IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal Number: 14-11225

GEORGIA CARRY ORG., INC. and MAHLON THEOBALD,
Appellants/ Plaintiffs below

v.

DEPUTY BRIAN KABLER
Appellee / Defendant below

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA, BRUNSWICK DIVISION
USDC CASE NUMBER: 2:12-cv-171-LGW-JEG

BRIEF OF APPELLEE

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Appeal Number: 14-11225
GeorgiaCarry.Org, Inc., et. al., v. Kabler

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned Counsel of Record for Defendant/Appellee Deputy Brian Kabler, in accordance with Rule 26.1 of the United States Court of Appeals, Eleventh Circuit, certify that the following is a full and complete list of all persons, firms, associations, partnerships, and corporations, including subsidiaries, conglomerates, affiliates, parent corporations, and other legal entities having an interest in the outcome of this case:

Association of County Commissioners of Georgia Interlocal Risk Management Agency (ACCG-IRMA)	Risk Management Pool Fund Administrator for
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Deputy Brian Kabler	Defendant / Appellee
GeorgiaCarry.Org, Inc	Plaintiff / Appellant
John Monroe	Attorney for Appellant
Paul M. Scott	Attorney for Appellee
Richard K. Strickland	Attorney for Appellee

Mahlon Theobald	Plaintiff / Appellant
Honorable Lisa G. Wood	Chief Judge, U. S. District Court for the Southern District of Georgia.

This 27th day of June, 2014.

BROWN, READDICK, BUMGARTNER
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Appeal Number: 14-11225
GeorgiaCarry.Org, Inc., et. al., v. Kabler

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

STATEMENT REGARDING THE RECORD

References to items in the Record will be identified by their document number and, if appropriate, by their exhibit, page number, line number, and/or paragraph number {Ex.: (Doc. 1, p. 3, ¶ 1, line 21)}.

STATEMENT OF THE ISSUES

1. Did a constitutional violation occur? The first issue in this case is whether a reasonable law enforcement officer has a reasonable suspicion, justifying a stop and a brief inspection of a firearms license, when the officer and his supervisor observe a person armed with a Glock 9mm pistol enter the side door of a convenience store right off of Interstate 95, after midnight, and see the person make an "obvious move" to conceal the previously visible firearm with an item of clothing upon encountering law enforcement officers?

2. Is the officer is entitled to qualified immunity? If the answer to issue number one is "no," then this Court must determine whether the officer is entitled to qualified immunity, which entails resolving at least two sub-issues:

A. As framed by the Plaintiffs in the trial court, the "crux of this case is whether a law enforcement officer in Georgia is empowered to make a forcible detention of a citizen seen carrying a firearm for the sole purpose of checking to see if the person possesses a license to do so." Dkt. No. 21, p. 4.

The Plaintiffs argue in their Brief to this Court that "the Georgia General Assembly, partially in response to the District Court's opinion [in the case at bar], passed a statute prohibiting law enforcement officers from detaining a person for the purpose of checking to see if the person has a weapons carry license." (Appellants' Brief, pp. 9-10). According to the Plaintiffs, "[b]eginning July 1, 2014, it will be illegal, as a matter of statutory law in Georgia, for a law enforcement officer to detain a person for the purpose of checking to see if the person" has a weapons carry license. *Id.* at 28-29. Thus, the first qualified-immunity issue is whether the Plaintiffs can rely upon a statute enacted after the subject incident, and purportedly in response to the trial court's opinion in the case at bar, to demonstrate that the law was clearly established on September 21, 2012, the date of the subject incident.

B. The second sub-issue for qualified immunity purposes is whether there was arguable reasonable suspicion such that Deputy Kabler is entitled to qualified immunity.

3. Have the Plaintiffs even pled a federal claim? The third issue in this case, and the most fundamental, is whether the Plaintiffs have even pled a federal claim, upon which relief may be granted. The Plaintiffs' Complaint

contains only one claim under federal law: "Count 1— Violations of Fourteenth Amendment." Dkt. No. 1, p. 12. There is no Fourth Amendment claim stated in the Plaintiffs' complaint. *See Id.* Thus, the third issue is whether this Court should follow Graham v. Connor, 490 U.S. 386, 388 (1989), which holds that claims for unreasonable searches and seizures must be analyzed under the Fourth Amendment's reasonableness standard, not the Fourteenth Amendment's substantive due process standard.

4. Plaintiffs' declaratory-judgment claim. There are four sub issues related to this claim:

A. The first sub-issue is whether the Plaintiffs have abandoned their declaratory-judgment claim. "[I]t is well settled in this circuit that a party abandons an issue 'by failing to list or otherwise state it as an issue on appeal.'" Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 680 (11th Cir. 2014) (*citing* Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316, 1318 (11th Cir.2012). In their opening brief, the Plaintiffs state two, and only two, issues:

> "Statement of the Issues
>
> 1. The District Court erred in ruling that Defendant-Appellee had arguable reasonable suspicion to detain Plaintiff-Appellant Theobald

> when Theobald was seen entering a convenience store with a handgun in a holster on his belt.
>
> 2. The District Court further erred in ruling that Defendant-Appellee was entitled to qualified immunity for such detention." (Appellants' Brief, p. 8).

Thus, the first sub issue is whether the Plaintiffs have abandoned their declaratory-judgment claim by failing to list it as an issue?

B. Even if the declaratory-judgment claim has been preserved, the second sub issue is whether Plaintiffs have standing to pursue such a claim.

C. The third sub issue is whether Plaintiffs' claims for declaratory relief can be maintained against an officer in his individual capacity.

D. The fourth sub issue is whether, even assuming the foregoing procedural hurdles can be overcome, the Plaintiffs are entitled to declaratory relief.

5. Have the Plaintiffs preserved their state-law claims? The Plaintiffs make no mention or argument anywhere in their brief regarding the state-law claims. Thus, the fifth, and final, issue is whether the Plaintiffs have preserved those claims, assuming they try to revive them in their Reply Brief.

STATEMENT OF THE CASE

Course of Proceedings Below

On September 21, 2012, Plaintiffs GeorgiaCarry.org ("GCO") and Theobald filed a complaint seeking relief under 42 U.S.C. § 1983 for violations of Theobald's constitutional rights at the hands of Defendant Deputy Brian Kabler. (Dkt. No. 1, p. 6). Specifically, the Plaintiffs contend that Deputy Kabler violated Theobald's rights under the Fourteenth Amendment of the United States Constitution by subjecting him to an unreasonable seizure. Id. Plaintiffs also contend that Deputy Kabler violated O.C.G.A. §§ 16-11-173 and 51-7-20. *Id.*

Plaintiff Theobald seeks money damages and declaratory relief, and Plaintiff GeorgiaCarry.Org seeks declaratory relief only. (Dkt. No. 1, ¶¶ 1, 52-55). As confirmed by the Plaintiffs' filings in this case, the Plaintiffs have sued Deputy Kabler in his individual capacity only. *(See* Dkt. No. 21, p. 15 explaining that Kabler "was sued in his individual capacity" and that Plaintiff "Theobald has not sued Kabler in Kabler's official capacity.")

Deputy Kabler removed the case to the United States District Court for the Southern District of Georgia on October 22, 2012. (Dkt. No. 1, Ex. A). On April 23, 2013, the District Court denied Plaintiffs' motion for partial judgment on the pleadings. (Dkt. No. 16). Subsequently, the parties filed cross-motions for summary judgment, Dkt. Nos. 17, 21, and the District Court granted summary judgment in favor of Deputy Kabler. (Dkt. No. 28).

Statement of the Facts

This action is predicated on a traffic stop and request to view a firearms permit. On August 3, 2012, Plaintiff Mahlon Theobald traveled south along Interstate 95 in McIntosh County, Georgia. (Dkt. No. 19, 9: 6-10). After exiting the Interstate shortly after midnight, Theobald drove to a convenience store near the highway and entered the side door of the store armed with a Glock 9-millimeter pistol in a holster on his side. (Dkt. No. 17-1, ¶¶ 3, 7-8, 19). Defendant Deputy Brian Kabler was on duty inside the convenience store with two other officers, Sergeant Myles and Deputy Wainwright. (Dkt. No. 19 at 39: 18-23; Dkt. No. 17, Exh. 2, ¶ 3).

As Theobald entered the store, Deputy Kabler observed Theobald's outer garment open, revealing a handgun on Theobald's waistband. (Dkt. No.

21-1, ¶ 5). Deputy Kabler and Sergeant Myles observed Theobald grab the outer garment and close it, concealing the firearm. (Dkt. No. 21-1, ¶ 6; Dkt. No. 17-1, ¶¶ 21-24). Deputy Kabler asked Sergeant Myles if he had seen the weapon, and Sergeant Myles responded in the affirmative. (Dkt. No. 17, Exh. 2, ¶ 7).

Deputy Kabler believed that Theobald's action of concealing the firearm, upon observing three law enforcement officers at the convenience store in the early morning hours, was "suspicious." (Dkt. No. 17-1, ¶ 27; Dkt. No. 20, 14: 5-9, 15: 17). Sergeant Myles, who also witnessed these events, told Deputy Kabler that he was concerned whether Theobald possessed a valid weapons license to posses a weapon in a convenience store because the Theobald attempted to cover up the gun, making it no longer visible. (Dkt. No. 17-1, ¶ 24). Sergeant Myles advised Deputy Kabler that he believed it would be appropriate for Deputy Kabler to make contact with Theobald "because the concealing of the weapon by the white male upon encountering law enforcement seemed suspicious." (Dkt. No. 17, Exh. 2, ¶¶ 8-9; Dkt. No. 17-1, ¶ 26). Deputy Kabler believed that the "obvious move" to conceal the firearm, and the fact that the move appeared to be precipitated by the

presence of the officers in the convenience store, was of a "significant" and "suspicious" nature. (Dkt. No. 20, 14: 5-9, 15: 17; Dkt. No. 17-1, ¶ 27).

While in the store, Theobald "kind of, like, browsed around. [He] was a little indecisive [and he] seem[s] to recall [he] was looking around for something for a while . . ." (Dkt. No. 17-1, ¶ 12). Shortly thereafter, Theobald returned to his car and exited the convenience store parking lot. (Dkt. No. 19, 24: 16-25). Deputy Kabler walked outside and observed Theobald drive away. (Dkt. No. 20, 17: 3-10). Deputy Kabler initiated a traffic stop shortly after Theobald merged onto the Interstate. (Dkt. No. 19, 27: 2-25). Within a minute, Sergeant Myles and Deputy Wainwright arrived as backup. (Dkt. No. 17, Exh. 3, Dash Video; Dkt. No. 20, 25: 19-25).

The traffic stop lasted eight minutes and fifty seconds (Dkt. No. 17, Exh. 3, Dash Video), during which time Theobald remained in his car. (Dkt. No. 19, 29: 5-7). Deputy Kabler testified that the purpose of the stop was "[t]o identify that he . . . had a permit to carry the weapon that he concealed [] in front of us." (Dkt. No. 20, 35: 2-8).

Deputy Kabler approached Theobald's car on the passenger side and asked to see Theobald's driver's license. (Dkt. No. 20, 21: 6-19). Deputy Kabler

then asked Theobald if he had a weapon with him. Id. at 22: 16-17. Theobald "asked [Deputy Kabler] if he had to answer" the question and Deputy Kabler stated, "I would hope [you] would be truthful" or "honest." Id. at 22: 18-22. Theobald said that he had a Florida Weapons Permit. Id. at 22: 24-25. Deputy Kabler asked to see the weapons permit. Theobald again asked, "Do I have to show you it?" Id. at 23: 5-6. Deputy Kabler responded, "Yes, sir, you do." Id. at 23: 7-8. Theobald produced his Florida Concealed Weapons Permit. Id. at 31: 12-14.

Theobald testified that he "had some concern that if [he] answered the question in the affirmative . . . , which was the truth, that would have . . . escalated the stop and . . . [he] would have been . . . made to get out of the car or . . [Deputy Kablerl would have pointed his firearm at [him] or something like that." (Dkt. No. 19, 30: 18-25). Deputy Kabler testified that Theobald was being "evasive" in the "way he was questioning [Deputy Kabler's] questions" and by answering Deputy Kabler's questions with questions of his own. (Dkt. No. 20, 23:20-22).

After Theobald gave Deputy Kabler his licenses, Deputy Kabler walked behind Theobald's car and ran Theobald's driver's license. (Dkt. No. 20, 23:

25, 24: 1-3; Dkt. No. 17, Exh. 3, Dash Video, 3:29-5:18). Theobald had a valid license. Id. at 24: 22. Aside from looking at Theobald's weapons permit, Deputy Kabler took no other steps to verify its validity. Id. at 24: 23-25, 25: 1-4. Deputy Kabler returned Theobald's licenses and told him he was free to go. (Dkt. No. 17, Exh. 3, Dash Video, 6:05-6:45; Dkt. No. 20, 28: 5-8). Deputy Kabler did not issue a traffic citation. (Dkt. No. 19, 36: 22-25).

Theobald asked Deputy Kabler for his name and badge number and for their current location. (Dkt. No. 20, 29: 21-25). Deputy Kabler informed Theobald that they were in McIntosh County, Georgia, and told Theobald that he could find information about his rights online. Id. at 29: 23-25, 30: 1-7. Deputy Kabler went to his vehicle to retrieve a business card, but realized he was out of cards. (Dkt. No. 19, 32: 3-5). In lieu of a business card, Deputy Kabler gave Theobald his name and badge number to write down. (Dkt. No. 19, 32: 3-15). Theobald testified that Deputy Kabler "wasn't particularly aggressive or antagonistic" and that he was not concerned about Deputy Kabler's manner or attitude during the stop. (Dkt. No. 19, 32: 19-25).

Summary of the Argument

The Plaintiffs cannot demonstrate a constitutional violation. Consistent with the Fourth Amendment's reasonableness requirement, under Terry v. Ohio, 392 U.S. 1 (1968), a police officer may initiate an investigatory stop if he "has a reasonable, articulable suspicion that criminal activity is afoot." Illinois v. Wardlow, 528 U.S. 119, 123 (2000).

"On a level-of-suspicion spectrum, 'reasonable suspicion' is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and even falls below the probable cause standard of 'a fair probability that contraband or evidence of a crime will be found.'" United States v. Reed, 402 F. App'x 413, 415 (11th Cir. 2010). "When determining whether reasonable suspicion exists, courts must review the 'totality of the circumstances' to ascertain whether the officer had 'some minimal level of objective justification' to suspect legal wrongdoing," and "the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." Id. Further, "where there is at least minimal communications between officers, we look to the 'collective knowledge' of all officers in assessing this determination." Id.

"The Supreme Court has identified several factors that might affect officers' reasonable suspicion calculus." Reed, 402 F. App'x at 415. These factors, as described by the Reed court, include:

- the "relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."
- "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion."
- "a bulge in one's outer clothing might indicate the presence of contraband or a weapon."

Here, as the District Court correctly found, there was a reasonable suspicion, justifying a stop and a brief inspection of a firearms' license, when Deputy Kabler and his supervisor observed Theobald enter the side door of a convenience store off of Interstate 95 after midnight, armed with a Glock 9mm pistol, and Theobald concealed the previously visible firearm with an item of clothing after encountering law enforcement officers.

In the alternative, even if it could be said that a reasonable suspicion did not exist, Deputy Kabler is entitled to qualified immunity because there was at least arguable reasonable suspicion. Jackson v. Sauls, 206 F.3d 1156, 1166 (11th Cir. 2000) Moreover, the Plaintiffs did not cite any U.S. Supreme Court,

Eleventh Circuit, or Georgia Supreme Court precedent establishing that a law enforcement officer would not form reasonable suspicion to validate a Terry stop under the circumstances of this case.

Also relevant to the qualified immunity issue is the Plaintiffs' argument regarding the "new" Georgia statute. The Plaintiffs argue that "the Georgia General Assembly, partially in response to the District Court's opinion [in the case at bar], passed a statute prohibiting law enforcement officers from detaining a person for the purpose of checking to see if the person has a weapons carry license." Appellants' Brief, pp. 9-10. According to the Plaintiffs, "[b]eginning July 1, 2014, it will be illegal, as a matter of statutory law in Georgia, for a law enforcement officer to detain a person for the purpose of checking to see if the person" has a weapons carry license. *Id.* at 28-29. Because this statute was enacted after, and purportedly partially in response to, the encounter at hand, and because the General Assembly is presumed to be aware of the law in existence, the enactment of this statute demonstrates that the law was not clearly established at the time of the subject incident.

At an even more fundamental level, this appeal raises the issue of whether the Plaintiffs have even pled a colorable federal claim. The Plaintiffs' Complaint contains only one claim under federal law: "Count 1— Violations of Fourteenth Amendment." Dkt. No. 1, p. 12. There is no Fourth Amendment claim in the Plaintiffs' complaint. *See Id.* Since Graham v. Connor, 490 U.S. 386, 388 (1989) holds that claims for unreasonable searches and seizures must be analyzed under the Fourth Amendment's reasonableness standard, not the Fourteenth Amendment's substantive due process standard, the Plaintiffs have failed to even plead a claim.

There are four reasons why the Plaintiffs' declaratory-judgment claims should be dismissed. First, by failing to identify those claims as relevant to this appeal, the Plaintiffs have abandoned them. Second, the Plaintiffs do not have standing to pursue those claims. Third, since declaratory relief cannot be maintained against an officer in his individual capacity, and given Theobald's admission that he has only sued Kabler in that capacity, the declaratory-judgment claims should be dismissed. Fourth, even on the merits, the Plaintiffs are not entitled to declaratory relief.

Finally, as for the Plaintiffs's state-law claims, by failing to mention those claims in their Brief, the Plaintiffs have abandoned them.

Argument and Citations to Authorities

1. The District Court correctly held that the Plaintiffs have not established a constitutional violation.

A. The controlling framework: a reasonable suspicion

As framed by the Plaintiffs in the trial court, the "crux of this case is whether a law enforcement officer in Georgia is empowered to make a forcible detention of a citizen seen carrying a firearm for the sole purpose of checking to see if the person possesses a license to do so." (Dkt. No. 21, p. 4). The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of

this provision." Whren v. United States, 517 U.S. 806, 809-10 (1996). Consistent with the Fourth Amendment's reasonableness requirement, however, under Terry v. Ohio, 392 U.S. 1 (1968), a police officer may initiate an investigatory stop if he "has a reasonable, articulable suspicion that criminal activity is afoot." Illinois v. Wardlow, 528 U.S. 119, 123 (2000).[1]

"Reasonable suspicion, like probable cause, is not readily, or even usefully, reduced to a neat set of legal rules." United States v. Reed, 402 F. App'x 413, 415 (11th Cir. 2010)(*citing* United States v. Sokolow, 490 U.S. 1, 7 (1989). "On a level-of-suspicion spectrum, 'reasonable suspicion' is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and even falls below the probable cause standard of 'a fair probability that contraband or evidence of a crime will be found.'" Id. However, "the officer, of course, must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." Id. (punctuation omitted). "When determining whether reasonable suspicion exists, courts must review the 'totality of the circumstances' to ascertain whether the officer

[1]The Plaintiffs apparently agree that a Terry stop is at issue here. Dkt. No. 21, p. 17("The only exception conceivably applicable is the 'Terry' stop, a brief investigatory detention based on reasonable articulable suspicion that the subject is engaged in criminal activity." Terry v. Ohio, 392 U.S. 1 (1968).

had 'some minimal level of objective justification' to suspect legal wrongdoing. Reed, 402 F. App'x at 415."A series of acts, each of them perhaps innocent in itself . . . taken together can warrant further investigation." Id. (*citing* Terry, 392 U.S. at 22) (punctuation omitted). "Reasonable suspicion analysis is not concerned with 'hard certainties, but with probabilities,' and law enforcement officials may rely on 'inferences and deductions that might well elude an untrained person because the evidence thus collected must be seen and weighed not in terms of library analysis by scholars." Id. (*citing* United States v. Cortez, 449 U.S. 411, 418 (1981)). Rather, "the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."Id. (*citing* Illinois v. Wardlow, 528 U.S. 119, 125, (2000)). "In making these commonsense judgments, 'the stopping officer is expected to assess the facts in light of his professional experience and where there is at least minimal communications between officers, we look to the 'collective knowledge' of all officers in assessing this determination." Reed, 402 F. App'x at 415 (*citing* United States v. Kreimes, 649 F.2d 1185, 1189 (5th Cir.1981).

"The Supreme Court has identified several factors that might affect officers' reasonable suspicion calculus." Reed, 402 F. App'x at 415. For instance, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." Id. (*citing* Wardlow, 528 U.S. at 124. Additionally, "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." Id. "So too, a bulge in one's outer clothing might indicate the presence of contraband or a weapon." Id. (*citing* Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) ("The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer.").

B. A reasonable suspicion: whose perspective governs?

Based upon the foregoing, the question here is not whether an individual in Georgia may legally openly carry a firearm. Rather, the question is whether a reasonable law enforcement officer has a reasonable suspicion, justifying a stop and a brief inspection of a firearms' license, when the officer and his supervisor see a person enter the side door of a convenience store off of Interstate 95 after midnight, armed with a Glock 9mm pistol, and the

person conceals the previously visible firearm with an item of clothing after encountering law enforcement officers. Before delving into that analysis, Deputy Kabler must first address the Plaintiffs' argument regarding what Deputy Kabler knew or did not know at the time of the traffic stop. *See* Appellants' Brief, pp. 9-10.

The Plaintiffs argue that if Deputy Kabler possessed a reasonable suspicion to believe that Theobald did not have a firearms license, Deputy Kabler would have been justified in detaining Theobald. But the Plaintiffs contend that the "problem for Kabler is that he did not have reasonable suspicion, or even 'arguable reasonable suspicion.' In fact, Kabler did not have any suspicion that Theobald did not have a GWL, or that Theobald was engaged in any other criminal activity." *See* Appellants' Brief, p. 16; *see also id* at p. 17 ("even though Kabler had no suspicion Theobald did not have a GWL, had no idea about that at all, Kabler performed a traffic stop on Theobald.") (all underlines added). The Plaintiffs take issue with the district court's ruling that "[d]espite Kabler's blundering into the incident, he nevertheless receives qualified immunity because a reasonable officer would have had reasonable suspicion (even though Kabler did not)." Id. at p. 17.

By focusing on Deputy Kabler's motives, the Plaintiffs' argument misses the mark. As this Court has explained, "the issue is not whether the particular officer involved actually and subjectively had the pertinent reasonable suspicion, but whether, given the circumstances, reasonable suspicion objectively existed to justify the investigatory stop." United States v. Harris, 526 F.3d 1334, 1338 (11th Cir. 2008). "The question is not whether a specific arresting officer actually and subjectively had the pertinent reasonable suspicion, but whether, given the circumstances, reasonable suspicion objectively existed to justify such a search." United States v. Nunez, 455 F.3d 1223, 1226 (11th Cir. 2006)(citations omitted). Thus, the Plaintiffs' arguments regarding Deputy Kabler's motives are misplaced. *See also* United States v. Robinson, 515 F. App'x 790, 792 (11th Cir. 2013) ("whether reasonable suspicion existed is an objective test, and an officer's subjective intentions or beliefs are immaterial.")

The Plaintiffs also focus on whether Plaintiff Theobald concealed the firearm before or after Plaintiff Theobald saw the officers, and what Theobald's intentions were. *See* Appellants' Brief, pp. 18-19. But what Plaintiff Theobald knew or intended is not the governing standard. *See* Harris, 526

F.3d at 1338 (the issue is "whether, given the circumstances, reasonable suspicion objectively existed to justify the investigatory stop."). The correct inquiry, and undisputed facts taken from the Plaintiffs' own filing at Dkt. No. 21-1, p. 1, ¶¶ 5-7, are as follows:

> 5. As Theobald entered the store, Kabler observed a gust of wind blow open Theobald's outer garment, revealing a handgun on Theobald's waistband. Id., pp. 11-12.
>
> 6. Kabler further observed Theobald grab the outer garment and close it. Id., p. 12.
>
> 7. Kabler thought Theobald's actions were "suspicious." Id., p. 15.

In sum, and as detailed below, because "Theobald enter[ed] the convenience store after midnight and closing his outer garment so as to conceal the weapon in the presence of police officers, a reasonable officer could form reasonable suspicion that Theobald did not possess a valid weapons license to carry a concealed firearm." (Dkt. No. 28, p. 11).

C. Application of the law to the facts

As the District Court correctly found, "the totality of the circumstances generated reasonable suspicion to perform a traffic stop to investigate whether Plaintiff possessed a license to carry the firearm." (Dkt. No. 28, p. 10).

Deputy Kabler's reasonable suspicion formed, correctly held the District Court, "when Theobald made 'an obvious move to conceal the weapon.'" Id. *citing* Dkt. No. 20, 14: 5-9. The District Court further correctly observed: "the officers saw that Theobald was carrying a firearm when the wind blew his jacket open. After he saw the three officers inside the convenience store, Theobald concealed the firearm by closing his outer garment." Id. To be sure, Deputy Kabler believed that the concealment of the firearm, early in the morning at a convenience store, upon observing three law enforcement officers, was suspicious, (Dkt. No. 17-1, ¶ 27), which weighs in favor of a finding that Deputy Kabler's actions were lawful. Sergeant Myles, who also saw these events, told Deputy Kabler that he was concerned whether Theobold possessed a valid weapons license allowing him to possess the weapon in a convenience store, because it appeared to Myles that Theobold attempted to cover up the gun, making it no longer visible. Dkt. No. 17-1, ¶ 24. Sergeant Myles told Deputy Kabler that he believed it would be appropriate to stop Theobald because the concealing of the weapon upon encountering law enforcement seemed suspicious to Myles. Dkt. No. 17-1, ¶ 26. All of these facts weigh in favor of a finding of lawfulness. *See* Reed, 402

F. App'x at 415 ("nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.") Moreover, as the District Court observed, under Georgia law, Theobald would be required to have a license to possess the firearm in a convenience store. *See* O.C.G.A. § 16-11-126(h); 16-11-127(c).

Under O.C.G.A. § 16-11-126(h)(2) it is a crime to violate subsection (h)(1) ("No person shall carry a weapon without a valid weapons carry license . . .). Thus, this first inquiry tilts in favor of Deputy Kabler. *See* Reed, 402 Fed. App'x at 417 ("furtive flight or fight eye movements" indicating an intent to merely hide something, without any actual "flight," was sufficient to permit a Terry frisk).

As the District Court also correctly observed, Theobald entered the convenience store sometime after midnight, which contributed to Deputy Kabler's reasonable suspicion. After all, as the District Court observed, "[c]ourts have considered the time of night as a relevant factor in determining the reasonableness of a Terry stop." Doc. 28, p. 10 (*citing* U.S. v. Abokhai, 829 F.2d 666, 670 (8th Cir. 1987) (considering that the defendants approached the convenience store on foot after dark as a factor to warrant a valid Terry stop);

see also U.S. v. Glover, 662 F.3d 694, 695-98 (4th Cir. 2011) (citing defendant's presence at a convenience store in the middle of the night as a relevant factor to validate a Terry stop). Further, the location of the incident – at a gas station off of Interstate 95 – also weighs in favor of finding reasonable suspicion. *See* Reed, 402 F. App'x at 415 ("officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."). Common sense tells us that a 24-hour convenience store is a target for robberies, particularly in the middle of the night, and a study released by the U.S. Department of Justice Office backs up that common sense. As that study confirms, "[c]onvenience store robberies account for approximately 6 percent of all robberies known to the police." ROBBERY OF CONVENIENCE STORES, U.S. Department of Justice Office of Community Oriented Policing Services, at page 2, available at www.cops.usdoj.gov/Publications/e0407972.pdf "Convenience store employees suffer from high rates of workplace homicide, second only to taxicab drivers." Id. at p. 4. "Operation hours are by far the strongest factor contributing to convenience story robbery, particularly for stores open 24 hours a day. Late evening to early morning hours carry a greater risk of being

targeted,...." Id. at p. 7. "Robbery offenders generally operate at night, when concealment is more likely. Convenience store robberies have been found to be consistent with this time pattern...Fifty percent occurred between 10 PM and 12 AM, generally times when business traffic is minimal. Three days (Friday, Saturday, and Sunday) accounted for 60 percent of the robberies." Id. at p. 13. Both the location and time of the encounter at issue – a convenience store near the interstate, after midnight – weigh in favor of a finding that Deputy Kabler had reasonable suspicion to justify a Terry stop. *See* Reed, 402 F. App'x at 415 ("officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."). Further, the fact that Theobald was actually carrying a firearm also weighs in favor of a finding that the stop was lawful. *See* Reed, 402 F. App'x at 415 ("So too, a bulge in one's outer clothing might indicate the presence of contraband or a weapon.")[2]

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[2]Further, as previously briefed, the detention lasted no longer than eight minutes and fifty seconds, and much of that was due to questions being asked by Plaintiff. Dkt. No. 17-4, pp. 9& 11. The Plaintiff was merely questioned and asked to provide his driver's license as well as his weapons permit. Once that information had been obtained and verified, Deputy Kabler informed Theobald that he was free to go. The stop only lasted as long as it did because plaintiff continued to engage Deputy Kabler with questions once Deputy Kabler was done. Courts have upheld Terry stops of much longer duration

In sum, the Plaintiffs cannot demonstrate a constitutional violation, under the totality of the circumstances, for the reasons summarized by the District Court: "By Theobald entering the convenience store after midnight and closing his outer garment so as to conceal the weapon in the presence of police officers, a reasonable officer could form reasonable suspicion that Theobald did not possess a valid weapons license to carry a concealed firearm." (Dkt. No. 28, p. 11). In sum, Kabler articulated more than an "inchoate and unparticularized suspicion or 'hunch' of criminal activity," and, therefore, the District Court correctly found that Kabler did not violate the Fourth Amendment in dealing with Theobald. See Wardlow, 528 U.S. at 123–25 ("Even in Terry, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation.... Terry recognized that the officers could detain the individuals to resolve the ambiguity.")

2. In the alternative, Deputy Kabler is entitled to qualified immunity.

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than this one. *See, e.g.*, United States v. Gil, 204 F.3d 1347, 1350-51 (11th Cir.2000) (upholding reasonable-suspicion detention for approximately 75 minutes); United States v. Cooper, 873 F.2d 269, 275 (11th Cir.1989) (affirming a 35-minute reasonable-suspicion detention); United States v. Hardy, 855 F.2d 753, 761 (11th Cir.1988) (affirming reasonable-suspicion stop lasting almost 50 minutes).

A. An overview of qualified-immunity law.

Deputy Kabler moved for summary judgment arguing, among other things, that qualified immunity barred the Plaintiffs' claims. (Dkt. No. 17, pp. 13-15). Deputy Kabler was acting within his discretionary authority as a law-enforcement officer at all times relevant in this case, and the Plaintiffs have made no challenge otherwise. As a result, the burden shifts to the Plaintiffs to demonstrate that Kabler's conduct violated the Plaintiffs' clearly established rights. Keating v. City of Miami, 598 F.3d 753, 762 (11th Cir. 2010).

For the law to be clearly established, the law "must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law." Sherrod v. Johnson, 667 F.3d 1359, 1363 (11th Cir. 2012) (internal citations and quotations omitted). Stated differently, qualified immunity affords complete protection to government officials sued individually "unless the law preexisting the defendant official's supposedly wrongful act was already established to such a high degree that every objectively reasonable official standing in the defendant's place would be on

notice that what the defendant official was doing would be clearly unlawful given the circumstances." Terrell v. Smith, 668 F.3d. 1244, 1250 (11th Cir. 2012).

When an officer asserts qualified immunity, the issue is not whether reasonable suspicion existed in fact, but whether the officer had "arguable" reasonable suspicion to support an investigatory stop. Jackson v. Sauls, 206 F.3d 1156, 1166 (11th Cir. 2000) (*citing* Williamson v. Mills, 65 F.3d 155, 157 (11th Cir. 1995)). Granting qualified immunity to Deputy Kabler, the District Court wrote that even if it could be said that Deputy Kabler was wrong in his conclusion that reasonable suspicion existed, he was entitled to qualified immunity because there was at least arguable reasonable suspicion. (Dkt. No. 28, p. 11). The District Court further held that binding precedent did not exist on August 3, 2012, the date of the incident, to inform Deputy Kabler that he should not have formed a suspicion, or that stopping Theobald to determine whether he possessed a valid weapons license was an unreasonable seizure. Moreover, as the District Court noted, the Plaintiffs did not present, and the District Court did not find, U.S. Supreme Court, Eleventh Circuit, or Georgia Supreme Court precedent establishing that a law enforcement officer would not form reasonable suspicion to validate a Terry stop under the

circumstances of this case. Deputy. Id. at pp. 12-13. Thus, Deputy Kabler is entitled to qualified immunity.

B. The Plaintiffs' argument regarding qualified immunity.

The Plaintiffs have not shown that any of Deputy Kabler's conduct violated clearly established law. Deputy Kabler noted that it did not appear that any Georgia court, or any court within the Eleventh Circuit, had addressed the parameters of inquiry allowed with regard to O.C.G.A. § 16-11-126(h)(2). "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." Alexander v. University of N. Fla., 39 F.3d 290, 291 (11th Cir. 1994) The Plaintiffs have not pointed to any such case. Instead of demonstrating that any of the conduct alleged violates clearly established law, the Plaintiffs rely solely on "general rules or abstract rights," which are insufficient to strip a § 1983 defendant of his qualified immunity. *See* Jackson v. Sauls, 206 F.3d 1156, 1165 (11th Cir. 2000) (noting that a "reasonable officer's awareness of the existence of an abstract right, such as a right to be free of

excessive force or an investigatory stop without reasonable suspicion, does not equate to knowledge that his conduct infringes that right").

1. The "change in Georgia law" in response to this case.

As framed by the Plaintiffs in the trial court, the "crux of this case is whether a law enforcement officer in Georgia is empowered to make a forcible detention of a citizen seen carrying a firearm for the sole purpose of checking to see if the person possesses a license to do so." Dkt. No. 21, p. 4. The Plaintiffs argue that "the Georgia General Assembly, partially in response to the District Court's opinion [in the case at bar], passed a statute prohibiting law enforcement officers from detaining a person for the purpose of checking to see if the person has a weapons carry license." Appellants' Brief, pp. 9-10. According to the Plaintiffs, "[b]eginning July 1, 2014, it will be illegal, as a matter of statutory law in Georgia, for a law enforcement officer to detain a person for the purpose of checking to see if the person has a GWL," i.e., weapons carry license. *Id*. at 28-29.

"In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy." O.C.G.A. § 1–3–1(a). "In construing a statute,

certain presumptions must be indulged." Retention Alternatives, Ltd. v. Hayward, 285 Ga. 437, 440, 678 S.E.2d 877, 879 (2009). One such presumption is that the General Assembly enacts statutes "with full knowledge of existing law, and their meaning and effect are to be determined with reference to the constitution as well as other statutes and decisions of the courts." Georgia Transmission Corp. v. Worley, 312 Ga. App. 855, 856, 720 S.E.2d 305, 307 (2011); see also Hayward, 285 Ga. at 440 (Georgia Supreme Court presumed the General Assembly employed the language it used in the amendment with full knowledge of the existing condition of the law).

If clearly established Georgia law provided , in 2012, that an officer could not detain a person for the purpose of checking to see if the person had a gun license, why would the General Assembly later enact a statute prohibiting exactly that? The "evil" sought to be remedied by this new statute, according to the Plaintiffs, was at least "partially" the District Court's opinion in this very case. If anything, the creation of this statute shows that the law was not clearly established at the time of the incident in this case. According to the Plaintiffs, "[b]eginning July 1, 2014, it will be illegal, as a matter of statutory law in Georgia, for a law enforcement officer to detain a

person for the purpose of checking to see if the person has a GWL," i.e., weapons carry license. Appellants' Brief, pp. 28-29. While that may be the case beginning this summer, the incident at issue here occurred in 2012. Thus, if anything, this statute, which is still not effective, actually confirms that Deputy Kabler is entitled to qualified immunity. See Lassiter v. Alabama A & M Univ., Bd. of Trustees, 28 F.3d 1146, 1150 (11th Cir. 1994)[3] "courts judge the acts of defendant government officials against the law and facts *at the time defendants acted*, not by hindsight, based on later events.") (italics added)

2. *Delaware v. Prouse* is inapplicable

In an effort to defeat qualified immunity, the Plaintiffs argue that the United States Supreme Court ruled in Delaware v. Prouse, 440 U.S. 648 (1979) that "stopping a motorist just to see if the motorist has a driver's license, absent reasonable suspicion to believe he does not, violates the 4th Amendment." (Appellants' Brief, p. 21). The Plaintiffs further argue that "[e]ven with no other cases, Kabler had 'fair warning from *Prouse* that random stops for license checks are unconstitutional." *Id*. at pp. 21-22.

[3]Abrogated by Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

Delaware v. Prouse, however, does not salvage the Plaintiffs' case. In Prouse, an officer stopped an automobile for no reason other than to check the driver's license and registration. 440 U.S. at 650, 99 S. Ct. at 1394. The officer confiscated marijuana that he saw on the floor of the car. *Id*. The evidence of marijuana was suppressed because the patrolman "testified that prior to stopping the vehicle he had observed neither traffic nor equipment violations **nor any suspicious activity**, and that he made the stop only in order to check the driver's license and registration." *Id*. (emphasis supplied). The Delaware Supreme Court affirmed, and the state of Delaware appealed, claiming that discretionary spot checks like the one made by the officer were reasonable under the Fourth Amendment, because they promoted safety on the roads. Prouse, 440 U.S. at 651 & 655, 99 S. Ct. at 1394 & 1397.

The United States Supreme Court granted certiorari, and affirmed the Delaware Supreme Court. Prouse, 440 U.S. at 651 & 663, 99 S. Ct. at 1394 & 1401. The Supreme Court found that the practice of discretionary spot checks by officers for public safety reasons was not "a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests ..."440

U.S. at 659. The Court stressed that there was nothing which distinguished the vehicle stopped from any other vehicle on the highway. 440 U.S. at 659-61.

As to whether Prouse clearly established the law governing a Terry stop to check for a firearms license, Banks v. Gallagher, a District Court opinion from the Third Circuit, is instructive. 3:08-CV-1110, 2011 WL 718632 (M.D. Pa. Feb. 22, 2011). In that case, which dealt with several family members dining in a restaurant openly carrying firearms, the Plaintiffs tried to argue that Prouse established the unlawfulness of the officer's actions. The district court, however, held that Prouse's rationale did not necessarily apply to a check for a firearms license:

> As an initial matter, Prouse's holding—that random, discretionary automobile stops unsupported by reasonable suspicion of a violation violate the Fourth Amendment—does not necessarily apply to checking gun licenses at random. It is not at all certain that the same balance the Court struck in Prouse, involving a suspicionless stop of an automobile driver, should apply to suspicionless requests to produce one's gun license. It can be argued that the state's interest in ensuring that only properly licensed individuals carry guns is much higher than the state's interest in Prouse, and that the individual's Fourth Amendment's privacy interests in being asked to produce a gun license is much lower. 3:08-CV-1110, 2011 WL 718632 (M.D. Pa. Feb. 22, 2011)

For the same reasons discussed by the Banks court, Prouse's rationale does not apply to the facts of this case either.

Moreover, Prouse is factually distinguishable. In Prouse, the officer randomly stopped an automobile for no reason other than to check the driver's license and registration. 440 U.S. at 650. Before stopping the vehicle, the officer did not observe "any suspicious activity," and the officer "made the stop only in order to check the driver's license and registration." Id.

By contrast, Deputy Kabler was not just driving around with nothing better to do than pull over a car to see if the occupant had a firearms license. Instead, unlike the officer in Prouse – who did not see *"any suspicious activity"* – Deputy Kabler and Sgt. Myles observed Plaintiff Theobald, in fact, engaged in "suspicious" activity: Theobald entered the side door of a convenience store off of I-95 after midnight with a Glock 9-millimeter pistol in a holster on his side. Dkt. No. 17-1, ¶¶ 3, 7-8, 19. As Theobald entered the store, Kabler observed Theobald's outer garment open, revealing a handgun on Theobald's waistband. Dkt. No. 21-1, ¶ 5. Kabler and Sgt. Myles observed Theobald grab the outer garment and close it, concealing the firearm. Dkt. No. 21-1, ¶ 6; Dkt. No. 17-1, ¶¶ 21-24. Deputy Kabler believed that Theobald acted suspiciously

by concealing his firearm upon observing three law enforcement officers at a convenience store in the early morning hours. Dkt. No. 17-1, ¶ 27. Sergeant Myles, who also saw these events, told Deputy Kabler that he was concerned whether Plaintiff possessed a valid weapons license because the Plaintiff attempted to cover up the gun, making it no longer visible. Dkt. No. 17-1, ¶ 24. Sgt. Myles told Deputy Kabler that he believed it would be appropriate to stop Theobald because the concealing of the weapon upon encountering law enforcement seemed suspicious to Myles. Dkt. No. 17-1, ¶ 26. While in the store, Plaintiff Theobald "kind of, like, browsed around. [He] was a little indecisive [and he] seem[s] to recall [he] was looking around for something for a while . . ."Dkt. No. 17-1, ¶ 12. Thus, Prouse is factually distinguishable.

Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases, and the line is not to be found in abstractions but in studying how these abstractions have been applied in concrete circumstances. Lassiter, 28 F.3d at 1149–50. Prouse, which deals with a random stop and driver's license check by an officer who has not seen any suspicious activity, does not apply to the facts of this case, where Theobold

was stopped and asked to produce his firearm permit after acting suspicious while carrying the firearm in a convenience store late at night.

To be sure, the Appellants argue that "[g]iven Prouse's *general prohibition* on stops for license checks,...Kabler had 'fair warning' that his stopping of Theobald was illegal." (Appellants' brief, pp. 27-28)(italics supplied). But "general prohibitions" regarding driver's license checks do not aid in the qualified-immunity analysis vis-a-vis the facts at hand. This Court "emphasized that general propositions have little to do with the concept of qualified immunity and that the facts of a case relied upon to clearly establish the law must be materially similar, because public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases." Hamilton by & ex rel. Hamilton v. Cannon, 80 F.3d 1525, 1531-1532 (11th Cir. 1996). This Court has cautioned that "the most common error [it] encounter[s] in qualified immunity cases involves the point that courts must not permit plaintiffs to discharge their burden by referring to general rules and to the violation of abstract rights." Id. Prouse, therefore, does not control the analysis.

3. Whether the procedure governing a firearms jury trial clearly established the law regarding traffic stops.

In an effort to defeat qualified immunity, the Plaintiffs also discuss how, procedurally, a firearms criminal jury trial would proceed in the trial court. (Appellants' Brief, pp. 23-24) The Plaintiffs argue that it is "clear from Georgia and binding federal appellate case law that carrying a weapon without a license has, as an element of the crime, the lack of a license." Id. at pp. 23-24 (relying upon Head v. State, 235 Ga. 677, 679 (1975), Fleming v. State, 138 Ga.App. 97, 98 (1976) and Johnson v. Wright, 509 F.2d 828 (5th Cir. 1975)). The Plaintiffs then offer the following quote from Head:

> "[T]he State introduced no evidence which shows appellant did not have a license for the pistol...Therefore, the trial court's judgment of conviction...must be reversed....Those cases which hold that whether an accused has a license to carry a pistol is a matter of defense and not an element of the offense are hereby overruled." Appellants' Brief, pp. 23-24

In a similar vein, the Plaintiffs argue that in Johnson v. Wright, the Fifth Circuit condemned the Supreme Court of Georgia for approving a "jury instruction that the burden was on a criminal defendant to prove that he had a license (as opposed to the burden being on the State to show that the

defendant did not have a license)" because that jury charge improperly shifted the "burden of proof to a criminal defendant to disprove an element of the crime," and, as such, that jury instruction violated the defendant's "due process" rights. (Appellants' Brief, p. 24)

How any criminal trial of Theobald would proceed in a court of law (and specifically, whether the District Attorney or Theobald's criminal defense lawyer would have the burden of proving that Theobald holds a firearm license to the jury) has no role in determining whether Kabler is entitled to qualified immunity. The "inquiry in qualified-immunity analysis is whether the government actor's conduct violated clearly established law and not whether an arrestee's conduct is a crime or ultimately will result in conviction. Police officers are not expected to be lawyers or prosecutors." Scarbrough v. Myles, 245 F.3d 1299, 1303, fn. 8 (11th Cir. 2001). After all, it is "unfair and impracticable to hold public officials to the same level of knowledge as trained lawyers." Id. Thus, whether carrying a weapon without a license is "an element of the crime," as the Plaintiffs argue, or a matter of defense, plays no role in determining whether qualified immunity is stripped. See Id. at 1302-03 (For purposes of determining qualified immunity, an officer

does not have to "prove every element of a crime or to obtain a confession before making an arrest, which would negate the concept of probable cause and transform arresting officers into prosecutors.") Head v. State and Johnson v. Wright, therefore, are insufficient to discharge the Plaintiff's burden. *See* Jones v. Cannon, 174 F.3d 1271, 1282–83 (11th Cir.1999)(plaintiff cannot discharge her burden of showing that a right is clearly established by referring to general rules and abstract rights in order to strip the defendant of his qualified immunity)

Simply put, the Plaintiffs have failed to carry their burden because these cases do not "dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what [Defendant was] doing violates federal law in the circumstances." Alexander, 39 F.3d at 291. Thus, summary judgment is warranted. *See also* Jackson, 206 F.3d at 1165 (noting that the "burden of showing that an officer violated clearly established law falls on the plaintiff, and a plaintiff's citation of general rules or abstract rights is insufficient to strip a § 1983 defendant of his qualified immunity"). Instead, based upon the facts detailed herein, a reasonable officer would have possessed arguable

reasonable suspicion to support the stop. "When an officer asserts qualified immunity, the issue is not whether reasonable suspicion existed in fact, but whether the officer had 'arguable reasonable suspicion to support an investigatory stop.'" Kilpatrick v. United States, 432 F. App'x 937, 939 (11th Cir. 2011). Arguable reasonable suspicion exists in this case because a reasonable officer in the same circumstances and possessing the same information as Kabler could have believed that reasonable suspicion existed to stop the Plaintiff. Lee v. Ferraro, 284 F.3d 1188, 1195 (11th Cir. 2002). The Plaintiffs have failed to carry their qualified-immunity burden, and the District Court's Order should be affirmed.

4. The Plaintiffs' reliance on cases from other circuits is inapplicable to the qualified-immunity analysis.

The Plaintiffs cite numerous cases from other circuits in support of their argument. (Appellants' Brief, pp. 26-28) For qualified immunity purposes, however, these cases are non-binding and, therefore, could not provide Deputy Kabler fair warning that his actions would violate the constitutional rights of the Plaintiff. *See* Coffin v. Brandau, 642 F.3d 999, 1013 (11th Cir. 2011)("Our Court looks only to binding precedent—cases from the United States Supreme Court, the Eleventh Circuit, and the highest court of the state

under which the claim arose—to determine whether the right in question was clearly established at the time of the violation.")

3. **The Fourteenth Amendment is inapplicable to the facts of this case.**

Plaintiffs' Complaint contains only one claim under federal law: "Count 1— Violations of Fourteenth Amendment." See Dkt. No. 1, p. 12. There is no Fourth Amendment claim stated in the Plaintiffs' complaint. Id. However, a claim for unreasonable search and seizure must be analyzed under the Fourth Amendment's reasonableness standard, not the Fourteenth Amendment's substantive due process standard. See Graham v. M.S. Connor, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Simply, since the only federal claim in Plaintiffs' complaint is a claim under the Fourteenth Amendment, Plaintiffs' claim should have been dismissed.[4]

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[4]Defendant is compelled to note the somewhat odd procedural route taken by this case. Plaintiff filed a Motion for Partial Judgment on the Pleadings. Dkt. No. 9. In that Motion, the Plaintiffs asked the District Court to grant relief to Plaintiff on a claim that appears nowhere in the four corners of the plaintiffs' Complaint. Defendant pointed out to plaintiff that no such claim was set forth in the four corners of plaintiffs' Complaint. Dkt. No. 13.

It is clear that in the Eleventh Circuit plaintiffs must identify the appropriate source of their legal claim in their Complaint. *See* Bloom v.

At the time, the case was in such a posture that plaintiff had time to amend the Complaint and allege a viable claim. Rather than amend the Complaint, plaintiffs took the rather odd approach of acknowledging that their Complaint only alleged violations of the Fourteenth Amendment, but that Defendant was somehow confused by Plaintiffs' approach. Dkt. No. 14, pp. 1 - 2.

Defendant's counsel will acknowledge a bit of confusion caused by Plaintiff's approach. Simply, the only federal claim asserted in this action is one under the Due Process clause of the Fourteenth Amendment to the Constitution, which is wholly inapplicable to the facts in this case. Further, as the time to amend Plaintiffs' Complaint has long since passed, and a plaintiff may not raise new claims in response to a Motion for Summary Judgment, this action was procedurally doomed. Plaintiffs chose to plead only a Fourteenth Amendment claim at their own peril, and the case must now be analyzed only under that inapplicable framework.

Alvereze, 498 F.Appx. 867, 876 (11th Cir. 2012)("[plaintiff] does not allege a violation of his Fourth Amendment right to be free from unreasonable seizure and, consequently, fails to state a claim for which relief can be granted."). In Bloom, the plaintiff alleged various claims under 42 U.S.C. § 1983, including a specific claim of arrest without probable cause, false arrest, and malicious prosecution. Id. at 872. Nevertheless, because the plaintiff did not allege that the defendant's behavior had violated the Fourth Amendment, this Court held that plaintiff had not even stated a claim. Similarly, a Florida Federal District Court dismissed a complaint "because the supporting factual basis of plaintiff's claims . . . did not actually support any of his legal claims . . .." Delor v. Clearwater Beach Development, LLC, 2008 Westlaw 1925264 (S.D. Fla. 2008). The court went on to note that "even a cursory review of the complaint reveals that plaintiff has failed to allege facts *which actually support any of his four counts*. . .." Id. at 3. (Emphasis supplied).

As illustrated by the order of Magistrate Judge G. R. Smith, in the Southern District of Georgia, it does matter what claims are set forth in the Plaintiffs' Complaint. Williams v. Bryan Cnty., CV409-107, 2009 WL 5149488 (S.D. Ga. Dec. 22, 2009). In the order from Williams, when presented with an

almost identical procedural situation, Judge Smith noted that it is not sufficient to plead a Fourteenth Amendment claim if the claim is one properly governed by the Fourth Amendment. Id. In that case, the plaintiffs specifically alleged that their detention and false arrest claims were brought "under the provisions of the Fourteenth Amendment . . .." Id.

In the instant case, Plaintiffs were made aware of the need to amend their Complaint to assert a Fourth Amendment claim, Dkt. No. 13, but failed to do so prior to the expiration of the deadline for such amendments. Based upon other authority from this Court, once this case proceeded to the summary judgment stage, it was too late for the plaintiffs to correct the fatal shortcoming in their pleadings, Gilmore v. Gates, McDonald & Company, 302 F.3d 1312 (11th Cir. 2004). Simply, as the only federal claim set forth in Plaintiffs' Complaint is one arising under the Fourteenth Amendment to the United States Constitution, summary judgment is required. Graham v. Conner, supra.

4. Plaintiffs' claims for declaratory relief should be dismissed for several different reasons.

A. GeorgiaCarry.Org, Inc. does not have standing.

"[A] plaintiff must establish standing, which requires a showing that

> (1) [He] had suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
>
> (2) The injury is fairly traceable to the challenged action of the defendant and
>
> (3) It is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Georgia Carry.Org, Inc. v. Georgia, 687 F.3d 1244, 1251 (11th Cir. 2012). "The 'injury' in this pre-enforcement context is the well founded fear that comes with the risk of subjecting oneself to prosecution for engaging in allegedly protected activity." Id. at 1252. This Court has "held that a risk of prosecution is sufficient if the plaintiff alleges (1) that an actual threat of prosecution was made, (2) that prosecution is likely, or (3) that a credible threat of prosecution exists based on the circumstances. [Cit.] To show that a prosecution is likely or a credible threat exists, a plaintiff must show that there is 'a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement.'" Id. This Court "look[s] to see whether the plaintiff is seriously interested in disobeying, and the defendant seriously intent on enforcing the challenged measure." Id.

In Georgia Carry.Org, Inc. v. Georgia, supra, the plaintiff was making a facial challenge to a portion of the Georgia Weapons License statutes that dealt with the possession of a firearm in a church. In the instant case, the Plaintiffs are not making a facial challenge to a statute, but are really complaining about Deputy Kabler's application of O.C.G.A. § 16-11-126(h)(1) and 16-11-127(c). Under the particular circumstances here, Georgia Carry.Org does not have standing for several reasons.

It is undisputed that Plaintiff Theobald was not a member of Georgia Carry.Org at the time of his interaction with Deputy Kabler. Further, there is no evidence in the record that either Plaintiff Theobald or any other member of Georgia Carry.Org is in realistic danger of having another interaction with Deputy Kabler. In fact, there is no evidence that Deputy Kabler, since he now knows Theobald possesses a weapons license, would stop Plaintiff in the future.

Moreover, there is no risk of prosecution because the Plaintiffs contend that they are, in fact, properly licensed to carry weapons. There can be no risk of prosecution because, according to the Plaintiffs, "the Georgia General Assembly, partially in response to the District Court's opinion [in the case at

bar], passed a statute prohibiting law enforcement officers from detaining a person for the purpose of checking to see if the person has a weapons carry license." Appellants' Brief, pp. 9-10. According to the Plaintiffs, "[b]eginning July 1, 2014, it will be illegal, as a matter of statutory law in Georgia, for a law enforcement officer to detain a person for the purpose of checking to see if the person" has a weapons carry license. *Id.* at 28-29. This "new Code section," (id. at p. 29), provides that a "person carrying a weapon shall not be subject to detention for the sole purpose of investigating whether such person has a weapons carry license."O.C.G.A. § 16-11-137(b). It is clear from the Plaintiffs' own description of this new statute that the statute moots their claims, and they thus have no standing to pursue declaratory relief. See, Erwin Chemerinsky, Constitutional Law: Principles and Policies § 2.7.1, p. 104 (1997) ("Mootness avoids unnecessary federal court decisions, limiting the role of the judiciary and saving the courts' institutional capital for cases truly requiring decisions.")

B. Since the Plaintiff Theobald has sued Kabler in his individual capacity only, Theobald's claims for declaratory relief should be dismissed.

Plaintiff Theobald seeks money damages and declaratory relief, and Plaintiff GeorgiaCarry.Org seeks declaratory relief only. (Complaint, ¶¶ 1, 52-55). The claims for declaratory relief are due to be dismissed because the Plaintiffs have failed to establish a constitutional violation. Further, the claims for declaratory relief are due to be dismissed because, as discussed in this section, declaratory relief may not be awarded against an officer sued in his individual capacity, as is the case here.

Theobald has sued Deputy Kabler in his individual capacity only. *See* Dkt. No. 21, p. 15 explaining that Kabler "was sued in his individual capacity" and that Plaintiff "Theobald has not sued Kabler in Kabler's official capacity." Deputy Kabler, however, in his individual capacity, is not properly the subject of any claim for declaratory relief. That is, this Court and district courts within this Circuit have consistently dismissed claims seeking declaratory relief against defendants sued in their individual capacities:

- Price v. Univ. of Alabama, 318 F. Supp. 2d 1084, 1094-1095 (N.D. Ala. 2003)(dismissing individual capacity claims for declaratory relief because if the defendant was "properly the subject of such relief at all it would only be in his official capacity.");

- Edwards v. Wallace Cmty. Coll., 49 F.3d 1517, 1524, n. 9 (11th Cir. 1995)(stating that "claims for injunctive or declaratory relief...are considered to be official capacity claims against the relevant governmental entity.");

- Santhuff v. Seitz, 385 F. App'x 939, 943, n.3 (11th Cir. 2010)(trial court dismissed claims seeking injunctive relief in Section 1983 lawsuit alleging violations of Fourth and Fourteenth Amendment rights "because the lawsuit was brought against [the officer] only in his individual capacity" and citing Edwards for the proposition that "claims for injunctive or declaratory relief are considered official capacity claims against the relevant governmental entity"); and

- Marshall v. West, 507 F. Supp. 2d 1285, 1304 (M.D. Ala. 2007)(dismissing claims for declaratory relief in Section 1983 lawsuit alleging illegal traffic stop, false arrest, and unlawful search against two deputies because the plaintiff brought individual-capacity claims against the deputies, not official-capacity claims)

Since Theobald has sued Kabler in his individual capacity only, his claims for declaratory relief are subject to summary judgment.

C. Plaintiffs Are Not Entitled to Declaratory or Injunctive Relief.

Plaintiffs seek, in various forms, declarations that Kabler's actions were improper in this case. (Dkt. No. 9, p. 7; Complaint, Prayers for Relief).

The Federal Declaratory Judgment Act states: "In a case of actual controversy . . . any court of the United States . . . may declare the rights and

other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201 (emphasis supplied). Based upon the facts revealed by discovery, there is no "actual controversy" of "sufficient immediacy and reality" to provide declaratory relief. Golden v. Zwickler, 394 U.S. 103, 108 (1969). Simply, at this point, Plaintiffs have not established that the threshold for obtaining declaratory relief could be met even if they had standing. See, Smith v. Montgomery County, Md, 573 F.Supp. 604 (D. Md. 1983). It is clear from the record that Plaintiff Theobald has no reason to believe that Deputy Kabler will stop him in the future, let alone stop him and ask to see his weapons' license (Depo. of Theobald, p. 35)

Under such circumstances, Plaintiffs' request for declaratory and injunctive relief should be treated similarly to the request by one of these same plaintiffs in GeorgiaCarry.Org, Inc. v. Metro. Atlanta Rapid Transit Auth., CIV.A 109-CV-594-TWT, 2009 WL 5033444 (N.D. Ga. Dec. 14, 2009). Therein, Judge Thrash noted, as follows:

> It is not, however, necessary to decide whether MARTA'S firearms policy as applied to any person openly carrying a firearm is unconstitutional. In addition to standing, the court must also determine for itself whether declaratory and injunctive relief are appropriate remedies. For this case they are not. C.

L. Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 498, n. 11 (1st Cir. 1992); Eccles v. Peoples Bank of Lakewood Village, 333 U.S. 426, 431 (1948).

First, to grant the plaintiff's declaratory and injunctive relief would require the court to decide uncertain questions of state and constitutional law. C. L. Dia, 963 F.2d at 494 ('declaratory judgments concerning the constitutionality of government conduct will almost always be inappropriate when the constitutional issues are freighted with uncertainty and the underlying grievance can be remedied for the time being without gratuitous exploration of unchartered constitutional terrain.') State Auto Ins. Companies v. Summy, 234 F.3d 131, 135 (3rd Cir. 2000)('where the applicable state law is uncertain or undetermined, district courts should be particularly reluctant to entertain declaratory judgment actions.')

Second, plaintiffs never clearly distinguish their claims for compensatory damages from their claims for declaratory and injunctive relief so the parties have not adequately discussed the issues of general declaratory and injunctive relief. *See* Eccles, 333 U.S. at 434 ('judgment on issues of public moment based on such evidence, not subject to probing by judge and opposing counsel, is apt to be treacherous.')

Third, because case law interpreting the Fourth Amendment requires highly case specific determinations of reasonableness of particular searches and seizures, general declaratory and injunctive relief may not provide significant guidance to any party. C. L. Dia, 963 F.2d at 494, ('courts should withhold declaratory relief as a matter of

> discretion if such redress is unlikely to palliate, or not needed to palliate, the fancied injury . . ..').
>
> Fourth, if any members of Georgia Carry.Org suffer a constitutional violation in the future, they will have an adequate remedy at law under § 1983, just as [plaintiff] would have had if his constitutional rights had been violated. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 113 (1983); Daniels v. Southfort, 6 F.3d 484, 486 (7th Cir. 1993).
>
> Taken as a whole, these four reasons demonstrate that declaratory and injunctive relief are not appropriate remedies for this case.
>
> Id. at * 7.

Further, in Rizzo v. Goode,, the Supreme Court noted that "the principles of equity nonetheless militate heavily against the grant of an injunction except in the most extraordinary circumstances."423 U.S. 362, 379 (1976). The Court noted that considerations of federalism should preclude federal court intervention "where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments...." Id. at 380. The Supreme Court in Rizzo also expressed serious doubts about whether individuals in the Plaintiffs' position could even establish the requisite Article

III case or controversy to seek injunctive relief. The Court noted that "while 'past wrongs are evidence bearing on the whether there is a real and immediate threat of repeated injury', the attempt to anticipate under what circumstances the [plaintiff] would be made to appear in the future before [defendants] 'takes us into the area of speculation and conjecture.' [cit.]. . . . Thus, we think plaintiffs lack the requisite 'personal stake in the outcome....'" Rizzo, 423 U.S. at 372.

"Where injunctive relief is at issue, moreover, 'to have standing . . . a plaintiff must show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future.'" Powell v. Barrett, supra, 376 F.Supp.2d at 1357. "Indeed, the Supreme Court has appeared singularly unwilling 'for purposes of assessing the likelihood that state authorities will reinflict a given injury . . . to assume that the party seeking relief will repeat the type of misconduct that would once against place him or her at risk of that injury.'" Id.

5. The Plaintiffs' state-law claims.

A. The Plaintiffs have abandoned any state-law claims

Plaintiffs' initial brief in their capacity as Appellants does not address any state-law claims. They have, therefore , abandoned any arguments with regard to these claims on appeal. Acquisto v. Secure Horizons ex rel. United Healthcare Ins. Co., 504 F. App'x 855, 856, fn. 1 (11th Cir. 2013)(citing Irwin v. Hawk, 40 F.3d 347, 347 n. 1 (11th Cir.1994).

CONCLUSION

For the reasons set forth herein, this Court should affirm the Order of the District Court and the Plaintiffs' claims should be dismissed.

Respectfully submitted, this 27th day of June, 2014.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney, counsel for Appellee, certifies that this brief complies with the type volume limitation set forth in FRAP 32(a)(7)(B). Pursuant to FRAP 32(a)(7)(C)(I), the undersigned further certifies that the foregoing brief contains 11,593 words, exclusive of those portions of the brief which are not considered for word count purposes, as measured by the word count of the word processing system used to prepare the brief (Corel Word Perfect 12.0 for Windows). The type size and style used in this brief in Font Size 14, Book Antiqua style.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served all parties with a copy of the foregoing pleading, by depositing same in the United States mail with adequate potage thereon to assure delivery to:

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