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JURISDICTIONAL STATEMENT

Appellant files this appeal from a final judgment from the Circuit Court of

McDonald County, Missouri on the basis claiming that Section 191.680, RSMo, employed against him in this factual sense violates his 5<sup>th</sup> and 14<sup>th</sup> amendment rights to due process of law guaranteed to him within the Constitution of the United States of America and the amendments thereto.

Appellant claims Section 191.680, RSMo, is void for vagueness. Article V, Section III of the Constitution of the State of Missouri permits such an appeal directly to the Supreme Court of the State of Missouri establishing jurisdiction since this appeal involves the validity of a Statute of the State of Missouri.

## STATEMENT OF FACTS

(Reference is as follows: T = Transcript; LF = Legal File)

Appellant herein, Robert Crump, Jr. engages in the commercial sales of

adult material at Midnight Video South, McDonald County, Missouri and in another establishment a short distance from the McDonald County property.

( LF - 15, T - 233.)

The business, Midnight Video South, hereinafter referred to as Midnight Video, is a retail store located along Highway 71 in McDonald County, Missouri.

(LF - 15.) The business itself sells video or DVD recordings which depict acts of sexual intercourse and sodomy between men and men and between men and women. (T - 37.)

In the front of the store is located a retail outlet which commercially sells materials depicting acts of sexual relations between people and in the rear of the building there is an arcade. (T - 76, T - 53.) The arcade allows patrons to enter each booth and for money (tokens) review adult movies. (T - 37.) Arcade booths are arranged in a matrix of enclosable cubicles which allow people to enclose each booth with privacy if the guests desire. (T-282, T-288.) "Buddy Booths" have glass on the adjacent walls between some arcade booths so people in the booths can watch each other. (T-34, T-52.) The arcades are serviced by others at Midnight Video and Crump's other business just down the road from Midnight Video. (T-38, T-233.)

Jim Buttram was employed to work at Midnight Video as a janitor. Part of his responsibilities were to clean up semen. (T-28, T-32.) He was an informant

for the Missouri State Highway Patrol. (T-72.)

He testified that while at Midnight Video working he observed in an area open to the public, men having unprotected sex with other men and men having sexual relations with women. (T-28-33, T-43-44.) He reported that these activities, as well as masturbation by men, was observable daily at Midnight Video. (T-28-31.) At times customers would clean themselves with paper towels provided by the store. (T-33-36, T-52.)

Witness Buttram recounted that he informed the sales clerks and Mr. Crump what he had seen. (T-36.) Buttram stated that he asked for authority from Crump to police this behavior he had described and Mr. Crump told him to leave the patrons alone. (T-30, T-44-45, T-160.)

Crump testified that he never received information about the types of sexual activities that Buttram claimed he observed. (T-288.) Lisa Burge, a sales clerk who worked for Crump at Midnight Video testified she was present when Buttram told Crump about the sexual activities he saw. (T-187-188.) She testified Crump's only response in her presence was essentially to pass it off as of no consequence or importance. (T-188.)

Lisa Burge related while she was on duty she saw sexual contact between a man and a woman and once got a bat to protect herself when a man came from the arcade and in the front of the store, masturbated in the store. (T-186-187.)

Although she had been present when Buttram told Crump about the “nasty things” patrons were doing, she saw Crump in Midnight Video only about five (5) times and, therefore, never told him what she had seen. (T-198-190, 217.)

Beginning June 9, 2002, Crump was only at Midnight Video every other day until Independence Day (2002) and thereafter, he was only present at the business approximately two (2) days a week. (T-278-279.) Crump further claimed he was never present if Buttram told Burge of the sexual activities between patrons Buttrum had observed. (T-301.) He also recounted he had never heard any allegations or complaints about Buttram from patrons but he had heard some complaints from sales clerks. (T-307.) Witness Buttrum’s job sent him to Midnight Video seven (7) days a week. (T-41.)

Sgt. Roger Renken, a member of the Missouri State Highway Patrol assigned to the Division of Drug and Crime Control, was asked to assist in the investigation of the operations of Midnight Video. (T-71.) Jim Buttram gave him information about the operation and activities occurring at the premises. (T-72.) Sgt. Renken obtained a search warrant to seize towels from the arcade area of Midnight Video. (T-74.) Sgt. Renken seized paper towels from the trash cans in the arcade area. (T-77.) Sgt. Renken did not seize any books, videotapes or novelties or any items which could be construed as affecting First Amendment rights. (T-78.) Sgt. Renken seized trash bag liners from the booths in the arcade.

(T-81.) He placed the contents of the trash can liners, which he seized, into evidence bags for delivery to the Missouri State Highway Patrol crime lab. (T-82.) Sgt. Renken testified he was in the store on a half dozen other occasions besides the date when he served the search warrant. (T-84.) At no time did he go into the arcade area except the day when he went in to serve the search warrant. (T-85.) While Sgt. Renken went into the arcade area to seize the towels and trash can liners he saw one person in a booth with the door open and that person appeared to be masturbating. (T-87.) That was the only sexual conduct he saw. (T-88.) He also observed a sign that said one person to a booth. (T-88.)

Jeff Hondrich is a physician licensed to practice in Missouri. (T-66.) Dr. Hondrich expressed the opinion that HIV is transmitted from one person to another through the exchange of blood which occurs in sexual activity. (T-68.) It was his opinion that unprotected anal sex can transmit HIV. (T-68.) It was also his opinion that unprotected oral sex can spread HIV. (T-68.) It is, he testified, highly unlikely that a person could pick up HIV from semen in a wastebasket. (T-68.) He agreed that unprotected sex could hypothetically take place anywhere. (T-68.)

Ryan Hoey is employed by the Missouri Highway Patrol crime lab in Jefferson City. (T-96.) He worked in the DNA section. Mr. Hoey examined the bags of paper towels collected by Sgt. Renken and performed tests for semen and

tested the DNA on some of the semen he detected. (T-105-112.) Of the two paper towels he tested, he detected semen from three (3) different individuals on these two (2) towels. On the first towel there was semen from one individual and on the second towel there was semen from two (2) individuals. (T-114.) All of the semen exhibited male gender traits. (T-114.) He testified the semen deposits on towel number two (2) could have been deposited at different times. (T-117.) He asserted during his testimony he was unaware whether or not the persons who deposited the DNA on the towels had HIV. (T-119.) He also recounted that he was unaware whether the semen stains on the second towel were made simultaneously. (T-121.)

On October 21, 2002 the plaintiff filed a petition for an injunction pursuant to Section 191.680 in the Circuit Court of McDonald County, Missouri. The petition gave a legal description to certain property alleged to be owned by Robert W. Crump, Jr. (LF-1-2.) The petition alleged that Crump was engaging in a business to-wit: Midnight Video-South. (LF-2.) The petition alleged that the structures upon the property were being used for the purpose of lewdness, assignation and other purposes involving sexual contact through which transmission of HIV infection can occur. (LF-2.) The petition requested the court to find that the property be a nuisance and issue an injunction enjoining and

abating Respondent from using this business and location for a period of one year. (LF-3.) On November 4, 2002, a motion to dismiss for failure to state a claim upon which relief may be granted was filed by appellant, Crump. (See docket entry at LF-70, and motion at LF-4-6.) The motion alleged that the petition failed to state a claim upon which relief could be granted because the relief sought was authorized only pursuant to Section 191.680 RSMo and that said Section was void and unenforceable in that it violated defendant's right of due process guaranteed by the Fifth and Fourteenth Amendment to the Constitution of the United States and also in violation of the defendant's rights pursuant to the First, Fourth, Fifth and Fourteen Amendments of the Constitution of the United States. (LF-5.) On November 8, 2002 the court notified counsel of its intention to hold a hearing on November 14. (See docket entry at LF-70.) Defendant, Crump filed a motion for continuance noting upon other items that an answer to the petition was not due until November 22, 2002, (LF-10) that counsel for Crump had filed a discovery request and the time for completing the discovery request had not passed, ( LF-11), and further noted that no motion request for a preliminary injunction had been made. (LF-11-12.) At the court's hearing on November 14, the court noted that no petition had been filed seeking a preliminary injunction, (T-14), and that the State was asking for a trial on the merits of the petition. (T-20.) Because of the claimed potential unavailability of a witness, the trial court decided it would

allow the plaintiff to present a portion of its evidence but deny the motion for continuance with the understanding that the court would not consider any preliminary injunction. It was further decided that counsel for Mr. Crump would be entitled to continue and complete discovery, be permitted further cross-examination of all plaintiff's witnesses and be permitted to present his entire case at the next hearing set on February 7, 2003. (T-24-25, T-124-309.)

On March 7, 2003 the court entered findings of fact and conclusions of law and judgment. (L-47-53.) (See appendix A.) The court found that the plaintiff's cause was instituted for the purpose of protecting the health and safety of the public at large. (LF-48.) The court further found that the statute was not unconstitutionally vague. (LF-51.) The court found the First Amendment did not bar the enforcement of this closure statute, as the purpose of this action and statute was designed to protect the public health and, therefore, enforcement of the statute in this cause did not abridge Crump's First Amendment rights. (LF-47-53.) The court made specific findings that Buttram did observe acts of oral and anal intercourse between persons of the same sex upon the property in question, that the premises was used for lewd purposes involving sexual contact through which the transmission of HIV infection can occur, that Buttram reported those incidents to Crump, that Lisa Burge was present when Buttram told Crump of the

sexual activities, and that Lisa Burge observed acts of sexual contact between same sex patrons on the property in question. She did, however, not personally tell the owner of her observations. (LF-52.) The court found that paper towels taken from the arcade booths had semen from three (3) different individual males on them, and that this corroborated Buttram's testimony. (LF-53.) The court found that the usage of Midnight Video-South was a nuisance and ordered the business closed for a period of one year. (LF-53.) Following the judgment Defendant, Crump requested the court to enter an order staying the judgement pursuant to Rule 92.03 upon the posting of a supersedeas bond. (LF-54-55.) Defendant Crump also filed a motion to amend the judgment. (LF-60-64.) Appellant's motions were denied by the trial court and on April 24, 2003, Appellant filed his notice of appeal. (LF-65-66.)

POINT RELIED ON

**THE TRIAL COURT DID NOT ERR IN ENTERING A JUDGMENT ORDERING APPELLANT'S PROPERTY CLOSED FOR A PERIOD OF ONE YEAR BECAUSE THE STATUTE UPON WHICH THE COURT RELIED TO AUTHORIZE THE CLOSURE, TO WIT: SECTION 191.680 RSMO IS NOT VOID BECAUSE IT IS NOT UNCONSTITUTIONALLY VAGUE IN CONTRAVENTION OF THE DUE PROCESS CLAUSE OF THE 5<sup>TH</sup> AND 14<sup>TH</sup> AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES FOR IT DOES NOT FAIL TO GIVE PROPER NOTICE OF WHAT CONDUCT VIOLATES THE PROHIBITIONS OF THE STATUTE BECAUSE IT DOES NOT REQUIRE PERSONS OF COMMON INTELLIGENCE TO SPECULATE AS TO WHAT TYPE OF LEWD CONDUCT CAN CAUSE THE TRANSMISSION OF HIV BECAUSE OF THE VERY NATURE OF HIV VIRUS TRANSMISSION AND DOES NOT FAIL TO PROVIDE A SPECIFIC STANDARD OF CERTAINTY OR**

**KNOWLEDGE OF THE LIKELIHOOD OF THE TRANSMISSION OF HIV BY  
THE CONDUCT IN QUESTION AND DOES NOT SUBJECT UPON THE  
OPERATOR ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE  
STATUTE IN QUESTION.**

**Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222**

**State v. Allen, 905 S.W. 2d 874 (Mo. banc. 1995)**

**State v. Knapp, 843 S.W. 2d 345, 349 (Mo. banc 1992)**

**State v. Young, 695 S.W. 2d, 882, 883-884 (Mo. banc 1985)**

**Section 1.090, RSMo**

**Section 191.680, RSMo**

**Constitution of the United States, Amendment V**

**Constitution of the United States, Amendment XIV**

## ARGUMENT

**THE TRIAL COURT DID NOT ERR IN ENTERING A JUDGMENT ORDERING APPELLANT'S PROPERTY CLOSED FOR A PERIOD OF ONE YEAR BECAUSE THE STATUTE UPON WHICH THE COURT RELIED TO AUTHORIZE THE CLOSURE, TO WIT: SECTION 191.680 RSMO IS NOT VOID BECAUSE IT IS NOT UNCONSTITUTIONALLY VAGUE IN CONTRAVENTION OF THE DUE PROCESS CLAUSE OF THE 5<sup>TH</sup> AND 14<sup>TH</sup> AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES FOR IT DOES NOT FAIL TO GIVE PROPER NOTICE OF WHAT CONDUCT VIOLATES THE PROHIBITIONS OF THE STATUTE BECAUSE IT DOES NOT REQUIRE PERSONS OF COMMON INTELLIGENCE TO SPECULATE AS TO WHAT TYPE OF LEWD CONDUCT CAN CAUSE THE TRANSMISSION OF HIV BECAUSE OF THE VERY NATURE OF HIV VIRUS TRANSMISSION AND DOES NOT FAIL TO PROVIDE A SPECIFIC STANDARD OF CERTAINTY OR KNOWLEDGE OF THE LIKELIHOOD OF THE TRANSMISSION OF HIV BY THE CONDUCT IN QUESTION AND DOES NOT SUBJECT UPON THE**

**OPERATOR ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE  
STATUTE IN QUESTION.**

Appellant limits his appeal claiming the statutory effect upon him of the judgment through the application of Section 191.680, RSMo, violates his due process rights guaranteed to him under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution because he claims the statute as, applied to him, should be found in this case void for vagueness.

Generally, statutes are presumed to be constitutional and will not be deemed unconstitutional unless they “clearly and undoubtedly” contravene the Constitution. *Adams v. Children’s Mercy Hosp.*, 832 S.W.2d 898, 903 (Mo. Banc 1992), *cert. denied*, 113 S. Ct. 511 (1992). In challenging the constitutionality of 191.680, RSMo, appellant has the burden of proving that the statute is unconstitutional and it must be proved beyond a reasonable doubt that the legislature abused its discretion. *Blaske v. Smith and Entzeroth, Inc.*, 821 S.W. 2d 822, 829 (Mo. Banc 1991); *Adams v. Children’s Mercy Hosp.*, *supra* at 903. Upon review of appellant’s brief both appellant and respondent herein, recognize for purposes of this appeal the trial court’s findings of fact are presumed to be correct. Upon review this Court must affirm unless there is no substantial

evidence to support the judgment, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Blakely v. Blakely*, 83 S. W. 3d 537, 540 (Mo. banc 2002).

Following two hearings, the trial court specifically found pursuant to Section 191.680 that Appellant Crump's property was used for lewd purposes involving sexual contact through which the transmission of HIV can occur and therefore its usage was a nuisance.

Section 191.680 RSMo provides:

“1. Any person who shall erect, establish, continue, maintain, use, own, or lease any building, structure, or place used for the purpose of lewdness, assignation, or illegal purpose involving sexual or other contact through which transmission of HIV infection can occur is guilty of maintaining a nuisance.

2. The building, structure, or place, or the ground itself, in or upon which any such lewdness, assignation, or illegal purpose is conducted, permitted, carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining such nuisance, are hereby declared to be a nuisance and shall be enjoined and abated as provided in subsection 3 or this section.

3. If the existence of a nuisance is admitted or established in an action pursuant to this section or in a criminal proceeding in any court, an order of abatement shall be

entered as part of the judgment in this case. The order shall direct the effectual closing of the business for any purpose, and so keeping it closed for a period of one year.

4. The department of health and senior services, a county prosecutor, or a circuit attorney shall file suit in its own name in any court of competent jurisdiction to enforce the provisions of this section.”

Upon reviewing appellant’s CONCLUSION following his brief, he has enumerated those issues he concedes are not issues raised in this case. He claims no constitutionally protected right to have people engage in lewd conduct on appellant’s property. Appellant recognizes a legitimate State interest in preventing the spread of the HIV infection. Appellant further recognizes that property subject to abatement as a nuisance is not protected from abatement just because a protected First Amendment activity also operates on the property. Finally, under Section 191.680, RSMo, appellant acknowledges the Legislature of the State of Missouri has not chosen to make all lewd conduct an actionable nuisance.

#### Appellant’s Vagueness Claim

There are two forms of vagueness challenges based upon due process. *State v. Allen*, 905 S.W. 2d 874, 876-877 (Mo. banc 1995). See also *State v. Knapp*, 843 S.W. 2d 345, 349 (Mo. banc 1992) and *St. Louis County v. McClune*, 762 S.W. 2d 91, 92 (Mo. App. 1988). The first requirement of due

process is that a statute provide adequate notice to a person or potential offender of the prohibited conduct. *State v. Allen*, *id* at 877. Notice is adequate unless the terms used in the statute are so unclear that a person of common intelligence must necessarily guess at their meaning. *State v. Knapp*, 843 S.W. 2d at 349. The second requirement of due process is that a statute must be sufficiently specific so as to provide adequate standards for preventing arbitrary and discriminatory enforcement. *State v. Allen*, 905 S.W. 2d at 877. Such “void for vagueness” challenges to statutes must, however, be raised by someone against whom the application of the statute is unconstitutional. *State v. Valentine*, 584 S.W. 2d 92, 96 (Mo. banc 1979). In other words, a vagueness challenge does not require this Court to imagine an instance in which the language of the statute might be considered vague or confusing, but rather this Court must examine the language of the statute by applying it to the facts of the present case. *State v. Young*, 695 S.W. 2d, 882,883-884 (Mo. banc 1985). See also *State v. Ellis*, 852 S.W. 2d 440, 447 (Mo.App., E.D. 1993).

The trial court, herein, noted in its Order the test established by the United States Supreme Court in *Grayned v. City of Rockford*, 408 U. S. 104 (1972) at page 108, which set fourth three major guidelines to consider when evaluating whether a particular ordinance or statute would be void for vagueness. The

United States Supreme Court set out the following three tests:

1. Laws must give the person or ordinary intelligence a reasonable opportunity to know what is prohibited.
2. If a statute or ordinance arbitrarily allows discriminatory enforcement, laws must provide explicit standards for those who apply them.
3. A statute is vague if it abuts against sensitive areas of basic First Amendment freedom and it operates to inhibit exercise of this freedom.

(Appendix A6.)

Initially addressing the third point of the *Grayned*, supra., vagueness test, respondent was concerned that this closure statute might abut the very sensitive nature of the First Amendment freedom. Throughout the entire investigation at Midnight Video, law enforcement authorities were very sensitive not to engage in any manner in conduct which would have even a chilling effect upon the First Amendment rights of appellant or any of his patrons. (T-175-176.) Plaintiff also did not request a preliminary injunction or any injunctive relief until all the evidence and testimony was presented. Great sensitivity was exercised to request no relief that could have even arguably be interpreted as unnecessarily infringing on our most precious freedom guaranteed to us under the 1<sup>st</sup> and 14<sup>th</sup> Amendments of the United States Constitution.

Notwithstanding the great care taken by law enforcement authorities during

the Midnight Video investigation “...the first amendment is not implicated by the enforcement of a public health statute regulation of general application against the physical premises in which respondents happened to sell books”. *Acara v. Cloud Books, Inc.*, 106 S.Ct 1378.

In *Acara*, supra, at 3172, 3177, n. 2 “The closure order sought in that case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his book selling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited ...indeed the imposition of the closure order has nothing to do with any expressive conduct at all.”

In addressing point three (3) of the *Grayned* test to the facts of this case, we know from the testimony Crump has another adult business just down the road from Midnight Video. (T-233.) In fact, we also know from the evidence that he has arcades at his second location as the testimony relates that the same people who service his arcade machines at Midnight Video service his arcades at his other location just down the road. (T-38, T-233.) Appellant is free to disseminate his adult material at his alternative location guaranteeing that the injunction at issue here acts as no prior restraint on his ability to sell his sexual

films, DVD's, and carry on his arcade business.

In an effort to “promote the general welfare” of the people of Missouri, the Missouri Legislature passed Section 191.680, RSMo, intending that the state of Missouri, does not mind what someone speaks when exercising one's first amendment rights; this health and safety statute seeks to insure that someone has a mind with which to speak.

The trial court, in its finding of fact and conclusions of law and judgment, ultimately found from the totality of the testimony and evidence, that Crump, operating his commercial venture in McDonald County, Missouri, was permitting lewd conduct involving sexual contact through which the HIV infection can occur.

Though Crump denied any knowledge that sexual contact was occurring within his business, he hired a janitor to clean up semen, provided towels for customers with which to clean themselves, provided no supervision over the arcade, absented himself regularly from the business and despite notification of sexual contact established a protocol of noninterference to sexual activities between patrons.

Mr. Crump's objective was to make money. (T-289.) Though notified about the sexual conduct occurring at his business, he instructed Mr. Buttrum to leave the patrons alone and let them do what they want. (T-161.) This policy of noninterference promoted an environment where sexual contact was occurring

daily that could pass the HIV infection. (T-30, T-44-45, T-160.)

Appellant claims that the term lewdness is so vague that a person of ordinary intelligence could not ascertain what activity was prohibited. Crump further claims that the statute is so arbitrary that it allows discriminatory enforcement because it provides no explicit standards for those who apply the law.

Upon reviewing the statute it is clear that the Missouri Legislature was very specific in that it did not sanction all lewdness only that lewd behavior which can pass the HIV infection. As we will recall in Young, supra., the Court held that in determining vagueness, the Court is not to try to think of hypotheticals under which “the language used might be vague or confusing”, but rather it is to apply it “to the facts at hand”, *id.* at 884. Appellant, at page 20 of his appellant brief cites Blakley v. Blakley, supra., on appeal as a proposition establishing that “statutory interpretation is an issue of law that this Court reviews *de nova*, *id.*”

Statutory words and phrases are taken in their ordinary and usual sense, generally derived from the dictionary, Abrams v. Ohio Pacific Exp. 819 S.W.2d 338 (Mo. banc 1991); Section 1.090, RSMo. In determining legislative intent, courts take statutory words and phrases in their ordinary and usual sense, which is generally derived from dictionary, St. Charles County Convention and Sports

*Facilities Authority v. Mydler* (App. E.D. 1997) 950 S.W.2d 668. The accepted definition of “lewd” to a citizen of ordinary intelligence is “offensive to accepted standards of decency”. Appellant proceeds to review a plethora of cases reviewing historical analysis of the implications of the term lewdness from cases all over the United States. One of the cases cited was *In the Matter of Jeffery V*, 586 N. Y. S. 2d 18 (N.Y. A.D. 1992) wherein the court found that the crime of public lewdness was committed when the defendant exposed his penis, grabbed it and waved it at 3 women while calling them sluts and yelling other vulgar and disparaging comments at them. Such review respondent claims is unnecessary. The issue before this Court *de nova*, as it was before the trial court, is under the specific facts of this case would daily behavior such as anal and oral sodomy preformed publicly in a business be so complicated and confusing that a person of ordinary and reasonable intelligence fail to know that behavior was lewd. Respondent argues people of reasonable intelligence could not but find oral and anal sodomy practiced in a public business anything but lewd.

When the trial court was urged by appellant to find that the definition of lewdness applicable in this case so ambiguous that it would not give notice to people of reasonable intelligence what behavior was prohibited, the trial court responded that appellants argument was unpersuasive. In the record there is substantial evidence to support the trial court’s holding in this regard. There are

some activities that are so depraved and disgusting that the interpretation of that behavior as “lewd” ceases to be subjective and undeniably becomes objective. In this factual case respondent argues appellant is attempting to stretch due process beyond the rational.

Finally, appellant asserts that his due process rights were violated since his client was provided with no specific standard of certainty or knowledge of the likelihood of the transmission of the HIV infection. Such argument may have had weight ten years ago, however, the dangers of the risks from unprotected sexual contact has become so pervasive that virtually every adult has been exposed to educational efforts notifying everyone of the risks by which HIV infection is transmitted. It must be recalled that Mr. Crump is in the business of selling sexual films and sexual paraphernalia.

Appellant claims that this statute, Section 191.680, RSMo, allows for arbitrarily and discriminatory enforcement without explicit standards for those who apply them. No one can enforce this statute unless there is a factual basis proved by a preponderance of the evidence that an owner of a business allows a specific type of lewd behavior on his premises and that establishes an explicit standard. The legislature in promulgating this statute did not outlaw all lewd conduct, only that specific conduct that met the explicit standard which can cause the HIV infection.

Appellant has the burden of proving that Section 191.680, RSMo, is unconstitutional and he must prove beyond a reasonable doubt that the legislator abused its discretion. *Blaske v. Smith Entzeroth, Inc.*, *supra*. At no time during Mr. Crump's testimony at the trial did he testify he was unaware of the modes of transmission of the HIV infection.

In fact on page 33 of appellant brief he cites *Pendergist v. Pendergrass*, M. D. et. al, 961 S.W. 2d 919, 922 (Mo. App. W.D. 1998) for the proposition that since 1998 it has been known in Missouri law that "HIV is a retro-virus that attacks the human immune system. ....thus the typical modes of transmission of HIV includes sexual contact, exposure to infected blood or blood components and prenatally from mother to infant". The mode of transmission of HIV is so specific and so widely known respondent contends once Crump was notified this sexual contact was occurring in his business he had a responsibility to act and chose to do nothing, therefore, he fell under the purview of Section 191.680, RSMo., and its sanctions.

### OVERBREATH

Unconstitutional overbreath occurs when a state statute deters an otherwise constitutionally protected activity. *Allen v. State*, *supra*. It has repeatedly been held by the United States Supreme Court and this Court that overbreath challenges to statutes on their face are only recognized in the context of First Amendment

claims. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987); *Schall v. Martin*, 467 U.S. 253, 268, 104 S.Ct 2403, 2412, 81 L.Ed.2d 207, n. 18 (1984); *Artman v. State Bd. Of Registration*, 918 S.W. 2d 247, 251 (Mo. banc 1996); *State v. Madsen*, 772 S.W.2d 656, 659 (Mo. banc 1989), *cert. denied*, 493 U.S. 1046, 110 S.Ct. 845, 107 L.Ed.2d 840 (1990); *State v. Munson*, 714 S.W.2d 515, 522 n. 7 (Mo. banc 1986).

In footnote number 2 on page 23 of appellant's brief, he cites *Lawrence v. Texas*, 123 S. Ct. 2417, (2003). He indicates during the trial that there was some question as to whether alleged acts of consensual sexual contact between persons of the same sex to be a violation of Section 566.090.1, RSMo. Notwithstanding footnote number 2 in appellant's brief, appellant did not raise overbreadth as a challenge to Section 191.680, RSMo, and wisely so, as the proprietor Crump does not have standing to raise any Constitutional challenge on behalf of his patrons privacy interest. There has not been established, to respondent's knowledge, any particular special relationship between sellers and consumers of sexually explicit material. See *Griswold v. Connecticut*, 381 U. S. 481, 85 S. Ct. 1679; *Eisenstadt v. Baird*, 405 U. S. 441-447, 92 S. Ct. 1032-1034.

Appellant makes no claim regarding violation of first amendment rights and thus he does not have standing to assert Section 191.680, RSMo as overbroad as

applied to himself or others. *Griswold*, *supra*; *Arcara*, *supra*.

### CONCLUSION

For the above reasons, appellant's claim that Section 191.680, RSMo, is unconstitutionally vague as applied to him is without merit. Accordingly, the trial court did not err in denying appellant's motion to dismiss which claimed that his rights guaranteed in the 5<sup>th</sup> and 14<sup>th</sup> amendments to the United States Constitution were violated. Appellant's point of error on appeal must therefore fail.

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ATTORNEY FOR RESPONDENT

**IN THE SUPREME COURT OF MISSOURI**

STATE EX REL.,	)	
W. Stephen Geeding, County Prosecutor	)	
In and For McDonald County, Missouri	)	
Respondent - Petitioner below	)	
	)	
vs.	)	Case No.: SC85249
	)	
ROBERT W. CRUMP, JR.,	)	
a/k/a Rob Crump,	)	
d/b/a Midnight Video South	)	
Appellant - Respondent below	)	
	)	
and	)	
	)	
Pine Designs, Inc.,	)	

CERTIFICATE PURSUANT TO RULE 84.06(c)

I, W. Stephen Geeding, counsel for Respondent, State Ex Rel., hereby certify that two (2) true and correct copies of Respondent's Brief were mailed this

\_\_\_\_\_ day of February, 2004 to Appellant's counsel as follows:

William J. Fleischaker  
Fleischaker, Williams & Powell  
P. O. Box 996  
Joplin, MO 64802

1. That the Brief complies with the limitations contained in Rule 84.06(b);
2. That there are 5,780 words in the brief;
3. That the disk containing respondent's brief has been scanned for viruses and that it is virus-free.

---

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APPENDIX

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