No. 13–6152

In the United States Court of Appeals
For the Tenth Circuit

MICHAEL D. LEATHERWOOD,
Plaintiff-Appellee,

v.

DENISE WELKER, *et al*.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (CAUTHRON, J.), NO. CIV-11-934-C

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

Dated: February 18, 2014

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STATEMENT OF PRIOR AND RELATED CASES

There are no related appeals pending in this Court. Plaintiff-Appellee Michael Leatherwood and Defendant-Appellant Denise Welker were parties to *Leatherwood* v. *Whetsel, et al.*, No. 13–6073, which is no longer pending in this Court.

INTRODUCTION

This case arises from a straightforward violation of Plaintiff-Appellee Michael Leatherwood's Fourth Amendment rights. In the early morning hours of September 17, 2009, six probation officers went to Mr. Leatherwood's home, handcuffed him, and searched his home, garage, and vehicle for three hours, all without a warrant or his consent. The probation officers (Defendants-Appellants here) performed this search solely on the basis of two uncorroborated tips from informants whose "indicia of reliability," the district court found, were "very insignificant." Mr. Leatherwood brought this action under 42 U.S.C. § 1983 to vindicate his right to be free from unreasonable searches.

The district court appropriately denied summary judgment to Defendants on their qualified immunity defense. Warrantless searches of the home are the chief evil the Fourth Amendment was designed to guard against, and the district court properly held that a jury could find that Defendants' warrantless search violated clearly established law. But while Defendants' arguments are thus incorrect on the

merits, their interlocutory appeal fails for the more basic reason that this Court lacks jurisdiction to address the questions they present. Accordingly, the Court should dismiss the appeal for lack of jurisdiction, or if the Court reaches the merits, affirm the judgment of the district court.

JURISDICTION AND STANDARD OF REVIEW

For the reasons explained below (see *infra* Part I), the Court lacks jurisdiction over this interlocutory appeal. Assuming *arguendo* there is jurisdiction, the Court reviews the denial of summary judgment on qualified immunity grounds de novo. *Armijo By & Through Chavez* v. *Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1260 (10th Cir. 1998). Because this is an interlocutory appeal, however, the Court "must scrupulously avoid second-guessing the district court's determinations regarding whether [plaintiff] has presented evidence sufficient to survive summary judgment. Rather, [the Court] review[s] only whether [defendant's] conduct, as alleged by [plaintiff], violated clearly established law." *Id.* at 1259 (internal quotation marks omitted). The Court must draw all inferences in favor of Plaintiff-Appellee Mr. Leatherwood. *Id.* at 1259, 1264 n.9.

STATEMENT OF FACTS[1]

1. Mr. Leatherwood's Probation

On May 18, 2009, Mr. Leatherwood was sentenced to probation after pleading guilty in state court to committing sexual offenses against his former spouse, Jennifer Leatherwood. App. 271. Defendant Denise Welker was assigned as Mr. Leatherwood's probation officer. App. 271. Throughout his probation, Mr. Leatherwood attended all required meetings with Defendant Welker and was fully cooperative during those meetings. App. 156, 384.

2. The Probation Order's Restriction On Warrantless Searches

Mr. Leatherwood's probation order authorized searches of his person, vehicle, or property "within the policy of the Department of Corrections." App. 235 ¶ 11. As relevant here, the Department of Corrections policy permitted warrantless searches only in the following, limited circumstances:

> 2. Warrantless Search with Prior Notification
>
> a. Evidence of a Rule Violation or Evidence of a Crime
>
> ***Where there is a reasonable suspicion*** that an offender under supervision by DOC located in the community is in violation of a rule or condition or in violation of the law, a warrantless search may be conducted for evidence of a rule or law violation ***if all the following factors are complied with***:

[1] Additional facts are set forth in the Argument sections to which they pertain.

(1) A conference is held with the district supervisor or designee granting approval which is documented in the chronological file of the offender wherein the following criteria is [sic] weighed:

(a) Failure to search may result in a threat to the public, employees, or offender;

(b) Any activity or information provided by the offender that is relevant to whether the offender has violated a rule or condition and possesses contraband;

(c) Any prior seizures of contraband from the offender;

(d) The supervising officer's experience with the offender has documented a need for close supervision;

(e) The reliability of the informant and the information provided when weighing the totality of the circumstances;

(f) Present and/or past offenses for which the offender is under supervision along with the experience of the officer with the offender or any similar experiences in addition to reliability of the informant information (i.e., offender on supervision for drug and/or weapon offense and information received that the offender may be in possession of illegal substances and/or weapons); and

(g) The search is not the result of an assistance request from other law enforcement officers who have been unable to obtain a search warrant.

App. 351–52 (emphasis added).[2]

3. The July 27 Telephone Call

On July 27, 2009, Defendant Welker received a telephone call from Jennifer Leatherwood (the "July 27 telephone call"). App. 78. Jennifer Leatherwood said that a woman named Regina Wood told her that she (Ms. Wood) had been raped by Mr. Leatherwood. App. 59, 78. Jennifer Leatherwood said that Detective Kim Davis was investigating the allegation. App. 78.

Also during the telephone call, Defendant Welker asked Jennifer Leatherwood if, "by chance," she knew if Mr. Leatherwood possessed any weapons. App. 137, 166–67. Jennifer Leatherwood said that a firearm was possibly in Mr. Leatherwood's truck, that there is a safe in Mr. Leatherwood's garage that could have weapons, and that he keeps a revolver on a shelf in his garage. App. 78, 137–38, 396. Jennifer Leatherwood provided no further information about the presence of a firearm beyond this statement. She did not state the basis of her knowledge; whether she had been to Mr. Leatherwood's property in the two months since his conviction; or—most importantly—whether she meant that Mr. Leatherwood was *then* in possession of a firearm (which would violate his probation), or only that he possessed a firearm before his probation

[2] Although the Department of Corrections policy refers to "factors" in the plural, the policy contains only the single factor (*i.e.*, subparagraph (1)) reproduced above.

began. App. 167, 169, 172, 186. Significantly, Defendant Welker knew that Mr. Leatherwood lawfully possessed firearms before the start of his probation. App. 174–75, 272, 385.

4. Defendant Welker Fails To Corroborate The Information In The July 27 Telephone Call

Defendant Welker contacted Detective Davis to try to corroborate Jennifer Leatherwood's allegation that Mr. Leatherwood had raped Regina Wood. App. 78. On August 10, 2009, Detective Davis told Defendant Welker that "it is not a strong case" and would not proceed further. App. 78. Defendant Welker concluded from this conversation that the case "wasn't going to go anywhere." App. 206.

In contrast to the rape allegation, Defendant Welker made no effort to corroborate Jennifer Leatherwood's statement regarding the possible presence of a firearm. Defendant Welker did not ask Jennifer Leatherwood to state the basis of her knowledge, or the time period in which she believed that Mr. Leatherwood possessed a firearm. App. 167, 169, 172, 186.

Other than Jennifer Leatherwood's statement in the July 27 telephone call, Defendant Welker received no other information that Mr. Leatherwood possessed a firearm (or any other weapon) during his probation. App. 389.

5. The September 4 E-mail

On September 4, 2009, Assistant District Attorney Gayland Geiger, who had prosecuted Mr. Leatherwood for his offense, forwarded to Defendant Welker's

office an e-mail he had received regarding Mr. Leatherwood (the "September 4 e-mail"). App. 77, 110–11. Defendant Welker viewed the e-mail on September 7, 2009. App. 77. The e-mail was from an individual whose identity was known to Mr. Geiger and to Defendant Welker, but which Defendants have not revealed in this case. The author of the e-mail stated that Mr. Leatherwood "has been known to keep porn in his safe . . . (S&M porn . . . hard core stuff)." App. 111. (Mr. Leatherwood's probation order prohibited him from possessing pornography. App. 234 ¶ 8.) Defendant Welker spoke on the telephone with the author of the e-mail. App. 77. But as with Jennifer Leatherwood's statement regarding a firearm, Defendant Welker did not ask the author for the basis of the author's knowledge; whether the author had been inside Mr. Leatherwood's home; or the time period in which the author believed Mr. Leatherwood possessed pornography. App. 181, 185–86, 204–05.

The September 4 e-mail further stated that an "undisclosed person" (who was not the author) had seen several items of a sexual nature in Mr. Leatherwood's home. App. 110–11. (The identity of the "undisclosed person" was known to Mr. Geiger and Defendant Welker but has not been revealed by Defendants in this case.) Defendant Welker did not communicate in any form with the undisclosed

person, and she made no effort to corroborate any of the information the author of the e-mail attributed to this person. App. 181, 204–05.[3]

6. Defendant Welker's Coordination With Assistant District Attorney Gayland Geiger

On Monday, September 7, 2009, the same day Defendant Welker read the September 4 e-mail, Defendant Welker sent an e-mail back to Mr. Geiger stating that she is "going to try to get a team together this week to search [Mr. Leatherwood's] house, garage, and vehicle. If guns aren't found, hopefully we will find some porn." App. 359.

As discussed in greater detail below (see *infra* at 35–38), Defendant Welker had coordinated closely with Mr. Geiger from the start of Mr. Leatherwood's probation. Mr. Geiger had told Defendant Welker that he had unsuccessfully sought to have Mr. Leatherwood incarcerated for his offenses, and that he would seek incarceration if Mr. Leatherwood violated his probation. App. 79, 161–62. Mr. Geiger had further instructed Defendant Welker that he "wants to be kept

[3] After the district court denied Defendants' motion for summary judgment, Defendants moved to supplement the record by identifying the author of the September 4 e-mail and the undisclosed person. No. 11-cv-934, Docket Entry ("Doc.") 113. The district court denied Defendants' motion (Doc. 114), and Defendants have not argued that this was error. Accordingly, as the case comes to this Court, the identities of the author of the September 4 e-mail and the undisclosed person are unknown. Defendants appropriately have not identified either individual in their appellate briefing.

informed of [Mr. Leatherwood's] progress/performance" (App. 79) —an instruction that Defendant Welker said was not ordinary. App. 162.

7. Defendant Welker Issues The Travel Permit

Defendant Welker did not organize a search the week of Monday, September 7, 2009, as she suggested she would in her e-mail to Mr. Geiger. Instead, on Friday, September 11, 2009, she issued Mr. Leatherwood a travel permit authorizing him to drive from Oklahoma to Texas to meet Jennifer Leatherwood and transport their two minor children back to Oklahoma. App. 357; see also *id.* at 190, 396–97. The travel permit specifically authorized Mr. Leatherwood to drive the same truck that Jennifer Leatherwood said might contain a firearm, and to transport their children to Mr. Leatherwood's home, which the author of the September 4 e-mail said might contain pornography. App. 190–95, 357.

8. Defendants Authorize The Warrantless Search Based On The Information Regarding A Firearm And Pornography

On September 16, 2009, Defendant Welker met with other probation officers—Defendants Shannon Hazen, Bracey Dangerfield, Travis Russell, Mark Pursley, Mark Egbert, and assistant district supervisor Chris Hudson—to discuss performing a warrantless search of Mr. Leatherwood's residence, garage, and vehicle. App. 76, 87. Defendant Welker told the other Defendants that informants had "allege[d] hardcore porn and weapons." App. 76. The Defendants

agreed to conduct the search. App. 76. Defendant Hudson then telephoned Defendant Karen White, the district supervisor, who formally approved the search. App. 76.

9. Defendants Perform A Three-Hour Warrantless Search While Mr. Leatherwood Is Handcuffed And Under Armed Guard

At 6:45 am on September 17, 2009, Defendants Welker, Hazen, Dangerfield, Russell, Pursley, and Egbert arrived at Mr. Leatherwood's residence to perform the warrantless search. App. 85. Defendant Welker asked Mr. Leatherwood if he would consent to the search, and Mr. Leatherwood declined. App. 85. Defendant Welker said the Defendants would nonetheless perform the search, which she claimed was authorized by his probation order. App. 85. She told Mr. Leatherwood that Defendants would handcuff him for safety reasons. App. 85. Mr. Leatherwood complied fully. App. 85. For the next three hours, Defendants searched Mr. Leatherwood's residence, garage, and vehicle while Mr. Leatherwood remained handcuffed and Defendants Dangerfield and Russell stood guard over him. App. 85. Mr. Leatherwood was at all times "very calm and cooperative." App. 87. During the search, Defendants found ammunition and a

rifle, but no pornography or other sexual contraband. App. 76. Defendants then arrested Mr. Leatherwood, who again was fully cooperative. App. 76.[4]

10. The District Court Holds The Warrantless Search Unconstitutional

Based on the results of the search, the government charged Mr. Leatherwood with a firearms offense in the United States District Court for the Western District of Oklahoma. App. 271. Mr. Leatherwood moved to suppress the evidence on the ground the warrantless search violated the Fourth Amendment. App. 271.

At the hearing on Mr. Leatherwood's suppression motion, Defendant Welker testified that the search was "conducted based upon the evidence that [she] obtained from the informants" in the July 27 telephone call and the September 4 e-mail. App. 166; see also *id.* at 165, 272 n.3. She acknowledged that she did not

[4] When Defendants showed the rifle to Mr. Leatherwood, he expressed surprise, stating that he was not aware it was in his home and asking whether it was even operative. App. 95. He said he had removed all other weapons from his home when his probation began, as a probation officer had instructed him to do. App. 95. He said that his failure to remove the rifle must have been an oversight, and he expressed disappointment in himself and said he would not intentionally violate his probation. App. 95. Regarding the presence of ammunition, Mr. Leatherwood said that he did not know this was prohibited. App. 95; see also *id.* at 96 ("[Mr. Leatherwood] repeatedly made comments like 'I feel so dumb' and 'How ignorant.'"). Defendant Welker later testified that neither she nor any other probation officer informed Mr. Leatherwood of this restriction. App. 215–17.

During the search, Defendants also found small-gauge rope, cutting pliers, and lubricating gel, but they did not seize these items or note the items in their contemporaneous search reports. App. 218, 225. Defendant Welker said she omitted the items from her report because they were not contraband and she did not feel they were "significant." App. 218–19, 225.

ask either informant the time period in which they believed Mr. Leatherwood possessed contraband, or the basis for their knowledge. App. 181, 203; see also *id.* at 167 (Defense counsel: "Why did you not ask [Jennifer Leatherwood] if [Mr. Leatherwood] had possessed a firearm after May 19, 2009? Defendant Welker: "I don't know."). Defendant Welker further acknowledged that she "didn't corroborate either one of their pieces of information with a third party" (App. 204–05), even though she "had never worked with either informant before" (App. 205). In addition, Defendant Welker stated that she "had no problem with issuing [Mr. Leatherwood] a travel permit at that time to specifically go and pick up his children." App. 203. Defendant Welker claimed that this was not inconsistent with her belief that Mr. Leatherwood possessed a firearm in his truck and pornography in his home. App. 191–95.

The district court (Miles-LaGrange, C.J.) granted Mr. Leatherwood's suppression motion, holding that the search was not supported by reasonable suspicion and did not comply with the Department of Corrections probation search regulations. App. 277. The district court stated that, "[h]aving heard the testimony of Officer Welker, the Court finds that there was no real or perceived threat to the public, employees, or defendant sufficient to establish reasonable suspicion to justify the warrantless search of defendant's home." App. 276. Among other things, the district court found "it simply impossible to believe that Officer Welker

truly had reasonable suspicion to believe that [Mr. Leatherwood] currently possessed firearms and was a threat to the public but yet issued him a travel permit to leave the state and to pick up minor children." App. 276. The district court also found the information provided in the July 27 telephone call and September 4 e-mail to be unreliable because it did not specify a timeframe in which Mr. Leatherwood possessed contraband, and because Defendant Welker did not corroborate the information. App. 276–77. Following the district court's judgment, the government dismissed its charges against Mr. Leatherwood.

11. The Instant Lawsuit

In 2011, Mr. Leatherwood, proceeding pro se, commenced this action under 42 U.S.C. § 1983, alleging that Defendants' warrantless search violated the Fourth Amendment. App. 7. Defendants ultimately moved for summary judgment on qualified immunity grounds. App. 34. The district court (Cauthron, J.) denied their motion, holding that a jury could find that Defendants violated Mr. Leatherwood's clearly-established Fourth Amendment rights. App. 431. In particular, the district court found that "questions of fact remain" on whether failure to perform the warrantless search would have resulted in a threat to the public, given Defendant Welker's decision to issue the travel permit "less than a week prior to the search," and given that the information Defendant Welker

received was "several weeks, if not months, old" by the time of the search. App. 436.

The district court also found that "questions of fact exist" on whether Defendants could reasonably have relied on the information in the July 27 telephone call and September 4 e-mail, "as its indicia of reliability was very insignificant." App. 436. The district court stated that a jury could find that "much of the information provided was coming to Defendant Welker either third- or fourth-hand and with at best minimal grounds for Defendant Welker to substantiate the truthfulness of the statements." App. 436. "Likewise, a jury could find that Defendant Welker's reliance upon information received in telephone calls and/or e-mails could not provide the basis for reasonable suspicion, as that information was presented without any indicia of the time when the violations had allegedly occurred." App. 436–37. And, "[w]hether or not Defendant Welker undertook appropriate action to determine whether the alleged violative act had occurred after Plaintiff's conviction is in dispute." App. 437; see also *ibid.* ("Finally, considering the significant length of time which passed between Defendant Welker obtaining certain information and the final decision to conduct the search, a jury could find any reliability that may have existed was diminished and certainly any urgency which would have prevented obtaining a warrant no longer existed."). The district court therefore denied summary judgment to

Defendants, concluding that, '[b]ased on the evidence before it, the Court finds that questions of material fact remain regarding the existence of reasonable suspicion." App. 437.

12. Defendants' Interlocutory Appeal

Defendants then took this interlocutory appeal from the district court's judgment. Mr. Leatherwood continued to represent himself in this Court. After the parties completed their briefing, this Court appointed the undersigned as counsel for Mr. Leatherwood and directed the undersigned to file this supplemental brief.

SUMMARY OF ARGUMENT

I. The Court lacks jurisdiction over this interlocutory appeal. The Court's jurisdiction to review the denial of summary judgment on qualified immunity grounds is "extremely limited." *Gray* v. *Baker*, 399 F.3d 1241, 1247 (10th Cir. 2005). In particular, the Court may not review an evidentiary determination by the district court, including the determination that "the facts asserted by the plaintiff are sufficiently supported by evidence in the record to survive summary judgment." *Foote* v. *Spiegel*, 118 F.3d 1416, 1422 (10th Cir. 1997). Here, the district court made precisely such a determination, holding that "questions of material fact remain regarding the existence of reasonable suspicion." Defendants may not challenge that holding by interlocutory appeal.

II. The district court correctly denied Defendants' summary judgment motion. Warrantless searches of the home—including the home of a probationer—are presumptively unconstitutional. Defendants claim their warrantless search was reasonable under either *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), or *United States* v. *Knights*, 534 U.S. 112 (2001). But under clearly established law, it was not.

A. A warrantless search of a probationer's home is a valid "special needs" search under *Griffin* only if the search complies with a State policy that itself satisfies the Fourth Amendment. This Court has held that Oklahoma's probation search regulations comply with the Fourth Amendment, but the regulations clearly did not authorize Defendants' warrantless search. The regulations require assessment of whether failure to search may "result in a threat to the public," as well as the "reliability of the informant and the information provided." As two federal judges have now held, however, Defendants' search was based on unreliable and uncorroborated information that provided no basis to believe that a failure to search would result in a threat to the public. Indeed, even though Defendants' avowed purpose of the search was to find a firearm, they no longer defend the search on that basis (and barely even mention the issue in their brief). Defendants' warrantless search also failed to satisfy the other criteria set out in the regulations, because (among other failings) the search served improper law enforcement motives.

B. Defendants' warrantless search is also not reasonable under the "totality of the circumstances" analysis in *Knights*. First, Defendants have waived this argument by not properly presenting it in the district court. Second, in any event, *Knights* requires that Defendants' search comply with Oklahoma policy, and here the search did not so comply. Third, even if *Knights* does not require compliance with Oklahoma policy, but would be satisfied by the existence of reasonable suspicion alone, here there was no reasonable suspicion under clearly established law.

ARGUMENT

I. The Court Lacks Jurisdiction Over This Interlocutory Appeal

A. Defendants Impermissibly Challenge The District Court's Determination Of Evidence Sufficiency

The district court denied Defendants summary judgment because, "[b]ased on the evidence before it, the Court [found] that questions of material fact remain regarding the existence of reasonable suspicion." App. 437. Defendants now challenge this holding. But the holding is a determination of evidence sufficiency that this Court lacks jurisdiction to review in an interlocutory appeal. The Court should therefore dismiss the appeal.

"The scope of [this Court's] appellate jurisdiction over a district court's denial of summary judgment on qualified immunity grounds is extremely limited." *Gray* v. *Baker*, 399 F.3d 1241, 1247 (10th Cir. 2005). The district court's order "is

not appealable if it merely determines [that] the facts asserted by the plaintiff are sufficiently supported by evidence in the record to survive summary judgment." *Foote* v. *Spiegel*, 118 F.3d 1416, 1422 (10th Cir. 1997); see also *Johnson* v. *Jones*, 515 U.S. 304, 319–20 (1995); *Newton* v. *Lee*, 677 F.3d 1017, 1031 (10th Cir. 2012). "In other words, we lack jurisdiction 'if our review would require second-guessing the district court's determinations of evidence sufficiency.'" *Gray*, 399 F.3d at 1247. But that is just what Defendants ask this Court to do.

Below, Defendants argued that they were entitled to summary judgment on qualified immunity grounds because their warrantless search of Mr. Leatherwood's home was supported by reasonable suspicion and therefore did not violate the Fourth Amendment. App. 34. In support of that argument, Defendants cited various facts they claimed formed the basis for their assertion of reasonable suspicion, including but not limited to the information contained in the July 27 telephone call and the September 4 e-mail. App. 43–45. Mr. Leatherwood's opposition disputed multiple facts on which Defendants relied. App. 236, 419. For example, Mr. Leatherwood denied that he did not take full responsibility for his offenses; that he did not attend required counseling sessions; that anyone who had access to his home after his conviction had communicated with Defendant Welker; and that he attempted to interfere with the results of his polygraph

examination (App. 419–23)—positions that are supported by the record. See App. 158–59, 196–200.

The district court reviewed the record and concluded that factual questions precluded the grant of summary judgment. App. 436–37. In particular, the district court found that, "based on the evidence presented, questions of fact exist on whether there was an immediate need [for the search]" and "on whether Defendant Welker could have reasonably relied upon much of the informant information as its indicia of reliability was very insignificant." App. 436. Accordingly, the district court held that "questions of material fact remain regarding the existence of reasonable suspicion." App. 437.

That conclusion was plainly a determination of evidence sufficiency. See *Bruner* v. *Baker*, 506 F.3d 1021, 1028 (10th Cir. 2007) ("where there is a question of fact or 'room for a difference of opinion' about the existence of probable cause, it is a proper question for a jury"); *Sherouse* v. *Ratchner*, 573 F.3d 1055, 1059 (10th Cir. 2009) ("[I]n a damages action based on an alleged Fourth Amendment violation the reasonableness of a search or seizure is a question for the jury."); see also *Cavanaugh* v. *Woods Cross City*, 718 F.3d 1244, 1253–54 (10th Cir. 2013) (same).

Defendants ask this Court to review the district court's holding, but this Court has repeatedly viewed substantially similar inquiries as beyond its

jurisdiction on interlocutory appeal. See, e.g., *Myers* v. *Oklahoma Cnty. Bd. of Cnty. Comm'rs*, 80 F.3d 421, 424 (10th Cir. 1996) (no jurisdiction to review district court's holding that "a reasonable person could conclude the degree of force used by the defendants was excessive under the facts and circumstances at the time" (internal quotation marks omitted)); *Foote*, 118 F.3d at 1422 (similar); *Newton*, 677 F.3d at 1030 (similar); *Gray*, 399 F.3d at 1247 (similar); *Prado* v. *Lane*, 98 F. App'x 757, 759 (10th Cir. 2004) (unpublished) (similar); *Sims* v. *Schaad*, 185 F.3d 875 (10th Cir. 1999) (unpublished) (similar).

B. Defendants' Contrary Arguments Lack Merit

1. None of Defendants' asserted "avenues to appellate jurisdiction" (Defendants Br. 3) has merit. Defendants argue that this Court may review factual determinations that are "blatantly contradicted by the record." *Id.* at 2 (quoting *Scott* v. *Harris*, 550 U.S. 372, 380 (2007)). But Defendants identify no "blatant contradiction," and this case is nothing like *Scott*, where the plaintiff's version of events was a "visible fiction" that was "so utterly discredited" by a video recording. *Id.* at 380–81.

2. Defendants also argue that this Court may review factual determinations that were made as the result of legal error. Defendants Br. 2. True enough, but Defendants identify no legal error. They claim the district court erroneously focused on only a subset of the summary judgment record.

Defendants. Br. 29–31. But Defendants ignore the district court's express statement that "[e]ven if the Court were to consider all the issues raised by Defendants in their summary judgment motion, the outcome in this case would not change, as each of the other purported factors suffers from the same flaws as [do the factors the Order explicitly addressed]." App. 435 n.1. Nor, for that matter, was it error for the district court to focus on the same evidence that Defendants actually discussed at the mandatory September 16, 2009, pre-search conference in which they approved the warrantless search. See *infra* at 29–30.

Defendants also argue briefly that the district court erred by considering whether there was an "immediate need" for the warrantless search, because the Oklahoma search policy does not consider this factor. Defendants Br. 31. But Defendants take the district court's discussion out of context. As is clear from its order, the district court was considering whether "the failure to search Plaintiff's home would result in a threat to the public, employees or the offender" (App. 436). And as Defendants acknowledge, that is the first factor listed in the Oklahoma search regulations. See Defendants Br. 15; see also App. 351.

3. Finally, Defendants argue that an appellate court may "look behind" a district court's order and review the record itself when a district court "fails to identify the particular charged conduct that it deemed adequately supported by the

record." Defendants Br. 3. This is (partially[5]) true as a general matter, but irrelevant here. When reviewing a district court's denial of summary judgment on qualified immunity grounds, this Court has jurisdiction to review only "abstract issues of law," not determinations of evidence sufficiency. *Shrum* v. *City of Coweta*, 449 F.3d 1132, 1137 (10th Cir. 2006). The Court may thus decide whether the facts, as alleged *by the plaintiff*, show a violation of clearly established law. *Clanton* v. *Cooper*, 129 F.3d 1147, 1153 (10th Cir. 1997). And the Court may ask the same question of the facts the district court "assumed when it denied summary judgment." *Shrum*, 449 F.3d at 1137 (internal quotation marks omitted).

But Defendants do not argue either of these issues here. That is, they do *not* claim that the facts alleged by Mr. Leatherwood fail to show a violation of clearly established law. Nor do they argue that the facts the district court found supported by the summary judgment record (to the extent those facts differ from Mr. Leatherwood's allegations), fail to show the same. Instead, as discussed above, Defendants merely recite the same facts they proffered below and ask this Court (1) to credit those facts, (2) to reject facts alleged by Mr. Leatherwood, (3) to reject

[5] Defendants omit that on the occasions when it is appropriate to conduct this review—and this is not such an occasion, for reasons explained below—the Court must "construe the evidence in the light most favorable to the plaintiff" and "must draw all inferences in favor of [the] [p]laintiff." *Armijo By & Through Chavez* v. *Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1259, 1264 n.9 (10th Cir. 1998).

the district court's evidentiary decision that there were material disputes between these competing versions of events, and (4) to conclude that *Defendants*' facts show no violation of clearly established law. This Court lacks jurisdiction to engage in that review. See, e.g., *Myers*, 80 F.3d at 425 (no jurisdiction where "defendants' appeal focuses almost exclusively on the factual evidence which would support a judgment in defendants' favor on individual qualified immunity grounds"); *Shinault* v. *Cleveland Cnty. Bd. of Cnty. Comm'rs*, 82 F.3d 367, 370 (10th Cir. 1996) (same); *Gray*, 399 F.3d at 1247–48 (same); *Prado*, 98 F. App'x at 759 (same); *Mick* v. *Brewer*, 76 F.3d 1127, 1133 (10th Cir. 1996) (same); compare *Shrum*, 449 F.3d at 1137 ("Because Chief Palmer argues that he is entitled to qualified immunity even under the Plaintiff's version of the facts, we have jurisdiction to hear this appeal.").[6]

Defendants' argument is also incorrect on its own terms. The Court may examine the record "*only*" if the district court "does not set forth with specificity

[6] Only in Defendants' reply brief do they argue, for the first time, that they are entitled to summary judgment on the basis of undisputed facts. But as this Court has made clear, "[i]t is not sufficient to merely mention an issue in a reply brief. Issues not raised in the opening brief are deemed abandoned or waived." *Coleman* v. *B-G Maint. Mgmt. of Colorado, Inc.*, 108 F.3d 1199, 1205 (10th Cir. 1997); see also *Bowdry* v. *United Airlines*, 58 F.3d 1483, 1490 (10th Cir.1995). Moreover, the "undisputed fact" on which Defendants rely—that Mr. Leatherwood was in a prohibited relationship—was, in fact, disputed. As Defendants themselves state in their reply brief (at 6), Mr. Leatherwood told Defendant Welker "that he was no longer in such a relationship." Thus, there is a factual dispute over whether Defendant Welker had a reasonable basis to believe the relationship was ongoing.

the facts presented by the plaintiff that support a finding that the defendant violated a clearly established right." *Armijo*, 159 F.3d at 1259 (emphasis added). But here, the district court set out those facts, including (among other things) that Defendant Welker issued the travel permit "less than a week prior to the search"; that she relied on information that was "several weeks, if not months, old" at the time of the search; that the informants' "indicia of reliability was very insignificant"; that "much of the information provided was coming to Defendant Welker either third- or fourth-hand and with at best minimal grounds for Defendant Welker to substantiate the truthfulness of the statements"; that the informants' information "was presented without any indicia of the time when the violations had allegedly occurred"; and that "[w]hether or not Defendant Welker undertook appropriate action to determine whether the alleged violative act had occurred after Plaintiff's conviction is in dispute." App. 436–37.

Finally, even assuming *arguendo* it were appropriate for the Court to review the record—and it is not—the Court would still lack jurisdiction over this appeal because the evidence, as construed in the light most favorable to Mr. Leatherwood (see *Armijo*, 159 F.3d at 1259, 1264 n.9), amply supports the district court's conclusion that factual questions precluded the grant of summary judgment. See, e.g., *Sevier* v. *City of Lawrence*, 60 F.3d 695, 700–01 (10th Cir. 1995) (reviewing the record and concluding that "we remain without jurisdiction to review the

[district] court's finding that there existed genuine issues of disputed facts that precluded the entry of summary judgment").

* * *

For these reasons, the Court lacks jurisdiction over this interlocutory appeal.

II. In Any Event, The District Court Properly Denied Summary Judgment To Defendants On Their Qualified Immunity Defense

The district court's judgment is correct in any event. "A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987). And "[i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *United States* v. *Martinez*, 643 F.3d 1292, 1295 (10th Cir. 2011) (internal quotation marks omitted). Indeed, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton* v. *New York*, 445 U.S. 573, 585 (1980) (internal quotation marks omitted).

Here, the district court properly held that a jury could find that Defendants' warrantless search violated the Fourth Amendment, and that this violation was clearly established at the time of the search. Defendants respond that their warrantless search is reasonable under either *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), or *United States* v. *Knights*, 534 U.S. 112 (2001). Defendants are wrong on both counts.

A. Under Clearly Established Law, Defendants' Warrantless Search Is Not Reasonable Under *Griffin* v. *Wisconsin*

1. Defendants' Warrantless Search Is Not Reasonable Under Griffin *Because It Violated Oklahoma's Search Policy In Numerous Respects*

Defendants primarily defend their warrantless search as a valid "special needs" search under *Griffin*. Defendants Br. 14–20. *Griffin* holds that a warrantless search of a probationer's home is reasonable under the Fourth Amendment if the search is conducted pursuant to a state regulation that itself complies with the Fourth Amendment. See 483 U.S. at 873–74 (reasoning that a "State's operation of a probation system . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements"); see also *United States* v. *Cantley*, 130 F.3d 1371, 1375 (10th Cir. 1997).

This Court has held that Oklahoma's probation search regulations comply with the Fourth Amendment. *Cantley*, 130 F.3d at 1375. But Defendants' warrantless search ran far afield of the regulations. As set out above (see *supra* at 3–4), the regulations prohibit warrantless searches unless there is reasonable suspicion based on consideration of the seven enumerated factors. App. 351–52. Here, fair consideration of the factors did not justify Defendants' search.

(i) *"Failure to search may result in a threat to the public, employees, or offender"* (*App. 351*)

1. First, there was no reasonable basis to believe that a failure to search would result in a "threat to the public, employees, or offender." Defendants do not claim there was a threat to themselves or to Mr. Leatherwood. Nor was there any basis to believe there was a threat to the public. To start with the most basic point, Defendant Welker issued Mr. Leatherwood a travel permit on September 11, 2009, just five days before Defendants approved the warrantless search, and after Defendants had received all of the information they claim justifies the search. App. 357. The permit authorized Mr. Leatherwood to drive his truck—the same vehicle that Jennifer Leatherwood said might contain a firearm—to meet Jennifer Leatherwood in Texas and transport their minor children back to Oklahoma. App. 357. As Chief Judge Miles-LaGrange found, it is "simply impossible to believe that Officer Welker truly had reasonable suspicion to believe that [Mr. Leatherwood] currently possessed firearms and was a threat to the public but yet issued him a travel permit to leave the state and to pick up minor children." App. 276.

Defendant Welker's decision to issue the travel permit is understandable, because in reality, Defendants had no reasonable basis to believe that Mr. Leatherwood possessed a firearm in his truck or otherwise. The only mention of a firearm came fifty-two days before the search, during Defendant Welker's July 27

telephone call with Jennifer Leatherwood. App. 78. As Defendant Welker has acknowledged, Jennifer Leatherwood called Defendant Welker on an unrelated subject, and the issue of a firearm arose only when Defendant Welker asked Jennifer Leatherwood if, "by chance" (App. 137), Mr. Leatherwood possessed one. App. 166–67; *id.* at 388 (Defendant Welker: "I actually asked her. That was not her reason for the call."). Jennifer Leatherwood answered affirmatively but did not explain whether she meant that Mr. Leatherwood was *then* in possession of a firearm, or only that he possessed one before the start of his probation, which had begun just two months before the call. App. 186, 203. This distinction was crucial because Defendant Welker knew that Mr. Leatherwood lawfully possessed firearms prior to his probation. App. 157, 174–75, 272, 385.

Yet, after "solicit[ing]" (App. 172) Jennifer Leatherwood's ambiguous response, Defendant Welker failed to ask any follow-up questions whatsoever, including the basis of Jennifer Leatherwood's knowledge or the time period in which she believed Mr. Leatherwood possessed a firearm. App. 167, 169, 171–72, 204–05. Such corroboration was essential, not only because of the ambiguous nature of the statement, but because of the risk that Jennifer Leatherwood—Mr. Leatherwood's former spouse and the victim of his offense—had a motive to exaggerate or even to fabricate information detrimental to Mr. Leatherwood.

2. Defendants no longer contend that their warrantless search can be justified by the potential presence of a firearm. Indeed, even though the stated "goal" of the search was, in their words, to "see if there was a firearm" (App. 416; see also *id.* at 393), Defendants barely mention the issue in their brief. Instead, they rely exclusively on other information about Mr. Leatherwood. Defendants Br. 16–18. But Defendants' newfound justifications fail for multiple reasons.

First, Defendants did not consider this other information at the mandatory September 16, 2009, conference in which they approved the warrantless search. Instead, as Defendant Welker recorded in her notes that day, they considered only that "[i]nformants allege hardcore porn and weapons." App. 76. Oklahoma policy, however, does not permit warrantless searches on the basis of information that is not considered at the mandatory pre-search conference. Instead, the search regulations required Defendants to determine *at the conference* whether the seven enumerated factors justified the search when applied to the information Defendants deemed relevant. See App. 351–52 (Oklahoma regulations) (search is authorized only when "[a] conference is held . . . ***wherein the following criteria is [sic] weighed***" (emphasis added)). This requirement would be a nullity if, as

Defendants try to do, they could rely on post-hoc justifications for their search that they did not actually consider at the pre-search conference.[7]

Second, even *assuming* arguendo it were appropriate to consider information not discussed at the September 16, 2009, conference, that could in theory help only Defendant Welker (who was aware of the information), but not the other Defendants (who were not). Defendants do not argue that Defendant Welker's knowledge of the additional information about Mr. Leatherwood can be imputed to the other Defendants, and it cannot be. Imputation is only a presumption, and it is rebutted where, as here, officers actually communicated with each other but did not communicate the information they now seek to impute. *United States* v. *Shareef*, 100 F.3d 1491, 1504–05 (10th Cir. 1996).

Third, even assuming *arguendo* it were appropriate to consider information not discussed in the September 16, 2009, conference, and further assuming it were appropriate to impute that information to all Defendants, that still would not justify Defendants' warrantless search. That is because the information provided no basis to believe that a failure to perform the search would constitute a public threat.

[7] Nor have Defendants explained or justified why, at the conference, Defendant Welker did not share the additional information on which Defendants now rely, given that she knew of the information long before the conference. The answer is apparent from Defendant Welker's testimony at the suppression hearing: She did not view the other information as constituting a probation violation. App. 158–59, 166, 180, 184, 196–99, 210–13, 218–19, 225.

Defendants mainly cite Jennifer Leatherwood's statement to Defendant Welker that Mr. Leatherwood raped Regina Wood. Defendants Br. 16. But Defendants do not say what happened next: Defendant Welker called the detective who was investigating the allegation, and was told that it was "not a strong case" and would proceed no further. App. 78, 176. Defendant Welker concluded from the conversation that the case "wasn't going to go anywhere." App. 206. Defendants do not explain how, in light of this, Defendants could reasonably think that Jennifer Leatherwood's allegation suggested a public threat, especially since the allegation was made fifty-two days before the search.[8]

Defendants also cite a host of other information, such as Mr. Leatherwood's asserted failure to acknowledge his alcohol problem, his purported denial that he raped Jennifer Leatherwood, the claimed existence of "tie ups" in his home, his alleged inadequate participation in sex offender treatment sessions, and purported evidence that he "may" have attempted to use countermeasures on his polygraph test. Defendants Br. 16. But Mr. Leatherwood has expressly denied most of these allegations (see Doc. 106 ¶¶ 2–3, 5–7), and the Court must construe the record in

[8] Defendants also refer to a "protective order petition" that Regina Wood filed against Mr. Leatherwood on August 21, 2009. Defendants Br. 16–17; App. 421 ¶ 4. Defendants do not disclose, however, that Ms. Wood filed the petition at the insistence of Assistant District Attorney Geiger, and that she asked for the order to be lifted the following business day (August 24, 2009). App. 421 ¶ 4. The order was in fact lifted that day, which was more than three weeks before the warrantless search was conducted on September 17, 2009.

the light most favorable to him (see *Armijo*, 159 F.3d at 1259, 1264 n.9). Moreover, Defendant Welker testified that the allegations would not constitute even probation violations. See App. 158–59, 166, 180, 184, 196–99, 210–13, 218–19, 225.

For these reasons, Defendants had no basis to believe that failure to conduct a warrantless search would result in a threat to the public.

(ii) *"The supervising officer's experience with the offender has documented a need for close supervision" (App. 351)*

Nor did Defendant Welker's experience with Mr. Leatherwood document a need for close supervision, but just the opposite. She acknowledged that Mr. Leatherwood attended all of his required office visits with her, and that during those meetings he was cooperative, coherent, and never appeared distracted. App. 156–157, 384. Meanwhile, Defendant Welker made only one visit to Mr. Leatherwood's home, in June 2009, even though Department of Corrections policy required a visit each month. App. 383–84. During that visit Defendant Welker saw "nothing that caused [her] concern." App. 385. And then, on September 11, 2009, she issued the travel permit authorizing Mr. Leatherwood to go to Texas to meet Jennifer Leatherwood and pick up their kids in the truck that allegedly contained a firearm. App. 357. Defendant Welker stated that she could have easily denied the permit, but did not do so because Jennifer Leatherwood "didn't

give me any indication that she was worried about [Mr. Leatherwood]." App. 397; see also *id.* at 195, 202–03.

Defendants do not address these points or cite any "documented . . . need for close supervision" (App. 351), but only assert that "Ms. Welker's interactions and experience with Mr. Leatherwood showed a need for close supervision." Defendants Br. 15, 17. That unsupported conclusion is belied by Defendant Welker's actual words and conduct.

(iii) *"The reliability of the informant and the information provided when weighing the totality of the circumstances" (App. 352)*

Next, the "reliability of the informant[s] and the information provided" in the July 27 telephone call and the September 4 e-mail was, as the district court found, "very insignificant." App. 436. As to the telephone call, Defendants do not defend the reliability of Jennifer Leatherwood's statement (elicited by Defendant Welker) about the potential presence of a firearm. And Defendant Welker failed to corroborate Jennifer Leatherwood's allegation that Mr. Leatherwood raped Regina Wood. As the district court found, this allegation, unreliable from the start, grew only more suspect as Defendants waited fifty-two days to conduct the warrantless search. App. 436–37.

The information in the September 4 e-mail was also unreliable. Defendants focused mainly on the statement that Mr. Leatherwood "has been known to keep

porn in his safe." App. 111, 180, 184. Yet this statement does not say that Mr. Leatherwood *actually* possessed pornography, but only that he "has been known" (by whom?) to do so. App. 111. And, like Jennifer Leatherwood's statement about a firearm, this statement does not say when Mr. Leatherwood possessed pornography—a crucial question because Mr. Leatherwood was not prohibited from possessing pornography before his probation began. App. 180, 204. But Defendant Welker made no effort to learn this information—let alone to corroborate its truth—by asking the author of the e-mail for the basis of the author's knowledge or whether the author had even been to Mr. Leatherwood's home. App. 181, 185–86, 204–05.

The other information contained in the September 4 e-mail is even less reliable. It comes not from the author of the e-mail, but from an "undisclosed person" (App. 110) who allegedly had access to Mr. Leatherwood's home. App. 179, 181. (As noted, Mr. Leatherwood has expressly denied that anyone who had access to his home during his probation communicated with Defendant Welker. See Doc. 106 ¶ 6.) This information thus came to Defendant Welker multiple times removed, and Defendant Welker never met with, spoke to, or otherwise communicated with the "undisclosed person." App. 181, 204–05. Nor did Defendant Welker undertake any other efforts to corroborate this information. App. 181, 204–05, 436–37. Thus, as the district court held, a jury could find that

Defendant Welker had "at best minimal grounds . . . to substantiate the truthfulness of the statements." App. 436.

(iv) "The search is not the result of an assistance request from other law enforcement officers who have been unable to obtain a search warrant" (App. 352)

Defendant Welker's eagerness to search Mr. Leatherwood's home, without corroborating the informant information she relied on, is explained by the fact that, in reality, she was not functioning as a probation officer, but instead was helping Assistant District Attorney Geiger in a law enforcement role. As explained below, Mr. Geiger had tried but failed to prosecute Mr. Leatherwood for the rape of Regina Wood, and he was seeking to find another basis to revoke Mr. Leatherwood's probation. The Oklahoma search regulations, however, prohibit warrantless searches that (as here) are proxies for searches by law enforcement officers who were unable to obtain their own search warrants.

Defendant Welker and Mr. Geiger began coordinating their efforts from the start of Mr. Leatherwood's probation. On June 4, 2009, just one day after she first met Mr. Leatherwood, Defendant Welker telephoned Mr. Geiger. App. 80. Defendant Welker was "shocked" that Mr. Leatherwood received probation, and she wanted to know the reason for the sentence. App. 159, 395. Mr. Geiger said that he had unsuccessfully "argued incarceration," but that he would put Mr. Leatherwood in prison if Mr. Leatherwood violated his probation. App. 79, 161–

62. Mr. Geiger instructed Defendant Welker to keep him informed about Mr. Leatherwood's compliance with probation—a request Defendant Welker said was "not routine." App. 79, 162–63 (Defense Counsel: "[Mr. Geiger] is basically telling you at this point, 'I want to know what this guy does?'" Defendant Welker: "Yes, sir.").

On July 22, 2009, Mr. Geiger called Defendant Welker and said that he had heard "rumors" that Mr. Leatherwood had "violated" Regina Wood. App. 79, 163–64. Mr. Gegier said he would attempt to have a detective investigate the allegation and that he would keep Defendant Welker apprised of his progress. App. 79, 163–64. Five days later, Defendant Welker received the July 27 telephone call from Jennifer Leatherwood, who (as discussed above) alleged that Mr. Leatherwood raped Regina Wood, and also made the ambiguous statement (solicited by Defendant Welker) that Mr. Leatherwood possessed firearms. App. 78.

That same day, without having made any effort to corroborate Jennifer Leatherwood's statement about a firearm, Defendant Welker left a message with the Bureau of Alcohol, Tobacco, and Firearms ("ATF"). App. 78. Defendant Welker testified that she contacted the ATF "based upon this single piece of information" because, "[i]f a weapon was found, it could be a new federal charge."

App. 174.[9] Defendant Welker also left a message for Detective Davis, who was investigating the rape allegation. App. 78.

On August 10, 2009, Defendant Welker spoke with Detective Davis. App. 78. As noted, Detective Davis said that she had interviewed Ms. Wood, that the case was not strong, and that she did not think Mr. Geiger would proceed any further. App. 78, 176, 206.

With the investigation of the alleged rape thus closed, Defendant Welker pressed ahead with her efforts to initiate a federal weapons charge—even though, again, she had made no effort to corroborate the sole piece of information she elicited from Jennifer Leatherwood in the July 27 telephone call. On August 21, 2009, Defendant Welker left another message with the ATF, stating that Mr. Leatherwood "possibly" possessed firearms. App.78. She asked for a return call "to discuss possible involvement of ATF agents and/or the filing of federal charges if weapons are found." App. 78.

Then, on Monday, September 7, 2009, Defendant Welker viewed the September 4 e-mail, which Mr. Geiger had forwarded to her office. App. 77. Also

[9] When Defendant Welker was later asked why, as a probation officer, she was urging the ATF to initiate charges against Mr. Leatherwood, she said that it was "part of [her] responsibility as a peace officer, not as his probation officer." App. 176. Defendant Hudson, the assistant district supervisor, said that he did not understand the meaning of Defendant Welker's statement and that Defendant Welker "didn't have any responsibility . . . to contact ATF." App. 413–14.

that day, Defendant Welker responded to Mr. Geiger by e-mail, stating that "I'm going to try to get a team together this week to search [Mr. Leatherwood's] house, garage, and vehicle. If guns aren't found, hopefully we will find some porn." App.112. Defendant Welker said that the reason she put "guns" first in the e-mail, rather than "porn," is that guns were "the more serious of the two violations." App. 189.

In fact, Defendant Welker did not organize a search the week of September 7, as she said she would. Instead, on Friday, September 11, she issued Mr. Leatherwood the travel permit authorizing him to transport his minor children in the truck that allegedly contained a firearm to his home that allegedly contained pornography. App. 357. Not until the following Wednesday, September 16, did Defendant Welker organize the conference in which the warrantless search was approved. App.76. And notably, nothing in the record indicates that Defendant Welker disclosed in that conference that she had issued the travel permit, or her coordination with Mr. Geiger.

In sum, there is strong reason to believe that Defendants' warrantless search served improper law enforcement motives, in light of (1) Defendant Welker's extensive coordination with Mr. Geiger, (2) Mr. Geiger's failed effort to prosecute Mr. Leatherwood for the rape of Regina Wood, and (3) Mr. Geiger's avowed intention of seeking to incarcerate Mr. Leatherwood for a probation violation.

(iv) The Remaining Factors In The Oklahoma Probation Search Regulations Also Did Not Justify Defendants' Warrantless Search (App. 351–52)

Defendants acknowledge that the third factor (prior seizures of contraband from the offender) weighs in favor of Mr. Leatherwood because there were no such seizures. Defendants Br. 17.

The sixth factor (the offenders' offense and the probation officer's "experience" with the offender) also does not support the warrantless search. Defendants' contrary argument is inconsistent with the fact that Defendant Welker issued the travel permit; that Defendant Welker acknowledged that Mr. Leatherwood attended all of his required office visits and was fully compliant; and that Defendant Welker performed only one of the required monthly home visits, even though the stated purpose of those visits was (according to her) "to see if there's any possible violations in th[e] home." App. 385.

Finally, Defendants claim that the second factor (information provided by the offender relevant to a probation violation) applies because Mr. Leatherwood told Defendant Hazen on May 19, 2009, that he was dating a woman with children. Defendants Br. 6, 17. But Defendant Welker admitted that Mr. Leatherwood told her the relationship had ended, and that this factor did not support the search. App. 201–02, 386. And in any event, Defendants offer no explanation, much less

justification, for waiting 120 days after receiving this information to conduct the warrantless search on September 17, 2009.

* * *

For these reasons, Defendants' warrantless search was not authorized by Oklahoma's probation search regulations and therefore was not a valid "special needs" search under *Griffin*.

2. It Was Clearly Established That Defendants' Warrantless Search Did Not Comply With Oklahoma's Search Policy And Therefore Was Not Reasonable Under Griffin

The district court appropriately denied summary judgment to Defendants because a reasonable officer would have known that Defendants' warrantless search was in violation of Oklahoma procedures and was not sanctioned by *Griffin*. See *Koch* v. *City of Del City*, 660 F.3d 1228, 1238 (10th Cir. 2011) (to defeat summary judgment on qualified immunity grounds, a plaintiff must show that the defendant violated a clearly established constitutional right).

Defendants do not dispute that the basic legal principles were clearly established at the time of the search, namely that (1) Mr. Leatherwood's probation status did not deprive him of Fourth Amendment protection from unreasonable searches (*Griffin*, 483 U.S. at 873); (2) warrantless searches of the home are presumptively unreasonable (*Payton* v. *New York*, 445 U.S. 573, 586 (1980)); and (3) Defendants' warrantless search is not permissible under *Griffin* unless the

search complies with Oklahoma's probation search regulations (*Griffin*, 483 U.S. at 873). Defendants argue, nonetheless, that the district court defined the relevant law at "too high a level of generality," and that Defendants could not reasonably have known that the particular circumstances of this case would not satisfy the Oklahoma probation search regulations and thus would not satisfy *Griffin*. Defendants Br. 26. That argument lacks merit.

For starters, the Supreme Court has rejected the notion that a plaintiff must produce a judicial decision exactly on point to defeat a defendant's motion for summary judgment on qualified immunity grounds. *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002). To the contrary, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Ibid*; see also *Armijo*, 159 F.3d at 1260. Here, Defendants' warrantless search satisfied none of the criteria they were required to consider under state law (see *supra* Part II.A.1), and Defendants had no reasonable basis to believe otherwise.

Indeed, there was authority closely on point that provided Defendants ample notice that their conduct was *unlawful*: the decision by the Oklahoma Court of Criminal Appeals in *State ex rel. Corgan* v. *King*, 868 P.2d 743 (1994). See also *United States* v. *Tucker*, 305 F.3d 1193, 1200 n.10 (10th Cir. 2002) (in a *Griffin* analysis, state law controls the meaning of a state's search regulations).

In *King*, the court held unconstitutional a warrantless search that failed to comply with just two of the Oklahoma probation search regulations. There, the police had investigated the defendant for drug dealing but were unable to obtain a search warrant. 868 P.2d at 744. They provided information about the defendant to his parole[10] officer, who then sought and received approval for the search. *Id.* at 744–45. The court held that this violated the prohibition against searches that result from assistance requests from police who are unable to obtain a search warrant. *Id.* at 747. Even though the opinion in *King* discloses no overt request from the police, the court was "concerned that the search was conducted to aid the local police who were unable to secure a search warrant as a result of their own investigation." *Ibid.* In particular, the court found that the search was not done for a "parole purpose" because, at the time of the search, the parole officer already possessed sufficient information to "justify revocation of [defendant's] parole." *Ibid.* Therefore, the court held, the parole officer "had for all practical purposes 'switched hats' and acted as a police officer rather than a parole officer." *Ibid.*

The court also held that a second search guideline was not satisfied, in that "failure to search [defendant's] home would not have resulted in an immediate

[10] Although the Supreme Court has held that "parolees have fewer expectations of privacy than probationers" (*Samson* v. *California*, 547 U.S. 843, 850 (2006)), this Court has equated parolees with probationers when deciding whether a search is reasonable under the Fourth Amendment (*United States v. Freeman*, 479 F.3d 743, 746 n.1 (10th Cir. 2007)).

threat to the public, employees, or offenders." *Ibid.* The court relied on "the fact that the search was not conducted until almost a month after it was requested and authorized," and also that the officers had arrested the defendant immediately before conducting the search. *Ibid.*

King was decided long before the search in this case—it is even cited in the Oklahoma probation search regulations (App. 354)—and it provided Defendants ample notice that their warrantless search was not permissible under state law. First, as in *King*, here there is strong evidence that Defendant Welker "switched hats" and was effectively working at the behest of Assistant District Attorney Geiger, who had

- instructed Defendant Welker to keep him informed of Mr. Leatherwood's performance (a request Defendant Welker said was unusual);
- told Defendant Welker that he would seek to imprison Mr. Leatherwood for a probation violation;
- tried but failed to prosecute Mr. Leatherwood for the alleged rape of Regina Wood;
- remained in regular communication with Defendant Welker about potential probation violations by Mr. Leatherwood; and
- was told by Defendant Welker that she would organize a search and "hopefully" find a firearm.

Further, as in *King*, Defendants have acknowledged that, in their view, the warrantless search was unnecessary to revoke Mr. Leatherwood's probation

because they claimed to already possess sufficient information to do so before the search. App. 393, 415–16. In addition, Defendant Welker's proffered explanation for her conduct—that she was acting in her capacity as a "peace officer" and not a "probation officer" (App. 176)—was not only rejected by her superior as incomprehensible (App. 414), but that exact argument was also rejected in *King*. 868 P.2d at 747. Finally, Defendants acknowledge that the "goal" (App. 416) of the search was to find a firearm, but make no effort to justify the search on that basis, thus further showing that their asserted justifications for the search are pretexts for impermissible law enforcement motives.

Second, as in *King*, a failure to search would not have constituted a threat to the public. *King* so held where the parole officer waited approximately a month to conduct the search. Here Defendants waited almost twice that time after the July 27 telephone call. And, Defendant Welker issued Mr. Leatherwood the travel permit just five days before Defendants approved the search.

Finally, while *King* held the search unlawful because it violated just two probation search regulations, Defendants' search violated numerous additional conditions, including because the informant information Defendant Welker received was highly unreliable. In contrast, the search in *King* was based on information provided by police officers who "had been investigating [the defendant] for some time." 868 P.2d at 744.

Defendants' efforts to distinguish *King* are unpersuasive. They note that the version of the probation regulations at issue in *King* referred to whether failure to conduct a warrantless search would result in an "immediate threat" to the public, while the current version of the regulations refers only to a "threat" to the public. Defendants Br. 24–25. But nothing in *King* indicates the court would have reached a different outcome under the current language; to the contrary, the Oklahoma Court of Criminal Appeals subsequently held (long before the search in this case) that the revisions worked no substantive change. See *Ott* v. *State*, 967 P.2d 472, 474 n.7 (Okla. Crim. App. 1998) ("The revised factors contain the same requirements as those set forth in *King* . . . .").

Defendants also argue that *King* is inapposite because "official purpose is no longer relevant" to the Fourth Amendment analysis. Defendants Br. 24; see also *id.* at 29–30 (faulting the district court for "limit[ing] its analysis" to the July 27 telephone call and the September 4 email). But Defendants' argument both misses the point and is incorrect. Where, as here, Defendants try to justify their warrantless search under *Griffin*, the Court must determine whether the search complies with state law. As discussed above, the Oklahoma regulations required Defendants to hold a pre-search conference to decide whether the search was justified based on the seven enumerated factors. It was plainly correct—and certainly not error—for the district court to focus on the July 27 telephone call and

the September 4 email, which is the only information Defendants actually considered at their pre-search conference.

Moreover, Defendants are wrong that "official purpose" is not relevant. To the contrary, the Oklahoma regulations require consideration of whether the warrantless search is a proxy for a law enforcement search. App. 352. Just as in *King*, it was not only appropriate—but required—for the district court (and this Court) to consider whether the search had improper law enforcement motives.

Finally, Defendants argue that *King* is distinguishable because law enforcement officers were not "involved" in Defendants' warrantless search. Defendants Br. 24. But Defendants do not deny (or otherwise address) Mr. Geiger's extensive discussions and out-of-the-ordinary instructions to Defendant Welker. Indeed, their coordination presents a much stronger "concern" (*King*, 868 P.2d at 747) of impermissible collusion than existed in *King*.

Defendants cite other cases, but only one involves Oklahoma law, and it is plainly inapposite. See *Ott* v. *State*, 967 P.2d 472 (Okla. Crim. App. 1998). In *Ott*, the court found the search reasonable not merely because there was a tip, but because, "immediately" prior to the search, the officers saw "a loaded gun within reach of the chair in which [defendant] had been seated." *Id.* at 475. The court naturally held that the presence of a loaded firearm—which defendant was not

permitted to possess—"gave the officers reasonable grounds to search the premises." *Ibid.* Nothing remotely like that happened here.

* * *

For these reasons, at the time of Defendants' warrantless search, a reasonable officer would have known that the search did not comply with Oklahoma law and therefore was not a valid "special needs" search under *Griffin*.

B. Under Clearly Established Law, Defendants' Warrantless Search Is Not Reasonable Under *United States* v. *Knights*

Defendants alternatively argue that, even if their warrantless search is not permissible under *Griffin*, it is reasonable under *United States* v. *Knights*, 534 U.S. 112 (2001). See Defendants Br. 20. *Knights* upheld the warrantless search of a probationer under the "general Fourth Amendment approach of examining the totality of the circumstances." *Id.* at 118 (internal quotation marks omitted). The Court held the search reasonable because it was supported by reasonable suspicion and because the defendant's probation order authorized warrantless searches without any suspicion at all. *Id.* at 122.

Defendants' reliance on *Knights* is misplaced. First, their argument is waived. Second and in any event, in light of the particular search terms of Mr. Leatherwood's probation order, *Knights* requires that Defendants' warrantless search comply with Oklahoma's probation search regulations to be reasonable

under the Fourth Amendment. And third, even if *Knights* requires only reasonable suspicion, here that suspicion was absent under clearly established law.

1. Defendants Have Waived Any Reliance On Knights

Below, Defendants' summary judgment papers made virtually no mention of *Knights*, but instead sought to defend their warrantless search under *Griffin*. While their brief spent more than five pages analyzing this case under *Griffin*, it mentioned *Knights* only in its final paragraph, and cited no cases in support of that argument other than *Knights* itself. App. 50–56 (The other cases cited in the brief each construed state law under a *Griffin* analysis.) Nor did Defendants' reply brief argue *Knights* or even cite it. App. 426.

Consistent with how Defendants framed their argument, the district court likewise addressed only *Griffin* in its order denying summary judgment. See App. 435 (stating that the relevant question is whether "reasonable suspicion existed under the terms of the governing [Oklahoma] policy"). And, when Defendants subsequently moved to supplement the record, arguing (among other things) that the district court "could reconsider its decision denying summary judgment" (Doc. 113 at 1), Defendants again made no mention of *Knights* or otherwise suggested the district court failed to consider any of their arguments. Under settled law, Defendants have waived their reliance on *Knights* by inadequately presenting their argument to the district court. See *Wall* v. *Astrue*, 561 F.3d 1048, 1066 (10th Cir.

2009); see also *Walker* v. *Progressive Direct Ins. Co.*, 472 F. App'x 858, 862 (10th Cir. 2012) (unpublished) (issue waived where it is discussed in only "one paragraph"); *Bancamerica Commercial Corp.* v. *Mosher Steel of Kansas, Inc.*, 100 F.3d 792, 798–99 (10th Cir.) (declining to consider a new theory on appeal even if it "falls under the same general category as an argument" presented to the district court), opinion amended on other grounds, 103 F.3d 80 (10th Cir. 1996); *Cook* v. *Chase Manhattan Mortg. Corp.*, 256 F. App'x 223, 228 (10th Cir. 2007) (unpublished) (same); *Tele-Commc'ns, Inc.* v. *Comm'r*, 104 F.3d 1229, 1233 (10th Cir. 1997) ("[T]o preserve the integrity of the appellate structure, we should not be considered a 'second-shot' forum where secondary, back-up theories may be mounted for the first time." (alterations omitted)).

2. Defendants' Warrantless Search Is Unreasonable Under Knights *Because, As Applied To This Case,* Knights *Requires That Defendants' Search Comply With Oklahoma's Search Policy*

In any event, Defendants' argument lacks merit. Defendants construe *Knights* to mean that a warrantless search of a probationer's home is reasonable under the Fourth Amendment so long as the search is supported by "reasonable suspicion." Defendants Br. 20. But Defendants misread *Knights*.

As noted, *Knights* applied the "general Fourth Amendment approach of examining the totality of the circumstances" to determine whether a warrantless probation search was constitutional. 534 U.S. at 118 (internal quotation marks

omitted). But contrary to what Defendants imply, the Supreme Court did not uphold the search just because it was supported by reasonable suspicion. Instead, a critical factor in the Supreme Court's balancing analysis were the extremely expansive terms of the California probation order that the defendant had signed. *Id.* at 118–20. The order authorized searches at any time, not only without a warrant, but even "without . . . reasonable cause." *Id.* at 114. The Supreme Court emphasized that this provision was a "salient circumstance" that "significantly diminished [defendant's] reasonable expectation of privacy." *Id.* at 118, 120. And, the provision was essential to *Knights*'s holding that the search was reasonable under the circumstances of that case. *Id.* at 122 ("We therefore hold that the warrantless search of [defendant], supported by reasonable suspicion and authorized by a condition of probation, was reasonable . . . ."); see also *Samson* v. *California*, 547 U.S. 843, 850 (2006) ("the search at issue in *Knights* was predicated on both the probation search condition and reasonable suspicion"); *United States* v. *Freeman*, 479 F.3d 743, 748 (10th Cir. 2007) ("We interpret [*Knights*] as resting on the [probationer's] diminished expectation of privacy stemming from his own [probation] agreement and the state regulations applicable to his case.").

This case is different. The probation order Mr. Leatherwood signed does not authorize suspicionless searches, as the order in *Knights* did. Nor does it even

authorize warrantless searches that are supported just by reasonable suspicion, as some states do. *Samson*, 547 U.S. at 855. Instead, the order is especially protective of Mr. Leatherwood's privacy in that it authorizes searches only if they comply with Oklahoma Department of Corrections policy. App. 130, 235 ¶ 11 ("I understand that my person, my vehicle or property under my control are subject to search within the policy of the Department of Corrections.").

This distinction matters. *Knights* upheld the search because it was supported by reasonable suspicion, and because that was substantially *more* than what the defendant was entitled to under his probation order authorizing suspicionless searches. But here, the probation order required Defendants to comply with Oklahoma's search policy, and yet Defendants claim their search is reasonable under *Knights* "even assuming arguendo that the terms of the Oklahoma[] probation search regulations were ***not*** followed." Defendants Br. 20 (emphasis added).

The Court should reject that argument. The Fourth Amendment balancing test must account for Mr. Leatherwood's "reasonable expectation of privacy." *Knights*, 534 U.S. at 120. Here, that expectation was made clear—as much to the State and Defendants as to Mr. Leatherwood—by the express terms of the probation order: A warrantless search is permissible *only* if it complies with the Oklahoma policy. Likewise, the inclusion of these terms in the probation order

shows that the State believed the terms were consistent with its interests in avoiding recidivism and rehabilitating Mr. Leatherwood. *Id.* at 119–20. Thus, under the totality of circumstances in this case, the Court should hold that Defendants' search is reasonable under *Knights* only if the search followed Oklahoma policy. See *United States* v. *Carnes*, 309 F.3d 950, 962–63 & n.2 (6th Cir. 2002) (reaching similar conclusion where Michigan defendant's parole agreement "is wholly different from Knights' probation search condition"; "Basically, [defendant] could expect government intrusion into his life to the extent the special needs exception [under *Griffin*] would allow it."); *United States* v. *Washington*, No. CR-1-07-129, 2008 WL 222510, at *8 (S.D. Ohio Jan. 25, 2008) (same).[11]

[11] The Court has stated that this "Circuit has interpreted *Knights* to mean that a probation search [is] permissible so long as supported by reasonable suspicion, regardless of the motivation for the search." *Freeman*, 479 F.3d at 747 (internal quotation marks omitted)). But that statement must be read in context. In the cases where this Court has applied *Knights*, reasonable suspicion is all that applicable *state law* required. See, e.g., *id.* at 744 (Kansas law); *United States* v. *Trujillo*, 404 F.3d 1238, 1240 (10th Cir. 2005) (Utah law); *United States* v. *Tucker*, 305 F.3d 1193 (10th Cir. 2002) (same); *United States* v. *Blake*, 284 F. App'x 530, 531 (10th Cir. 2008) (unpublished) (Wyoming law); see also *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 520 (2012) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." (internal quotation marks omitted)). Whether *Knights* requires more than reasonable suspicion where (as here) state law so requires is an open question that should be answered in the affirmative. Cf. *United States* v. *Warren*, 566 F.3d 1211, 1217 (10th Cir. 2009).

3. Even if Reasonable Suspicion, Alone, Satisfies Knights, *Here There Was No Such Suspicion Under Clearly Established Law*

1. In any event, on this record and applying the proper summary judgment standard, a reasonable officer would have known that Defendants' warrantless search was not supported by reasonable suspicion. See *Armijo*, 159 F.3d at 1259, 1264 n.9 (the Court "must draw all inferences in favor of [the] [p]laintiff" and "must scrupulously avoid second-guessing the district court's [evidence-sufficiency] determinations"). Therefore, the search was not valid even under an unduly broad reading of *Knights*.

Defendants rely mainly on the information provided by Jennifer Leatherwood in the July 27 telephone call and by the unidentified sources in the September 4 e-mail. But the reliability of that information was "very insignificant" (App. 436), and this was clear under existing federal law. See *Tucker*, 305 F.3d at 1200 n.10 (the Court "look[s] to the federal standard of reasonable suspicion" when "applying general Fourth Amendment principles and not the special needs exception").

To determine whether a tip "is sufficiently reliable to provide reasonable suspicion, [the Court] consider[s] the credibility or veracity of the informant, the basis of the informant's knowledge, and the extent to which the police are able independently to verify the reliability of the tip." *United States* v. *Leos-Quijada*,

107 F.3d 786, 792 (10th Cir. 1997) (citing various Supreme Court precedent). Each of these factors points strongly against reasonable suspicion here.

This case closely resembles *United States* v. *Monteiro*, 447 F.3d 39 (1st Cir. 2006), which applied the foregoing principles and found reasonable suspicion lacking. There, a gang member told the police that his relative, whom he did not further identify, said that she had witnessed gunfire on a particular street from two cars, one of which the police determined was owned by a rival gang member. *Id.* at 41. The police visited the street in question but did not find any evidence of gunfire. *Ibid.* They nonetheless stopped the second gang member when, one week later, they spotted him driving the vehicle the relative identified. *Id.* at 41–42. The First Circuit held that the search violated the Fourth Amendment because the vehicle stop was not supported by reasonable suspicion. The court found that the tip bore "some important badges of unreliability," including:

- The police "had no way of knowing the state of mind of [the] relative when she gave her information, or whether she was a person who could be relied on to relate events accurately" (*id.* at 45–46);

- In light of the gang rivalry, both the gang member who spoke to the police and his relative had an "obvious" motive to lie (*id.* at 46);

- "[C]rucially," the police had "specific reasons to doubt the tip by the time they made their stop," in light of the fact they found no evidence of a shooting when they visited the street at issue (*ibid*);

- The tip contained no predictive information that the police could verify to "confirm[ ] the tipster's knowledge of the subject's criminal intentions" (*id.* at 48 n.12);

- The passage of one week between when the police received the tip and when they conducted the stop "reduced the weight that the tip could carry in the reasonable suspicion analysis" (*id.* at 48); and

- There was no "imminent threat to public safety" that might justify giving the tip more weight than it otherwise deserved (*id.* at 49).

Each of these factors is present here. Consider first the July 27 telephone call from Jennifer Leatherwood. Defendants do not now justify their search based on Jennifer Leatherwood's statement about a firearm. And her allegation that Mr. Leatherwood raped Regina Wood was no more reliable. As in *Monteiro*, (1) Jennifer Leatherwood had a clear motive to fabricate information; (2) Defendant Welker had "specific reasons to doubt the tip" because the detective investigating the rape allegation told Defendant Welker the case was weak and would not proceed; (3) the search was not conducted until fifty-two days after the tip (and thirty-eight days *after* Defendant Welker spoke with the detective); and (4) there was no threat to public safety (imminent or otherwise), as shown by the fact that Defendant Welker had "no problem" issuing the travel permit authorizing Mr. Leatherwood to drive the truck that allegedly contained a firearm. App. 203. Thus, Jennifer Leatherwood's tip was not credible, and the police failed to verify the reliability of her allegation. *Leos-Quijada*, 107 F.3d at 792; see also, e.g.,

United States v. Payne, 181 F.3d 781, 790 (6th Cir. 1999) ("[F]from the government's failure to produce a single item of evidence from [its investigation] in support of founded suspicion, the only rational inference [is] that the informant was unreliable.") (internal quotation marks omitted).

The information in the September 4 e-mail is even less credible. Nearly all the information came not from the author of the e-mail, but from the "undisclosed person" with whom Defendant Welker never communicated. As in *Monteiro*, Defendant Welker had no way of knowing this person's state of mind or whether the person was reliable. See also, e.g., *United States v. O'Connor*, No. 06-20583, 2007 WL 4126357, at *5 (E.D. Mich. Nov. 20, 2007) (no reasonable suspicion where parole officer did not speak with anonymous caller and "admitted that there was no attempt made to corroborate the information received from the tips"). And because Defendants have not identified the undisclosed person to the Court, the Court has no way of knowing whether the person has a motive to fabricate. See *DelGarza-Alzaga* v. *State*, 36 P.3d 454, 456 (Okla. Crim. App. 2001) ("[T]he informant was never identified, and although the officer personally considered the informant to be trustworthy, the State offered no particulars by which the trial court, or this Court, could objectively evaluate this opinion."); see also *Florida* v. *J.L.*, 529 U.S. 266, 270 (2000) (anonymous tip of illegal activity insufficient to provide reasonable suspicion).

In addition, the undisclosed person provided no predictive information that Defendant Welker could corroborate. And Defendants also waited more than a week after receiving the tip to conduct the search, while Defendant Welker issued the travel permit in the meantime.

The only other information in the September 4 e-mail is the author's vague assertion that Mr. Leatherwood "has been known to keep porn in his safe." App. 111. But this conclusory allegation contains no predictive information; is inconsistent with the issuance of the travel permit; and does not specify whether Mr. Leatherwood possessed pornography before his probation began, when he could permissibly do so. See *Poolaw* v. *Marcantel*, 565 F.3d 721, 736 (10th Cir. 2009) ("Because it is lawful to carry a gun in a vehicle in New Mexico, Chara's admission that she had a gun does not weigh heavily in our reasonable suspicion calculus . . . ."); *Payne*, 181 F.3d at 790 (no reasonable suspicion where, among other things, the tip did not indicate that unlawful activity was occurring at the time of the search); *United States v. Comrie*, 136 F. App'x 883, 893 (6th Cir. 2005) (unpublished) (same). And as discussed above, Defendant Welker made no effort to corroborate this statement or any other information in the e-mail. Nor did she have any prior experience working with the author of the e-mail or the undisclosed person, from which she could assess their credibility. App. 205.

2. The remaining information Defendants rely on does not create reasonable suspicion, whether considered alone or together. See Defendants Br. 9–11. As discussed above (see *supra* at 31–32), much of the information is expressly disputed by Mr. Leatherwood and therefore is not cognizable in light of the Court's limited interlocutory jurisdiction. See Doc. 106 ¶¶ 2–3 , 5–7; see also *Armijo*, 159 F.3d at 1259, 1264 n.9. In addition, Defendant Welker has acknowledged that most of the information Defendants cite would not even constitute a probation violation. See App. 158–59, 166, 180, 184, 196–99, 210–13, 218–19, 225; see also *United States* v. *Tuter*, 240 F.3d 1292, 1297 (10th Cir. 2001) (corroboration of "innocent" information does not give rise to reasonable suspicion); *United States* v. *Sanchez*, 608 F.3d 685, 689 (10th Cir. 2010) (same).

Defendants also point to information relating to Mr. Leatherwood's offense and the fact he was on probation. Defendants. Br. 9–11. But "parolee status and criminal history, without other particularized and objective facts," is not "sufficient to form reasonable suspicion." *Freeman*, 479 F.3d at 749 ("Presumably all parolees have criminal records, and if this were sufficient to warrant reasonable suspicion, there would effectively be no limits on the ability of law enforcement officers to conduct warrantless searches of parolees' homes."); see also *Tuter*, 240 F.3d at 1297.

What remains is Mr. Leatherwood's statement to Defendant Hazen on May 19, 2009, that he was dating a woman with children. But this statement, made four months before the search, cannot bear the weight Defendants place on it, especially because Defendant Welker acknowledged that Mr. Leatherwood later told her he was no longer in that relationship. App. 386.

Finally, even if any of the foregoing information could help establish reasonable suspicion, this would benefit only Defendant Welker, and not the other Defendants, who were not aware of the information. As explained above, this information cannot be imputed to the other Defendants, and Defendants do not contend that it should be. See *supra* at 30.

3. Defendants nonetheless claim their search was supported by reasonable suspicion, or at least that the law was not clearly established to the contrary. The cases they cite are inapposite. See Defendants Br. 22–23. In *United States* v. *Trujillo*, 404 F.3d 1238 (10th Cir. 2005), the defendant had violated numerous provisions of his parole agreement by failing a drug test, refusing to submit to a subsequent drug test, failing to pay restitution to the victims of his offenses, and failing to provide documentation of attendance at required therapy sessions. *Id.* at 1240. The defendant was also being investigated by the police for drug distribution, based on a tip that the police evidently deemed reliable enough to proceed with the investigation. *Ibid.* No similar factors are present here. To the

contrary, Detective Davis specifically *declined* to investigate Mr. Leatherwood after she could not corroborate Jennifer Leatherwood's rape allegation, and told this to Defendant Welker.

Defendants also cite *United States* v. *Tucker*, 305 F.3d 1193 (10th Cir. 2002), but the informant information there was much more reliable than the information Defendants possessed. The informant in *Tucker* was an employee of the United States Attorney's office who identified herself in a telephone conversation with a police officer. *Id.* at 1196. And the informant disclosed to the officer that the informant's source was a government employee who was a coworker of the defendant and who saw contraband in the defendant's home when they were on a lunch break together. *Ibid.* Here, in contrast, the record does not disclose the identity of either the author of the September 4 e-mail or the author's source, let alone whether the author or source lack credibility or have a motive to fabricate (neither of which was true in *Tucker*). See also *Monteiro*, 447 F.3d at 46 (distinguishing *Tucker* because "the police knew that the unnamed hearsay informant was a government employee," providing a "stronger indication that the informant [could] be trusted").

* * *

Defendants' warrantless search was therefore not reasonable under *Knights*.

CONCLUSION

For the reasons above, the Court should dismiss the appeal for lack of jurisdiction. Alternatively, the Court should affirm the judgment of the district court.

STATEMENT RESPECTING ORAL ARGUMENT

The Court's December 12, 2013, order states that there will be oral argument in this case.

Dated: February 18, 2014

Respectfully submitted,

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As required by Fed R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 13,992 words, including headings, footnotes, and quotations.

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I hereby certify that on February 18, 2014, I caused a copy of the foregoing to be served on counsel for Defendants-Appellants via transmission to the Clerk of the Court using the Court's ECF system.

s/ Mark A. Hiller
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