CHAPTER 21

STATE HABEAS CORPUS: FLORIDA, NEW YORK, AND MICHIGAN*

A. Introduction

This Chapter discusses how the writ of habeas corpus is applied in three states: Florida, New York, and Michigan.[1] The rules about habeas corpus in Florida, New York, and Michigan are often similar. This Introduction will give you a short overview of habeas corpus. Part B has specific information about Florida petitions, Part C has specific information about New York petitions, and Part D has specific information about Michigan petitions. These Parts offer important information, including how, where, and when to file your petition. If you are in prison in a state other than Florida, New York or Michigan, and wish to file a habeas corpus petition in state court, the laws may differ in important ways from the ones described below.[2] You should be sure to check the laws in your own state before filing a state habeas petition.[3]

1. What is a Writ of Habeas Corpus?

When you file a petition for a writ of habeas corpus, you are asking a judge for a hearing to determine whether your imprisonment is lawful. This hearing is not another trial. Instead of deciding whether you were guilty or not, the judge will evaluate the fairness of the procedure used to convict and sentence you. To get a writ of habeas corpus, you must file a petition for a civil (not criminal) proceeding in either state or federal court. A prisoner filing a habeas corpus petition is often referred to as a "petitioner" or "relator." This chapter will cover filing a petition in state, not federal, court. To learn more about federal habeas corpus, you should read *JLM*, Chapter 13, "Federal Habeas Corpus."

2. Requirements for Habeas Relief

There are four requirements you must fulfill in order to get state habeas relief:

(1) you must be in custody;
(2) you must be entitled to immediate release if your petition is successful;
(3) you must be a state prisoner; and
(4) there must be no other legal procedure to get the relief you want.

(a) Custody

Custody means you must be confined by the state in some way. Therefore, usually you cannot challenge a sentence you have not yet begun to serve. In Florida, New York and Michigan, you may apply for habeas corpus if you are in jail or prison. However, whether you may apply for habeas corpus if you are on parole, released on a bond, or released on your own recognizance ("ROR")[4], depends on which state convicted you. See Parts A(3)(c), B(3)(c), C(2)(c), and D(2)(c) of this Chapter for more information about habeas corpus petitions if you are on probation or parole.

(b) Immediate Release

Florida,[5] New York,[6] and Michigan[7] courts will usually refuse to consider your habeas corpus petition unless a successful petition will result in your immediate release. For example, if you are serving time for

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1. "Habeas corpus" is often shortened to "habeas." Also, "petition for a writ of habeas corpus" is sometimes shortened to "petition for habeas corpus."

2. See *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedural Law to Attack Your Unfair Conviction or Illegal Sentence," Appendix A, for a list of statutes for state post-conviction relief in other states. *JLM*, Chapter 2, "Introduction to Legal Research" can help you to conduct further research on the laws in your state.

3. If you are incarcerated in a federal prison, you cannot file for state habeas corpus. You must file a petition for federal habeas corpus. See *JLM*, Chapter 13 for more information about federal habeas corpus.

4. Released on your own recognizance (often shortened to "ROR'd" or simply "ROR") means that the court has released you because you have given a written promise to appear at your next court date.

5. *See* North v. State, 217 So. 2d 608, 609 (Fla. Dist. Ct. App. 1969) (denying petition for writ of habeas corpus when defendant was no longer in custody). *See also* Schmunk v. State *ex rel* Sandstrom, 353 So. 2d 907, 907 (Fla. Dist.

several convictions, you may not petition for a writ of habeas corpus to challenge only one conviction or sentence, since you will remain imprisoned for the other convictions regardless of the outcome of your petition.[8]

However, you may be able to petition for habeas corpus even though it will not result in your immediate release if you complain about a specific aspect of your incarceration. For example, if you are incarcerated at the wrong facility or your bail was set too high, you may petition for a writ of habeas corpus. Though you will not be released when your petition is granted, you will be transferred to the correct facility or your bail will be lowered.

(c) State Prisoner

If you are a federal prisoner, state habeas corpus relief is not available to you.[9] See *JLM*, Chapter 13, "Federal Habeas Corpus," for help with applying for a habeas writ in federal court if you are a federal prisoner or if you are unsure about whether you are a federal prisoner. Importantly, if you are a state prisoner, you must submit your petition in the state where you are incarcerated.[10]

Ct. App. 1977) (denying petition when defendant was fined for a traffic violation, but never in custody).

6. *See* People *ex rel.* Daniels v. Beaver, 303 A.D.2d 1025, 1025, 757 N.Y.S.2d 195, 195 (4th Dept. 2003) (holding that trial court properly dismissed habeas petition where, even if petitioner had been denied the right to appear before the Parole Board, he would not have been entitled to immediate release); People *ex rel.* Chaikin v. Warden, 63 N.Y.2d 120, 125, 470 N.E.2d 146, 148, 480 N.Y.S.2d 719, 721 (App. Div. 1984) ("[H]abeas corpus generally will lie only where the defendant would become entitled to his immediate release upon the writ being sustained . . . ."); People *ex rel.* Kaplan v. Comm'r of Corr. of City of N.Y., 60 N.Y.2d 648, 649, 454 N.E.2d 1309, 1309, 467 N.Y.S.2d 566, 566 (1983) (denying writ of habeas corpus because only remedy to which petitioner was entitled would be a new trial or new appeal, not immediate release). *See also* People *ex rel.* DeFlumer v. Strack, 212 A.D.2d 555, 555, 623 N.Y.S.2d 1, 1 (2d Dept. 1995) (denying habeas petition where petitioner challenged several conditions of his conditional release); People *ex rel.* Travis v. Coombe, 219 A.D.2d 881, 881, 632 N.Y.S.2d 340, 340 (4th Dept. 1995) (denying habeas petition where conditions for conditional release were not met and petitioner was therefore not entitled to immediate release even if the writ was granted).

7. *See* Trayer v. Kent County Sheriff, 304 N.W.2d 11, 12, 104 Mich. App. 32, 34 (Mich. Ct. App. 1981) (finding petition for writ of habeas corpus not proper where petitioner was transferred out of state and therefore the state petitioned could not provide immediate release).

8. In Florida: *see* Alderman v. State, 188 So.2d 803, 804 (Fla. 1966) (denying writ of habeas corpus when prisoner was legally incarcerated on concurrent sentence and only challenged one sentence); Gorman v. Cochran, 127 So.2d 667, 667–68 (Fla. 1961) (denying writ of habeas corpus to prisoner who was attacking a future sentence he had not yet begun to serve).

In New York: *see* People *ex rel.* Brown v. New York State Div. of Parole, 70 N.Y.2d 391, 398, 516 N.E.2d 194, 197, 521 N.Y.S.2d 657, 660 (1987) (denying writ of habeas corpus because prisoner, "in addition to being held on the parole violation, is being held on unrelated pending criminal charges. Because success on the merits in this proceeding would not entitle him to immediate release from custody, the remedy of habeas corpus is unavailable.").

In Texas: *see Ex parte* Padgett, 230 S.W.2d 813, 814 (Tex. Crim. App. 1950) (holding that where a prisoner was confined under two different sentences, only one challenged in his habeas petition, was not entitled to discharge on a writ of habeas corpus).

9. In Florida: *see* Simmons v. State, 579 So. 2d 874, 874 (Fla. Dist. Ct. App. 1991) (holding that the state circuit court is without power to issue a writ of habeas corpus for a prisoner who is not in the custody of the state).

In New York: *see* N.Y. C.P.L.R. 7002(a) (McKinney 1998 & Supp. 2011) ("A person illegally imprisoned or otherwise restrained in his liberty within the state . . . may petition without notice for a writ of habeas corpus . . . ."); N.Y. C.P.L.R. 7002(c)(3) (McKinney 1998 & Supp. 2011) ("The petition . . . shall state . . . that a court or judge of the United States does not have exclusive jurisdiction to order [the petitioner] released.").

In Texas: *see* Tex. Code Crim. Proc. Ann. art. 11.63 (West 2005 & Supp. 2010) (prohibiting state habeas corpus relief to prisoner held under federal authority); *see also Ex parte* Nguyen, 31 S.W.3d 815, 816 (Tex. App. 2000) (denying habeas corpus relief to a petitioner in Immigration and Naturalization Service custody, stating that only a federal court could issue a writ of habeas corpus to a petitioner in federal custody).

10. In New York: *see* People *ex rel.* Warren v. People, 171 A.D.2d 768, 768, 567 N.Y.S.2d 321, 321 (2d Dept. 1991) (dismissing federal prisoner's habeas corpus petition because the petitioner was incarcerated outside of New York).

In Texas: *see Ex parte* Rodriguez, 169 Tex. Crim. 367, 367–68, 334 S.W.2d 294, 294 (Tex. Crim. App. 1960) (holding that prisoner must apply for habeas corpus relief first to the judge of the trial court).

In Florida: *see* Dugger v. Jackson, 598 So. 2d 280, 282, 17 Fla. L. Weekly 1264, 1266 (Fla. Dist. Ct. App. 1992) (vacating lower court's grant of habeas corpus writ because prisoner had not petitioned the state of conviction, South Carolina, nor had the state given its authority for the Florida court to hear such claim).

(d) No Other Options

You may not petition the court for a writ of habeas corpus if there are other ways to get the relief you seek. Other procedures include appeal, administrative procedures, and grievance procedures. If you have not yet finished your appeal or are in the middle of a grievance hearing, you should not file a habeas petition until you are done with those other procedures. When you appeal, you are asking the court to reconsider the decision of the lower court. When you file a habeas petition, on the other hand, you are asking the court to consider whether the conviction and sentencing procedure was fair. You should read *JLM*, Chapter 15, "Inmate Grievance Procedures," for more information about prisoner grievance proceedings, and *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," for discussion of an appeal. Each state has its own standards for and exceptions to the general rule that other procedures must not be available when seeking habeas relief.

3. What You Can Complain About in Your Habeas Petition

(a) Before Trial[11]

If you are incarcerated before your trial (detained), you may be able to claim one of the following grounds for habeas relief: improper *extradition*, excessive bail, or delay. In Florida, you can also challenge a search warrant or probable cause. These grounds are discussed in detail in Part B of this Chapter.

(i) Extradition

An extradition is a warrant for arrest demanding that the arrested person be returned to and tried in the state issuing the warrant. If you were arrested in Florida, New York, or Michigan on an extradition warrant from another state, you may contest extradition to that state by petitioning the court for a writ of habeas corpus in the state in which you are in custody.[12] But, the Supreme Court has held that in such circumstances the state court may only consider the following issues: whether the documents from the demanding state[13] are in order, whether you are a fugitive, whether you have been charged with a crime in the demanding state, and whether you are the person named in the extradition warrant.[14]

You may challenge the extradition warrant on the following two grounds: (1) if you can prove by conclusive evidence that you were not in the demanding state at the time the crime was committed,[15] or (2) if you have been held longer than allowed by the laws of the state in which you are held.

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11. See *JLM,* Chapter 3, "Your Right to Learn the Law and Go to Court" for more information generally on your rights before trial.

12. For example, if you are arrested in Florida on an extradition warrant from Georgia, you could contest your extradition to Georgia using the Florida state habeas corpus procedures.

13. The demanding state is the state that requested the arrest and the state to which the prisoner will be extradited (sent) for prosecution. The state in which the prisoner is being held is known as the asylum state.

14. *See* Michigan v. Doran, 439 U.S. 282, 289, 99 S. Ct. 530, 535, 58 L. Ed. 2d 521, 527 (1978) ("[A] court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive."); State v. Luster, 596 So. 2d 454, 456, 17 Fla. L. Weekly 206, (Fla. 1992) (adopting *Michigan v. Doran* in Florida); *Ex parte* Potter, 21 S.W.3d 290, 299 (Tex. Crim. App. 2000) (applying *Michigan v. Doran* to Texas); People *ex rel.* Coster v. Andrews, 104 Misc. 2d 506, 512, 428 N.Y.S. 2d 594, 597–98 (Sup. Ct. Broome County 1980) (applying *Michigan v. Doran* to New York).

In New York: *see also* People v. Culwell, 163 Misc. 2d 576, 579–80, 621 N.Y.S.2d 490, 492 (Sup. Ct. Schoharie County 1995) (granting writ of habeas corpus and finding that petitioner was not a fugitive where the demanding state failed to comply with N.Y. Crim. Proc. Law § 570.16 (McKinney 2009), which required proof that petitioner either committed a crime in the demanding state *or* did acts in New York which would constitute a crime in the demanding state).

15. In Florida, this ties into the other factors. If you were not in the demanding state at the time of the incident then you are also not a fugitive from justice. *See* Galloway v. Josey, 507 So. 2d 590, 594, 12 Fla. L. Weekly 182, 182 (Fla. 1987) (granting habeas petition and holding that once a petitioner comes forward with clear and convincing evidence to rebut the presumption that he was a fugitive, the burden shifts to the state to produce competent evidence discrediting the prisoner's proof to such a degree that it ceases to be clear and convincing). *See also* State v. Cox, 306 So. 2d 156, 159, (Fla. Dist. Ct. App. 2d Dist. 1974) ("[T]he question of whether an accused is a fugitive from justice asks nothing more than whether he was bodily present in the demanding state at the time of the offense and thereafter departed from that state."); State *ex rel.* Smith v. Clark, 33 So. 2d 721, 722, 160 Fla. 113, 114 (1948) (denying habeas petition where record determined that petitioner was in the state at the time of the commission of the robbery); Trent v. McLeod, 179 So. 906,

(ii) Bail

You do not have a constitutional right to bail, but if you are granted bail, it must not be excessive. Florida, New York, and Michigan all permit you to ask for habeas relief if you have been denied bail, or if the bail was excessive.[16] Each state, however, has different criteria for determining when bail is excessive. Make sure to read the state-specific parts of this Chapter and research your state's laws.

(iii) Delay

You may file for habeas corpus if you have been incarcerated without formal charges filed against you for a period of time longer than the maximum your state allows. There are two types of formal charges. The first is called an *information*. This is a formal charging document. An information may be filed by a prosecutor without a grand jury. In New York, prosecutors usually charge misdemeanors using an information. The second type of formal charge is an *indictment*, which a grand jury issues.

(b) After Your Conviction

If you are incarcerated after your conviction, you may be able to claim one of the following grounds for habeas relief:

(1) confinement beyond your sentence or a miscalculation of sentence;
(2) violation of fundamental constitutional or statutory rights;
(3) new or void law;
(4) ineffective assistance of counsel; or
(5) discovery of new evidence.

In New York, you can also file on the grounds of unreasonable delay[17] or violation of the conditions of your sentence.[18] Each state has a different approach. For more information on grounds for habeas petitions in particular states, see Parts B (Florida), C (New York), and D (Michigan) of this Chapter.

(c) While You Are On Probation or Parole

You can also file a habeas corpus petition if your parole or probation is withdrawn. No matter which state you are in, you have the right to a probable cause hearing to determine whether you violated the conditions of your parole.[19] You must be given notice of this hearing and you have the right to appear, speak on your own behalf, present witnesses, and cross-examine witnesses testifying against you. This hearing is

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907, 131 Fla. 617, 618–19 (1938) (denying habeas petition where nothing in the record supported petitioner's claim that he was not in the demanding state); State *ex rel.* Stringer v. Quigg, 107 So. 409, 412, 91 Fla. 197, 203 (1926) (holding that the court must consider, among other things, whether the warrant shows that he was in the demanding state at the time that the offense was committed); Kuney v. State, 102 So. 547, 549, 88 Fla. 354, 358 (1924) (reversing lower court because it did not consider whether petitioner was in the demanding state at the time of the alleged offense).

In New York: *see* People *ex rel.* Friedman v. Comm'r of New York City Dept. of Corr., 66 A.D.2d 689, 690, 411 N.Y.S.2d 267, 268–69 (1st Dept. 1978) (holding that failure to specify when a crime was committed deprived petitioner of the right to prove that he was out of the state at the time). *But see* People *ex rel.* Pata v. Lindemann, 75 A.D.2d 654, 655, 427 N.Y.S.2d 445, 446 (2d Dept. 1980) (denying habeas petition and holding that where the indictment charged crimes of a continuing nature which allegedly took place throughout the entire period covered by the indictment, it was up to the accused to prove his absence from the demanding state throughout the entire period).

16. In Florida: *see* Fla. R. Crim. P. 3.850(a) (West 2011). In New York: *see* N.Y. C.P.L.R. 7010(b) (McKinney 1998 and Supp. 2010).

17. *See* People *ex rel.* Anderson v. Warden, New York City Corr. Inst. for Men, 68 Misc. 2d 463, 468, 325 N.Y.S.2d 829, 835 (Sup. Ct. Bronx County 1971) (holding that "if there is an unreasonable delay in the disposition of an article 440 motion, the defendant can, perhaps, properly bring a writ of habeas corpus."); *see also* People *ex rel.* Lee v. Smith, 58 A.D.2d 987, 987, 397 N.Y.S.2d 266, 267 (4th Dept. 1977) (granting a hearing on the merits of relator's habeas corpus petition, even though an appeal was pending, because the relator's appeal had been pending for more than four years). You should read Part C(2)(b)(vi) of this Chapter for more information about "unreasonable delay" habeas grounds in New York.

18. *See* People *ex rel.* Brown v. Johnston, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45 (App. Div. 1961) (holding that "it seems quite obvious that any *further* restraint *in excess* of that permitted by the judgment or constitutional guarantees should be subject to inquiry."). You should read Part C(2)(b)(vii) of this Chapter for more information about "violation of the conditions of your sentence" habeas grounds in New York.

19. Morrissey v. Brewer, 408 U.S. 471, 485, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484, 496–97 (1972). Since this is a Supreme Court case, it applies to all states.

to determine whether you will be held in custody until the decision on whether to revoke (take away) your parole is issued. You also have the right to a *final revocation hearing* "within a reasonable time" after you have been taken into custody.[20] For more information about parole, see *JLM*, Chapter 35, "Getting Out Early: Conditional and Early Release," and *JLM*, Chapter 36, "Parole."

In Florida, you may challenge errors in parole revocation proceedings and orders of the Florida Probation and Parole Commission by petitioning for a writ of habeas corpus.[21] You may file a habeas petition to challenge the Parole Commission's determinations of presumptive (expected) parole release dates.[22] If you are incarcerated after your presumptive release date, you may petition for a habeas corpus writ.[23]

Petitions for habeas corpus relief can also be brought in connection with parole revocation hearings in New York[24] and Michigan.

(d) Jurisdiction

Another possible ground for habeas relief—but one almost always rejected—is that the court that imprisoned you did not have jurisdiction, or the power to hear and decide a case. In a criminal case, a court must have two types of jurisdiction: (1) personal jurisdiction (the power to judge you, the defendant); and (2) subject matter jurisdiction (the power to judge the offense with which you were charged). If the court that imprisoned you did not have either of these types of jurisdiction, you can petition for habeas corpus.[25]

(i) Personal Jurisdiction

A court has personal jurisdiction when you go to or are taken to court and appear before the judge.[26] Since you almost certainly appeared before a court either at the trial leading to your conviction or at your *arraignment* (if you have not yet gone to trial), you will rarely be able to petition for habeas corpus on the ground that the court lacked personal jurisdiction.

(ii) Subject Matter Jurisdiction

Subject matter jurisdiction is the court's power to decide cases involving the type of offense with which you were charged. The court only has proper subject matter jurisdiction if the right kind of indictment or information has been issued.[27] Because indictments and informations grant jurisdiction, you may petition the court for habeas relief at any time before or after conviction[28] if the indictment against you is defective.[29]

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20. Morrissey v. Brewer, 408 U.S. 471, 488, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484, 498 (1972).

21 . *See* State v. Sampson, 297 So. 2d 120, 121–22 (Fla. Dist. Ct. App. 4th 1974) (finding that habeas corpus is the proper method for challenging an order of the Florida Parole and Probation Commission); State *ex rel.* Wainwright v. Holley, 234 So. 2d 409, 410 (Fla. Dist. Ct. App. 2d Dist. 1970) (holding that the proper way to challenge error in post-conviction proceedings such as parole revocation is through habeas corpus); *see also* Jackson v. Mayo, 73 So. 2d 881, 882–83 (Fla. 1954) (granting relief where no evidence was offered authorizing revocation of parole); Beal v. Mayo, 70 So. 2d 367, 369 (Fla. 1954) (affirming that where there is a complete absence of any adjudication at all, the judgment and sentence will be subject to being set aside on habeas corpus); Sellers v. Bridges, 15 So. 2d 293, 295, 153 Fla. 586, 590–91 (1943) (holding that whether a prisoner inexcusably violated conditions of pardon or parole was proper for habeas inquiry).

22. *See* Williams v. Florida Parole Comm'n, 625 So. 2d 926, 934, 18 Fla. L. Weekly 2258 (Fla. 1st Dist. Ct. App. 1993) (finding that the proper remedy to challenge presumptive release date is habeas corpus).

23. *See* Jenrette v. Wainwright, 410 So. 2d 575, 577–78 (Fla. Dist. Ct. App. 1982) (ruling that prisoner whose presumptive parole release date had passed was entitled to immediate release on habeas corpus).

24. Read Part C(2)(c) of this Chapter for more information about bringing a petition for habeas corpus in connection with your parole revocation hearing in New York.

25. *See Ex parte* Livingston, 156 So. 612, 618, 116 Fla. 640, 654 (1934) ("Want of jurisdiction over person or subject matter is always ground for relief on habeas corpus.").

26. *See* Frisbie v. Collins, 342 U.S. 519, 522–23, 72 S. Ct. 509, 511–12, 96 L. Ed. 541, 545–46 (1952) (denying petitioner's application for habeas corpus even though he was brought into the court's jurisdiction by forcible abduction).

In New York: *see* People *ex rel.* Ortiz v. Warden, 119 A.D.2d 526, 528, 501 N.Y.S.2d 667, 668 (1st Dept. 1986) (dismissing petition for habeas corpus, and, by applying two U.S. Supreme Court cases to New York, ruling that even though New York authorities did not provide the proper papers for extradition, court has personal jurisdiction if petitioner is present in court).

27. An "information" is the same thing as an "indictment." *See JLM,* Appendix V: Definitions of Words Used in the *JLM*.

28. In Florida: *see Ex parte* Livingston, 116 Fla. 640, 654, 156 So. 612, 618 (1934) (holding that a faulty indictment may be grounds to overturn a conviction and may be challenged at any time). In New York, *see* People *ex rel.*

An indictment can be defective in many ways, but to get habeas relief it must be so wrong that it fails to charge you with a crime.[30] What constitutes a defective indictment varies from state to state. For instance, a defective indictment might not list all of the elements of the crime, or it might charge you with something not against the law, or it might have been issued after the *statute of limitations* for the offense has run. If the court finds the indictment is defective, it will be voided and you will be entitled to immediate release for that charge. But, the prosecutor may try to re-indict you for the same offense, using an indictment that is not defective.

B. Florida

This Part explains some of the basic rules for filing a habeas corpus petition in Florida.

1. Requirements

The Florida writ of habeas corpus rules can be found in Rule 3.850 of the Florida Rules of Criminal Procedure[31] and in Title VI, Section 79.01 of the Florida State Statutes.[32] To challenge your conviction, sentence, or confinement, you must either file a Rule 3.850 motion or file a habeas petition. If you want to challenge your conviction on any of the grounds specified in Rule 3.850 (see the next sub-point entitled "Requirements for a Rule 3.850 motion), then you must file a Rule 3.850 motion. If your grounds for relief do not fall within those listed in sub-point 2 below, then you may file a habeas petition. Although the Rule 3.850 motion asks for relief similar to a habeas petition, you should be sure to follow its own specific pleading requirements. Prisoners facing the death penalty in Florida must follow a different procedure.[33] The rest of this sub-point will explain the requirements for a habeas petition, and the requirements for a Rule 3.850 petition will follow.

(a) Custody

If you are on parole or probation you are eligible for habeas corpus.[34] However, if you have been released on bond[35] or ROR,[36] you may not file a petition for writ of habeas corpus in Florida.

Morris v. Skinner, 67 Misc. 2d 221, 323 N.Y.S.2d 905, 909 (Sup. Ct. Monroe County 1971) (granting habeas relief where information failed to charge petitioner with a crime); 64 N.Y. Jur. 2d, Habeas Corpus § 44 (2010). In Texas: *see Ex parte* McClain, 623 S.W.2d 140 (Tex. Crim. App. 1981) (finding that defective indictment can be attacked for the first time on post-conviction petition for writ of habeas corpus).

29. In Florida: *see* Farrior v. State *ex rel.* Compton, 13 So. 2d 147, 147, 152 Fla. 754, 756 (1943) (finding that habeas is proper remedy for indictment that fails to allege a crime); *see also* Locklin v. Pridgeon, 30 So. 2d 102, 103 158 Fla. 737, 739 (1947) (finding that "the sufficiency of the indictment may be challenged in habeas corpus proceedings when it totally fails to charge an offense under any valid law," and granting a writ of habeas corpus where the statute under which he was convicted was too indefinite and uncertain to comply with due process requirements); *Ex parte* Wilson, 14 So. 2d 846, 846, 153 Fla. 459, 460 (1943) (remanding with instructions where verdict purporting to find petitioner guilty of criminal offense was defective and judgment pronounced by trial court was imperfect); House v. State, 172 So. 734, 735, 127 Fla. 145, 150 (1937) (holding that where a prisoner brought a habeas corpus challenge because his verdict was imperfect in that it did not contain a proper adjudication of the crime as defined in the statute, he should be sent back to the trial court for a proper adjudication); Martin v. State, 166 So. 467, 467, 123 Fla. 143, 144–45 (1936) (holding that petitioner could raise issue of defective information on post-conviction petition for writ of habeas corpus).

In New York: *see* People *ex rel.* Gray v. Tekben, 86 A.D.2d 176, 180, 449 N.Y.S.2d 276, 276 (2d Dept. 1982) (granting habeas corpus where the indictment charging assault in second degree only conferred jurisdiction to enter judgment on such crime or lesser included offenses, and petitioner was convicted of another offense, which was neither included in the indictment nor a lesser included offense of assault), *aff'd*, 57 N.Y.2d 651, 493 N.E.2d 875, 454 N.Y.S.2d 66 (1982).

30. In Florida: *see Ex parte* Stirrup, 19 So. 2d 712, 713, 155 Fla. 173, 175 (Fla. 1944) (holding habeas will not secure release where the indictment was merely defective in its allegations); *see also* Peterson v. Mayo, 65 So. 2d 48, 48 (Fla. 1953) ("Defects in an information are not subject to attack in a habeas corpus proceeding unless the defects are of such magnitude that the information utterly fails to charge any crime or offense under the laws of the State of Florida.").

31. Fla. R. Crim. P. 3.850(a) (West 2009).

32. Fla. Stat. Ann. § 79.01 (West 2009).

33. *See* Fla. R. Crim. P. 3.851 (West 2009) (setting out collateral relief procedures after a death sentence has been imposed and affirmed on direct appeal).

34. *See* State v. Bolyea, 520 So. 2d 562, 563–64, 13 Fla. L. Weekly 117, 117 (Fla. 1988) (holding that a petitioner on probation is in custody); Sellers v. Bridges, 15 So. 2d 293, 295–96, 153 Fla. 586, 590–91 (1943) (holding that parole is sufficient restraint on freedom to consider parolee in custody).

35. *See* State *ex rel.* Curley v. Gatlin, 5 So. 2d 54, 54, 149 Fla. 1, 1 (1941) (holding that prisoner released on an appearance bond is not entitled to habeas relief).

(b) Immediate Release

You must be entitled to immediate release upon the success of your habeas claim.

(c) State Prisoner

In Florida, if you were convicted in another state, but sent to prison in Florida, the state that convicted you (the sending state) must hear your habeas corpus petition.[37]

(d) No Other Options

If you are appealing administrative action taken against you by the Florida State Department of Corrections or complaining about the conditions of your confinement, you must follow Florida's administrative procedures before filing a petition for relief in state court. Rule 33-103 of the Florida Administrative Code describes the administrative procedures available to you.[38] Your petition for habeas corpus will not be granted unless you have followed these procedures.[39] For example, you may lose your right to habeas relief on an issue if you file a habeas petition before *exhausting* administrative procedures.[40] Florida courts will also refuse to consider your habeas petition if you could have raised an issue or error on appeal, but did not.[41] *Alleging* "ineffective assistance of counsel" will not allow you to raise issues in your habeas petition that could have otherwise been raised on appeal.[42]

2. Requirements of a Rule 3.850 Motion

(a) Grounds for Motion[43]

You may bring a Rule 3.850 motion for relief from *judgment* or release from custody if:

(1) The judgment entered against you or sentence imposed violates the Constitution, Federal or Florida law.
(2) The court did not have jurisdiction to enter the judgment against you.
(3) The court did not have jurisdiction to impose the sentence.
(4) The sentence exceeded the maximum authorized by law.
(5) Your plea was *involuntary*.
(6) The judgment against you or sentence imposed is otherwise subject to *collateral attack*.

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36. *See* Sandstrom v. Kolski, 305 So. 2d 75, 76 (Fla. Dist. Ct. App. 3rd Dist. 1974) (refusing to entertain petition for habeas corpus when petitioner promised to appear in court at a future date, since petitioner was not in custody).

37. *See* Dugger v. Jackson, 598 So. 2d 280, 282, 17 Fla. L. Weekly 1264 (Fla. Dist. Ct. App. 1st Dist. 1992) (vacating lower court's grant of writ of habeas corpus because petitioner had been convicted in South Carolina, and South Carolina had not permitted the Florida court to hear such claim; the relator was ordered to apply for relief from South Carolina).

38. Fla. Admin. Code Ann. R. 33-103 (2010).

39. *See* Seccia v. Wainwright, 517 So. 2d 80, 81, 12 Fla. L. Weekly 2886 (Fla. Dist. Ct. App. 1st Dist. 1987) (dismissing prisoner's habeas claim for improper administrative confinement where petitioner failed to exhaust administrative remedies); Sutton v. Strickland, 485 So. 2d 25, 25–26, 11 Fla. L. Weekly 675 (Fla. Dist. Ct. App. 1st Dist. 1986) (dismissing prisoner's petition for writ of habeas corpus on the ground that he failed to exhaust prisoner grievance procedures); Griggs v. Wainwright, 473 So. 2d 49, 49–50, 10 Fla. L. Weekly 1844 (Fla. Dist. Ct. App. 1st Dist. 1985) (holding that a prisoner challenging his confinement must exhaust his administrative remedies before seeking habeas relief).

40. *See* Comer v. Fla. Parole & Prob. Comm'n, 388 So. 2d 1341, 1341 (Fla. Dist. Ct. App. 1st Dist. 1980) (holding that the failure to exhaust all available administrative remedies may procedurally bar relief by writ of habeas corpus).

41. *See* Hardwick v. Dugger, 648 So. 2d 100, 105, 19 Fla. L. Weekly 433 (Fla. 1994) (finding habeas corpus was not an available remedy where errors of law either were or could have been raised on direct appeal); *see also* T.L.W. v. Soud, 645 So. 2d 1101, 1105, 19 Fla. L. Weekly 2520, (Fla. Dist. Ct. App. 1st Dist. 1994) (stating that habeas claim concerning whether the detention of minors is contrary to a Florida statute must first be addressed to trial courts or in a motion for post-conviction relief).

42. *See* Mills v. Dugger, 574 So. 2d 63, 65, 15 Fla. L. Weekly 589 (Fla. 1990) (finding that alleging ineffective counsel will not allow relator to raise issues that should have been raised on appeal), *reh'g denied* (Feb. 28, 1991).

43. Fla. R. Crim. P. 3.850 (West 2009).

(b) Time Limits

If you believe that your sentence exceeds the limits provided by law, you may file your Rule 3.850 motion at any time. All Rule 3.850 claims must be filed no later than two years after your judgment and sentence become final.[44]

These time requirements are inapplicable if you can prove that you did not know the facts critical to your Rule 3.850 motion before the deadline. You must also show that these facts could not have been discovered through the exercise of *due diligence*. The time limit will also be inapplicable if you are asserting a violation of your constitutional right, which was established after the two-year time period had passed. Finally, you can challenge the Rule 3.850 time period if you retained counsel to file your motion, but your lawyer failed to file the motion on time.[45]

(c) Contents of Motion

Your Rule 3.850 motion must be made under oath and include details about the judgment or sentence under attack. If you have appealed the judgment or sentence, you must include those facts as well as the ruling of the court on the appeal.[46] You must inform the court whether you have filed a previous post-conviction motion, and if so, how many motions you have filed.[47] If you have filed a previous motion or motions, you must also state the reason or reasons you did not raise your current Rule 3.850 claims in those prior filings. Finally, you must inform the court of the type of relief sought, as well as provide a brief statement of facts relied upon in the motion.[48]

3. Determining Whether to File a Rule 3.850 Motion or a Habeas Petition

(a) Before Trial

(i) Extradition

In Florida, you may be held for a maximum of 30 days before you can be extradited to another state.[49] If you have been held for over 30 days awaiting extradition, you may bring a habeas corpus petition in Florida. Extradition issues may be brought to the court pursuant to a writ of habeas corpus, and not according to the procedures laid out in Rule 3.850.[50]

(ii) Bail

You may ask for habeas relief on the ground that you were denied bail[51] or that your bail is excessive.[52] Some courts require petitioners to prove they have tried to make bail, and will not consider a habeas petition

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44. Fla. R. Crim. P. 3.850 (West 2009).

45. Fla. R. Crim. P. 3.850 (West 2009).

46. *See* Catlett v. State, 367 So. 2d 735 (Fla. Dist. Ct. App. 4th Dist. 1979) (dismissing a motion to vacate because the plaintiff failed to mention prior appeals or Rule 3.850 motions).

47. *See* Catlett v. State, 367 So. 2d 735 (Fla. Dist. Ct. App. 4th Dist. 1979) (dismissing a motion to vacate because the plaintiff failed to mention prior appeals or Rule 3.850 motions).

48. Fla. R. Crim. P. 3.850 (West 2009).

49. *See* Hill v. Roberts, 359 So. 2d 911, 913 (Fla. Dist. Ct. App. 2d Dist. 1978) (finding prisoner entitled to discharge on a habeas writ where he was available for extradition for more than 30 days and demanding state took no action to receive him)*; see also* Fla. Stat. Ann. § 941.15 (West Supp. 2006) (setting statutory maximum of 30 days).

50. *See* State v. Luster, 596 So. 2d 454, 454, 17 Fla. L. Weekly S206 (Fla. 1992) (holding that a court considering release on habeas corpus can do no more than decide whether extradition documents sent by demanding state are in order on their face, whether petitioner has been charged with a crime in the demanding state, whether petitioner has been named in the demand, and whether petitioner is a fugitive); Galloway v. Josey, 507 So. 2d 590, 12 Fla. L. Weekly 182, 182 (Fla. 1987) (finding that, on habeas review, when an extradition warrant is based upon a facially valid probable cause hearing in another state, the accused may only avoid extradition by producing clear and convincing proof that he is not a fugitive from justice).

51. *See* Bennett v. State, 118 So. 18, 18, 1896 Fla. 237, 238 (1928) (finding that a person seeking release on bail should do so by filing a habeas corpus petition); *see also* Bradwell v. McClure, 488 So. 2d 566, 567, 11 Fla. L. Weekly 978 (Fla. Dist. Ct. App. 1st Dist. 1986) (granting habeas relief and ordering trial court to set a reasonable bail for petitioner).

52. *See* Nicholas v. Cochran, 673 So. 2d 882, 883, 21 Fla. L. Weekly 989, 989 (Fla. Dist. Ct. App. 4th Dist. 1996) (granting writ after finding that trial court's large increase of bail upon discovering that petitioner possessed more assets than the court was aware of did not comply with the purposes of bail); Rawls v. State, 540 So. 2d 946, 947, 14 Fla. L. Weekly 935, 935 (Fla. Dist. Ct. App. 5th Dist. 1989) (finding that writ of habeas corpus is available when petitioner can

if the evidence indicates that you could not post bail in any amount.[53] If the court finds in your favor, it may grant relief or lower your bail. If you have already been convicted, the court will not review any petition requesting bail because you cannot get bail after you are convicted. To challenge your bail proceedings or pretrial detainment conditions, you need not exhaust Rule 3.850 procedures. Instead, you may directly file a habeas petition.[54]

(iii) Delay

If no formal charges are filed against you within 21 days, you may be entitled to release on a Rule 3.850 motion. The Florida courts had previously recognized delay as a cause of action for habeas relief, and you may raise a habeas claim after exhausting Rule 3.850 procedures.[55] If you are released or charged before the court rules on your habeas petition, your petition becomes moot (no longer relevant) and the court will not consider it.[56] You may also petition the court for a writ of habeas corpus if you request a preliminary hearing and are not granted one in a timely manner.

(iv) Search Warrant and Probable Cause

If you were arrested pursuant to a search warrant, you may file a pretrial motion under Rule 3.850 challenging the validity of the search warrant.[57] You may also challenge your arrest on the ground that there is no probable cause to believe that you committed the crime with which you are charged.[58] Probable cause is a very low threshold and courts are not likely to grant habeas relief on this ground.[59] When deciding your petition, the court will not evaluate conflicting testimony in order to make determinations of fact.[60] The

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show that the trial court has set bail at an unreasonable amount and that bond schedules do not justify excessive bail). In order to discourage the profits from the sale of drugs being used to post bail, under Fla. Stat. Ann. § 903.046(2)(h) (West 2009), courts may consider the street value of drugs when setting bail on drug-related offenses. *See* Alvarez v. Crowder, 645 So. 2d 63, 63–64, 19 Fla. L. Weekly 2363, 2363 (Fla. Dist. Ct. App. 4th Dist. 1994) (citing Fla. Stat. Ann. § 903.046 (1993) (noting that the criteria that should be taken into consideration in evaluating the amount of bail include: "nature of the offense and applicable penalty, family ties, length of residence in the community, employment history, financial resources, the defendant's prior criminal record, risk of flight, danger to the community and street value of any drugs involved."). *But see* Sikes v. McMillian, 564 So. 2d 1206, 1208, 15 Fla. L. Weekly 1949, 1949 (Fla. Dist. Ct. App. 1st Dist. 1990) (finding Fla. Stat. Ann. § 903.046(2)(h) (West 2009) does not support court increasing bail when defendant is charged with purchasing and not selling drugs).

53. *See Ex parte* Smith, 193 So. 431, 431–32, 141 Fla. 434, 434–35 (1940) (holding that reduction of bail will not be considered on habeas petition where the record indicates that petitioner would not have been able to make bail in any amount, but without prejudice to renew petition if petitioner becomes able to make bail).

54. *See* Dupree v. Cochran, 698 So. 2d 945, 22 Fla. L. Weekly D2201 (Fla. Dist. Ct. App. 4th Dist. 1997) (granting petitioner's petition because trial judge failed to state with specificity facts on which she revoked bond); Wilson v. State, 669 So. 2d 312, 21 Fla. L. Weekly D661 (Fla. Dist. Ct. App. 5th Dist. 1996) (finding, upon habeas review, that trial court abused its discretion in committing petitioner to custody for failure to appear at rescheduled trial); Alvarez v. Crowder, 645 So. 2d 63 (Fla. Dist. Ct. App. 4th Dist. 1994) (holding that one million dollars bail for petitioner, charged with trafficking in marijuana was clearly excessive).

55. *See* Fla. R. Crim. P. 3.133(b) (West 2009); s*ee also* Beicke v. Boone, 527 So. 2d 273, 275, 13 Fla. L. Weekly 1410, 1410 (Fla. Dist. Ct. App. 1st Dist. 1988) (finding that state's failure to file charges within 21 days of arrest entitled defendant to adversary preliminary hearing on any charge pending against him; the state's failure to present evidence at the required hearing entitled defendant to release on his own recognizance on any charges resulting from the crime for which he was arrested).

56. *See* Bowens v. Tyson, 578 So. 2d 696, 697, 16 Fla. L. Weekly 270, 270 (Fla. 1991) (holding that defendant who was held in custody for 30 days without filing information or indictment was not entitled to automatic pretrial release where state filed information before court heard defendant's motion for release).

57. *See* State *ex rel.* Wilson v. Quigg, 17 So. 2d 697, 698–703, 154 Fla. 349–58 (1944) (considering search warrant's validity on appeal from a habeas corpus proceeding, where defendant was held in part based on the warrant).

58. *See* Jefferson v. Sweat, 76 So. 2d 494, 501 (Fla. 1954) (finding habeas corpus is a proper remedy for testing validity of arrest warrant); State *ex rel.* Hanks v. Goodman, 253 So. 2d 129, 130 (Fla. 1971) (stating defendant has remedy through habeas corpus if there is no probable cause to hold him).

59. *See* Alabama v. White, 496 U.S. 325, 330, 110 S. Ct 2412, 2416, 110 L. Ed. 301, 308 (1990) ("[P]robable cause means 'a fair probability that contraband or evidence of a crime will be found.'") (quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983)). *But see* Pierce v. Mims, 418 So. 2d 273, 273 (Fla. Dist. Ct. App. 2d Dist. 1982) (finding no probable cause for arrest warrant when the only evidence presented at preliminary hearing was hearsay).

60. *See* State *ex rel.* Price v. Stone, 175 So. 229, 231, 128 Fla. 637, 641 (Fla. 1937) (denying motion to appoint special commissioner to take testimony because "while on habeas corpus the court will examine the legal sufficiency of

court will leave this determination for trial. After exhausting Rule 3.850 procedures, you may raise these same issues in a habeas petition.

(b) After Your Conviction

(i) Confinement Beyond Sentence

You are also entitled to Rule 3.850 relief if your sentence is void (not valid). A court will consider a sentence void if it is completely different than what the law requires. For example, if the judgment fails to state an offense, does not state clearly that you have been found guilty, or lists a charge not on the indictment, your conviction and sentence might be void.[61] If you are denied relief under Rule 3.850, you may then raise this claim in a habeas corpus proceeding.

(ii) Fundamental Rights

You may attack prior criminal proceedings under Rule 3.850 by asserting a violation of your fundamental constitutional rights. If you are denied relief, you may raise these issues in a petition for habeas relief. Although there is no comprehensive list of rights that Florida courts have declared "fundamental," courts have consistently allowed petitioners to claim certain rights in habeas petitions. These include the right to a trial by jury,[62] the right to due process,[63] the right not to be convicted twice of the same charge (also called the right against double jeopardy),[64] the right to appeal,[65] and the right to a speedy trial.[66] You may also claim the right to be free from cruel and unusual punishment. That is, you may challenge your prison conditions by alleging they are so unbearable as to be considered cruel and unusual punishment.[67]

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the alleged facts to make out a crime, it will not determine the probative force of conflicting testimony upon which the charge is based.").

61. *See* Anglin v. Mayo, 88 So. 2d 918, 921–922 (Fla. 1956) (granting writ of habeas corpus when defendant was sentenced using an outdated statute and the sentence imposed by the revised statute was shorter); Anderson v. Chapman, 146 So. 675, 677, 109 Fla. 54, 57–58 (Fla. 1933) ("[I]f the vice of a sentence is not merely that it is defective, but is of an entirely different character from that authorized by law, it is generally held that such sentence is void, and that the prisoner will be discharged on habeas corpus."); *see also* Dean v. State, 476 So. 2d 318, 319, 10 Fla. L. Weekly 2331 (Fla. Dist. Ct. App. 2d Dist. 1985) (reversing sentences of youthful offender that exceeded maximums specified in Youthful Offender Act); R. J. K. v. State, 375 So. 2d 871, 871 (Fla. Dist. Ct. App. 1st Dist. 1979) (granting writ to juvenile because a "trial court cannot commit a juvenile for a specific period of time"); State ex rel. Saunders v. Boyer, 166 So. 2d 694, 696–97 (Fla. Dist. Ct. App. 2d Dist. 1964) (remanding case for resentencing because the sentence of one year hard labor for contempt was void due to statutory limitations). *But see* Dixon v. Mayo, 168 So. 800, 800–01, 124 Fla. 485, 487 (Fla. Div. B 1936) (denying writ of habeas corpus when court found relator's argument—that the language of the judgment appeared to find him guilty of a charge different than the one on the indictment—to be "not tenable" (or unreasonable)).

62. *See* Sneed v. Mayo, 66 So. 2d 865, 869–70, 874 (Fla. 1953) (holding that habeas corpus is proper to review the allegation that petitioner was denied right to trial by jury). To raise this issue in a habeas petition, you must have been denied your right to a jury trial. If you were offered a jury trial and turned it down, then you expressly waived your right to a jury trial and may not petition the court for habeas on this issue.

63. *See* Sneed v. Mayo, 69 So. 2d 653, 655 (Fla. 1954) (despite non-compliance with state statute, court denied writ because constitutional requirement of due process was met in this case (because the defendant waived his right to a jury trial)); Lightfoot v. Wainwright, 369 So. 2d 110, 111 (Fla. Dist. Ct. App. 1st Dist. 1979) (finding that a person who has been denied right to due process is entitled to habeas relief).

64. *See* Deal v. Mayo, 76 So. 2d 275, 276 (Fla. 1954) (holding that habeas corpus review is proper to test whether petitioner was subject to double jeopardy at trial).

65. *See* Myrick v. Wainwright, 243 So. 2d 179, 180 (Fla. Dist. Ct. App. 2d Dist. 1971) (considering and denying habeas petition because the official court record clearly showed that the petitioner had been advised of his right to appeal his conviction and sentence); Dennis v. Wainwright, 243 So. 2d 181, 182 (Fla. Dist. Ct. App. 2d Dist. 1971), *aff'd sub nom.*, 247 So. 2d 88 (Fla. Dist. Ct. App. 2d Dist. 1971) (finding that to raise the issue of denial of right to appeal because of untimely filing (filing for an appeal after the deadline had passed), petitioner must prove that the frustration (denial) of right to appeal was due to state action and not to petitioner's negligence).

66. *See* Pena v. Schultz, 245 So. 2d 49, 50 (Fla. 1971) (finding habeas is proper to determine whether right to speedy trial was denied); Griswold v. State, 82 So. 44, 48, 77 Fla. 505, 515–17 (Fla. 1919) (holding that unless there was evidence that the continuance (delay in trial) was granted without good cause, the court presumed one continuance did not violate the defendant's speedy trial right). This issue should be brought before trial. It is very unlikely the court will grant relief on this issue after conviction.

67. *See* Graham v. Vann, 394 So.2d 176, 177 (Fla. Dist. Ct. App. 1st Dist. 1981) (affirming writ of habeas corpus

(iii) New or Void Law

You may also petition the court under Rule 3.850 on the ground that the statute under which you were prosecuted is unconstitutional.[68] It is very rare for courts to find a statute unconstitutional. If the statute you were prosecuted under is declared unconstitutional, you are entitled to immediate release.

(iv) Ineffective Counsel

You have the right to effective assistance of counsel to help you with your appeal. You may petition the court according to the process laid out in Rule 3.850 if you: (1) are indigent (poor), (2) requested counsel on appeal, and (3) were denied that right.[69] If you did not make your need for counsel known, the court is not likely to consider your petition. You may also petition the court for habeas relief because your counsel was ineffective.[70] Proving ineffective assistance of counsel is very difficult. The court will only consider whether the attorney's mistakes were so great that they were grossly (obviously) outside the range of acceptable performance and hindered (prevented) your appeal to the extent that they undermined its result.[71] You must show there is a good chance that if your counsel had not made these mistakes, the outcome on appeal would have been different.[72] You may not use a habeas corpus proceeding to allege ineffective assistance of counsel at trial; that issue may only be raised on appeal.[73] Finally, you do not need to exhaust Rule 3.850 procedures

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where petitioners sought relief from prison conditions that were constantly dangerous to the lives and safety of the prisoners, even though a federal case challenging inadequate medical care was pending). Prison conditions may also be challenged using 42 U.S.C. § 1983; see *JLM*, Chapter 16 for more information.

68. *See* Sandstrom v. Leader, 370 So. 2d 3, 5 (Fla. 1979) ("[A] writ of habeas corpus may be utilized by an accused to challenge the constitutionality of a statutory provision under which he is charged."); State ex rel. Matthews v. Culver, 114 So. 2d 796, 796 (Fla. 1959) (holding petitioner was being unlawfully detained because he was convicted and sentenced under a statute that was later declared unconstitutional and therefore he must be released); Coleman v. State ex rel. Jackson, 193 So. 84, 85, 140 Fla. 772, 774 (1939) (holding habeas corpus is the proper procedure where the charge made does not constitute a crime under the laws of Florida because the statute under which the charge is being made is unconstitutional); La Tour v. Stone, 190 So. 704, 710–11, 139 Fla. 681 (Fla. 1939) (stating the right to attack an information or indictment by writ of habeas corpus is limited, and a habeas corpus proceeding is proper vehicle when the offense charged does not constitute a crime under the laws of the State because the statute invoked is unconstitutional); Roberts v. Schumacher, 173 So. 827, 827, 127 Fla. 461, 462 (Fla. 1937) (noting habeas corpus is appropriate relief when the statute under which offense was charged is invalid); State ex rel. Dixon v. Cochran, 114 So. 2d 228, 229 (Fla. Dist. Ct. App. 2d Dist. 1959) (granting a writ of habeas corpus for a conviction and sentence under a statute that was later held invalid by the State Supreme Court).

69. *See* Baggett v. Wainwright, 229 So. 2d 239, 241–42 (Fla. 1969) (holding prisoners have a constitutional right to counsel for purposes of direct appeal and the state's failure to give access to a lawyer entitles prisoner to habeas relief to enforce that right, as long as the prisoner makes his need for counsel known). For more information on ineffective assistance of counsel claims, see Chapter 12 of the *JLM*, "Appealing Your Conviction Based on Ineffective Assistance of Counsel."

70. *See* Owen v. Crosby, 854 So. 2d 182, 188, 28 Fla. L. Weekly 615, 615 (Fla. 2003) (holding that petition for post-conviction relief is proper method to raise claims of ineffective assistance of appellate counsel); Groover v. Singletary, 656 So. 2d 424, 425, 20 Fla. L. Weekly 151, 151 (Fla. 1995) (denying habeas petition because all claims had been raised in prior Rule 3.850 proceedings and were found to be procedurally barred or without merit and therefore appellate counsel was not ineffective for failing to raise them); Nerey v. State, 634 So. 2d 206, 206–07, 19 Fla. L. Weekly 661 (Fla. Dist. Ct. App. 3d Dist. 1994) (denying habeas petition and finding appellate counsel was not ineffective because counsel could reasonably have concluded that an argument would not prevail).

71. *See* Rogers v. Singletary, 698 So. 2d 1178, 1180–81, 21 Fla. L. Weekly 503, 22 Fla. L. Weekly 561 (Fla. 1996) (applying Pope v. Wainwright, 496 So. 2d 798, 11 Fla. L. Weekly 533 (Fla. 1986), and denying writ of habeas corpus where court found that relator did knowingly and intelligently waive the right to counsel for his appeal); Pope v. Wainwright, 496 So. 2d 798, 800, 11 Fla. L. Weekly 533 (Fla. 1986) (limiting determinations of ineffective appellate counsel to situations where the alleged failures of counsel are important enough to be serious error or serious failure to perform professionally as a lawyer and whether the failure by counsel interfered with the process of the appeal so much that the result cannot be trusted) (citing Johnson v. Wainwright, 463 So. 2d 207, 209, 10 Fla. L. Weekly 85 (Fla. 1985)); Jackson v. Dugger, 580 So. 2d 161, 162, 16 Fla. L. Weekly 327 (Fla. Dist. Ct. App. 4th Dist. 1991) (granting petition for habeas corpus where counsel was determined to be defective due to his failure to raise an issue on appeal that counsel for relator's co-defendant raised, causing co-defendant's conviction to be reversed).

72. For more information on ineffective assistance of counsel claims, see Chapter 12 of the *JLM*, "Appealing Your Conviction Based on Ineffective Assistance of Counsel."

73. *See* Breedlove v. Singletary, 595 So. 2d 8, 10, 17 Fla. L. Weekly 67 (Fla. 1992) (holding that claims of trial counsel's effectiveness cannot be heard in habeas corpus proceedings.).

if you are challenging the ineffectiveness of appellate counsel (the lawyer who helped with your appeal). In those circumstances, you may directly file a habeas petition.[74]

(v) New Evidence

If there is newly discovered evidence in your case, you may attack the judgment against you pursuant to Rule 3.850 procedures.[75] If you later file a habeas petition, be aware that the evidence must be very strong.[76] It must be so strong that, if admitted, it would probably produce an acquittal on retrial.[77] In addition, you must be able to prove that the information was not known by you or your attorney and could not have been discovered by you or your attorney at time of trial.[78] The court will be required to hold an evidentiary hearing on your claim for post-conviction relief, unless the evidence is plainly refuted by the record.[79] You may also file for post-conviction relief if you can show that the prosecutor failed to turn over exculpatory evidence (evidence tending to support your innocence).[80] To establish a claim that the prosecutor failed to turn over such evidence, you must be able to show that:

(1) The state possessed evidence favorable to you;
(2) You did not possess nor could have obtained such evidence with reasonable effort;
(3) The prosecution suppressed (did not turn over) the evidence; and
(4) There is a reasonable probability the case would have come out differently if the evidence had been disclosed.[81]

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74. *See* Groover v. Singletary, 656 So. 2d 424, 425, 20 Fla. L. Weekly S151 (noting that a petition for a writ of habeas corpus is the appropriate vehicle to raise claims of ineffective assistance of appellate counsel).

75. *See* McLin v. State, 827 So.2d 948, 951, 27 Fla. L. Weekly 743, 743 (Fla. 2002) (analyzing a Rule 3.850 motion raising newly discovered evidence by incorporating an affidavit of an eyewitness to the murder stating that McLin did not commit the crime for which he was convicted); *see also*, Fla. R. Crim. P. 3.850 (West 2011) (outlining the general grounds on which a sentence can be vacated, set aside, or corrected).

76. DNA evidence may be such an example. See *JLM*, Chapter 11, "Using Post-Conviction DNA Testing to Attack Your Conviction or Sentence."

77. *See* Jones v. State, 591 So. 2d 911, 915, 16 Fla. L. Weekly 745, 745 (Fla. 1991) ("[T]he newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial."); *see also* Davis v. State, 736 So. 2d 1156, 1159, 24 Fla. L. Weekly 260, 260 (Fla. 1999) (denying post-conviction relief motion because petitioner's allegations regarding expert witness testimony were speculative and thus not newly discovered evidence); Williamson v. Dugger, 651 So. 2d 84, 89, 19 Fla. L. Weekly 582, 582 (Fla. 1994) (denying habeas corpus petition because new affidavits petitioner offered to impeach a witness' credibility were not likely to lead to an acquittal on retrial).

78. *See* Jones v. State, 591 So. 2d 911, 916, 16 Fla. L. Weekly 745, 745 (Fla. 1991) (holding newly discovered information must have been unknown at time of trial and could not have been discovered through reasonable diligence); *see also* Steinhorst v. State, 695 So. 2d 1245, 1247–48, 22 Fla. L. Weekly 335, 335 (Fla. 1997) (affirming the denial of defendant's habeas motion because due diligence could have uncovered files relating to the fact that defendant's judge recused himself on a co-defendant's case, which defendant attempted to offer as newly discovered evidence); Correll v. State, 698 So. 2d 522, 523–24, 22 Fla. L. Weekly 188, 188 (Fla. 1997) (denying petitioner's post-conviction relief because the evidence on an expert witness' education offered to impeach the witness could have been discovered at trial).

79. *See* McLin v. State, 827 So.2d 948, 954, 27 Fla. L. Weekly 743, 743 (Fla. 2002) (finding that "to uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held on a claim for post-conviction relief, an appellate court must accept the defendant's factual allegations to the extent they are not refuted by the record.").

80. *See* Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215, 218 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused…violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also* Kyles v. Whitley, 514 U.S. 419, 421–22, 115 S. Ct. 1555, 1560, 131 L. Ed. 2d 490, 498 (1995) (applying *Brady* and reversing the denial of a habeas corpus petition because the state failed to disclose evidence favorable to the petitioner); Brown v. Wainwright, 785 F.2d 1457, 1458 (11th Cir. 1986) (reversing petitioner's conviction because the prosecution knowingly allowed false testimony to be introduced and exploited in its case).

81. Downs v. State, 740 So. 2d 506, 513–17, 24 Fla. L. Weekly 231, 231 (Fla. 1999) (denying motion for post-conviction relief because appellant's contentions that appellee had, among other things, withheld exculpatory evidence and that appellant had received ineffective assistance of counsel were meritless); Mills v. State, 684 So. 2d 801, 806, 21 Fla. L. Weekly 527, 527 (Fla. 1996) (denying motion for successive petition where defendant failed to produce statements or evidence to show that further proceedings would have changed court's conclusion of guilt); Scott v. State, 657 So. 2d 1129, 1132, 20 Fla. L. Weekly 133, 133 (Fla. 1995) (reversing trial court's decision and remanding for evidentiary hearing on issue of possible *Brady* violations raised by defendant's motion, but denying habeas petition as procedurally barred); Hildwin v. Dugger, 654 So. 2d 107, 110–11, 20 Fla. L. Weekly 39, 39 (Fla. 1995) (denying habeas petition but vacating and remanding for new sentencing before a jury because counsel's errors had deprived petitioner of a reliable

(c) Probation or Parole

Florida courts have held that a Rule 3.850 motion, followed by a habeas petition if unsuccessful, is the correct procedure by which you can challenge errors in parole revocation proceedings and orders of the Florida Probation and Parole Commission.[82] You may also file a habeas petition to challenge the Parole Commission's determinations of presumptive parole release dates,[83] or if you are incarcerated after your presumptive release date.[84]

(d) Subject Matter Jurisdiction

In Florida, courts will ordinarily find that as long as an indictment or information does not completely fail to charge an offense, it provides the accused with enough information to construct a defense and protects him from future prosecution for the same act. Therefore, courts will not generally find such indictments or information void or defective.[85]

4. How to File a Habeas Petition

(a) When to File

First make sure you are not eligible to bring a Rule 3.850 motion. Florida courts will refuse to issue a writ of habeas corpus if you can pursue your claim through another available action, like a Rule 3.850 motion, but fail to do so.[86]

If you are facing the death penalty, your petition for a writ of habeas corpus must be filed at the same time as the initial brief filed on your behalf in the appeal of the circuit court's order on a motion to vacate, set aside, or correct a sentence.[87]

(b) Where to File

Where you file depends upon the stage of your criminal case. If you have not yet been convicted, or are filing a petition related to a probation violation, you must petition the circuit court judge presiding over your case.[88] But, if the Supreme Court has affirmed your conviction, you must file your petition with the Supreme

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penalty phase).

82. *See* State v. Sampson, 297 So. 2d 120, 121–22 (Fla. Dist. Ct. App. 4th Dist. 1974) (finding that habeas corpus is the proper method for challenging order of the Florida Parole and Probation Commission); State *ex rel.* Wainwright v. Holley, 234 So. 2d 409, 410 (Fla. Dist. Ct. App. 2d Dist. 1970) (holding that the proper way to challenge error in post-conviction proceedings such as parole revocation is through habeas corpus); Bush v. State, 945 So. 2d 1207, 1210 (Fla. 2006) (The proper remedy for a prisoner to pursue in challenging a sentence-reducing credit determination by the Department of Corrections, where the prisoner has exhausted administrative remedies and is alleging entitlement to immediate release, is a petition for writ of habeas corpus); *see also* Jackson v. Mayo, 73 So. 2d 881, 882–83 (Fla. 1954) (granting relief where the commission revoked parole based on evidence that had not been introduced at the revocation hearing); Beal v. Mayo, 70 So. 2d 367, 369 (Fla. 1954) (affirming that where there is a complete absence of any adjudication at all, the judgment and sentence will be subject to being set aside on habeas corpus); Sellers v. Bridges, 15 So. 2d 293, 295–296, 153 Fla. 586, 590–91 (1943) (holding whether prisoner inexcusably violated conditions of pardon or parole was proper for habeas inquiry).

83. *See* Williams v. Florida Parole Comm'n, 625 So. 2d 926, 934, 18 Fla. L. Weekly 2258, 2258 (Fla. Dist. Ct. App. 1st Dist. 1993) (finding that the proper remedy to challenge presumptive release date is habeas corpus).

84. *See* Jenrette v. Wainwright, 410 So. 2d 575, 577–78 (Fla. Dist. Ct. App. 1982) (ruling that prisoner whose presumptive parole release date has passed is entitled to immediate release on habeas corpus); *but see* Kirsch v. Greadington, 425 So. 2d 153, 155 (Fla. Dist. Ct. App. 1983) (holding that a successful Habeas petition merely obliges the parole commission to exercise its judgment without the previous unconstitutional factors).

85. *See* Sweat v. Pettis, 158 Fla. 104, 106, 27 So. 2d 827, 828 (Fla. 1946) (holding where the information could not be said to wholly fail to state a violation of the law, a habeas petition was not the proper way to challenge it; petitioner should have brought a motion to quash); State *ex rel.* Miller v. Coleman, 130 Fla. 537, 544, 178 So. 157, 160 (Fla. 1938) (holding information that "informs defendant of the nature of the accusation against him, which does not wholly fail to charge an offense and which enables defendant to prepare his defense and protects him from subsequent prosecution for the same offense, will not on habeas corpus be held so fatally defective as to render conviction and commitment . . . void."); Taylor v. Chapman, 173 So. 143, 146, 127 Fla. 401, 407–08 (1937) (refusing to grant a writ where the information sufficiently claimed intent and overt acts that would have resulted in commission of the crime).

86. Fla. R. Crim. P. 3.850(l) (West 2011).

87. Fla. R. Crim. P. 3.851(d)(3) (West 2011).

88. Fla. Stat. Ann. § 79.01 (West 2009); *see also* Newkirk v. Jenne, 754 So. 2d 61, 62, 25 Fla. L. Weekly 518 (Fla. Dist. Ct. App. 2000) (finding that where the petitioner was being detained in relation to a probation violation, the circuit

Court.[89] If you originally file with the circuit court, and the circuit court denies your petition, then you may file another petition with the Supreme Court.[90] In general, you should file the petition in the jurisdiction in which you are incarcerated, but if you are raising an issue that should have been raised on direct appeal (like ineffective counsel), you should file in the court where the original sentence was imposed.[91]

(c) What to Include in Your Petition

Because the writ of habeas corpus is such a unique right, the courts in Florida may occasionally grant applications for writs that do not follow statutory requirements. For example, an attorney may make a telephone call to a judge to apply for a writ,[92] or a judge may decide that the informal letters from a prisoner provide sufficient grounds for issuing the writ.[93] However, it is always better to comply with statutory requirements if you can, basing your argument on enough detailed, factual allegations to make a case that on its face shows you are entitled to be released.[94] The statutory requirements for your application for a writ include

(1) The facts upon which you rely for relief;
(2) A request for a writ of habeas corpus; and
(3) An optional argument in support of the petition with citations of authority.[95]

While you do not need to present all the evidence of your wrongful detention,[96] you should attach to your petition copies of the warrant, process, or proceeding that is causing you to be detained.[97] You should also state that you have exhausted all the administrative remedies available to you.[98]

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court judge presiding over her case had full authority to order her release).

89. *See* Kinsey v. Davis, 19 So. 2d 323, 325 154 Fla. 889, 892 (Fla. 1944) (holding that where the petitioner's conviction had been affirmed by the Supreme Court, his habeas petition should have been made to the Supreme Court because the circuit court could not grant a writ).

90. *See* Deeb v. Gandy, 148 So. 540, 541 110 Fla. 283, 284 (Fla. 1933) (holding that the petitioner was entitled to bail after the circuit court held that he should be remanded without bail).

91. Fla. Stat. Ann. § 79.01 (West 2009); *see also* Collins v. State, 859 So. 2d 1244, 1245, 28 Fla. L. Weekly 2628, 2628 (Fla. 2003) (stating that when a petitioner attacks the validity of the conviction by raising issues relating to the trial or to the propriety of the plea, jurisdiction lies with the trial court that imposed the sentence); McLeroy v. State, 704 So. 2d 151, 152, 22 Fla. L. Weekly 2718, 2718 (Fla. Dist. Ct. App. 5th Dist. 1997) (denying a petition for writ of habeas corpus alleging ineffective assistance of counsel because the prisoner improperly filed in the jurisdiction where he was incarcerated rather than where the original sentence was imposed).

92. *See* Jamason v. State, 455 So. 2d 380, 381, 9 Fla. L. Weekly 330, 330 (Fla. 1983) (upholding an oral writ of habeas corpus which was issued in response to an oral application by the client's attorney over the telephone).

93. *See* Sneed v. Mayo, 66 So. 2d 865, 868 (Fla. 1953) (finding that although the application for a writ was an informal letter not conforming to statutory requirements, the communication was sufficient); McKay v. Jenkins, 405 So. 2d 287, 288 (Fla. Dist. Ct. App. 1981) (construing the appellant's informal letter to the court as a petition for a writ).

94. *See* Sims v. Dugger, 519 So. 2d 1080, 1082, 13 Fla. L. Weekly 292 (Fla. Dist. Ct. App. 1st Dist. 1988) (reversing the dismissal of a petition for habeas corpus because the petition contained detailed factual allegations); Brown v. Wainwright, 498 So. 2d 679, 679, 11 Fla. L. Weekly 2626 (Fla. Dist. Ct. App. 1st Dist. 1986) (denying a petition for habeas in part because the petition failed to include any arguments in support of the allegations); DeAngelo v. Strickland, 426 So. 2d 1264, 1264 (Fla. Dist. Ct. App. 1st Dist. 1983) (affirming the denial of a prisoner's petition for a writ of habeas corpus because the prisoner was not entitled to the relief he sought and he failed to make a prima facie case since he did not claim that he was illegally imprisoned); Bennington v. Thornton, 370 So. 2d 856, 857 (Fla. Dist. Ct. App. 4th Dist. 1979) (denying a prisoner's petition for a writ of habeas corpus because he failed to show that the trial court abused its discretion in denying him bail or failing to hold a hearing as soon as was possible); Bagley v. Brierton, 362 So. 2d 1048, 1049 (Fla. Dist. Ct. App. 1st Dist. 1978) (affirming the trial court's denial of a prisoner's habeas petition in which he claimed he was denied adequate medical care because even if the allegations were true, he would not be entitled to relief); Smith v. State, 176 So. 2d 383, 384 (Fla. Dist. Ct. App. 3d Dist. 1965) (affirming the trial court's denial of a prisoner's habeas petition because the petition did not contain factual allegations to support its conclusions); Sneed v. Mayo, 66 So. 2d 865, 869–70 (Fla. 1953) (stating that a habeas petition must contain at least "some good faith suggestion of illegal detention"); Sullivan v. State *ex rel.* McCrory, 49 So. 2d 794, 796 (Fla. 1951) (noting that a habeas petition should be dismissed if the petition does not make a case that on its face shows that the petitioner should be released from custody); Herring v. State, 132 Fla. 658, 659, 181 So. 892, 892 (1938) (denying a habeas petition since the prisoner did not claim unlawful detention).

95. Fla. R. Civ. P. 1.630.

96. *See* Johnson v. Lindsey, 89 Fla. 143, 148, 103 So. 419, 421 (1925) (stating that a habeas petition does not need to include all of the evidence necessary to establish that the detention is wrongful).

97. *See* Cooper v. Lipscomb, 122 So. 5, 5, 97 Fla. 668, 670 (1929) (stating that where the petitioner was arrested

(d) How to File

After you have created your petition for habeas corpus including all the items outlined in Part (B)(3)(c) above, "What to Include in Your Petition", you should send your petition and any supporting documents to the court specified above in Part (B)(3)(b), "Where to File".

5. Your Right to Counsel for Your Habeas Petition

The U.S. Supreme Court has held you have no federal constitutional right to counsel in state habeas corpus proceedings.[99] In Florida, you have no right to appointed counsel in a habeas proceeding.[100] A public defender may represent you, but there is no requirement that one be appointed to you.[101] But, if you are applying for a writ because you are about to be extradited, you are entitled to be provided with an attorney.[102]

6. What to Expect After You File

In Florida, the court must issue a writ of habeas corpus if your petition states allegations, which, if true, would entitle you to release.[103] When the court issues the writ, it establishes a date for the person who has you in custody to return you to the court.[104] The respondent (whoever has you in custody) may provide a response, also called a "return."[105] The response includes the respondent's arguments for keeping you in custody. If the respondent does not return you to court by the scheduled date, he must pay you $300.[106] You have a right to provide a reply to a response within twenty days of receiving it.[107] If the return does not address a fact that you allege in your petition, you do not need to prove that fact in your reply.[108] In your reply, you may, if necessary, put forth other important, material facts not stated in your petition.[109]

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and held by the sheriff pursuant to a warrant, a habeas petition should include a copy of the warrant); Johnson v. Lindsey, 103 So. 419, 421, 89 Fla. 143, 148 (1925) (stating that if a petitioner claims that he is unlawfully detained because the processes or proceedings under which he is being held are invalid, then the habeas petition should include copies of such proceedings or processes); *see also* Simons v. State, 555 So. 2d 960, 961, 15 Fla. L. Weekly 253, 253 (Fla. Dist. Ct. App. 1st Dist. 1990) (denying a petition for writ of habeas corpus, in which the petitioner claimed he was being deprived of his right to a pretrial release due to his inability to afford bond, because the petition did not include a copy of the order or a transcript of the hearing from the lower court on bond reduction); McNamara v. Cook, 336 So. 2d 677, 679 (Fla. Dist. Ct. App. 4th Dist. 1976) (finding a habeas petition insufficient because it did not include documentary evidence).

98. Moore v. Dugger, 613 So. 2d 571, 572, 18 Fla. L. Weekly 499, 499 (Fla. 1st Dist. Ct. App. 1993) (finding that a petition for writ was insufficient because it did not allege that the petitioner had exhausted administrative remedies).

99. *See* Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539, 545 (1987) ("[T]he right to appointed counsel extends to the first appeal of right and no further.").

100. *See* Coffee v. Wainwright, 172 So. 2d 851, 853 (Fla. Dist. Ct. App. 1st Dist. 1965) (finding that because post-conviction habeas corpus proceedings are civil, not criminal, "there is no absolute right to assistance of a lawyer").

101. *See* Fla. Parole & Probation Comm'n v. Alby, 400 So. 2d 864, 864 (Fla. Dist. Ct. App. 4th Dist. 1981) (denying a motion to prevent a public defender from representing an appellee in habeas corpus proceedings).

102. *See* Bentzel v. State, 585 So. 2d 1118, 1119–20, 16 Fla. L. Weekly 2410, 2410 (Fla. Dist. Ct. App. 1st Dist. 1991) (finding that a prisoner has a statutory right to counsel at a habeas corpus proceeding challenging extradition).

103. Guess v. Barton, 599 So. 2d 770, 771, 17 Fla. L. Weekly 1427, 1427 (Fla. Dist. Ct. App. 1st Dist. 1992) ("[F]or purposes of appellate review, [the court] must assume that the allegations of appellant's habeas petition are true."); Roy v. Dugger, 592 So. 2d 1235, 1236, 17 Fla. L. Weekly 386, 386 (Fla. Dist. Ct. App. 1st Dist. 1992) (reversing summary denial of the lower court on the ground that if the prisoner's allegations were true, they could establish that the department had failed to comply with due process, a failure that could establish a violation of due process or the protection against cruel and unusual punishment).

104. Fla. Stat. Ann. § 79.04(2) (West 2009).

105. Fla. R. App. P. 9.100(j) (West 2012).

106. Fla. Stat. Ann. § 79.05(1) (West 2009).

107. Fla. R. App. P. 9.100(k) (West 2012).

108. *See* State *ex rel.* Libtz v. Coleman, 149 Fla. 28, 30, 5 So. 2d 60, 61 (Fla. 1941) (holding that undenied allegations in a petition for writ of habeas corpus are taken as true).

109. *See* Sneed v. Mayo, 66 So. 2d 865, 870 (Fla. 1953) (stating that, in his reply, petitioner "may allege facts not appearing in the petition"); *see also* Bard v. Wolson, 687 So. 2d 254, 255, 21 Fla. L. Weekly 2565, 2565 (Fla. Dist. Ct. App. 1st Dist. 1996) (reversing an order denying a petition for writ because the appellant was not given an opportunity to reply to the response); Matera v. Buchanan, 192 So. 2d 18, 20 (Fla. Dist. Ct. App. 3d Dist. 1966) (finding that after the respondent has filed a return, the petitioner may "allege facts not appearing in the petition or return that may be material in the case").

The court may decide to hold a hearing to evaluate the facts you allege in your petition. This hearing is usually held after a return is filed, but the court may also decide to hold a hearing before issuing the writ.[110] You have the right to a hearing if your petition is "facially sufficient," which means that if everything on your petition were true, you would be entitled to a writ.[111] In Florida, hearings are informal, and if a witness is unable to attend, he may provide an affidavit instead.[112]

Once the hearing is completed, the court may release you, remand (return) you to custody, or release you on bail.[113] Though there are no fees for applying for a writ, you may be ordered to pay the cost of the proceedings if the writ is not granted.[114]

7. Your Right to Appeal

You may appeal the denial of your application for a writ of habeas corpus to the state's highest court. In New York, for example, the highest court is the Court of Appeals. Filing the petition in the appellate court will be treated as a notice of appeal as long as you raise the same issues you raised in lower court.[115] However, you also should usually file a notice of appeal.

C. New York

This Part explains some of the basic rules for filing a habeas corpus petition in New York.

1. Requirements

The New York habeas corpus rules can be found in Article 70 of New York Civil Practice Law and Rules, also known as N.Y. C.P.L.R. 7001–7012 (McKinney 2009). The New York State Legislature has restricted the use of the writ of habeas corpus. For most post-conviction relief (challenges to your conviction or sentence), you must file an Article 440 motion, not a petition for a habeas corpus writ.[116]

(a) Custody

If you have been released on parole, on probation, on *conditional release*, ROR, or you are free on bail, a New York court cannot grant a writ of habeas corpus.[117]

(b) Immediate Release

You must be entitled to immediate release if your habeas petition is successful.[118]

(c) State Prisoner

You must be a prisoner in New York.

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110. *See* Turiano v. Butterworth, 416 So. 2d 1261, 1263 (Fla. Dist. Ct. App. 4th Dist. 1982) (finding that the trial court did not err in holding an evidentiary hearing before issuing a writ of habeas corpus).

111. Seibert v. Dugger, 595 So. 2d 1083, 1084 17 Fla. L. Weekly 784, 784 (Fla. Dist. Ct. App. 1st Dist. 1992) (finding that dismissal of a petition for writ of habeas corpus without a hearing is error when the prisoner makes specific allegations which, if true, would establish that the department of corrections had failed to comply with its own rules).

112. Fla. Stat. Ann. § 79.07 (West 2009).

113. Fla. Stat. Ann. § 79.08 (West 2009).

114. *See* Beasley v. Cahoon, 109 Fla. 106, 126, 147 So. 288, 295 (1933) (finding that a petitioner can be required to pay costs in a habeas case).

115. *See* Garner v. Wainwright, 454 So. 2d 28, 28 (Fla. Dist. Ct. App. 1st Dist. 1984) (treating filing of same habeas petition as a notice of appeal since filed with the appellate court within 30 days, as the appellate rules required).

116. See *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence," for more information on filing an Article 440 motion.

117. *See* People *ex rel.* Doty v. Krueger, 26 N.Y.2d 881, 882, 258 N.E.2d 215, 215, 309 N.Y.S.2d 932, 932 (1970) (probation); People *ex rel.* Nunez v. N.Y. State Bd. of Parole, 182 A.D.2d 998, 998, 585 N.Y.S.2d 716, 716 (3d Dept. 1992) (parole); People *ex rel.* Birt v. Grenis, 76 A.D.2d 872, 872, 428 N.Y.S.2d 494, 494 (2d Dept. 1980) (conditional release); People *ex rel.* Doyle v. Fischer, 159 A.D.2d 208, 208, 551 N.Y.S.2d 830, 830 (1st Dept. 1990) (ROR); Bayless v. Wandel, 119 Misc. 2d 82, 84, 462 N.Y.S.2d 396, 398 (Sup. Ct. Fulton County 1983) (free on bail).

118. People *ex rel.* Goldberg v. Warden of Rikers Is. Corr. Facility, 45 A.D.3d 356, 846 N.Y.S.2d 15 (1st Dept. 2007) (finding habeas to be an inappropriate remedy as the prisoner was not entitled to immediate release).

(d) No Other Options

A New York court will not grant your petition for a writ of habeas corpus if there are other procedures available, *unless* there are exceptional circumstances of "practicality and necessity."[119] In other words, you must have a very good reason for filing a petition for habeas corpus instead of appealing your conviction, filing an Article 78 petition, or filing an Article 440 motion, whichever would otherwise be appropriate.[120] See Section 2(b)(ii) below for more information about what might constitute exceptional circumstances of practicality and necessity. To find out more about how to challenge your conviction or sentence using Article 440, see *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedural Law to Attack Your Unfair Conviction or Illegal Sentence," and, for a description of how to appeal administrative decisions using Article 78, see *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Laws and Rules."

2. What You Can Complain About in Your Habeas Petition

(a) Before Trial

(i) Extradition

You may be held in custody in New York for a maximum of ninety days before you are extradited. After the first thirty days of custody, New York may file an extension for sixty additional days of custody.[121] Therefore, you may be eligible for a writ of habeas corpus if you have been held in custody in New York for over ninety days or if you have been held for more than thirty days *and* the state of New York has not applied for an extension.

(ii) Bail

If, in denying or setting your bail, the court did not follow New York's statutory guidelines, violated constitutional provisions forbidding excessive bail (for example, bail was set too high), or denied bail arbitrarily (for example, the court did not give a reason for why bail was not set), you have grounds for a habeas petition.[122] New York Criminal Procedure Law § 510.30(2)(a) lists factors that a court must use to determine the amount, if any, of your bail.[123] If a court bases its bail determination on a factor not included in the statute, or ignores one or more of the factors, you may challenge the court's action by petitioning for

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119. People *ex rel.* Keitt v. McMann, 18 N.Y.2d 257, 262, 220 N.E.2d 653, 655, 273 N.Y.S.2d 897, 900 (1966) (ruling that habeas corpus is not the preferred means of vindicating fundamental constitutional or statutory rights and that departure from traditional orderly proceedings, such as appeal, should be permitted only when dictated by reason of "practicality and necessity").

120. *See* People *ex rel.* Wise v. Scully, 163 A.D.2d 444, 444, 570 N.Y.S.2d 1018, 1018 (2d Dept. 1990) (holding that the court cannot review errors already considered on a direct appeal); People *ex rel.* Sanchez v. Hoke, 132 A.D.2d 861, 862, 518 N.Y.S.2d 69, 70 (3d Dept. 1987) (declining to grant habeas relief where petitioner had direct appeal pending and had raised the same issues in an unsuccessful application for post-conviction relief under Article 440); People *ex rel.* Proctor v. Henderson, 74 A.D.2d 718, 719, 425 N.Y.S.2d 680, 680 (4th Dept. 1980) (holding that habeas corpus will not lie where the issue had already been decided in an earlier Article 440 motion but suggesting that the prisoner could bring another Article 440 motion seeking the same relief).

121. *See* People *ex rel.* Linaris v. Weizenecker, 89 Misc. 2d 814, 816, 392 N.Y.S.2d 813, 815 (Sup. Ct. Putnam County 1977) (granting writ of habeas corpus where petitioner had been held beyond 90-day period without warrant even though other charges were pending against him in New York); *see also* N.Y. Crim. Proc. Law §§ 570.36, 570.40 (McKinney 2009).

122. *See* People *ex rel.* Klein v. Krueger, 25 N.Y.2d 497, 499, 255 N.E.2d 552, 554, 307 N.Y.S.2d 207, 209–10 (1969) (holding that in a habeas corpus proceeding, the court can review a bail decision if the decision appears to be excessive or arbitrary according to constitutional or statutory standards); *see, e.g.*, People *ex rel.* Gutierrez v. Jacobson, 219 A.D.2d 740, 740, 632 N.Y.S.2d 466, 466 (2d Dept. 1995) (dismissing habeas petition on finding that lower court's determination was not an improvident exercise of discretion and did not violate constitutional or statutory standards); People *ex rel.* Hunt v. Warden of Rikers Is. Corr. Facility, 161 A.D.2d 475, 476, 555 N.Y.S.2d 742, 742 (1st Dept. 1990) (dismissing habeas petition on basis that the lower court did not abuse discretion in denial of bail); *see also* N.Y. C.P.L.R. 7010(b) (McKinney 2009).

123. These factors are character, reputation, habits, and mental condition; employment and financial resources; ties to family and community and length of residence in community; criminal record; juvenile record; previous failure to show up in court; the likelihood of conviction or the merit of any pending appeal; and the sentence that may be imposed. N.Y. Crim. Proc. Law § 510.30(2)(a) (McKinney 2009).

habeas corpus.[124] Normally, when deciding a habeas corpus petition, the court can only review the record that was before the court that set bail. In other words, in making its decision about granting the writ of habeas corpus, the court can only look at the facts and evidence that were presented at the bail hearing itself.[125] If you can show that bail was set too high, the court can grant a writ of habeas corpus reducing the amount, but it will not release you.[126] If you have already been tried and convicted, the court will dismiss your habeas petition as moot or irrelevant because bail no longer matters once you have been convicted.[127]

(iii) Delay

If you were arrested without a warrant, have been detained for longer than twenty-four hours, and have not yet been arraigned, you may petition for a writ of habeas corpus.[128] At your arraignment, you should receive a *complaint*. If you are charged with a misdemeanor, the District Attorney's office has five days (not counting Sunday) to replace the complaint with an information.[129] If you have been arrested for a felony, the District Attorney's office has five or six days (depending on whether you were incarcerated over a weekend or during a holiday)[130] either to file an indictment against you by a grand jury vote or to file an information. However, even if these requirements are not met, your application for habeas relief may be denied if: (1) the delay is a result of your own actions; (2) the District Attorney already filed a certification that an indictment has been voted; (3) a grand jury filed an indictment or a direction to file an information; or (4) a court finds good cause for the delay.[131]

You may also petition for a writ of habeas corpus if you are being denied your right to a speedy trial under subdivision (2) of New York's speedy trial statute.[132] This statute applies to individuals who are incarcerated and have an information or indictment filed against them but whose cases have not yet gone to

124. *See* People *ex rel.* Bryce v. Infante, 144 A.D.2d 898, 899, 535 N.Y.S.2d 215, 216 (3d Dept. 1988) (overturning denial of bail set on the basis of defendant's suicidal tendencies); People *ex rel.* Ryan v. Infante, 108 A.D.2d 987, 988, 485 N.Y.S.2d 852, 853B54 (3d Dept. 1985) (finding that the absence of a codefendant should not be a factor in setting bail unless a defendant has assisted the codefendent in bail jumping); People *ex rel.* Bauer v. McGreevy, 147 Misc. 2d 213, 216, 555 N.Y.S.2d 581, 583 (Sup. Ct. Rensselaer County 1990) (overturning denial of bail solely to protect the community from possible future criminal conduct by the defendant); Becher *ex rel.* Vadakin v. Dunston, 142 Misc. 2d 103, 104, 536 N.Y.S.2d 396, 397 (Sup. Ct. Rensselaer County 1988) (overturning denial of bail without conducting a hearing and on the ground that the defendant disobeyed a subpoena to testify before the grand jury); People *ex rel.* Glass v. McGreevy, 134 Misc. 2d 1085, 1086, 514 N.Y.S.2d 622, 623 (Sup. Ct. Rensselaer County 1987) (overturning imposition of negative AIDS test as a condition for release on bail).

125. *See* People *ex rel.* Rosenthal v. Wolfson, 48 N.Y.2d 230, 232–33, 397 N.E.2d 745, 422 N.Y.S.2d 55 (1979) (holding that, absent extraordinary circumstances, new evidence relevant to bail determination should be submitted to the bail-fixing court, not to a habeas court).

126. N.Y. C.P.L.R. 7010(b) (McKinney 2009) ("If the person detained has been admitted to bail but the amount fixed is so excessive as to constitute an abuse of discretion, and he is not ordered discharged, the court shall direct a final judgment reducing bail to a proper amount."). For example, if you were indicted for selling heroin on two different occasions for amounts totaling $19,000, and you have a wife and son with whom you had been living in the community, the court may find that bail set at $150,000 is excessive. People *ex rel.* Mordkofsky v. Stancari, 93 A.D.2d 826, 827, 460 N.Y.S.2d 830, 832 (2d Dept. 1983).

127. *See* Kassebaum v. al-Rahman, 212 A.D.2d 482, 483, 624 N.Y.S.2d 573, 573 (1st Dept. 1995) (denying habeas petition for failure to set reasonable bail, finding the decision moot because petitioner had been tried and convicted).

128. *See* People *ex rel.* Maxian v. Brown, 77 N.Y.2d 422, 426–27, 570 N.E.2d 223, 225, 568 N.Y.S.2d 575, 577 (1991) (granting habeas and holding a delay of arraignment of more than 24 hours is presumptively unnecessary and violates N.Y. Crim. Proc. Law 140.20(1) that if no explanation for the delay is given); *see also* N.Y. Crim. Proc. Law § 140.20(1) (McKinney Supp. 2011).

129. *See* N.Y. Crim. Proc. Law § 170.70 (McKinney 2009); People *ex rel.* Alvarez v. Warden, Bronx House of Det., 178 Misc. 2d 254, 256, 680 N.Y.S.2d 153, 154–55 (Sup. Ct. Bronx County 1998) (granting the petition for a writ of habeas corpus and ordering the petitioner released because of the failure to file an information against the petitioner within five days); *see also* People *ex rel.* Neufeld v. McMickens, 70 N.Y.2d 763, 764–65, 514 N.E.2d 1368, 1368, 520 N.Y.S.2d 744, 744 (1987) (stating that five-day period includes the first day of custody unless the first day preceded arraignment or was a Sunday).

130. *See* People *ex rel.* Barna v. Malcolm, 85 A.D.2d 313, 316–17, 448 N.Y.S.2d 176, 178–79 (1st Dept. 1982) (finding 72-hour period may be extended if it expires upon a Saturday, Sunday, or public holiday, or if there is "good cause").

131. N.Y. Crim. Proc. Law § 180.80 (McKinney 2009).

132. N.Y. Crim. Proc. Law § 30.30 (McKinney 1989 & Supp. 2012).

trial.[133] If the court grants your petition, you will have the right to "be released on bail or on [your] own recognizance, upon such conditions as may be just and reasonable."[134] If your trial has started, you can no longer bring a habeas corpus petition on this ground. Instead, you should raise the issue on direct appeal.[135]

(b) After Your Conviction

(i) Confinement Beyond Sentence

You may petition for habeas corpus relief if you have already served your sentence and are still being detained. This detainment may be due to clerical error, office delay, or miscalculation of jail or prison time, as long as you would be entitled to immediate release if you won your petition.[136]

Other than the administrative mistakes listed above, which, if corrected, would result in your release, you may not file for a writ of habeas corpus to contest your sentence. For example, if you are serving time for several convictions, you may not petition for a writ of habeas corpus to challenge only one of these convictions or sentences, since you will remain imprisoned under the other convictions, as explained in Part A(2)(b) of this Chapter. Also, if you were improperly given a consecutive sentence instead of a concurrent sentence, or you were incorrectly sentenced as a *predicate* or *persistent felon* instead of a first-time offender, you cannot petition for a writ of habeas corpus to fix this mistake because it would not result in your immediate release.[137] Instead, you must raise such issues in a direct appeal or an Article 440 motion.

(ii) Fundamental Rights

Some cases suggest that New York courts will not require you to use other available procedures if you are claiming a violation of a fundamental constitutional or statutory right.[138] However, courts have been

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133. N.Y. Crim. Proc. Law § 30.30 (McKinney 1989 & Supp. 2012). You may only petition for a writ of habeas corpus to challenge a violation of subdivision (2), not subdivision (1), of § 30.30. Under subdivision (2), a defendant charged with a felony cannot be held in custody before going to trial for longer than 90 days; a defendant charged with a misdemeanor where the punishment for the misdemeanor is longer than three months of incarceration cannot be held in custody before going to trial for longer than 30 days; a defendant charged with a misdemeanor where the punishment for the misdemeanor is less than three months of incarceration cannot be held before going to trial for longer than 15 days; and a defendant charged with only a violation cannot be held in custody before going to trial for longer than five days. *See* People *ex rel.* Chakwin v. Warden, 63 N.Y.2d 120, 126, 470 N.E.2d 146, 149, 480 N.Y.S.2d 719, 722 (1984) (finding that delay of 91 days, after excluding delay due to defendant's motions, exceeds statutory limit of 90 days, and requires release of defendant). Note that you must file a motion for release in order to have a habeas claim to challenge the violation of your right to a speedy trial. People *ex rel.* Bullock v. Barry, 2002 N.Y. Slip. Op. 50463U, *3–4, 2002 N.Y. Misc. LEXIS 1525, **4–5 (Sup. Ct. N.Y. County 2002) (*unpublished*).

134. N.Y. Crim. Proc. Law § 30.30(2) (McKinney 1989 & Supp. 2012).

135. *See* Kassebaum v. Al-Rahman, 212 A.D.2d 482, 483, 624 N.Y.S.2d 573, 573 (1st Dept. 1995) (affirming denial of habeas petition on speedy trial grounds because petition was brought after trial had commenced); *see also* People *ex rel.* McDonald v. Warden, 34 N.Y.2d 554, 554, 310 N.E.2d 537, 537, 354 N.Y.S.2d 939, 939 (1974) (finding that once criminal action is brought to trial, habeas petition based on denial of right to speedy trial should be denied); People *ex rel.* Meurer v. Bentley, 202 A.D.2d 1042, 1043, 609 N.Y.S.2d 466, 467 (4th Dept. 1994) (finding that appeal from denial of habeas petition was rendered moot by commencement of trial).

136. *See* People *ex rel.* Henderson v. Casscles, 66 Misc. 2d 492, 495, 320 N.Y.S.2d 99, 104 (Sup. Ct. Westchester County 1971) (noting that although habeas petition would be appropriate where petitioner was entitled to immediate release, petitioner should use Article 78 motion if he seeks only to re-compute jail time).

137. *See* People *ex rel.* Sims v. Senkowski, 226 A.D.2d 800, 801, 640 N.Y.S.2d 820, 820–21 (3d Dept. 1996) (denying habeas petition and ruling that petitioner claiming that he should not have been sentenced as a persistent felon should raise this argument on direct appeal or file an Article 440 motion); People *ex rel.* McGourty v. Senkowski, 213 A.D.2d 954, 954, 624 N.Y.S.2d 308, 308 (3d Dept. 1995) (dismissing habeas petition where petitioner claimed that he was improperly sentenced as a persistent felon because, if successful, petitioner would be entitled to resentencing, not immediate release); People *ex rel.* Hampton v. Scully, 166 A.D.2d 734, 734–35, 561 N.Y.S.2d 482, 483 (2d Dept. 1990) (denial of habeas petitions because re-calculation of sentence would not result in immediate release; an Article 78 proceeding would be more appropriate to force a re-calculation of the sentence); People *ex rel.* World v. Jones, 88 A.D.2d 1096, 1096, 453 N.Y.S.2d 60, 61 (3d Dept. 1982) (ruling that appeal or Article 440 motion is appropriate proceeding where habeas relief would not affect an immediate release of petitioner from custody). *But see* People *ex rel.* Colan v. La Vallee, 14 N.Y.2d 83, 86–87, 198 N.E.2d 240, 241, 248 N.Y.S.2d 853, 855 (1964) (holding in a habeas corpus proceeding violating section 335-b of the Code of Criminal Procedure, as it read in 1960, which required the court to inform the defendant upon his arraignment and before acceptance of his plea that his previous conviction of a crime would enhance his punishment, renders his conviction invalid, and ordering the defendant's re-arraignment and re-pleading).

138. *See* Roberts v. County Court of Wyoming County, 39 A.D.2d 246, 253, 333 N.Y.S.2d 882, 890 (4th Dept. 1972)

reluctant to hold that a violation of a fundamental right alone can serve as a basis for a writ of habeas corpus. Generally, courts will only bypass traditional proceedings, such as appeal, where "practicality and necessity" require it.[139] Some cases go so far as to state that habeas corpus may not be used to attack a judgment on constitutional grounds when habeas corpus is not the primary cause of the case.[140]

(iii) New or Void Law

You may also petition the court on the ground that the statute under which you were prosecuted is unconstitutional.[141] It is very rare for courts to declare a statute unconstitutional. If the statute you were prosecuted under is declared unconstitutional, you are entitled to immediate release on a petition for a writ of habeas corpus. New York may also grant writs of habeas corpus when the law has changed, and the law used to convict you has been declared void. Finally, a court may grant a writ of habeas corpus if your claim involves the "violation of a fundamental constitutional right, which was not clearly recognized nor fully articulated" by the Court of Appeals until after all appeals of your conviction have been completed.[142]

("[W]hile some form of alternative relief, such as *coram nobis* [codified in Article 440 of the C.P.L.R.], might also have been available to the relator in the present case, this should not foreclose the relator from proceeding by way of habeas corpus."); People *ex rel.* Rohrlich v. Follette, 20 N.Y.2d 297, 299–300, 229 N.E.2d 419, 420, 282 N.Y.S.2d 729, 730–731 (1967) (finding that habeas corpus is an appropriate proceeding to test the claim that the relator has been deprived of a fundamental constitutional or statutory right in a criminal prosecution, in this case, right to a trial by jury). Note that these are old cases and courts have become increasingly reluctant to review habeas corpus petitions if other procedures are available. For a list of constitutional and statutory rights in criminal cases, see *JLM*, Chapter 9, "Appealing Your Conviction or Sentence." For more information on other forms of alternative relief, such as Article 440 motions and *coram nobis*, see *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

139. People *ex rel.* Keitt v. McMann, 18 N.Y.2d 257, 262, 220 N.E.2d 653, 655, 273 N.Y.S.2d 897, 900 (1966) (ruling that habeas corpus is not the preferred means of vindicating fundamental constitutional or statutory rights and that departure from traditional orderly proceedings, such as appeal, should be permitted only when dictated by reason of "practicality and necessity."); *see also* People *ex rel.* Murphy v. Leonardo, 179 A.D.2d 848, 848–49, 578 N.Y.S.2d 426, 427 (3d Dept. 1992) (holding that constitutional double jeopardy claim is not enough to support writ of habeas corpus when same claim is also pending on appeal); People *ex rel.* Hall v. LeFevre, 92 A.D.2d 956, 957, 460 N.Y.S.2d 640, 641 (3d Dept. 1983) (holding that the "facts of this case do not demonstrate a violation of petitioner's fundamental constitutional rights so egregious as to compel a departure from traditional orderly procedure."); People *ex rel.* Sales v. LeFevre, 93 A.D.2d 945, 946, 463 N.Y.S.2d 58, 59 (3d Dept. 1983) (habeas corpus may not be utilized to collaterally attack the judgment on constitutional grounds—in this case, the right of confrontation—and facts of case do not compel departure from traditional orderly procedure); People *ex rel.* Russell v. LeFevre, 59 A.D.2d 588, 588, 397 N.Y.S.2d 27, 28 (3d Dept. 1977) (dismissing habeas corpus petition alleging violation of constitutional right because habeas is not proper remedy for attacking the judgment of conviction and noting the petitioner should have filed an Article 440 motion).

140. *See* People *ex rel.* Sales v. LeFevre, 93 A.D.2d 945, 946, 463 N.Y.S.2d 58, 59 (3d Dept. 1983) (holding that habeas corpus may not be utilized to collaterally attack the judgment on constitutional grounds—in this case, the right of confrontation—and facts of case do not compel departure from traditional orderly procedure); People *ex rel.* Russell v. LeFevre, 59 A.D.2d 588, 588, 397 N.Y.S.2d 27, 28 (3d Dept. 1977) (dismissing habeas corpus petition alleging violation of constitutional right because habeas is not proper remedy for attacking the judgment of conviction and noting the petitioner should have filed an Article 440 motion).

141. *See* People *ex rel.* Haines v. Hunt, 242 N.Y.S. 105, 107–08, 229 A.D. 419, 420–22 (3d Dept. 1930) (holding that habeas corpus is proper remedy for relator convicted under unconstitutional statute).

142. *See* People *ex rel.* Rodriguez v. Harris, 84 A.D.2d 769, 770, 443 N.Y.S.2d 784, 785 (2d Dept. 1981). In *Rodriguez*, the petitioner filed for a writ of habeas corpus alleging a violation of the petitioner's right to counsel based on a Court of Appeals decision, People v. Rogers, 48 N.Y.2d 167, 422 N.Y.S.2d 18, 397 N.E.2d 709 (1979). The *Rodriguez* court upheld the lower court's dismissal of the writ, ruling that the *Rogers* decision (prohibiting police interrogation of defendant, in absence of counsel, on matters related or unrelated to pending charges for which defendant is already represented by counsel) could not be given retroactive application to petitioner's criminal case. People *ex rel.* Rodriguez v. Harris, 84 A.D.2d 769, 770, 443 N.Y.S.2d 784, 785 (2d Dept. 1981). Note that the court denied the petition in *Rodriguez* on narrow grounds. The Court of Appeals had previously held in People v. Pepper, 53 N.Y.2d 213, 221, 423 N.E.2d 366, 369, 440 N.Y.S.2d 889, 892 (1981), that in cases involving a defendant's right to counsel in pretrial encounters, retroactive application of a change in decisional law is limited to those cases still on direct review at the time the change in law occurred. *See also* People *ex rel.* Gallo v. Warden, 32 A.D.2d 1051, 1052, 303 N.Y.S.2d 752, 753 (2d Dept. 1969) (holding that habeas corpus proceeding was proper for reviewing propriety of imposition of consecutive sentence where the petition was based upon decisions rendered after petitioner's appeal).

(iv) Ineffective Counsel

In New York, you cannot use habeas corpus proceedings to claim ineffective assistance of counsel.[143] This is because the remedy would be a new trial and not release from custody and habeas petitions are for getting released from custody. Filing an Article 440.10 motion would be the appropriate cause of action.[144]

(v) New Evidence

In New York, if you wish to raise the issue of new evidence, you must file an Article 440 motion.[145] See *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence" for more information on how to do this.

(vi) Unreasonable Delay

A court may grant a writ of habeas corpus if there has been an "unreasonable delay" in the disposition (settlement) of an Article 440 motion[146] or if your appeal has been pending for an unusually long time.[147]

In addition, you may petition for habeas corpus if waiting for the appeal of your conviction will cause you to face a longer prison term.[148] In one case, a prisoner petitioned for habeas corpus on the grounds that he was wrongfully imprisoned in New York. The prisoner's commitment order indicated that he should be imprisoned in Alabama, where he had earlier escaped from prison. The court granted the writ of habeas corpus even though an appeal that raised the issue of wrongful imprisonment was pending, because the appeal was not due to be heard by the court until later in the year, and none of the time that the prisoner served in New York would count against his Alabama sentence.[149]

(vii) Violations of the Conditions of Your Sentence (New York Only)

You may also petition for a writ of habeas corpus if the conditions of your imprisonment are worse than the conditions authorized by your judgment of conviction or by the New York and U.S. Constitutions.[150] For example, you may petition for habeas corpus on the grounds that:

(1) You are being denied the rehabilitation, care, or treatment required by your sentence;[151]
(2) You were arbitrarily and illegally transferred to an institution for the criminally insane;[152]

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143. For more information about ineffective assistance of counsel claims, see *JLM*, Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel." *See also* Application of Jones, 34 Misc. 2d 564, 565, 227 N.Y.S.2d 1002, 1004 (Sup. Ct. Special Term New York County 1962) (denying habeas petition because relator was represented by counsel and further adding habeas is "not the proper remedy for testing the requirements of due process or whether relator was properly represented by assigned counsel").

144. *See* People v. Martin, 52 A.D.2d 988, 989, 383 N.Y.S.2d 425, 428 (3d Dept. 1976) (holding that "in the absence of a record concerning adequacy of representation" an Article 440 proceeding is the correct place to bring a motion regarding ineffectiveness of counsel); People *ex rel.* Hall v. LeFevre, 460 N.Y.S. 2d 640, 641, 92 A.D.2d 956, 957 (3d Dept. 1983) (holding that issues of inadequacy of counsel must proceed using a 440 motion). For more information on filing Article 440.10 motions, see *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

145. *See* People v. Taylor, 246 A.D.2d 410, 411, 668 N.Y.S.2d 583, 584 (1st Dept. 1998) (holding that the power to set aside a verdict on the grounds of new evidence is derived from N.Y. Crim. Proc. Law § 440.10(1)(g) and listing the six criteria that new evidence must meet).

146. *See* People *ex rel.* Anderson v. Warden, New York City Corr. Inst. for Men, 68 Misc. 2d 463, 468, 325 N.Y.S.2d 829, 835 (Sup. Ct. Bronx County 1971) ("[I]f there is an unreasonable delay in the disposition of an article 440 motion, the defendant can, perhaps, properly bring a writ of habeas corpus.").

147. *See* People *ex rel.* Lee v. Smith, 58 A.D.2d 987, 987, 397 N.Y.S.2d 266, 267 (4th Dept. 1977) (granting a hearing on the merits of petitioner's habeas corpus petition, even though an appeal was pending, because the petitioner's appeal had been pending for more than four years).

148. *See* State *ex rel.* Harbin v. Wilmot, 104 Misc. 2d 272, 275, 428 N.Y.S.2d 152, 154–55 (Sup. Ct. Chemung County 1980) (finding the prisoner's current place of incarceration resulted in a longer term of imprisonment).

149. *See* State *ex rel.* Harbin v. Wilmot, 104 Misc. 2d 272, 275, 428 N.Y.S.2d 152, 154–55 (Sup. Ct. Chemung County 1980) (finding the prisoner's current place of incarceration resulted in a longer term of imprisonment).

150. *See* People *ex rel.* Brown v. Johnston, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45 (1961) ("[I]t seems quite obvious that any *further* restraint *in excess* of that permitted by the judgment or constitutional guarantees should be subject to inquiry.").

151. *See* People *ex rel.* Smith v. La Vallee, 29 A.D.2d 248, 250, 287 N.Y.S.2d 601, 604 (4th Dept. 1968) (petitioner with an indeterminate sentence is entitled to psychiatric treatment and examination).

(3) You have been found not guilty because of mental illness[153] and are being held at an institution for the criminally insane, but you have not received a hearing or proceeding to evaluate your mental health as required by New York Criminal Procedure Law Section 330.20;[154]

(4) You have been found not guilty because of mental illness and are being held at an institution for the criminally insane, but are no longer suffering from mental illness and are thus entitled to release, or are no longer dangerous and are thus entitled to transfer to a non-secure facility as required by New York Criminal Procedure Law Section 330.20;[155]

(5) You are held in a different prison than the one on the sentencing court's commitment order;[156] or

(6) You were transferred to solitary confinement as a result of unconstitutional discrimination.[157]

Wardens and the Department of Correctional Services have wide discretion in determining the conditions of your incarceration, and few forms of punishment inside the prison violate your constitutional rights or the conditions of your sentence.[158]

(c) Probation or Parole

(i) Preliminary Revocation Hearings

If the Department of Correctional Services tries to revoke your parole, you are entitled to a hearing. You may petition for habeas corpus if your preliminary parole revocation hearing was not conducted in accordance with the law. You are entitled to the following:

(1) Written notice of the charges against you (i.e. the conditions of presumptive release, parole, conditional release or post-release supervision alleged to have been violated), as well as the time and place of your hearing.[159] You are entitled to this notice within three days of the execution of the warrant

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152. *See* People *ex rel.* Brown v. Johnston, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45 (1961) (holding that lower court wrongly refused to consider petition for habeas corpus that challenged the transfer of a convicted rapist from a prison to a mental hospital).

153. This is also known as "not guilty by reason of insanity."

154. *See* People *ex rel.* Thorpe v. Von Holden, 63 N.Y.2d 546, 555, 473 N.E.2d 14, 18, 483 N.Y.S.2d 662, 666 (1984) (finding that a habeas petition is proper to test whether petitioner may remain in custody when Department of Mental Health Commissioner has failed to comply with time, notice, and hearing requirements for statutory retention order).

If your petition is granted for this reason, the court will order your release or your transfer to a non-secure facility, unless there is evidence of a dangerous mental disorder. If the court has ordered your release, the State Commissioner of Mental Health or the Mental Retardation and Developmental Disabilities may, however, apply to the court to have you remain at the institution. This application may be granted if it is immediately filed and processed. *See* State *ex rel.* Henry L. v. Hawes, 174 Misc. 2d 929, 933, 667 N.Y.S.2d 212, 216 (N.Y. Cty. Ct. 1997) (granting petitioner's habeas writ and ordering petitioner immediately transferred to non-secure facility because order of confinement had expired and no application for order's extension had been made in violation of N.Y. Crim. Proc. Law § 330.20).

155. *See* McGraw v. Wack, 220 A.D.2d 291, 292, 632 N.Y.S.2d 135, 136 (1st Dept. 1995) (finding that writ of habeas corpus is proper proceeding for petitioner to seek transfer to non-secure facility or release); People *ex rel.* Schreiner v. Tekben, 160 Misc. 2d 724, 727, 611 N.Y.S.2d 734, 736 (Sup. Ct. Orange County 1994) (holding that the habeas corpus proceeding was an appropriate mechanism for transfer from a secure psychiatric facility to a non-secure facility), *aff'd sub nom.* People *ex rel.* Richard S. v. Tekben, 219 A.D.2d 609, 610, 631 N.Y.S.2d 524, 524 (2d Dept. 1995) (holding that habeas petition is proper mechanism to seek transfer from a secure to a non-secure facility).

156. *See* State *ex rel.* Harbin v. Wilmot, 104 Misc. 2d 272, 274, 428 N.Y.S.2d 152, 154 (N.Y. Sup. Ct. 1980) (holding that a prisoner was illegally imprisoned within New York State when he was held in a prison in New York rather than the Alabama prison that was specified on his commitment order by the sentencing court).

157. *See* People *ex rel.* Rockey v. Krueger, 62 Misc. 2d 135, 136, 306 N.Y.S.2d 359, 360 (Sup. Ct. Nassau County 1969) (finding placement of Muslim prisoner in solitary confinement because he would not shave his beard for religious reasons was unconstitutional discrimination, and ordered release of prisoner from solitary confinement); *see also JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law," *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Proceedings," and *JLM*, Chapter 27, "Religious Freedom in Prison."

158. *See*, *e.g.*, People *ex rel.* France v. Coughlin, 99 A.D.2d 599, 471 N.Y.S.2d 695, 696 (3d Dept. 1984) (denying habeas petition because administrative segregation of prisoner was well within terms of confinement ordinarily contemplated by prison sentence, petitioner made no showing that confinement violated his constitutional rights, and petitioner failed to comply with statutory requirements); People *ex rel.* Jacobson v. Warden of Brooklyn House of Det., 77 A.D.2d 937, 431 N.Y.S.2d 114, 115 (2d Dept. 1980) (upholding warden's denial of contact visits with person who allegedly helped in an earlier escape on grounds that such restriction is outside the scope of habeas corpus relief).

159. N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney 2010).

for your retaking and temporary detention, or within five days of the execution of the warrant if you are detained in another state and were not there through an out-of-state parolee supervision agreement;[160]
(2) A hearing conducted within fifteen days after the warrant has been executed;[161]
(3) Evidence introduced at your preliminary parole revocation hearing sufficient to provide probable cause[162] to believe that you had violated a condition of your parole;[163] and
(4) To appear and speak on your own behalf, present witnesses, or cross-examine witnesses (question the witnesses against you).[164]

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160. N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney 2009). However, even if you are not given notice of your parole violation within three days of your hearing, that is not necessarily reason to grant a petition for habeas corpus. You must also show that the lack of notice somehow hurt your ability to prepare for the hearing. *See* People *ex rel.* Wise v. New York State Div. of Parole, 50 A.D.3d 303, 853 N.Y.S.2d 886 (1st Dept. 2008) (denying writ of habeas corpus, even assuming that petitioner did not receive proper notice of preliminary revocation hearing, when petitioner appeared for the hearing and did not object, request an adjournment to prepare, or argue that he lacked notice regarding the basis of the parole violation or was otherwise prejudiced); People *ex rel.* Washington v. New York State Div. of Parole, 279 A.D.2d 379, 379–80, 720 N.Y.S.2d 22, 23 (1st Dept. 2001) (affirming dismissal of habeas petition where there was no showing of prejudice caused by lateness of notice of hearing); People *ex rel.* Williams v. Walsh, 241 A.D.2d 979, 661 N.Y.S.2d 371 (4th Dept. 1997) (finding defendant not entitled to restoration of parole or dismissal of parole violation warrant based on one day delay in serving statutory notice and failure to comply with three day notice rule where the preliminary hearing was held in a timely manner, defendant did not request adjournment to prepare for the hearing or contend that he lacked adequate notice of basis for parole violation, and did not contend that he was prejudiced by the one day delay); *see also* People *ex rel.* Walker v. New York State Bd. of Parole, 98 A.D.2d 33, 33–34, 469 N.Y.S.2d 780, 781 (2d Dept. 1983) (finding judicial intervention not appropriate until final revocation hearing conducted, where final hearing has been scheduled within the statutory 90 day period).

161. N.Y. Exec. Law § 259-i(3)(c)(i) (McKinney 2009); *see also, e.g.,* People *ex rel.* Richman v. Warden, Bronx House of Det., 122 Misc. 2d 957, 958, 472 N.Y.S.2d 291, 292 (Sup. Ct. Bronx County 1984) (vacating warrant and reinstating parole when parolee was not granted preliminary parole revocation hearing within 15 days of service of notice of parole violation).

The court may, however, find that the delay is not the state's fault and dismiss the habeas corpus petition. *See, e.g.*, People *ex rel.* Goldberg v. Warden, Rikers Island Corr. Facility, 45 A.D.3d 356, 356, 846 N.Y.S.2d 15, 16 (denying petition for habeas where the preliminary parole revocation hearing was timely scheduled but "adjourned for the legitimate reason that petitioner was confined for medical reasons"); People *ex rel.* Hampton v. Warden, Rikers Island Corr. Facility, 211 A.D.2d 566, 621 N.Y.S.2d 580 (1st Dept. 1995) (dismissing habeas petition where timely hearing was postponed a few days due to closure of courthouse during snowstorm and then rescheduled to allow probationer to attend). In addition, the law does not require that the hearing be *completed* within 15 days. *See, e.g.*, Matter of Emmick v. Enders, 107 A.D.2d 1066, 1067, 486 N.Y.S.2d 559, 560 (4th Dept. 1985) (holding that the law requires only that the hearing be "scheduled to take place" within the statutory 15 day period, and that "[w]hen a preliminary parole revocation hearing has been timely scheduled, or held in whole or in part, and thereafter is adjourned for legitimate reasons, without prejudice to the petitioner, there is no violation of the 15-day limit").

Finally, a court may find that you have waived your right to a timely hearing. *See* People *ex rel.* Miller v. Walters, 60 N.Y.2d 899, 901, 458 N.E.2d 1251, 1252, 470 N.Y.S.2d 574, 575 (1983) (denying petition for writ of habeas corpus because petitioner waived preliminary hearing and thereby waived right to challenge board's failure to afford him a timely preliminary hearing). However, the waiver must be clearly made or else it will be invalid and parolee will be entitled to a timely hearing. *See* People *ex rel.* Melendez v. Warden of Rikers Island Corr. Facility, 214 A.D.2d 301, 302, 624 N.Y.S.2d 580, 581 (1st Dept. 1995) (ruling that the parolee does not waive his right to a timely hearing where the state does not prove that the waiver was clearly made, and ordering that petitioner be reinstated to parole).

162."Probable cause" in this case means reasonable cause, or reasonable grounds for believing, based on existing facts, that you have violated your parole.

163. N.Y. Exec. Law § 259-i(3)(c)(vi) (McKinney 2009); *see also* People *ex rel.* Davis v. New York State Div. of Parole, 149 Misc. 2d 741, 744, 566 N.Y.S.2d 469, 471 (Sup. Ct. Westchester County 1991) (ruling that there was not probable cause to believe that the parolee violated a condition of his parole in an important respect where the parolee failed to notify parole officer of arrest that occurred 95 hours earlier despite requirement that officer be notified immediately, when parolee only had a 50-minute window of opportunity to do so); People *ex rel.* Glenn v. Bantum, 132 Misc.2d 676, 678, 505 N.Y.S.2d 359, 361 (Sup. Ct. Bronx County 1986) (holding that there was no legal evidence presented at preliminary hearing to support probable cause that parolee was in possession of drugs where sole evidence was hearsay testimony of parole officer's conversations with arresting officer, and parole officer was unable to testify that substances in question were recovered from the parolee).

164. N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney 2009); *see also* People *ex rel.* Deyver by Weinstein v. Travis, 172 Misc. 2d 83, 85, 657 N.Y.S.2d 306, 307 (Sup. Ct. Erie County 1997) (granting petitioner's habeas petition and finding that, to preserve petitioner's statutory right to effective cross-examination, petitioner was entitled to production of parole officer's notes, upon which parole officer had relied in testifying at hearing).

Any denial of the above requirements may be grounds for a habeas petition in New York. Note that you are not entitled to a preliminary parole revocation hearing if you were convicted of a new crime.[165]

(ii) Final Parole Revocation Hearings

You may petition for habeas corpus if your final parole revocation hearing was not conducted in accordance with the law. You are entitled to the following:

(1) A hearing that was conducted within ninety days of the probable cause hearing; [166]

(2) Representation by a lawyer at the hearing;[167]

(3) Written notice of the date, place, and time of the hearing given to you and your attorney at least fourteen days prior to the scheduled hearing date;[168]

(4) An opportunity to confront and cross-examine witnesses against you, unless there was good cause for witnesses not to attend the hearing (as determined by the hearing officer);[169] and

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165. *See* N.Y. Exec. Law § 259-i(3)(c)(i) (McKinney 2009); People *ex rel.* Felder v. Warden of Queens House of Det. for Men, 173 Misc. 2d 1029, 1030, 662 N.Y.S.2d 729, 731 (Sup. Ct. Queens County 1997) (ruling that parolee was not entitled to preliminary parole hearing on his violation where he had been convicted of a felony while released on parole).

166. N.Y. Exec. Law § 259-i(3)(f)(i) (McKinney 2009); *see* People *ex rel.* Ford v. LaPaglia, 176 Misc. 2d 912, 914, 674 N.Y.S.2d 565, 566 (County Ct. Ulster County 1998) (ruling that statutory "90-day time limit must be adhered to strictly, absent any of the statutory exceptions"); People *ex rel.* Brown v. New York State Div. of Parole, 70 N.Y.2d 391, 402, 516 N.E.2d 194, 200, 521 N.Y.S.2d 657, 663 (1987) (vacating parole violation warrant and dismissing parole violation proceeding where revocation hearing was not held within 90 days).

However, the court may find that the hearing was timely if the delay was due to the parolee. *See, e.g.*, People *ex rel.* Williams v. Allard, 19 A.D.3d 890, 891, 798 N.Y.S.2d 153, 155 (3d Dept. 2005) (finding final parole revocation hearing was timely because 119 days of the delay were "attributable to petitioner's numerous requests for adjournments"); People *ex rel.* McAllister v. Leonardo, 182 A.D.2d 1031, 1033, 583 N.Y.S.2d 540, 542 (3d Dept. 1992) (ruling final parole revocation hearing was timely, even though held more than 90 days after probable cause determination, since delay resulted when no attorney was present for petitioner at timely scheduled date and petitioner requested representation, and additional delay was at request of petitioner's counsel). If you were incarcerated out of state, the court may also find that your hearing was timely even if it was held after 90 days from the probable cause determination. N.Y. Exec. Law § 259-i(3)(a)(iii) (McKinney 2010) ("Where the alleged violator is detained in another state . . . the warrant will not be deemed to be executed until the alleged violator is detained exclusively on the basis of such . . . [parole] warrant . . . ."); *see also* People *ex rel.* Johnson v. Warden, Manhattan House of Det., 178 A.D.2d 331, 579 N.Y.S.2d 1 (1st Dept. 1991) (ruling defendant's final revocation hearing was not untimely, particularly as he was never detained "exclusively" on basis of parole revocation warrant).

167. N.Y. Exec. Law, § 259-i(3)(f)(v) (McKinney 2009); *see also* People *ex rel.* Brown v. Smith, 115 A.D.2d. 255, 496 N.Y.S.2d 123 (4th Dept. 1985) (holding that a parolee has the right to counsel upon a final parole revocation hearing). You can waive (give up) this right if you state that you do not want or need counsel. *See* Torres v. Russi, 221 A.D.2d 769, 633 N.Y.S.2d 666 (3d Dept. 1995) (finding that waiver of counsel was valid because it was "voluntarily, knowingly, and intelligently made"); People *ex rel.* Martinez v. Walters, 99 A.D.2d 476, 470 N.Y.S.2d 56 (2d Dept. 1984) (finding that prisoner had waived his right to counsel at his revocation hearing because the decision was knowing, intelligent, and voluntary; finding that the right to counsel may be waived in the absence of counsel). However, a waiver must be knowingly, intelligently, and voluntarily made in order to be valid. *See, e.g.*, People *ex rel.* Perez v. Warden, 139 A.D.2d 477, 478, 527 N.Y.S.2d 233, 234 (1st Dept. 1988) (holding parolee's waiver of counsel ineffective as the hearing officer failed to conduct sufficient inquiry to reasonably assure that parolee appreciated dangers and disadvantages of waiving right to counsel).

168. N.Y. Exec. Law, § 259-i(3)(f)(iii) (McKinney 2009); *see also* People *ex rel.* Rivera v. New York State Div. of Parole, 83 A.D.2d 918, 919, 442 N.Y.S.2d 511 (3d Dept. 1981) (granting petitioner new final parole revocation hearing because notice of time and date of hearing was mailed five days before the hearing in violation of state law, which requires 14 days' notice). Note that an adjournment [postponement] of the final parole revocation hearing does not require a new 14-day notice to parolee. *See* People *ex rel.* Crooks v. New York State Bd. of Parole, 194 A.D.2d 376, 598 N.Y.S.2d 263 (1st Dept. 1993).

169. N.Y. Exec. Law § 259-i(3)(f)(v) (McKinney 2009); s*ee also* People *ex rel.* Rosenfeld v. Sposato, 87 A.D.3d 665, 666–67, 928 N.Y.S.2d 350, 352 (2d Dept. 2011) (finding that "the petitioner's due process rights were violated when he was afforded no opportunity to cross-examine the parole officer who prepared the report and who possessed personal knowledge of the alleged violations" when the State's only reason for the officer's absence "was that he was on vacation"); People *ex rel.* McGee v. Walters, 62 N.Y.2d 317, 319, 465 N.E.2d 342, 343, 476 N.Y.S.2d 803, 804 (1984) (ruling that a parolee's right to confront adverse witnesses at parole revocation hearings should not be "underestimated or ignored," but that "a hearing examiner may, nevertheless, upon a specific finding of good cause, permit the introduction of adverse hearsay statements without affording the parolee an opportunity to confront the declarant"); People *ex rel.* Martin v. Warden, Ossining Corr. Facility, 133 A.D.2d 134, 135, 518 N.Y.S.2d 669, 670 (2d Dept. 1987) (ruling that good cause existed for dispensing with production of New Jersey parole officer at parole hearing, where the state of New Jersey had

(5) Proof of your parole violation by a *preponderance* of the evidence.[170]

Any denial of the above requirements may be grounds for a habeas petition. You may also petition if: (1) you were denied your fundamental constitutional right to be present at the hearing;[171] or (2) you requested a local parole revocation hearing, and your request was denied.[172]

Note that you are not entitled to a final parole revocation hearing if your parole was revoked because of a new felony conviction.[173] You may not petition for a writ of habeas corpus for the above reasons if you would remain imprisoned for other convictions.[174]

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an established and firm policy of refusing to allow its supervising parole officers to travel to other states for parole revocation hearings, and petitioner refused to submit interrogatories to New Jersey officer).

170. N.Y. Exec. Law § 259-i(3)(f)(viii) (McKinney 2009)*; see also* People *ex rel.* Saafir v. Mantello, 163 A.D.2d 824, 825, 558 N.Y.S.2d 356, 357 (4th Dept. 1990) (ruling that uncertified report of parolee's drug tests was insufficient to demonstrate violation of parole by a preponderance of the evidence). You will waive this ground if you do not raise it in your habeas petition. In other words, if you do not state in your habeas petition that your parole violation was unproven, you cannot argue this point at a later time. People *ex rel.* McWhinney v. Smith, 219 A.D.2d 879, 632 N.Y.S.2d 40 (4th Dept. 1995). Also, even if you do not think that there is enough evidence for your parole to be revoked, you must wait until after the final revocation hearing before you file your habeas petition. *See* People *ex rel.* Wallace v. New York State Bd. of Parole, 111 A.D.2d 940, 941, 491 N.Y.S.2d 50, 51 (2d Dept. 1985) (dismissing the petition because it was filed before the final revocation hearing).

171. *See* Wyche v. New York State Bd. of Parole, 66 A.D.3d 541, 887 N.Y.S.2d 71 (affirming that a "parolee's right to be present and be heard at a parole revocation hearing is a fundamental due process right" and reinstating parole for petitioner on grounds that he did not waive his right to be present at the hearing); People *ex rel.* Johnson v. New York State Bd. of Parole, 98 A.D.2d 949, 470 N.Y.S.2d 62 (4th Dept. 1983) (reinstating petition for habeas alleging that final parole revocation hearing was held without petitioner present); *In re* Schwartz v. Warden, New York State Corr. Facility at Ossining, 82 A.D.2d 870, 871, 440 N.Y.S.2d 270, 272 (2d Dept. 1981) (finding that parolee, who invoked his right to counsel and who refused to attend revocation hearing due to inability of his attorney to attend the hearing, did not waive his right to appear; and that it was therefore error for hearing officer to conduct the hearing without parolee). Note, however, that a court may find that you have waived this right. If you are called to a hearing, you must appear even if you have applied for an adjournment; otherwise you have waived your appearance. *See, e.g.*, People *ex rel.* Rodriguez v. Warden, 163 A.D.2d 206, 207, 558 N.Y.S.2d 59, 59 (1st Dept. 1990) (holding that prisoner knowingly and intelligently waived his right to be present at final parole revocation hearing by persistently refusing to appear despite repeated efforts by Division of Parole to produce him); People *ex rel.* McFadden v. New York State Div. of Parole, 79 A.D.2d 952,, 435 N.Y.S.2d 589, 589–90 (1st Dept. 1981) (petitioner who failed to appear on three occasions at a parole revocation hearing waived the right to be present).

172. N.Y. Exec. Law § 259-i(3)(e)(i) (McKinney 2009) ("If the alleged violator requests a local revocation hearing, he or she shall be given a revocation hearing reasonably near the place of the alleged violation or arrest if he has not been convicted of a crime committed while under supervision."); *see* People *ex rel.* Starks v. Superintendent, Clinton Corr. Facility, 138 A.D.2d 818, 819, 525 N.Y.S.2d 739, 740 (3d Dept. 1988) (ordering new parole revocation hearing for petitioner whose request for a local revocation hearing was denied, on the grounds that Rikers Island is not "reasonably near" Syracuse); People *ex rel.* Campolito v. Portuondo, 248 A.D.2d 768, 769, 669 N.Y.S.2d 726, 727 (3d Dept. 1998) (finding that where a prisoner had not requested a local parole revocation hearing, he was not entitled to one); People *ex rel.* Madison v. Sullivan, 142 A.D.2d 621, 530 N.Y.S.2d 43 (2d Dept. 1988) (finding that where neither prisoner nor his counsel had requested a local parole revocation hearing, the New York State Board of Parole was not required to arrange one for him).

173. *See* N.Y. Exec. Law § 259-i(3)(d)(iii) (McKinney 2010); s*ee also* People *ex rel.* Stevenson v. Beaver, 309 A.D.2d 1171, 1172, 765 N.Y.S.2d 291, 291 (4th Dept. 2003) (holding that habeas corpus petition was properly denied because parole is revoked by operation of law upon a new felony conviction); O'Quinn v. N.Y. State Bd. of Parole, 132 Misc. 2d 92, 94–95, 503 N.Y.S.2d 483, 484–85 (Sup. Ct. N.Y. County 1986) (noting statute barring right to final revocation hearing where parolee has been convicted of felony while on parole does not violate due process).

174. *See* People *ex rel.* Cook v. Mantello, 136 A.D.2d 891, 891, 525 N.Y.S.2d 79, 79 (4th Dept. 1988) (dismissing habeas petition challenging the timeliness of petitioner's parole revocation hearing because the petitioner was incarcerated as the result of an unrelated conviction and would not be eligible for immediate release from custody should he have succeeded on merits of habeas proceeding); People *ex rel.* Linares v. Dalsheim, 107 A.D.2d 728, 728, 484 N.Y.S.2d 89, 90 (2d Dept. 1985) (noting that habeas corpus was not available since petitioner was incarcerated due to a subsequent felony conviction and would not have been entitled to immediate release). You may, however, bring an Article 78 proceeding to challenge Parole Board decisions even if you will remain incarcerated for other convictions. *See* People *ex rel.* Mack v. Reid, 113 A.D.2d 962, 963, 494 N.Y.S.2d 25, 26–27 (2d Dept. 1985) (stating that petitioner who had raised the issue of untimeliness before Parole Board should bring Article 78 proceeding after Board decides against him). Be aware that a four-month statute of limitations applies to Article 78 petitions. *See, e.g.*, Soto v. N.Y. State Bd. of Parole, 107 A.D.2d 693, 694–95, 484 N.Y.S.2d 49, 50 (2d Dept. 1985) (dismissing Article 78 petition filed three years after the parole revocation hearing because it violated four-month statute of limitations for Article 78 proceedings). See Chapter 22 of the *JLM* for a discussion of Article 78 proceedings.

(d) Subject Matter Jurisdiction

In New York, supreme and county courts have jurisdiction to try felonies.[175] District, city, town, and village courts have jurisdiction over misdemeanors.[176] If you are convicted by a court that does not have authority to try your offense, you may petition for habeas corpus.[177] As stated above, a court may also lack subject matter jurisdiction if the allegations made in your indictment are in some way insufficient.

This issue should normally be raised on appeal or in an Article 440 motion; but, provided that you give a compelling reason why the court should depart from regular procedure, you may petition for habeas corpus if:

(1) An indictment or information was not filed against you;[178]

(2) Your indictment failed to state facts that made up every necessary element, or part, of your crime, and the court was entirely stripped of jurisdiction as a result;[179] or

(3) The court convicted you of a crime not included in the indictment (this does not include lesser included offenses of the offenses[180] charged in your indictment). You may waive this claim, however, if you fail to object to the submission of the offense at your trial.[181]

In New York, you may also petition for a writ of habeas corpus to challenge the court's subject matter jurisdiction with respect to the validity of your conviction. A court will review your petition regardless of whether you raised it on appeal only if the issue is very important and will invalidate your conviction if the habeas petition is decided in your favor.[182] In one case, for example, a prisoner petitioned for habeas corpus

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175. N.Y. Crim. Proc. Law § 10.20(1)(a) (McKinney 2003 & Supp. 2012) (superior courts have exclusive jurisdiction over felonies); N.Y. Crim. Proc. Law § 10.10(2) (McKinney 2003 & Supp. 2012) (supreme court and county courts are the superior courts). Felonies are offenses that are punishable by a prison term of more than one year. N.Y. Penal Law § 10.00(5) (McKinney 2009).

176. N.Y. Crim. Proc. Law § 10.30(1) (McKinney 2003 & Supp. 2012). Misdemeanors are offenses punishable by fine and/or a brief jail sentence of more than 15 days, but less than a year. N.Y. Penal Law § 10.00(4) (McKinney 2009).

177. *See* Clifford v. Krueger, 59 Misc. 2d 87, 93, 297 N.Y.S.2d 990, 996–97 (Sup. Ct. Nassau County 1969) (granting petitioner's writ of habeas corpus, finding the conviction illegal because the crime of which he was convicted was an offense over which Family Court had exclusive original jurisdiction, and transferring the matter to Family Court).

178. *See* People *ex rel.* Battista v. Christian, 249 N.Y. 314, 321, 164 N.E. 111, 113 (1928) (granting habeas corpus petition because there was no presentment or indictment of a grand jury). Note that an indictment no longer has to be filed for every crime; the prosecutor may file an information instead. In November 1973, the New York Constitution was amended to provide an exception to the indictment requirement where the accused is charged with an offense that is not punishable by death or life imprisonment. N.Y. Const. art. I, § 6. This amendment is explained in People v. Trueluck, 88 N.Y.2d 546, 548–49, 670 N.E.2d 977, 978, 647 N.Y.S.2d 476, 477 (1996) (noting that a defendant may waive an indictment and consent to be prosecuted by a superior court information where (1) the local criminal court has held the defendant for the action of a Grand Jury; (2) the defendant is not charged with a class A felony, and (3) the District Attorney consents to the waiver of indictment (quoting N.Y. Crim. Proc. Law § 195.10(1) (McKinney 2007))).

179. For example, if your indictment for 1st degree murder fails to describe acts that showed that you intended to kill another person, the court does not have jurisdiction to convict you of 1st degree murder, because intent to kill is a necessary element of 1st degree murder. However, the court does have jurisdiction to convict you of 2nd degree murder, since intent is not a necessary element of 2nd degree murder. Therefore, in this case, you can challenge your conviction of 1st degree murder, but you cannot challenge your conviction of 2nd degree murder in a petition for habeas corpus. *See* People *ex rel.* Williams v. La Vallee, 30 A.D.2d 1034, 1034, 294 N.Y.S.2d 824, 826 (4th Dept. 1968) (noting that indictment did not allege the 1st degree murder elements of premeditation or depraved mind, but this did not strip the court of jurisdiction because the allegations were sufficient to support a charge of 2nd degree murder); People *ex rel.* Wysokowski v. Conboy, 19 A.D.2d 663, 664, 241 N.Y.S.2d 245, 246 (3d Dept. 1963) (denying habeas corpus petition because simplified form of indictment that omitted certain facts did not deprive court of jurisdiction).

180. See *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," for an explanation of lesser included offense.

181. For example, if your indictment charged you with murder, but the judge announced that he or she also would consider whether you were guilty of robbery (which is not a lesser included offense within the crime of murder), and you were subsequently convicted of robbery, you may challenge your conviction only if you objected at your trial to the judge's intention to consider robbery. *See* People *ex rel.* Tanner v. Vincent, 44 A.D.2d 170, 173–74, 354 N.Y.S.2d 145, 148 (2d Dept. 1974) (denying habeas petition where petitioner failed to raise objection on appeal to robbery conviction where petitioner had been indicted for common law murder, felony murder, and possession of a weapon, but convicted of robbery, which is not a lesser included offense within the crime of felony murder).

182. *See* People *ex rel.* Keitt v. McMann, 18 N.Y.2d 257, 262–63, 220 N.E.2d 653, 655, 273 N.Y.S.2d 897, 899–900 (1966) ("traditional orderly proceedings" other than habeas corpus should be followed unless habeas corpus is required by "reason of practicality and necessity"); People *ex rel.* Culhane v. Sullivan, 139 A.D.2d 315, 317–18, 531 N.Y.S.2d 287, 288 (2d Dept. 1988) (refusing to grant a writ of habeas corpus where the information included sufficient showings of intent and overt acts which would have resulted in the commission of the crime under state law).

on the ground that attempted escape could not serve as the basis for a felony murder conviction because attempted escape was only classified as a misdemeanor, not a felony.[183] Though the prisoner had not raised this issue in a second appeal from his conviction (he did raise it in his first appeal), the court heard the prisoner's argument for granting a writ of habeas corpus because of the importance of the issue and its impact upon the validity of the conviction and sentence for murder. The court believed that the issue needed to be resolved and noted that it would have to reverse the prisoner's murder conviction if the court resolved the issue in the prisoner's favor.[184]

3. How to File Your Petition

(a) When to File

In New York, before you file your petition, make sure you cannot bring any of these proceedings:

(1) Appeal (refer to *JLM*, Chapter 9, "Appealing Your Conviction or Sentence");
(2) Article 440 (refer to *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence"); or
(3) Article 78 (refer to *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules").

(b) Where to File

In New York, you may petition any of the following courts or judges for a writ of habeas corpus:

(1) The supreme court in the judicial district in which you are imprisoned;
(2) The appellate division of the department in which you are imprisoned;
(3) Any justice of the supreme court; or
(4) A county judge within the county in which you are imprisoned, or a county judge from an adjoining county, if no judge within the county can or will issue a writ.[185]

(c) What to Include in Your Petition

The habeas corpus petition you submit should include the following information:

(1) The name of your prison and of the warden or official imprisoning you, if you know their names;
(2) A copy of the mandate by which you are detained or an explanation of why you could not obtain a copy of the mandate;[186]
(3) The reason you are imprisoned, to the best of your knowledge;
(4) An explanation of why your imprisonment is illegal;[187]

183.Felony murder is a rule of criminal law which holds a defendant responsible for any killing that occurred during the commission of a felony.

184.People *ex rel.* Culhane v. Sullivan, 139 A.D.2d 315, 317, 531 N.Y.S.2d 287, 288 (2d Dept. 1988) (refusing to grant a writ of habeas corpus where the information included sufficient showings of intent and overt acts which would have resulted in the commission of the crime under state law); *see* People *ex rel.* Bartlam v. Murphy, 9 N.Y.2d 550, 553–54, 175 N.E.2d 336, 337–38, 215 N.Y.S.2d 753, 755–56 (1961) (ruling in favor of relator in habeas corpus petition and ordering hearing on whether relator was denied right to be present when jury received further instructions, which is an issue essential to the court's jurisdiction to proceed with trial). *But see* People *ex rel.* Lupo v. Fay, 13 N.Y.2d 253, 257, 196 N.E.2d 56, 58–59, 246 N.Y.S.2d 399, 402 (1963) (denying writ of habeas corpus and holding that the defendant's absence when counsel made a motion to discharge jury did not affect any substantial rights).

185.N.Y. C.P.L.R. 7002(b)(1)–(4) (McKinney 1998). Note that if you are being held in a New York City detention center, you may also file with any justice of the supreme court of the county in which your charge is pending, in addition to the above-listed options. For example, an inmate being held on Rikers Island in the Bronx may file a writ of habeas corpus with a justice of the Supreme Court in New York County (Manhattan) if he has a charge pending there. N.Y. C.P.L.R. 7002(b)(5) (McKinney 1998).

186.A mandate is a written order of the court directing the warden to enforce the sentence against you. N.Y. Gen. Constr. Law § 28-a (McKinney 2003). Under N.Y. Pub. Off. Law § 89 (McKinney 2008), the superintendent or warden of your prison should make the mandate available to you upon your written request.

187.You should support your claim that your imprisonment is illegal with as many facts as possible. If you merely state that your imprisonment is illegal without detailing why, a court will dismiss your petition. *See* People *ex rel.* Boyd v. LeFevre, 92 A.D.2d 1042, 1042, 461 N.Y.S.2d 667, 667 (3d Dept. 1983) (upholding dismissal of habeas corpus petition where the petition contained only bare, conclusory assertions that defendant's rights were violated without any facts alleged to support such claims).

(5) The result of any appeal from the trial court's judgment, or a statement that you did not take an appeal, if that is the case;
(6) The date, result, and name of the court or judge to whom you previously petitioned for a writ, plus a statement of any new facts in your current petition that you did not raise in earlier petitions. If you have not petitioned for a writ of habeas corpus before, state this fact in your petition;[188] and
(7) The facts that authorize the judge to act, if the petition is made to a county judge outside of the county where you are detained.

This is not a complete list. You should consult New York Civil Practice Law and Rules 7002(c) for other information that you must include in your habeas corpus petition. If you do not include the required information, a court will dismiss your petition, unless you can show some convincing reason why you could not include the required information.[189] One reason, for example, might be that you were deprived of legal material and writing instruments.[190]

You do not have to enclose a copy of a writ of habeas corpus with your petition. However, you may want to include a copy of the writ, because this may allow the court to issue the writ sooner. If you do enclose a writ, fill in whatever information you can provide.

(d) How to File

Write out and then type a petition and a writ. Sign the petition in the presence of a *notary public*, who will put his seal on the papers. By "notarizing" the petition, you are swearing that all statements in the document are true.[191] Send the documents to the court specified above in Section 2, "Where to File." Appendix II of the *JLM* provides the addresses for New York courts.

4. Your Right to Counsel for Your Petition

The U.S. Supreme Court has held that you have no federal constitutional right to counsel in state habeas corpus proceedings.[192] But, New York state law may provide you the right to counsel. If you are indigent and incapable of obtaining your own lawyer, you often have the right to a court-appointed lawyer for a hearing on your habeas petition, provided you request that the court appoint a lawyer.[193] To do so, you must complete "poor person's papers" (known as proceeding *in forma pauperis*). *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," contains sample poor person's papers in its Appendix A for use in obtaining a lawyer for an Article 78 proceeding. You may use the same forms to obtain a lawyer for a habeas corpus proceeding if you: (1) substitute "Article 70" wherever the forms say "Article 78" (2) delete any references to the Attorney General;

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188. If you fail to detail prior applications for a writ of habeas corpus, the court may dismiss your petition. *See* People *ex rel.* Christianson v. Berry, 165 A.D.2d 961, 961, 561 N.Y.S.2d 848, 849 (3d Dept. 1990) (citing N.Y. C.P.L.R. 7002(c)(6) (McKinney 1998)) (denying petitioner's application for writ of habeas corpus because it was fatally defective where, among other things, it failed to indicate petitioner's previous applications for habeas corpus relief). If you have already petitioned for habeas corpus unsuccessfully and your current petition does not contain any new grounds for relief, a court will only issue a writ in the extremely rare circumstances when the "ends of justice" require it. N.Y. C.P.L.R. 7003(b) (McKinney 1998); s*ee* People *ex rel.* Taylor v. Jones, 171 A.D.2d 906, 906, 566 N.Y.S.2d 779, 780 (3d Dept. 1991) (denying petitioner's application for writ of habeas corpus because it failed to indicate his previous applications for such relief).

189. *See* Matter of Tullis v. Kelly, 154 A.D.2d 926, 926, 547 N.Y.S.2d 259, 259 (4th Dept. 1989) (dismissing habeas petition because it failed to comply with procedural requirements of N.Y. C.P.L.R. 7002(c)); People *ex rel.* Kagan v. La Vallee, 49 A.D.2d 986, 986, 374 N.Y.S.2d 408, 408 (3d Dept. 1975) (affirming dismissal of habeas petition where application did not comply with provisions of N.Y. C.P.L.R. 7002(c) and was therefore insufficient on its face).

190. *See* People *ex rel.* La Rocca v. Conboy, 40 A.D.2d 736, 736, 336 N.Y.S.2d 724, 725 (3d Dept. 1972) (noting that "deficiencies in the petition might be overlooked where compelling reasons appeared from the papers," such as deprivation of legal material and writing material).

191. Notarizing your petition satisfies the "verification" requirement. N.Y. C.P.L.R. 7002(c) (McKinney 1998 & Supp. 2012).

192. *See* Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539, 545 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further.").

193. *See* People *ex rel.* Brock v. La Vallee, 42 A.D.2d 629, 629–30, 344 N.Y.S.2d 513, 515 (3d Dept. 1973) (holding that at any hearing in connection with a habeas petition filed by an indigent prisoner seeking to be released from custody, the prisoner shall be entitled, upon request, to the assignment of counsel to represent him at such hearing); *see also* People *ex rel.* Ferguson v. Campbell, 186 A.D.2d 319, 587 N.Y.S.2d 798, 799 (3d Dept. 1992) (noting court did not abuse discretion by not appointing counsel because petitioner indicated that he did not want legal representation).

and (3) substitute "writ of habeas corpus" wherever the papers read "order to show cause" or "verified petition."

You may also use poor person's papers to request a reduction or waiver of the filing fees. You should read Part D of *JLM*, Chapter 22, on Article 78 for a detailed description of filing fees. It explains that sentenced prisoners likely must pay at least a portion of the filing fees to proceed with their claims.[194]

If you have not been sentenced (for example, are filing a habeas petition to challenge excessive bail), you should still be able to receive a full filing fee waiver if you are indigent under New York law.[195] To request a waiver of filing fees, you should replace all references to N.Y. C.P.L.R. 1101(f) in the poor person's papers with N.Y. C.P.L.R. 1101(d) and make sure the papers request a waiver, not a reduction, of the filing fees.

5. What to Expect After You File

A court will not issue a writ of habeas corpus if (1) it appears from your petition that your claim is plainly without merit[196] or (2) your petition does not contain any claim that was not already decided against you in a previous petition.[197] However, if the court believes that your claim may have some merit, the court will issue you a writ.[198]

After the court issues the writ, you must *serve* (deliver) the writ and a copy of your petition upon the warden.[199] Upon being served with the writ and your petition, the warden must respond to the claims made in your petition within twenty-four hours.[200] The warden's response is known as the "return of the writ."[201] The warden must provide you with a copy of the return.[202] You have the right to make a reply to the return in order to deny any statements in the return or to state additional facts that support your claim.[203]

The writ may specify a time and place for a hearing to which the warden must take you to determine whether you are being imprisoned illegally. If the writ orders a hearing, you must inform the District Attorney of both the county in which you are imprisoned and the county in which you were convicted of the date and time of the hearing, in writing, at least eight days prior to the hearing.[204] Appendix III of the *JLM* provides the addresses of all the District Attorneys in New York. At the hearing, the court will consider your petition, the return, and your reply to the return. You will be allowed to produce evidence to support your claim and to cross-examine any witnesses against you.[205]

6. Your Right to Appeal

If the judge hands down a judgment refusing to issue a writ of habeas corpus or denying your claim after a hearing or return of the writ, you may appeal the judgment to an intermediate appellate court.[206] In New York, this court is called the Appellate Division and is divided into four different Departments.[207]

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194. N.Y. C.P.L.R. 1101(f) (McKinney 1997 & Supp. 2012) (expiring Sept. 1, 2013).

195. N.Y. C.P.L.R. 1101(d) (McKinney 1997 & Supp. 2012).

196. Your petition must state one of the valid grounds for relief supported by factual allegations. If your petition does not contain both the grounds for relief and supporting facts, then it will be dismissed.

197. N.Y. C.P.L.R. 7003(a)–(b) (McKinney 1998 & Supp. 2012). *See also* People *ex rel.* Sanchez v. Hoke, 132 A.D.2d 861, 518 N.Y.S.2d 69 (3d Dept. 1987) (dismissing habeas petition without a hearing where the petition raised no new matter that had not already been raised and resolved against the petitioner).

198. N.Y. C P.L.R. 7003(a) (McKinney 1998 & Supp. 2012).

199. N.Y. C.P.L.R. 7005 (McKinney 1998 & Supp. 2012).

200. N.Y. C.P.L.R. 7006(a) (McKinny 1998 & Supp. 2012); N.Y. C.P.L.R. 7008(a) (McKinney 1998 & Supp. 2012).

201. N.Y. C.P.L.R. 7008(a) (McKinney 1998 & Supp. 2012).

202. *See* Vincent C. Alexander, Practice Commentaries, N.Y. C.P.L.R. 7008 (McKinney 1998 & Supp. 2012) (noting that "the court presumably will require service by personal delivery on the petitioner" because of the timeframe's urgency).

203. N.Y. C.P.L.R. 7009(b) (McKinney 1998 & Supp. 2012).

204. N.Y. C.P.L.R. 7009(a)(3) (McKinney 1998 & Supp. 2012). If you file a poor person's papers, which is also known as proceeding *in forma pauperis*, a court officer will inform the District Attorney for you.

205. *See* People *ex rel.* Cole v. Johnston, 22 A.D.2d 893, 255 N.Y.S.2d 388, 390 (2d Dept. 1964) (finding reversible error where petitioner was not allowed to produce evidence on his behalf or to cross-examine the only witness against him).

206. N.Y. C.P.L.R. 7011 (McKinney 1998 & Supp. 2012). The rules that govern civil appeals, rather than criminal appeals, govern habeas corpus proceedings because habeas corpus is considered a civil remedy.

207. See *JLM*, Chapter 2, "An Introduction to Legal Research," for a description of New York courts.

D. Michigan

This part explains some of the basic rules for filing a habeas corpus petition in Michigan.

1. Requirements

The Michigan writ of habeas corpus rules can be found in Chapter 43 of the Revised Judicature Act[208] and in state law 600.4301–4379.[209]

(a) Custody

If you have been released from prison, a Michigan court cannot grant a writ of habeas corpus.[210] However, if you are in prison because of an alleged parole violation, you are eligible for habeas corpus.[211] You are also eligible for habeas corpus if you are being civilly confined in a mental institution.[212]

(b) Immediate Release

You are entitled to immediate release if your habeas petition is successful. However, Michigan courts may grant you a conditional writ of habeas corpus that will require your release from prison only if new proceedings are not commenced by the state within the prescribed time period.[213] If this time period passes, Michigan is still allowed to arrest you again for the same crime.[214]

(c) State Prisoner

You must be a prisoner in Michigan.

(d) No Other Options

A Michigan court will not grant your petition for a writ of habeas corpus if there are other procedures available.[215] A writ of habeas corpus cannot be used when a writ of error or a writ of *certiorari* would be more appropriate.[216] The writ of habeas corpus is only used to raise defects so radical that will they render the conviction absolutely void and allow you to be released from prison.

2. What You Can Complain About in Your Habeas Petition

(a) Before Trial

(i) Extradition

In Michigan, you have the right to challenge your extradition through the writ of habeas corpus.[217] The court will only engage in a very limited review in these cases.[218] The court will take the Governor's warrant

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208. Revised Judicature Act of 1961.

209. Mich. Comp. Laws Ann. § 600.4301–4379 (West 2000 & Supp. 2011-12).

210. Mich. Comp. Laws Ann. § 600.4322 (West 2000).

211. *See* Triplett v. Deputy Warden, Jackson Prison, 371 N.W.2d 862, 865, 142 Mich. App. 774, 779 (Mich. Ct. App. 1985) ("[R]eview of a parole revocation decision is permissible upon a complaint for habeas corpus.").

212. *See* Mich. Comp. Laws Ann. § 600.4322 (West 2000); *see also* Silvers v. People, 176 N.W.2d 702, 703, 22 Mich. App. 1, 3 (Mich. Ct. App. 1970) (holding that the Michigan circuit court is an appropriate venue to adjudicate the question of whether not receiving adequate treatment at a mental health facility is a violation of habeas corpus).

213. *See* People v. Scott, 739 N.W.2d 702, 704, 275 Mich. App. 521, 523 (Mich. Ct. App. 2007) (finding that the conditional writ of habeas corpus granted to the defendant, stating that he be retried in 90 days or released, was legitimate, but that the state does not lose its right to re-prosecute if it does not retry within the allotted time).

214. *See* People v. Scott, 739 N.W.2d 702, 704, 275 Mich. App. 521, 523 (Mich. Ct. App. 2007) ("[I]n a typical case in which a prisoner is released because a state fails to retry the prisoner by the deadline set in a conditional writ, the state is not precluded from rearresting [the] petitioner and retrying him under the same indictment, unless … the state's delay prejudices the petitioner's ability to defend himself.") (internal quotation marks omitted) (alteration in original) (quoting Satterlee v. Wolfenbarger, 453 F.3d 362, 370, 2006 FED App. 0218P, 7 (6th Cir. 2006)).

215. *See In re* Abbott, 255 N.W. 603, 603, 267 Mich. 703, 704 (Mich. 1934) (finding that the court could not hear the petitioner's writ for habeas corpus since he could have filed a writ of error or *certiorari* instead).

216. *See In re* Abbott, 255 N.W. 603, 603, 267 Mich. 703, 704 (Mich. 1934) ("[H]abeas corpus may not be employed to serve in any instance where review could and should have been had by writ of error or certiorari.").

217. Mich. Comp. Laws. Ann. § 780.9 (West 2007 & Supp. 2011).

218. People v. Wend 309 N.W.2d 230, 233, 107 Mich. App. 269, 274 (Mich. Ct. App. 1981) (holding that petitions for habeas corpus are to be "liberally construed" when they deal with extradition).

and supporting papers as *prima facie* evidence supporting your extradition.[219] The court will only look at whether the papers are in order, whether you have been charged with a crime in the demanding state, whether you are the person named in the request for extradition, and whether you are a fugitive.[220] Once you are outside of Michigan, you have no right to habeas review in a Michigan court.[221]

(ii) Bail

You may ask for habeas relief on the ground that you were denied bail or that the bail you were granted is excessive.[222] The court will be reluctant to second guess the judge that denied bail, and the petition will only be granted if the judge acted in an arbitrary, unjust, or oppressive manner, or if the judge was clearly wrong.[223]

(b) After Your Conviction

(i) Confinement Beyond Sentence

You may petition for habeas corpus relief if you have already served your sentence and are still being detained.[224] As explained in Part A(2)(b) of this Chapter, you must be eligible for immediate release if your petition is granted. If you believe that the sentence imposed on you was incorrect or excessive, you are not entitled to habeas review, but you may challenge the sentence on appeal or in a writ of error.[225]

(ii) Fundamental Rights

Michigan courts do not use the language of fundamental rights. Instead, the courts refer to "radical defects rendering a judgment or proceeding absolutely void."[226] If the court finds that your fundamental rights have been violated in your trial or sentencing, they may find that the judgment or proceeding is void and grant your habeas petition. For example, when a defendant was not given an opportunity to present his case, the court found that habeas corpus was the proper remedy to inquire into the reason of the detention.[227]

(iii) Ineffective Counsel

You may petition the court for habeas relief on the ground that your lawyer was ineffective.[228] Proving a claim of ineffective assistance of counsel is very difficult. The court will only grant relief when "the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported

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219. People v. Wend 309 N.W.2d 230, 233, 107 Mich. App. 269, 274 (Mich. Ct. App. 1981).

220. People v. Wend 309 N.W.2d 230, 233, 107 Mich. App. 269, 274 (Mich. Ct. App. 1981) (quoting Michigan v. Doran, 439 U.S. 282, 289, 99 S. Ct. 530, 535, 58 L. Ed. 2d 521 (1978)) (stating that a court may only look at these readily verifiable historical facts).

221. *See* Trayer v. Kent County Sheriff, 304 N.W.2d 11, 12, 104 Mich. App. 32, 35 (Mich. Ct. App. 1981) (finding that even though petitioner had been granted a writ of habeas corpus, the writ was rendered moot as the petitioner had been moved out of Michigan and into Pennsylvania and was therefore subject to Pennsylvania's jurisdiction).

222. *See In re* Peoples, 14 N.W. 112, 116, 47 Mich. 626, 633 (Mich. 1882) (finding that a defendant denied bail warranted, under these circumstances, granting the writ of habeas corpus).

223. *In re* Tubbs, 102 N.W. 626, 627, 139 Mich. 102, 103 (Mich 1905) (holding that appellate courts will generally not interfere with a lower court's decision to deny bail, except when the refusal is obviously erroneous).

224. *See* Cross v. Dept. of Corr., 303 N.W.2d 218, 220–21, 103 Mich. App. 409, 415–16 (finding that a plaintiff whose state sentence was to run concurrently with his federal sentence, upon being released from federal prison, should not have been re-incarcerated in Michigan prison).

225. *See In re* Franks, 297 N.W. 521, 522, 297 Mich. 353, 355 (Mich. 1941) (holding that a petitioner challenging the length of his sentence and the method of sentencing should have appealed instead of having filed a writ of habeas corpus). *See also Ex parte* Wall, 47 N.W.2d 682, 685, 330 Mich. 430, 435 (Mich. 1951) (finding that a petitioner who wanted to challenge his sentence could successfully do so on appeal or through a writ of error, and not through filing a writ of habeas corpus).

226. Triplett v. Deputy Warden, Jackson Prison, 371 N.W.2d 862, 866, 142 Mich. App. 774, 780 (Mich. Ct. App. 1985) (outlining that Habeas Corpus only deals with such radical defects in a decision, and that incorrect judgments are only subject to review on appeal).

227. *Ex parte* Bobowski, 21 N.W.2d 838, 839, 313 Mich. 521, 522 (Mich. 1946) (holding that where the defendant was not allowed to make his case, habeas corpus was the correct method to look at the reason for the detention).

228. *See* People v. Wynn, 165 N.W.2d 493, 495, 14 Mich. App. 268, 269 (Mich. Ct. App. 1968).

representation was only perfunctory, in bad faith, a sham, a pretence, or without adequate opportunity for conference and preparation."[229]

(iv) New Evidence

In Michigan, if you wish to raise the issue of new evidence, you must file a motion for a new trial. Habeas relief will not be granted because of new evidence.

(c) Probation or Parole

Michigan courts have held that habeas corpus is the correct procedure by which you can challenge errors in parole revocation proceedings.[230] However, if you are accused of a parole violation and a fact-finding hearing (a process similar to a trial) on the charge is not held within forty-five days as required by law, habeas corpus is not available to you.[231] Instead, you should apply for a writ of *mandamus* to force the government to give you your hearing.[232]

(d) Subject Matter Jurisdiction

Habeas corpus is available when "the convicting court was without jurisdiction to try the defendant for the crime in question."[233] This defect must be "radical" such that it would render a conviction void.[234] However, if you have been convicted of a crime by a court which has acquired jurisdiction and has not abused its power, habeas corpus is not available to you.[235]

3. How to File Your Petition

(a) When to File

In Michigan, before you file your petition, be sure that you cannot appeal your conviction or apply for administrative relief. If there are other options for redress, the court will generally not consider your habeas corpus petition.[236]

(b) Where to File

In Michigan, you may petition any of the following courts or judges for a writ of habeas corpus:

(1) The supreme court, or a justice of that court;
(2) The courts of appeals, or a judge of those courts;
(3) The circuit courts, or a judge of those courts;
(4) The municipal courts of record, including (but not limited to) the recorder's court of the city of Detroit, common pleas court, or a judge of those courts; or
(5) The district courts, or a judge of those courts.[237]

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229. *See* People v. Wynn, 165 N.W.2d 493, 495, 14 Mich. App. 268, 269 (Mich. Ct. App. 1968).

230. Triplett v. Deputy Warden, Jackson Prison, 371 N.W.2d 862, 865–66, 142 Mich.App. 774, 779 (Mich. Ct. App. 1985) (holding that "review of a parole revocation decision is permissible upon a complaint for habeas corpus").

231. Jones v. Dept. of Corr., 664 N.W.2d 717, 720-21, 468 Mich. 646, 653-54 (Mich. 2003) (holding that the appropriate procedure is to file a writ of mandamus in a situation where a fact-finding hearing failed to occur within the allotted
45 days).

232. Jones v. Dept. of Corr., 664 N.W.2d 717, 724, 468 Mich. 646, 658 (Mich. 2003).

233. People v. Price, 179 N.W.2d 177, 180, 23 Mich. App. 663, 670 (Mich. Ct. App. 1970).

234. People v. Price, 179 N.W.2d 177, 180, 23 Mich. App. 663, 671 (Mich. Ct. App. 1970) (defining a "radical defect in jurisdiction" as "an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission").

235. *See* Krause v. Weideman, 80 N.W.2d 481, 483, 347 Mich. 567, 572 (Mich. 1957) ("[Habeas] is not available to one convicted of a crime and committed by a court which has acquired jurisdiction and has not abused its power.").

236. *See In re* Abbott, 255 N.W. 603, 603, 267 Mich. 703, 705 (Mich. 1934) (finding that the court could not hear the petitioner's writ for habeas corpus since he did not exhaust all his other options such as a writ of error or *certiorari* instead). *But see* Walls v. Dir. of Institutional Services Maxie Boy's Training School, 269 N.W.2d 599, 601, 84 Mich. App. 355, 357 (Mich. Ct. App. 1978) (finding that though there were other avenues the juvenile could have taken to seek redress, there was a "radical defect in jurisdiction" and so filing a habeas petition was warranted).

237. Mich. Comp. Laws Ann. § 600.4304 (West 2011).

You must file with the judge or court in the county where you are detained.[238] However, if there is no judge in that county capable of issuing the writ, or if the judge has refused to issue the writ, you can apply for habeas corpus at the court of appeals.[239] You may file with either the judge or the court, but if you file with a judge you must later file the petition with the court.[240]

(c) What to Include in Your Petition

The petition for habeas corpus (also known as the complaint) must state:
(1) that you (the prisoner) are restrained of your liberty;
(2) your name, or if the petition is being written on the behalf of someone else and his name is not known, you can provide a description of the prisoner;
(3) the name, if known, or the description of the officer or person by whom the prisoner is restrained;
(4) the place of restraint, if known;
(5) that you or your representative is not barred from seeking habeas corpus;
(6) the cause or pretense of the restraint, according to your best knowledge and belief; and
(7) why the restraint is illegal.[241]

(d) How to File

After you have created your petition for habeas corpus including all the items in Part (B)(3)(c) of this Chapter, "What to Include in Your Petition," you should send your petition and any supporting documents to the court specified above in Part (B)(3)(b) of this Chapter, "Where to File." You can file the petition yourself, or someone may file the petition on your behalf.[242]

4. Your Right to Counsel for Your Petition

The U.S. Supreme Court has held that you have no federal constitutional right to be provided counsel in state habeas corpus proceedings.[243] However, in Michigan you are entitled to counsel at your habeas corpus hearing.[244] In addition, if you are applying for relief because you are about to be extradited (to be handed over to a foreign state for criminal prosecution), you do have a limited right to counsel.[245]

5. What to Expect After You File

In Michigan, the court may issue a preliminary writ of habeas corpus (or an order to show cause) if your petition states allegations, which, if true, would entitle you to release.[246]

After the court issues the writ, you must serve (deliver) the person who has you in custody with the writ and a copy of your petition.[247] Upon the service of the writ and the petition, the person who has you in custody must follow the writ unless you are too sick to be moved.[248] If you are too sick to be moved, the person who has you in custody should state that in the answer to your complaint.[249] The judge will then rule on your petition based on information already available to him: he will rule based on his assessment of the truth of your complaint and the sufficiency of the answer (to your complaint) from the person who has you in custody.[250]

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238. Mich. Ct. Rules of 1985, Rule 3.303(A)(2).
239. Mich. Ct.Rules of 1985, Rule 3.303(A)(2).
240. Mich. Ct. Rules of 1985, Rule 3.303(F)(3).
241. Mich. Ct. Rules of 1985, Rule 3.303(C).
242. Mich. Ct. Rules of 1985, Rule 3.303(B).
243. *See* Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed. 2d 539, 545 (1987) ("[T]he right to appointed counsel extends to the first appeal of right and no further.").
244. Mich. Ct. Rules of 1985, Rule 3.303(Q)(3).
245. *See* People v. Donaldson, 302 N.W.2d 592, 595, 103 Mich. App. 42, 48–49 (Mich Ct. App. 1981) (stating that under the Uniform Criminal Extradition Act, the defendant had a right to counsel for the limited purpose of challenging his arrest through habeas corpus).
246. Mich. Comp. Laws § 600.4316 (West 2011).
247. Mich. Ct. Rules of 1985, Rule 3.303(I)(1).
248. Mich. Comp. Laws § 600.4325 (West 2011).
249 .Mich. Comp. Laws § 600.4328 (West 2011).
250. Mich. Comp. Laws § 600.4328 (West 2011).

The person who has you in custody may file an answer to the writ, in which he will tell the judge why he thinks you should be in custody.[251] You may respond to the answer, either in a reply brief or in the hearing on your petition.[252]

When the court issues the preliminary writ (or an order to show cause), it may set a date and place for a hearing where the person who has you in custody must take you to determine whether you are being imprisoned illegally. At the hearing, the court will consider your petition, the return, and your reply to the return. You will be allowed to provide evidence to support your claim.[253]

6. Your Right to Appeal

In Michigan, you may appeal the denial of your writ of habeas corpus.[254] If you do so, you must make sure that the writ has been properly filed with the court where you originally brought the petition. You may also bring a new petition for habeas corpus to an appellate court or the Supreme Court of Michigan.

E. Conclusion

You must meet certain elements in your petition for a writ of habeas corpus to be granted. These include custody (confinement by the state), entitlement to immediate release, imprisonment by the state, and lack of other available procedures, including administrative and grievance procedures. Your petition can complain about a variety of issues post-conviction, parole or probation revocation, or jurisdiction. Remember that the details of this process vary from state to state. You should research the rules in the state where you are imprisoned before petitioning for a writ of state habeas corpus.

251. Mich. Ct. Rules of 1985, Rule 3.303(N).

252. Mich. Ct. Rules of 1985, Rule 3.303(O).

253. Mich. Ct. Rules of 1985, Rule 3.303(Q)(2)(b).

254. *See* People v. Wendt, 309 N.W.2d 230, 233, 107 Mich. App. 269, 274 (Mich. Ct. App. 1981) (finding that the denial of the writ of habeas corpus is reviewable though the scope of review is limited).