No.

In The
Supreme Court of the United States

ADAM LANE

Petitioner,

v.

ADAM NADING, Probation and Parole Office, and
JOSEPH M. BOYD, Corporal, Police Officer #4338,
Sebastian County Sheriff's Office,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves a circuit split on whether qualified immunity applies to § 1983 actions for failure to knock-and-announce in parole searches.

The venerable knock-and-announce rule is part of the common law and the Fourth Amendment's reasonableness requirement. *Wilson v. Arkansas*, 514 U.S. 927, 930–31, 932 n.2, 934 (1995). *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997), rejected categorical exceptions to the rule for drug cases and held that officers must establish exigency or futility "whenever the unreasonableness of a no-knock entry is challenged." Per se exceptions based on hypotheticals were rejected because "the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." *Id.* at 394–95.

Samson v. California, 547 U.S. 843, 855 n.4 (2006), upheld the reasonableness of suspicionless searches of parolees stating "[t]he touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." The Court noted that the state parole search law there prohibited "arbitrary, capricious or harassing" searches and thus did not "inflict[] dignitary harms." *Id.* at 856 (brackets added). And, that same Term, *Hudson v. Michigan*, 547 U.S. 586, 594 (2006), held that "the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance." There, however, the Court refused to apply the exclusionary rule because the search was legally justified at its inception by a warrant.

The Seventh Circuit held in 2005 it was clearly established that the knock-and-announce requirement applies to parole or probation searches in 42 U.S.C. § 1983 cases. The Eighth Circuit here said no in 2019. Yet, no case has ever held knock-and-announce was not required for a parole search. The Eighth Circuit was incorrect on whether this is clearly established law.

The questions presented are:

1. With a Fourth Amendment knock-and-announce violation in Petitioner's parole search, and where no case in nearly 50 years ever held that knock-and-announce did not apply to parole and probation searches, is that "clearly established law" or "robust consensus" of case law for qualified immunity in a 42 U.S.C. § 1983 case? (Or, does *Samson v. California* undo all that case law under the Fourth Amendment?)

2. Without Congressional approval in 42 U.S.C. § 1983, should qualified immunity be reconsidered or eliminated in Fourth Amendment cases because qualified immunity leaves these constitutional violations wholly unremedied and undermines police deference to and respect for the Fourth Amendment?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Adam Lane respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's June 20, 2019, opinion is published at *Lane v. Nading*, 927 F.3d 1018 (8th Cir. 2019). (Pet.App. 1a-8a, Appendix A)

The U.S. District Court for the Western District of Arkansas's May 10, 2018, order denying Respondents qualified immunity on Petitioner's individual capacity claims and granting qualified immunity as to Petitioner's official capacity claims is *Lane v. Nading*, 2:17-CV-02056 PKH (May 10, 2018) (unreported). (Pet.App. 9a-19a, Appendix B)

Lane's underlying conviction was affirmed by the Arkansas Supreme Court on February 16, 2017, holding that Respondents' failure to knock-and-announce violated Petitioner's Fourth Amendment rights but did not warrant suppression under *Hudson v. Michigan* is published at *Lane v. State*, 2017 Ark. 34, 513 S.W.3d 230, *cert. den.,* 137 S. Ct. 2222 (2017). (Pet.App. 20a-34a, Appendix C)

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eighth Circuit entered its judgment on June 20, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment, U.S. Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

STATEMENT OF THE CASE

A. Introduction and summary

This is a § 1983 case against Respondents, Nading, a state parole officer and Boyd, a Sebastian County Sheriff's deputy, alleging that they violated Petitioner's Fourth Amendment right against unreasonable search and seizure by failing to knock-and- announce prior to their predawn 6:00 a.m. warrantless and suspicionless parole entry and search of his motel room. The State conceded in Petitioner's direct appeal from his drug and firearm conviction that the officers did not knock-and-announce and "that no exigent circumstances existed to give the officers reasonable suspicion that knocking and announcing would be dangerous or futile." *Lane v. State*, 2017 Ark. 34 at *5, 513 S.W.3d 230, 234, *cert. den.*, 137 S. Ct. 2222 (2017). (Pet.App. 24a; *see also id.* at 11a, 18a) The State instead relied on *Hudson v. Michigan,* 547 U.S. 586 (2006), that the exclusionary rule did not apply to knock-and-announce violations. The Arkansas Supreme Court so held.

Lane was on parole and subject to a warrantless and suspicionless search condition. He was staying in a Fort Smith, Arkansas, motel room without prior approval from his parole officer, and he had also failed to report. Both were violations of his parole conditions. *Lane v. State*, at *2, 513 S.W.3d at 232. (Pet.App. 21a) Respondents arrived at the motel about 6 a.m. and had the manager unlock the room with an electronic key. *Id.* They did not knock-and-announce their presence prior to

entry. *Id.* It was still dark out (6:00 a.m. in January), and Lane was found in bed asleep with his female companion and arrested.

Respondents searched the room and found a handgun in the bed and several small baggies with methamphetamine next to the bed. *Id.* at *2–3, 513 S.W.3d at 233. (Pet.App. 21a)

B. Petitioner's state criminal case

The Sebastian County Circuit Court denied Lane's motion to suppress, and he went to trial. He was convicted of being a felon in possession of the firearm and drug offenses and sentenced by jury to 70 years as a repeat offender. *Id.*

His conviction was affirmed by the Arkansas Supreme Court. That court held that, as a matter of first impression in Arkansas, the knock-and-announce rule applied to parolees and that the officers' failure to knock-and-announce violated Lane's Fourth Amendment rights and under the state constitution. *Id.* at *5–8, 513 S.W.3d at 235. (Pet.App. 24a–27a) The Arkansas court, however, declined to apply the exclusionary rule and followed *Hudson v. Michigan*: Because the search itself was authorized by law, the failure to knock-and-announce thus did not warrant exclusion of evidence. *Lane v. State,* at *8–10, 513 S.W.3d at 236. This Court denied certiorari. 137 S. Ct. 2222 (June 5, 2017). (Pet.App. 27a– 29a)

C. Petitioner's § 1983 case against the officers for violation of his Fourth Amendment rights

After affirmance of his conviction, and relying on the state court's finding the Fourth Amendment was violated, Lane filed a *pro se* § 1983 complaint from prison alleging that Respondents violated his right against unreasonable search and seizure.[1] He amended his complaint alleging that Respondents violated his Fourth Amendment rights by failing to knock-and-announce before entering his motel room.

Respondents moved to dismiss that they were entitled to qualified immunity contending the parolee right to knock-and-announce was not "clearly established."

1. The District Court denies Respondents qualified immunity on Petitioner's individual capacity claims

The U.S. District Court for the Western District of Arkansas denied Respondents qualified immunity as to Lane's individual capacity claims.[2] *Lane v. Nading*, 2:17-CV-02056 PKH (May 10, 2018) (unreported). (Pet.App. 18a) In light of the Arkansas Supreme Court's holding that their actions violated the Fourth Amendment, the District Court limited its opinion to whether they violated a clearly

[1] Lane filed in the Eastern District of Arkansas but the situs of the claim was in the Western District. The case was transferred to the Western District under 28 U.S.C. § 1406(a).

[2] Respondents were granted qualified immunity as to Lane's official capacity claims. That was never an issue thereafter.

established right.[3] (Pet.App. 18a) The District Court held that

> there appears to be a consensus of both binding and persuasive federal law prior to January 27, 2015, that a failure to knock and announce is a violation of the Fourth Amendment absent a reasonable suspicion of exigency or futility. ... Indeed, the knock and announce rule appears to be one of the few rights available to parolees.

Pet.App. 18a.

> In terms of binding federal authority, neither the United States Supreme Court or the Eighth Circuit have specifically addressed the question of whether the knock and announce rule applies to parolees who have agreed to warrantless searches as a condition of their parole; however, "the common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one ... [t]racing its origins in our English legal heritage." *Hudson v. Michigan*, 547 U.S. 586, 589 (2006). "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). Both the United States Supreme Court and the Eighth Circuit have held "there is no blanket exception to the knock and announce requirement for felony drug cases." *United States v. Tavares*, 223 F.3d 911, 916 (8th Cir. 2000), *overruled on other grounds by Doran v. Eckold*, 409 F.3d 958 (8th Cir. 2005) (citing *Richards,* 520 U.S. at 388).
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> In terms of persuasive authority, in 2005 the Seventh Circuit rejected a blanket exception to the knock and announce rule for parolees who had signed agreements to be searched at any time as a condition of parole. *Green v. Butler*, 420 F.3d 689, 699 (7th Cir. 2005). The

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[3] "Under our precedents, officers are entitled to qualified immunity under §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

> *Green* Court stated that "a reasonable officer would not believe that a parolee's consent to search on demand eliminates the need to make such a demand, absent an exigency or demonstrated futility." *Id.* at 698.
>
> As noted by the Arkansas Supreme Court, blanket exceptions to the knock and announce rule have also been rejected in several other federal Circuits for drug cases, felony murder investigations, and possession of firearms cases. *Lane*, 2017 Ark. at 7, 513 S.W.3d at 235 (listing cases in the Third, Fourth, Fifth, Sixth, and Tenth Circuits).

Pet.App. 17a-18a.

2. The Eighth Circuit reverses on qualified immunity

Respondents appealed to the U.S. Court of Appeals for the Eighth Circuit, and that court appointed counsel for Petitioner. That court reversed June 20, 2019. *Lane v. Nading*, 927 F.3d 1018 (8th Cir. 2019). (Pet.App. 8a) The Court of Appeals assumed a Fourth Amendment violation occurred but held that Respondents were "entitled to qualified immunity on the face of the complaint" because it was not clearly established that parolees retained their right to announcement. *Lane*, 927 F.3d at 1022–23 (Pet.App. 5a):

> Even assuming that the officers violated the Fourth Amendment by failing to knock and announce their presence before entering Lane's dwelling, it was not clearly established in January 2015 that failing to knock and announce before entering the dwelling of a parolee was unlawful. That is because neither the Arkansas Supreme Court, this Court, nor the U.S. Supreme Court had spoken on the specific issue of whether the knock-and-announce requirement applies to parolees. Moreover, there existed no "robust consensus of cases of persuasive authority" addressing the issue at the time the officers entered Lane's dwelling. [*Wesby*,] at 589-90.

Id. (brackets added). (Pet.App. 5a–6a) The Court of Appeals also held that, given

Samson v. California's "proposition that parolees may be treated differently than non-parolees for some Fourth Amendment purposes," "it would not have been clear to every reasonable officer in the defendant officers' positions that failing to knock and announce his presence before entering and searching Lane's hotel room violated the Fourth Amendment." *Lane*, 927 F.3d at 1024. (Pet.App. 8a)

So, has *Samson*, not even directly on point, unsettled a parolee's Fourth Amendment right to knock-and-announce established by so many lower court cases?

REASONS FOR GRANTING THE WRIT

First, this case allows the Court to resolve a circuit split regarding whether it is clearly established that parolees have a right to knock-and-announce absent exigency or futility. Sup. Ct. Rule 10(a). The Eighth Circuit here, *Lane v. Nading*, 927 F.3d 1018 (8th Cir. 2019), is directly contrary to the Seventh Circuit's *Green v. Butler*, 420 F.3d at 699, on this precise question where it was clearly established law for qualified immunity purposes that parolees had a Fourth Amendment right to knock-and-announce on substantially similar facts.

Second, this case also presents the important question of whether *Samson v. California* tempers the knock-and-announce rule as to parolees. The Court of Appeals left this question open, and it needs to be resolved because of the important policy and safety issues underlying the knock-and-announce rule. Sup. Ct. Rule 10(c).

Third, this case presents the Court with the opportunity to reconsider or eliminate the judicially-created doctrine of qualified immunity as contrary to § 1983 and never authorized by Congress and the Fourth Amendment. The Court should overrule or limit *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Anderson v. Creighton*, 483 U.S. 635 (1987), and their progeny. Sup. Ct. Rule 10(c).

I. Respondents are not entitled to qualified immunity for their failure to knock-and-announce their presence prior to their predawn entering Petitioner's motel room because it was clearly established at the time that there are no categorical exceptions to the knock-and-announce rule even for parolees.

A. Respondents violated Petitioner's Fourth Amendment rights by failing to knock-and-announce before entering his motel room.[4]

The Fourth Amendment right to knock-and-announce before police entry of a person's dwelling[5] was settled at common law by *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194, 195 (K.B. 1603), relying on a statute from 1275. It was first adopted here by 18 U.S.C. § 3109 in 1917. *See Miller v. United States*, 357 U.S. 301 (1958); *Ker v. California*, 374 U.S. 23 (1963); *Sabbath v. United States*, 391 U.S. 585 (1968).

Being a part of the common law, knock-and-announce was held part of the Fourth Amendment in *Wilson v. Arkansas*, 514 U.S. 927, 930–31 (1995), which noted that the right to announcement actually appeared to pre-date *Semayne's Case* in a British statute enacted in 1275, at that time 720 years earlier, which was itself "'but an affirmance of the common law.'" *Wilson*, 514 U.S. at 932 n.2. Thus, knock-

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[4] The District Court and the Eighth Circuit assumed this prong of the qualified immunity test was satisfied in light of the Arkansas Supreme Court's decision on direct appeal in *Lane v. State*, at *5–8, 513 S.W.3d at 235. (Pet.App. 3a, 5a, 18a)

Respondents of course were not parties to the criminal appeal, so they have never litigated whether the Fourth Amendment was violated. It has been conceded or assumed throughout this case.

[5] Including motel rooms. *Richards v. Wisconsin*, 520 U.S. 385, 388 (1997).

and-announce is a part of the fundamental requirement of "reasonableness" in the Fourth Amendment:

> Our own cases have acknowledged that the common law principle of announcement is "embedded in Anglo-American law," *Miller v. United States*, 357 U.S. 301, 313 (1958), but we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold.

Wilson, 514 U.S. at 934.

Reasonableness, in turn, is an objective inquiry which applies to every search, whether it be warrantless or with a warrant, *see, e.g., Terry v. Ohio*, 392 U.S. 1, 20–22 (1968), and whether it involves students in school, *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985), pre-trial detainees in jail, *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), probationers, *Griffin v. Wisconsin*, 483 U.S. 868 (1987), or parolees, *Samson v. California*, 547 U.S. 843, 855 n.4 (2006) (parole searches do not constitutionally require individualized suspicion because "[t]he touchstone of the Fourth Amendment is reasonableness, not individualized suspicion"). Reasonableness is, after all, "the underlying command of the Fourth Amendment." *Wilson*, 514 U.S. at 931 (quoting *New Jersey v. T.L.O., supra*).

The only exception to the knock-and-announce rule is where the officers "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of

evidence." *Richards v. Wisconsin*, 520 U.S. at 394. "This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged." *Id.* at 394–95. There can be no categorical exceptions to the knock-and-announce rule because it would necessitate over-generalizations and would easily swallow the rule. *Id.* at 393–94. "If a *per se* exception were allowed for each category of criminal investigation that included a considerable – albeit hypothetical – risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." *Id.* at 394.

In fact, courts cannot rely on a categorical approach regarding knock-and-announce timing issues for the same reasons: an "overlay of a categorical scheme on the general reasonableness analysis threatens to distort the 'totality of the circumstances' principle, by replacing a stress on revealing facts with resort to pigeonholes." *United States v. Banks*, 540 U.S. 31, 42 (2003) (discussing *United States v. Arvizu*, 534 U.S. 266 (2002)). Retaining a case-by-case, rather than categorical, approach recognizes the individual's strong interest in having "an opportunity to themselves comply with the law and to avoid the destruction of property occasioned by a forcible entry." *Richards*, 520 U.S. at 393 n.5 (citing *Wilson v. Arkansas*, 514 U.S. at 930–32).

These interests are heightened by the fact that, since most search warrants are

executed late at night or early in the morning, "[t]he brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed."[6] *Richards*, 520 U.S. at 393 n.5. Further, the State has a strong interest in applying the knock-and-announce rule whenever possible given that the rule and its exceptions are meant to protect officers from a violent reaction by a startled occupant.[7]

In the years since, *Richards* has been applied in various contexts such as hot pursuit, *Ingram v. City of Columbus*, 185 F.3d 579 (6th Cir. 1999); *Trent v. Wade*, 776 F.3d 368 (5th Cir. 2015) (no qualified immunity), and, relevant to Petitioner's case, parole searches. *Green v. Butler*, 420 F.3d at 699 (no qualified immunity);

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[6] And there is an obvious salutary purpose of announcement: Petitioner was in bed with his girlfriend, albeit asleep. Sleeping isn't all that people do at home or in motel rooms. They could have been in bed having sex when the police came in without announcing. *Compare Mitchell v. Stewart*, 608 Fed. Appx. 730 (11th Cir. 2015) (but officers announced); *People v. Contreras*, 211 Cal. App. 2d 641, 27 Cal. Rptr. 619 (2d Dist. 1963) (officer following prostitute heard her in room likely having sex so he waited to knock). Hence, the basic civility and constitutionally duty of officers knocking before entering unless there is exigency.

[7] *See Miller*, 357 U.S. at 313 n.12; *McDonald v. United States*, 335 U.S. 451, 460–61 (1948) (Jackson, J., concurring) (concerned that failure to announce can lead to death of police officers and householders alike when a homeowner defends his or her property from what he or she believes is an unwarranted invasion); *Hudson v. Michigan*, 547 U.S. 586, 594 (2006). A homeowner generally has a right to do so. *District of Columbia v. Heller*, 554 U.S. 570 (2008), and although a probationer or parolee isn't *supposed to* have a firearm, that does not obviate the need to protect all concerned from violence whether it be from a legally- or illegally-possessed firearm.

United States v. Musa, 288 F. Supp. 2d 1205, 1208 (D. Kan. 2003) (status on supervised release does not create a *per se* greater risk of destruction of evidence), *rev'd on other grounds,* 401 F.3d 1208 (10th Cir. 2005); *Portnoy v. City of Davis*, 663 F. Supp. 2d 949, 957 (E.D. Cal. 2009) (no qualified immunity); *People v. Montenegro*, 173 Cal. App. 3d 983, 219 Cal. Rptr. 331, 334 (4th Dist. 1985). Two leading search and seizure treatises are in accord that application of knock-and-announce to probationers and parolees is a settled rule before 1978 by the absence of any contrary case law.[8]

It was conceded below that none of the exceptions listed in *Wilson* and

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[8] 5 LAFAVE, SEARCH AND SEIZURE: TREATISE ON THE FOURTH AMENDMENT § 10.10(d) at n.154 (5th ed. 2012, 2018 update) ("For example, it would be totally inappropriate to provide as a condition of probation or parole that the person may be subjected to premises searches not preceded by the usual knock-and-announce procedure. 'This requirement is made as much for the protection of the officers as for the protection of the occupants and their constitutional rights.'"). LaFave has it in § 10.10(d) in every edition from 1978: 1st ed. 1978 at nn. 75–76; 2d ed. 1987 at nn. 81–82; 3d ed. 1996 at nn. 96-97; 4th ed. 2004 at nn. 117–18; 5th ed. 2012 at nn. 153–54. *Accord:* 2 JOHN WESLEY HALL, JR., SEARCH AND SEIZURE § 34.04 n.14 (5th ed. 2013, 2018 update) ("Furthermore, the knock-and-announce requirements apply to entries into a dwelling to conduct a parolee or probationer search."). Hall has it 2d ed. 1993 at § 25:16 nn.23–25; 3d ed. 2000 at § 25:16 nn.224–25; 4th ed. 2012 at § 25:16 nn. 224-25. *See also* COHEN, LAW OF PROBATION & PAROLE § 23:18 (2018 update), starting with *People v. Rosales*, 68 Cal. 2d 299, 66 Cal. Rptr. 1, 437 P.2d 489, 492–93 (1968) (the knock-and-announce rule protects everybody from violence, relying on *Miller*; it has to apply to probation and parole searches for the same reason; the court of appeals held that exigency had been shown suggesting that futility applied, *People v. Rosales,* 61 Cal. Rptr. 170 (Cal. App. 2d Dist. 1967), but the California Supreme Court disagreed and reversed.

Richards justifying a no-knock entry were present here. (Pet.App. 11a, 18a, 24a) Thus, in light of this Court's precedent, Respondents' failure to knock-and-announce before entering Petitioner's motel room was a violation of his Fourth Amendment rights.

B. It was clearly established at the time of Respondents' entry into Petitioner's motel room that there are no categorical exceptions to the knock-and-announce rule even for parolees. Thus, this case creates a conflict with the Seventh Circuit.

1. Clearly established law and beyond debate; the principles

"To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent" such that "the constitutionality of the officer's conduct" is "'beyond debate.'" *Wesby,* 138 S. Ct. at 589 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). It must be "dictated by 'controlling authority' or a 'robust consensus of cases of persuasive authority.'" *Wesby*, 138 S. Ct. at 589–90 (quoting *Hunter v.* Bryant, 502 U.S. 224, 228 (1991) (per curiam); *al-Kidd,* 563 U.S. at 741–42)).

A consensus is "[a] general agreement; collective opinion." BLACK'S LAW DICTIONARY (11th ed. 2019). "Robust" is strength or vigor and without failure. Merriam-Webster online (accessed Sept. 14, 2019).

Clearly established law cannot be defined "at a high level of generality" unless it is the "rare 'obvious case.'" *Wesby*, 138 S. Ct. at 590 (quoting *Brosseau v. Haugen*,

543 U.S. 194, 199 (2004) (per curiam); *see also Hope v. Pelzer*, 536 U.S. 730 (2002). Rather, "[t]he rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Wesby*, 138 S. Ct. at 590 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)). The "salient question" is whether the state of the law gives the officials "fair warning" that their conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. at 741.

> The contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987). There must be "'a body of relevant case law'" rather than "'a case directly on point.'" *Wesby*, 138 S. Ct. at 590 (quoting *al-Kidd*, 563 U.S. at 741).

2. There is a "robust consensus" of persuasive authority; indeed, there is no case to the contrary in the 50 years since it first came up.

The Eighth Circuit held that the District Court erred in denying qualified immunity because there was neither a "robust consensus" of persuasive authority, nor any controlling authority, on the particular issue of whether parolees are entitled to the protection of the knock-and-announce rule. (Pet.App. 23a-25a) The Court of

Appeals erred, however, because that level of specificity in defining the rule at issue is not required. Indeed, this Court has held that a case directly on point is not even necessary. *Wesby*, 138 S. Ct. at 590 (quoting *al-Kidd*, 563 U.S. at 741). The fact that an officer is presented with a somewhat different factual scenario simply does not give him or her the right to disregard well-defined, firmly-established constitutional principles.

The knock-and-announce rule's "contours" are "well defined" under controlling authority that, absent reasonable suspicion of exigency or futility which Respondents conceded did not exist, Respondents were constitutionally required to knock-and-announce their presence before entering Petitioner's motel room, and they could not create, on their own accord, a blanket exception to the rule for all parolees. *Richards,* 520 U.S. at 394; *Banks*, 540 U.S. at 42; *United States v. Tarvares*, *supra.* (Pet.App. 11a, 17a–18a)

Further, there is a "robust consensus" of persuasive authority[9] applying *Richards*' flat prohibition of categorical exceptions to the knock-and-announce rule to various classes of persons and crimes. *See, e.g.*, *United States v. Nielson*, 415 F.3d 1195, 1202 (10th Cir. 2005) (rejecting blanket exception for possession of firearms); *Ingram v. City of Columbus*, *supra* (rejecting blanket exception in hot pursuit cases);

[9] There is no particular number that defines what constitutes a "robust consensus" of cases.

Trent v. Wade, *supra* (same); *Bishop v. Arcuri*, 674 F.3d 456, 467 (5th Cir. 2012) (rejecting blanket exception for investigating drug premises); *United States v. Singleton*, 441 F.3d 290, 294 (4th Cir. 2006) (rejecting blanket exception for drug investigations even if dangerous neighborhood and suspect with a criminal history); *Kornegay v. Cottingham*, 120 F.3d 392, 398–99 (3d Cir. 1997) (rejecting blanket exception for murder investigations even where suspect had prior arrests for violent offenses with a weapon).

3. All the cases on point favor petitioner since 1967, including the Seventh Circuit in 2005.

Several cases specifically hold that the knock-and-announce rule applies to parolees, and no case holds otherwise. *Green v. Butler*, 420 F.3d at 699, found no qualified immunity on similar facts 14 years before this case. Hence the circuit conflict. With only two cases making the conflict, in an area with relatively few cases, the conflict will remain this way until remedied by this court.

The first application of knock-and-announce to a parole search appears to be *People v. Rosales, supra,* 437 P.2d at 492–93 (no exigency), *rev'g* 61 Cal. Rptr. 170 (Cal. App. 2d Dist. 1967) (finding exigency and substantial compliance with knock-and-announce), decided a half century ago, and there has been no variance in the case law since then.

Other cases are: *United States v. Musa*, *supra,* 288 F. Supp. 2d at 1208 (status

on supervised release does not create a *per se* greater risk of destruction of evidence); *Portnoy v. City of Davis*, *supra,* 663 F. Supp. 2d at 957 (no qualified immunity); *People v. Montenegro*, 219 Cal. Rptr. at 334. As for the Seventh Circuit's *Green:*

> As the Supreme Court stated in *Griffin v. Wisconsin*, 483 U.S. 868, 873, 97 L. Ed. 2d 709, 107 S. Ct. 3164 (1987), "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" Just as "there is no blanket exception to the knock and announce requirement for felony drug cases," *United States v. Tavares*, 223 F.3d 911, 916 (8th Cir. 2000); *see Richards*, 520 U.S. at 394, there is no blanket exception to the requirement for parolees absent exigency or futility. A parolee who consents to search as a parole condition cannot refuse an officer's request to enter, and the officer is excused from the general requirement that he search only upon warrant supported by probable cause, *Knights*, 534 U.S. at 121, but the officer is not excused from identifying himself. *See United States v. Musa*, 288 F. Supp. 2d 1205, 1208 (D. Kan. 2003) ("The government does not cite, nor did the Court find, cases that extend a probationer's diminished expectation of privacy to elimination of the knock and announce requirement ...."), *rev'd on other grounds by United States v. Musa*, 401 F.3d 1208 (10th Cir. 2005).

Green v. Butler, 420 F.3d at 699. That is, by definition, a "robust consensus of cases."

Further, this Court's decision in *Samson v. California* did not at all undermine the Seventh Circuit's reasoning in *Green*. True, as a parolee, Petitioner had a reduced expectation of privacy and thus did not have the right to refuse a demand from Respondents to enter his motel room and perform a warrantless search. However, the *Samson* Court distinguished individualized suspicion from reasonableness, and this case is only about reasonableness. Thus, did Petitioner at least have the right to get

out of bed, get dressed, and yield his privacy to the officers' reasonable demand?

"The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion. ... [B]ecause the object of the Fourth Amendment is *reasonableness*, our decision today is far from remarkable." *Samson,* 547 U.S. at 855 n.4 (emphasis in original). The right to announcement is a matter of reasonableness, *Wilson*, 514 U.S. at 934, and, as such, is "one of the few rights available to parolees." (Pet.App. 18a) In fact, the *Samson* Court noted that the parole search law at issue in *Samson* prohibited "arbitrary, capricious or harassing" searches and thus did not "inflict[] dignitary harms." *Samson*, 547 U.S. at 856 (brackets added). This was just days after the Court's holding in *Hudson v. Michigan*, 547 U.S. at 594, that "the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance." In light of this, Respondents could not reasonably believe that *Samson* deprived Petitioner of, or even called into question, his right to knock-and-announce, even as a parolee.

Thus, there is "'a body of relevant case law,'" *Wesby*, 138 S. Ct. at 590 (quoting *al-Kidd*, 563 U.S. at 741), a "robust consensus," that has been going only one way for nearly 50 years at the time[10] and that's sufficient to give Respondents

[10] A diligent Westlaw and Lexis search produces no reported case holding that the knock-and-announce requirement does not apply in probation and parole searches. *See Musa*, 288 F. Supp. 2d at 1208 ("The government does not cite, nor did the Court find, cases that extend a probationer's diminished expectation of

"fair warning" that their failure to knock-and-announce was unconstitutional. *See Hope v. Pelzer*, 536 U.S. at 741. Thus, the District Court correctly found "a consensus of both binding and persuasive federal law prior to January 27, 2015, that a failure to knock and announce is a violation of the Fourth Amendment absent a reasonable suspicion of exigency or futility." (Pet.App. 18a) That any reasonable officer would have known that should have been "beyond debate," *Wesby*, 138 S. Ct. at 589 (2018), that they must knock and announce their entry before forcefully entering someone's motel room in the predawn hours of the morning, parolee or not.

For all these reasons, Respondents are not entitled to qualified immunity and certiorari should be granted to resolve the circuit split.

II. This Court should grant certiorari to reconsider or eliminate the doctrine of qualified immunity in Fourth Amendment cases and cases under § 1983, and overrule *Harlow v. Fitzgerald* and *Anderson v. Creighton* and their progeny as no longer justified.

"In legal circles and beyond, one of the most debated civil rights litigation issues of our time is the appropriate scope and application of the qualified immunity doctrine, particularly in cases of deaths resulting from police shootings." *Ventura v. Rutledge*, 2019 WL 3219252 at *10 n.6, 2019 U.S. Dist. Lexis 119236 at *26 n.6 (E.D. Cal. July 16, 2019). This is not, of course, a police shooting, but it underscores

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privacy to elimination of the knock-and-announce requirement, and the Court declines to do so in this case.").

that a Fourth Amendment violation has utterly no remedy from any forum despite what appears to be settled law. *See also Zadeh v. Robinson*, 928 F.3d 457, 478–79 (5th Cir. 2019) (Willett, J., concurring)[11]; *Manzanares v. Roosevelt Cty. Adult Detention Ctr.,* 331 F. Supp. 3d 1260, 1293–94 n.10 (D.N.M. 2018).

Several members of this Court have discussed the problematic nature of our current qualified immunity doctrine. *See, e.g., Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (per curiam) (Sotomayor & Ginsburg, JJ., dissenting) ("The majority today ... tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); *Wyatt v. Cole*, 504 U.S. 158, 170–71 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity for public officials, however, we have diverged to a substantial degree from the historical standards. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), we 'completely

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[11]

> Yet here we are—Dr. Zadeh still loses; there and back again. Everyone agrees his Fourth Amendment rights were violated. But owing to a legal *deus ex machina*—the "clearly established" prong of qualified-immunity analysis—the violation eludes vindication. At first I agreed with the panel majority that the government violated the law but not *clearly established* law. I was wrong. Beyond this case, though, I must restate my broader unease with the real-world functioning of modern immunity practice. (emphasis in original)

reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action.' *Anderson v. Creighton*, 483 U.S. 635, 645 (1987)"); *Anderson v. Creighton*, 483 U.S. at 647 (Stevens, J., dissenting) ("The Court stunningly restricts the constitutional accountability of the police by creating a false dichotomy between police entitlement to summary judgment on immunity grounds and damages liability for every police misstep, by responding to this dichotomy with an uncritical application of the precedents of qualified immunity that we have developed for a quite different group of high public office holders, and by displaying remarkably little fidelity to the countervailing principles of individual liberty and privacy that infuse the Fourth Amendment.").

Respected commentary also questions current qualified immunity for Fourth Amendment violations.[12]

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[12] *See, e.g.,* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1937 (2018) ("[I]t is fair to say that the doctrine has now puzzled, intrigued, and frustrated legal academics, federal judges, and litigators for half a century."); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1798, 1800 (2018); Steven R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1244-50 (2015); Cato Institute, *Qualified Immunity: The Supreme Court's Unlawful Assault*

It is now time for this Court to finally reconsider or eliminate this judicially-created doctrine. This case presents this Court with an ideal vehicle for doing so because there is no factual dispute that Respondents failed to knock-and-announce prior to entry and "that no exigent circumstances existed to give the officers reasonable suspicion that knocking and announcing would be dangerous or futile." *Lane v. State*, at *5, 513 S.W.3d at 234. (Pet. App. 24a and *id*. at 11a, 18a)[13]

Justice Thomas noted in *Ziglar*, 137 S. Ct. at 1870, that 42 U.S.C. § 1983 and the 1871 Civil Rights Act does not itself mention qualified immunity, nor any defenses or immunities for that matter. Rather, the Court initially took the position that, to the extent the statute is silent on the matter, officials enjoyed the same immunities that would have been available at common law. *Id.* (quoting *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976)); *Wyatt*, 504 U.S. at 170. Thus, police officers were granted "the defense of good faith and probable cause," *Pierson v. Ray*, 386 U.S. 555, 557 (1967), but not absolute immunity. *Id.* at 555. Near absolute immunity is what qualified immunity has turned into in Fourth Amendment cases.

However, as Justice Thomas noted, the current qualified immunity test is not grounded in the common law but is rather an exercise in "freewheeling policy

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on Civil Rights and Police Accountability (Mar. 1, 2018 policy forum).

[13] Petitioner raised this qualified immunity issue below in the Court of Appeals in Point III of his Appellee's Brief. Petitioner was pro se in the District Court.

choice[s]" that should be the domain of Congress. *Ziglar*, 137 S. Ct. at 1871 (quoting *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012)). *See also Wyatt*, 504 U.S. at 170–71 (Kennedy, J., concurring) ("In the context of qualified immunity for public officials, however, we have diverged to a substantial degree from the historical standards. ... The transformation was justified by the special policy concerns arising from public officials' exposure to repeated suits.").

> Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under §1983, we instead grant immunity to any officer whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna,* 577 U. S. ___, ___-___, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255, 259 (2015) (per curiam) (internal quotation marks omitted); *Taylor v. Barkes,* 575 U. S. ___, ___, 135 S. Ct. 2042, 2044, 192 L. Ed. 2d 78, 81 (2015)) (a Government official is liable under the 1871 Act only if "'existing precedent ... placed the statutory or constitutional question beyond debate'" (quoting *Ashcroft v. al-Kidd,* 563 U. S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011))). We apply this "clearly established" standard "across the board" and without regard to "the precise nature of the various officials' duties or the precise character of the particular rights alleged to have been violated." *Anderson, supra,* at 641-643, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (internal quotation marks omitted). We have not attempted to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine. See generally Baude, Is Qualified Immunity Unlawful? 106 Cal. L. Rev. (forthcoming 2018) (manuscript, at 7-17), online at https://papers.ssrn.com/abstract=2896508 (as last visited June 15, 2017).

Ziglar, 137 S. Ct. at 1871.

Further, the public policy concerns that originally drove the Court to adopt the

current qualified immunity doctrine no longer exist. *Wyatt*, 504 U.S. at 170-71 (discussing how *Harlow v. Fitzgerald* and *Anderson v. Creighton* adopted a qualified immunity doctrine to solve a problem since solved by *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage.").

Moreover, the good faith exception to the exclusionary rule in *United States v. Leon,* 468 U.S. 897 (1984), came on the heels of and from *Harlow.* Then, *Hudson v. Michigan* remedied the exclusionary rule question for knock-and-announce violations for criminal cases, and that happened here in state court. So, what we have here is a Fourth Amendment violation with no possible exclusion and no possible civil remedy.[14]

Against this backdrop qualified immunity has evolved into "an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment," with the Court tending to only summarily reverse denials of qualified immunity. *Kisela v. Hughes*, 138 S. Ct. at 1162 (Sotomayor & Ginsburg, JJ., dissenting).

Thus, *Harlow*, *Anderson*, and their progeny should be overruled or limited because they are contrary to the language and purpose of § 1983 as well as the

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[14] *See Thompson v. Clark*, 2018 WL 2997415 at *30, 2018 U.S. Dist. LEXIS 105225 at *30 (E.D.N.Y. June 26, 2018) ("The Supreme Court's recent emphasis on shielding public officials and federal and local law enforcement means many individuals who suffer a constitutional deprivation will have no redress ....").

common law, and Congress never authorized qualified immunity.

This brings to mind Chief Justice Burger's 1971 lament dissenting for himself and Justices Black and Blackmun in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 420–24 (1971) (Burger, C.J., dissenting), that some alternative to the exclusionary rule needs to be adopted before it is jettisoned, such as expanding a civil remedy for those whose Fourth Amendment rights were violated. There must be deterrence of officers from violating the Fourth Amendment. But where now? Between the good faith exception to the exclusionary rule and qualified immunity in damages actions, where is the deterrence? We need to guard that the Fourth Amendment does not become mere rhetoric.[15]

[15] *Id.,* 403 U.S. at 415: "I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric."

CONCLUSION

The writ of certiorari to the Court of Appeals for the Eighth Circuit should be granted.

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Appendices

United States Court of Appeals
For the Eighth Circuit

No. 18-2194

Adam Lane

Plaintiff - Appellee

v.

Adam Nading, Probation and Parole Office

Defendant

Joseph M. Boyd, Corporal, Police Officer #4338, Sebastian County Sheriff's Office

Defendant - Appellant

Fort Smith Police Department; Probation and Parole Office

*Defendant*s

No. 18-2426

Adam Lane

Plaintiff - Appellee

v.

Adam Nading, Probation and Parole Office

Defendant - Appellant

Joseph M. Boyd, Corporal, Police Officer #4338, Sebastian County Sheriff's Office; Fort Smith Police Department; Probation and Parole Office

*Defendant*s

Appeals from United States District Court
for the Western District of Arkansas - Ft. Smith

Submitted: March 7, 2019
Filed: June 20, 2019

Before BENTON, MELLOY, and SHEPHERD, Circuit Judges.

MELLOY, Circuit Judge.

Arkansas state prisoner Adam Lane sued his former parole officer, Adam Nading, and a Fort Smith police officer, Joseph Boyd, (collectively, the "officers") under 42 U.S.C. § 1983 for allegedly violating his Fourth Amendment right to be free from unreasonable searches and seizures. He claimed that the officers failed to knock and announce their presence before entering his hotel room, seizing narcotics and a gun, and arresting him while he was on parole. The district court denied Nading's motion for judgment on the pleadings and Boyd's motion to dismiss on the grounds that the officers were not entitled to qualified immunity. The officers appeal. Having jurisdiction under 28 U.S.C. § 1291, we reverse.

I. Background

The following facts are taken from Lane's amended complaint and the documents he references therein—namely, his original complaint and the Arkansas Supreme Court opinion upholding his conviction. We accept these facts as true and

view them in the light most favorable to Lane. See Stanley v. Finnegan, 899 F.3d 623, 625 (8th Cir. 2018) (setting forth the standard of review on "[a]n interlocutory order denying a motion to dismiss based on qualified immunity").

Lane was on parole in Arkansas in January 2015. As part of his conditions of release from the Arkansas Department of Corrections, Lane consented to warrantless searches and seizures of his "person, place of residence, and motor vehicles." Lane v. State, 513 S.W.3d 230, 233 (Ark. 2017). Lane appeared for his initial parole intake with Nading but subsequently failed to report, a violation of his release conditions.

That same month, Lane committed another violation of his release conditions: He began staying at a hotel in Fort Smith. The hotel was not his primary residence, and he did not receive prior authorization from Nading before staying there. Nading learned that Lane was staying at the hotel and went with Boyd to find Lane.

The officers enlisted a hotel worker to open Lane's door for them. Without knocking and announcing their presence, they entered the room. Inside, they found Lane asleep with a female companion. They also found drugs and a handgun. The officers arrested Lane, who signed an affidavit declaring that the drugs were his.

Lane was convicted in state court of multiple drug charges and simultaneous possession of a firearm. He received a sentence of 70 years' imprisonment. He appealed to the Arkansas Supreme Court, which affirmed. See id. at 237. Relevant to this case, the Arkansas Supreme Court held that the officers violated Lane's Fourth Amendment right to be free from unreasonable searches and seizures because they did not knock and announce their presence before entering the hotel room.[1]

[1]The Arkansas Supreme Court nevertheless extended the rule set forth in Hudson v. Michigan, 547 U.S. 586 (2006), and decided not to apply the exclusionary rule to the evidence the officers seized. Lane, 513 S.W.3d at 235–36.

Lane subsequently brought this action under 42 U.S.C. § 1983. After Lane amended his complaint, the officers filed their answer. Along with the answer, Nading filed a motion for judgment on the pleadings, and Boyd filed a motion to dismiss. Both argued that they: (1) were immune from liability in their official capacities under the doctrine of sovereign immunity; and (2) were immune from liability in their individual capacities under the doctrine of qualified immunity because they had not violated any of Lane's clearly established constitutional rights.

The district court granted the officers' motions in part and denied them in part. Regarding the official-capacity claims, the district court held that the doctrine of sovereign immunity applied, so the officers could not be sued. Regarding the individual-capacity claims, the district court said that "there appear[ed] to be a consensus of both binding and persuasive federal law prior to January 27, 2015, that a failure to knock and announce is a violation of the Fourth Amendment absent a reasonable suspicion of exigency or futility." The district court pointed to a Seventh Circuit case, Green v. Butler, 420 F.3d 689 (7th Cir. 2005), and said that Green "held that a failure to knock and announce is not waived when a parolee has signed an agreement permitting warrantless searches." Finally, the district court said that the officers had "conceded that there was no exigency." The district court determined "that [the officers'] actions were unconstitutional." "[W]ithout sufficient information" to determine at that time whether the officers' actions on the day of the search "were those of reasonable officers such that they are entitled to qualified immunity," the district court declined to grant the officer's motions on Lane's individual-capacity claims and allowed the case to proceed. The officers timely appealed.

II. Discussion

The question presented is whether the district court erred in denying the officers qualified immunity. We review both the denial of a motion to dismiss and a motion for judgment on the pleadings de novo. See Kiesling v. Holladay, 859 F.3d

529, 533 (8th Cir. 2017) (motion to dismiss); Prater v. Dahm, 89 F.3d 538, 540 (8th Cir. 1996) (motion for judgment on the pleadings). We reverse if the officers are "entitled to qualified immunity on the face of the complaint." Kiesling, 859 F.3d at 533 (quoting Bradford v. Huckabee, 394 F.3d 1012, 1015 (8th Cir. 2005)).

The "officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (citation omitted). To be "clearly established," the law must be "sufficiently clear that every reasonable official would understand what he is doing is unlawful." Id. (internal quotation marks and citation omitted). Clearly established law is "dictated by controlling authority or a robust consensus of cases of persuasive authority." Id. at 589–90 (internal quotation marks and citation omitted). "[P]recedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." Id. at 590. "It is not enough that the rule is suggested by then-existent precedent." Id. The "clearly established" standard, therefore, requires that a particular rule's contours be well defined at a "high 'degree of specificity.'" Id. (citation omitted). Courts should not "define clearly established law at a high level of generality" but should "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." Id. (citation omitted). The case need not be "directly on point," but should place the lawfulness of the officer's conduct "beyond debate." Id. (citation omitted).

Given the governing law, we hold that the officers are entitled to qualified immunity on the face of the complaint. Even assuming that the officers violated the Fourth Amendment by failing to knock and announce their presence before entering Lane's dwelling, it was not clearly established in January 2015 that failing to knock and announce before entering the dwelling of a parolee was unlawful. That is because neither the Arkansas Supreme Court, this Court, nor the U.S. Supreme Court

had spoken on the specific issue of whether the knock-and-announce requirement applies to parolees. Moreover, there existed no "robust consensus of cases of persuasive authority" addressing the issue at the time the officers entered Lane's dwelling. Id. at 589–90.

Lane essentially argues that a robust consensus of persuasive authority had established by January 2015 that the knock-and-announce requirement applies to parolees. To support his argument, he cites the Seventh Circuit's Green v. Butler decision,[2] a pair of district-court decisions,[3] and an intermediate appellate-court decision out of California.[4] We disagree. It is true that the cases Lane cites generally hold that an officer must knock and announce his presence before entering a parolee's dwelling. However, we do not consider a consensus based on the decision of a single circuit and a handful of lower courts to be "robust." Wesby, 138 S. Ct. at 589; see Jacobson v. McCormick, 763 F.3d 914, 918 (8th Cir. 2014) (concluding that "two decisions from other circuits did not place [an] issue beyond debate" in the absence of controlling authority); Turner v. Arkansas Ins. Dep't, 297 F.3d 751, 759 (8th Cir.

[2]See 420 F.3d at 699 (holding that "there is no blanket exception to the [knock-and-announce] requirement for parolees absent exigency or futility" and as such an officer is not excused from the requirement when entering a parolee's home).

[3]See Portnoy v. City of Davis, 663 F. Supp. 2d 949, 957 (E.D. Cal. 2009) (relying on Green for the proposition that "[a] parole or probation search does not permit an exception to the knock and announce requirement unless there are exigent circumstances or futility"); United States v. Musa, 288 F. Supp. 2d 1205, 1208 (D. Kan. 2003) (rejecting an argument that the knock-and-announce rule did not apply to parolees because the government had not cited, nor had the district court found, "cases that extend a probationer's diminished expectation of privacy to elimination of the knock and announce requirement"), rev'd on other grounds, 401 F.3d 1208 (10th Cir. 2005).

[4]See People v. Montenegro, 219 Cal. Rptr. 331, 334 (Cal. Ct. App. 1985) (holding that officers must comply with state statutory knock-and-announce requirements when searching a parolee's dwelling).

2002) ("[T]he fact that two circuit cases and fifteen district court cases directly support a proposition and the Supreme Court implicitly supports that same position is sufficient to demonstrate that the law was 'clearly established' . . . ."); see also Sauers v. Borough of Nesquehoning, 905 F.3d 711, 722 (3d Cir. 2018) (concluding that a single circuit's decision did not "amount[] to the robust consensus of cases of persuasive authority in the Court of Appeals that we have held necessary to clearly establish a right in the absence of controlling precedent" (internal quotation marks and citation omitted)); McClendon v. City of Columbia, 305 F.3d 314, 329–33 (5th Cir. 2002) (en banc) ("[T]he mere fact that a large number of courts [six circuits] had recognized the existence of a right to be free from state-created danger in some circumstances . . . is insufficient to clearly establish the unlawfulness of [the officer's] actions.").

Furthermore, the U.S. Supreme Court has arguably called into question the extent to which a parolee enjoys Fourth Amendment protections commensurate in scope with those of non-parolees. In its 2006 Samson v. California decision, the Court held that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." 547 U.S. 843, 857 (2006). The Court explained that "parole is an established variation on imprisonment of convicted criminals," id. at 850 (citation omitted), so parolees "have severely diminished expectations of privacy," id. at 852. In a situation where, like here, a parolee is released on the condition that he must "submit to suspicionless searches by a parole officer or other peace officer 'at any time'" and is "unambiguously" made aware of the condition, he lacks "an expectation of privacy that society would recognize as legitimate." Id. (citation omitted). By contrast, the State has "substantial" and "overwhelming" interests in "supervising parolees because 'parolees . . . are more likely to commit future criminal offenses.'" Id. at 853 (quoting Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 365 (1998)). The State also has "interests in reducing recidivism and thereby promoting reintegration and positive

citizenship among" parolees that "warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." Id.

While we recognize that Samson does not address the issue of whether the knock-and-announce rule applies to parolees, it certainly stands for the proposition that parolees may be treated differently than non-parolees for some Fourth Amendment purposes. Given that proposition and the fact that the Supreme Court decided Samson after the Seventh Circuit decided Green, we hold it would not have been clear to every reasonable officer in the defendant officers' positions that failing to knock and announce his presence before entering and searching Lane's hotel room violated the Fourth Amendment. Cf. Wesby, 138 S. Ct. at 589 (stating that to be "clearly established," the law must be "sufficiently clear that every reasonable official would understand what he is doing is unlawful"). Because the law was not clear, the officers are entitled to qualified immunity.

III. Conclusion

Accordingly, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ADAM LANE PLAINTIFF

v. Civil No. 2:17-CV-02056

ADAM NADING[1] and JOSEPH M. BOYD DEFENDANTS

ORDER

Plaintiff proceeds in this matter *pro se* and *in forma pauperis* pursuant to 42 U.S.C. § 1983. Currently before the Court is a Motion for Judgment on the Pleadings (ECF No. 21) by Defendant Nading and a Motion to Dismiss (ECF No. 27) by Defendant Boyd.

I. BACKGROUND

Plaintiff filed his initial Complaint in the Eastern District of Arkansas on March 2, 2017. (ECF No. 2). It was transferred to this District on April 6, 2017. (ECF No. 4). On August 28, 2017, Plaintiff filed a Motion to Amend his Complaint. (ECF No. 12). The Court entered an Order granting his Motion on September 19, 2017. (ECF No. 13). Plaintiff filed his Amended Complaint on September 28, 2017. (ECF No. 14).

In his Amended Complaint, Plaintiff alleges his constitutional rights were violated on January 27, 2015, when the Defendants "illegally entered [his] dwelling prematurely without knocking and announcing" their identity and purpose. (ECF No. 14 at 4). Plaintiff further alleges this violation was the result of poor training and instruction. (ECF No. 14 at 5). Plaintiff cites his Arkansas Supreme Court case of *Lane v. State*, 2017 Ark. 34, 513 S.W.3d 230, *cert. denied*, 137 S. Ct. 2222 (2017), as support for his allegations. (ECF No. 14 at 4). Plaintiff proceeds against

[1] This Defendant was originally identified as Nadding. Based on documents submitted to this Court, as well as the Arkansas Supreme Court case, the correct spelling is Nading. The Clerk is being directed to correct the spelling.

both Defendants in their official and personal capacities. (ECF No. 14 at 4). Plaintiff seeks compensatory and punitive damages. (ECF No. 14 at 7).

In *Lane*, the Arkansas Supreme Court provided additional details concerning the background of this case. In January 2015, Plaintiff was on parole from the Arkansas Department of Correction ("ADC"). *Lane*, 2017 Ark. 34, at 2, 513 S.W.3d at 232. Defendant Nading was Plaintiff's Arkansas Department of Community Corrections parole officer. Defendant Boyd was a Fort Smith police officer. *Id.* Plaintiff appeared for his initial parole intake, but he subsequently failed to report to Nading, and he was staying at a hotel in Fort Smith in violation of his parole conditions. *Id.* Prior to his release from the ADC, Plaintiff signed a "Conditions of Release" in which he consented to the warrantless search and seizure of his "person, place of residence, and motor vehicles." *Id.* at 3, 513 S.W.3d at 233. Although searches under this consent did not require warrants, they did require that "reasonable grounds exist to investigate whether the parolee had violated the terms of his parole." *Id.*

After learning that Plaintiff was staying at the hotel, Defendant Nading went there accompanied by Defendant Boyd. *Id*. at 2, 513 S.W.3d at 232. Defendants did not knock and announce their presence. Instead, the hotel manager used an electronic key device to open the locked hotel room door for them. *Id.* Plaintiff was asleep in bed with a female companion when Defendants entered the hotel room. Next to the bed, Defendants observed drugs and a handgun. Plaintiff was arrested. *Id.*

After his arrest, Plaintiff wrote a statement that the drugs in the hotel room belonged to him and not his companion, and he had the statement notarized by a jail employee. *Id.* The Arkansas Supreme Court noted:

> "[Plaintiff] was charged as a habitual criminal offender with simultaneous possession of drugs and a firearm, possession of methamphetamine with intent to

> deliver, and possession of drug paraphernalia. He filed a motion to suppress the evidence seized during his arrest on the basis that the officers entered his hotel room without a warrant and failed to knock and announce their presence. He also filed a motion in limine to exclude the signed statement. The circuit court denied both motions. The jury convicted Lane of the charges, and the circuit court sentenced Lane to seventy years' imprisonment.

Id. at 2, 513 S.W.3d at 232-33.

The Arkansas Supreme Court observed that "[i]t is an issue of first impression in Arkansas whether the knock-and-announce rule applies to parolees, and if it does apply, whether the exclusionary rule is the appropriate remedy." *Id.* at 1, 513 S.W.3d at 232. The State did not dispute that the officers failed to knock and announce their presence and purpose prior to entering the hotel room. The State also did not dispute that "no exigent circumstances existed to give the officers reasonable suspicion that knocking and announcing would be dangerous or futile." *Id.* at 5, 513 S.W.3d at 234. The Arkansas Supreme Court held that that the officers' failure to knock and announce violated Plaintiff's federal and state constitutional protection from unreasonable searches and seizures.[2] *Id.* at 8, 513 S.W.3d at 235.

On October 25, 2017, Defendant Nading filed a Motion for Judgment on the Pleadings. (ECF No. 21). Plaintiff filed his Response on November 8, 2017. (ECF No. 23). On March 6, 2018, Defendant Boyd filed a Motion to Dismiss. (ECF No. 27). Plaintiff filed his Response on March 14, 2018. (ECF No. 30).

II. LEGAL STANDARD

Rule 8(a) contains the general pleading rules and requires a complaint to present "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "In order to meet this standard, and survive a motion to dismiss under Rule 12(b)(6), 'a

[2] The Arkansas Supreme Court also held that the search itself was reasonable, and the exclusionary rule did not apply. *Id.* at 3, 8, 513 S.W.3d at 233, 235.

complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Braden v. Wal–Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted)). A Rule 12(c) motion for judgment on the pleadings is reviewed under the same standard as a Rule 12(b)(6) motion. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678. While the Court will liberally construe a *pro se* plaintiff's complaint, the plaintiff must allege sufficient facts to support his claims. *See Stone v. Harry*, 364 F.3d 912, 914 (8th Cir. 2004).

III. ANALYSIS

Defendant Nading argues Plaintiff's case against him should be dismissed for the following reasons: (1) Plaintiff's official capacity claims against him are barred by sovereign immunity; and, (2) Plaintiff's individual capacity claims against him are barred because, as a case of first impression in Arkansas in 2017, the law was not clearly established at the time of the events in question in 2015. (ECF No. 22 at 4-8).

Defendant Boyd argues Plaintiff's case against him should be dismissed for the following reasons: (1) he is entitled to qualified immunity for Plaintiff's individual capacity claims; and, (2) Plaintiff failed to state an official capacity claim for municipal liability based on inadequate police training. (ECF No. 28 at 6-9).

In response to the Defendants' motions, Plaintiff argues that the knock-and-announce rule is well-established, there are no blanket exceptions to the rule, and it has been acknowledged by all law enforcement officers. (ECF Nos. 23, 30).

A. Official Capacity

1. Defendant Nading

Defendant Nading correctly argues that, as an Arkansas Department of Community Correction Parole Officer, he is entitled to sovereign immunity for any official capacity claim. (ECF No. 21 at 1; 22 at 4-5). "Claims against individuals in their official capacities are equivalent to claims against the entity for which they work." *Gorman v. Bartch*, 152 F.3d 907, 914 (8th Cir. 1998). Thus, Plaintiff's official capacity claim against Defendant Nading is a claim against the ADC. *Id.* The ADC is a state agency. *See Fegans v. Norris*, 351 Ark. 200, 206, 89 S.W.3d 919 (2002). States and state agencies are not "persons" subject to suit under § 1983. *Howlett v. Rose*, 496 U.S. 356 (1990); *Will v. Mich. Dept. of State Police*, 491 U.S. 58 (1989); *McLean v. Gordon*, 548 F.3d 613, 618 (8th Cir. 2008). "This bar exists whether the relief sought is legal or equitable." *Williams v. Missouri*, 973 F.2d 599, 599-600 (8th Cir. 1992) (citing *Papasan v. Allain*, 478 U.S. 265, 276 (1986)). "Congress did not abrogate constitutional sovereign immunity when enacting the law that was to become section 1983." *Burk v. Beene*, 948 F.2d 489, 493 (8th Cir. 1991) (citing *Quern v. Jordan*, 440 U.S. 332, 342 (1979)).

Defendant Nading is an employee of the Arkansas Department of Community Correction. Because Defendant Nading is a state employee, Plaintiff's official capacity claims against him are barred by sovereign immunity.

2. Defendant Boyd

Defendant Boyd, a Fort Smith police officer at the time of the incident, argues that Plaintiff has failed to state an official capacity claim that the City of Fort Smith had a policy or custom of inadequately training their police officers based on a single incident by a "mere patrolman." (ECF No. 27 at 2; 28 at 6-9). Under Section 1983, a defendant may be sued in either his individual

capacity, or in his official capacity, or in both. In *Gorman, supra*, the Eighth Circuit Court of Appeals discussed the distinction between individual and official capacity suits:

> Claims against government actors in their individual capacities differ from those in their official capacities as to the type of conduct that is actionable and as to the type of defense that is available. *See Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). Claims against individuals in their official capacities are equivalent to claims against the entity for which they work; they require proof that a policy or custom of the entity violated the plaintiff's rights, and the only type of immunity available is one belonging to the entity itself. *Id.* 502 U.S. at 24-27, 112 S.Ct. at 361-62 (1991). Personal capacity claims, on the other hand, are those which allege personal liability for individual actions by officials in the course of their duties; these claims do not require proof of any policy and qualified immunity may be raised as a defense. *Id.* 502 U.S. at 25-27, 112 S.Ct. at 362.

Gorman, 152 F.3d at 914. A failure to train rises to the level of a "policy" only where it "reflects a 'deliberate' or 'conscious' choice by a municipality." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989).

Here, Plaintiff's sole allegation for his official capacity claim is as follows: "Violation of 4th Amendment Knock and Announce Rule, inadequate Training and instructions." (ECF No. 14 at 5). These vague and conclusory allegations cannot support an inference that the City of Fort Smith made a deliberate or conscious choice to provide inadequate training regarding the knock and announce rule to its police officers. *See Nix v. Norman*, 879 F.2d 429, 433 (8th Cir. 1989) ("To establish liability in an official-capacity suit under section 1983, a plaintiff must show either that the official named in the suit took an action pursuant to an unconstitutional governmental policy or custom . . .or that he or she possessed final authority over the subject matter at issue and used that authority in an unconstitutional manner."); *Arnold v. Corizon, Inc*, No. 1:15CV62, 2015 WL 4206307, at *2 (E.D. Mo. July 10, 2015) (conclusory claims that defendants acted according to some unspecified policies or customs are not enough to state official capacity claims).

Nor does Plaintiff's allegation concerning a single incident by a single patrolman permit an inference that the City had a custom of providing inadequate training on the knock and announce rule to its police officers. *See Johnson v. Douglas Cty. Med. Dept.*, 725 F.3d 825, 829 (8th Cir. 2013) (a custom conflicting with written policy can be shown if, among other things, Plaintiff demonstrates a continuing, widespread, and persistent pattern of unconstitutional misconduct by the governmental entity's employees.)

Thus, Plaintiff failed to state an official capacity claim against Defendant Boyd.

B. Individual Capacity – Qualified Immunity

Defendants argue they are entitled to qualified immunity because on January 27, 2015, at the time of the events complained of, it was not clearly established that the knock and announce rule applied to parolees. (ECF No. 22 at 5-7; 28 at 4-6).

Analyzing a claim of qualified immunity requires a two-step inquiry. *Jones v. McNeese,* 675 F.3d 1158, 1161 (8th Cir. 2012). "An official is entitled to qualified immunity unless (1) the evidence, viewed in the light most favorable to the nonmoving party, establishes a violation of a federal constitutional or statutory right, and (2) the right was clearly established at the time of the violation." *Robinson v. Payton*, 791 F.3d 824, 828 (8th Cir. 2015). "Unless the answer to both these questions is yes, the defendants are entitled to qualified immunity." *Krout v. Goemmer*, 583 F.3d 557, 564 (8th Cir. 2009).

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). A case directly on point is not required, "but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741. "[Q]ualified immunity is lost when plaintiffs

point either to 'cases of controlling authority in their jurisdiction at the time of the incident' or to 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'" *Id.* at 746 (Kennedy, J., with Ginsberg, Breyer and Sotomayor, JJ., concurring) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). Courts are "not to define clearly established law at a high level of generality." *Id.* at 742 (majority opinion).

Defendants correctly argue that cases of first impression, by definition, typically indicate that a right was not clearly established in that jurisdiction. *See Cavallaro v. City of Edmondson*, 44 F. App'x 70, 71 (8th Cir. 2002). Here, it is clear that the question of whether the knock and announce rule applied to parolees was a case of first impression in Arkansas as of 2017. The Eighth Circuit, however, has expressly rejected overly-narrow jurisdictional reviews of established law to determine questions of qualified immunity. In *Johnson-El v. Schoemehl*, 878 F.2d 1043 (8th Cir. 1989), the defendants in a § 1983 case argued that in order for the law to be clearly established "the specific acts of the officials must be particularly proscribed by decisions rendered by this Circuit or another court with direct jurisdiction over the institution." The Eighth Circuit rejected this proposed rule, reasoning:

> This rule would enable a jail official to claim immunity where several other circuit, district or state courts had condemned similar practices on the basis of the federal Constitution, so long as a Missouri court, or the district court for the Eastern District of Missouri or the Eighth Circuit had not yet done so. While the identity of a court and its geographical proximity may be relevant in determining whether a reasonable official would be aware of the law (as might the dissemination of information within the pertinent profession and the frequency of similar litigation), we do not think that the defendants' per se rule adequately captures what the Supreme Court has meant by its objective test for what is "clearly established."

Id. at 1049.

Here, Plaintiff brought this case in a federal court under a federal statute concerning the violation of his federal constitutional rights. The qualified immunity analysis should, therefore, not be limited to Arkansas law.

In terms of binding federal authority, neither the United States Supreme Court or the Eighth Circuit have specifically addressed the question of whether the knock and announce rule applies to parolees who have agreed to warrantless searches as a condition of their parole; however, "the common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one. . . [t]racing its origins in our English legal heritage." *Hudson v. Michigan*, 547 U.S. 586, 589 (2006). "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). Both the United States Supreme Court and the Eighth Circuit have held "there is no blanket exception to the knock and announce requirement for felony drug cases." *United States v. Tavares*, 223 F.3d 911, 916 (8th Cir. 2000), *overruled on other grounds by Doran v. Eckold*, 409 F.3d 958 (8th Cir. 2005) (citing *Richards*, 520 U.S. at 388).

In terms of persuasive authority, in 2005 the Seventh Circuit rejected a blanket exception to the knock and announce rule for parolees who had signed agreements to be searched at any time as a condition of parole. *Green v. Butler*, 420 F.3d 689, 699 (7th Cir. 2005). The *Green* Court stated that "a reasonable officer would not believe that a parolee's consent to search on demand eliminates the need to make such a demand, absent an exigency or demonstrated futility." *Id.* at 698.

As noted by the Arkansas Supreme Court, blanket exceptions to the knock and announce rule have also been rejected in several other federal Circuits for drug cases, felony murder investigations, and possession of firearms cases. *Lane*, 2017 Ark. at 7, 513 S.W.3d at 235 (listing cases in the Third, Fourth, Fifth, Sixth, and Tenth Circuits.)

Thus, there appears to be a consensus of both binding and persuasive federal law prior to January 27, 2015, that a failure to knock and announce is a violation of the Fourth Amendment absent a reasonable suspicion of exigency or futility. Further, at least one Circuit has held that a failure to knock and announce is not waived when a parolee has signed an agreement permitting warrantless searches. Indeed, the knock and announce rule appears to be one of the few rights available to parolees.[3] Defendants Nading and Boyd have conceded that there was no exigency, and it has been determined that their actions were unconstitutional. As Defendants have focused their individual capacity arguments solely on the fact that this case was one of first impression in Arkansas, the Court is without sufficient information at this time to determine if their actions on January 27, 2015 were those of reasonable officers such that they are entitled to qualified immunity.

IV. CONCLUSION

For these reasons, IT IS ORDERED that the Motion for Judgment on the Pleadings by Defendant Nading (ECF No. 21), and the Motion to Dismiss by Defendant Boyd (ECF No. 27) are DENIED IN PART and GRANTED IN PART. Defendants' Motions are DENIED as to Plaintiff's individual capacity claims, and they are GRANTED as to Plaintiff's official capacity claims.

[3] "While probationers and parolees are generally held to have somewhat restricted privacy rights . . . they still have some which merit protection. 'Knock and announce' rules protect these limited rights." Neil P. Cohen, *Law of Probation & Parole* § 23:18 Arrests by violator warrant - "Knock and announce" rules (2d. ed., June 2017 update).

The Clerk is directed to correct the spelling of Nadding to Nading on the docket.

IT IS SO ORDERED this 10th day of May 2018.

/s/ P. K. Holmes, III

P. K. HOLMES, III
CHIEF U.S. DISTRICT JUDGE

SUPREME COURT OF ARKANSAS

No. CR-15-1022

ADAM EUGENE LANE APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered:** February 16, 2017 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [NO. CR-2015-90-A] HONORABLE STEPHEN TABOR, JUDGE AFFIRMED.

RHONDA K. WOOD, Associate Justice

Appellant Adam Lane, a parolee, appeals the judgment of the Sebastian County Circuit Court denying his motion to suppress evidence that officers discovered in his hotel room. Lane argues on appeal that the circuit court erred in denying his motion because the officers entered without a warrant and without knocking and announcing their presence in compliance with the Fourth Amendment to the United States Constitution and article II, section 15 of the Arkansas Constitution. It is an issue of first impression in Arkansas whether the knock-and-announce rule applies to parolees, and if it does apply, whether the exclusionary rule is the appropriate remedy. Lane also argues that that circuit court should have granted his motion in limine to exclude an affidavit in which he took criminal responsibility for the contraband discovered in the hotel room. We hold that the knock-and-announce rule applies to parolees, but that the exclusionary rule is not the appropriate remedy. We also hold that Lane's affidavit should not be excluded under the Arkansas Rules of Evidence. Therefore, we affirm.

I. *Background*

In January 2015, Lane, who was on parole from the Arkansas Department of Correction, was staying at a hotel in Fort Smith. Lane had appeared for his initial parole intake but had failed to report to his Arkansas Department of Community Corrections parole officer, Adam Nading, in January as instructed. Lane also had violated a condition of his release by staying at the hotel, which was not his primary residence, without prior approval.

Nading learned that Lane was staying at the hotel and went there with a Fort Smith police officer. The hotel manager used an electronic key device to open the locked door for the officers. The officers did not knock or announce their presence before entering the room. Lane, who had been asleep in bed with a female companion, was arrested by the officers. Next to the bed, officers observed several baggies containing methamphetamine. The officers discovered more methamphetamine and a handgun in the bed.

Following his arrest, Lane authored a statement wherein he stated that the drugs found in the hotel room were his, not his companion's. A jail employee notarized the statement. Lane was charged as a habitual criminal offender with simultaneous possession of drugs and a firearm, possession of methamphetamine with intent to deliver, and possession of drug paraphernalia. He filed a motion to suppress the evidence seized during his arrest on the basis that the officers entered his hotel room without a warrant and failed to knock and announce their presence. He also filed a motion in limine to exclude the signed statement. The circuit court denied both motions. The jury convicted Lane of the charges, and the circuit court sentenced Lane to seventy years' imprisonment.

II. *Motion to Suppress*

When we review a trial court's denial of a motion to suppress evidence de novo, we make an independent determination based on the totality of the circumstances. *Cherry v. State*, 302 Ark. 462, 731 S.W.2d 354 (1990). We reverse the trial court only if the ruling was clearly against the preponderance of the evidence. *Id.*

To resolve the issue presented here, we first must decide whether the officers lawfully entered the hotel room without a warrant. If we determine that their entry was lawful, we then must determine whether the "knock and announce" rules of the Fourth Amendment to the United States Constitution and article II, section 15 of the Arkansas Constitution apply to parolees. If knock and announce does apply, and since the parties agree that there were no exigent circumstances, we must then decide whether exclusion of the evidence is warranted.

A. Warrantless Entry

We first conclude that the officers' warrantless entry into Lane's hotel room was lawful. As part of his "Conditions of Release" from the Arkansas Department of Correction, Lane consented to a warrantless search and seizure of his "person, place of residence, and motor vehicles." In *Cherry*, we held that such consents-in-advance do not violate the Fourth Amendment because "[t]he special needs of the parole process call for intensive supervision of the parolee making the warrant requirement impractical" and because parolees have a "diminished expectation of privacy." *Id* at 467, 731 S.W.2d at 357. However, parole officers may carry out searches only if reasonable grounds exist to investigate whether the parolee had violated the terms of his parole. *Id.*

Here, the entry into Lane's hotel room was lawful because reasonable grounds existed. Lane had violated a condition of his parole by failing to report to Nading in January. Furthermore, among the conditions of Lane's parole was that he not stay away from his designated residence without prior approval from his parole officer. Nading had not approved Lane's stay at the hotel. For these reasons, we find that the warrantless search conducted by the parole officer was valid.

B. Knock and Announce

Next, we must determine whether the officers violated the "knock and announce" requirement of the United States Constitution and the Arkansas Constitution when they entered the parolee's hotel room. In 1917, Congress adopted the common-law principle that law enforcement officers must knock and announce their presence before entering a residence. *See* The Espionage Act, 40 Stat. 229 (currently codified at 18 U.S.C. § 3109). In *Wilson v. Arkansas*, the United States Supreme Court reversed the Arkansas Supreme Court and held that the Fourth Amendment incorporates the common-law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting entry. 514 U.S. 927 (1995). Justice Thomas explained that the common-law protection of knock and announce can be traced back to the year 1603. *Id.*

However, the *Wilson* Court recognized that under some circumstances the "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Id.* at 934. These circumstances may include the threat of harm to law enforcement officials or third parties, the possible destruction of relevant evidence, or the potential escape of the suspects. *Id.* We have

similarly incorporated a reasonableness inquiry in analyzing "knock and announce" violations under the Arkansas Constitution. *See Hart v. State*, 368 Ark. 237, 244 S.W.3d 670 (2006).

In the present case, the State does not dispute that the officers did not knock on the door and announce their presence and purpose prior to entering Lane's hotel room or that no exigent circumstances existed to give the officers reasonable suspicion that knocking and announcing would be dangerous or futile. Nevertheless, the circuit court concluded that because Lane had waived his rights regarding searches and seizures as part of his conditions of parole, the entry represented "one of the reasonable unannounced entries contemplated by the *Wilson* court." Therefore, the circuit court concluded that the officers were not required to knock and announce before entering Lane's hotel room. On this point, we disagree with the circuit court.

While parolees have fewer expectations of privacy than free citizens, their privacy rights are not wholly inconsequential. A parolee has a diminished expectation of privacy because his residence is subject to search on demand. But this diminished expectation does not justify unannounced entry at any time. Knock-and-announce principles protect even those with limited privacy interests, like parolees, and the individual interests implicated by an unannounced, forcible entry should not be unduly minimized. We should not be cavalier in curtailing the knock and announce rule, which dates back to 1603.

Like other courts considering this issue, we do not limit the privacy interests of parolees such that searches may be pursued by officers without knock and announcement prior to entry. *See Portnoy v. City of Davis*, 663 F. Supp. 2d 949, 957 (E.D. Cal. 2009) ("A

parole or probation search does not permit an exception to the knock and announce requirement unless there are exigent circumstances or futility."); *Green v. Butler*, 420 F.3d 689 (2005) (holding that there is no blanket exception to the knock-and-announce requirement for parolees); *People v. Montenegro*, 219 Cal. Rptr. 331 (Cal. Ct. App. 1985) (for warrantless parole arrests, there must be substantial compliance with knock-and-announce rules); *United States v. Musa*, 288 F. Supp. 2d 1205, 1208 (D. Kan. 2003) ("The government does not cite, nor did the Court find, cases that extend a probationer's diminished expectation of privacy to elimination of the knock and announce requirement . . . ."), *rev'd on other grounds by United States v. Musa*, 401 F.3d 1208 (10th Cir. 2005).

Three reasons weigh in favor of requiring knock and announce for parolees. First, the knock-and-announce requirement safeguards and protects the interests of officers themselves "because an unannounced entry may provoke violence in supposed self-defense by the surprised resident." *Hudson v. Michigan*, 547 U.S. 586, 594 (2006). In this case, appellant and his female companion had a gun in close proximity. The parole and law enforcement officers who entered without knocking and announcing risked being shot as unknown entrants to the hotel room.

Second, the requirement guards the privacy and dignity that can be eliminated by a sudden entrance. *Richards v. Wisconsin*, 520 U.S. 385, 393, n.5 (1997). This protects not only the parolee, but also the parolee's family and acquaintances, who may be on the premises when the search occurs. It gives residents the "opportunity to prepare themselves for" an entry by giving them time to put on clothes or get out of bed. *Id.* In the present case, appellant and his companion were in bed when officers entered unannounced. By

requiring officers to take the small step of knocking and announcing, we ensure the privacy and dignity of parolees, their families, and companions.

Third, as the Supreme Court observed in *Wilson*, individuals should be provided the opportunity to comply with the law and to avoid the destruction of property occasioned by forcible entry. *Wilson*, 514 U.S. at 930–32. In the present case, the motel employee opened the door, but often, unannounced entry results in a door being kicked in and property being destroyed.

Furthermore, the United States Supreme Court and the federal courts have tended to reject blanket exclusions to the knock-and-announcement requirement. *See, e.g.*, *Richards*, 520 U.S. at 390–94 (rejecting blanket exception to knock-and-announce rule in felony drug cases); *Kornegay v. Cottingham*, 120 F.3d 392, 398–99 (3d Cir. 1997) (rejecting blanket exception to knock-and-announce rule for murder investigations, even if suspect had previous arrests for violent offenses using weapon); *Ingram v. City of Columbus*, 185 F.3d 579, 589 (6th Cir. 1999) (rejecting blanket exception to knock-and-announce rule in investigation of drug transaction because mere possibility or suspicion that defendant is likely to dispose of evidence is insufficient to create exigency); *United States v. Tavares*, 223 F.3d 911, 916–17 (8th Cir. 2000) (rejecting blanket exception to knock-and-announce rule for felony drug cases stemming from destruction-of-evidence exigency), *overruled on other grounds by Doran v. Eckold*, 409 F.3d 958 (8th Cir. 2005); *United States v. Nielson*, 415 F.3d 1195, 1202 (10th Cir. 2005) (rejecting blanket exception to knock-and-announce rule for possession of firearms because "mere statement that firearms are present, standing alone, is insufficient" to create exigency); *Green v. Butler*, 420 F.3d 689, 699 (7th Cir.

2005) (rejecting blanket exception to knock-and-announce rule for searches of parolees' and probationers' residences); *United States v. Singleton*, 441 F.3d 290, 294 (4th Cir. 2006) (rejecting blanket exception to knock-and-announce rule for drug investigations, even if conducted in dangerous neighborhood and defendant has criminal history); *Bishop v. Arcuri*, 674 F.3d 456, 467 (5th Cir. 2012) (rejecting blanket exception to knock-and announce rule for investigation of residence suspected of being site of sale of methamphetamine).

Accordingly, because the officers failed to knock and announce their presence before entering Lane's hotel room and because there was no reasonable basis for their failure to knock and announce, the officers' conduct violated Lane's protection from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and article 2, section 15 of the Arkansas Constitution.

C. Exclusionary Rule

Despite this violation, we hold that the evidence seized should not be suppressed. The Supreme Court has held that under the Fourth Amendment to the United States Constitution the exclusionary rule does not apply to knock-and-announce violations by police. *Hudson v. Michigan*, 547 U.S. 586 (2006).[1] We likewise hold that in the case of parolees, the exclusionary rule does not apply to knock-and-announce violations under article II, section 15 of the Arkansas Constitution. In *Hudson*, the Court held that if officers

[1] *Hudson* overrules our decision in *Mazepink v. State*, 336 Ark. 171, 987 S.W.2d 648 (1999) wherein we concluded that under the Fourth Amendment, the exclusion of evidence was the appropriate remedy for a knock-and-announce violation. In *Mazepink,* we did not address whether the exclusionary rule should apply under article 2, section 15 of the Arkansas Constitution.

violate the knock-and-announce rule in the course of executing a search warrant, then the trial court may not suppress the evidence for two reasons. First, a knock-and-announce violation is too "attenuated" from the seizure of evidence to warrant exclusion. *Id.* at 591–94. Second, under the exclusionary-rule balancing test, the "deterrence benefits" of suppression do not "outweigh the substantial social costs." *Id.* at 593–94.

Hudson involved a search of a defendant's home with a valid search warrant. However, the *Hudson* rule has been extended to situations involving different types of authorization for police to enter a defendant's dwelling. *See, e.g., United States v. Smith*, 526 F.3d 306 (6th Cir. 2008) (extending *Hudson* rule to knock-and-announce violations during warrantless searches of parolees); *United States v. Pelletier*, 469 F.3d 194 (1st Cir. 2006) (extending *Hudson* to knock-and-announce violations during execution of an arrest warrant); *In re Frank S. v. Frank S.*, 47 Cal. Rptr. 3d 320 (Cal. Ct. App. 2006) (also extending *Hudson* to knock-and-announce violations during parolee searches).

We extend the *Hudson* rationale to instances in which the defendant is a parolee. As in *Hudson*, exclusion is not warranted because the relationship between discovery of the evidence and the constitutional violation is sufficiently attenuated. In other words, the interest asserted by Lane (i.e., the right to prevent the government from using the drug evidence in court) is unrelated to the interests underlying the knock-and-announce rule. Furthermore, the social costs identified by the Court in *Hudson* (the release of dangerous criminals into society, the drain of judicial resources, and the result of preventable violence to officers and destruction of evidence) far outweigh the deterrence benefits as applied to parolees. Thus, despite the knock-and-announce violation, the evidence seized from Lane

should not have been suppressed under the Fourth Amendment or article 2, section 15 of the Arkansas Constitution. Consequently, we affirm the circuit court's decision to admit the evidence seized from Lane.

III. *Motion in Limine*

Lane also argues that the circuit court erred in denying his motion in limine. He argues that the sworn affidavit he executed, wherein he asked to "take all charges" and that his female companion be relieved of the charges, should be excluded under Arkansas Rules of Evidence 410, 403, and 801 (2015). We review denials of motions in limine for an abuse of discretion. *Rollins v. State*, 362 Ark. 279, 208 S.W.3d 215 (2005).

Arkansas Rule of Evidence 410 provides that an offer to plead guilty, later withdrawn, is not admissible against the person making the plea or offer. Ark. R. Evid. 410. The circuit court concluded that the sworn statement was not an offer to plead guilty but rather an attempt to absolve his companion of any charges against her. We agree. While asking to "take all charges," Lane did not offer to plead guilty to the charges against him. Rather, he requested that he, not his companion, be charged with the crimes charged against them both.

Furthermore, Lane failed to obtain a ruling from the circuit court that the affidavit was inadmissible pursuant to Arkansas Rule of Evidence 403; therefore, the issue is not preserved for appellate review. *Eastin v. State*, 370 Ark. 10, 257 S.W.3d 58 (2007). Additionally, Lane did not argue to the circuit court that the affidavit was inadmissible hearsay under Rule 801. Therefore, we will not consider either of these arguments on

appeal. *See, e.g.*, *Dickey v. State*, 2016 Ark. 66, 483 S.W.3d 287 ("[w]e will not consider an argument raised for the first time on appeal").

For the foregoing reasons, we affirm the circuit court's denial of the motion to suppress and the motion in limine.

Affirmed.

KEMP, C.J., and BAKER and WOMACK, JJ., concur.

SUPREME COURT OF ARKANSAS

No. CR-15-1022

	Opinion Delivered: February 16, 2017
ADAM EUGENE LANE APPELLANT V. STATE OF ARKANSAS APPELLEE	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [NO. CR-15-90] HONORABLE STEPHEN TABOR, JUDGE CONCURRING OPINION.

SHAWN A. WOMACK, Associate Justice

I concur with the majority opinion to the extent that it affirms the trial court's denial of Lane's motion to suppress and motion in limine. I write separately to express my opinion that Lane's status as a parolee obviated the constitutional knock-and-announce requirement.

The United States Supreme Court has held that the requirement of authorities to knock and announce their presence "forms a part of the Fourth Amendment reasonableness inquiry." *Wilson v. Arkansas*, 514 U.S. 927, 930 (1995). In reaching this conclusion, the Court pointed to a long history of the requirement at common law. *Id.* at 931–36. As it is only one component of a reasonableness standard, the Court has identified several circumstances in which the requirement is waived. This nonexhaustive list includes instances where the officer has a reasonable fear that evidence would be destroyed given advance notice, when a search is conducted following the pursuit of a fleeing prisoner, and when the searching officers face the threat of imminent physical violence. *Id.* at 936. Police are

only required to demonstrate a reasonable suspicion that one of these safe harbors is operative, and "[t]his showing is not high." *Hudson v. Michigan*, 547 U.S. 586, 590 (2006).

Both this court and the United States Supreme Court, however, have held that parolees and probationers enjoy a sharply diminished degree of Fourth Amendment protection as a consequence of their status. Supervision of individuals in these categories is a "'special need' of the state, permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Cherry v. State*, 302 Ark. 462, 467, 791 S.W.2d 354, 356 (1990) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987)). Further, a parolee has "a diminished expectation of privacy" because he or she is legally "still in custody of the penal institution" from which he or she was released. *Id.* at 467, 791 S.W.2d at 357. This is stated plainly in our statutes, which identify parolees as "inmates." *See* Ark. Code Ann. § 16-93-701(b)(3) (Supp. 2015).

Because of parolees' limited rights, courts have upheld searches conducted pursuant to relatively invasive terms of parole. The Supreme Court held, for instance, that suspicionless searches of a parolee's person did not violate the Fourth Amendment's search and seizure protections. *Samson v. California*, 547 U.S. 843, 857 (2006). In *Samson*, the Court held that the California law setting out terms of parole authorizing searches at any time, with or without probable cause, was constitutionally permissible. *Id.* at 848. This court has also upheld warrantless searches of parolees due to their diminished privacy rights. *Cherry*, 302 Ark. at 467, 791 S.W.2d at 357. Once we determine that consent to the terms of parole is valid, we ask only if there were "reasonable grounds to investigate whether the appellant

had violated the terms of his parole" and whether the search was conducted by a parole officer. *Id.* at 468, 791 S.W.2d at 357.

As the majority notes, it is an issue of first impression for this court whether parolees are entitled to a knock-and-announce warning prior to a search executed pursuant to their terms of parole. I would hold that parolees' status as legal inmates under Arkansas law relieves parole officers of the obligation to knock and announce their presence prior to a search of a parolee who has consented as a term of parole. As the Sixth Circuit has explained, it is useful to think of a continuum of privacy under the Fourth Amendment. At one end, free citizens enjoy maximum protection; at the other, incarcerated individuals enjoy very little. *See United States v. Smith*, 526 F.3d 306, 308–09 (6th Cir. 2008). The Supreme Court held in *Hudson v. Palmer*, 468 U.S. 517 (1984), for example, that inmates have *no* reasonable expectation of privacy in their cells. *Id.* at 525–26.

It is not necessary to hold that parolees are identical to incarcerated inmates in all respects relevant to the United States and Arkansas Constitutions to conclude that a parolee's consent to search authorizes not only warrantless search, but also search without a knock-and-announce warning. Since Lane does not dispute that he signed the "Conditions of Release" document voluntarily, and because Nading acted on reasonable grounds that Lane was violating the terms of his parole, I would find no defect in Nading's search without a knock-and-announce warning.

The majority concludes that the knock-and-announce requirement does apply to searches of parolees, citing a number of cases in which a variety of courts have rejected "blanket exclusions" to the knock-and-announce requirement. The only United States

Supreme Court case cited for this proposition—*Richards v. Wisconsin*, 520 U.S. 385 (1997)—rejected a state exception to the requirement in felony drug cases; most of the other federal circuit and district cases cited discuss similar exceptions to the requirement in searches related to substantive areas of law. The Seventh Circuit's decision in *Green v. Butler*, 420 F.3d 689 (7th Cir. 2005), reaches a conclusion in line with the majority's on parolees, but it is, of course, only persuasive authority for this court's constitutional interpretation. I am persuaded that the Supreme Court's holding in *Richards* is not controlling here, where our question is about the constitutional protections enjoyed by parolees. As explained above, Arkansas law makes clear that parolees are legal inmates, a category with minimal Fourth Amendment protection.

For the reasons set out above, I would also affirm the trial court's decision to dismiss both of Lane's motions. Because I do not believe the knock-and-announce requirement applies to parolees, however, I would not engage in the majority's analysis of the exclusionary rule's application.

KEMP, C.J., and BAKER, J., join.