Approved: March 20, 2006
Date

MINUTES OF THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman John Edmonds at 1:30 P.M. on March 8, 2006 in Room 313-S of the Capitol.

All members were present.

Committee staff present:
Athena Andaya, Kansas Legislative Research Department
Dennis Hodgins, Kansas Legislative Research Department
Mary Torrence, Revisor of Statutes Office
Carol Doel, Committee Secretary

Conferees:
Phillip Cosby - Prairie Cosby
Austin Vincent - Attorney

Others attending:
See attached list

The Chairman opened the floor for introduction of bills.

Representative Cox requested a bill concerning identity theft bill which would coincide with a bill regarding personal records possessed by businesses; requiring certain actions regarding disposal and providing penalties for violations.

With no objections, that was accepted for introduction.

A CD copy of Dr. Prentice' briefing was given to each member of the committee for review.

Chairman called for a motion to adopt minutes from February 7th, 8th, 9th, 13th, 14th, 15th, and 20th.

Representative Brunk made a motion to adopt the above minutes. Representative Siegfreid seconded the motion. Minutes were adopted.

Committee attention was directed to **HB 2912** - a bill concerning promoting obscenity; deleting provisions concerning devices promoted to emphasize their sexually provocative aspects. Chairman Edmonds opened the meeting for public hearing.

Phillip Cosby of Abilene, Kansas spoke to the committee in support of **HB 2912**. For the past two and one-half years, Mr. Cosby has worked with twelve Kansas communities concerning the dangers of pornography to individuals and communities. He gave the opinion that Kansas has a good obscenity statute in place, however, the Kansas obscenity statute does have one small flaw that has chilled the forward progress of prosecuting obscenity in Kansas communities. Mr. Cosby would propose amending the Kansas Statute 21-4301 to remove the words "sexually provocative aspect: on lines 30 and 35. For committee review, Mr. Cosby included a copy of the twenty nine indictments of devices by the Dickinson county Grand Jury, a copy of an article from the Abilene Reflector-Chronicle and a copy of the district court case regarding the promotion of obscenity. (Attachment 1)

Austin Vincent, an attorney from Topeka, Kansas, addressed the committee supporting **HB 2912** an amendment to K.S.A. 21-4301. The bill would removed the words "sexually provocative aspect" from the statute. Mr. Vincent further stated that without the amendment, it is most likely that the sale or distribution of "obscene devices" will not be prosecuted in Kansas. (Attachment 2)

With no other person wishing to address **HB 2912**, Chairman Edmonds closed the public hearing.

There was no further business before the committee and the meeting was adjourned.

FEDERAL AND STATE AFFAIRS
GUEST LIST
Date 3-8-06

K:d	
Lindsey Douglas	Hein Law Firm

TESTIMONY OF PHILLIP COSBY
BEFORE THE KANSAS HOUSE FEDERAL & STATE AFFAIRS COMMITTEE
March 8th , 2006

Chairman Edmonds and honorable members of the House Committee on Federal & State Affairs, my name is Phillip Cosby of Abilene, Kansas. I am honored to have the privilege to speak to you in support of HB 2912 addressing the small flaw in the Kansas obscenity statute.

In the past two and a half years I have spoken to thousands of Kansans and I am currently working with about twelve Kansas communities concerning the dangers of pornography to individuals and communities. Court upheld evidence continues to mount pointing to pornography and obscenity as a real and growing danger to families and communities. Common sense tells us that something has gone terribly wrong and we can no longer ignore this issue but we must talk and act to address the danger obscenities present to the public.

Some say it is too late, that we have become desensitized to the point of indifference. Indeed, indifference may have been our condition, as evidenced by a fifteen year dormancy of obscenity prosecutions in Kansas. I believe and I have seen that indifference is no longer the prevailing wind in Kansas. A good obscenity statute is in place and indifference is being set aside.

However the Kansas obscenity statute does have one small flaw that has chilled the forward progress of prosecuting obscenity in Kansas communities. One public prosecutor wrote me a letter stating that one potential reason for this fifteen year unaddressed flaw was the possible indifference of the legislature. In recent months I have not found that to be the case in the legislature any more than I have observed in the general Kansas populace. It is simply a matter of a growing awareness in contrast with the current dismay at the increasing tempo and burden of sexual criminal behavior. Together we all share the blame for fifteen years of dormancy and today we share in addressing part of the remedy.

On April 1st 2005 ten counts of promotion of obscenity charges were brought against the "Lions Den Adult Superstore" in Dickinson County, Kansas. The ten items charged were derived from earlier, April 2004 Dickinson County Grand Jury indictments of twenty nine counts of promotion of obscenity. (see yellow attachment)

On September 7th 2005, Honorable Robert D. Innes, Assigned Senior Retired District Judge dismissed the Dickinson County obscenity charges based solely on the unconstitutionality of the words "sexually provocative aspect" in harmony with the 1990 Kansas Supreme Court "Hughes" ruling.

Central to the purpose of this bill is to amend the Kansas Statute 21-4301 to remove the words "sexually provocative aspect" on lines 30 & 35.

* Review of the United States Supreme Court 1973 "Miller" decision. Obscenity is not protected 1st amendment free speech. However obscenity was not defined for the entire nation but left to "Community Standards" determined by a judge or a jury trial.

* Review and highlight of Abilene Reflector news story. Two years of work to discover this flaw.

* Review of Judge Innes ruling in light of the 1990 Kansas Supreme Court "Hughes" case. "The General Assembly has never amended the language thus singled out for criticism"

Definition of "prurient" "arousing an immoderate or unwholesome interest or unusual sexual desire" as opposed to the words "sexually provocative" "The state may not criminalize a normal, non-prurient interest in sex".

(R) Senator Sam Brownback's judiciary committee hearing on pornography. March 2005

"This hearing will emphasize two well-established legal principles. The first is that the Supreme Court has clearly and repeatedly held that obscenity does not merit First Amendment protection. The second is that the government has a legitimate and constitutionally valid interest in regulating obscenity through, among other things, the enforcement of relevant federal and state statutes." "...government has a compelling interest in pornography prosecution"

(D) Senator Joe Lieberman on a 25% proposed tax on internet pornography, July 2005:

"All officials in positions of responsibility must choose which side of this battle they are on. We are taking our stand, and we are taking our stand on the side of parents... in support of efforts on the part of law enforcement and others to combat Internet and pornography-related crimes."

On May 5, 2005 the US Department of Justice announced that it is establishing an **Obscenity Prosecution Task Force** "dedicated exclusively" to the investigation and prosecution of obscenity crimes. Distribution of hardcore pornography, has reached epidemic proportions, and law enforcement must make a concerted effort to deal with it.

A number of communities in Kansas desire to move forward with "Promotion of Obscenity" charges against pornography outlets but have been hampered by the issue of the words "sexually provocative aspect" found to be unconstitutional.

Today I am asking you to vote to amend this statute to conform to the 1990 Kansas Supreme Court ruling on the words "sexually provocative aspect". So that we, the average citizen in Kansas can shake our indifference and have the tools to effectively do our part in defining "Community Standards".

Thank you for your time and attention.

Phillip C. Cosby
401 NE 13th St.
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785-263-3667
Cosby1@sbcglobal.net

Below is the list of twenty nine indictments of devices by the Dickinson County Grand Jury April 1st 2004. These devices were determined to be in violation of K.S. A. 21-4301 Promotion of Obscenity.

1. 10" Mega Coxx Dildo
2. Ultra Tech 3000 Dildo
3. Cyber Inflatable Blow-up Doll
4. Julie Ashton Realistic Pussy and Ass
5. Double Dong with Harness
6. Cherry Scented Artificial Mouth
7. Nick Manning's Masturstroke
8. Hustler-Little Pink Pussy
9. Pure Pussy Vibrating Pink Puregel Vagina
10. Auto Suck
11. Stephanie Swift's Vibrating Love Doll
12. The Clone-Life Like Vibrating Vagina
13. The realistic Cock-Molded From An Actual Erect Penis
14. Cyberskin Cyber Cock
15. Thumbs Up-Enhancing Clit Stim
16. Doctor Love's-The Perfect Extension
17. Honey Bee-Vaginal, Anal and Clitoral Stimulation System
18. Hustler Lady Godiva-Bendable Pleasure Dong With Harness
19. Fujiko's Asian Odyssey-Vaginal Clitoral and Anal Stimulation
20. Hustler-My First Clit Kiss
21. My First Sex Kit-Petite Toys for Big Orgasms
22. The Overnghter-Ginger Lynn's Favorite Toys
23. Waterproof Water Penis G
24. Slender G Spot
25. Hustler Cyberskin-Xtasy Vibe
26. Club Jenna-Jenna's Beaver
27. Sensual Clierific
28. Nikki Tyler-Realistic Vibrating Vagina & Anus
29. The Love Machine

Other themes and items common to all pornography outlets are videos and magazines featuring sadomasochistic torture, bondage, "barely legal" teen sex, excretement activities, multiple partners, reenacted gang rape scenes, bondage, auto-erotic displays, anal sex, straight sex, mixed sex, etc…

Often Pornography outlets contain private viewing rooms, or 'peepshow' booths, where patrons engage in masturbation or promiscuous and unsafe sex acts with prostitutes or other patrons. The booths are covered with bodily fluids and sometime have openings to allow anonymous acts of oral and anal intercourse. A woman from Wilson, Kansas upon investigating an "Adult" Bookstore, described eight enclosed booths. "Each booth had a lock on the door, a small chair, a video machine, a trashcan and a roll of toilet paper on a shelf! There are no hand washing facilities in the booth to prevent the contamination of other surfaces. Customers handle money, merchandise, equipment and then head out to their trucks often to deliver our products. Do the employees wear gloves when taking out the trash and handling the money before coming home to Wilson? ".

The sexual perversions are shocking to the average Kansan when revealed. These listed perversions lead to even more depravity as sexual appetites are inflamed and demand more.

The Abilene Reflector-Chro

Abilene, Kansas To Subscribe: (785) 263-1000 Wednesday, September 7, 2005

Obscenity complaint against Lion's Den dismissed

By LAURA STRODA
News Editor

Citing a Kansas Supreme Court case that dates back 15 years, Senior Judge Ronald Innes dismissed the state's case this morning against the Abilene Lion's Den Adult Superstore.

This is the second time this year Innes has dismissed an obscenity complaint against the Lion's Den. He threw out a 29-count indictment in March, ruling that voting precinct information on a petition for a grand jury was not collected properly.

J. Michael Murray, an Ohio attorney representing the adult store, presented arguments this morning concerning his motion to dismiss the case. Murray attacked not only the complaint filed by Dickinson County attorney Keith Hoffman, but he also challenged the constitutionality of the Kansas obscenity statute.

Innes overruled all of the arguments raised by the defense—except one. And that was all it took for the 10 misdemeanor counts against the Abilene store to be dismissed.

He based his ruling on a 1990 Kansas Supreme Court case, State v. Hughes. Murray contended the Hughes case was controlling in the Dickinson County case and noted how the facts were similar in both cases.

"The defendant, Hughes, was the manager of an adult bookstore in Wichita. He sold two sexual devices and was charged with promoting obscenity," said Murray. "The statute has been amended since."

But the statute still contains a fatal flaw that the Kansas Supreme Court noted when it overturned the Hughes case.

In section B of the Kansas obscenity statute, it reads that "Evidence that materials or devices were promoted to emphasize their prurient appeal or sexually provocative aspect shall be relevant in determining the question of the obscenity of such materials or devices."

"The court held that the legislature may not declare a device obscene merely because it relates to human sexuality," Murray said.

But when the statute was amended, that language regarding "sexually provocative" devices was not taken out.

"The claim by the defendant that most troubles me is the claim that the statute continues to have the language in it that was, in a sense, condemned by the court in Hughes," Judge Innes said. "It doesn't appear the legislature addressed that. It appears, in my view, to emphasize the sexual aspect, which is impermissible.

"Be it substantive or procedural, my view is that (the statute) is unconstitutional. And with that, the court sustains the defendant's motion to dismiss the complaint, but only on that basis," he said.

Hoffman said he would "give it some thought" before deciding whether or not to appeal the decision made by Innes Wednesday. He said what Innes was saying, in effect, by dismissing the case is that the legislature needs to change the language in the statute.

"The legislature didn't address the other issue (about the sexual aspect), and it should have been addressed," said Hoffman.

IN THE DISTRICT COURT FOR THE EIGHTH
JUDICIAL DISTRICT, DICKINSON COUNTY, KANSAS

State of Kansas,	)	Case Number 2005-CR-078
Plaintiff	)	Honorable Ronald D. Innes Assigned Senior Retired Judge
– vs –	)	
Abilene Retail # 30, Inc., d/b/a Lion's Den Adult Superstore,	)	Opinion & Order
Defendant.	)	

The Defendant is charged by means of an Information with ten counts of promoting obscenity in violation of K.S.A. §21-4301. Before the Court is a Motion to Dismiss the Information, which motion was filed by the Defendant on June 24, 2005. A hearing was held on that motion, and oral argument was presented by the State and the Defendant, on September 7, 2005.

In its brief and at oral argument, the Defendant advanced several arguments in support of its motion, including the claim that the statute under which it has been charged suffers from constitutional defects that have remained uncorrected since they were first identified by the Kansas Supreme Court in State v. Hughes, 246 Kan. 607 (1990).

The Court finds this argument persuasive. Accordingly, and for the reasons explained below, the Motion to Dismiss is hereby **Granted**.

Factual and Procedural History

On April 1, 2005, the defendant was charged by Information with ten counts of violating K.S.A. § 21-4301 ("the statute"), which prohibits, *inter alia*, the distribution of sexual assistive devices as a form of promoting obscenity.[1]

[1]Exactly one year earlier, on April 1, 2004, the defendant had been charged with twenty-nine counts of violating that statute in an indictment issued by a Dickinson County grand jury. Upon a supplemental motion to dismiss filed by the defendant in December 2004, this Court held that the grand jury which had issued that indictment was not properly empaneled in accordance with the provisions of K.S.A. § 22-3001(2), and dismissed the indictment which commenced the earlier prosecution in an Order dated March 1, 2005.

Each of the ten counts alleged in the Information charges the sale of a device which is designed or intended to assist the user in sexual activity, either alone or with a partner. These devices, which are often called marital aides, are alleged by the state to violate the provisions of the obscenity statute, which provides in relevant part:

> (a) Promoting obscenity is knowingly or recklessly:
>
> (1) Manufacturing, issuing, selling, giving, providing, lending, mailing, delivering, transmitting, publishing, distributing, circulating, disseminating, presenting, exhibiting or advertising any obscene material or obscene device;
>
> (2) possessing any obscene material or obscene device with intent to issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit or advertise such material or device;
>
> (3) offering or agreeing to manufacture, issue, sell, give, provide, lend, mail, deliver, transmit, publish, distribute, circulate, disseminate, present, exhibit or advertise any obscene material or obscene device . . .
>
> * * *
>
> (b) Evidence that materials or devices were promoted to emphasize their prurient appeal or sexually provocative aspect shall be relevant in determining the question of the obscenity of such materials or devices. There shall be a presumption that a person promoting obscene materials or obscene devices did so knowingly or recklessly if:
>
> (1) The materials or devices were promoted to emphasize their prurient appeal or sexually provocative aspect; or
>
> (2) the person is not a wholesaler and promotes the materials or devices in the course of the person's business.
>
> * * *

(c) Any material or performance is "obscene" if:

* * *

(3) "Obscene device" means a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs, except such devices disseminated or promoted for the purpose of medical or psychological therapy.

K.S.A. § 21-4301.

The information at issue charges, in substantially identical language, that the defendant violated the statute through the display and offering for sale of ten different marital aides.

> That on or about the 6th day of November, 2003, in Dickinson County, Kansas, LION'S DEN ADULT SUPERSTORE, did then and there knowingly or recklessly, and unlawfully engage in promoting obscenity by issuing, selling, providing, distributing, circulating, disseminating, presenting, exhibiting, advertising, or possessed with intent to issue, sell, provide, distribute, circulate, disseminate, present, exhibit and advertise, as obscene device, to wit: [specific devices named in turn].

The defendant contends that the indictment must be dismissed for six reasons. We will consider each of these, though not in the order in which the defendant has presented them.

– Multiplicity –

The Court is not persuaded that the indictment, which alleges ten violations of the statute, is multiplicitous. The information does not charge ten counts in connection with the sale or offering of the same device, or ten instances of selling the same device. It does allege ten counts of promoting obscenity based on the claim that the defendant offered for sale ten different sexual devices, each of which is alleged to be obscene. This is not, in the opinion of the Court, an impermissible stacking of claims. The motion to dismiss, to extent it is advanced on the basis of multiplicity, is accordingly **overruled**.

– Authentication of the Information –

The Defendant claims the information by which this case was commenced is defective, in that it is not affirmed by the District Attorney. The Court finds that the information substantially complies with K.S.A. § 22-2303(1), which requires that each "information shall be verified positively or shall be accompanied by affidavits stating the facts constituting the crime charged." The Court believes that the District Attorney may, without violating this section, adopt the declaration of the undersheriff. Accordingly, to the extent it asserts that the information at bar violates K.S.A. § 22-2303(1), the motion to dismiss is **overruled**.

– Constitutional Claims –

At the heart of the instant motion to dismiss are four related claims, asserted under both the Federal and the Kansas Constitutions. In two distinct arguments, the defendant claims that, by criminalizing the display and sale of marital aides, the state has violated a fundamental right to obtain and use such devices, which the defendant asserts is protected by the substantive due process clause of the Fourteenth Amendment.

There can be little question that the defendant has standing to make this argument, and to assert the Fourteenth Amendment rights of its customers in this way. In State v. Hughes, 246 Kan. 607 (1990), the Kansas Supreme Court expressly allowed the operator of adult bookstore to challenge, on constitutional grounds, the same statute that is at issue in this case, and in doing so, to assert the rights of his potential customers. While the precise content of the constitutional challenge in this case is somewhat different from that brought in Hughes, there can be no real question that the defendant here, like the adult bookstore manager in Hughes, is in a proper position to assert those claims. That said, the Court now turns to the privacy claims themselves.

In two related arguments, the defendant contends that there exists a fundamental right to intimate privacy, which includes both the right to sexual privacy and the right to sexual autonomy, which the statute at issue violates by banning the sale and distribution of marital aides for all but medical or psychological use, without a legitimate state interest for doing so.

In support of its argument, the defendant relies upon the recent United States Supreme Court holding in Lawrence v. Texas, 539 U.S. 558 (2003), which invalidated, on Fourteenth Amendment privacy grounds, a Texas statute which criminalized homosexual relations between consenting adults. The defendant also relies on a long line cases, from Griswold v. Connecticut, 381 U.S. 479 (1965) to Carey v. Population Services, 431 U.S. 678 (1977) and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) to supports its argument that laws which place substantial burdens on sexual privacy violate the Fourteenth Amendment.

Finally, in support of the argument that marital aides of the sort at issue in this case are in fact an important part of the intimate lives of Kansans, the defendant has introduced the affidavit testimony of three professors, at Cornell University, the University of Hartford, and the University of Michigan. Together, these professors (one of whom is also a physician) testified that marital aides have a long, indeed, an ancient history in the treating various sexual dysfunctions, and continue to play an important role in facilitating sexual activity both for healthy couples, and those with various psychological or medical problems. The Court hereby adopts their testimony into the record and adopts their statements as a part of its factual findings in this case.

The privacy claims raised by the defendant are serious, and well supported, and the Court has labored at great length over them. But while the Court is sympathetic to these claims, and recognizes that there does exist a right to engage in healthy sex in the privacy of the home, and that the devices at issue in this case further that end, the Court is not prepared to hold that the statute at issue violates the Fourteenth Amendment by prohibiting their distribution.

The issue of sexual privacy is contentious. The question of whether a law is unconstitutional is very different from the question of whether certain people deem a specific practice to be moral or immoral. That said, because the Court believes these questions are better left either to the legislative branch, or to the higher appellate courts, it declines to invalidate the statute at bar on the basis that it violates a Fourteenth Amendment right to intimate privacy. To the extent that it depends upon such a claim, the motion to dismiss is accordingly **overruled**.

The defendant also alleges that a constitutional defect first identified by the Kansas Supreme Court in Hughes remains a part of the statute, despite the fact that the General Assembly amended the statute twice after Hughes was decided, once in 1993, and again in 1994. After careful examination, the Court has concluded that the defendant is correct, and that the statute remains constitutionally flawed for this reason, and that the information at bar must accordingly be dismissed. The Court adopts here the reasoning set forth in the memorandum filed by the defendant in support of its motion to dismiss as a part of its holding in this regard. What follows has been substantially adopted – though not verbatim – from that memorandum.

In Hughes, the Kansas Supreme Court endorsed the view, taken by the trial court, that Section 21-3401 defined "obscene device" in a manner which unconstitutionally equated sex with obscenity. Hughes, 246 Kan. at 614. Despite having been amended twice since Hughes was decided in 1990, Section 21-4301 still contains what the Kansas Supreme Court concluded was a constitutionally impermissible definition of obscene device.

At the time Hughes was decided K.S.A. §§ 21-4301(c)(3), read "'Obscene device' means a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs."

A 1993 amendments to the statute narrowed that definition to "except such devices disseminated or promoted for the purpose of medical or psychological therapy." While this addressed that part of the holding in Hughes, which said that the state could not constitutionally ban the use of such devices in connection with medial and psychological use, it did nothing to address the impermissible way in which another subsection of the statute equated, and to this day continues to equate, an interest in sex with obscenity:

> The trial court found K.S.A. 21-4301 overbroad because it does not restrict its scope to distribution of devices for obscene purposes, noting the legislature cannot make a device automatically obscene merely through the use of labels.

Id. at 617.

The trial court had held that, in order to pass constitutional muster, the statute had to define obscenity in a fashion consistent with the Supreme Court's holding in Miller v. California, 413 U.S. 15 (1973), and include the familiar requirement that a work, evaluated against prevailing community standards of decency, appeals to the prurient interest in sex. Hughes, 246 Kan. at 618.

The Hughes court disagreed. Noting that the Miller test was formulated under the assumption that a challenged work would be "a book, movie, or play, rather than a device," the court found that the legislature had made some effort to avoid defining obscene device too rigidly by including language, in K.S.A. § 21-4301(2), that "[e]vidence that materials or devices were promoted to emphasize their prurient appeal or sexually provocative aspect shall be relevant in determining the question of the obscenity of such materials or devices." Id. at 618 (emphasis added).

While parting company with the trial court over the question of whether the statute must include the full of safeguards set forth in Miller, the Kansas Supreme Court agreed that the language in question had the impermissible effect of equating a non-prurient interest in sex with obscenity:

> We agree with the trial court's finding that the term "sexually provocative aspect" impermissibly equates sexuality with obscenity. The legislature may not declare a device obscene merely because it relates to human sexual activity.

Hughes, 246 Kan. at 618 (citing Roth v. United States, 354 U.S. 476, 487- 88 (1957)).

The General Assembly has never amended the language thus singled out for criticism, and the statute still contains the same equation of obscenity with a normal, non-prurient interest in sex, which the Hughes court found to be unconstitutional in 1990.

The legislature, in the statute, instructs us to consider whether an item is sexually provocative in deciding whether a given device is obscene. But Hughes teaches us that this is improper, and the Court does not take lightly what it believes were the studied, and well considered words of our Supreme Court. The state may not criminalize a normal, non-prurient interest in sex. Because the statute continues to do so, fifteen years after the Kansas Supreme Court in Hughes said that it could not do so, the statute is unconstitutional and information at bar must be dismissed. The motion to dismiss the information in its entirety, on this basis, is accordingly **sustained**.

The Court **overrules**, without more, the argument that the statute is impermissibly vague, restates its position that the defendant has standing to assert each of the arguments it raised, and hereby **Orders** that the information and the instant case against the defendant should be, and hereby is, **Dismissed with Prejudice**.

IT IS SO ORDERED

Robert D. Innes
Senior Kansas District Judge

1-12

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TESTIMONY IN FAVOR OF HB 2912 BEFORE THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE ON MARCH 8, 2006

HB 2912 is a simple amendment to K.S.A. 21-4301, the obscenity statute, necessitated by the effects of the Kansas Supreme Court ruling in *State v. Hughes*, 246 Kan. 607 (1990).

In *Hughes*, the Court affirmed a trial court determination that the statute was overbroad in that it prohibited certain devices for all uses, including medical and psychological therapy. That problem was remedied when the 1993 Legislature excepted such use from the definition of "obscene device" now found in subparagraph (c) (3) of the statute.

However, the *Hughes* decision contains the following criticism of the wording "sexually provocative aspect" found in the statute:

> *We agree with the trial court's finding that the term "sexually provocative aspect" impermissibly equates sexuality with obscenity. The legislature may not declare a device obscene merely because it relates to human sexual activity.*

State v. Hughes at 618.

While the above statement (apparently *dicta*) was not the basis of the Court's decision in *Hughes*, the statement has been brought to the attention of at least one trial court by counsel for a sexually oriented business. The Dickinson County District Court recently dismissed a prosecution for sale of such devices solely because the legislature has not removed the phrase "sexually provocative aspects" from K.S.A. 21-4301 in the 15 years since the *Hughes* decision. Opinion and Order entered 12-28-05, Case no. 05-CR-78 by the Honorable Ronald D. Innes, Assigned Senior Retired Judge, presiding.

Without amendment of 21-4301, it is most likely the sale or distribution of "obscene devices" will not be prosecuted in Kansas. HB 2912 would remedy that problem.

Respectfully,

Austin K. Vincent

FEDERAL AND STATE AFFAIRS
Date 3-8-06
Attachment 2