CONCURRING AND DISSENTING OPINION BY MOON, C.J.

I agree with the plurality's holding that Hawai'i Revised Statutes (HRS) § 712-1249 (1993),[1] pursuant to which defendant-appellant Joseph Sunderland was charged and convicted, does not offend the Free Exercise Clause of the first amendment to the United States Constitution.[2] Moreover, although I agree with the dissent that Sunderland sufficiently raised and argued his privacy issue, i.e., that his conviction under HRS § 712-1249 impinges upon his right to privacy under article I, section 6 of the Hawai'i Constitution, quoted infra, I concur in the result reached by the plurality to affirm the District Court of the Third Circuit's June 23, 2004 judgment of conviction. I write separately to set forth the analysis upon which my concurrence in the result is based.

Briefly summarized, Sunderland argues that his right to possess and use marijuana for religious purposes **in his home** was protected from governmental intrusion by (1) the first amendment to the United States Constitution and (2) the right to privacy under article I, section 6 of the Hawai'i Constitution. As indicated above, I agree with the plurality that the plaintiff-

[1] HRS § 712-1249 provides that "(1) A person commits the offense of promoting a detrimental drug in the third degree if the person knowingly possesses any marijuana or any Schedule V substance in any amount. (2) Promoting a detrimental drug in the third degree is a petty misdemeanor."

[2] The first amendment, which is applicable to the states pursuant to the fourteenth amendment, Cantwell v. Connecticut, 310 U.S. 296 (1940), provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

appellee State of Hawai'i (the State) can regulate the use of marijuana, irrespective of Sunderland's claimed religious motivations. The plurality determined that, pursuant to Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), HRS § 712-1249 is a valid, religiously-neutral, and generally applicable criminal statute that prohibits conduct the State is free to regulate and, therefore, does not implicate the first amendment. See plurality opinion at 17-19. Consequently, the issue turns upon whether the purported right to possess and use marijuana in the home is protected from government intrusion by the right to privacy under article I, section 6 of our constitution, as Sunderland contends.

Article I, section 6 provides that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." This court has on numerous occasions examined the right to privacy clause in article I, section 6.[3] Of significant importance is the discussion in State v. Mallan, 86 Hawai'i 440,

[3] See, e.g., State v. Romano, 114 Hawai'i 1, 13-14, 155 P.3d 1102, 1114-15 (2007) (right to privacy does not extend to commercialized sexual activities); Janra Enters., Inc. v. City & County of Honolulu, 107 Hawai'i 314, 322, 113 P.3d 190, 198 (2005) (viewing adult materials in an enclosed panoram booth on commercial premises not a protectable privacy interest); State v. Rothman, 70 Haw. 546, 556, 779 P.2d 1, 7-8 (1989) (without a warrant, governmental seizure of telephone numbers of outgoing and incoming calls on private telephone line violates right to privacy); State v. Kam, 69 Haw. 483, 493-94, 748 P.2d 372, 378-79 (1988) (right to privacy includes possession of pornographic materials in one's own home); State v. Mueller, 66 Haw. 616, 629-30, 671 P.2d 1351, 1360 (1983) (no protected right to sexual activities for hire within the home).

950 P.2d 178 (1998), wherein this court was confronted with a similar issue as in this case -- namely, "whether the express right to privacy located in article I, section 6 of the Hawai'i Constitution encompasses a right to possess and use marijuana for recreational purposes." Id. at 441, 950 P.2d at 179 (emphasis added) (footnotes omitted).

In Mallan, the undisputed facts revealed that the defendant "was arrested in the parking lot of the Waikīkī Shell after Honolulu police officers, attracted by the odor of burning marijuana, found a partially burnt marijuana cigarette in [the defendant's] automobile." Id. at 442, 950 P.2d at 180. The defendant was charged with and convicted of the offense of promoting a detrimental drug in the third degree, in violation of HRS § 712-1249. Id. The defendant appealed, arguing that the possession of marijuana for personal use is protected by the right to privacy. Id. The Intermediate Court of Appeals, however, rejected the defendant's argument and affirmed his conviction. Id. at 442-43, 950 P.2d at 180-81. The defendant applied for a writ of certiorari, which this court granted. Id. at 443, 950 P.2d at 181.

In a 2-2-1 decision,[4] this court ultimately affirmed the defendant's conviction and concluded that the right to

[4] Former Justice Ramil announced the opinion of the court, in which I joined. Former Justice Klein wrote separately, concurring in the result, in which Justice Nakayama joined. Justice Levinson issued a dissenting opinion.

privacy does not include the right to possess and use marijuana for recreational purposes. Id. at 454, 950 P.2d at 192. In so concluding, the plurality explained the two distinct approaches that this court has utilized in interpreting article I, section 6:

> The first approach was applied by this court in State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983), and later by the plurality in Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44, reconsideration granted in part, 74 Haw. 650, 875 P.2d 225 (1993). **Under this approach, "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."** Mueller, 66 Haw. at 628, 671 P.2d at 1355 (quoting Roe v. Wade, 410 U.S. 113, 152 . . . (1973)) (citations omitted). In determining which rights are fundamental, we must look
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> > to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." . . . The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ."
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> Baehr, 74 Haw. at 556, 852 P.2d at 57 (quoting Griswold v. Connecticut, 381 U.S. 479, 493 . . . (1965) (Goldberg, J., concurring) (alterations in original). If a right is determined to be fundamental, it is subject to interference only when a compelling state interest is demonstrated. In the absence of a fundamental right, however, a statute need only satisfy the minimum rationality requirements of due process, i.e., it must have a rational basis.

Id. at 443, 950 P.2d at 181 (emphases added) (some internal quotation marks and some citations omitted).

> The second approach, adopted by this court in State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988), is ultimately based on the United States Supreme Court's decision in Stanley v. Georgia, 394 U.S. 557 . . . (1969). . . . [U]nder the Stanley/Kam approach, the right to privacy located in article I, section 6 encompasses the right to reach or view pornographic material in the privacy of one's home, as well as the correlative right to purchase such materials for use in one's home. The State cannot interfere with these rights unless a compelling state interest is demonstrated.

> It should be noted that there are two significant aspects of the Stanley/Kam approach. **First, the approach focuses squarely on the home as the situs of privacy.** Rather than focusing on intimate relationships as in the Mueller/Baehr approach, **the Stanley/Kam approach is tied to a specific place**. . . .
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> **The second aspect of the Stanley/Kam approach is that freedom of speech and freedom of the press are strongly implicated.** . . . Although Kam subsequently grounded the right to read or view pornographic material within the home on article I, section 6, we cannot ignore the fact that freedom of speech and freedom of the press are essential factors in the Stanley/Kam analysis.

Id. at 444-45, 950 P.2d at 182-83 (underscored emphases in original) (bold emphases added) (citations omitted).

The plurality, however, determined that the Stanley/Kam approach did not apply in Mallan because

> [t]he record indicate[d] that [the defendant] was not **in the privacy of his own home** when he was arrested for possession of marijuana. Rather, he was sitting in an automobile parked in a public parking lot. Additionally, **this case involve[d] the possession of marijuana, not the possession of pornographic material.** Therefore, neither of the two elements required under the Stanley/Kam approach have been met, and the right to privacy does not apply on this basis.

Id. at 447, 950 P.2d at 185 (underscored emphasis in original) (bold emphases added). The plurality further declined to extend the Stanley/Kam approach beyond the home and beyond pornography. Id. Consequently, in applying the Mueller/Baehr approach, the plurality held that "the right to possess and use marijuana cannot be considered a 'fundamental' right that is 'implicit in the concept of ordered liberty.'" Id. at 445, 950 P.2d at 183. The plurality reasoned that:

> We cannot say that smoking marijuana is a part of the "traditions and collective conscience of our people." In Hawai'i, possession of marijuana has been illegal since 1931. See 1931 Haw. Sess. L. Act 152, § 12, at 155-56. In the rest of the United States, the possession and/or use of marijuana, even in small quantities, is almost universally prohibited. Therefore, tradition appears to be in favor of

> the prohibition against possession and use of marijuana. . . . Furthermore, we cannot say that the principles of liberty and justice underlying our civil and political institutions are violated by marijuana possession laws. We dare say that liberty and justice can exist in spite of the prohibition against marijuana possession. Therefore, the purported right to possess and use marijuana is not a fundamental right and a compelling state interest is not required.

Id. at 445-46, 950 P.2d at 183-84 (footnote omitted) (emphasis added). In other words, the plurality believed that, under the circumstances in that case, the right to privacy was not implicated, and, as such, "HRS § 712-1249 need only survive the rational basis test." Id. at 446, 950 P.2d at 184. Ultimately, the plurality concluded that the defendant failed to satisfy his heavy burden of demonstrating that HRS § 712-1249 lacked any rational basis. Id. at 446-47, 950 P.2d at 184-85.

In this case, Sunderland contends that the right to privacy under article I, section 6 protects his right to possess and use marijuana in the privacy of his own home. In his view, "the instant case is readily distinguishable from Mallan" because Sunderland's "possession of marijuana in his home clearly implicated his privacy[.]" (Emphasis added.)

Preliminarily, I agree with Sunderland that Mallan is distinguishable from the instant case because the Mallan court was presented with the issue whether possession of marijuana for recreational purposes is violative of the privacy clause contained in article I, section 6 of the Hawai'i Constitution. Indeed, as that court specifically noted, "our holding is limited to the possession and use of marijuana for recreational

purposes," and, inasmuch as "other possible purposes are not before us, we express no opinion, at this time, as to whether the right to privacy protects the possession and use of marijuana for other purposes." Id. at 454 n.12, 950 P.2d at 191 n.12 (emphasis added). The Mallan court, thus, left open the question whether possession and use of marijuana in the home is protected by the right to privacy. In examining this issue, I continue to adhere to the Mueller/Baehr approach, enunciated by the plurality in Mallan.[5]

As stated by the plurality in Mallan, "[t]he right to privacy is not absolute, and there must be reasonable limits placed on activities that test constitutional boundaries." Id. at 454, 950 P.2d at 192 (emphasis in original). Such right includes only those personal rights that can be deemed

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[5] Sunderland contends that "the instant circumstances warrant application of the Stanley/Kam approach" because,

> [i]n contrast to Mallan, . . . Sunderland's possession of marijuana in his home clearly implicates his privacy and [f]irst [a]mendment rights, albeit under the free exercise clause, not freedom of speech clause. Had these constitutional rights been in the balance, the Mallan court's analysis would have afforded [that defendant] the same protections afforded the defendants in Stanley and Kam, as is urged in the instant case.

As previously stated, the Stanley/Kam approach (1) "focuses squarely on the home as the situs of privacy[,]" and (2) strongly implicates freedom of speech and freedom of press, such as pornography and obscenity. Mallan, 86 Hawai'i at 444-45, 950 P.2d at 182-83 (emphasis omitted). However, similar to Mallan, this case does not satisfy the required elements to render the Stanley/Kam approach applicable. Although he met the first element because he was arrested for possession of marijuana while in his own home, Sunderland cannot meet the second element inasmuch as the present case, like Mallan, "involves the possession of marijuana, not the possession of pornographic material." Id. at 447, 950 P.2d at 185. Moreover, because the Mallan court declined to extend the Stanley/Kam approach beyond pornography, I decline to do so as well.

"fundamental" or "implicit in the concept of ordered liberty." Id. at 445, 950 P.2d at 183 (internal quotation marks omitted). In Mallan, the plurality announced that there is no fundamental right to possess and use marijuana, reasoning that

> tradition appears to be in favor of the prohibition against possession and use of marijuana. . . . [W]e cannot say that the principles of liberty and justice underlying our civil and political institutions are violated by marijuana possession laws. We dare say that liberty and justice can exist in spite of the prohibition against marijuana possession.

Id. at 445-46, 950 P.2d at 183-84. Consequently, the inquiry is whether the purported right to possess and use marijuana, which is not a fundamental right, would transform into such a right when the activity is conducted in the home. I conclude that it does not.

In examining the framers' intent in adopting article I, section 6 of the Hawai'i Constitution, the Mallan plurality observed that:

> Nothing in the committee reports indicates that the delegates intended such a drastic step as the decriminalization of drugs for personal consumption. If the delegates had intended such a result, surely they would have placed an explicit reference in the committee reports. Instead, the committee reports contain no mention of the legalization of illicit drugs.
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> A close reading of the convention debates reveals a sincere concern, perhaps even a strong fear, among the delegates that an express right to privacy might further impede the battle against illegal drugs.
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> > Now what alarms me is that by putting in the language as it is right now -- that the right to privacy "is recognized and shall not be infringed without the showing of a compelling state interest" -- goes beyond our present statutory law and would in fact hinder law enforcement. The result would then be that it would be virtually impossible, as I can see it, to stop criminal activity conducted in what can be considered a dwelling.

> 2 [Proceedings of the Constitutional Convention of Hawai'i of 1978 (2 Proceedings)] at 629-30 (Delegate [John E.] Tam). In response, Delegate [Akira] Hino reassured Delegate Tam that the privacy provision was not intended to hinder law enforcement or protect criminals.
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> > I'd like to allay the fears of law enforcement officials and people connected with law enforcement that this provision will make it a little more difficult for the law to be enforced. This factor was recognized during our committee's deliberations. We proposed that this privacy provision be put in a separate section, of and by itself, to show that it was not the intent of the committee to upset any kind of precedents on criminal justice or law enforcement procedures; that this privacy provision would refer to and protect the rights of noncriminals.
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> Id. at 630 (Delegate Hino) (emphasis added).

Id. at 448-49, 950 P.2d at 186-87 (original ellipses and brackets omitted) (some emphases in original and some added). The Mallan plurality, relying upon numerous concerns raised by the delegates, concluded that

> the delegates who spoke in favor of the privacy provision did so based on their understanding that the right to privacy would neither hinder law enforcement nor further criminal activity. Inasmuch as we are convinced that the delegates who adopted the privacy provision did not intend to legalize contraband drugs, we also believe that the voters who later ratified the privacy provision did not intend such a result.

Id. at 450, 950 P.2d at 188 (emphasis added). Indeed, the Mallan concurrence (i.e., Justices Klein and Nakayama) was also "not convinced that it was the intent of the framers of article I, section 6 that the right to privacy envisioned by them would protect an individual from criminal prosecution for the possession and use of marijuana, or any contraband drug bought, sold, or used privately." Id. at 510, 950 P.2d at 248 (emphasis omitted). In other words, to conclude that the purported right

to possess and use marijuana in the home is "fundamental" or "implicit in the concept of ordered liberty," id. at 445, 950 P.2d at 183 (internal quotation marks omitted), would contravene the intent of the framers "not . . . to hinder law enforcement or protect criminals," id. at 449, 950 P.2d at 187 (emphasis omitted), when they adopted article I, section 6.[6]

Because there is no fundamental right to the private use and possession of marijuana, the right to privacy contained in article I, section 6 of the Hawai'i Constitution is not implicated; thus, a compelling state interest is not required to be shown.[7] Rather, HRS § 712-1249 need only survive the rational

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[6] Although recognizing that the Mallan court refused to follow the Alaska case of Ravin v. State, 537 P.2d 494 (Alaska 1975), wherein the Alaska Supreme Court held that Alaska's state constitutional right to privacy precluded prosecution of home use and possession of marijuana, Sunderland nevertheless appears to urge this court to follow the Ravin court. In Mallan, the plurality rejected the defendant's suggestion to adopt the Ravin analysis, stating that:

> Ravin is a case from another jurisdiction and is in no sense binding upon us. Furthermore, Ravin was based, at least in part, on social and cultural factors unique to Alaska. . . . [A]s far as we can determine, Alaska stands alone in extending the right to privacy to include possession and use of marijuana. Other states that have considered the issue uniformly conclude that possession and use of marijuana is not protected.

Mallan, 86 Hawai'i at 450, 950 P.2d at 188 (citations omitted). I see no reason to deviate from the Mallan court's reasoning and, therefore, would reject Sunderland's argument.

[7] The dissent criticizes my approach in analyzing privacy claims under article I, section 6 of the Hawai'i Constitution, i.e., the application of the Mueller/Baehr versus the Stanley/Kam approach. See Dissenting Op. at 5 n.1. In support of its position, the dissent relies upon "Justice Klein's separate concurrence" in Mallan, which, in the dissent's view, "refuted" the Mallan plurality's approach -- "that the right to privacy, as expressly codified in article I, section 6 of the Hawai'i Constitution, materializes only in tandem with some separate and distinct constitutional guarantee that serves as the substantive basis or catalyst of the privacy right." Id. Indeed, Justice

(continued...)

basis test set forth in Mallan. Id. at 443, 950 P.2d at 181 ("In the absence of a fundamental right, . . . a statute need only satisfy the minimum rationality requirements of due process, i.e., it must have a rational basis." (Internal quotation marks and citation omitted.)).

"Under the rational basis test, [this court] inquire[s] as to whether a statute rationally furthers a legitimate state interest. [The] inquiry seeks only to determine whether any reasonable justification can be found for the legislative enactment." Id. at 446, 950 P.2d at 184 (ellipsis and citation omitted). Moreover, this court

> has long held that: (1) legislative enactments are presumptively constitutional; (2) a party challenging a statutory scheme has the burden of showing unconstitutionality beyond a reasonable doubt; and (3) the constitutional defect must be clear, manifest, and unmistakable.

Id. (internal quotation marks and citations omitted). Consequently, Sunderland bears "the heavy burden of demonstrating that HRS § 712-1249 lacks any rational basis." Id. (emphasis in original).

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[7](...continued)
Klein (joined by Justice Nakayama) opined, as the dissent here does, that "the right of privacy embodied in article I, section 6 is a fundamental right in and of itself." Mallan, 86 Hawai'i at 510, 950 P.2d at 248 (emphasis in original). Justice Klein believed that the approach should be "to analyze the conduct itself and the circumstances under which it is prohibited to determine whether it is reasonable to give the conduct constitutional protection." Id. As previously stated and demonstrated supra, I continue to adhere to the approach taken by the Mallan plurality. Nonetheless, I note that Justice Klein did not agree with the dissent (Levinson, J.) in that case that "Hawaii's right to privacy is so broad that it protects the use and possession of marijuana for recreational purposes." Id. As Justice Klein aptly indicated, "[i]n effect, the dissent's reasoning decriminalizes the use and possession of virtually all contraband drugs used within the home or wherever a person senses being 'in private.'" Id.

Rather than advancing arguments that HRS § 712-1249 is not supported by any rational basis, Sunderland solely takes the position that a compelling state interest test applies and argues that "the government interest must be accomplished through the least restrictive means of limiting the reach of the government to conduct that affects the public, i.e., marijuana possession, use or trafficking which occurs outside of the privacy of the home." (Emphasis omitted.) However, as indicated above, the facts of the instant case do not implicate the right to privacy and, thus, only a rational basis test is applicable. Consequently, on this basis alone, Sunderland fails to satisfy his burden.

Furthermore, the stipulated evidence in this case would not have overcome the presumption of constitutionality to conclude that HRS § 712-1249 is unsupported by any rational basis. At trial, the parties stipulated into evidence transcripts from other trial proceedings,[8] wherein various experts proffered testimony relating to the effects of marijuana. The experts essentially testified that there remains a controversy as to whether marijuana has harmful effects and

[8] The parties specifically agreed to incorporate expert testimony from two unrelated cases -- State v. Shields, No. 21753, and State v. Adler, No. 25224 --, which cases dealt with whether the marijuana statute unconstitutionally burden the defendant's free exercise of religion. In Shields, this court summarily affirmed the defendant's conviction. See 90 Hawai'i 476, 979 P.2d 72 (1999). In Adler, this court issued a published opinion, holding, inter alia, that the defendant failed to establish that HRS § 712-1249.5 (1993) (governing commercial promotion of marijuana in the second degree) unconstitutionally burdened the free exercise of his religion. 108 Hawai'i 169, 178, 118 P.3d 652, 661 (2005).

indicated that it has yet to be determined conclusively what harmful effects marijuana has on the human body.[9] Indeed, as the State observed and I agree, "[t]he stipulated witness testimonies . . . support the conclusion that the medical world has not yet reached a consensus on the long-term effects of marijuana use." For example, Dr. John Paul Morgan, a physician and pharmacologist, who was qualified as an expert in the area of pharmacology and toxicology, as well as drug abuse, testified that

> marijuana, like most psychoactive preparations, has a variety of effects on humans. Like all medications, it has some toxic effects. It has some adverse effects. But[,] in general, it is my belief, and I have published and widely talked about that, that marijuana is a psychoactive drug with a surprisingly wide margin of safety.
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> That means that other than extreme doses, most humans can use it without harm to their bodies, without biological harm. . . . [B]asically, I believe marijuana is a surprisingly safe medicinal -- surprisingly safe, psychoactive preparation that may be used by humans under a wide variety of circumstances for a wide variety of uses without significant import and harm in toxicity.

Dr. Morgan, however, agreed that, although there are experts who would agree with his position, there are also experts who would disagree. Dr. Morgan could only relate that there is no convincing medical evidence that marijuana causes "amotivational syndrome" where a person loses interest in social, academic or

[9] Testimonies of a total of nine experts from two separate trials were admitted at Sunderland's trial. Specifically, from the Shields trial, testimonies of Dr. John Paul Morgan, Dr. Blase Harris, Dr. Willis Butler, Dr. Eric A. Voth, Donald Barry Lupien (a therapist), Earl Mick Mollica (expert in the training of law enforcement of laws dealing with narcotics), and Tanya Jean Canoso (a clinical psychologist and substance abuse counselor) were admitted. From the Adler trial, testimonies of Canoso, Keith Kamita (administrator of the state's narcotic's enforcement division of public safety), and Dr. William Wenner were admitted.

work pursuits, and there is no data or empirical findings that marijuana produces addictive behavior in other than a minuscule proportion of users. Further, although he responded in the negative when asked whether the use of marijuana caused brain damage, Dr. Morgan testified that,

> [t]here are, in reality, no human studies of marijuana users who have died and whose brains have been examined so that one could solve the problem that way, but there have been a number of studies over the years which people have felt may be reflections of brain damage.

Dr. Morgan also indicated that,

> heavy marijuana smoking over a lengthy period of time is associated with lung pathology and lung disease.
> . . . .
> [Although] it is clear that marijuana smoking in heavy doses may be associated with pulmonary disease[, i]t is not clear how severe that pulmonary disease is, and it does not appear to be associated with emphysema.
> . . . .
> In fact, at this moment, there are no proved cases of pulmonary cancer related to marijuana smoking. There are cases reports that say maybe these men had cancer because of their marijuana smoking, but most of them were tobacco smokers as well. So at moment, there is no proof that marijuana causes pulmonary cancer. It may. I would not want to say it won't or it never will, but at moment, there's no proof.

Similarly, Dr. Blase Harris, a psychiatrist who was qualified as an expert in his field, acknowledged that, in his practice, he has never seen a case of psychological or physical addiction to marijuana. He believed that amotivational syndrome is a theoretical construct which is not scientifically proven and there is no evidence that marijuana causes amotivational syndrome. Dr. Harris also stated that, "there is no evidence that marijuana, in any scientifically controlled study, causes harm. There are theoretical constructs, but no scientific

proof." See also Dr. Butler's testimony, stating that there is "no conclusive proof" as to the harmful effects of marijuana.

Based upon the experts' testimonies and the fact that "a genuine controversy exists and scientists have not reached a consensus as to the harmful effects of marijuana," I cannot say that Sunderland has sufficiently rebutted the presumption of constitutionality nor proven that HRS § 712-1249 is unsupported by any rational basis. Mallan, 86 Hawai'i at 447, 950 P.2d at 185 (also concluding that, based upon the experts' testimonies, the defendant has not overcome the presumption of constitutionality); see also State v. Baker, 56 Haw. 271, 276, 535 P.2d 1394, 1397 (1975) ("It is well settled that when a substance has been proscribed as harmful, the presumption of constitutionality applies although there are conflicting views as to its harmful effects.").

Moreover, it is noteworthy that controlled substances are categorized into five schedules based upon their potential dangerousness. See HRS § 329-11 (Supp. 2006) ("In making a determination regarding a substance, the department of public safety shall assess the degree of danger or probable danger of the substance[.]"). Marijuana is listed in HRS § 329-14(d)(20) (Supp. 2006) as a Schedule I controlled substance, which indicates "the highest degree of danger or probable danger." HRS § 329-13 (1993). Through its inclusion of marijuana as a prohibited controlled substance and its promulgation of the

statute at issue -- HRS § 712-1249 --, the legislature clearly has declared that the possession and use of marijuana should be subjected to criminal penalties. Such legislation reflects a legislative judgment that prohibition of activities relating to marijuana is a substantial interest of the State. Preservation of the public health and safety is the obvious purpose underlying the State's drug laws.[10] I, therefore, believe that this court should not substitute its judgment for that of the legislature where, as here, the challenged legislation reflects the legislature's clear intent to control a substance on a rational basis. See State v. Cotton, 55 Haw. 148, 151, 516 P.2d 715, 718 (1973) (stating that, "enactment of laws is the prerogative of the legislature and it is not for the judiciary to second-guess the legislature or substitute its judgment for that of the legislature").

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[10] As the State pointed out, in this case,

> minors were present. The fact that they were asleep when Sunderland was smoking is of minimal significance. The pipe was left in a place where they would have had access to it, the location of the pipe within the house suggests that the smoking was within the house, where the minors although asleep were undoubtedly still breathing.
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> The legislature has enacted any number of statutes to protect the health and welfare of minors, including provisions disallowing sales of cigarettes to minors, HRS § 328K-7 and HRS [§] 709-908; and perhaps even more pertinent, HRS [§] 134-10.5, a law that makes it a crime for adults not to secure firearms in a home where minors are present.

Based upon the foregoing, I would affirm, as the plurality does, the district court's June 23, 2004 judgment of conviction against Sunderland.