CHAPTER 21

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

A. Introduction

This Chapter will cover state habeas corpus for people incarcerated in state prisons. Specifically, this Chapter discusses how habeas corpus is applied in three states: Florida, New York, and Michigan. **If you are incarcerated in a federal prison, you cannot use the procedures described in this Chapter.** Instead, you must file a petition for federal habeas corpus. To learn more about federal habeas corpus, you should read *JLM*, Chapter 13, "Federal Habeas Corpus Petitions."

1. What is Habeas Corpus?

Most simply, habeas corpus[1] is a procedure used to argue that your incarceration is illegal, which may be done by challenging your conviction. A "writ of habeas corpus" is an order issued by a court to release an incarcerated person from prison or jail. The court might also order other actions, like reducing your sentence, reducing your bail, or remanding your case for further proceedings. You can ask a court for this order by filing what is called a "petition for writ of habeas corpus," or "habeas petition" for short. To challenge your incarceration, you might be able to use habeas petitions, a petition by another name, or both, depending on the laws of your state. It is important to research the specific laws for your state.

When you file a habeas petition, you are starting a civil (not criminal) proceeding in court. An incarcerated person who files a habeas petition is often called a "petitioner" or "relator." When you file a habeas petition, you are asking a judge for a hearing to decide whether your incarceration is unlawful. During this hearing, the judge will evaluate the fairness of the procedures used to convict and sentence you. This hearing is **not** another trial. The judge will **not** decide whether or not you are guilty and **cannot** overturn your conviction.

2. What Will This Chapter Teach You?

This Chapter is divided into four parts. **Part A**—the Introduction you are reading now—will give you a short overview of habeas corpus and the basic requirements for a habeas petition.

Part B ("Florida") will teach you the specific rules for filing habeas petitions in a Florida state court. In Florida, there is another procedure called a Rule 3.850 motion that you can use to challenge your conviction or sentence. Section B(1) ("Basic Requirements for Rule 3.850 Motions and Habeas Petitions") will give you a general overview of habeas petitions and Rule 3.850 motions, explaining the basic requirements for both procedures and the main differences between them. Whether you should file a Rule 3.850 motion or a habeas petition depends on the claims you wish to raise. Section B(2) ("Deciding Whether to File a Rule 3.850 Motion or a Habeas Petition") will help you determine whether a habeas petition or a Rule 3.850 motion is right for your circumstances. Whether you should file a Rule 3.850 motion or a habeas petition depends on the claims you wish to raise. Once you decide which procedure is right for you, Sections B(3) and (4) will teach you the process for filing either a habeas petition or a Rule 3.850 motion Florida state court, including what to include in your petition, when, where, and how to file your petition, what you can expect to happen after you file your petition, and what rights you have during your proceedings.

Part C ("New York") will teach you the specific rules for filing a habeas petition in a New York state court. In New York, there are other procedures you can use to challenge your conviction or sentence: an Article 440 motion and an Article 79 petition. Whether you file an Article 440 motion, an

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[1] "Habeas corpus" is often shortened to "habeas." "Petition for a writ of habeas corpus" is sometimes shortened to "petition for habeas corpus," or "habeas petition."

Article 78 petition, or a habeas petition depends on the claims you wish to raise. Section C(2) ("Claims You Can Raise in Your Habeas Petition") will help you figure out which procedure is most appropriate for your claims. Sections C(3) and (4) will teach you the process for filing a habeas petition in New York state court, including what to include in your petition, when, where, and how to file your petition, and what you can expect to happen after you file your petition. Sections C(5), (6), and (7) explain your rights in habeas proceedings, including your right to a lawyer, your right to a fact-finding hearing, and your right to an appeal.

Part D ("Michigan") will teach you the specific rules for filing a habeas petition in a Michigan state court. Section D(2) discusses claims that you can raise in your habeas petition. Parts D(3) and (4) will teach you the process for filing a habeas petition in Michigan state court, including what to include in your petition, when, where, and how to file your petition, and what you can expect to happen after you file your petition. Sections D(5) and (6) explain your rights in habeas proceedings, including your right to a lawyer and your right to an appeal.

Although the rules for habeas corpus in Florida, New York, and Michigan are often similar, you should be sure to check the laws for your specific state before filing a state habeas petition. If you are in prison or jail 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. *JLM*, Chapter 2, "Introduction to Legal Research," can guide you as you research the laws in your state.

3. Requirements for Habeas Relief

"Habeas relief" refers to what a court will order after a successful habeas petition. To get habeas relief in state court, you must meet each of the following requirements (described in more detail below):

(1) you must be *in custody* **or** *incarcerated in a state prison*
(2) you must be *entitled to immediate release* if your petition is successful
(3) there must be *no other legal procedure* to get the relief you want.

(a) "In Custody"

Being in custody means that you are confined by the state in some way. Usually, you cannot challenge a sentence that you have not started to serve. In Florida, New York, and Michigan, you may file a habeas petition if you are in jail or prison. If you are on parole, released on a bond, or released on your own recognizance ("ROR"), whether you can file a habeas petition depends on which state convicted you.[2] For more information about habeas petitions when you are on probation or parole, see Subsections A(3)(c), B(3)(c), C(2)(c), and D(2)(c) of this Chapter.

(b) "Incarcerated in a State Prison"

If you are incarcerated in a state prison, you **must** submit your petition in the state where you are incarcerated.[3] If you are incarcerated in a federal prison, a state court cannot hear your claim and you **must** file a habeas petition in federal court.[4] See *JLM*, Chapter 13, "Federal Habeas Corpus Petitions," for information about filing a federal habeas petition.

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[2] The phrase "released on your own recognizance" (often shortened to "ROR'd" or simply "ROR") means that the court has released you without bail because you have given a written promise to appear at your next court date.

[3] **In Florida:** *see* Dugger v. Jackson, 598 So. 2d 280, 282, 17 Fla. L. Weekly D1264 (Fla. Dist. Ct. App. 1st Dist. 1992) (*per curiam*) (vacating lower court's grant of habeas corpus writ because incarcerated person had not petitioned the state of conviction, South Carolina, and the state had not given its authority for the Florida court to hear the claim). **In New York:** *see* People *ex rel.* Warren v. People, 171 A.D.2d 768, 768, 567 N.Y.S.2d 321, 322 (2d Dept. 1991) (dismissing federal incarcerated person's habeas corpus petition because the petitioner was incarcerated outside of New York State). **In Michigan:** *see* MICH. COMP. LAWS §§ 600.4307, 600.4310(1) (1961) (specifying that actions for habeas corpus cannot be brought by individuals who are under the "exclusive jurisdiction" of any other court or judge).

[4] **In Florida**: *see* Simmons v. State, 579 So. 2d 874, 874, 16 Fla. L. Weekly D1476 (Fla. Dist. Ct. App. 1st Dist. 1991) (holding that the state circuit court does not have the power to issue a writ of habeas corpus for an incarcerated person who is not in the custody of the state). **In New York:** *see* N.Y. C.P.L.R. § 7002(a) (McKinney 2013) ("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 2013) ("The petition . . .

(c) "Entitled to Immediate Release"

In Florida, New York, and Michigan, courts usually will only consider your habeas corpus petition if a successful petition would result in your immediate release.[5] One situation where a successful petition may *not* result in your immediate release is if you are serving time for more than one conviction. If your habeas petition only challenges one of your convictions or sentences, you would not be entitled to immediate release because, even if your petition was successful, you would remain incarcerated for the other convictions.[6] For example, in one New York case, the petitioner was being held on a parole violation and filed a petition for habeas corpus to vacate the parole warrant. However, the petitioner was also being held on related criminal charges. The court determined that, even if the petitioner's challenge to his parole was successful, he could not be immediately released because he would still be held for the other charges.[7] For some claims, like ineffective assistance of counsel, the appropriate relief (or remedy) might be a new trial or a new appeal instead of immediate release.[8]

However, if you are challenging a specific aspect of your incarceration, you might still be able to file a habeas petition, even though you would not be entitled to immediate release if your petition was successful. For example, if you are incarcerated at the wrong facility or if your bail was set too high, you can still file a habeas petition. In these situations, you would not be released if your petition was successful, but you would be transferred to the correct facility or your bail would be lowered.

(d) "No Other Legal Procedure"

You may not file a habeas petition if there are still other procedures to get the relief you are seeking. These other procedures might include an appeal, administrative procedures, or grievance procedures. If you have not finished your appeal or are in the middle of a grievance hearing, you should wait until you are done with those procedures before you file a habeas petition.

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shall state . . . that a court or judge of the United States does not have exclusive jurisdiction to order [the petitioner] released."). **In Michigan:** *see* In re Abbott, 255 N.W. 603, 604, 267 Mich. 703, 706 (1934) ("No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them.").

[5] **In Florida:** *see* North v. State, 217 So. 2d 608, 609 (Fla. Dist. Ct. App. 1st Dist. 1969) (*per curiam*) (denying petition for writ of habeas corpus when defendant was no longer in custody); Schmunk v. State *ex rel.* Sandstrom, 353 So. 2d 907, 907 (Fla. Dist. Ct. App. 4th Dist. 1977) (*per curiam*) (denying petition when defendant was fined for a traffic violation, but was never in custody). **In New York:** *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.* Chakwin v. Warden, N.Y.C. Corr. Facility, 63 N.Y.2d 120, 125, 470 N.E.2d 146, 148, 480 N.Y.S.2d 719, 721 (1984) ("[H]abeas corpus generally will lie only where the defendant would become entitled to his immediate release upon the writ being sustained[.]"); *see also* 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). **In Michigan:** *see* Trayer v. Kent Cnty. Sheriff, 304 N.W.2d 11, 12, 104 Mich. App. 32, 34–35 (Mich. Ct. App. 1981) (finding petition for writ of habeas corpus was not proper because petitioner was transferred out of state and, therefore, the state that was petitioned could not provide immediate release).

[6] **In Florida:** *see* Alderman v. State, 188 So. 2d 803, 804 (Fla. 1966) (denying writ of habeas corpus when an incarcerated person was legally incarcerated on concurrent sentences and only challenged one sentence). **In Michigan:** *see* In re Rhyndress, 26 N.W.2d 581, 582, 317 Mich. 21, 23 (1947) (denying writ of habeas corpus to an incarcerated person serving two sentences, one for breaking and entering and one for escaping from prison, at least "until the expiration of the sentence imposed upon him for escaping from prison[.]").

[7] People *ex rel.* Brown v. N.Y. State Div. of Parole, 70 N.Y.2d 391, 398, 516 N.E.2d 194, 197, 521 N.Y.S.2d 657, 660 (1987).

[8] **In New York:** People *ex rel.* Kaplan v. Comm'r of Corr., 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 petitioner would only be entitled to the remedies of a new trial or new appeal, not immediate release); People *ex rel.* Douglas v. Vincent, 50 N.Y.2d 901, 903, 409 N.E.2d 990, 990, 431 N.Y.S.2d 518, 518 (1980) (denying habeas petition because "even if there were merit to the relator's contention that he was denied effective assistance of counsel at trial or on appeal he would not be entitled to habeas corpus relief because the only remedy he seeks would provide him a new trial or new appeal, and not a direction that he be immediately released from custody.").

A habeas petition is different from these other procedures. For instance, when you appeal, you are asking the court to review 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, "Incarcerated Grievance Procedures," for more information about grievance proceedings, and *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," for information about appeals. Each state has its own standards for, and exceptions to, the general rule that other procedures must not be available when seeking habeas relief.

B. Florida

This Part explains some of the basic rules for habeas corpus in a Florida state court. In Florida, there are two main procedures that a person can use to ask a court for habeas relief: (1) a Rule 3.850 motion—which is only available to a person with a noncapital[9] (non-death) sentence—or (2) a habeas petition. Section 1, "Rule 3.850 Motions vs. Habeas Petitions," gives a general overview of each procedure and the main differences between them.

Whether you should file a Rule 3.850 motion or a habeas petition will depend on your particular circumstances. So, you should pay careful attention to the rules that govern which type of procedure to use. Section 2, "Deciding Whether to File a Rule 3.850 Motion or a Habeas Petition," will help you make this decision. Once you have decided which procedure is right for you, Section 3, "Filing a Rule 3.850 Motion," and Section 4, "Filing a Habeas Petition," will teach you more about how to file under your chosen procedure, what to expect after you file, and what rights you have during the process.

1. Basic Requirements for Rule 3.850 Motions and Habeas Petitions

This Section gives a general overview of Rule 3.850 motions and habeas petitions, explaining the basic requirements you must meet to use each procedure and highlighting the main differences between them.

(a) Rule 3.850 Motions

Rule 3.850 motions are also called "post-conviction motions" because they are used *after* you have been convicted and sentenced. Rule 3.850 motions are preferred over habeas petitions by Florida courts, and a court will dismiss your habeas petition if it could have been filed under Rule 3.850 instead.[10] Additionally, Rule 3.850 has strict time limits that control how long you have to file your motion. So, accidentally filing a habeas petition when you should have filed a Rule 3.850 motion could waste valuable time. For this reason, it is important for you to carefully decide which procedure you should use so you do not risk losing your ability to file a Rule 3.850 motion because the time limit has passed. These time limits are explained in detail in Subsection B(3)(A), "When to File."

The main requirement for a Rule 3.850 motion is that you were tried (or entered a plea) and sentenced in a Florida state court. Unlike habeas petitions, you do *not* need to be incarcerated in the state of Florida to file a Rule 3.850 motion. So, if you have been transferred to an out-of-state prison to serve a sentence you received from a Florida state court, you can still file a Rule 3.850 motion.[11] In fact, you do not need to be in "custody" at all to file a Rule 3.850 motion like you do for a habeas

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[9] If you were sentenced to death and lost your appeal, you must use a different procedure to challenge your death sentence under Rule 3.851. FLA. R. CRIM. P. 3.851 (West 2011 & Supp. 2023). The procedures in Rule 3.851 are very similar to those for Rule 3.850, but they are not always identical. When the Supreme Court of Florida affirmed your death sentence during your direct appeal, the court was required to issue an order appointing you counsel to represent you in Rule 3.851 proceedings. FLA. R. CRIM. P. 3.851(b) (West 2011 & Supp. 2023). While this Chapter does not go into Rule 3.851 procedures in depth, you should consult with your appointed attorney to help you through the Rule 3.851 process.

[10] FLA. R. CRIM. P. 3.850(m) (West 2011 & Supp. 2023); *see also* Baker v. State, 878 So. 2d 1236, 1245–1247, 29 Fla. L. Weekly S413 (Fla. 2004) (*per curiam*) (holding that the court will dismiss habeas petitions as unauthorized that seek relief that could have been obtained in a Rule 3.850 motion).

[11] *See, e.g.*, Ramsey v. State, 965 So. 2d 854, 855, 32 Fla. L. Weekly D2349 (Fla. Dist. Ct. App. 2nd Dist. 2007) (addressing a Rule 3.850 motion filed by a person who was serving their Florida sentence in a New York State prison).

petition.[12] This means that you can still use a Rule 3.850 motion to challenge your conviction even after you have completed your sentence and are released from incarceration. If you were sentenced in a different state court but were transferred to a Florida prison to serve your sentence, you may *not* file a Rule 3.850 motion because you will not meet the main requirement of being convicted and sentenced by a Florida state court.

The second main requirement for a Rule 3.850 motion is that you are challenging your conviction or sentence under one of the six grounds listed in Rule 3.850(a):

(1) The judgment entered against you or your sentence violates the U.S. Constitution, federal law, 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 your sentence.
(4) Your sentence exceeded the maximum allowed by law.
(5) Your plea was involuntary.
(6) The judgment against you or the sentence imposed is otherwise subject to collateral attack.

The last ground—that your conviction or sentence is "otherwise subject to collateral attack"—may sound confusing. "Collateral" (also called indirect) attack means you are challenging your conviction or sentence by raising issues that did not appear on your original trial record. For example, your judgment is otherwise subject to collateral attack if you are raising a claim based on new evidence that you or your attorney did not discover until after your trial was over. Section B(2), "Deciding Whether to File a Rule 3.850 Motion or a Habeas Petition," will help you understand what sort of claims are covered under the grounds listed above for Rule 3.850 motions.

(b) Habeas Petitions

In Florida, habeas petitions are used to challenge your incarceration, conviction, or sentence under circumstances that are not covered by Rule 3.850. Unlike Rule 3.850 motions, habeas petitions can be filed by someone who has not yet been convicted or sentenced, so you can use a habeas petition to challenge your pre-trial incarceration even though you have not been convicted.[13] Section B(2), "Deciding Whether to File a Rule 3.850 Motion or a Habeas Petition," will help you understand what sort of claims you can raise in a habeas petition.

There are four main requirements you must meet before you can file a habeas petition, which are described below.

(i) *In Custody*

The first requirement for a habeas petition is that you are in "custody."[14] Being in custody means that your freedom is restrained by the state in some way. If you are in prison or jail, you will meet the custody requirement. In Florida, if you are on probation or parole, you will also meet the custody requirement.[15] If you have been involuntarily retained for substance abuse treatment under the Marchman Act, you will meet the custody requirement.[16] However, if you have been released on bond

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[12] Woods v. State, 750 So. 2d 592, 595, 24 Fla. L. Weekly S240 (Fla. 1999) (amending Rule 3.850 to remove the custody requirement).

[13] See, e.g., Peterson v. McNeil, 358 So. 3d 1281, 48 Fla. L. Weekly D777 (Fla. Dist. Ct. App. 1st Dist. 2023) (*per curiam*) (reviewing a habeas petition challenging a court's decision to revoke the petitioner's pre-trial release when he violated a bail condition and order to place him in pre-trial custody).

[14] FLA. STAT. ANN. § 79.01 (West 2004).

[15] *See Ex parte* Bosso, 41 So. 2d 322, 323 (Fla. 1949) (holding that probation meets the custody requirement for habeas petitions); Sellers v. Bridges, 15 So. 2d 293, 294, 153 Fla. 586, 588 (Fla. 1943) (holding that parole meets the custody requirement for habeas petitions).

[16] FLA. STAT. ANN. § 397.501(9) (West 2018 & Supp. 2023) (granting the right to file a habeas petition to an individual involuntarily retained for substance abuse treatment under the Marchman Act, and granting the same right to file on the individual's behalf to their parent, guardian, custodian, or attorney).

or "released on your own recognizance" (ROR), you will not meet the custody requirement and cannot file a habeas petition.[17]

(ii) *By the State of Florida*

The second requirement for a habeas petition is that the state of Florida has placed you in custody. This is because Florida courts do not have the authority to review decisions made by another state. 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.[18]

(iii) *Entitled to Immediate Release*

The third requirement for a habeas petition is that you are entitled to immediate release if your petition is successful. This is because a habeas petition is designed to test the legality of your current restraint or incarceration. So, if your restraint or incarceration would be legal for another reason that you are not challenging, you are not entitled to immediate release. A common example of a situation where you would *not* be entitled to immediate release is if you are serving more than one sentence and only challenging the legality of your incarceration under one of them.[19]

(iv) *No Other Options*

The fourth requirement for a habeas petition is that you have no other options (procedures) to get the relief you are seeking. These other procedures might include a direct appeal if you have been convicted or administrative and grievance procedures if you are challenging the conditions of your incarceration in prison.

If you were already convicted and sentenced, Florida courts will refuse to consider your habeas petition if you could have raised an issue or error by appealing your sentence, but did not.[20] Alleging "ineffective assistance of counsel" will not allow you to raise issues in your habeas petition that could have been raised on appeal.[21] Examples of issues that could or should be raised on direct appeal might include the introduction of evidence of other crimes and bad character without proper jury instruction or the trial court's failure to consider "mitigating evidence."

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 first follow Florida's administrative procedures. You should only file a petition for relief in state court **after** following administrative procedures. The rules in Chapter 33-103 of the Florida Administrative Code describe the administrative procedures available to you.[22] Your petition for habeas corpus may be denied if you did not follow these procedures first.[23] If you file your habeas petition before "exhausting"

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[17] *See* State *ex rel.* Curley v. Gatlin, 5 So. 2d 54, 54, 149 Fla. 1, 1 (Fla. 1941) (*per curiam*) (holding that incarcerated person released on an appearance bond is not entitled to habeas relief because incarcerated person is no longer in custody); Sandstrom v. Kolski, 305 So. 2d 75, 76 (Fla. Dist. Ct. App. 3rd Dist. 1974) (*per curiam*) (refusing to entertain petition for habeas corpus when petitioner promised to appear in court at a future date, since petitioner was not in custody).

[18] *See* Meyer v. Moore, 826 So. 2d 330, 331, 27 Fla. L. Weekly D764 (Fla. Dist. Ct. App. 2nd Dist.2002) (denying a petition for writ of certiorari because, although petitioner was serving time in Florida, he was convicted in Kansas, and the Florida circuit court lacked jurisdiction to consider or grant a writ of habeas corpus).

[19] *See* Hollingshead v. Mayo, 79 So. 2d 774, 775 (Fla. 1955) (denying a petitioner's habeas petition on the grounds that he did not show entitlement to release because the petitioner was serving two sentences of incarceration but only challenging one of the sentences).

[20] *See* Hardwick v. Dugger, 648 So. 2d 100, 105, 19 Fla. L. Weekly S433 (Fla. 1994) (*per curiam*) (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 D2520 (Fla. Dist. Ct. App. 1st Dist. 1994) (*per curiam*) (stating that habeas claims 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).

[21] *See* Mills v. Dugger, 574 So. 2d 63, 65, 15 Fla. L. Weekly S589 (Fla. 1990) (*per curiam*) (finding that alleging ineffective counsel will not allow relator to raise issues that should have been raised on appeal).

[22] FLA. ADMIN. CODE ANN. ch. 33-103 (2030).

[23] *See* Seccia v. Wainwright, 517 So. 2d 80, 81, 12 Fla. L. Weekly 2886 (Fla. Dist. Ct. App. 1st Dist. 1987)

administrative procedures (in other words, before administrative procedures are finished), your habeas petition may be dismissed or refused.[24] Note, however, that a court cannot dismiss your petition for failure to exhaust administrative procedures *unless* the state raises this issue to the court as a defense to your petition.[25]

2. Deciding Whether to File a Rule 3.850 Motion or a Habeas Petition

This Section will help you decide whether you should file a Rule 3.850 motion or a habeas petition based on what type of claim you want to make. Remember, you must also ensure you meet the basic requirements for these procedures discussed in the previous section. So, for a Rule 3.850 motion, you must have been convicted and sentenced by a Florida state court. For a habeas petition, you must be in custody by the state of Florida, entitled to immediate release, and have no other options to get the relief you are seeking.

(a) Extradition

If you are being detained in Florida for extradition to answer criminal charges in another state, you can challenge your extradition through a **habeas petition**.[26] Florida law says that you may only be detained for thirty days before your removal to another state, but allows a judge to extend this period for another sixty days (meaning, you can be detained for a maximum of ninety days if a judge orders this extension).[27] The 30-day period begins to run **after** you have been arrested on a governor's warrant issued in response to the other state's request for your removal.[28] A judge may extend this 30-day period for an additional sixty days and recommit you into custody.[29] In total, this means that you could be held for up to 90 days awaiting extradition.[30] Note that a judge cannot recommit you into custody two or more successive times. So, you may file a habeas petition in Florida challenging that your detention awaiting extradition exceeds these time limits in two situations. First, if you have been held for over thirty days awaiting extradition and a judge has *not* extended your detainment. Second, if you have been held for more than ninety days and a judge *has* extended your detainment.

You can also challenge your extradition through a habeas petition to argue that the governor did not meet the requirements to issue the governor's warrants. You may do this under the following four grounds:

(dismissing incarcerated person'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 incarcerated person's petition for writ of habeas corpus on the ground that he failed to exhaust incarcerated person 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 an incarcerated person challenging his confinement must exhaust his administrative remedies before seeking habeas relief).

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

[25] *See* Henry v. Santana, 62 So. 3d 1122, 1123, 36 Fla. L. Weekly S191 (Fla. 2011) (holding that a court may not dismiss a habeas petition due to failure to exhaust administrative remedies where the issue of the petitioner's failure to exhaust has not been raised by the parties).

[26] *See* FLA. STAT. ANN. § 941.10 (West 2015 & Supp. 2024) (granting an accused person in custody for extradition the right to petition for a writ of habeas corpus).

[27] FLA. STAT. ANN. § 941.15 (West 2015 & Supp. 2024) (setting statutory maximum of thirty days); FLA. STAT. ANN. § 941.17 (West 2015 & Supp. 2024) (allowing a judge to recommit a person detained for extradition after the 30-day maximum passes for up to sixty days).

[28] Lewis v. Boone, 418 So. 2d 319, 320 (Fla. Dist. Ct. App. 1st Dist. 1982) (if governor's warrant is introduced prior to habeas proceedings, even after the 30-day statutory maximum, and warrant suggests facial and substantial compliance with the Uniform Interstate Extradition Act, then the petitioner is not entitled to habeas relief).

[29] FLA. STAT. ANN. § 941.17 (West 2015 & Supp. 2024).

[30] FLA. STAT. ANN. § 941.17 (West 2015 & Supp. 2024); *see also* Vargas v. Junior, 254 So. 3d 1092, 1096, 43 Fla. L. Weekly D1995 (Fla. Dist. Ct. App. 3rd Dist. 2018) (holding that petitioner should be discharged if they are not arrested on an issued governor's warrant after a total of 90 days).

(1) You can argue that the extradition documents are not, on their face, in order.
(2) You can argue that you have not been charged with a crime in the demanding state.
(3) You can argue that you are not the person named in the request for extradition.
(4) You can argue that you are not a "fugitive," meaning someone who left a state after they committed a crime.[31]

(b) Bail

To challenge your bail proceedings, including the amount of your bail or the revocation of your bail, you should first follow the criminal processes in Fla. R. Crim P. 3.131 to request a reduction in the amount of your bail or to secure bail.[32] If a trial court sets bail and refuses your request for a reduction before trial, you may file a **habeas petition**.[33]

You may ask for habeas relief on the grounds that you were denied bail or that your bail is excessive.[34] Factors that a court can consider when setting your bail include the nature of your offense, family ties, length of residence in the community, employment history, financial resources, and your prior criminal record (if you have one).[35] A bail-setting court may also consider the street value of drugs on drug-related offenses.[36] Some courts require petitioners to prove that they have tried to make bail and will not consider a habeas petition if the evidence shows that you could not post bail in any amount.[37] 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.

(c) After Your Conviction

(i) *Void Sentence*

You may use a **Rule 3.850 motion** to argue that your sentence is "void" (not valid). A court will consider a sentence void if it was not issued properly based on what is required by the law.[38] For

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[31] *See* Fauls v. Sheriff of Leon Cnty., 394 So. 2d 117, 118 (Fla. 1981) (listing the four limited grounds through which a person may challenge their extradition through a habeas petition (citing Michigan v. Doran, 439 U.S. 282, 289, 99 S. Ct. 530, 535, 58 L. Ed. 2d 521 (1978))).

[32] FLA. R. CRIM. P. 3.131 (West 2019); King v. Byrd, 590 So. 2d 2, 3, 16 Fla. L. Weekly D2928 (Fla. Dist. Ct. App. 1st Dist. 1991) (*per curiam*).

[33] FLA. R. CRIM. P. 3.131 (d)(3) (West 2019); *see* Dupree v. Cochran, 698 So. 2d 945, 946, 22 Fla. L. Weekly D2201 (Fla. Dist. Ct. App. 4th Dist. 1997) (granting petitioner's habeas petition because trial judge failed to specify the facts and reasons why she revoked the bond); Wilson v. State, 669 So. 2d 312, 313–314, 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 when it was unclear if the failure was knowing and willful); Bennett v. State, 118 So. 18, 18, 96 Fla. 237, 238 (Fla. 1928) (finding that a person seeking release on bail should do so by filing a habeas corpus petition).

[34] *See* Bradwell v. McClure, 488 So. 2d 566, 567, 11 Fla. L. Weekly 978 (Fla. Dist. Ct. App. 1st Dist. 1986) (*per curiam*) (granting habeas relief and ordering trial court to set a reasonable bail for petitioner); Nicholas v. Cochran, 673 So. 2d 882, 883, 21 Fla. L. Weekly D989 (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 (Fla. Dist. Ct. App. 5th Dist. 1989) (finding that writ of habeas corpus is available when petitioner can show that the trial court has set bail at an unreasonable amount and that bond schedules do not justify excessive bail).

[35] *See* Alvarez v. Crowder, 645 So. 2d 63, 63–64, 19 Fla. L. Weekly D2363 (Fla. Dist. Ct. App. 4th Dist. 1994) (*per curiam*) (citing FLA. STAT. ANN. § 903.046).

[36] FLA. STAT. ANN. § 903.046(2)(h) (West 2014). *But see* Sikes v. McMillian, 564 So. 2d 1206, 1208, 15 Fla. L. Weekly D1949 (Fla. Dist. Ct. App. 1st Dist. 1990) (finding that FLA. STAT. ANN. § 903.046(2)(h) does not support a court increasing bail when defendant is charged with purchasing and not selling drugs).

[37] *See Ex parte* Smith, 193 So. 431, 431–432, 141 Fla. 434, 434–435 (Fla. 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).

[38] Anderson v. Chapman, 146 So. 675, 677, 109 Fla. 54, 57–58 (Fla. 1933) (*en banc*) ("[I]f the vice of a sentence is not merely that it is defective, but [that it] is of an entirely different character from that authorized by law, it is generally held that such sentence is void, and that the incarcerated person will be discharged on habeas

example, your sentence might be void if you were sentenced based on an outdated statute and the revised statute imposes a shorter sentence for the crime you were convicted of.[39] Your sentence might also be void if it is longer than the maximum sentence allowed by the statute used to convict you.[40] Similarly, Florida courts have noted that the severity of your sentence should be balanced with the gravity of your offense (in other words, your sentence should be proportionate to your offense). If your sentence is excessive compared with your offense, your sentence might be void.[41] Finally, your sentence might be void if your judgment does not specify the length of your sentence.[42]

On the other hand, a Florida court will **not** find your sentence void because the judgment does not clearly state an offense or does not clearly state that you have been found guilty.[43] A Florida court also might **not** find your sentence void if the judgment lists a charge that is not on the indictment or is different from the one on the indictment.[44]

(ii) *Constitutional Rights*

You can use a **Rule 3.850 motion** to argue that your conviction or sentence violated certain constitutional rights. Be aware that Rule 3.850 motions may **not** be used to challenge issues that you should have raised during your direct appeal, which includes issues like prosecutorial misconduct or trial court error.[45] See Chapter 9, "Appealing Your Conviction or Sentence," to learn more about what claims should be raised in your direct appeal.

A common constitutional claim raised in Rule 3.850 motions is the right against double jeopardy (meaning the right not to be convicted twice of the same offense).[46] You should note that the right against double jeopardy is fundamental, so a court cannot rule that you waived this claim because you failed to raise it earlier except in very limited instances.[47]

You may also raise due process claims in your Rule 3.850 motion. Often, these sorts of claims argue that your plea was involuntary. You can argue your plea was involuntary by claiming you entered the plea against your will, that you were not informed of the rights you were waiving when you entered the plea, or that you were not made aware of the consequences of your plea.[48] Some examples of this

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corpus.")

[39] Anglin v. Mayo, 88 So. 2d 918, 921–922 (Fla. 1956) (granting writ of habeas corpus for illegal sentencing where defendant was sentenced to 5 years of imprisonment using an outdated statute, and the sentence imposed by the revised statute was shorter).

[40] Dean v. State, 476 So. 2d 318, 319, 10 Fla. L. Weekly 2331 (Fla. Dist. Ct. App. 2nd Dist. 1985) (*per curiam*) (reversing sentences of youthful offender that exceeded maximums specified in Youthful Offender Act).

[41] State *ex rel.* Saunders v. Boyer, 166 So. 2d 694, 696–697 (Fla. Dist. Ct. App. 2nd Dist. 1964) (remanding case for resentencing because 1-year sentence of hard labor for contempt of court was not authorized by statute and was void).

[42] R.J.K. v. State, 375 So. 2d 871, 871 (Fla. Dist. Ct. App. 1st Dist. 1979) (granting writ to juvenile because committing the juvenile to the Department of Health and Rehabilitative Services for an indeterminate period was improper).

[43] *See* Anderson v. Chapman, 146 So. 675, 677, 109 Fla. 54, 57–58 (Fla. 1933) (*en banc*) (denying habeas corpus and holding that "the judgment sentencing the defendant to the penitentiary sufficiently implies the judgment of guilt" even though the defendant's guilt was not clearly stated).

[44] Dixon v. Mayo, 168 So. 800, 800–801, 124 Fla. 485, 487 (Fla. 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—was not reasonable because the differing element was not material to the crime).

[45] FLA. R. CRIM. P. 3.850(c) (West 2011 & Supp. 2023); *see also* Henry v. State, 933 So. 2d 28, 29, 31 Fla. L. Weekly D1230 (Fla. Dist. Ct. App. 2nd Dist. 2006) (*per curiam*) (denying Rule 3.850 claims of prosecutorial misconduct and trial court error because they should have been raised on direct appeal).

[46] State v. Johnson, 483 So. 2d 420, 422, 11 Fla. L. Weekly 49 (Fla. 1986) (concluding that the "law is clear that the claim of double jeopardy may be raised in [Rule 3.850 motions]" even when the defendant plead guilty to the second offense).

[47] Lippman v. State, 633 So. 2d 1061, 1065, 19 Fla. L. Weekly S129 (Fla. 1994) (holding that double jeopardy claims cannot be denied due to failure to timely raise the claim, except in very limited circumstances where a court may find a defendant knowingly waived this right).

[48] Barnes v. State, 29 So. 3d 1010, 1020–1021, 35 Fla. L. Weekly S85 (Fla. 2010) (*per curiam*) (explaining that,

might be if you were under the influence of medication or a mental incapacity when you made the plea or if your plea resulted in deportation but you were not informed that this would be a possibility.[49] Other types of due process claims include your right to appeal your sentence[50] and your right to be present at every critical stage of your criminal proceedings (including when your sentence is being imposed).[51]

You can also claim the right to a trial by jury.[52] To raise this issue, 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" (gave up) your right to a jury trial and may not petition the court for habeas on this issue.[53]

Another right that you can claim in your petition is the right to a speedy trial.[54] It is important to be aware that you may "waive" (give up) your right to a speedy trial. If you do, you may not file a habeas petition to determine whether your right to a speedy trial was denied.[55] In addition, the issue of your right to a speedy trial should normally be brought **before** trial. It is very unlikely the court will grant relief on this issue after conviction.

Finally, you can claim the right to be free from cruel and unusual punishment in your habeas petition. In other words, you may challenge your prison conditions by alleging they are so unbearable that they must be considered cruel and unusual punishment.[56]

(iii) *New or Void Law*

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when reviewing a post-conviction motion (including Rule 3.850 and Rule 3.851 motions), a court will "scrutinize the plea to ensure that the defendant was made aware of the consequences of his plea, was apprised of the constitutional rights he was waiving, and pled guilty voluntarily").

[49] *See* Iacono v. State, 930 So. 2d 829, 831, 31 Fla. L. Weekly D1558 (Fla. Dist. Ct. App. 4th Dist. 2006) (*per curiam*) (noting that trial judges should inquire into matters like the defendant's mental illness or the influence of medication when reviewing the voluntariness of a plea in Rule 3.850 proceedings, but ultimately denying the petitioner's claim because he made sworn statements that the medication did not affect his thinking when he entered his plea); Charles v. State, 920 So. 2d 740, 741, 31 Fla. L. Weekly D439 (Fla. Dist. Ct. App. 5th Dist. 2006) (*per curiam*) (holding that, to show a plea was involuntary based on deportation consequences, a petitioner must show that they did not know that deportation may result, that they are "threatened" with deportation as a result of the plea, and that they would not have entered the plea if they knew of the possible deportation consequence).

[50] *See* Myrick v. Wainwright, 243 So. 2d 179, 180 (Fla. Dist. Ct. App. 2nd 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. 2nd Dist.), (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), *opinion supplemented by* 247 So. 2d 88 (Fla. Dist. Ct. App. 2nd Dist. 1971).

[51] *See* Evans v. State, 909 So. 2d 424, 425–426, 30 Fla. L. Weekly D1950 (Fla. Dist. Ct. App. 5th Dist. 2005) (holding that a defendant may use a Rule 3.850 motion to argue that they were not allowed to be present during critical stages of their criminal proceedings).

[52] Sneed v. Mayo, 66 So. 2d 865, 869–870, 874 (Fla. 1953) (holding that habeas corpus is proper to review the allegation that petitioner was denied right to trial by jury).

[53] 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).

[54] 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, 515–517 (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).

[55] State v. Sylvester, No. 2004 033118 CFAES 2016 10399 CIDL, 2016 Fla. Cir. LEXIS 26733, at *11 (Fla. Nov. 10, 2016) (*unpublished*) ("Defendant has no right to a speedy trial because he waived it.").

[56] *See* Graham v. Vann, 394 So. 2d 176, 177 (Fla. Dist. Ct. App. 1st Dist. 1981) (*per curiam*) (affirming writ of habeas corpus where petitioners sought relief from prison conditions that were constantly dangerous to the lives and safety of the incarcerated people, even though a federal case challenging inadequate medical care was pending). Prison conditions may also be challenged under federal law using 42 U.S.C. § 1983. See *JLM*, Chapter 16 "Using 42 U.S.C § 1983 to Obtain Relief from Violations of Federal Law" for more information.

You may file a **Rule 3.850 motion** on the ground that the statute used to prosecute you is void (unconstitutional).[57] In the rare circumstance that you do not meet the requirements to file a Rule 3.850 motion, you may raise this claim through a **habeas petition** instead. It is very rare for courts to find a statute unconstitutional. But, if the statute you were prosecuted under is declared unconstitutional, you are entitled to immediate release.

(d) Ineffective Counsel

You have the right to effective assistance of counsel during both your trial and in your direct appeal appeals. Whether you should file a Rule 3.850 motion or a habeas petition depends on which phase of your criminal proceedings you are claiming ineffective assistance of counsel. For more information on ineffective assistance of counsel claims, see *JLM*, Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel."

If you are alleging that your **trial** counsel was ineffective, you must bring your claim through a **Rule 3.850 motion**.[58] Florida courts use *Strickland*'s two-pronged test to determine if trial counsel was ineffective.[59] First, you must show that your attorney's performance was "deficient." This prong is very difficult to satisfy: the court will strongly presume that your counsel was not deficient and if the court decides that the action you are claiming was deficient was part of your attorney's trial strategy, you will fail this prong.[60] Second, you must show that the deficient performance actually prejudiced you, meaning that your trial probably would have had a different result if it was not for your trial attorney's deficient performance.[61]

If you are alleging that your **appellate** counsel was ineffective, you must bring your claim through a **habeas petition**.[62] Florida courts standard similar to the *Strickland* standard described above to

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[57] *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) (*per curiam*) (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 (Fla. 1939) (*en banc*) (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, 710–711, 139 Fla. 681, 695–697 (Fla. 1939) (stating the right to attack an information or indictment by writ of habeas corpus is limited, and a habeas corpus proceeding is a 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. 2nd Dist. 1959) (*per curiam*) (granting a writ of habeas corpus for a conviction and sentence under a statute that was later held invalid by the Florida Supreme Court).

[58] Bruno v. State, 807 So. 2d 55, 63, 26 Fla. L. Weekly S803 (Fla. 2001) (*per curiam*) ("As a rule, [a defendant] can *only* raise an ineffectiveness [of trial counsel] claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal.").

[59] Bradley v. State, 33 So. 3d 664, 671–672, 35 Fla. L. Weekly S23 (Fla. 2010) (*per curiam*) (explaining Florida's test for ineffective assistance of trial counsel, which mirrors the Supreme Court's approach in *Strickland* (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 671 (1984))).

[60] Bradley v. State, 33 So. 3d 664, 671, 35 Fla. L. Weekly S23 (Fla. 2010) (*per curiam*) (explaining that the deficiency of trial counsel is determined through an objective test of reasonableness and that great deference is given to the trial counsel (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 20252, 80 L. Ed. 2d 671 (1984))); Occhicone v. State, 768 So. 2d 1037, 1048, 25 Fla. L. Weekly S529 (Fla. 2000) (*per curiam*) (holding that strategic decisions made by an attorney will not constitute ineffective assistance of counsel).

[61] Bradley v. State, 33 So. 3d 664, 672, 35 Fla. L. Weekly S23 (Fla. 2010) (*per curiam*) (explaining that the prejudice prong must be proven by showing more than mere speculation that the deficient performance affected the outcome, instead it must show that there is a reasonable probability that the outcome would have been different but for the deficient performance (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 20252, 80 L. Ed. 2d 671 (1984))).

[62] *See* Freeman v. State, 761 So. 2d 1055, 1069, 25 Fla. L. Weekly S451 (Fla. 2000) (*per curiam*) ("The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus."); Nixon v. State, 932 So. 2d 1009, 1023, 31 Fla. L. Weekly S245 (Fla. 2006) (*per curiam*) ("Claims of ineffective assistance of appellate counsel are properly raised in a habeas petition before the court that heard the defendant's direct appeal.").

determine whether appellate counsel was ineffective. First, you must allege a specific and serious omission (something your counsel failed to do) or overt act (something your counsel did) that shows a serious error or substantial deficiency.[63] Second, you show that this substantially deficient act or omission actually affected the outcome of your appeal and was not just a harmless error.[64] You cannot base your ineffective appellate counsel claim on an omission from your attorney where they did not raise an issue because it was not preserved for appeal, or when they decided not to raise an issue based on their strategy.[65]

(e) Newly Discovered Evidence

If there is newly discovered evidence in your case, you may attack or challenge the judgment against you through a **Rule 3.850 motion**.[66] Newly discovered evidence claims can be brought under Rule 3.850 if you meet two conditions:

(1) You, your attorney, and the court did not know about the new evidence during your trial and you and your attorney could not have discovered the evidence through the exercise of "due diligence" (meaning reasonable or expected actions); **and**
(2) This new evidence would probably (more likely than not) result in either an acquittal or a less severe sentence if you were retried. [67]

When you bring this type of claim in a Rule 3.850 motion, the court must hold an evidentiary hearing on your claim for post-conviction relief, unless the new evidence is plainly refuted by the record.[68]

You can also use a Rule 3.850 motion to show that the prosecutor failed to turn over exculpatory evidence (evidence that would tend to show that you were innocent).[69] To establish a claim that the prosecutor failed to turn over such evidence, you must be able to show that:

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[63] Freeman v. State, 761 So. 2d 1055, 1069, 25 Fla. L. Weekly S451 (Fla. 2000) (*per curiam*) (explaining that the defendant alleging ineffective assistance of appellate counsel has the burden of alleging a specific, serious omission or overt act from appellate counsel that constitutes a serious error or substantial deficiency (citing Knight v. State, 394 So. 2d 997 (Fla. 1981) (*per curiam*))).

[64] Freeman v. State, 761 So. 2d 1055, 1069, 25 Fla. L. Weekly S451 (Fla. 2000) (*per curiam*) (explaining that appellate counsel's deficiency must concern an error that actually affects the outcome and not mere harmless error (quoting Knight v. State, 394 So. 2d 997, 1001 (Fla. 1981) (*per curiam*))).

[65] *See* Freeman v. State, 761 So. 2d 1055, 1069, 25 Fla. L. Weekly S451 (Fla. 2000) (*per curiam*) ("[I]neffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy."); Atkins v. Dugger, 541 So. 2d 1165, 1167, 14 Fla. L. Weekly 207 (Fla. 1989) (*per curiam*) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

[66] *See* McLin v. State, 827 So. 2d 948, 951–952, 27 Fla. L. Weekly S743 (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 & Supp. 2023) (outlining the general grounds on which a sentence can be vacated, set aside, or corrected).

[67] *See* FLA. R. CRIM. P. 3.850(b)(1) (West 2011); Davis v. State, 26 So. 3d 519, 526, 34 Fla. L. Weekly S605 (Fla. 2009) (*per curiam*) ("[T]he newly discovered evidence must be of a nature that it would probably produce an acquittal on retrial or yield a less severe sentence."); Long v. State, 183 So. 3d 342, 345, 41 Fla. L. Weekly S15 (Fla. 2016) (*per curiam*) (explaining that newly discovered evidence claims must satisfy a 2-prong test establishing that the party, the counsel, and the court did not know about the evidence during the trial and could not have discovered it through due diligence (citing Jones v. State, 709 So. 2d 512, 521, 23 Fla. L. Weekly S137 (Fla. 1998) (*per curiam*))).

[68] *See* McLin v. State, 827 So. 2d 948, 954, 27 Fla. L. Weekly S743 (Fla. 2002) ("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." (quoting Foster v. State, 810 So. 2d 910, 914, 27 Fla. L. Weekly S147 (Fla. 2002) (*per curiam*))).

[69] *See* Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 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, 421–422, 115 S. Ct. 1555, 1560, 131 L. Ed. 2d 490, 498 (1995) (applying *Brady*

(1) The state possessed evidence favorable to your case;[70]
(2) You did not possess such evidence **and** could not have obtained such evidence with reasonable effort;[71]
(3) The prosecution suppressed (did not turn over) the evidence;[72] and
(4) There is a reasonable probability the case would have come out differently if the evidence had been disclosed.[73]

(f) Probation or Parole

You can challenge errors in parole revocation proceedings and orders of the Florida Probation and Parole Commission through a **habeas petition** or through another type of petition, called a petition for writ of mandamus.[74] While habeas petitions are used to ask for immediate release from incarceration, petitions for writs of mandamus are used to ask a court to compel (force) a public official (like a probation or parole officer) to perform a duty (like fixing an error they made in your parole hearing). If you are challenging the calculation of your presumptive parole release date (PPRD), you should do this by filing a petition for writ of mandamus asking them to fix the error they made in calculating this date.[75] For any other challenges that deal with your actual parole release date, you should file a habeas petition.[76] For example, if you are challenging the revocation of your early release from prison, you should do this by filing a habeas petition in the circuit court where you are currently incarcerated.[77] If you want to argue that your parole was revoked without any factual basis for this happening, you should also do this by filing a habeas petition in the circuit court where you are currently incarcerated.[78]

If you would like to argue that your due process rights were violated during your parole revocation proceedings, you should do this through a habeas petition.[79] You should note, however, that you have

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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 a petitioner's conviction because the prosecution knowingly allowed false testimony to be introduced and exploited in its case).

[70] Hildwin v. Dugger, 654 So. 2d 107, 109, 20 Fla. L. Weekly S39 (Fla. 1995) (*per curiam*).

[71] Hildwin v. Dugger, 654 So. 2d 107, 109, 20 Fla. L. Weekly S39 (Fla. 1995) (*per curiam*).

[72] Downs v. State, 740 So. 2d 506, 513–517, 24 Fla. L. Weekly S231 (Fla. 1999) (*per curiam*) (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).

[73] Mills v. State, 684 So. 2d 801, 806, 21 Fla. L. Weekly 527, 527 (Fla. 1996) (*per curiam*) (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 S133 (Fla. 1995) (*per curiam*) (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, 110–111, 20 Fla. L. Weekly S39 (Fla. 1995) (*per curiam*) (denying habeas petition but vacating and remanding for new sentencing before a jury because defense counsel's errors had deprived petitioner of a reliable penalty phase).

[74] *See* Griffith v. Fla. Parole & Prob. Comm'n, 485 So. 2d 818, 820, 11 Fla. L. Weekly 124 ("[J]udicial review is still available through the common law writs of mandamus, for review of [presumptive parole release dates], and habeas corpus, for review of effective parole release dates.").

[75] *See* Heard v. Fla. Parole Comm'n, 811 So. 2d 808, 808 (Fla. Dist. Ct. App. 1st Dist. 2002) (*per curiam*) (overturning a decision to treat a habeas petition as a writ of mandamus because a challenge to revocation of early release is properly filed as a habeas petition).

[76] Griffith v. Fla. Parole & Prob. Comm'n, 485 So. 2d 818, 820, 11 Fla. L. Weekly 124 (Fla. 1986).

[77] *See* Heard v. Fla. Parole Comm'n, 811 So. 2d 808, 808 (Fla. Dist. Ct. App. 1st Dist. 2002) (*per curiam*) (overturning a decision to treat a habeas petition as a writ of mandamus because a challenge to revocation of early release is properly filed as a habeas petition).

[78] *See* Johnson v. Fla. Parole Comm'n, 841 So. 2d 615, 616–617, 28 Fla. L. Weekly D886 (Fla. Dist. Ct. App. 1st Dist. 2003) (*per curiam*) (holding that a petitioner's challenge of the factual basis behind his parole revocation was properly filed as a habeas petition).

[79] *See* Means v. Wainwright, 299 So. 2d 577, 577 (Fla. 1974) (reviewing a habeas petition alleging that the petitioner's due process rights were violated because, among other reasons, he was not allowed to be present during his parole revocation proceedings).

more limited due process rights during parole revocation proceedings. These rights include: (1) written notice of your alleged violations, (2) disclosure (telling you) the evidence against you, (3) an opportunity to be heard (to make arguments in your favor) and present witnesses and evidence, (4) the right to cross-examine witnesses against you unless the hearing officer shows good cause for not allowing this, (5) a neutral hearing body (the people deciding your case are not biased against you), and (6) a written statement explaining the facts they used to make the revocation decision.[80]

(g) Subject Matter Jurisdiction

In Florida, courts will ordinarily find that an indictment or information provides the court with subject matter jurisdiction to prosecute the accused. Non-essential defects in the document will not render a conviction void. An example of a non-essential defect in an information is if the wrong prosecuting attorney signed the document.[81] Therefore, courts generally will not find indictments or informations void or defective unless they completely fail to charge you with an offense at all.[82] If you believe your indictment or information meets this high bar, you may file a **Rule 3.850 motion** to argue that the judgment entered against you is void due to lack of subject matter jurisdiction.

3. How to File a Rule 3.850 Motion

(a) When to File

For most claims, you **must** file your Rule 3.850 motion no later than two years after your judgment or sentence became final.[83] There are four exceptions to this rule, listed in Rule 3.850(b) and described below.

First, there is no time limit for a claim that your sentence exceeded the maximum allowed by law.[84] Some laws create limits on the amount of time you can be sentenced for committing a certain act. You should do research on the specific law that you were sentenced under to see if there is a maximum sentence. If you believe that your sentence is greater than the maximum provided by law, you may file your Rule 3.850 motion at *any* time without worrying about the two-year time limit.

Second, if your claim relies on newly discovered evidence, it might fall within another exception. For this exception to apply, the newly discovered evidence must meet two conditions: (1) at your trial, you or your attorney did not know about the evidence and could not have discovered it through the exercise of "due diligence" (meaning reasonable or expected actions), and (2) the new evidence would probably result in an acquittal or a less severe sentence if you were retried.[85] If you think your newly discovered facts meet these conditions, you must file within two years of when these facts were or could reasonably have been found (as opposed to the normal deadline of two years after your judgment or sentence became final).[86] In one case, a Florida court found that a petitioner qualified for this exception

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[80] *See* Means v. Wainwright, 299 So. 2d 577, 577 (Fla. 1974) (listing the limited rights available in parole revocation hearings).

[81] *See* Carbajal v. State, 75 So. 3d 258, 262–263, 36 Fla. L. Weekly S628 (Fla. 2011) (denying a petitioner's Rule 3.850 motion which argued that the judgment was void because the information filed against him was signed by the incorrect prosecuting attorney).

[82] *See* Stack v. State *ex rel.* LaFratta, 230 So. 2d 15, 16 (Fla. App. 1969) (holding that where the information did not completely fail to state a violation of the law, a habeas petition was not the proper way to challenge it; instead, petitioner should have brought a motion to quash); State *ex rel.* Burton v. Taylor, 148 So. 2d 11, 13 (Fla. 1962) (*per curiam*) (holding that "information adequately informed petitioner of the nature of the accusation against him, the date of its alleged commission and of the particulars surrounding the transaction alleged to be a violation of the statute" such that it "did not 'utterly' or 'wholly fail' to charge the offense"); *Ex parte* Reed, 135 So. 302, 303, 101 Fla. 800, 803–804 (Fla. 1931) (declaring a judgment void when the indictment failed to charge the petitioner with a felony offense).

[83] FLA. R. CRIM. P. 3.850(b) (West 2011).

[84] FLA. R. CRIM. P. 3.850(b) (West 2011).

[85] FLA. R. CRIM. P. 3.850(b)(1) (West 2011); Davis v. State, 26 So. 3d 519, 526, 34 Fla. L. Weekly S605 (Fla. 2009) ("[T]he newly discovered evidence must be of a nature that it would probably produce an acquittal on retrial or yield a less severe sentence.").

[86] FLA. R. CRIM. P. 3.850(b)(1) (West 2011 & Supp. 2023).

when, while incarcerated for a crime, he received an anonymous letter on police letterhead informing him that the police had video evidence proving that the petitioner was not at the scene of the crime when it was committed.[87]

Third, if your claim asserts a violation of a constitutional right that was established after the two-year time period has passed, it might fall within another exception.[88] For this exception to apply, the newly established constitutional right must be "retroactive," which means that the new right also applies in the past. Not all constitutional rights will be retroactive, and it is important to do more research into the law that established the new right. Under this exception, you must instead file your motion no later than two years after when the new right was officially announced to be retroactive.

Finally, if you retained counsel to file your Rule 3.850 motion but your lawyer failed to file the motion on time due to neglect, another exception to the two-year time limit will apply.[89] In these cases, you must instead file your motion no later than two years after the missed filing deadline. This will usually, but not always, be within four years of your judgment and sentence becoming final. For example, if you already qualified for a time extension under one of the previous exceptions, the new deadline will be two years after that extended deadline.[90]

(b) Where to File

You should file your Rule 3.850 motion in the same court where you were originally tried and sentenced.[91] You can find a map of judicial circuits in Florida and corresponding counties on the Florida Courts website.[92]

(c) What to Include in Your Motion

Rule 3.850(c) sets requirements for the contents of your motion (what your motion must include).[93] Your motion must be made under oath, including a signed statement that you have read the motion (or it has been read to you), that you understand the contents of the motion, and that all the facts in the motion are true and correct. Importantly, *you* must be the one to sign the oath statement and the court will not hear your motion if someone else signed the oath statement for you.[94] Your motion also must include a certification stating that you can understand English or that the motion was completely translated for you into a language you understand.[95]

In addition to the required oath statements and certifications, your motion must include the following information, listed in Rule 3.850(c):

(1) The judgment or sentence that you are challenging, including what court issued that judgment or sentence.

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[87] Harris v. State, 370 So. 3d 1040, 1043–1045, 48 Fla. L. Weekly D1929 (Fla. 2023) (finding a petitioner's Rule 3.850 motion was not untimely because his claim relied on newly discovered evidence that he received in an anonymous letter from someone claiming to be a retired police detective with knowledge of withheld video footage showing that the petitioner was not present at the scene of the crime).

[88] FLA. R. CRIM. P. 3.850(b)(2) (West 2011 & Supp. 2023).

[89] FLA. R. CRIM. P. 3.850(b)(3) (West 2011 & Supp. 2023).

[90] *See* Seme v. State, 327 So. 3d 383, 385–386, 46 Fla. L. Weekly D1925 (Fla. 2021) (holding that a defendant, whose judgment and sentence became final in August 2001, filed an untimely motion based on attorney neglect when he, after alleging newly discovered evidence in March 2015, did not file the motion by March 2017).

[91] *See* Baker v. State, 878 So. 2d 1236, 1240, 29 Fla. L. Weekly S413 (Fla. 2004) (*per curiam*) (explaining that Rule 3.850 was created to move habeas proceedings to the sentencing court because those courts are best equipped to adjudicate the rights of people originally tried in their courts).

[92] *Trial Courts – Circuit,* FLORIDA COURTS, *available at* https://www.flcourts.gov/Florida-Courts/Trial-Courts-Circuit (last visited Apr. 17, 2024).

[93] FLA. R. CRIM. P. 3.850(c) (West 2011 & Supp. 2023)

[94] *See* Green v. State, 373 So. 3d 950, 953–954, 48 Fla. L. Weekly D2164 (Fla. Dist. Ct. App. 5th Dist. 2023) (finding a Rule 3.850 facially insufficient when a notary signed the oath statement instead of the defendant).

[95] FLA. R. CRIM. P. 3.850(n) (West 2011 & Supp. 2023). If you are certifying that the motion was translated for you, you must include the name and address of the person who translated the motion for you. That person must also certify that they provided a complete and accurate translation for you.

(2) Whether the judgment or sentence came after a trial or a plea.
(3) Whether you have appealed your judgment or sentence and, if so, what the outcome was.
(4) Whether you have previously filed a Rule 3.850 motion and, if so, how many.
(5) What kind of relief you are asking the court for.
(6) A brief statement of the facts or other conditions you are relying on to support your motion.

When you are constructing your brief statement of the facts you are relying on to support your motion, you should not use what are called "conclusory" statements. Conclusory allegations are ones that make a claim without supporting it with specific evidence. For example, you cannot simply say "my trial counsel was ineffective." You must say "my counsel was ineffective because" and then list what specific facts in your case made your counsel ineffective and why those facts affected the outcome of your case.[96] Further, if you raise an ineffective assistance of counsel claim that is based on testimony your attorney could have gotten from a witness or that is based on your counsel's failure to call a certain witness, you should include the name of the witness and whether they are available to testify.[97]

Rule 3.850(c) also sets out additional requirements for what must be included that might apply to your motion. If you have previously filed a Rule 3.850 motion or motions, you must also provide an explanation of why the claims in your current motion were not raised in those previous motion or motions. If the claim in your motion is based on recanted trial testimony or a newly discovered witness, you must attach an affidavit from that person to your motion. If the claim in your motion is based on another type of newly discovered evidence, you must attach an affidavit from any person whose testimony would be necessary to support your claim. If you do not include one of these affidavits in your motion, you must include an explanation of why you were not able to get the required affidavit.

(d) How to File

Rule 3.850(d) sets the requirements for what form your motion must take.[98] The motion must be in blue or black ink, either typed or in legible printed (not cursive) handwriting. Your motion must be on 8½ by 11-inch paper and may not have margins of less than one inch. Your motion may not be greater than 50 pages unless the court has given you permission to submit a longer motion.

After you have created your Rule 3.850 motion including all the items outlined in Part (B)(3)(c) above, "What to Include in Your Motion," you should send your motion and any supporting documents to the court that originally sentenced you.

(e) What to Expect After You File

After you file your motion, the court will review it, along with the record for your case, following the procedures under Rule 3.850(f). The record for your case will include all the documents and exhibits previously filed in the case and all portions of your case that can be transcribed.[99] When reviewing your motion, the court must assume all the facts in it are true, unless they are clearly false based on the record.[100] During this initial review, the court will look at whether your motion is timely (meaning it is not late according to the time limits listed in Section B(3)(a)). The court will also look at whether your motion is "facially sufficient." Your motion is facially sufficient if it appears to meet the basic

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[96] *See* Kennedy v. State, 547 So. 2d 912, 913, 14 Fla. L. Weekly 277 (Fla. 1999) (*per curiam*) (holding that an ineffective assistance of trial counsel claim cannot only include conclusory allegations, it must include the specific facts that support the claim of deficient performance of counsel and that the defendant was prejudiced by the deficient performance).

[97] *See* Nelson v. State, 875 So. 2d 579, 583, 29 Fla. L. Weekly S277 (Fla. 2004) (holding that a Rule 3.850 motion claiming ineffective assistance of counsel is insufficient if it does not allege whether a witness necessary to establish this claim is available to testify).

[98] FLA. R. CRIM. P. 3.850(d) (West 2011 & Supp. 2023)

[99] FLA. R. CRIM. P. 3.850(f)(4) (West 2011 & Supp. 2023)

[100] *See* Peede v. State, 748 So. 2d 253, 257, 24 Fla. L. Weekly S391 (Fla. 1999) (*per curiam*) (holding that a court's denial of claims raised in a Rule 3.850 motion can only be upheld if the claims are "facially invalid or conclusively refuted by the record").

requirements listed in Section B(1)(a), includes the required content listed in Section B(3)(c), and is in the required form described in B(3)(d).

If your motion is untimely and insufficient on its face, the court will deny your motion with prejudice.[101] If your motion is timely and insufficient on its face, the court must submit an order that gives you sixty days to amend (correct) your motion.[102] If your motion is timely and raises some sufficient claims and some claims that are insufficient, the court also must give you sixty days to amend your motion and fix your insufficient claims.[103] If the court determines that some of your claims are refuted by the record, it will deny those claims without a hearing.[104] If the court denies some or all of your claims because they are refuted by the record, it must also send you a copy of what portion of the record it believes proves that you are not entitled to relief.[105]

If the court determines that all of the claims in your petition are timely and sufficient, it will then order the state to file a reply to your motion within a time limit the court will choose.[106] After the state replies, the court may enter an order that makes a decision on your claims, or it might order an evidentiary hearing. An evidentiary hearing is an opportunity for you (and your attorney, if you have one) and the state's attorney to argue your Rule 3.850 motion before the judge and present any evidence, including testimony. Generally, you are entitled to an evidentiary hearing on your Rule 3.850 motion unless (1) the motion and record conclusively show that you are not entitled to relief or (2) the motion or claim is legally insufficient, meaning once the court applies the law to your claims it determines they fail.[107] If you are granted an evidentiary hearing, the court must allow you to be present at the hearing.[108] At the evidentiary hearing, you will have the "burden of proof "(meaning you have the responsibility of proving your claim is true, as opposed to the state having the responsibility of proving your claim is false).[109] You also have the responsibility of presenting any evidence that supports your claim, meaning the court will not help you come up with evidence that supports your arguments.[110] After your evidentiary hearing, the court will issue a final order that resolves all of the claims you raised in your motion.[111]

(f) Your Rights in Rule 3.850 Proceedings

In Florida, if you have a capital (death) sentence, you have a right to counsel in a Rule 3.851 proceeding.[112] However, if you have a noncapital sentence, you are **not** guaranteed a right to counsel in Rule 3.850 proceedings, but the court has discretion (the choice) to appoint you counsel.[113] When

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[101] FLA. R. CRIM. P. 3.850(f)(1) (West 2011 & Supp. 2023).

[102] FLA. R. CRIM. P. 3.850(f)(2) (West 2011 & Supp. 2023); *see also* Nelson v. State, 875 So. 2d 579, 583–584, 29 Fla. L. Weekly S277 (Fla. 2004) (holding that a court cannot deny a Rule 3.850 motion with prejudice because it failed to allege that a necessary witness was available to testify, instead the court must allow the petitioner an opportunity to amend the motion). If you miss the sixty-day deadline to amend, the court can decide either to give you another opportunity to amend or to deny your motion with prejudice. FLA. R. CRIM. P. 3.850(f)(2) (West 2011 & Supp. 2023).

[103] FLA. R. CRIM. P. 3.850(f)(3) (West 2011 & Supp. 2023). If you miss the 60-day deadline to amend your insufficient claims, the court will dismiss those insufficient claims, but you can appeal this decision once the rest of your claims are decided.

[104] FLA. R. CRIM. P. 3.850(f)(4)–(5) (West 2011 & Supp. 2023).

[105] FLA. R. CRIM. P. 3.850(f)(4)–(5) (West 2011 & Supp. 2023).

[106] FLA. R. CRIM. P. 3.850(f)(6) (West 2011 & Supp. 2023).

[107] Freeman v. State, 761 So. 2d 1055, 1061, 25 Fla. L. Weekly S451 (Fla. 2000) (*per curiam*).

[108] FLA. R. CRIM. P. 3.850(g) (West 2011 & Supp. 2023).

[109] FLA. R. CRIM. P. 3.850(f)(8)(B) (West 2011 & Supp. 2023).

[110] FLA. R. CRIM. P. 3.850(f)(8)(B) (West 2011 & Supp. 2023).

[111] FLA. R. CRIM. P. 3.850(f)(8)(C) (West 2011 & Supp. 2023).

[112] FLA. R. CRIM. P. 3.851(b) (West 2011 & Supp. 2023) (requiring the court to appoint counsel to represent a person with a capital sentence in Rule 3.851 proceedings after their direct appeal was lost and becomes final).

[113] *See* Fla. R. CRIM. P. 3.850(f)(7) (West 2011 & Supp. 2023) (explaining that the right to counsel is available at the court's discretion only); Graham v. State, 372 So. 2d 1363, 1366 (Fla. 1979) (*per curiam*) (holding there is no

considering whether to appoint someone counsel for Rule 3.850 proceedings, the court must consider (1) the adversary nature[114] of the proceeding, (2) the complexity of the proceeding, (3) the complexity of the claims you are bringing in your motion, (4) your apparent level of intelligence and education, (5) the need for an evidentiary hearing, and (6) the need of substantial legal research.[115] Additionally, the Florida Supreme Court has held that if your Rule 3.850 motion presents a meritorious claim (meaning one that is reasonably likely to succeed) and an evidentiary hearing on the claim would be very complex, the court **must** appoint you counsel.[116] So, even though you are not automatically guaranteed the right to counsel, you should still make this request to the court. If you request counsel during your Rule 3.850 proceedings and the court denies your request, this is something you can appeal later on.[117]

You also have the right to appeal a final order dismissing or denying your Rule 3.850 motion.[118] If the court enters a final order denying your motion, it must also include a notice that you have the right to appeal within thirty days.[119] You should file your appeal with the appellate court. So, if you filed your motion in a court in the First District, you should file your appeal to the First District Court of Appeals.

4. How to File a Habeas Petition

(a) When to File

Generally, there is no time period within which you must file a habeas petition. A long period between your incarceration and the filing of a petition does not necessarily bar relief. For example, in one Florida case, the court refused to dismiss a habeas petition filed 27 years after the petitioner's conviction when his trial counsel refused to file an appeal on his behalf, and the trial court judge did not respond to the petitioner's letter asking for help.[120]

However, there is a doctrine called "laches," which may prevent you from filing your habeas petition if you wait too long, so you should still file your petition **as soon as possible**. There is no specific time period where laches will apply. The court will use the doctrine of laches to deny your claim as time-barred (too late) if the court finds that you unreasonably delayed bringing your claim and, because of that delay, the state will be prejudiced in responding.[121] In other words, the court will not hear your habeas petition if it thinks that you were unreasonable in waiting a long time to file your claim and that it would be unfair or difficult for the state to argue against your claim because of the length of time that has passed. The reasoning behind this doctrine is that, as time passes, records may be destroyed, important evidence might be lost, and witnesses may have forgotten what happened or be unavailable to testify. If a very long time has passed since your conviction and sentence became

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constitutional requirement to appoint counsel for a post-conviction motion).

[114] Adversary nature refers to how confrontational the proceeding might be. Our legal system is often called an "adversarial" system because it puts two parties on opposite sides (here, you versus the state) where both sides argue against each other by bringing in different evidence, presenting their own witnesses, and cross-examining the other party's witnesses.

[115] FLA. R. CRIM. P. 3.850(f)(7) (West 2011 & Supp. 2023).

[116] *See* Russo v. Akers, 724 So. 2d 1151, 1153, 23 Fla. L. Weekly S597 (Fla. 1998) (*per curiam*) (holding that the right to due process requires that the court appoint counsel in a Rule 3.850 proceeding if the motion "presents a meritorious claim and a hearing on the motion is potentially so complex that counsel is necessary")

[117] *See* Rogers v. State, 702 So. 2d 607, 609, 23 Fla. L. Weekly D38 (Fla. Dist. Ct. App. 1st Dist. 1997) (holding that the court abused its discretion when it denied a petitioner the right to counsel in his Rule 3.850 proceedings and reversing the denial of his motion).

[118] FLA. R. CRIM. P. 3.850(k) (West 2011 & Supp. 2023).

[119] FLA. R. CRIM. P. 3.850(k) (West 2011 & Supp. 2023).

[120] Bashlor v. Wainwright, 369 So. 2d 695, 698 (Fla. Dist. Ct. App. 1st Dist. 1978) ("We recognize that the passage of 27 years . . . may present serious problems . . . . Yet, in the peculiar circumstances of this case, that interval should not of itself bar Bashlor's claim for relief.").

[121] McCray v. State, 699 So. 2d 1366, 1368, 22 Fla. L. Weekly S627 (Fla. 1997) (holding that the proper application of laches to habeas petitions is "when the delay in bringing a claim for collateral relief has been unreasonable and the state has been prejudiced in responding to the claim" (quoting Anderson v. Singletary, 688 So. 2d 462, 463, 22 Fla. L. Weekly D601 (Fla. Dist. Ct. App. 4th Dist. 1997))).

final, you should explain in your petition why you waited so long to file. This is because Florida courts will apply laches to your claim without the state even raising it as a defense if, from reading your petition alone, it is obvious that the state will be prejudiced and the petition does not include any reason for the "extraordinary" delay.[122]

Habeas petitions alleging ineffective assistance of *appellate* counsel have a separate time limit. Under Rule 9.141 of the Florida Rules of Appellate Procedure, you must file these claims within two years of your judgment and sentence becoming final.[123] However, if you are claiming that your appellate counsel misled you about the results of your appeal, you can allege this fact under oath to get an extension of this time limit of up to four years after your judgment or sentence became final. So, for example, say you want to file a habeas petition claiming ineffective assistance of appellate counsel and over two years (but less than four years) have passed since your sentence became final, and you missed this deadline because your appellate counsel told you that your appeal was still pending when it was actually final. In this case, you can still file if you include the claim that your counsel misled you, along with a signed oath statement.

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.[124]

(b) Where to File

In general, you should file the petition with the clerk of the circuit court of the county in which you are incarcerated.[125] One exception to this rule is if you are alleging ineffective assistance of your appellate counsel. If you are raising an ineffective assistance of appellate counsel claim, you should instead file this in the court where you had your appeal.[126] You can find a map of judicial circuits in Florida and corresponding counties on the Florida Courts website.[127]

If you originally filed with the circuit court, and the circuit court denies your petition, then you may file another petition with the state Supreme Court.[128] If the state Supreme Court has already affirmed your conviction on appeal, you must file your petition directly with the state Supreme Court.[129]

However, if you are raising an issue that should have been raised on direct appeal (like ineffective assistance of counsel), you should file in the court where the original sentence was imposed, **not** the jurisdiction where you are incarcerated.[130]

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[122] McCray v. State, 699 So. 2d 1366, 1368, 22 Fla. L. Weekly S627 (Fla. 1997)) ("[T]he doctrine of laches has been applied to bar a collateral relief proceeding when, from the face of the petition, it is obvious that the state has been manifestly prejudiced and no reason for an extraordinary delay has been provided.").

[123] FLA. R. APP. P. 9.141(d)(5) (West 2017 & Supp. 2022).

[124] FLA. R. CRIM. P. 3.851(d)(3)) (West 2011 & Supp. 2023).

[125] FLA. STAT. ANN. § 79.09 (West 2004); *see also* Bush v. State, 945 So. 2d 1207, 1213, 31 Fla. L. Weekly S879 (Fla. 2006) (*per curiam*) (finding that the Leon County circuit court was the proper venue for a sentence-reducing credit case); Buss v. Reichman, 53 So. 3d 339, 344, 36 Fla. L. Weekly D101 (Fla. Dist. Ct. App. 4th Dist. 2011) (*per curiam*) (stating that when habeas corpus is sought in a circuit court, the papers shall be filed with the clerk of the circuit court of the county in which the incarcerated person is detained).

[126] FLA. R. APP. P. 9.141(d)(3) (West 2017 & Supp. 2022).

[127] *Trial Courts – Circuit,* FLA. CTS. (Mar. 11, 2024), *available at* https://www.flcourts.gov/Florida-Courts/Trial-Courts-Circuit (last visited Mar. 28, 2024).

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

[129] *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).

[130] *See* Collins v. State, 859 So. 2d 1244, 1245, 28 Fla. L. Weekly D2628 (Fla. 2003) (stating that when a petitioner attacks the validity of the conviction by raising issues relating to the trial or to the appropriateness of the plea, the trial court that imposed the sentence has jurisdiction); McLeroy v. State, 704 So. 2d 151, 152, 22 Fla. L. Weekly D2718 (Fla. Dist. Ct. App. 5th Dist. 1997) (denying a petition for writ of habeas corpus alleging

If you file your petition in the incorrect court, your petition may be dismissed. You will still have the opportunity to file your petition again in the proper court, or the court may return the petition to the proper court for a decision.

(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,[131] or a judge may decide that the informal letters from an incarcerated person provide sufficient grounds for issuing the writ.[132]

However, it is always better to comply with statutory requirements if you can. You should base your argument on enough detailed factual allegations to make a case that shows you are entitled to be released.[133] The statutory requirements for your application for a writ include:

(1) The basis on which you are seeking relief.

(a) This could be any of the claims discussed in Subsection B(3)(b) above.

(2) The facts you are relying on for relief,

(3) A request for a writ of habeas corpus, and

(4) An optional argument in support of the petition with citations of authority.[134]

As the petitioner, you bear the "burden of proof." This means that it is your responsibility to prove that your detention is unlawful.[135] You **do not** need to present **all** the evidence of your wrongful

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ineffective assistance of counsel because the incarcerated person improperly filed in the jurisdiction where he was incarcerated rather than where the original sentence was imposed). *But see* Johnson v. State, 3 So. 3d 426, 426, 34 Fla. L. Weekly D388 (Fla. Dist. Ct. App. 4th Dist. 2009) (*per curiam*) (holding that a petition for writ of habeas corpus alleging ineffective assistance of counsel must be filed in the appellate court "to which the appeal was or should have been taken." (quoting FLA. R. APP. P. 9.141(c)(2))).

[131] *See* Jamason v. State, 455 So. 2d 380, 381, 9 Fla. L. Weekly 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).

[132] *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, 289 (Fla. Dist. Ct. App. 1st Dist. 1981) (*per curiam*) (interpreting the appellant's informal letter to the court as a petition for a writ).

[133] *See* Sneed v. Mayo, 66 So. 2d 865, 870 (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, 181 So. 892, 892, 132 Fla. 658, 659 (Fla. 1938) (denying a habeas petition since the incarcerated person did not claim unlawful detention); 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 an incarcerated person's habeas petition because the incarcerated person was not entitled to the relief he sought and he failed to make a prima facie case because 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 an incarcerated person's habeas petition 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) (*per curiam*) (affirming the portion of the trial court's denial of an incarcerated person'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) (*per curiam*) (affirming the trial court's denial of an incarcerated person's habeas petition because the petition did not contain factual allegations to support its conclusions).

[134] FLA. R. CIV. P. 1.630(b) (West 2004 & Supp. 2022).

[135] Coleman v. State, 159 So. 504, 505, 118 Fla. 201, 203 (Fla. 1935) (stating that in habeas corpus proceedings, the burden is on the petitioner to show that he is unlawfully restrained of his liberty); Matera v. Buchanan, 192 So. 2d 18, 20 (Fla. Dist. Ct. App. 3rd Dist. 1966) (*per curiam*) ("The applicant for a writ of habeas corpus must first show by evidence or affidavit probable cause to believe that his restraint is illegal if a writ is to issue."); Kohler v. Sandstrom, 305 So. 2d 76, 77 (Fla. Dist. Ct. App. 3rd Dist. 1974) (*per curiam*) ("In a habeas corpus proceeding contesting the validity and propriety of an extradition . . . the accused has the burden to overcome by competent proof the prima facie case made by the extradition warrant.")

detention but do need to show probable cause that it is wrongful with your application, through evidence or an affidavit.[136] You should attach to your petition copies of the warrant, process, or proceeding that is causing you to be detained.[137] You should also state that you have exhausted all the administrative remedies available to you.[138]

(d) How to File

After you have created your petition for habeas corpus, including all the items outlined in Subsection (B)(4)(c) above, "What to Include in Your Petition," you should send your petition and any supporting documents to the court specified above in Subsection (B)(3)(b), "Where to File," You are **not** required to pay a filing fee or to submit an "oath of indigency" (a signed document confirming that you are unable to pay the fees).[139]

(e) What to Expect After You File

In Florida, the court must issue a writ of habeas corpus if your petition states allegations (claims or assertions of wrongdoings), which, if true, would entitle you to release.[140] When reviewing your petition, the court must assume that the allegations in your petition are true.[141]

When the court issues the writ, it sets a date for the person who has you in custody to return you to the court.[142] The respondent (whoever has you in custody) may provide a response, also called a "return."[143] 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.[144]

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[136] *See* Johnson v. Lindsey, 103 So. 419, 421, 89 Fla. 143, 148 (Fla. 1925) (stating that a habeas petition does not need to include all of the evidence necessary to establish that the detention is wrongful); Matera v. Buchanan, 192 So. 2d 18, 20 (Fla. Dist. Ct. App. 3rd Dist. 1966) (*per curiam*) ("The applicant for a writ of habeas corpus must first show by evidence or affidavit probable cause to believe that his restraint is illegal if a writ is to issue.").

[137] *See* Cooper v. Lipscomb, 122 So. 5, 5, 97 Fla. 668, 670 (Fla. 1929) (stating that, where the petitioner was arrested 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 (Fla. 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 D253 (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) (*per curiam*) (finding a habeas petition insufficient because it did not include documentary evidence).

[138] *See* Moore v. Dugger, 613 So. 2d 571, 572, 18 Fla. L. Weekly D499 (Fla. Dist. Ct. App. 1st Dist. 1993) (finding that a petition for writ was insufficient because it did not allege that the petitioner had exhausted administrative remedies).

[139] Bocharski v. Cir. Ct. of the Second Jud. Cir., 552 So. 2d 946, 946, 14 Fla. L. Weekly 2601 (Fla. Dist. Ct. App. 1st Dist. 1989) (*per curiam*) (holding that a petitioner is not required to either pay a filing fee or submit an oath of indigency before his petition for writ of habeas corpus will be processed); Bradley v. Sturgis, 541 So. 2d 766, 767, 14 Fla. L. Weekly 936 (Fla. Dist. Ct. App. 5th Dist. 1989) (*per curiam*) (ordering a circuit court clerk to deliver to the assigned judge all petitions for writs of habeas corpus without any delay and at no cost to the petitioner).

[140] *See* Roy v. Dugger, 592 So. 2d 1235, 1236, 17 Fla. L. Weekly D386 (Fla. Dist. Ct. App. 1st Dist. 1992) (*per curiam*) (reversing summary denial of the lower court on the ground that if the incarcerated person's allegations were true, they could establish that the department had failed to comply with due process, which could establish a violation of due process or the protection against cruel and unusual punishment).

[141] Guess v. Barton, 599 So. 2d 770, 771, 17 Fla. L. Weekly D1427 (Fla. Dist. Ct. App. 1st Dist. 1992) (reversing trial court's summary denial of petitioning incarcerated person's habeas corpus claim that respondent prison officials inflicted cruel and unusual punishment because, assuming the truth of his allegations, he adequately stated a claim for relief).

[142] FLA. STAT. ANN. § 79.04(2) (West 2004).

[143] FLA. R. APP. P. 9.100(j) (West 2017 & Supp. 2022).

[144] FLA. STAT. ANN. § 79.05(1) (West 2004).

You have a right to reply to a response within thirty days of receiving it.[145] 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.[146] In your reply, you may, if necessary, state other important material facts that are not already stated in your petition.[147]

The court may decide to hold a hearing to evaluate the facts you allege in your petition. You have the right to a hearing if everything in your petition is true and you would be entitled to a writ.[148] In Florida, hearings are informal, and if a witness is unable to attend, he may provide an affidavit instead.[149] This hearing is usually held after a return is filed, but the court may also decide to hold a hearing before issuing the writ.[150]

Once the hearing is completed, the court may release you, remand (return) you to custody, or release you on bail.[151] Though there are no fees to apply for a writ, you may be ordered to pay the cost of the proceedings if the writ is not granted.[152]

(f) Your Rights in Habeas Proceedings

The U.S. Supreme Court has held that you do not have a federal constitutional right to counsel for state habeas corpus proceedings.[153] In Florida, you do not have a right to appointed counsel (a lawyer assigned by the court) in a habeas proceeding.[154] The court can appoint a public defender to represent you, but there is no requirement that one be appointed to you.[155] The only situation in which you are entitled to be provided with an attorney for habeas proceedings is if you are applying for a writ because you are about to be extradited.[156]

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[145] FLA. R. APP. P. 9.100(k) (West 2017 & Supp. 2022).

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

[147] *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 (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) (*per curiam*) (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").

[148] *See* Seibert v. Dugger, 595 So. 2d 1083, 1084, 17 Fla. L. Weekly D784 (Fla. Dist. Ct. App. 1st Dist. 1992) (finding that dismissal of a petition for writ of habeas corpus without a hearing is an error when the incarcerated person makes specific allegations which, if true, would establish that the department of corrections had failed to comply with its own rules).

[149] Turiano v. Butterworth, 416 So. 2d 1261, 1263 (Fla. Dist. Ct. App. 4th Dist. 1982) (stating that hearings are informal and denying petitioner's claim that the State needed to produce a witness, relying instead on the witness' affidavit).

[150] *See* Baptiste v. State, 289 So. 3d 561, 562, 45 Fla. L. Weekly D273 (Fla. Dist. Ct. App. 2nd 2020) (holding that a defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief; or (2) the motion or a particular claim is legally insufficient); Turiano v. Butterworth, 416 So. 2d 1261, 1263 (Fla. Dist. Ct. App. 4th Dist. 1982) (finding that the trial court did not make a mistake in holding an evidentiary hearing before issuing a writ of habeas corpus).

[151] FLA. STAT. ANN. § 79.08 (West 2004).

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

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

[154] *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" (quoting State v. Weeks, 166 So. 2d 892, 896 (Fla. 1964))).

[155] *See* Graham v. Vann, 394 So. 2d 176, 178 (Fla. Dist. Ct. App. 1st Dist. 1981) (*per curiam*) (stating that "the court possesses the authority to appoint counsel to represent the indigent appellees").

[156] *See* Bentzel v. State, 585 So. 2d 1118, 1120, 16 Fla. L. Weekly D2410 (Fla. Dist. Ct. App. 1st Dist. 1991) (finding that an incarcerated person has a statutory right to counsel at a habeas corpus proceeding challenging extradition).

If your petition for a writ of habeas corpus is denied, you can appeal to the state's highest court. 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.[157] 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 a New York state court.

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.

The New York State Legislature has restricted the use of the writ of habeas corpus. You may file a habeas petition to challenge your pre-trial detention. You may also file a habeas petition after your conviction (for example, if your conviction is based on an unconstitutional statute).

If you want to challenge your conviction or the sentence itself (post-conviction relief), you must file an Article 440 motion, not a petition for a writ of habeas corpus.[158] If you want to challenge the Department of Corrections and Community Services' (DOCCS) conduct during your incarceration, you should generally file an Article 78 petition.[159]

The following sections will further explain when and in what situations you should file a habeas petition, an Article 440 motion, or an Article 78 petition. You can also find detailed information on filing an Article 440 motion in *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence." When deciding which procedure to follow, you should be aware that there is a *statute of limitations* for filing an Article 78 petition. You must file your petition within four months after the decision or determination that you are challenging becomes final.[160]

(a) Custody

If you have been released on parole, probation, conditional release, or ROR, or if you are free on bail, a New York court **cannot** grant a writ of habeas corpus.[161] This is because, in New York, you must be under "actual or physical restraint" to be entitled to a writ of habeas corpus.[162] In those situations, you are not considered to be "restrained of your liberty"[163] and, therefore, are not considered to be in custody.[164]

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

[158] *See* N.Y. CRIM. PROC. LAW § 440 (McKinney 2023).

[159] *See* N.Y. C.P.L.R §§ 7801–7806 (McKinney 2008).

[160] N.Y. C.P.L.R. § 217(1) (McKinney 2019); *see, e.g.*, Soto v. N.Y. State Bd. of Parole, 107 A.D.2d 693, 696, 484 N.Y.S.2d 49, 51 (2d Dept.) (dismissing Article 78 petition that was filed three years after the parole revocation hearing because it violated the four-month statute of limitations for Article 78 proceedings), *aff'd*, 66 N.Y.2d 817, 489 N.E.2d 250, 498 N.Y.S.2d 363 (1985).

[161] *See* People *ex rel.* Doyle v. Fischer, 159 A.D.2d 208, 208, 551 N.Y.S.2d 830, 830 (1st Dept. 1990) (dismissing a petition for a writ of habeas corpus as moot because petitioner was released on his own recognizance); Bayless v. Wandel, 119 Misc. 2d 82, 83, 462 N.Y.S.2d 396, 397 (Sup. Ct. Fulton County 1983) ("A person at liberty on bail is not so restrained of his liberty as to be entitled to a Writ.").

[162] Bayless v. Wandel, 119 Misc. 2d 82, 84, 462 N.Y.S.2d 396, 397 (Sup. Ct. Fulton County 1983).

[163] *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) (dismissing petition because relator was on probation); People *ex rel.* Birt v. Grenis, 76 A.D.2d 872, 872, 428 N.Y.S.2d 494, 494 (2d Dept. 1980) (dismissing petition because petitioner was on conditional release).

[164] 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) (dismissing petition because petitioner was not in physical custody).

(b) Immediate Release

If you are in a situation where you could not be immediately released if your petition was successful, then you would not be eligible for habeas relief.[165] For instance, you could not be immediately released if you are serving time for more than one conviction or if you are being held for two separate, unrelated charges. You may not petition for a writ of habeas corpus to challenge only one conviction, sentence, or charge because, even if your petition is successful, you would remain imprisoned for the other convictions or charges.[166] Another situation where you could not be immediately released is if you are eligible for conditional release, but the conditions have not been met.[167]

(c) Incarceration in New York

To file a habeas petition in New York, you must be incarcerated in a New York state prison.

(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. In general, you cannot raise any claim in a state habeas petition that could be raised in an Article 440 motion, even if your Article 440 motion is unsuccessful.[168] Some of the claims covered by Article 440 include insufficient evidence to support your indictment,[169] insufficiency of documents used to commit you to prison,[170] or an unconstitutional application of the law at your trial.[171] This is not a full list of claims that could be covered by Article 440.[172] Part C(2) below, will help you to figure out when you should file an Article 440 motion, a petition for habeas corpus, or an Article 78 petition.

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[165] *See* People *ex rel.* Porter v. Napoli, 56 A.D.3d 830, 831, 867 N.Y.S.2d 733, 734 (3d Dept. 2008) ("Habeas corpus relief is available only if an inmate can demonstrate that he or she is entitled to immediate release from prison.").

[166] *See* People *ex rel.* VanSteenburg v. Wasser, 69 A.D.3d 1135, 1136, 893 N.Y.S.2d 379, 380 (3d Dept. 2010) (affirming dismissal of habeas petition where petitioner was convicted of other offenses after his petition was dismissed); People *ex rel.* Brown v. N.Y. State Div. of Parole, 70 N.Y.2d 391, 398, 516 N.E.2d 194, 197, 521 N.Y.S.2d 657, 660 (1987).

[167] People *ex rel.* Travis v. Coombe, 219 A.D.2d 881, 881, 632 N.Y.S.2d 340, 340 (4th Dept. 1995) (dismissing petition where petitioner was entitled to conditional release upon the securing of a residence acceptable to the Division of Parole, when no such residence was available).

[168] *See* People *ex rel.* Rudolph v. Lilley, 215 A.D.3d 1196, 1197, 186 N.Y.S.3d 743, leave to appeal denied, 40 N.Y.3d 907, 222 N.E.3d 536 (2023) ("[C]ase law makes clear that 'habeas corpus is not the appropriate remedy for [] claims that could have been raised on direct appeal or in the context of [an] article 440 motion . . . .'" (quoting People ex rel. Thompson v. Keyser, 173 A.D.3d 1586, 1586, 101 N.Y.S.3d 670 (3d Dept. 2019))); 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 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 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 is not available where the issue had already been decided in an earlier Article 440 motion, but suggesting that the incarcerated person could bring another Article 440 motion seeking the same relief).

[169] *See* People *ex rel.* Rivas v. Walsh, 69 A.D.3d 1236, 1236, 893 N.Y.S.2d 388, 389 (2010) (dismissing habeas claim that an indictment was based upon legally insufficient evidence because it could have been raised in an Article 440 motion); *see also* People *ex rel.* Brown v. Hanslmaier, 209 A.D.2d 801, 802 N.Y.S.2d 597, 597 (3d Dept. 1994).

[170] *See* Medina v. Senkowski, 242 A.D.2d 762, 762 N.Y.S.2d 856,856 (3d Dept. 1997) (dismissing habeas corpus petition alleging that documents committing petitioner to prison were insufficient because the claim could have been raised on direct appeal or by an Article 440 motion).

[171] *See* People *ex rel.* Best v. Kuhlmann, 151 A.D.2d 937, 938 N.Y.S.2d 212 (3d Dept. 1989) (dismissing habeas corpus petition alleging that an unconstitutional application of the law because it "could readily have been made on direct appeal or pursuant to CPL article 440 in the court of conviction").

[172] *See* N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2023).

However, if there are exceptional circumstances of "practicality and necessity" a court *might* consider your petition.[173] 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.

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." 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. Claims You Can Raise in Your Habeas Petition

(a) Extradition

In New York, you cannot be held in custody for more than ninety days before you are extradited. After the first thirty days of custody, the state may request an extension for sixty additional days of custody.[174] So, you can file a petition for a writ of habeas corpus in two situations:

(1) If you have been held for more than thirty days **and** the state of New York has not applied for an extension; or
(2) If you have been held in custody in New York for over ninety days.[175]

This ninety-day maximum applies **only** to the time that you may be held in custody awaiting extradition. If the ninety-day period ends without the initiation of extradition proceedings and you have been released from custody, you may still be returned to the demanding state in the future.[176]

Note that you can "waive" (give up) the right to the issuance of a rendition warrant against you. If you do so, the extradition process will not happen and you should willingly return to the demanding state. This also means that you give up the right to file a habeas petition to challenge the legality of the warrant.[177]

(b) Bail

You have grounds for a habeas petition if the court improperly set your bail or denied you bail.[178] The court may have acted improperly if it did not follow New York's statutory guidelines, if it violated constitutional provisions forbidding excessive bail (for example, by setting bail too high),[179] or if it denied you bail arbitrarily (for example, by not giving reasons for denying bail).[180]

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[173] *See* People *ex rel.* Gordon v. Heath, 113 A.D.3d 706, 978 N.Y.S.2d 694, 695 (2d Dept. 2014) ("Departure from traditional orderly proceedings, such as appeal, should be permitted only when dictated . . . by reason of practicality and necessity." (quoting 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))).

[174] *See* N.Y. CRIM. PROC. LAW §§ 570.36, 570.40 (McKinney 2009).

[175] *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).

[176] *See, e.g.*, People *ex rel.* Swanston v. Pelkey, 25 A.D.3d 900, 901, 806 N.Y.S.2d 440, 441 (2006); Jones v. People, 94 Misc. 2d 304, 305–306 N.Y.S.2d 525, 525 (Cnty. Ct. Rockland County 1978).

[177] *See* N.Y. CRIM. PROC. LAW § 570.50 (McKinney 2009); *see also* People v. Luciano, 66 Misc. 3d 884, 885, 119 N.Y.S.2d 714 (Crim. Ct. Queens County 2020) ("[A]n individual may waive those rights, and voluntarily agree to return to the state seeking extradition.").

[178] N.Y. CP.L.R. § 7010(b) (McKinney 2013).

[179] *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, 209–210 (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); 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 because the lower court's bail determination was reasonable and did not violate constitutional or statutory standards).

[180] People *ex rel.* Hunt v. Warden of Rikers Island Corr. Facility, 161 A.D.2d 475, 476, 555 N.Y.S.2d 742, 743 (1st Dept. 1990) (dismissing habeas petition because the lower court did not abuse discretion in denial of bail); People *ex rel.* Masselli v. Levy, 126 A.D.2d 501, 503, 511 N.Y.S.2d 236, 238 (1987) (1st Dept. 1987) (finding that

New York Criminal Procedure Law § 510.30(1) lists the factors that a court must consider to determine the amount, if any, of your bail.[181] If a court bases its bail determination on a factor that is not included in the statute, or ignores one or more of the factors, you may challenge the court's action by petitioning for habeas corpus.[182] For instance, a court cannot deny bail without a hearing solely on the basis that you disobeyed a court order[183] or condition your bail on a medical test result.[184]

Normally, when deciding whether to grant a habeas corpus petition, the court can only review the record that was before the court that set your bail. In other words, the court deciding on your petition can only look at the facts and evidence that were presented at your bail hearing. It cannot consider new evidence that the bail-fixing court did not see.[185] 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.[186] 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.[187]

(c) Delay

You may petition for a writ of habeas corpus if you were arrested without a warrant and have been detained for longer than twenty-four hours without being arraigned. An "arraignment" is when you are called before the court to answer your charge. If you are held in custody for more than twenty-four hours without being called before the court, a court will presume that your custody is unnecessary unless the government has provided an acceptable explanation for the delay.[188]

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.[189] If you have been arrested for a felony, the District Attorney's office has five days (not

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the denial of bail was "arbitrary and an abuse of discretion").

[181] These factors include 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(1) (McKinney 2009); *see also* People v. Portoreal, 66 Misc. 3d 497, 508 (Sup. Ct. Bronx County 2019) (holding that a court may consider factors outside those listed the statute, including community and family ties, employment status, and all information relevant to determining bail).

[182] *See* People *ex rel.* Bryce v. Infante, 144 A.D.2d 898, 899, 535 N.Y.S.2d 215, 216 (3d Dept. 1988) (overturning a court's denial of bail based on defendant's suicidal tendencies); People *ex rel.* Ryan v. Infante, 108 A.D.2d 987, 988 n.1, 485 N.Y.S.2d 852, 853–854 n.1 (3d Dept. 1985) (finding that a judge cannot increase bail to force a defendant to locate an absent codefendant, unless the defendant has assisted the codefendant 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) (holding that bail cannot be denied solely to protect the community from possible future criminal conduct by the defendant).

[183] 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 issued without conducting a hearing and on the ground that the defendant disobeyed a court order to testify before the grand jury).

[184] People *ex rel.* Glass v. McGreevy, 134 Misc. 2d 1085, 1086, 514 N.Y.S.2d 622, 623 (Sup. Ct. Rensselaer County 1987) (holding that a negative AIDS test cannot be made a condition for bail).

[185] *See* People *ex rel.* Rosenthal v. Wolfson, 48 N.Y.2d 230, 231–233, 397 N.E.2d 745, 745–746, 422 N.Y.S.2d 55, 55–56 (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).

[186] N.Y. C.P.L.R. § 7010(b) (McKinney 2013) ("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."); *see also* People *ex rel.* Mordkofsky v. Stancari, 93 A.D.2d 826, 827, 460 N.Y.S.2d 830, 832 (2d Dept. 1983).

[187] *See, e.g.*, Kassebaum v. al-Rahman, 212 A.D.2d 482, 483, 624 N.Y.S.2d 573, 573 (1st Dept. 1995) (denying habeas petition challenging bail amount because petitioner had already been tried and convicted).

[188] *See* People *ex rel.* Maxian v. Brown, 77 N.Y.2d 422, 426–427, 570 N.E.2d 223, 225, 568 N.Y.S.2d 575, 577 (1991) (granting habeas because an unexplained delay of arraignment of more than 24 hours violates N.Y. CRIM. PROC. LAW 140.20(1)).

[189] *See* N.Y. CRIM. PROC. LAW § 170.70 (McKinney 2007); People *ex rel.* Alvarez v. Warden, Bronx House of Det., 178 Misc. 2d 254, 256, 680 N.Y.S.2d 153, 154–155 (Sup. Ct. Bronx County 1998) (granting a writ of habeas corpus

counting weekends or holidays) either to file an indictment against you by a grand jury vote or to file an information.[190]

However, even if these requirements are not met, your application for habeas relief may still be denied if: (1) the delay is a result of your own actions;[191] (2) the District Attorney already filed a certification that an indictment has been voted;[192] (3) a grand jury filed an indictment or a direction to file an information;[193] or (4) a court finds good cause for the delay.[194]

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.[195] This statute applies to people who are incarcerated and have an information or indictment filed against them but have not yet gone to trial. 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 for longer than ninety days before going to trial. A defendant charged with a misdemeanor, where the punishment for the misdemeanor is longer than three months of incarceration, cannot be held in custody for longer than thirty days before going to trial. A defendant charged with a misdemeanor where the punishment for the misdemeanor is less than three months of incarceration cannot be held for longer than fifteen days before going to trial. Finally, a defendant charged with only a violation cannot be held in custody before going to trial for longer than five days.[196]

Note that you must first file a motion according to N.Y. Crim. Proc. Law § 30.30(2) for release in order to have a habeas claim to challenge the violation of your right to a speedy trial.[197] 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."[198]

Once your trial has started, you cannot bring a habeas corpus petition for delay. Instead, you can raise the issue on direct appeal.[199]

(d) 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. The continued detainment may be due to clerical error, office delay, or miscalculation of jail or prison time. You can only bring the petition, however, if you are actually entitled to immediate

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because an information was not filed within 5 days); *see also* People *ex rel.* Neufeld v. McMickens, 70 N.Y.2d 763, 765, 514 N.E.2d 1368, 1368, 520 N.Y.S.2d 744, 744 (1987) (holding that the 5-day period includes the 1st day of custody unless the 1st day preceded arraignment or was a Sunday).

190 *See* N.Y. CRIM. PROC. LAW § 180.80 (McKinney 2007).

191 *See* People v. Moss, 188 A.D.2d 620, 621, 591 N.Y.S.2d 499, 500 (1992).

192 *See* People *ex rel.* Arogyaswamy v. Brann, 68 Misc. 3d 738, 741, 126 N.Y.S.3d 341, 344 (Sup. Ct. Queens County 2020).

193 *See* People *ex rel.* Arogyaswamy v. Brann, 68 Misc. 3d 738, 741, 126 N.Y.S.3d 341, 344 (Sup. Ct. Queens County 2020).

194 *See* People *ex rel.* Kaufmann on Behalf of Marongiu v. Brann, 69 Misc. 3d 506, 528, 129 N.Y.S.3d 707, 723 (Sup. Ct. N.Y. County 2020).

195 N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2018).

196 People *ex rel.* Neufeld v. McMickens, 70 N.Y.2d 763, 765, 514 N.E.2d 1368, 1368, 520 N.Y.S.2d 744, 744 (1987) (holding that the 5-day period includes the first day of custody unless the first day preceded arraignment or was a Sunday).

197 People *ex rel.* Bullock v. Barry, No. 02-403954, 2002 N.Y. Misc. LEXIS 1525, at *4–5 (Sup. Ct. N.Y. County Nov. 13, 2002) (*unpublished*).

198 N.Y. CRIM. PROC. LAW § 30.30(2) (McKinney 2018).

199 *See* Kassebaum v. Al-Rahman, 212 A.D.2d 482, 483, 624 N.Y.S.2d 573, 573 (1st Dept. 1995) (affirming the denial of habeas petition on speedy trial grounds because petition was brought after trial had commenced); *see also* People *ex rel.* McDonald v. Warden, N.Y.C. House of Det. for Men 34 N.Y.2d 554, 554, 310 N.E.2d 537, 537, 354 N.Y.S.2d 939, 939 (1974) (finding that once a criminal action is brought to trial, a habeas petition based on denial of right to speedy trial should be denied).

release if your petition is successful. So, for example, if the relief you are seeking is a recalculation of your jail time, or if the court decides that recalculation of your jail time is the appropriate remedy, you would not be entitled to immediate release. In this case, an Article 78 motion is the correct procedure to follow.[200]

Unless one of the administrative mistakes listed above has been committed, you may **not** file for a writ of habeas corpus to challenge your sentence. For instance, if you are serving time for several convictions, you cannot petition for a writ of habeas corpus to challenge only one of these convictions or sentences, since you would remain imprisoned under the other convictions. This is explained more in Part A(3)(c) above.

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.[201] Instead, you must raise these issues on direct appeal or by filing 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 right.[202] Note, however, that these are old cases and that courts have become increasingly reluctant to review habeas corpus petitions if other procedures are available. Similarly, courts have been 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, like appeals, where "practicality and necessity" require doing so.[203]

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[200] *See* People *ex rel.* Hampton v. Scully, 166 A.D.2d 734, 734–735, 561 N.Y.S.2d 482, 483 (2d Dept. 1990) (denying habeas petitions because the recalculation of the sentence would not result in immediate release, and holding that an Article 78 proceeding would be more appropriate to force a recalculation of the sentence); *see also* 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 recalculate jail time).

[201] *See* 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 only to resentencing, not immediate release); *see also* People *ex rel.* Sims v. Senkowski, 226 A.D.2d 800, 801, 640 N.Y.S.2d 820, 820–821 (3d Dept. 1996) (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). *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) (granting habeas corpus where defendant was not informed, before his guilty plea, that his previous conviction would increase his punishment, but remanding the case to arraignment rather than freeing the defendant).

[202] *See* Roberts v. Co. Ct. of Wyoming Co., 39 A.D.2d 246, 253, 333 N.Y.S.2d 882, 890 (4th Dept. 1972) ("[W]hile some form of alternative relief, such as *coram nobis* [an order changing a judgment based on the discovery of a fundamental error], 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."); *see also* 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 appropriate to test whether there has been a deprivation of a fundamental constitutional or statutory right in a criminal prosecution, such as right to a trial by jury). For a list of constitutional and statutory rights in criminal cases, see Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence." For more information on other forms of alternative relief, such as Article 440 motions and *coram nobis*, see Chapter 20 of the *JLM*, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

[203] 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 providing relief for fundamental constitutional or statutory rights absent "practicality and necessity"); People *ex rel.* Hall v. LeFevre, 92 A.D.2d 956, 957, 460 N.Y.S.2d 640, 641 (3d Dept. 1983) ("[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.* Russell v. LeFevre, 59 A.D.2d 588, 588, 397 N.Y.S.2d 27, 28 (3d Dept. 1977) (dismissing a habeas corpus petition alleging violation of a constitutional right because an Article 440 motion, not habeas, is the proper remedy for attacking a conviction); 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 cannot be used to collaterally attack a conviction on constitutional grounds and that the facts of the case did not compel departure from traditional orderly proceedings such as appeal).

Even so, the New York Supreme Court has decided that a habeas petition is appropriate to challenge "unalterable conditions of incarceration" that would expose you to a serious risk of death or illness caused by the COVID-19 virus.[204] In this circumstance, there can be no measures that could protect you from this risk and the only remedy should be your immediate release.[205]

To successfully file a petition for habeas corpus on a claim of increased exposure to the COVID-19 virus, you must have a strong claim that the conditions of your incarceration violate your Eighth Amendment right against cruel, unusual, and excessive punishment. You must be able to demonstrate that (1) you are "incarcerated under conditions posing a substantial risk of serious harm" **and** (2) prison officials disregarded/ignored the risks posed by COVID-19 or displayed deliberate indifference by failing to protect you from those risks.[206]

If you are not able to demonstrate one of these two elements, your petition will likely be denied. For example, the New York Supreme Court has denied a petition alleging that the petitioner's age, race, and underlying medical conditions left them at high risk of serious illness and death if infected with COVID-19. First, the Court determined that the petitioner "arguably" demonstrated that the conditions of their incarceration presented a substantial risk of harm due to the contagiousness of the disease and the close contact between individuals in prison.[207] But for the second element, the Court found that the petitioner could not demonstrate that prison officials were "deliberately indifferent," noting instead that the facility had taken steps to ensure safety by "suspending inmate visitation, directing that nonessential personnel remain home, [and] implementing social distancing and enhanced cleaning procedures."[208]

(iii) *New or Void Law*

Another argument you may raise on a petition for habeas corpus is that the statute under which you were prosecuted is unconstitutional,[209] which, if proven, would entitle you to immediate release. That said, it is very rare for courts to declare a statute unconstitutional. A New York court may also grant a writ of habeas corpus if the law has changed, such that the law under which you were convicted has been declared void.

Finally, a court may also 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** you had completed all appeals of your conviction. For example, in *People* ex rel. *Rodriguez v. Harris*, the petitioner filed for a writ of habeas corpus alleging a violation of his right to counsel based on an earlier Court of Appeals decision, *People v. Rogers*.[210] The *Rodriguez* court upheld the lower court's dismissal of the habeas petition, ruling that the *Rogers* decision could not be

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[204] People *ex rel.* Tse v. Barometre, 188 A.D.3d 714, 715 (2d Dept. 2020) (ruling that the grave risk of death or serious illness created by the COVID-19 virus in an incarceration facility is an 8th Amendment violation that is cognizable in habeas corpus).

[205] People *ex rel.* Tse v. Barometre, 188 A.D.3d 714, 715 (2d Dept. 2020) (finding that the only remedy to correct the incarcerated person's illegal detention would be their immediate release).

[206] *See* People *ex rel.* Figueroa v. Keyser, 193 A.D.3d 1148, 1150 (3d Dept. 2021) (finding that both elements of the 8th Amendment claim must be satisfied); People *ex rel.* Carroll v Keyser, 184 A.D.3d 189, 193–194 (3d Dept. 2020) (finding that the incarcerated person's punishment was not grossly disproportionate to his offense and thus did not violate the 8th Amendment).

[207] People *ex rel.* Carroll v. Keyser, 184 A.D.3d 189, 194 (3d Dept. 2020).

[208] People *ex rel.* Carroll v. Keyser, 184 A.D.3d 189, 194 (3d Dept. 2020); *see also* People *ex rel.* Figueroa v Keyser, 193 A.D.3d 1148, 1150 (3d Dept. 2021) (denying petitioner's application for a writ of habeas corpus because petitioner did not demonstrate that "prison officials failed to protect him [by] exhibiting 'deliberate indifference'" to the risk of COVID-19).

[209] *See* People *ex rel.* Haines v. Hunt, 229 A.D. 419, 420–422, 242 N.Y.S. 105, 107–108 (3d Dept. 1930) (holding that habeas corpus is the proper remedy for a relator convicted under an unconstitutional statute).

[210] People *ex rel.* Rodriguez v. Harris, 84 A.D.2d 769, 770, 443 N.Y.S.2d 784, 785 (2d Dept. 1981); People v. Rogers, 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979) (prohibiting police interrogation of a defendant without counsel on matters related or unrelated to pending charges for which defendant is already represented by counsel).

retroactively applied to the petitioner's criminal case.[211] The petition was denied on narrow grounds, as the Court of Appeals had previously held in *People v. Pepper* that, in cases involving a defendant's pretrial right to counsel, retroactive application of a change in case law is limited to those cases that are still under review at the time of the change in law.[212]

(e) Ineffective Counsel

In New York, you **cannot** use habeas corpus proceedings to claim ineffective assistance of counsel.[213] This is because the remedy would be a new trial, not release from custody. The appropriate procedure would be to file an Article 440 motion.[214] For more information about claims of ineffective assistance of counsel, see *JLM*, Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel."

(f) New Evidence

In New York, if you wish to raise the issue of new evidence, you must file an Article 440 motion.[215] For a court to set aside a verdict on an Article 440 motion, the new evidence must meet six criteria. The evidence must:

(1) probably change the result if a new trial were held;
(2) have been discovered **after** trial;
(3) have been undiscoverable prior to or during trial, even with reasonable effort;
(4) be material to the issue;
(5) not be merely cumulative; and
(6) not merely impeach or contradict evidence given at trial.[216]

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.

(a) Unreasonable Delay

A court may grant a writ of habeas corpus if there has been an "unreasonable delay" in the resolution of your Article 440 motion[217] or if your appeal has been pending for an unusually long time.[218]

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[211] People *ex rel.* Rodriguez v. Harris, 84 A.D.2d 769, 770, 443 N.Y.S.2d 784, 785 (2d Dept. 1981).

[212] People v. Pepper, 53 N.Y.2d 213, 221, 423 N.E.2d 366, 369, 440 N.Y.S.2d 889, 892 (1981); *see also* People *ex rel.* Gallo v. Warden of Greenhaven State Prison, 32 A.D.2d 1051, 1052, 303 N.Y.S.2d 752, 753 (2d Dept. 1969) (finding that a habeas corpus proceeding was proper for reviewing propriety of imposition of a consecutive sentence where the petition was based upon decisions rendered after petitioner's appeal).

[213] Application of Jones, 34 Misc. 2d 564, 565, 227 N.Y.S.2d 1002, 1004 (Sup. Ct. N.Y. County 1962) (denying a habeas petition because habeas is "not the proper remedy for testing the requirements of due process or whether relator was properly represented by assigned counsel"), *aff'd sub nom.*, People *ex rel.* Jones v. Warden, Manhattan House of Det. for Men, 16 A.D.2d 922, 230 N.Y.S.2d 667 (1st Dept. 1962).

[214] *See* People *ex rel.* Hall v. LeFevre, 60 N.Y.2d 579, 454 N.E.2d 121, 467 N.Y.S.2d 40 (1983) (holding that habeas corpus is not an appropriate remedy for claims of inadequacy of counsel); People *ex rel.* Thomas v. LeFevre, 102 A.D.2d 925, 925, 477 N.Y.S.2d 508, 509 (4th Dept. 1984) (dismissing petitioner's claims about ineffective counsel because they could have been raised on direct appeal or by an Article 440 motion). For more information on filing Article 440.10 motions, see Chapter 20 of the *JLM*, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

[215] N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2023).

[216] *See* People v. Taylor, 246 A.D.2d 410, 411, 668 N.Y.S.2d 583, 584 (1st Dept. 1998) (vacating a defendant's robbery conviction under N.Y. CRIM. PROC. LAW § 440.10(1)(g)).

[217] *See* People *ex rel.* Anderson v. Warden, N.Y.C. 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.").

[218] *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, since the petitioner's appeal had been pending for more than four years).

In addition, you may petition for habeas corpus if waiting for your appeal would cause you to face a longer prison term.[219] For example, in one case, an incarcerated person petitioned for habeas corpus on the grounds that he was wrongfully imprisoned in New York. The individual's commitment order stated 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 he served in New York would count against his Alabama sentence.[220]

(g) Violations of the Conditions of Your Sentence

You may also petition for a writ of habeas corpus if the conditions of your imprisonment are worse than the conditions authorized by your conviction or by the New York or U.S. Constitutions.[221] 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;[222]
(2) You were arbitrarily and illegally transferred to an institution for the criminally insane;[223]
(3) You have been found not guilty because of mental illness[224] and are being held at an institution for the criminally insane, if you are no longer suffering from mental illness and thus entitled to release, or if you are no longer dangerous and thus entitled to transfer to a non-secure facility as required by New York Criminal Procedure Law Section 330.20;[225]
(4) You are held in a different prison than the one on the sentencing court's commitment order;[226]
(5) You were transferred to solitary confinement because of unconstitutional discrimination;[227] or

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[219] *See* State *ex rel.* Harbin v. Wilmot, 104 Misc. 2d 272, 274–275, 428 N.Y.S.2d 152, 154–155 (Sup. Ct. Chemung County 1980) (finding that a writ of habeas corpus is "available when an incarcerated person is confined in the wrong State penal institution" and the incarcerated person's current place of incarceration will result in a longer term of imprisonment).

[220] State *ex rel.* Harbin v. Wilmot, 104 Misc. 2d 272, 274–275, 428 N.Y.S.2d 152, 154–155 (Sup. Ct. Chemung County 1980).

[221] *See* People *ex rel.* Short v. Royce, No. 51175/20, 2020 N.Y. Misc. LEXIS 13766, at *3 (Sup. Ct. Dutchess County June 25, 2020) (*unpublished*) ("[H]abeas corpus review is appropriate where a constitutional violation results in a further restraint in excess of that permitted by the judgment of conviction." (citing 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.")).

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

[223] *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) (finding that lower court wrongly refused to consider petition for habeas corpus that challenged the transfer of a person convicted of rape from a prison to a mental hospital).

[224] This is also known as "not guilty by reason of insanity."

[225] *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 the proper proceeding for petitioner to seek transfer to a non-secure facility or release); *see also* 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, 631 N.Y.S.2d 524 (2d Dept. 1995) (holding that habeas petition is the proper mechanism to seek transfer from a secure to a non-secure facility).

[226] *See* People *ex rel.* Harbin v. Wilmot, 104 Misc. 2d 272, 274, 428 N.Y.S.2d 152, 154 (Sup. Ct. Chemung County 1980) (holding that an incarcerated person was illegally imprisoned in 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).

[227] *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 that placement of a Muslim incarcerated person in solitary confinement because he would not shave his beard for religious reasons was unconstitutional discrimination and ordering release from solitary confinement); *see also* Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal

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

If your petition is granted because you have not received a proceeding to evaluate your mental health, 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 Mental Retardation and Developmental Disabilities may, however, apply to the court to have you remain at the institution. The State Commissioner's application may be granted if it is immediately filed and processed.[228]

(h) Probation or Parole

(i) *Preliminary Revocation Hearings*

If DOCCS 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 written notice of the charges against you (including the conditions of presumptive release, parole, conditional release, or post-release supervision that you allegedly violated), as well as the time and place of your hearing.[229] You are entitled to this notice within three days of the execution of the warrant 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 in that state through an out-of-state parolee supervision agreement.[230] Showing that you were not given notice of your parole violation within three days of your hearing, however, is not necessarily enough for a court to grant your petition. You must also show that the lack of notice somehow hurt your ability to prepare for the hearing.[231]

You are also entitled to a hearing conducted within fifteen days of the warrant's execution.[232] If the court finds that the delay in your hearing is not the state's fault, however, it may dismiss your

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Law," Chapter 18, of the *JLM,* "Your Rights at Prison Disciplinary Proceedings," and Chapter 27 of the *JLM*, "Religious Freedom in Prison."

[228] *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 the Department of Mental Health Commissioner has failed to comply with time, notice, and hearing requirements for a statutory retention order); State *ex rel.* Henry L. v. Hawes, 174 Misc. 2d 929, 933–934, 667 N.Y.S.2d 212, 216 (Cnty. Ct. Franklin County 1997) (granting petitioner's habeas writ and ordering petitioner immediately transferred to a non-secure facility because the order of confinement had expired and no application for the order's extension had been made, in violation of N.Y. CRIM. PROC. LAW § 330.20).

[229] N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018).

[230] N.Y. EXEC. LAW § 259-i(3)(c)(i)(A) (McKinney 2018).

[231] *See* People *ex rel.* Wise v. N.Y. State Div. of Parole, 50 A.D.3d 303, 303, 853 N.Y.S.2d 886, 886 (1st Dept. 2008) (denying writ of habeas corpus, even after assuming that the petitioner did not receive proper notice of the 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. N.Y. State Div. of Parole, 279 A.D.2d 379, 379–380, 720 N.Y.S.2d 22, 23 (1st Dept. 2001) (affirming dismissal of a 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, 980, 661 N.Y.S.2d 371, 371 (4th Dept. 1997) (finding defendant was not entitled to restoration of parole or dismissal of parole violation warrant based on a 1-day delay in serving statutory notice and failure to comply with 3-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 a basis for parole violation, and did not contend that he was prejudiced by the 1-day delay); *see also* People *ex rel.* Walker v. N.Y. State Bd. of Parole, 98 A.D.2d 33, 33–35, 469 N.Y.S.2d 780, 782 (2d Dept. 1983) (holding that it is inappropriate for a court to decide factual issues concerning the presence or absence of timely notice until the final revocation hearing is conducted and where the final hearing has been scheduled within the statutory 90-day period).

[232] N.Y. EXEC. LAW § 259-i(3)(c)(i) (McKinney 2018); *see also* 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 a preliminary parole revocation hearing within 15 days of service of notice of his parole violation).

petition.[233] In addition, the law does not require that the hearing be *completed* within fifteen days, it only requires that the hearing be "scheduled to take place" within the statutory fifteen-day period.[234] Finally, a court may find that you have waived (given up) your right to a timely hearing.[235] That waiver must be clearly made or it will be invalid.[236] If the court finds that you waived your right to a hearing and the waiver was valid, your habeas petition may not be granted. Lastly, you are entitled to (1) appear at the hearing, (2) speak on your own behalf at your hearing, (3) present evidence, (4) present witnesses, (5) cross-examine witnesses (meaning, to question the witnesses the other side brings), (6) see the relevant documents used by the witness to come to their conclusion, and (7) pay for a lawyer to represent you at your preliminary hearing.[237]

Note that the evidence introduced at your preliminary parole revocation hearing must be sufficient to establish probable cause[238] to believe that you violated a condition of your parole.[239] Any denial of the above requirements may be grounds for a habeas petition in New York. However, if you were convicted of a new crime, you are not entitled to a preliminary parole revocation hearing.[240]

(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.[241]

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[233] *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 (1st Dept. 2007) (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, 567, 621 N.Y.S.2d 580, 581 (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).

[234] *See, e.g.*, Matter of Emmick v. Enders, 107 A.D.2d 1066, 1067, 486 N.Y.S.2d 559, 560 (4th Dept. 1985) ("When 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 . . . .").

[235] *See* People *ex rel.* Miller v. Walters, 60 N.Y.2d 899, 901, 458 N.E.2d 1251, 1251, 470 N.Y.S.2d 574, 575 (1983) (denying petition for writ of habeas corpus because petitioner waived preliminary hearing and therefore waived right to challenge board's failure to provide him a timely preliminary hearing).

[236] *See* People *ex rel.* Melendez v. Warden of Rikers Island Corr. Facility, 214 A.D.2d 301, 302–303, 624 N.Y.S.2d 580, 582 (1st Dept. 1995) (ruling that the state failed to prove that the petitioner had waived his right to a timely hearing when respondent provided petitioner a "Notice of Violation" form, and petitioner put a cross over the box to request a hearing and a circle around the box waiving a hearing).

[237] N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018); *see also* People *ex rel.* Deyver by Weinstein v. Travis, 172 Misc. 2d 83, 85–86, 657 N.Y.S.2d 306, 307 (Sup. Ct. Erie County 1997) (granting petitioner's habeas petition and finding that, to preserve petitioner's right to effective cross-examination, petitioner was entitled to see parole officer's notes that parole officer had relied on in testifying at hearing).

[238] In this case, "probable cause" refers to a "reasonable basis" or rational grounds, based on existing facts, for believing that you have violated your parole. *Probable Cause*, BOUVIER LAW DICTIONARY (Desk ed. 2012).

[239] N.Y. EXEC. LAW § 259-i(3)(c)(vi) (McKinney 2018); *see also* People *ex rel.* Davis v. N.Y. State Div. of Parole, 149 Misc. 2d 741, 744-745, 566 N.Y.S.2d 469, 471–472 (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 a new arrest for 95 hours, despite the requirement that officer be notified immediately); 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 no legal evidence was presented at the preliminary hearing to support probable cause that the parolee was in possession of drugs, where the only evidence presented was the testimony of parole officer's conversations with arresting officer, and parole officer was unable to testify that the drugs were recovered from the parolee).

[240] *See* N.Y. EXEC. LAW § 259-i(3)(c)(i) (McKinney 2018); *see also* 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 because he had been convicted of a new crime while released on parole).

[241] People *ex rel.* Perez v. Warden, 139 A.D.2d 477, 478, 527 N.Y.S.2d 233, 234 (1st Dept. 1988) (holding that parolee's waiver of counsel was ineffective because the hearing officer failed to conduct sufficient inquiry to reasonably ensure that parolee appreciated the dangers and disadvantages of waiving his right to counsel).

You are entitled to a hearing that is conducted within ninety days of the probable cause hearing.[242] Even if the hearing does not occur within ninety days, the court might still find that the hearing was timely if it finds that the delay was due to your own actions.[243] Additionally, even if the hearing is held more than ninety days after the probable cause determination, the court may find that your hearing was timely if you were incarcerated out of state.[244] You are entitled to be represented by a lawyer at the hearing. [245]

You and your attorney must be notified in writing of the date, place, and time of the hearing at least fourteen days before the scheduled hearing date.[246] Note that an adjournment (postponement) of the final parole revocation hearing does not require a new fourteen-day notice as long as the final hearing is within ninety days of the initial parole hearing.[247]

During the hearing, you are entitled to the opportunity to cross-examine witnesses against you, unless the hearing officer determines that there is good cause for witnesses not to attend the hearing.[248] The state must prove your parole violation by *clear and convincing evidence*. This means it must provide evidence that makes it highly probable there was a violation.[249] You will waive this

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[242] N.Y. EXEC. LAW § 259-i(3)(f)(i) (McKinney 2018); *see also* People *ex rel.* Brown v. N.Y. 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 deciding judgement in favor of parolee because the revocation hearing was not held within 90 days).

[243] *See, e.g.*, People *ex rel.* Williams v. Allard, 19 A.D.3d 890, 891, 798 N.Y.S.2d 153, 154–155 (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 [rescheduling]").

[244] N.Y. EXEC. LAW § 259-i(3)(a)(iii) (McKinney 2018) ("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, 331, 579 N.Y.S.2d 1, 1 (1st Dept. 1991) (ruling defendant's final revocation hearing was not untimely, particularly as he was never detained "exclusively" on the basis of parole revocation warrant as he was previously detained on charges for a different crime).

[245] N.Y. EXEC. LAW, § 259-i(3)(f)(v) (McKinney 2018); *see also* People *ex rel.* Brown v. Smith, 115 A.D.2d 255, 255, 496 N.Y.S.2d 123, 123–124 (4th Dept. 1985) (holding that a parolee has the right to counsel in a final parole revocation hearing). You can waive (give up) this right if you decide that you do not want or need counsel. *See* People *ex rel.* Martinez v. Walters, 99 A.D.2d 476, 476–477, 470 N.Y.S.2d 56 (2d Dept. 1984) (noting that the right to counsel may be waived without counsel). However, a waiver must be knowingly, intelligently, and voluntarily made 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 was invalid because the hearing officer failed to gather enough information to be sure that parolee understood the dangers and disadvantages of waiving his right to counsel).

[246] N.Y. EXEC. LAW § 259-i(3)(f)(iii) (McKinney 2018); *see also* People *ex rel.* Rivera v. N.Y. State Div. of Parole, 83 A.D.2d 918, 919, 442 N.Y.S.2d 511, 512 (1st 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 a 14-day notice).

[247] *See* People *ex rel.* Crooks v. N.Y. State Bd. of Parole, 194 A.D.2d 376, 376, 598 N.Y.S.2d 263, 264 (1st Dept. 1993) (holding that adjournment of the final hearing did not require a new 14-day notice to petitioner since the adjourned date did not fall outside the required 90-day period from the probable cause determination).

[248] N.Y. EXEC. LAW § 259-i(3)(f)(v) (McKinney 2018); *see also* People *ex rel.* Rosenfeld v. Sposato, 87 A.D.3d 665, 666–667, 928 N.Y.S.2d 350, 352 (2d Dept. 2011) (finding that "the petitioner's due process rights were violated when he was given no opportunity to cross-examine the parole officer who prepared the report and who possessed personal knowledge of the alleged violations," and 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, 322, 465 N.E.2d 342, 344, 476 N.Y.S.2d 803, 805 (1984) (ruling that a parolee's right to confront adverse witnesses at parole revocation hearings should not be "underestimated or ignored" and finding that there was no good cause given for declarant's absence.); 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 New Jersey parole officer to not testify at parole hearing because New Jersey had 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 send written questions to New Jersey officer).

[249] N.Y. EXEC. LAW § 259-i(3)(f)(viii) (McKinney 2018). Bouvier's Law Dictionary defines clear and convincing evidence as evidence that "clearly supports" the truth of the matter or "proof sufficient for the finder of fact to believe that it is highly probable that the claim or allegation is true." *Clear and Convincing Evidence (Proof by Clear and Convincing Evidence)*, BOUVIER'S LAW DICTIONARY (Desk ed. 2012); *see also* Duguid v. B.K., 76 Misc. 3d 1005, 1016, 175 N.Y.S.3d 853, 861 (Sup. Ct. Saratoga County 2022) (explaining that, for a party to satisfy the clear and convincing evidence standard, the evidence must make it highly probable that what they claim is what

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 later.[250] 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.[251]

Any denial of the above requirements may be grounds for a habeas petition. You may also petition if either (1) you were denied your fundamental constitutional right to be present at the hearing[252] or (2) you requested a local parole revocation hearing that was denied.[253]

Note that you are not entitled to a final parole revocation hearing if your parole was revoked because of a new felony conviction.[254] If you are called to a hearing, you must appear, even if you have applied for an adjournment. Otherwise, you have waived your right to appear.[255]

You may not petition for a writ of habeas corpus for the above reasons if you would remain imprisoned for other convictions, since you would not be entitled to immediate release.[256] You still have the opportunity to bring an Article 78 proceeding to challenge Parole Board decisions, however, if you would remain incarcerated for other convictions.[257]

(i) Subject Matter Jurisdiction

In New York, supreme and county courts are the only courts that have jurisdiction (the power to preside over a case) over felony trials.[258] District, city, town, and village courts have jurisdiction over misdemeanors.[259] If you are convicted by a court that does not have jurisdiction, you may be entitled

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actually happened).

[250] People *ex rel.* McWhinney v. Smith, 219 A.D.2d 879, 879, 632 N.Y.S.2d 40, 40 (4th Dept. 1995) (finding that petitioner waived their right to allege that their parole violation was unproven in their habeas petition).

[251] *See* People *ex rel.* Wallace v. N.Y. State Bd. of Parole, 111 A.D.2d 940, 941, 491 N.Y.S.2d 50, 50 (2d Dept. 1985) (dismissing a habeas petition because it was filed before the final revocation hearing).

[252] *See* Wyche v. N.Y. State Bd. of Parole, 66 A.D.3d 541, 542, 887 N.Y.S.2d 71, 72 (1st Dept. 2009) (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); *see also* Schwartz v. Warden, N.Y. State Corr. Facility, 82 A.D.2d 870, 871, 440 N.Y.S.2d 270, 271–272 (2d Dept. 1981) (finding that parolee, who had an attorney and who refused to attend a revocation hearing due to the fact that his attorney couldn't attend the hearing, did not waive his right to appear, and that it was thus an error for the hearing officer to conduct the hearing without parolee).

[253] N.Y. EXEC. LAW § 259-i(3)(e)(i) (McKinney 2018) ("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 or she 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).

[254] *See* N.Y. EXEC. LAW § 259-i(3)(d)(iii) (McKinney 2018); s*ee also* O'Quinn v. N.Y. State Bd. of Parole, 132 Misc. 2d 92, 94–95, 503 N.Y.S.2d 483, 484–485 (Sup. Ct. N.Y. County 1986) (noting that a statute that removes right to final revocation hearing where parolee has been convicted of felony while on parole does not violate due process).

[255] *See, e.g.*, People *ex rel.* Rodriguez v. Warden, 163 A.D.2d 206, 206–207, 558 N.Y.S.2d 59, 59 (1st Dept. 1990). (finding that petitioner's right to be present at the final parole hearing was waived when he refused to attend the hearing despite multiple efforts by the division of parole to bring him to the hearing and his attorney then waived the right).

[256] *See* 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).

[257] *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 has raised the issue of untimeliness before the Parole Board should bring Article 78 proceeding after Board decides against him).

[258] *See* N.Y. CRIM. PROC. LAW §§ 10.10(2), 10.20(1)(a) (McKinney 2018). Felonies are offenses that are punishable by a prison term of more than one year. N.Y. PENAL LAW § 10.00(5) (McKinney 2009).

[259] N.Y. CRIM. PROC. LAW § 10.30(1) (McKinney 2018). Misdemeanors are offenses punishable by fine and/or a jail sentence of more than 15 days but less than 1 year. N.Y. PENAL LAW § 10.00(4) (McKinney 2009).

to post-conviction relief.[260] A court may also lack jurisdiction if the allegations made in your indictment are insufficient in some way.[261] This issue should normally be raised on appeal or in an Article 440 motion.

However, if you give a **compelling** reason why the court should depart from regular procedure, you may petition for habeas corpus. For instance, you may file a habeas petition if an indictment or information was not filed against you.[262] Note that an indictment no longer has to be filed for every crime; the prosecutor may file an information instead.[263]

You may file a petition for habeas corpus if the indictment brought against you fails to state that a crime has been committed, as that would mean the court has no jurisdiction over you.[264] You may also file a petition if your indictment fails to state facts that satisfy every necessary element of your crime, and the court was entirely stripped of jurisdiction as a result. For example, if an indictment for first-degree murder fails to describe acts that show that a person intended to kill another person, the court does not have jurisdiction to convict the defendant of first-degree murder, since intent to kill is a necessary element of the crime. In this hypothetical, the court would, however, have jurisdiction to convict the defendant of second-degree murder, since intent is not a necessary element of the offense. Thus, the defendant in this example could challenge their conviction for first-degree murder, but not second-degree murder, in a petition for habeas corpus.[265] Importantly, if the defect in the indictment would not remove the court's jurisdiction, then the petition will be denied. It is very difficult to find a defect that would entirely remove jurisdiction, as courts have upheld indictments with vague or limited information.[266]

Finally, you may file a habeas petition if the court convicted you of a crime that was not included in the indictment or information filed by the prosecution. This does not include lesser included offenses of the offenses charged in your indictment.[267] If you failed to object to the submission of the offense at your trial, however, you may have waived this claim. For example, if your indictment charged you with murder, but the judge announced that they also would consider whether you were guilty of robbery

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[260] *See* People *ex rel.* Clifford v. Krueger, 59 Misc. 2d 87, 93, 297 N.Y.S.2d 990, 996–997 (Sup. Ct. Nassau County 1969) (finding that petitioner's conviction was illegal because the crime of which he was convicted was an offense over which Family Court had exclusive original jurisdiction, granting his writ of habeas corpus, and transferring the matter to Family Court).

[261] N.Y. CRIM. PROC. LAW § 20.20 (McKinney 2018).

[262] *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); *but see* N.Y. CRIM. PROC. LAW § 195.10 (McKinney 2007) (allowing for a defendant to waive his right to an indictment when he is before a grand jury, not charged with a felony, and the District Attorney consents). This waiver must be in writing and given in open court according to N.Y. CONST. art. I, § 6.

[263] 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. *See* N.Y. CONST. art. I, § 6. This amendment is explained in People v. Trueluck, 88 N.Y.2d 546, 548–549, 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 [the defendant has been arraigned to a local criminal court and had or waived a preliminary hearing], (2) the defendant is not charged with a class A felony, and (3) the District Attorney consents to the waiver of indictment." (citing N.Y. CRIM. PROC. LAW § 195.10(1))).

[264] *See* People *ex rel.* Morris v. Skinner, 67 Misc. 2d 221, 221–222 323 N.Y.S.2d 905, 906 (Sup. Ct. Monroe County 1971) (holding that the right to challenge an indictment or an information is very limited but available when the challenge would be sufficient to deny the court's jurisdiction).

[265] *See, e.g.*, People *ex rel.* Williams v. La Vallee, 30 A.D.2d 1034, 1034, 294 N.Y.S.2d 824, 826 (4th Dept. 1968) ("The indictment herein . . . is defective insofar as it charges murder, first degree, because, omitted therefrom is the essential allegation that the act was done with a deliberate and premeditated design to effect death . . . . Nevertheless the defect was not fatal. The misnomer in describing the offense as in the first instead of in the second degree is of no moment if the specific allegations of fact are sufficient as they are here to describe the ingredients of murder in the second degree . . . .").

[266] *See, e.g.*, 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 a simplified form of indictment that omitted certain facts did not deprive the court of jurisdiction).

[267] See *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," for an explanation of lesser included offenses.

(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.[268]

In the above circumstances, a court will review your habeas corpus petition only if the issue is very important and would invalidate your conviction.[269] This is because these claims usually should be raised by direct appeal or with an Article 440 motion. In one case, for example, an incarcerated person petitioned for habeas corpus on the ground that attempted escape could not serve as the basis for a felony murder[270] conviction because attempted escape was classified as a misdemeanor, not a felony. Petitioner raised this issue in his first appeal but did not raise it again in a second appeal from his conviction. The court still heard his argument for granting a writ of habeas corpus due to the importance of the issue and its impact on 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 petitioner's murder conviction if the court resolved the issue in his favor.[271]

3. How to File Your Habeas Corpus Petition

(a) When to File

In New York, before you file your habeas corpus 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").

If you can bring any of these proceedings but file a petition for habeas corpus instead, your petition is likely to be dismissed. If you **cannot** bring any of these proceedings, you may file a habeas corpus petition in New York.

(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

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[268] *See* People *ex rel.* Tanner v. Vincent, 44 A.D.2d 170, 173–174, 354 N.Y.S.2d 145, 148 (2d Dept. 1974) (denying habeas corpus petition where the petitioner failed to raise an objection on appeal to a robbery conviction when the petitioner had been indicted for common law murder, felony murder, and possession of a weapon, but was instead convicted of robbery, which is not a lesser included offense within the crime of felony murder).

[269] *See* People *ex rel.* Keitt v. McMann, 18 N.Y.2d 257, 262–263, 220 N.E.2d 653, 655, 273 N.Y.S.2d 897, 899–900 (1966) (noting that "traditional orderly proceedings" other than habeas corpus should be followed unless habeas corpus is required by "reason of practicality and necessity"); *see also* People *ex rel.* Culhane v. Sullivan, 139 A.D.2d 315, 321–322, 531 N.Y.S.2d 287, 291 (2d Dept. 1988) (refusing to grant a writ of habeas corpus where the facts included enough evidence of intent and enough overt acts to be considered a crime under state law).

[270] Felony murder is a rule of criminal law that holds that a defendant is responsible for any killing that occurs while they are committing a felony. N.Y. CRIM. PROC. LAW § 125.25 (McKinney 2019). Presently, New York state legislators are attempting to pass bills that would narrow the situations where defendants can be prosecuted for existence of felony murder.

[271] People *ex rel.* Culhane v. Sullivan, 139 A.D.2d 315, 317, 531 N.Y.S.2d 287, 288 (2d Dept. 1988); *see also* People *ex rel.* Bartlam v. Murphy, 9 N.Y.2d 550, 553–554, 175 N.E.2d 336, 337–338, 215 N.Y.S.2d 753, 755–756 (1961) (ruling in favor of a petitioner in a habeas corpus petition and ordering a hearing on whether the petitioner was denied the right to be present when the 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 the jury did not affect any substantial rights).

(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. [272]

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, a person 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 they have a charge pending there. Importantly, if you choose to file with a court other than the supreme court of the county you're in, you must make the writ returnable (movable) to the supreme court of the county you are detained in.[273] Appendix II of the *JLM* provides the addresses for New York courts.

(c) What to Include in Your Petition

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

(1) The names of your prison and 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.[274]
(3) The reason you are imprisoned, to the best of your knowledge.
(4) An explanation of why your imprisonment is illegal. 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.[275]
(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 of habeas corpus, along with 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. If you fail to detail prior applications for a writ of habeas corpus, the court may dismiss your petition.[276] 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 doing so.[277]
(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 provide a convincing reason

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[272] N.Y. C.P.L.R. §§ 7002(b)(1)–(4), 7004(c) (McKinney 2013).

[273] N.Y. C.P.L.R. § 7002(b)(5) (McKinney 2013).

[274] A mandate is a written order of the court directing the warden to enforce the sentence against you. *See* N.Y. GEN. CONSTR. LAW § 28-a (McKinney 2018).

[275] *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 the defendant's rights were violated without any facts alleged to support such claims).

[276] *See* People *ex rel.* Christianson v. Berry, 165 A.D.2d 961, 961, 561 N.Y.S.2d 848, 849 (3d Dept. 1990) (denying petitioner's application for writ of habeas corpus because it was fatally defective where, among other things, it failed to indicate the petitioner's previous applications for habeas corpus relief).

[277] N.Y. C.P.L.R. § 7003(b) (McKinney 2013); *see* 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).

why you could not include the required information.[278] For example, one reason might be that you were deprived of legal material and writing instruments.[279]

You should write out and then type a petition and a writ. Sign the petition in the presence of a *notary public*, who will put their seal on the papers. By "notarizing" the petition, you are swearing that all statements in the document are true.[280] Notarizing your petition satisfies the "verification" requirement. You should then send the documents to the relevant court, as explained above in Subsection C(3)(b), "Where to File." Appendix II of the *JLM* provides the addresses for New York courts.

4. 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, or (2) your petition does not contain any claim that was not already decided against you in a previous petition. 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.[281] However, if the court believes that your claim may have some merit, the court will issue you a writ.[282]

After the court issues the writ, you must serve (deliver) the writ and a copy of your petition to the warden.[283] Upon being served, the warden must respond by affidavit to the claims made in your petition within twenty-four hours.[284] The warden's response is known as the "return of the writ."[285] The warden should provide you with a copy of the return.[286] You have the right to make a reply to the return to deny any statements in the return or to state additional facts that support your claim.[287]

The writ may specify a time and place for a hearing, and the warden must take you to that hearing to determine whether you are being imprisoned illegally. If the writ orders a hearing, you must inform the District Attorneys 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 and at least eight days prior to the hearing.[288] 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

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[278] *See* Matter of Tullis v. Kelly, 154 A.D.2d 926, 926, 547 N.Y.S.2d 259, 259 (4th Dept. 1989) (dismissing habeas corpus petition because it failed to comply with the 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 a habeas corpus petition where the application did not comply with the provisions of N.Y. C.P.L.R. § 7002(c) and was, therefore, insufficient on its face).

[279] *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 "a deprivation of legal material and writing material").

[280] *See* N.Y. C.P.L.R. § 7002(c) (McKinney 2013); N.Y. EXEC. LAW § 135 (McKinney 2018) (explaining that a notary has the power to take acknowledgements wherein they verify having positively identified a document signer who personally appeared and admitted having signed the document).

[281] N.Y. C.P.L.R. § 7003(a)–(b) (McKinney 2013); *see also* People *ex rel.* Sanchez v. Hoke, 132 A.D.2d 861, 862, 518 N.Y.S.2d 69, 70 (3d Dept. 1987) (dismissing habeas corpus petition without a hearing where the petition did not raise new matter).

[282] N.Y. C P.L.R. § 7003(a) (McKinney 2013).

[283] N.Y. C.P.L.R. § 7005 (McKinney 2013).

[284] N.Y. C.P.L.R. § 7008(a) (McKinney 2013).

[285] *See, e.g.,* People *ex rel.* Delia v. Munsey, 26 N.Y.3d 124, 137, 41 N.E.3d 1119, 1127–1128, 20 N.Y.S.3d 304, 313–314 (2015) (Abdus-Salaam, J., dissenting) (challenging the majority's decision to affirm the release of a mentally ill patient upon "return of the writ" without a hearing to determine the status of his mental disability).

[286] *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, N.Y. C.P.L.R. § 7008 (2013) (noting that "the court presumably will require service by personal delivery on the petitioner" because of the timeframe's urgency).

[287] N.Y. C.P.L.R. § 7009(b) (McKinney 2013).

[288] N.Y. C.P.L.R. § 7009(a)(3) (McKinney 2013). If you file to proceed *in forma pauperis*, a court officer will notify the District Attorneys for you.

be allowed to produce evidence to support your claim and to cross-examine any witnesses against you.[289]

5. Your Right to a Fact-Finding Hearing

As long as your petition is "facially sufficient," a court must either issue the writ "without delay" or order the respondent (the person detaining you) to demonstrate why you should not be released.[290] "Facially sufficient" means that you have provided all the required information, as explained in Subsection C(3)(c) above, and enough facts to support your claims.

If your habeas petition raises an issue of fact, you have the right to a fact-finding hearing before the court.[291] For example, in a habeas petition challenging an extradition proceeding, the issue of whether the petitioner was in the demanding state at the time that the alleged offense was committed is a question of fact that should be resolved with a hearing.[292]

6. Your Right to Counsel for Your Petition

The U.S. Supreme Court has held that there is no federal constitutional right to counsel in state habeas corpus proceedings.[293] However, New York state law may provide you the right to counsel. If you do not have the financial ability to obtain your own lawyer, you often have the right to a court-appointed lawyer for a hearing on your habeas corpus petition. You must request that the court appoint you a lawyer.[294] To do so, you must file a motion to proceed "*in forma pauperis*."

You may also use the *in forma pauperis* procedure to request a reduction or waiver of the filing fees. You should read Section D(6) of Chapter 22 of the *JLM* pertaining to Article 78 for a detailed description of filing fees. Sentenced incarcerated people usually must pay between $15 and $50 of the filing fees to proceed with their claims.[295]

If you have not been sentenced (for example, if you are filing a habeas corpus petition to challenge excessive bail), you should still be able to receive a full filing fee waiver under New York law if you are unable to pay the costs.[296] You can find a sample motion for *in forma pauperis* proceedings in Appendix A of this chapter. **Do not tear the papers out of the book.** Copy the printed language on your own paper, fill in the blanks, and remove any italicized words with the facts that apply to your situation. To request a waiver of filing fees, make sure that the papers request a waiver, **not** a reduction, of the filing fees.

7. Your Right to Appeal

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[289] *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 the petitioner "was not allowed to produce evidence in his behalf or to cross-examine the only witness against him").

[290] N.Y. C.P.L.R. § 7003(a) (McKinney 2013); *see* People *ex rel.* Collins v. Braun, 57 N.Y.2d 714, 715, 440 N.E.2d 789, 454 N.Y.S.2d 704 (1982) (reversing summary denial of the writ because "[t]aken at face value, relator's papers were sufficient to entitle him to have the court 'hear the evidence' on [his claims]")

[291] N.Y. C.P.L.R. § 7009 (McKinney 2013); People *ex rel.* Robertson v. N.Y. State Div. of Parole, 67 N.Y.2d 197, 201, 492 N.E.2d 762, 764, 501 N.Y.S.2d 634, 636 (1986) (holding that "the evidentiary hearing concerning legality of detention is to be before the habeas court rather than the detaining agency").

[292] *See* People *ex rel.* Degina v. Delaney, 385 N.Y.S.2d 332, 332 (2d Dept. 1976).

[293] *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.").

[294] *See* People *ex rel.* Brock v. La Vallee, 42 A.D.2d 629, 629–630, 344 N.Y.S.2d 513, 515 (3d Dept. 1973) (holding that at any hearing in connection with a habeas corpus 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 upon such hearing"); *see also* People *ex rel.* Ferguson v. Campbell, 186 A.D.2d 319, 319, 587 N.Y.S.2d 798, 799 (3d Dept. 1992) (noting that the court did not abuse its discretion by not appointing counsel because the petitioner indicated that he did not want legal representation).

[295] N.Y. C.P.L.R. § 1101(f)(2) (McKinney 2012) (expiring Sept. 1, 2025).

[296] N.Y. C.P.L.R. § 1101(d) (McKinney 2012).

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.[297] In New York, this court is called the Appellate Division and is divided into four different Departments.[298] The highest court in New York is called the Court of Appeals.

D. Michigan

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

1. Requirements

The Michigan writ of habeas corpus rules can be found in Chapter 43 of the Revised Judicature Act (as codified in state law 600.4301–4387) and in Rule 3.303 of the Michigan Court Rules of 1985.[299]

(a) Custody

In general, any person who has been "committed, detained, confined or restrained of his liberty" for a criminal matter can file a petition for habeas corpus.[300] So, if you have been released from prison, a Michigan court cannot grant a writ of habeas corpus.[301] However, if you are in prison because of an alleged parole violation, you are eligible for habeas corpus.[302] You are also eligible for habeas corpus if you are being civilly confined in a mental institution.[303]

(b) Immediate Release

As discussed in Part A(3)(c), if you are in a situation where you cannot be immediately released, your habeas petition may not be granted. For instance, if you were transferred out of state, a Michigan court would not be able to order your release. This might be the case in an extradition proceeding, where you have been handed to the authority of the demanding state and transferred out of Michigan.[304] You also could not be immediately released on a habeas petition if you are serving two sentences. Even if your habeas petition is granted, you would still be imprisoned for the second sentence.[305]

However, Michigan courts may grant you a conditional writ of habeas corpus that will require your release from prison only if the state does not start new proceedings within a time period set by the court.[306] If this time period passes, Michigan is still allowed to arrest you again for the same crime.

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[297] N.Y. C.P.L.R. § 7011 (McKinney 2013). The rules that govern civil appeals, rather than criminal appeals, govern habeas corpus proceedings because habeas corpus is considered a civil remedy.

[298] See *JLM*, Chapter 2, "Introduction to Legal Research," for a description of New York courts.

[299] Revised Judicature Act of 1961; MICH. COMP. LAWS ANN. § 600.4301–4387 (West 2000); MICH. CT. RULES OF 1985, r. 3.303.

[300] Triplett v. Deputy Warden, Jackson Prison, 371 N.W.2d 862, 866, 142 Mich. App. 774, 780-81 (Mich. Ct. App. 1985); MICH. COMP. LAWS ANN. § 600.4307 (West 2000).

[301] MICH. COMP. LAWS ANN. § 600.4322 (West 2000).

[302] *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.").

[303] *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 in the county where the petitioner is detained 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).

[304] *See* Trayer v. Kent Cnty. Sheriff, 304 N.W.2d 11, 12, 104 Mich. App. 32, 34–35 (Mich. Ct. App. 1981) (finding petition for writ of habeas corpus was not proper because petitioner was transferred out of state and, therefore, the state that was petitioned could not provide immediate release).

[305] *See In re* Rhyndress, 26 N.W.2d 581, 582, 317 Mich. 21, 23 (1947) (denying writ of habeas corpus to an incarcerated person serving two sentences, where the validity of one sentence was not challenged).

[306] *See* People v. Scott, 739 N.W.2d 702, 704, 275 Mich. App. 521, 523 (Mich. Ct. App. 2007) (finding that the

So, in a typical case in which an incarcerated person is released because a state does not retry them by the deadline set in a conditional writ, the state is not forbidden from re-arresting the petitioner and retrying them under the same indictment. But, the state cannot re-arrest and re-try the petitioner if the state's delay prejudices (negatively affects) the petitioner's ability to defend themself.[307]

(c) Incarceration in Michigan

You must be incarcerated in a state prison, mental institution, or other state-run institution in Michigan.[308]

(d) No Other Options

A Michigan court will **not** grant your petition for a writ of habeas corpus if there are other procedures available.[309] So, a writ of habeas corpus cannot be used when a writ of error or a writ of *certiorari* would be more appropriate.[310]

You cannot file a petition for habeas corpus to challenge the merits of your conviction or sentence.[311] Incorrect judgments can only be reviewed on appeal.[312] The writ of habeas corpus is only used to raise defects of a decision that are so radical that they will absolutely void the conviction and allow you to be released from prison.[313]

2. Claims You Can Raise 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.[314] The court will only engage in a very limited review in these cases.[315] The court will take the warrant and supporting papers from the Governor as *prima facie* (accepted as true until proven false) evidence supporting your extradition.[316] In other words, the court will assume that the information in the warrant and supporting papers is true if that information is not refuted. In deciding a habeas petition challenging your extradition, 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

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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 the defendant by the deadline set in the writ).

[307] People v. Scott, 739 N.W.2d 702, 704, 275 Mich. App. 521, 523 (Mich. Ct. App. 2007); Satterlee v. Wolfenbarger, 453 F.3d 362, 370 (6th Cir. 2006).

[308] MICH. COMP. LAWS ANN. § 600.4307 (West 2000).

[309] *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); People v. Jackson, 633 N.W.2d 825, 831, 465 Mich. 390, 400 (Mich. 2001) (noting that the writ of habeas corpus requires exhaustion of all other remedies).

[310] *See In re* Abbott, 255 N.W. 603, 603, 267 Mich. 703, 705 (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."); *see also* People v. Price, 179 N.W.2d 177, 180, 23 Mich. App. 663, 670 (Mich. 1970) ("[T]he writ of habeas corpus may not be used as a substitute for writ of error or to perform its functions.")

[311] Cross v. Dept. of Corr., 303 N.W.2d 218, 220–221, 103 Mich. App. 409, 414–415 (Mich. Ct. App. 1981).

[312] Triplett v. Deputy Warden, Jackson Prison, 371 N.W.2d 862, 866, 142 Mich. App. 774, 780 (Mich. Ct. App. 1985); *Ex parte* Rankin, 47 N.W.2d 28, 28, 330 Mich. 91, 93 (Mich. 1951) (addressing a habeas petition alleging excessive bail, though not reaching the question of excessive bail because the petition was moot on other grounds).

[313] Triplett v. Deputy Warden, Jackson Prison, 371 N.W.2d 862, 866, 142 Mich. App. 774, 780 (Mich. Ct. App. 1985).

[314] MICH. COMP. LAWS. ANN. § 780.9 (West 2007).

[315] People v. Wendt, 309 N.W.2d 230, 233, 107 Mich. App. 269, 273 (Mich. Ct. App. 1981) ("The court in an asylum state has limited scope of review after the governor of the state has granted extradition.").

[316] People v. Wendt, 309 N.W.2d 230, 233, 107 Mich. App. 269, 274 (Mich. Ct. App. 1981).

request for extradition, and whether you are a fugitive.[317] Once you are outside of Michigan, you have no right to habeas review in a Michigan court.[318] This is because, as discussed in Subsection D(1)(b) above, once you have been transferred out of Michigan, a Michigan court will not be able to order your immediate release.

(ii) *Bail*

You may ask for habeas relief on the grounds that you were denied bail or that the bail you were granted is excessive.[319] The court will be reluctant to second-guess the judge that denied bail, and the petition will only be granted if the bail is considered grossly disproportionate in relation to the crime you are being held for.[320]

(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.[321] As explained in Part A(3)(c) 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. You should instead challenge the sentence on appeal or in a writ of error.[322] However, habeas corpus may be appropriate if the trial court imposed a sentence that is longer than the maximum allowed by the law used to convict you.[323]

(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."[324] 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 for detention.[325]

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

[318] *See* Trayer v. Kent Cnty. Sheriff, 304 N.W.2d 11, 12, 104 Mich. App. 32, 34–35 (Mich. Ct. App. 1981) (finding that, even though petitioner had been granted a writ of habeas corpus, the writ became moot when the petitioner was moved out of Michigan and into Pennsylvania and was, therefore, subject to Pennsylvania's jurisdiction).

[319] *See In re* Peoples, 14 N.W. 112, 115, 47 Mich. 626, 631 (Mich. 1882) (finding that habeas corpus was the proper avenue through which to challenge denial of bail).

[320] *See In re* Tubbs, 102 N.W. 626, 626, 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 made in an unjust manner or is obviously erroneous); People v. Jackson, No. 349960, 2021 Mich. App. LEXIS 433, at *19 (Mich. Ct. App. Jan. 21, 2021) (*unpublished*) (holding that the standard in Michigan for cruel and unusual punishment, including bail, only bars the imposition of "grossly disproportionate" sentences).

[321] *See* Cross v. Dept. of Corr., 303 N.W.2d 218, 220–221, 103 Mich. App. 409, 415–416 (Mich. Ct. App. 1981) (finding that a plaintiff whose state sentence was to run at the same time as his federal sentence should not have been re-incarcerated in Michigan state prison after being released from federal prison).

[322] *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).

[323] *Ex parte* Wall, 47 N.W.2d 682, 685, 330 Mich. 430, 435 (Mich. 1951).

[324] 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 radical defects that render a decision void, whereas judgments that are merely incorrect can only be reviewed on appeal).

[325] *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).

(iii) *Ineffective Counsel*

You may petition the court for habeas relief on the ground that your lawyer was ineffective.[326] Proving a claim of ineffective assistance of counsel is very difficult. There is a low standard for what counts as effective assistance of counsel. If a court decides that your case was "well handled or even adequately handled" by your lawyer, you are unlikely to succeed on a claim for habeas relief.[327] According to Michigan law, the fact that your case might have had a different or better outcome also does not mean that you had ineffective representation.[328] In addition, your counsel will not be deemed ineffective even if he makes a "serious mistake," like failing to assert a particular defense in your case.[329]

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 representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation."[330]

(iv) *New Evidence*

In Michigan, if you wish to raise the issue of new evidence, you must file a motion for a new trial.[331] 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.[332] 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.[333] Instead, you should apply for a writ of *mandamus* to force the government to give you your hearing.[334]

(d) Subject Matter Jurisdiction

Habeas corpus is available when "the convicting court was without jurisdiction to try the defendant for the crime in question."[335] This defect of lacking jurisdiction must be "radical" such that it would render a conviction void.[336] However, if you have been convicted of a crime by a court that had jurisdiction and did not abuse its power, habeas corpus is not available to you.[337]

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[326] *See* People v. Wynn, 165 N.W.2d 493, 495, 14 Mich. App. 268, 269 (Mich. Ct. App. 1968) (outlining the requirements for a habeas challenge based on ineffective counsel (quoting Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965))).

[327] People v. DeGraffenreid, 173 N.W.2d 317, 322, 19 Mich. App. 702, 712 (Mich. Ct. App 1969).

[328] People v. DeGraffenreid, 173 N.W.2d 317, 321, 19 Mich. App. 702, 711 (Mich. Ct App 1969) (quoting Scott v. United States, 334 F.2d 72, 73 (6th Cir. 1964).

[329] People v. DeGraffenreid, 173 N.W.2d 317, 322, 19 Mich. App. 702, 712 (Mich. Ct. App 1969).

[330] People v. Wynn, 165 N.W.2d 493, 495, 14 Mich. App. 268, 269 (Mich. Ct. App. 1968) (quoting Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965)).

[331] *See, e.g.,* People v. Grissom, 821 N.W.2d 50, 52, 492 Mich. 296, 299 (Mich. 2012) (addressing a claim of newly discovered evidence on a motion for a new trial).

[332] Triplett v. Deputy Warden, Jackson Prison, 371 N.W.2d 862, 865, 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").

[333] Jones v. Dept. of Corr., 664 N.W.2d 717, 721–722, 468 Mich. 646, 653–655 (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).

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

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

[336] 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").

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

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.[338]

As long as you are in custody when the court decides on your petition, there is no time limit for filing your habeas petition. In other words, you can file a petition for habeas corpus at any time.[339]

(b) Where to File

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

(1) The Supreme Court (or one of its justices);
(2) A Court of Appeals (or one of its judges);
(3) A circuit court (or one of its judges);
(4) A municipal court of record (or one of its judges); or
(5) A district court (or one of its judges).[340]

You **must** file with the judge or court in the county where you are detained.[341] 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.[342] Note that the court of appeals can only consider your habeas petition if you first file your petition in the county where you are detained.[343] You may file with either the judge or the court. If you file with a judge, you must later file the petition with the court.[344]

(c) What to Include in Your Petition

The petition for habeas corpus (also known as the complaint) must state:

(1) That you (the incarcerated person) are restrained of your liberty,
(2) Your name,
    (a) If the petition is being written on behalf of someone else and their name is not known, you can provide a description of the incarcerated person.
(3) The name, if known, or the description of the officer or person by whom the incarcerated person 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.[345]

(d) How to File

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its power.").

[338] *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*). *But see* Walls v. Dir. of Institutional Servs. Maxie Boy's Training Sch., 269 N.W.2d 599, 601, 84 Mich. App. 355, 357 (Mich. Ct. App. 1978) (finding that, although 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).

[339] Triplett v. Deputy Warden, Jackson Prison, 371 N.W.2d 862, 865, 142 Mich. App. 774, 779 (Mich. Ct. App. 1985).

[340] MICH. COMP. LAWS ANN. § 600.4304 (West 2011).

[341] MICH. CT. RULES OF 1985, r. 3.303(A)(2).

[342] MICH. CT. RULES OF 1985, r. 3.303(A)(2).

[343] Kato v. Dept. of Corr., 932 N.W.2d 639, 640, 504 Mich. 961, 961 (Mich. 2019) (Cavanagh, J., concurring).

[344] MICH. CT. RULES OF 1985, r. 3.303(F)(3).

[345] MICH. CT. RULES OF 1985, r. 3.303(C).

After you have created your petition for habeas corpus and included all the items in Part (D)(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 (D)(3)(b) of this Chapter, "Where to File." You can file the petition yourself, or someone may file the petition on your behalf.[346]

4. What to Expect After You File

In Michigan, the court may issue a preliminary writ of habeas corpus (or an order to show cause), which would entitle you to release unless the party applying is not entitled to the writ.[347] When the court issues the preliminary writ (or the 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.[348]

After the court issues the writ, you must serve the person who has you in custody with the writ and a copy of your petition. In other words, you must deliver the writ and a copy of your petition to this person.[349] 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.[350]

The person who has you in custody must file an answer to the writ, in which he will tell the judge why he thinks you should be in custody.[351] If you are too sick to be moved, the person who has you in custody should state that in the answer to your complaint.[352] You may respond to the answer, either in a written reply on oath or in the hearing on your petition.[353]

At the hearing, the court will consider your petition, the return, and your reply to the return. The defendant, or the person holding you in custody, will be allowed to provide evidence to support the cause of detention.[354] The judge will then rule on your petition 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.[355]

5. Your Right to Counsel for Your Petition

The U.S. Supreme Court has held that you do not have a federal constitutional right to be provided counsel in state habeas corpus proceedings.[356] However, in Michigan, state law entitles you to counsel at your habeas corpus hearing.[357] In addition, if you are applying for relief because you are about to be extradited and you are indigent (poor), you have limited right to counsel.[358] You are entitled to counsel for the purpose of challenging the legality of your arrest under a governor's warrant. But, you

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346 MICH. CT. RULES OF 1985, r. 3.303(B).

347 MICH. COMP. LAWS § 600.4316 (West 2011).

348 MICH. COMP. LAWS § 600.4304 (West 2011) (granting certain court the power to issue the writ); MICH. COMP. LAWS § 600.4325 (West 2011) (requiring production of person in custody).

349 MICH. CT. RULES OF 1985, r. 3.303(I)(1).

350 MICH. COMP. LAWS §§ 600.4325–4328 (West 2011).

351 MICH. CT. RULES OF 1985, r. 3.303(N).

352 MICH. COMP. LAWS § 600.4328 (West 2011).

353 MICH. CT. RULES OF 1985, r. 3.303(O).

354 MICH. CT. RULES OF 1985, r. 3.303(Q)(2)(b).

355 MICH. CT. RULES OF 1985, r. 3.303(Q).

356 *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.").

357 MICH. CT. RULES OF 1985, r. 3.303(Q)(3).

358 MICH. COMP. LAWS § 780.9 (West 2011). *But see* People v. Donaldson, 302 N.W.2d 592, 595, 103. Mich. App. 42, 48–49 (Mich. Ct. App. 1981) (holding that a defendant charged with a felony is not entitled to be appointed counsel by a Michigan court in connection with extradition proceedings, until the defendant is returned to Michigan for proceedings under the criminal warrant).

are not entitled to counsel for the initial arraignment on the warrant or the hearing before the governor.[359]

6. Your Right to Appeal

In Michigan, if your habeas petition is successful, you have the right to be released immediately. However, if the petition is not successful, you may appeal the denial of your writ of habeas corpus.[360] If you do so, you must make sure that the writ has been properly filed with the court where you originally brought the petition. If the appellate court denies relief, you may seek "leave to appeal" (meaning permission to appeal) that denial to the Michigan Supreme Court.[361]

Alternatively, you can also bring a new petition for habeas corpus to an appellate court or the Supreme Court of Michigan.

E. Conclusion

There are four basic elements required for your petition for a writ of habeas corpus to be granted. You must be in custody (confined by the state), you must be entitled to immediate release, you must be detained in a state prison or jail, and there must not be other available procedures, such as administrative and grievance procedures. You can raise a variety of claims in your petition, including challenges to the amount of your bail, to extradition proceedings, or to the revocation of your parole or probation. Remember that the details of the habeas 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.

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[359] People v. Donaldson, 302 N.W.2d 592, 595, 103 Mich. App. 42, 48–49 (Mich. Ct. App. 1981).

[360] *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); *see also* Jefferson v. Mich. Reformatory Warden, No. 341955, 2018 Mich. App. LEXIS 3342, at *1 (Mich. Ct. App. Oct. 18, 2018) (*unpublished*) (reviewing petitioner's appeal of trial court's order denying his complaint for a writ of habeas corpus).

[361] *See e.g.,* Goldman v. Dept. of Corr., 901 N.W.2d 590, 590, 501 Mich. 870, 870 (Mich. 2017) (considering but denying application for leave to appeal the Michigan Court of Appeals' denial of habeas corpus).