HABEAS CORPUS

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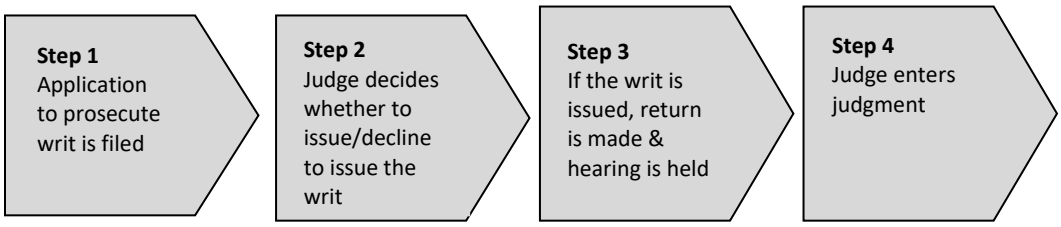
Contents

I. Generally. Habeas corpus is a procedure by which a person may challenge an imprisonment or a restraint on his or her liberty "for any criminal or supposed criminal matter, or on any pretense whatsoever." G.S. 17-3; N.C. CONST. art. I § 21. One example of a scenario when habeas might be appropriate is when a person has been taken into and has remained in police custody for weeks without being charged with a crime. As discussed below, habeas is not the proper procedure for challenging a detention pursuant to a valid final judgment in a criminal case entered by a court with proper jurisdiction. It is not a substitute for an appeal, Matter of Imprisonment of Stevens, 28 N.C. App. 471, 473 (1976), or a proper procedure for deciding an issue that is properly presented to the jury in a pending criminal case. State v. Chapman, 228 N.C. App. 449, 453 (2013) (the trial court exceeded its authority by dismissing capital murder charges against a defendant who was being held without bond on grounds that twins who were in utero at the time of the mother's shooting were not born alive and thus could not have been murdered; the question of whether the twins were born alive should

be decided by the jury in the pending murder case, not by a judge in a pre-trial habeas proceeding).

The basic steps involved in the habeas process are illustrated in Figure 1 below, and are discussed in the sections that follow.

Figure 1. Steps in The Habeas Process



II. The Application for The Writ

A. Who May Apply. An application to prosecute a writ of habeas corpus may be made by the person imprisoned or restrained ("the party") or by "any person in his behalf." G.S. 17-5.

B. Appropriate Court. An application may be made to any justice or judge in the appellate division or to any superior court judge, "either during a session or in vacation." G.S. 17-6. For the special rules that apply in capital cases, see section VIII, below.

C. Form. The application must be in writing and signed by the applicant. G.S. 17-6. The facts set forth in the application must be verified under oath. G.S. 17-7. According to G.S. 17-7, the application must:

- Name the party imprisoned or restrained;
- State that the party is imprisoned or restrained of his or her liberty;
- Name the place where the party is imprisoned or restrained;
- Name the officer or person who has imprisoned or restrained the party ("the custodian");
- Describe the party and/or custodian if their names are unknown;
- State the "cause or pretense" of the imprisonment or restraint;
- Attach a copy of any applicable warrant or process, state that a copy was demanded and refused, or provide a "sufficient reason" why a demand for a copy could not be made;
- State why the imprisonment or restraint is illegal; and
- State that, to the applicant's knowledge, the legality of the imprisonment or restraint has not already been determined by writ of habeas corpus.

The court of appeals has noted that G.S. 17-7 "clearly places the burden on the applicant to make an evidentiary forecast establishing that he or she is entitled to habeas corpus relief." State v. Leach, 227 N.C. App. 399, 411 (2013) (the defendant failed to make the required showing).

D. Court May Act Sua Sponte. If the appellate or superior court division, or any judge of either division, "has evidence from [a] judicial proceeding before [the] court or judge that any person . . . is illegally imprisoned or restrained of his [or her] liberty," the court or judge has a duty to issue a writ of habeas corpus, even if no application is made. G.S. 17-8.

III. Assessing The Application. When assessing the application for the writ, the trial court must make two inquiries:

- whether the application is in proper form and
- whether the applicant has established a valid basis for believing that he or she is being unlawfully detained and entitled to be discharged.

State v. Leach, 227 N.C. App. 399, 406 (2013). "In making this determination, the trial court is simply required to examine the face of the . . . application, including any supporting documentation, and decide whether the necessary preliminary showing has been made." *Id.* The form of the application is discussed in section II.C above.

A. When The Application Must Be Denied. G.S. 17-4 provides that an application must be denied in the following circumstances:

- When the party is committed or detained pursuant to process issued by a U.S. court or judge, in cases in which such courts or judges have exclusive jurisdiction, G.S. 17-4(1);
- When the party is committed or detained by virtue of a final order, judgment, or decree of a competent tribunal, or by virtue of an execution issued upon such final order, judgment or decree, G.S. 17-4(2), *see* State v. Barrier, 348 S.E.2d 345 (N.C. 1986) (mem. order denying an application to prosecute a writ where "the petitioner is seeking to test his commitment by virtue of a judgment of a competent tribunal of criminal jurisdiction"); or
- When no probable ground for relief is shown in the application, G.S. 17-4(4).

The statute also provides that the writ shall be denied when a party has willfully neglected, for two whole sessions after imprisonment, to apply for the writ to the superior court of the county in which he or she is imprisoned and that person is not entitled to habeas corpus in vacation. G.S. 17-4(3). Presumably, such a person may secure relief if a proper application is made in session.

Notwithstanding the general rule of G.S. 17-4(2) that an application must be denied when the party is detained by virtue of a final order, judgment, or decree of a competent tribunal, the North Carolina Court of Appeals has explained, in an analysis harmonizing the language of G.S. 17-4 and G.S. 17-33, that there may be circumstances where an applicant originally detained in a lawful manner nevertheless may be entitled to habeas relief due to developments subsequent to the original detention. *See* State v. Daw, 277 N.C. App. 240, 259-60 (2021) (so stating in case involving habeas application alleging that incarceration in state prison system during COVID-19 pandemic violated cruel and unusual punishment provisions of state and federal constitutions), *review allowed*, ___ N.C. ___, 883 S.E.2d 457 (2023); *Leach*, 227 N.C. App. at 411 n.6 (2013) (same

in case involving a habeas application challenging actions of the Parole Commission). For further discussion of G.S. 17-33, see section VI.C.1, below.

With respect to the requirement of G.S. 17-4(1) that an application must be denied when the party is detained pursuant to federal process, the North Carolina Supreme Court held in Chavez v. McFadden, 374 N.C. 458, 477-78 (2020) that a habeas application challenging detention in a local jail on the sole basis of alleged federal immigration violations must be denied where it appears from the application or the return that such detention is pursuant to a federal immigration-related arrest warrant or detainer and the detaining sheriff has entered into an immigration enforcement agreement with the federal government under § 287(g) of the Immigration and Nationality Act.

B. Court's Order. The court may rule on the application summarily; it need not make findings of fact or conclusions of law. *Leach*, 227 N.C. App. at 405-07 (reasoning that the question at this point is a legal one, not a factual one). The procedure for issuing the writ is discussed in section IV below.

IV. Issuing The Writ. The writ refers to the judge's order requiring the custodian to respond to the petition and produce the party in court. The writ does not release the party from imprisonment or restraint; if appropriate, that is done by the judgment, discussed below.

A. Time for Granting the Application and Penalties. When an application is properly presented, the writ must be granted without delay. G.S. 17-9. If a judge refuses to grant a writ, "such judge shall forfeit . . . [$2,500]." G.S. 17-10.

B. Form of The Writ

1. Sample Writ. A sample writ is provided in Appendix A.

2. Defects. A writ may not be disobeyed on grounds of defect in form. G.S. 17-11.

3. Naming Custodian and Party. The writ is sufficient if it names the custodian by the name of his or her office or by natural name. G.S. 17-11. If those names are unknown, the custodian may be "described by an assumed appellation." *Id.* The writ is sufficient as long as the party is designated by name. *Id.* If the party's name is uncertain or unknown, the party may be described "by an assumed appellation or in any other way, so as to designate the person intended." *Id.*

4. Setting Time for Return. Return of the writ refers to the custodian's response and production of the party before the court. The judge may set the time for return for a specific date or immediately, "as the case may require." G.S. 17-13. For the special rules about the return that apply in capital cases, see section VIII, below.

C. Service of Writ. G.S. 17-12 sets out the requirements for service of the writ. Typically service is done by a Sheriff or Deputy Sheriff.

V. Return and Production of Party

A. Return

1. Form. The custodian must make a return in writing. G.S. 17-14. Except when that person is a sworn public officer acting in an official capacity, the return must be verified by oath. *Id.*

2. Contents. G.S. 17-14 provides that the return must state:

- Whether the person has the party in or her custody or under his or her power or restraint;
- If so, the authority for the imprisonment or restraint;
- If the party is detained by virtue of a writ, warrant, or other written authority, a copy of that document must be attached to the return and the original must be produced in court;
- If the person on whom the writ is served had custody of the party but has transferred custody to someone else, the return must state to whom, when, for what cause, and by what authority the transfer occurred.

B. Production of Person Detained. If required by the writ, the custodian must produce the party in his or her custody, except in the event of sickness. G.S. 17-15. In cases of sickness, the judge can proceed in the party's absence. G.S. 17-37.

C. Failure to Obey and "Conniving". The statute has provisions for dealing with the custodian's refusal to obey the writ, a judge's conniving at an insufficient return, for the making of false returns, and other disobedience to the writ. G.S. 17-16 through 17-28.

VI. Proceedings after Return

A. Additional Notice

1. To Interested Parties. If the return indicates that someone else has an interest in continuing the party's imprisonment or restraint, no discharge order can be made until reasonable notice of the proceeding is given to that person or that person's lawyer. G.S. 17-29.

2. To District Attorney. If the return indicates that the party is detained because of a criminal accusation, the court can require notice to the district attorney of the district in which the party is detained. G.S. 17-30.

B. Hearing

1. Summary Proceeding. Once the party is brought before the judge, the judge "shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing or remanding such party." G.S. 17-32. The summary nature of the proceedings "reflects the fact that their principal object is a release of a party from illegal restraint and that such proceedings would lose many of their most beneficial results if they were not summary and prompt." State v. Leach, 227 N.C. App. 399, 404 (2013) (quotation omitted). However, the proceedings "should not be perfunctory and merely formal." *Id.* (quotation omitted).

2. Relevant Determination. The "sole question for determination" at the hearing "is whether petitioner is then being unlawfully restrained of his liberty." State v. Chapman, 228 N.C. App. 449, 453 (quotation omitted); *see also Leach,* 227 N.C. App. at 405.

3. Counsel. An indigent is entitled to counsel at a habeas hearing. G.S. 7A-451(a)(2).

4. **Evidence.** At the hearing, relevant facts "may be established by evidence like any other disputed fact." *Leach*, 227 N.C. App. at 404 (quotation omitted). The statute provides that any party may procure the attendance of witnesses at the hearing by subpoena. G.S. 17-31.

5. **Findings of Fact and Conclusions of Law.** Following the return, "the trial court must make the factual and legal decisions necessary to determine whether the applicant is, in fact, lawfully imprisoned or restrained utilizing such procedures as suffice to adequately resolve any relevant issues of law or fact." *Leach*, 227 N.C. App. at 405; State v. Daw, 277 N.C. App 240, 257 (2021). Findings of fact are "necessary when the trial court is required to resolve disputed factual issues." *Leach*, 227 N.C. App. at 406. Accordingly, the sample judgments provided in Appendix B and Appendix C provide for both findings of fact and conclusions of law.

C. **Judgment.** After the hearing, the court has several options to implement its legal determination as to whether the defendant has been unlawfully restrained. They include:

- discharging the defendant,
- modifying the defendant's custody, or
- remanding the defendant to custody.

Each of these options is discussed in the sections that follow.

1. **Discharge.** G.S. 17-33 provides that the court must discharge the defendant in certain circumstances, illustrated in Figure 2 below. While G.S. 17-33 refers to situations where a petitioner is in custody "by virtue of civil process," the discharge provisions the statute describes are applicable to criminal cases. *See* State v. Daw, 277 N.C. App. 240, 253-55 (2021) (rejecting State's argument that G.S. 17-33 was inapplicable to criminal cases; describing the statutory reference to "civil process" as codifying a distinction between civil and military systems of justice rather than between civil and criminal litigation), *review allowed*, ___ N.C. ___, 883 S.E.2d 457 (2023).

Figure 2. When the Defendant Must Be Discharged.

Statutory Basis	Notes
No cause shown for imprisonment or restraint	For example, (1) when the defendant has been held in jail for ten days and no charges have been filed; or (2) when the defendant is imprisoned on a judgment finding him or her in contempt of court but the issuing court had no jurisdiction to render judgment. *Cf.* In re Palmer, 265 N.C. 485, 486 (1965) (question at a habeas hearing challenging imprisonment for contempt "is whether, on the record, the court which imposed the sentence had jurisdiction and acted within its lawful authority").
Process has been issued but the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person (G.S. 17-33(1))	For example, the defendant has been charged with a crime that did not occur in North Carolina.
Process has been issued and although the original imprisonment was lawful, some act, omission or event, has occurred entitling the party to be discharged (G.S. 17-33(2))	For example, an allegation the person has recovered from a mental disease after commitment. In re Harris, 241 N.C. 179, 181 (1954) (suggesting that habeas is the proper avenue for asserting such a claim). Relief is not available under this provision in connection with a prisoner's "challenge to an administrative decision, such as the denial of parole or the rescission of a [Mutual Agreement Parole Program (MAPP)] contract, unless the inmate has exhausted any available administrative remedies and unless some clear constitutional violation has occurred." State v. Leach, 227 N.C. App. 399, 411 (2013) (citing similar cases).
Process has been issued but it is defective in some manner, rendering it void (G.S. 17-33(3))	For example, the defendant is in custody on the basis of an indictment which fails to name or otherwise sufficiently identify the defendant. *Cf.* State v. Simpson, 302 N.C. 613, 616-17 (1981) (such an indictment is fatally and incurably defective).
Process has been issued in a proper form but it is not allowed by law (G.S. 17-33(4))	For example, an arrest warrant was issued for an infraction. G.S.15A-304.
Process has been issued but the person having the custody of the party under such process is not the person empowered by law to detain the party (G.S. 17-33(5))	For example, a person under the age of 18 is detained pending trial at a facility that has not been approved by the Division of Juvenile Justice to provide secure confinement and care for juveniles and which is not a holdover facility as defined in G.S. 7B-1501(11). *See* G.S. 15A-521(a).
Process has been issued but it is not authorized by any judgment, order or decree of any court or by any provision of law (G.S. 17-33(6))	For example, the defendant has been arrested on the basis of an order for arrest for failing to appear on a charge that already has been disposed. G.S. 15A-301(g)(3) (disposition of all charges on which a process is based effects the recall of that process and all derivative orders for arrest issued for failure to appear).

Source: G.S. 17-33.

2. **Custody Modification.** If the party has been legally committed but the commitment is irregular, the judge can correct the irregularity by, in appropriate cases, setting bail or committing the party to the proper custodian. G.S. 17-35.
3. **Remand to Custody.** Pursuant to G.S. 17-34, the judge must remand the party if it appears that he or she is detained:

    - By virtue of process issued by any U.S. court or judge, in a case where such court or judge has exclusive jurisdiction;

- By virtue of the final judgment or decree of any competent court, or of any execution issued upon such judgment or decree (as illustrated in Figure 2. and as discussed in section III.A., under G.S. 17-33(2) there may be circumstances following a lawful final judgment or decree where a petitioner's detention has become unlawful on the basis of a subsequent development; this remand provision would apply if a judge considering such a claim rejects it and finds no basis for discharge under G.S. 17-33(2));
- For any contempt specially and plainly charged in the commitment by some court, officer, or body having authority to commit for the contempt; or
- That the time during which the party may be legally detained has not expired.

4. **Costs.** G.S. 6-21 provides that costs in habeas proceedings "shall be taxed against either party, or apportioned among the parties, in the discretion of the court."

5. **Sample Judgment.** Sample judgments are provided in Appendices B and C.

D. **Alternative Proceedings.** Occasionally, a petition for habeas corpus will raise a valid issue but the issue is not one that warrants relief through habeas. For example, the party might correctly argue that he or she is entitled to be discharged from imprisonment because the judge incorrectly calculated the prior record level. In these circumstances, the judge has a few options. One is to exercise the authority granted in G.S. 15A-1420(d), allowing a judge to order relief on his or her own motion for appropriate relief. Another option is to appoint counsel to file a motion for appropriate relief raising the issue identified and all other relevant issues. It would be inadvisable to "convert" the party's habeas petition into a motion for appropriate relief, as that may inadvertently result in procedural default of other meritorious claims. Finally, for capital cases, see section VIII, below.

VII. **Appeal.** Appellate review of a trial court's judgment on a writ of habeas corpus is by writ of certiorari. State v. Niccum, 293 N.C. 276, 278 (1977). The decision whether to summarily deny the application or issue the writ is reviewed de novo. State v. Leach, 227 N.C. App. 399, 407 (2013).

VIII. **Capital Cases.** If the application for a writ of habeas corpus is made in superior court after sentencing in a capital case, Rule 25 of the General Rules of Practice for the Superior and District Courts applies. In short, Section (5) of that rule requires that in capital cases, meritorious challenges must be presented to the senior resident superior court judge or his or her designee. Specifically, the rule states that if the application "raises a meritorious challenge to the original jurisdiction of the sentencing court, and the writ is granted," the judge must make it "returnable before the senior resident superior court judge of the judicial district where the applicant was sentenced or the senior resident superior court judge's designee." *Id*. Section (5) also provides that if the application "raises a meritorious non-jurisdictional challenge to the applicant's conviction and sentence," the judge must "refer the matter to the senior resident superior court judge of the judicial district where the applicant was sentenced or the senior resident superior court judge's designee for disposition as a motion for appropriate relief." *Id*.

Appendix A: Sample Writ

IN THE MATTER OF)
)
)
)
)
_____
Party Imprisoned or Restrained

WRIT OF HABEAS CORPUS
(G.S. Ch. 17)

TO [*custodian of party imprisoned or restrained*]:

You are ordered to bring [*name of party imprisoned or restrained*], by whatever name he/she may be called, before Judge [*name judge*], on [*insert time and date*], [*insert court and place*], together with the official records of his/her confinement.

This, the ____ day of _____, 20___.

THE HONORABLE _____
Superior Court Judge

TO THE SHERIFF OF [*name county*] COUNTY:

You are hereby ordered to serve the foregoing writ of habeas corpus upon [*name custodian of party imprisoned or restrained*].

THE HONORABLE _____
Superior Court Judge

RETURN

RECEIVED on the ____ day of _____, 20___. Served by reading and delivering a copy to _____ on the _____ day of _____, 20___.

_____
Sheriff/Deputy Sheriff

[Note: If the order is returnable before another judge, the issuing judge should notify the second judge.]

Appendix B: Sample Judgment Denying Relief

IN THE MATTER OF	)	
	)	**JUDGMENT UPON WRIT OF**
	)	**HABEAS CORPUS**
	)	(G.S. Ch. 17)
	)	
_____	)	
Petitioner		

This matter was heard on [*date*] in the [*name county*] County Superior Court upon a writ of habeas corpus concerning the imprisonment of the petitioner, and a return to the writ filed by [*name custodian*], the officer having custody of the petitioner.

The petitioner, the petitioner's attorney, [*attorney's name and address*], and the above-mentioned custodian were present.

Upon examination of the return and all records attached thereto, and hearing all of the evidence, the court finds that the petitioner is confined by virtue of [*make findings of fact concerning confinement*]. [*make any findings necessary to resolve factual disputes and support the legal conclusion set forth below that petitioner is not entitled to relief*].

The court concludes as a matter of law that the petitioner is confined by virtue of a lawful [*identify document, order, etc.*] of a court of competent jurisdiction; that the petitioner is not unlawfully restrained of [*his or her*] liberty; that the time during which the petitioner may be legally detained has not expired; that the allegations set forth in the petition do not constitute probable grounds for relief, either in fact or in law, by way of habeas corpus; and that the petition shall be denied.

THEREFORE IT IS ORDERED that

1. The petitioner's petition be denied;

2. The petitioner be remanded to the custodian in whose custody [*he or she*] was when the writ was issued; and

3. A copy of this judgment be forwarded to the petitioner, the petitioner's attorney named above, the District Attorney, and the custodian of the facility where the petitioner is confined.

This, the ___ day of _____, 20___.

THE HONORABLE _____
Superior Court Judge

Appendix C: Sample Judgment Granting Relief

IN THE MATTER OF	)	
	)	**JUDGMENT UPON WRIT OF**
	)	**HABEAS CORPUS**
	)	(G.S. Ch. 17)
	)	
_____	)	
Petitioner		

This matter was heard on [*date*] in the [*name county*] County Superior Court upon a writ of habeas corpus concerning the imprisonment of the petitioner, and a return to the writ filed by [*name custodian*], the officer having custody of the petitioner.

The petitioner, the petitioner's attorney, [*attorney's name and address*], and the above-mentioned custodian were present.

Upon examination of the return and all records attached thereto, and hearing all of the evidence, the court finds that [*make findings of fact concerning imprisonment or restraint*]. [*make any findings necessary to resolve factual disputes and support the legal conclusion set forth below that petitioner is entitled to relief*].

The court concludes as a matter of law that [*make conclusions regarding the illegality of the petitioner's imprisonment or restraint e.g., specifying the jurisdictional defect in the process, order, etc. resulting in the petitioner's confinement*]; and that the petition shall be granted.

THEREFORE IT IS ORDERED that

1. The petitioner's petition be granted;

2. The custodian named above immediately discharge the petitioner from custody [*Note: you have authority to modify custody as an alternative to discharge, if appropriate e.g., if petitioner is entitled to conditions of pretrial release but not to complete discharge*]; and

3. A copy of this judgment be forwarded to the petitioner, the petitioner's attorney named above, the District Attorney, and the custodian of the facility where the petitioner is confined.

This, the ___ day of _____, 20___.

THE HONORABLE _____
Superior Court Judge