

HABEAS CORPUS

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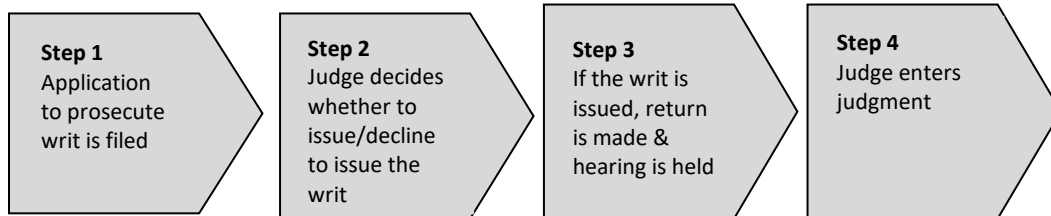
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I. Generally. Habeas corpus is a procedure by which a person may challenge an imprisonment or a restraint on his or her liberty “for any criminal or supposed criminal matter, or on any pretense whatsoever.” G.S. 17-3; N.C. CONST. art. I § 21. One example 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. Daw*, ___ N.C. ___, 904 S.E.2d 765 (2024), *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.

In *State v. Daw*, the North Carolina Supreme Court made clear that G.S. 17-4(2) mandates denial of a habeas application when the petitioner is “detained by virtue of the final judgments of a competent court of criminal jurisdiction.” ___ N.C. ___, 904 S.E.2d 765, 772 (2024). The Court in *Daw* expressly disavowed an opinion from the Court of Appeals below that interpreted G.S. 17-33 to permit habeas relief for a person in custody pursuant to a lawful criminal judgment on the basis of unlawful conditions of confinement or other developments subsequent to the judgment. For further discussion of *Daw* and 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 petitioner “[i]f no legal cause is shown for [the petitioner’s] imprisonment or restraint, or for the continuance thereof.” G.S. 17-33 also refers to situations where a petitioner who is in custody “by virtue of civil process” may be discharged. See G.S. 17-33(1)-(6). The Court of Appeals had held that the provisions of the statute applicable to petitioners in custody by virtue of civil process also were applicable to petitioners in custody pursuant to a valid final judgment in a criminal case. *State v. Daw*, 277 N.C. App. 240, 253-55 (2021), *disavowed*, ___ N.C. ___, 904 S.E.2d 765 (2024); see also *Leach*, 227 N.C. App. at 409-411, n.6 (2013) (so stating on the basis of earlier cases considering challenges to parole board and other administrative decisions). However, in *State v. Daw* the North Carolina Supreme Court expressly disavowed this interpretation of the statute by the Court of Appeals below and held that the discharge provisions of G.S. 17-33 applicable to petitioners in custody by virtue of civil process are categorically unavailable to petitioners in custody pursuant to a valid final judgment in a criminal case. ___ N.C. ___, 904 S.E.2d 765, 774-75 (2024). The Court in *Daw* reasoned that because G.S. 17-4(2) “mandates summary denial” of a habeas petition when the applicant is “imprisoned due to a final judgment or order of a court possessing jurisdiction over the matter” the provisions of G.S. 17-33, which become relevant only after the writ has been issued, returned, and heard, are never applicable to a person in custody pursuant to a valid final criminal judgment. *Id.* The Court also explained that beyond the practical obstacle of the mandatory summary denial required by G.S. 17-4(2), the plain language of G.S. 17-33 makes clear that the provisions of G.S. 17-33(1) through (6) apply only to “persons detained by virtue of civil process” and not to “persons in custody by virtue of criminal process.” *Id.*

The *Daw* opinion at times refers to a broad inapplicability of G.S. 17-33 to criminal cases. See, e.g., ___ N.C. at ___, 904 S.E.2d at 774 (“Even if section 17-33 applied to persons in custody by virtue of criminal process, which it does not, it would not conflict with section 17-4 . . .”). However, *Daw* involved a criminal judgment of uncontested validity and the Court’s analysis focused on the portion of G.S. 17-33 referring to cases involving civil process. See, e.g., ___ N.C. at ___, 904 S.E.2d at 772 n.4 (“Petitioner’s argument for habeas relief is rooted in subsection 17-33(2). But he has not argued that there is no legal cause for his detention under the first sentence of that subsection.”). Thus, it is not clear that the sometimes broadly phrased references in *Daw* to the inapplicability of G.S. 17-33 to criminal cases should be understood to include the first sentence of the statute which requires a habeas petitioner to be discharged “[i]f no legal cause is shown for [the petitioner’s] imprisonment or restraint, or for the continuance thereof.” Presumably, that basis for discharge remains available to a criminal defendant whose habeas petition is not subject to summary denial under G.S. 17-4. See, e.g., *Daw*, ___ N.C. at ___, 904 S.E.2d at 770-71 (explaining the North Carolina history of the writ of habeas corpus as a fundamental remedy for unlawful restraint of liberty). Examples of circumstances where there is no legal cause for a petitioner’s restraint include:

- the defendant is being held in jail but has not been charged with a criminal offense or afforded an initial or first appearance, *or*
- 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”).

Note that a discharge from custody for lack of “legal cause” in a criminal case may involve circumstances factually analogous to those described by G.S. 17-33 for civil cases. Examples of such circumstances include:

- the defendant has been charged by North Carolina criminal process with a crime that did not occur in North Carolina (analogous to G.S. 17-33(1)),
- the defendant is in custody pursuant to an indictment that wholly fails to charge a crime (analogous to G.S. 17-33(3)),
- the defendant is in custody pursuant to an arrest warrant issued for an infraction (analogous to G.S. 17-33(4)), *or*
- the defendant has been arrested pursuant to an order for arrest for failing to appear on a charge that already has been disposed (analogous to G.S. 17-33(6)).

Again, however, language in the *Daw* opinion is at times broad and the Court did not directly explain its view on the applicability of the first sentence of G.S. 17-33 to criminal cases.

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;
 - 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 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)
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_____)

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

Party Imprisoned or Restrained

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

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