UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

GEORGIACARRY.ORG, INC., *et.al.*,	)	
	)	
Plaintiffs	)	
	)	
v.	)	
	)	Civil Action No. 2:12-CV-171-LGW
BRIAN KABLER,	)	
	)	
Defendant	)	
	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Introduction

Plaintiff Mahlon Theobald commenced this case after he was stopped by Defendant McIntosh County, Georgia Sheriff's Deputy Brian Kabler and detained while Kabler investigated Theobald's license to carry a weapon. Kabler told Theobald that possession of a weapon is grounds for such a detention and investigation and that Theobald could expect similar detentions in the future if he carried a weapon. Theobald contends that the detention was unlawful under state and federal law, and seeks damages together with appropriate declaratory and injunctive relief.

Theobald filed this case in the Superior Court of McIntosh County, but Kabler removed the case to this Court on the grounds that some of Plaintiffs' claims involve federal questions. Kabler has filed a Motion for Summary Judgment. Theobald will show that Kabler is not entitled to judgment as a matter of law and that Kabler's Motion must therefore be denied.

Background

Please see Plaintiffs' Statement of Material Facts [Doc. 21-1] for complete background of the case. Plaintiff will reference those facts below as needed.

Argument

I. Kabler Erroneously Focuses on Procedure

In his Motion, Kabler takes an almost obsessive position regarding the procedural aspects of Theobald's claims, devoting almost none of his Brief to the merits of those claims. Kabler chooses to avoid altogether ***any*** discussion of the propriety of law enforcement engaging in a forcible detention of a person just to see if the person has a license to carry a firearm. That topic will be discussed in greater detail below. This section will be devoted to Kabler's excessive procedural concerns.

Kabler has convinced himself that Plaintiff mistakenly, and fatally, pled a violation of the 14th Amendment in his Complaint. 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. Theobald contends that doing so violates his right to be free from unreasonable seizures of his person, a provision contained within the Fourth Amendment and applied to the states via the Due Process Clause of the 14th Amendment.

What Kabler overlooks is that the Fourth Amendment does not apply directly to the states or state actors. *Weeks v. U.S.,* 232 U.S. 383, 398 (1914) ("The 4th Amendment is not directed to individual misconduct of [state] officials.") The result in *Weeks* was modified by the Court some 35 years later in *Wolf v. Colorado,* 338 U.S. 25 (1949) *overruled on another point by Mapp v.*

Ohio, 367 U.S. 643 (1961), wherein the Court said, "The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States ***through the Due Process Clause.*** *Id.* at 27. The Court continued, "[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the ***guaranty of the Fourteenth Amendment.***" *Id.* at 28 [emphasis supplied]. *Mapp* reaffirmed the concept that the 14th Amendment guarantees freedom from unreasonable searches and seizures by the states, and extended the exclusionary rule to illegal state searches, where it previously had applied only to illegal federal searches. 367 U.S. at 655 ("Since the Fourth Amendment's right of privacy has been declared enforceable against the States ***through the Due Process Clause of the Fourteenth***, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.") [Emphasis supplied].

The holdings of *Weeks* and *Wolf* remain intact. The Fourth Amendment does not ***directly*** apply to the states, but the ***provisions*** of the Fourth Amendment apply to the states via the Due Process Clause of the Fourteenth Amendment. While it has become somewhat common in modern parlance to speak of "Fourth Amendment rights" in the context of a state government, it nonetheless is technically incorrect to do so. It is the Fourteenth Amendment that guarantees a person's right to be free from unreasonable searches and seizures from states, not the Fourth Amendment. The Supreme Court said so in *Weeks, Wolf,* and *Mapp,* and those principals remain good law. Kabler would turn these 100 years of Supreme Court precedent on their head and now have this Court declare that it is not the 14th Amendment, but the 4th Amendment, that protects a citizen from unreasonable seizures by state actors. Theobald has no objection to Kabler's use of

the common parlance of 4th Amendment rights vis-à-vis states. He does, however, most certainly object to his case being dismissed because he used the correct, and not the common, parlance in his Complaint.

As Kabler pointed out in his Response to Plaintiffs' Motion for Judgment on the Pleadings, unreasonable seizure claims must be ***analyzed*** under the Fourth Amendment and not the Fourteenth Amendment. *Graham v. Connor,* 490 U.S. 386 (1989). This is so because there is only one body of federal constitutional search and seizure law, not two. "There is no war between the Constitution and common sense." *Mapp,* 367 U.S. at 657.

Contrary to Kabler's assumption, *Graham* does not say anything about how unreasonable seizure claims must be ***pled.*** By lifting quotes from *Graham* and interpreting them out of context, Kabler has concluded that Graham announced a new rule of pleading It did not, as a closer look at *Graham* will reveal. As the Supreme Court recited, "[Graham] commenced this action under 42 U.S.C. § 1983 … alleging … excessive force … in violation of 'rights secured to him under the Fourteenth Amendment….'" 490 U.S. at 390. The district court dismissed Graham's claim, relying on a generic due process subjective reasonableness standard and determining that the officers did not have malicious intent in injuring Graham. *Id.*

The Supreme Court reversed, ruling that the district court should have used an objective reasonableness 4th Amendment standard ***in analyzing Graham's 14th Amendment Claim.*** Thus, even though the district court (and the 4th Circuit) had rejected Graham's 14th Amendment claim for excessive use of force, the Supreme Court reinstated it. Nowhere in *Graham* does the Court say, knowing full well that Graham pled under the 14th Amendment, that Graham's claim should have been dismissed because Graham should have pled a 4th Amendment claim. Instead, the

Supreme Court reinstated Graham's case, telling the lower courts to use a 4th Amendment objective reasonableness analysis. Thus, rather than supporting Kabler's position, *Graham* is a case where the Supreme Court implicitly approved pleading 14th Amendment claims for violation by state actors of the provisions of the 4th Amendment.

Kabler actually ignores modern pleading requirements altogether. All that is required in the complaint is 1) a statement on the court's jurisdiction; 2) "a short and plain statement of the claim showing that the pleader is entitled to relief" and 3) a demand for the relief sought. Fed.R. Civ.Proc. 8(a).

> [A]ll the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests…. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures…. Following the simple guide of Rule 8(f) [now 8(e)] that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. ***The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.***

Conley v. Gibson*,* 355 U.S. 41, 47 (1957) [Emphasis supplied]. Kabler asks this Court to do exactly what *Conley* said not to do. Kabler insists that Theobald should have pled his illegal seizure claims as Fourth Amendment claims, not Fourteenth Amendment claims, despite the holdings of *Weeks, Wolf,* and *Mapp,* and the implicit approval of *Graham.*

The irony is that Kabler suffers no misconception of what Theobald's claims are. Kabler acknowledges that Theobald is making illegal seizure claims. He just insists that Theobald should have called them Fourth Amendment claims and not Fourteenth Amendment claims, apparently believing that commonly used shorthand somehow has supplanted technical

correctness as the only appropriate form of pleading. Kabler cites an unpublished opinion of the 11th Circuit, *Bloom v. Alvereze,* 498 F.Appx. 867 (11th Cir. 2012) in his support. *Bloom,* however, does not involve a case where a plaintiff pled 14th Amendment violations for illegal seizures. In *Bloom,* the plaintiff pled no constitutional violation at all. On the other hand, discussion of 14th Amendment protections against unreasonable seizures (or searches) is not rare. *See, e.g., Gall v. Com.,* 607 S.W.2d 97 (Ky. 1980) ("4th and 14th Amendment protection against unreasonable search and seizure…."); *Tikalsky v. City of Chicago,* 687 F.2d 175 (7th Cir. 1982) ("reasonableness of a search under the 14th Amendment"); *Williams v. Brierley,* 291 F.Supp. 912 (E.D. Pa. 1968) ("search was a violation of the 14th Amendment", *citing Mapp*); *Smith v. Georgia,* 120 Ga.App. 613 (1969) ("unreasonable search and seizure prohibited by the 14th Amendment"); *Illinois v. Belousek,* 110 Ill.App.2d 442 (1969) ("search of his auto violated the 14th Amendment"); *Arizona v. Tigue,* 95 Ariz. 45 (1963) ("illegal search and seizure in violation of the 14th Amendment"); *Burge v. Texas,* 443 S.W.2d 720 (Tex.Cr.App. 1969) ("illegal search and seizure in violation of the 14th Amendment"); *Louisiana v. Pickens,* 245 La. 680 (1964) ("unlawful search, seizure, and arrest was in violation of the 14th Amendment").

Kabler relies on another unpublished case, this one from a District Court in Florida, *Delor v. Clearwater Beach Development, LLC,* No. 1:08-cv-20402. Kabler lists a decision year of 2008, but he lists no date. Because the decision is not published, it is not possible to know what order from that case Kabler relies upon, but Theobald notes that this case involved a *pro se* plaintiff bringing unspecified RICO claims that the District Court found to be frivolous and for which it ultimately awarded Rule 11 sanctions. The case had nothing to do with Kabler's issue of Fourth Amendment v. Fourteenth Amendment pleading, and it is therefore unhelpful to

Kabler's position.

Kabler also relies on unpublished orders from this Court in another case, *Williams v. Bryan County,* No. 4:09-CV-107. In *Williams,* the plaintiff alleged violations of his Fourteenth Amendment rights and later sought to amend his complaint after the deadline to do so in the scheduling order. The ability to amend a complaint is not at issue in the instant case and that aspect of *Williams* is therefore inapplicable. The plaintiff later voluntarily dismissed his complaint with prejudice. Again, there is no question of a voluntary dismissal in the instant case. What Kabler really wants this Court to do is apply an issue that never was decided in *Williams* to the instant case. Kabler implies that the *Williams* court ruled that a complaint alleging 14th Amendment violations against a state actor when the violations are related to 4th Amendment provisions must be ***pled*** under the 4th Amendment and not the 14th Amendment. *Williams* did not so hold. The plaintiff in *Williams* apparently concluded that he should have pled under the 4th Amendment, but the Court did not rule one way or the other on that issue because the issue was never before the Court. The plaintiff dismissed his case voluntarily before that issue went before the Court. This Court can hardly be expected to follow the holding in a case that never happened.

Kabler has not cited a single case in which even a 14th Amendment search or seizure claim was pled that way and dismissed because it should have been pled as a 4th Amendment claim. Even though Kabler dug extensively into unpublished decisions to find even the meager holdings that he did find, apparently no court in any jurisdiction anywhere in the United States has ruled as Kabler would have this Court rule.

Having thoroughly debunked Kabler's "wrongful pleading" defense, Theobald will now

turn to the merits of his claims.

II. **An Officer May Not Stop a Person Just for Carrying a Firearm**

The central legal issue in this case was briefed already in Plaintiffs' Motion for Partial Judgment on the Pleadings [Doc. 9]. Kabler successfully deflected that Motion [Doc. 16] by convincing the Court that he should be allowed to produce evidence that he had reasonable articulable suspicion, or probable cause, to detain Theobald.[1] Now that discovery has closed, it is clear that Kabler cannot produce such evidence:

> Q. And you stopped him by activating your emergency lights on your squad car?
> A. Correct.
> Q. And prior to activating your emergency lights had you seen him commit any traffic infractions?
> A. No, sir.
> Q. Had you seen him do anything that made you suspicious that he had committed or was committing a crime?
> A. No, sir.
> Q. With regard to what you observed about his firearm at the store, did you believe that anything he did or didn't do constituted a crime?
> A. No.
> Q. Did you suspect, based on everything that you saw, including the firearm, that he had committed or was committing or was about to commit a crime?
> A. No, sir.

Deposition of Brian Kabler, p. 18, ll. 20-25; p. 19, ll. 1-13.

> Q. So prior to the time that you stopped him you hadn't formed any kind of opinion or belief or suspicion that he did or didn't have a weapons permit?
> A. I didn't form any opinion on that.
> Q. You didn't have any idea at all?
> A. I had no idea.

Deposition of Brian Kabler, p. 34, l. 1.

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[1] Defendant emphasized his Answer to Par. 12 of the Complaint, in which he denied that "Defendant had no reasonable, articulable suspicion to believe that Theobald had committed, was

It is clear, therefore, that Kabler had no reasonable articulable suspicion and he had no probable cause. Instead, he performed a traffic stop on Theobald for the sole and express purpose of checking to see if Theobald had a license to carry a firearm:

> Q. And when you stopped Mr. Theobald what was the purpose of your stop? What were you intending to accomplish?
>
> A. To identify that he wasn't – you know, that he had a permit to carry the weapon that he had attempted to conceal in front of us. He didn't make an attempt, he concealed it in front of us.

Kabler Deposition, p. 35, ll. 2-8. This is consistent with what Kabler told Theobald on the scene:

> Defendant looked at Theobald's licenses and told Theobald that the reason Defendant stopped Theobald was because Defendant had noticed at the convenience store that Theobald had a weapon.

Verified Complaint, ¶ 19; Answer, ¶ 19. Kabler elaborated:

> Defendant returned to Theobald's vehicle [and] said, "For future reference, at any time I see a weapon, I can ask for your permit, OK?"

Verified Complaint, ¶27; Answer, ¶27.

II.A. Kabler Acted Based On His Incorrect Understanding of the Law

Kabler articulated his legal position succinctly in the much-discussed Par. 12 of his Answer:

> Under Georgia law, a *prima facie* case of a charge of carrying a concealed weapon or of possessing a weapon without a license, is stated solely by proof that the plaintiff carried a pistol in a public place, and it is a citizen's burden to prove he has a valid license. As such, a law enforcement officer is entitled to inquire further upon observation of a weapon.

Kabler's position represents an incorrect view of the law. First, the crime of carrying a concealed weapon was abolished in Georgia in 2010, some two years before the incident. 2010 Ga. Act

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committing, or was about to commit a crime."

643. Obviously, Kabler cannot have a *prima facie* case for a non-existent crime. Likewise, there is no crime of "possessing a weapon without a license."

There is, however, a similarly-worded crime of ***carrying*** a weapon without a license, O.C.G.A. § 16-11-126(h):

> (1) No person shall carry a weapon without a valid weapons carry license unless he or she meets one of the exceptions to having such license as provided in subsections (a) through (g) of this Code section.
> (2) A person commits the offense of carrying a weapon without a license when he or she violates the provisions of paragraph (1) of this subsection.

Assuming *arguendo* that Kabler was referring to ***carrying*** a weapon without a license, rather than ***possessing*** a weapon without a license, Kabler still is wrong about the application of that statute. Kabler asserts, without authority, that "it is a citizen's burden to prove he has a valid license." There simply is no basis for that assertion.

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:[2]

> [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.

Head v. State, 235 Ga. 677, 679 (1975).

> [T]he state does not make out a prima facie case of carrying a pistol without a license by merely showing that the accused carried the pistol, ***but must also show that she did not have a license*** for the pistol….

[2] The former O.C.G.A. § 16-11-128 provided "A person commits the offense of carrying a pistol without a license when he or she carries on or about his person … any pistol or revolver without having on his person a valid license…." O.C.G.A. § 16-11-128 was repealed in 2010 Ga. Act 643 and replaced with O.C.G.A. § 16-11-126(h), the current crime of carrying a weapon without a license.

Fleming v. State, 138 Ga.App. 97, 98 (1976). [Emphasis supplied].

One of the cases overruled by the Supreme Court of Georgia in *Head* was *Johnson v. State,* 230 Ga. 196 (1973), in which the Court had approved 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). The Fifth Circuit condemned this holding of the Supreme Court of Georgia as a violation of due process, improperly shifting the burden of proof to a criminal defendant to disprove an element of the crime. *Johnson v. Wright,* 509 F.2d 828 (5th Cir. 1975). ("We hold that the trial court's instruction violated appellant's right to due process in permitting the jury to infer that his pistol was unlicensed from evidence that he possessed one, and also in shifting to him the burden of proof on an essential element of the offense.")

The opinions of the Fifth Circuit issued prior to October 1, 1981 have been adopted by the Eleventh Circuit and are therefore binding on this Court. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*). Thus, there is 37-year-old binding precedent that the lack of a license is an element of the crime, contrary to Kabler's assertion. Kabler admits that, until Theobald presented his Florida license to Kabler, Kabler had no idea whether (or not) Theobald had a license.[3] Because Kabler had no way of knowing whether Theobald had a license, Kabler had no basis to stop and detain Theobald.

[3] Georgia has reciprocity with Florida for the purpose of weapons carry licenses. O.C.G.A. § 16-11-126(e); law.ga.gov/firearm-permit-reciprocity ("Georgia currently reciprocates in recognizing firearms licenses with the following states: Alabama, Alaska, Arkansas, Arizona, Colorado, ***Florida,*** Idaho, Indiana, Iowa, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Wisconsin, and Wyoming.") [Emphasis supplied]. Kabler also admitted this reciprocity in his deposition. Kabler Depo., p. 24, ll. 7-18.

Theobald notes that he made the above argument in their Motion for Judgment on the Pleadings. Kabler observed in responding to that Motion that the Court of Appeals of Georgia continued to follow the overruled line of cases that unconstitutionally shifted the burden of proof from the state to the criminal defendant in carrying weapons without licenses cases. Doc. 13, p. 10. Kabler concludes, "Georgia law is not exactly crystal clear regarding the burden of proof." *Id.* Spurious decisions of the Court of Appeals of Georgia notwithstanding, both the Supreme Court of Georgia and the Fifth Circuit have ruled that it would be unconstitutional to shift the burden to the criminal defendant as the cases upon which Kabler relies purport to do.

Kabler's reliance on his mistaken understanding of law is fatal to his defense:

> [A]n officer's reasonable mistake of fact may provide the objective grounds for reasonable suspicion or probable cause required to justify a traffic stop, ***but an officer's mistake of law may not.***

US v. Chanthasouxat, 343 F.3d 1271, 1276 (11th Cir. 2003). Thus, Kabler's mistaken belief, however well-intentioned or sincere, that the burden of proof lies with a person seen carrying a firearm to prove the person's authorization to do so, cannot form the basis for a valid traffic stop.

There is no provision in Georgia law even requiring a weapons carry licensee to display his license to law enforcement officers on demand. Even if there were, however, it would be unconstitutional to stop a person seen carrying a firearm, just to see if the person had a license to do so. *See, e.g., Delaware v. Prouse,* 440 U.S. 648, 661 (1979), holding that stopping a motorist just to see if he has a driver's license is unconstitutional ("When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations – or other ***articulable basis amounting to reasonable suspicion that the driver is unlicensed*** or his vehicle unregistered – we cannot conceive of any legitimate basis upon which a

patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver.") [Emphasis supplied].

Moreover, carrying a firearm is not the inherently dangerous activity that driving a car is. The majority of states do not require a license to carry a firearm.[4] On the other hand, every state requires a license to drive a car. In 2011, there were 34,677 deaths from motor vehicle accidents in the United States. There were 12,174 firearms deaths from accidental discharges and homicides by firearms.[5]

Given that there are three times as many deaths from automobile accidents, that driving is much more heavily regulated than carrying a firearm, and that carrying a firearm is explicitly protected by the Constitution, there can be no rationale for not applying the rule from *Prouse* to weapons carry licenses. Kabler had no idea whether Theobald possessed a license to carry a firearm or not. He simply had no legally valid reason for detaining Theobald.

II.B. Theobald's Concealing of the Firearm is Insignificant

In his deposition, Kabler attempts to justify the traffic stop by describing Theobald's actions upon entering the convenience store. Kabler said a gust of wind, or air pressure, blew

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[4] Plaintiff GeorgiaCarry.Org, Inc. has surveyed state laws regarding carrying firearms without a license. There are 30 states that do not require a license to carry a firearm (Washington, Oregon, California, Utah, Alaska, Nevada, Arizona, Idaho, Montana, Wyoming, Colorado, New Mexico, South Dakota, Nebraska, Kansas, Missouri, Louisiana, Wisconsin, Michigan, Kentucky, Alabama, Ohio, West Virginia, Virginia, North Carolina, Pennsylvania, Maine, Vermont, New Hampshire, and Delaware). There are 19 states that require a license to carry firearms (Hawaii, North Dakota, Minnesota, Iowa, Arkansas, Oklahoma, Texas, Indiana, Tennessee, Mississippi, Georgia, Massachusetts, Connecticut, Rhode Island, New Jersey, New York, South Carolina, Florida, and Maryland). One state, Illinois, forbids the carrying of firearms and does not issue licenses to do so. The 7th Circuit has declared Illinois' scheme to be unconstitutionally violative of the Second Amendment. *Moore v. Madigan,* 702 F.3d 933 (2012).

[5] U.S. Centers for Disease Control, *National Vital Statistics Reports,* Vol. 61, No. 6, available online at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_06.pdf.

open Theobald's blazer and allowed Kabler to view Theobald's firearm on his waistband. Kabler Depo., pp. 12-15. Kabler says that Theobald "grabbed his outer garment or the jacket and closed it." *Id.,* p. 12, ll. 12-14. Kabler called this action "suspicious," *Id.,* p. 15, l. 17. He believed Theobald was trying to conceal his firearm in front of the Kabler and other officers.

Kabler's other testimony, however, belies the sincerity of his suspicions. As already noted, Kabler admits he had no idea whether Theobald had a license or not. He also admits he had no reason to believe Theobald had committed, was committing, or was about to commit a crime. Moreover, Kabler testified, "To the best of my knowledge, you're not allowed to open carry in the State of Georgia [with or without a permit]." Kabler Depo., p. 32, ll. 20-25. Kabler fails to reconcile his suspicion of Theobald's concealing a firearm with his (mistaken) belief that a person with a license must conceal his firearm and cannot carry it openly. If, as Kabler believes, a person with a license to carry a weapon must conceal it, there should have been nothing suspicious about Theobald apparently attempting to conceal a firearm. Quite the contrary, a reasonable officer in Kabler's position (with the mistaken understanding of the law) logically would believe a citizen would be alarmed at inadvertently exposing a firearm in front of law enforcement.

Indeed, Theobald hails from a state (Florida) that has the very law that Kabler ascribed to Georgia. Although in Georgia a person may carry a firearm openly or concealed with a license, Florida ***requires*** licensees to carry their firearms concealed and criminalizes the open carry of firearms, even by licensees. Florida Statutes § 790.053. It was only natural, therefore, for Theobald's instinct to be to follow the rule of his home state and keep his firearm concealed.

Moreover, it also is natural, when one's garment is blown open by the wind, to hold the garment closed. Kabler's "suspicions" were unfounded.

To be lawful, a *Terry* stop "must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid v. Georgia,* 448 U.S. 438, 440 (1980); *United States v. Boyce,* 351 F.2d 1102, 1108 (11th Cir. 2003). Taking the facts in a light most favorable to Kabler, Kabler saw Theobald walk into a convenience store, saw a gust of wind blow open Theobald's jacket, revealing a firearm and saw Theobald pull his jacket back down, re-concealing the firearm.

Kabler viewed these facts as suggesting that Theobald did not have a license to carry the gun. In particular, Kabler says Theobald's actions of concealing the gun in the officers' presence indicated that Theobald might not have had a license. But Kabler also says he had no reason to believe or even suspect that Theobald had no license. In short, Kabler had no valid basis for detaining Kabler. When an officer is "[S]topping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." *Brown v. Texas,* 443 U.S. 47, 52 (1979).

II.C. Courts Around the Country Have Rejected Detentions for Carrying Firearms

In addition, the Supreme Court has ruled that there is no "firearm exception" to the Fourth Amendment. *Florida v. J.L.,* 529 U.S. 266 (2000). Other courts around the country likewise have ruled that possessing a firearm in a jurisdiction where such possession is legal (even if a license is required) is not grounds for stopping a person seen carrying a firearm:

> [Officer] Martin's impetus to investigate the Dudleys was a radio call alerting him to the presence of two people at the truckstop in possession of some guns. Of course the possession of firearms is not, generally speaking, a crime unless you happen to be a convicted felon, the firearms are otherwise illegal, ***or you are not licensed to possess the gun.*** Martin, presumably not clairvoyant, could not have known, and did not know, the Dudleys and their guns met all three of these criteria…. A telephone report of citizens possessing guns or merely engaging in "suspicious" activity, standing alone, cannot amount to reasonable suspicion of crime.

United States v. Dudley, 854 F.Supp. 570, 580 (S.D. Ind. 1994). [Emphasis supplied].

> For all the officers knew, even assuming … that Ubiles possessed a gun, Ubiles was another celebrant lawfully exercising his right under Virgin Islands law to possess a gun in public…. [T]he authorities in this case had no reason to believe that Ubiles was engaged in or planning or preparing to engage in illegal activity due to his possession of a gun. Accordingly, ***in stopping him and subsequently searching him, the authorities infringed on Ubiles's Fourth Amendment Rights.***

United States v. Ubiles, 224 F.3d 213, 218 (3rd Cir. 2000). [Emphasis supplied].

> The undisputed facts establish that Mr. St. John's seizure was unreasonable. Defendants lacked a justifiable suspicion that Mr. St. John had committed a crime, was committing a crime or was about to commit a crime. Indeed, Officer McColley conceded that he did not observe Mr. St. John committing any crimes and that he arrived at the theater with the suspicion that Mr. St. John was merely "showing a gun," which is not illegal in the State of New Mexico.

St. John v. McColley, 653 F.Supp.2d 1155 (D. N.M. 2009).

> In a state such as New Mexico, which permits persons to lawfully carry firearms, the government's argument [that the officer's investigatory detention of defendant was justified by concern for his safety and the safety of bystanders] would effectively eliminate Fourth Amendment protections for lawfully armed persons.

United States v. King, 990 F.2d 1552, 1559 (10th Cir. 1993).

Quite recently, the Fourth Circuit decided a case arising from North Carolina where officers detained a person on account of an openly carried firearm. The officers said that until they stopped the person to see if he was a felon, they had no way of knowing if he carried the

firearm legally. The Court said:

> Being a felon in possession of a firearm is not the default status. More importantly, where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention. Permitting such a justification would eviscerate *Fourth Amendment* protections for lawfully armed individuals in those states.

United States v. Black, 707 F.3d 531 (4th Cir., 2013).

II.D. A Reasonable Officer In Kabler's Position Would Not Have Detained Theobald

Kabler asserts that Theobald was required to have a license to carry a firearm in a convenience store. O.C.G.A. § 16-11-126. While this is a correct statement of the law, it does nothing to help Kabler. Kabler saw Theobald carry a firearm in a convenience store, an activity that required a license, and Kabler saw Theobald drive a car on the highways of Georgia, another activity that required a license. Kabler had no reason to believe Theobald lacked either license. Nevertheless, Kabler performed a forcible detention, a "seizure," of Theobald, for the sole purpose of checking to see if Theobald had the firearms license.

Kabler argues that nothing in Georgia law specifically says a person can, or cannot, be detained to see if he has a GWL, so he ought to get the benefit of the doubt. Unfortunately for Kabler, things do not work that way. A law enforcement officer is not free to detain a person whenever there is not a statute prohibiting such detention. Instead, an officer cannot detain a person without a warrant, and a warrantless detention is *per se* unreasonable, unless it meets a well-defined exception. The only exception Kabler can find is that he claims to have been performing a *Terry* stop for the purpose of determining if Theobald had a GWL.

The problem with this claim is that Kabler cannot perform random license checks. *See Prouse, supra.* Kabler cites to *United States v. Lewis,* 674 F.3d 1298 (11th Cir. 2012), a case

originating in Florida. In *Lewis,* the defendant was arrested for carrying a concealed weapon after law enforcement officers saw a firearm on his person. The 11th Circuit determined that knowledge that a person in Florida has a concealed weapon forms sufficient probable cause to arrest, because having a license to carry in Florida is an affirmative defense – the lack of a license is not an element of the crime. 674 F.3d at 1304 (citing Fla.Stat. § 790.01(3)). Incredibly, Kabler calls this scenario "close enough" to fit the instant case.

Apparently for Kabler, if Theobald's conduct would have been a crime in any state besides Georgia, it was constitutionally permissible to detain Theobald for such conduct in Georgia. Again, that is not how things work. Either Kabler had reasonable suspicion to believe crime was afoot ***in Georgia*** or he did not. All he saw was Theobald wearing a firearm in a convenience store and, at most, pull his jacket down when a gust of wind blew it open.

The problem with Kabler's theory is that it is not a crime to carry a concealed weapon in Georgia, and the lack of a GWL is an element of the crime of carrying a weapon without a license (after all, the "without a license" is even in the name of the crime). Kabler therefore could not have legally detained Theobald unless he had a reasonable articulable suspicion that Theobald lacked a GWL. Pulling down a jacket cannot even remotely give a reasonable officer suspicion that a person lacks a license. In Georgia, a person with a GWL may carry a firearm openly or concealed, at his option. No method of carry is prescribed (or proscribed). The fact that Theobald pulled his jacket down is of no significance.

III. **Kabler is Not Entitled to Qualified Immunity**

Kabler asserts that he is entitled to qualified immunity. In analyzing a qualified immunity assertion, the Court must determine 1) whether a constitutional right was violated; and 2)

whether the right was clearly established. *Wood v. Kesler,* 323 F.3d 872, 877 (11th Cir. 2003). Theobald already has demonstrated that his constitutional right to be free from unreasonable seizures was violated. The only question remaining is whether the law was clearly established.

"[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*. In order for such seizure to be constitutional, a reasonable officer approach is used, and "due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.*

Kabler testified that he had no opinion prior to seizing Theobald whether Theobald had a GWL or not. He further testified that his purpose in stopping Theobald was to see if Theobald had a GWL. At best, Kabler had the "unparticularized suspicion or hunch" that *Terry* dismissed as insufficient reason for a detention. The law was clearly established, and Kabler violated it.

IV. **Plaintiffs Are Entitled to Declaratory Relief**

Kabler asserts that the Plaintiffs are not entitled to any declaratory relief because there is no actual controversy between the parties. He ignores, however, that this case hinges on a controversy that is very real and very important to Plaintiffs: May an officer detain a person seen carrying a firearm solely for the purpose of checking to see if the person has a GWL? Kabler told Theobald he can stop a person "at any time" he sees a firearm. GCO and Theobald both have legitimate concerns of being detained in the future by Kabler for carrying firearms.

V. **Kabler Violated O.C.G.A. § 16-17-173**

Kabler next denies that he violated O.C.G.A. § 16-11-173, which prohibits local governments from regulating "in any manner" the possession or carrying of firearms. His sole

defense is that he personally is not a local government. First, it should be pointed out that the statute has been held to apply to the carrying of firearms. *Georgia Carry.Org., Inc. v. Coweta County,* 288 Ga.App. 748 (2007). In that case, GCO challenged a county ordinance banning carrying guns in county parks. The superior court dismissed the case, but the Court of Appeals of Georgia reversed, holding, "[T]he plain language of the statute expressly precludes a county from regulating 'in any manner [the] carrying of firearms. Under these circumstances, … the trial court erred in concluding otherwise." 288 Ga.App. at 347.

In the instant case, Kabler took actions that undoubtedly would have a chilling effect on Theobald's carriage of firearms. Kabler had the express agreement of his supervisor to do so. Kabler stated that he could do so "any time" he sees a firearm. While Kabler and the McIntosh County Sheriff's Office may not have enacted a formal policy of stopping people seen carrying firearms, a violation of the statute is not dependent on such formalities. In *Sturm, Ruger & Co., Inc. v. City of Atlanta,* 253 Ga.App. 713 (2002), a gun manufacturer successfully defended against a lawsuit by the City of Atlanta on the grounds that the City indirectly violated O.C.G.A. § 16-11-173. The Court said, "The City may not do indirectly that which it cannot do directly." 253 GA.App. at 718. By the same reasoning, McIntosh County cannot indirectly regulate the carriage of firearms by informal policy of its sheriff or deputies. Kabler may not set up a private rule about carrying firearms and use the force of law and the power of his office to implement it.

Next, Kabler asserts that he did not violate O.C.G.A. § 51-7-20, Georgia's tort statute against false imprisonment. Kabler's sole defense, however, is that his detention of Theobald was legal under federal law, so it is legal under state law. Kabler's logic is circular, however, because the reason he asserts the detention was legal under federal law is because it was legal

under state law. Thus, all defenses point to state law. Kabler admits that nothing in Georgia law authorized him to detain Theobald to see if Theobald had a license. Kabler can point to no statute or case law in Georgia authorizing law enforcement to stop people to see if they have GWLs. Indeed, there is not even a law in Georgia requiring a person carrying a firearm to display a GWL to an officer upon demand (as there is for a motorist and a driver's license). Because Kabler had no authority to detain Theobald, he violated O.C.G.A. § 51-7-20. Moreover, a defense against a claim of unconstitutional detention is not the equivalent of "legal under federal law."

VI. Kabler is Not Entitled to Sovereign Immunity for Prospective Relief

Kabler next asserts sovereign immunity for suits against him in his official capacity, citing the 1991 amendment to the state Constitution restoring sovereign immunity. Theobald only seeks damages against Kabler in Kabler's individual capacity. Both Plaintiffs seek declaratory and injunctive relief against Kabler in Kabler's official capacity. While Kabler correctly cites that Georgia law provides immunity for suits against government officials in their official capacities, that immunity extends only to suits for damages. *IBM v. Evans,* 265 Ga. 215, 217 (1995) ("The 1991 amendment is not implicated … because sovereign immunity has *never* applied to bar this type of action seeking injunctive relief.") Kabler therefore has no sovereign immunity against suits seeking prospective relief.

VII. GCO Has Standing

Kabler next asserts that GCO lacked standing to sue. Kabler relies solely on *GeorgiaCarry.Org, Inc. v. Georgia,* 687 F.3d 1244 (11th Cir. 2012), an odd choice given that the 11th Circuit in that case found that GCO ***had standing to sue.*** *Id.* at ("[W]e believe that

Plaintiffs have alleged a credible threat of prosecution … sufficient to establish standing….") Moreover, the standing discussion in *GCO v. Georgia* was pointed at the individual plaintiffs, not at GCO the organization. The Court never addressed GCO's organizational standing. Because Kabler has not attacked Theobald's standing (nor could he reasonably do so), the matter of GCO's standing is simple.

An organization has standing if 1) its members would otherwise have standing to sue; 2) the interests it seeks to protect are germane to the organization's purpose; and c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343 (1977). In the instant case, as noted above, Kabler does not attack Theobald's standing. Nor does Kabler attack the standing of any other GCO members or introduce any evidence vitiating any other GCO members' standing to sue. Because at least Theobald has standing to sue, the first prong is satisfied. Likewise, Kabler raises no issues related to the interests GCO seeks to protect. GCO's interest is public and clear: to foster the rights of its members to keep and bear arms. *See, e.g., GeorgiaCarry.Org, Inc. v. City of Roswell,* 298 Ga.App. 686 (2009) ("As part of GeorgiaCarry.Org, Inc.'s gun rights advocacy work…."). Kabler cannot seriously question that this case fits squarely within GCO's mission. Lastly, Kabler makes no argument pertaining to the necessity of the participation of any GCO members besides Theobald. In short, Kabler has not attacked any of the three prongs of organizational standing analysis. He has left GCO with nothing of substance to refute.

Conclusion

There was no basis for Kabler's stop and detention of Theobald. Kabler's assertion that

he is authorized to detain anyone seen carrying a firearm is contrary to the Fourth Amendment and unsupported by Georgia law. Theobald therefore seeks a declaration and appropriate injunction that Kabler's assertion is incorrect and that Kabler may not stop and detain him for the sole purpose of ascertaining if he possesses a license to carry a weapon. He also seeks damages in an amount to be determined at trial.

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CERTIFICATE OF SERVICE

I certify that on May 17, 2013, I served a copy of the foregoing using the ECF system upon:

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/s/ John R. Monroe
John R. Monroe