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)

OPENING BRIEF FOR APPELLANT

Elisha B. Barron
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Charles A. Rothfeld
Michael B. Kimberly*
Paul W. Hughes
Mayer Brown LLP
1999 K Street NW
Washington, D.C. 20006
(202) 263-3000
mkimberly@mayerbrown.com

**Counsel of Record*

Counsel for Plaintiff-Appellant

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STATEMENT CONCERNING ORAL ARGUMENT

Plaintiff-Appellant Clifford George respectfully requests oral argument. This case involves constitutional violations of the greatest magnitude, evidenced in a complex record, including *pro se* documents filed prior to the involvement of counsel. Oral argument will provide an opportunity for the parties to address any questions the Court may have concerning the record and the significant legal issues presented for review.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and entered a final judgment on November 7, 2011. George filed a timely notice of appeal on November 29, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Is there a genuine dispute of fact concerning the existence of a conspiracy among the defendants to violate George's constitutional rights?

2. Did an initial involuntary digital rectal cavity search of George, or a subsequent rectal cavity search performed under forced general anesthesia, violate George's clearly established (a) Fourth Amendment right to be free from unreasonable searches or (b) Fourteenth Amendment due process right to refuse unwanted medical treatment?

STATEMENT OF THE CASE

George filed this *pro se* 42 U.S.C. § 1983 civil rights complaint against police officers Greg Freeman and Daryll Johnson, Dr. Thomas Edholm, and two Jane Doe nurses. Neither Edholm nor the nurses appeared in district court or filed an answer to the complaint.

The case was referred to a magistrate judge. Dkt. 2. Following initial discovery, defendants Freeman and Johnson moved for summary judgment. Dkt. 11. The magistrate judge recommended granting summary judgment to all defendants on all claims. Dkt. 36. Over George's objection (Dkt. 40), the district court adopted the report and recommendation and granted summary judgment. Dkt. 42.

This Court reversed and remanded, finding that the district court committed an evidentiary error that warranted reconsideration of the summary judgment motion. *George v. Edholm*, 410 F. App'x 32 (9th Cir. 2010). The Court further instructed the district court to permit George to re-serve the complaint on Edholm; it affirmed summary judgment as to the Jane Doe nurses. *Id*. at 33-34.

With George represented by counsel on remand, the parties reopened limited discovery. Dkts. 63, 64. Edholm was re-served with the complaint but again failed to appear or answer. Dkts. 70, 71. At the close of addition-

al discovery, Defendants Freeman and Johnson moved for (Dkt. 80), and the district court again granted (Dkts. 109), summary judgment. The district court further ordered George to file a Rule 41 notice voluntarily dismissing Edholm without prejudice. [ER21]. Before George filed the Rule 41 dismissal, [ER321], however, the district court entered judgment for all defendants on all counts. [ER22]. This appeal followed.

STATEMENT OF FACTS

A. Factual background

Defendant police officers Freeman and Johnson arrested George on March 14, 2004, allegedly for violating the conditions of his parole.[1] The officers transported George to the Pomona City Jail and took him to the jail's "strip tank" for a strip search, as part of the standard booking process. [ER35, 266-267]. After removing his clothes, George fell to the floor in a seizure. [ER35, 44, 229, 269-270]. Freeman's police report states that while George was convulsing, Freeman saw him "reach[] under his body" and "conceal an item" in his "anus." [ER35-36]. The officers did not believe George was actually having a seizure, [ER128, 142-143, 231], but they summoned paramedics anyway. [ER312-315]. The paramedics determined that "plaintiff was [no longer] having a seizure," [ER42] and "there

[1] It is unclear what condition of his parole George was alleged to have violated, and the parole-violation charge was eventually dropped.

[was] nothing medically wrong with him," [ER27-28]. The EMS report specifically described George's "status" as "Improved," and noted "normal" respiration, skin signs, and orientation. [ER314-315].

The officers told the paramedics that they believed George had hidden cocaine in his rectum, but the paramedics refused the officers' request to search his rectum for the contraband. [ER42]. Notwithstanding the officers' belief that the seizure was fake and the paramedics' conclusion that there was no medical problem, Johnson transported George to the Pomona Valley Hospital in his police vehicle "to be treated for his immediate health condition." [ER28, 36, 41-42, 44-45]. At his deposition, Johnson made clear the officers' purpose for taking George to the hospital: "Police officers are not allowed" to search a person's "buttocks," and so they needed "a doctor" to "remove" the suspected drugs from George's rectum. [ER155].

Upon arrival at the hospital, two nurses examined George and confirmed the paramedics' conclusion that there was no medical emergency requiring immediate treatment. [ER28-30]. Dr. Edholm then entered the examination room. The evidence shows that he conferred not with George, but with the police officers. [ER281]. It is undisputed that the officers informed Edholm that they believed George had ingested cocaine and hidden

a bag of cocaine in his rectum. [ER42, 45; *see also* ER49 ("Per P.D.: pt. ingested cocaine & put some into his rectum.")].

At this point, the parties' stories diverge. According to George, Edholm—acting on the information from the officers, but without conferring with George himself [ER306]—instructed the officers to "roll [George] over" onto his side so that Edholm could conduct a digital rectal examination. [ER284]. The officers did so, George testified, and Edholm commenced his exam, putting "his hands right up [George's] rectum." [ER282, 284]. George began "screaming" and "yelling" and "hollering" because "it hurt[]." [ER284]. George told Edholm to "stop," [ER307], and accused Edholm of "battering" him [ER282].

Officer Freeman nevertheless instructed Edholm to continue with the examination because "Goddamn it, I know that he's got [contraband]" in his rectum. [ER282]. To assist Edholm in the examination, Freeman instructed Johnson to "hold him down"; Johnson obliged, and both he and Freeman held George's legs down. [ER282-283; *see also* ER307 ("Freeman was holding my leg")]. All the while, George heard Freeman continue to direct Edholm: "You need to get this out [of] his ass. He's got something up his ass, Goddamn it, I know he does." [ER286; *see also* ER307 ("I know he's got something up his ass. You need to get that out. I know he does.")].

The officers tell a different story. In their version of events, they simply told Edholm that they suspected George had contraband in his rectum. [ER42, 45, 184-185]. Having been apprised of the situation, Edholm "took over from there," and the officers stood back and played no further role, although Johnson admitted that "it was kind of . . . a given" that, in relaying their suspicions to Edholm, the officers were suggesting that they wanted Edholm to search for and remove the drugs. [ER185]. Both officers expressly denied that they took part in restraining George. [ER42-43, 45-46]. For his part, Freeman, who recalled very little of the encounter, suggested that he would not have told Edholm that he "needed the cocaine out now" because Edholm "would have laughed at [him]" if he had "tr[ied] to tell [him how] to do his job." [ER248].

In any event, there is no dispute that George "denied all complaints," "deni[ed] any drug use," and vociferously refused consent to be examined or treated. [ER49-50]. Faced with George's resistance, Edholm determined that merely restraining George's legs "[wa]sn't going to work," [ER309], and more "aggressive management" was necessary to overcome George's "noncomplian[ce]," [ER51, 93]. George claims that he was then forcibly restrained by the officers "acting together" with hospital security, [ER308-309], while Edholm administered drugs to place George under general

anesthesia against his will, [ER51]. The officers again deny that they took part in the restraint. [ER43, 46].

With George completely unconscious and intubated under general anesthesia—in "chemical restraints," as Edholm euphemistically put it at his deposition, [ER79]—Edholm inserted an anoscope into George's anus. [ER51]. Using forceps, Dr. Edholm "removed the drug packet" from George's rectum and "handed it directly to the Pomona Police Officer upon removal from the patient's anus." [ER51]. It is undisputed that neither Edholm nor his staff sought or obtained George's consent, George did not want to be treated, and he repeatedly refused "treatment." [ER306-307].

George suffered anal pain and severe bleeding as a result of the search of his body cavity. [ER294-295]. In Edholm's later write-up of the encounter, Edholm simply reiterated the officers' explanation of George's medical condition, noting that George "tried to swallow drugs and they also saw him putting something in his rectum." [ER50]. The report also accused George of "refusing to comply and admit what happened." [ER50].

The report noted that George had "mild psychomotor agitation," high blood pressure, a fast heart rate, and was sweating. [ER50-53]. Edholm concluded that these symptoms were consistent with cocaine intoxication, [ER52], but later acknowledged that they also were consistent with many

other conditions, including simply experiencing "severe pain." [ER81-84]. George had informed the medical staff that he suffered from hypertension and schizophrenia and was on various medications. [ER50]. There is no evidence that Edholm explored any of these other options.

After George was resuscitated from anesthesia, Edholm cleared him and released him for booking. He later was charged with possession of cocaine base for sale in violation of California Health & Safety Code § 11351.5. [ER316]. George eventually pled no contest and waived his right to appeal. [ER316]. He is currently serving an eight year prison sentence in Folsom State Prison.

B. Procedural background

George filed this *pro se* Section 1983 action against Edholm, Freeman, Johnson, and two nurses, [ER25-26], alleging (in relevant part) that the forcible search of his rectal cavity violated his Fourth and Fourteenth Amendment rights, [ER27-31].[2] It is unclear whether the complaint, which seeks a declaratory judgment and compensatory and punitive damages, was properly served on Edholm when it first was filed. In any event, nei-

[2] The complaint included two claims in addition to the body cavity search claim—one based on the officers' initial detention and pat-down search of George, and the other on a parole compliance search of his apartment. Neither of those claims is pressed in this appeal.

ther Edholm nor the nurses have answered the complaint or otherwise taken part in this litigation.

1. With George proceeding *pro se*, the case initially was referred to a magistrate judge. Dkt. 2. The officers moved for, the magistrate judge recommended, and the district court ultimately granted, summary judgment to all of the defendants on all of George's claims following George's failure to timely respond to the officers' request for admissions, which the district court deemed admitted.

This Court reversed on appeal, holding that the district court had abused its discretion in deeming admitted the officers' request for admissions and remanding with instructions to reconsider the summary judgment motion. *See George v. Edholm*, 410 F. App'x 32, 33 (9th Cir. 2010). The Court further instructed the district court to "determine whether Dr. Edholm was properly served," and "[i]f not," to "allow George to perfect service." *Id.* at 34. The panel—Circuit Judges Wardlaw and W. Fletcher, and District Judge Lynn, sitting by designation—retained jurisdiction over any future appeals. *Id.*

The case was assigned to a new district judge on remand. Dkt. 58. George, now represented by *pro bono* counsel at the district court, reserved Edholm with the complaint. [ER318-320]. The parties agreed to

reopen discovery, permitting limited additional documentary discovery and depositions of George, the officers, and Edholm. Dkt. 64.

2. At the close of the additional discovery, the officers again moved for summary judgment. Dkt. 80. They argued, in the main, that there was no evidence of a Section 1983 conspiracy between the officers and Edholm. In their view, the evidence shows only that they transported George to the hospital and informed Edholm that George probably had contraband in his rectum. *Id.* at 18. On their view of the evidence, Edholm independently noted signs of cocaine intoxication, conducted a "minimally invasive" initial rectal exam, and determined in his sole medical judgment that "aggressive management" was necessary to save George's life. *Id.* at 19. The officers stood back and "had no involvement" in the "procedure" to remove the contraband from George's body cavity. *Id.* at 20. Moreover, the officers argued, neither of them "instructed Dr. Edholm to extract the foreign object from George's rectum." *Id.* at 21.

Having asserted that there was no evidence of a conspiracy between the officers and Edholm, the officers argued that Edholm had been acting as a private citizen, and not under color of law. Accordingly, they argued, George's constitutional rights were never implicated. The officers further claimed that, even if they had conspired with Edholm to search George,

they were entitled to qualified immunity because there are "no legal authorities" to support a conclusion that "transporting an arrestee to a hospital to receive treatment for a medical condition prior to booking" would implicate them in a "conspiracy theory with hospital staff who administer 'unwanted' yet life-saving medical procedures." Dkt. 80 at 23.

George opposed the motion (Dkt. 96), arguing that there was ample evidence that the officers were engaged in a conspiracy with Edholm to extract evidence of a crime from George's body cavity. George also argued that the relevant law was clearly established at the relevant time.

3. The district court granted the motion, finding that there was no evidence of a conspiracy. [ER1-14]. The court began by concluding that, although the officers "suspect[ed] that George had faked his seizure," and the paramedics had determined that nothing was wrong with George, "it was appropriate and justified for the Officers" to take George to the hospital "to obtain medical clearance." [ER11-12]. The court further acknowledged that, "while at the hospital," Freeman and Johnson "informed Dr. Edholm that they saw George stick something in his rectum." [ER12]. It dismissed this fact, however, explaining that merely "providing background information on George's medical condition to [Edholm] is not evidence of a conspiracy." [ER12].

The court next turned to the question whether the officers had instructed Edholm to search for the drugs. The court observed that "[i]t is disputed whether or not Freeman instructed Dr. Edholm to remove the foreign object from Plaintiff's body," but it disregarded this factual dispute as "immaterial." [ER12]. In the district court's view, the evidence showed that Edholm "devised the treatment plan based on his expertise and own independent examination of George." [ER12]. "If Dr. Edholm had immediately undertaken 'aggressive management' without any independent examination," the court explained, "that might be evidence of a conspiracy," but "that was not the case." [ER12]. The court further concluded that the procedure was "medically necessary" and found that George had "mischaracterize[d]" the evidence in arguing that there were "alternative, less intrusive treatment options." [ER12]. And, "[r]egardless of whether the procedure was medically necessary, the absence of evidence regarding any conspiracy . . . is fatal to any Section 1983 claim." [ER13].

At the final hearing on the motion for summary judgment, the district court addressed whether also to grant judgment to Edholm. The court noted that "unless [it had made a] mistake[] in [its] rulings" on the officers' summary judgment motion, "the case should [come to an] end" as to all of the parties. [ER20]. The court was initially uncertain, however, how to re-

solve the "technicality" of dismissing the case as against Edholm, who had not appeared. [ER20]. The court concluded that "the easiest and cleanest way" would be for George to "file . . . a voluntary dismissal." [ER21-22]. The court thus ordered George to file a voluntary dismissal without prejudice. [ER21]. Prior to the filing of a voluntary dismissal, however, the district court entered a final judgment declaring that "Plaintiff Clifford George takes nothing by way of the Complaint herein" and "the action [is] dismissed on the merits." [ER23]. The following day, George filed a voluntary dismissal as against Edholm, as per the district court's instructions; he expressly "reserve[d] all rights." [ER322]. This appeal followed.

SUMMARY OF THE ARGUMENT

The district court's decision to grant summary judgment misunderstood the controlling law and improperly weighed the evidence. Most fundamentally, the court rejected George's deposition testimony and documentary evidence as not credible. But it was not the court's role to weigh the evidence in this way; its obligation, instead, was to view the evidence in the light most favorable to George. Viewed in that light, George's testimony and the medical report would allow a rational jury to conclude that the officers and Edholm were, indeed, engaged in a civil conspiracy to remove the suspected contraband from George's rectum. What Edholm

might have done without the officers' involvement is irrelevant—the question is simply whether there is sufficient evidence for a jury to find that the defendants were engaged in a joint endeavor. There most certainly is.

The evidence also is sufficient to prove a constitutional violation. It has been settled for decades that a body cavity search that is supported by neither probable cause, nor a warrant, nor necessity; that constitutes a degrading offense to the suspect's dignity and privacy; and that poses unknown risks to his health and safety, violates the Fourth Amendment. In circumstances such as these, the Fourth Amendment's reasonableness standard requires that the evidence be allowed to pass naturally in a monitored bowel movement unless there is an objectively reasonable basis to believe that physical intervention is necessary to save the suspect from grave and immediate danger. The question whether there was such a risk in this case raises, at most, a fact question for the jury.

A reasonable jury could further find that the course of events at the hospital—Edholm's overriding George's protestations and treating him under forced general anesthesia—violated George's due process right to refuse unwanted medical treatment.

The district court thus erred in granting summary judgment.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011). In "determin[ing] whether [there are] any genuine issues of material fact" for trial, or "whether the district court correctly applied the relevant substantive law," the Court must "[v]iew[] the evidence and draw[] all inferences in the light most favorable to the non-moving party." *Id.*

ARGUMENT

I. IT IS FOR A JURY, AND NOT THE DISTRICT COURT, TO DECIDE WHETHER THERE WAS A CONSPIRACY AMONG THE DEFENDANTS.

It is well established that a "private party's joint participation with a state official in a conspiracy to" violate an individual's constitutional rights "is sufficient" both "to characterize [the private] party as a 'state actor' for purposes of the Fourteenth Amendment" and to impute the private party's conduct to, and thus "show a direct violation" by, the state actors themselves. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 931, 941 (1982) (internal quotation marks omitted) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970)). The district court acknowledged this basic legal principle, [ER11], but nevertheless concluded that there is an "absence of evidence regarding any conspiracy between [the officers] and Dr. Edholm" in this case, [ER13].

That conclusion is incorrect. There is ample evidence demonstrating that the officers took George to the hospital for the purpose of recovering evidence of a crime and, once there, encouraged and worked together with Edholm to remove the contraband from George's rectum. In reaching the opposite conclusion, the district court—rather than viewing the evidence in the light most favorable to George—evaluated and weighed the parties' conflicting accounts and rejected George's as less believable. That was reversible error: "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Bravo*, 665 F.3d at 1083 (quoting *Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir. 2009)).

A. There is abundant evidence of a conspiracy between the officers and Edholm.

"To establish liability for a conspiracy in a § 1983 case, a plaintiff must 'demonstrate the existence of an agreement or meeting of the minds' to violate constitutional rights." *Crowe v. Cnty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010) (quoting *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1301 (9th Cir. 1999)), *cert. denied,* 131 S. Ct. 905 (2011). "To be liable, each participant in the conspiracy need not know the exact details of the plan" and instead need only "share the common objective of the conspiracy." *Id.* (quoting *United Steelworkers of Am. v. Phelps Dodge Corp.*,

865 F.2d 1539, 1541 (9th Cir. 1989) (en banc)). *See also* Wayne R. LaFave, 1 *Search and Seizure* § 1.8(b) (4th ed. 2004) ("A search [is] subject to Fourth Amendment restrictions if it is a 'joint endeavor,' involving both a private person and a government official.").

The threshold for demonstrating a Section 1983 civil conspiracy is low. To begin with, the conspiracy need not be elaborate or overt, and may be inferred from spontaneous cooperation among the defendants to achieve a common goal. *Crowe*, 608 F.3d at 440 (citing *Mendocino*, 192 F.3d at 1301). It may, in other words, "be inferred from . . . the defendant's actions" themselves, if those actions suggest a "unity of purpose or a common design and understanding" to "accomplish some unlawful objective." *Gilbrook v. City of Westminster*, 177 F.3d 839, 856-857 (9th Cir. 1999) (internal quotation marks omitted). Thus, the Supreme Court has recognized a "host of facts that can bear on" the "attribution" of a private party's conduct to state actors, including whether the state actors have "provide[d] 'significant encouragement, either overt or covert,'" for the challenged conduct. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

Given this broad and encompassing standard, and given further the "fact-intensive nature of the inquiry" (*Florer v. Congregation Pidyon She-*

vuyim, N.A., 639 F.3d 916, 924 (9th Cir. 2011), *cert. denied,* 132 S. Ct. 1000 (2012)), this Court has recognized that the question "[w]hether defendants were involved in an unlawful conspiracy" ordinarily "should be resolved by the jury, so long as there is a possibility that the jury can infer from the circumstances that the alleged conspirators . . . reached a [tacit] understanding to achieve the conspiracy's objectives." *Mendocino*, 192 F.3d at 1301-1302.

Against this legal backdrop, the record contains more than sufficient evidence for a jury to find that Freeman and Johnson were engaged in a civil conspiracy with Edholm—that they provided "significant encouragement" for his actions (*Brentwood Acad.*, 531 U.S. at 296) and shared a "unity of purpose or common design" (*Gilbrook*, 177 F.3d at 856) to search George's rectal cavity and recover evidence of a suspected crime.

As an initial matter, there is evidence showing that the officers' primary interest in transporting George to the hospital was *not* to obtain "treat[ment] for [George's] immediate health condition," [ER28, 36, 41-42, 44-45], but to enlist a doctor to search George's body cavity for evidence of a crime. Neither Freeman nor Johnson believed that George actually had suffered a seizure, [ER128, 231], and the paramedics had reported George's condition as "normal," [ER315]. Thus, it is not surprising that

Johnson affirmatively acknowledged the true reason for taking George to the emergency room: "[p]olice officers are not allowed to touch" a person's "buttocks," so they needed "a doctor" to search for and "remove" the suspected drugs from George's rectum. [ER155]. The evidence accordingly demonstrates—and a jury rationally could conclude—that the officers' real purpose in transporting George to the hospital was to obtain medical assistance in recovering suspected drugs from George's body cavity.[3]

The evidence concerning the defendants' conduct at the hospital is even more damning. Most importantly, there is George's account of events: when Edholm entered the exam room, he conferred *not* with his ostensible patient (who was in police custody and handcuffed to his gurney, [ER281]), but with the officers. [ER306]. Acting on the information they gave him, Edholm told the officers to "roll [George] over" onto his side so that Edholm could conduct a digital rectal examination. [ER284]. The officers did so, and Edholm proceeded to put "his hands right up [George's] rectum." [ER282, 284]. George began "screaming" and "yelling" and "hollering," tell-

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[3] As the Supreme Court suggested just last month, "when there is a particular need for specialized knowledge or expertise," the government often "must look outside its permanent work force to secure the services of private individuals," whose conduct under such circumstances is "'fairly attributable to the state.'" *Filarsky v. Delia*, 132 S. Ct. 1657, 1661, 1665-1666 (2012) (quoting *Lugar*, 457 U.S. at 937) (reversing the denial of qualified immunity to a private individual acting under color of law).

ing Edholm to stop. [ER284]. Disregarding George's protests, Freeman instructed Edholm to continue with the exam because "Goddamn it, I know that he's got [contraband]" in his rectum. [ER282]. To assist Edholm in his efforts, and Freeman and Johnson held George's legs down. [ER282-283; 307]. All the while, George heard Freeman directing Edholm: "You need to get this out [of] his ass. He's got something up his ass, Goddamn it, I know he does." [ER286]. This all is powerful evidence that the officers were encouraging and assisting Edholm in his brutal search. *See, e.g.*, *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 51-52 (1st Cir. 2009) (finding that a doctor had acted under color of law when correctional officers "strongly encouraged" her to surgically remove contraband from within a prisoner's body).

And there is more. Edholm's medical report strongly suggests a tacit understanding among the defendants to achieve a common objective. After all, doctors do not ordinarily anesthetize their patients to force unwanted procedures on them simply because they are "noncompliant" or "refuse[] . . . full treatment." [ER51-52]. A patient's decision to refuse a particular medical procedure ordinarily is the end of the matter. Yet the medical report demonstrates that Edholm believed there was a "need," [ER51], to place George under general anesthesia (or "chemical restraints" [ER79]) precisely because George was "noncompliant." [ER51]. A reasonable fact-

finder could conclude that this extraordinary course of conduct—a doctor overriding his patient's personal medical decision and forcing treatment on him against his will and under forced general anesthesia—was "unlikely to have been undertaken without an agreement of some kind [among] the defendants" to work together toward the common goal of retrieving evidence of a crime from George's rectal cavity. *Crowe*, 593 F.3d at 875.

To be sure, the officers deny that they encouraged Edholm to remove the drugs or helped restrain George to facilitate the search. [ER42-43, 45-46, 187-188]. As they tell the story, they transported George to the hospital solely to ensure his well-being; and once at the hospital, they merely told Edholm that they suspected George had secreted a bag of drugs in his rectum, nothing more. [ER184-185, 248]. But such inconsistency in the parties' stories is a reason to *deny* summary judgment, not grant it.

At this stage in the litigation, the district court was required to assume that the jury would resolve all of the material disputes in favor of George's evidence, and not the officers'. *Bravo*, 665 F.3d at 1083. And precisely because "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge" (*id.*), the fact-intensive question of "[w]hether defendants were involved in an unlawful conspiracy" must "be resolved by the

jury" if there is any "possibility that the jury can infer from the circumstances that the alleged conspirators . . . reached [an] understanding to achieve the conspiracy's objectives." *Mendocino*, 192 F.3d at 1301-1302. There assuredly is such a possibility in this case.

B. The district court's rationales for discounting George's testimony are mistaken.

In nevertheless determining that there was no evidence of a conspiracy, the district court discounted George's testimony as incredible and irrelevant. Its reasons for doing so were both improper and mistaken.

The district court first addressed the uncontested evidence that the officers informed Edholm of their suspicion that George had a bag of cocaine in his rectum. The district court dismissed this fact out of hand, concluding that "providing background information on George's medical condition to a doctor is not evidence of a conspiracy." [ER12]. That conclusion—inappropriately based on the evidence viewed in the light more favorable to the *defendants*—is incorrect.

Again, the evidence shows that the officers took George to the hospital for the *purpose* of obtaining a physician's help in searching George's rectum for drugs. [ER155-156]. Once there, they relayed to Edholm their suspicion that George had contraband in his rectum. [ER42, 45, 49]. Edholm subsequently conducted a search and recovered the drugs against the

wishes of his supposed patient. From these facts alone, a jury could infer that, simply by "providing background information" to Edholm [ER12], the officers reached a tacit understanding with Edholm to accomplish a common objective. As Johnson himself put it, "it was kind of . . . a given" that, by informing Edholm that they believed George had cocaine in his body cavity, the officers were suggesting to Edholm that they wanted "to have the cocaine removed." [ER185]. The district court erred in dismissing these facts as "not evidence of a conspiracy." [ER12].

The district court also improperly dismissed George's claim that the officers held his legs down to facilitate Edholm's search. As the court saw it, that testimony was not believable because George did "not indicate at what point in time his legs were being held" and said he was unsure "if Johnson was one of the officers holding his legs." [ER12]. But that is incorrect: George's testimony is clear that the officers were holding his legs during Edholm's initial digital examination, before George was placed under general anesthesia, [ER283], and again while Edholm administered the anesthetic drugs, [ER307]. And the testimony is equally clear that Freeman instructed Johnson to hold George's legs, and that Johnson complied. [ER282-283]. In any event, there is no question that George's testimony would permit a jury to conclude, as a general matter, that the officers were

personally involved in restraining George. That is especially so because Freeman readily admitted that officers commonly assist with restraining detainees at the hospital. [ER245-246]. The district court's contrary conclusion cannot be squared with its obligation to view the evidence in the light most favorable to George.

Finally, the district court dismissed as "immaterial" George's testimony that Freeman affirmatively instructed Edholm to remove the drugs from George's body cavity. [ER12]. "If Dr. Edholm had immediately undertaken 'aggressive management' without any independent examination," the district court explained, "that might be evidence of a conspiracy." [ER12]. "That, however, was not the case." [ER12]. Instead, the court went on, Edholm testified that he "devised the treatment plan based on his expertise and own independent examination of George" and "would have used the same procedure (including the initial digital rectal exam) to treat any patient suspected of engaging in cocaine packing." [ER12]. Thus, the district court appears to have reasoned, Freeman's instruction to Edholm to remove the drugs was not a but-for cause of Edholm's conduct, and thus did not evidence a conspiracy.

That theory has no foundation in either the record or the law. As an initial matter, the record is clear that Edholm's decisionmaking was not

entirely independent, but in fact directly influenced by the officers' statements and conduct. Edholm himself testified that "[t]he treatment was based on" not just his examination of George, but also "information from the police"; he further explained that, although the treatment plan was not undertaken at the "direction of the police," it was done "in conjunction" with them. [ER111-112]. That by itself is enough to warrant a trial on the conspiracy question. *Cf. Sanchez*, 590 F.3d at 51-52 .

Even apart from this substantial evidence, the district court was wrong on the law. The Supreme Court has held in plain terms 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." *West v. Atkins*, 487 U.S. 42, 51-52 (1988). For example, the fact that a private physician may "make independent medical judgments" in his treatment of prison inmates is not inconsistent with finding that "his relationship with [state] authorities [is] cooperative," and thus his actions are under color of law. *Id.* at 51. That conclusion follows naturally from the Section 1983 conspiracy standard itself. The question here is not what would have happened independent of Edholm's professional medical judgment; it is simply whether the defendants "share[d] the

common objective of the conspiracy" (*Crowe*, 608 F.3d at 440) to recover the drugs from George's rectum. Regardless what Edholm claims he would have done absent the officers' involvement, the evidence suggests that the defendants *did*, in fact, share that common objective.[4]

That is exactly the conclusion that the Supreme Court of Wisconsin reached in *State v. Payano-Roman*, 714 N.W.2d 548 (Wis. 2006). In that case, officers witnessed a criminal suspect swallow a small bag of heroine. *Id.* at 551. Just as in this case, the suspect was "conveyed to a hospital," where the officers "explained to the staff what they had observed [the suspect] ingest." *Id.* Acting on the information from the officers, the staff administered laxatives. *Id.* at 552. "Early the next morning, [the suspect] had a bowel movement," which the officers "examined," and from which they "recovered the baggie" containing heroin. *Id.*

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[4] In truth, it is difficult to believe that Edholm actually would have forced the same violent procedure upon George without the involvement of the police. If a private individual came to the emergency room of his own accord, complaining that he had hidden cocaine in his rectum and could not get it out, it stretches credulity to think that any treating physician, acting alone, would summon hospital security, have the individual restrained, and perform an anal probe under forced general anesthesia against the individual's vociferous protests. Such a course of action would openly offend longstanding common law doctrine that "protects the right of competent adult patients to refuse medical treatment" and imposes "an obligation on health care providers to seek patients' informed consent before undertaking medical procedures." *Ross v. RagingWire Telecomm'ns, Inc.*, 174 P.3d 200, 209 (Cal. 2008). This doctrine has constitutional dimensions. *See* Section II.B, *infra* at pp. 43-45.

In later criminal proceedings, the defendant moved to suppress the evidence on Fourth Amendment grounds. In opposing the motion, the state argued that the administration of laxatives had been undertaken as part of a course of medical treatment and thus had constituted a "private search" by the hospital staff, and not a "government search" by the officers. *Payano-Roman*, 714 N.W.2d at 554. The Wisconsin Supreme Court rejected that claim. Although acknowledging that "the officers did not dictate [the defendant]'s treatment" and "it was the medical staff who made the decision to give [the defendant] the laxative," the court nevertheless concluded that "the police and medical staff were engaged in a joint endeavor with a dual purpose: medical treatment and the recovery of evidence of a crime." *Id*.

Relevant to that conclusion, the court noted—*precisely as in this case*—that (1) the suspect "had been arrested and was in police custody at the time of the search" and "remained handcuffed," (2) the officers "participated" in the procedure, and although they "were concerned with [the suspect]'s well-being," they also were "intent on recovering the heroin as evidence of a crime," and (3) the hospital staff facilitated the officer's recovery of the evidence from the suspect's stool. *Payano-Roman*, 714 N.W.2d at 555. All of this, taken together, the court concluded, was suffi-

cient to demonstrate a "joint endeavor" for purposes of characterizing the medical procedure as a Fourth Amendment search performed under color of law. *Id*. That same rationale applies fully in this case.[5]

In sum, the district court erred in concluding that there was no evidence of a Section 1983 civil conspiracy in this case. Viewing the evidence in the light most favorable to George, a jury easily could conclude that (1) Freeman and Johnson took George to the hospital for the purpose of recruiting a doctor to search George's rectum and recover evidence of a crime; (2) each informed Edholm that he believed George had a bag of cocaine in his rectum, with the unspoken understanding that this would prompt Edholm to conduct a search; (3) Freeman actively instructed Edholm to remove the drugs; (4) both Freeman and Johnson assisted Edholm in that task by rolling George over and holding his legs down; and (5) acting on the information and instructions from the officers, and proceeding against George's wishes and protestations, Edholm searched George's rectum—eventually under forced general anesthesia—and recovered the drugs, which the state subsequently used to prosecute George. These facts are more than sufficient for a jury to find that the officers provided "signif-

[5] If anything, the evidence here is stronger: unlike in *Payano-Roman*, there is evidence in this case that the officers actively instructed Edholm what to do. That makes the course of conduct here even more clearly a "joint endeavor" between the officers and Edholm.

icant encouragement" to Edholm (*Brentwood Acad.*, 531 U.S. at 296) and shared in a "unity of purpose or common design" (*Gilbrook*, 177 F.3d at 856) with him to recover the drugs from George's rectum.

II. A JURY COULD FIND THAT THE SEARCH OF GEORGE'S BODY CAVITY WAS UNCONSTITUTIONAL.

Viewing the evidence in the light most favorable to George (and thus assuming that the officers and Edholm were engaged in a civil conspiracy), the brutal rectal cavity search unambiguously violated George's Fourth Amendment rights. Decades of case law make clear that when an arrestee is suspected of having hidden drugs in his or her gastrointestinal tract, the Fourth Amendment's reasonableness standard bars physical intrusion into the arrestee's body to recover the evidence; officers, instead, may monitor the detainee to recover any evidence when it is expelled naturally in a bowel movement. The only exception to this rule occurs when there is an objectively reasonable basis for thinking that the suspect is in grave and immediate danger, such as when the container of drugs has *actually* ruptured. Here, the defendants' decision to administer anesthetic drugs and enter George's body cavity by force violated the Fourth Amendment. Any contention by the defendants that George's life was in imminent peril, at most, creates a question of fact for the jury.

A. The rectal cavity probe violated George's Fourth Amendment right to be free from unreasonable searches.

When it comes to body cavity searches, just as with any other search, the "test for determining reasonableness" entails "balancing the need to search against the invasion which the search entails." *Camara v. Mun. Ct.*, 387 U.S. 523, 536-537 (1967). Thus, as the Supreme Court explained in *Winston v. Lee*, 470 U.S. 753 (1985), when officers of the state wish to compel a medical procedure upon a suspect to recover evidence of a crime, "the community's interest in fairly and accurately determining guilt or innocence" must be weighed against "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity." *Id.* at 761-762 (citing *Schmerber v. Cal.*, 384 U.S. 757, 771 (1966)).

1. Here, the balance of interests weighs decisively in George's favor. As this Court has recognized, "[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). A strip search involving mere "*visual* exploration of body cavities is dehumanizing and humiliating" (*id.* (emphasis added)), and "digital rectal searches" are even more "intrusive and humiliating" (*Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988)). Simply

put, "bodycavity searches" like the one in this case are "one of the most grievous offenses against personal dignity and common decency." *Bell v. Wolfish*, 441 U.S. 520, 576-577 (1979) (Marshall, J., dissenting).

Of course, there is even more at stake here than a straightforward body cavity search. The defendants not only visually examined and physically probed George's rectum, but they *forcibly anesthetized* him, necessitating the use of a breathing tube to keep him alive. [ER51]. While they had complete and unchecked control of George's unconscious body, Edholm physically opened George's anus with an anoscope and reached inside of his body with forceps to recover evidence of a crime.

"A compelled medical procedure" of this sort, involving "use of general anesthesia" 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." *United States v. Husband*, 226 F.3d 626, 633-634 (7th Cir. 2000). That is because bodily intrusions involving general anesthesia "implicate[]" the "most personal and deep-rooted expectations of privacy." *Winston*, 470 U.S. at 759-760. The Supreme Court thus has admonished that even "minor intrusions into an individual's body" (such as simply drawing blood) risk offending the "cherished value of our society" in the "integrity of an individual's per-

son" and are constitutionally permissible only under the most "stringently limited conditions." *Schmerber*, 384 U.S. at 772.

None of the conditions that might justify Edholm's intrusive methods is remotely present in this case. For starters, the officers did not have a search warrant. "Search warrants are ordinarily required for searches of dwellings" and, except in a very narrow range of cases, "no less could be required where intrusions into the human body are concerned." *Schmerber*, 384 U.S. at 770. This common sense rule recognizes that "[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. As the Seventh Circuit has said, "[t]he benefits of obtaining [judicial] 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." *Husband*, 226 F.3d at 634. There is nothing to indicate that the officers could not have attempted to obtain a telephonic search warrant in this case; the officers nevertheless failed to do so.[6]

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[6] One explanation for this omission is that the officers lacked probable cause to support a warrant. Although Freeman claimed to have observed George "attempt[] to conceal an item," which he thought looked like a "plastic baggie," [ER35], both he and Johnson have admitted that neither

What is more, there is nothing to suggest that the defendants had any overriding "need" (*Camara*, 387 U.S. at 537) to conduct the search in the manner that they did. The evidence, instead, demonstrates that each defendant was aware that far less intrusive alternatives were available: all three testified that they had been involved in prior cases where they simply administered laxatives or performed a "bowel irrigation" and let the drugs or other foreign bodies pass naturally. [ER102-106; 159-160; 249]. A jury could conclude that there was no factual basis for the defendants refusal to do the same in *this* case.

2. The defendants are likely to assert, in response, that George's life was imperiled by the presence of the drugs in his rectum, and that Edholm undertook the forced rectal exam to save George's life. [*E.g.*, ER12-13]. But a jury could reject that overly dramatic account.

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actually saw what was in the bag. [ER129, 230]. Other courts have held that when officers have not actually seen what is in a bag, they necessarily lack probable cause to believe the bag contains drugs, even under the most suggestive of circumstances. *See United States v. Ingrao*, 897 F.2d 860, 863-865 (7th Cir. 1990); *United States v. Ceballos*, 654 F.2d 177, 185 (2d Cir. 1981). That is especially so in body cavity search cases like this one, where courts and commentators alike have suggested that something *more* than probable cause is required. *See* Wayne R. LaFave, 2 *Search and Seizure* § 4.1(e), at nn.97-100 & accompanying text (4th ed. 2004) (approving the view that the Fourth Amendment "may also be said to require a greater than ordinary showing for certain unique invasions of privacy which are particularly severe in nature" and collecting cases).

Edholm's medical report did note that George had "mild psychomotor agitation," high blood pressure, a fast heart rate, and was sweating, [ER50]—all of which Edholm concluded was "[l]ikely drug induced." [ER51]. But none of those unremarkable symptoms suggests that George necessarily faced an imminent risk to his health. To begin with, George's agitation, heart rate, blood pressure, and sweating are hardly surprising under the circumstances—he was, after all, being held down by police officers while a doctor violently probed his rectum against his will. Edholm himself acknowledged that George's symptoms were consistent not just with "cocaine intoxication," but also with simply experiencing "severe pain," [ER81-84], which George unquestionably was, [ER284].

Apart from that, the medical report nowhere suggests that anyone suspected that the bag of drugs had ruptured in George's rectum; it adverts, instead, to the medical team's objective of recovering the drugs "*before*" that event came to pass. [ER52]. The medical report also notes that a "large clear package with a large amount of white material" was recovered from George's rectum, [ER51], but conspicuously *without* suggesting that the bag had ruptured—an occasion that would have been noteworthy under the circumstances.

That is not all: Edholm further testified that he *always* performs intrusive body cavity searches to treat suspected "rectal placements" of drugs by detainees because "if you don't get the drugs out, then they *can* rupture." [ER105-106 (emphasis added)]. Thus, his "aggressive" approach to George's case does not reflect any special concern that George, more than any other detainee suspected of rectal drug packing, faced an imminent health threat. It reflected, instead, Edholm's general and unsubstantiated concern that the bag *might* rupture, just as in any other case.[7]

In this context, a jury could reasonably conclude that the defendants had no reasonable basis for suspecting that the bag of drugs actually had ruptured or that George otherwise faced an immediate risk to his life. In coming to the contrary conclusion, [ER14], the district court again improperly weighed the evidence in favor of the defendants.

3. Tellingly, neither the officers nor the district court cited a single case in which a court has upheld violent search methods of the kind employed in this case. To our knowledge, every appellate court that had addressed circumstances such as these—a search undertaken in response to

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[7] The district court believed that Edholm's claim that he "routine[ly]" uses such brutal and aggressive tactics on drug-packing suspects was evidence that the methods are reasonable. [ER14]. But that puts the cart before the horse. Edholm's testimony on this score might simply suggest that he "routine[ly]" violates the Fourth Amendment. At the very least, it suggests that there was nothing unusual or outstanding about George's case.

the suspected presence of a bag of drugs in an arrestee's gastrointestinal tract—has held, for Fourth Amendment purposes, that officers and the medical team must await a monitored bowel movement.

In *United States v. Nelson*, 36 F.3d 758 (8th Cir. 1994), for example, the Eighth Circuit held that, when officers have reason to believe that a suspect has hidden drugs within a body cavity, they must obtain a warrant to conduct a body cavity search absent exigent circumstances. *Id.* at 761. In that court's view, "[e]xigent circumstances exist where the delay necessary to obtain a warrant jeopardizes the preservation of evidence or threatens the defendant's life." *Id.* But, the court explained, the mere fact that "doctors were concerned that the packet [of drugs] could *possibly* rupture" in the defendant's gastrointestinal tract was not enough to indicate a "medical emergency" sufficient to justify a warrantless "body cavity search" in that case. *Id.* (emphasis added). Without an objectively reasonable basis to believe that the suspect's life was in immediate peril, the proper course of action was to wait for "the packet to pass naturally." *Id.*[8]

[8] *Nelson* involved a suspect swallowing bags of suspected contraband. But there is no reason to think that the analysis should be any different for that reason. Indeed, given that contraband in rectal drug-packing cases has a much shorter distance to travel within the body before being expelled in a bowel movement, there is even greater reason to think that waiting for the drugs to pass naturally is the proper course.

Similarly, in *State v. Hodson*, 907 P.2d 1155 (Utah 1995), the Supreme Court of Utah found that there is no inherent reason to "fear . . . that [a suspect's] swallowing [of] plastic-wrapped [drugs] w[ill] render their contents nondiscoverable or harmful to defendant." *Id.* at 1158. That court held that "[n]o emergency or exigency justifies the use of force at this level to preserve evidence" if the evidence is "readily (if inconveniently) accessible through nonviolent means." *Id.* Like the Eighth Circuit, it concluded that the proper course of action for Fourth Amendment purposes is to allow the drugs to "pass through the system," so that they may later be "identif[ied] and recover[ed] in [a] supervised, nonviolent post-arrest setting[]" in a monitored bowel movement. *Id.*

The Supreme Court of California reached the same conclusion in *People v. Bracamonte*, 540 P.2d 624, 631 (Cal. 1975) (en banc). There, officers saw the defendant swallow several balloons filled with drugs. *Id.* at 626. Just as in this case, the suspect there "was transported to a local hospital for the purpose of retrieving through medical methods the objects which [the officers] had observed [the suspect] swallowing." *Id.* Although she initially "strenuously resisted" and "struggle[d]" with the medical staff, the suspect eventually complied with an order to swallow emetic solution and regurgitated the drugs. *Id.*

On later review of the suspect's Fourth Amendment challenge to the search, the California court held that it was unconstitutional. The court observed that, although the officers "may have believed that a medical emergency existed" and the treating physician "would . . . have recommended regurgitation as a medical precaution" regardless whether there was evidence that the drug packets had ruptured, the court could not conclude that that there was a medical "emergency . . . as a matter of law" sufficient to justify the forced medical procedure. *Bracamonte*, 540 P.2d at 628-629 & n.5. On the contrary, contraband in impermeable containers like the plastic bag in this case typically "pass completely through the digestive tract, by the ordinary processes of nature, without causing any ill effects." *Id.* at 631. The court therefore concluded that the suspect "easily could have been transported to jail and placed in an isolation cell and kept under proper surveillance" until she had a bowel movement. *Id.* It therefore rejected as unconstitutional the "nonconsensual, warrantless search" of the suspect's bowels with emetic solution. *Id.*

These cases, together, stand for a straightforward legal proposition: When a physician is acting together with police officers to recover illegal contraband from within a suspect's gastrointestinal tract, the Fourth Amendment's reasonableness standard requires the officers and physician

to allow the evidence to pass naturally unless—and only unless—there is an objectively reasonable basis to conclude that the suspect faces an imminent risk to his life, such as when the bag actually has ruptured. Absent such an emergency, the mere *possibility* that a bag of drugs hidden within a "rectal cavity" *might* "rupture[] and release[] narcotics" justifies only 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)); it is *not* enough, taken alone, to permit anything more. *Cf. United States v. Solimini*, 560 F. Supp. 648, 653 (E.D.N.Y. 1983) ("detention for observation at the hospital . . . [for a] bowel movement" is "reasonable" when there is a "danger that one or more of the drug-containing packets [may] rupture, thereby endangering [the suspect]'s life").[9]

The defendants violated that rule in this case. To be sure, 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. But

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[9] This rule is consistent with the general principle that "[p]olice officers can proceed without a warrant if they reasonably believe they are confronted with an emergency that threatens life or limb." *Barlow v. Ground*, 943 F.2d 1132, 1138 (9th Cir. 1991). *See also Mincey v. Ariz.*, 437 U.S. 385, 392 (1978) ("The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.").

on the present record, a jury could conclude that there was no reason to believe that the plastic bag containing the cocaine had ruptured or was otherwise incapable of being passed safely in a monitored bowel movement. The mere possibility that the bag *might* rupture (the same possibility that is present in literally *every* case like this one) did not render Edholm's brutal methods reasonable for Fourth Amendment purposes.

4. To the extent there is any lingering doubt concerning the constitutionality of the search in this case, it is resolved by the Supreme Court's unequivocal condemnation of such searches in *Rochin v. California*, 342 U.S. 165 (1952), and *Winston v. Lee*, *supra*.

In *Rochin*, the Court considered a search substantially similar to that at issue here and, in the harshest of terms, found that it violated the Constitution.[10] There, officers witnessed Rochin put pills they believed to be illegal contraband into his mouth. 342 U.S. 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

[10] Although *Rochin* predates the incorporation of the Fourth Amendment against the states, the Supreme Court has indicated that it would have reached "the same result" had it "treated [*Rochin*] under the Fourth Amendment" rather than the Due Process Clause. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 n.9 (1998). *See also* LaFave, 2 *Search and Seizure* § 4.1(e) (addressing *Rochin* as a Fourth Amendment case); *Husband*, 226 F.3d at 630 (same).

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 combating 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. The Court held that "force so brutal and so offensive to human dignity" is constitutionally impermissible for purposes of merely "securing evidence from a suspect." *Id.* at 174. Just so here.

The Supreme Court's more recent decision in *Winston* reached the same result on somewhat different reasoning. There, the Court considered

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

The Supreme Court enjoined the surgery, holding that if performed, it would have constituted an illegal search and seizure under the Fourth Amendment. In reaching that conclusion, the Court reasoned that, even though "[t]he Commonwealth plainly had probable cause to conduct the search," which had twice been approved in state court proceedings, the proposed search would have been unconstitutional because there was "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 763-765.

Here, those same factors require finding the violent and dehumanizing search of George's rectum unconstitutional: the search was not supported by probable cause, a warrant, or necessity; it constituted an pro-

found offense to George's dignity and privacy; and the general anesthesia posed unknown risks to his health and safety. *Cf. Husband*, *supra*. It was, to say the least, unreasonable.

B. The search violated George's due process right to refuse unwanted medical treatment.

Although the Fourth Amendment violation itself requires reversal of the decision below, the district court committed a second error: The defendants' actions violated George's due process right "to refuse unwanted medical treatment" and "to be free from unjustified intrusions to the body." *Benson v. Terhune*, 304 F.3d 874, 884 (9th Cir. 2002) (citing *Riggins v. Nev.*, 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). 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)). Thus, as this Court has suggested, "pretrial detainees" are constitutionally entitled to information about a "proposed treatment, its benefits and side effects and viable alternative treatments" so that they may "make a rational decision to accept or reject proposed medical treatment." *Benson*, 304 F.3d at 884-885.

The defendants unquestionably denied George that right in this case. Forcibly placing a suspect under general anesthesia to recover evidence of a crime 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). Here, the defendants not only completely disregarded George's right to refuse unwanted medical treatment, they in fact considered his "noncomplian[ce] and refus[al] to allow full treatment" to be a *justification* for implementing "aggressive management" to overcome his will. [ER51]. The defendants' conduct—their physical, and later "chemical," restraint of George to force a medical procedure upon him against his will—is utterly irreconcilable with decades of clearly established constitutional law acknowledging that forced medical treatment "represents a substantial interference with . . . liberty." *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (quoting *Wash. v. Harper*, 494 U.S. 210, 229 (1990)).

The search thus violated not only George's Fourth Amendment right to be free from unreasonable searches, but also his due process right "to refuse unwanted medical treatment" and "to be free from unjustified intrusions to the body." *Benson*, 304 F.3d at 884.

C. The defendants are not entitled to qualified immunity.

The district court found, in the alternative, that the officers were entitled to qualified immunity. That also is incorrect.

"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." *Moss v. U.S. Secret Serv.*, 675 F.3d 1213, at *4 (9th Cir. 2012) (internal quotation marks and alterations omitted) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "The purpose of such immunity is to ensure that public officials may be held accountable when they exercise power irresponsibly, while shielding them from harassment, distraction, and liability when they perform their duties reasonably." *Id.*

"To determine whether a government official is entitled to qualified immunity, [this Court] conduct[s] a two-prong analysis." *Moss*, 675 F.3d 1213, at *4. "The first prong assesses whether the wrong a plaintiff alleges is, in fact, a constitutional violation." *Id.* at *5. "The second prong assesses" whether the right that was violated was "clearly established," such that it would be "'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quoting *Dunn v. Castro*, 621 F.3d 1196, 1200 (9th Cir. 2010)).

We have shown that George suffered a constitutional violation: Viewing the evidence in the light most favorable to him, a jury could find that the violent rectal cavity search, including the administration of forced general anesthesia, violated George's constitutional rights to be free from unreasonable searches and to refuse unwanted medical treatment. The sole question remaining, for qualified immunity purposes, is whether the legal principles establishing the illegality of the conduct in this case were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Moss*, 675 F.3d 1213, at *5.

They plainly were. To begin with, it should have been clear to any competent officer that providing affirmative encouragement to a physician to undertake a body cavity search, and actively assisting him by restraining the suspect to accomplish that objective, would subject each participant to liability for the search. The hornbook conspiracy cases establishing that very basic principle—cases including *Luger*, *United Steelworkers*, and *Gilbrook*—had been on the books for years.

Apart from that, the contours of George's right to be free from the intrusive and degrading methods employed here were clear enough as a matter of common sense, to say nothing of the law. *Winston* and *Rochin* had made it manifest that a maximally invasive rectal cavity search of the

kind that took place here—a probe undertaken under forced general anesthesia, without a search warrant, without indispensible need, without consent, and without any certainty as to the health risks to George—is a violation of the Fourth Amendment. Other cases, including *Nelson*, *Hodson*, *Bracamonte*, *Aman*, and *Solimini*, had clarified that the proper course, instead, is to wait for a monitored bowel movement. And George's right to refuse unwanted medical treatment also was clearly established at the time of the search: cases like *Benson*, *Husband*, and *Cruzan* had been on the books for a decade or longer.

In response to all of this, the district court concluded that the defendants were entitled to qualified immunity because "it was entirely reasonable for the Officers to act the way they did." [ER13]. But whether the defendants' conduct was objectively "reasonable" raises a question not about qualified immunity, but about the existence of a constitutional violation. *See Saucier v. Katz*, 533 U.S. 194, 206 (2001) (when officers "have reasonable, but mistaken, beliefs" concerning the propriety of a search, courts "will not hold that they have violated the Constitution" at all). And as we have demonstrated, there is ample evidence from which a jury could conclude that the officers were engaged in a civil conspiracy to search George's rectum using methods that were constitutionally *un*reasonable.

III. THE JUDGMENT SHOULD BE REVERSED WITH RESPECT TO ALL DEFENDANTS.

One final point bears mention. When this case was first before this Court, the record was unclear on whether Edholm had been served properly with the complaint; the Court accordingly remanded with express instructions to allow George to re-serve Edholm, if necessary. *See George v. Edholm*, 410 F. App'x 32, 34 (9th Cir. 2010). When the case was remanded, George's trial counsel did just that. [ER318-320]. Nevertheless (and although he was deposed in this case) Edholm still has not answered or otherwise defended against George's allegations.

The district court recognized that, in finding that there was no evidence of a conspiracy in this case, its grant of summary judgment to the officers disposed of the case on the merits as against Edholm as well. [ER20]. The court nevertheless, and somewhat puzzlingly, ordered George to dismiss Edholm "voluntarily" and without prejudice. [ER21]. Before George could comply with the court's order, however, the court entered its final judgment, without limitation and in favor of all of the defendants, declaring that "IT IS ORDERED AND ADJUDGED that Plaintiff Clifford George takes nothing by way of the Complaint herein and that the action be dismissed on the merits." [ER23]. It is from that final judgment that George has appealed.

In conformity with the district court's instructions, George later filed a voluntary dismissal as against Edholm. [ER322]. But because the district court already had granted judgment to each of the defendants on the merits, that filing had no effect. Accordingly, this Court should reverse and remand the case with respect to all defendants, including Edholm.

CONCLUSION

The district court's final order granting summary judgment to all of the defendants should be reversed, and the case remanded for trial.

Respectfully submitted,

/s/ *Michael B. Kimberly*
Charles A. Rothfeld
Michael B. Kimberly
Paul W. Hughes
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

Elisha B. Barron
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500 (phone)

Counsel for Plaintiff-Appellant

Dated: May 11, 2012

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for Plaintiff-Appellant Clifford George states that there are no related cases presently pending before this or any other court or agency. This Court previously disposed of an appeal in this case, in No. 08-56497. In its memorandum disposition of October 7, 2010, the original three-judge panel of this Court retained jurisdiction over future appeals.

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 10,826 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: May 11, 2012

/s/ *Michael B. Kimberly*

Michael B. Kimberly
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

CERTIFICATE OF SERVICE

I hereby certify that that on May 11, 2012, three copies of the foregoing brief, together with one copy of the accompanying Excerpts of Record, were served by overnight courier upon counsel of record for Officers Greg Freeman and Darryl Johnson and directly upon Dr. Thomas Edholm. Electronic versions of the same were served upon the same via the Court's CM/ECF system and email.

Dated: May 11, 2012

/s/ *Michael B. Kimberly*

Michael B. Kimberly
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000