DISSENTING OPINION BY NAKAMURA, J.

I.

I agree with the majority that the law enforcement officers did not comply with the literal requirements of Hawaii Revised Statutes (HRS) § 803-11 (1993), the knock-and-announce statute for executing an arrest. The officers, however, substantially complied[1/] with HRS § 803-11 given the policies underlying the statute. I would follow California precedents in holding that suppression of evidence is not warranted when there is substantial compliance with the knock-and-announce statute. People v. Peterson, 511 P.2d 1187, 1191-92 (Cal. 1973); People v. Tacy, 241 Cal. Rptr. 400, 406-12 (Cal. Ct. App. 1987); People v. Hoag, 100 Cal. Rptr. 2d 556, 561-65 (Cal. Ct. App. 2000).[2/] The California Supreme Court summarized the substantial compliance rule as follows:

> When police procedures fail to conform to the precise demands of the [knock-and-announce] statute but nevertheless serve its policies we have deemed that there has been such substantial compliance that technical and, in the particular circumstances, insignificant defaults may be ignored.

Peterson, 511 P.2d at 1192.

As the majority notes, under existing case law, the officers "broke" the unlocked screen door by opening it. In

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[1/] In orally denying the motion of Defendant-Appellant Jobert Maldonado (Maldonado) to suppress evidence, the trial court found that there was "substantial compliance with . . . the knock-and-announce rule."

[2/] Courts in other jurisdictions have likewise applied a substantial compliance rule in determining whether knock-and-announce violations require suppression of evidence. E.g., State v. Steingraber, 296 N.W.2d 543, 545-46 (S.D. 1980); People v. Bernardo, 392 N.Y.S.2d 1001, 1002-03 (N.Y. Sup. Ct. 1977); see also, Commonwealth v. McDonnell, 516 A.2d 329, 330-31 (Pa. 1986).

almost all knock-and-announce cases, the "breaking" of the door is immediately followed by the officers' entry into the residence. This case is unique in that the officers did not enter the residence of Defendant-Appellant Jobert Maldonado (Maldonado) after opening the screen door, but instead waited at the doorway. Indeed, the officers did not enter the residence until after they identified themselves as law enforcement officers, stated that they had a retake warrant for Maldonado's brother, and asked for and obtained permission from Maldonado to enter. This case therefore raises the question of whether the suppression of evidence is required based on the premature opening of an unlocked screen door where the officers otherwise satisfied the requirements of HRS § 803-11 before entering the residence. In my view, the suppression of evidence in these circumstances is not required.

HRS § 803-11 requires that an officer demand entrance and identify his or her authority before breaking into a house to effect an arrest. The statute provides:

> **§ 803-11 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 in a case in which arrest is lawful without warrant, the officer or person shall substantially state that information in an audible voice.

The purposes of HRS § 803-11 "are to: (1) reduce the potential of violence to both occupants and police resulting from an

unannounced entry; (2) prevent unnecessary property damage; and (3) protect the occupant's right of privacy." State v. Dixon, 83 Hawai'i 13, 14, 924 P.2d 181, 182 (1996).

Under the circumstances of this case, the officers' conduct served the purposes of HRS § 803-11 and constituted substantial compliance with its requirements. First, there was no potential for violence due to an unannounced entry because the officers did not enter until they had announced their authority and received permission to enter. The officers knocked and identified themselves as the "Sheriff's Office" and "Police" while opening the screen door. The officers' conduct in opening the screen door (the "breaking") and waiting at the doorway served to reduce the potential for violence. Such conduct not only permitted the occupants to see that the persons at the door were indeed law enforcement officers,[3/] but allowed the officers to assure themselves that the occupants were not reaching for weapons.

Second, opening the unlocked screen door did not result in the destruction of any property.

Third, the officers could already see into the residence through the screen door. After opening the screen door, the officers did not enter the residence; they waited at

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[3/] The officers displayed badges and were dressed in protective gear bearing markings that clearly identified them as law enforcement officers.

the door until Maldonado gave them permission to enter. Any incremental infringement on Maldonado's privacy caused by the officers' opening the screen door was minimal. In addition, the officers' decision to open the screen door was motivated by legitimate concerns for their safety.

HRS § 803-11 is entitled "Entering house to arrest." The statute's title and language shows that it was directed at a situation where the officers' breaking of a door leads to their gaining entry into the house to effect an arrest. In this case, however, the officers waited at the doorway until they received Maldonado's consent to enter. Officer Yosemori testified that he stood in the doorway with one foot outside and one foot on the doorsill "no more than a couple inches inside the house." Deputy Sheriff Cayetano testified that he remained outside the house although a portion of his upper body may have leaned in and crossed the threshold.[4/] The officers' conduct while waiting at the door did not constitute the type of entry into the house contemplated by the statute. The officers only entered the house after the demand and notice requirements of HRS § 803-11 had been satisfied and the officers had received consent from Maldonado to enter.

[4/] Based on the testimony of Officer Yosemori and Deputy Sheriff Cayetano, the trial court found that "one or more of the officers partially entered the front door" of the residence after the screen door was opened. (Emphasis added). The court further found that the officers did not fully enter the residence until after Maldonado gave them permission to enter.

The facts of Peterson are illuminating. In Peterson, a police officer went to the defendant's residence to execute a search warrant. 511 P.2d at 1190. The inner door was open, but an unlocked screen door was closed. Id. The officer was able to see into the living area through the screen door and observed a man and woman seated and engaged in conversation. Id. The officer knocked several times but the occupants did not respond. Id. After waiting a minute, the officer opened the screen door, then identified himself, stated he had a warrant, and entered the residence. Id. (emphasis added).

The California Supreme Court noted that the officer's opening of the unlocked screen door constituted a "breaking" under the California knock-and-announce statute. Id. at 1191.[5/] The officer had violated the statute by failing to provide notice of his authority and purpose before opening the screen door as required by the statute. Id. Nevertheless, the court held that the officer's technical violation of the statute by delaying his announcement until after he had opened the screen door had not contravened the purposes or policies of the knock-and-announce statute. Id. at 1192. The court concluded that the officer had

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[5/] The California knock-and-announce statute considered in People v. Peterson provided, in relevant part, as follows:

> 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 the warrant, if, after notice or his authority and purpose, he is refused admittance.

Peterson, 511 P.2d 1187, 1190 n.2 (Cal. 1973).

substantially complied with the knock-and-announce statute and upheld the denial of the defendant's suppression motion. Id.

The circumstances of Maldonado's case are almost identical with the circumstances of Peterson regarding the timing of the screen door's opening and the officers' announcement. But unlike in Peterson, the officers in Maldonado's case waited outside until they received specific permission to enter. Thus, Maldonado's case presents stronger facts than Peterson for applying the substantial compliance rule.

II.

Even if the officers' compliance with HRS § 803-11 is deemed not to be substantial or sufficient, suppression of the evidence is not warranted. Maldonado's valid consent to the search of his residence provided an independent basis for the lawful seizure of the evidence. Maldonado's consent to search included his giving the officers permission to enter his residence, and the officers did not enter the residence until they received Maldonado's consent to search. If the screen door had not been opened, the officers would still have asked for consent to search the residence since they were there to find Maldonado's brother, one of Hawai'i's most-wanted fugitives. Thus, Maldonado's consent to search was not the fruit of the officers' violation of the knock-and-announce statute.

I disagree with the majority's conclusion that Maldonado's consent to search was involuntary. "[W]hether consent to search has been given voluntarily is a question of fact to be determined by the trial court from the 'totality of all the circumstances.'" State v. Patterson, 58 Haw. 462, 468 571 P.2d 745, 749 (1977) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). The trial court "is best situated to decide the question of voluntariness" and its findings "regarding the validity of consent to search must be upheld unless 'clearly erroneous.'" Patterson, 58 Haw. at 468-69, 571 P.2d at 749.[6/]

Deputy Sheriff Cayetano testified that he did not make any threatening remarks and that "there was no duress at all" when he asked Maldonado for consent to enter the house and search for Maldonado's brother. Officer Pagan confirmed that no threats were made. The officers waited at the doorway and had not entered the house when they asked for Maldonado's consent. Although the officers were armed, they kept their guns pointed down and not in the direction of Maldonado while seeking his consent. Moreover, prior to obtaining Maldonado's consent, the

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[6/] In Maldonado's motion to suppress evidence, Maldonado claimed that any consent to search he gave was coerced or given under duress. At the hearing in which the trial court orally denied Maldonado's suppression motion, Maldonado's counsel asked if the court was making a finding on the "issue of consent to enter when Mr. Maldonado was questioned or asked for permission to enter." The court responded that "if consent was needed, it was given." The trial court's written findings of fact do not use the word "consent" but state that "Defendant Maldonado gave the officers permission to enter to check the premises at which time the officers entered." I interpret this language as a finding by the trial court that Maldonado gave the officers valid consent to search.

officers advised Maldonado that they were there to look for his brother to execute a retake warrant. The officers' statement of their purpose explained the reason for their guns being drawn and served to dissipate the potential intimidating effect of Maldonado's seeing their weapons. The officers' statement of their purpose also informed Maldonado that he was not the focus of the officers' scrutiny. Given these circumstances, I would not overturn the circuit court's finding that Maldonado gave the officers permission to enter and search his residence.

III.

In my view, the circuit court properly denied Maldonado's motion to suppress evidence. Accordingly, I respectfully dissent.

Craig H. Nakamura