DISSENTING OPINION OF ACOBA, J.

While the majority now apparently agrees with the position herein -- that the execution of a search warrant in this case must be subjected to a constitutionally reasonable standard,[1] -- I dissent from the holding that police need not demand entry prior to entering a closed interior door. I believe the right of Defendant-Appellant Alicia Diaz (Defendant) to be free from unreasonable searches under article 1, section 7 of the Hawai‘i Constitution was violated when the police, without expressly demanding entry, broke through a locked interior office door into the area where she was located and seized evidence from her. Of course, for the sake of consistency, uniformity, and simplicity, in the future, the police are not prohibited from making the three-part announcement, "Police, search warrant, open the door," at closed interior doors that is now required at closed exterior doors.

In my view, before making a forcible entry through a closed inner office door, the police were required to declare their office, announce their business, and demand entry. Inasmuch as the police did not demand entry the evidence obtained should have been suppressed. Cf. State v. Monay, 85 Hawai‘i 282,

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[1] Of course Justice Ramil has always espoused this view. See State v. Harada, 98 Hawai‘i 18, 40, 41 P.3d 174, 196 (2002) ("[T]his court [has] explained, quoting the United States Supreme Court, [that] the knock and announce principle 'is an element of the reasonableness inquiry under the fourth amendment.'" (Quoting State v. Dixon, 83 Hawai‘i 13, 22, 924 P.2d 181, 190 (1996).)) (Ramil, J. dissenting).

284, 943 P.2d 908, 910 (1997) (police officers' failure to properly knock and announce "rendered the entry illegal and required suppression of all items seized"). On that ground, I would reverse the conviction herein.[2]

I.

A.

The findings of the court relate the following facts. On December 4, 1998, Honolulu Police Department (HPD) officers executed a search warrant at the Fil-Am Video Store (the store), which was a small building in the industrial area on Nimitz Highway. The search warrant indicated that the police were to look for, among other things, methamphetamine and methamphetamine paraphernalia. When the officers arrived at 6:24 p.m., the store was "open," as indicated by a sign, but its front door was closed and a man was exiting the store. The officers detained the man and entered the store with him. They did not announce their presence from outside the store.

Upon entering the store, the police identified themselves and stated that they had a search warrant. After securing the front portion of the store, the officers walked to a closed and locked office door, knocked, and announced three times, "[P]olice department, search warrant." After fifteen seconds without a response, one of the officers kicked in the

[2] Because I believe the evidence should have been suppressed, I do not consider the other issues raised by Defendant.

office door. Defendant was inside the office, sitting in a chair with her back to the officers. Defendant slowly turned toward the officers and dropped a white envelope to the floor. Once Defendant was detained, the officers discovered several clear ziplock baggies containing crystal methamphetamine inside the envelope. The police also found drug paraphernalia in Defendant's purse, in her jacket pocket, and on a shelf in the office.

It is unclear as to whether the police made the requisite pronouncements before forcibly breaking the interior door. Only one police officer testified that Officer Richardson said, "Police, search warrant, open the door," but other witnesses, including Officer Richardson himself, testified that Richardson merely said, "[P]olice department, search warrant." The court made no findings as to whether Officer Richardson demanded entry prior to forcible entry.

B.

Defendant was indicted on October 27, 1999, on charges of promoting a dangerous drug in the second degree, Hawai‘i Revised Statutes (HRS) § 712-1242(1)(b)(i) (1993) and unlawful use of drug paraphernalia, HRS § 329-43.5(a) (1993). On July 27, 2000, Defendant filed a "Motion to Suppress Items of Evidence," seeking suppression of several items recovered by the police in the course of executing the search warrant. Defendant contended that, in the execution of the warrant, the police officers

violated HRS § 803-37 (1993)[3] and article 1, section 7 of the state constitution[4] when they entered the exterior of the building and when they entered the interior office door. The court denied the motion to suppress evidence. The August 3, 2000 amended findings reflected much of what is described supra,[5] and the court entered the following relevant amended conclusions:

> CONCLUSIONS OF LAW
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> 1. The knock-and-announce requirement contained in Section 803-37, [HRS], did not apply to the police as they

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[3] For the text of HRS § 803-37, see section II., infra.

[4] Article 1, section 7 states:

> The 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.

[5] The findings stated in part as follows:

> FINDINGS OF FACT
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> . . . .
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> 4. Fil-Am Video is a video-rental business establishment which was open for business at the time the police arrived and entered. A sign saying "Open" was located at the front of the store facing outward to the public. The front door to the business establishment was in a closed position but unlocked.
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> 5. . . . [Officer Richardson] did not knock and announce his office and mission or demand entry before he entered the front door. As he entered or upon entering, Officer Richardson identified himself verbally and by showing his badge and announced that he was serving a search warrant.
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> . . . .
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> 7. Officer Richardson asked the man who had returned to Fil-Am Video whether a closed door on the makai side of the store was the door to the office. The man said yes. Officer Richardson then knocked on the locked door and announced "Police, search warrant." He did this three times and waited for some response. Getting no response, Officer Richardson kicked in the door. The procedure from the first knock to the kicking in of the door spanned 15 seconds.
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> 8. Once in the office, Officer Richardson identified himself, verbally and by warrant. . . .
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> . . . .

(Emphases added.)

> sought to enter Fil-Am Video to serve the search warrant at issue. The Court considers, among other things, the policy reasons underlying the knock-and-announce rule, which are to notify the person inside of the presence of police and the impending intrusion, give that person time to respond, avoid violence, and protect privacy as much as possible. Under the facts of this case, police actions in regard to the knock-and-announce rule were consistent with the rule's underlying policy reasons and requirements, and were reasonable.
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> 2. Pursuant to State v. Balberdi, 90 Haw. App. [sic] 16 (1995), under Section 803-37, [HRS], the knock-and-announce language with regard to inner doors is discretionary. Therefore, the fact that Officer Richardson did not demand entry at Fil-Am Video's inner office door is not fatal to the validity of the search.
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> . . . .

(Emphases added.)

A jury convicted Defendant of both counts.

II.

HRS § 803-37, governing the execution of search warrants, reads as follows:

> **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.

(Boldfaced font in original.) (Emphasis added.) In making its decision the court relied on State v. Balberdi, 90 Hawai‘i 16, 975 P.2d 773 (App. 1999). In that case, the Intermediate Court of Appeals (ICA) held that the term "may," as used in HRS § 803-37 that states that the officer "may demand . . . [that] closed place[s]. . . be opened," was "*non-mandatory*, i.e., . . .

discretionary." Id. at 22, 975 P.2d at 779. In Balberdi, police officers, executing a search warrant for narcotics, announced their presence, and then entered through the front door of a residence. See id. at 18, 975 P.2d at 775. The police apparently opened or kicked open the closed door to the defendant's bedroom without demanding entry and upon entering the bedroom, the defendant was found sleeping. Three packets of crystal methamphetamine were in the room. See id. Based upon its construction of the term "may," the ICA concluded that the announcement requirements in the preceding part of the statute to be given "upon initial entry" at the front door, id., need not be given at interior closed doors. See id. at 21, 975 P.2d at 778.

Insofar as the ICA held that "may" signifies that the police have discretion to announce or not to announce at closed inner doors, I must disagree. The plain language of HRS § 803-37 does not grant police such discretion. I agree that the word "may" connotes discretion. See Gray v. Administrative Dir. of the Court, 84 Hawai'i 138, 149, 931 P.2d 580, 591 (1997) ("[T]he close proximity of the contrasting verbs 'may' and 'shall' requires a non-mandatory, i.e., a discretionary, construction of the term 'may.'"). The question, however, is to what that discretion relates. In my view, the word "may" merely provides officers the discretion to seek entry into closed places. Considered in context, the reference in HRS § 803-37 to demands for opening closed places "after entry" assumes that the officer had made such demands upon those persons situated at the exterior

of the closed spaces, i.e., those occupants of the building whom the officer had already encountered and who presumably had been informed of the search by the initial knock and announcement at the front door, not upon those persons who occupied the "closed places."[6]

III.

A.

HRS § 803-37 is essentially silent with respect to what procedure, if any, is required of the police when faced with a closed inner door.[7] However, the execution of a search warrant must be constitutionally reasonable and, hence, constitutional considerations apply, a proposition which the majority now apparently agrees with and applies to this case. Cf. Wilson v. Arkansas, 514 U.S. 927, 931 (1995) ("[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable . . . [and an] examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering." (Internal quotation marks and citations omitted.)). Likewise, "inherent in an analysis of our constitution's

[6] The circuit court in this case should not be faulted inasmuch as it was bound by precedent as embodied in Balberdi.

[7] I believe the application of terms such as "open" and "shut" in applying a statute such as HRS § 803-37, must be determined in the context of a specific case. See Harada, 98 Hawai'i at 52 n.1, 41 P.3d at 208 n.1 (Acoba, J., concurring in part and dissenting in part).

counterpart 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 . . . will invalidate the subsequent search and the fruits thereby obtained." State v. Harada, 98 Hawai'i 18, 44, 41 P.3d 174, 201 (2002) (Acoba, J., concurring in part and dissenting in part) (emphasis omitted). Therefore, under article 1, section 7 of our constitution, the focus is on whether the officer's actions are constitutionally reasonable. See State v. Garcia, 77 Hawai'i 461, 467, 887 P.2d 671, 677 (App. 1995) ("The objective here being a search, the constitution mandates that police conduct in executing a search warrant must be reasonable."). Indeed, "'[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.'" Id. (quoting State v. Martinez, 59 Haw. 366, 368, 580 P.2d 1282, 1284 (1978)).

"The purpose[s] of the knock-and-announce rule [are] 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 (quoting People v. Condon, 148 Ill. 2d 96, 103, 170 Ill. Dec. 271, 274, 592 N.E.2d 951, 954 (1992), cert. denied, 507 U.S. 948, 113 S.Ct. 1359, 122 L.Ed.2d 738 (1993)) (quotation marks and brackets omitted). See State v. Eleneki, 92 Hawai'i 562, 566, 993 P.2d 1191, 1195 (2000) (explaining the three purposes of the knock and announce rule);

State v. Dixon, 83 Hawai‘i 13, 22, 924 P.2d 181, 190 (1996) (purpose of the knock and announce rule are to avoid violence, limit property damage and protection of an individual's right to privacy).

The officers' actions in the instant case cannot be deemed reasonable. While the store premises were purportedly open to the public, the office decidedly was not. As the police ascertained, the door was closed and locked. The court found that the police knocked and announced their office, but made no finding that they demanded entrance before breaking the door down. The shut and locked office door was obviously meant to exclude the public. Under such circumstances, the officers' failure to demand entry once they found the office door shut was not a reasonable exercise of their power.

B.

This court has held that, "where a breaking occurs or force is used, officers are required to comply with applicable knock and announce requirements regardless of whether they are executing a search or an arrest warrant." Harada, 98 Hawai‘i at 23, 41 P.3d at 179. It was said that the cases "demonstrate that the use of force in gaining entry is not only relevant to whether the knock and announce statute is implicated, it is a primary factor in making such determination." Id. at 24, 41 P.3d at 180. Therefore, in our jurisdiction, "where force is used to gain entry, the statute is implicated." Id. In that regard, "the

requirements of the knock and announce rule are not met when police officers fail to orally demand entry[.]" Id. at 29, 41 P.3d at 185 (emphasis added).

Relatedly, under article I, section 7 of our constitution, the occupants of an area that is the subject of a search warrant must be given notice of the coming intrusion and a reasonable time to respond to the pronouncements, absent exigent circumstances.[8] See Garcia, 77 Hawai'i at 467, 887 P.2d at 677. Thus, "the amount of time allowed to lapse between announcement [by the police] and entry is relevant in determining the reasonableness of the officers' conduct in executing a search warrant [before they enter by force]." Id. (brackets, internal quotation marks, citation, and ellipsis points omitted). See also 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).

In that regard, "such pronouncements are intended to notify the occupants of an impending intrusion and to afford the

[8] Exigent circumstances are not involved in this case.

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." Harada, 98 Hawai‘i at 49, 41 P.3d at 205 (Acoba, J., concurring in part and dissenting in part). The majority concludes that the phrase "police department, search warrant" is sufficient because it "gave notice of their presence, authority, and impending intrusion." Majority opinion at 20. However, as was said with respect to analogous situations in which the "knock and announce" statute is applied, "we know of no more effective way of complying with [demanding entry] than that the demand be orally communicated in the same way the police announce their office and purpose." Garcia, 77 Hawai‘i at 466, 887 P.2d at 676. Indeed, "the burden of making an express announcement is certainly slight and a few more words by the officers would . . . satisf[y]" the purposes for such a demand. Id. (internal quotation marks and brackets omitted). In light of these considerations, the police "announce[ment,]" see majority opinion at 20, does not reasonably satisfy a demand for entry for several reasons.

IV.

A.

A demand that the occupants open the door would dispel any doubt or confusion likely to arise from an imminent, unexpected intrusion by the police. By requiring that police

expressly demand entry, there would be no question in either the minds of the police or the occupants that a response is required and that the occupants will be afforded the opportunity to act on the demand. The lack of an appropriate announcement also may risk confusion and, thus, the precipitation of violence. See Garcia, 77 Hawai‘i at 468, 887 P.2d at 678 (The purpose of the knock-and-announce rule is to . . . avoid violence.").

Hence, a separate and distinct request for entry is a necessary condition for the reasonable execution of a warrant in light of (1) the purposes served by a knock and announce rule and (2) the right afforded to individuals under our constitution to a reasonable time to respond in order to avoid a forcible entry. See State v. Quesnel, 79 Hawai‘i 185, 191, 900 P.2d 182, 191 (App. 1995) ("If the occupants are not afforded a reasonable time to respond, the entry and the ensuing search and seizure are illegal and the evidence seized must be suppressed."); Garcia, 77 Hawai‘i at 470, 887 P.2d at 680 (suppressing evidence because police failed to give reasonable amount of time between knocking and entering through door).

B.

Moreover, the underlying purposes of "knock and announce" requirements are as germane to an entry at a closed exterior door as they are to a closed inner door. Hence, the pronouncements made at the exterior door should reasonably be constitutionally mandated at a closed interior door. It would

appear evident that the purposes served by the rule may prevail not only when a home is involved but when other "closed places" are forcibly entered.

For example, a likelihood exists that persons behind a closed interior door may not have heard an earlier pronouncement at an exterior door, if made.[9] Moreover, it would serve no relevant or viable principle in practice or in the implementation of such pronouncements to hold that the police need demand entry at an exterior door but not at an interior one. The reasonableness requirement in the warrant clause dictates that the police make all three statements. Of course, for the purpose of consistency, uniformity, and simplicity, the police may choose to make the three-part announcement at both closed exterior doors and at closed interior doors.

V.

The majority also apparently agrees that the breaking of a locked interior door without pronouncement pays no heed to the protection of an occupant's right to privacy. See majority opinion at 20-21. A contrary approach would invite the unannounced forcible entry by the police into "closed places"

[9] A majority of the cases supporting the "no knock and announce rule" at interior doors is grounded on the assumption that a knock and announce occurred at an exterior door. However, in this case, no knock and announce occurred at the exterior door. While it is true that the detectives announced themselves upon entering the store, it is not apparent that the Defendant, who was inside the office, was so informed. In any particular case, the size of the store or location of the office may make an initial announcement wholly ineffective in fulfilling the purposes of the knock and announce requirements.

imbued with constitutional privacy protections. See State v. Bonnell, 75 Haw. 124, 146, 856 P.2d 1265, 1277 (1993) (employees have a reasonable expectation of privacy in an employee break room, apart from the common area of the post office); State v. Biggar, 68 Haw. 404, 407, 716 P.2d 493, 495 (1986) (defendant had a reasonable expectation of privacy inside a closed toilet stall, recognizable by society as objectively reasonable); State v. Loo, 66 Haw. 653, 661, 675 P.2d 754, 760 (1983) ("[A] hotel room ostensibly serving as someone's temporary abode is a 'private place' . . . [and the person] is 'entitled to privacy therein[.]'"); Ortega v. O'Connor, 764 F.2d 703, 705-06 (9th Cir. 1985) (an employee has a reasonable expectation of privacy within his or her office), rev'd on other grounds, 480 U.S. 709 (1987); Tatman v. State, 320 A.2d 750, 750 (Del. 1974) (police must knock and announce at an apartment door as well as a building's outer door in order to fulfil the purpose of the rule, namely to 1) protect privacy and 2) reduce the danger to citizen and police by notifying the purpose of the entry); Duckworth v. Sayad, 670 S.W.2d 88, 92 (Mo. Ct. App. 1984) (conduct in a dormitory room, which was visible only from a particular spot on an outside balcony, was protected by a constitutional right of privacy); People v. Lerhinan, 455 N.Y.S.2d 822, 824-26 (N.Y. App. Div. 1982) (a guest in a hotel room is entitled to protection of the Fourth Amendment and an employee of a hotel cannot consent to a search).

The majority's position would otherwise be contrary to the protection we have long afforded privacy rights under our constitution. See, e.g., 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) (noting that "parallel State constitutional provision[s]" were interpreted differently than the federal constitution); State v. Tanaka, 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 (1985) ("In our view, article I, § 7 of the Hawai‘i Constitution recognizes an expectation of privacy beyond the parallel provisions in the Federal Bill of Rights."). A different holding would sanction the breaking into closed spaces and ignore purposes that are fundamental to the reasonable execution of a search warrant that inhere in the "knock and announce" rule. "It is, after all, intrusion by *government* that we are concerned with, not simply the act of opening a door." Harada, 98 Hawai‘i at 52, 41 P.3d at 208 (Acoba, J., concurring in part and dissenting in part) (emphasis in original).

VI.

Because I disagree that the police were not required to demand entry at the closed and locked interior office door under the circumstances of this case, I would reverse the court's denial of Defendant's motion to suppress evidence and, therefore, would also reverse the judgment of conviction.