DISSENTING OPINION BY LEVINSON, J.

I dissent.

I agree with the plurality's characterization of the defendant-appellant Joseph Sunderland's point of error on appeal as being that "his possession of marijuana at home and for religious purposes was protected by the free exercise clause of the first amendment to the United States Constitution, as well as his right to privacy under article I, section 6 of the Hawai'i Constitution." Plurality opinion at 1. I disagree, however, that "Sunderland [f]ailed to [p]reserve [h]is [r]ight to [p]rivacy [a]rgument on [a]ppeal" on the basis that the argument that he advanced in the circuit court "differ[ed] from the argument Sunderland now seeks to assert on appeal." Id. at 5, 7.

The "statement of points of error" section of Sunderland's opening brief includes the following:

> . . . [T]he lower court failed to consider the extent to which the government's interest in regulating Mr. Sunderland's religious practices was further attenuated by his right to privacy. As discussed below at Argument I.B., when First Amendment pursuits are conducted in the home, the right to privacy provides an additional layer of protection from governmental intrusion. Stanley v. Georgia, 394 U.S. 557 . . . (1988). In Stanley v. Georgia, the United States Supreme Court examined the extent to which the state of Georgia could enforce statutes outlawing obscenity. The court acknowledged that the government had a legitimate interest in regulating obscenity for the protection of the general public welfare. However, when it came to possessing obscene materials in the privacy of the home, the government's interest did not justify the "invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home." 394 U.S. at 565 . . . .
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> By analogy, the free exercise clause of the First Amendment must also give greater protection to Mr. Sunderland's practice of his religion in his home then [sic] in public places. The stated governmental interests in prohibiting the use of marijuana for the protection of the

> welfare of the general public are similar to those regarding obscenity. However, as the United States Supreme Court held in Stanley, whatever the governmental interests for other laws regulating obscenity, they do not justify reaching into the privacy of an individual's own home. 394 U.S. at 565 . . . . Similarly, in this case, the government's enforcement cannot reach into Mr. Sunderland's home where the use of marijuana is tied to his fundamental right of free exercise of his religion.
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> Finally, the right to privacy under the Hawai[']i State constitution also protects Mr. Sunderland's right to possess marijuana for religious purposes in his home. Defense counsel framed the constitutional question as a blend of freedom of religion and privacy interests: "This case is about someone in his own home possessing a very small amount of marijuana for religious purposes. That is the only issue in this case." The lower court clearly was aware that Mr. Sunderland's conduct in his home implicated his privacy interests. ["You're saying that there is no compelling state interest in preventing him from using or possessing marijuana for religious purposes in the privacy of his own home."] However, the lower court's ruling merely focused on the [question] whether the state had shown a compelling state interest without engaging in any further analysis.
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> Defense counsel mistakenly believed that the issue of whether the Hawai[']i state constitution protected marijuana use in the home for religious purposes had been answered in the negative: "They have done that case in Hawai[']i. And on a privacy level, you're not allowed to have marijuana. They have raised that." Defense counsel was apparently referring to State v. Mallan, 8[6] Haw[ai'i] 440, 950 P.2d 178 (1998), wherein the Hawai[']i Supreme court held that the state constitutional right to privacy does not extend to possession of use of marijuana in a public place for recreational purposes. Mallan expressly left open the question of whether the right to privacy protects the possession or use of marijuana for other purposes. 86 Haw[ai'i] at 454 [n.12], 950 P.2d at 192 [n.]12. As discussed below at Argument I.C., Mallan actually provides grounds for concluding that the right to privacy protects possession of marijuana in the home when its use is connected to the exercise of a fundamental right such as exercise of religious freedom. Thus, Article I, Section 6 of the Hawai[']i Constitution provides separate grounds for granting Mr. Sunderland's motion. The lower court erred in failing to so conclude, and in . . . convicting Mr. Sunderland as charged.

Opening brief at 11-13. (Some brackets added and some in original.) (Record citations omitted.)

Given the foregoing, it is apparent to me that the plurality's view of what is necessary to preserve an issue for appellate review is unduly cramped, although the plurality's unwillingness to reach the issue on the merits may not be such a bad thing, considering the state of lockdown in which the right to privacy, as supposedly protected by article I, section 6 of the Hawai'i Constitution, is kept these days. The fact is that, "[a]lthough [Sunderland] did not explicitly phrase [his conviction, despite its article I, section 6 implications,] in terms of plain error, he did raise the issue and argued it as error." State v. Frisbee, 114 Hawai'i 76, 84, 156 P.3d 1182, 1190 (2007) (Moon, C.J., concurring) (emphases in original). I would therefore reach the privacy issue that Sunderland raises on appeal and, based upon the analysis set forth in my dissenting opinion in Mallan, 86 Hawai'i at 454-509, 950 P.2d at 192-247,[1]

[1] I disagree with Justice Acoba that "[t]he plurality opinion in State v. Kantner, 53 Haw. 327, [333,] 493 P.2d 306[, 310] (1972), upheld general regulation of marijuana use[,] 'absent an intimate connection with a "preferred freedom[,]"' as constitutional." Justice Acoba's concurring and dissenting opinion at 3 (some brackets added and some in original). Rather, the Kantner plurality -- Chief Justice Richardson and Justice Marumoto -- "doubt[ed] . . . that use of a mind-altering drug, absent an intimate connection with a 'preferred freedom', requires the standard of review which appellants suggest." 53 Haw. at 333, 493 P.2d at 310. Justice Abe did "not agree . . . that one does not enjoy the fundamental constitutional right to smoke marijuana." 53 Haw. at 336, 493 P.2d at 312 (Abe, J., concurring). Justice Levinson wrote that

> [t]he crucial issue in this case is whether a person has a constitutionally protected right purposely to induce in himself, in private, a mild hallucinatory mental condition through the use of marihuana. I believe that there is such a right and that it is founded upon the constitutional rights to personal autonomy and privacy, guaranteed by . . . the Hawaii Constitution as well as by the due process clause of the fourteenth amendment of the Federal Constitution. I believe that HRS § 329-5 (Supp. 1971) [i.e., the statutory predecessor of HRS § 712-1249] violates both constitutions because it unreasonably

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infringes upon these rights . . . .

Id. at 339, 493 P.2d at 313 (Levinson, J., dissenting). And in Justice Kobayashi's view,

> our present method of regulating marijuana -- inclusion of marijuana within the classification of criminally proscribed narcotics -- is unreasonable and unconstitutional in violation of the due process and equal protection clauses of the Fourteenth Amendment.
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> . . . Even if I felt that the legislature's present treatment of marijuana achieved a noble end, which I do not, HRS § 329-5, which proscribes the use of narcotics and classifies marijuana as a narcotic, must be regarded as an unconstitutionally arbitrary legislative declaration tantamount to an abuse of the state's police-power.

Id. at 347-48, 493 P.2d at 318 (Kobayashi, J., dissenting).

Indeed, although he disagreed "that Hawai'i's right to privacy is so broad that it protects the use and possession of marijuana for recreational purposes," Justice Klein (with whom Justice Nakayama joined), concurring separately in Mallan, expressed his unambiguous view that the only "preferred freedom" implicated in a right-to-privacy claim is the right to privacy itself, as recently enshrined in article I, section 6 of the Hawai'i Constitution:

> This state's constitution was amended after the 1978 Constitutional Convention by adding the specific right to privacy provision set forth in article I, section 6. There is no question that the right to privacy embodied in article I, section 6, is a fundamental right in and of itself. Any infringement of the right to privacy must be subjected to the compelling state interest test. Thus, the only analysis this court need utilize when testing a right to privacy claim such as Mallan's is whether the conduct prohibited by law is entitled to protection under article I, section 6. . . .
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> . . . The only approach that makes sense is 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.

86 Hawai'i at 510, 950 P.2d at 248 (Klein, J., concurring, joined by Nakayama, J.) (emphases in original).

The "core question" at issue in Mallan was

> whether, as a matter of constitutional law, the police power of the state extends to criminalizing mere possession of marijuana for personal use, as proscribed by Hawai'i Revised Statutes (HRS) § 712-1249 (1993). Over twenty-five [now thirty-five] years ago, in . . . Kantner . . . , three justices of his court -- a majority -- answered the same question, as it pertained to the predecessor statute, with an emphatic and unequivocal "No." For purposes of the question before us, the only constitutionally significant event to occur since Kantner has been the

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promulgation of article I, section 6 of the Hawai'i Constitution (1978), which has given an express and more expansive local home to the proposition -- theretofore residing, for the most part, within the "penumbra" emanating from the federal Bill of Rights -- that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."

Id. at 454-55, 950 P.2d at 192-93 (Levinson, J., dissenting) (footnotes omitted). Kantner spawned four separate opinions -- a plurality opinion, a concurrence, and two dissents.

> The overarching irony of the Kantner quaternary is that it was only because the Richardson/Marumoto plurality and the Abe concurring opinion took the position that the appellants had conceded arguendo that the state's police power extended, per se, to the criminalization of marijuana possession that the Kantner appellants lost their appeal and thereby changed constitutional history. In light of the combined positions of Justices Abe, Levinson, and Kobayashi, . . . it is apparent that, but for the appellants' alleged concession, HRS § 329-5 would have been struck down as unconstitutional by this court, HRS § 712-1249, as subsequently enacted in 1972, would not have been applied to the possession of marijuana, and Mallan would have had the right to be let alone . . . and to tell the state to mind its own business.

Id. at 474, 950 P.2d at 212 (Levinson, J., dissenting.

Chief Justice Moon's assertion, set forth at 11 of his concurring and dissenting opinion, that "[b]ecause 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" perpetuates the Mallan plurality's misapprehension, described and refuted in Justice Klein's separate concurrence set forth supra, 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. That basic misapprehension grows out of the fact that the right of privacy enshrined in article I, section 6 is stand-alone, see Mallan, 86 Hawai'i at 486-87, 950 P.2d at 224-25 (Levinson, J., dissenting) ("'The right to personal autonomy, to dictate his lifestyle, to be oneself are included in this concept of privacy. As Justice Abe stated in his concurring opinion in State v. Kantner, 53 Haw. 327, 493 P.2d 306 (1972): each person has the "fundamental right of liberty to make a fool of himself as long as his act does not endanger others, and that the state may regulate conduct of a person under pain of criminal punishment only when his actions affect the general welfare -- that is, where others are harmed or likely to be harmed." . . . The importance of this amendment is that it establishes that certain rights deserve special judicial protection from majority rule. It recognizes that there will always be a dynamic tension between majority rule, which is the basis of a democratic society, and the rights of individuals to do as they choose, which is the basis of freedom . . . . Your Committee . . . intends that the right [of privacy] be considered a fundamental right and that

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reverse the district court's judgment of conviction.

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interference with the activities protected by it be minimal.'") (quoting Stand. Comm. Rep. No. 69, reprinted in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978 (1980) (some emphasis deleted)), unlike the federally recognized constitutional right to privacy, which emanates from the "penumbra" of other expressly enumerated protections contained in the federal Bill of Rights and is therefore, of necessity, parasitic of them. See, e.g., Griswold v. Connecticut, 381 479, 484-85 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . We have had many controversies over these penumbral rights of 'privacy and repose.'"); Schmerber v. California, 384 U.S. 757, 778 (1966) (Douglas, J., dissenting) ("We are dealing with the right of privacy which . . . we have held to be within the penumbra of some specific guarantees of the Bill of Rights."). Indeed, Chief Justice Moon's suggestion that "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" (emphasis omitted) and his conclusion that "it does not," Chief Justice Moon's concurring and dissenting opinion at 8-9, is another example of the fallacy of trivialization that I discussed extensively in my Mallan dissent, as well as another manifestation of the Mallan plurality's misapprehension. The issue is not whether there is a fundamental constitutional right to possess and use marijuana in the home. The issue is whether article I, section 6, which establishes a fundamental right to privacy and which, as noted above, the framers expressly intended to limit the state's power to "regulate conduct of a person under pain of criminal punishment" to instances "where others are harmed or likely to be harmed," constrains the state from criminalizing mere possession of marijuana for personal use. My thesis is that it does.