

Washington Defender Association's Immigration Project

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Practice Advisory to Assist Defenders in Filing State Habeas Petitions (And Other Actions) To Challenge Unlawful Detention on Expired Immigration Detainers¹ January 2010

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I. Introduction

This memorandum offers guidance to Washington State defenders seeking to challenge the unlawful detention of noncitizens who are being held in local jails pursuant to expired immigration detainers.

Pursuant to federal regulations at 8 C.F.R. § 287.7, state and local jails are continuing to detain alleged noncitizens defendants upon their release from criminal custody to give agents from Immigration and Customs (ICE) an opportunity to assume custody of the person. Under the regulations, a jail is permitted to hold a released individual for an additional period of up to 48 hours while waiting for ICE pickups.

Unfortunately, ICE can often take much longer than the authorized 48 hours to assume custody. This memorandum is intended to provide some guidance to Washington practitioners, defenders who wish to obtain immediate release of their clients whom the local jail refuses to release after the expiration of authorized 48-hour period (but who ICE has not yet assumed custody).

The first part of the memo explains that federal courts lack jurisdiction over this matter, and because state and local governments have authority over the alleged noncitizen detainees for only the regulatory 48 hours, no governmental entity has the authority to continue to detain individuals on an ICE detainer once the 48-hour period is over.² The next part of the memo provides an explanation of how state habeas writs and state writs of prohibition and mandamus can be used to obtain the immediate release of detained individuals.³

INA § 236(a) gives the U.S. Attorney General discretion to arrest and detain a noncitizen pending a decision to remove the noncitizen from the country. Once a Notice to Appear (“NTA”) is issued, the noncitizen who is subject to arrest may be taken into custody until removal proceedings are terminated. 8 C.F.R. § 236.1(b)(1). Federal regulations only authorize certain officials to issue and serve a warrant of arrest or detainer. 8 C.F.R. § 236.1(b)(1); 8 C.F.R. § 287.5(e)(2)-(3); 8 C.F.R. § 287.7; 8 C.F.R. § 1236.1(b)(1). When the noncitizen is taken into custody, the relevant bond will be cancelled. 8 C.F.R. § 241.3(b). The Immigration and Customs Enforcement (“ICE”) may continue to detain or release the noncitizen pending a determination of removability, unless the noncitizen is subject to mandatory detention. INA § 236(a)(1); INA § 236(a)(2).

A detainer is a request that another federal, state, or local law enforcement agency uses to notify the Department of Homeland Security (“DHS”) (which notifies ICE, the investigative arm of DHS) prior to releasing a noncitizen. 8 C.F.R. § 287.7(a).⁴ Detainers are used to control the release of noncitizens from

² The research in the first part of the memo relies in part on an unpublished memorandum by Jim Melo and on additional two sources: Christopher N. Lasch, *Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164 (2008); and Kathrine Brady and Michael K. Mehr, *Defending Immigrants in the Ninth Circuit*, Chapter 12, Immigrant Legal Resource Center (2007).

³ Pleadings filed by Chris Jackson at The Defender Association were used as models for the second part of this memo. These pleadings were filed in superior court to obtain immediate release for individuals arrested and held in local jails for more than 48 hours (including weekends and holidays) without a probable cause determination.

⁴ ICE claims general authority to issue such detainers. It is far from clear that ICE has such broad authority; explicit statutory authority for immigration detainers comes from the Narcotics Traffickers Deportation Act, INA § 287(d), but the authority there is narrower than that given by the regulations. See Christopher N. Lasch, *Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 186-87 (2008).

local prisons and jails. The form detainer notice, Form I-247, is given to the state or local officials, directing the recipient to retain the individual for 48 hours or until ICE comes for a pickup.⁵

This procedure serves to assist DHS and ICE in arranging to assume custody of the noncitizen for the purposes of arresting and removing the noncitizen. 8 CFR § 287.7(a). The DHS regulations authorize temporary detention at ICE's request once ICE decides "to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department." 8 C.F.R. § 287.7(d). Section 287.7(e) provides that the Department shall not incur any financial obligation for issuance of a detainer not to be controversial and except if temporary detention is authorized per Section 287.7(d).

Despite cost and the lack of authority, state prisons and local jails in Washington have violated 8 CFR § 287.7(d) too often by maintaining custody over a noncitizen beyond the regulatory limitation of 48 hours (including weekends and holidays) while waiting for ICE to pick up the noncitizen. This is a clear violation of the federal regulation. Even more problematic is the fact that if ICE issues a detainer on an individual on a late Friday afternoon, ICE has until Wednesday morning to pick up the individual because weekends are not counted within the 48-hour period.

II. Lack of Authority to Detain Individuals After 48 Hours

Because state and local governments have authority over the alleged noncitizen detainees for only the regulatory 48 hours, once the 48-hour period is over, no governmental entity has the authority to continue to detain individuals on an ICE detainer. State and local law enforcement officers may not, on their own, place a "hold" on an alleged noncitizen beyond the time the individual would otherwise be released.⁶ Only ICE is authorized to place an immigration detainer on an individual. 8 C.F.R. § 287.7(d).

The case of *Ochoa v. Bass*, 181 P.3d 727 (2008), directly addresses the issue of jurisdiction in a situation where a detainer has expired after 48 hours, ICE has not taken custody of the noncitizen, and a writ of habeas corpus is being sought for the noncitizen's release. In *Ochoa v. Bass*, where defendant noncitizens sought writs of habeas corpus, the Oklahoma Court of Criminal Appeals held that the State "no longer had authority to continue to hold Petitioners" after the 48-hour period has passed. *Id.* at 733. The Court further held that "[i]f the federal government fails to apply federal law and take custody of Petitioners within the time limit set by federal regulations, then the state authorities must release Petitioners." *Id.* More importantly, the court here (a state court) implied that federal jurisdiction is lacking in such a case by issuing this final decision at the end of the opinion: "IT IS THEREFORE THE ORDER OF THIS COURT that original jurisdiction is assumed...the WRITS OF HABEAS CORPUS ARE ISSUED, and Petitioners...are hereby DISCHARGED from further state confinement..." *Id.* at 734.

In *Campillo v. Sullivan*, appellants sought review of grant of a writ of habeas corpus petition to compel the Immigration and Naturalization Service ("INS") to provide an immediate hearing and disposition of deportation proceedings upon filing an INS detainer with a local jail where the noncitizen was incarcerated. 853 F.2d 593, 594 (8th Cir. 1988). However, the Eighth Circuit in *Campillo* ruled that a filing of detainer with prison officials does not amount "to the taking into custody, technical or otherwise,

⁵ See, generally, Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164 (2008).

⁶ Michael K. Mehr, *State Enforcement of Immigration Law, Immigration Holds and Detainers, and Detention of Juvenile Aliens*, Criminal and Immigration Law, Immigrant Legal Resource Center, 12-8 (citing *Gates v. Superior Court*, 13 Cal. App. 3d 205, 211, 238 Cal. Rptr. 592 (1987); *Chairez v. County of Van Buren*, 542 F. Supp. 706, 713-16 (W. D. Mich. 1982) (*rev'd on other grounds*, 790 F.2d 554 (6th Cir. 1986)).

of the petitioner.” *Id.* at 596. Similarly, in *Molina v. Dept. of Homeland Sec.*, a federal trial court stated: “Courts have generally held that ‘a prisoner who is serving a criminal sentence is not in [ICE’s] custody simply because the [ICE] has lodged a detainer against him with the person where he is incarcerated.’” 2008 U.S. Dist. LEXIS 17725 (2008).

Custody controls jurisdiction on issues of habeas corpus. 28 U.S.C. § 2241. The courts in the foregoing cases as well as other federal court cases, all of which involved a noncitizen being held in a state facility and subject to detainers by INS or ICE, have stated that an ICE detainer alone is not sufficient to create custody, which means that federal courts lack jurisdiction over this matter. It is also apparent from the above cases that federal jurisdiction is not available to seek the release of a noncitizen from local custody.

Based on the line of cases cited above, it seems that the only appropriate jurisdiction that governs a case where a noncitizen is held by state or local enforcement agencies beyond the authorized 48 hours and has not been placed into ICE’s custody is that of *state* courts. Therefore, because (1) the state or local agency’s custody ends after 48 hours, and (2) a § 287.7 detainer lacks the authority to establish ICE’s custody over the noncitizen, the noncitizen should be released from state or local custody after the 48 hours is up.

An additional note should be made regarding § 287(g) of the Immigration and Nationality Act (“INA”), which was added by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). This particular section of the INA authorizes the secretary of the DHS to enter into Memoranda of Agreement (“MOA”) with state and local law enforcement agencies to allow state and local officers to perform immigration law enforcement. In order to qualify, state and local officers must undergo requisite training and act in accordance under the supervision of sworn ICE officers. *Id.* More specifically, MOAs define the scope and limitations of authority designated to state and local officers, establish the supervisory structure for the officers, and prescribe the complaint process governing officer conduct. *Id.* ICE has the statutory responsibility to supervise all cross-designated officers when they exercise their immigration authorities. *Id.* As of September 14, 2007, 28 state and local agencies have signed § 287(g) MOAs.⁷

Washington currently does not have any § 287(g) agreements in place with the federal government. Therefore, in Washington, a stronger argument can be made against the propriety of state and local agencies’ authority to maintain custody over noncitizens, particularly when they have maintained such custody beyond the authorized 48 hours. Absent a § 287(g) agreement with DHS, state and local jails are *not* detention facilities for federal purposes and state and local officers *cannot* maintain custody over noncitizens past the 48-hour mark because they are not acting under color of federal law.

III. Writ of Habeas Corpus⁸

A petition for writ of habeas corpus filed in the superior court of the county in which the person is unlawfully detained would provide the person with access to the courts and would be the fastest mechanism for the person’s immediate release. A habeas petition provides a way for the person to challenge an illegal restraint.⁹

⁷ ICE Fact Sheet, <http://www.ice.gov/pi/news/factsheets/070906factsheet287gprogoover.htm>.

⁸ A sample petition for a writ of habeas corpus is also available on the Immigration Detainer page of the WDA website.

⁹ See, e.g., Christopher N. Lasch, *Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 194 (2008) (suggesting petitions for habeas writs as one strategy for challenging individuals held too long after the expiration of their sentences).

A. Authority of the Superior Court to Issue the Writ

In Washington, the writ of habeas corpus is addressed in both statutory and constitutional provisions. The right to challenge an unlawful detention by writ of habeas corpus in superior court is guaranteed by the Washington Constitution, Art. 4, sec. 6, and by RCW 7.36. The Washington Constitution provides that superior courts and their judges “shall have power to issue . . . writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties.” Wash. Const. Art. 4, sec. 6.

RCW 7.36 provides a mechanism for challenging any illegal restraint. The habeas corpus statutory provisions underscore an illegally restrained person’s right to seek a writ of habeas corpus and prescribe the court’s responsibilities with regard to the writ. The statutory language provides for immediate release upon a finding of illegal restraint:

Every person restrained of his liberty under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered therefrom when illegal.

RCW 7.36.010. Release from the illegal restraint is *mandatory* under this statute. *Id.*

A superior court judge has constitutional authority to grant a writ of habeas corpus and explicit statutory authority to do so under RCW 7.36.040:

Writs of habeas corpus may be granted by the supreme court, the court of appeals, or superior court, or by any judge of such courts, and upon application the writ shall be granted without delay.

RCW 7.36.040. After being presented with a petition, the court or judge “shall thereupon proceed in a summary way to hear and determine the cause[.]” RCW 7.36.120. A granted writ is to be directed to the party having the person under restraint; in most cases, that will be the local jail or prison. *See* RCW 7.36.050.

B. Restrained of Liberty

The writ of habeas corpus provides a unique judicial avenue to challenge one’s detention. In order for a person to petition for a writ of habeas corpus, the person must be (1) restrained of his liberty, (2) under a pretense, and (3) illegally restrained. RCW 7.36.010.

The writ of habeas corpus is not a criminal action, but a civil action to enforce the right to personal liberty. *Honore v. Board of Prison Terms & Parole*, 77 Wn.2d 660, 663-64, 466 P.2d 485 (1970).¹⁰ The primary purpose of the writ is to test the legality of the current detention. “Whatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of a prisoner’s current detention.” *Toliver v. Olsen*, 109 Wn.2d 607, 610, 746 P.2d 809 (1987), (quoting *Walker v. Wainwright*, 390 U.S. 335, 336, 19 L.Ed 2d 1215, 88 S.Ct. 962 (1968)).

The habeas writ guarantees the right to challenge a restraint imposed in violation of the individual’s state and federal constitutional rights. *In re Runyan*, 121 Wn.2d 432, 441-43. *Smith v. Whatcom County*

¹⁰ However, the United States Supreme Court, in denying applicability of the discovery provisions of civil rules to habeas proceedings, observed the label “civil” is inexact, and that “more approximately the remedy in such context is unique, if not somewhat *Sui generis*.” *Honore v. Board of Prison Terms & Parole*, 77 Wn.2d at 664 (citing *Harris v. Nelson*, 394 U.S. 286, 89 S. Ct. 1082, 22 L.Ed.2d 28 (1969)).

District Court, 147 Wn.2d 98, 113 (2002), citing 7.36.140. However, according to the explicit text of the statute, the restraint does not have to be unconstitutional. It only has to be “illegal”.¹¹ RCW 7.36.010.

Unlawfully detained individuals have a liberty interest in their freedom. *See Weiss v. Thompson*, 120 Wn. App. 402, 407, 85 P.3d 944 (2004). Individuals detained solely because of an ICE hold beyond the 48 hours authorized by § 287.7 are unlawfully detained by the local jail or state prison. In addition, the detained individuals have state and federal constitutional claims, as they are being deprived of liberty without due process of law. U.S. Const. Fifth & Fourteenth Amendments; Wash. Const. art. 1, sec. 3. Habeas corpus is necessary to remedy these constitutional violations.

When necessary, the writ of habeas corpus provides for an evidentiary hearing to resolve significant factual and legal issues. *Honore v. Board of Prison Terms & Parole*, 77 Wn.2d 660, 663-64. When a local jail or state prison agrees that it has detained an individual due solely to an ICE detainer for more than the 48 hours authorized in the regulations, there are no significant factual or legal issues left to resolve. The individual is illegally restrained, and must be immediately released.

C. Immediate Release is Mandatory

The writ of habeas corpus *requires* the release of any person who is illegally restrained. The statute directs that a person whose liberty is unlawfully restrained “*shall* be delivered therefrom when illegal.” 7.36.010. Immediate release is the primary remedy for unlawful detention challenged by a writ of habeas corpus. RCW 7.36.120.

When ordered by the court, respondent, typically the representative or director of the local jail or prison, must present “the authority or cause of the restraint of the party in his custody.” RCW 7.36.100(1)-(3). If the respondent cannot provide a legal cause for the restraint, the court is to order immediate release. RCW 7.36.120. The habeas writ provides a “speedy device to test the constitutionality of detention.” *Honore v. Board of Prison Terms & Parole*, 77 Wn.2d 660, 663-64, 466 P.2d 485 (1970). Upon the application of an unlawfully detained person, the writ is to be granted “without delay.” RCW 7.36.040.

Because detaining persons in the absence of authority is a constitutional violation, the detained individuals are entitled to immediate habeas relief. *Weiss v. Thompson*, 120 Wn. App. 402, 407, 85 P.3d 944 (2004). Leaving individuals unlawfully detained in local jails or state prisons while waiting for ICE to pick them up would add to the length of time detained persons are unlawfully restrained, and potentially subject local jurisdictions to suits for civil damages.

After issuing a detainer under the authority of § 287.7, ICE has 48 hours to pick up an individual, excluding weekends and holidays. This means if an ICE detainer is placed on an individual on Friday at 5 p.m., ICE has until Wednesday morning to pick up the individual. However, if the petitioner has already been detained for 48 hours solely on the basis of an ICE detainer by 5 p.m. on Friday or the closest non-holiday weekday, the petitioner could be released on the weekend.¹² As a hearing on a petition for writ of habeas corpus is an emergency proceeding, it can even be held on a Sunday. RCW 7.36.230.

D. Limitations on Habeas Writs

¹¹ The writ of habeas corpus has been used to address a number of non-constitutional issues, such as the application of the capital statute to bail pending appeal, *State v. Haga*, 81 Wn.2d 704, 504 P.2d 787 (1972).

¹² There are anecdotal reports of ICE claiming that its business day ends at 3 p.m. on Friday, so that persons detained under 287.7 beginning on Wednesday at 4 p.m. would not be unlawfully detained until the following Monday.

RCW 7.36.130 lists the limitations on petitions for writs of habeas corpus. There are three limitations which would prohibit the inquiry by a judge into the legality of any judgment or process by which a party is in custody. There limitations are: (1) when the petitioner is challenging a final judgment of a court, except where it is alleged that the petitioner's state or constitutional rights are violated; (2) for contempt of any court, officer, or body having authority in the premises to commit; or (3) "upon a warrant issued from the superior court upon an indictment or information." RCW 7.36.130.

None of the limitations on petitions for writs of habeas corpus listed in RCW 7.36.130 apply in this case. The petitioner is not making a collateral attack on a final order by a court, as the individual is being held in the jail or prison solely on the basis of an ICE detainer, which merely serves a notice function. In addition, the individual's constitutional rights *are* being violated, which is a sufficient, though not necessary, condition for avoiding the first limitation. The second limitation does not apply, as the petitioner is not seeking an order of contempt, and the respondents do not have the power to commit the individuals. And, finally, the ICE detainer is *not* a warrant but merely serves a notice function, and it is not "issued by the superior court upon an indictment or information." As none of the limitations apply, a petitioner can ask the superior court to grant the writ of habeas corpus and order immediate release from custody, and the superior court must, on finding of unlawful restraint, grant the writ and order release.

A writ of habeas corpus is an original action; it is not an appeal or a mechanism for review. In order to file a writ of habeas corpus, a petition is *not* required to first exhaust other available remedies, such as a personal restraint petition (PRP). *Toliver v. Olsen*, 109 Wn.2d 607, 610 (1987); *Weiss v. Thompson*, 120 Wn. App. 402, 407 (2004). This is true even for postconviction proceedings, because the writ of habeas corpus is constitutional and "antecedent to statute." *Toliver v. Olsen*, 109 Wn.2d 607, 610, 746 P.2d 809 (1987).

Personal restraint petitions (PRPs) replaced the writ of habeas corpus with regard to post-conviction relief in the Court of Appeals. *Toliver v. Olsen*, 109 Wn.2d 607, 610 (1987), RAP 16.3(a), 16.3(b). But if a habeas petition is filed in the superior court of the county in which the individual is detained, that court may itself handle and determine the matter. *See Toliver v. Olsen*, 109 Wn.2d at 610. PRPs did not replace habeas relief from illegal detention when that is sought in the superior court or Supreme Court. *See* RAP 16.3(b)(providing that "[t]hese rules do not supersede and do not apply to habeas corpus proceedings in the superior court"). This is out of deference to the fact that habeas corpus is a constitutional writ. *Toliver v. Olsen*, 109 Wn.2d at 611 (stating that even in postconviction review cases, the personal restraint rules do not affect the habeas corpus jurisdiction of superior courts). However, in postconviction proceedings, the superior court *may* transfer the proceeding to the Court of Appeals for consideration as a personal restraint petition if the superior court, in the exercise of its informed discretion, determines that the ends of justice will best be served by the transfer. *Toliver v. Olsen*, 109 Wn.2d at 610.

A petition for a writ of habeas corpus brought by an individual unlawfully detained in a jail or prison solely on the basis of an ICE detainer should *not* be transferred to the Court of Appeals as a PRP because the ends of justice will not be best served by such a transfer. The individual is already unlawfully detained beyond the 48-hour period by the time the habeas petition is filed; transfer to the Court of Appeals as a PRP would add significant time to the unlawful detention. In addition, most PRPs are brought by detained individuals collaterally attacking their sentences or conditions of confinement; in those cases, whether the state has authority to restrain the liberty of the individual is in dispute. With individuals detained solely on the basis of an ICE detainer for more than 48 hours, it is clear that the state or local jurisdiction has no authority to continue to hold the individual while waiting for ICE agents to arrive. There is no complicated factual or legal issue to resolve; nothing material is likely to be in dispute. The individual is unlawfully detained beyond the 48-hour period, and he or she must be released.

E. Practical Considerations

(i) How to File

Public defenders can file petitions for writs of habeas corpus for their clients. In addition, public defenders have representative standing to challenge any measure that impairs the rights of their clients, particularly when the clients would have difficulty vindicating their rights on their own. *Vovos v. Grant*, 87 Wn.2d 697, 701, 555 P.2d 1343 (1976). In addition, any persons may be joined as plaintiffs if they assert any right to relief arising out of the same occurrences. CR 20(a).

The filing fee can be waived for petitions for writs of habeas corpus. A person entitled to file a habeas petition, but who cannot afford to pay the costs of filing the petition, can file a motion *in forma pauperis* and attach a financial affidavit along with the facts supporting the entitlement to the habeas relief. RCW 7.36.250. This may be done ex parte.

RCW 7.36.030 specifies what must be included in an application for a writ of habeas corpus:

Application for the writ shall be made by petition, signed and verified either by the plaintiff or by some person in his behalf, and shall specify:

- (1) By whom the petitioner is restrained of his liberty, and the place where, (naming the parties if they are known, or describing them if they are not known).
- (2) The cause of pretense of the restraint according to the best knowledge and belief of the applicant.
- (3) If the restraint be alleged to be illegal, in what the illegality consists.

RCW 7.36.020. The writ is to be directed to the party having the person under restraint; in most cases, that will be the local jail or prison. RCW 7.36.050.

After obtaining the client’s permission and gathering the necessary pleadings and affidavits, the attorney may want to notify the prosecutor and the court that the writ is coming. The attorney should take the pleadings to the criminal presiding judge to review the IFP, writ application, and the return on the writ. Once the IFP is signed, the attorney should take it to the clerk’s office and fill out the case designation form. The attorney should show the IFP order to the clerk and ask for a cause number. Once a cause number is received, serve the judge, prosecutor, and jail before leaving the courthouse, tell the client when the writ will be heard, and remind the bailiff to request an interpreter if needed.¹³

Emergency After Hours Proceedings: Timing is Everything. One day, or even a matter of hours can make the difference in whether your client will be apprehended by ICE on an expired detainer. Every superior court (where these habeas actions are filed) has a designated “after hours” judge who is required to entertain motions such as this. As such, **DO NOT WAIT** until the next day, or if on Friday, until Monday for your motion to be calendared. Determine the after hours judge in your court and insist that your habeas motion be heard immediately.

(ii) Consequences

Individuals held beyond the 48-hour period authorized by an ICE detainer are unlawfully detained by the jail or prison. The remedy unlawfully detained individuals can obtain through a writ of habeas corpus is

¹³ Thanks to Chris Jackson of The Defender Association for providing a more detailed version of these steps.

immediate release.¹⁴ However, the practical result of filing a habeas petition may be that the jail or prison contacts ICE again, and ICE rushes to pick up the individual before the court orders release. In some cases, though, the unlawfully detained individual may be released before ICE can arrive.

If the writ is denied by the superior court, the individual has the right to appeal that denial, although such an appeal is not likely to be practical for an individual unlawfully detained on an I-247 ICE detainer. Review of the denial by the appellate courts is *de novo*. *State v. Dallman*, 112 Wn. App. 578, 50 P.3d 274 (2002).

F. Habeas Class Actions and Injunctive Relief

Habeas Class Actions. The class of all individuals unlawfully detained for more than 48 hours on an ICE detainer may be able to bring a habeas class action suit. There is nothing in the habeas statute, the Washington constitution, or case law that precludes a habeas class action brought in the superior court. The Washington Supreme Court held in *Johnson v. Moore*, 80 Wn.2d 531, 496 P.2d 334 (1972), that persons detained without a hearing or charges qualified as a class under CR 23. In *Johnson*, two petitioners brought a class action, including a habeas petition, to end the practice of holding persons in the Seattle city jail on suspicion of various crimes without bringing them promptly before a magistrate. *Johnson*, 80 Wn.2d at 532. When charges were filed against the petitioners, the court dismissed their habeas petition. *Id.* On appeal, the Supreme Court held that persons detained without a hearing or charges (and thus illegally detained) qualified as class under CR 23. *Johnson*, 80 Wn.2d at 533-36. The court, however, refused to decide in that case whether the class action would be appropriate if brought solely to obtain habeas relief, putting that issue aside. *Johnson*, 80 Wn.2d at 535.

Under 23(a), one or more members of a class can sue as representative parties on behalf of all only if (1) the class is so numerous that joinder is impractical, (2) there are common questions of law and fact, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class members. Persons detained in excess of the 48 hours permitted by the ICE detainer are a proper class for all of the reasons stated in *Johnson*. Joinder of all petitioners is impractical because respondents can moot out individual cases by simply releasing the individuals, therefore a class action may be the best way to ensure justice for unlawfully detained individuals. The ultimate questions of law and fact are identical for each member of the class; in most cases, the material questions of law and fact will be uncontested by the parties. The claims of the representative parties are identical, and, particularly if the public defender is added as a representative party, the representative parties will fairly and adequately protect the interests of all class members.

The Washington Supreme Court has held, however, that the function of a writ of habeas corpus is to inquire into the legality of the particular restraint being imposed on the individual, “not to inquire into the validity of some future restraint that may or may not be imposed.” *Bailey v. Gallagher*, 75 Wn.2d 260, 266, 450 P.2d 802 (1969).¹⁵ Therefore, attorneys filing habeas petitions may want to file a petition for a

¹⁴ In addition to habeas relief, an unlawfully detained individual may be able to sue state and local officials for civil damages under 42 U.S.C. § 1983, as well as for injunctive and declaratory relief. Section 1983 lawsuits have been effective in addressing other types of illegal enforcement of immigration law by state and local officials. Michael K. Mehr, *State Enforcement of Immigration Law, Immigration Holds and Detainers, and Detention of Juvenile Aliens*, Criminal and Immigration Law, Immigrant Legal Resource Center, 12-5.

¹⁵ *But see In re Personal Restraint of Erickson*, 146 Wn. App. 576, 582, 191 P.3d 917 (2008) (holding that “where a petitioner is no longer in custody, a petition should be reviewed on the merits, despite its mootness, where the issue presented is one of continuing and substantial public interest and likely to evade review.”). Presumably, the reasoning of the Court of Appeals in this case would apply to habeas petitions filed in the superior courts as well as personal restraint petitions.

writ of prohibition and for a writ of mandamus, for individual clients or on behalf of a class of similarly situated unlawfully detained individuals, in addition to the habeas petition.

Injunctive Relief. In lieu of a class action, an individual habeas petition under RCW 7.36 may be an effective vehicle to force local jail authorities to alter their policies and create new policies of releasing noncitizens whom ICE has not picked up at the expiration of the 48 hour detainer period. In the case of *In re Personal Restraint of Erickson*, 146 Wn. App. 576, 582, 191 P.3d 917 (2008) the court held that “where a petitioner is no longer in custody, a petition should be reviewed on the merits, despite its mootness, where the issue presented is one of continuing and substantial public interest and likely to evade review.” This rationale would also apply to the instant issue where jails are repeatedly engaging in unlawful detention beyond the authorized period.

IV. Writs of Prohibition and Mandamus

A. Writ of Prohibition

RCW 7.16.290 regarding the writ of prohibition provides that this writ is “the counterpart of the writ of mandate,” and it is used to arrest the proceedings of an inferior tribunal, corporation, board, or person when those proceedings are without or in excess of the body’s jurisdiction. This procedural mechanism challenges the legality, existence, or jurisdiction of an office. *Ordell v. Gaddis*, 99 Wn.2d 409, 662 P.2d 49 (1983). There must be no plain, speedy, and adequate remedy at law before such a writ may be issued. RCW 7.16.300. Whether a remedy is “plain, speedy, and adequate” depends on a particular case’s facts and is subject to the discretion of the court in which the writ is sought. *Butts v. Heller*, 69 Wn. App. 263, 266, 848 P.2d 213 (1993). In addition, the application must be made by a person who is beneficially interested. RCW 7.16.300.

Art. IV, sec. 6 of Washington’s Constitution provides that the trial courts “and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties.” Injunctions, writs of prohibition, and writs of habeas corpus “may be issued and served on legal holidays and nonjudicial days.” The writ of prohibition is an extraordinary remedy. *Brower v. Charles*, 82 Wn. App. 53, 57-58, 914 P.2d 1202 (1996). However, Art. IV, sec. 6 of Washington’s constitution grants the superior courts jurisdiction over “such special cases and proceedings as are not otherwise provided for” and the power to issue the constitutional writs.

The form of the writ issued by the court must be either alternative or peremptory. RCW 7.16.310. Both forms must indicate the allegations against the party it is directed and may direct that party to refrain from further proceedings. *Id.* The alternative writ directs the party receiving the writ to show cause why further proceedings should not be absolutely restrained, while the peremptory writ does not have a show cause provision. *Id.*

This particular writ can be used to supplement a writ of habeas corpus when alleged noncitizens who are detained in a state prison or local jail and awaiting pickup by ICE wish to obtain immediate release and avoid future illegal restraint. The rationale in support of such a writ is that the right to a judicial determination of a detention past 48 hours cannot be vindicated by appeal *after* the granting of habeas corpus because the conditions of the alleged noncitizens’ detention are moot after release. Moreover, current law is unclear as to whether a writ of habeas corpus can provide injunctive relief in such a case and whether it would survive a challenge as to mootness. *See Johnson v. Moore*, 80 Wn.2d 531, 496, P.2d 334 (1972). The foregoing are all reasons that support the use of a writ of prohibition when noncitizens are unlawfully detained because this type of extraordinary, interlocutory writ is required to address issues relating to the unlawful detention past the 48-hour period that would otherwise not receive

review. In sum, a writ of prohibition may be used along with a writ of habeas corpus in order to prohibit local jails from continuing to violate 8 C.F.R. § 287.7(d).

B. Writ of Mandamus

The writ of mandamus is the counterpart of the writ of prohibition. RCW 7.16.290. It may be issued to “compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station.” RCW 7.16.160. When there is not another speedy and adequate remedy at law, the writ *must* be issued upon the application of a beneficially interested person. RCW 7.16.170. Thus, if the respondent is under a clear duty to act, the applicant has no plain, speedy, and adequate remedy at law, and the applicant is beneficially interested, the writ of mandamus will issue to compel performance of the respondent. *Eugster v. City of Spokane*, 118 Wn. App. 383, 76 P.3d 741 (2003).

In addition, the remedy by mandamus “contemplates the necessity of indicating the precise thing to be done.” *Clark Cy. Sheriff v. DSHS*, 95 Wn.2d 445, 450, 626 P.2d 6 (1981). A court will not issue a writ of mandamus to compel general compliance with the law; some specific act must be identified by the petitioner. *Id.*

Local jails and state prisons holding petitioners on ICE detainers beyond the 48 hours permitted by 8 C.F.R. § 287.7 are under a clear duty to act by immediately releasing those illegally detained individuals. The desired action, immediate release for those held too long on an ICE detainer, is specific enough to meet the requirements set by the Washington Supreme Court in *Clark Cy. Sheriff*. For a class of individuals, it is not clear that a habeas remedy would be available, particularly if the named individuals are released. The public defender, in his or her representative capacity, can bring a mandamus action compelling the director or representative of the jail to release illegally detained individuals.

V. Conclusion

The law, as it stands now, is reasonably clear on the limitations of the authority of local jails and state prisons to hold individuals detained solely under the authority of 8 U.S.C. § 287.7 (and corresponding Form I-247) to not more than 48 hours, excluding weekends and federal holidays. Washington state habeas relief should be available to all individuals petitioning for such relief after the 48 hours expire. In addition, classes of individuals unlawfully detained past the permitted 48 hours may wish to file petitions for writs of prohibition and mandamus simultaneously with a petition for a writ of habeas corpus.