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Supreme Court
SCWC-11-0000774
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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.

SYLVA RIVERA, Petitioner/Defendant-Appellant.

SCWC-11-0000774

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000774; CR. NO. 10-1-1327)

FEBRUARY 6, 2014

CONCURRING AND DISSENTING OPINION BY
RECKTENWALD, C.J., IN WHICH NAKAYAMA, J., JOINS

For the reasons set forth in my dissenting opinion in State v. Apollonio, 130 Hawai'i 353, 364-371, 311 P.3d 676, 687-694, I respectfully dissent from the majority's conclusion that the lack of a mens rea allegation in the charge requires that the case be dismissed without prejudice despite the defendant's untimely objection to the sufficiency of the charge. In my view,

where a defendant does not object to a deficient charge in the trial court, the defendant is required to show how he or she was prejudiced by the error. In the instant case, the defendant has not demonstrated how he was prejudiced by the deficient charge.

Accordingly, I respectfully dissent from the majority's decision to remand for dismissal of the charge. However, I concur in the majority's discussion of the defendant's arguments on the merits, and would affirm his conviction for the reasons set forth therein.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

