UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(Appeal #16-2174)

TREY SIMS,

Appellant,

v.

Kenneth E. Labowitz, Administrator Pursuant to Code of Va. §64.2-454
of the Estate of DAVID E. ABBOTT,

Appellee,

*

Claiborne Richardson,

Defendant.

BRIEF OF APPELLANT TREY SIMS

On Appeal From The United States District Court For
The Eastern District Of Virginia, Alexandria Division

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Jurisdictional Statement

The court below had jurisdiction under 28 U.S.C. §1331 over this case brought under the Fourth and Fourteenth Amendments of the United States Constitution, 42 U.S.C. §1983, and 18 U.S.C. §2255. This court has jurisdiction under 28 U.S.C. §1291 over this appeal from the final order and judgment granting defendant/appellee's motion to dismiss and dismissing the claims of plaintiff/appellant, entered by the district court on September 19, 2016. The notice of appeal was filed on October 12, 2016.

Questions Presented For Review

A teenage boy who consensually exchanged "sexts"[1] with his girlfriend was investigated by a Virginia detective for allegedly producing child pornography (*i.e.*, images of himself). The detective: (a) sought and obtained a warrant that called for the boy to achieve an erection that would then be photographed; (b) forced the boy to simulate masturbation by manipulating his flaccid penis to mimic the underlying sexts depicting him erect; (c) took photos of this process, thereby creating photos that, while pornographic, were not called for by the warrant and

[1]"Sext" is the name conventionally given to a sexually explicit image shared via cell-phone. It is endemic among teenagers. *See generally*, Hasinoff, *Sexting Panic: Rethinking Criminalization, Privacy and Consent* (2015).

could not be used as comparators for the underlying sexts; and (d) thereafter threatened to have the boy injected with a substance that would cause him to have an erection. The district court granted qualified immunity to the personal representative of the detective's estate from the youth's constitutional and statutory claims.[2] The following questions are presented for review:

1. Whether the district court erred in holding that a police officer was qualifiedly immune from liability for having forced a boy to expose and touch himself for pornographic photos not called for by any warrant, and threatening to have him receive an erection-producing injection.

2. Whether the district court erred in dismissing the youth's statutory claims against the detective under 18 U.S.C. §2255 for forcible production of child pornography, without presenting any discussion of the sufficiency of that claim, nor any reason whatsoever for dismissing it.

Statement of the Case

Following the dismissal of sexting charges against him in Prince William (Virginia) Juvenile and Domestic Relations Court, on May 25, 2016 appellant Trey

[2]Prior to this suit's being filed, the detective died under circumstances relevant to appellant's statutory claim, and thus his estate was named as defendant. *See infra* note 10 at 12.

Sims, having turned 18, brought suit in United States District Court for the Eastern District of Virginia against the police detective who secured and executed a warrant directing the photographing of his erect penis, to permit comparison with the underlying sexts.[3] App. 21-22, ¶1. When Trey understandably failed to produce an erection, the detective thereafter threatened him with an injection to make him do so. (The latter project was abandoned after a public outcry and the police department's public rebuke.) Trey's complaint presented several constitutionally based claims and one claim under a federal statute criminalizing and providing a civil remedy for forced participation in the production of child pornography. The defendants moved to dismiss all claims against them. The district court, per Hilton, J., by order entered September 19, 2016, granted the motion on the basis of the detective's qualified immunity and the prosecutor's absolute immunity. App. 9-20. In his memorandum opinion, the district judge did not address the sufficiency of Trey's statutory claim, nor offer any reasons why it should be dismissed. Trey now appeals the dismissal of some of his claims against the detective, as follows:

[3]Trey also sued the prosecutor who had worked with the detective. The court's dismissal of the prosecutor is not at issue on this appeal. For ease of reference, the appellee is referred to herein as Detective Abbott.

* That forcibly procuring photographs of Trey manipulating his penis was unreasonable and unconstitutional under the Fourth Amendment (Count IIA),
* That forcibly procuring photographs of Trey manipulating his penis was, in the alternative, a violation of his substantive due process rights under the Fourteenth Amendment (Count IIB),
* That threatening Trey with an erection-producing injection violated his substantive due process rights under the Fourteenth Amendment (Count III), and
* That forcibly taking pictures of Trey manipulating his penis so as to be photographed simulating masturbation, in an effort to duplicate alleged child pornography, itself constituted the creation of child pornography in violation of 18 U.S.C. §2251(a) (Count V).

Statement of Facts[4]

When Trey was 17 years old, he and his girlfriend exchanged explicit, nude photos or videos of themselves ("sexts"). The girlfriend's mother became aware of these sexts and reported them to the Manassas City (Va.) Police Department (MCPD) in January 2014. App. 23, ¶¶5-6. On or about January 6, 2014, MCPD Detective David E. Abbott procured a warrant to seize evidence related to the sexts. Along with several other police officers, Det. Abbott executed the warrant at the home of Trey's aunt with whom he lived, the same day. Trey was charged with the juvenile version of felony manufacture and distribution of child pornography, *i.e.*, for an explicit video he made of himself. His trial was set for June 3, 2014, and he was put on home confinement pending trial. App. 23, ¶¶7-9.

On the day of trial, the prosecution offered to drop the charge of manufacture of child pornography if Trey pled guilty to possession thereof. Trey rejected the offer. The charges against Trey were thereupon dismissed on a *nolle prosequi*. App. 24, ¶11. Later that day, with no charges pending against Trey, Det. Abbott obtained a magistrate's secure detention order permitting Trey's seizure

[4]This statement of facts derives directly from the complaint of record. App. 21-34. While reciting portions of the complaint that bear on its dismissal of the case, App. 9-11, the district court omitted reference to material averments at odds with its analysis and holding; those are re-introduced into the material facts here.

from his home and his transportation to a local juvenile detention facility, ostensibly pursuant to *Code of Va*. §16.1-248.1. App. 24, ¶12. Det. Abbott secured this detention order notwithstanding that for the prior six months, Trey had been on court-ordered home confinement without incident, and that the day following his seizure he was once again released on home confinement to the custody of his aunt, until his trial date two months later.[5] App. 24, 27, ¶¶10, 31. What happened during the brief period of Trey's one-day detention, away from his aunt's home, lies at the heart of this lawsuit. Det. Abbott had, somehow, obtained a search warrant from a magistrate calling for photographing Trey's body, including, specifically, "a photograph of the suspect's erect penis."[6] The photographs were to be used as comparisons to the sexts underlying the

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[5]*Code of Va.* §16.1-248.1(A), provides that a juvenile may be taken to a secure facility only if certain conditions are satisfied by clear and convincing evidence. Trey's detention order was obtained on the basis of representations – repeated below – regarding Trey's alleged imminent flight or dangerousness. App. at 23, ¶¶13-14. These representations, belied by Trey's unchallenged compliance with his home detention for half a year before his seizure, and by his immediate return to his aunt's custody once the desired photography was done, were never subjected to discovery, given the threshold dismissal of the lawsuit. Trey would prove that the sole purpose of his detention of less than one day was to facilitate the photography here at bar, rather than attempt to have it done at his aunt's home with her present to object. *See also* n.30 at 35, *infra*.

[6]It bears noting that "in Virginia, 'magistrates need not be members of the bar or trained lawyers.'" *Graham v. Gagnon*, 831 F.3d 176, n.3 (4th Cir. 2016).

pornography prosecution so as to establish that Trey was depicted in the sext. App. 25, ¶16.

Det. Abbott should have known that requesting a magistrate to issue a warrant for taking police photographs of a boy's erect penis was unreasonable to the point of absurdity, that undertaking to act on the basis of any such warrant would be shocking to the conscience, and that any request for him to secure such a warrant should have been disregarded, if not reported to proper authorities. He should also have known that asking for such a warrant was also requesting the acquisition of something impossible to procure lawfully: a replica of pictures of a 17-year-old boy that, according to the Commonwealth of Virginia, Det. Abbott himself, and black-letter federal law, constituted child pornography.[7] App. 25-26, ¶18.

[7]The complaint challenged the defense to explain, apart from this legal hurdle, how Det. Abbott was going to be able to photograph Trey's erection, pointing out that as a matter of common sense and common knowledge, Det. Abbott knew that Trey neither could nor would produce an erection on demand. Short of force-feeding Trey with Viagra, compelling him to look at pornographic videos or magazines, or subjecting him to advances by a stripper or lap dancer, Det. Abbott had no better options for producing Trey's erection than the one he later announced to Trey's criminal defense lawyer: having Trey injected at a hospital with an erection-producing substance. The complaint alleged that Det. Abbott knew all this when he requested, obtained and then executed the search warrant at issue. App. 28-30, ¶¶29, 37.

Det. Abbott and several other officers executed the secure detention order at Trey's home on June 3, 2014, placing him in handcuffs and taking him to the Prince William County Juvenile Detention Center ("JDC"). App. 26, ¶20. At the JDC, Trey was taken into a locker room by Det. Abbott and two other uniformed officers. Det. Abbott told Trey to pull down his pants so that photos could be taken of his penis. Upset, Trey asked Det. Abbott whether he was required to submit to his direction. Det. Abbott responded to the effect that he would do it by force if Trey did not comply. Reasonably concluding that he could not oppose the three armed, uniformed officers surrounding him, Trey reluctantly submitted. Unsurprisingly, his penis was not erect. App. 26-27, ¶¶21-23. Once Trey had exposed himself per Det. Abbott's demand, Det. Abbott directed Trey to use his hand to manipulate his penis in different ways, presumably to position it so as to simulate the erection depicted in the underlying sext. Understandably, no erection was forthcoming. App. 27, ¶24. By forcing Trey to position and manipulate his penis for the pictures, Det. Abbott created a lascivious exhibition of a child's genitals and/or photographed simulated masturbation. By taking these pictures with his cell phone, ostensibly for the purpose of comparing them to sexts allegedly constituting child pornography under *Code of Va.* §18.2-374.1:1,

Det. Abbott replicated and thus manufactured child pornography within the meaning of 18 U.S.C. §2251(a). App. 27, ¶27.

The next day, Trey was arraigned on charges of possession and distribution of child pornography. He was appointed a defense attorney and a guardian *ad litem*, and trial set for July 1, 2014. App. 28, ¶30. Following his arraignment, he was released to the custody of his aunt, assuming the same home-bound status he had satisfactorily held for half a year before its brief interruption the day before for the sole purpose of out-of-home genital photography. App. 28, ¶31.

Having failed to secure the requisite photographs of Trey's erection the first time, on June 13, 2014, Det. Abbott told Trey's defense counsel that he would make a second effort, and that if Trey did not accomplish an erection himself, he would take him to a hospital to give him an erection-producing injection.[8] App. 28, ¶32. On July 1, 2014, Trey having again refused a plea offer made by the Commonwealth, Det. Abbott applied for and received a second search warrant for photographs of Trey's erect penis. App. 28-29, ¶¶33-34. Unable to dissuade Det. Abbott from his astonishing plan, Trey's defense counsel turned to the court of

[8]Trey's allegations to this effect cannot, alas, be discounted as "implausible" or exaggerating the import of a mere bluff. Immediately prior to dismissal of the case below, discovery identified the hospital personnel who were implicated in this bizarre scheme.

public opinion. The publicized demand that Trey submit to the photographing of his erect penis, and suffer an injection if he did not comply, prompted a firestorm of public protest, ultimately causing the authorities to announce publicly that they would relent. App. 29, ¶35.

Det. Abbott's procurement of both warrants for photographing Trey's erect penis was contrary to the policies and practices of the department in which he worked and contrary to his training and departmental experience in such cases. The Manassas City Police Chief and the Prince William Commonwealth's Attorney separately condemned the invasive searches and photography at issue; indeed, initially, neither of them could believe that such invasive procedures had taken place or were planned. Specifically, when Police Chief Douglas Keen found out about the warrant authorizing photographing Trey's erect penis, he said publicly that the injection procedure would not proceed. App. 29-30, ¶¶36-37. The Manassas City Police Department issued a statement saying: "It is not the policy of the Manassas City Police or the Commonwealth Attorney's Office to authorize invasive search procedures of suspects in cases of this nature and no such procedures have been conducted in this case." The Prince William Commonwealth's Attorney, who was misinformed, similarly publicly disputed that

Det. Abbott had taken pictures of Trey's penis, contending that the allegations to that effect "lack credibility." App. 29, ¶36.

Before the July 1 warrant could be executed, Trey's lawyer and his guardian *ad litem* filed motions to quash it. In response, and in response as well to the public outcry, the prosecution confirmed in open court that the Commonwealth would let the warrant expire without service (within fifteen days, under Virginia law), thereby avoiding an adverse judicial ruling as to its reasonableness and validity. App. 30, ¶38. By leave of court, Trey spent those days in West Virginia, so as to ensure his security from any possible service. App. 30, ¶40. The prosecution also stipulated to proceeding with the case against Trey without using any of the previously taken photographs of his penis, thereby avoiding a second a judicial ruling on this one, the reasonableness of Det. Abbott's forcible procurement of the photographs and on their admissibility. App. 30, ¶38.

At Trey's trial on August 4, 2014, the Juvenile and Domestic Relations Court, without entering any finding of guilt, suspended imposition of sentence pending Trey's completion of a one-year probation. Trey completed his probation and the charges against him were dismissed in August 2015. App. 30-31. ¶¶43, 45.

By his actions set forth above, Det. Abbott engaged in a display of investigatory excess grossly inappropriate to the juvenile matter at hand.[9] His actions were knowing, gratuitous, wanton, willful, and on information and belief, motivated by private prurient interest.[10] They were taken in disregard of Trey's clearly established rights, to say nothing of his best interests as a minor. App. 31, ¶46. As a result of Det. Abbott's actions, Trey suffered humiliation, embarrassment, and physical manifestations thereof. His injuries were magnified by the fact that these events occurred the summer before his senior year of high school. As a result, he deferred applying for college pending termination of the criminal proceedings, despite his outstanding academic and extracurricular records. Throughout the investigation and prosecution, he was mortified to face his peers. App. 31, ¶47.

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[9]This case does not address whether applying child pornography laws to consensual teen-age sexting is wise or foolish. *But see*, Hasinoff, *Sexting Panic: Rethinking Criminalization, Privacy and Consent* (2015).

[10]Det. Abbott committed suicide as county police officers prepared to serve warrants upon him arising out of an unrelated investigation of his alleged sexual misbehavior with boys. App. 22, ¶4. While Det. Abbott's private motivation does not bear on the constitutional claims against him, it does bear on the claim of production of child pornography. *See* discussion at 29-34, *infra*.

At all times, Det. Abbott – a detective, not a rookie officer – knew or should have known that his actions towards Trey were not only not in Trey's best interests as a minor, but that they violated his Fourth and Fourteenth Amendment rights, violated federal child pornography law, and had no legitimate law-enforcement purpose. App. 31, ¶48.

Standard of Review

This court reviews the district court's grant of qualified immunity *de novo*. *Cooper v. Sheehan*, 735 F.3d 153, 158 (4th Cir. 2013); *Goldstein v. Moatz*, 364 F.3d 205, 211 (4th Cir. 2004). Trey's burden is to present "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face,'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), with all reasonable inferences from his allegations having been drawn in his favor. *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 391 (4th Cir.2011).

Summary of Argument

While investigating a consensual teen sexting case, a police detective briefly took a 17-year-old boy from his home to a juvenile detention facility on the basis of apparent misrepresentations to a magistrate as to the boy's dangerousness or risk

of flight.[11] The detective thereby secured a venue where he might, without disruption by a family member, forcibly take photographs of the youth's erect penis while, per the detective's demand, the boy manipulated his penis, simulating masturbation. The conceded goal of this exercise was to duplicate pictures that the detective proposed to charge as creation of child pornography so that the detective's pictures could be compared with the issue sexts. The boy understandably did not achieve an erection for the occasion, and the photographs taken by the detective were necessarily useless for prosecutorial purposes. The detective's actions in having the youth expose himself and simulate masturbation for photography constituted both creation of child pornography under federal law and a violation of the boy's rights under the Fourth, if not also the Fourteenth, Amendments of the United States Constitution.[12] The detective's subsequent threat to have the youth injected with a substance that would cause him involuntarily to have an erection was equally outrageous and shocking to the conscience, and constituted a violation of the boy's substantive due process rights.

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[11]*See* n.30 at 35, *infra*.

[12]Trey's Fourth and Fourteenth Amendment claims are offered in the alternative. *See* discussion *infra* at 16-27.

Nothing in American jurisprudence came close to giving the detective any reason to believe that he could constitutionally engage in either photographing Trey's penis or threatening him with an erection-producing shot. The district court's extension of qualified immunity to the detective reflected its complete disregard of federal law on child pornography and its reliance on wholly inapposite case law involving the legitimate creation of usable evidence based on a sex crime victim's identification of some unique feature of a suspect's penis, case law not involving juveniles, not involving purported authorization to secure a subject's erection by force, and not involving photographed simulated masturbation. The boy's constitutional claims against the detective's estate – the detective having committed suicide under circumstances probative of the boy's claim for sexual exploitation here at bar – should have been permitted to proceed to discovery and trial.

As for the boy's federal statutory claim against the detective's estate for forced participation in the production of child pornography, it was simply ignored by the district judge. The claim could not have properly been dismissed on grounds of qualified immunity – the only grounds addressed by the court – because the statute implicates an entirely different body of law than do the constitutional claims at issue; the statute is perfectly clear; and it provides for no exceptions

whereby police officers can create (as oppose to possess) child pornography as part of an investigation. The boy's statutory claim against the detective should have been permitted to proceed.

Argument

A. The Warrant and Photography Were Unreasonable

Det. Abbott requested, somehow obtained, and then executed a warrant to secure and then photograph Trey's erect penis. App. 25, ¶16.[13] When, after-the-fact, this was brought to the attention of the Chief of Police and the Commonwealth's Attorney, these officials could not believe it. App. 29, ¶36. And for good reason.

"Searches conducted 'in an abusive fashion . . . cannot be condoned.'" *King v. Rubenstein*, 825 F. 3d 206, 216 (4th Cir. 2016) (inmate stated claim that unnecessary surgery to remove marbles from his penis violated his Fourth Amendment rights). The "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the state." *Schmerber v. California*, 384 U.S. 757, 767 (1966). "The applicability of the Fourth Amendment turns on whether the person invoking its protection can claim a

[13] *See* n.6 at 6, *supra*, regarding Virginia magistrates.

justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action." *Hudson v. Palmer*, 468 U.S. 517, 525 (1984).

It is beyond debate that absent compelling cause, individuals have a reasonable expectation of privacy in not being forced to expose their genitals for inspection by government agents. Such searches "have been accurately described as demeaning, dehumanizing, undignified, humiliating, embarrassing, repulsive, degrading, and extremely intrusive of one's personal privacy." *Amaechi v. West*, 87 F. Supp. 2d 556, 565 (E.D. Va. 2000), *aff'd and remanded*, 237 F.3d 356 (4th Cir. 2001) (denying qualified immunity).[14] Even in the correctional context, strip search policies have been invalidated as unjustifiable invasions of privacy when unconnected to institutional security needs. *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982) (denying qualified immunity).[15]

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[14]This circuit does not stand alone on this issue. *E.g.*, *York v. Story*, 324 F.2d 450, 455 (9th Cir.1963) ("We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from views of strangers . . . is impelled by elementary self-respect and personal dignity"); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) ("[A]ll forced observations or inspections of the naked body implicate a privacy concern"); *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993) ("It is axiomatic that a strip search represents a serious intrusion upon personal rights.")

[15]*Accord*, *Walsh v. Franco*, 849 F.2d 66 (2d Cir.1988); *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir.1985), *cert. denied*, 475 U.S. 1066 (1986); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir.1989), *cert. denied*, 493 U.S. 977 (1989); *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1272 (7th Cir.1983); *Jones v. Edwards*, 770

Determining whether a search is reasonable requires a

> balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559 (1979). "The interest in bodily integrity involves the most personal and deep-rooted expectations of privacy." *King*, 825 F.3d at 215. In *King*, not merely the *fact* of surgery but "[t]he *nature* of the surgery itself – surgery into [plaintiff's] penis – counsel[ed] against reasonableness"). *Id.* (Emphasis added.)

The constitution forbids certain searches even if probable cause exists to believe that they will produce usable evidence – something not present in the instant case. Courts are to consider "the extent to which the procedure may threaten the safety or health of the individual, . . . [and] the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity." *Winston v. Lee*, 470 U.S. 753, 761-62 (1985) (state prohibited from surgically extracting bullet from defendant's body notwithstanding its uncontested probative value). These factors are to be weighed against "the community's interest in fairly and accurately determining guilt or innocence." One must focus on "the extent of

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F.2d 739 (8th Cir.1985); *Fuller v. M.G. Jewelry*, 950 F.2d 1437 (9th Cir.1991); *Hill v. Bogans*, 735 F.2d 391 (10th Cir.1984).

the intrusion on respondent's privacy interests and on the State's need for the evidence." *Id.* at 762-63.

Investigations involving juveniles present special constitutional considerations that further limit the state's power. As the Supreme Court has recognized, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). A child "is not equal to the police in knowledge and understanding ... and ... is unable to know how to protect his own interests or how to get the benefit of his constitutional rights." *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962). Thus, when the state holds a child in custody, it "must play its part as *parens patriae*," *i.e.*, "preserv[e] and promot[e] the welfare of the child." *Schall v. Martin*, 467 U.S. 253, 265 (1984). The reasonable child subjected to police questioning "will sometimes feel pressured to submit when a reasonable adult would feel free to go." *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011).

Laws against child pornography are in place to protect children from physical, mental, and future harm, given the state's long-recognized and compelling interest in safeguarding the psychological as well as the physical well-being of minors. *New York v. Ferber*, 458 U.S. 747, 756 (1982); *Osborne v. Ohio*,

495 U.S. 103, 109 (1990). The government's interest in preventing sexual exploitation and abuse of children is of "surpassing importance." *Ferber*, 458 U.S. at 757. Using children in pornographic materials is harmful to them physiologically, emotionally, and mentally. *Id*. at 756-57.

For precisely these reasons, courts have required authorities to be especially careful when conducting strip searches of children. Sexually intrusive searches demand particular justification and care.

> A strip search with body-cavity inspection is the practice that 'instinctively' has given the Supreme Court the 'most pause.' *Wolfish*, 441 U.S. at 558. The Seventh Circuit has described strip searches as 'demeaning,' 'dehumanizing,' and 'terrifying.' *Mary Beth G.* [*v. City of Chicago*], 723 F.2d[, 1263,] 1272 [(7th Cir. 1983)]. The Tenth Circuit has called them 'terrifying.' *Chapman* [*v. Nichols*], 989 F.2d[, 393,] 396 [(10th Cir. 1993)]. The Eighth Circuit has called them 'humiliating.' *Hunter v. Auger*, 672 F.2d, 668, 674 (8th Cir. 1982).

N.G. v. Connecticut, 382 F.3d 225, 233 (2d Cir. 2004). From this, the Second Circuit rightly noted that "children are especially susceptible to possible traumas from strip searches." *Id*. (internal citations omitted).

The complaint alleges a disturbing state of affairs. A minor being prosecuted for having sent his girlfriend an explicit video of himself in response to receipt of her nude photographs, was taken from his home to a juvenile detention center on the authority of a secure detention order apparently procured through misrepresenting his dangerousness and/or risk of flight, thereby improperly

securing a venue where he might be forced to pull down his pants and manipulate his penis for photographs pursuant to a warrant that called for him to achieve an erection.[16] App. 24, 26-27, ¶¶14, 19-24. The alleged purpose in taking the photos was to compare them to those underlying his proposed prosecution, *i.e.*, photos that, according to Det. Abbott, constituted child pornography. App. 25, 27, ¶¶16, 27. On this theory, and absent any statutory exception for the production of such images by law enforcement – which is lacking under both federal and state law – Det. Abbott's compelled photographs necessarily constituted child pornography.[17] The compelled photos neither fulfilled the demands of the warrant nor produced usable content, since the underlying sexts depicted Trey erect. App. 25, 27, ¶¶16, 23. The photos were ultimately deemed unnecessary for and not used in the case. App. ¶38. Taking the pictures was wholly outside of police departmental policy, as

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[16]As the complaint alleges, App. 23-26, ¶¶9-10, 12-14, 20, Trey was taken from his aunt's home where he had been living for half a year in compliance with a strict regimen controlling his activities. Following his brief detention for purposes of genital photography, he was immediately re- released to his aunt's supervision, where he remained, once again in regulated home confinement, for two months awaiting trial. App. at 28, ¶¶30-31. The inference (in the absence of discovery) that he was briefly removed from his home simply to get him to a venue where the photographs of his desired erection might be forcibly procured in the absence of his aunt and her foreseeable protests seems inescapable – and one to be drawn in Trey's favor on Det. Abbott's motion to dismiss.

[17]*See* discussion at §C, *infra* at 29-34.

the police chief promptly declared. App. 29, ¶36.[18]

Given Trey's undeniable privacy interest, the discrete Fourth Amendment question is whether the state's evidentiary interest in trying, by astonishing means, to secure photographs of a juvenile's erect penis outweighed the juvenile's privacy interest in not being forced to expose and manipulate himself for such photographs, in the presence of three armed police officers to boot. This is not a close call. As Abbott took his photographs, he had to know they would be useless as comparisons to the sexts at issue in the proposed juvenile prosecution. Neither the Police Chief nor the Commonwealth's Attorney could initially believe the pictures had been taken. As occurred in the case of the prisoner plaintiff in *King*, appellees "sought 'to intrude upon an area in which our society recognizes a significantly heightened privacy interest,' requiring 'a more substantial justification' to make the search 'reasonable.'" *King*, 825 F. 3d at 217, *citing Lee*, 470 U.S. at 767. At a minimum, the court should find, as it did in *King*, that "at this early stage of the proceedings, . . . the justification for the search weighs in favor of

[18]Given Det. Abbott's arguments below, Trey notes that victims of sexual abuse, including child victims, may be subjected to genital photography, but this would be done by a medical professional – not a detective on his cell phone – in a suitable medical setting, with the consent of the victim or the victim's parent or guardian, and pursuant to the numerous safeguards imposed by the Health Insurance Portability and Accountability Act, 42 U.S.C. §1320d-6, none of which was invoked here.

unreasonableness," and that Trey has "pleaded sufficient facts to establish a Fourth Amendment claim plausibly entitling him to relief."[19] *Id*.

With the exception of one case, all of the cases referencing genital photography that diligent research has identified, the warrants for genital photography issued based on a sexual abuse victim's identification of some special defining characteristic of the defendant's penis, such that viewing it – with no need for fondling and regardless of its state of arousal – would confirm the victim's account.[20] *Roadcap v. Commonwealth*, 50 Va. App. 732, 737 (2007) (tattoo); *Curtis v. Clarke*, 2012 U.S. Dist. LEXIS 85037, *6 (E.D. Va. June 19, 2012) (moles); *Mata v. Hubbard*, 2011 U.S. Dist. LEXIS 143856, *3 (C.D. Cal. Oct. 25, 2011) (protruding vein); *Willis v. Commonwealth*, 1997 Va. App. LEXIS 50, *4

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[19]Doubtless, the plaintiff in *King* faced physical injury. But the psychological and emotional injury visited on Trey by Det. Abbott's pornographic zeal are no less real or entitled to protection. The Supreme Court has commented several times on the susceptibility of youth to mental harm. *See* discussion at 14-15, *supra*.

[20]The exception is an Illinois case in which a warrant issued to photograph an incarcerated suspect's penis based on the victim's statement that he was circumcised. *People v. Turner*, 367 Ill. App. 3d 490, 500 (2006). The appellate court affirmed the trial court's suppression of the photos, as "circumcision is not an unusual or distinguishing feature in today's society," and the photos were taken without notice to or presence of defendant's counsel, as required by state criminal discovery. *Id.* at 496-97, 500. Thus, while *Turner* also involved unique state law issues, the court's common sense analysis that pictures of a non-unique penis do not have evidentiary value for proving that a sex crime occurred is instructive here.

(Feb. 4, 1997) ("huge" size with bump or sore); *State v. Bleigh*, 2010 WL 1076253 (Ohio Ct. App. Mar. 22, 2010) (scar); *Jordan v. State*, 317 Ga. App. 160, 162 (2012) and *State v. Taylor*, 2015 WL 4899447 (Ohio Ct. App. Aug. 17, 2015) (moles). The differences between the case at bar are dramatic and significant:

* Each of these cases was predicated on a discrete, readily discerned, special penile characteristic: something entirely absent here.
* Not one of these cases dealt with a child.
* Not one of these cases dealt with a purported authorization to procure an erection and then photograph it.
* Not one of these cases involved a subject being coerced to simulate masturbation.[21]
* Not one of these cases challenged the manner in which the warrant was executed.

[21] *See* discussion at 19-20, *supra*, regarding the relative helplessness of children in dealing with police.

* In none of these cases was the subject transported to a place of detention based on apparent fabrications, so that the penile examination might take place there.[22]

* In only one case – *Willis* – was the warrant challenged at all. The defendant argued on appeal that "the magistrate who issued the search warrant ordering the examination did not have probable cause to believe that his penis would match the description given by the victim of her assailant's penis [over one year prior to the warrant's procurement]." [23]

* In such cases as photographs were taken, they were of actual or potential use in the criminal case, as opposed to what occurred here, where Det. Abbott took lewd photographs that could not and did not shed light on the charges facing Trey.

Disregarding all the distinguishing features that tipped the scales of reasonableness in favor of photographing adult male genitalia in other cases, the district court broadly noted that "*similar warrants* have been issued and upheld to

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[22]As noted, Det. Abbott removed Trey from his aunt's home for the purpose of taking his photographs without having to contend with her objections.

[23]Reviewing the evidence, the appellate court disagreed.

collect evidence." App. 18 at 10. (Emphasis added.) But there are no "similar warrants," not one, not even close. The district court's bland reference to the search warrant at issue, intended to assimilate it to the allegedly "similar" warrants in cases on which the court relied, suppresses all the disturbing facts giving rise to this case. It neglects Trey's age. It avoids the express call for an erect penis to carry out the warrant's stated purpose: authorizing pictures to compare to the allegedly pornographic sexts at issue. It ignores the fact that the photographs Det. Abbott chose to take (of a flaccid penis) were self-evidently useless for evidentiary purposes. It disregards Trey's having been taken temporarily from his home to a juvenile detention center locker room where he was forced, in the presence of three armed police officers, to mimic the photographed masturbation for which he was proposed to be prosecuted. It evades the repudiation of what occurred by the local police chief and chief prosecutor. All these material distinctions, crucial for assessing Fourth Amendment reasonableness, were before the district court but ignored by it. In air-brushing the warrants as it did, the district court joined Det. Abbott in simply avoiding the gravamen of the complaint. This line of defense is the legal equivalent of boldly proclaiming the appearance of the emperor with no clothes. Trey respectfully shouts out, in response, that what happened here was plainly unreasonable – an outrage, rather than appropriate and constitutional law

enforcement. Trey's rights under the Fourth Amendment – or under the Fourteenth – were violated by Det. Abbot's intrusive, unauthorized, traumatizing, and useless photographs.[24] His claims to this effect should not have been dismissed.

[24]Recognizing that the Fourth Amendment is the preferred basis for contesting unreasonable searches, Trey offered, and offers, his substantive due process claim (Count IIB) only in the alternative to his Fourth Amendment claim arising out of the photography in question (Count IIA). At issue in a substantive due process claim is "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998). When, as here, "actual deliberation is practical," intent to harm need not be shown and evidence of mere deliberate indifference suffices. *Id.* at 848-49, 851. The right to be free from bodily intrusion at the hands of the government is an archetypal subject of substantive due process protection. *See, e.g.*, *Rochin v. California*, 342 U.S. 165 (1952) (forcible use of stomach pump by police violates substantive due process). The Fourth Circuit recognizes *Rochin* to vindicate "the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court." *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (sustaining substantive due process claim alleging severe paddling of a student). "The existence of this right to ultimate bodily security[,] the most fundamental aspect of personal privacy[,] is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process." *Id.*

B. Threatening Trey With an Erection-Producing Injection Was An Outrageous, Conscience-Shocking Substantive Due Process Violation

Det. Abbott's threat to inject Trey with an erection-producing substance (Count III) received no follow-up other than Trey's court-approved flight from Virginia pending expiration of the warrant authorizing this absurdity. Once Trey's defense counsel informed the media of this threat, a firestorm of public protest caused Det. Abbott to abandon this plan. There having ensued no actual search or seizure, Trey brings no Fourth Amendment claim based on this threat. The question at bar is whether threatening a 17 year old boy – previously compelled to simulate masturbation for photographs – with being forcibly injected to achieve an erection, causing him to flee the state (with judicial approval) while on bond, warrants protection as a matter of substantive due process.

A fruitful comparison may be made with cases alleging outrageous conduct arising in the Eighth Amendment context. Courts routinely defer to the discretion of correctional authorities – but there are limits. In *King v.McCarty*, 781 F.3d 889 (7th Cir. 2015), the plaintiff alleged that he had been degraded and humiliated by being transported in a see-through jumpsuit that left him exposed. Permitting the claim, the Seventh Circuit cautioned that "[e]ven where prison authorities are able to identify a valid correctional justification for the search, it may still violate the Eighth Amendment if conducted in a harassing manner intended to humiliate and

cause psychological pain." *Id*. at 897. Trey respectfully submits that these strictures apply to Det. Abbott's threat to have him – then a 17-year-old boy who had already been forced to pose for a first round of pictures – injected with a substance that would give him an involuntary erection[25] that would then be photographed by the police, ostensibly for use in his criminal trial. Defendant Abbott – once a boy himself – had to know that this prospect would terrify and anguish Trey. "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer v. Brennan*, 511 U.S. 825, 842 (1970). The fact that as a result of a huge public outcry the threat ended up not being carried out does not unring the bell. This may go to the quantum of damages available against Det. Abbott, but not his liability for his conscience-shocking behavior.

C. Det. Abbott Forced Trey to Participate in Making Child Pornography

18 U.S.C. §2255(a)(1) creates a civil remedy for victims of forced participation in child pornography. Among the conduct prohibited by statute is using, persuading, inducing, or coercing "any minor to engage in . . . with the intent that such minor engage in, any sexually explicit conduct for the purpose of

[25]For how long, using what chemicals, and at what risk, who knows?

producing any visual depiction of such conduct." §2251. "Sexually explicit conduct" is defined as actual or simulated masturbation or the lascivious exhibition of the genitals or pubic area of any person. §2256(2)(A). What constitutes a "lascivious exhibition" is a common-sense inquiry. *United States v. Whorley*, 400 F. Supp. 2d 880, 883-84 (E.D. Va. 2005) *aff'd*, 550 F.3d 326 (4th Cir. 2008). The exhibition need not be obscene as a matter of law. *United States v. Whorley*, 386 F. Supp. 2d 693, 696 (E.D. Va. 2005) *aff'd*, 550 F.3d 326 (4th Cir. 2008).

Det. Abbott is singularly disabled from contesting that he sought to create child pornography. The explicit, conceded goal of his photography at issue was to duplicate what was to be prosecuted as child pornography. To this end and no other was Trey ordered to drop his pants, expose himself, and manipulate his penis this way and that, simulating masturbation. A jury also could readily find that this constitutes a "lascivious exhibition" within the meaning of 18 U.S.C. §2256(2)(A). *See, United States v. Whorley*, 400 F. Supp. 2d at 883-84 (emphasizing the non-technical, "commonsensical" standard to be used in making this assessment).[26]

[26]Det. Abbott's sexual interest in boys supports Trey's claim under 28 U.S.C. §2255. Absent discovery of the police information leading to the warrants that caused Det. Abbott to commit suicide, no further facts along these lines could properly be alleged in the complaint. But the inferences fairly to be drawn from the suicide are surely consistent with Trey's claim regarding Det. Abbott's pornographic interest, and thus the merits of Trey's claim under §2255.

It is no response to argue, as Det. Abbott urged below, that in the proper discharge of their duties, police officers must be able to possess contraband without being charged with criminal possession thereof. The protection they can enjoy in *possessing* child pornography seized in investigating a crime does not extend to *creating* it. No legal authority blunts the impact upon Det. Abbott of 18 U.S.C. §2255(a)(1), which includes no exemption for production of child pornography by police officers.[27]

Doe v. Boland, 630 F.3d 491, 493 (6th Cir 2011), *cert. denied*, 698 F.3d 877 (2013), exemplifies the strict interpretation that this child protective statute is to be afforded. In preparing for trial in a child pornography prosecution, a defense expert (who also happened to be a lawyer) took images from a stock photo website and "morphed" them into pornography by combining them with pornographic images of adults. This was in aid of the defense that one who did not participate in the creation of the pornographic images would not have known if the person

[27]Nor does state law avail Det. Abbott in this regard. *Code of Va.* §18.2-374.1 criminalizes the production of child pornography, and §18.2-374.1:1 criminalizes the possession thereof. In 2007, the legislature sensibly amended the possession statute to exclude child pornography "possessed for a bona fide . . . law enforcement, or judicial purpose," §18.2-374.1:1(H). The legislature did not amend the statute banning production of child pornography to provide a similar law-enforcement exception: an understandable differentiation. In Virginia, a police officer, like anyone else, is not free to create child pornography.

depicted was in fact a minor, thus ostensibly negating the crime's scienter requirement. For his pains in providing exhibits for the defense, the expert was charged with, and ultimately admitted to, knowing possession of child pornography. When the minors whose faces were used in the pictures then sued him under 18 U.S.C. §2255, the district court rejected their claims as a matter of law, reasoning that Congress did not intend the law to apply to expert witnesses and that the expert was simply responding to a federal court directive to prepare testimony on aspects of virtual pornography. *Boland*, 630 F. 3d at 494. The Sixth Circuit reversed:

> The statutes provide no exemption for this conduct. *** The provisions encompass all violations of [the statute], not some of them. As with the terms of the underlying substantive provision, so with the terms of the civil remedy provisions: They cover Boland's conduct, and they supply a cause of action for individuals aggrieved or injured by his actions.
>
> ...Congress means business when it comes to enforcing the child pornography laws. The Adam Walsh Child Protection and Safety Act of 2006 says that in any criminal proceeding, child pornography "shall remain in the care, custody, and control of either the Government or the court." Pub.L. No. 109-248, § 504 (codified at 18 U.S.C. § 3509(m)). Even though Criminal Rule 16(a)(1)(E) usually allows defendants to copy material documents in the government's possession, the Act requires federal courts to deny these requests when the materials contain child pornography, instead permitting the defendant only to have an 'ample opportunity for inspection, viewing, and examination at a Government facility.' 18 U.S.C. § 3509(m)(2)(B). If Congress did not want defense counsel to view, let alone possess, existing child pornography without governmental

> oversight, it is hardly surprising that Congress opted not to permit expert witnesses to create and possess *new* child pornography.
>
> Even when federal law allows participants in the criminal justice system to possess contraband, it does not allow the creation and possession of new contraband. . . Individuals cannot defend criminal charges by having their lawyers or witnesses initiate new offenses.

Id. at 495-96.

This analysis applies with full force to Trey's claim under the same statute. Trey's sexts were, according to Det. Abbott, child pornography. Lawful handling of those images would have been to limit their usage as much as possible commensurate with bona fide law enforcement purposes, not to replicate them with a live child model. There is no law enforcement exemption for producing child pornography, nor is there any basis on which to claim that forcing Trey to pose for his photographs was anything but forced participation in producing child pornography. The magistrate's authorization to do so changes nothing. A magistrate does not have the power to authorize violations of the law, much less the production of child pornography. *See Va. Code* §19.2-45 (enumerating magistrates' powers). *See also Malley v. Briggs*, 475 U.S. 335, 345–46 (1986):

> [I]n an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize

this danger by exercising reasonable professional judgment").[28] Exercising reasonable judgment is exactly what Det. Abbott did not do.

None of the above – nothing at all, in fact, about Trey's statutory claim – was addressed by the district court in its memorandum opinion dismissing Trey's lawsuit. Trey's statutory claim should not have been dismissed.

D. Det. Abbott Does Not Enjoy Qualified Immunity

Qualified immunity, which protects public officials from constitutional violations resulting from "reasonable mistakes as to the legality of their actions," *Saucier v. Katz*, 533 U.S. 194, 206 (2001), provides no protection to "the plainly incompetent or those who knowingly violate the law."[29] *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity is an affirmative defense, and the burden of establishing it rests here with Det. Abbott. *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 305 (4th Cir. 2006).

[28]As noted n.6 at 6, *supra*, Virginia magistrates need not be lawyers.

[29]One might add: "or those who commit crimes." Creation of child pornography is a crime. The only thing that prevents *Doe v. Boland*, *supra* at 32-33, from summarily nullifying Det. Abbott's claim to qualified immunity is the precious distinction that the case was decided by the Sixth Circuit, not this court. Whether that makes a difference here, given the categorical language of §2251(a), is for this court to determine.

Qualified immunity analysis involves two inquiries: (1) taken in the light most favorable to the plaintiff, do the facts allege a violation of the plaintiff's federal statutory or constitutional right, and (2), was the right violated "clearly established in the specific context of the case." *Merchant v. Bauer*, 677 F.3d 656, 662 (4th Cir. 2012). Trey respectfully submits that to ask these questions here is to answer them in the affirmative. Consider: in investigating a 17 year old boy for consensual sexting in response to his girlfriend's sext, a police detective seized the youth from his home in apparent derogation of the applicable juvenile detention law,[30] brought him briefly to a detention facility where he was ordered to manipulate his flaccid penis so as to simulate masturbation, all for the express purpose of duplicating photography that the detective sought to have prosecuted as child

[30] *See* n.5 at 6, *supra*. What Det. Abbott represented to the magistrate by way of "clear and convincing evidence" may never be known, given his death and the magistrate's privilege not to testify – but what is known is that Trey remained on good behavior on home detention for half a year before being taken briefly from his aunt's home to have photos taken of his genitals, following which he was returned to his aunt's home for another two months pending trial. How this might possibly comport with the circumstances elaborated in *Code of Va.* §16.1-248.1(A) as justifying secure detention of a juvenile is a mystery. The district court considered none of this in holding that Trey "has not alleged sufficient facts to show that Det. Abbott made material misrepresentations in seeking a detention order." App. 16. Given Det. Abbott's knowledge of Trey's peaceful and successful acquiescence in his half-year home detention and the "clear and convincing" evidence that the law requires to warrant his detention, the court's conclusion is baseless.

pornography. He did so, moreover, beyond the scope of the authorizing warrant, and with the self-evident result of producing no useful evidence, and in violation of black-letter federal law criminalizing the production of child pornography.

Trey respectfully submits that the provisions of 18 U.S.C. §2251(a) by themselves suffice to deny Det. Abbott qualified immunity. *Cf. Boland, supra* at 32-33. A Virginia police detective is properly charged with knowledge of this law, which criminalizes the creation of child pornography with no exception for police officers. He is also charged with knowing that the Supreme Court has declared the production of photos of this nature to be physiologically, emotionally and mentally harmful to their subjects. *Ferber*, *supra*, 458 U.S. at 756-57. The law, clear and clearly established, is dispositive here without further inquiry into qualified immunity jurisprudence. Although the court below did not address qualified immunity relative to Trey's statutory claim, it is clear the protection does not apply here.

Happily, and unsurprisingly, there are no cases directly on point. But that is inconsequential, as some things are clear enough even if a court has not specifically said so.

> [W]hen the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show the law is

> clearly established.

Clem v. Corbeau, 284 F.3d 543, 553 (4th Cir. 2002). Judge Posner put it well over a quarter century ago:

> There has never been a §1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose the officials would be immune from damages liability because no previous case had found liability in such circumstances.

K.H. ex rel. Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990). Qualified immunity is unavailable "if there are no substantial grounds for a reasonable officer to conclude that there was a legitimate justification for acting as [he] did." *Casey v. City of Federal Heights*, 509 F. 3d 1278, 1286 (10th Cir. 2007). The salient question is whether the state of the law at the time of the events in question gave Det. Abbott "fair warning" that his conduct was unconstitutional. *Ridpath*, 447 F.3d at 313.

The dispositive law discussed at 16-20 of this brief has long been clearly established. Indeed, this case is *a fortiori* to the settled law governing exposure of persons in correctional settings. In the latter contexts, not only are the rights of the detainees legally diminished, but important institutional safety considerations come into play. Yet even in such circumstances the constitution imposes limits on intrusive searches. *Logan, supra*, 660 F.2d at 1013 ("Strip searches of detainees are constitutionally constrained by due process requirements of reasonableness under the circumstances."). What then is to be said about seizing a boy from his home for the purpose of forcing him to mimic masturbation for the sake of forensic photography, and thereafter threatening to inject him with an erection-producing shot to secure the desired photographs? Manifestly, this amounts to "state intrusion[] into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court." *Hall*, 621 F.2d at 613. This type of state action has long been prohibited by the Constitution. The fact that Det. Abbott's conduct violated explicit text in a federal criminal statute further weakens any claim that his actions fall into the type of "bad guesses in gray areas" that qualified immunity is designed to protect. *Anderson v. Craighton*, 483 U.S. 635, 639-40 (1987). Abbott, a seasoned

detective whose department publicly distanced itself from his actions, knew or should have known this.

Det. Abbott's estate cannot take solace in the fact that he was armed with a warrant and apparently acted at the suggestion of the prosecutor on the case. Apart from the fact that "following orders" has not worked as a defense since the Nuremberg Trials, a prosecutor is in no position to give a police detective "orders." Nor are police officers robots. Det. Abbott was not bound to seek or execute a plainly unconstitutional warrant. Neither the warrant nor the request of a prosecutor is a talisman nullifying the obligation of a law enforcement officer to act reasonably.

> [T]he fact that a neutral magistrate has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness. Rather, we have recognized an exception allowing suit when 'it is obvious that no reasonably competent officer would have concluded that a warrant should issue.'

Messerschmidt v. Millender, 132 S. Ct. 1235, 1245 (2012), *quoting Malley v. Briggs*, 475 U.S. 335, 341 (1980). Three wrongs do not make a right. *See*, *Merchant v. Bauer*, 677 F.3d 656, 664 (4th Cir. 2012), *cert den.*, 1335 S.Ct 789 (2012) (officer's "patently deficient" conclusions leading to wrongful arrest not immunized by concurrence of prosecutor and magistrate). Persons acting in concert to deny a victim's rights cannot provide themselves with a defense by

pointing a finger of justification at their colleagues. Another result would allow each to be immunized as a matter of law regardless of the objective unreasonableness of their joint actions, thereby nullifying the capacity of the federal judiciary "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). "[I]f no officer of reasonable competence would have requested the warrant ... [t]he officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate." *Graham*, 831 F.3d at 183, quoting *Malley*, 475 U.S. at 346, n.9. In every case, "the manner in which a warrant is executed is subject to later judicial review as to its reasonableness." *Dalia v. United States*, 441 U.S. 238, 258 (1979). *See also, Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Henry v. Purnell*, 652 F.3d 524, 532 (4th Cir. 2011) (*en banc*). Here, the warrant not only called for commission of the very criminal act under investigation, but was summarily disregarded by Det. Abbott when he took pictures of a flaccid penis, thereby producing no evidence of value to show for his intrusive excesses. Nor can he possibly justify his subsequent threat of an erection-producing injection. His estate has no immunity from liability for these offenses.

Conclusion And Request For Oral Argument

For these reasons, the court should reverse the decision of the district court and remand the claims against Det. Abbott appealed here for discovery and trial. Trey requests oral argument on his appeal.

Respectfully submitted,

TREY SIMS,

By counsel

Dated: December 7, 2016

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Certificate of Compliance

Certificate of Service

I, Victor M. Glasberg, hereby certify that on this 7th day of December 2016, I electronically filed the foregoing Appellant's Brief with the clerk of the court.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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