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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

J. ROBERT KILLIAN,	)	Case No. 5:12-cv-05418-PSG
	)	
Plaintiff,	)	<b>ORDER GRANTING MOTION FOR</b>
v.	)	<b>SUMMARY JUDGMENT AND</b>
	)	<b>MOTION TO WITHDRAW</b>
CITY OF MONTEREY, et al.,	)	
	)	<b>(Re: Docket Nos. 43 and 45)</b>
Defendants.	)	

Before the court is Defendants Kris Richardson and John Olney’s motion for summary judgment as to Plaintiff J. Robert Killian’s remaining equal protection claim<sup>1</sup> and Ben Nisenbaum’s motion to withdraw as counsel of record for Killian.<sup>2</sup> Killian has not filed any timely opposition to either motion.<sup>3</sup> With the benefit of the parties’ prior summary judgment argument,<sup>4</sup> the court finds this additional motion for summary judgment suitable for disposition on the papers.<sup>5</sup>

<sup>1</sup> See Docket No. 45.

<sup>2</sup> See Docket No. 43.

<sup>3</sup> See Civil L.R. 7-3 (“The opposition must be filed and served not more than 14 days after the motion was filed.”).

<sup>4</sup> See Docket No. 31.

<sup>5</sup> See Civil L.R. 7-1(b) (“In the Judge’s discretion, or upon request by counsel and with the Judge’s approval, a motion may be determined without oral argument or by telephone conference call.”).

1 In the interests of expediency, the court will turn directly to the motion before it.<sup>6</sup>

2 In its prior summary judgment order, the court noted that although Defendants sought  
3 summary judgment as to all of Killian’s claims, Defendants did not “substantively address” why  
4 summary judgment was warranted on Killian’s equal protection claim related to Officers  
5 Richardson and Olney.<sup>7</sup> Because the current motion remedies that defect, summary judgment on  
6 the sole remaining equal protection claim is warranted.

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8 **I. LEGAL STANDARDS**

9 **A. Summary Judgment**

10 Pursuant to Fed. R. Civ. P. 56(a), the “court shall grant summary judgment if the movant  
11 shows that there is no genuine dispute as to any material fact and the movant is entitled to  
12 judgment as a matter of law.”<sup>8</sup> Material facts are those that may affect the outcome of the case.<sup>9</sup> A  
13 dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return  
14 a verdict for the nonmoving party.<sup>10</sup> When the parties file cross-motions for summary judgment,  
15 the district court must consider all of the evidence submitted in support of both motions to evaluate  
16 whether a genuine issue of material fact exists precluding summary judgment for either party.<sup>11</sup>

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18 **B. Qualified Immunity**

19 Qualified immunity shields government officials from civil liability under Section 1983

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21 <sup>6</sup> Unfamiliar readers are directed to the court’s Order Granting-in-Part Defendants’ Motion for and  
Denying Killian’s Cross-Motion for Summary. *See* Docket No. 32 at 1-10.

22 <sup>7</sup> *See* Docket No. 32 at 21.

23 <sup>8</sup> Fed. R. Civ. P. 56(a).

24 <sup>9</sup> *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“Only disputes over facts that  
25 might affect the outcome of the suit under the governing law will properly preclude the entry of  
summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”).

26 <sup>10</sup> *See id.*

27 <sup>11</sup> *See Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136  
28 (9th Cir. 2001) (the “court must review the evidence submitted in support” of each cross-motion).

1 where “their conduct does not violate clearly established statutory or constitutional rights of which  
2 a reasonable person would have known.”<sup>12</sup> “Qualified immunity balances two important  
3 interests—the need to hold public officials accountable when they exercise power irresponsibly and  
4 the need to shield officials from harassment, distraction, and liability when they perform their  
5 duties reasonably.”<sup>13</sup>

6 A police officer is entitled to qualified immunity from a civil rights action unless, under the  
7 particularized circumstances he faced at the time of his actions, it would have been clear to a  
8 reasonable officer that his conduct was unlawful in the situation he confronted.<sup>14</sup> The issue of  
9 qualified immunity requires a determination of: (1) whether the facts show the officer’s conduct  
10 violated a constitutional right and (2) whether the right was clearly established.<sup>15</sup> The court may  
11 evaluate the two prongs in any order.<sup>16</sup> It is the responsibility of the jury, not the judge, to  
12 determine any disputed foundational or historical facts that underlie the determination of whether  
13 an officer is entitled to qualified immunity.<sup>17</sup>

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16 <sup>12</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (government officials “performing discretionary  
17 functions generally are shielded from liability for civil damages insofar as their conduct does not  
18 violate clearly established statutory or constitutional rights of which a reasonable person” would  
19 have known).

20 <sup>13</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

21 <sup>14</sup> *See Saucier v. Katz*, 533 U.S. 194, 202 (2001) (“The relevant, dispositive inquiry in determining  
22 whether a right is clearly established is whether it would be clear to a reasonable officer that his  
23 conduct was unlawful in the situation he confronted.”).

24 <sup>15</sup> *See Pearson*, 555 U.S. at 232 (“Qualified immunity is applicable unless the official’s conduct  
25 violated a clearly established constitutional right.”).

26 <sup>16</sup> *See id.* at 236 (“The judges of the district courts and the courts of appeals should be permitted to  
27 exercise their sound discretion in deciding which of the two prongs of the qualified immunity  
28 analysis should be addressed first in light of the circumstances in the particular case at hand.”).

29 <sup>17</sup> *See Acosta v. City & Cnty. of San Francisco*, 83 F.3d 1143, 1147 (9th Cir. 1996) (“Regardless of  
30 who makes the ultimate determination as to qualified immunity, the jury, not the judge, must  
31 decide the disputed ‘foundational’ or ‘historical’ facts that underlie the determination.”); *see also*  
32 *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 70 F.3d 1095, 1099 (9th Cir. 1995) (“The  
33 threshold determination of whether the law is clearly established is a question of law for the court.  
34 The second part of the test, whether a reasonable state official could have believed the action taken

1 In this case, Killian “bears the burden of proving that the rights” he “claims were ‘clearly  
2 established’ at the time of the alleged violation.”<sup>18</sup> The burden is on the government, however, to  
3 show that “a reasonable police officer could have believed, in light of the settled law, that he was  
4 not violating a constitutional or statutory right.”<sup>19</sup>

5 **C. Equal Protection**

6 “The Equal Protection Clause of the Fourteenth Amendment commands that no State shall  
7 ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a  
8 direction that all persons similarly situated should be treated alike.”<sup>20</sup> “To prevail on an equal  
9 protection claim under the ‘Fourteenth Amendment, a plaintiff must demonstrate that enforcement  
10 [of the laws] had a discriminatory effect and the police were motivated by a discriminatory  
11 purpose.”<sup>21</sup> “Enforcement may be shown through a variety of actual or threatened arrests,  
12 searches and temporary seizures, citations, and other coercive conduct by the police.”<sup>22</sup> In order to  
13 prove a discriminatory effect, “the claimant must show that similarly situated individuals” were not  
14 prosecuted.<sup>23</sup>

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18 was lawful, is a mixed question of law and fact. It involves an objective test of whether a  
19 reasonable official could have believed that his conduct was lawful in light of what he knew and  
20 the action he took. If there are genuine issues of material fact in issue relating to the historical facts  
of what the official knew or what he did, it is clear that these are questions of fact for the jury to  
determine.”) (citations omitted).

21 <sup>18</sup> *Moran v. Washington*, 147 F.3d 839, 844 (9th Cir. 1998) (citing *Davis v. Scherer*, 468 U.S. 183,  
197 (1984)).

22 <sup>19</sup> *Gasho v. United States*, 39 F.3d 1420, 1438 (9th Cir. 1994).

23 <sup>20</sup> *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*,  
24 457 U.S. 202, 216 (1982)).

25 <sup>21</sup> *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 920 (9th Cir. 2012) (quoting *Rosenbaum v. City & Cnty.*  
26 *of S.F.*, 484 F.3d 1142, 1152 (9th Cir. 2007)); *see also* *Wayte v. United States*, 470 U.S. 598, 608,  
(1985).

27 <sup>22</sup> *Id.* (citing *Rosenbaum*, 484 F.3d at 1152) (additional citation omitted).

28 <sup>23</sup> *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *see also* *Lacey*, 693 F.3d at 921.

1 **D. Motion to Withdraw**

2 Civil L.R. 11-5 provides: “Counsel may not withdraw from an action until relieved by order  
3 of Court after written notice has been given reasonably in advance to the client and to all other  
4 parties who have appeared in the case.” “The decision to grant or deny counsel’s motion to  
5 withdraw is committed to the discretion of the trial court.”<sup>24</sup>

6 **II. DISCUSSION**

7 **A. Killian Has Not Identified Any Similarly-Situated Individual Who Was**  
8 **Treated Differently**

9 In its prior order the court held that “a reasonable jury could only find” that Officers  
10 Richardson and Olney had “probable cause” to arrest Killian.<sup>25</sup> The court also found that there was  
11 “no dispute that Olney had seen Killian driving an hour before at a different location at a time  
12 when his behavior was markedly” different and that later the car was found “at a different location”  
13 with Killian in the driver’s seat.<sup>26</sup> The court also found that there was “no dispute” that “the car  
14 obstructed both pedestrian and vehicular” traffic and Killian had “consumed opiate and  
15 benzodiazepine medication” and “performed poorly on sobriety tests.”<sup>27</sup> Moreover, “the hour was  
16 late” and “Killian’s car was illegally parked across an entire crosswalk at a four-way intersection  
17 with several stop lights.”<sup>28</sup> In light of the uncontroverted factual record summary judgment also is  
18 warranted on Killian’s remaining equal protection claim. Because Killian has not identified  
19 similarly-situated individuals who were treated differently, a reasonable jury could only find that  
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23 <sup>24</sup> *Irwin v. Mascott*, Case No. 3:97-cv-04737-JL, 2004 U.S. Dist. LEXIS 28264, at \*3-4  
24 (N.D. Cal. Dec. 1, 2004) (citing *Washington v. Sherwin Real Estate, Inc.*, 694 F.2d 1081, 1087  
(7th Cir. 1982) (explaining the “grant or denial of an attorney’s motion to withdraw in a civil case  
is a matter addressed to the discretion of the trial court”)).

25 <sup>25</sup> Docket No. 32 at 17.

26 <sup>26</sup> *Id.*

27 <sup>27</sup> *Id.*

28 <sup>28</sup> *Id.*

1 the defendant officers did not violate Killian's constitutional right to the equal protection of the  
2 laws. Because Killian cites no case law that the defendant officers violated any clearly established  
3 constitutional right by acting on the probable cause that was present when they arrested Killian, the  
4 officers are entitled to qualified immunity on Killian's equal protection claim. Summary judgment  
5 on Killian's equal protection claim therefore is GRANTED.

6 **B. Nisenbaum's Motion to Withdraw as Killian's Counsel of Record**

7 Killian's counsel Benjamin Nisenbaum moves to withdraw from his representation in this  
8 case because Nisenbaum and Killian have reached an impasse about whether or not and under what  
9 circumstances the case should proceed.<sup>29</sup> That motion is unopposed and has been filed on the  
10 docket.<sup>30</sup> The court discussed the issue at a hearing which was attended by Nisenbaum, Killian and  
11 Defendants' counsel of record, Omar Rodriguez.<sup>31</sup> Because the court believes that both Killian and  
12 Nisenbaum would be best-served by permitting Nisenbaum to withdraw, the court GRANTS  
13 Nisenbaum's motion. Killian is reminded that now that Nisenbaum is no longer counsel of record  
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17 <sup>29</sup> See Docket No. 43-1 at ¶¶ 3-4

18 3. The instant lawsuit was filed in this Court on October 19, 2012. The parties  
19 conducted complete and full discovery. Both Plaintiff, ROBERT KILLIAN and  
20 Defendants timely filed Cross-Motions for Summary Judgment. The Court ruled on the  
21 parties' Cross-Motions for Summary Judgment on December 13, 2013, granting summary  
22 adjudication on all claims in favor of defendants except an equal protection claim against  
23 which defendants did not move. The parties subsequently engaged in settlement  
24 negotiations. A settlement, approved by Mr. KILLIAN, was reached on January 13, 2014.  
25 Since then, Mr. KILLIAN has refused to sign the written agreement reflecting the terms of  
26 the settlement.

27 4. Mr. KILLIAN and I have reached irreconcilable differences over how to proceed in  
28 this matter. I therefore ask the Court to allow this law office to withdraw as counsel of  
record. I have advised Mr. KILLIAN in writing of the pendency of the instant Motion to  
Withdraw as his counsel of record, as well as the pending Order to Show Cause (including  
a copy of the Order to Show Cause), and all its particulars, including the Court's Order that  
he appear on March 25, 2014 at 9:00 a.m. in Courtroom 5 on the Fourth Floor, and the  
address of the Courthouse, when he can address both the Order to Show Cause and the  
instant Motion to Withdraw as his counsel of record.

<sup>30</sup> See Docket No. 43.


<sup>31</sup> See Docket No. 44.

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in this case, he may seek advice from Federal Legal Assistance Self-Help Center (“FLASH”) located on the second floor of the courthouse, here, in San Jose.

**IT IS SO ORDERED.**

Dated: April 16, 2014

  
PAUL S. GREWAL  
United States Magistrate Judge