DISSENTING OPINION BY RAMIL, J.

My disagreement with the majority centers on the proper scope of the knock and announce rule. Here, Harada voluntarily opened the door three-feet-wide (or three-quarters of the way open). After realizing that officers were outside, Harada attempted to close the door. In response, Officer Bermudes entered and prevented the door from being shut.[1] I believe that the door in this case is "open" for purposes of the knock and announce statute[2] and, therefore, the subsequent use of force in keeping the door open must be analyzed under the constitutional reasonableness of such search and seizure -- not the now-inapplicable knock and announce rule. In contrast, the majority asserts that "a breaking occurred when Officer Bermudes used force to prevent Harada from closing the door." Majority at 26; accord majority at 2. Therefore, the majority considers the door "shut" for purposes of the knock and announce statute;[3] as a result, the requirements were invoked and the officers were required to declare their office, their business, and expressly demand entrance. See id. at 26. Thus, according to the

[1] The majority notes that "[a]s 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." Majority at 4.

[2] Or, under the majority's approach, that the officer had "gained entry." As discussed in Section III, regardless of the focus -- either on the "breaking" or "gaining entry," used by the majority, or on the "open door," used by me -- the key question is whether the policy reasons underlying the statute are satisfied. The answer here is the same under both approaches: the policy objectives were met.

[3] Or, under the majority's approach, that the officer had not "gained entry."

majority, the fatal mistake occurred when Officer Bermudes prevented Harada from closing the door after Harada realized that officers were outside. Furthermore, because Officer Bermudes yelled, "Police. Search Warrant. Get on the ground," he failed to expressly state the required words, "we demand entry."

But the majority ignores this court's recent decision in State v. Eleneki, 92 Hawai'i 562, 993 P.2d 1191 (2000), recent federal case law, and the policy reasons underlying the knock and announce rule in favor of wholly irrelevant cases. Accordingly, I respectfully dissent. I would vacate the circuit court's order granting Harada's motion to suppress.

I. HAWAI'I LAW

Hawai'i Revised Statutes (HRS) § 803-37 (1985) establishes the "knock and announce" requirements with respect to search warrants:[4]

> 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. . . .

(Emphasis added.) Thus, an officer must comply with the knock and announce rule if the door is "shut."[5] This court, in State

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[4] This court has treated arrest warrants and search warrants similarly. See Eleneki, 92 Hawai'i at 565, 993 P.2d at 1194 ("Although the language of HRS §§ 803-11 [arrest warrant] and 803-37 [search warrant] 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 both].").

[5] Or, under similar language of HRS § 803-11 (1985), when "entrance is refused" in executing an arrest warrant. The majority appears to believe that (continued...)

v. Dixon, 83 Hawai‘i 13, 924 P.2d 181 (1996), explained that an officer must comply with such requirements only if there is a "breaking" -- where force is involved in gaining entry of a shut door. Id. at 21, 924 P.2d at 189. In addition, this court specifically held that a ruse effectuating voluntary opening of a door is not a "breaking." Id.

In Eleneki, this court further instructed that the knock and announce requirements are not invoked where force is used after a door is "open." 92 Hawai‘i at 566-67, 993 P.2d at 1195-96. An analysis of the following sequence of events in Eleneki clarifies this court's holding:

1. Officer employs ruse.
2. Occupant opens door one-foot-wide.
3. Occupant quickly tries to close door.
4. Officer meets resistance and pushes door further open announcing, "Police, search warrant, we demand entry."
5. Officer repeats announcement once inside.

See id. at 563, 993 P.2d at 1192. For purposes of HRS § 803-37, this court held that the door was considered "open" in Step 2. See id. Thus, the force used by the officer in Step 4 was not considered a "breaking" because the door was already "open." See id. Accordingly, this court concluded that the officer did not violate the terms of HRS § 803-37.[6] In other words, after a door

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[5](...continued)
such difference in terminology is prohibitively problematic, see majority at 24-25, even though, as discussed in Section III, the dispositive question is whether the policy reasons underlying the statutes, which are identical in each context, are satisfied. Moreover, this court in Eleneki focused on whether the door was "open" with respect to the execution of a search warrant. 92 Hawai‘i at 566, 993 P.2d at 1195.

[6] The subheading for Section III.C and its introductory paragraph mistakenly state that the officers used force in gaining entry and, thus, must comply with the knock and announce statute. See Eleneki, 92 Hawai‘i at 566,
(continued...)

is considered "open," the police officers do not need to comply with the knock and announce requirements. Whether force is subsequently used is irrelevant to this determination.

Here, the majority claims that the ruse was accompanied by the use of force to gain entry and, as such, the officers were required to comply with HRS § 803-37:

> 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. 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.

Majority at 26 (citations omitted). But an examination of the sequence of events in this case reveals that the majority mischaracterizes the fact pattern and is inconsistent with Eleneki, which it cites approvingly:

> 1. Officer employs ruse.
> 2. Occupant opens door three-feet-wide ("'three-quarters' of the way open") and officers yell, "Police! Search Warrant!"
> 3. Occupant quickly tries to close door.
> 4. Officer uses force to prevent door from closing and officer yells, "Police. Search Warrant. Get on the ground."

See id. at 3-4. In this case, the ruse (Step 1) was not actually "accompanied by the use of force," as claimed by the majority, id. at 8 (emphasis added), but rather followed by the use of force (Step 4). The close proximity in time of the opening of the door (or gaining of entry) and the officer's use of force

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[6](...continued)
993 P.2d at 1195; see also infra note 7.

does not mean that the knock and announce rule is implicated. Indeed, the majority has no doubt that the force used in "securing" Harada and the other occupants after gaining entry did not invoke the knock and announce requirement. Id. at 4. Likewise, the force used in preventing the door from being shut after it had been opened and Bermudes had already gained entry does not trigger the knock and announce requirement. Thus, it is essential to determine accurately, rather than glossing glibly over, when the force is used. The majority alleges that my "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." Id. at 17 (emphasis in original). But the majority disregards the dispositive fact that the door was open and Officer Bermudes had already gained entry. Accordingly, nearly every case cited by the majority in support of its position deals specifically with the issue of gaining entrance with or without the use of force and is, thus, irrelevant to the issue at hand. See, e.g., id. at 10 (citing Dixon), 11-12 (citing Leahy, Dickey, Gatewood, Beale, Syler, Raines, Iverson, Palmer, Ryals), 16 (citing Adcock), 21 (citing Seelig, Smith). All that these cases establish is that which is not at issue here: if any force is used to gain entry, such breaking must comply with the knock and announce rule -- the mere fact that a ruse was being employed makes no difference. But that is irrelevant to the issue in question here because the

use of force by Officer Bermudes was used after entry had been gained.

Moreover, the majority asserts that, in Step 4 of this case, the officer's use of force was a "breaking." Therefore, the majority necessarily does not consider the door in Step 2 to be "open" for purposes of HRS § 803-37. Such reasoning, however, is contrary to this court's ruling in Eleneki. In that case, the door was opened only one foot, yet this court considered it sufficient to render the door "open." Here, however, even though the door was opened three feet, the majority maintains that the door was not "open." Though the majority selectively cites Eleneki, it ignores significant portions of that case, including the primary holding. This court plainly stated:[7]

> In the present case, the officers employed a permissible ruse, which induced [the 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 [the occupant's] resistance was not a breaking.
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> United States v. Contreras-Ceballos, 999 F.2d 432 (9th Cir. 1993), is factually similar to the present case. In Contreras-Ceballos, the state troopers and postal inspectors executing a search warrant claimed to be from Federal Express. Kevin See, one of the apartment's occupants, opened the door approximately twelve inches and then attempted to close it because he saw the troopers. The lead trooper put his hand through the doorway, pushed the door open, and stepped inside while he announced, "Troopers, search warrant." The Ninth Circuit held that the search did not violate the federal knock and announce statute.

[7] Although the subheading for Section III.C and its introductory paragraph indicate that the officers used force in gaining entry and, thus, must comply with the knock and announce requirements, this court's discussion clarifies that the door was opened without the use of force and, therefore, did not invoke the knock and announce requirements. Given such internal inconsistency, it appears more reasonable that this court be guided by the four paragraphs of discussion, analysis, and reasoning, rather than a few conclusory statements in the subheading and introductory paragraph.

> The federal knock and announce statute applicable in Contreras-Ceballos provided that "[t]he 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 his authority and purpose, he is refused admittance . . . ." 18 U.S.C. § 3109 (1985). The Ninth Circuit noted that it had previously established that the use of a ruse to gain entry did not implicate § 3109 because there was no breaking and that these cases controlled the outcome in Contreras-Ceballos. The court stated:
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> > Under Dickey [v. United States, 332 F.2d 773, (9th Cir. 1964),] and Leahy [v. United States, 272 F.2d 487 (9th Cir. 1959)], the officers were not in violation of section 3109 when See opened the door in response to the officers' ruse. The officers then stated their identity, authority and purpose. At that point, the purposes of section 3109 had been fully served . . . . Their use of force to keep the door open, and to enter, did not implicate section 3109.
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> Contreras-Ceballos, 999 F.2d at 435. See also United States v. Salter, 815 F.2d 1150, 1152 (7th Cir. 1987) ("Even if, as Salter says, the officers blocked the doorway and then pushed the door fully open . . . there was no force used in this case that would implicate § 3109.").
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> In the present case, as in Contreras-Ceballos, Foster opened the door approximately twelve inches in response 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.

Eleneki, 92 Hawai‘i at 566-67, 993 P.2d at 1195-96. Given that this court has already held that a door opened one foot is considered "open" for purposes of the knock and announce statute, it follows, a fortiori, that a door opened three feet must be considered "open" for purposes of the same statute.

In this regard, I only follow the principle of precedent. Because this court has already expressly decided that opening a door one foot is "sufficient to render the door 'open' for purposes of the statute," id. at 566, 993 P.2d at 1195, I reason -- if not am bound to decide -- that opening a door three

feet must be sufficient to render the door "open" for purposes of the statute. Second, the majority overlooks the second half of my position, which is explained in Section IV: although the knock and announce requirements are not implicated when a door is considered "open," the reasonableness standard secured by the state and federal constitutions does apply. Thus, under some circumstances, the officers may well be required to knock and announce.

To avoid the reasoning in Eleneki, the majority attempts to distinguish the facts in that case from the facts here by claiming that the officers in the former "complied" with the knock and announce statute. The majority repeatedly insists, "[I]t 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." Majority at 10 (emphasis added). But the statute and this court have incontrovertibly established that compliance with the knock and announce requirements must occur before, not while, using force to gain entry. The knock and announce statute, which is the linchpin of the majority's argument, actually reads:

> 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.

HRS § 803-37. Likewise, this court in Dixon expressly specified that force in breaking a door may be used "only after complying with the knock and announce requirements." Dixon, 83 Hawai'i at 21, 924 P.2d at 189. Again, this court in State v. Monay, 85 Hawai'i 282, 943 P.2d 908 (1997), observed that the "plain and unambiguous language of HRS § 803-37 requires police to expressly demand entrance when the doors to a place to be searched are shut before attempting forcible entry." 85 Hawai'i at 284, 943 P.2d at 910. In addition, this court in Eleneki explicitly rejected the majority's assertion by specifying that the knock and announce statute was not even invoked, no less complied with. See Eleneki, 92 Hawai'i at 566-67, 993 P.2d at 1195-96 ("In the present case, the officers employed a permissible ruse, which induced [the 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 [the occupant's] resistance was not a breaking." (Emphasis added.)).

The majority then asserts that the Eleneki court relied on what the majority terms the "Dixon rule," which states: "The applicable knock and announce statute 'is not implicated where entry is gained through an open door without [the] use of force.'" Majority at 10 (brackets and emphases in original). The majority believes that this rule and its "logical corollary

. . . that, where force is used to gain entry, the statute is implicated," answers the question raised here. Id. at 11. But the majority overlooks a key detail: entry had already been gained through an open door. Thus, the Dixon rule and its logical corollary are irrelevant in addressing the issue presented in this case: whether the knock and announce requirements are implicated where force is used after entry is gained through an open door.[8] Similarly, the majority's subsequent string citation of surveyed cases cannot help this court resolve the issue at hand. See id. at 11-13. Seven of the nine cases listed deal with the situation where force is not used at all. I, too, agree that where no force is applied to gain entry, that the knock and announce requirements are not implicated. But that is the easy case. And not the case in question here. Rather, this court must decide whether the knock and announce requirements are implicated where entry is gained

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[8] Moreover, the majority overgeneralizes the discussion and ruling in that case. In Dixon, this court specified that "[t]he issue in this case [is] whether use of a ruse, without force or threat of force, constitutes a 'breaking' within the meaning of the 'knock and announce' statute, HRS § 803-11, requiring HPD officers to announce their presence and purpose, and demand entry." 83 Hawai'i at 16, 924 P.2d at 184. Thus, the Dixon court held that "HRS § 803-11 is not implicated where entry is gained through an open door without use of force." Id. at 21, 924 P.2d at 189. But the majority overstates the applicability of Dixon:

> The Dixon rule . . . 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. In Dixon, it was unnecessary to determine as much because force was not used.

Majority at 10-11. In this way, the majority mistakes a limitation on the scope of the issue addressed, for the answer to a question not even asked.

through an open door and force is used after such door is opened and entry has been gained. Of the remaining two cases dealing with force, one is inapplicable to the issue here, while the other, indeed, counters the majority's claim. First, the 1953 case of Gatewood v. United States, 209 F.2d 789 (D.C. Cir. 1953), deals with force accompanying, not following, the ruse.[9] Second, the 1970 case of United States v. Syler, 430 F.2d 68 (7th Cir. 1970), actually contradicts the majority's proposition. There, the officer identified himself as a "gas man." As the occupant "unlatched the outer screen door and began to open it, [the officer] pulled it open further, entering the house with the other two officers." Id. at 69. Only as the officer "came through the door," did he announce that he was "a federal officer and that he had a warrant for her arrest." Id. The Seventh Circuit held:

> 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 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.

Id. at 70 (citations omitted) (emphases added). Thus, according

[9] Additionally, Gatewood disapproved of the use of not only "force," but also "falsehood," or use of a ruse, 209 F.2d at 791, which this court has expressly allowed. See Eleneki, 92 Hawai'i at 566, 993 P.2d at 1195; see also Gatewood, 209 F.2d at 791 ("The government's evidence in this case showed the officers gained entrance to Gatewood's apartment through falsehood followed by force, without first disclosing to him the true reason they desired to enter."), 791 n.1 ("Entry by stealth can, of course, be as unlawful as entry by the illegal use of force." (citing Gouled v. United States, 255 U.S. 298 (1921))).

to the reasoning of this case cited by the majority, an officer's further opening of an already open door is not considered use of force to gain entry.

Even assuming arguendo that Dixon holds the answer to the question in this case, it appears to support my position:

> In Syler, agents with a valid arrest warrant approached appellant's front door simultaneously with a serviceman who was there to connect the gas. The front door to the house was open, but the screen door was closed. The serviceman knocked on the door and called out, "Gas man." The serviceman then left at the agents' instructions. When no one came to the door, one of the agents yelled "gas man," and appellant unlatched and partially opened the screen door. The agents then pulled the door open further and entered. The court held that there was no "breaking" within the meaning of 18 U.S.C. § 3109 because the agent merely completed the operation voluntarily initiated by appellant and "[n]o attempt was made to bar his way and no force was applied in gaining entry." Id. at 70. See also United States v. Raines, 536 F.2d 796, 800 (8th Cir.) ("A police entry into a private home by invitation without force, though the invitation be obtained by ruse, is not a breaking and does not invoke the common law requirement of prior announcement of authority and purpose, codified in § 3109."), cert. denied, 429 U.S. 925 (1976); United States v. Salter, 815 F.2d 1150 (7th Cir. 1987) (holding that where officer, identifying himself as hotel clerk, telephoned appellant requesting her to come to hotel desk, and other officers positioned outside hotel room door waited until appellant opened door, prevented her from closing door, and entered hotel room, there was no "intrusion," and section 3109 was not implicated by entry through an open door); United States v. Contreras-Ceballos, 999 F.2d 432 (9th Cir. 1993) (officer's use of force to keep open door that was voluntarily opened in response to officer's ruse, and to enter, did not implicate section 3109).

Dixon, 83 Hawai'i at 20, 924 P.2d at 188 (emphases added). The majority describes nine irrelevant cases from Dixon, without focusing on the two cases in Dixon that actually deal with the question at issue here.

Finally, the irrelevant cases cited by the majority do not carry substantial weight -- seven of the nine cases are from the 1950s, '60s, and '70s, with the two most recent being a 1986

opinion from the Florida District Court of Appeal and a 1983 opinion from the Alabama Court of Criminal Appeals. If, as the majority asserts, these cases from decades ago have "steadfastly stood the test of time," majority at 15, where are the recent cases testifying to this? If the claim is that the case law is the same today as they were yesterday, then why would the majority insist on referring only to yesterday's cases? The answer lies in the fact that recent federal cases do not support the majority's position.

II. FEDERAL CASE LAW

The Ninth Circuit[10] addressed this very issue in question, and has answered it in the same manner as Eleneki -- and in diametric contradiction to the majority's proposition. In 1964, the Ninth Circuit stated:

> Had 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" in the sense of section 3109. But the employment of a ruse to obtain the full opening of the Dickeys' door unassociated with force, was not a "breaking." And since the door was then wide open, the subsequent entry into Dickey's room for the purpose of arresting him did not involve a "breaking" of the door.

Dickey v. United States, 332 F.2d 773, 777-78 (9th Cir.) (citations and footnotes omitted) (emphasis added), cert. denied, 379 U.S. 948 (1964) . The majority's reasoning attempts to follow this view by applying it to this case. But, here, as

[10] In examining whether the state knock and announce statutes are invoked, this court has held that "cases interpreting the federal statut[ory counterpart] are clearly relevant." Dixon, 83 Hawai'i at 17 n.4, 924 P.2d at 185 n.4; see also Eleneki, 92 Hawai'i at 566-67, 993 P.2d at 1195-96.

described in Section I, Officer Bermudes had already gained entrance and, thus, Dickey's analysis is inapplicable.

More recently and more relevantly, in the 1993 case of United States v. Contreras-Ceballos, 999 F.2d 432 (9th Cir. 1993), which this court extensively relied on in Eleneki, 92 Hawai'i at 567, 993 P.2d at 1196, and cited in Dixon, 83 Hawai'i at 20, 924 P.2d at 188, the Ninth Circuit expressly held that the knock and announce rule does not apply to an officer's use of force to keep the door open once it has been opened. It explained,

> Under Dickey and Leahy[v. United States, 272 F.2d 487 (9th Cir. 1959)], the officers were not in violation of [the knock and announce statute] when [the 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 [such statute] had been fully served.

Contreras-Ceballos, 999 F.2d at 435. In other words, the Ninth Circuit noted that the knock and announce statute's applicability ended at that point. It continued, "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 section 3109." Id. (emphasis added); see also United States v. Salter, 815 F.2d 1150, 1152 (7th Cir. 1987) (officer's preventing door that had been partially opened by occupant from closing does not implicate knock and announce requirement); United States v. Byars, 762 F. Supp. 1235, 1238 (E.D. Va. 1991) (officer's preventing door that had been opened by occupant from closing does not implicate knock and announce

requirement). Thus, the Ninth Circuit reiterated the fact that, after the door was open, the knock and announce analysis was no longer relevant. And, as if to end any further doubts about the inapplicability of the knock and announce statute after the door is open, the Ninth Circuit pointed out the folly of holding to the contrary:

> To rule otherwise 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 the majority concedes that such procedure is absurd, it contends that under its approach, officers "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." Majority at 25. Its reasoning is relegated to a footnote, which argues only that "it would be unreasonable to require the officers to wait." Id. at 25 n.7 (citing State v. Garcia, 77 Hawai'i 461, 468, 887 P.2d 671, 678 (App. 1995)) (emphasis in original). But this explanation suffers from two flaws. First, as described in Section I, the knock and announce statute requires that any force be used only after, not while, complying with the knock and announce requirements. Second, the majority cites to the Intermediate Court of Appeals' opinion in Garcia, which held only that officers must wait a reasonable amount of time to allow the occupant to respond to their demand

for entry, see Garcia, 77 Hawai‘i at 468, 887 P.2d at 678, not, as the majority claims, that officers must wait a reasonable amount of time in waiting "for the door to close." Even if officers need not wait for the door to close or for a reasonable amount of time, requiring the officers to state their office and business, and demand entry, as the majority absolutely requires here, is still unreasonable. See infra Section III.

In a subsequent case, in 1998, the Ninth Circuit reaffirmed that the "knock and announce" requirements apply only to closed -- not open -- doors:

> [The knock and announce 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 [knock and announce statute] . . . is aimed at the closed or locked door")."

United States v. Phillips, 149 F.3d 1026, 1029 (9th Cir. 1998).[11] The majority, however, relies on "old" cases that are irrelevant, majority at 11-14, as a substitute for focusing on the recent federal case law that directly addresses the issue in question.

III. POLICY REASONS FOR KNOCK AND ANNOUNCE RULE

In order to understand Hawai‘i and federal case law, it is essential to examine the articulated purposes of the knock and announce statutes:

[11] Though the majority correctly points out that Phillips is "factually inapposite," majority at 20, this recent case's reasoning and holding are highly apposite. Although the case did not involve the execution of a search warrant, Phillips alleged a violation of the knock and announce statute and, thus, the Ninth Circuit specifically analyzed the applicability of such requirements.

> 1. reduction of potential violence to both occupants and police resulting from an unannounced entry,
> 2. prevention of unnecessary property damage, and
> 3. protection of an occupant's right to privacy

Eleneki, 92 Hawai‘i at 566, 993 P.2d at 1195 (quoting Dixon, 83 Hawai‘i at 22, 924 P.2d at 190); see also Contreras-Ceballos, 999 F.2d at 434-35. A ruse requires the occupant to open the door consciously, thereby achieving these three objectives. Ruse entries, even if later followed by force, are "invariably characterized by some degree of advance notice; the occupant is expecting an entry." Eleneki, 92 Hawai‘i at 566, 993 P.2d at 1195 (citation omitted); Coleman v. United States, 728 A.2d 1230, 1235 (D.C. 1999) (citation omitted). Similarly, the Ninth Circuit, in ruling that federal agents entering an open door need not comply with the knock and announce statute, noted that the occupants expected entry: "A significant factor [in determining that the knock and announce statute was not invoked] here was the immediate presence of [Defendant] and his friend (about to be arrested) right inside the door. It was not a case of officers sneaking in and going prowling." United States v. Vargas, 436 F.2d 1280, 1281 (9th Cir. 1971) (per curiam).

In Eleneki, this court determined that because the door was "open," the knock and announce requirements did not apply. Nevertheless, the majority here asserts:

> At the point that Harada opened his door in response to the ruse, there was no breaking within the meaning of HRS § 803-37. 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.

Majority at 26 (citations omitted) (emphases added). But the Ninth Circuit has expressly warned against requiring such "nonsensical procedure":

> [The officers] use of force to keep the door open, and to enter, did not implicate [the knock and announce requirements]. Accord United States v. Salter, 815 F.2d 1150, 1152 (7th Cir. 1987). To rule otherwise 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. What would be gained by demanding, as is required by the majority's insistence that the knock and announce statute applies, that the officers (1) permit the "open door" to be closed[12] and (2) re-knock, re-announce, and open the door forcibly if refused admittance (as surely would occur)? Under these circumstances, requiring the police to allow a defendant to close his door then to wait a reasonable period of time before breaking in would not further serve the purpose of the knock and announce rule. In an attempt to mitigate the senselessness of this nonsensical procedure, the majority introduces a new exception to the knock and announce rule -- if any part of the requirement is "unreasonable" based on the "totality of the circumstances," it is eliminated. Majority at 25 n.7. Thus, the majority asserts that officers need not wait for the door to close or for a reasonable amount of time. See id. at 25. Applying the same exception to the case at bar, is it

[12] Although the majority claims that, under its approach, officers need not wait for the door to close, the discussion in Section II demonstrates the two fatal flaws with this assertion.

not unreasonable to require the officer to "orally demand entry," id. at 26, even though the officer has already announced, "Police. Search Warrant. Get on the ground." and is contemporaneously using force to prevent the door from being shut? Is there really any question that the officer who is pushing on the door and demanding Harada to "get on the ground" is effectively demanding entry? Does the majority believe that reciting the mantra, "we demand entry," has a magical effect that no other similar command possesses? If the majority believes that the "lawfulness of the execution of a search warrant should be judged under a standard of reasonableness," id. at 26 n.7, why does it rigidly impose the straitjacket of intoning a specific catchphrase, while rejecting functionally equivalent phrases different only in form? Does not the reasonableness analysis also apply to the officer's demanding entrance? If "[u]nder the circumstances described [in Contreras-Ceballos], it would be unreasonable to require the officers to wait," id. (emphasis in original), thereby eliminating that requirement, is it not, under the circumstances described in this case, also unreasonable to require the officer to orally demand entrance when he has effectively already done so, thereby eliminating that requirement? Cf. Monay, 85 Hawai'i at 285, 943 P.2d at 911 (Ramil, J., joined by Nakayama, J., concurring and dissenting) ("[The officers'] behavior taken as a whole, did translate into a demand for entry . . . . These actions were reasonable and realized the intent behind HRS § 803-37."). The majority,

applying the knock and announce rule in this case, should apply all of the rule. It cannot freely pick and choose only those elements that it fancies.

Here, with respect to the first purpose of the knock and announce rule -- reducing potential violence to both occupants and police resulting from an unannounced entry -- not only are the occupants aware of the officers' desired entry, but also the threat of violence is not reduced by blindly adhering to the knock and announce rule. Indeed, the potential for violence may actually increase by providing the occupant with additional time to rebuff the police's entry. Second, mandating that the officers allow the door to be closed before entering may actually increase the amount of unnecessary property damage because it practically guarantees that the door, at least, must be broken down. In contrast, if the officers are able to keep the door open by force, the damage to the door and other property will likely be lessened. Third, this court has already held that the occupant's right to privacy is minimal because (1) the occupant voluntarily opened his or her door to the outside world and (2) the only privacy interest in question is for the short "span of time between the announcement and the actual entry," Dixon, 83 Hawai'i at 23, 924 P.2d at 191. Accordingly, the majority should heed the earlier advice of this court: "The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." Id. at 22, 924 P.2d at 190 (quoting

Wilson v. Arkansas, 514 U.S. 927, 934 (1995)). Requiring compliance with the knock and announce rule in this case would be to insist on a formality, which has outlived its usefulness and may very well be counter to its original purpose.

In fact, the majority neglects to explain how requiring the officers in this case to orally demand entry -- even putting aside the knock and announce requirement that the door be closed -- would have further served the purpose of the rule. Does the majority believe that orally demanding entry in this case would be any different? Would it have actually advanced any of the three policy reasons in any way? The real-life result of the majority's position is that police officers will be rigidly required to recite the mantra, "Police, search warrant, we demand entry," even where, like this case, it serves no purpose.

Given that the majority recognizes the viability of Eleneki, see majority at 7-13, the majority must agree that the door in this case is undoubtedly "open" for purposes of the knock and announce rule. Once the door is opened, even if only partially, the purposes of the statute, as described earlier, have already been satisfied. The plain language of the statute supports such reading -- it does not distinguish between "partially open" and "open." Rather, a door is either "open" or "shut." After all, despite what the majority suggests, one cannot "close" a door that is not "open." Similarly, a "breaking," even one by the majority, see id. at 17, cannot occur on an already "open" door, see HRS § 803-37 ("If the doors,

gates, or other bars to the entrance are not immediately opened, the officer may break them.") (emphases added). The majority focuses, instead, on when a "breaking" occurs, which is, in turn, defined as "where force is used to gain entry." See majority at 25. But that merely begs the question of what it means to "gain entry." The ultimate question remains whether the three policy reasons underlying the statute are satisfied. Here, the officers "gained entry" when Harada voluntarily opened the door about three feet and Officer Bermudes entered. At that point, the three policies underlying the knock and announce statute had been achieved. After the door was "open" and entry had been "gained," the knock and announce requirements were no longer relevant, by both the terms of the statute and its underlying policies.

IV. CONSTITUTIONAL REASONABLENESS

Granted, there are still concerns with the use of force, but such concerns are now properly addressed by the reasonableness standard secured by the state and federal constitutions. "[T]he standards by which any governmental search is to be judged is always its reasonableness, in light of the constitutional guarantee of freedom from unreasonable searches and seizures." Monay, 85 Hawai‘i at 284, 943 P.2d at 910 (quoting Garcia, 77 Hawai‘i at 467, 887 P.2d at 677) (citation omitted). As specified in Dixon, "[b]oth article I, section 7 of the Hawai‘i Constitution and the fourth amendment to the United States Constitution provide for the right of the people to be secure in their houses against unreasonable searches and

seizures, and article I, section 7 additionally protects specifically against unreasonable invasions of privacy." 83 Hawai'i at 21-22, 924 P.2d at 189-90. The majority appears to believe that there are no other safeguards to protect a defendant's rights against unreasonable search and seizure other than the knock and announce statute. Indeed, if all one has is a knock and announce requirement, then any scenario concerning execution of a search or arrest warrant -- even if the door is open (and entry has been gained) -- seems to invoke such requirement. Thus, the majority sneaks this case, where the front door is already open, through the backdoor analysis of the knock and announce statute.

Rather, after the door is opened, the reasonableness standard -- not the knock and announce requirements -- applies. Of course, under some circumstances, the officers may well be required to announce their office and business, as entailed by the knock and announce statute. The reasonableness standard, however, does not incorrigibly demand a mechanistic and formulaic incantation to be recited, before using force on an already-opened door.

Here, I would hold that the officers' ruse entry and subsequent use of force were reasonable under the state and federal constitutions. The constitutional protections include the right of Harada to be secure in his house "against unreasonable searches and seizures" and "against unreasonable

invasions of privacy." Dixon, 83 Hawai'i at 22, 924 P.2d at 190. Given that the officers had a valid search warrant, the privacy interest protected by the state and federal constitutions was "minimal" because "it is only the occupant's privacy for the span of time between the announcement and the actual entry that is implicated." Id. at 23, 924 P.2d at 191. The facts, as described by the majority, that (1) Harada was aware of the officers' presence outside his apartment, majority at 4, and (2) Harada might destroy evidence, namely the narcotics, if given an opportunity to do so after closing his door, demonstrate that Officer Bermudes's use of force to keep the door open was reasonable.

In my view, the use of the appropriate reasonableness standard, rather than the now-irrelevant knock and announce statute, allows for an accurate analysis of the situation. As this court explained, quoting the United States Supreme Court, the knock and announce principle "is an element of the reasonableness inquiry under the fourth amendment." Dixon, 83 Hawai'i at 22, 924 P.2d at 190 (quoting Wilson, 514 U.S. at 934); see also Richards v. Wisconsin, 520 U.S. 385, 387 (1997). Thus, the knock and announce rule serves effectively as a proxy for reasonableness of the officers' gaining entry when the door is shut. But the knock and announce statute cannot be transformed into the sole, dispositive question in determining reasonableness in all cases, regardless of whether the door is shut. Here, the

majority appears to believe that use of force on an open door is sufficient to invoke the knock and announce requirements, which relate to force on a shut door.

V. CONCLUSION

Accordingly, I dissent -- mindful of Justice Cardozo's admonition against the "tyranny of labels": the indiscriminate application of generalized legal principles to every and all potentially related cases, no matter how tenuous the connection, as a substitute for a well-considered application of the law as both written and intended by the legislature. Snyder v. Commonwealth, 291 U.S. 97, 114 (1934), overruled on other grounds by, Malloy v. Hogan, 378 U.S. 1 (1964).