**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 REPLY BRIEF

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## INTRODUCTION

Defendants' answering brief is notable for what it does *not* say: It does not dispute that defendants lacked articulable suspicion to detain George at the outset of their encounter, or that George's right to be free from arbitrary detentions was clearly established at the relevant time. It does not deny that Defendants failed to provide any evidence demonstrating the conditions of George's parole, or that – assuming George was not subject to a residential search condition – the search of his home was unconstitutional.

Concerning the post-arrest rectal cavity search, the answering brief does not suggest that the circumstances of the brutal search in this case are distinguishable from the circumstances of the search in *Rochin*. It does not argue that the search was justified by a medical emergency or supported by probable cause. It does not dispute that the suspected presence of drugs in George's rectum could not have warranted anything more than detaining him and waiting for a monitored bowel movement. It also does not take issue with our observation that George's right to be free from rectal cavity searches under general anesthesia was clearly established at the relevant time.

And with respect to the evidence, Defendants offer no response to our interpretation of Rule 72(a), or our observation that George's verified complaint and answers to their requests for admissions are both properly part of the record.

Against this backdrop, what Defendants *do* say is insubstantial. With respect to the pre-search detention, they argue only that "George alleges no such claim for relief in the Complaint." [Ans. Br. 1 n.1]. But that is obviously wrong: the complaint alleges in plain, unambiguous language that Freeman and Johnson "arbitrar[ily] stopped plaintiff for questioning." [ER 4]. That claim has been fully preserved and presented in the record. Even if it had not been, the proper course of action would be to reverse and remand with instructions to allow George to amend the complaint.

Concerning the warrantless search of George's home, Defendants suggest that certain California regulations demonstrate the George *was* subject to a residential search condition. [Ans. Br. 20–22]. But the only thing the regulations show is that under *some* circumstances, *some* parolees may have their homes searched without a search warrant. That conclusion sheds no light on whether George was *personally* subject to a suspicionless residential search condition. And Defendants do not dispute that they have offered no *evidence* demonstrating that he was. As we explained, moreover, California Penal Code § 3067's legislative history suggests that, prior to its passage, "local law enforcement officers" were *not* generally "free to conduct [suspicionless] search[es]" of parolees' homes. *See* Cal. Bill Analysis, A.B. 2284 Sen. (Aug. 7, 1996). Thus, absent evidence

demonstrating that George was subject to a residential search condition, there was no basis for the grant of summary judgment on the home search claim.

Finally, with respect to the rectal cavity search, Defendants argue that there is no evidence of an understanding among the Defendants to violate George's constitutional rights – no evidence, for example, that Freeman and Johnson instructed Edholm to remove the contraband from George's rectum or assisted hospital security in restraining George to help Edholm accomplish that end. *See* [Ans. Br. 11–15]. But that contention is also wrong: the verified complaint, which serves as a sworn affidavit for purposes of summary judgment, is evidence that Freeman and Johnson did exactly those things, creating genuine issues for trial. And the medical report provides independent circumstantial evidence from which a jury could infer an agreement. There is no doubt that, in the face of such material disputes, "summary judgment will not lie." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

## ARGUMENT

### I. THE COMPLAINT STATES A CLAIM FOR THE PRE-SEARCH DETENTION.

Defendants first argue that George's pre-search detention claim is "not properly before the Court because Mr. George does not allege in the Complaint that his constitutional rights were violated" apart from the rectal cavity search. [Ans. Br. 19]; *see also id*. at 1 n.1 (George "alleges no such claim for relief in the

Complaint"). That assertion is incorrect. The complaint states in plain terms that Freeman and Johnson "arbitrar[ily] stopped [George] for questioning," [ER 4], a Fourth Amendment claim that George consistently pressed below. [ER 152–153].

It is well settled that federal courts have an "obligation where the [plaintiff] is *pro se*, particularly in civil rights cases, to construe the pleadings liberally and to afford the [plaintiff] the benefit of any doubt" concerning the presentation of a claim. *Klingele v. Eikenberry*, 849 F.2d 409, 413 (9th Cir. 1988) (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc)). Thus, as we explained in our opening brief (at 20), *pro se* filings are "held to less stringent standards than formal pleadings drafted by lawyers," and should be "construed as to do substantial justice." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) and Fed. R. Civ. P. 8(f)).

Here – construing the pleadings liberally and giving George the benefit of any doubt – the complaint alleged a violation of his Fourth Amendment rights concerning the pre-search detention. As the Supreme Court recently explained, Rule 8 requires only that a complaint "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson*, 551 U.S. at 93 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). George's complaint gave defendants just that: it stated in clear language that, although the officers *claimed* to have had articulable suspicion (they "alleged good cause" to

stop George and "search plaintiff person," based on "reason of being suspicious"), they in fact lacked justification (they "*arbitrar*[*ily*] stopped plaintiff for questioning"). [ER 4] (emphasis added). These allegations, although not voluminous or artful, unambiguously alerted the officers to George's Fourth Amendment claim for having been "arbitrar[ily] stopped . . . for questioning." *Id*. This Court has previously "ben[t] over backwards to pluck" far less "viable claim[s]" than this from *pro se* pleadings. *See Lockhart v. United States*, 376 F.3d 1027, 1028 (9th Cir. 2004) (construing a *pro se* complaint as alleging "[b]y implication" jurisdiction and a "cognizable claim for an injunction" where the "confusing" and "far ranging" complaint contained a "barrage" of irrelevant allegations), *aff'd*, 546 U.S. 142 (2005).

And George did not waive the pre-search detention claim before the district court. Liberally construing his opposition to the summary judgment motion, for example, he indicated that the facts did not support articulable suspicion. [ER 152–153]. He noted that while the officers argued that they stopped George because he was "allegedly loitering" in an area they "claimed" to be well known for crime, the defendants "neglected" to acknowledge that George "live[d] at this location," and thus that he could not have been loitering at all. *Id*. And he suggested that the officers stopped him "to seek out" where he lived, without "permission from his

Parole agent" and "in violation of the 4th Amendment." *Id*. at 153. The pre-search detention is thus preserved for review. [1]

If this Court were to disagree and find that the complaint does not state a claim for the pre-search detention, moreover, the appropriate course of action would be to reverse and remand with instructions to allow George to amend the complaint. In *Moss v. United States Secret Service*, 572 F.3d 962 (9th Cir. 2009), for example, this Court reversed the grant of summary judgment in a *Bivens* case because the plaintiffs there "may [have been] able to amend their complaint to include facts that will state a plausible claim, and thus the interests of justice would be served by granting them a chance to do so." *Id*. at 975. Remand for amendment

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[1] Even if George had not pressed the pre-search detention claim below, a failure to raise an issue before the district court does not operate as an absolute bar on appeal. On the contrary, "[t]he matter of what questions may be . . . resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The "general rule . . . that a federal appellate court does not consider an issue not passed upon below" is intended to afford the parties an "'opportunity to offer all the evidence they believe relevant to the issues'" and to avoid "surprise." *Id*. at 120 (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). Thus, when (as here) the record is already fully developed and surprise not an issue, and when (as here) "'injustice might otherwise result'" from a failure to address an issue on appeal, "a federal appellate court is justified in resolving an issue not passed on below." *Id*. at 121 (quoting *Hormel*, 312 U.S. at 557).

*Zobrest v. Catalina Foothills School District*, which simply noted in passing that "[w]here issues are neither raised before nor considered by the Court of Appeals, [the Supreme Court] will not ordinarily consider them," 509 U.S. 1, 8 (1993), does not suggest otherwise.

here is even more appropriate than it was in *Moss*: there, the plaintiffs' factual allegations were insufficient to state a claim – here, George's factual allegations *are* sufficient to state a pre-search detention claim; he failed only to include the magic words "claim for relief."

## II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE HOME SEARCH CLAIM.

### A. There is no evidence that George was subject to a residential search condition.

Concerning the residential parole compliance search,[2] Defendants suggest that it is irrelevant that "there is no evidence establishing" whether George was subject to California Penal Code § 3067, or that he otherwise "had notice of his parole conditions." [Ans. Br. 21]. In Defendants' view, they need not produce evidence of the conditions of George's parole because "residential parole compliance searches are specifically provided for under . . . California

[2] Defendants' suggestion that "George does not allege in the Complaint that his constitutional rights were violated" by the "search of [his] residence," [Ans. Br. 19], is certainly mistaken: the complaint alleges in plain language that the officers "entered" his home "without a search warrant," and states a claim for relief on the basis that they violated his Fourth Amendment rights by "breach[ing] their duty" not to "enter" his home "without probable cause." [ER 4, 7–8]. That is how the district court saw it: "[t]he complaint alleges that defendants unlawfully searched plaintiff's residence in violation of the Fourth Amendment." *Id*. at 174. And George unquestionably pressed the home search claim in his opposition to the summary judgment motion, *id*. at 153, fully litigating the claim before the district court and preserving it for review on appeal. There is accordingly no basis for this Court to decline consideration of that claim.

regulations," which categorically "required [George] to sign a parole agreement containing the conditions of parole." *Id*. at 20–21 (citing Cal. Admin. Code. tit. 15, §§ 2512(a)(6), 3600(c), 4929(a)(6)).

Defendants' argument on this score is unpersuasive. In the first place, they acknowledge that *Lopez*'s holding was limited. [Ans. Br. 20] ("The *Lopez* decision notes that California parolees have no legitimate expectation of privacy in their residences *in light of Penal Code section 3067* (the parole compliance search statute).") (emphasis added). There, this Court held that "officers may conduct a warrantless, suspicionless search of a parolee's person or residence" only insofar as such a search accords with the "parole conditions a parolee has notice of and agrees to." *United States v. Lopez*, 474 F.3d 1208, 1214 (9th Cir. 2007). *Lopez* is therefore not a blanket approval of *all* suspicionless residential parole compliance searches, and is instead expressly limited by application of the "parole conditions a parolee has notice of and agrees to."[3]

[3] *Motley v. Parks*, 432 F.3d 1072 (9th Cir. 2005), which pre-dates *Lopez*, does not suggest otherwise. *See* [Ans. Br. 20, 22]. That case involved pre-planned searches of ten parolees' homes. The question presented there was whether "officers [must] have probable cause to believe that a parolee resides at a particular address prior to conducting a parole search." *Motley*, 432 F.3d at 1080. Whether the particular parolees in that case were subject to suspicionless home search conditions, or whether the searches would have been permissible if they had not been, were not questions not at issue there.

Determining the "parole conditions" that George "ha[d] notice of and agree[d] to," *Lopez*, 474 F.3d at 1214, is a straightforward fact question. And it is well settled that on a motion for summary judgment, "[t]he moving party bears the initial burden to demonstrate the absence of any genuine issue of material fact," *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007), by "produc[ing] . . . *evidence*" to refute the plaintiff's allegations. *KRL v. Moore*, 384 F.3d 1105, 1110 (9th Cir. 2004) (emphasis added) (quoting *Butler v. San Diego Dist. Attorney's Office*, 370 F.3d 956, 963 (9th Cir. 2004)). Here, Defendants have simply failed to satisfy that burden – they have not produced any evidence showing that the conditions of George's parole permitted Freeman and Johnson to search his home without a warrant or any suspicion of criminal activity.

As we noted in our opening brief (at 30–31), one way Defendants might have established the conditions of George's parole would have been to show, in accordance with *Lopez*, that George was subject to California Penal Code § 3067, which provides that "[a]ny 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." Cal. Penal Code. § 3067(a). But Section 3067 applies only to parolees whose crimes were committed after 1997 (*see* Cal. Penal Code § 3067(c)), and defendants have not entered any evidence showing when George committed the crime for which he was paroled.

Another way defendants might have established that George was subject to a suspicionless home search condition, as we explained (at 31–32), would have been to submit evidence demonstrating the contents of the parole release form George signed when he was placed on parole. Such evidence might have included an actual copy of the form or perhaps an affidavit from George's parole officer. But defendants did provide that either. Indeed, the only effort Defendants made on this point was to seek an admission from George that he was subject to a residential search condition – but George *denied* that he was. [ER 127–128].[4]

In the face of this conspicuous lack of evidence demonstrating the "parole conditions" that George "ha[d] notice of and agree[d] to," *Lopez*, 474 F.3d at 1214, Defendants resort to scattered sections of the California Code of Regulations to plant the idea that George simply *must* have been subject to a suspicionless home search condition. [Ans. Br. 20–22]. But these efforts are futile. Code section

[4] Defendants suggest that George did not deny that he was subject to a *general* residential search condition, but only a search condition that encompassed his *mother's apartment*. [Ans. Br. 22]. As an initial matter, even Defendants' stingy reading of George's answer means that the search was *not* authorized by the conditions of his parole. That aside, their hair-splitting interpretation ignores that the evidence must be viewed in light most favorable to George and that this Court should "afford the [plaintiff] the benefit of any doubt" concerning interpretation of his *pro se* filings. *Klingele*, 849 F.2d at 413. Viewed in this light, George's answer is a flat denial. Defendants requested the an admission that George was "on active parole which conditions allowed Pomona Police officers without [his] consent or probable cause to search [his] person and [his] residence." [ER 75]. George answered, "Plaintiff deny that . . . his residence . . . may be searched." *Id*. at 128.

3600(c), for example, states simply that *when* a residential parole compliance search takes place, "[o]nly those areas of a parolee's residence occupied solely by the parolee or of common access shall be searched without a search warrant." Cal. Admin. Code. tit. 15, § 3600(c). While it is true that this language contemplates that warrantless residential parole compliance searches are authorized under *some* circumstances (a proposition we do not dispute), it provides no indication of whether George was *himself* subject to such searches as a condition of his parole, much less the particular terms of that condition (such as a suspicion requirement), assuming he was.

That California regulations affirmatively require all parolees to sign general parole condition forms, [Ans. Br. 21] (citing Cal. Admin. Code. tit. 15, § 2512(a)(6)), is also beside the point. Like Section 3600, Section 2512 sheds no light on whether George was *personally* subject to suspicionless residential search condition among the conditions he was required to accept. In fact, insofar as Section 2512 describes the "general conditions of parole," it conspicuously *omits* a residential search condition. *See* Cal. Admin. Code. tit. 15, § 2512(a). And Section 4929(a)(6) is even less helpful. [Ans. Br. 21–22]. That provision applies only to "youthful offenders" and obviously has no relevance here. *See* Cal. Admin. Code. tit. 15, § 4929(a)(6).

In sum, Defendants have provided no basis upon which a jury could conclude that the conditions of George's parole required him to submit to suspicionless residential compliance searches. And there is good reason to doubt that they did. As we have explained (and as defendants notably do not dispute), California Penal Code § 3067's legislative history suggests that, prior to its passage, "local law enforcement offices" were *not* generally "free to conduct [suspicionless] search[es]" of parolees' homes. [Opening Br. 32 n.10] (quoting Cal. Bill Analysis, A.B. 2284 Sen. (Aug. 7, 1996)). Indeed, there would have been little need to pass Section 3067 if California regulations already required all parolees to submit to suspicionless home searches. Without evidence that George was actually subject to California Penal Code § 3067 or otherwise had notice of a residential search condition, therefore, there was no basis for the grant of summary judgment on the parole compliance search claim. Defendants have provided no reason for concluding otherwise.

**B. Defendants are not entitled to qualified immunity.**

Defendants' suggestion that it was not clearly established that the officers had to *know* of a residential search condition, [Ans. Br. 22–25], is nothing more than a smoke screen. To be sure, we did suggest – assuming *arguendo* that George *had been* subject to a residential search condition – that the officers would have had to know that George was on parole and subject to that condition in order for

the search to have been constitutional. [Opening Br. 32–33]. But whether it was clearly established that the officers had to *know* of the residential search condition is relevant only assuming there was evidence that George indeed *was* subject to such a condition. Our primary basis for challenging the grant of summary judgment on the warrantless search of George's home was (and remains) the conspicuous *lack* of any such evidence. *Id*. at 27–33.

As to *that* issue, defendants do not argue that the law was not clearly established. As we demonstrated in our opening brief (at 33–34), there could be no confusion that a warrantless search of a parolee's home, when the parolee is *not* subject to a residential search condition, violates his clearly established Fourth Amendment rights. *See Griffin v. Wisc.*, 483 U.S. 868, 873 (1987) (a parolee's home, "like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable'").

In any event, Defendants are wrong to suggest that there was any confusion concerning whether the officers had to know that George was subject to parole search condition prior to the search, assuming he was. It is a long-recognized and common sense principle that "facts and circumstances within the officer's knowledge" at the time of the search must, of themselves, be "sufficient" to justify the search. *Mich. v. DeFillippo*, 443 U.S. 31, 37 (1979). Thus "in evaluating alleged violations of the Fourth Amendment," a court must "first undertake[] an

objective assessment of an officer's actions in light of the facts and circumstances *then known to him*." *Scott v. United States*, 436 U.S. 128, 137 (1978) (emphasis added). Nothing the California courts might or might not have said is capable of overriding this basic federal constitutional principle.

There was accordingly no basis for granting summary judgment to Defendants on the home search claim.

## III. THERE ARE GENUINE DISPUTES OF MATERIAL FACT CONCERNING WHETHER THERE WAS A CONSPIRACY.

With respect to the rectal cavity search claim, Defendants are simply wrong that "the record below is completely devoid of any facts to suggest" that a "conspiracy existed." [Ans. Br. 11]. On the contrary, there is both direct and circumstantial evidence that Defendants conspired to deprive George of his constitutional rights.

### A. There is evidence of an agreement.

1. Freeman and Johnson devote considerable portions of their brief to rehashing their version of the post-arrest facts and insisting there was no agreement among Defendants. *See* [Ans. Br. 12–15]. Selectively citing their own evidence and ignoring the rest, they claim that it is "undisputed," *id*. at 15, that they neither "instructed Dr. Edholm to extract the foreign object" nor "tackle[d] Mr. George in order for Dr. Edholm to commence medical treatment." *Id*. at 13–14; *see also id.* at 15 (there is "absolutely no support in the record" that "Appellees directed and

instructed Dr. Edholm" to search George's rectum). Thus, they insist, "[t]he only affirmative act" either of them took at the hospital was to inform Edholm that they suspected George had drugs his rectum. *Id*. at 13.

These contentions are obviously wrong. As Defendants have acknowledged, [Ans. Br. 7], the district court admitted George's verified complaint as a sworn affidavit, [ER 209], which accordingly serves as testimonial evidence for purposes of defeating summary judgment. *Moran v. Selig*, 447 F.3d 748, 759 n.16 (9th Cir. 2006); *Laws v. Lamarque*, 351 F.3d 919, 924 (9th Cir. 2003). And as evidence in the record, the verified complaint demonstrates that the officers *did* instruct Edholm to remove the contraband from George's rectum (they told him that "[w]e need it out now," [ER 5]), and *did* assist hospital security in restraining George (they "tackle[d] plaintiff down to the table" so that Edholm could "perform rectum/anus surgery," *id*.).[5] To be sure, Freeman and Johnson have each denied

[5] Defendants' somewhat puzzling observation that this Court should "not construe the allegations in the complaint as true," [Ans. Br. 19], misses the point entirely. Of course, they are correct that the allegations should not be assumed as true – that is the standard of review for appeals from grants of motions to dismiss, and not of motions for summary judgment. *Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010)); *see also Butler*, 370 F.3d at 964 ("It would . . . be extremely odd if, in ruling on a defendant's motion for summary judgment based on official immunity, [this Court] were required to assume that the allegations in plaintiff's complaint are true."). But our reference to the verified complaint as evidence in the record does not require any such assumption. Instead, George's verification of the complaint means simply that the Court should "treat the allegations . . . as an affidavit" (*Laws*, 351 F.3d at 924) – *i.e*., as *evidence*. And all inferences that can be

*continued . . .*

that they did these things. [ER 82–83, 97–98, 105]; *see also* [Ans. Br. 13–14]. But such "his word against mine" disputes are quintessential fact questions for trial – it is, after all, "the exclusive province of the *jury* to determine the credibility of witnesses [and] resolve evidentiary conflicts." *United States v. Kranovich*, 401 F.3d 1107, 1112–1113 (9th Cir. 2005) (emphasis added). Freeman and Johnson cannot wish these disputes away by simply ignoring the verified complaint.

2. As evidence that the officers instructed and assisted Edholm, the verified complaint plainly demonstrates an *agreement*. Of course, an agreement need not be premeditated or elaborate, and may be inferred from spontaneous cooperation among the defendants to achieve a common goal. *See Crowe v. County of San Diego*, 593 F.3d 841, 875 (9th Cir. 2010) ("an agreement need not be overt, and may be inferred" from "the actions of the defendants" if those actions demonstrate a "common" goal) (quoting *Mendocino Envt'l Ctr. v. Mendocino County*, 192 F.3d 1283, 1301 (9th Cir. 1999)). Thus "each participant in the conspiracy need not know the exact details of the plan" so long as they "share [in a] common objective." *Id*. (quoting *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th Cir. 1989) (en banc)). And a "private party's joint participation with a state official in a conspiracy" constitutes "both 'state action

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. . . *continued*
drawn from the verified complaint, as evidence, should be drawn in George's favor. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158–159 (1970).

essential to show a direct [constitutional] violation" and "action under color of law," sufficient to bring *both* the private and state actors within the reach of § 1983. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 931 (1982).

Here, the verified complaint shows exactly the sort of spontaneous joint activity in pursuit of a common objective necessary to satisfy § 1983. It demonstrates not just that the officers worked together with Edholm by helping to restrain George so the doctor could anesthetize him, but that the officers "provided significant encouragement . . . for [Edholm's] action," *Single Moms, Inc. v. Mont. Power Co.*, 331 F.3d 743, 747 (9th Cir. 2003) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)), by affirmatively instructing him that "[w]e need it out now." [ER 5]. Viewing this evidence in the light most favorable to George (*Avalos v. Baca*, 596 F.3d 583, 587 (9th Cir. 2010)), there is little doubt there was an unspoken understanding among Defendants – that they were "jointly engaged" in a "prohibited action" – for purposes of § 1983. *Lugar*, 457 U.S. at 941 (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

3. Yet even if the district court had not admitted the verified complaint as an affidavit in the record, a jury could infer an agreement independently from the medical report. As we have said, a § 1983 conspiracy need not be "detail[ed]" or "overt," and "may be inferred on the basis of circumstantial evidence." *Crowe*, 593 F.3d at 875. Such evidence suffices when it suggests that Defendants' actions

"'are unlikely to have been undertaken without an agreement,'" *Mendocino Envt'l Ctr.*, 192 F.3d at 1301, or were "*not categorically inconsistent* with a tacit 'meeting of the minds.'" *Crowe*, 593 F.3d at 875 (emphasis added) (reversing grant of summary judgment to defendants because "[t]he record shows that the quality of Blum's involvement in the interrogations [was] not categorically inconsistent with a tacit 'meeting of the minds'").

Taken in the light most favorable to George, the medical report provides strong circumstantial evidence of a tacit understanding among 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." [ER 22–23]. Yet the medical report demonstrates that Edholm believed that there was a "need" to place George under general anesthesia for precisely that reason. *Id.* at 22. A "reasonable factfinder" could conclude that this extraordinary course of conduct – a doctor overriding his patient's personal medical decisions 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 (quoting *Mendocino Envt'l Ctr.*, 192 F.3d at 1301).

Indeed, the medical report expressly adverts to Edholm's cooperation with and assistance of Freeman and Johnson: it notes that the bag of drugs, once removed, "was given directly to the police," and that, when the procedure was complete, Edholm "medically cleared [George] to be booked." [ER 23]. A jury could infer from these portions of the report, as well, that Edholm and the officers shared the "common objective" of recovering the evidence from George's rectum and clearing him for booking. *Crowe*, 593 F.3d at 875.

The grant of summary judgment was accordingly error: "so long as there is a *possibility* that the jury can infer from the circumstances that the alleged conspirators . . . reached [an] understanding to achieve the conspiracy's objectives," the question "[w]hether defendants were involved in an unlawful conspiracy . . . should be resolved by the jury." *Mendocino Envt'l Ctr.*, 192 F.3d at 1301 (emphasis added; alterations and quotation marks omitted). That is precisely the case here: taken in the light most favorable to George, a reasonable jury could infer from the verified complaint and the medical report that Defendants reached a spontaneous and unspoken understanding to pursue a joint course of conduct that violated George's constitutional rights. The district court accordingly erred in concluded that there was no evidence of a conspiracy. [ER 175].

**B. There is evidence of a constitutional violation.**

Defendants' half-hearted argument that George's Fourth Amendment rights were not implicated here, [Ans. Br. 15–17], merely places a different label on the same meritless argument. They reiterate that "undisputed facts show that" there was no "meeting of the minds," and insist, as a consequence, that Edholm was not acting under color of law. *Id*. at 15. But, again, this claim is based on a selective and incomplete assessment of the record. As we have just explained (*supra* pp. 14–18), whether there was a tacit understanding among Defendants to remove the drugs from George's rectum implicates genuine disputes of material fact for trial. And the same evidence that shows a conspiracy among defendants establishes that Edholm acted under color of law. *Lugar*, 457 U.S. at 931; *see also, e.g.*, *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 51– 52 (1st Cir. 2009) (doctor "strongly encouraged" by correctional officers to perform a surgery to remove contraband from within a prisoner's body acted under color of law); *State v. Payano-Roman*, 714 N.W.2d 548, 554–555 (Wis. 2006) (doctor implicitly encouraged by officers to administer laxatives to speed the passage of drugs acted under color of law).

Apart from their baseless suggestion that Edholm was not acting under color of law, Defendants do not – indeed *could not* – dispute that the search violated George's constitutional rights. They do not assert that the search was in any sense

necessary, or that it was (or could have been) justified by a medical emergency.[6] And as we explained in our opening brief (at 36–43, 47–50), the Supreme Court has unequivocally condemned searches like the one that took place here (*Winston v. Lee*, 470 U.S. 753 (1985); *Rochin v. Cal.*, 342 U.S. 165 (1952)); other courts have universally held that the proper course of action under such circumstances is to wait for a monitored bowel movement. *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). Defendants do not argue otherwise.

### C. Defendants are not entitled to qualified immunity.

Finally, Defendants claim that qualified immunity provides a "separate ground" for affirming the judgment below on the rectal cavity search claim. [Ans. Br. 17]. But their argument on this score is not "separate" at all – it is, instead, a *third* reiteration of their assertion that "there is no triable issue of fact as to

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[6] Although they do not argue there was any medical emergency here, Defendants assert that George presented at the hospital with "cocaine intoxication" because he had already "absorbed" some of "the cocaine . . . concealed in his rectum." [Ans. Br. 5]. That is incorrect. George expressly denied that Edholm diagnosed him with cocaine intoxication "absorbed . . . from the cocaine . . . concealed" in his rectum. [ER 129–130]. And the medical report states the "drug packet" was removed "*before*" George "absorbed some or much" or the cocaine. [ER 23] (emphasis added). Elsewhere, the medical report states that the officers informed hospital personnel that George swallowed cocaine orally, [ER 20]; it never attributes George's apparent cocaine intoxication to the plastic bag in his rectum.

whether a conspiracy existed." *Id.* at 18. Unfortunately for Defendants, "[a] bad argument does not improve with repetition." *Carr v. United States*, No. 08-1301, 2010 WL 2160783, at *13 (June 1, 2010) (Alito, J., dissenting).

In any event, qualified immunity provides an independent basis for granting summary judgment only if, *assuming a constitutional violation took place*, the right that was violated was not "clearly established" at the relevant time. *See Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009) ("if the plaintiff has" presented evidence of a constitutional violation, "the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct"). Defendants do not argue that George's constitutional right to be free from warrantless rectal cavity searches under general anesthesia was not clearly established at the time the search took place. Nor could they – *Rochin* and *Winston* have been the law of the land for decades. Qualified immunity accordingly offers them no relief here.

## 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.

Dated: June 7, 2010

Respectfully submitted,

s/ Michael B. Kimberly

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## 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 5,606 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 June 7, 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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