

**NO. SC87864**

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**IN THE MISSOURI SUPREME COURT**

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**HAROLD KAUBLE,**

**RELATOR,**

**VS.**

**THE HONORABLE JAMES R. HARTENBACH,**

**RESPONDENT,**

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**Writ of Mandamus/Prohibition from the Circuit Court of St. Louis  
County and the  
Missouri Court of Appeals-Eastern District  
State of Missouri**

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**BRIEF OF RELATOR HAROLD KAUBLE.**

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## **JURISDICTIONAL STATEMENT**

The action is one involving the question of whether the Order issued by Division 14 in the Circuit Court of the County of St. Louis, Missouri, against Relator, dismissing his Motion to Dismiss and Set-Aside the Resulting Sentence Due to Lack of Subject Matter Jurisdiction; was properly granted in compliance with RSMo Section 556.026, Missouri Criminal Rule of procedure 30.20 and Missouri Rules of Civil Procedure 84.22, 84.23, 94.01 and 97.01 and hence involves the proper interpretation and application of a Missouri Statute and Missouri Court Rules. This case falls under the jurisdiction of the Missouri Supreme Court due to the fact that the trial court and the Appeals Court both are located in the City of St. Louis, which is within the state of Missouri.

## STATEMENT OF FACTS

On September 24, 1998, Relator, Harold Kauble was charged by complaint with Sexual Misconduct Involving a Child, a Class D Felony, RSMo 566.083.1(1)(Appendix Pg. A4). Mr. Kauble subsequently pled guilty to the charge on January 8, 1999, in Division 14 of the Circuit Court of the County of St. Louis Missouri (Appendix Pg. A15). In return for his guilty plea Mr. Kauble received a Suspended Imposition of Sentence and was placed on five years of supervised probation with the special conditions of no employment involving children and to continue counseling. He was also required to register with Missouri's Sex Offender Registry. Mr. Kauble was successful in completing his probation and was discharged from supervision on January 9, 2004 (Appendix Pg. A17). However, Mr. Kauble is still required to register and maintain up to date information on the state's sex offender's registry.

On April 24, 2005, RSMo 566.083.1(1) Sexual Misconduct Involving a Child, the statute under which Mr. Kauble pled guilty, was deemed unconstitutional by the Missouri Supreme Court in, State v. Beine, 162 S.W.2d 483 (Mo. Banc 2005). Thereafter, Mr. Kauble filed a Motion to Dismiss and Set Aside Resulting Sentence Due to Lack of Subject Matter Jurisdiction (Appendix Pg. A18). The Honorable Judge Hartenbach in

Division 14 of the St. Louis County Circuit Court heard the Motion off the record on December 16, 2005. After hearing the Motion, the judge took the case under submission.

Nearly four months later on April 10, 2006, St. Louis County Prosecutor, Robert F. Livergood filed with the court an Order asking the court to dismiss Mr. Kauble's Motion (Appendix Pg. A22). The basis of the order was that the court lacked jurisdiction in the case because Mr. Kauble had been discharged from probation. Counsel for Mr. Kauble received a copy of this Order on April 11, 2006 and The Honorable Judge Hartenbach signed the prosecutor's proposed order on April 12, 2006.

Mr. Kauble then filed a Writ of Prohibition or in the Alternative Writ of Mandamus in the Missouri Appeals Court-Eastern District on May 15, 2006 (Appendix Pg. A24). Respondent filed his Suggestions in Opposition to Writ of Prohibition and/or Writ of Mandamus on May 26, 2006 (Appendix Pg. 35). The Eastern District then summarily denied Relator's Writ on May 31, 2006, without requesting briefs on the matter (Appendix Pg. A43). Following the Eastern District's denial of Mr. Kauble's Writ, counsel filed an original Writ of Prohibition/Mandamus with this Court on July 25, 2006. This Court issued a preliminary writ of Mandamus on August 22, 2006 and Respondent's answer was filed on September 20, 2006.

## POINTS RELIED ON

I. Relator is entitled to an Order compelling Respondent to grant the Relator's Motion to Dismiss and Set Aside Resulting Sentence Due to Lack of Subject Matter Jurisdiction because the Court erroneously construed and applied Missouri Statute 556.026 and Missouri case law in that the Court's dismissal of Relator's motion abused its authority and exceeded its jurisdiction.

- State ex rel. Leigh v. Dierker, 974 S.W.2D 505, 506 (Mo. Banc 1998)
- State v. Beine, 162 S.W.2d 483 (Mo. Banc 2005)
- RSMo. 556.026
- State v. Harper, S.W.2d 749 (Mo. App. W.D. 1974)

## ARGUMENT

- I. **RELATOR IS ENTITLED TO AN ORDER COMPELLING RESPONDENT TO GRANT RELATOR’S “MOTION TO DISMISS AND SET ASIDE RESULTING SENTENCE DUE TO LACK OF SUBJECT MATTTER JURISIDICIION” BECAUSE THE COURT ERRORNEOUSLY CONSTRUED AND APPLIED MISSOURI STATUTE 556.026 AND MISSOURI CASE LAW IN THAT THE COURT’S DISMISSAL OF RELATOR’S MOTION ABUSED ITS AUTHORITY AND EXCEEDED ITS JURISDICTION.**

**The standard of review for cases involving writs of Mandamus is that a writ of mandamus is appropriate, “where a court has exceeded its jurisdiction or authority.” State ex rel. Leigh v. Dierker, 974 S.W.2d 505, 857 (Mo. Banc 1998). “A writ will lie both to compel a court to do that which it is obligated by law to do and to undo that which the court was by law prohibited from doing,” Id.**

**In State v. Beine, 162 S.W.2d 483 (Mo. Banc 2005), R.S.Mo 566.083.1 was declared unconstitutional (Appendix A4). A statute that is**

**unconstitutional is not law and confers no rights from the date of its enactment, not merely from the date of the decision, Memorial Hospital for Children v. The Honorable Carl L. Gaertner, 583 S.W.2d 107 (Mo. En Banc 1979). No conduct constitutes an offense unless made so by either criminal code or statute, RSMo Section 556.026 (Appendix A3). If the facts alleged in the information or indictment do not amount to a violation of the law punishable as a crime, a Motion to Dismiss will lie. State v. Harper, S.W. 2d 749 (Mo. App. W.D. 1974).**

**In a criminal prosecution, a trial court’s jurisdiction ends once final judgment and sentence has been rendered. Ossana v. State, 699 S.W. 2d 72, 73 (Mo. App. E.D. 1985) (Rehearing and/or Transfer denied October 17, 1985). “In order to constitute a final judgment, it is axiomatic that the sentence not be contrary to law.” Id. The court went on to say in Ossana that “since the original sentences in this case did not comply with the statute, the trial court did not exhaust its jurisdiction until it rendered sentences in accordance with the law.” Id. Therefore, since the Supreme Court ruling in Beine rendered R.S.M.o. 566.083.1 unconstitutional; any and all judgments and sentences made under the auspices of this statute are not in accordance with the law. Trial courts**

**issuing judgments retain jurisdiction until they have “rendered sentences in accordance with the law.”**

In the current case, the Defendant, Harold Kauble was charged with a crime that was found to be unconstitutional from its inception. His conduct did not constitute an offense because it was not illegal per the Beine decision. The Court therefore had no jurisdiction to accept a plea or a judgment against Mr. Kauble (Appendix A15). His actions do not amount to a violation of the law. Because the indictment to which Mr. Kauble pled described conduct that is not criminal, the plea itself is a legal fiction. Because this plea is not in “accordance with the law,” the trial court, over which Respondent presides, retains jurisdiction in this case. Ossana at 73.

Although Mr. Kauble has successfully completed his probation (Appendix A17), he still suffers from the collateral effects of the invalid judgment as he is still required to register as a sex offender. While the Missouri sex offender registry is not a per se criminal punishment, it does have

“both punitive and regulatory attributes.”<sup>1</sup> This honorable court analyzed the nature of the sex offender registration statutes in In re: R.W. v. Michael Sanders, et al, 168 S.W.3d 65, 69 (Mo. En Banc 2005). In that case, the appellant pled guilty to a sex offense, was placed on probation, and required to register as a sex offender. Id. Once his probation was complete, he refused to continue to register as a sex offender. He then protested the registration requirements on several grounds. Id. One such point was that requiring him to register violated his due process rights guaranteed by the

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<sup>1</sup> See In re: R.W. v. Michael Sanders, et al, 168 S.W.3d 65, 69 (Mo. En Banc 2005) “The Missouri registration statutes do not clearly express the General Assembly’s intent to make the registration statutes civil or criminal. There is evidence that the registration statutes were intended to be criminal and punitive insofar as the statutes are located in Title XXXVIII dealing with ‘Crimes and Punishment.’ However, ‘the location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one.’” quoting Smith v. Doe, 538 U.S. 84, 94, 123 S.Ct. 1140 (2003); “While the registration statutes have both punitive and regulatory attributes, a weighing of the factors above leads to the conclusion that the thrust of the registration and notification requirements are civil and regulatory in nature.” In re: R.W. at 70.

United States Constitution. Id. at 71. This Court relied on the decision of the United States Supreme Court in Connecticut Dept. of Public Safety et. al. v. Doe<sup>2</sup> to hold that,

because the ultimate fact in determining whether a person had to register was conviction of a sex crime, the Court found that the criminal procedures leading to conviction provided the registrant with a sufficient procedurally safeguarded opportunity to challenge the conviction that triggered the registration requirement.

In re: R.W. at 71. This Court applied that notion to R.W.’s case stating that he was “charged with a sex offense and pled guilty...[he] received all procedural safeguards attending a guilty plea. No further process was necessary.” Id.

In Ramsey v. State, the Court of Appeals reiterated the ruling in In re R.W. and added that the “registration requirement is a collateral consequence of a guilty plea.” 182 S.W.3d 665 (Mo. App. E.D. 2005).

In the current case, because Mr. Kauble’s original guilty plea is invalid, any “collateral consequences” cannot be said to have been obtained through proper procedural safeguards and procedures. Since the trial court is without

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<sup>2</sup> 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed. 2d 98 (2003).

jurisdiction in the judgment and sentence,<sup>3</sup> it naturally follows that the trial court was without jurisdiction in any civil, regulatory or collateral matters. Otherwise, Mr. Kauble would be in a position to have his judgment and sentence voided, yet still be required to register as a sex offender. With no offense having been committed, a situation is created that forces a citizen—convicted of no sex crime—to maintain registration with a list created to help law enforcement monitor “sex offenders.” In re R.W. Without a proper court order adjudicating him as such, there is no reason to require Mr. Kauble to continue registration. Since his original judgment and sentence is void, he is not provided with “sufficient procedurally safeguarded opportunity” to challenge the registration requirement. Requiring him to remain on the list creates a “manifest injustice” by continuing to suffer collateral consequences of being convicted under a statute that was later invalidated. State v. Burgin, 2006 WL 1318785 (Mo. App. E.D.) May 16, 2006.

Respondent’s contention that the trial court no longer has jurisdiction over the case because Mr. Kauble was already discharged from probation is flawed (Appendix A35). Respondent has shown no justification to prove that legally invalid judgments contrary to the law and the Missouri Constitution

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<sup>3</sup> State v. Burgin, 2006 WL1318785 (Mo. App. Ed.) May 16, 2006.

are in “in accordance with the law” to render the judgment and sentence final, terminating the trial court’s jurisdiction.

Instead, Respondent cites State v. Ortega, 985 S.W. 2d 373 (Mo. App. S.D. 1999). In that case, the defendant sought to withdraw his guilty plea after he had been discharged from probation under Missouri Supreme Court Rule 29.07. *Id.* The reported case offers no explanation of the defendant’s reason for seeking this withdrawal. See generally Id.

In the present case, Mr. Kauble is requesting that the Respondent grant his Motion to Dismiss and set aside a judgment that is in discord with the laws he swore to uphold. Until the Court complies with the statutory law and Constitution, the case is still open. There is no final judgment in this case simply because Mr. Kauble has been released from probation. Being released from probation does not make the trial court’s original judgment and sentence proper. The trial court’s sentence is improper and contrary to law. Until the Court remedies the error, the sentence will continue to be improper and contrary to the law. The trial court, therefore, still has jurisdiction over the case to render a judgment in accordance with the law, Ossana v. State, 699 S.W. 2d 72 (Mo. App. 1985). The pendency of the proceeding continues until the trial court, the court that retains jurisdiction, remedies the error (Appendix A2).

Based on an unconstitutional statute, the trial court had no lawful right or authority to place Mr. Kauble on probation. The court must remedy the error. Mr. Kauble cannot be properly discharged from a probation and sentence that is unconstitutional from the start, Burgin. Since the sentence and subsequent probation were improper, the court cannot discharge Mr. Kauble and end its jurisdiction, when it had no jurisdiction in the beginning to sentence Mr. Kauble.

It is true that a trial court loses jurisdiction to alter a final judgment and sentence after it has been rendered, but the sentence cannot be contrary to law. If a sentence is contrary to law, the trial court has jurisdiction to re-sentence a defendant until it has rendered a sentence in accordance with the law, State v. Ossana, 699 S.W. 2d 72 (Mo. App. 1985).

In the current case, the Defendant, Harold Kauble was charged with a crime that was found to be unconstitutional from its inception. His conduct did not constitute an offense because it was not illegal per the Beine decision. The Court had no jurisdiction to accept a plea or a judgment against Mr. Kauble. Therefore, his actions do not amount to a violation of the law and a Motion to dismiss is proper.

The trial court cannot pick and choose its jurisdiction.<sup>4</sup> In essence, the Respondent is claiming that the trial court had subject matter jurisdiction, but no longer retains procedural jurisdiction. But in reality, the opposite is true. Because the statute is unconstitutional, the trial court never had subject matter jurisdiction. Since it is maintaining an illegal order, it retains procedural jurisdiction until it complies with the law. Trial courts must comply with the Constitution of the State of Missouri and the Supreme Court Rules and may not refuse to do so simply because it does not like the thought of someone being released from the sex offender registry. Refusing to comply with the laws of the state is an abuse of judicial discretion. State ex rel. Leigh at 506.

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<sup>4</sup> See generally R.S.Mo. 478.220

#### CONCLUSION

This Court does have jurisdiction to grant Mr. Kauble's Motion because the trial court's original finding of guilt is contrary to Missouri case law and the Missouri Constitution and is not in accordance with Missouri Law. Relator prays this Court make its temporary preliminary Writ of Mandamus absolute against Respondent, barring his dismissal of Relator's Motion to Dismiss and Set Aside the Resulting Conviction Due to Lack of Subject Matter Jurisdiction.

The Relator believes the proper remedy in this case is for the Court to grant relief to Mr. Kauble under V.A.M.R. Civil Rule 94.01 and V.A.M.R. Criminal Rules 24.04(b)(2) and 30.20, due to manifest injustice and additionally compel the trial court to dismiss the charges against Mr. Kauble and order him removed from the Missouri Sex Offenders List.

### **CERTIFICATE OF SERVICE**

I, TODD A WAKELAND, do hereby certify that one typewritten copy of the above RELATOR'S Brief and one copy on floppy disk were hand delivered to the RESPONDENT, The Honorable Judge Hartenbach, Division 14, St. Louis County Courts Building, 7900 Carondelet Avenue, Clayton Missouri, 63105 this 19<sup>th</sup> day of October, 2006. And one typewritten copy and one copy on floppy disk was hand delivered to RESPONDENT, Rob Livergood, Assistant Prosecuting Attorney, St. Louis County Prosecuting Attorney's Office, Second Floor, 100 South Central Avenue, Clayton Missouri, 63105, this 19<sup>th</sup> day of October, 2006.

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RULE 84.06(g) AND RULE 84.06(c)  
CERTIFICATE OF COMPLIANCE

Undersigned certifies that the disk containing Respondent's Brief has been scanned for viruses and is virus free as required under Missouri Rule of Civil Procedure 84.06(g) and the undersigned certifies that the above and foregoing brief complies with the requirements and limitations of Missouri Rules of Civil Procedure 84.06(c) in that the Respondent's Brief contains 3,209 words and 451 lines.

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