

## **CHAPTER 32-22 HABEAS CORPUS**

**32-22-01. Persons restrained may prosecute the writ.** Every person imprisoned or restrained of the person's liberty under any pretense whatever may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint and thereby, except in the cases specified in section 32-22-02, obtain relief from such imprisonment or restraint if it is unlawful.

**32-22-02. Who not entitled to relief.** The person in whose behalf the application is made is not entitled to relief from imprisonment or restraint under a writ of habeas corpus, if the time during which such person may be detained legally in custody has not expired, whenever it appears:

1. That the person is detained in custody by virtue of process issued by any court or judge of the United States in a case where such court or judge has exclusive jurisdiction; or
2. Except as provided in section 32-22-17, that the person is detained in custody by virtue of the final order or judgment of any competent court of criminal jurisdiction or of any process issued upon such order or judgment.

**32-22-03. Application for writ - Contents - Verification.** Application for the writ must be made by petition signed either by the person for whose relief it is intended or by some person in that person's behalf, and must specify:

1. That the person in whose behalf the writ is applied for is imprisoned or restrained of the person's liberty, the officer or person by whom the person is so confined or restrained, and the place where, naming all the parties if they are known, or describing them if they are not known.
2. The cause or pretense of such confinement or restraint according to the knowledge or belief of the party verifying the petition.
3. If the confinement or restraint is by virtue of any warrant, order, or process, a copy thereof shall be annexed, or it shall be averred because such person was removed or concealed before application, a demand of such copy could not be made, or that such demand was made and the legal fees therefor tendered to the officer or person having such person in custody, and that such copy was refused.
4. If the imprisonment is alleged to be illegal, the petition shall state in what the illegality consists.

The petition must be verified by the oath or affirmation of the person making the application.

**32-22-04. By what court application granted.** The writ of habeas corpus must be granted, issued, and made returnable as hereinafter stated:

1. The writ must be granted by the supreme court, or any judge thereof, upon petition by or on behalf of any person restrained of the person's liberty within this state. When granted by the court, it, in all cases, shall be issued out of and under the seal of the supreme court, and may be made returnable, either before the supreme court, or before the district court or any judge of the district court; or
2. The writ may be granted, issued, and determined by the district courts and the judges thereof upon petition by or on behalf of any person restrained of the person's liberty in their respective districts.



the place where the party is confined or under restraint. In any case the court issuing the writ, at its discretion, may authorize any person to serve and deliver it by an entry signed by the judge thereon to the following effect: "I hereby authorize \_\_\_\_\_ to serve the within writ", and service made by such person in the manner designated in this section shall be due and lawful service.

**32-22-10. Penalty if officer refuses to execute and return writ.** If the person to whom the writ is directed refuses, after service, to obey the same, the court, upon affidavit stating such facts, must issue an attachment against such person, directed to the sheriff or coroner, commanding the sheriff or coroner forthwith to arrest such person and bring such person immediately before such court, and upon being so brought that person must be committed to the jail of the county until that person makes due return to such writ or is otherwise legally discharged. The person disobeying such writ also shall forfeit to the person imprisoned or restrained a sum not exceeding five hundred dollars to be recovered in a civil action by the person restrained. If the person disobeying the writ is an officer, that officer shall be incapable of holding or executing that office.

**32-22-11. What the return must set forth.** The person upon whom the writ is served must state in the person's return, plainly and unequivocally:

1. Whether that person has or has not the party in custody or under power or restraint.
2. If that person has the party in custody or power or under restraint, that person must state the authority and cause of such imprisonment or restraint.
3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof must be annexed to the return and the original produced and exhibited to the court on the hearing of such return.
4. If the person upon whom the writ is served had the party in the person's custody or power or under the person's restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but has transferred such custody or restraint to another, the return must state particularly to whom, at what time and place, for what cause, and by what authority such transfer took place.
5. The return must be signed by the person making the same, and, except when such person is a sworn public officer and makes such return in an official capacity, it must be verified by the officer's oath or affirmation.

**32-22-12. Party restrained must be brought into court - Exception.** The person to whom the writ is directed, if it is served, must bring the party in custody or under restraint, according to the command of the writ, except in cases specified in section 32-22-13.

**32-22-13. When party need not be brought.** When from sickness or infirmity of the person directed to be produced such person cannot be brought before the court without danger, the person in whose power or custody such person is may state that fact in the return to the writ, verifying the same by affidavit. If the court is satisfied of the truth of such return and the return to the writ is otherwise sufficient, the court may proceed to decide on such return and to dispose of the matter as if such party had been produced on the writ, or the hearing thereof may be adjourned until such party can be produced.

**32-22-14. When hearing must be had.** The court before whom the writ is returned, immediately after the return or within five days thereafter, must proceed to hear and examine the return, and such other matters as may be submitted properly to its consideration.

**32-22-15. Return may be controverted - Proofs.** The party brought before the court on the return of the writ may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that the imprisonment or detention is unlawful or that the party is entitled to be discharged. The court thereupon must

proceed in a summary way to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and has full power and authority to require and compel the attendance of witnesses, by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case. The court may allow the return to be amended according to the facts of the case, whenever it may be deemed necessary.

**32-22-16. When person restrained must be discharged.** If no legal cause is shown for the imprisonment or restraint or for the continuation thereof, the court must discharge the party from the custody or restraint under which the party is held.

**32-22-17. Causes for discharge of person restrained.** If it appears on the return of the writ that the party is in custody by virtue of process from any court of this state, or any judge or officer thereof, such person may be discharged in any of the following cases, subject to the restrictions of section 32-22-02:

1. When the jurisdiction of such court or officer has been exceeded.
2. When the imprisonment was at first lawful, but by some act, omission, or event which has taken place afterward, the party has become entitled to a discharge.
3. When the process is defective in some matter of substance required by law rendering such process void.
4. When the process, though regular in form, has been issued in a case not allowed by law.
5. When the person having the custody of the party is not the person allowed by law to detain the party.
6. When the process is not authorized by any order or judgment of any court nor by any provisions of law.
7. When a party has been committed on a criminal charge without reasonable or probable cause.
8. When the process appears to have been obtained by false pretense or bribery.

**32-22-18. Informal commitment from district judge.** If the person is committed to prison, or is in custody of an officer on a criminal charge, by virtue of a warrant of commitment of a district judge, the person must not be discharged on the ground of any mere defect of form in the warrant of commitment.

**32-22-19. Procedure when person appears to be guilty.** If it appears to the court, by affidavit or otherwise, or upon inspection of the process or warrant of commitment and proceedings as may be shown to the court, that the party is guilty of a criminal offense or ought not to be discharged, such court, although the charge is defectively or not substantially set forth in such process or warrant of commitment, must cause the complainant or other necessary witness to be subpoenaed to attend at such time as ordered, to testify before the court, and upon the examination the judge may discharge such party, admit the party to bail if the offense is bailable, or recommit the party to custody, as may be just and legal.

**32-22-20. Habeas corpus to give bail.** Whenever a person is imprisoned or detained in custody on a criminal charge, for want of bail, such person is entitled to a writ of habeas corpus for the purpose of giving bail, upon averring that fact in such person's petition, without alleging that the person is confined illegally. Any judge in or out of the court in which the judge is authorized to act may take an undertaking of bail from any person who has been committed on a criminal charge, when brought before the judge on a writ of habeas corpus, as in other cases, if the offense is bailable, and file the undertaking in the proper court.

**32-22-21. Procedure when person not entitled to discharge.** If a party brought before the court on the return of the writ is not entitled to a discharge, and is not admitted to bail or bailed when allowable, the court must remand the party to custody, or place the party under the restraint from which the party was taken, if the person under whose custody or restraint the party was is legally entitled thereto.

**32-22-22. Prisoner may be ordered to custody of proper officer.** In cases where any party is held under illegal restraint or custody, and any other person is entitled to the custody or restraint of such party, the court may order such party to be committed to the custody or restraint of such person as by law is entitled thereto.

**32-22-23. How person disposed of before judgment.** Until judgment is given on the return, the court before whom any party may be brought on such writ may commit the party to the sheriff of the county or place the party in such care or under such custody as the party's age or circumstances may require.

**32-22-24. When notice of hearing must be given state's attorney.** When it appears that the person in whose behalf a writ of habeas corpus is issued is held upon a criminal charge of any kind, notice of the time and place of the hearing upon the return shall be given to the state's attorney of the county where the offense arose if the person is within the state's attorney's county. In other cases, like notice shall be given to any person interested in continuing the custody or restraint of the party asking aid of such writ.

**32-22-25. Person taken out of county - Expenses.** Whenever the officer or person to whom a writ of habeas corpus is directed and delivered is required thereby to make return and take the person in whose behalf the writ is issued into a county other than the county in which such person is imprisoned or restrained, the court awarding the writ, at the court's discretion, may ascertain, and by an entry thereon specifying the amount, but not exceeding fifteen cents per mile, may require the payment or tender, at the time of delivering the writ, of the charges of obeying the same. However, in no case when an entry is not made can the payment or tender of such charges be demanded before the return of the writ in accordance with its direction.

**32-22-26. Writ must not be disobeyed.** No writ of habeas corpus can be disobeyed for defect of form, if it sufficiently appears therefrom in whose restraint the party imprisoned or restrained is, the officer or person detaining the party, and the court before whom the party is to be brought.

**32-22-27. When person discharged may be arrested again.** No person who has been discharged by the order of the court upon habeas corpus can be imprisoned again or kept in custody for the same cause, except in any of the following cases:

1. If the person has been discharged from custody on a criminal charge and is committed afterwards for the same offense, by legal order or process.
2. If, after a discharge for defect of proof, or for any defect of the process, warrant, or commitment in a criminal action, the accused is arrested again on sufficient proof and committed by legal process for the same offense.
3. If in a civil action the party has been discharged for any illegality in the order, judgment, or process and afterwards is imprisoned by legal process for the same claim for relief.

**32-22-28. How obedience to order of discharge enforced.** Obedience to an order for the discharge of any person, granted pursuant to the provisions of this chapter, may be enforced by the court or judge issuing such writ, or granting such order, by attachment, in the same manner as hereinbefore provided for a neglect to make a return to a writ of habeas corpus, and the person guilty of such disobedience shall forfeit to the party aggrieved five hundred dollars, in addition to any special damages such party may have sustained.

**32-22-29. Person restrained in danger of being taken out of jurisdiction - Warrant.**

When it appears to any court authorized by law to issue the writ of habeas corpus that anyone is illegally held in custody, confinement, or restraint, and that there is reason to believe that the person will be carried out of the jurisdiction of the court, or will suffer some irreparable injury before compliance with the writ of habeas corpus can be enforced, the court may cause a warrant to be issued reciting the facts and directed to the sheriff or coroner of the county, commanding the officer to take the person thus held in custody, confinement, or restraint, and forthwith bring that person before the court to be dealt with according to law. The court also may insert in the warrant a command for the arrest of the person charged with the illegal detention and restraint.

**32-22-30. Execution of warrant.** The officer to whom such warrant is delivered must execute it by bringing the person therein named before the court who directed the issuing of such warrant, but if such warrant is issued by the supreme court or a judge thereof, upon the return of the warrant, the hearing and decision of the matter may be ordered by such court or judge to be had before the district court of the proper county or the judge thereof.

**32-22-31. Return to warrant - Procedure.** The person alleged to have such party under illegal confinement or restraint may make return to such warrant, as in case of a writ of habeas corpus, and the same may be denied, and like allegations, proofs, and trial thereupon may be had as upon a return to a writ of habeas corpus.

**32-22-32. When person must be discharged.** If the party is held under illegal custody or restraint, the party must be discharged or be restored to the care or custody of the person entitled thereto.

**32-22-33. When writ may be served.** Any writ or process authorized by this chapter may be issued and served on any day or at any time.

**32-22-34. Accused liberated for want of prosecution.** If any person shall be committed for a criminal or supposed criminal matter and not admitted to bail, and shall not be tried on or before the second term of the court having jurisdiction of the offense, the prisoner shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner. If such court at the second term shall be satisfied that due exertions have been made to procure the evidence for and on behalf of the state, and that there are reasonable grounds to believe that such evidence may be procured at the third term, it shall have power to continue such case until the third term. If any such prisoner shall have been admitted to bail for a crime other than a capital offense, the court may continue the trial of said cause to a third term, if it shall appear by oath or affirmation that the witnesses for the state are absent, such witnesses being mentioned by name, and the court shown wherein their testimony is material.

**32-22-35. Writ not allowed to delay trial.** To prevent any person from avoiding or delaying that person's trial, it shall not be lawful to remove any prisoner on habeas corpus under this chapter out of the county in which the prisoner is confined, within fifteen days next preceding the term of the court at which such person ought to be tried, unless it is to convey the prisoner into the county where the offense with which the prisoner stands charged properly is cognizable.

**32-22-36. Prisoners may not be removed from one prison to another - Exceptions.**  
Repealed by S.L. 1997, ch. 114, § 8.

**32-22-37. Penalty if judge refuses or delays writ.** Any judge empowered by this chapter to issue writs of habeas corpus, who corruptly shall refuse to issue such writ when legally applied to, in a case where such writ may issue lawfully, or who, for the purpose of oppression, shall delay unreasonably the issuing of such writ, shall forfeit to the prisoner or party aggrieved a sum not exceeding five hundred dollars for every such offense.

**32-22-38. Removing or concealing prisoner to avoid writ.** Anyone having a person in custody or under restraint, power, or control, for whose relief a writ of habeas corpus is issued, who, with intent to avoid the effect of such writ, shall transfer such person to the custody, or place

such person under control of another, or shall conceal such person or change the place of such person's confinement with intent to avoid the operation of such writ, or with intent to remove such person out of this state, shall be guilty of a class C felony. In any prosecution under this section, it shall not be necessary to show that the writ of habeas corpus had issued at the time of the removal, transfer, or concealment therein mentioned, if it is proven that the acts therein forbidden were done with the intent to avoid the operation of such writ.

**32-22-39. Officer refusing prisoner copy of commitment - Penalty.** Repealed by S.L. 1985, ch. 169, § 3.

**32-22-40. Penalty for rearresting on same charge.** Any person who, knowing that another has been discharged by order of a competent judge or tribunal on a writ of habeas corpus, shall arrest or detain that person again, contrary to the provisions of this chapter, for the same cause which was shown on the return of such writ, shall forfeit five hundred dollars for the first offense, and one thousand dollars for every subsequent offense.

**32-22-41. All penalties inure to use of party aggrieved.** All the pecuniary forfeitures under this chapter shall inure to the use of the party for whose benefit the writ of habeas corpus issued, and shall be sued for and recovered with costs, in the name of the state, by any person aggrieved.

**32-22-42. Recovery of penalties no bar to civil action.** The recovery of the penalties prescribed by this chapter shall be no bar to a civil suit for damages.

**32-22-43. Writ may issue for witness or for surrender of principal in discharge of bail - Liability of jailer - Costs.** The supreme court or any district court within this state, or any judge of any such court, may issue a writ of habeas corpus to bring the body of any person confined in any jail in the state before such court or judge to testify or to be surrendered in discharge of bail. Where a writ is issued for any such purpose and the witness or principal sought is confined in any jail in a county other than the county in which such person is to be surrendered, or to which such person is to be removed, and where such writ is executed and returned by an officer to whom it is directed, the jailer from whose custody such person is taken shall be exonerated from liability for an escape if:

1. The court or judge issuing the writ shall make an order directing the return of such person to the custody of such jailer.
2. An attested copy of such order is delivered to the said jailer.
3. The officer to whom the writ was directed shall return such person pursuant to the said order after the execution of the writ.

The party praying out such writ of habeas corpus shall pay to the officer executing the same such reasonable sum for the officer's services as shall be adjudged by the court.