafted by lawyers[,]' . . . courts have a duty to construe *pro se* pleadings liberally." [ER 208]. The court noted that "[a]lthough Plaintiff's verification does not follow" the form required by federal law "with precision, it is made under penalty of perjury that the contents are true and correct and clearly incorporates traditional legal language that a litigant untrained in the law might understand to satisfy legal requirements." *Id.* (citing *Schroeder v. McDonald*, 55 F.3d 454, 460 n.10 (9th Cir. 1995)). "Accordingly," the district court concluded, "Plaintiff's verified complaint should have served as an opposing affidavit to Defendants' motion for summary judgment." [ER 209].

Turning to George's "conten[tion] that the Magistrate Judge's denial of the Motion [to Withdraw Admissions] was an abuse of discretion," the court observed that "[i]t appears from the record that Plaintiff attempted to request an extension of time to respond to Defendants' RFA[s]" when he requested an extension of time to respond to "[v]arious [m]otions." [ER 209]. Reiterating that "it is well-recognized

that *pro se* litigants are unskilled in the law, and thus their pleadings should be held to less stringent standards and construed liberally," the district court concluded that, in light of his effort to seek an extension of time, "Plaintiff's Motion [to Withdraw Admissions] should have been granted." [ER 209–210].

Having sustained George's evidentiary objections, the district court nevertheless found "no genuine issue of material fact with respect to Plaintiff's claims." [ER 210]. It accordingly "approved and adopted ['the Report and Recommendation'] with the above exceptions," and granted the motion for summary judgment. *Id*.

SUMMARY OF THE ARGUMENT

This case strikes at the very heart of the Fourth Amendment. It begins with an arbitrary seizure of George's person and a suspicionless search of his home. By implicating George's privacy within his home, where "the protective force of the fourth amendment [is its most] powerful," the state action here involves, from the outset, a constitutional violation that "lies at the very core of the rights which animate the amendment." *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 884 (9th Cir. 1990). But the illegal investigative detention and home search were just the beginning. After discovering a weapon in George's home – a weapon that everyone acknowledges was not George's – officers took George to jail and then to a hospital, where they instructed hospital staff to conduct a warrantless

search of George's rectum under general anesthesia. This Court has previously characterized rectal cavity searches as "dehumanizing and humiliating" (*Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 711 (9th Cir. 1990), *abrogated on unrelated grounds by Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam)); and the particular search here took place under circumstances that the Supreme Court has held to "implicate[] expectations of privacy and security of such magnitude that" they may render a search unreasonable entirely apart from whether it was "likely to produce evidence of a crime." *Winston v. Lee*, 470 U.S. 753, 759 (1985).

The district court nevertheless concluded that in arbitrarily stopping George in the neighborhood where he lived; conducting a warrantless and suspicionless search of his home without any knowledge of the conditions of his parole; and forcibly anesthetizing him, prying open his anus with a speculum, and removing evidence of a crime from within his body cavity, Defendants not only did not violate his clearly established constitutional rights, but they did him a service by forcing medical treatment upon him. That conclusion was error in every respect.

I. First, the district court erred in granting summary judgment on the pre-search detention claim. There is simply no doubt that the defendant officers seized George when Freeman "yelled [at George] to stop," [ER 64] – no one would have felt free to disregard the police under such circumstances. *See Hopkins v. Bonvicino*, 573 F.3d 752, 773 (9th Cir. 2009) (a seizure "'occurs when a law

enforcement officer, through coercion, physical force, or a show of authority, in some way restricts the liberty of a person'" (alterations omitted)), *cert. denied*, 2010 WL 1265866 (U.S. Apr. 5, 2010).

Such a seizure would have been justified if the officers had "reasonable suspicion supported by articulable facts that criminal activity may be afoot," *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007) (internal quotation marks omitted), *cert. denied*, 129 S. Ct. 105 (2008), or prior knowledge of George's parole status and the conditions of his release – but they had neither. Indeed, the record demonstrates only that the officers observed George standing in the "courtyard area of the apartment complex," that Freeman believed George was "loitering," and that George attempted to leave the scene when the officers first approached. [ER 64]. But, in fact, there was no reason to think that George was loitering – *i.e.*, that he was "linger[ing] . . . for the purpose of committing a crime." Cal. Penal Code § 647(h). And the fact that he attempted to leave the scene as officers approached is an "'activity . . . no different from the activity of other pedestrians in [any given] neighborhood.'" *Moreno v. Baca*, 431 F.3d 633, 643 (9th Cir. 2005) (quoting *Brown v. Texas*, 443 U.S. 47, 52 (1979)). Because the detention was unsupported by any suspicion of criminal activity or knowledge of George's parole status, it violated George's clearly established constitutional

rights. The district court therefore erred in granting summary judgment on that claim.

II. The district court also erred in granting summary judgment on the suspicionless home search claim. Of course, there is no disputing that George was on parole at the time of the search. There is also no disputing that this Court, following the Supreme Court's lead in *Samson v. California*, 547 U.S. 843, 847 (2006), has previously held the Fourth Amendment permits a police officer to conduct a suspicionless search of a parolee's home when, *and only when*, the conditions of the parolee's release require him to submit to such searches. *United States v. Lopez*, 474 F.3d 1208, 1213 (9th Cir. 2007). But here, there is no evidence in the record demonstrating one way or another whether the "parole conditions" that George "ha[d] notice of and agree[d] to" required him to submit to such searches. *Lopez*, 474 F.3d at 1214. In the absence of such evidence – a *conditio sine qua non* to application of *Samson* and *Lopez* – summary judgment should not have been granted on the suspicionless home search claim.

III. Granting summary judgment on the forced anesthesia and rectal cavity search was also error. This Court and the Supreme Court have both repeatedly recognized the profound dehumanization and humiliation involved with rectal cavity searches. *E.g.*, *Winston*, 470 U.S. at 760; *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988). And here, Defendants went even further: in addition to

visually and digitally inspecting George's rectum, they forcibly anesthetized George and, while he was unconscious, used medical equipment physically to open his anus and to enter his body cavity. Such a brutal procedure represents perhaps the greatest possible "intrusion upon an individual's dignitary and privacy interests." *United States v. Husband*, 226 F.3d 626, 633–634 (7th Cir. 2000).

It therefore comes as no surprise that the Supreme Court has unequivocally condemned body cavity searches in cases like this. In *Rochin v. California*, 342 U.S. 165 (1952), for example, the Court considered a forcible stomach pumping under indistinguishable circumstances and concluded that the Constitution cannot "afford [such] brutality the cloak of law," without "discredit[ing]" the law and thereby "brutaliz[ing] the temper of a society." *Id*. at 173–174. The Court found the search unconstitutional without reservation. And in *Winston*, the Court explained that a forced medical procedure to retrieve evidence from within a suspect's body is justifiable only in the very narrowest of circumstances: when there is probable cause, prior review and approval by a neutral magistrate, limited risk to the suspect, and an indispensible need to perform the procedure. 470 U.S. at 761–762. Such circumstances plainly were not present here.

Nor could the search be justified by any of the other circumstances of this case. *Samson* and *Lopez*, for example, are clearly inapplicable – it is unimaginable that the conditions of George's parole could have put him on notice that he would

be subject to warrantless rectal cavity searches under general anesthesia. Such a condition would be unconstitutional in any event.

There was also no medical emergency to justify the search. Even aside from George's clearly established right to refuse unwanted medical treatment (*see Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990)), every court to confront a case like this has held that the presence of drugs in a suspect's gastrointestinal tract *never* justifies a warrantless body cavity search; instead, the proper course is to wait for a monitored bowel movement. *See, e.g., United States v. Nelson*, 36 F.3d 758, 761 (8th Cir. 1994); *State v. Hodson*, 907 P.2d 1155, 1159 (Utah 1995); *People v. Bracamonte*, 540 P.2d 624, 631 (Cal. 1975) (en banc). Accordingly, the district court erred, not only in granting summary judgment on the pre-search detention and the suspicionless home search claims, but also on the forced anesthesia and body cavity search claim.

STANDARD OF REVIEW

This court "review[s] the district court's grant of summary judgment *de novo* and 'must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.'" *Avalos v. Baca*, 596 F.3d 583, 587 (9th Cir. 2010) (quoting *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001)). Defendants, as the moving parties, bear "'the burden of

showing the absence of a genuine issue as to any material fact.'" *Id*. (quoting *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 157 (1970)).

George has, until now, represented himself. *Pro se* pleadings "are to be construed liberally," *Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007), and held "to a less stringent standard than briefs by counsel." *Davis v. Silva*, 511 F.3d 1005, 1009 n.4 (9th Cir. 2008). Accordingly, George's filings before the district court must be "read[] . . . generously, 'however inartfully pleaded.'" *Id.* (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam)).

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS ON THE PRE-SEARCH DETENTION CLAIM.

Although the district court did not expressly address George's allegation that the defendant officers "arbitrar[il]y stopped" him while he "stood in front of his mother[']s] apartment," [ER 4], its dismissal of the entire action with prejudice, [ER 212], amounted to a grant of summary judgment to Defendants on that claim. That decision was error.

It is well settled that a seizure "'occurs when a law enforcement officer, through coercion, physical force, or a show of authority, in some way restricts the liberty of a person.'" *Hopkins v. Bonvicino*, 573 F.3d 752, 773 (9th Cir. 2009) (alterations omitted) (quoting *United States v. Washington*, 387 F.3d 1060, 1068

(9th Cir. 2004)), *cert. denied*, 2010 WL 1265866 (U.S. Apr. 5, 2010). And "[a] person's liberty is restrained when, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Id*. (quoting *Washington*, 387 F.3d at 1069 (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991))).

Here, there is no question that George was seized when Freeman "yelled [at George] to stop," and George immediately "complied." [ER 64]. A person's compliance with an authoritative command to "stop" is a quintessential example of a seizure within the meaning of the Fourth Amendment. *See, e.g.*, *California v. Hodari D.*, 499 U.S. 621, 626 (1991) ("a policeman yelling 'Stop, in the name of the law!'" followed by "submission to the assertion of authority" constitutes a Fourth Amendment seizure); *United States v. Jones*, 562 F.3d 768, 774 (6th Cir. 2009) (where the officer "ordered Jones to stop" and "Jones immediately complied," a "seizure of Jones was effected"); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 n.2 (2d Cir. 2006) (when an officer "yell[s] at [someone] to stop" and the person complies, the person is "seized for . . . purposes of [the] Fourth Amendment"). Indeed, as this court has explained in circumstances far less clear than those at issue here, a seizure occurs "when [an] officer merely indicates by his authoritative manner that the person is not free to leave." *Orhorhaghe v. I.N.S.*, 38

F.3d 488, 495–496 (9th Cir. 1994) (holding that compliance with the words "Let's go into your apartment" constituted a seizure). Here, in yelling at George to stop, Freeman plainly "indicate[d] by his authoritative manner that [George was] not free to leave." *Id*. Accordingly, George was detained within the meaning of the Fourth Amendment.

As relevant here, such a detention may be constitutionally permissible if the officers either (1) have articulable suspicion of criminal activity, or (2) know of the individual's parole status *ex ante*. Since neither condition applies in this case, the search was unconstitutional as a matter of clearly established law, and summary judgment should not have been granted to Defendants on this claim.

A. There is no evidence that the pre-search detention was supported by articulable suspicion of criminal activity.

An investigative detention may be constitutional if, at the time the detention begins, officers have "'reasonable suspicion supported by articulable facts that criminal activity may be afoot.'" *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007) (some internal quotation marks omitted) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)), *cert. denied*, 129 S. Ct. 105 (2008). "[R]easonable suspicion exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion." *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc).

Viewed in the light most favorable to George, the record evidence leaves no doubt that Freeman and Johnson lacked the requisite suspicion. The sparse record demonstrates only that the officers observed George standing in the "courtyard area of the apartment complex," that Freeman believed George was "loitering," and that George attempted to leave the scene when the officers first approached. [ER 64]. These factors, construed in George's favor, do not establish articulable suspicion.

As an initial matter, there is no evidence that George was actually loitering. In California, loitering consists of "linger[ing] . . . *for the purpose of committing a crime*." Cal. Penal Code § 647(h) (emphasis added); *see also Edgerly v. City & County of San Francisco*, __ F.3d __, 2010 WL 986764 at *4 (9th Cir. Mar. 19, 2010) (explaining that the California loitering law "has a specific intent requirement"). Of course, if Freeman had had a particularized and objective basis for suspecting that George intended to commit a crime as he was standing in the courtyard, then any independent suspicion the George was "loitering" would have been entirely superfluous. But as it is, there is no evidence whatsoever supporting an objective basis to suspect that George was lingering "for the purpose of committing a crime." Cal. Penal Code § 647(h). Freeman's unsupported suggestion that George was loitering accordingly does not suffice. *See Edgerly*, 2010 WL 986764 at *4 (holding that officers lacked probable cause where the officers had no

basis for believing that the suspect satisfied the loitering law's "specific intent requirement").

The evidence that George initially tried to leave the scene, [ER 64], is also insufficient to justify the investigative detention. It is well established that the "simple act of walking away from the officers" does not support reasonable suspicion. *Moreno v. Baca*, 431 F.3d 633, 643 (9th Cir. 2005). On the contrary, simply leaving the scene when officers approach is an "'activity . . . no different from the activity of other pedestrians in [any given] neighborhood.'"*Id.* (quoting *Brown v. Texas*, 443 U.S. 47, 52 (1979)). Thus in *Moreno*, in which officers approached a suspect "in a 'high crime' area" and he started "walking away," this Court held that "no reasonable officer could have concluded that [such] circumstances . . . gave rise to 'reasonable suspicion.'" *Id*. at 636–637, 643. Here, officers had no more to go on than did the officers in *Moreno* – and as that case makes clear, evidence that George tried to leave the scene in a high crime area, and no more, does not give rise to reasonable suspicion.

Of course, "'headlong flight'" from the police may, "'in some circumstances[,] . . . justify an investigatory seizure,'" *id.* at 643 (quoting *United States v. Valentine*, 232 F.3d 350, 357 (3d Cir. 2000)), because unrestrained flight is a "consummate act of evasion" that can be "suggestive of ['wrongdoing']." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). But there is no evidence of such

headlong flight in this case. Freeman's police report states only that George "*started* to run towards the front gate" when the officers approached. [ER 64] (emphasis added). This could not have been the kind of "consummate act of evasion" at issue in *Wardlow*, because George immediately "complied" and returned to the scene once Freeman "order[ed]" him to "stop" (*id*.) – hardly a course of conduct "suggestive of ['wrongdoing']." 528 U.S. at 124. Taken in the light most favorable to George, the record is therefore fully consistent with an initial, innocent decision to leave the scene given George's fear of police. Nothing the officers saw supported *articulable* suspicion that George was doing something illicit – they had nothing more than an "inarticulate hunch[]." *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

B. The officer's after-the-fact discovery of George's parole status cannot justify the search.

The investigative detention also cannot be justified by George's parole status. It is well established that "'police officers cannot retroactively justify a suspicionless search on the basis of an after-the-fact discovery of a parole condition.'" *United States v. Caseres*, 533 F.3d 1064, 1076 (9th Cir. 2008) (alteration omitted) (quoting *Moreno*, 431 F.3d at 641); *id*. at 1075–1076 (knowledge of parole status "validates a search only if the police had *advance knowledge* that the search condition applied before they conducted the search" (emphasis added)). Here, there is no question in the record that Freeman and

Johnson learned of George's status as a parolee only after Freeman ordered him to stop. [ER 64]. Accordingly, George's status as a parolee also cannot justify the detention.

C. The relevant law was clearly established on March 13, 2004.

Because the detention was not supported by either reasonable suspicion or prior knowledge of George's parole status, it violated George's Fourth Amendment rights. Concluding that Freeman and Johnson violated George's Fourth Amendment rights does not end the inquiry, however: "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Accordingly, if George's right to be free from the detention was "clearly established" on March 13, 2004, the defendants are not entitled to qualified immunity, and the district court erred in granting summary judgment.

Here, there is no doubt that the relevant law was clearly established at the relevant time. It had been the law of the land for decades prior to March 13, 2004 that if an officer "stop[s]" a pedestrian, and the "the stop is involuntary, it must be supported by reasonable suspicion based upon articulable facts that criminal activity is afoot." *United States v. Summers*, 268 F.3d 683, 686 (9th Cir. 2001)

(citing *United States v. Kerr*, 817 F.2d 1384, 1386 (9th Cir. 1987)). *Wardlow* and *Brown* had also been on the books for years, so there could be no question that only "headlong flight" would suffice to permit a detention, *Wardlow*, 528 U.S. at 124, and not merely an attempt to leave the presence of the police. *Brown*, 443 U.S. at 52. Likewise, it was clearly established well before 2004 that "whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted," and thus that "a search cannot be conducted 'under the auspices' of a [parole] search condition if the officer is unaware that the condition exists." *People v. Sanders*, 73 P.3d 496, 505–506 (Cal. 2003) (citing *People v. Reyes*, 968 P.2d 445 (Cal. 1998)). The Defendants therefore are not entitled to qualified immunity, and the district court erred in granting summary judgment to Defendants on that claim.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS ON THE RESIDENTIAL PAROLE SEARCH CLAIM.

Following the unconstitutional investigative detention, the officers searched George's apartment without a search warrant or any suspicion of criminal activity. Summary judgment was improper on George's challenge of that search, as well.

A. *Samson* does not apply here.

It is settled that a parolee's home, no less than anyone else's, "is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin v.*

Wisconsin, 483 U.S. 868, 873 (1987). It is also settled that home searches are presumed unreasonable in the absence of a search warrant supported by probable cause. *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (per curiam); *see also Payton v. New York*, 445 U.S. 573, 586 (1980) ("[S]earches and seizures inside a home without a warrant are presumptively unreasonable."). Under such circumstances, a search of a person's home therefore violates the Constitution unless one of a few very narrow exceptions applies.

No such exception applies here. Although the district court cited *Samson v. California*, 547 U.S. 843 (2006), to support its conclusion that George's "parole conditions obviated the requirements of probable cause or consent to search his residence," [ER 174], its reliance on that case was misplaced because, here, there is no evidence establishing that George was subject to suspicionless home searches as a condition of his parole.

Samson involved a suspicionless detention and pat-down search. 547 U.S. at 846–847. The suspect there had been on parole at the time and subject to California Penal Code § 3067(a), which provides that "every prisoner eligible for release on state parole 'shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.'" *Id*. at 846 (quoting Cal. Penal Code § 3067(a)). In upholding the constitutionality of the pat-down search, the Supreme

Court reasoned that "the totality of the circumstances pertaining to [Samson]'s status as a parolee, . . . *including the plain terms of the parole search condition*," eliminated Samson's "expectation of privacy" against suspicionless pat-down searches. *Id*. at 852 (emphasis added). Thus, according to the Court, "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search" of a parolee if the conditions of the parolee's release require him to submit to suspicionless searches. *Id*. at 857.

This Court has extended *Samson* to authorize suspicionless searches of parolees' residences and not just their persons. *See United States v. Lopez*, 474 F.3d 1208, 1213 (9th Cir. 2007) ("If under the California parole-search statute, a parolee has no expectation of privacy in his person, . . . [then] a parolee has no legitimate expectation of privacy in his residence either . . . .").[8] But it did so

[8] We respectfully submit that *Lopez* was wrongly decided. As an initial matter, California's statutory search condition applies by its terms to *parolees* and not to their homes. *See* Cal. Penal Code § 3067(a) ("Any *inmate* [released on parole] . . . shall . . . be subject to search or seizure . . . at any time of the day or night, with or without a search warrant and with or without cause." (emphasis added)). Nothing in the plain language of § 3067(a) places parolees on notice that they are subject to suspicionless *home* searches. But even if California law did expressly authorize suspicionless home searches of parolees, such searches still would be unconstitutional for at least two reasons. *See Cooper v. California*, 386 U.S. 58, 61 (1967) ("[A] search authorized by state law may be an unreasonable one under [the Fourth A]mendment . . . .").

First, *Lopez*'s conclusion that there is "not a significant difference" between a "search of a parolee's person" and a search of "a parolee's residence" (474 F.3d at 1213) is plainly incorrect. The Supreme Court has "acknowledged [for more than a

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according to the same rationale as *Samson* itself: it reasoned that "*under parole conditions a parolee has notice of and agrees to*, officers may conduct a warrantless, suspicionless search of a parolee's person or residence." *Id*. at 1214 (emphasis added). According to both *Samson* and *Lopez*, therefore, notice to the parolee that he is subject to suspicionless searches as a condition of his parole is the *conditio sine qua non* that justifies a parole compliance search. Absent notice of an express search condition, therefore, a parolee maintains a reasonable expectation of privacy in his home against suspicionless, warrantless searches. *See*

. . . continued

century] that the Fourth Amendment accords special protection to the home." *United States v. Johnson*, 457 U.S. 537, 552 n.13 (1982); *see also Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 884 (9th Cir. 1990) ("Nowhere is the protective force of the fourth amendment more powerful than it is when the sanctity of the home is involved" because the home "lies at the very core of the rights which animate the amendment.").

Second, *Lopez* was mistaken to suggest that parolees "agree[]" to the conditions of their parole (474 F.3d at 1214): "to speak of consent in this context is to resort to a 'manifest fiction,' for 'the [parolee] who purportedly waives his rights by accepting such a condition has little genuine option to refuse . . . .'" 5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b), at 440–441 (4th ed. 2004); *see also Samson*, 547 U.S. at 863 n.4 (Stevens, J., dissenting) (any "argument that a California parolee 'consents' to the suspicionless search condition is sophistry"; parolees have "no 'choice' concerning the search condition; [they] may either remain in prison, where [they] will be subjected to suspicionless searches, or [they] may exit prison and still be subject to suspicionless searches").

Thus, as the Kansas Supreme Court has held, a search condition permitting "random, nonconsensual, suspicionless [home] searches violates . . . the Fourth Amendment." *State v. Bennett*, 200 P.3d 455, 463 (Kan. 2009).

United States v. Freeman, 479 F.3d 743, 748 (10th Cir. 2007) ("*Samson* does not represent a blanket approval for warrantless parolee or probationer searches by general law enforcement officers without reasonable suspicion"; without an express search condition, parolee home searches therefore remain "[im]permissible in the absence of reasonable suspicion"); *cf. Sierra v. State*, 958 A.2d 825, 829 (Del. 2008) (holding suspicionless probationer home search unconstitutional because "Delaware law does not permit suspicionless searches of probationer or parolee residences").

The district court erred in granting summary judgment on the apartment search claim because, here, there is no evidence in the record establishing the "parole conditions" that George "ha[d] notice of and agree[d] to." *Lopez*, 474 F.3d at 1214. In his answers to Defendants' request for admissions, for example, George denied that the conditions of his parole permitted suspicionless searches of his home. [ER 127–128]. Even apart from that denial, there is no evidence that California Penal Code § 3067(a) applies in this case – California law provides that § 3067(a) "shall only apply to an inmate who is eligible for release on parole for an offense committed on or after January 1, 1997." Cal. Penal Code § 3067(c). Yet, here, there is no evidence that the crime for which George was paroled was

committed on or after January 1, 1997.[9] In the absence of evidence that George is subject to § 3067(a), definitive evidence demonstrating the conditions of his parole (and notice of such conditions) might have included a signed parole release form or an affidavit from George's parole officer. Yet none is in the record.[10]

And even if such evidence were in the record, there is also no evidence that Officers Freeman and Johnson were personally aware of the specific conditions of George's parole at the time of the home search. But again, the search cannot be justified by reference to facts not known to Defendants at the time. *See Caseres*, 533 F.3d at 1076 ("'Police officers cannot retroactively justify a suspicionless search on the basis of an after-the-fact discovery of a parole condition.'" (alterations omitted) (quoting *Moreno*, 431 F.3d at 641)).

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[9] George's opposition to the motion for summary judgment asserts that he was convicted prior to January 1, 1997. [ER 158]; *see also* [ER 128, 196–197]. This claim is credible: after serving a minimum prison sentence, prisoners in California convicted of any crime other than murder or a sex offense are paroled for up to five years. Cal. Pen. Code § 3000(b). Thus if George had been sentenced sometime in late 1996 and served, for example, five years in prison and three years on probation, he still would have been on parole in March 2004.

[10] It is unclear whether parolees were categorically subject to suspicionless search conditions prior to 1997. Section 3067's legislative history suggests that they were not. *See* Cal. Bill Analysis, A.B. 2284 Sen. (Aug. 7, 1996) (suggesting that, prior to passage of Cal. Penal Code § 3067, probationers were "subject to much stricter search and seizure provisions" than were parolees, and that "local law enforcement offices" were not "free to conduct [suspicionless] search[es]" of parolees' homes); *but see* Cal. Code Regs. tit. 15, § 2511(b)(4) (stating that all notices of parole shall include a search condition).

Accordingly, taking the evidence in the light most favorable to George, the record does not establish that (1) the conditions of George's parole authorized suspicionless searches of his home, (2) he was on notice of those conditions, or (3) the officers had personal knowledge of them. Thus there is no basis in either fact or law to support the district court's sweeping conclusion that George's "parole conditions obviated the requirements of probable cause or consent to search his residence." [ER 174]. The search of his apartment was therefore unconstitutional.

B. The relevant law was clearly established on March 13, 2004.

There is little doubt that the illegality of the suspicionless apartment search was clearly established on March 13, 2004. As a general matter, it had certainly been clearly established that "[i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable," *Payton*, 445 U.S. at 586 (internal quotation marks omitted), and that a parolee's home, "like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin*, 483 U.S. at 873.

It was also clearly established by 2001 that the central consideration in evaluating a probationer's or parolee's expectation of privacy in his home – and thus the reasonableness of particular residential compliance search – is whether he is subject to and has notice of a suspicionless search condition. In *United States v. Knights*, 534 U.S. 112 (2001), the Supreme Court made clear that probation

compliance searches based upon less than probable cause are constitutional only *because* and *when* probationers and parolees who have been "unambiguously informed" of a "clearly expressed" suspicionless "search condition" have "significantly diminished" "expectation[s] of privacy." *Id*. at 119–120. Here, there is absolutely no evidence demonstrating that George was subject to or had notice of a suspicionless search condition. Absent such evidence that he had a "significantly diminished" expectation of privacy in his home, *id*. at 120, the search was illegal as a matter of clearly established law. Accordingly, Defendants are not entitled to qualified immunity, and the district court erred in granting summary judgment to Defendants on that claim.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS ON THE FORCED ANESTHESIA AND RECTAL CAVITY SEARCH CLAIM.

Following the unconstitutional seizure of George's person and search of his home, the officers later took George to the hospital, where they and Edholm forcibly anesthetized him and conducted a highly invasive and involuntary rectal cavity search. The district court further erred in granting summary judgment to Defendants on George's challenge of that search.

A. The rectal cavity search violated George's clearly established Fourth Amendment rights.

There is little question here that the brutal rectal cavity search violated the Fourth Amendment. "'[T]he overriding function of the Fourth Amendment is to

protect personal privacy and dignity against unwarranted intrusion by the State.'" *Winston v. Lee*, 470 U.S. 753, 760 (1985) (quoting *Schmerber v. California*, 384 U.S. 757, 767 (1966)). Thus "[a] central element in the analysis" of the totality of the circumstances for Fourth Amendment purposes is "the scope of the particular intrusion." *Terry v. Ohio*, 392 U.S. 1, 17 n.15 (1968).

Here, the scope of the intrusion sets an extraordinarily high bar for defendants: as this Court has previously explained, "[t]he intrusiveness of a body-cavity search cannot be overstated." *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 711 (9th Cir. 1990), *abrogated on other grounds by Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam). In fact, a strip search involving mere "*visual* exploration of body cavities is dehumanizing and humiliating." *Id*. (emphasis added). And, of course, "digital rectal searches" are even more "intrusive and humiliating" than visual searches. *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988); *see also Bell v. Wolfish*, 441 U.S. 520, 576–577 (1979) (Marshall, J., dissenting) ("[B]odycavity searches . . . represent one of the most grievous offenses against personal dignity and common decency.").

It would be bad enough if all that were at issue here were a visual and digital rectal search, but in this case Defendants went even further: they restrained George and *forcibly anesthetized* him, necessitating the use of a breathing tube to keep him alive. [ER 22]. While Defendants had utter and unchecked control of George's

unconscious body, Edholm physically entered and opened George's anus with a speculum (the same instrument used for gynecological examinations) and reached into the interior of his body with forceps to recover evidence of a crime. There is more at issue here, therefore, than even the profound "dehumaniz[ation] and humiliat[ion]" of a rectal cavity search (*Kennedy*, 901 F.2d at 711): "[a] compelled medical procedure," involving "use of general anesthesia" in order to conduct "an invasive search of a person's body cavity" simply "to obtain evidence," represents perhaps the greatest possible "intrusion upon an individual's dignitary and privacy interests" under the Fourth Amendment. *United States v. Husband*, 226 F.3d 626, 633–634 (7th Cir. 2000); *see also Winston*, 470 U.S. at 760 (bodily intrusions involving general anesthesia "implicate[the] . . . most personal and deep-rooted expectations of privacy").

The Supreme Court has unequivocally condemned searches under circumstances such as these. In *Rochin v. California*, 342 U.S. 165 (1952), for example, the Court considered a search analytically indistinguishable from that at issue here and, in the harshest of terms, found that it violated the Constitution. In that case, officers witnessed Rochin put pills they believed to be illegal contraband into his mouth. *Id*. at 166. The officers were unable to prevent him from swallowing the pills. *Id*. Accordingly, Rochin "was handcuffed and taken to a hospital." *Id*. There, "[a]t the direction of one of the officers a doctor forced emetic

solution through a tube into Rochin's stomach against his will. This 'stomach pumping' produced vomiting. In the vomited matter were found two capsules which proved to contain morphine." *Id*.

On later review of Rochin's conviction, the Supreme Court excoriated the officers' methods as "too close to the rack and the screw to permit of constitutional differentiation." *Rochin*, 342 U.S. at 172. It found that the "the forcible extraction of [Rochin's] stomach's contents" did "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically." *Id*. Instead, the "course of proceeding by agents of government to obtain evidence" – involving the coercive use of a medical procedure to extract suspected contraband from within Rochin's body – "is bound to offend even hardened sensibilities." *Id*. "[T]o afford [such] brutality the cloak of law," the Court reasoned, "would . . . discredit [the] law and thereby . . . brutalize the temper of a society." *Id*. at 173–174. Accordingly, the Court held that the Constitution does not permit "force so brutal and so offensive to human dignity in securing evidence from a suspect." *Id*. at 173.

The sequence of events in *Rochin* match those here with remarkable similarity. Taking the evidence in the light most favorable to George, the record shows that, upon arrival at the hospital, the officers informed Edholm that they suspected George had hidden drugs in his rectum and instructed Edholm that "[w]e

need it out now." [ER 5]; *see also* [ER 20, 28, 89–90, 104–105]. George understandably did not cooperate, so – at the behest of the officers[11] – Edholm anesthetized George, and, in a procedure perhaps even more "brutal" than the stomach pumping in *Rochin*, pried open his anus and retrieved the evidence from within his body cavity. According to *Rochin*, the search was undoubtedly illegal: like the officers' actions in *Rochin*, these were "methods too close to the rack and the screw to permit of constitutional differentiation." 342 U.S. at 172.

Rochin can and should provide the beginning and end of the question in this case. But if there is any question concerning *Rochin*'s relevance in the modern Fourth Amendment context,[12] the Supreme Court's decision in *Winston* resolves

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[11] There is no doubt that Edholm and the nurses who assisted him were willful participants in the officers' illegal conduct. As the Supreme Court has explained, "[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of [42 U.S.C. § 1983]." *United States v. Price*, 383 U.S. 787, 794 (1966); *see also State v. Payano-Roman*, 714 N.W.2d 548, 554 (Wis. 2006) (holding in a similar case that "police and medical staff [can be] engaged in a joint endeavor" even where there is "a dual purpose: medical treatment and the recovery of evidence of a crime").

[12] Although *Rochin* was decided before the Fourth Amendment and its exclusionary rule were incorporated against the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), there is no doubt that the Court would have reached "the same result" had it "treated [the case] under the Fourth Amendment" rather than under the Due Process Clause. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 n.9 (1998). *Rochin* thus remains directly relevant under the Fourth Amendment's modern totality of the circumstances analysis. *See Husband*, 226 F.3d at 630 (*Rochin* "provides" an appropriate "framework for [the court's] analysis" of the reasonableness of a search involving forced anesthesia); *see also Lopez-Rodriguez*

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any possible doubt as to the proper outcome here. In *Winston*, the Court considered the constitutionality of "[a] compelled surgical intrusion into an individual's body for evidence." *Winston*, 470 U.S. at 759. There, Winston had been involved in an armed robbery. During the course of the robbery, the shop owner shot Winston, who fled the scene. *Id*. at 755. The shop owner later identified Winston as the robber. *Id*. at 756. To prove that Winston was indeed the robber, the state obtained a state court "order directing [Winston] to undergo surgery to remove [the] bullet lodged under his left collar bone." *Id*.

The Supreme Court enjoined the surgery, holding that if performed, it would constitute an illegal search and seizure under the Fourth Amendment. In reaching this conclusion, the Court considered four factors: (1) whether a neutral magistrate had determined that there was probable cause to support the search, (2) "the extent to which the procedure may threaten the safety or health of the individual," (3) "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," and, against these individual concerns, (4) "the community's

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v. Holder, 560 F.3d 1098, 1104 (9th Cir. 2009) (Bea, J., dissenting) (characterizing *Rochin* as "an example of an egregious violation of the Fourth Amendment"); *Franklins v. Maricopa Co. Med. Ctr.*, 978 F.2d 714 (table), 1992 WL 317248, at *4 n.6 (9th Cir. 1992) (mem.) (*Rochin*'s "holding is now subsumed [under] the Fourth Amendment" (citing 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 5.3(c) at 503, n.115 (2d ed. 1988)).

interest in fairly and accurately determining guilt or innocence." *Winston*, 470 U.S. at 761–762 (citing *Schmerber*).

There, the Court concluded that, even though "[t]he Commonwealth plainly had probable cause to conduct the search," *Winston*, 470 U.S. at 763, which had twice been approved in state court proceedings, the proposed search was unconstitutional because the record evidence yielded "uncertainty about the medical risks" of the procedure; the procedure would have been "an extensive intrusion on [Winston]'s personal privacy and bodily integrity"; and "the Commonwealth's need to intrude into respondent's body to retrieve the bullet" was "hardly persuasive." *Id*. at 764–765. Accordingly, the search would have been unreasonable under the Fourth Amendment.

Here, those same factors require finding the search of George's rectum unreasonable. In the first place, and unlike in *Winston*, there is nothing in the record indicating that the officers had probable cause prior to the procedure. The evidence demonstrates only that Freeman observed George "attempt[] to conceal an item," which Freeman thought looked like a "plastic baggie." [ER 65]. Without any *direct evidence* that the bag contained contraband, however, the officers lacked probable cause – mere inference is not enough. *See, e.g.*, *United States v. Ingrao*, 897 F.2d 860, 863–865 (7th Cir.1990) (holding that officers lacked probable cause to believe that a suspect was carrying contraband when they observed the suspect

walking away from known drug traffickers, carrying an opaque bag, which they only inferred contained drugs); *United States v. Ceballos*, 654 F.2d 177, 185 (2nd Cir.1981) (holding that police lacked probable cause when they observed a suspect emerging from a known drug dealer's house carrying a brown paper bag, but did not see any "white powder" until after they arrested the suspect).

Like the officers in *Ingrao* and *Ceballos*, Freeman and Johnson did not actually observe any drugs in this case – they saw only an unidentified "item" that resembled a "baggie," [ER 65], which Freeman "suspected" by circumstantial inference "that the bag contained cocaine." [ER 175]. This case is therefore quite unlike, for example, *United States v. Miller*, 769 F.2d 554 (9th Cir. 1985), where this Court found that officers "had probable cause to believe that [a] plastic bag contained contraband" because "[w]hite powder [had] spilled out" of a "hole" in the bag. *Id*. at 555, 557. Absent direct evidence that George was attempting to conceal specifically *contraband*, Freeman's "[m]ere suspicion" – "even strong" suspicion – was "not enough" to support probable cause. *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007). Such suspicion would have been insufficient to justify an ordinary search of a home, and "'no less could be required where intrusions into the human body are concerned.'" *Winston*, 470 U.S. at 761 (quoting *Schmerber*, 384 U.S. at 770).

What is more, there is also no question that, independent of the level of Freeman's suspicion, a neutral magistrate did not conduct an *ex ante*, detached review of the facts. Yet "'[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.'" *Winston*, 470 U.S. at 761 (quoting *Schmerber*, 384 U.S. at 770); *see also Husband*, 226 F.3d at 634 ("The benefits of obtaining authorization to perform a compelled medical procedure are obvious: presentation to a neutral decisionmaker both ensures that the individual's Fourth Amendment rights are protected, and safeguards the health and safety of the suspect." (citations omitted)).

Even imagining that there had been probable cause and detached review by a neutral magistrate, the search of George's rectum *still* would have been unconstitutional: like the search in *Winston*, it involved uncertain risks to George (as in *Winston*, it is unclear whether George was at a low or high risk of injury from the general anesthesia), the greatest imaginable invasion of George's privacy (*see supra*, pp. 34–35), and no compelling need for the procedure.

Concerning the necessity of the procedure, the *Winston* Court held that the lack of an indispensible "*need* for the Commonwealth to compel respondent to undergo the contemplated surgery" substantially undercut the reasonableness of the proposed search in that case. 470 U.S. at 765–766 (emphasis added). Thus, as this

Court has explained, "'nonroutine manipulative intrusions on bodily integrity [are] subject to heightened scrutiny to determine, *inter alia*, whether there are less intrusive alternatives available.'" *United States v. Webber*, 451 F.3d 552, 563 (9th Cir. 2006) (quoting *Harrington v. Almy*, 977 F.2d 37, 44 (1st Cir. 1992)). Here, substantially less intrusive alternatives plainly *were* available: hospital staff could have simply observed George until he produced a monitored bowel movement, which would have either confirmed or rebutted the officer's suspicions. *See United States v. Nelson*, 36 F.3d 758, 761 (8th Cir. 1994); *State v. Hodson*, 907 P.2d 1155, 1159 (Utah 1995); *People v. Bracamonte*, 540 P.2d 624, 631 (Cal. 1975) (en banc); *see also infra*, pp. 47–49.

On the record presently before the Court, there is therefore no disputing that the rectal cavity search was unconstitutional under the *Winston* balancing test: it was supported neither by probable cause, nor a warrant, nor necessity; constituted an extreme offense to George's dignity and privacy; and posed unknown risks to his health and safety. Thus, no matter whether analyzed under *Rochin* or *Winston* – both of which were clearly established at the relevant time – the search was plainly unconstitutional.

B. The rectal cavity search was not justified by the conditions of George's parole.

No other circumstances of the search are capable of rendering it reasonable. The fact the George was on parole, for example, certainly cannot justify the

search.[13] As we have explained, *Samson* and related cases stand for the limited proposition that notice to a parolee that he is subject to a suspicionless search condition undercuts his reasonable expectation of privacy against such searches. *See supra*, pp. 27–29. Absent notice of an express search condition, however, a parolee maintains a reasonable expectation of privacy against suspicionless searches. *See Freeman*, 479 F.3d at 748.

Here, even imagining that there were evidence in the record establishing the conditions of George's parole, it is utterly inconceivable that those conditions would have put George on notice that he could be subject to the brutal procedures utilized by Defendants in this case. Certainly, if George's parole *were* conditioned on his being subject to warrantless rectal cavity searches under general anesthesia, that condition would run headlong into both the Fourth Amendment, which "protect[s] personal privacy and dignity against unwarranted intrusion by the State," *Winston*, 470 U.S. at 760 (internal quotation marks omitted), and the Eighth Amendment, which "proscribes" all "excessive" and "cruel and unusual punishments." *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008); *cf. State v. Bennett*, 200 P.3d 455, 463 (Kan. 2009). Accordingly, George's status as a parolee provides no shelter for Defendants.

[13] By order filed January 20, 2010, this Court directed pro bono counsel to "address the appropriate standard governing invasive body cavity parole searches in the wake of *Samson v. California*, 547 U.S. 843 (2006)." Dkt. No. 25 at 2.

C. The rectal cavity search violated George's clearly established right to refuse unwanted medical treatment.

Nor does the record support finding Defendants' actions justified by a medical emergency independent of the officer's interest in retrieving the evidence. As an initial matter, this Court and the Supreme Court have both repeatedly recognized that "[t]he due process clause of the Fourteenth Amendment substantively protects a person's rights . . . to refuse unwanted medical treatment" and generally "to be free from unjustified intrusions to the body." *Benson v. Terhune*, 304 F.3d 874, 884 (9th Cir. 2002) (citing *Riggins v. Nevada*, 504 U.S. 127, 134 (1992)); *see also United States v. Rivera-Guerrero*, 426 F.3d 1130, 1136 (9th Cir. 2005) (reaffirming "a 'liberty interest in freedom from unwanted'" medical treatment) (quoting *United States v. Williams*, 356 F.3d 1045, 1053 (9th Cir. 2004) (quoting *Riggins*, 504 U.S. at 137)).

This right to refuse unwanted bodily intrusions extends even to those with substantially limited freedom. Thus incarcerated prisoners "possess 'a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs,'" because, even for them, "'[t]he forcible injection of medication . . . represents a substantial interference with . . . liberty.'" *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (quoting *Washington v. Harper*, 494 U.S. 210, 221–222, 229 (1990)). Children, too, have a right to refuse unwanted treatment: "'a child, in common with adults, has a substantial liberty interest in not being confined

unnecessarily for medical treatment.'" *Id*. at 278–279 (quoting *Parham v. J.R.*, 442 U.S. 584, 600 (1979)). In short, it has long been established that the freedom to make decisions about the course of one's own medical care is one of "those personal immunities" of private life that is "'ranked as fundamental'" and is "'implicit in the concept of ordered liberty.'" *Rochin*, 342 U.S. at 169 (quoting *Palko v. Conn.*, 302 U.S. 319, 325 (1937)).

There is no doubt that forcibly placing a suspect under general anesthesia to recover evidence from within his body implicates the suspect's right "to refuse medical treatment [and] to determine the course of his own care." *Husband*, 226 F.3d at 632 (general anesthesia to recover evidence from within the suspect's mouth). Yet, here, the district court not only completely disregarded George's right to refuse unwanted medical treatment, but considered George's "noncomplian[ce]" and "refus[al] to allow the procedure to proceed," [ER 176], a *justification* for the forced anesthesia, as though George's own judgment about his medical care were simply an obstacle for Defendants to overcome. The district court's cavalier endorsement of Edholm's euphemistic "conclu[sion] that plaintiff required 'complete relaxation' for GI and rectal decontamination" and that "plaintiff's condition 'required aggressive management' in the face of noncompliance," [ER 176–177], is thus utterly irreconcilable with decades of clearly established constitutional law acknowledging that forced medical treatment "'represents a

substantial interference with . . . liberty.'" *Cruzan*, 497 U.S. at 278 (quoting *Harper*, 494 U.S. at 221–222).

Of course, concluding "that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry" – determining whether George's "'constitutional rights [were] violated'" by the forced medical treatment requires "'balancing his liberty interests against the relevant state interests.'" *Cruzan*, 497 U.S. at 279 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)). And the Supreme Court has previously suggested, in dictum, that a state may have an interest in compelling medical treatment upon those in its custody when "refusal to [accept treatment] puts [a detainee's] health gravely at risk." *Sell v. United Sates*, 539 U.S. 166, 182 (2003); *but see Stouffer v. Reid*, __ A.2d __, 2010 WL 1526472, at *9 (Md. Apr. 19, 2010) (in a prisoners' rights case, explaining that "[w]e simply are not persuaded that the State's interest in the preservation of life outweighs Reid's right to refuse medical treatment").

Yet even assuming *arguendo* that a medical emergency could have overcome George's right to refuse treatment, the record does not establish that there was any such emergency in this case. In fact, to our knowledge, no court has *ever* determined that the mere presence of a bag of drugs in a suspect's gastrointestinal tract created a medical emergency capable of justifying the brutal methods employed by Defendants. In *Nelson*, for example, the Eighth Circuit held

that "there was no medical emergency" sufficient to justify the "body cavity search" in that case, even though "doctors were concerned that the packet [of drugs] could possibly rupture" in the defendant's gastrointestinal tract. 36 F.3d at 761. The proper course of action, according to the Eighth Circuit, was simply to wait for "the packet to pass naturally." *Id*. Similarly, in *Hodson*, the Supreme Court of Utah found that there was no basis to support "a reasonable fear by the officers that swallowing the plastic-wrapped [drugs] would render their contents nondiscoverable or harmful to defendant." 907 P.2d at 1158. That court, too, held that the proper course of action was to allow the drugs to "pass through the system," so that they could later be "identif[ied] and recover[ed] in supervised, nonviolent post-arrest settings." *Id*. And in *Bracamonte*, the Supreme Court of California observed that drugs in impermeable containers ordinarily "pass completely through the digestive tract, by the ordinary processes of nature, without causing any ill effects." 540 P.2d at 631. The court there observed that the suspect "easily could have been transported to jail and placed in an isolation cell and kept under proper surveillance" until he had a bowel movement. *Id*.[14]

[14] The examples could continue. *See also, e.g.*, *State v. Ellis*, No. 0812014486, 2009 WL 5176196, at *6 (Del. Super. Ct. Nov. 18, 2009) (finding "no imminent threat to [the suspect]'s health" to support a visual body cavity search prior to obtaining a search warrant simply because the suspect "*could have* overdosed" in the uncertain event that the "bag . . . ruptured" (emphasis added)).

The Fourth Amendment required no less here than it required in *Nelson*, *Hodson*, and *Bracamonte*. To be sure, 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. [ER 20, 23, 28]. But there is absolutely no evidence that Defendants had any particular reason to believe that the plastic bag containing the cocaine was in any danger of rupturing before George could safely pass it in a monitored bowel movement. And even if Defendants *had* had a credible, particularized reason to think the bag would rupture, the possibility that a bag of drugs may "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), rather than forcing immediate and involuntary treatment under general anesthesia. *See United States v. Solimini*, 560 F. Supp. 648, 653 (E.D.N.Y. 1983) ("[The] detention for observation at the hospital while the inspectors awaited his first bowel movement was reasonable" given the "danger that one or more of the drug-containing packets [might] rupture").[15]

Accordingly, there is nothing in the record supporting a "'relevant state interest[],'" *Cruzan*, 497 U.S. at 279 (quoting *Youngberg*, 457 U.S. at 321), to

[15] For this reason, the nurse's pre-operative speculation that the presence of the cocaine in George's rectum was "*potentially* life-threatening," [ER 26] (emphasis added), is entirely beside the point.

justify overriding George's constitutionally protected right to refuse medical treatment. On the contrary, both the record evidence and common sense indicate that Defendants simply should have waited for a bowel movement. That doubtless would have been a less expedient solution than anesthetizing George and forcing the procedure upon him, but "constitutional protections against arbitrary government" do not become "inoperative when they become inconvenient." *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality). The district court accordingly erred in granting summary judgment on the forced anesthesia and rectal cavity search claim, which plainly involved a violation of George's clearly established constitutional rights.

IV. THE DISTRICT COURT CLEARLY ERRED IN FINDING THAT GEORGE DID NOT SERVE EDHOLM.

Finally, the district court clearly erred in finding that George "has not served . . . Dr. Edholm . . . with the summons and complaint." [ER 180]. Although Edholm never answered the complaint, there is uncontested evidence that Edholm was indeed served. [ER 203]. On remand, George should be permitted to obtain a default judgment against Edholm under Federal Rule of Civil Procedure 55(b)(2).

CONCLUSION

The decision of the district court should be reversed with respect to all defendants and all claims, and the case remanded for further proceedings.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Local Rule 28-2.6, the undersigned counsel for appellant Clifford George states that there are no related cases pending in this Court.

s/ Michael B. Kimberly

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for appellant Clifford George certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,552 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in 14-point sized Times New Roman font.

s/ Michael B. Kimberly

CERTIFICATE OF SERVICE

The undersigned counsel for appellant Clifford George certifies that:

(i) this brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on April 23, 2010, and participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system; and

(ii) some of the participants in the case are not registered CM/ECF users, and a hard copy of this brief has been served via courier service for delivery within three calendar days to:

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