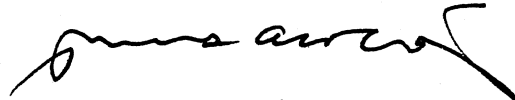


CONCURRING OPINION BY ACOBA, J., IN WHICH DUFFY, J., JOINS

I continue to adhere to the position taken in my dissent in State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004). However, in the absence of a mandate "that the states retroactively apply a new [federal] constitutional rule [of procedure] for criminal cases[,] . . . applicable . . . through the fourteenth amendment[,]" State v. Garcia, 96 Hawai'i 200, 213 n.19, 29 P.3d 919, 932 n.19 (2001), I concur in the result.



James E. Duffy, Jr.