

CONCURRING OPINION BY ACOBA, J.,  
WITH WHOM DUFFY, J. JOINS

I continue to adhere to the position taken in my dissents in State v. White, 110 Hawai'i 79, 91, 129 P.3d 1107, 1119 (2006) (Acoba, J., dissenting, joined by Duffy, J.) and State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004) (Acoba, J., dissenting, joined by Duffy, J.). However, in the absence of a mandate "that the states retroactively apply a new [federal] constitutional rule for criminal cases[,] . . . applicable to the states through the fourteenth amendment[,]" State v. Garcia, 96 Hawai'i 200, 213, 29 P.3d 919, 932 (2001), I concur in the result.

  
James E. Duffy, Jr.