

## **TABLE OF CONTENTS**

<u>ARGUMENT</u> .....	6
<u>I. The parties agree or Mr. Beaver accedes to Respondents' account with regard to all material facts including Mr. Beaver's corrected conditional release date.</u> .....	7
<u>II. Petitioner Eric Beaver is entitled to prison-time credit for the 620 days he spent on the illegal third term of probation; Respondents' argument to the contrary is without precedent, contrary to the widely-adopted credit for time erroneously at liberty doctrine, and suggests an unmanageable result.</u> .....	8
<u>A. The widely-accepted credit for time erroneously at liberty doctrine requires that Mr. Beaver receive prison-time credit for the 620 day period he was improperly on probation.</u> .....	9
<u>B. Sound judicial policy also supports rejecting Respondents' suggestion that a defendant should not receive prison-time credit for a period of unlawful probation imposed due to government error</u> .....	14

<u>III. Mr. Beaver would accept the alternative relief Respondents propose that the Parole Board be ordered to give him 620 additional days prison-time credit and recalculate his sentence.....</u>	17
<u>CONCLUSION.....</u>	17

## **TABLE OF AUTHORITIES**

### **Cases**

<u>Clark v. Floyd</u> , 80 F.3d 371 (9 <sup>th</sup> Cir. 1996).....	9
<u>Curry v. State</u> , 720 S.W.2d 261 (Tex. Ct. App. 1986).....	12
<u>Drumwright v. State</u> , 572 So.2d 1029 (Fla. Ct. App. 1991).....	13
<u>Dunne v. Keohane</u> , 14 F.3d 335 (7th Cir. 1994) .....	10
<u>In re Roach</u> , 74 P.3d 134 (Wash. 2003).....	9, 11
<u>Jackson v. Kaiser</u> , 185 S.W.2d 784 (Mo. banc 1945).....	11
<u>Kiendra v. Hadden</u> , 763 F.2d 69, 73 (2d Cir.1985) .....	10
<u>Patton v. State</u> , 721 S.W.2d 885 (Tex. Ct. App. 1986) .....	12
<u>Smith v. Swope</u> , 91 F.2d 260 (9th Cir. 1937).....	10
<u>State ex rel. Brown v. Combs</u> , 994 S.W.2d 69 (Mo. App. W.D., 1999).....	8, 14

<u>State v. Robinson</u> , 835 S.W.2d 303, 306 (Mo. 1992) .....	15
<u>State v. Williams</u> , 410 A.2d 251 (N.J. 1980) .....	13
<u>United States v. Martinez</u> , 837 F.2d 861 (9th Cir. 1988) .....	10
<u>White v. Pearlman</u> , 42 F.2d 788 (10th Cir.1930).....	10, 11

### **Statutes**

Missouri Revised Statute § 559.036 .....	7, 14, 15, 16
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### **Other Authorities**

Gabriel J. Chin, <u>Getting Out of Jail Free: Sentence Credit for Periods of Mistaken Liberty</u> , 45 Cath. U. L. Rev. 403 (1996).....	10
N.M. State Bar Advisory Op. 1990-2 (Mar. 10, 1990) .....	16

## **ARGUMENT**

A comparison of the briefs filed by petitioner Eric Beaver and respondents William Burgess and Denis Agniel (collectively “Respondents”) demonstrates this case is appropriate for mandamus. The parties do not dispute any material facts. Rather, they disagree only regarding the legal impact the central, agreed facts – that on December 22, 1999, the Circuit Court of Buchanan County improperly and illegally sentenced Mr. Beaver to a third term of probation and that Mr. Beaver spent 620 days on the resulting unlawful third term of probation – should have on of Mr. Beaver’s conditional release date.

Consistent with prior law, Mr. Beaver has stated that the order should be void, and that he should receive prison-time credit for the 620 days he was on the unlawful third term of probation. Respondents have attempted to ignore that the December 22, 1999, order is void and to argue Mr. Beaver should receive no prison-time credits for the third term of probation because Mr. Beaver was not actually in prison. Respondents’ argument is contrary to precedent related to the well-accepted “credit for time erroneously at liberty” doctrine and sound judicial policy, and should be rejected.

**I. The parties agree or Mr. Beaver accedes to Respondents' account with regard to all material facts including Mr. Beaver's corrected conditional release date.**

There are no material disagreements regarding the facts. The parties each admit that on December 22, 1999, the Circuit Court of Buchanan County sentenced Mr. Beaver to a third-term of probation for cases CR397-0654 and CR397-0675 (the "Concurrent Cases"). (See Respondent's Brief at 10.) Both parties also agree that Mr. Beaver spent 620 days on probation between December 22, 1999, and July 26, 2001, when he was re-incarcerated. (Id. at 11.) Both parties further agree that Missouri Revised Statute § 559.036.3 does not allow a circuit court to sentence an inmate to a third term of probation, and that therefore the Circuit Court's order of December 22 is improper. (Id. at 10.)

Each party also generally agrees that the various documents record Mr. Beaver's periods of incarceration and thus establish the prison time credits Mr. Beaver has earned. Mr. Beaver's brief noted some inconsistencies in the documents, but Respondents have provided corrected data that allow Respondents to calculate that, should Mr. Beaver prevail in this litigation, his conditional release date should be on or before February 7, 2005. (Id.) Mr. Beaver hereby accedes that Respondents are correct and that when (as discussed below) the 620 days of

the unlawful probation term are credited to his prison time Mr. Beaver's conditional release date for completing the prison term for the sentences he received in the Concurrent Cases and in case CR 3972425-01 (the "Consecutive Case") should be February 7, 2005.

**II. Petitioner Eric Beaver is entitled to prison-time credit for the 620 days he spent on the illegal third term of probation; Respondents' argument to the contrary is without precedent, contrary to the widely-adopted credit for time erroneously at liberty doctrine, and suggests an unmanageable result.**

There being no factual disputes, the only remaining disagreement is whether Mr. Beaver should receive 620 days prison-time credit for the days he spent on the illegal third term of parole. Consistent with State ex rel. Brown v. Combs, 994 S.W.2d 69, 71 (Mo. App. W.D., 1999), Mr. Beaver argued in his Petitioner's Brief that – as the State had previously conceded – the December 22 order is "void." The Court should therefore look to the immediately preceding order, which order was dated August 23, 1999, and sentenced Mr. Beaver to a term of incarceration. (Ex. J, O, T, & AA.) This August 23 order would retain full effect, and the December 22 order revoking it would be rendered void, such that Mr. Beaver

should receive prison time credit consecutively from August 23, 1999, to the present. (Petitioner's Brief at 20-21.)

Respondents in their brief ignore that the Order of December 22, 1999, is void and offer a position that is unprecedented and generally unworkable. Respondents suggest that, because Mr. Beaver was not actually in prison, he should not receive prison time credit. (Respondent's Brief at 13-15.) Respondents fail to suggest what other effect voiding the December 22 order would have.

**A. The widely-accepted credit for time erroneously at liberty doctrine requires that Mr. Beaver receive prison-time credit for the 620 day period he was improperly on probation.**

Respondents offer no legal precedent to support their argument that Mr. Beaver should not receive credit for his time on the improper third term of probation, probably because the "credit for time erroneously at liberty" doctrine adopted by virtually every jurisdiction directly contradicts Respondents' position. The credit for time erroneously at liberty doctrine provides that a court should "grant day-for-day credit against a sentence for time spent at liberty where the government mistakenly released a prisoner through inadvertence or mere negligence." In re Roach, 74 P.3d 134, 136 (Wash. 2003) (citing precedent including Clark v. Floyd, 80 F.3d 371, 374 (9th Cir. 1996); Dunne v. Keohane, 14



F.3d 335, 336 (7th Cir. 1994); United States v. Martinez, 837 F.2d 861, 865 (9th Cir. 1988); Kiendra v. Hadden, 763 F.2d 69, 73 (2d Cir.1985); Smith v. Swope, 91 F.2d 260 (9th Cir. 1937); and White v. Pearlman, 42 F.2d 788 (10th Cir.1930)).

The credit for time erroneously at liberty doctrine has been adopted by the vast majority of state and federal courts, with no jurisdiction rejecting it outright. A 1996 law review article states that the principle a criminal defendant should receive credit for time erroneously at liberty has been adopted by “courts in the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits, and state courts in the District of Columbia, Alabama, Arizona, Colorado, Florida, Georgia, Louisiana, Massachusetts, New Jersey, New York, Oklahoma, Pennsylvania, Tennessee and Texas.” Gabriel J. Chin, Getting Out of Jail Free: Sentence Credit for Periods of Mistaken Liberty, 45 Cath. U. L. Rev. 403, 407 (1996) (footnotes omitted). A number of other state courts, including courts “in California, Iowa, Mississippi, Missouri, New Hampshire, and Ohio have found the doctrine inapplicable in particular cases . . . without suggesting that they reject it in principle. Even many prosecutors recognize the principle; the United States Department of Justice and authorities in Delaware, Nevada, and Wisconsin have granted credit without litigation.” Id. at 407-08.

Professor Chin found two states whose courts which have issued opinions critical of the doctrine, but in each instance other courts within the same

jurisdictions adopted the credit for time erroneously at liberty doctrine. See id. at 408 (discussing decisions in Oklahoma and Tennessee that refuse to recognize the doctrine). Since Professor Chin’s article was published, several other states have favorably discussed the doctrine, and Washington has adopted it. See Roach, 74 P.2d at 136-37.

Almost sixty years ago, this Court confirmed the credit for time erroneously at liberty doctrine as set forth in a lead case, but found the doctrine inapplicable to the situation before it. In Jackson v. Kaiser, 185 S.W.2d 784 (Mo. banc 1945), this Court agrees with White v. Pearlman, 42 F.2d 788 (10th Cir. 1930), that a prisoner “cannot be compelled to serve his sentence in installments.” Jackson, 185 S.W.2d at 924. In Jackson, however, this Court found the petitioner’s state sentence was not executed until after the petitioner had served his federal sentence. Id. at 925. Therefore, Jackson did not involve an interrupted sentence, and this Court held the doctrine did not apply.

Mr. Beaver’s situation is unlike Jackson because Mr. Beaver’s sentence was clearly interrupted by an erroneous period at liberty. Immediately after a period of incarceration from August to December 1999, Mr. Beaver was sentenced to and began serving a third term of probation. This unlawful third term of probation ended in July 2001, when Mr. Beaver was re-incarcerated. (Respondents’ Brief at 7.)

When faced with facts similar to Mr. Beaver's situation, courts in several other jurisdictions have held defendant should receive day-for-day credit for the period he or she was improperly at liberty. In Patton v. State, 721 S.W.2d 885 (Tex. Ct. App. 1986), for example, the trial court granted defendant's motion requesting "shock" probation and released her on probation. Later, defendant violated her probation and was returned to prison. Defendant then appealed arguing she should receive credit for her time on probation because her motion for the shock probation was granted out of time and thus the order granting her probation was void.

The Texas appellate court agreed with defendant the untimely order sentencing her to shock probation was void. The court also found nothing to indicate defendant had caused the motion to be granted out of time, for she had timely filed her motion and had not otherwise sought to delay the proceedings. The court therefore held, "[W]e conclude the infirmity in the trial court's order resulted solely from the inaction of the trial court and not through the fault of [defendant]. Accordingly, [defendant] is entitled to credit against her sentence for the number of calendar days during which she was erroneously released from prison." 721 S.W.2d at 888; accord Curry v. State, 720 S.W.2d 261, 263-64 (Tex. Ct. App. 1986).

Similarly, in Drumwright v. State, 572 So.2d 1029 (Fla. Ct. App. 1991), defendant was sentenced to thirty years, but a clerical error resulted in the judgment reflecting a thirty month sentence. Defendant was released after serving six months, but the error was soon discovered and defendant was re-incarcerated under a corrected judgment. Stating that “[t]he sentence of a prisoner who is discharged without contributing fault continues to run while he is at liberty,” the Florida appellate court held defendant should receive prison-time credit for the days defendant was at liberty.

And in State v. Williams, 410 A.2d 251 (N.J. 1980), the New Jersey Supreme Court granted a convicted murderer credit for the time he was on probation after the order that allowed the probation was reversed on appeal.

Like the defendants in Patton, Drumwright, and Williams, Mr. Beaver did nothing wrong to cause the Circuit Court to enter its improper December 22, 1999, order. No one claims that Mr. Beaver made any misrepresentations or otherwise tricked the Circuit Court into sentencing him to a third term of probation. Also, the probation period that illegal order imposed interrupted Mr. Beaver’s sentence. Therefore, consistent with Patton, Drumwright, and Williams, and the credit for time erroneously at liberty doctrine adopted by a vast majority of jurisdictions, this Court should reject Respondents’ argument and give Mr. Beaver 620 days of

prison-time credit for the period from December 22, 1999, to July 26, 2001, when Mr. Beaver was on the third, improper term of probation.

**B. Sound judicial policy also supports rejecting Respondents' suggestion that a defendants should not receive prison-time credit for a period of unlawful probation imposed due to government error.**

In addition to the credit for time erroneously at liberty doctrine, sound policy supports that Mr. Beaver should receive prison-time credit for the days he was serving the improper third term of probation. In particular, Respondents do not allege Mr. Beaver did something wrong such that the December 22, 1999, order was entered. Respondents note that Mr. Beaver and his counsel did not object. (Respondents' Brief at 11.) However, it appears no one – neither the State nor Mr. Beaver – objected. Apparently the State, Mr. Beaver, and the Circuit Court were unaware of the Missouri appellate court decision in State ex rel. Brown v. Combs that declared a third term of probation illegal, or they all failed to appreciate Brown's effect on Mr. Beaver's case.

Respondents' argument that Mr. Beaver should have objected would also place defendants and their counsel in an untenable position, while allowing the State to avoid any consequences for allowing the error to happen. Defendants

generally seek to avoid incarceration. They and their counsel should not be placed in the position of needing to warn a trial court its order granting the defendant probation would be void to prevent imposition of an interrupted sentence. See United States v. Martinez, 837 F.2d 861, 866 (9th Cir. 1988) (stating a defendant “has no affirmative duty to aid in the execution of his sentence”); see also N.M. State Bar Advisory Op. 1990-2 (Mar. 10, 1990), Attached as Appendix A-17 to A-18, available at [http://www.nmbar.org/Content/NavigationMenu/Attorney\\_Services\\_Practice\\_Resources/Risk\\_Management/Topical\\_Index/2000-2002\\_opinions/1990-2.doc](http://www.nmbar.org/Content/NavigationMenu/Attorney_Services_Practice_Resources/Risk_Management/Topical_Index/2000-2002_opinions/1990-2.doc) (stating it may be malpractice for a criminal defense attorney to give notice to the court or prosecutor that the prosecution of his client had “fallen through the cracks”).

The State, meanwhile, generally has a duty to make sure that justice is accomplished in criminal proceedings. “The prosecutor, and the entire law enforcement community, represent the state. The state’s interest in the criminal trial is . . . that justice be done.” State v. Robinson, 835 S.W.2d 303, 306 (Mo. 1992). This duty should include preventing illegal terms of probation, or suffering the consequences when such a term is granted. The State also is a participant in all criminal cases, and can easily give notice to all prosecutors, courts, and probation officials that a third term of probation is illegal under Missouri Revised Statute § 559.036.3. Thus, contrary to Respondents’ argument, the State and not a defendant

like Mr. Beaver should bear the burden of, and thus have the motivation to avoid, entry of an illegal third term of probation in future cases.

Simply treating the December 22, 1999, order as void and allowing the prior order to have full effect as Mr. Beaver advocates would also provide a clear rule that can be applied to all other instances where, contrary to Missouri Revised Statute § 559.036.3, a Missouri inmate has without fault been sentenced to a third term of probation. If this Court were instead to adopt Respondents' suggestion that at least in some circumstances prison-time credit should not be granted, the result would be that Missouri courts would need to develop guidelines when prison time should and should not be granted, and then relitigate the prison-time credit issue with each other person who has served or is serving an illegal third term of probation.

Finally, if this Court accepts Respondents' argument, some persons not currently incarcerated would become subject to possible re-incarceration because they had received a third term of probation and would not receive prison-time credit for it. Some might be re-incarcerated even though they were acting properly and had completed all or almost all of the unlawful third probation term. People who had become productive members of society again and who thought they had completed or almost completed their entire sentences would unjustly face re-incarceration.

**III. Mr. Beaver would accept the alternative relief Respondents propose that the Parole Board be ordered to give him 620 additional days prison-time credit and recalculate his sentence.**

To the extent any uncertainty regarding the calculation of Mr. Beaver's conditional release date may still exist, Mr. Beaver will accept Respondent's suggestion that this Court should simply order the Missouri Department of Corrections and its Parole Board to give Mr. Beaver the 620 days of prison-time credits he has earned between December 22, 1999, and July 26, 2001, and let the Parole Board recalculate Mr. Beaver's conditional release date after awarding all proper credits.

**CONCLUSION**

For the reasons stated in this Reply and his Brief of Petitioner, Eric Beaver petitions this Court to make the writ of mandamus absolute and order the Respondents to credit Mr. Beaver 620 additional days prison-time credit for his time on the unlawful third term of probation; set Mr. Beaver's conditional release date as February 7, 2005; or grant Mr. Beaver any other relief this Court deems just and proper.



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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was sent by United States mail, postage pre-paid, this 27th day of July, 2004, to the following counsel of record:

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### **Certificate of Compliance and Service**

Pursuant to Rule 84.06, the undersigned certifies that this Brief complies with the word limitation set forth in Missouri Supreme Court Rule 84.06(b), in that it contains fewer than 7,750 words. In fact, the brief – excluding cover, certificate of service, this certification and appendix – contains 2,988 words.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using Symantec AntiVirus Corporate Edition. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 27<sup>th</sup> day of July, 2004, to Andrew Hassell, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102 and a copy was e-mailed to opposing counsel as well.

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Michael P. Downey