CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I agree with the dissent that Defendant-Appellant Joseph Sunderland (Appellant) sufficiently raised the argument that enforcement of Hawai'i Revised Statutes (HRS) § 712-1249 (1993) violates his right to privacy guaranteed by article I, section 6 of the Hawai'i Constitution. Dissenting opinion at 3. The points of error section of Appellant's opening brief plainly states that "the right to privacy under the Hawaii State [C]onstitution also protects [Appellant's] right to possess marijuana for religious purposes in his home." (Emphases added.)

I also note that the plurality's seeming assertion that a plain error argument must be raised in the trial court for this court to consider an issue, see plurality opinion at 8, is wrong and antithetical to our rules and plain error doctrine. It is well-settled that plain error may be noticed even if a defendant did not assert a plain error argument on appeal. See Hawai'i Rules of Penal Procedure Rule 52(b) (2007) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); Hawai'i Rules of Appellate Procedure Rule 28(b)(4) (2007) (An "appellate court, at its option, may notice a plain error not presented." (Emphasis added.)). Recently, in State v. Ruggiero, 114 Hawai'i 227, 241, 160 P.3d 703, 717 (2007), all members of this court, including the plurality, agreed to note plain error although the error was not brought to the attention of the trial court or this

court. See also In re Doe, 102 Hawai'i 75, 87, 73 P.3d 29, 41 (2003); State v. McGriff, 76 Hawai'i 148, 155, 871 P.2d 782, 789 (1994) (citing State v. Grindles, 70 Haw. 528, 530, 777 P.2d 1187, 1189 (1989) (stating that "the power to sua sponte notice 'plain errors or defects affecting substantial rights' clearly resides in this court" (quoting State v. Hernandez, 61 Haw. 475, 482, 605 P.2d 75, 79 (1980)))).

The plurality's quote regarding Appellant's reference in argument to the court to "that case in Hawaii" involving the right of privacy presumably refers to State v. Mallan, 86 Hawai'i 440, 950 P.2d 178 (1998). In that case, the plurality held that "the right to privacy in article I, section 6 of the Hawai'i Constitution does not encompass a right to possess and use marijuana for recreational purposes[,]" id. at 454, 950 P.2d at 192, by the defendant in a parking lot. But the Mallan plurality limited its holding "to the possession and use of marijuana for recreational purposes" and stated that "[i]nasmuch 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 192 n.12.

Mallan thus left open the question of privacy as it related to use of marijuana in non-public places and for non-recreational purposes. Accordingly, the fact that Appellant's "argument [before the court] differs from the argument [he] now seeks to assert on appeal -- that his right to privacy

encompasses the right to possess marijuana for religious purposes within the confines of his own home[,]" plurality opinion at 7, is not foreclosed by Mallan or, inferentially, by his reference to Mallan. Appellant's allusion to Mallan before the trial court, then, does not preclude recognition of plain error on the ground he argues on appeal either as a matter of the factual circumstances on this record, or as a matter of well established case law and our appellate rules.

However, under the circumstances of this case, I concur in the result. The plurality opinion in State v. Kantner, 53 Haw. 327, 493 P.2d 306 (1972), upheld general regulation of marijuana use "absent an intimate connection with a 'preferred freedom[,]'" as constitutional. Id. at 333, 493 P.2d at 310 (Richardson, C.J., announcing the judgment of the court).[1] Relatedly, the plurality relies on established law in Employment Div., Dep't. of Human Res. of Oregon v. Smith, 494 U.S. 872, 885

[1] It should be noted that Justice Levinson disagrees that this was the holding of the plurality. Dissenting opinion at 3 n.1 ("I disagree with Justice Acoba that '[t]he plurality opinion in [Kantner], 53 Haw. [at 333,] 493 P.2d [at 310 (Richardson, C.J., announcing the judgment of the court),] upheld general regulation of marijuana use[,] 'absent an intimate connection with a 'preferred freedom[,]' as constitutional.'"). However, to be clear, in Kantner this court upheld "the constitutionality of the statutory scheme for the control of the possession of marihuana . . . , which served as the basis for parole revocation of [the petitioners] and upon which [the] defendant was convicted." 53 Haw. at 334, 493 P.2d at 307. Justice Abe in his concurrence joined Chief Justice Richardson and Justice Marumoto in affirming the judgment of the trial court. Id. at 339, 493 P.2d at 313 (Abe, J., concurring).

Although Justice Abe did "not agree with Chief Justice Richardson that one does not enjoy the fundamental constitutional right to smoke marijuana[,]" he concluded that because "the appellants have conceded both in the trial court and on appeal that the State may regulate the use of marijuana under its police power[,]" it would be unreasonable to conclude that the State failed to meet its burden of proof "that the use of marijuana is not only harmful to the user but also to the general public before it can prohibit its use." Id. at 338-39, 493 P.2d at 313 (Abe, J., concurring) (emphasis added).

(1990), wherein the U.S. Supreme Court noted that "[t]o make an individual's obligation to obey" a generally applicable law "contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'--permitting him, by virtue of his beliefs, 'to become a law unto himself,' Reynolds v. United States, 98 U.S. [145,] 167 [(1878)]--contradicts both constitutional tradition and common sense."

Later, in Mallan, as noted above, the plurality excluded the "use of marijuana for recreational purposes[,]" 86 Hawai'i at 454 n.12, 950 P.2d at 192 n.12 (emphasis in original), in a public place from the scope of the right to privacy in article I, section 6 of the Hawai'i Constitution, despite the matters cited by the dissent herein regarding Kanter and Mallan. In any event, under the specific facts and circumstances of this case, it is debatable whether it has been demonstrated that the conduct here entails "an intimate connection with a 'preferred freedom.'"[2] Kantner, 53 Haw. at 333, 493 P.2d at 310.

[2] The facts here indicate that the officer involved "observed three girls sleeping on a futon bed in the living room. [The officer] subsequently observed a six-inch marijuana pipe on the kitchen table." Whether a compelling state interest would encompass a situation where the protection of minors would be paramount is an underlying question. See State v. Kam, 69 Haw. 483, 496 n.2, 748 P.2d 372, 380 n.2 (1988) (concluding that "[w]e do not determine whether a compelling government interest justifies the ban on certain types of obscenity" in situations involving the sale of pornography to minors); but see Ashcroft v. ACLU, 542 U.S. 656, 659-60 (2004) (affirming preliminary injunction against a "statute enacted . . . to protect minors from exposure to sexually explicit materials on the Internet, the Child Online Protection Act . . . , 112 Stat. 2681-736, codified at 47 U.S.C. § 231," because the statute likely violated the First Amendment).