

LAW OFFICE OF TARA HERIVEL, LLC
811 S.W. NAITO PARKWAY, SUITE 420
PORTLAND, OREGON 97204

PHONE: (503) 893-5525
E-MAIL: TARA@HERIVELDEFENSE.COM
WWW.HERIVELDEFENSE.COM

LICENSED IN OREGON AND WASHINGTON

Updated 4/7/20

INSTRUCTIONS FOR FILING YOUR MEDICAL CONDITIONS CASE

The following instructions for filing a habeas case are for people in jails and prisons currently unprotected against coronavirus or the disease Covid-19 to ask for help from the court. The purpose of the habeas petition is to make the jail or prison provide you with protection from Covid-19, or release you if they won't or can't. By creating and distributing these documents, I am not offering to be your attorney.

Attached is a blank legal form, called a pleading or petition, to fill out and file a habeas corpus petition in the county where you are now in jail or prison, with other forms you will need to also file at the same time to request an attorney.

Relevant laws: ORS 34.310 *et seq*; Oregon Constitution Article 1, Sections 13, 16 and 23; U.S. Constitution Article 1, Section 9; Oregon Rules of Civil Procedure 47 (time for response).

FORMS ATTACHED

1. Blank pleading/petition for a writ for habeas corpus that should apply for all jails or prisons in a Covid-19 case.
2. Affidavit of eligibility
3. Motion for court appointed attorney
4. Habeas statute – Art 1 §23, Oregon Constitution ORS 34.310

General information:

Habeas corpus is a legal remedy available to all people in jails or prisons to challenge the conditions of their confinement. It is a fundamental right under the state and federal constitutions and courts cannot legally prevent you from bringing this type of case. Let an attorney know if your county is trying to stop habeas cases because of its interpretation of Covid-19 emergency court orders, which may be unlawful.

The case types in habeas are either 1) medical conditions (failure of jail or prison to provide adequate care for a serious medical condition) or sentencing errors that keep

person incarcerated past sentence date. The following instructions concern medical cases, with Covid-19 issues.

Exhaustion of available administrative remedies: To bring a habeas case, the law requires a prisoner must exhaust all available administrative resources: that means you must kyte the issue and follow the jail or prison processes, if available. When those steps are completed, if no remedy, it's time to file a habeas. But, sometimes the circumstances are so urgent, as may be the case here, the court can hear a habeas case when administrative remedies haven't been exhausted because the risk of harm is so great and immediate.

To exhaust your remedies, kyte immediately and often to the jail or prison. Tell the jail or prison: you need protections from Covid-19, and be specific:

- **You need to be a minimum of 6 feet from any other person, including staff. You need personal protection equipment (PPE) like masks and gloves and for all staff and other prisoners to have adequate PPEs, access to soap and sinks, and distance from other sick prisoners or staff.**
- **You need all staff and anyone entering and leaving the facility to be properly screened for infection from the virus causing Covid-19 every day.**
- **You have an underlying health condition (if you do) that makes you "at risk: or severe harm or even death if you get Covid-19. Specify health conditions, like asthma, respiratory disease, heart disease, obesity, over 50, other health problems.**

What you win in habeas:

If you win a habeas, you usually receive injunctive relief, which means the court will order the jail or prison to provide the care needed (if a medical case). Release is extremely unusual, but with Covid-19, you or your attorney should request both release and enforcement of adequate distancing from others given the urgent circumstances.

The following are the usual steps in a habeas case.

STEP 1:

FILE THE PETITION FOR WRIT OF HABEAS CORPUS

- 1) Fill in and file enclosed blank petition for writ of habeas corpus with the court with clear description of the claims. It is extremely important to be very specific. Provide detail about how you are about to be harmed, what you have done to try and get the jailer to protect you, why you are at-risk.
- 2) File with affidavit of eligibility for court appointed counsel (see form).

- 3) File with motion for appointment of counsel **You can ask for representation by Tara Herivel (OSB# 070418, contact above) in your form for court-appointed counsel by writing in the request on the form: “Please appoint attorney Tara Herivel with the Oregon Post-Conviction Consortium”.** (see form) This is not a guarantee I will be appointed.

CLAIM TYPES

Two general types your claims must fit under:

1. **CONDITIONS CASES** Most common claim type in habeas:

-Allegations involve illegal conditions of confinement amounting to a deprivation of a constitutional right, like failure or refusal to provide adequate medical/mental health care, or other conditions of confinement, rising to an 8th A violation of deliberate indifference, cruel and unusual punishment.

Must state in specific detail:

- 1) Need for immediate judicial scrutiny because of the “urgency of the harm to which petitioner claims to be exposed...or [judicial scrutiny] is found to be required as a matter of constitutional law,”; and
- 2) the lack of any other adequate and timely remedy. *Penrod/Brown v. Cupp*, 283 O2 21, 28, 581 P2d 934 (1978).

2. **“PRISON WITHIN A PRISON”**- where prisoner in segregation and isolation, or juvenile in adult prison. No requirement to show a need for immediate judicial attention of inadequacy of all other remedies (Cases: *Penrod/Brown v. Cupp*, *Armstrong v. Cupp*, *Peters v. Renfro*).

FACTS NEEDED FOR COVID-19 CLAIMS:

For Covid-19 claims, must include the specific information below in the petition. There are blank sections in the petition provided to fill in this information.

- 1) State if you have a health condition that makes you more at-risk to the disease (more likely to get very sick), like: asthma, respiratory disease, diabetes, heart disease, other serious medical conditions.
- 2) State if you have requested testing for Covid-19 and been refused.
- 3) State if you have kyted for help and been refused.
- 4) State if you are provided any protections by the jail or prison, like: maintaining at least 6 feet distance between prisoners and staff at all times, providing face masks,

gloves, access to soap, adequate number of sinks, separation of prisoners who are or may be sick, daily screening of staff before entry to jail or prison.

FILING TIPS

Filing fee: File habeas pleadings along with affidavit of indigency and request for appointment of counsel with the circuit court in the county where you are incarcerated. The fee may change, but it is currently \$263 and will be automatically withdrawn from your prisoner account.

Service of petition: Most pleadings have to be served formally to the opposing party or defendant. Service is **not** required on defendant to begin the case in habeas. The court will contact the defendant when it produces its Order to Show Cause (see below). For future pleadings, if you aren't represented by counsel, you will have to file all pleadings on the court and the defendant yourself.

Notary: Ask the jail or prison for access to a notary, and have them notarize your forms.

STEP 2:

ORDER to SHOW CAUSE – issued by the court upon Defendant, with copy sent to you, the petitioner, or your attorney, if appointed.

DEFENDANT has 14 days to respond. If no response, **Court will issue writ and appoint counsel.** After 14 days, Ct will either deny writ as meritless, issue judgment with relief (never happens), issue the writ of habeas corpus requiring a return be made by the defendant, and set date by which plaintiff must produce first pleading called a replication.

IMPORTANT: If the court dismisses your case before counsel is appointed, contact either me, or the below law firm who will file an appeal for you **within no more than 30 days of the dismissal:**

O'Connor Weber, LLC
1500 SW 1st Ave., Suite 1090
Portland, OR 97201
(503) 226-0923

You can also email O'Connor Weber at appeal@oconnorweber.com. Send them a copy of the judgment denying your case, if you can, or at least the case number and name.

STEP 3:

DEFENDANT'S RETURN (ORS 34.421, 34.540 contents of writ) – first pleading from the state. Has plaintiff's basic information regarding criminal case serving time for at time of habeas case, and other boilerplate statements about validity of plaintiff's custody.

STEP 4:

PLAINTIFF'S REPLICATION (ORS 34.670) – first pleading with attorney, if appointed or retained, with general outline of claims. Typically about 2-3 weeks after Defendant's return.

STEP 5:

DEFENDANT'S MOTION TO DISMISS - The attorney for the defendant will usually file a motion to dismiss, arguing there are no valid claims, regardless of whether there are valid claims. You or your attorney have 20 days to respond under ORCP 47, with a pleading called "objections to motion to dismiss". You may need to file an extension to have more time to file objections to the state's motion to dismiss. After you file your objections, a hearing date is set, and you will fight to keep your case alive. If you win, you will set a trial date and begin trial preparations. Habeas cases are supposed to be fast-tracked, with trials set as soon as possible, usually between 2-4 months out.

STEP 6:

TRIAL - If you have an attorney, this is your trial where the court will order the defendant to do whatever it is you have asked, called "injunctive relief", if you win. If the defendant is not providing adequate medical care, for example, the court can order them to do so in the specific ways requested that the court agrees is required. There are typically no awards for money damages in this type of case. If you win, you can ask for your filing fee to be reimbursed to your books, but it is unlikely that will be granted.

IF THE COURT DISMISSES YOUR CASE AT ANY TIME YOU SHOULD APPEAL

If the court dismisses your case at any time, you must appeal within 30 days of the decision. If you want to appeal, contact the attorneys at O'Connor Weber (contact above). You will not have to pay any additional fees for their help, it's considered part of your original habeas case.

* * *