IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Plaintiff-Appellant,

vs.

KENNY HARADA, FAAVESI SAVE, and
GLENN AOKI, Defendants-Appellees

NO. 22356

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-2409)

FEBRUARY 25, 2002

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ.;
RAMIL, J., DISSENTING; AND ACOBA, J.,
CONCURRING IN PART AND DISSENTING IN PART

OPINION OF THE COURT BY MOON, C.J.

Plaintiff-appellant State of Hawaiʻi (the prosecution) appeals the first circuit court's[1] grant of defendant-appellee Kenny Harada's motion to suppress evidence, in which co-defendants-appellees Faavesi Save and Glen Aoki joined [hereinafter, defendants' motion to suppress]. On appeal, the prosecution essentially contends that: (1) the trial court erred

[1] The Honorable Francis Q. F. Wong presided over Harada's motion to suppress.

when it concluded that the Honolulu Police Department (HPD) officers' use of force to prevent Harada from closing his door, without demanding entry, constituted an unlawful breaking, in violation of the "knock and announce" requirements of Hawai'i Revised Statutes (HRS) § 803-37 (1993);[2] and (2) even if force was used, exigent circumstances existed that required the officers to enter the residence excusing their compliance with the knock and announce rule. Based on the discussion below, we hold that a breaking occurred when the police officer used force to prevent Harada from closing the door. Consequently, the requirements of HRS § 803-37 were triggered, and the officers' failure to expressly demand entrance as they entered Harada's apartment constituted an unlawful breaking, in violation of the knock and announce rule. We also hold that the prosecution failed to properly preserve the issue whether there were exigent

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[2] HRS § 803-37 provides that:

> The officer charged with the warrant, if a house, store, or other building is designated as the place to be searched, may enter it without demanding permission if the officer finds it open. If the doors are shut the officer must declare the officer's office and the officer's business, and demand entrance. If the doors, gates, or other bars to the entrance are not immediately opened, the officer may break them. When entered, the officer may demand that any other part of the house, or any closet, or other closed place in which the officer has reason to believe the property is concealed, may be opened for the officer's inspection, and if refused the officer may break them.

circumstances at the time the warrant was executed that excused the officers' compliance with HRS § 803-37. Consequently, the issue has been waived. Accordingly, we affirm the trial court's order granting the defendants' motion to suppress.

I. BACKGROUND

Harada filed a pretrial motion to suppress evidence gathered after the allegedly unlawful execution of a search warrant for narcotics at his residence (the residence). The following relevant facts were adduced at the suppression hearing on February 12, 1999.

Pursuant to a valid search warrant, HPD Officer Murumoto and other HPD officers executed a search of Harada's residence on October 29, 1998. Prior to executing the search warrant, HPD Detective Struss determined that a ruse should be used to enter the residence. The ruse involved the use of two plain-clothes undercover female officers, whom Harada had previously met through a friend. On October 29, 1998, the female officers knocked on the door of Harada's residence and called out his name. Although he looked through the peephole, Harada did not see any of the other HPD officers waiting to execute the search warrant.

Upon seeing the door knob begin to move, the undercover female officers jumped aside to allow the search team to enter the residence. Harada testified that he opened the door

approximately eight to twelve inches then quickly attempted to shut the door when he felt someone begin to push the door open.

Although Harada testified that he was unaware that a police officer was pushing the door open, the circuit court specifically found the testimony of Officer Bermudes, the officer closest to the door, credible. Officer Bermudes testified that Harada opened the door "three-quarters" of the way open, or approximately three feet, and that he saw Harada's face before Harada attempted to close the door. Officer Bermudes also testified that, as Harada opened the door, other search team members immediately began yelling, "Police! Search Warrant!" As Harada attempted to shut the door, Officer Bermudes used his body and arm to completely open the door by using "quite a bit" of force. In addition, while forcing the door open, Officer Bermudes yelled, "Police. Search Warrant. Get on the ground." No officers, however, expressly demanded entry into the residence to execute the search warrant. In addition to securing Harada, after entering the apartment, the officers secured codefendants Aoki and Save in the living room. The officers also secured another male, Karl Koja, after he ran from the living room into the bathroom, and a woman, Tok Kwon, in the living room.

After securing the residence, the officers conducted a search and discovered three ziplock bags of methamphetamine and various drug paraphernalia. At the time of the warrant's

execution, with the exception of Harada, the other four persons were seen within approximately five feet of the seized contraband.

At the conclusion of the hearing, the circuit court orally granted Harada's motion to suppress and subsequently entered the following pertinent Findings of Fact (FOF) and Conclusions of Law (COL):

> FINDINGS OF FACT
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> . . . .
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> 4. The Narcotics/Vice officers determined that a "ruse" should be used and had two plain-clothes female police officers approach the door, knock and call out, "Kenny." The officers executing the search were out of sight of the peephole in the door.
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> 5. As soon as the female officers saw the door handle begin to move, they jumped aside to allow the search team access. . . .
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> 6. [Harada] opened the door several inches and then Officer Bermudes and the rest of the search team entered the apartment a few seconds after, some members of the Search team yelled, "Police! Search Warrant!"
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> 7. While [Harada] attempted to shut the door, Officer Bermudes, who was the first officer in line at the door, used his arm and body to completely open the door to allow entry. He yelled, "Police! Search Warrant! Get on the ground," after the door started opening.
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> . . . .
>
> 9. No one demanded to be allowed to enter the apartment.
>
> CONCLUSIONS OF LAW
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> 3. The use of a ruse by the police is legal and appropriate. The ruse in this case failed only because of the method and timing of the actual entry of the uniformed officers.
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> . . . .
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> 6. Dixon's cite [(referring to State v. Dixon, 83 Hawai'i 13, 924 P.2d 181 (1996))] to Dickey v. United States, 332 F.2d 773 (9th Cir.), cert. denied, 379 U.S. 948, 85 S.Ct. 444, 13 L.Ed.2d 545 (1964), that "[h]ad the officers obtained, by ruse, a partial opening of Dickey's door, and if they had then forced open the door the rest of the way to gain entrance, this would have been a breaking . . ." (Dixon, [83 Hawai'i] at 19, citing Dickey, [332 F.2d] at 777-778), is applicable in the instant case to determine a breaking occurred.

> . . . .
> 8. The use of force to complete the opening of the door in the instant case rendered the ruse illegal under Dixon.
> 9. Concomitantly, the [c]ourt finds there was no proper "knock and announce" under HRS § 803-37.

The prosecution timely appeals the trial court's order granting the defendants' motion to suppress.

II. STANDARDS OF REVIEW

> We review a circuit court's findings of fact in a pretrial ruling according to the following standard:
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> > Appellate review of factual determinations made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made.
>
> State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995) (citations and internal quotation marks omitted). "The circuit court's conclusions of law are reviewed under the right/wrong standard." State v. Pattioay, 78 Hawai'i 455, 459, 896 P.2d 911, 915 (1995) (citation omitted).

State v. Wilson, 92 Hawai'i 45, 48, 987 P.2d 268, 271 (1999).

III. DISCUSSION

The prosecution contends that the method and manner in which the search warrant was executed was lawful. In the alternative, the prosecution contends that, if the knock and announce rule of HRS § 803-37 was invoked, exigent circumstances existed that excused the officers' compliance with the knock and announce rule of HRS § 803-37.

A. The Knock and Announce Rule

The question whether the knock and announce requirements are invoked during the execution of a search warrant

focuses upon whether there has been a breaking. See State v. Dixon, 83 Hawai‘i 13, 16, 924 P.2d 181, 184 (1996). Although a breaking "connotes some use of force," that force may be no more than that required to turn a doorknob. See id. at 18, 924 P.2d at 186 (stating that "[a]n unannounced intrusion into a dwelling . . . is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or . . . open a closed but unlocked door" (citation and emphasis omitted)). However, where the police gain entry into a place to make an arrest or to search via the use of a ruse without the use of force, there is no breaking; thus, the knock and announce rule is not implicated. Id. at 21, 924 P.2d at 189; State v. Eleneki, 92 Hawai‘i 562, 566, 993 P.2d 1191, 1195 (2000) (holding that the use of a ruse does not necessarily violate HRS § 803-37).[3] But, where a ruse

[3] In his concurring and dissenting opinion, Justice Acoba rejects this court's previous determinations that the use of a ruse neither violates the federal and state constitutions nor HRS §§ 803-11 and 803-37 as construed in Dixon and Eleneki, supra. "As a general rule, we do not lightly disregard precedent." Francis v. Lee Enterprises, Inc., 89 Hawai‘i 234, 236, 971 P.2d 707, 709 (1999). However, a rule established by precedent is not infallible. See id. Thus, where unintended injury would result from following a previous decision or where judicial errors cannot be reconciled with basic principles of law, we have determined that "[i]t is generally better to establish a new rule than to follow a bad precedent." See id. (citing Parke v. Parke, 25 Haw. 397, 401 (1920)). "Although the doctrine of stare decisis is subordinate to legal reasons and justice, a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." State v. Stocker, 90 Hawai‘i 85, 95, 976 P.2d 399, 409 (1999) (internal quotation signals and citation omitted). Justice Acoba has not pointed to any judicial "error" in reasoning that was not previously considered or any unintended injury that justifies abandoning the principles of stare decisis with respect to our previous constitutional and statutory analysis. Additionally, we have found no jurisdiction that holds the use of a ruse to be unconstitutional;

(continued...)

is accompanied by the use of force to gain entry during the execution of a search warrant, police officers are required to comply with HRS § 803-37. See id. at 566, 993 P.2d at 1195. Thus, where a breaking occurs or force is used, officers are required to comply with applicable knock and announce requirements regardless of whether they are executing a search or an arrest warrant. Id.

In his dissenting opinion, Justice Ramil, also citing Eleneki, concludes that, "after a door is considered 'open,' police officers do not need to comply with the knock and announce requirements." J. Ramil, dissenting op. at 3-4. Justice Ramil goes on to say -- and seemingly concludes -- that "[w]hether force is subsequently used is irrelevant to [determining the officers' need to comply with the knock and announce requirements]." Id. at 4. In other words, if a door is open, no matter how slight, police officers need not knock and announce regardless of whether force is used. The foregoing conclusion, however, is contrary to Hawai'i and most federal and state case law.

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[3](...continued)
nor have we discovered any other jurisdiction, with or without statutory language similar to ours, that has construed the warrant statute(s) to preclude the use of a ruse. Accordingly, we are not persuaded by Justice Acoba's opinion.

Given the internal inconsistencies contained within Eleneki, Justice Ramil's position is not completely unfounded. The relevant analysis as set forth in Eleneki is as follows:

> In Dixon, we held that "HRS § 803-11 is not implicated where entry is gained through an open door without use of force." 83 Hawai'i at 21, 924 P.2d at 189. In the present case, although the ruse prompted Foster to partially open the door, Officer Kenui had to use force to gain entry because Foster attempted to close the door after recognizing Kenui. Because force was used, the officers were required to comply with HRS § 803-37 and Garcia. The circuit court did not reach the issue whether the officers complied with HRS § 803-37 and Garcia; the ICA held that the requirements were not satisfied. We disagree with the ICA.
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> HRS § 803-37 provides that officers executing a search warrant "may enter [the place to be searched] without demanding permission if the officer finds it open. If the doors are shut the officer must declare the officer's office and the officer's business, and demand entrance." Under [HRS] § 803-37 and Garcia, if the occupants do not open the door after the officers knock and announce, the officers may break the door after giving the occupants a reasonable time to respond. In the present case, the officers employed a permissible ruse, which induced Foster to open the door approximately one foot. This was sufficient to render the door "open" for purposes of the statute. Therefore, the officers were not required to knock and announce before entering, and the force used by the officers to further open the door against Foster's resistance was not a breaking.

Eleneki, 92 Hawai'i at 566-67, 993 P.2d at 1195-96 (emphases added).[4] As emphasized above, Eleneki states, first, that the knock and announce statute was implicated (based on the officer's use of force) and, second, that it was not implicated (because

[4] Notably, the opening section of Eleneki states:

> We hold that the use of a ruse is not prohibited in the execution of a search warrant. However, when the police use force to gain entry, they are required to comply with HRS § 803-37 and Garcia.

Eleneki, 92 Hawai'i at 563, 993 P.2d at 1192.

the force used by the officers did not constitute a breaking). Notwithstanding this internal conflict, it was unnecessary in Eleneki to resolve whether the statute was implicated because the officers had complied with the knock and announce rule by declaring "police, search warrant, we demand entry" as they were pushing open the door. Id. at 567, 993 P.2d at 1196. In this case, however, the officers failed to state "we demand entry" as they entered and, thus, did not comply with the knock and announce rule. As such, this case presents us with the opportunity to correct the conflicting language in Eleneki.

The analysis in Eleneki relies primarily on State v. Dixon, 83 Hawai'i 13, 924 P.2d 181 (1996), and United States v. Contreras-Ceballos, 999 F.2d 432 (9th Cir. 1993). Our review of those two cases and the cases upon which they rely demonstrate that the use of force in gaining entry is not only relevant to whether the knock and announce statute is implicated, it is a primary factor in making such determination.

In Eleneki, we held that "the rule established in Dixon [regarding the execution of arrest warrants] also applies to the execution of search warrants[.]" Eleneki, 92 Hawai'i at 566, 993 P.2d at 1195. The Dixon rule, to which we referred in Eleneki, was that the applicable knock and announce statute "is not implicated where entry is gained through an open door without [the] use of force." Dixon, 83 Hawai'i at 21, 924 P.2d at 189

(emphases added). The logical corollary is that, where force is used to gain entry, the statute is implicated.[5] In Dixon, it was unnecessary to determine as much because force was not used.

In arriving at the Dixon rule, this court surveyed numerous federal and state cases that have held that gaining entrance via the use of a ruse without force or threat of force does not violate the knock and announce rule. See id. at 18-20, 924 P.2d at 186-88 (citing: (a) Leahy v. United States, 272 F.2d 487, 489 (9th Cir. 1959) (holding that the officers were not required to knock and announce because no "breaking" occurred where a ruse was employed to open the door without the element of force); (b) Dickey v. United States, 332 F.2d 773, 778 (9th Cir. 1964) (holding that "the employment of a ruse to obtain the full opening of the [defendant's] door unassociated with force was not a 'breaking'" (emphasis added)); (c) Gatewood v. United States, 209 F.2d 789, 791 (D.C. Cir. 1953) (holding that officers' entrance "through falsehood followed by force, without first disclosing . . . the true reason they desired to enter"

[5] As previously indicated, the case at bar presents us with the opportunity to correct the conflicting language in Eleneki. See discussion, supra at 9. In so doing, we recognize that we inadvertently stated in the second paragraph of the portion of Eleneki discussed supra at 9 that "the force used by the officers to further open the door against Foster's resistance was not a breaking." Considering Eleneki as a whole, the aforementioned statement was obviously a mistake. Nevertheless, Justice Acoba seizes upon our inadvertent mistake in support of his assertion that Eleneki and Dixon are inconsistent with each other. See J. Acoba, concurring and dissenting op. at 21-22. However, a careful reading of the analysis in this opinion demonstrates that they are not.

constituted an unlawful breaking); (d) United States v. Beale, 445 F.2d 977, 978 (5th Cir. 1971) (holding, on petition for rehearing, that entrance gained by deception, and "wholly without [the] application of force," is not governed by the knock and announce rule (emphasis added)); (e) United States v. Syler, 430 F.2d 68, 70 (7th Cir. 1970) (holding that no "breaking" occurred where a defendant partially opened the door and agents opened the door further and entered because "[n]o attempt was made to bar his way and no force was applied in gaining entry" (emphasis added)); (f) United States v. Raines, 536 F.2d 796, 800 (8th Cir. 1976) (holding that "[a] police entry into a private home by invitation without force, though the invitation be obtained by a ruse, is not a breaking and does not invoke the [knock and announce rule]" (emphasis added)); (g) State v. Iverson, 272 N.W.2d 1, 5 (Iowa 1978) (holding that entrance to a home gained by ruse was reasonable where "[n]o force was threatened or used" and "[n]o breaking occurred" (emphasis added)); (h) Palmer v. State, 426 So. 2d 950, 953 (Ala. Crim. App. 1983) (stating that "an entry obtained by deception or ruse, without the use of any force, is not violative of the knock and announce statute" (emphasis added)); and (i) Ryals v. State, 498 So. 2d 1365, 1366 (Fla. Dist. Ct. App. 1986) (adopting the rationale of the cases holding that entry by deception does not violate the knock and

announce rule because no "breaking" or use of force occurs (emphasis added))).

Justice Ramil indicates that seven of the nine foregoing cases involve situations where no force was used, seemingly suggesting that these cases are, therefore, inapplicable to this case. J. Ramil, dissenting op. at 10. All nine cases, however, are cited in Dixon [hereinafter, the Dixon cases] and support our interpretation of the proposition espoused therein, with which Justice Ramil has no dispute. The Dixon cases also support our interpretation of the proposition for which Eleneki stands. Justice Ramil's implication that these cases are inapplicable to this case ignores the fact that these cases permit the use of a ruse because no force or threat of force was involved -- which is precisely why these cases are relevant.

Additionally, with respect to the remaining two cases cited above, Gatewood and Syler, Justice Ramil indicates that Gatewood is "inapplicable" and that Syler, "indeed," is contrary to the majority's holding in the case at bar. See J. Ramil, dissenting op. at 11. The central proposition in Gatewood -- that officers may not gain entrance to a person's home through "falsehood followed by force, without first disclosing to [that person] the true reason they wish to enter," is directly relevant to our holding in this case. Moreover, the proposition for which

we cited Gatewood still stands in that jurisdiction. See United States v. Covington, 385 A.2d 164, 167 (D.C. 1978) (cited in Coleman v. United States, 738 A.2d 1230 (D.C. 1999)).

Next, Justice Ramil indicates that Syler "actually contradicts [our] proposition" and points to the following language from Syler:

> We also agree with the district court's finding that **force was not employed** to gain entrance to the bungalow and no violation of the principles of Sabbath v. United States[, 391 U.S. 585 (1968),] occurred. The facts conceded by defendant show that the front door was already open. Apparently responding to the announcement of the arrival of the "Gas man," defendant unlatched the screen door and partly opened it. [The officer] merely completed the operation voluntarily initiated by defendant. **No attempt was made to bar his way** and **no force was applied** in gaining entry.

J. Ramil, dissenting op. at 11 (quoting Syler, 430 F.2d at 70) (underscored emphases in dissent) (bold emphases added). Based on the foregoing, Justice Ramil concludes that, "according to the reasoning of this case . . . an officer's further opening of an already open door is not considered use of force to gain entry." J. Ramil, dissenting op. at 11-12. To the contrary, the boldly emphasized language above clearly indicates that the court in Syler determined that no force was used and no attempt was made to bar the officer's from entering the premises. Thus, Syler supports rather than contradicts our holding today.

Finally, Justice Ramil indicates that seven of the nine Dixon cases are from the 1950s, 60s, and 70s, the remaining two being a 1986 opinion from the Florida District Court of Appeal

and a 1983 opinion from the Alabama Court of Criminal Appeals. J. Ramil, dissenting op. at 12-13. Interestingly, Justice Ramil does not explain how any of these cases are "bad law" -- and, in fact, they are not. With the exception of Eleneki and Contreras-Ceballos -- both of which are extensively discussed in this opinion, -- Justice Ramil does not cite to any cases that stand for propositions contrary to the Dixon cases. Moreover, that these "old" cases have not been overruled or contradicted underscores the fact that the rationale expressed in each of them is not only directly relevant today, but has steadfastly stood the test of time.

Moreover, some of the cases cited specifically addressed the situation where officers force open a door that the occupant has voluntarily opened, but is then attempting to close. See Leahy v. United States, 272 F.2d 487, 489 (9th Cir. 1959) (distinguishing the facts of Leahy from cases in which the occupant had voluntarily opened the door and then attempted to close it because the element of force was not present in Leahy), cert. granted, 363 U.S. 810, cert. dismissed, 364 U.S. 945 (1960); Dickey v. United States, 332 F.2d 773, 777-78 (9th Cir.) (noting that, if the officers had obtained a partial opening and had forced the door open the rest of the way to gain entrance, that would have been a "breaking"), cert. denied, 379 U.S. 948

(1964); United States v. Beale, 445 F.2d 977, 978 (5th Cir. 1971) (noting that Sabbath v. United States, 391 U.S. 585 (1968), "left undisturbed the existent distinction between entry where some force is employed and entry where force is not an element at all"), cert. denied, 404 U.S. 1026 (1972).

As stated above, after surveying the foregoing cases, this court, in Dixon, held that the knock and announce statute "is not implicated where entry is gained through an open door without the use of force." Dixon, 83 Hawai'i at 21, 924 P.2d at 189 (emphases added); see also, e.g., United States v. Covington, 385 A.2d 164 (D.C. 1978) (citing a number of courts that have "approved the use of a ruse to gain peaceful entry" and noting that "[t]he critical factor in each of those cases . . . was that the police used force to prevent the door from being closed without first announcing their authority and purpose") (cited with approval in Coleman v. United States, 728 A.2d 1230 (D.C. 1999)); Adcock v. Commonwealth, 967 S.W.2d 6 (Ky. 1998) ("[F]ederal and state courts in interpreting either knock and announce statutes or the common law knock and announce rule are in general agreement that there is no constitutional impediment to the use of subterfuge. Entry gained through the use of deception, accomplished without force, is not a 'breaking' requiring officers to first announce their authority and

purpose."). Based upon the foregoing, the use of force in gaining entrance into a place to be searched is clearly relevant to whether the officers must "knock and announce." Consequently, Justice Ramil's conclusion that the use of force is irrelevant to that determination is clearly unfounded.

Justice Ramil's dissenting opinion seems to focus on the fact that the force used was subsequent to the door being voluntarily opened. Specifically, Justice Ramil states that "the majority mischaracterizes the fact pattern" by describing the ruse as "accompanied by the use of force." J. Ramil, dissenting op. at 4. In Justice Ramil's view, "the ruse . . . was not actually 'accompanied by the use of force,' as claimed by the majority, but rather [was] followed by the use of force[.]" Id. (citation omitted) (emphases in original). We disagree. The assertion that a breaking does not occur where force is applied subsequent to a voluntary opening of a door is disingenuous because force is being used to gain entry in any event. Therefore, the force used constitutes a breaking. Moreover, the focus in determining the applicability of the knock and announce statute is properly on whether there has been a breaking. See Dixon, 83 Hawai'i at 16, 924 P.2d at 184.

Justice Ramil maintains that the Ninth Circuit's decision in United States v. Contreras-Ceballos, 999 F.2d 432

(9th Cir. 1993), is "in diametric contradiction" to the Dickey analysis that we adopt. J. Ramil, dissenting op. at 13.

In Contreras-Ceballos, the Ninth Circuit stated:

> This court has not squarely faced the question whether use of force after achieving, by means of deception, a voluntary partial opening of an entryway implicates the knock-and-announce statute. In earlier decisions, however, we have held that a law enforcement officer's use of a ruse to gain admittance does not implicate [the federal knock and announce statute] because it entails no breaking. Dickey v. United States, 332 F.2d 773, 777-78 (9th Cir.), cert. denied, 379 U.S. 948 (1964); Leahy v. United States, 272 F.2d 487, 489 (9th Cir.1959), cert. granted, 363 U.S. 810 (1960), and cert. dismissed, 364 U.S. 945 (1961).
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> These decisions leave us with little alternative but to uphold the action of the officers in this case. Under Dickey and Leahy, the officers were not in violation of [the federal knock and announce statute] when [an apartment occupant] opened the door in response to the officers' ruse. The officers then stated their identity, authority and purpose. At that point, the purposes of [the statute] had been fully served. The warrant held by the officers entitled them to search whether or not their search was resisted. Their use of force to keep the door open, and to enter, did not implicate [the statute]. Accord United States v. Salter, 815 F.2d 1150, 1152 (7th Cir.1987).[6]

Contreras-Ceballos, 999 F.2d at 435 (emphases added). Although the Ninth Circuit stated that the officer's use of force did not

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[6] In Salter, a police officer, posing as a hotel clerk, called the defendant and requested that she come to the front desk to sign a paper. 815 F.2d at 1151. Several police officers and a Drug Enforcement Agency (DEA) agent waited outside of her room to serve a search warrant. The parties disagreed about what happened next. Id. According to the government, the officers stopped the defendant after she had opened the door to her room and stepped out into the hall, identified themselves, and informed her of the search warrant before they escorted her back into her room. Id. According to the defendant, the officers came forward in the room, pushed the door open, and did not identify themselves or inform her of the warrant until after they had taken her back into the hotel room. By both accounts, the DEA agent had placed his foot in the doorway to keep the door from closing. Id. The United States Court of Appeals for the Seventh Circuit concluded that this "means of entry" did not constitute an "intrusion" and that, even if the agent did push the door fully open, such action did not constitute force. Id. at 1152. Based on the foregoing, Salter is distinguishable from Contreras-Ceballos and from the case at bar in that the defendant in Salter was not attempting to close the door. Thus, the use of force was not at issue.

implicate the federal knock and announce statute, the court was also attempting to follow Dickey and Leahy.

In Dickey, agents gained entry into the premises by disguising their voices and answering, "[I]t's Lacey, open up" when the occupant asked, "[W]ho's there?" The door was then opened, and the officers at no time used force. Analogously, in Leahy, an agent gained admittance into the defendant's premises by stating that he was an agent from the County Assessor's office. Once inside, he stated his real purpose; again, no force was ever used. The courts in both Dickey and Leahy distinguished the facts of their respective cases from situations where force is applied after the door is open in order to gain entry. See Dickey, 332 F.2d at 777-78 (noting that, if the officers had obtained a partial opening and had forced the door open the rest of the way to gain entrance, there would have been a "breaking"); Leahy, 272 F.2d at 489 (distinguishing the facts of Leahy from cases in which the occupant had voluntarily opened the door and then attempted to close it because the element of force was not present in Leahy).

In Contreras-Ceballos, the Ninth Circuit did not expressly indicate that it was attempting to modify or overrule any previous decision. Based on the foregoing, we disagree that Contreras-Ceballos contradicts Dickey or that it effected a change in federal law.

In further support of his assertion that "recent federal cases do not support the majority's position," J. Ramil, dissenting op. at 13, Justice Ramil cites to United States v. Phillips, 149 F.3d 1026, 1029 (9th Cir. 1998), which he asserts "reaffirmed [the proposition] that 'knock and announce' requirements apply only to closed -- not open -- doors[.]" J. Ramil, dissenting op. at 16. Phillips, however, is factually inapposite to this case. Phillips did not involve the execution of a search warrant or the use of a ruse; rather, the police were called to a home by its owner, who left a door unlocked and opened. Thus, the officers not only entered with the consent of the owner, but they also did so due to exigent circumstances (that is, the defendant, who was not welcome in the home, was apparently high on methamphetamine and threatening to forcibly remove a third person from the home). Phillips, 149 F.3d at 1028-29. Moreover, Phillips cites cases from 1970 and 1971 for the very proposition that Justice Ramil purports is not supported by recent federal cases. Specifically, Phillips states:

> [The knock and announce statute] requires that police officers "not open the closed door of a dwelling until they have been refused admittance." Contreras-Ceballos, 999 F.2d at 434. We agree with the district court that the statute does not apply to officers who enter through open doors. See United States v. Valenzuela, 596 F.2d 1361, 1365 (9th Cir. **1979**) ("entry through an open door is not a 'breaking' within the meaning of the statute"); United States v. Vargas, 436 F.2d 1280, 1281 (9th Cir. **1971**) ("thrust of Section 3109 ... is aimed at the closed or locked door"). Moreover, the district court correctly noted that **exigent circumstances and the owner's consent in this case would serve to negate any violation of the statute.**

Id. at 1029 (bold emphasis added). Based on the foregoing, Phillips is completely inapposite, not only to the case at bar, but also to the law surrounding the use of ruses in the execution of warrants.

Even if the Ninth Circuit intended to alter the existing rule, a proposition with which we disagree, such a holding would be contrary to the great weight of authority in the aforementioned cases. See United States v. Seelig, 498 F.2d 109, 113 (5th Cir. 1974) (determining that the force used by officers to physically enter an apartment implicated the knock and announce rule even though the agents had employed a ruse to cause the door to be opened slightly) (citing Sabbath v. United States, 391 U.S. 585 (1968); Smith v. United States, 357 F.2d 486, 488 n.1 (5th Cir. 1966) (noting that "entrance gained by fraud or other use of deception for the purpose of effecting an arrest is constitutionally permissible so long as force is not employed" (emphasis added)).

Furthermore, notwithstanding its statement that the statute was not implicated, the court's holding in Contreras-Ceballos was clearly based on the fact that, when the door was opened in response to the ruse, the officers "stated their identity, authority and purpose" because, "[a]t that point[,] the purposes of [the statute] had been fully served." Contreras-

Ceballos, 999 F.2d 435. Similarly, in Eleneki, this court stated:

> [the occupant] opened the door approximately twelve inches in responses to the officers' ruse, then attempted to close the door. The officers met his resistance and pushed the door open further, announcing "Police, search warrant, we demand entry." They repeated the announcement once inside. Their entry violated neither the terms of HRS § 803-37 nor the purposes of the knock and announce statute. Therefore, the search was valid.

Eleneki, 92 Hawai'i at 567, 993 P.2d at 1196 (footnote omitted). Thus, Contreras-Ceballos is analogous to Eleneki and distinguishable from the instant case because, in both Contreras-Ceballos and Eleneki, the officers had complied with the statute. Based on the foregoing and the facts of this case, we believe that law enforcement officers are required to comply with the knock and announce statute when a ruse is accompanied by force.

Such a requirement best serves the purposes of the rule, which are (1) to reduce potential violence to both occupants and police resulting from an unannounced entry, (2) to prevent unnecessary property damage, and (3) to protect an occupant's right to privacy. See Eleneki at 566, 993 P.2d at 1195 (citing Dixon, 83 Hawai'i at 22, 924 P.2d at 190). If police are not required to comply with the knock and announce rule upon applying force to gain entry, the potential for violence and unnecessary property damage will increase.

Justice Ramil's dissent relies heavily on the language of the statute to declare that "an officer must comply with the

knock and announce rule if the door is 'shut.'" J. Ramil, dissenting op. at 2 (emphasis added). Although the triggering language in the search warrant statute is "if the doors are shut," the triggering language in the arrest warrant statute is "when entrance is refused." Compare HRS § 803-11 with HRS § 803-37. Notwithstanding that distinction, we specifically stated in Eleneki that, "[a]lthough the language of HRS §§ 803-11 and 803-37 differs, the purposes of the 'knock and announce' rule are identical in each context and the use of a ruse[, which is permissible to gain entrance in the execution of an arrest warrant,] is also consistent with those purposes in the execution of a search warrant." Eleneki, 92 Hawai'i at 565, 993 P.2d at 1194 (emphasis added). Thus, in both contexts, we have determined that a ruse is permissible (i.e., that the use of a ruse does not necessarily violate either statute) -- notwithstanding the fact that the statutes are silent on the issue -- because the purposes behind the statutes are identically served.

Justice Ramil's narrow view of the search warrant statute creates an incongruity between the application of the knock and announce requirement when executing an arrest warrant and when executing a search warrant. Under the analysis proffered in Justice Ramil's dissenting opinion, an officer executing a search warrant will not be required to comply with

the knock and announce statute when a ruse is employed, the occupant voluntarily opens the door and then attempts to close it, and the officer uses force to gain entry. By contrast, an officer executing an arrest warrant, under the same circumstances, would be required to comply with the knock and announce statute. This incongruity begs the question of what happens when the officers are simultaneously executing both an arrest and a search warrant. We believe that the relevant analysis should instead focus upon whether a "breaking" has occurred. See Dixon, 83 Hawai'i at 16, 924 P.2d at 184. Under the Dixon analysis and the cases previously cited, a "breaking" occurs where force is used to gain entry.

Finally, Justice Ramil contends that our analysis and conclusion in the instant case would lead to the "nonsensical procedure" described by the Ninth Circuit in Contreras-Ceballos. J. Ramil, dissenting op. at 18. The court in Contreras-Ceballos stated that requiring the officers to knock and announce after the door was opened, but was subsequently being closed,

> would dictate a nonsensical procedure in which the officers, after having employed a permissible ruse to cause the door to be opened, must permit it to be shut by the occupants so that the officers could then knock, reannounce, and open the door forcibly if refused admittance.

Contreras-Ceballos, 999 F.2d at 435. Although we agree that the procedure described by the court in Contreras-Ceballos is nonsensical, police officers in the situation described would

actually need only state their office, their business, and demand entry; they would not be required to wait for the door to close, or for a "reasonable" amount of time to pass.[7] Moreover, none of the cited cases require that the police, in response to an occupant's attempt to close the door, first allow the door to be closed and then mechanistically comply with the knock and announce statute.

Accordingly, we hold that, where a ruse is accompanied by the use of force to gain entry during the execution of either a search or arrest warrant, police officers are required to comply with the knock and announce rule.

Where the knock and announce rule has been triggered, the police are required to declare their office, their business, and expressly demand entry. See State v. Monay, 85 Hawai'i 282, 284, 943 P.2d 908, 910 (1997); State v. Garcia, 77 Hawai'i 461, 466, 887 P.2d 671, 676 (App. 1995); HRS §§ 803-11 (1993)[8] and

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[7] Under the circumstances described, it would be unreasonable to require the officers to wait. See State v. Garcia 77 Hawai'i 461, 468, 887 P.2d 671, 678 (App. 1995) (stating that the lawfulness of the execution of a search warrant should be judged under a standard of reasonableness, taking into account the totality of the circumstances).

[8] HRS § 803-11 provides that:

> Whenever it is necessary to enter a house to arrest an offender, and entrance is refused, the officer or person making the arrest may force an entrance by breaking doors or other barriers. But before breaking any door, the officer or person shall first demand entrance in a loud voice, and state that the officer or person is the bearer of a warrant of arrest; or if it is in a case in which arrest is lawful without warrant, the officer or person shall substantially

(continued...)

803-37. In other words, the requirements of the knock and announce rule are not met when police officers fail to orally demand entry, and a demand of entry cannot be implied from simply stating, "Police, search warrant." Monay, 85 Hawai'i at 284, 943 P.2d at 910.

In the present case, the officers employed a ruse while executing the search warrant at Harada's apartment. In response, Harada opened the door, but then quickly attempted to close it. Officer Bermudes used force to prevent the door from being closed and succeeded in gaining entry. At the point that Harada opened his door in response to the ruse, there was no breaking within the meaning of HRS § 803-37. See Eleneki, 92 Hawai'i at 566-67, 993 P.2d at 1195-96; Dixon, 83 Hawai'i at 21, 924 P.2d at 189. However, a breaking occurred when Officer Bermudes used force to prevent Harada from closing the door. Consequently, the requirements of HRS § 803-37 were triggered, and the officers were required to declare their office, their business, and demand entrance. See Monay, 85 Hawai'i at 284, 943 P.2d at 910. It is undisputed that none of the officers expressly demanded entrance as they entered Harada's apartment. Thus, the officers' entry did not comply with the knock and announce rule of HRS § 803-37.

[8](...continued)
state that information in an audible voice.

B. Exigent Circumstances

On appeal, the prosecution alternatively contends that exigent circumstances at the time the warrant was executed excused the police officers' compliance with HRS § 803-37. However, Harada contends that the prosecution failed to properly preserve the issue whether there were exigent circumstances and, therefore, has waived the issue. See State v. Rodrigues, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) (holding that the prosecution waived the issues of "good faith" and "exigent circumstances" exceptions to the exclusionary rule because it failed to raise the issue at trial). We agree with Harada.

IV. CONCLUSION

Based upon the foregoing, we hold that a breaking occurred when Officer Bermudes used force to prevent Harada from closing the door. Consequently, the requirements of HRS § 803-37 were triggered, and the officers' failure to expressly demand entrance as they entered Harada's apartment constituted an unlawful breaking, in violation of the knock and announce rule. We also hold that the prosecution failed to properly preserve the issue whether there were exigent circumstances at the time the warrant was executed that excused the officers' compliance with HRS § 803-37. Consequently, the issue has been waived.

Accordingly, we affirm the trial court's order granting the defendants' motion to suppress.

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