OPINION OF ACOBA, J.,
CONCURRING IN PART AND DISSENTING IN PART

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail -- its roof may shake -- the wind may blow through it -- the storm may enter, the rain may enter -- but the King of England cannot enter -- all his force dares not cross the threshold of the ruined tenement!

Frank v. Maryland, 359 U.S. 360, 378-79 (1959) (Douglas, J., dissenting) (quoting 15 Hansard, Parliamentary History of England (1753-1765), at 1307), overruled in part by Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967). The sanctity of one's abode has been embedded in our common law traditions even before the origins of our nation. See Payton v. New York, 445 U.S. 573, 601 (1980) (citation omitted). Protection for that sanctity is embodied in 1869 statutes now denominated as Hawai‘i Revised Statutes (HRS) §§ 803-37 and 803-11 (1993). The majority departs from express mandates of those statutes. Therefore, I respectfully disagree with the import and reasoning of the majority opinion, and for the reasons stated, would affirm the order of the first circuit court (the court) granting suppression of the evidence, but on the ground that use of a ruse is not permitted under the express language and underlying policies of those statutes.

I.

A.

The relevant statute in this case, HRS § 803-37, states:

> **Power of officer serving.** 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.

(Emphasis added.) "In interpreting statutes, the fundamental starting point is the language of the statute itself and where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning." State v. Kalama, 94 Hawai'i 60, 64, 8 P.3d 1224, 1228 (2000) (internal quotation marks and citations omitted). In this case, "[n]one of the parties contend and [it can]not [be] discern[ed] that the language of HRS § [803-37] is ambiguous inasmuch as, on its face, there is no 'doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression.'" Id. (quoting Citizens for Protection of North Kohala Coastline v. County of Hawai'i, 91 Hawai'i 94, 107, 979 P.2d 1120, 1133 (1999) (internal quotation marks and citations omitted)). Thus, we must interpret HRS § 803-37, by "giv[ing] effect to the legislature's intent, which

is obtained primarily from the language of the statute[.]" Dines v. Pacific Ins. Co., 78 Hawai'i 325, 332, 893 P.2d 176, 183 (1995) (internal quotation marks, citation, and brackets omitted). Cf. Kalama, 94 Hawai'i at 65, 8 P.3d at 1229 ("It is how the statute would be read by the layperson [that] guides our construction in criminal cases.").

B.

The statute is clear and unambiguous. On its face, HRS § 803-37 permits entry "without . . . permission" when serving a search warrant only "if the officer finds [the premises] open." It is without dispute that the officer here did not "find" the door to the premises open. "Find" in its ordinary and common sense meaning denotes "[t]o come upon," "[t]o discover," Blacks Law Dictionary 631 (6th ed. 1990), or "to come upon often accidentally." Merriam Webster's Collegiate Dictionary 436 (10th ed. 1993). The police did not "come upon" or "discover" the door open; they fomented the circumstances which caused it to be partially ajar. Hence, the police cannot be said to have found the door open within the meaning of HRS § 803-37. Under the statute, finding the door open is the only circumstance that permits the officer to "enter [the premises] without demanding permission." HRS § 803-37.

Because the police did not find the door open, but "shut," they were obligated to "'declare [the officer's] office and [the officer's] business, and demand entrance.'" State v. Garcia, 77 Hawai'i 461, 465, 887 P.2d 671, 675 (App. 1995) (quoting The King v. Ah Lou You, 3 Haw. 393, 395 (1872)) (emphasis in original). The court's finding No. 9 "indisputably establish[ed] that the police failed to specifically 'demand entrance' as directed by the statute." Id. Thus, "[t]he police, here, having failed to follow the statute's mandate, illegally entered the premises. The entry being illegal, any items seized as a result of the illegal entry must be suppressed." Id. at 466, 887 P.2d at 676 (citation omitted).

Because HRS § 803-37 prescribes the manner in which search warrants are to be served, it is to be given paramount effect within the territorial boundaries of this jurisdiction. The statutes of our state admit of no other manner in which search warrants are to be served, thus a fortiorari purported service in a manner other than that authorized by HRS § 803-37 is invalid, the entry illegal, and, thus, the fruits of the search tainted. By authorizing entry in two specific ways -- upon finding the door open,[1] or if shut, then after the required

[1] The question of whether the police may simply enter premises that are "open" must be determined in the context of a specific case. However, the construction of terms such as "open" and "shut" in applying a statute such as HRS § 803-37, is an altogether different matter from sanctioning its circumvention.

pronouncements -- the statute excludes all other manner of entry by those charged with serving a search warrant.

"[A] statute which provides for a thing to be done in a particular manner or by a prescribed person or tribunal implies that it shall not be done otherwise or by a different person or tribunal; and the maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies to such statute." State ex rel. Battle v. Hereford, 133 S.E.2d 86, 90 (W.Va. 1963) (citations omitted). See also Amantiad v. Odum, 90 Hawai'i 152, 163, 977 P.2d 160, 171 (1999) (applying maxim of *expressio unius est exclusio alterius* to HRS § 386-73, stating that "'original court action to settle controversies involving the workers' compensation law'" were precluded, and that the circuit court was relegated "'to a secondary role'") (quoting Travelers Ins. Co. v. Hawaii Roofing, Inc., 64 Haw. 380, 384, 641 P.2d 1333, 1336 (1982); Travelers Ins. Co., 64 Haw. at 387, 641 P.2d at 1338 (also applying maxim to HRS § 386-73, stating that "'appellant [may not] properly bring an original action in the circuit court which would bar the operative effect of [an administrative] order'") (quoting Ras v. Hasegawa, 53 Haw. 640, 641, 500 P.2d 746, 747, reh'g denied, 53 Haw. 640, 500 P.2d 746 (1972)).

II.

The exception to the statutory requirements allowed in our jurisdiction permits the police in executing a warrant to immediately enter the premises if exigent circumstances justify such an entry. HRS § 803-37 does not "prevent police executing a warrant from immediately entering the premises if exigent circumstances justify such an entry." Garcia, 77 Hawai'i at 469, 887 P.2d at 679 (citing State v. Lloyd, 61 Haw. 505, 512, 606 P.2d 913, 918 (1980)). The impetus for such action originates with the occupants and not with the police and is justified by objective evidence of a threat to life or the occupants' flight or their destruction of objects sought to be seized. See State v. Davenport, 55 Haw. 90, 99, 516 P.2d 65, 72 (1973) ("The court properly held that . . . the police had no choice but to effect a forced entry, since the alternative might well have been the destruction of the illicit drugs for which they were searching."); cf. State v. Quesnel, 79 Hawai'i 185, 189, 900 P.2d 182, 186 (App. 1995) (holding that contraband was seized in violation of HRS § 803-37, where officers had forcibly entered on the ground that "a search warrant had been previously executed at the residence, [and] there was a high probability that evidence[] may be destroyed if [they] did not enter immediately") (some brackets added and some deleted) (internal quotation marks omitted). This exception is not in derogation of, but is drawn

in recognition of the policies embodied in HRS § 803-37. See discussion infra.

No relevant principle justifies a ruse to obtain entry.[2] In this case, the use of two plainclothes female officers was employed because, according to the prosecution, the detective in charge "thought it would be more likely that the door would be opened under those circumstances." Obviously, then, no exigency existed. The ploy utilized was intended to entice the occupants to admit the police. Rather than comply with the statutory requirements applicable where a door is shut, the police sought to trick the occupants into opening the door without notifying them of their office or purpose or demanding entrance, a patent violation of HRS § 803-37.

III.

A ruse undermines the inherent policies of HRS § 803-37 and circumvents the requirements of the statute. "The purpose of the knock-and-announce rule is to notify the person inside of the presence of the police and of the impending intrusion, give that person time to respond, avoid violence, and protect privacy as much as possible." Garcia, 77 Hawai'i at 468, 887 P.2d at 678 (internal quotation marks, citation, footnote, and brackets

[2] A ruse is a "trick," Webster's Third New Int'l Dictionary 1990 (1961), "a willy subterfuge." Merriam Webster's Collegiate Dictionary 1026.

omitted). This is because "'every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.'" Id. at 468 n.9, 887 P.2d at 678 n.9 (quoting Miller v. United States, 357 U.S. 301, 313 (1958)).

> The basic premise of the prohibition against [unreasonable] searches was not protection against self-incrimination; it was the common law right of a [person] to privacy in his [or her] home, a right which is one of the indispensable ultimate essentials of our concept of civilization. . . . It belonged to all [persons], not merely to criminals[.]"

Frank, 359 U.S. at 377 (Douglas, J., dissenting). Additionally, "'the rule of announcement [is], generally, to safeguard officers, who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there.'" Garcia, 77 Hawai'i at 468 n.9, 887 P.2d at 678 n.9 (quoting Sabbath v. United States, 391 U.S. 585, 589 (1968)).

A ruse gives no consideration to the occupant's privacy, for its purpose is to gain entry without the occupant's knowledge of the actual purpose for the intrusion. Under the stratagem employed, no thought is given to allowing an occupant time to respond to an official demand, inasmuch as an informed response is precluded. Likewise, the purpose of notifying residents of impending governmental intrusion is simply disregarded. Notification of the police presence becomes immaterial if the objective is to gain entry past unsuspecting residents.

When a ruse is employed, violence is not necessarily avoided. In the instant case, there was conflicting testimony about whether the police in fact announced their office before forcibly entering. What is undeniable is that an unsuccessful ruse in this case, as in State v. Eleneki, 92 Hawai'i 562, 993 P.2d 1191 (2000), see infra Section IV., resulted in the use of force by police to gain admittance. As the court said in finding No. 8, "Officer Bermudes used 'quite a bit' of force to open the door and had bruises all over his body the next day."

Moreover, surprise and confusion are likely to result at a resident's realization that entry is being made by someone who was not expected, or for some unknown purpose, engendering the risk of mistaking the identity of the intruder or the reason for the entry. None of the officers here were in uniform, the court observing in finding No. 5 that members of the "search team [were] dressed in plainclothes with HPD logo shirts or jackets [and that s]ome wore ski-masks[.]" A ruse is a practice pregnant with potential for tragic consequences and heightens the risk that "officers . . . might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there." Garcia, 77 Hawai'i at 468 n.9, 887 P.2d at 678 n.9 (internal quotation marks and citation omitted).

The implications of sanctioning ruses in the execution of search warrants is far reaching. As this case demonstrates,

the police will simply resort to a ruse and dispense with statutory requirements altogether to "make entry easier." With the shedding of such requirements, the purposes effectuated by a prior notification requirement and the attendant exigent circumstances formulation become irrelevant.

IV.

A.

In circumstances similar to the present case, Eleneki departed from the plain language of HRS § 803-37 and its prior construction in Garcia and Quesnel, in holding that "the use of a ruse is not prohibited in the execution of a search warrant." Eleneki, 92 Hawai'i at 563, 993 P.2d at 1192. In Eleneki, the police, armed with a search warrant, made no attempt to comply with the requirements of HRS § 803-37 but instead "decided to employ a ruse to have the occupants open the door." Id. After several entreaties of, "Open the door, Ripper," one of the residents "opened the door approximately one foot." Id. The officer "then used some amount of force to further open the door as [an occupant] tried to close it." Id. According to the officer, "he simultaneously announced, 'Police, search warrant, we demand entry.'" Id.

Despite the plain language of HRS § 803-37, it was held that "the [Hawai'i] statutes are silent on the issue [of] whether

the use of a ruse is permissible, [therefore] we look beyond the plain language of the statutes." Id. at 565-66, 993 P.2d at 1194-95. As related above, in mandating the methods by which search warrants are to be executed, the statute distinctly allowed service only in the manner stated. Under the facts in Eleneki, the police made no pretense of following the statute since they made no attempt to comply with it before effecting entry, but only recited the necessary announcements after having gained a foothold in the entrance.

In Eleneki, as in this case, the use of a ruse actually engendered the use of force between the police and the occupants, as those on the outside of the entrance attempted to expand the opening in the doorway, while another on the inside attempted to close it. Inexplicably, it was said in Eleneki that "'[r]use entries such as that in the present case lack the element of surprise, thereby reducing the chance of confrontation,'" id. at 566, 993 P.2d at 1195 (quoting State v. Dixon, 83 Hawai'i 13, 22-23, 924 P.2d 181, 190-91 (1996) (internal quotation marks and citation omitted), when in truth, the facts recounted in Eleneki were that a confrontation did take place. Moreover, the view expressed in Eleneki that "'the occupant's right of privacy is severely limited where the police have satisfied the Fourth Amendment's probable cause and warrant requirements'" merely begs the question. Id. (quoting Dixon, 83 Hawai'i at 23, 924 P.2d at

191 (internal quotation marks and citation omitted). Cf. Payton, 445 U.S. at 589 ("To be arrested in the home . . . [is] an invasion of the sanctity of the home[, which] is simply too substantial an invasion to allow without a warrant, in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present." (Emphasis added.)).

For inherent in an analysis of our constitution's counterpart[3] of the Fourth Amendment is the premise that the execution of a search warrant must be reasonable, inasmuch as an unreasonable execution of a warrant, even if that warrant satisfies "probable cause and warrant requirements," will invalidate the subsequent search and the fruits thereby obtained. See Wilson v. Arkansas, 514 U.S. 927, 934 (1995) (stating that "[g]iven the longstanding common-law endorsement of the practice of announcement, . . . the method of an officer's entry into a dwelling [is] among the factors to be considered in assessing the reasonableness of a search or seizure," and that "in some

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[3] Article 1, § 7 of the Hawai'i Constitution states that

> [t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy 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 or the communications sought to be intercepted.

(Emphasis added.)

circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment").

The rationale adopted in Eleneki led to the tortured conclusion that the requirements of HRS § 803-37 had been met in that case. It was said that

> the officers employed a permissible ruse, which induced [an occupant] 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 [that occupant]'s resistance was not a breaking.

Eleneki, 92 Hawai'i at 566-67, 993 P.2d at 1195-96 (emphasis added). The language of HRS § 803-37 is manifestly to the contrary. HRS § 803-37 pronouncements may be forborne "if the officer[s] find [the premises] open." Obviously, the officers did not "find it open"; they tricked the occupants into partially opening the door. Had the police found the door open, there would have been no reason to employ a ruse to have it opened. The federal cases cited in Eleneki were inapposite. They applied a statute that rendered no direction at all as to the appropriate conduct of the law enforcement officers in the event the door was found "open" or not and is less solicitous of the privacy rights of occupants than HRS § 803-37.[4]

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[4] 18 U.S.C. § 3109 (1985), the statute referred to in Eleneki, states as follows:

> **§ 3109. Breaking doors or windows for entry or exit.**
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of

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B.

In applying HRS § 803-37, Eleneki adopted the rationale applied in Dixon to HRS § 803-11, the statute pertaining to service of arrest warrants. In Dixon, the defendant was the subject of an outstanding arrest warrant. Using the hotel's security guard to obtain entry to defendant's hotel room on the pretense of "check[ing] on the air conditioning," 83 Hawai'i at 15, 924 P.2d at 183, the police entered and arrested defendant. In moving to suppress evidence obtained at the time of arrest, the defendant maintained that HRS § 803-11 was violated. HRS § 803-11 provides as follows:

> **Entering house to arrest.** 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 a case in which arrest is lawful without warrant, the officer or person shall substantially state that information in an audible voice.

(Emphasis added.)

The language employed is plain and unambiguous. On its face, HRS § 803-11 concerns "enter[ing] a house to [make an] arrest" and, thus, is directed at "the officer or person making

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[4](...continued)
his [or her] authority and purpose, he [or she] is refused admittance or when necessary to liberate himself [or herself] or a person aiding him [or her] in the execution of the warrant.

HRS § 803-37 is more protective of the privacy interest of occupants of a place, affirmatively requiring that the police demand entrance. See Garcia, 77 Hawai'i at 466, 887 P.2d at 676.

the arrest." Dixon, 83 Hawai'i at 15-16, 924 P.2d at 183-84. Hence, the words "entrance is refused" relate to the person so affected, that is, "the officer or person" who finds "it . . . necessary to enter a house to arrest an offender." Id. It is the officer or person making the arrest, then, who is empowered to enter for that purpose and who, as the words "entrance is refused" indicate, id., must first request entry.

Because, as stated in the statute, authorization to request entry is given "to [make] an arrest," the entry requested must be for that purpose. Id. The statute does not contemplate that the request to enter a house for the purpose of arrest be on any other ground; a fortiorari, entry is authorized only upon a request to make an arrest. HRS § 803-11, then, does not permit any person except one acting in the capacity described, to enter other than upon a request to make an arrest. Because the statute does not authorize any other manner of serving an arrest warrant, it forecloses the use of a ruse that masks the true purpose of the request to enter.

Despite the clear language of HRS § 803-11, from which legislative intent is to be determined, Dixon relied on federal decisions under 18 U.S.C. § 3109 pertaining to search warrants and other state decisions, a course at odds with our duty to apply the plain language of our own statute. In arriving at the conclusion that "HRS § 803-11 is not implicated where entry is

gained through an open door without use of force," Dixon, 83 Hawai'i at 21, 924 P.2d at 189, this court rendered HRS § 803-11 a nullity. See infra Part VII. In executing warrants, the police now need only resort to a ruse to obtain entry, a practice verified by Dixon, Eleneki, and the majority opinion in this case. Dixon went even further, in an analysis paying little heed to constitutional considerations of privacy in the execution of a warrant, a matter discussed infra in Part X.

V.

We are not faced with exigent circumstances in a situation where the police lacked a warrant. Here the police officers had a warrant; the exigent circumstances rule in that situation is applied for the purpose of excusing officers' adherence to the announcements required before entry, see State v. Balberdi, 90 Hawai'i 16, 21, 975 P.2d 773, 778 (App. 1999), and the constitutional mandate that they afford an occupant a reasonable time to respond to a demand for entry. See Garcia, 77 Hawai'i at 467, 887 P.2d at 677 (holding that article I, § 7 of the Hawai'i Constitution's mandate that search be reasonable requires officers to afford the occupants of the premises a reasonable time to respond to their announcement). Accordingly, the relevant exigent circumstances overriding constitutional and statutory mandates are those occurring prior to entry. Here,

there were no exigent circumstances justifying an abandonment of the requirements set down in Garcia.

The so called "exigent circumstances" asserted by the prosecution originated not in the actions of the defendants, but in the failure of the police's own ruse. The police cannot justify entry by creating their own exigency. For example, in State v. Barnett, 68 Haw. 32, 703 P.2d 680 (1985), the fact that the police knew a defendant was aware of their presence and had told her what they were looking for did not create an exigency to justify entry without a warrant.

> At most, these facts may have led the police to assume that evidence would not be secure while a warrant was obtained. However, more than this is required [for exigent circumstances]. . . . "[T]he mere subjective belief of the police that evidence is in imminent danger of removal or destruction is never enough as a basis for a finding of exigent circumstances."

Id. at 36, 703 P.2d at 683 (quoting State v. Dorson, 62 Haw. 377, 386, 615 P.2d 740, 747 (1980)). Moreover, it was pointed out that "nowhere do the findings contain 'specific and articulable facts from which it may be determined that the action [the police] took was necessitated by the exigencies of the situation.'" Id. (quoting Dorson, 62 Haw. at 388, 615 P.2d at 748 and State v. Dias, 62 Haw. 52, 57, 609 P.2d 637, 640-41 (1980)).

The correct application of the exigent circumstances rule in that circumstance where the police are executing a warrant rests on the police's objectively supported belief that

unforseen circumstances have arisen justifying immediate entry. See Quesnel, 79 Hawai‘i at 192, 900 P.2d at 189. The record of the instant case is totally devoid of any officer's belief that exigent circumstances justified the entry, inasmuch as such a claim would be logically inconsistent and factually inaccurate in the face of the officers' own testimony that they gained partial entry by way of a ruse and completed entry by use of force.

To the credit of the police witnesses, they did not engage in an "exigent circumstances" subterfuge. Nor did the trial court in its findings depart from the facts presented to it, that is, that the officers used force to gain entry after a failed ruse, and not because of exigent circumstances. The majority opinion does not adopt the prosecution's position that the exigent circumstances circumstance should apply in this case, apparently because to apply it, as the defense contends, would be a significant departure from the precedent of State v. Rodrigues, 67 Haw. 496, 692 P.2d 1156 (1985), where it was held that a claim of exigent circumstances not raised below by the prosecution in a suppression case is waived.[5] Nevertheless, despite the lack of

[5] Plaintiff-Appellant State of Hawai‘i (the prosecution) did not raise the question of exigent circumstances at the motion to suppress and does so for the first time on appeal. In Rodrigues, a review of the record revealed that at the trial level the prosecution had not presented the issue of exigent circumstances, nor the issue of a "good faith" exception to the exclusionary rule. This court ruled that, "[n]othing in the record even hints that the [prosecution] was . . . relying on a finding of exigent circumstances to justify the warrantless search and seizure, or on a 'good faith' exception theory. . . . [W]e deem the issues of exigency and a 'good faith' exception to have been waived." 67 Haw. at 498, 692 P.2d at 1158 (citing State v.

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any basis in the record, the majority holds out the possibility that, absent waiver, the doctrine of exigent circumstances may apply in this case.

VI.

There is no "knock and announce" rule pertinent to our jurisdiction except as set forth in HRS §§ 803-11 and 803-37. Our knock and announce statute differs from the federal knock and announce statute, see Garcia, 77 Hawai'i at 466, 887 P.2d at 676 ("the third requirement of 18 U.S.C. section 3109 is clearly different from that of HRS section 803-37 which affirmatively requires that the police demand entrance"), and is unique in its express and explicitly-directed tripartite requirements. There is nothing to be gained, then, in consulting case law from other jurisdictions, as did Eleneki and Dixon, except perhaps as the statutes themselves may contravene the federal constitution or our own constitution. See Garcia, 77 Hawai'i at 467, 887 P.2d at 677 (referring to Illinois cases in determining that under article I, § 7 of the Hawai'i Constitution, reasonableness of search involves judgment of whether occupants were given reasonable amount of time to respond to a demand for entry).

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[5](...continued)
Miyazaki, 64 Haw. 611, 616, 645 P.2d 1340, 1344 (1982); State v. Hook, 60 Haw. 197, 204, 587 P.2d 1224, 1229 (1978)). Accordingly, that issue was waived. See id.

Hence, the decisions have deviated from the true path established in the venerable 1869 statutes and strayed into the mire of fictional "breaking," Dixon, 83 Hawai'i at 21, 924 P.2d at 189; "permissible ruse[s]," Eleneki, 92 Hawai'i at 566, 993 P.2d at 1195; and partially opened doors, see id. Sight of the objectives of HRS §§ 803-11 and 803-37 -- that they serve as a limitation on the conduct of police officers in executing warrants in order to effectuate the purposes discussed supra at 7-9, at the core of which is the policy favoring privacy -- is lost. For "[a]ny official intrusion is necessarily an invasion of privacy, and the sanctity of the home is jealously guarded by the law." State v. Richardson, 80 Hawai'i 1, 4, 904 P.2d 886, 889 (1995).

VII.

Thus, there are compelling reasons for overruling Dixon and Eleneki. The rules announced in those cases conflict with unambiguous statutory language and defy conceptual and practical workability. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854-55 (1992) (stating that "when th[e c]ourt reexamines a prior holding, . . . [it] may ask whether the rule has proven to be intolerable simply in defying practical workability") (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)); Allied-Signal, Inc. v. Director, Div. of Taxation, 504

U.S. 768, 783 (1992) ("In deciding whether to depart from a prior decision, one relevant consideration is . . . whether it is 'unworkable in practice.'" (Quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546, (1985).)).

Quite plainly, Dixon and Eleneki violated established rules of statutory construction. As mentioned, HRS §§ 803-11 and 803-37 are not ambiguous; therefore, they should have been applied according to their plain meaning. See supra pages 3, 15. HRS §§ 803-11 and 803-37 specifically set forth the manner in which arrest and search warrants are to be executed and on their faces do not admit of service in any other way, absent, as we have held, exigent circumstances. See supra pages 3-5, 14-15. The maxim of expressio unius est exclusio alterius applies, but was ignored in both Dixon and Eleneki. See supra pages 4-5. Rather than adhere to such rules of construction, Dixon and Eleneki looked to foreign statutes and precedent, setting this court on a wayward journey far from the prescriptions and historical underpinnings of our own statutes.

At their crux, Dixon and Eleneki contradict each other. Dixon held that a "ruse to effect [a] voluntary opening of the door, through which the officers enter without any use of force . . . [is not] a breaking requiring compliance with the knock and announce requirements of HRS § 803-11." 83 Hawai'i at 21, 924 P.2d at 189 (emphasis added). Eleneki held, in direct

contradiction to Dixon that, in employing a ruse, "the officers were not required to knock and announce before entering and the force used by the officers to further open the door against [the occupant's] resistance was not a breaking" requiring the compliance with the knock and announce principles under HRS § 803-37.[6] 92 Hawai'i at 566-67, 993 P.2d at 1195-96 (emphasis added). If Dixon is a correct statement of the law, then Eleneki should be overruled. If Eleneki is a correct statement of the law, then Dixon should be overruled. It is not a question of "inadvertence" for they cannot in principle coexist. For the reasons I have espoused, neither, in my view, is a correct statement of the law, but evidence of the grave error in judicial statutory construction originating in Dixon and amplified in Eleneki.

Dixon and Eleneki subvert the language and purposes of HRS §§ 803-11 and 803-37. This can no longer be doubted. What was not considered in those cases, but is presented here and supports their overruling, is the now established fact that HRS §§ 803-11 and 803-37 have been largely abrogated by those decisions. Resting on the Dixon formulation, the police may now completely circumvent the requirements of those statutes by use

[6] HRS §§ 803-11 and 803-37 have been viewed as essentially the same. See Eleneki, 92 Hawai'i at 565, 993 P.2d at 1194 ("Although 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 is also consistent with those purposes in the execution of a search warrant.")

of a ruse, as the officer in the instant case related, to "make entry easier."

If the requirements of the statutes are not followed, the purposes they serve are nullified. Thus, in construing these statutes to permit ruses, the majority has effected a judicial repeal of them, a violation of our obligation and our separate function as the third branch of government to avoid such a result. See Potter v. Hawai'i Newspaper Agency, 89 Hawai'i 411, 422, 974 P.2d 51, 62-63 (1999) ("Our rules of statutory construction require us to reject an interpretation of a statute that renders any part of the statutory language a nullity." (Citations omitted)); Konno v. County of Hawai'i, 85 Hawai'i 61, 71, 937 P.2d 397, 407 (1997) ("'[S]tatutory construction dictates that an interpreting court should not fashion a construction of statutory text that effectively renders the statute a nullity or creates an absurd or unjust result.'" (Quoting Dines, 78 Hawai'i at 337, 893 P.2d at 188 (Ramil, J., dissenting.) (Citation omitted.)); Levy v. Kimball, 51 Haw. 540, 545, 465 P.2d 580, 583 (1970) ("In the construction of a statute the general law is that a statute should be so interpreted to give it effect; and we must start with the presumption that our legislature intended to enact an effective law, and it is not to be presumed that legislation is a vain effort, or a nullity." (Citations omitted.)); State v. Isomura, 9 Haw. App. 333, 341, 839 P.2d 1186, 1190 (1992) ("[a]

statute should be interpreted to give it effect and to avoid a construction that would render it a vain legislative effort or a nullity." (Citation omitted.)).

In light of the foregoing, the justifications for overruling Dixon and Eleneki are far more than compelling. See State v. Garcia, 96 Hawai'i 200, 206, 29 P.3d 924, 925 (2001) ("[A] court should 'not depart from the doctrine of stare decisis without some compelling justification.'" (Quoting Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197, 202 (1991).) (Emphasis omitted.)).

VIII.

As this case illustrates, the refusal to apply the statute as written only perpetuates the fruitless search for some unifying proposition. The majority's holding that, in a ruse, the HRS § 803-37 pronouncements are triggered if officers use force to force entry, see majority opinion at 2, is lacking in principled basis. Indeed, such a rule has been found objectionable. See, e.g., State v. Reynaga, 5 P.3d 579, 582 (N.M. Ct. App.) (2000) (holding in suppressing evidence recovered that, where police used force following a ruse to gain entry into a mobile home, that "for a ruse to be a reasonable and constitutional alternative to knocking and announcing, the State must demonstrate that, at the time of the execution of the

warrant, . . . that exigent circumstances exist[ed]" (citation omitted)); Commonwealth v. Martinelli, 729 A.2d 628, 630 (Pa. Super. Ct. 1999) (suppressing evidence from search warrant execution where police used a ruse to encourage the defendant to open the door slightly, and pushed open the door while simultaneously announcing, "[P]olice, search warrant," because "[t]he purpose of the 'knock and announce' rule[,] to prevent violence, . . . protect an occupant's privacy expectation, . . . and to prevent property damage . . . may be achieved only if the police officer awaits a response for a reasonable period of time after his [or her] announcement of identity, authority, and purpose"); Commonwealth v. Ceriani, 600 A.2d 1282, 1287-89 (Pa. Super. Ct. 1991) (holding that police acted unreasonably by using a ruse to encourage the opening of a door and thereafter "announcing their authority and purpose simultaneously with their entry" as they "forced their way" into the residence; and explaining that "[b]alancing the benefits of deterring police misconduct against the cost of excluding otherwise reliable evidence" resulted in the determination that the evidence recovered during the warrant execution should have been suppressed); State v. Ellis, 584 P.2d 428 (Wash. Ct. App. 1978) (holding that, absent exigent circumstances, "where a ruse is unsuccessfully employed in an attempt to gain entry, the 'knock and wait' rule must be observed [and that t]he officer must

announce his [or her] true identity and purpose and be refused admission before he [or she] may enter by force").

The requirements of HRS § 803-37 have nothing to do with the use of force, once entry of any degree has been made. As Justice Ramil points out in his dissenting opinion, the pronouncements mandated are a prerequisite to entry. By their terms, such pronouncements are intended to notify the occupants of an impending intrusion and to afford the occupants the opportunity to open the door, see Garcia, 77 Hawai'i at 468, 887 P.2d at 678; hence, the requirement that the officer must first "demand entrance," id. at 466, 887 P.2d at 676 (emphasis added), when the door is shut.

Once entry of any degree is made in a ruse, the interests sought to be protected by such pronouncements are dissipated and are no longer served by a post-entry rendition of HRS § 803-37 announcements. With all due respect, the holding in this case is a perverse application of the statutory knock and announce requirements which were intended not to legitimize ruses gone awry, but to condition government intrusion in the first place.

IX.

It should be evident from the foregoing that an issue of constitutional dimension as to HRS §§ 803-11 and -37 is posed

only if their application runs afoul of a constitutional prohibition. See Garcia, 77 Hawai‘i at 467, 887 P.2d at 677 (holding that HRS § 803-37 "violates the Hawai‘i Constitution to the extent that it permits the police to break into the place to be searched if 'bars' to their entrance are not immediately opened."). Otherwise, applying canons of statutory construction, they must be applied as written.

Of course, higher standards may be imposed by the legislature pursuant to statute, than under a constitutional provision. See, e.g., In re Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 719 N.E.2d 897,903-04 (N.Y. 1999) (determining that a state statute prohibiting seizures of art on loan to museums was applicable to a grand jury subpoena and did not implicate the Fourth Amendment's reasonableness requirements, because the statute was "broader than the constitutional concerns of unreasonable seizures[, and, t]hus, although the subpoena may pass constitutional muster, the statute stands in its way"). Therefore, when a legislature enacts a statute that provides more protection than does a constitution, the court is bound to construe the statute, as written, as the constitution is no longer implicated. See id. (stating that interpretation of a statute providing broader protection than the federal and state constitution does not implicate those provisions, and "[t]he analysis necessary to resolve this case is

not of a constitutional dimension"). Because our knock and announce statutes do not offend either the federal or state constitutions, this court's duty is to adhere to the plain meaning of the statute, otherwise, we encroach on legislative authority. "[N]either the courts nor the administrative agencies are empowered to rewrite statutes to suit their notions of sound public policy when the legislature has clearly and unambiguously spoken." 1 N. Singer, Sutherland Statutory Construction § 3.06, at 55 (5th ed. 1992-94).

Thus, the constitutional impact of ruses becomes an issue only because Dixon, Eleneki, and the majority in this case permit the circumvention of service requirements by sanctioning ruses. Assuming arguendo that the requirements of HRS §§ 803-11 and -37 may be cast aside, Dixon's own analysis is inherently faulty in at least two ways.

X.

As noted previously, Dixon found little constitutional impediment to ruses. However, in contrast to the United States Constitution, the right against unreasonable searches and invasions of privacy is expressly confirmed in article I, § 7 of the Hawai‘i Constitution. In light of that expression, we have construed our provision as affording broader protection to persons in our state than might be recognized by United States

Supreme Court and federal court decisions construing the prohibition against unreasonable searches and an implied right of privacy in the federal constitution. See cases cited infra Part X.C.

Dixon's trivialization of the Hawai'i Constitution's right to privacy as "minimal," in the context of governmental entries into the home, finds no support in prior case law or the history of section 7 and is based on two untenable grounds: (1) that "[t]he privacy interest protected by the knock and announce rule is minimal, inasmuch as it is only the occupant's privacy for the span of time between the announcement and the actual entry that is implicated," 83 Hawai'i at 23, 924 P.2d at 191, and (2) that "[w]here the entry is obtained by ruse, there is no unwarranted intrusion on the occupant's privacy because the occupant has voluntarily surrendered his or her privacy by opening the door." Id.

The right to privacy implicated transcends "the span of time between the announcement and the actual entry." Id. The privacy interest involved is that expectation against government intrusion in one's own place of abode that society recognizes as reasonable. "[T]he home [is] the situs of privacy." Mallan, 86 Hawai'i at 444, 950 P.2d at 183 (emphasis omitted). See also State v. Apo, 82 Hawai'i 394, 401, 922 P.2d 1007, 1014 (App. 1996) (holding that police officer's entry into the living room

constituted a "'search' in the constitutional sense," because the officer invaded defendant's legitimate expectation of privacy in his home (citation omitted)).

A.

What Dixon mistook for a minimal privacy interest was in fact that constitutional rule of reasonableness in the execution of a warrant imposed on officers to afford a reasonable time for the occupant to respond after their announcement and before entry:

> [T]he amount of time allowed to lapse between announcement and entry is relevant in determining the reasonableness of the officers' conduct in executing a search warrant. It follows, then, that a person should be afforded sufficient opportunity to respond to authority before a forcible entry is made. Thus, even where the operative statute does not require the officers to demand entrance, a reasonable amount of time to respond must be given to the occupants. Hence, one commentator has summed up the rule as follows: "An officer must wait a reasonable period of time before he or she may break and enter into the premises to be searched. That is, the occupant must be given a reasonable opportunity to surrender his or her privacy voluntarily." 2 W.Lafave Search and Seizure § 4.8(c), at 278 (1987) (footnote omitted).

Garcia, 77 Hawai'i at 467, 887 P.2d at 677 (some internal quotation marks and citations omitted) (brackets, ellipsis points, and footnote omitted). In our state, absent exigent circumstances, the officers must afford the occupants of the premises "a reasonable time," id. at 468, 887 P.2d at 678, to respond to their announcement before making a forced entry. Otherwise, the "request for entry is meaningless." Quesnel, 79 Hawai'i at 190, 900 P.2d at 187 (internal quotation marks and

citation omitted). Hence, the point from which the occupants would know it was the police demanding entrance, as opposed to other persons, as measured from the time the police announced their office and business, is not a gauge of the privacy interest involved, but a standard governing police execution of a warrant. See id. at 191, 900 P.2d at 188.

B.

The second Dixon ground is an incongruous application of the words "voluntary surrender." In its ordinary sense, "[t]he word ['voluntary'] . . . often implies knowledge of essential facts." Black's Law Dictionary at 1575. Voluntary also means "proceeding from the will or from one's own choice or consent." Merriam Webster's Collegiate Dictionary at 1324. The mere opening of the door cannot be deemed voluntary in any fair sense because, as the facts in Dixon showed, the occupants were misinformed as to the reason for requesting entry. Under a ruse, the essential facts are hidden from the occupants, thus it cannot be said justly that they acted "from [their] own choice or consent." Id. (emphasis added). "Surrender" denotes "yield[ing] to the power, control, or possession of another upon compulsion or demand . . . or [to] agree to forgo esp[ecially] in favor of another." Id. at 1186. Obviously, there cannot be a "true" surrender where the actor does not actually know what he or she

has agreed to forego or to whom. Of course, it is arguable whether one who has either not completely opened the door, as the court found in this case, or attempts to close a partially opened door, can reasonably be said to have "voluntarily surrendered" his or her right to privacy.

C.

Any construction of article I, section 7, as was undertaken in Dixon, must be made in light of the fact that we have decided it provides for greater protection from unreasonable searches and seizures than does the federal constitution, see State v. Mallan, 86 Hawai‘i 440, 448, 950 P.2d 178, 186 (1998) (stating that, "'[a]s the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii Constitution, we are free to give broader privacy protection than that given by the federal constitution,'" and that "unlike the federal constitution, our state constitution contains a specific provision expressly establishing the right to privacy as a constitutional right" (quoting State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988))) (emphasis omitted); State v. Navas, 81 Hawai‘i 113, 123, 913 P.2d 39, 49 (1996) (explaining that article I, section 7 affords a "more extensive right of privacy" than that of the United States Constitution); State v. Lopez, 78 Hawai‘i 433, 445, 896 P.2d 889, 901 (1995) ("In the area of

searches and seizures under article I, section 7, we have often exercised th[e] freedom" to "provide broader protection under our state constitution."); State v. Enos, 68 Haw. 509, 511, 720 P.2d 1012, 1014 (1986); State v. Tanaka, 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 (1985) ("In our view, article I, § 7 of the Hawaii Constitution recognizes an expectation of privacy beyond the parallel provisions in the Federal Bill of Rights."); State v. Kaluna, 55 Haw. 361, 369-70 n.6, 520 P.2d 51, 58-59 n.6 (1974); State v. Hanson, 97 Hawai'i 77, 82, 34 P.3d 7, 12 (App.), affirmed by, 97 Hawai'i 71, 34 P.3d 1 (2001) ("The Hawai'i Supreme Court has concluded that a person's expectation of privacy under article 1, § 7 of the Hawai'i Constitution is greater than that under the fourth amendment to the United States Constitution." (Citation omitted.)), and in consideration of the protection expressly provided for against invasions of privacy, see Lopez, 78 Hawai'i at 446, 896 P.2d at 902 ("[U]nlike its federal counterpart, article I, section 7, specifically protects against 'invasions of privacy.'" (Citation omitted.)); State v. Vinuya, 96 Hawai'i 472, 484, 32 P.3d 116, 128 (App. 2001) ("[W]e have not hesitated to extend the protections afforded under article I, section 7 of the Hawai'i State Constitution beyond those available under the cognate Fourth Amendment to the United States Constitution when logic and a sound regard for the purposes of those protections have so warranted." (Internal quotation marks

and citations omitted.)). With due regard for the majority position, the analysis employed in Dixon, see supra Part X.A. & B., is bereft of such principles. In deciding the applicability of article I, section 7 to this case, any analysis must be rooted in our long held view of the protection it affords the people of our state. It is, after all, intrusion by government that we are concerned with, not simply the act of opening a door.

XI.

The conduct of police officers in executing warrants is circumscribed by our state statutes. To uphold the use of ruses in the circumstances presented by the cases discussed contravenes such limitations. In a world that tolerates such ruses, a person can never be certain for whom or for what purpose he or she has opened the door.