HABEAS CORPUS

Source: Jessica Smith, UNC School of Government (May 2009)

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 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.

II. The application

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. G.S. 17-6. For the special rules that apply in capital cases, see section VII, 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.

D. Content. 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.

E. 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**.**

F. When 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;
- 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;
- When the party has willfully neglected, for two whole sessions after imprisonment, to apply for the writ; or
- When no probable ground for relief is shown in the application.

III. 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 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 attached to this outline as Exhibit A.

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

3. Naming the 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 so 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 a 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 VII, below.

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

IV. Return and production of the party imprisoned or restrained

A. Return

1. Form of the return. 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 of the return. 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 the 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" at insufficient return. 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.

V. 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. 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.

1. **Counsel.** An indigent is entitled to counsel for a habeas hearing. G.S. 7A-451(a)(2).
2. **Witnesses.** Any party may procure the attendance of witnesses at the hearing by subpoena. G.S. 17-31.

D. Judgment. After the hearing, the judge has several options, including discharge, remand to custody, and modification of custody. Sample judgments are attached to this outline as Exhibits B and C.

1. **Discharge when no cause shown for imprisonment or restraint.** If no cause is shown for the imprisonment or restraint, the judge must discharge the party. G.S. 17-33.
2. **Discharge when process is ineffective.** If the party is in custody by process issued by a court or by an officer in the course of judicial proceedings, G.S. 17-33 provides that the party should be discharged if:
   - The jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person;
   - Although the original imprisonment was lawful, some act, omission or event, has occurred entitling the party to be discharged;
   - The process is defective in some manner, rendering it void;
   - The process is in proper form but is not allowed by law;
   - The person having the custody of the party under such process is not the person empowered by law to detain the party;
   - The process is not authorized by any judgment, order or decree of any court or by any provision of law.

   a. **Modification of custody.** If the party has been legally committed but the commitment is irregular, judge can correct the irregularity e.g., by setting bail or committing the party to the proper custodian. G.S. 17-35.
3. **Remand to custody.** Pursuant to G.S. 14-34, 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."

E. 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 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 VII, below.

VI. 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 (1977).

VII. 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 defendant was sentenced, or the senior resident superior court judge's designee. Section (5) also provides that if the application raises a meritorious non-jurisdictional challenge to the defendant'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.

Exhibit 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.]

Exhibit 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*].

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

Exhibit 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*].

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