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NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ARMAND A. JACKSON,

Plaintiff,

vs.

OFFICER MIKE MYERS,

Defendants.

No. C 05-02620 JF (PR)

ORDER GRANTING MOTION  
FOR SUMMARY JUDGMENT;  
DENYING OTHER PENDING  
MOTIONS

(Docket Nos. 50, 53, 59)

Plaintiff, a state prisoner proceeding pro se, filed this civil rights action pursuant to 42 U.S.C. § 1983. The complaint was dismissed with leave to amend, Plaintiff filed an amended complaint, and subsequently requested, and was granted, leave to file a second amended complaint. On May 18, 2007, this Court found that the second amended complaint stated a cognizable claim of excessive force in violation of the Fourth Amendment against Defendant San Mateo Police Officer Mark Myers (“Myers”).<sup>1</sup> Myers filed a motion for summary judgment on the

<sup>1</sup> The claims against the other Defendant named in the second amended complaint, Belmont Police Officer Ledwith, were thereafter dismissed without prejudice pursuant to Rule 4(m) of the Federal Rules of Civil Procedure.

1 grounds that: (1) Plaintiff has not established that Myers violated his federal  
2 constitutional rights; and (2) Myers is entitled to qualified immunity. Plaintiff did  
3 not file an opposition, although he was given an opportunity to do so and was  
4 advised about the consequences of not filing an opposition. After reviewing the  
5 motion, the Court concludes that Defendant is entitled to summary judgment and  
6 will GRANT Defendant’s motion as to all claims.

7 **DISCUSSION**

8 **I. Standard of Review**

9 Summary judgment is proper where the pleadings, discovery and affidavits  
10 show that there is “no genuine issue as to any material fact and [that] the moving  
11 party is entitled to judgment as a matter of law.” See Fed. R. Civ. P. 56(c). Material  
12 facts are those that may affect the outcome of the case. See Anderson v. Liberty  
13 Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if  
14 the evidence is such that a reasonable jury could return a verdict for the nonmoving  
15 party. See id.

16 The court will grant summary judgment “against a party who fails to make a  
17 showing sufficient to establish the existence of an element essential to that party’s  
18 case, and on which that party will bear the burden of proof at trial... since a complete  
19 failure of proof concerning an essential element of the nonmoving party’s case  
20 necessarily renders all other facts immaterial.” Celotex Corp. v. Catrett, 477 U.S.  
21 317, 322-23 (1986); see also Liberty Lobby, 477 U.S. at 248 (holding a fact is  
22 material if it might affect the outcome of the suit under governing law, and that a  
23 dispute about a material fact is genuine “if the evidence is such that a reasonable  
24 jury could return a verdict for the nonmoving party”). The moving party bears the  
25 initial burden of identifying those portions of the record which demonstrate the  
26 absence of a genuine issue of material fact. See Celotex Corp., 477 U.S. at 323.  
27 Where the moving party will have the burden of proof on an issue at trial, it must

1 affirmatively demonstrate that no reasonable trier of fact could find other than for  
2 the moving party. But on an issue for which the opposing party will have the burden  
3 of proof at trial, the moving party need only point out “that there is an absence of  
4 evidence to support the nonmoving party’s case.” Id. at 325. If the evidence in  
5 opposition to the motion is merely colorable, or is not significantly probative,  
6 summary judgment may be granted. See Liberty Lobby, 477 U.S. at 249-50.

7 The burden then shifts to the nonmoving party to “go beyond the pleadings  
8 and by her own affidavits, or by the ‘depositions, answers to interrogatories, and  
9 admissions on file,’ designate ‘specific facts showing that there is a genuine issue  
10 for trial.’” Celotex Corp., 477 U.S. at 324 (citations omitted). If the nonmoving  
11 party fails to make this showing, “the moving party is entitled to judgment as a  
12 matter of law.” Id. at 323.

13 In considering a motion for summary judgment, the court must view the  
14 evidence in the light most favorable to the nonmoving party; if, as to any given fact,  
15 evidence produced by the moving party conflicts with evidence produced by the  
16 nonmoving party, the court must assume the truth of the evidence set forth by the  
17 nonmoving party with respect to that fact. See Leslie v. Grupo ICA, 198 F.3d 1152,  
18 1158 (9th Cir. 1999). The court’s function on a summary judgment motion is not to  
19 make credibility determinations or weigh conflicting evidence with respect to a  
20 disputed material fact. See T.W. Elec. Serv. V. Pacific Elec. Contractors Ass’n, 809  
21 F.2d 626, 630 (9th Cir. 1987).

## 22 **II. Legal Claims and Analysis**

23 Defendant Myers asserts, inter alia, that he is entitled to qualified immunity  
24 from Plaintiff’s claim that he used excessive force in violation of the Fourth  
25 Amendment. Under Saucier v. Katz, 533 U.S. 194 (2001), the court must undertake  
26 a two-step analysis when a defendant asserts qualified immunity in a motion for  
27 summary judgment. The court first faces “this threshold question: Taken in the light  
28 most favorable to the party asserting the injury, do the facts alleged show the

1 officer’s conduct violated a constitutional right?” 533 U.S. at 201. If the court  
2 determines that the conduct did not violate a constitutional right, the inquiry is over  
3 and the officer is entitled to qualified immunity.

4 If the court determines that the conduct did violate a constitutional right, it  
5 then moves to the second step and asks “whether the right was clearly established”  
6 such that “it would be clear to a reasonable officer that his conduct was unlawful in  
7 the situation he confronted.” Id. at 201-02. Even if the violated right was clearly  
8 established, qualified immunity shields an officer from suit when he makes a  
9 decision that, even if constitutionally deficient, reasonably misapprehends the law  
10 governing the circumstances he confronted. Brosseau v. Haugen, 543 U.S. 194, 198  
11 (2004); Saucier, 533 U.S. at 205-06. If “the officer’s mistake as to what the law  
12 requires is reasonable... the officer is entitled to the immunity defense.” Id. at 205.

13 Under the Fourth Amendment, officers may only use such force as is  
14 “objectively reasonable” under the circumstances. Graham v. Connor, 490 U.S. 386,  
15 397 (1989). To determine whether the force used was reasonable, courts balance the  
16 nature and quality of the intrusion on the individual’s Fourth Amendment interests  
17 against the countervailing governmental interests at stake. Id. at 396. The  
18 “reasonableness” of a particular use of force must be judged from the perspective of  
19 a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Id.  
20 Because the reasonableness test is not capable of precise definition or mechanical  
21 application, its practical application requires careful attention to the facts and  
22 circumstances of each particular case, including “the severity of the crime at issue,  
23 whether the suspect poses an immediate threat to the safety of the officers or others,  
24 and whether he is actively resisting arrest or attempting to evade arrest by flight.”  
25 Id.

26 In addition, the court’s consideration of “reasonableness must embody  
27 allowance for the fact that police officers are often forced to make split-second  
28 judgments – in circumstances that are tense, uncertain, and rapidly evolving – about

1 the amount of force that is necessary in a particular situation.” Id. at 396-97. Nor  
2 every push or shove, even if it may later seem unnecessary in the peace of a judge’s  
3 chambers, violates the Fourth Amendment. Id. at 396.

4 Defendant has submitted his own declaration as well as the declaration of  
5 Officer Schlegel of the San Mateo Police Department, showing the following facts:  
6 On the date of the incident, January 21, 2005, Myers was standing next to his  
7 marked police car in his uniform on a street corner in San Mateo near two grocery  
8 stores where armed robberies had recently occurred. (Myers Decl, at 2.) Plaintiff  
9 drove very slowly past Myers, and immediately after looking directly at him,  
10 “gunned the engine of his vehicle, sped up” and headed toward Highway 101. (Id.)  
11 Plaintiff and others in Plaintiff’s car fit the descriptions of the armed robbery  
12 suspects. (Id.) Suspecting them to be the robbers, Myers followed in his car, and  
13 saw them speeding at 50 to 55 miles per hour in a 35 mile-per-hour zone and run a  
14 stop sign. (Id.) When Plaintiff entered Highway 101, Myers turned on his  
15 emergency lights and siren and pursued Plaintiff; Officer Schlegel joined the chase  
16 in his car. (Id.; Schlegel Decl. at 2.) Traffic was heavy as it was approximately 5:25  
17 p.m. on a weekday, and Plaintiff’s car proceeded to swerve between lanes, enter and  
18 exit the shoulder, and approach 75-80 miles per hour, approximately 25 miles per  
19 hour faster than the rest of traffic, forcing other cars to veer out of the way. (Myers  
20 Decl. at 2-3; Schlegel Decl. at 2.)

21 Myers pulled alongside Plaintiff’s car on an off-ramp, and he pulled out his  
22 gun, held it alongside his chest and pointed it towards Plaintiff’s car; he did not  
23 extend the gun outside the car, and did not fire it. (Myers Decl. at 3-4.) He put the  
24 gun back in the holster when Plaintiff returned to the shoulder and sped up again.  
25 (Id. at 4; Schlegel Decl. at 2.) At the end of the off-ramp, Plaintiff passed several  
26 cars waiting at a red light, ran the red light and jumped over the concrete center  
27 median. (Myers Decl. at 4.) The car came to a stop, and the driver, Plaintiff, got out  
28 of the car and ran into some nearby bushes. (Myers Decl. at 3.) Myers did not chase

1 Plaintiff on foot because Plaintiff was now in the jurisdiction of the City of Belmont,  
2 whose police officers later detained and arrested him. (Id.)

3 Under the circumstances described by Defendant, even when viewed in the  
4 light most favorable to Plaintiff, there was no seizure within the meaning of the  
5 Fourth Amendment. “A Fourth Amendment seizure does not occur whenever there is a  
6 governmentally caused termination of an individual’s freedom of movement . . . but only  
7 when there is a governmental termination of freedom of movement *through means*  
8 *intentionally applied.*” Brower v. County of Inyo, 489 U.S. 593, 596-97 (1989) (emphasis  
9 in original). Thus, a police chase that leads to a suspect unexpectedly crashing his car does  
10 not, without more, amount to a Fourth Amendment seizure. Id. at 595-96. To be sure, in  
11 this case, Myers did more than chase Plaintiff’s car; at one point he pulled up alongside  
12 the car and pointed his gun at it. However, Myers’s pointing the gun at Plaintiff’s car did  
13 not cause Plaintiff to stop, and quite to the contrary it caused Plaintiff to speed up and  
14 continue to flee. Plaintiff did not stop until he crashed over the concrete median at the end  
15 of the off-ramp, by which time Myers had put away the gun in his holster.<sup>2</sup> Plaintiff’s  
16 stopping due to his crash at the end of a high-speed chase is the circumstance described by  
17 Brower as not constituting a seizure under the Fourth Amendment. See id.; compare id. at  
18 598 (finding seizure occurred because suspect crashed into blockade erected by police to  
19 stop him); Robinson v. Solano County, 278 F.3d 1007, 1013 (9th Cir. 2002) (en banc)  
20 (finding seizure where suspect stopped walking toward officers when officers pointed gun  
21 at suspect’s head at close range). As the “means intentionally applied” by Myers in this  
22 case, i.e. his chasing Plaintiff and pointing a gun at Plaintiff’s car, did not “terminate  
23 [Plaintiff’s] freedom of movement,” Brower, 493 U.S. at 597, there was no seizure in this  
24 case and thus no Fourth Amendment violation.

25 Moreover, even if there had been a seizure, under the circumstances described by  
26 Defendant, when viewed in the light most favorable to Plaintiff, the amount of force used

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<sup>2</sup>According to the allegations in the second amended complaint and attachments  
thereto, Plaintiff’s tire popped and he could not continue when he hopped the median.

1 by Defendant was objectively reasonable. See Scott v. Harris, 127 S.Ct. 1769  
2 (2007).<sup>3</sup> In Scott, the police officer engaged in a high-speed chase occurred after  
3 seeing the plaintiff speeding, and the officer intentionally rammed plaintiff's car  
4 with his bumper, crashing plaintiff's car and severely injuring plaintiff. Id. at 1773.  
5 The plaintiff sued the arresting officers alleging that they used excessive force to  
6 arrest him in violation of the Fourth Amendment. Id. The United States Supreme  
7 Court found the officer did not use excessive force under the circumstances, because  
8 he was reasonably stopping an actual and imminent threat to the lives of any nearby  
9 pedestrians, motorists, and officers. Id. at 1778.

10 The same conclusion applies here. Defendant believed that Plaintiff was the  
11 armed robbery suspect, Plaintiff ran a stop sign, entered into heavy, rush-hour traffic  
12 on a highway, driving 25 miles per hour faster than the flow of traffic at speeds up to  
13 80 miles per hour, weaving in and out of lanes and the shoulder, and causing other  
14 cars to have to veer out of the way. Plaintiff then ran a red light after getting off the  
15 highway, and crashed over a concrete median. As in Scott, there is no question as to  
16 the imminent danger Plaintiff imposed upon pedestrians, motorists, the officers  
17 giving chase, and the passengers in Plaintiff's car, which included his infant child.  
18 Accord id. Moreover, Myers used considerably less force, by temporarily pointing  
19 his gun at Plaintiff's car from inside his car and without firing it, than the officer in  
20 Scott who rammed his car into the suspect's car and caused it to crash. See id. As a  
21 result, Myers's chasing Plaintiff and briefly pointing his gun at Plaintiff's car, even  
22 if it constituted a seizure, was objectively reasonable under these circumstances.  
23 Accord id.

24 As noted, Plaintiff has not filed an opposition to the motion for summary  
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26 <sup>3</sup> While the test of reasonableness is often a question for the jury, this issue may be  
27 decided as a matter of law if, in resolving all factual disputes in favor of the plaintiff, the  
28 officer's force was "objectively reasonable" under the circumstances. Jackson v. City of  
Bremerton, 268 F.3d 646, 651 n.1 (9th Cir. 2001).

1 judgment. Although a plaintiff's factual allegations in a verified complaint, to the  
2 extent such allegations are based on plaintiff's personal knowledge and set forth  
3 specific facts admissible in evidence, may be treated as an opposing affidavit under  
4 Rule 56, see Schroeder v. McDonald, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995),  
5 in this case Plaintiff's second amended complaint was neither sworn nor verified.  
6 Thus, Plaintiff has presented no evidence in the record supporting his claims or  
7 disputing the evidence presented by Defendant.<sup>4</sup> Moreover, Plaintiff's account of  
8 Myers's involvement in the incident does not materially contradict Myers's account.  
9 The differences in Plaintiff's account concern whether he could perceive Myers's  
10 siren and lights before Myers pulled up alongside him. Plaintiff does not dispute  
11 Myers's account of the chase, the dangerous manner of Plaintiff's driving, and that  
12 he ultimately stopped his car when he crashed over the concrete median after  
13 popping a tire. As a result, even if Plaintiff's factual disputes with Myers could be  
14 considered in opposition to Defendant's motion, they do not affect whether or not  
15 Defendant's actions amounted to a seizure, or whether his use of force was  
16 reasonable under the circumstances.

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18 <sup>4</sup>In the order of service, Plaintiff was cautioned as follows, pursuant to Rand v.  
19 Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc):

20 The defendants have made a motion for summary judgment by  
21 which they seek to have your case dismissed. A motion for summary  
22 judgment under Rule 56 of the Federal Rules of Civil Procedure will, if  
23 granted, end your case.

24 Rule 56 tells you what you must do in order to oppose a motion for  
25 summary judgment. Generally, summary judgment must be granted when  
26 there is no genuine issue of material fact--that is, if there is no real dispute  
27 about any fact that would affect the result of your case, the party who asked  
28 for summary judgment is entitled to judgment as a matter of law, which will  
end your case. When a party you are suing makes a motion for summary  
judgment that is properly supported by declarations (or other sworn  
testimony), you cannot simply rely on what your complaint says. Instead,  
you must set out specific facts in declarations, depositions, answers to  
interrogatories, or authenticated documents, as provided in Rule 56(e), that  
contradict the facts shown in the defendant's declarations and documents  
and show that there is a genuine issue of material fact for trial. If you do not  
submit your own evidence in opposition, summary judgment, if appropriate,  
may be entered against you. If summary judgment is granted in favor of  
defendants, your case will be dismissed and there will be no trial.

1 Defendants are entitled to summary judgment based on Plaintiff's failure to  
2 meet his burden of proof under Celotex and show that there is a genuine issue for  
3 trial on his claim of excessive force under the Fourth Amendment. Defendant is  
4 entitled to qualified immunity because, even if the use of force amounted to a  
5 constitutional violation, it is clear that, in light of Scott, at a minimum a reasonable  
6 officer could properly believe that the use of force under these circumstances in this  
7 case would not violate a clearly established constitutional right. See Saucier, 533  
8 U.S. at 201-02.<sup>5</sup>

9 **CONCLUSION**

10 For the foregoing reasons, Defendant's motion for summary judgment is  
11 GRANTED. Plaintiff's motion to strike Defendant's unspecified affirmative  
12 defense is DENIED. Plaintiff's motion for appointment of counsel is DENIED for  
13 want of exceptional circumstances.

14 The Clerk of Court shall terminate Docket Nos. 50, 53, and 59, enter  
15 judgment and close the file.

16 **IT IS SO ORDERED.**

17 DATED: 9/12/08

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19 JEREMY FOGEL  
20 United States District Judge

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27 <sup>5</sup>As this conclusion disposes of all of Plaintiff's federal claims, the Court declines  
28 to exercise supplemental jurisdiction over Plaintiff's state law claims. See 28 U.S.C. §  
1367(c). Such claims are DISMISSED without prejudice to Plaintiff's raising them in state  
court.