DISSENT BY ACOBA, J.

I respectfully dissent and believe the application for a writ should be granted in this court's discretion because I believe State v. Tookes, 67 Haw. 608, 699 P.2d 983 (1985), should be reexamined.

In this case Detective Eric Egami apparently testified that Petitioner/Defendant-Appellant Kun Ok Cho (Petitioner) asked him if he knew what happened in a place like Kiku Relaxation Parlor, to which he replied, "I think so." At the hearing, Petitioner's counsel asked Detective Egami if at that point he felt it "was an opportunity . . . to try and get a violation there?" Detective Egami responded to Petitioner's counsel that he was "not gonna go and ask for it."

Detective Egami also testified that Petitioner stroked his penis for a brief time and asked if he wanted a "combination," a term Detective Egami explained during testimony that was "street vernacular for fellatio and sexual intercourse." Detective Egami further testified that Petitioner held up two fingers. Detective Egami stated that he asked Petitioner if she meant $200.00 and that Petitioner responded by saying "two hundred okay, yeah." According to Detective Egami's testimony, Petitioner also responded by saying "shish, be quiet."

In her motion to dismiss, Petitioner argues that Detective Egami's conduct of allowing himself to be massaged in the nude and in allegedly having the Petitioner stroke his penis

in the course of the investigation, constituted "government conduct [that] violates fundamental fairness and 'shocks the conscience', and this violation of due process requires dismissal" of the case against Petitioner. Petitioner argued that the Honolulu Police Department's policy of allowing police officers to readily engage in sexual contact with a suspect in order to deter prostitution "allows the police officer to engage in a broad range of sexual activity under the guise of conducting an investigation" and "should not be condoned or encouraged."

In Tookes, this court held that a police agent "by actually engaging in sexual activity with the defendants," 67 Haw. at 611, 699 P.2d at 986, did not engage in conduct that was so "outrageous . . . [as to] bar the government from invoking judicial process to obtain a conviction[,]" id. (quoting United States v. Russell, 411 U.S. 423, 431-32 (1973)), and was "'conduct that shocks the conscience' sufficiently to trigger a defense bottomed on the due process clause[,]" id. (citation omitted). Tookes noted that "[the civilian volunteer's] conduct, if undertaken by a police officer, would have violated an internal Department rule against engaging in sex with a prostitute in order to obtain evidence . . . [but t]here was no showing . . . that such a rule was compelled by law or the constitution." Id. at 613, 699 P.2d at 987.

However, this court recently decided a case long after

Tookes in which the police were able to obtain evidence of solicitation without resorting to sexual relations or contact. See State v. Romano, 114 Hawai'i 1, 14, 155 P.2d 1102, 1115 (2007) (affirming conviction under HRS § 712-1200(1) where evidence of prostitution was conversation between undercover police officer and defendant agreeing to exchange sexual conduct for money, but where the transaction was not consummated). Moreover, in this case there was not a violation of a policy but an affirmative official policy that sanctioned engaging in "limited forms of sexual contact, like[] with the hand[,] . . . in the process of acting like a normal customer." Whether the change in policy stemmed from Tookes is not evident from the record, but appears to be an extension of this court's ruling in that case. I believe such an official policy poses serious questions of a constitutional nature and of the involvement of the courts in sanctioning use of the resulting evidence in the courtroom, at least under the Hawai'i Constitution. Therefore, granting certiorari is appropriate.