

1 the Court to rethink its analysis. *Id.*; see *Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*,
2 841 F.2d 918, 925-26 (9th Cir. 1988).

3 **II. Discussion.**

4 The Order rejected Defendant’s qualified immunity argument, holding in part that
5 Plaintiff raised a genuine dispute of fact, that the allegations if assumed true would establish
6 violation of a constitutional right, and that the right was clearly established. Doc. 104 at 3-6.
7 Defendant moves for reconsideration on the ground that the right was not clearly established
8 and that Defendant was entitled to qualified immunity even if the right was clearly
9 established. Doc. 107. The Court will address the second argument first.

10 Defendant argues that he is entitled to qualified immunity even if Plaintiff’s right was
11 clearly established, so long as “one reasonable officer out of the world of reasonable officers
12 could disagree whether [Defendant’s] conduct was permissible.” Doc. 107 at 6. Defendant
13 made the same argument in his motion for summary judgment without citing any law for the
14 proposition. Doc. 94 at 8:19-28. The Court’s Order identified the “clearly established” test
15 as “whether it would be clear to a reasonable officer that his conduct was unlawful in the
16 situation he confronted.” Doc. 104 at 5 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).
17 The Ninth Circuit recently confirmed this to be the test. *Garcia v. County of Merced*, ___
18 F.3d ___, 2011 WL 1680388 (9th Cir. May 5, 2011) (“In determining whether a right was
19 ‘clearly established,’ the court considers whether it would be clear to a reasonable officer that
20 his conduct was unlawful in the situation he confronted.” (citing *Saucier*, 533 U.S. at 202));
21 see *Torres v. City of Los Angeles*, 548 F.3d 1197, 1210 (9th Cir. 2008) (citing *Saucier*, 533
22 U.S. at 201-02, for the two-part qualified immunity test).

23 In his motion for reconsideration, Defendant cites in part to *Reynolds v. County of San*
24 *Diego*, 84 F.3d 1162, 1170 (9th Cir. 1996), and *Malley v. Briggs*, 475 U.S. 335, 341 (1986),
25 both decided prior to *Saucier*. Defendant also cites two post-*Saucier* cases in the Fifth
26 Circuit, neither of which is binding law on this Court and neither of which mentioned
27 *Saucier*. The Court is not persuaded that it erred in stating the correct test for the “clearly
28 established” prong of qualified immunity.

1 The Court now turns to Defendant’s first argument: that the right Plaintiff asserts was
2 not clearly established. Defendant begins by noting that the Court found the right to be
3 clearly established on the basis of *Robinson v. Solano County*, 278 F.3d 1007, 1015 (9th Cir.
4 2002). Defendant argues that *Robinson* – a gun case – did not provide adequate notice to
5 Defendant that pressing a taser against a plaintiff’s neck with the stated intent to deploy it
6 could constitute excessive force. Doc. 107 at 3.¹

7 Defendant argues that the Ninth Circuit did not hold that deployment of a taser could
8 constitute excessive force until *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010).
9 Doc. 107 at 3. *Bryan* observed the taser to be relatively new and the case law on tasers to be
10 still developing. *Id.* Defendant notes that *Bryan* cited two other Ninth Circuit cases in
11 recognition that “the law regarding tasers is not sufficiently clearly established to warrant
12 denying officers qualified immunity.” *Id.* The cited cases are *Mattos v. Agarano*, 590 F.3d
13 1082, 1089-90 (9th Cir. 2010), and *Brooks v. City of Seattle*, 599 F.3d 1018, 1031 n.18 (9th
14 Cir. 2010). All three cases – *Bryan*, *Mattos*, and *Brooks* – concern tasers and were decided
15 after the conduct at issue in this case. *Id.* The Court agrees that these 2010 cases recognize
16 that the law with respect to taser use was unsettled.

17 Given this fact, the Court concludes that it erred when it decided that Defendant’s
18 actions violated clearly established constitutional law. Although the facts in *Bryan*, *Mattos*,
19 and *Brooks* differ from the facts in this case, they do show that the law concerning police use
20 of tasers and the effect of that use on constitutional rights was still developing when the
21 events in this case occurred in 2009. Moreover, *Brooks* found that use of a taser on the neck
22 was a “quantum of force . . . less than [] intermediate,” 599 F.3d at 1027-28, suggesting that
23 the Order erred in finding that the threatened use of a taser on Plaintiff’s neck was a clearly
24 established constitutional violation in 2009. Defendant also notes that the only reported case
25

26
27 ¹ Defendant argues that *Robinson* was “a case that neither party raised, discussed, or
28 believed was applicable.” Doc. 107 at 1:24. It bears mention that Defendant’s own motion
for summary judgment cited *Robinson*. Doc. 94 at 6:15.

1 involving the pointing of a taser, *Wallace v. Poulos*, 2009 U.S. Dist. LEXIS 89700 (D. Md.
2 Sept. 29, 2009), found the officers were entitled to qualified immunity. Doc. 107 at 4.

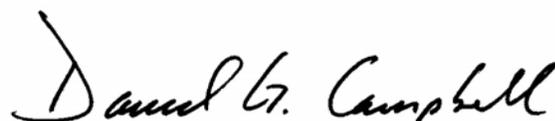
3 The Court has provided Plaintiff with an opportunity to respond to the motion for
4 reconsideration. Doc. 108. Plaintiff's response does not address *Brooks*. Plaintiff argues
5 only that "[t]he impact of a gun pointed toward one's head and a [taser] pressed against one's
6 neck must be obvious to any trained law enforcement officer," and characterizes the latter
7 as "potentially deadly force, as perceived by the Plaintiff." Doc. 109 at 2.

8 "The relevant, dispositive inquiry in determining whether a right is clearly established
9 is whether it would be clear to a reasonable officer that his conduct was unlawful in the
10 situation he confronted." *Saucier*, 533 U.S. at 202 (citing *Wilson v. Layne*, 526 U.S. 603,
11 615 (1999)). "If the law did not put the officer on notice that his conduct would be clearly
12 unlawful, summary judgment based on qualified immunity is appropriate." *Id.* (citing
13 *Malley*, 475 U.S. at 341). The Court concludes that it committed manifest error when it held
14 that pressing a taser against the neck of Plaintiff was a clearly established constitutional
15 violation in 2009. As the cases discussed above recognize, the law on the use of tasers was
16 unsettled even a year later in 2010. As a result, Defendant Hughes is entitled to summary
17 judgment on the grounds of qualified immunity.

18 **IT IS ORDERED:**

- 19 1. Defendant Hughes's motion for reconsideration (Doc. 107) is **granted**.
- 20 2. The Court's April 18, 2011 order (Doc. 104) is vacated to the extent it denied
21 qualified immunity to Defendant Hughes on Claim 1.
- 22 3. Summary judgment will be entered in favor of Defendant Hughes on Claim 1.
- 23 4. The Clerk shall terminate this action.

24 DATED this 23rd day of May, 2011.

25
26 

27
28

David G. Campbell
United States District Judge