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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Respondent/Plaintiff-Appellee,

vs.

SAMSON K. KEANAAINA,
Petitioner/Defendant-Appellant.

SCWC-17-0000898

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-17-0000898; CR. NO. 3CPC-17-0000154)

MARCH 22, 2022

DISSENTING OPINION BY McKENNA, J.,
IN WHICH WILSON, J., JOINS

I. Introduction

The Majority assumes the validity of an unconstitutional general search warrant that failed to describe the place to be searched with sufficient particularity. The Majority also holds that Wright's residence was "open," contradicting existing precedent that defines the force required to constitute a

breaking under Hawai'i Revised Statutes ("HRS") § 803-37.

The Majority rulings violate the constitutional and statutory rights of our citizens without traditional, sheltered homes ("unsheltered persons").[1] Hence, I respectfully dissent.

II. Discussion

On March 8, 2017, officers executed Search Warrant No. 2017-030K, which directed a search of the following area:

> The residence of Michelle WRIGHT described as a homeless campsite consisting of various color and size tarpaulins at the Old Kona Airport beach park, located at the north end of Kuakini Highway, behind the Hawai'i State Parks and Recreation maintenance building. Said campsite is situated on land belonging to the County of Hawai'i (Old Kona Airport) and Queen Liliuokalani Trust (corner of Kuakini Hwy and Makala Blvd); to include but not limited to all rooms, boxes, toolboxes, suitcases, handbags, safes, backpacks, fanny packs, bags, storage containers, wallets, purses, papers, utility receipts and clothing located within said camp and/or stored outside-near the camp, wherever located within the County and State of Hawai'i . . .

(emphasis added). The probable cause affidavit in support of the search warrant used the same verbatim description, but also attached two photos of the campsite as Exhibit A. Keanaaina, a visitor at Wright's residence, had his backpack taken and searched under the auspices of this warrant. Evidence seized led to Keanaaina's arrest for and ultimate conviction on various drug-related charges.

[1] I use the term "unsheltered persons" to mean those "without traditional housing." I avoid the terms "homeless" and "houseless" because for an increasing number of our citizens, tent-like structures have become their homes and houses.

A. The search warrant was an invalid general warrant subject to total invalidation

1. Wright's constitutional right against unreasonable searches and seizures

Article 1, section 7 of the Constitution of the State of Hawai'i provides, "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." Haw. Const. art. 1, § 7.[2] This provision "safeguard[s] individuals from the arbitrary, oppressive, and harassing conduct of government officials." State v. Naeole, 148 Hawai'i 243, 247, 470 P.3d 1120, 1124 (2020) (cleaned up).

This court has long recognized that the protection against warrantless searches and seizures can apply to residences of unsheltered persons, even when placed on government property without permission. See State v. Dias, 62 Haw. 52, 609 P.2d 637 (1980). In Dias, the trial court granted a motion to suppress gambling evidence obtained without a warrant brought by occupants of a shack built on Sand Island in an area then known as "Squatters Row." 62 Haw. at 53, 609 P.2d at 639. In affirming the suppression, we applied the two-pronged test for

[2] The Fourth Amendment to the United States Constitution reads, in relevant part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Thus, the Hawai'i Constitution provides additional protection against "invasions of privacy."

when a defendant has a reasonable expectation of privacy:

> In determining whether the defendants in the present case had a reasonable expectation of privacy in the area searched, a two-fold test is to be applied: (1) whether they had exhibited an actual expectation of privacy, and (2) whether the expectation was one which society would deem to be reasonable. State v. Kaaheena, 59 Haw. 23, 575 P.2d 462 (1978); State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977). A [person's] dwelling, generally, is a place where [they] expect[] privacy, and except as to conduct, objects, and statements which [they] knowingly expose[] to public view, they] will be deemed to have exhibited an actual expectation of privacy therein. See United States v. Botelho, 30 F.Supp. 620 (D. Haw. 1973).

Dias, 62 Haw. at 55, 609 P.2d at 639. We concluded that although the structure had been erected on government property without permission, the "long acquiescence by the government" to its existence gave rise to a reasonable expectation of privacy, "at least with respect to the interior of the building itself." Dias, 62 Haw. at 55, 609 P.2d at 640.

In this case, the area searched was a tent structure on land belonging to the County of Hawai'i and the Queen Lili'uokalani Trust. Wright had been living there without the government's permission since late 2015, more than one year prior to the search. Wright exhibited an actual expectation of privacy in the structure by creating an enclosure, regularly sleeping in it, and safekeeping her belongings within it. The structure contained furniture and spaces commonly found in houses, including a bed, a couch, a kitchen area, and a storage area.

Thus, Wright enjoyed a reasonable expectation of privacy

within her tent structure residence.[3] The State recognized this by seeking a search warrant of her "residence."

2. As a visitor, Keanaaina also enjoyed Wright's constitutional right against unreasonable searches and seizures

The reasonable expectation of privacy enjoyed by Wright in her residence extended to her visitor, Keanaaina. Keanaaina was an occasional visitor to Wright's residence. A guest of a homedweller shares the right of privacy of the homedweller. State v. Cuntapay, 104 Hawai'i 109, 110, 85 P.3d 634, 635

[3] See also State v. Pippin, 200 Wash. App. 826, 403 P.3d 907 (2017). In Pippin, Washington police officers lifted a tarp to peer into an unsheltered man's tent without a warrant and arrested him after observing a bag of methamphetamine. 200 Wash. App. at 832, 403 P.3d at 910. On appeal, the Washington appellate court held the man's tent-like residence on public property and its contents "fell among those privacy interests which citizens of this state should be entitled to hold, safe from governmental trespass absent a warrant." Pippin, 200 Wash. App. at 846, 403 P.3d at 917 (cleaned up). The court highlighted the similarities between the man's tent and a fixed dwelling:

> ¶37 Pippin's tent allowed him one of the most fundamental activities that most individuals enjoy in private—sleeping under the comfort of a roof and enclosure. The tent also gave him a modicum of separation and refuge from the eyes of the world: a shred of space to exercise autonomy over the personal. These artifacts of the personal could be the same as with any of us, whether in physical or electronic form: reading material, personal letters, signs of political or religious belief, photographs, sexual material, and hints of hopes, fears, and desires. These speak to one's most personal and intimate matters.
>
> ¶38 The law is meant to apply to the real world, and the realities of homelessness dictate that dwelling places are often transient and precarious. The temporary nature of Pippin's tent does not undermine any privacy interest. Nor does the flimsy and vulnerable nature of an improvised structure leave it less worthy of privacy protections. For the homeless, this may often be the only refuge for privacy in the world as it is.

Pippin, 200 Wash. App. at 840–41, 403 P.3d at 915 (cleaned up).

(2004).[4]

3. The search warrant failed to meet the particularity requirement and is subject to total invalidation

a. The particularity requirement and the consequences of failure to satisfy the requirement

Where a search warrant is required, Article 1, Section 7 of the Constitution of the State of Hawai'i requires the warrant to describe the place to be searched with particularity. We have explained:

> The particularity requirement ensures that a search pursuant to a warrant limits the police as to where they can search, for otherwise the constitutional protection against warrantless searches is meaningless. A determination regarding whether a warrant satisfies the particularity requirement must be made on a case-by-case basis, taking into account all of the surrounding facts and circumstances. While the cornerstone of such a determination is the language of the warrant itself, the executing officer's prior knowledge as to the place intended to be searched, and the description of the place to be searched appearing in the probable cause affidavit in support of the search warrant is also relevant.

State v. Rodrigues, 145 Hawai'i 487, 494, 454 P.3d 428, 435 (2019) (cleaned up). General warrants, or warrants that do not meet the particularity requirement, are subject to total invalidation. State v. Kealoha, 62 Haw. 166, 178, 613 P.2d 645, 653 (1980).

[4] In Cuntapay, we also recognized that, in Hawai'i, an open garage, which is a space not entirely enclosed by brick-and-mortar walls, still hosts an expectation of privacy. 104 Hawai'i at 117, 85 P.3d at 642.

b. The language of the warrant was overbroad, extending well beyond Wright's residence

The language in Search Warrant No. 2017-030K fails the particularity requirement because it was overbroad.

The warrant describes Wright's residence as "a homeless campsite consisting of various color and size tarpaulins at the Old Kona Airport beach park[.]" The warrant then included within its scope various objects "located within said camp and/or stored outside-near the camp, wherever located within the County and State of Hawai'i." (Emphasis added.) This language expanded the scope of the warrant to include spaces well beyond Wright's residence, including, but apparently not limited to, the entire Old Kona Airport encampment. This overbroad language was clearly insufficiently particularized.

c. The language of the warrant describing Wright's residence was also inadequate

The search warrant language also did not particularly distinguish Wright's residence from other campsites in the area.

Again, the warrant described Wright's residence as "a homeless campsite consisting of various color and size tarpaulins at the Old Kona Airport beach park[.]" The Majority acknowledges, however, that there were approximately seven separate "campsites" located within the Old Kona Airport beach park with tents and tarpaulins of different colors, or a combination thereof. State's Exhibits 201, 202, and 204 show

that Wright's campsite was not the only structure that "consist[ed] of various color and size tarpaulins at the Old Kona Airport beach park, located at the north end of Kuakini Highway, behind the Hawai'i State Parks and Recreation maintenance building." Given the presence of other similar campsites in the same general area, the warrant required additional descriptions unique to Wright's residence or more precisely pinpointing of its location to satisfy the particularity requirement. Thus, the warrant did not adequately describe Wright's residence to distinguish it from other tent structures within the encampment.

d. The officers had prior knowledge sufficient to meet the particularity requirement

As noted, Rodrigues instructs that an executing officer's prior knowledge as to the place intended to be searched is also relevant in determining whether the particularity requirement has been met. 145 Hawai'i at 494, 454 P.3d at 435. Here, the officers[5] knew which campsite within the Old Kona Airport beach park area belonged to Wright. In his probable cause affidavit, Officer Marco Segobia ("Officer Segobia") indicated he and other vice officers "maintained constant surveillance" of a

[5] Several people participated in serving the search warrant: Officers Marco Segobia, Stephen Parker, Kyle Hirayama, Edward Lewis, Joseph Stender, and Reubin Pukahi; Detectives Sean Smith, Jeremy Lewis, and Michael Hardie; and Lieutenant Sherry Bird.

confidential informant's entrance into and exit from Wright's campsite during a controlled methamphetamine purchase. Thus, this case was not one where the place to be searched could only be narrowed with the benefit of hindsight. Cf. State v. Anderson, 84 Hawai'i 462, 470, 935 P.2d 1007, 1015 (1997) (upholding a search warrant discovered to be overbroad only with the benefit of hindsight because its constitutionality had to be judged "in light of the information available to the police officers at the time the search warrant was issued").

There was testimony regarding the specific colors of the tarps and sheets used in Wright's structure. When asked whether there was anything distinguishing about Wright's campsite, one officer said it was "the largest camp there at that site, the most northern and the largest camp at that area." Another officer described its size as being "approximately two ten by ten tents put together with some tarps over it." Additional testimony also placed the campsite beneath the canopy of a tree and along the borderline that separated the park from the Lili'uokalani Trust land.

Officer Segobia's probable cause affidavit used the same broad and unparticularized language as the search warrant to describe Wright's residence, but also attached two photos of Wright's campsite as Exhibit A. The photos, however, were not attached to the search warrant.

In sum, the officers could have and were therefore required to more particularly describe the area to be searched, and the more particularized description was required to be included in the warrant. The warrant was a general search warrant that also described other tent encampments at the Old Kona Airport beach park. Hence, pursuant to the particularity analysis set out in Rodrigues, this was a prohibited general search warrant subject to total invalidation.

B. The officers did not comply with HRS § 803-37

The officers also violated HRS § 803-37 by entering Wright's residence without first demanding entry. HRS § 803-37 (2014 & Supp. 2016) provides:

> 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 shall 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).

1. HRS § 803-37 applies to Wright's house

In footnote 14, the Majority states that "[f]or the purposes of this proceeding, this court assumes without deciding that Wright's tent structure constituted 'a house . . . or other building' under the terms of HRS § 803-37." The Majority then

goes on to analyze HRS § 803-37, erroneously ruling that its requirements were met. But the Majority leaves open the possibility that the statute does not apply to Wright's house.

HRS § 804-37's language has existed basically unchanged since the Penal Code of the Hawaiian Kingdom, Chapter XLVIII, § 8 (1869).[6] This statute was part of a package of statutes addressing search warrants. Penal Code of the Hawaiian Kingdom, Chapter XLVIII (1869). Although there are no committee reports from the time of the statute's adoption, it is common knowledge that there were many grass houses with open doorways around that time. That the statute applied to such "houses" that then existed is supported by its third sentence, which refers to "doors, gates, or other bars to entrance." In this case, law enforcement sought a warrant recognizing the tent encampment as Wright's "residence" or "house." A clear holding that HRS § 803-37 applies to Wright's residence as a house would be

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[6] The section then read as follows:

> 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 he finds it open; if the doors be shut, he must declare his office and his business, and demand entrance; if the doors, gates or other bars to the entrance be not immediately opened, he may break them. When entered, he may demand that any other part of the house, or any closet, or other closed place in which he has reason to believe the property is concealed, may be opened for his inspection, and if refused he may break them.

Penal Code of the Hawaiian Kingdom, Chapter XLVIII, § 8 (1869) (emphasis added).

consistent with the original intent of the statute.

2. Wright's house was not open

HRS § 803-37 explicitly requires that an officer charged with executing a search warrant (1) declare the officer's office and business; and (2) demand permission to enter if doors to a house are not "open." There is no dispute that no demand for entry was made here. The Majority holds, however, that no demand for entry was required because the house was "open." It so posits on the grounds the house contained "numerous openings" through which officers could enter and there allegedly was another "open" entry way, even though entry was not made through it. Both bases for ruling the tent was "open" are wrong.

With respect to whether the tent structure was "open," when asked whether Wright's tent had any gaps or spaces, Detective Michael Hardie ("Detective Hardie") described looking through a hole from the west side of the tent. Without moving anything out of the way, Detective Hardie could see into the tent, including Wright and Keanaaina asleep on a bed. Such a hole through which one can observe the contents of a home, however, is not an "open door"; it is tantamount to a window in a house. Windows are not open "doors."

Also, when Keanaaina described the tent as "just open," he did so in response to the State's inquiry regarding the temperature inside the tent. Keanaaina explained that the tent

was hot inside and that there was no fan, only a "cross breeze" or "wind blowing in." The gaps in Wright's structure functioned as open windows of a house on a hot day. Although a house with open windows would still require a demand of entry, the Majority would hold that one is not required for a tent house.

Wright's residence was not "open" because a "breaking" was required and made for entry. Using force to enter a house constitutes a "breaking" and means a structure is not "open":

> The question whether the knock and announce requirements are invoked during the execution of a search warrant focuses upon whether there has been a breaking. Although a breaking connotes some use of force, that force may be no more than that required to turn a doorknob. An unannounced intrusion into a dwelling is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or open a closed but unlocked door.

State v. Harada, 98 Hawai'i 18, 22, 41 P.3d 174, 178 (2002) (cleaned up) (emphasis added). Detective Hardie's own testimony revealed that his pathway into the structure to reach Keanaaina was not open:

> Q. How did you get into the tent?
> A. I moved a couch. Appeared to be a couch that was blocking my path to the bed. I moved it to the – pushed it south a little bit enough for me to get through and then I approached the male on the bed.
> Q. And from the vantage point that you had found that you were looking through, where was the couch?
> A. The couch was directly below where I was looking through the – on the west side of the structure.
> Q. Like you, and then whatever the tarp structure was in front of you, and then the couch?
> A. The couch is butted up right against the tarps, yes.
> Q. So you're able to move the couch and then did you go in?
> A. Yes, I did.

Detective Hardie approached, peered into, and made his

commands from the west side of the structure. To wake Keanaaina, he entered the structure from that side, moving the tarp and couch situated below his vantage point "window" to do so.[7] Detective Hardie's actions of moving the tarp and couch to gain entry were much more than the force required to turn a doorknob and constitute a "breaking." Thus, the structure was not "open."

The Majority also adopts an unprecedented new method of finding a structure "open" for purposes of HRS § 803-37. It rules that where a use of force is "incidental" and not necessary to entry, no breaking occurs. The Majority cites no authority for this proposition. It rules that any force used by Detective Hardie, whether by moving a couch or a tarp to the side, was only incidental and does not constitute a breaking because Detective Hardie could have entered using the same

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[7] Keanaaina also explained that Wright intended the cover to be used for privacy:

> Q. Did Officer Hardie tell you how he came into the tent?
> A. No.
> Q. Okay. In the area of that pink, the pink sheet in the front on the makai side of the tent –
> A. Yes.
> Q. -- wasn't there a couch there on the inside?
> A. Under the opening, yeah.
> Q. Okay. There's a couch; right?
> A. No, not in the way but it's on the side. You can walk around. Michelle used that pink for block the doorway so you cannot see in.

(emphasis added).

opening Wright used as an exit without using force. The Majority errs on both points.

First, as noted, the Majority ignores precedent regarding what constitutes a "breaking" or use of force. Harada held that the level of force required to implicate HRS § 803-37 "may be no more than that required to turn a doorknob. An unannounced intrusion into a dwelling is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or open a closed but unlocked door." Harada, 98 Hawai'i at 22, 41 P.3d at 178 (cleaned up) (emphasis added).

Second, the Majority also erroneously rules that because Detective Hardie could have entered the tent structure through the same area in which Wright exited it, the tent was "open." According to Detective Hardie, on the north side of Wright's structure was "a small opening by a bunch of mopeds and other items." Per his instructions, Wright exited her residence via this northside access point. Officer Segobia testified, however, that in any event this pathway was also not unobstructed:

> Q Did you actually see Michelle Wright come out?
> A I did, yes.
> Q And was she upright as she exited the tent or did she have to crawl under the tarp to get out?
> A There's no actual doors in this tent. The way they had it done was (indecipherable). They had like different items holding down tarps and stuff, so she obviously would have to crawl down and move some stuff.
> Q So my question again: Did you see her exit from the

tent?
A Yes, I did.
Q Was she standing upright or did she crawl underneath the tarp to get out?
A She moved the tarp to the side.

(emphasis added).

Thus, contrary to the Majority, Detective Hardie would also have had to use force by moving the tarp to the side to enter Wright's structure through the north side. Force would have been required to be used to enter this way; therefore, it was not "open." In any event, this was not the entry used.

The Majority fails to apply our precedent holding that the requirements of HRS § 803-37 must be met if any level of "force" is used to gain entry to a house. The purposes of HRS § 803-37 are:

> (1) to reduce potential violence to both occupants and police resulting from an unannounced entry, (2) to prevent unnecessary property damage, and (3) to protect an occupant's right to privacy. If police are not required to comply with the knock and announce rule upon applying force to gain entry, the potential for violence and unnecessary property damage will increase.

Harada, 98 Hawai'i at 28, 41 P.3d at 184 (cleaned up). The Majority's ruling today does not further the statute's purposes.

3. The officers failed to demand entry

There is no dispute that the executing officers failed to demand entry into Wright's house. When a dwelling is not open, HRS § 803-37 expressly requires the executing officers to "declare the officer's office and the officer's business and demand entrance." HRS § 803-37 (emphasis added). While the

officers satisfied the first half of this requirement, they did not comply with the latter.

The first half requires an executing officer to "declare the officer's office and the officer's business." Detective Hardie testified that he did not physically knock on the tarp because it would not have made any noise; instead, he and other officers loudly announced their presence and purpose using words, which succeeded in waking at least Wright up. As noted, however, the statute does not require a "knock."[8] The trial court found that "[m]ore than one officer announced the presence of police and the search warrants using words to the effect of, 'police, search warrants.'" A loud, verbal announcement such as this satisfied the requirement that the officers declare their office and business.

However, the second half of the statute explicitly requires an executing officer to "demand entrance," which the officers here failed to do. When asked whether the executing officers demanded entrance or only asked people to come out, Detective Hardie testified, "In this situation, they requested people come out." Officer Segobia similarly stated that they asked people to come out of their tents but not that they demanded entry. The trial court found that the police only announced "police,

[8] It probably would have been difficult to "knock" on an open door of a grass house when the statute was passed in 1869.

search warrants" statements and the instructions "to exit their tents."

When executing a search warrant, however, the second requirement of demanding entry must be met to satisfy the requirements of HRS § 803-37:

> Where the knock and announce rule has been triggered, the police are required to declare their office, their business, and expressly demand entry. In other words, the requirements of the knock and announce rule are not met when police officers fail to orally demand entry, and a demand of entry cannot be implied from simply stating, "Police, search warrant."

Harada, 98 Hawai'i at 29, 41 P.3d at 185 (cleaned up) (emphasis added). Here, there is no dispute that the officers did not demand entry. Thus, the Majority again ignores precedent by ruling that an express demand for entry was not required. Although this ruling was not necessary to the Majority ruling based on its holding that Wright's house was "open" and the other requirements of HRS § 803-37 were not triggered, and thus constitutes obiter dictum, it contravenes precedent and is therefore troubling.

4. Alleged fulfillment of the objectives of HRS § 803-37 does not constitute compliance with the statute

Like the ICA, the Majority suggests that the officers did not violate HRS § 803-37 because their actions fulfilled the three purposes of the statute. The ICA cited State v. Dixon, 83 Hawai'i 13, 924 P.2d 181 (1996) for the holding, "Where the purposes of the knock and announce rules are not frustrated,

evidence need not be suppressed." However, Dixon concerned the use of a ruse when executing an arrest warrant, not a search warrant, and the applicability of HRS § 803-11 (1993), not HRS § 803-37. Later, in State v. Eleneki, 92 Hawai'i 562, 993 P.2d 1191 (2000), we determined that the policies supporting the two statutes were the same and that the Dixon rule permitting ruses to gain entry also applied when executing search warrants. Eleneki, 92 Hawai'i at 566, 993 P.2d at 1195.

The instant case does not involve the use of a ruse to gain entry without force or threat of force; the officers here used force by moving furniture and moving the tarp. The officers failed to demand entry and therefore failed to comply with the statutory requirements.

To repeat, the demand for entry is a statutory requirement that must be met. The statute requires the second step of demanding entry "(1) to reduce potential violence to both occupants and police resulting from an unannounced entry, (2) to prevent unnecessary property damage, and (3) to protect an occupant's right to privacy. If police are not required to comply with the knock and announce rule upon applying force to gain entry, the potential for violence and unnecessary property damage will increase." Harada, 98 Hawai'i at 28, 41 P.3d at 184 (cleaned up).

The Majority ignores that in State v. Maldonado, 108 Hawai'i

436, 121 P.3d 901 (2005), adopting Harada's requirement of strict compliance with HRS § 803-37, we explicitly rejected a "substantial compliance" standard for the "knock and announce" requirement of HRS 803-11[9] governing execution of arrest warrants. We stated:

> First, our prior case law contains no reference to substantial compliance; rather, it establishes that the knock-and-announce rule must be strictly followed. For example, in Harada, we held that "the requirements of the knock and announce rule are not met when police officers fail to orally demand entry, and a *demand of entry cannot be implied from simply stating, 'Police, search warrant.'"* 98 Hawai'i at 29, 41 P.3d at 185. (Emphasis added.) Significantly, we held that law enforcement must *explicitly* make a demand for entry even though it would be reasonable to infer that if law enforcement officials standing at the entry to a residence state, "Police, search warrant," then it follows that they wish to enter the residence to execute the warrant. Thus, given that we have previously found a violation of the knock-and-announce rule where law enforcement could be deemed to have substantially complied, the ICA majority in this case correctly rejected the argument that "substantial compliance" with HRS § 803-11 is legally sufficient in the absence of exigent circumstances. To remove any remaining doubt, we now expressly reject the doctrine of substantial compliance because it violates the plain language of the statute.

Maldonado, 108 Hawai'i at 444, 121 P.3d at 909.

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[9] HRS § 803-11, entitled "Entering house to arrest," provided then, as it does now, as follows:

> 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.

We explained that substantial compliance with statutory requirements is insufficient based on the "separation of powers" doctrine:

> To employ the substantial compliance analysis in a statutory reconstruction of what is plain and unambiguous in HRS § 803-11 would infringe on the legislature's prerogatives in our governmental system of separation of powers. It is true that both the fourth amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution require only that a search or seizure must be reasonable. However, where the legislature has enacted a valid statute that provides greater protection than the constitution, conformance to the statutory mandate, and not the lower reasonableness standard set forth by the state or federal constitution, is required. Because the statute thus affords greater protection than the constitution, the constitutional reasonableness inquiry is not implicated. Accordingly, we find no room in the knock-and-announce statute for the doctrine of substantial compliance; to limit the protection afforded by HRS § 803-11 with such an overlay would violate the express language of the statute and be incompatible with this jurisdiction's viable and controlling precedents.

Maldonado, 108 Hawaii at 444-45, 121 P.3d at 909-10 (citations omitted).

As pointed out in Maldonado, there is no "reasonableness" standard applicable to the statute, as it exists in the constitutional right against "unreasonable" searches and seizures. Strict compliance with the statute is required under the "separation of powers" doctrine. Although that section of the Majority opinion is also obiter dictum unnecessary to its holding, the Majority ignores precedent by ruling that "[t]he officers nevertheless satisfied the objectives of HRS § 803-37's requirement to demand entrance."

Keanaaina's motion to suppress should also have been

granted due to the failure to comply with HRS § 803-37.

III. Conclusion

For the foregoing reasons, I dissent and would vacate the ICA's judgment on appeal and the circuit court's judgment of conviction and order denying Keanaaina's motion to suppress. I would remand for further proceedings.

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson