APPELLATE COURT

OF THE

STATE OF CONNECTICUT

A.C. 42795

**NONHUMAN RIGHTS PROJECT, INC.,
ON BEHALF OF BEULAH, MINNIE AND KAREN**

v.

**R.W. COMMERFORD & SONS, INC. A/K/A COMMERFORD ZOO, AND
WILLIAM R. COMMERFORD, AS PRESIDENT OF R.W. COMMERFORD & SONS, INC.**

**APPENDIX TO BRIEF OF PLAINTIFF-APPELLANT
(PARTS ONE AND TWO)**

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TO BE ARGUED BY:
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Attorney/Firm: COHEN & WOLF PC (010032) E-Mail: kela@cohenandwolf.com Logout

LLI-CV18-5010773-S NONHUMAN RIGHTS PROJECT, INC. v. R.W. COMMERFORD & SONS, INC. A/K/A COMMERFORD ZOO

Prefix: LL3 **Case Type:** M90 **File Date:** 06/11/2018 **Return Date:** 06/11/2018

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All Court events scheduled to occur on and after August 28, 2017 will take place at the new Litchfield Judicial District Courthouse at Torrington, located at 50 Field Street, Torrington, CT.

Information updated as of: 08/05/2019

Case Information

Case Type: M90 - Misc - All other
Court Location: Litchfield JD
List Type: No List Type
Trial List Claim:
Last Action Date: 07/29/2019 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date: 02/13/2019
Disposition: JUDGMENT OF DISMISSAL
Judge or Magistrate: HON DAN SHABAN

Party & Appearance Information

Party		No Fee Party	Party Category	Party Type
P-01	**NONHUMAN RIGHTS PROJECT, INC., ON BEHALF OF BEULAH, MINNIE, AND KAREN** **Attorney:** COHEN & WOLF PC (010032) File Date: 06/11/2018 PO BOX 1821 BRIDGEPORT, CT 06601 **Attorney:** PHV WISE STEVEN M. 10/9/09 (428757) File Date: 09/21/2018 5195 NW 112TH TERRACE CORAL SPRINGS, FL 33076		Plaintiff	Firm or Corporation
D-01	**R.W. COMMERFORD & SONS, INC. A/K/A COMMERFORD ZOO** Non-Appearing		Defendant	Firm or Corporation
D-02	**WILLIAM R. COMMERFORD, AS PRESIDENT OF R.W. COMMERFORD & SONS, INC.** Non-Appearing		Defendant	Person

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- Documents, court orders and judicial notices in electronic (paperless) civil, housing and small claims cases with a return date on or after January 1, 2014 are available publicly over the internet.* For more information on what you can view in all cases, view the Electronic Access to Court Documents Quick Card.
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Motions / Pleadings / Documents / Case Status

Entry No	File Date	Filed By	Description	Arguable
	09/21/2018		APPEARANCE	
100.30	06/11/2018	P	SUMMONS	No
100.31	06/11/2018	P	COMPLAINT	No
101.00	06/11/2018	P	PETITION *RESULT:* Order 6/15/2018 HON JOHN FARLEY	No
101.10	06/15/2018	C	ORDER *RESULT:* Order 6/15/2018 HON JOHN FARLEY	No
102.00	06/11/2018	P	MEMORANDUM	No
103.00	06/11/2018	P	EXHIBITS	No
104.00	06/11/2018	P	AFFIDAVIT	No
105.00	06/11/2018	P	AFFIDAVIT	No
106.00	06/11/2018	P	AFFIDAVIT	No
107.00	06/11/2018	P	AFFIDAVIT	No
108.00	06/11/2018	P	AFFIDAVIT	No
109.00	06/11/2018	P	AFFIDAVIT	No
110.00	06/11/2018	P	AFFIDAVIT	No
111.00	06/11/2018	P	AFFIDAVIT	No
112.00	06/11/2018	P	AFFIDAVIT	No
113.00	06/11/2018	P	AFFIDAVIT	No
114.00	06/11/2018	P	AFFIDAVIT	No
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116.00	06/11/2018	P	AFFIDAVIT	No
117.33	06/15/2018	C	TRANSFERRED FROM SUPERIOR COURT JUDICIAL DISTRICT OF TOLLAND	No
118.33	06/15/2018	C	TRANSFERRED TO SUPERIOR COURT JUDICIAL DISTRICT OF LITCHFIELD	No
119.00	08/03/2018	P	MOTION FOR PERMISSION TO APPEAR PRO HAC VICE PB 2-16 Motion for Admission of Attorney Steven M. Wise As Counsel Pro Hac Vice *RESULT:* Order 9/7/2018 HON DAN SHABAN	No
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122.00	11/19/2018	C	ORDER *RESULT:* Order 11/19/2018 HON DAN SHABAN	No
123.00	11/20/2018	P	CASEFLOW REQUEST (JD-CV-116) *RESULT:* Granted 11/21/2018 HON DAN SHABAN	No
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LLI-CV18-5010773-S - NONHUMAN RIGHTS PROJECT, INC. v. R.W. COMMERFORD & SONS, INC. A/K/A COMMERFORD ZOO				
#	Date	Time	Event Description	Status
No Events Scheduled				

Judicial ADR events may be heard in a court that is different from the court where the case is filed. To check location information about an ADR event, select the **Notices** tab on the top of the case detail page.

Matters that appear on the Short Calendar and Family Support Magistrate Calendar are shown as scheduled court events on this page. The date displayed on this page is the date of the calendar.

All matters on a family support magistrate calendar are presumed ready to go forward.

The status of a Short Calendar matter is not displayed because it is determined by markings made by the parties as required by the calendar notices and the civil or family standing orders. Markings made electronically can be viewed by those who have electronic access through the Markings History link on the Civil/Family Menu in E-Services. Markings made by telephone can only be obtained through the clerk's office. If more than one motion is on a single short calendar, the calendar will be listed once on this page. You can see more information on matters appearing on Short Calendars and Family Support Magistrate Calendars by going to the Civil/Family Case Look-Up page and Short Calendars By Juris Number or By Court Location.

Periodic changes to terminology that do not affect the status of the case may be made.
This list does not constitute or replace official notice of scheduled court events.

Disclaimer: For civil and family cases statewide, case information can be seen on this website for a period of time, from one year to a maximum period of ten years, after the disposition date. If the Connecticut Practice Book Sections 7-10 and 7-11 give a shorter period of time, the case information will be displayed for the shorter period. Under the Federal Violence Against Women Act of 2005, cases for relief from physical abuse, foreign protective orders, and motions that would be likely to publicly reveal the identity or location of a protected party may not be displayed and may be available only at the courts.

DOCKET NO. TTD-CV-18-5010080

In the matter of a Petition for a Common Law Writ of Habeas Corpus,	:	SUPERIOR COURT
NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN, Petitioner,	:	JUDICIAL DISTRICT OF TOLLAND
v.	:	AT ROCKVILLE
R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC., Respondents.	:	June 8, 2018

VERIFIED PETITION FOR A
COMMON LAW WRIT OF HABEAS CORPUS

"Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? . . . To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect. . . .

The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. . . . Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing."

-Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery, 2018 WL 2107087, at *1-2 (N.Y. May 8, 2018)(Fahey, J. concurring)

***

Pursuant to Connecticut Practice Book § 23-21 *et seq.* and C.G.S.A. § 52-466 *et seq.*, the Nonhuman Rights Project, Inc. ("NhRP" or "Petitioner") submits this Verified Petition for a Common Law Writ of Habeas Corpus ("Petition") on behalf of Beulah, Minnie, and Karen, three

elephants, and attaches a Memorandum of Law in Support ("Memorandum"), an Appendix of Exhibits, Exhibits, Expert Affidavits (including one expert legal affidavit and numerous expert scientific affidavits), and a proposed Writ of Habeas Corpus, and states:

I. Parties

1. Petitioner is a not-for-profit corporation organized pursuant to the laws of the State of Massachusetts with a principal address at 5195 NW 112th Terrace, Coral Springs, FL 33076. Its mission is "to change the common law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal rights, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them." https://www.nonhumanrights.org/who-we-are/. The NhRP does not seek to reform animal welfare legislation.

2. Respondent R.W. Commerford & Sons, Inc., also known as the Commerford Zoo, is a Connecticut corporation with a business address at 48 Torrington Road, Goshen, CT 06756.

3. Respondent William R. Commerford is the President of R.W. Commerford & Sons, Inc., with a residential address at 64 Crossman Road, Goshen, CT 06752.

4. Karen is a female African elephant in her mid-thirties. She was captured from the wild around 1983. Respondents have owned Karen since 1984. Her last known address is 48 Torrington Rd, Goshen, CT 06756.

5. Beulah is a female Asian elephant in her mid-forties. She was captured from the wild in 1967 in Myanmar. Upon information and belief, Respondents have owned Beulah since 1973. Her last known address is 48 Torrington Rd, Goshen, CT 06756.

6. Minnie is a female Asian elephant. Respondents have owned Minnie since at least 1989. Her last known address is 48 Torrington Rd, Goshen, CT 06756.

7. Beulah, Minnie and Karen are beneficiaries of an *inter vivos* trust created by the NhRP pursuant to C.G.S.A. § 45a-489a for the purpose of their care and maintenance should

they be released from Respondents' unlawful detention. A true and correct copy of the trust is attached hereto as **Exhibit 1.**

II. Introduction and Overview

8. This Petition is filed as an application in good faith seeking the extension or modification of the Connecticut common law of habeas corpus as it pertains to Beulah, Minnie, and Karen, who are being detained by Respondents solely because they are presently classified under the common law as rightless things rather than the legal persons they should be for the purpose of securing their common law right to bodily liberty through common law habeas corpus. This Court must determine, in light of the Expert Legal and Scientific Affidavits and the NhRP's legal arguments, whether Beulah, Minnie, and Karen, as autonomous beings, should now be recognized as "persons" solely for the purpose of the Connecticut common law of habeas corpus pursuant to a Connecticut common law that keeps abreast of evolving standards of justice, morality, experience, and scientific discovery.

9. This Petition is brought under the common law of Connecticut, which is broad, flexible, and adaptable. *State v. Brocuglio*, 264 Conn. 778, 793 (2003); *State v. Guess*, 244 Conn. 761, 778 (1998); *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184, 196 (1996); *Dacey v. Connecticut Bar Association*, 184 Conn. 21, 25-26 (1981).

10. Connecticut courts are "charged with the ongoing responsibility to revisit our common-law doctrines when the need arises." *Brocuglio*, 264 Conn. at 793.

11. "Person" has never been a synonym for "human being;" rather it designates Western law's most fundamental category by identifying those entities capable of possessing a legal right. Personhood can determine, among other things, who counts, who lives, who dies, who is enslaved, and who is free.

12. The procedures for utilizing the common law writ of habeas corpus are set forth in Title 52, C.G.S.A. §§ 52-466 - 52-470, and in the Conn. Practice Book §§ 23-21 - 23-40 and do not affect the substantive entitlement to the writ. In Connecticut, "[t]he writ of habeas corpus exists as part of the common law and the purpose of the statutes regulating its issuance is to

perfect the remedy it is designed to afford (citation omitted). Such statutes have not been intended to detract from its force but to add to its efficiency." *Hudson v. Groothoff*, 10 Conn. Supp. 275, 278-79 (Conn. C.P. 1942). *See also Kaddah v. Comm'r of Correction*, 324 Conn. 548, 565-66 (2017).

13. The determination of legal personhood for purposes of the common law writ of habeas corpus is a matter for common law adjudication and is based on public policy rather than biology. *Craig v. Driscoll*, 262 Conn. 312, 330 n.15 (2003). *See Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201-02 (1972); *Tommy*, 2018 WL 2107087, at *1-2 (N.Y. 2018) (Fahey, J. concurring).

14. Accordingly, it is for the courts alone to decide whether Beulah, Minnie, and Karen are "persons" for purposes of the common law of habeas corpus. *E.g.*, *Craig*, 262 Conn. at 330 n.15. The decision will turn on whether Beulah, Minnie, and Karen's present common law classification as rightless things, despite their autonomy, is an anachronism that no longer meets the requirements of justice. (Mem. at 10-23). *See Tommy*, 2018 WL 2107087, at *2 (Fahey, J., concurring) ("The reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a 'person' or relegated to the category of a 'thing' amounts to a refusal to confront a manifest injustice. . . . To solve this dilemma, we have to recognize its complexity and confront it.")

15. Connecticut courts expand and define the common law based on a public policy that "can be found in express statutory or constitutional provisions, or in judicially conceived notions of public policy." *Curry v. Community Sys., Inc.*, 1993 WL 383281, at *3 (Conn. Super. Sept. 17, 1993).

16. As set forth in the accompanying Memorandum at 14-23, autonomy is a *sufficient* condition for personhood for purposes of the common law of habeas corpus based on Connecticut's public policy interests in liberty and equality.

17. The common law of habeas corpus is deeply rooted in our cherished ideas of individual autonomy and free choice. Autonomy is a supreme Connecticut common law value

that trumps even the State's interest in human life. The common law therefore mandates the protection of the fundamental interest of autonomous beings to their bodily liberty. (Mem. at 14-17).

18. Equality is a deeply enshrined principle of Connecticut statutory, constitutional, and common law. There exists a general public policy in Connecticut to eliminate all forms of invidious and arbitrary discrimination. Classifying Beulah, Minnie, and Karen as "things" solely because they are not human, thereby denying them the capacity for any legal right, is so arbitrary and unjust that it violates basic common law equality. (Mem. at 17-23). The Expert Scientific Affidavits demonstrate that Beulah, Minnie, and Karen are autonomous and that their interest in exercising their autonomy is as fundamental to them as it is to us. To deny some autonomous beings all legal rights across the board, merely because they are nonhuman, while granting those same legal rights to all humans, regardless of autonomy, offends common law equality.

19. Connecticut public policy already recognizes nonhuman animals as "persons" for trust purposes. The Connecticut legislature has granted nonhuman animals the rights of a true beneficiary, and therefore personhood, for the purpose of the Connecticut "Pet Trust" statute, C.G.S.A. § 45a-489a ("Trust to provide for care of animal"), as only "persons" may be trust beneficiaries. RESTATEMENT (THIRD) OF TRUSTS § 43 *Persons Who May Be Beneficiaries* (2003); RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No. 2, approved 1999); RESTATEMENT (SECOND) OF TRUSTS § 124 (1959); Kate McEvoy, "§ 2:16. Pet trusts," 20 CONN. PRAC., CONN. ELDER LAW § 2:16 (2014 ed.). This alone makes clear that there is at least a possibility that Beulah, Minnie, and Karen could be deemed legal persons for the purpose of common law habeas corpus, too. (Mem. at 23-24).

20. As the NhRP is not seeking any right other than the common law right to bodily liberty protected by common law habeas corpus, this Court need not initially determine whether Beulah, Minnie, and Karen are "persons" for any purpose other than the Connecticut common law of habeas corpus in order to issue the requested writ of habeas corpus. Instead, this Court *must* issue the writ if the NhRP demonstrates a mere *possibility* that they *could be* legal persons

solely for the purposes of seeking to vindicate their common law right to bodily liberty. The issuance of the writ by this Court harmonizes with the procedure historically used by courts faced with habeas corpus petitions that turned on novel (at the time) personhood claims. There is ample common law precedent in which the writ of habeas corpus was used by or on behalf of individuals not recognized as legal persons to secure their bodily liberty and consequently, legal personhood, at least with respect to the right to bodily liberty protected by habeas corpus.

21. In *Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep. 499 (K.B. 1772), which was incorporated into Connecticut common law, *Jackson v. Bulloch*, 12 Conn. 38, 40-42, 53 (1837),[1] Lord Mansfield issued the habeas corpus writ that required the respondent to provide a legally sufficient reason for detaining a black slave.

22. In *Arabas v. Ivers*, 1 Root 92 (Conn. Super. 1784), the court issued a writ of habeas corpus upon the petition of a slave who claimed he was being unlawfully detained.

23. In *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C. Neb. 1879), the court rejected the United States Attorney's argument that no Native American could ever be a "person" able to obtain a writ of habeas corpus and issued a writ of habeas corpus on behalf of the Ponca Chief, Standing Bear.

24. In *The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 908, 917 (N.Y. Sup. Ct. 2015), the court issued the order to show cause under New York State's habeas corpus procedural statute on behalf of two chimpanzees and expressly rejected respondents' argument that the issuance of the writ "requires an initial, substantive finding that chimpanzees are not entitled to legal personhood for the purpose of obtaining a writ of habeas corpus."

25. Analogously, in *Lebron v. Commissioner of Correction*, 82 Conn. App. 475, 477-79 (2004), a case of first impression, the petitioner claimed that the Superior Court had improperly concluded that it lacked subject matter jurisdiction because the petitioner was not in

[1] Connecticut adopted English common law as it existed prior to 1776. *See State v. Courchesne*, 296 Conn. 622, 680 (2010).

"custody" at the time he filed his petition pursuant to C.G.S.A. § 52-466. The habeas court properly issued the writ, conducted a hearing, and then dismissed the case only after the respondent filed a motion to dismiss.

III. The NhRP has stated a *prima facie* case entitling it to issuance of the writ.

26. The NhRP is entitled, as of right, to the issuance of the writ. The provisions of Conn. Practice Book § 23-24 govern the application of the common law writ of habeas corpus. Section 23-24 provides that the "judicial authority shall issue the writ unless it appears that: (1) the court lacks jurisdiction; (2) the petition is wholly frivolous on its face; or (3) the relief sought is not available." As discussed below, the Court must issue the writ because this Court has jurisdiction, the Petition is not wholly frivolous on its face, and the relief sought is available.

A. This Court has subject matter jurisdiction.

27. This Court has subject matter jurisdiction over Beulah, Minnie, and Karen, as they are owned by, and in the custody of, the Connecticut Respondents upon whom service of process will be delivered in Connecticut upon the issuance of the writ or as otherwise directed by the Court. *See* C.G.S.A. § 52–466(a).[2]

28. "It is well established that, in determining whether a court has subject matter jurisdiction, 'every presumption favoring jurisdiction should be indulged,'" *Amodio v. Amodio*, 247 Conn. 724, 727-28 (1999) (citations omitted), and "[t]here is a judicial bias in favor of jurisdiction in petitions for writs of habeas corpus." *Mock v. Warden*, 40 Conn. Supp. 470, 477 (Sup. Ct. 2003).

[2] Petitioner filed a petition for a writ of habeas corpus in the Superior Court for the Judicial District of Litchfield at Torrington on November 13, 2017, basing venue on C.G.S.A. § 53-466(a)(1), because the elephants are detained and confined within that Judicial District. Petitioner files this Petition in the Rockville venue due to this Court's extensive experience and expertise with habeas corpus petitions. Further, this Court's location would be convenient for Petitioner and Respondents, and their respective counsel. If a writ of habeas corpus issues and the Respondents desire to challenge venue, they may do so. Otherwise any objection to venue is waived. *Richardello v. Butka,* 45 Conn. Supp. 336, 337 (1997).

29. " 'Subject matter jurisdiction for adjudicating habeas petitions is conferred on the Superior Court by General Statutes § 52-466, which gives it the authority to hear those petitions that allege illegal confinement or deprivation of liberty.' " *Hickey v. Commission of Corrections*, 82 Conn. App. 25, 31 (2004) (quoting *Abed v. Commissioner of Correction*, 43 Conn. App. 176, 179, *cert. denied*, 239 Conn. 937 (1996)), *app. dism.*, 274 Conn. 553 (2005). "The jurisprudential history of our habeas corpus statute is consistent with the English common-law principles of the Great Writ and the federal habeas corpus statute." *Id.*

30. Connecticut courts have jurisdiction to issue writs of habeas corpus even on behalf of petitioners located outside of Connecticut so long as they remain in the *custody* of a Connecticut respondent. *See Wyman v. Commissioner of Correction*, 86 Conn. App. 98, 101 (2004); *Hickey*, 82 Conn. App. at 31-32, 34, 36. *See also Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 495 (1973); *Peyton v. Rowe*, 391 U.S. 54, 58 (1968); Paul D. Halliday, *Habeas Corpus: From England to Empire* 42–43 (2010). Of course, even if the elephants are temporarily brought outside of Connecticut, they remain in Respondents' custody, and Respondents are domiciled in Connecticut.

31. The NhRP has standing to bring this Petition both under the common law and the governing procedural statutes, C.G.S.A. § 52-466(a) and Conn. Practice Book § 23-40(a). Neither § 52-466(a)(2) nor Conn. Practice Book § 23-40(a) places any limitation on *who* may bring a habeas corpus petition on behalf of another. *See generally Rodd v. Norwich State Hosp.*, 5 Conn. Supp. 360, 360 (Super. Ct. 1937); *Moye v. Warden*, 2009 WL 3839292, at *2 n.1 (Conn. Super. Ct. Oct. 22, 2009); *Suarez v. Warden-Chesire*, 2001 WL 291057, at *2 (Conn. Super. Ct. Mar. 2, 2001).

32. Section 52-466 was enacted against a background of centuries of Anglo-American habeas corpus law recognizing that *anyone* — including complete strangers — may bring habeas corpus petitions on behalf of another, and carries on that common law tradition. The leading Connecticut case of a stranger having standing to file a petition seeking a common law writ of habeas corpus on behalf of a privately detained individual is *Jackson v. Bulloch*, 12 Conn. 38

(1837). In *Jackson*, the famed black abolitionist and former slave, James Mars, successfully sought a common law writ of habeas corpus on behalf of a slave named Nancy Jackson, to whom he was a stranger, who had been brought temporarily into Connecticut by her Georgia master, James S. Bulloch. *Id. Jackson* remains controlling on this Court, and is consistent with decades of Anglo-American common law precedent. *See Somerset*, 1 Lofft 1, 98 Eng. Rep. 499 (unrelated third parties received common law writ of habeas corpus on behalf of a black slave imprisoned on a ship) (*Somerset* was cited with approval and was said to be settled law in Connecticut by the Connecticut Supreme Court of Errors in *Jackson*, 12 Conn. at 53); *Lemmon v. People*, 20 N.Y. 562, 562, 599-600 (1860) (as he had in other cases, the free black abolitionist dock worker Louis Napoleon received a common law writ of habeas corpus on behalf of eight detained slaves, adults and children, with whom he had no relationship[3]); *State ex rel. v. Malone*, 35 Tenn. 699, 705 (1856) ("It is not absolutely necessary that either the petition for the writ, or the affidavit, should be by the party in detention, though such a course is more regular. In the *Hottentot Venus Case*, 13 East, 185, the woman was incapable to make either one or the other."); *In re Kirk*, 1 Edm. Sel. Cas. 315, 315 (N.Y. Supr. Ct. 1846) (as he would in *Lemmon*, *supra,* Louis Napoleon received a writ of habeas corpus on behalf of a slave with whom he had no relationship); *Commonwealth v. Aves*, 35 Mass. 193, 193, 206 (1836) (Boston abolitionist Levin H. Harris received a common law writ of habeas corpus on behalf of an eight year old slave girl named Med, to whom he was a stranger, who was being held by her Louisiana master

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[3] Louis Napoleon was able to file a petition for habeas corpus

> for seven persons whose names he did not know. They had been taken from the *City of Richmond* to a house on Carlisle Street, where Napoleon believed a Negro trader named 'Lemmings' was confining them on the 'pretense' that they were slaves. Lemmings intended to ship them to Texas and sell them, but they did not want to go there. Because Napoleon had not been able to speak with them, many of his facts were incorrect, but that was of no consequence: he had instituted a legal process, and all that mattered was the law.

Don Papson and Tom Calarco, *Secret Lives of the Underground Railroad in New York City; Sydney Howard Gay, Louis Napoleon and the* Record of Fugitives 83-84 *(McFarland & Co., Inc. 2015).*

in Boston) (*Aves* was cited with approval in *Jackson*, 12 Conn. at 42); *Case of the Hottentot Venus*, 13 East 185, 104 Eng. Rep. 344 (K.B. 1810) (English Abolitionist Society received common law writ of habeas corpus to determine whether an African woman who did not speak English was being exhibited in London against her will); *In re Trainor*, *New York Times*, May 11, 14, 21, 25, June 14 (1853) (abolitionist and underground railway conductor Jacob R. Gibbs on behalf of nine year old slave); *Lebranca* slaves, "Reported for the Express," *New York Evening Express*, July 13, 1847; *New York Legal Observer* 5, 299 (1847) (John Iverness, a black restauranteur, obtained writ of habeas corpus on behalf of three slaves he had never met who he was told were being held captive on a ship in New York harbor).

33. In the six habeas corpus cases that the NhRP has filed on behalf of nonhuman animals in New York State, not a single court found that the NhRP lacked standing. The New York State Supreme Court expressly recognized the standing of the NhRP to bring a petition for a common law writ of habeas corpus on behalf of two chimpanzees in *Stanley*, 16 N.Y.S. 3d 898. While it cited to a procedural statute, CPLR 7002(a), allowing "one acting on his behalf" to bring suit, that statute merely codified the long-standing common law of habeas corpus that New York, English, and Connecticut cases had employed long before it, or its predecessors, had been enacted.[4] *See also Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 75 n.1 (1st Dept. 2017) ("*Tommy*") ("[a]ssuming habeas relief may be sought on behalf of a chimpanzee, petitioner [NhRP] undisputedly has standing pursuant to CPLR 7002(a), which authorizes anyone to seek habeas relief on behalf of a detainee."), *leave to appeal den.*, No. 2018-268, 2018 WL 2107087 (N.Y. May 8, 2018); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015).

[4] *See People v. McLeod*, 3 Hill 635 n. "j" sec.7 (N.Y. 1842) ("The common law right was clear for any *friend* of the prisoner as well as *agent* to make the application. In the proceedings in parliament in the case of *Ashby and White*, the dispute arose whether the writ could relieve against a commitment by the house of commons; and one resolution of the lords, admitted by the commons, was, "that every Englishman who is imprisoned by any authority whatsoever, has an undoubted right, by his *agents* or *friends*, to apply for and obtain a writ of *habeas corpus* in order to procure his liberty by due course of law.") (emphases in original).

34. C.G.S.A. § 52-466 carries on the common law tradition of allowing third parties to file habeas corpus petitions on behalf of others, and merely regulates the manner in which convicted prisoners may challenge the legality of their convictions. The language of § 52-466(a)(2) simply requires a habeas corpus suit to be brought in the judicial district of Tolland when it is "made by or on behalf of an inmate or prisoner confined in a correctional facility as a result of a conviction of a crime." It does not, nor does it purport to, contract the longstanding common law precedent of allowing common law writs of habeas corpus to be sought by anyone, including strangers, on behalf of a detained individual. "Procedures that are appropriate for one type of habeas proceeding may not be appropriate for the other." Mark D. Falcoff, *Back to basics: Habeas corpus procedures and long-term executive detention*, 86 DENVER UNIV. L. REV. 961, 982 (2009) (comparing federal habeas corpus challenges to Guantanamo prisoners and federal habeas corpus challenges brought by state prisoners in federal court).

35. Furthermore, Connecticut courts are not confined by the jurisdictional limitations of federal courts imposed by Article III of the U.S. Constitution, and thus, federal standing cases are inapposite. *See Connecticut Ass'n of Health Care Facilities, Inc. v. Worrell*, 199 Conn. 609, 613 (1986) ("our state constitution contains no 'case or controversy' requirement like that found in article three of the United States Constitution"); *Hyde v. Pysz*, 2006 WL 894921, at *4 n.8 (Conn. Super. Ct. Mar. 21, 2006) ("The court notes that the standing issue presented in *Linda R.S. v. Richard D.*, [citation omitted] implicated federal court jurisdiction under article III of the United States constitution, and 'the constraints of Article III do not apply in state courts.'") (citation omitted). *See also ASARCO, Inc. v. Kadish*, 400 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute."); *Whitmore v. Arkansas*, 495 U.S. 149, 176 n.3 (1990) (Marshall, J., dissenting) ("The question whether Whitmore may act as Simmons' next friend in this Court is distinct from the question whether Whitmore could do so in

the Arkansas Supreme Court. This Court cannot impose federal standing restrictions, whether derived from Article III or federal common law, on state courts [citation omitted]. The Court's holding thus affects only federal courts."). Consequently, neither *Whitmore*, 459 U.S. 149, *see infra* at ¶¶ 36-38, nor *Naruto v. Slater*, No. 16-15469, 2018 U.S. App. LEXIS 9477, at *2 (9th Cir. Apr. 13, 2018) (holding both that no one can assert the interests of a nonhuman animal as next friend in the context of a copyright claim and that every nonhuman animal has standing to sue directly under Article III) have any bearing on Connecticut standing law. To rely upon Article III federal jurisprudence would be particularly inappropriate where, as here, the detained individual is not a convicted prisoner, but one who has heretofore been enslaved by a private detainer in a manner that precludes the detainee from having any recourse but through the acts of a stranger, *e.g.*, *Jackson, supra* (slave); *Somerset, supra* (slave), and *Standing Bear*, *supra* (Native Americans).

36. In *Whitmore*, 495 U.S. at 163-64, the United States Supreme Court adopted a two-prong test for Article III "next friend" standing.[5] The Connecticut Supreme Court has not adopted the *Whitmore* test but has merely applied the first of the two prongs (that a next friend provide an adequate explanation why the real party in interest cannot appear on his own behalf), to habeas corpus petitions filed on behalf of inmates or children in custody disputes,[6] which is consonant with centuries of habeas corpus practice. *See id.* at 165 ("And in keeping with the ancient tradition of the doctrine, we conclude that one necessary condition for 'next friend' standing in federal court is a showing by the proposed 'next friend' that the real party in interest

[5] Under the first prong, the next friend must provide "an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action." *Id.* at 163 (citations omitted). Under the second prong, the next friend must demonstrate that it is "truly dedicated to the best interests of the person on whose behalf [it] seeks to litigate." *Id.* The Supreme Court noted in *dicta* that "it has been further suggested [by a single U.S. district court] that a 'next friend' must have some significant relationship with the real party in interest," but said nothing further on that issue. *Id.* at 163-64.

[6] *See Carrubba v. Moskowitz*, 274 Conn. 533, 549 (2005); *State v. Ross*, 272 Conn. 577, 596-611 (2005); *In re Ross*, 272 Conn. 653, 655-56 (2005); *Phoebe G. v. Solnit*, 252 Conn. 68, 71 (1999).

is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability."). The second prong of the *Whitmore* test has no applicability to Connecticut habeas corpus practice, as it solely vindicates Article III values.

37. Although *Whitmore* is irrelevant to this case, and the second prong of *Whitmore* has never been adopted into Connecticut jurisprudence, the NhRP nonetheless satisfies the entire *Whitmore* test. The first *Whitmore* prong is satisfied, as Beulah, Minnie, and Karen, as elephants and therefore legal things, lack the capacity to sue. The second prong is also satisfied, as the NhRP is undeniably dedicated to the best interests of the elephants and has a lengthy history of unwavering dedication to the best interests of every nonhuman client it has represented (*supra* at ¶ 1).

38. Many federal courts have properly recognized that *Whitmore*'s language regarding a "significant relationship" (at 163-64) is nonbinding *dictum*.[7] No Connecticut court has adopted this *dictum*, nor should it. Even federal courts that have adopted the significant-relationship *dictum* as a standing requirement have held that a significant relationship is not necessary where the real party in interest has no significant relationships with an entity with the capacity to sue.[8] Beulah, Minnie, and Karen would readily fall into this exception. As elephants, they cannot have "significant" relationships with any such entity in the manner intended by *Whitmore*, and even if they could, Respondents have owned, controlled, and economically exploited the elephants for decades, making their interests powerfully adverse to the elephants

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[7] *See Sam M. v. Carcieri*, 608 F.3d 77, 90-91 (1st Cir. 2010); *Padilla v. Rumsfeld*, 352 F.3d 695, 703 n.7 (2d Cir. 2003), *rev'd and remanded on other grounds*, 542 U.S. 426 (2004); *Coal. of Clergy v. Bush*, 310 F.3d 1153, 1165-66 (9th Cir. 2002) (Berzon J., concurring); *Sanchez-Velasco v. Secretary of Dept. of Corrections*, 287 F.3d 1015, 1026 (11th Cir. 2002); *ACLU Found. v. Mattis*, 2017 WL6558503, at *4 (D.D.C. December 23, 2017); *Nichols v. Nichols*, 2011WL2470135, at *4 (D. Or. 2011); *Does v. Bush*, 2006 U.S. Dist. LEXIS 79175, 2006 WL 3096685, at *6 (D.D.C. Oct. 31, 2006).

[8] *See Hamdi v. Rumsfeld*, 294 F.3d 598, 604 n.3 (4th Cir. 2002) ("we reserve the case of someone who possesses no significant relationships at all."); *Coal. Of Clergy, Lawyers & Professors*, 310 F.3d 1153, 1162 (9th Cir. 2002) ("[n]ot all detainees may have a relative, friend, or even a diplomatic delegation able or willing to act on their behalf.").

and making it impossible for the elephants to form significant relationships with other humans. Their only recourse is through the actions of strangers.

B. The Petition is not wholly frivolous on its face.

39. This Petition presents a matter of first impression involving a novel issue of personhood in Connecticut common law jurisprudence, and is far from wholly frivolous on its face. *See Tommy*, 2018 WL 2107087, at *2 (Fahey, J., concurring) ("The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. . . ."); *Stanley*, 16 N.Y.S.3d at 917 ("Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed.") (See also ¶¶ 42-71 below).

40. This case is obviously not frivolous within the meaning of the Connecticut Rule of Professional Conduct 3.1, which provides that a lawsuit containing a good faith argument for an extension, modification or reversal of existing law is not frivolous. See Affidavit of Mark Dubois ("Dubois Aff.") at ¶¶ 10-11.

41. And necessarily then, it is not frivolous for the purpose of seeking a writ of habeas corpus, where the standard is even more deferential to the petitioner. The standard for determining frivolity under Conn. Practice Book § 23-24(a)(2) is set forth in *Henry E.S., Sr. v. Hamilton*, 2008 WL 1001969 at *5, 2008 Conn. Super. LEXIS 717, at *14-15 (Conn. Super. Ct. Feb. 28, 2008): it "is that of a *possibility* of victory," not even a "probable victory" or "[m]eritorious." Although no test for determining what claims meet this low threshold under the statute has been set forth, the courts have developed an analogous disjunctive three-criteria test (known as the "*Lozada* criteria"[9]) for determining whether claims are frivolous for purposes of a habeas court's denial of certification to appeal. *See Fernandez v. Comm'r of Corr.*, 125 Conn. App. 220, 223-24 (2010). A habeas case is not "frivolous" under this test if: (i) "the issues are debatable among jurists of reason," (ii) "a court could resolve the issues [in a different manner],"

[9] The test is derived from *Lozada v. Deeds*, 498 U.S. 430, 432 (1991).

or (iii) "the questions are adequate to deserve encouragement to proceed further." *Id.* Satisfying any one of these criteria is sufficient to demonstrate that a claim is not frivolous. *Id. See also Simms v. Warden*, 230 Conn. 608, 616 (1994) ("A habeas appeal that satisfies one of the *Lozada* criteria is not frivolous."); *Vanwhy v Commissioner of Correction*, 121 Conn. App. 1, 6 (2010) ("we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy *one or more of the three criteria identified in* [*Lozada*]") (emphasis added). As shown below, the NhRP satisfies *all three* criteria. (*See also* Dubois Aff. at ¶¶ 18-22).

i. ***The issues are debatable among jurists of reason.***

42. The Petition is powerfully meritorious and satisfies the first *Lozoda* criteria for four independent reasons. (*See also* Dubois Aff. at ¶ 22).

43. First, not only are the issues debatable among jurists of reason, but jurists of reason have *already granted* the relief the NhRP seeks in other jurisdictions. At least four courts have issued writs of habeas corpus (or their equivalents) on behalf of nonhuman animals, one in New York, two in Argentina, and one in Colombia.

44. An order to show cause, which is the equivalent of the writ pursuant to New York Civil Practice Law and Rules ("CPLR") Article 70, was issued on behalf of two chimpanzees in New York. *Stanley*, 16 N.Y.S.3d at 917. As the court in *Stanley* noted, "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" 16 N.Y.S.3d at 912. (See Mem. at 1-2, 5-6, 10, 15, 25, and 34 for further discussion of *Stanley*).

45. A writ was issued on behalf of a chimpanzee named Cecilia in Mendoza, Argentina, The Third Court of Guarantees, Mendoza, Argentina, in *In re Cecilia*, File No. P-72.254/15 at 22-23 (November 3, 2016), which declared a chimpanzee to be a "non-human person," then ordered her immediate release from imprisonment in a zoo to a sanctuary in Brazil. (See Mem. at 6-7).

46. A writ was issued on behalf of an orangutan named Sandra in Buenos Aires, Argentina) *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros*

contra GCBA, Sobre Amparo (*Association of Officials and Attorneys for the Rights of Animals and Others v. GCBA, on Amparo*), EXPTE. A2174-2015 (October 21, 2015).

47. A writ was issued on behalf of a bear named Chucho in Colombia, though that ruling was overturned by a higher court and further appeal is pending. *Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 (July 26, 2017).

48. Second, the only written opinion from the judge of an American state's highest court on the issue presented in this case is the concurrence of Judge Fahey in *Tommy*, 2018 WL 2107087, in which the judge opined that nonhuman animals should no longer be deemed mere "things." While Judge Fahey agreed that the case was properly dismissed on a procedural issue, he disagreed with the lower courts' decisions on the merits, writing separately "to underscore that denial of leave to appeal is not a decision on the merits of petitioner's claims." *Id.* at *1. Judge Fahey declared: "The question will have to be addressed eventually. Can a non-human animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing." *Id.* Judge Fahey added: "In the interval since we first denied leave to the Nonhuman Rights Project . . . I have struggled with whether this was the right decision. Although I concur in the Court's decision to deny leave to appeal now [on a procedural issue], I continue to question whether the Court was right to deny leave in the first instance. The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' *there is no doubt that it is not merely a thing.*" *Id.* at *2 (emphasis added).

49. In addition to Judge Fahey's powerful opinion, the Supreme Court of Oregon referenced NhRP's "ongoing litigation" and declared in a similar fashion: "As we continue to learn more about the interrelated nature of all life, the day may come when humans perceive less separation between themselves and other living beings than the law now reflects. However, we

do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still[.]" *State v. Fessenden*, 355 Or. 759, 769-70 (2014).

50. Furthermore, the Indian Supreme Court has held that nonhuman animals have both a statutory and a constitutional right to personhood and certain legal rights. *Animal Welfare Board v. Nagaraja,* 6 SCALE 468 (2014), *available at*: https://indiankanoon.org/doc/39696860/ (last accessed on May 14, 2018).

51. Third, and dispositive of the *Lozoda* analysis in Connecticut, is that cases of first impression are *per se* not frivolous. *See Torres v. Commissioner of Correction*, 175 Conn. App. 460, 468 (2017) (noting that "[t]his court has previously concluded that issues of first impression in Connecticut meet one or more of the three criteria"). Because the issues presented in this case have never been decided by the Connecticut Supreme Court or the Connecticut Appellate Courts, this case is *necessarily deemed* debatable among jurists of reason. *See id.* at 468-69 ("Because the petitioner's second petition presents two issues of first impression in Connecticut, we will conduct a full review of the merits of his appeal."); *State v. Obas*, 147 Conn. App. 465, 475 (2014) ("Two issues of law were raised by the state before the trial court, neither of which previously has been decided by the Connecticut Supreme or Appellate Courts. . . . These are questions of law on which our state's court of last resort has not ruled, both debatable among jurists of reason and, both deserving encouragement to proceed further."); *Bates v. Commissioner of Correction*, 86 Conn. App. 777, 781 (2005) ("This case presents an issue of first impression. . . We [therefore] conclude that this case presents an issue that is debatable among jurists of reason."); *Graham v. Commissioner of Correction*, 39 Conn. App. 473, 476 (1995) ("The issue . . . is a case of first impression in Connecticut. We hold that the issue is debatable among jurists of reason and that a court could resolve the issue in a different manner."), *cert. denied*, 235 Conn. 930 (1995).

52. Fourth, noted scholars of American jurisprudence have submitted *amicus curiae* briefs in favor of habeas corpus relief for nonhuman animals including constitutional law scholar Professor Laurence H. Tribe of Harvard Law School, and habeas corpus experts Justin Marceau,

of the University of Denver Law School and Samuel Wiseman, of the Florida State University College of Law.[10] *See Tommy*, 2018 WL 2107087, at *1 (Fahey, J., concurring) (finding persuasive the amicus briefs of Tribe, Marceau, and Wiseman).

53. A group of North American moral philosophers also submitted an *amicus curiae* brief in support of extending habeas corpus for nonhuman animals.[11] *See Tommy*, 2018 WL 2107087, at *1 (Fahey, J., concurring) ("the amici philosophers with expertise in animal ethics and related areas draw our attention to recent evidence that chimpanzees demonstrate autonomy by self–initiating intentional, adequately informed actions, free of controlling influences."). These philosophers included: Kristin Andrews (York University); Gary Comstock (North Carolina State University); G.K.D. Crozier (Laurentian University); Sue Donaldson (Queen's University); Andrew Fenton (Dalhousie University); Tyler M. John (Rutgers University); L. Syd M Johnson (Michigan Technological University); Robert Jones (California State University, Chico); Will Kymlicka (Queen's University); Letitia Meynell (Dalhousie University); Nathan Nobis (Morehouse College); David Peña-Guzmán (California State University, San Francisco); James Rocha (California State University, Fresno); Bernard Rollin (Colorado State); Jeffrey Sebo (New York University); Adam Shriver (University of British Columbia); Rebecca L. Walker (University of North Carolina at Chapel Hill).

54. Apart from the above, the NhRP's cases have captured the interest of the world's leading legal scholars and the most selective academic publications,[12] while catalyzing the

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[10] The *amicus curiae* brief of Laurence Tribe in *Kiko* is available at: https://www.nonhumanrights.org/content/uploads/2016_150149_Tribe_ITMO-The-NonHuman-Right-Project-v.-Presti_Amicus-1-2.pdf (last accessed February 19, 2018). The *amicus curiae* brief of Justin Marceau and Samuel Wiseman in *Kiko* is available at: https://www.nonhumanrights.org/content/uploads/2016_150149_ITMO-The-Nonjuman-Rights-Project-v.-Presti_Amici.pdf (last accessed February 19, 2018).

[11] *See* https://www.nonhumanrights.org/content/uploads/In-re-Nonhuman-Rights-v.-Lavery-Proposed-Brief-by-PHILOSOPHERS-74435.pdf

[12] *See* Richard A. Epstein, *Animals as Objects of Subjects of Rights*, ANIMAL RIGHTS: CURRENT DEBATES & NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Richard A. Posner, *Animal Rights: Legal Philosophical, and Pragmatic Perspectives*, ANIMAL RIGHTS: CURRENT DEBATES & NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004).

development of an entire field of academic research and debate, generating extensive discussion in almost one hundred law review articles, multiple academic books, science journals, and a variety of legal industry publications.[13]

See also VI. Aesthetic Injuries, Animal Rights, and Anthropomorphism, 122 HARV. L. REV. 1204, 1216 (2009); Jeffrey L. Amestoy, *Uncommon Humanity: Reflections on Judging in A Post-Human Era*, 78 N.Y.U. L. REV. 1581, 1591 (2003); Richard A. Epstein, *Drawing the Line: Science and the Case for Animal Rights*, 46 PERSPECTIVES IN BIOLOGY & MED. 469 (2003); Craig Ewasiuk, *Escape Routes: The Possibility of Habeas Corpus Protection for Animals Under Modern Social Contract Theory*, 48 COLUM. HUM. RTS. L. REV. 69 (2017); Adam Kolber, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163 (2001); Will Kymlicka, *Social Membership: Animal Law beyond the Property/Personhood Impasse*, 40 DALHOUSIE L. J. 123 (2017); Kenan Malik, *Rights and Wrongs*, 406 NATURE 675 (2000); Greg Miller, *A Road Map for Animal Rights*, 332 SCIENCE 30 (2011); Greg Miller, *The Rise of Animal Law: Will Growing Interest in How the Legal System Deals with Animals Ultimately Lead to Changes for Researchers?* 332 SCIENCE 28 (2011); Martha C. Nussbaum, *Working with and for Animals: Getting the Theoretical Framework Right*, 94 DENV. L. REV. 609, 615 (2017); Martha C. Nussbaum, *Animal Rights: The Need for A Theoretical Basis*, 114 HARV. L. REV. 1506, 1541 (2001); Richard A. Posner, *Animal Rights*, 110 YALE L. J. 527, 541 (2000); Diana Reiss, *The Question of Animal Rights*, 418 NATURE 369 (2002); Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 401 (2003); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000); Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1 (2001).

[13] *See* Justin F. Marceau and Steven M. Wise, *"Exonerating the Innocent: Habeas for Nonhuman Animals,"* WRONGFUL CONVICTIONS & THE DNA REVOLUTION - TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel S. Medwed ed. Cambridge University Press 2017); Steven M. Wise, *A Great Shout: Legal Rights for Great Apes,* THE ANIMAL ETHICS READER (Susan J. Armstrong & Richard G. Botzler eds. 2017); Steven M. Wise, *Animal Rights, One Step at a Time*, ANIMAL RIGHTS: CURRENT DEBATES & NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Steven M. Wise, *The Capacity of Non-Human Animals for Legal Personhood and Legal Rights,* THE POLITICS OF SPECIES: RESHAPING OUR RELATIONSHIPS WITH OTHER ANIMALS (Raymond Corbey & Annette Lanjouw eds. 2013); "Why Things Can Hold Rights: Reconceptualizing the Legal Person," LEGAL PERSONHOOD: ANIMALS, ARTIFICIAL INTELLIGENCE & THE UNBORN (Tomasz Pietrzykowski and Visa Kurki, eds. Springer 2017); Randall S. Abate and Jonathan Crowe, *From Inside the Cage to Outside the Box*, 5(1) GLOBAL J. OF ANIMAL L. (2017); Katrina M. Albright, *The Extension of Legal Rights to Animals Under A Caring Ethic: An Ecofeminist Exploration of Steven Wise's Rattling the Cage*, 42 NAT'L RESOURCES J. 915, 917 (2002); Kristin Andrews, *Cow Persons? How to Find Out*, 4 ANIMAL BEHAVIOR & COGNITION 499 (2017); Kristin Andrews, *Life in a Cage*, PHILOSOPHERS' MAG., 1st Quarter 2017, at 72; Pat Andriola, *Equal Protection for Animals*, 6 BARRY U. ENVTL. & EARTH L. J. 50, 64 (2016); Davidson Anestal, *Chimpanzees in Court: Limited Legal Personhood Recognition for Standing to Challenge Captivity and Abuse*, 15 DARTMOUTH L.J. 75 (2017); Louis Anthes & Michele Host, *Rattling the Cage: Toward Legal Rights for Animals by Steven M.*

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55. The issues raised by the NhRP's habeas cases have also been the subject of thousands of legal commentaries, national and international news articles, radio and television programs, and podcasts. For example, from March 1, 2017, through September 30, 2017, 2,095 media articles were published on the NhRP's claim that a chimpanzee should have the right to a writ of habeas corpus.[14] In the United States, these outlets ranged from *NBC News* and the *Wall Street Journal* to the *Washington Post*, *Associated Press*, *Law360*, *Gizmodo*, *Fox News*, and *Salon*. Around the world they included the *Sydney Morning Herald*, *Kremlin Express*, *Yahoo Japan*, Mexico's *Entrelíneas*, and India's *Economic Times*.

56. Accordingly, this case is not, and cannot be, frivolous and the Court must therefore issue the writ.

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[14] A spreadsheet containing the full list of 2,095 media items covering this case between the period of March-October, 2017 is available for download at: https://www.nonhumanrights.org/content/uploads/Media-Coverage-Tommy-Kiko-Appellate-Hearing-Raw-Data.csv (last accessed February 15, 2018).

ii. *A court could resolve the issues in a different manner.*

57. The Petition independently passes muster under the second *Lozoda* criteria. For, not only *could* a court resolve the issues in a different manner, but they *have*, as set forth above.

iii. *The questions are adequate to deserve encouragement to proceed further.*

58. Finally, while it is not necessary for the NhRP to satisfy all three *Lozoda* criteria, it is significant that the NhRP meets the final criteria too. Not only are the questions presented adequate to deserve encouragement to proceed further, but numerous legal academics, writers, and judges have long been debating them, *supra.*

59. Who is a "person" is the most important individual question that can come before a court, as the term "person" identifies those entities capable of possessing one or more legal rights.

60. The novelty of the NhRP's claim is an insufficient ground to deny Beulah, Minnie, and Karen habeas corpus relief. *See, e.g.*, *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (that no Native American had previously sought relief pursuant to the Federal Habeas Corpus Act did not foreclose a Native American from being characterized as a "person" and being awarded the requested habeas corpus relief); *Somerset*, Lofft 1, 98 Eng. Rep. 499 (that no slave had ever been granted a writ of habeas corpus was no obstacle to the court granting one to the slave petitioner); *see also Lemmon*, 20 N.Y. 562.

61. The novelty of the NhRP's claim makes it more meritorious rather than less, as a case of first impression necessarily deserves to proceed further. *See, e.g.*, *Little v. Commissioner of Correction*, 177 Conn. App. 337, 349 (2017) ("Because such a question has not yet been addressed by any appellate court of this state, we conclude that the petitioner's claims are adequate to deserve encouragement to proceed further."); *State v. Obas*, 147 Conn. App. 465, 475 (2014); *Rodriguez v. Commissioner of Correction*, 131 Conn. App. 336, 347 (2011) ("Because such a question has not yet been addressed by any appellate court of this state, we conclude that the . . . claim raised by the petitioner is adequate to deserve encouragement to

proceed further"), *aff'd*, 312 Conn. 345 (2014); *Small v. Commissioner of Correction*, 98 Conn. App. 389, 391-2 (2006) ("No appellate case has decided those precise issues . . . The questions, therefore, . . . deserved encouragement to proceed further").

62. The principles underlying the Connecticut cases concerning human petitioners are directly applicable to the case at bar, and no Connecticut case has held otherwise. Indeed, other than the first NhRP petition that was dismissed (erroneously) on standing grounds, no case has been brought before in Connecticut seeking the application of the common law of habeas corpus to any nonhuman animal, let alone an autonomous nonhuman animal such as an elephant.

63. As it is not necessary for this Court to find that Beulah, Minnie, and Karen are "persons" for purposes of *issuing* the writ, this Court must issue it if there is a *possibility* that they *could be* "persons" under Connecticut common law solely for the purpose of obtaining the legal right to bodily liberty protected by the writ of habeas corpus (see *Somerset*, *supra*; *Stanley*, *supra*). To dismiss this case as frivolous on its face, therefore, this Court would have to find, among other things, that it is impossible, under any circumstances, for autonomous nonhuman animals to have any legal rights under Connecticut law. Yet the Connecticut pet trust statute already confers personhood rights upon nonhuman animals. (Mem. at 23-24). Moreover, the Petition presents a serious, complex, well-researched claim that is supported by cases from other jurisdictions that have already granted the relief requested, numerous complex and relevant expert opinions, and substantial and broad academic support.

C. The relief sought is available.

64. The third and final requirement of Conn. Practice Book § 23-24 is met, as the relief sought by the NhRP, that is, release of the elephants from Respondents' detention, is available.

65. The Petition asks this Court to: (a) issue the writ of habeas corpus and require Respondents to file a return pursuant to Conn. Practice Book § 23-21 *et seq.* including, *inter alia*, setting forth the facts claimed to justify the denial of liberty and detention of Beulah, Minnie, and

Karen; and (b) order the immediate release of Beulah, Minnie, and Karen from such unlawful detention.

66. For the safety of the elephants as well as the public, Beulah, Minnie, and Karen cannot be released into the wilds of Africa or Asia or onto the streets of Connecticut. This Court has the authority however to release them to the Performing Animal Welfare Society Sanctuary ("PAWS") near Sacramento, California, which has agreed to provide permanent sanctuary for them.[15]

67. At PAWS, Beulah, Minnie, and Karen, along with other elephants, will flourish in an environment that respects their autonomy to the greatest degree possible, as close to their native Asia and Africa as may be found in North America.

68. PAWS is a 501(c)(3) non-profit organization incorporated in 1984. It maintains three captive wildlife sanctuaries: the original 30-acre PAWS sanctuary in Galt, California; the 100-acre Amanda Blake Memorial Wildlife Refuge in Herald, California; and the 2,300-acre ARK 2000 sanctuary in San Andreas, California, that are home to elephants, bears, and big cats. The Galt sanctuary was the first sanctuary in the country equipped to care for elephants. (Stewart Aff. ¶4). PAWS sanctuaries provide rescued animals with specially designed peaceful, natural habitats where they have the freedom to engage in natural autonomous behaviors that are as close to their native habitat as can be found in North America.

69. The mission of PAWS is to protect performing wild animals, provide sanctuary to abused, abandoned or retired captive wildlife, promote the best standards of care for all captive wildlife, preserve wild species and their habitat, and educate the public about captive wild animals. (Stewart Aff. ¶6).

70. The ARK 2000 sanctuary is located near the Sierra Nevada Mountains in San Andreas, California, and has five elephant barns, one for female Asian elephants, one for female

[15] Submitted with this Verified Petition in the accompanying Appendix of Expert Affidavits is an affidavit from Ed Stewart, Co-Founder and President of PAWS. Affidavit of Ed Stewart ["Stewart Aff."] ¶2.

African elephants, and three for bull elephants. The property encompasses 2,300 acres of rolling foothills with varied natural terrain. Habitats include natural grasses, trees, lakes and pools in which the elephants may bathe. The Asian and African barns are each 20,000 square feet in size. Barns are equipped with heaters, hydraulic gates, restraint devices for veterinary procedures, heated and padded concrete floors, dirt floors, spacious sleeping stalls and pipe hallways for introduction and socialization of new elephants. The African barn has an indoor therapy pool. The Asian elephant barn contains dirt-floor sleeping stalls specially designed for older elephants with foot and joint problems. (Stewart Aff. ¶8).

71. The fact that this Petition does not seek Beulah, Minnie, and Karen's release into the wild or onto the streets of Connecticut but rather into the care of a sanctuary does not preclude them from habeas corpus relief. *See Dart v. Mecum*, 19 Conn. Supp. 428, 434 (Super. Ct. 1955); *Buster v. Bonzagni*, 1990 WL 272742, at *2 (Conn. Super. Ct. Apr. 5, 1990) *aff'd sub Comm'r of Correction*, 26 Conn. App. 48 (1991). (For further discussion, see Mem. at 25-26).

IV. Statement pursuant to Conn. Practice Book § 23-22

A. Cause and Pretense of Illegal Confinement

72. Upon the NhRP's best knowledge and belief, the cause or pretense of Beulah, Minnie, and Karen's detention is that they are owned by, and being used for, entertainment and profit by the Respondents in such a manner that they are deprived of their autonomy and consequently their ability to choose how to live their emotionally, socially, and cognitively complex lives. They are trucked from place-to-place. They are forced to give public performances, do tricks, and give rides to members of the public at such places as county fairs under fear of being struck with bullhooks. Upon information and belief, they are rented out for private use in weddings and other private events. One elephant was forced into the Cathedral of St. John the Divine in New York City. The Respondents have been frequently cited for violations of the Federal Animal Welfare Act for their treatment of the elephants in their custody.

73. If this Court finds that Beulah, Minnie, and Karen are "persons" within the meaning of the common law, then their detention and deprivation of bodily liberty by

Respondents is unlawful under the common law, pursuant to which all persons are presumed free absent positive law. *Somerset, supra. See also State v. Oquendo*, 223 Conn. 635, 650 (1992) ("no man can be restrained of his liberty; be prevented from removing himself from place to place, as he choses; be compelled to go to a place contrary to his inclination, or be in any way imprisoned, or confined, unless by virtue of the express laws of the land.") (quoting Zephaniah Swift, *A Digest of the Laws of Connecticut* 180 (1795)); *id.* at 650 ("every detention is an imprisonment."). Stated differently, if Beulah, Minnie, and Karen are "persons" under the common law of Connecticut, then their detention by Respondents is *per se* unlawful.

74. This habeas corpus case is not an "animal protection" or "animal welfare" case, just as a habeas corpus case brought on behalf of a detained human would not be a "human protection" or "human welfare" case. *Lavery*, 124 A.D.3d at 149; *Stanley*, 16 N.Y.S.3d at 901. The issue before this Court, as it is in any habeas corpus action, is whether Beulah, Minnie, and Karen may be detained at all. Even if Respondents were violating animal welfare statutes, habeas corpus remains available, as alternative remedies do not alter one's ability to bring the writ. *In re Jonathan M.*, 255 Conn. 208, 221 (2001); *Weidenbacher v. Duclos*, 234 Conn. 51, 64-65 (1995).

75. While this Petition challenges neither the conditions of their confinement nor Respondents' treatment of the elephants, but rather the fact of their detention itself, the deplorable conditions of Beulah, Minnie, and Karen's confinement underscore the need for immediate relief and the degree to which their bodily liberty and autonomy are impaired.

B. Prior Petitions and Appeals

76. One previous application for the writ of habeas corpus asked herein was filed on November 13, 2017 in the Judicial District of Litchfield at Torrington. On December 26, 2017, that court refused to issue the requested writ of habeas corpus on the grounds that the NhRP lacked standing.[16] The court also suggested, in the alternative, that the Petition was frivolous on

[16] *See* http://civilinquiry.jud.ct.gov/DocumentInquiry/DocumentInquiry.aspx?DocumentNo=13631754 ("Opinion").

its face as a matter of law. As set forth in ¶¶ 27-63, that judge was plainly wrong on both accounts.[17]

77. A timely "Motion to Reargue And Leave to Amend the Petition," was filed on January 16, 2018,[18] and was denied on February 28, 2018.[19]

78. A timely appeal has been taken from the December 26, 2017 and February 28, 2018 orders (filed March 26, 2018) and is pending. (AC 41464). Because Beulah, Minnie, and Karen are currently being deprived of their bodily liberty, the NhRP promptly filed this Petition to avoid any undue delay in securing their liberty while the appellate process is proceeding on the first petition.

79. "[A]bsent an explicit exception, an evidentiary hearing is always required before a habeas petition may be dismissed." *Mercer v. Comm'r of Corr.*, 230 Conn. 88, 93 (1994). Connecticut "'case law has recognized only one situation in which a court is not legally required to hear a habeas petition,' namely Practice Book § 23–29(3)," assuming the court has jurisdiction and the petition is not frivolous on its face. *Skakel v. Warden, State Prison*, 2013 WL 1943921, at *10 (Conn. Super. Ct. Mar. 1, 2013) (citing *Coleman v. Commissioner*, 137 Conn. App. 51, 57 (2012)). *See also Carpenter v. Comm'r of Corr.*, 274 Conn. 834, 840-41 (2005); *Mercer v. Comm'r of Corr.*, 230 Conn. 88, 93 (1994).

80. The Petition cannot be dismissed under Conn. Practice Book § 23-29(3) as improperly successive because the only previous petition filed on behalf of Beulah, Minnie, and Karen was dismissed on its face on standing grounds and without a hearing.

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[17] The NhRP's New York cases were dismissed on various grounds by three intermediate appellate courts. The NhRP insisted that each of the three courts had erred. In his recent concurring opinion for the New York Court of Appeals, Judge Fahey agreed that all three intermediate appellate courts had erred when they ruled that an entity must have the capacity to bear duties in order to have any legal rights, that nonhuman animals may be deprived of all rights simply because they are not human, and that habeas corpus may only be used to unconditionally release an individual from detention. *Tommy*, 2018 WL 2107087, at *1 (Fahey, J., concurring).

[18] *See* https://www.nonhumanrights.org/content/uploads/2018-01-16-Motion-to-Reargue.pdf

[19] *See* https://www.nonhumanrights.org/content/uploads/2018-02-27-Memo-of-Decision-re-Motion-to-Reargue-1.pdf

81. The res judicata doctrine in habeas cases bars relitigation of "claims that actually have been raised *and litigated* in an earlier proceeding." *Thorpe v. Commissioner of Correction*, 73 Conn. App. 773, 778-79 n.7 (2002) (emphasis added).[20] A successive petition cannot be dismissed pursuant to Conn. Practice Book § 23-29(3) if the petitioner did not have "a fair and full opportunity to litigate" in the earlier proceeding. *In re Ross*, 272 Conn. 653, 661 (2005).[21] "Implicit in this rule is that multiple habeas filings *must be entertained* unless the same claim is asserted" *and* that claim has actually been litigated. *Skakel v. Warden, State Prison*, 2013 WL 1943921, at *4–6 (Conn. Super. Ct. Mar. 1, 2013) (emphasis added). *E.g.*, *Harris v. Comm'r of Correction*, 108 Conn. App. 201, 211 (2008) (fourth habeas corpus petition was not impermissibly successive because his claims that his "prior habeas counsel were ineffective were neither raised nor litigated in any earlier proceedings").

82. Not only was the NhRP's first petition summarily dismissed without a "full and fair opportunity" to be litigated, it was dismissed on standing grounds specifically. (Opinion at 3-9). It is well settled "that the dismissal of an earlier action for lack of standing is not a judgment on the merits and does not have a res judicata effect." *United States Bank, N.A. v. Foote*, 151 Conn. App. 620, 626 (2014). Furthermore, because the judge dismissed the first petition on standing grounds, anything said relating to the merits of the petition, and specifically in terms of the frivolousness of the action, was mere *dictum*. *See Pierce v. Warden*, 2013 Conn. Super. LEXIS 2550, at *21-22 (Conn. Super. Ct. Nov. 6, 2013) ("Although the petitioner attempted to litigate his claim regarding the inclusion in the 1999 PSI report of the treatment information contained in the 1996 PSI report, Judge Espinosa's dismissal on lack of subject matter grounds is not a decision on the merits and the alternative ground that the claim must fail on the merits is *dictum*."); *see also Johnson v. Commissioner of Correction*, 258 Conn. 804, 813 (2002) ("Whenever a court finds that it has no jurisdiction, it must dismiss the case") (internal

[20] *Accord Fernandez v. Commissioner of Correction*, 86 Conn. App. 42, 45-46 (2004); *Cayer Enterprises, Inc. v. DiMasi*, 84 Conn. App. 190, 194 (2004).
[21] *See also Connecticut National Bank v. Rytman*, 241 Conn. 24, 43-44 (1997).

quotation marks omitted); *cf. Ajadi v. Comm'r of Corr.*, 280 Conn. 514, 535-36 (2006) ("a judgment rendered without subject matter jurisdiction is void.").

83. Even assuming, *arguendo*, that the judge in the prior proceeding had not dismissed the petition on standing grounds but solely on the ground it was frivolous, that dismissal would not have a preclusive effect on the present Petition, as the first was dismissed without issuance of the writ (or order to show cause), service of process, and without a hearing, and was therefore not "actually litigated." A "pretrial dismissal . . . is not the logical or practical equivalent of a full and fair opportunity to litigate." *State v. Ellis*, 197 Conn. 436, 469 (1985), *on appeal after remand sub nom. State v. Paradise*, 213 Conn. 388 (1990). In general, where a first habeas corpus petition is summarily dismissed without a hearing, a second petition asserting the same grounds cannot be dismissed as successive. *See Palmenta v. Warden*, 2006 WL 3833865, at *1 n.1 (Conn. Super. Ct. Dec. 14, 2006) (because "there was no hearing on the merits of that motion. . . . petitioner's claim was not actually litigated, [and] res judicata does not apply").[22] Importantly, the "application of the doctrine of claim preclusion to a habeas petition is narrower than in a general civil context because of the nature of the Great Writ." *Skakel*, 2013 WL 1943921, at *4–6. "'Unique policy considerations must be taken into account.'" *In re Ross*, 272 Conn. at 662 (quoting *Thorpe*, 73 Conn. App. at 779 n.7). "'Foremost among those considerations is the interest in making certain that no one is deprived of liberty.'" *Id.* (citation omitted).[23] "Given the narrowed application of the doctrine of res judicata in the habeas context,

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[22] *See also State v. Joyner*, 255 Conn. 477, 496 (2001) ("Although an inadequate cross-examination of the victim was consistent with the habeas court's findings, it was not cited by the habeas court explicitly. Furthermore, to read such a conclusion into the habeas court's decision would be contrary to the requirement that issues be actually litigated and determined for collateral estoppel to apply."); *Lorthe v. Comm'r of Correction*, 2013 WL 1849280, at *4 (Conn. Super. Ct. Apr. 10, 2013) ("the prior dismissal of a petition for writ of habeas corpus based solely on the granting of an *Anders* motion is not a determination on the merits of the claims within that petition such as would subject them to dismissal on grounds of res judicata when raised in a subsequent petition for writ of habeas corpus").

[23] *See also Johnson v. Commissioner of Correction*, 288 Conn. 53, 66-67 (2008); *Carter v. Comm'r of Correction*, 133 Conn. App. 387, 393 (2012) (in "'the habeas context, in the interest of ensuring that no one is deprived of liberty . . . the application of the doctrine of res judicata . . .

it would only seem logical that this line of reasoning [regarding an 'adequate opportunity to litigate' in the prior proceeding] would apply with even greater strength here." *Taylor v. Warden*, 2013 WL 3970244, at *5 (Conn. Super. Ct. July 16, 2013) (refusing to dismiss second habeas corpus petition on res judicata grounds where inmate had no "prior opportunity to litigate the claim of ineffective assistance" as the first was "dismissed pursuant to a pretrial motion.").

84. Lastly, a court may act "within its discretion in declining to dismiss the second petition because the language of § 23-29 is discretionary rather than mandatory." *In re Ross*, 272 Conn. at 667-69. *See* Conn. Practice Book § 23–29(3) ("The judicial authority *may,* at any time, . . . dismiss the petition, or any count thereof, if it determines that . . .") (emphasis added). In *James L. v. Comm'r of Correction*, 245 Conn. 132, 142 & n.11 (1998), the Court concluded that, even if the two petitions had presented identical grounds, the habeas court would have acted within its discretion in declining to dismiss the second petition because the language of § 23-29 is "discretionary rather than mandatory." The Court observed: "The language of this provision illustrates the common-law principle that the doctrines of res judicata and collateral estoppel, claim preclusion and issue preclusion, respectively, are ordinarily inapplicable in the habeas corpus context." *Id.*

85. Moreover, circumstances have changed in at least three ways since the first petition was dismissed. First, on May 8, 2018, Judge Fahey, of New York's Court of Appeals, penned a concurring opinion that admonished the courts in New York for declining to grant personhood to nonhuman animals for the purposes of habeas corpus solely because they are not human. *Tommy*, 2018 WL 2107087, at *1-2 (Fahey, J., concurring). In a case of first impression as this, the legal opinion of the first high court judge in the United States to offer an opinion on the eligibility of nonhuman animals for habeas corpus, although not binding, severely undermines the finding of the court that the first petition is frivolous.

[is limited] to claims that actually have been raised and litigated in an earlier proceeding.'") (citations omitted); *Kearney v. Commissioner,* 113 Conn. App. 223 (2009).

86. Second, on February 23, 2018, the NhRP received the support of the Philosophers' *Amicus Brief* filed in the New York Court of Appeals[24] which Judge Fahey found persuasive on the issue of whether legal rights should be extended to nonhuman animals in the context of common law habeas corpus. *Tommy*, 2018 WL 2107087, at *1 (concurring).

87. Third, after the first petition was denied, the Colombian Supreme Court had also designated its part of the Amazon rainforest as "as an entity subject of rights," in other words, a "person."[25]

88. The foregoing changes in the legal landscape make it plain that the present petition should not be dismissed as successive.

V. Statement of Facts based on Expert Affidavits

89. Submitted with this Verified Petition in the accompanying Appendix of Expert Affidavits are the following affidavits, including four affidavits from five of the world's most renowned experts on the cognitive abilities of elephants ("Expert Scientific Affidavits"), as well as one legal affidavit. In total, these affidavits include:

(a) Affidavit of Kevin R. Schneider, Esq.

(b) Joint Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D.

(c) Affidavit of Joyce Poole, Ph.D.

(d) Affidavit of Karen McComb, Ph.D.

(e) Affidavit of Cynthia Moss

(f) Affidavit of Ed Stewart

(g) Affidavit of Mark Dubois, Esq.

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[24] https://www.nonhumanrights.org/content/uploads/In-re-Nonhuman-Rights-v.-Lavery-Proposed-Brief-by-PHILOSOPHERS-74435.pdf.

[25] *See* STC4360-2018 (2018-00319-01), http://www.cortesuprema.gov.co/corte/index.php/2018/04/05/corte-suprema-ordena-proteccion-inmediata-de-la-amazonia-colombiana/, *excerpts available at* https://www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf?x54537 (last accessed May 4, 2018).

90. Expert Affidavits (b) through (e) demonstrate that Beulah, Minnie, and Karen possess complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty, as a matter of common law liberty, equality, or both under Connecticut common law. These include: autonomy; empathy; self-awareness; self-determination; theory of mind (awareness others have minds); insight; working memory, and an extensive long-term memory that allows them to accumulate social knowledge; the ability to act intentionally and in a goal-oriented manner, and to detect animacy and goal directedness in others; to understand the physical competence and emotional state of others; imitate, including vocal imitation; point and understand pointing; engage in true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do); cooperate and build coalitions; cooperative problem-solving, innovative problem-solving, and behavioral flexibility; understand causation; intentional communication, including vocalizations to share knowledge and information with others in a manner similar to humans; ostensive behavior that emphasizes the importance of a particular communication; wide variety of gestures, signals, and postures; use of specific calls and gestures to plan and discuss a course of action, adjust their plan according to their assessment of risk, and execute the plan in a coordinated manner; complex learning and categorization abilities, and; an awareness of and response to death, including grieving behaviors.

91. African and Asian elephants share numerous complex cognitive abilities with humans, such as self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities.[26]

92. Many of these capacities have been considered — erroneously — as uniquely human; each is a component of autonomy.[27] African and Asian elephants are autonomous, as they exhibit "self-determined behaviour that is based on freedom of choice. As a psychological

[26] Joint Affidavit of Lucy Bates and Richard M. Byrne ["Bates & Byrne Aff."] ¶37; Affidavit of Karen McComb ["McComb Aff."] ¶31; Affidavit of Joyce Poole ["Poole Aff."] ¶29; Affidavit of Cynthia Moss ["Moss Aff."] ¶25.
[27] Bates & Byrne Aff. ¶37; McComb Aff. ¶31; Poole Aff. ¶29; Moss Aff. ¶25.

concept it implies that the individual is directing their behaviour based on some non-observable, internal cognitive process, rather than simply responding reflexively."[28]

93. Elephants possess the largest absolute brain of any land animal.[29] Even relative to their body sizes, elephant brains are large.[30]

94. An encephalization quotient ("EQ") of 1.0 means a brain is exactly the size expected for that body size; values greater than 1.0 indicate a larger brain than expected for that body size. (*Id.*).[31] Elephants have an EQ of between 1.3 and 2.3 (varying between sex and African and Asian species).[32] This means an elephant's brain can be more than twice as large as is expected for an animal of its size.[33] These EQ values are similar to those of the great apes, with whom elephants have not shared a common ancestor for almost 100 million years.[34]

95. A large brain allows greater cognitive skill and behavioral flexibility.[35] Typically, mammals are born with brains weighing up to 90% of the adult weight.[36] This figure drops to about 50% for chimpanzees.[37] At birth, human brains weigh only about 27% of the adult brain weight and increase in size over a prolonged childhood period.[38] This lengthy period of brain development (termed "developmental delay") is a key feature of human brain evolution.[39] It provides a longer period in which the brain may be shaped by experience and learning, and plays a role in the emergence of complex cognitive abilities such as self-awareness, creativity, forward

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[28] Bates & Byrne Aff. ¶30, ¶60; McComb Aff. ¶24, ¶31, ¶54; Poole Aff. ¶22, ¶53; Moss Aff. ¶18; ¶48.
[29] Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.
[30] Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.
[31] Encephalization quotients (EQ) are a standardized measure of brain size relative to body size, and illustrate by how much a species' brain size deviates from that expected for its body size. Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.
[32] Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.
[33] Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.
[34] Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.
[35] Bates & Byrne Aff. ¶¶32-33; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.
[36] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.
[37] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.
[38] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.
[39] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

planning, decision making and social interaction.[40] Elephant brains at birth weigh only about 35% of their adult weight, and elephants accordingly undergo a similarly protracted period of growth, development and learning.[41] This similar developmental delay in the elephant brain is likewise associated with the emergence of analogous cognitive abilities.[42]

96. Physical similarities between human and elephant brains occur in areas that link to the capacities necessary for autonomy and self-awareness.[43] Elephant and human brains share deep and complex foldings of the cerebral cortex, large parietal and temporal lobes, and a large cerebellum.[44] The temporal and parietal lobes of the cerebral cortex manage communication, perception, and recognition and comprehension of physical actions, while the cerebellum is involved in planning, empathy, and predicting and understanding the actions of others.[45]

97. Elephant brains hold nearly as many cortical neurons as do human brains, and a much greater number than do chimpanzees or bottlenose dolphins.[46] Elephants' pyramidal neurons — the class of neurons found in the cerebral cortex, particularly the pre-frontal cortex, which is the brain area that controls "executive functions" — are larger than in humans and most other species.[47] The term "executive function" refers to controlling operations, such as paying attention, inhibiting inappropriate responses, and deciding how to use memory search. These abilities develop late in human infancy and are often impaired in dementia. The degree of complexity of pyramidal neurons is linked to cognitive ability, with more complex connections between pyramidal neurons being associated with increased cognitive capabilities.[48] Elephant

[40] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.
[41] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.
[42] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.
[43] Bates & Byrne Aff. ¶34; Poole Aff. ¶26; McComb Aff. ¶28; Moss Aff. ¶22.
[44] Bates & Byrne Aff. ¶34; McComb Aff. ¶28; Poole Aff. ¶26; Moss Aff. ¶22.
[45] Bates & Byrne Aff. ¶34; McComb Aff. ¶28; Poole Aff. ¶26; Moss Aff. ¶22.
[46] Humans: 1.15×10^{10}; elephants: 1.1×10^{10}, chimpanzees: 6.2×10^{9}; dolphins: 5.8×10^{9}. Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.
[47] Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.
[48] Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.

pyramidal neurons have a large number of connections with other neurons for receiving and sending signals, known as a dendritic tree.[49]

98. Elephants, like humans, great apes, and some cetaceans, possess *von Economo neurons*, or spindle cells, the so-called "air-traffic controllers for emotions," in the anterior cingulate, fronto-insular, and dorsolateral prefrontal cortex areas of the brain.[50] In humans, these cortical areas are involved, among other things, with the processing of complex social information, emotional learning and empathy, planning and decision-making, and self-awareness and self-control.[51] The presence of spindle cells in the same brain locations in elephants and humans strongly implies that these higher-order brain functions, which are the building blocks of autonomous, self-determined behavior, are common to both species.[52]

99. Elephants have extensive and long-lasting memories.[53] McComb et al. (2000), using experimental playback of long-distance contact calls in Amboseli National Park, Kenya, showed that African elephants remember and recognize the voices of at least 100 other elephants.[54] Each adult female elephant tested was familiar with the contact-call vocalizations of individuals from an average of 14 families in the population.[55] When the calls came from the test elephants' own family, they contact-called in response and approached the location of the loudspeaker; when they were from another non-related but familiar family, one that had been shown to have a high association index with the test group, they listened but remained relaxed.[56] However, when a test group heard unfamiliar contact calls from groups with a low association index with the test group, the elephants bunched together and retreated from the area.[57]

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[49] Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.
[50] Bates & Byrne Aff. ¶36; McComb Aff. ¶30; Poole Aff. ¶28; Moss Aff. ¶24.
[51] Bates & Byrne Aff. ¶36; McComb Aff. ¶30; Poole Aff. ¶28; Moss Aff. ¶24.
[52] Bates & Byrne Aff. ¶36; McComb Aff. ¶30; Poole Aff. ¶28; Moss Aff. ¶24.
[53] Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.
[54] Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.
[55] Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.
[56] Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.
[57] Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.

100. McComb *et al.* has demonstrated that this social knowledge accumulates with age, with older females having the best knowledge of the contact calls of other family groups, and that older females are better leaders than younger, with more appropriate decision-making in response to potential threats (in this case, in the form of hearing lion roars).[58] Younger matriarchs under-reacted to hearing roars from male lions, elephants' most dangerous predators.[59] Sensitivity to the roars of male lions increased with increasing matriarch age, with the oldest, most experienced females showing the strongest response to this danger.[60] These studies show that elephants continue to learn and remember information about their environments throughout their lives, and this accrual of knowledge allows them to make better decisions and better lead their families as they age.[61]

101. Further demonstration of elephants' long-term memory emerges from data on their movement patterns.[62] African elephants move over very large distances in their search for food and water.[63] Leggett (2006) used GPS collars to track the movements of elephants living in the Namib Desert, with one group traveling over 600 km in five months.[64] Viljoen (1989) showed that elephants in the same region visited water holes approximately every four days, though some were more than 60 km apart.[65]

102. Elephants inhabiting the deserts of Namibia and Mali may travel hundreds of kilometers to visit remote water sources shortly after the onset of a period of rainfall, sometimes along routes that have not been used for many years.[66] These remarkable feats suggest exceptional cognitive mapping skills that rely upon the long-term memories of older individuals

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[58] Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.
[59] Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.
[60] Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.
[61] Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.
[62] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[63] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[64] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[65] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[66] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

who may have traveled that same path decades earlier.[67] Thus, family groups headed by older matriarchs are better able to survive periods of drought.[68] These older matriarchs lead their families over larger areas during droughts than families headed by younger matriarchs, again drawing on their accrued knowledge, this time about the locations of permanent, drought-resistant sources of food and water, to better lead and protect their families.[69]

103. Studies reveal that long-term memories, and the decision-making mechanisms that rely on this knowledge, are severely disrupted in elephants who have experienced trauma or extreme disruption due to "management" practices initiated by humans.[70] Shannon *et al.* (2013) demonstrated that South African elephants who experienced trauma decades earlier showed significantly reduced social knowledge.[71] As a result of archaic culling practices, these elephants had been forcibly separated from family members and subsequently taken to new locations.[72] Two decades later, their social knowledge and skills and decision-making abilities were impoverished compared to an undisturbed Kenyan population.[73] Disrupting elephants' natural way of life has substantial negative impacts on their knowledge and decision-making abilities.[74]

104. Elephants demonstrate advanced working memory skills.[75] Working memory is the ability to temporarily store, recall, manipulate and coordinate items from memory.[76] Working memory directs one's attention to relevant information, utilized in reasoning, planning, coordination, and execution of cognitive processes through a "central executive."[77] Adult human working memory has a capacity of around seven items.[78] When experiments were conducted

[67] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[68] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[69] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[70] Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.
[71] Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.
[72] Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.
[73] Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.
[74] Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.
[75] Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.
[76] Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.
[77] Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.
[78] Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

with wild elephants in Kenya in which the locations of fresh urine samples from related or unrelated elephants were manipulated, the elephants responded by detecting urine from known individuals in surprising locations, thereby demonstrating the ability continually to track the locations of at least 17 family members in relation to themselves, as either absent, present in front of self, or present behind self.[79] This remarkable ability to hold in mind and regularly update information about the locations and movements of a large number of family members is best explained by the fact that elephants possess an unusually large working memory capacity that is much larger than that of humans.[80]

105. Elephants display a sophisticated categorization of their environment on par with humans.[81] Bates, Byrne, Poole, and Moss experimentally presented the elephants of Amboseli National Park, Kenya with garments that gave olfactory or visual information about their human wearers, either Maasai warriors who traditionally attack and spear elephants as part of their rite of passage, or Kamba men who are agriculturalists and traditionally pose little threat to elephants.[82] In the first experiment, the only thing that differed between the cloths was the smell, derived from the ethnicity and/or lifestyle of the wearers.[83] The elephants were significantly more likely to run away when they sniffed cloths worn by Maasai men than those worn by Kamba men or no one at all. (See "Video 7" attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit K").[84]

106. In a second experiment, they presented the elephants with two cloths that had not been worn by anyone; one was white (a neutral stimulus) and the other red, the color ritually worn by Maasai warriors.[85] With access only to these visual cues, the elephants showed

[79] Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.
[80] Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.
[81] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[82] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[83] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[84] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[85] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

significantly greater, sometimes aggressive, reactions to red garments than white.[86] They concluded that elephants are able to categorize a single species (humans) into sub-classes (i.e., "dangerous" or "low risk") based on either olfactory or visual cues alone.[87]

107. McComb *et al.* further demonstrated that these same elephants distinguish human groups based on voices.[88] The elephants reacted differently, and appropriately, depending on whether they heard Maasai or Kamba men speaking, and whether the speakers were male Maasai versus female Maasai, who also pose no threat.[89] Scent, sounds and visual signs associated specifically with Maasai men are categorized as "dangerous," while neutral signals are attended to but categorized as "low risk."[90] These sophisticated, multi-modal categorization skills may be exceptional among non-human animals and demonstrate elephants' acute sensitivity to the human world and how they monitor human behavior and learn to recognize when we might cause them harm.[91]

108. Human speech and language reflect autonomous thinking and intentional behavior.[92] Similarly, elephants vocalize to share knowledge and information.[93] Male elephants primarily communicate about their sexual status, rank and identity, whereas females and dependents emphasize and reinforce their social units.[94] Call types are separated into those produced by the larynx (such as "rumbles") and calls produced by the trunk (such as "trumpets"), with different calls in each category used in different contexts.[95] Field experiments have shown that African elephants distinguish between call types. For example, such contact calls as "rumbles" may travel kilometers and maintain associations between elephants, or "oestrus

[86] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[87] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[88] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[89] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[90] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[91] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[92] Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.
[93] Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.
[94] Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.
[95] Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.

rumbles" may occur after a female has copulated, and these call types elicit different responses in listeners.[96]

109. Elephant vocalizations are not merely reflexive; they have distinct meanings to listeners and communicate in a manner similar to the way humans use language.[97] Elephants display more than two hundred gestures, signals and postures that they use to communicate information to their audience.[98] Such signals are adopted in many contexts, such as aggressive, sexual or socially integrative situations, are well-defined, carry a specific meaning both to the actor and recipient, result in predictable responses from the audience, and together demonstrate intentional and purposeful communication intended to share information and/or alter the others' behavior to fit their own will.[99]

110. Elephants use specific calls and gestures to plan and discuss a course of action.[100] These may be to respond to a threat through a group retreating or mobbing action (including celebration of successful efforts), or planning and discussing where, when and how to move to a new location.[101] In group-defensive situations, elephants respond with highly coordinated behaviour, both rapidly and *predictably*, to specific calls uttered and particular gestures exhibited by group members.[102] These calls and gestures carry specific meanings not only to elephant listeners, but to experienced human listeners as well.[103] The rapid, predictable and collective response of elephants to these calls and gestures indicates that elephants have the capacity to understand the goals and intentions of the signalling individual.[104]

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[96] Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.
[97] Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.
[98] Poole Aff. ¶43; Bates & Byrne Aff. ¶52; McComb Aff. ¶46; Moss Aff. ¶40.
[99] Bates & Byrne Aff. ¶52; McComb Aff. ¶46; Poole Aff. ¶43; Moss Aff. ¶40.
[100] Poole Aff. ¶44.
[101] Poole Aff. ¶44.
[102] Poole Aff. ¶45.
[103] Poole Aff. ¶45.
[104] Poole Aff. ¶45.

111. Elephant group defensive behavior is highly evolved and involves a range of different tactical maneuvers adopted by different elephants.[105] For example, matriarch Provocadora's contemplation of Poole's team through listening and "j-sniffing," followed by her purposeful "perpendicular-walk" (in relation to Poole's team) toward her family and her "ear-flap-slide" clearly communicated that her family should begin a "group-advance" upon Poole's team.[106] This particular elephant attack is a powerful example of elephants' use of empathy, coalition and cooperation.[107] Provocadora's instigation of the "group-advance" led to a two-and-a-half minute "group-charge" in which the three other large adult females of the 36-member family took turns leading the charge, passing the baton, in a sense, from one to the next.[108] Once they succeeded in their goal of chasing Poole's team away, they celebrated their victory by "high-fiving" with their trunks and engaging in an "end-zone-dance."[109] "High-fiving" is also typically used to initiate a coalition and is both preceded by and associated with other specific gestures and calls that lead to very goal oriented collective behavior.[110]

112. Ostensive communication refers to the way humans use particular behavior, such as tone of speech, eye contact, and physical contact, to emphasize that a particular communication is important.[111] Lead elephants in family groups use ostensive communication frequently as a way to say, "Heads up – I am about to do something that you should pay attention to."[112]

113. In planning and communicating intentions regarding a movement, elephants use both vocal and gestural communication.[113] For example, Poole has observed that a member of a family will use the axis of her body to point in the direction she wishes to go and then vocalize,

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[105] Poole Aff. ¶45.
[106] Poole Aff. ¶45.
[107] Poole Aff. ¶45.
[108] Poole Aff. ¶45.
[109] Poole Aff. ¶45.
[110] Poole Aff. ¶45.
[111] Poole Aff. ¶36.
[112] Poole Aff. ¶36.
[113] Poole Aff. ¶46.

every couple of minutes, with a specific call known as a "let's-go" rumble, "I want to go this way, let's go together."[114] The elephant will also use intention gestures — such as "foot-swinging" — to indicate her intention to move.[115] Such a call may be successful or unsuccessful at moving the group or may lead to a 45-minute or longer discussion (a series of rumble exchanges known as "cadenced rumbles") that researchers interpret as negotiation.[116] Sometimes such negotiation leads to disagreement that may result in the group splitting and going in different directions for a period of time.[117] In situations where the security of the group is at stake, such as when movement is planned through or near human settlement, all group members focus on the matriarch's decision.[118] So while "let's go" rumbles are uttered, others adopt a "waiting" posture until the matriarch, after much "listening," "j-sniffing," and "monitoring," decides it is safe to proceed, where upon they bunch together and move purposefully, and at a fast pace in a "group-march."[119]

114. Elephants typically move through dangerous habitat and nighttime hours at high speed in a clearly goal-oriented manner known as "streaking," which has been described and documented through the movements of elephants wearing satellite tracking collars.[120] The many different signals — calls, postures, gestures and behaviors elephants use to contemplate and initiate such movement (including "ear-flap," "ear-flap-slide") — are clearly understood by other elephants (just as they can be understood after long-term study by human observers), mean very specific things, and indicate that elephants: 1) have a particular plan which they can communicate with others, 2) can adjust their plan according to their immediate assessment of risk or opportunity, and 3) can communicate and execute the plan in a coordinated manner.[121]

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[114] Poole Aff. ¶46.
[115] Poole Aff. ¶46.
[116] Poole Aff. ¶46.
[117] Poole Aff. ¶46.
[118] Poole Aff. ¶46.
[119] Poole Aff. ¶46.
[120] Poole Aff. ¶46.
[121] Poole Aff. ¶46.

115. Elephants can vocally imitate sounds they hear, from the engines of passing trucks to the commands of human zookeepers.[122] Imitating another's behavior is demonstrative of a sense of self, as it is necessary to understand how one's own behavior relates to the behavior of others.[123] African elephants recognize the importance of visual attentiveness on the part of an intended recipient, elephant or human, and of gestural communication, which further demonstrates that elephants' gestural communications are intentional and purposeful.[124] This ability to understand the visual attentiveness and perspective of others is crucial for empathy, mental-state understanding, and "theory of mind," the ability to mentally represent and think about the knowledge, beliefs and emotional states of others, while recognizing that these can be distinct from your own knowledge, beliefs and emotions.[125]

116. As do humans, Asian elephants exhibit "mirror self-recognition" (MSR) using Gallup's classic "mark test."[126] MSR is the ability to recognize a reflection in the mirror as oneself, while the mark test involves surreptitiously placing a colored mark on an individual's forehead that she cannot see or be aware of without the aid of a mirror.[127] If the individual uses the mirror to investigate the mark, the individual must recognize the reflection as herself. (See "Video 1," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit D").[128]

117. MSR is significant because it is a key identifier of self-awareness.[129] Self-awareness is intimately related to autobiographical memory in humans and is central to

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[122] Bates & Byrne Aff. ¶51; McComb Aff. ¶45; Poole Aff. ¶47; Moss Aff. ¶39.
[123] Bates & Byrne Aff. ¶51; McComb Aff. ¶45; Poole Aff. ¶47; Moss Aff. ¶39.
[124] Bates & Byrne Aff. ¶53; McComb Aff. ¶47; Poole Aff. ¶48; Moss Aff. ¶41.
[125] Bates & Byrne Aff. ¶40, ¶53; McComb Aff. ¶34, ¶47; Poole Aff. ¶32, ¶48; Moss Aff. ¶28, ¶41.
[126] Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26. African elephants have not yet been tested.
[127] Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.
[128] Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.
[129] Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.

autonomy and being able to direct one's own behavior to achieve personal goals and desires.[130] By demonstrating they can recognize themselves in a mirror, elephants must be holding a mental representation of themselves from another perspective and thus be aware that they are a separate entity from others.[131]

118. One who understands the concept of dying and death must possess a sense of self.[132] Both chimpanzees and elephants demonstrate an awareness of death by reacting to dead family or group members.[133] Having a mental representation of the self, which is a pre-requisite for mirror-self recognition, likely confers an ability to comprehend death.[134]

119. Wild African elephants have been shown experimentally to be more interested in the bones of dead elephants than the bones of other animals. (See "Video 2," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit E").[135] They have frequently been observed using their tusks, trunk or feet to attempt to lift sick, dying or dead individuals.[136] Although they do not give up trying to lift or elicit movement from a dead body immediately, elephants appear to realize that once dead, the carcass can no longer be helped; and instead they engage in more "mournful" or "grief-stricken" behavior, such as standing guard over the body with dejected demeanor and protecting it from predators. (See "Photographs," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit F").[137]

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[130] "Autobiographical memory" refers to what one remembers about his or her own life; for example, not that "Paris is the capital of France," but the recollection that you had a lovely time when you went there. Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.
[131] Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.
[132] Poole Aff. ¶31; Bates & Byrne Aff. ¶39; Moss Aff. ¶27.
[133] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[134] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[135] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[136] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[137] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

120. Wild African elephants have been observed to cover the bodies of their dead with dirt and vegetation.[138] Mothers who lose a calf may remain with the calf's body for an extended period, but do not behave towards the body as they would a live calf.[139] Indeed, the general demeanor of elephants attending to a dead elephant is one of grief and compassion, with slow movements and few vocalizations.[140] These behaviors are akin to human responses to the death of a close relative or friend and demonstrate that elephants possess some understanding of life and the permanence of death. (See "Photographs," attached to the Affidavit of Karen McComb, Ph.D. on CD as "Exhibit E").[141]

121. Elephants' interest in the bodies, carcasses and bones of elephants who have passed is so marked that when one has died, trails to the site of death become worn into the ground by the repeated visits of many elephants over days, weeks, months, even years.[142] The accumulation of dung around the site attests to the extended time that visiting elephants spend touching and contemplating the bones.[143] Poole observed that, over years, the bones may become scattered over tens or hundreds of square meters as elephants pick up the bones and carry them away.[144] The tusks are of particular interest and may be carried and deposited many hundreds of meters from the site of death.[145]

122. The capacity for mentally representing the self as an individual entity has been linked to general empathic abilities.[146] Empathy is defined as identifying with and understanding another's experiences or feelings by relating personally to their situation.[147]

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[138] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[139] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[140] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[141] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[142] Poole Aff. ¶31.
[143] Poole Aff. ¶31.
[144] Poole Aff. ¶31.
[145] Poole Aff. ¶31.
[146] Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.
[147] Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.

123. Empathy is an important component of human consciousness and autonomy and is a cornerstone of normal social interaction.[148] It requires modeling the emotional states and desired goals that influence others' behavior both in the past and future, and using this information to plan one's own actions; empathy is only possible if one can adopt or imagine another's perspective, and attribute emotions to that other individual.[149] Thus, empathy is a component of "theory of mind."[150]

124. Elephants frequently display empathy in the form of protection, comfort and consolation, as well as by actively helping those in difficulty, such as assisting injured individuals to stand and walk, or helping calves out of rivers or ditches with steep banks. (See "Video 3," attached to the Affidavit of Karen McComb, Ph.D. on CD as "Exhibit F").[151] Elephants have been seen to react when anticipating the pain of others by wincing when a nearby elephant stretched her trunk toward a live wire, and have been observed feeding those unable to use their own trunks to eat and attempting to feed those who have just died.[152]

125. In an analysis of behavioural data collected from wild African elephants over a 40-year continuous field study, Bates and colleagues concluded that as well as possessing their own intentions, elephants can diagnose animacy and goal directedness in others, understand the physical competence and emotional state of others, and attribute goals and mental states (intentions) to others.[153]

126. This is borne out by examples such as:

> IB family is crossing river. Infant struggles to climb out of bank after its mother. An adult female [not the mother] is standing next to calf and moves closer as the infant struggles. Female does not push calf out with its trunk, but digs her tusks into the mud behind the calf's front right leg which acts to provide some anchorage for the calf, who then scrambles up and out and rejoins mother.

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[148] Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.
[149] Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.
[150] Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.
[151] Bates & Byrne Aff. ¶41; McComb Aff. ¶35; Poole Aff. ¶33; Moss Aff. ¶29.
[152] Poole Aff. ¶33; Bates & Byrne Aff. ¶41; McComb Aff. ¶35; Moss Aff. ¶29.
[153] Bates & Byrne Aff. ¶42; McComb Aff. ¶36; Poole Aff. ¶34; Moss Aff. ¶30.

> At 11.10ish Ella gives a "lets go" rumble as she moves further down the swamp . . . At 11.19 Ella goes into the swamp. The entire group is in the swamp except Elspeth and her calf [<1 year] and Eudora [Elspeth's mother]. At 11.25 Eudora appears to "lead" Elspeth and the calf to a good place to enter the swamp — the only place where there is no mud.

(See "Video 3," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit G").[154]

127. In addition to the examples analyzed in Bates *et al.*, Poole observed two adult females rush to the side of a third female who had just given birth, back into her, and press their bodies to her in what appeared to be a spontaneous attempt to prevent injury to the newborn.[155] In describing the situation, Poole wrote:

> The elephants' sounds [relating to the birth] also attracted the attention of several males including young and inexperienced, Ramon, who, picking up on the interesting smells of the mother [Ella], mounted her, his clumsy body and feet poised above the newborn. Matriarch Echo and her adult daughter Erin, rushed to Ella's side and, I believe, purposefully backed into her in what appeared to be an attempt to prevent the male from landing on the baby when he dismounted.[156]

128. Such examples demonstrate that the acting elephant(s) (the adult female in the first example, Eudora in the second, and Erin and Echo in the third) were able to understand the intentions or situation of the other (the calf in the first case, Elspeth in the second, Ella's newborn and the male in the third), and could adjust their own behavior to counteract the problem being faced by the other.[157]

129. In raw footage Poole acquired of elephant behavior filmed by her brother in the Mara, Kenya, an "allo-mother" (an elephant who cares for an infant and is not the infant's mother or father) moves a log from under the head of an infant in what appears to be an effort to make him more comfortable. (See "Video 1," attached to the Affidavit of Joyce Poole, Ph.D. on CD as "Exhibit C").[158] In a further example of the ability to understand goal directedness of

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[154] Bates & Byrne Aff. ¶42.
[155] Poole Aff. ¶34.
[156] Poole Aff. ¶34.
[157] Bates & Byrne Aff. ¶42; McComb Aff. ¶36; Poole Aff. ¶34; Moss Aff. ¶30.
[158] Poole Aff. ¶34.

others, elephants appear to understand that vehicles drive on roads or tracks and they further appear to know where these tracks lead.[159] In Gorongosa, Mozambique, where elephants exhibit a culture of aggression toward humans, charging, chasing and attacking vehicles, adult females anticipate the direction the vehicle will go and attempt to cut it off by taking shortcuts *before* the vehicle has begun to turn.[160]

130. Empathic behavior begins early in elephants. In humans, rudimentary sympathy for others in distress has been recorded in infants as young as 10 months old; young elephants similarly exhibit sympathetic behavior.[161] For example, during fieldwork in the Maasai Mara in 2011, Poole filmed a mother elephant using her trunk to assist her one-year-old female calf up a steep bank. Once the calf was safely up the bank she turned around to face her five-year-old sister, who was also having difficulties getting up the bank. As the older calf struggled to clamber up the bank the younger calf approached her and first touched her mouth (a gesture of reassurance among family members) and then reached her trunk out to touch the leg that had been having difficulty. Only when her sibling was safely up the bank did the calf turn to follow her mother. (See "Video 2," attached to the Affidavit of Joyce Poole, Ph.D. on CD as "Exhibit D").[162]

94. Captive African elephants attribute intentions to others, as they follow and understand human pointing gestures.[163] The elephants understood that the human experimenter was pointing to communicate information to them about the location of a hidden object. (See "Video 4," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit H").[164] Attributing intentions and understanding another's reference point is central to both empathy and "theory of mind."[165]

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[159] Poole Aff. ¶34.
[160] Poole Aff. ¶34.
[161] Poole Aff. ¶34.
[162] Poole Aff. ¶34.
[163] Bates & Byrne Aff. ¶43; McComb Aff. ¶37; Poole Aff. ¶35; Moss Aff. ¶31.
[164] Bates & Byrne Aff. ¶43; McComb Aff. ¶37; Poole Aff. ¶35; Moss Aff. ¶31.
[165] Bates & Byrne Aff. ¶43; McComb Aff. ¶37; Poole Aff. ¶35; Moss Aff. ¶31.

95. There is evidence of "natural pedagogy," or true teaching — whereby a teacher takes into account the knowledge states of the learner as she passes on relevant information — in elephants. Bates, Byrne, and Moss's analysis of simulated "oestrus behaviours"[166] in African elephants — whereby a non-cycling, sexually experienced older female will simulate the visual signals of being sexually receptive, even though she is not ready to mate or breed again — demonstrates that these knowledgeable females can adopt false "oestrus behaviours" to demonstrate to naïve young females how to attract and respond appropriately to suitable males.[167] The experienced females may be taking the youngster's lack of knowledge into account and actively showing them what to do — a possible example of true teaching as it is defined in humans.[168] This evidence, coupled with the data showing they understand the ostensive cues in human pointing, suggests that elephants understand the intentions and knowledge states (minds) of others.[169]

96. Coalitions and cooperation have been frequently documented in wild African elephants, particularly to defend family members or close allies from (potential) attacks by outsiders, such as when one family group tries to "kidnap" a calf from an unrelated family.[170] These behaviors are generally preceded by gestural and vocal signals, typically given by the matriarch and acted upon by family members, and are based on one elephant understanding the emotions and goals of a coalition partner.[171]

97. Cooperation is evident in captive Asian elephants, who demonstrate they can work together in pairs to obtain a reward, but also understand the pointlessness of attempting the

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[166] Bates & Byrne Aff. ¶44. Ostension is the way that we can "mark" our communications to show people that that is what they are. If you do something that another copies, that's imitation; but if you deliberately indicate what you are doing to be helpful, that's "ostensive" teaching. Similarly, we may "mark" a joke, hidden in seemingly innocent words; or "mark" our words as directed towards someone specific by catching their eye. Ostension implies that the signaller knows what she is doing.
[167] Bates & Byrne Aff. ¶44; McComb Aff. ¶38; Poole Aff. ¶36; Moss Aff. ¶32.
[168] Bates & Byrne Aff. ¶44; McComb Aff. ¶38; Poole Aff. ¶36; Moss Aff. ¶32.
[169] Bates & Byrne Aff. ¶44; McComb Aff. ¶38; Poole Aff. ¶36; Moss Aff. ¶32.
[170] Bates & Byrne Aff. ¶45; McComb Aff. ¶39; Poole Aff. ¶37; Moss Aff. ¶33.
[171] Bates & Byrne Aff. ¶45; McComb Aff. ¶39; Poole Aff. ¶37; Moss Aff. ¶33.

task if their partner was not present or could not access the equipment. (See "Video 5," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit. I").[172] Problem-solving and working together to achieve a collectively desired outcome involve mentally representing both a goal and the sequence of behaviors that is required to achieve that goal; it is based on (at the very least) short-term action planning.[173]

98. Wild elephants have frequently been observed engaging in such cooperative problem-solving as retrieving calves kidnapped by other groups, helping calves out of steep, muddy river banks (see "Video 3," attached to the Affidavit of Karen McComb, Ph.D. on CD as "Exhibit F"), rescuing a calf attacked by a lion (acoustic recording calling to elicit help from others), and navigating through human-dominated landscapes to reach a desired destination such as a habitat, salt-lick, or waterhole.[174] These behaviors demonstrate the purposeful and well-coordinated social system of elephants and show that elephants can collectively hold specific aims in mind, then work together to achieve those goals.[175] Such intentional, goal-directed action forms the foundation of independent agency, self-determination, and autonomy.[176]

99. Elephants also show innovative problem-solving in experimental tests of insight, defined as the "a-ha" moment when a solution to a problem suddenly becomes clear.[177] A juvenile male Asian elephant demonstrated such a spontaneous action by moving a plastic cube and standing on it to obtain previously out-of-reach food.[178] After solving this problem once, he showed flexibility and generalization of the technique to other similar problems by using the same cube in different situations, or different objects in place of the cube when it was

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[172] Bates & Byrne Aff. ¶46; McComb Aff. ¶40; Poole Aff. ¶38; Moss Aff. ¶34.
[173] Bates & Byrne Aff. ¶46; McComb Aff. ¶40; Poole Aff. ¶38; Moss Aff. ¶34.
[174] Poole Aff. ¶39; Bates & Byrne Aff. ¶47; McComb Aff. ¶41; Moss Aff. ¶35.
[175] Bates & Byrne Aff. ¶47; McComb Aff. ¶41; Poole Aff. ¶39; Moss Aff. ¶35.
[176] Bates & Byrne Aff. ¶47; McComb Aff. ¶41; Poole Aff. ¶39; Moss Aff. ¶35.
[177] Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36. In cognitive psychology terms, "insight" is the ability to inspect and manipulate a mental representation of something, even when you can't physically perceive or touch the something at the time. Simply, insight is using only thinking to solve problems.
[178] Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36.

unavailable. (See "Video 6," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit J").[179] This experiment demonstrates that elephants can choose an appropriate action and incorporate it into a sequence of behavior to achieve a goal they kept in mind throughout the process.[180]

100. Asian elephants demonstrate the ability to understand goal-directed behavior.[181] When presented with food that was out of reach, but with some bits resting on a tray that could be pulled within reach, elephants learned to pull only those trays baited with food.[182] Success in this kind of "means-end" task demonstrates causal knowledge, which requires understanding not just that two events are associated with each other, but that some mediating force connects and affects the two which may be used to predict and control events.[183] Understanding causation and inferring object relations may be related to understanding psychological causation, which is appreciation that others are animate beings who generate their own behavior and have mental states (e.g., intentions).[184]

DEMAND

WHEREFORE, Petitioner respectfully requests the following relief:

A. Issuance of the Writ of Habeas Corpus directing the Respondents to file a return to the Petition pursuant to Connecticut Practice Book § 23-21 *et seq.* including, *inter alia*, setting forth the facts claimed to justify the detention and denial of liberty of Beulah, Minnie, and Karen, three unlawfully detained elephants in Respondents' custody;

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[179] Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36.
[180] Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36.
[181] Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.
[182] Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.
[183] Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.
[184] Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.

B. Upon a determination that Beulah, Minnie, and Karen are being unlawfully detained and denied their liberty, ordering their immediate release from Respondents' custody and unlawful detention forthwith to PAWS;

C. Awarding Petitioner its costs and disbursements in connection with this matter; and

D. Granting such other and further relief as this Court deems just and proper.

THE PETITIONER,
THE NONHUMAN RIGHTS PROJECT, INC.

BY: _____

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OATH

I, Kevin Schneider, Executive Director of The Nonhuman Rights Project, Inc., solemnly and sincerely affirm and declare that the statements contained herein are true to the best of my knowledge and belief, upon the pains and penalties of perjury or false statement.

Kevin Schneider

Kevin Schneider, being duly sworn, states that the above information is true to the best of his knowledge and belief.

Sworn to and subscribed before me this 8 day of June, 2018.

Notary Public
~~Commissioner of the Superior Court~~

KAREN O. RHODEN
Notary Public, State of New York
Qualified in Kings County
No. 01RH6176226
My Commission Expires 10/09/19.

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DOCKET NO.: LLI-CV18-5010773-S	:	SUPERIOR COURT
In the matter of a Petition for a Common Law Writ of Habeas Corpus,	:	JUDICIAL DISTRICT OF LITCHFIELD
NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN, Petitioner,	:	AT TORRINGTON
v.	:	
R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC., Respondents.	:	January 4, 2019

MOTION FOR COURT TO RULE PROMPTLY ON PETITION FOR HABEAS CORPUS

On June 7, 2018, Petitioner, the Nonhuman Rights Project, Inc. ("NhRP"), filed a Verified Petition for a Common Law Writ of Habeas Corpus ("Petition") in the Superior Court for the Judicial District of Tolland at Rockland seeking a good faith extension or modification of the Connecticut common law of habeas corpus on behalf of three autonomous beings, Beulah, Minnie, and Karen, elephants who are being illegally detained by Respondents, R.W. Commerford & Sons, Inc. (a/k/a Commerford Zoo), a Connecticut corporation, and its President. The NhRP seeks recognition of the elephants' personhood for the sole purpose of according them the common law right to bodily liberty protected by habeas corpus and immediate release from their illegal detention. On June 15, 2018, the case was transferred to the Judicial District of Litchfield.

On November 27, 2018, Petitioner provided to the Court the Petitioner's Status Conference Memorandum (*see* Exhibit A attached hereto), which it now incorporates into this Motion to Rule by reference. At the November 27, 2018 status conference, this Court stated that it was considering whether to stay the case pending the decision of either the Appellate Court or the Supreme Court on the appeal of Judge Bentivegna's December 27, 2018 decision on the issue of standing in the case entitled *Nonhuman Rights Project, Inc., on behalf of Beulah, Minnie and Karen v. R.W. Commerford & Sons, Inc. a/k/a Commerford Zoo, et al.*, AC 41464. Petitioner there suggested that, as the Petition in the case at bar alleges the additional habeas corpus standing requirements that were set forth by Judge Bentivegna in the case now on appeal (which Petitioner is contending on appeal were incorrect), there is no reason to stay this case as, even if Petitioner loses on appeal, this Court would still be required to rule on the sufficiency of the additional standing allegations, and, moreover, that habeas corpus cases are summary proceedings that should move forward expeditiously. This Court then scheduled a second status conference for January 24, 2019. Other than granting Steven M. Wise's Motion to Appear *pro hac vice* and scheduling two status conferences, no action has been taken by this Court in the case at bar.

Therefore, in accordance with both the language of Connecticut Practice Book § 23-24,[1] which requires this Court to "promptly review" the Petition, and the exigent and summary nature of habeas corpus itself, the NhRP respectfully asks

[1] Connecticut Practice Book §§ 23-21 through 23-42 govern the procedure applicable to common law writs of habeas corpus. *See* Conn. Practice Book § 23-21 ("the procedures set forth [herein] shall apply to any petition for a writ of habeas corpus which sets forth a claim of illegal confinement").

this Court to immediately rule on whether it will issue the Writ of Habeas Corpus ("Writ") so that Beulah, Minnie, and Karen's ongoing illegal detention may be addressed at last.

I. Brief History

The NhRP is a nonprofit civil rights organization with a mission "to change the common law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal rights, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them." Karen is a female African elephant in her mid-thirties who was captured from the wild around 1983. Respondents have owned Karen since 1984. Beulah is a female Asian elephant in her mid-forties who was captured from the wild in 1967 in Myanmar. Respondents have owned her since 1973. Minnie is a female Asian elephant who Respondents have owned since at least 1989.

II. Argument

A. Connecticut Practice Book § 23-24 requires this Court to rule on the NhRP's request for a Writ of Habeas Corpus "promptly."

Connecticut Practice Book § 23-24 provides in relevant part that the Court "shall *promptly* review any petition for a writ of habeas corpus to determine whether the writ should issue." (Emphasis added). Although the phrase "promptly" is not defined in this rule, the Connecticut Supreme Court has stated that "principles of statutory construction apply with equal force to Practice Book rules" [internal quotation marks omitted], *State v. Pares*, 253 Conn. 611, 622 (2000)), and "[w]hen a term is not statutorily defined, we look to the commonly approved meaning of the

word as defined in the dictionary." *State v, Tutson,* 278 Conn. 715, 732 (2006). *See also*, *Henry E.S., Sr. v. Hamilton*, 2008 WL 1001969 at *5, 2008 Conn. Super. LEXIS 717, at *14-15 (Conn. Super. Ct. Feb. 28, 2008) (quoting *Tutson)* (as the term "meritorious" is undefined in the context of the habeas corpus child custody statute, Connecticut Practice Book § 25-41, the court looks to the dictionary definition thereof.) At 12 *Oxford English Dictionary* 620 (2nd ed. 1989), the sole definition of "promptly" is ""In a prompt manner; readily; readily, quickly; directly, at once, without a moment's delay."

In defining the term "promptly," this Court should also look to "its relationship to existing legislation and *common law principles* governing the same general matter." *State v, Ehler,* 252 Conn. 579, 589 (2000) (emphasis added). Given the exigent nature of habeas corpus and the wrong it is meant to summarily remedy (*see infra* Part II.B.), the meaning of "promptly" is clear. *Cf. State v. Phidd*, 42 Conn. App. 17, 31 (1996) (noting that a habeas corpus civil proceeding under General Statutes § 52-470 is "summary in the sense that it should be heard promptly") (internal quotations and citation omitted).

Connecticut courts interpreting similar language in other laws unsurprisingly uniformly agree that "promptly" means quickly. *See, e.g., Helmedach v. Commissioner of Correction*, 168 Conn. App. 439, 460-61 (2016) (relying on "commonly approved" dictionary definitions to interpret "promptly" in the context of the Rules of Professional Conduct under the Practice Book, and holding that "promptly" "references . . . immediacy or lack of delay"); *Domestic Violence Services of Greater New Haven, Inc. v. Freedom of Information Com'n*, 240 Conn. 1, 7–8

(1997) (ruling that "promptly" means "within a 'reasonable time" in the context of requested public records, and that three months was not prompt). Other states interpreting similar language in habeas corpus laws also interpret "promptly" to convey a sense of urgency and immediacy. *See, e.g.*, *Ex parte Twombly*, 251 N.W. 538, 538 (Mich. 1933) ("Habeas corpus, to be at all effective, commands speedy determination[.]"); *State ex rel. Oklahoma Bar Ass'n v. Pearson*, 767 P.2d 420, 425-26 (Okla. 1989) (in interpreting federal habeas corpus statute that requires judge to examine petition "promptly," describing the process as "swift and summary").

Thus, because Connecticut Practice Book § 23-24 requires that this Court act "promptly" in deciding whether to issue the Writ, the NhRP requests that this be accomplished immediately. [2]

B. In keeping with the nature of common law habeas corpus, this Court should decide promptly whether it will issue the Writ.

Habeas corpus is the ""Great Writ" that protects "persons" from all unlawful detentions, whether public or private. *Lozada v. Warden*, 223 Conn. 834, 840 (1992); *Little v. Commissioner of Correction*, 177 Conn. App. 337, 362 (2017) (quoting with approval that habeas corpus "has played a great role in the history of . . . freedom [and] has been the judicial method of lifting undue restraints upon personal liberty") (citation omitted). "Indeed, there is nothing more critical than the denial of liberty, even if the liberty interest is one day in jail." *Gonzalez v. Commissioner of Correction*, 308 Conn. 463, 482-83 (2013); *Miller v. Warden*, No.

[2] This Court need not determine that Beulah, Minnie, and Karen are "persons" for purposes of issuing the Writ. Rather, this Court must issue the Writ if there is any possibility that they could be "persons" under Connecticut common law solely for the purpose of obtaining the right to bodily liberty secured by common law habeas corpus. Petition at ¶¶ 20-25; Memorandum at 4-7.

CV921566S, 1996 WL 222404, at *1 (Conn. Super. Ct. Apr. 12, 1996) ("The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty.") (citations omitted). It is intended to be a quick and summary proceeding. *See, e.g.*, *Buster v. Bonzagni*, Nos. 293014, 292954 & 292300, 1990 WL 272742, at *3 (Conn. Super. Ct. Apr. 5, 1990) (quoting, with approval, that "a writ of habeas corpus affords a swift and imperative remedy in all cases of illegal restraint or confinement" and "its function has been to provide a prompt and efficacious remedy") (internal quotations and citation omitted); *see also Petition of Pitt*, 541 A.2d 554, 556 (Del. 1988) ("Habeas corpus is intended as a quick and summary procedure for relief from illegal imprisonment."); *People ex rel. Robertson v. New York State Division of Parole*, 492 N.E.2d 762, 67 N.Y. 2d 197, 201 (1986) ("The writ of habeas corpus, as its history shows, is a summary proceeding to secure personal liberty. . . . *It tolerates no delay except of necessity*, and is hindered by no obstacle except the limits set by the law of its creation.") (citation omitted). The *Buster* court further quoted, with approval, that "if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to *immediate* release." 1990 WL 272742, at *3 (emphasis added) (internal quotations and citation omitted).

Accordingly, this Court should rule on the NhRP's request for a Writ promptly so that the significant issues raised by the NhRP – recognition of the elephants' personhood for the sole purpose of according them the common law right to bodily liberty protected by habeas corpus and immediate release from their illegal detention – are fully and properly addressed.

III. Conclusion

This Court must decide "promptly" whether it will issue the Writ of Habeas Corpus on behalf of Beulah, Minnie, and Karen in this summary and exigent proceeding and should not stay the case.

THE PETITIONER,
THE NONHUMAN RIGHTS PROJECT, INC.

By:_____

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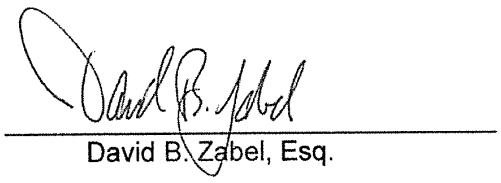
CERTIFICATION OF SERVICE

I hereby certify that a copy of the above Motion to Rule Promptly on Petition for Habeas Corpus (the "Motion to Rule") was mailed or delivered on January 4, 2019, to all counsel and self-represented parties of record as follows:

There are no counsel or self-represented parties of record to whom the Motion to Rule may be mailed or delivered.



David B. Zabel, Esq.

EXHIBIT A

DOCKET NO.: LLI-CV18-5010773-S	:	SUPERIOR COURT
In the matter of a Petition for a Common Law Writ of Habeas Corpus,	:	
NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN,	:	JUDICIAL DISTRICT OF LITCHFIELD
Petitioner,	:	AT TORRINGTON
v.	:	
R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC.,	:	
Respondents.	:	November 27, 2018

PETITIONER'S STATUS CONFERENCE MEMORANDUM

I. BACKGROUND

On November 13, 2017, Petitioner, the Nonhuman Rights Project, Inc., filed a Petition for a Common Law Writ of Habeas Corpus ("Petition #1") seeking a good faith extension or modification of the Connecticut common law of habeas corpus on behalf of three elephants, Beulah, Minnie, and Karen, who are being illegally detained by Respondents, R.W. Commerford & Sons, Inc., a Connecticut corporation, and its President. On December 26, 2017, the Trial Court refused to issue the writ under Connecticut Practice Book ("Practice Book") § 23-24 (a)(1) on the ground that Petitioner lacked standing and that Petition #1 was "wholly frivolous on its face as a matter of law" within the meaning of § 23-24 (a)(2). On January 16, 2018, Petitioner filed a Motion to Reargue or, in the Alternative, to Amend the Petition, which was denied on February 27, 2018 on the ground that since Petition #1 was "wholly

frivolous," allowing an amendment to cure a standing deficiency would be futile. Petitioner filed a timely Notice of Appeal.

On June 7, 2018, Petitioner filed a second Petition for a Common Law Writ of Habeas Corpus ("Petition #2") in the Superior Court for the Judicial District of Tolland at Rockland on behalf of Beulah, Minnie, and Karen. On June 15, 2018, that case was transferred to this Court.

As set forth below, this Court should rule on Petition #2, notwithstanding the fact that Petition #1 is currently under appeal, because: (1) neither issue preclusion nor claim preclusion apply, and (2) Petition #2, at paras. ~~#48 and #52~~ 85, 86 and 87, provides numerous new facts and proffers new evidence that were self-evidently not in existence at the time of the decision on Petition #1 within the meaning of Practice Book § 23-29(3). These new facts and new evidence substantially bolster Petitioner's claim that its allegations are not "wholly frivolous" within the meaning of Practice Book § 23-24(a)(2). *See infra* at 4-8.

II. ARGUMENT

A. Neither issue preclusion nor claim preclusion apply to Petition #2

The dismissal of Petition #1 has no preclusive effect on Petition #2, as Petition #1 was dismissed without the issuance of the writ, without service of process, and without a hearing. Petitioner therefore never had the required full and fair opportunity to actually litigate the merits of its claims. *Thorpe v. Commissioner of Correction*, 73 Conn. App.773, 777 (2002) ("[W]here a party has fully and fairly litigated his claims, he may be barred from future actions on matters not raised in the prior proceeding." [citations omitted]). *See Id.* at 779 n. 7 (in the context of habeas corpus, "we limit the

application of the doctrine of res judicata . . . to claims that actually have been raised and litigated in an earlier proceeding."); *Kearney v. Commissioner of Correction*, 113 Conn. App. 223, 233 (2009).

> In considering a defense of res judicata, our Supreme Court has stated that "[t]he appropriate inquiry ... is whether the party had an *adequate opportunity to litigate the matter in the earlier proceeding* ...." (Emphasis in original; internal quotation marks omitted.) *Connecticut National Bank v. Rytman*, 241 Conn. 24, 43–44, 694 A.2d 1246 (1997). If not, res judicata is inappropriate. See *P.X. Restaurant, Inc. v. Windsor*, 189 Conn. 153, 161–62, 454 A.2d 1258 (1983). In the present case, the prior judgment was a dismissal merely for lack of standing. That is not a judgment on the merits.

Cayer Enterprises v. DiMasi, 84 Conn. App. 190, 194 (2004).[1]

In general, where a first habeas corpus petition is summarily dismissed *without a hearing*, a second petition asserting even the same grounds cannot be dismissed as successive. *See Palmenta v. Warden*, 2006 WL 3833865, at *1 n.1 (Conn. Super. Ct. Dec. 14, 2006) (because "there was no hearing on the merits of that motion . . . petitioner's claim was not actually litigated, [and] res judicata does not apply").[2] "Given the narrowed application of the doctrine of res judicata in the habeas context,

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[1] The issue of Petitioner's standing to bring Petition #1 is not barred by res judicata both because it was not fully and fairly litigated and because the dismissal of the petition on that ground is not a judgment on the merits.

[2] *See also State v. Joyner*, 255 Conn. 477, 496 (2001) ("Although an inadequate cross-examination of the victim was consistent with the habeas court's findings, it was not cited by the habeas court explicitly. Furthermore, to read such a conclusion into the habeas court's decision would be contrary to the requirement that issues be actually litigated and determined for collateral estoppel to apply."); *Lorthe v. Comm'r of Correction*, 2013 WL 1849280, at *4 (Conn. Super. Ct. Apr. 10, 2013) ("the prior dismissal of a petition for writ of habeas corpus based solely on the granting of an *Anders* motion is not a determination on the merits of the claims within that petition such as would subject them to dismissal on grounds of res judicata when raised in a subsequent petition for writ of habeas corpus").

it would only seem logical that this line of reasoning [regarding an 'adequate opportunity to litigate' in the prior proceeding] would apply with even greater strength here." *Taylor v. Warden*, 2013 WL 3970244, at *5 (Conn. Super. Ct. July 16, 2013) (refusing to dismiss second habeas corpus petition on res judicata grounds where inmate had no "prior opportunity to litigate the claim of ineffective assistance" as the first was "dismissed pursuant to a pretrial motion.").[3]

Moreover, not only was Petition #1 summarily dismissed without a "full and fair opportunity" to be litigated, it was dismissed on standing grounds specifically. It is well settled "that the dismissal of an earlier action for lack of standing is not a judgment on the merits and does not have a res judicata effect." *United States Bank, N.A. v. Foote*, 151 Conn. App. 620, 626 (2014). Because the judge dismissed Petition #1 on standing grounds, anything said concerning the merits of the petition, and specifically the frivolousness of the action, was mere *dictum*. *See Pierce v. Warden*, 2013 Conn. Super. LEXIS 2550, at *21-22 (Conn. Super. Ct. Nov. 6, 2013) ("Although the petitioner attempted to litigate his claim regarding the inclusion in the 1999 PSI report of the treatment information contained in the 1996 PSI report, Judge Espinosa's dismissal on lack of subject matter grounds is not a decision on the merits and the alternative ground that the claim must fail on the merits is *dictum*."); *see also Johnson v. Commissioner of Correction*, 258 Conn. 804, 813 (2002) ("Whenever a court finds that it has no jurisdiction, it must dismiss the case")

[3] It is of no consequence that the appeal of the dismissal of Petition #1 is pending. Because claim preclusion does not apply, Petitioner could have decided not to appeal and simply brought Petition #2. To refuse to rule on Petition #2 because Petitioner's discretionary appeal of Petition #1 is pending would improperly penalize Petitioner for exercising its right to appeal.

(internal quotation marks omitted); *cf. Ajadi v. Comm'r of Corr.*, 280 Conn. 514, 535-36 (2006) ("a judgment rendered without subject matter jurisdiction is void.").

B. Petition #2 may not be dismissed under Practice Book § 23-29(3) as it states numerous new facts and proffers new evidence that were self-evidently not in existence on the date Petition #1 was dismissed

Even if the Court's pretrial dismissal of Petition #1 had constituted a full and fair opportunity to litigate, which it did not, "'(u)nique policy considerations must be taken into account'" in a habeas corpus case. *In re Ross*, 272 Conn. at 662 (quoting *Thorpe*, 73 Conn. App. at 779 n.7). "'Foremost among those considerations is the interest in making certain that no one is deprived of liberty.'" *Id.* (citation omitted). That is why Practice Book § 23-29(3) provides that a court may dismiss a successive habeas corpus petition only if it "presents the same ground as a prior petition previously denied *and fails to state new facts or proffer new evidence not reasonably available at the time of the prior petition*," which gives it a narrower scope than *res judicata* or claim preclusion. *See Carter v. Commissioner of Correction*, 109 Conn. App. 300, 304 n. 5, *cert. den.* 289 Conn. 915 (2008) (emphasis added).

Both the decisions dismissing Petition #1 and refusing to allow Petitioner to amend Petition #1 to add the Court-required standing allegations turned on the single finding that Petition #1 was "wholly frivolous on its face" within the meaning of Practice Book § 23-24(a)(2). However, the disjunctive three-criteria test derived from *Lozada v. Deeds*, 498 U.S. 430, 432 (1991) (the "*Lozada* criteria") is used in Connecticut to determine whether claims are frivolous for purposes of a habeas court's denial of certification to appeal. *See Fernandez v. Comm'r of Corr.*, 125 Conn. App. 220, 223-24 (2010). Under *Lozada*, a habeas case is not "frivolous" if: (i) "the issues are

debatable among jurists of reason," (ii) "a court could resolve the issues [in a different manner]," *or* (iii) "the questions are adequate to deserve encouragement to proceed further." *Id.* Satisfying any one of these criteria is sufficient to demonstrate that a claim is not frivolous. *Id.*[4]

While Petitioner asserts that Petition #1 was already plainly not "wholly frivolous on its face" and satisfied all three disjunctive *Lozada* criteria, this argument is powerfully bolstered in Petition #2 by the following facts and evidence that were, on their face, not in existence at the time the Court dismissed Petition #1.

First, the only opinion from an American high court judge on the issue of whether any nonhuman animal can be a "person" for the purpose of habeas corpus issued on May 8, 2018. This was the concurrence of Judge Eugene M. Fahey in the habeas corpus case of *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y. 3d 1054 (2018) (Fahey, J., concurring) brought on behalf of two chimpanzees. Petition #2, at para. #48. There Judge Fahey noted that, in 2015, he had voted not to hear Petitioner's appeal of a habeas corpus decision involving a chimpanzee, but now agreed with Petitioner's arguments that nonhuman animals, such as chimpanzees, should no longer be deemed mere "things." *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring).

> In the interval since we first denied leave to the Nonhuman Rights Project . . . I have struggled with whether this was the right decision. Although I concur in the Court's decision to deny leave to appeal now [on a procedural issue], I continue to question whether the Court was

[4] *See also Simms v. Warden*, 230 Conn. 608, 616 (1994) ("A habeas appeal that satisfies one of the *Lozada* criteria is not frivolous."); *Vanwhy v. Comm'r of Corr*, 121 Conn. App. 1, 6 (2010) ("we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria identified in [*Lozada*]").

> right to deny leave in the first instance. The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a "person," there is no doubt *that it is not merely a thing*.

Id. at 1059 (emphasis added).

Second, Judge Fahey relied in his opinion in part upon the *amicus* brief that was filed in the Court of Appeals by the distinguished Harvard Law Professor Laurence H. Tribe on March 2, 2018.[5] *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring). Petition #2, at para. #52.

Third, Judge Fahey relied in his opinion in part upon the *amicus* brief that was filed in the Court of Appeals by noted habeas corpus scholars, University of Denver Law Professor Justin Marceau, and Florida State University Law Professor Samuel Wiseman on March 2, 2018.[6] *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring). Petition #2, at para. #52.

Fourth, Judge Fahey relied in his opinion in part upon the *amicus* brief that was filed in the Court of Appeals by seventeen distinguished philosophers on February 23, 2018.[7] *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring). Petition #2, at para. #53.

Fifth, on February 22, 2018, the Center for Constitutional Rights submitted an *amicus* brief in the New York Court of Appeals in support of Petitioner's argument

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[5] https://www.nonhumanrights.org/content/uploads/NhRP-v.-Lavery-Tribe-Proposed-Brief-2018.pdf.
[6] https://www.nonhumanrights.org/content/uploads/NhRP-v.-Lavery-Marceau-Wiseman-Proposed-Brief-2018.pdf.
[7] https://www.nonhumanrights.org/content/uploads/In-re-Nonhuman-Rights-v.-Lavery-Proposed-Brief-by-PHILOSOPHERS-74435.pdf.

that legal rights should be extended to nonhuman animals in the context of common law habeas corpus.[8]

Sixth, accompanying the filing of Petition #2 in the case at bar was an expert affidavit by Mark Dubois, Esq, Connecticut's first Chief Disciplinary Counsel, stating that Petition #2 was not frivolous, but was meritorious. Petitioner had no way of knowing this was Attorney Dubois's opinion or even that Attorney Dubois existed until he publicly criticized the judge's dismissal of Petition #1.

Seventh, on June 15, 2018, the New York State Supreme Court Appellate Division, Fourth Judicial Department, in *Graves*, 78 N.Y.S. 3d at 617, became the first appellate court in the United States to acknowledge that legal rights have been extended to nonhuman animals in the United States when it stated that:

> it is *common knowledge that personhood can and sometimes does attach to nonhuman entities like* corporations or *animals* ... (*see also Matter of Nonhuman Rights Project, Inc. v. Presti*, 124 A.D.3d 1334, 1335, 999 N.Y.S.2d 652 [4th Dept. 2015], *lv. denied* 26 N.Y.3d 901, 2015 WL 5125507 [2015]). Indeed, the Court of Appeals has written that personhood is "not a question of biological or 'natural' correspondence" (*Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201, 335 N.Y.S.2d 390, 286 N.E.2d 887 [1972]) (citations omitted).

(emphases added).[9]

Eighth, on November 16, 2018, New York's Orleans County Supreme Court issued an order to show cause[10] under New York's common law of habeas corpus

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[8] https://www.nonhumanrights.org/content/uploads/NhRP-v.-Lavery-CCR-Proposed-Brief-2018.pdf.

[9] As *Graves* was decided on June 15, 2018, one week *after* Petition #2 was filed, it was not mentioned there.

[10] In New York, a writ of habeas corpus is used when the petitioner requires the production of the prisoner in court; an order to show cause is used when the petitioner does not require the prisoner's production. CPLR 7003(a).

and its habeas corpus procedural statute, CPLR Article 7003(a), on behalf of an elephant named Happy, and against the Bronx Zoo, where she has long been imprisoned. *In the Matter of a Proceeding Under Article 70 of the CPLR for a Writ of Habeas Corpus, The Nonhuman Rights Project, Inc., on Behalf of Happy, v. Breheny*, Index No. 1845164 (November 16, 2018).

The numerous new facts and new evidence discussed above, all of which were self-evidently not in existence on the date that Petition #1 was dismissed, taken together or separately, make clear that Petition #2 meets not just one, but all three, of the disjunctive *Lozada* requirements for avoiding a finding of frivolousness: (i) "the issues are debatable among jurists of reason," (ii) "a court could resolve the issues [in a different manner]," *or* (iii) "the questions are adequate to deserve encouragement to proceed further." As Petitioner has already made the standing allegations within Petition #2 that were required by the Judge in deciding Petition #1, this case is ready for prompt review by this Court pursuant to Practice Book § 23-24.

III. CONCLUSION

Practice Book § 23-24(a) provides that the court "shall *promptly review* any petition for a writ of habeas corpus to determine whether the writ should issue", and that "(t)he judicial authority *shall issue the writ* unless" the court lacks jurisdiction, the petition is wholly frivolous on its face, or the relief sought is not available. (emphases added). As nothing prevents this Court from hearing the case at this time and bearing in mind that "there is nothing more critical than the denial of liberty, even if the liberty interest is one day in jail." *Gonzalez v. Comm'r of Corr.*, 308 Conn. 463, 483-84 (2013), this Court should now decide "promptly" whether it will issue the Writ of

Habeas Corpus on behalf of Beulah, Minnie, and Karen pursuant to Practice Book § 23-24.

THE PETITIONER,
THE NONHUMAN RIGHTS PROJECT, INC.

By: _____

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the above Status Conference Memorandum was mailed or delivered on November 27, 2018, to all counsel and self-represented parties of record as follows:

There are no counsel or self-represented parties of record to whom the Status Conference Memorandum may be mailed or delivered.

David B. Zabel, Esq.

DOCKET NO: LLI CV 18 5010773S	:	SUPERIOR COURT
NONHUMAN RIGHTS PROJECT, INC., On behalf of BEULAH, MINNIE, and KAREN	:	J.D. OF LITCHFIELD
V.	:	AT TORRINGTON
R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC.	:	FEBRUARY 13, 2019

MEMORANDUM OF DECISION

RE: PETITION FOR WRIT OF HABEAS CORPUS

PROCEDURAL HISTORY

The petitioner, Nonhuman Rights Project, Inc., seeks a writ of habeas corpus on behalf of three elephants, Beulah, Minnie, and Karen, which are owned by the respondents, R.W. Commerford & Sons, Inc. a/k/a Commerford Zoo, and William R. Commerford, as president of R.W. Commerford & Sons, Inc.[1] The issue is whether the court should grant the petition for writ of habeas corpus because the elephants are "persons" entitled to liberty and equality for the purposes of habeas corpus. The petition (#101) was filed on June 8, 2018, along with a supporting memorandum of law (#102) and exhibits consisting of expert affidavits and related material.[2] The petitioner's "mission is to change the common law status of at least some nonhuman animals from

[1] This matter was originally filed in the judicial district of Tolland and transferred to the judicial district of Litchfield on June 15, 2018 (#118.33).

[2] The petitioner's exhibits include: (1) affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D.; (2) CD of exhibits to affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D.; (3) affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D.; (4) CD of exhibits to affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D.; (5) affidavit of Joyce Poole, Ph.D.; (6) CD of exhibits to affidavit of Joyce Poole, Ph.D.; (7) affidavit of Karen McComb, Ph.D.; (8) CD of exhibits to affidavit of Karen McComb, Ph.D.; (9) affidavit of Cynthia Moss; (10) CD of exhibits to affidavit of Cynthia Moss; (11) affidavit of Ed Stewart; (12) affidavit of Kevin R. Schneider, Esq.; (13) affidavit of Mark Dubois, Esq.

mere 'things,' which lack the capacity to possess any legal rights, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them. . . . The [petitioner] does not seek to reform animal welfare legislation." (Internal quotation marks omitted.) Pet. Writ Habeas Corpus, ¶ 1 (#101). "While this Petition challenges neither the conditions of their confinement nor Respondents' treatment of the elephants, but rather the fact of their detention itself, the deplorable conditions of Beulah's, Minnie's, and Karen's confinement underscore the need for immediate relief and the degree to which their bodily liberty and autonomy are impaired." Pet. Writ Habeas Corpus, ¶ 75 (#101).[3] "The Expert Scientific Affidavits demonstrate that Beulah, Minnie, and Karen are autonomous and that their interest in exercising their autonomy is as fundamental to them as it is to us. To deny some autonomous beings all legal rights across the board, merely because they are nonhuman, while granting those same legal rights to all humans, regardless of autonomy, offends common law equality." Pet. Writ Habeas Corpus, ¶ 18 (#101).

On January 4, 2019, the petitioner filed a motion for the court to rule promptly on its petition for habeas corpus (#124). As part of its motion, the petitioner submitted Exhibit A, which was a copy of its November 27, 2018 status conference memorandum. On January 28, 2019, the court heard oral argument on the motion. Within its motion, the petitioner underscores that it seeks "recognition of the elephants' personhood for the sole purpose of according them the common law right to bodily liberty protected by habeas corpus and immediate release from their illegal detention." Having considered the motion and the oral argument in support thereof, the court dismisses the petition.

[3] The quotations referenced from paragraphs 1 and 75 of the petition are identical to paragraphs 1 and 51 from a previous petition for writ of habeas corpus that was dismissed, which is discussed in more detail below.

FACTS

The subjects of the petition are three elephants named Beulah, Minnie and Karen who are privately owned by the respondents and are in their custody. The allegations of the 54-page, 137-paragraph petition are that the respondents have unlawfully detained the elephants denying them their liberty.[4] The petitioner had previously filed a petition for writ of habeas corpus entitled, *Nonhuman Rights Project, Inc. ex rel. Beulah, Minnie & Karen* v. *R.W. Commerford & Sons, Inc. et al.*, judicial district of Litchfield, Docket No. LLI-CV-17-5009822, which was dismissed by the court on December 27, 2017, both for lack of subject matter jurisdiction and because it was wholly frivolous on its face in legal terms. That case is now pending on appeal before our Appellate Court (Docket No. AC 41464). The parties and facts set forth in the current petition mirror those set forth in the prior petition. The petitioner is a not-for-profit corporation that has brought the petition to change the common law status of some nonhuman animals from "things" to "persons." The respondents are R.W. Commerford & Sons, Inc., and, William R. Commerford as the president of the corporation. The relief sought is to have a writ issued to the respondents to justify the detention of the elephants and to ultimately have them released from their custody.

STATEMENT OF LAW

The petitioner has brought its writ of habeas corpus pursuant to Practice Book § 23-21 et seq. and General Statutes § 52-466 seeking the release of the three elephants. Practice Book § 23-24 provides: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that: (1) the court lacks jurisdiction; (2) the petition is wholly frivolous on its face; or (3) the relief sought is not available. (b) The judicial authority shall notify the petitioner if it

[4] The last seven paragraphs of the petition are mistakenly numbered as paragraphs 94-100.

declines to issue the writ pursuant to this rule." As noted above, the writ previously filed by the petitioner was dismissed by the court under Practice Book § 23-24 (a) (1) and (2) for lack of subject matter jurisdiction and for being wholly frivolous on its face. The motion now before this court is based on this section, which calls upon the court to "promptly" review the petition.[5] The petitioner acknowledges the existence of the prior action, which was dismissed by the court and is now on appeal. Although the petitioner argues against any consideration by the court of granting a stay of this matter pending the outcome of the appeal,[6] given the similarities between the two petitions it is incumbent upon the court to examine whether this matter is subject to the provisions of Practice Book § 23-29. That section states in relevant part that "[t]he judicial authority may, at any time, upon its own motion or upon motion of the respondent dismiss the petition, or any count thereof, if it determines that: . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition; . . . (5) any other legally sufficient ground for dismissal of the petition exists."[7]

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[5] Although "promptly" is not defined for the purposes of Practice Book § 23-24, General Statutes § 52-470 (a) provides: "The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require." "The proceeding is 'summary' in the sense that it should be heard promptly, without continuances. . . . [B]ut the use of the word also implies that the proceeding should be short, concise and conducted in a prompt and simple manner, without the aid of a jury, or in other respects out of the regular course of the common law." (Citation omitted.) *State* v. *Phidd,* 42 Conn. App. 17, 31, 681 A.2d 310, cert. denied, 238 Conn. 907, 679 A.2d 2 (1996), cert. denied, 520 U.S. 1108, 117 S. Ct. 1115, 137 L. Ed. 2d 315 (1997) (discussing § 52-470 (a)). Black's Law Dictionary (9th Ed. 2009) defines a summary proceeding as: "A nonjury proceeding that settles a controversy or disposes of a case in a relatively prompt and simple manner."

[6] "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." (Internal quotation marks omitted.) *Lee* v. *Harlow, Adams & Friedman, P.C.*, 116 Conn. App. 289, 311-12, 975 A.2d 715 (2009). "Even in the in the absence of statutory authority, a court may, within it discretion, order stay of proceedings sua sponte." *Graham* v. *XVIVO, LLC*, Superior Court, judicial district of New Britain, Docket No. CV-15-6030021-S (February 9, 2016, *Wiese, J.*) (61 Conn. L. Rptr. 805, 807).

[7] Three other grounds for dismissal are set forth in that section: "(1) the court lacks subject matter jurisdiction; (2) the petition or a count thereof, fails to state a claim upon which habeas corpus relief can be granted; . . . (4) the claims asserted in the petition are moot or premature[.]"

ANALYSIS

At oral argument and in its motion and supporting exhibits, the petitioner addressed the issue of whether the present action should be stayed pending the outcome of the appeal as to the prior petition. It acknowledged that the parties, the subjects of the petition, the grounds of the petition and the relief sought were the same as the prior petition. Also, that both petitions are in the same judicial district. Although the court has the authority to issue a stay of the proceedings, the current circumstances would appear to justify a dismissal pursuant to Practice Book § 23-29 (3). However, the petitioner argues against such a dismissal in that this second petition is different from the first claiming that it alleges new facts. Specifically, the petitioner references paragraphs 85, 86 and 87 of the petition as setting forth facts not found in the first petition as they arose subsequent to the issuance of the court's December 26, 2017 memorandum of decision in that case. A review of those paragraphs finds that claim to be wholly unsupported.

In paragraph 85, the petitioner references a concurring opinion issued in the matter of *Nonhuman Rights Project, Inc., on Behalf of Tommy* v. *Lavery*, 31 N.Y.3d 1054, 100 N.E. 3d 846, 76 N.Y.S. 3d 507 (2018), arising out of the New York Court of Appeals, which upheld a lower court ruling declining to grant personhood to nonhuman animals for the purposes of habeas corpus. Although Judge Fahey of that court concurred in the outcome, the petitioner characterizes Judge Fahey's opinion as having "admonished" the courts in New York for declining to do so. The petitioner contends that this concurring opinion supports its position relative to the petition now before this court. Despite the petitioner's editorializing as to the character and import of the opinion, as well as its own acknowledgement within paragraph 85 that the decision is not binding on this court, it is unclear how a concurring opinion in an appellate case from a foreign jurisdiction constitutes a new "fact" that was not reasonably available at the time of the prior petition. When

confronted at oral argument by this court that the opinion might properly be suited for placement in a memorandum of law as opposed to standing as a "fact," counsel for petitioner insisted that the decision did constitute a new fact as the opinion was issued after this court's December 26, 2017 memorandum of decision issued on the prior petition. Moreover, in paragraph 85, the petitioner specifically makes multiple references to the concurrence of Judge Fahey not as a fact, but rather as an "opinion" or "legal opinion."

In paragraph 86, the petitioner alleges: "Second, on February 23, 2018, the [petitioner] received the support of the Philosophers' *Amicus Brief* filed in the New York Court of Appeals which Judge Fahey found persuasive on the issue of whether legal rights should be extended to nonhuman animals in the context of common law habeas corpus." (Citation omitted; footnote omitted.)

In paragraph 87, the petitioner further alleges: "Third, after the first petition was denied, the Colombian Supreme Court had also designated its part of the Amazon rainforest as an 'entity subject of rights' in other words, a 'person'." (Footnote omitted.)

Following these three paragraphs, in paragraph 88, the petitioner noted that "[t]he foregoing changes in the *legal* landscape make it plain that the present petition should not be dismissed as successive." (Emphasis added.) Clearly, paragraphs 85, 86 and 87 offer references only to legal proceedings and not to any new factual information that was not available to it at the time of the prior petition. Even as legal proceedings from which it might hope to draw support in favor of its position in this matter, the petitioner has affirmatively acknowledged that such cases from foreign jurisdictions (and in fact, foreign countries) have no binding precedent on this court.

Additionally, at oral argument and in its motion, the petitioner cited as a new "fact" *People* v. *Graves*, 163 A.3d 16, 78 N.Y.S.3d 613 (2018), claiming that the court's decision in that matter

"became the first appellate court in the United States to acknowledge that legal rights have been extended to nonhuman animals in the United States." It specifically cited to language from the decision that stated "it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals." Id., 21. The proposition for which the petitioner claims that case holds or supports is completely inapposite to the issue now before the court. The *Graves* case involved a group of young people, including the defendant, who vandalized a number of cars on the lot of a car dealership. Id., 18-19. One of the ancillary claims raised by the defendant in that case was the identity of the victim. Id., 20. The court noted that the state, in prosecuting the defendant for criminal mischief "never definitely established Bill Cram Chevrolet's precise corporate form" but that it "was not strictly necessary to prove, beyond a reasonable doubt, that [the victim] qualified as an 'appropriate' nonhuman 'person' for purposes of section 10.00 (7)."[8] Id. The case had nothing to do with habeas corpus or an attempt to judicially designate elephants, or any other animal, as "persons" for the purpose of giving them legal rights available to a human being. Not only is this case not a new "fact" as petitioner contends, but its representation to the court as to what the case stands for as a matter of law is a blatant misrepresentation.

A detailed comparison of the two petitions, even accounting for the petitioner's claim of new facts since the court's December 26, 2017 decision on the prior petition, reveals the following: both cases arise out of the same jurisdiction. The petitioner is exactly the same in both. The respondents are exactly the same in both. The subjects of the petition—the three elephants Beulah, Minnie and Karen—are exactly the same. The grounds of the petition and the relief sought—declaring the elephants as persons and having them released from the custody of the respondents

[8] The New York statute referenced by that court defines "person" as follows: "[p]erson means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality." *People* v. *Graves*, supra, 163 A.3d 20.

through a writ of habeas corpus--is exactly the same. There is no real difference between this petition and the one previous to it. In fact, a close reading of paragraph 78 of the current petition reveals the fundamental purpose underlying its submission to the court. "A timely appeal has been taken from the December 26, 2017 and February 28, 2018 orders (filed March 26, 2018) and is pending. (AC41464). Because Beulah, Minnie, and Karen are *currently* being deprived of their bodily liberty, the [petitioner] promptly filed this Petition *to avoid any undue delay in securing their liberty while the appellate process is proceeding on the first petition.* (Emphasis added.) Or, put another way, the petitioner simply does not want to wait for the appellate process to be completed even though it was the one who brought the appeal. It clearly hopes to have another bite at the apple and have a different outcome while waiting for the Appellate Court to render its decision.

Because these two petitions are exactly alike and are brought to adjudicate the same issues, this court has the authority to dismiss the matter pursuant to Practice Book § 23-29 (3).

CONCLUSION

The petitioner's writ for habeas corpus has exactly the same parties, the same subjects, raises the same grounds and issues, offers no new facts, is brought in the same jurisdiction and seeks the same relief as the matter of *Nonhuman Rights Project, Inc. ex rel. Beulah, Minnie & Karen* v. *R.W. Commerford & Sons, Inc. et al.*, judicial district of Litchfield, Docket No. LLI-CV-17-5009822. That matter was dismissed by this court on December 26, 2017, and is now on appeal before the Appellate Court. Therefore, the petition now before the court is dismissed pursuant to

Practice Book § 23-29 (3).[9]

BY THE COURT

Shaban, J.

[9] Even if Practice Book § 23-29 (3) were to be found not to be a proper basis for the dismissal of this matter, the court finds that given the circumstances and facts set forth above, dismissal would also be appropriate under Practice Book § 23-29 (5).

STATE OF CONNECTICUT

DOCKET NO.: LLI-CV-18-5010773-S	:	SUPERIOR COURT
In the matter of a Petition for a Common Law Writ of Habeas Corpus,	:	J.D. OF LITCHFIELD
NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN,	:	AT TORRINGTON
NONHUMAN RIGHTS PROJECT, INC. 5195 NW 112th Terrace Coral Springs, Florida 33076	:	
BEULAH, MINNIE, and KAREN 48 Torrington Rd. Goshen, CT 06756	:	
Plaintiffs	:	
v.	:	
R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC.,	:	
48 Torrington Rd. Goshen, CT 06756	:	
Defendants	:	FEBRUARY 13, 2019

PRESENT: HON. DAN SHABAN

JUDGMENT

This Petition for a Common Law Writ of Habeas Corpus seeking issuance of a Writ of Habeas Corpus and other relief, came before the Court by Verified Petition

on June 11, 2018. The matter was transferred from the judicial district of Tolland to the judicial district of Litchfield on June 15, 2018. On February 13, 2019, the Court issued an Order dismissing the Petition. On March 4, 2019, the plaintiff filed a Motion to Reargue, which was denied by the Court on March 26, 2019.

WHEREUPON, it is hereby adjudged and decreed that the Plaintiff's Petition is dismissed and the Plaintiff's Motion to Reargue is denied.

BY THE COURT

~~Judge / Assistant Clerk~~
Pamela F. Longwell
Deputy Chief Clerk

DOCKET NO. LLI-CV18-5010773-S	:	SUPERIOR COURT
In the matter of a Petition for a Common Law Writ of Habeas Corpus,	:	
NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN, Petitioner,	:	JUDICIAL DISTRICT OF LITCHFIELD
v.	:	
R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC., Respondents.	:	AT TORRINGTON
	:	MARCH 4, 2019

MOTION TO REARGUE

Pursuant to Section 11-11 of the Connecticut Practice Book, Petitioner, the Nonhuman Rights Project, Inc.("NhRP"), respectfully requests reargument of the Memorandum of Decision re: Petition for Writ of Habeas Corpus dated February 13, 2019 (the "Decision") rendered by the Hon. Dan Shaban, on the grounds that the Decision erroneously overlooked controlling decisions and principles of law, In support of this motion, the NhRP relies upon and incorporates the Memorandum of Law in Support of Motion to Reargue dated March 4, 2019, filed contemporaneously with this motion.

Wherefore, because the Court (Shaban, J.) erred in the Decision both by overlooking well-settled and controlling principles of res judicata and by overlooking the significance of the new facts cited in the Petitioner's Verified Petition for a Common Law Writ of Habeas Corpus

THIS MOTION IS A SECTION 11-11 MOTION

dated June 8, 2018 and supporting memoranda in this case, upon reargument this Court should reverse its Decision and issue a writ of habeas corpus in this case pursuant to Practice Book § 23-24.

Respectfully submitted,

THE PETITIONER,
THE NONHUMAN RIGHTS PROJECT, INC.

By:_____

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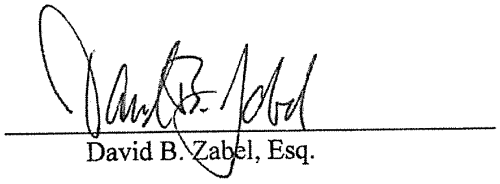
CERTIFICATION OF SERVICE

I hereby certify that a copy of the above Motion to Reargue was mailed or delivered on March 4, 2019, to all counsel and self-represented parties of record as follows:

There are no counsel or self-represented parties of record to whom the Motion to Reargue may be mailed or delivered.



David B. Zabel, Esq.

ORDER 422679

DOCKET NO: LLICV185010773S

SUPERIOR COURT

NONHUMAN RIGHTS PROJECT, INC.
V.
R.W. COMMERFORD & SONS, INC. A/K/A
COMMERFORD ZOO

JUDICIAL DISTRICT OF LITCHFIELD
AT TORRINGTON

3/26/2019

ORDER

ORDER REGARDING:
03/04/2019 128.00 MOTION TO REARGUE/RECONSIDER

The foregoing, having been considered by the Court, is hereby:

ORDER: DENIED

Short Calendar Results Automated Mailing (SCRAM) Notice was sent on the underlying motion.

422679

Judge: DAN SHABAN

This document may be signed or verified electronically and has the same validity and status as a document with a physical (pen-to-paper) signature. For more information, see Section I.E. of the *State of Connecticut Superior Court E-Services Procedures and Technical Standards* (https://jud.ct.gov/external/super/E-Services/e-standards.pdf), section 51-193c of the Connecticut General Statutes and Connecticut Practice Book Section 4-4.

☒ APPEAL ☐ JOINT APPEAL ☐ CROSS APPEAL ☐ AMENDED APPEAL ☐ CORRECTED FORM

JD-SC-33 Rev. 11-17
P.B. Sections 3-8, 60-7, 60-8, 62-7, 62-8, 63-3, 63-4, 63-10, 72-3
C.G.S. Sections 31-301b, 51-197f, 52-470

All appeals must be filed electronically unless an exemption from the requirements of electronic filing has been granted or you are an incarcerated self-represented party. For further information about e-filing or this form, see the Appeal Instructions, form JD-SC-34.

☐ To Supreme Court ☒ To Appellate Court

Name of case *(State full name of case)*

NONHUMAN RIGHTS PROJECT, INC. v. R.W. COMMERFORD & SONS, INC. A/K/A COMMERFORD ZOO

Type of appellate matter (*If a writ of error, the writ and the signed marshal's return must be filed on the same business day as this form. See Practice Book Section 72-3.*)

Appeal

Trial Court History

Tried to	Trial court location
Court	**50 FIELD STREET Torrington CT 06790**

Trial court judges being appealed	List all trial court docket numbers, including location prefixes
HON. DAN SHABAN	**LLI-CV-18-5010773-S**
All other trial court judges who were involved with the case: **HON. JOHN B. FARLEY**	Judgment for *(Where there are multiple parties, specify those for whom judgment was rendered)*: **R.W. COMMERFORD & SONS, INC. A/K/A COMMERFORD ZOO Continued**
Date of judgment(s) or decision(s) being appealed: **02/13/2019 Continued**	Date of issuance of notice on any order on any motion that would render judgment ineffective: **03/27/2019** / Date for filing appeal extended to:
Case type: **Civil**	For Juvenile Cases: ☐ Termination of Parental Rights ☐ Order of Temporary Custody
For Civil/Family Case Types, Major/Minor code: **M90**	☐ Other

Appeal

Appeal filed by *(Party name(s))*: **NONHUMAN RIGHTS PROJECT, INC., ON BEHALF OF BEULAH, MINNIE, AND KAREN**

From *(the action that constitutes the appealable judgment or decision)*: **Judgment of Dismissal and the judgment denying Motion to Reargue/Reconsider.**

If this appeal is taken by the State of Connecticut, provide the name of the judge who granted permission to appeal and the date of the order

Statutory Basis for Appeal to Supreme Court

By *(Signature of counsel of record)*	Telephone number	Fax number	Juris number *(If applicable)*
▶ **305749**	**203-974-6458**	**203-337-5559**	**305749**

Appearance

Type name and address of counsel of record filing this appellate matter *(This is your appearance; see Practice Book Section 62-8)*: COHEN AND WOLF PC 657 ORANGE CENTER ROAD ORANGE CT 06477

E-mail address: **pkraut@cohenandwolf.com**

"X" one if applicable

☒ Counsel or self-represented party who files this appeal will be deemed to have appeared **in addition to** counsel of record who appeared in the trial court.

☐ Counsel or self-represented party who files this appeal is appearing **in place of:**

Name of counsel of record / Juris number *(If applicable)*

Certification

I certify that a copy of the appeal form I am filing will immediately be delivered to each other counsel of record and I have included their names, addresses, e-mail addresses and telephone numbers; the appeal form has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and the appeal form complies with all applicable rules of appellate procedure in accordance with Practice Book Sections 62-7 and 63-3.

Date to be delivered **04/11/2019**.

If you have an exemption from e-filing under Practice Book Section 60-8, attach a list with the name, address, e-mail address, and telephone number of each counsel of record and the address where the copy was delivered.

If this appeal is a criminal or habeas corpus matter, I certify that a copy of this appeal form will immediately be delivered to the Office of the Chief State's Attorney Appellate Bureau. Date to be delivered _____.

Signed *(Counsel of record)*	Date signed
▶ **305749**	**04/11/2019**

Required Documents

To be filed with the Appellate Clerk within ten days of the filing of the appeal, if applicable. See Practice Book Section 63-4.

1. Preliminary Statement of the Issues
2. Court Reporter's Acknowledgment or Certificate that no transcript is necessary
3. Docketing Statement
4. Statement for Preargument Conference (form JD-SC-28A)
5. Constitutionality Notice
6. Sealing Order form, if any

☒ Entry Fee Paid ☐ No Fees Required ☐ Fees, Costs, and Security waived by Judge (*enter Judge's name below*)

Court Use Only
Date and time filed

Judge / Date waived

Print Form Reset Form

Appeal Form (continued)

CASE NAME:
NONHUMAN RIGHTS PROJECT, INC. v. R.W. COMMERFORD & SONS, INC. A/K/A COMMERFORD ZOO

JUDGMENT DATES
02/13/2019
03/26/2019

Parties & Appearances

PARTY/PARTIES INITIATING THE APPEAL

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ALL OTHER PARTIES AND APPEARANCES

R.W. COMMERFORD & SONS, INC. A/K/A COMMERFORD ZOO - Judgment For
Revised Information: 48 Torrington Road, Goshen, CT 06756; 860-491-3421 (p); 860-491-9428 (f); commerfordzoo@ya

WILLIAM R. COMMERFORD, AS PRESIDENT OF R.W. COMMERFORD & SONS, INC. - Judgment For
Revised Information: 48 Torrington Road, Goshen, CT 06756; 860-491-3421 (p); 860-491-9428 (f); commerfordzoo@ya

A.C. 42795 (D.N. LLI-CV-18-5010773-S)	:	APPELLATE COURT
NONHUMAN RIGHTS PROJECT, INC., ON BEHALF OF BEULAH, MINNIE AND KAREN	:	
	:	STATE OF CONNECTICUT
vs.	:	
R.W. COMMERFORD & SONS, INC., ET AL.	:	APRIL 22, 2019

DOCKETING STATEMENT

The Plaintiff-Appellant provides the following information:

The names and addresses of the parties and their counsel are as follows:

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William R. Commerford
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No other persons are known to the Plaintiff-Appellant who have a legal interest in the cause on appeal.

A.C. 41464, Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc., et al, is an appeal which arises from substantially the same controversy as the cause on appeal, or involves issues closely related to those presented by this appeal.

There were exhibits in the Trial Court in this matter.

This is not a criminal case and no one is incarcerated.

THE PLAINTIFF-APPELLANT,

By /s/ Barbara M. Schellenberg (305749)
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CERTIFICATION

I hereby certify that: a copy of the foregoing has been delivered electronically on the date hereof to each other counsel of record and the non-appearing defendants; counsels' and defendants' names, addresses, e-mail addresses, telephone and facsimile numbers are listed below; the foregoing has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and the foregoing complies with all applicable rules of appellate procedure.

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Foreign Case

DOCKET NO. LLI CV17 5009822-S : SUPERIOR COURT

In the matter of a Petition for a Common Law Writ of Habeas Corpus,	:	JUDICIAL DISTRICT OF LITCHFIELD
NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN, Petitioner,	:	AT TORRINGTON
v.	:	
R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC., Respondents.	:	November 13, 2017

VERIFIED PETITION FOR A
COMMON LAW WRIT OF HABEAS CORPUS

PARTIES

1. Petitioner the Nonhuman Rights Project, Inc. ("NhRP" or "Petitioner") is a not-for-profit corporation organized pursuant to the laws of the State of Massachusetts with a principal address at 5195 NW 112th Terrace, Coral Springs, FL 33076. Its mission is "to change the common law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal rights, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them." The NhRP does not seek to reform animal welfare legislation.

2. Respondent R.W. Commerford & Sons, Inc., also known as the Commerford Zoo, is a Connecticut corporation with a business address at 48 Torrington Road, Goshen, CT 06756.

3. Respondent William R. Commerford is the President of R.W. Commerford & Sons, Inc., with a residential address at 64 Crossman Road, Goshen, CT 06752.

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4. Karen is a female African elephant in her mid-thirties. She was captured in the wild around 1983. Respondents have owned Karen since 1984. Her last known address is 48 Torrington Rd, Goshen, CT 06756.

5. Beulah is a female Asian elephant in her mid-forties. She was captured in the wild in 1967 in Myanmar. Upon information and belief, Respondents have owned Beulah since 1973. Her last known address is 48 Torrington Rd, Goshen, CT 06756.

6. Minnie is a female Asian elephant. Respondents have owned Minnie since at least 1989. Her last known address is 48 Torrington Rd, Goshen, CT 06756.

INTRODUCTION

7. On behalf of Beulah, Minnie, and Karen, the NhRP submits this Verified Petition for a Common Law Writ of Habeas Corpus (the "Petition") and states: This Petition is filed pursuant to Connecticut Practice Book ("Practice Book") § 23-21 *et seq.* as well as Conn. Gen. Stat. § 52-466 *et seq.*, and requests that this Court: (a) issue the requested writ of habeas corpus and require Respondents to file a return to the Petition pursuant to Connecticut Practice Book § 23-21 *et seq.* including, *inter alia*, setting forth the facts claimed to justify the denial of liberty, detention and imprisonment of Beulah, Minnie, and Karen, three illegally confined elephants in Respondents' custody; and (b) order the immediate release of Beulah, Minnie, and Karen from such illegal confinement.

8. This Petition is brought under the common law of Connecticut, which is broad, flexible, and adaptable. *State v. Brocuglio*, 264 Conn. 778, 793 (2003); *State v. Guess*, 244 Conn. 761, 778 (1998); *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184, 196 (1996); *Dacey v. Connecticut Bar Association*, 184 Conn. 21, 25-26 (1981).

9. Connecticut courts have long recognized the common law writ of habeas corpus. *Hudson v. Groothoff*, 10 Conn. Supp. 275, 278 (Conn. C.P. 1942). This Petition is filed as an application in good faith for an extension of the Connecticut common law of habeas corpus to Beulah, Minnie, and Karen, who are being imprisoned solely because they are legal things rather than the legal persons they should be for the purpose of common law habeas corpus.

10. The Expert Affidavits submitted in support of this Petition set forth the facts that demonstrate that elephants such as Beulah, Minnie, and Karen are autonomous beings who live extraordinarily complex emotional, social, and intellectual lives and who possess those complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty protected by the common law of habeas corpus, as a matter of common law liberty, equality, or both.

11. As this action is instituted *ex parte* pursuant to Practice Book § 23-23, Respondents have not been served with this Petition. The NhRP will promptly serve the Petition upon Respondents upon the issuance of the writ or as otherwise directed by the Court.

12. The NhRP is entitled, as of right, to the issuance of the writ. Practice Book § 23-24 provides that the court: "shall issue the writ unless it appears that: (1.) the court lacks jurisdiction; (2.) the petition is wholly frivolous on its face; or (3.) the relief sought is not available."

13. There is no question this court has jurisdiction and that relief is available, *infra* at Paragraphs 46-48.

14. The Petition is also not "wholly frivolous on its face," a requirement satisfied by a mere "possibility of victory." *Henry E.S., Sr. v. Hamilton*, 2008 WL 1001969, at *5 (Conn. Super. Ct. Feb. 28, 2008). *See The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 917 (N.Y. Sup. Ct. 2015) ("Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed.").

15. While this Petition raises a novel issue of personhood in Connecticut common law jurisprudence, it is far from "wholly frivolous on its face." To the contrary, it is powerfully meritorious and the writ it seeks has been issued on behalf of nonhuman animals at least four times in other jurisdictions.

16. An order to show cause, which is the equivalent of the writ pursuant to New York Civil Practice Law and Rules ("CPLR") Article 70, was issued once on behalf of two chimpanzees in New York. *Id.* at 917.

17. The writ was also issued once on behalf of a chimpanzee named Cecilia in Mendoza, Argentina, The Third Court of Guarantees, Mendoza, Argentina, in *In re Cecilia*, File No. P-72.254/15 at 22-23 (November 3, 2016), which declared a chimpanzee to be a "non-human person," then ordered her immediate release from imprisonment in a zoo to a sanctuary in Brazil.

18. The writ was also issued once on behalf of an orangutan named Sandra in Buenos Aires, Argentina) *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA, Sobre Amparo* (*Association of Officials and Attorneys for the Rights of Animals and Others v. GCBA, on Amparo*), EXPTE. A2174-2015 (October 21, 2015).

19. A writ was also issued once on behalf of a bear named Chucho in Colombia, though that ruling was overruled by a higher court and further appeal is pending. *Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 (July 26, 2017).

20. The cases that the NhRP filed on behalf of chimpanzees in New York are being noted by the courts of other states as well. For instance, in *State v. Fessenden*, 355 Ore. 759, 769-70 (2014), the Supreme Court of Oregon referenced the "ongoing litigation" brought by the NhRP which "seeks to establish legal personhood for chimpanzees" and wrote: "As we continue to learn more about the interrelated nature of all life, the day may come when humans perceive less separation between themselves and other living beings than the law now reflects. However, we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still[.]"

21. The NhRP's litigation and arguments over whether a nonhuman animal can be a legal person for habeas corpus or any other purpose has been covered by thousands of media outlets around the world[1] and has captured the interest of the world's leading legal scholars and

[1] Since December 2013, the NhRP has brought numerous habeas corpus petitions on behalf of captive chimpanzees in New York State, and these suits have been the subject of thousands of legal commentaries, national and international news articles, radio and television programs, and podcasts. For example, there were at least 2,095 articles published on the issue of whether a

the most selective academic publications,[2] while catalyzing the development of a whole field of academic research and debate, generating extensive discussion in dozens of law review articles, multiple academic books, several science journals, and a variety of legal industry publications.[3]

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chimpanzee could have the right to a common law writ of habeas corpus in the six months between March and September 2017 alone. These outlets include, in the US, *NBC News*, *Wall Street Journal*, *Washington Post*, *Associated Press*, *Law360*, *Gizmodo*, *Fox News*, and *Salon*, and around the world, the *Sydney Morning Herald*, *Kremlin Express*, *Yahoo Japan*, Mexico's *Entrelíneas*, and India's *Economic Times*. The collective potential reach of this media coverage is approximately 1.4 billion people, according to the media monitoring service Meltwater. A spreadsheet containing the full list of 2,095 media items covering this case is available for download at: https://www.nonhumanrights.org/content/uploads/Media-Coverage-Tommy-Kiko-Appellate-Hearing-Raw-Data.csv (last accessed November 10, 2017).

[2] *See* Richard A. Epstein, *Animals as Objects of Subjects of Rights*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Richard A. Posner, *Animal Rights: Legal Philosophical, and Pragmatic Perspectives,* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); *VI. Aesthetic Injuries, Animal Rights, and Anthropomorphism*, 122 HARV. L. REV. 1204, 1216 (2009); Jeffrey L. Amestoy, *Uncommon Humanity: Reflections on Judging in A Post-Human Era*, 78 N.Y.U. L. REV. 1581 (2003); Richard A. Epstein, *Drawing the Line: Science and the Case for Animal Rights*, 46 PERSPECTIVES IN BIOLOGY AND MEDICINE 469 (2003); Craig Ewasiuk, *Escape Routes: The Possibility of Habeas Corpus Protection for Animals Under Modern Social Contract Theory*, 48 COLUM. HUM. RTS. L. REV. 69 (2017); Adam Kolber, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163 (2001); Will Kymlicka, *Social Membership: Animal Law beyond the Property/Personhood Impasse*, 40 DALHOUSIE LAW JOURNAL 123 (2017); Kenan Malik, *Rights and Wrongs*, 406 NATURE 675 (2000); Greg Miller, *A Road Map for Animal Rights*, 332 SCIENCE 30 (2011); Greg Miller, *The Rise of Animal Law: Will Growing Interest in How the Legal System Deals with Animals Ultimately Lead to Changes for Researchers?* 332 SCIENCE 28 (2011); Martha C. Nussbaum, *Working with and for Animals: Getting the Theoretical Framework Right*, 94 DENV. L. REV. 609, 615 (2017); Martha C. Nussbaum, *Animal Rights: The Need for A Theoretical Basis*, 114 HARV. L. REV. 1506, 1541 (2001); Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527, 541 (2000); Diana Reiss, *The Question of Animal Rights*, 418 NATURE 369 (2002); Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 401 (2003); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000); Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1 (2001).

[3] Richard A. Epstein, *Animals as Objects of Subjects of Rights*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Richard A. Posner, *Animal Rights: Legal Philosophical, and Pragmatic Perspectives,* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Justin F. Marceau and Steven M. Wise, "Exonerating the Innocent: Habeas for Nonhuman Animals," WRONGFUL CONVICTIONS AND THE DNA REVOLUTION - TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel S. Medwed, ed. Cambridge University Press 2017); Steven M.

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22. Who is a "person" is the most important individual question that can come before a court, as the term person identifies those entities capable of possessing one or more legal rights. Only a "person" may invoke a common law writ of habeas corpus and the inclusion of elephants as "persons" for that purpose is for this Court to decide.

23. As the NhRP is not seeking any right other than the common law right to bodily liberty, this Court need not determine whether Beulah, Minnie, and Karen are "persons" for any purpose other than the Connecticut common law of habeas corpus.

24. "Person" has never been a synonym for "human being;" rather it designates Western law's most fundamental category by identifying those capable of possessing a legal right. Personhood determines who counts, who lives, who dies, who is enslaved, and who is free.

25. The procedures for utilizing the common law writ of habeas corpus are set forth in Title 52, C.G.S.A. §§ 52-466 - 52-470, and in the Practice Book §§ 23-21 - 23-40 and do not affect the substantive entitlement to the writ. "Such statutes have not been intended to detract from its force, but rather to add to its efficiency . . . the statutes have been intended to prevent the writ being rendered inoperative." *Hudson v. Groothof,* 10 Conn. Supp. 275, 278-79 (1942). *See Kaddah v. Comm'r of Correction*, 324 Conn. 548, 565-66 (2017).

26. The issuance of the writ by this Court harmonizes with the procedure historically used by courts faced with habeas petitions that turned on novel (at the time) personhood claims.

27. In *Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep. 499 (K.B. 1772), which was incorporated into Connecticut common law, *State v. Courchesne*, 296 Conn. 622, 680 (2010),

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Person," LEGAL PERSONHOOD: ANIMALS, ARTIFICIAL INTELLIGENCE AND THE UNBORN (Tomasz Pietrzykowski and Visa Kurki, eds., Springer, 2017); Brandon Keim, *The Eye of the Sandpiper: Stories from the Living World*, Comstock (2017), pp. 132-150; Charles Seibert, "Should a Chimp Be Able to Sue Its Owner?", *New York Times Magazine* (April 23, 2014), *available at:* https://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html (last accessed October 16, 2017); Astra Taylor, "Who Speaks for the Trees?", *The Baffler*, (Sept. 7, 2016), *available at*: thebaffler.com/salvos/speaks-trees-astra-taylor (last accessed October 16, 2017); Sindhu Sundar, "Primal Rights: One Attorney's Quest for Chimpanzee Personhood.", Law360 (March 10, 2017), *available at*: https://www.law360.com/articles/900753 (last accessed October 16, 2017).

Lord Mansfield for the first time in history issued the writ that required the respondent to provide a legally sufficient reason for detaining a black slave.

28. In *Arabas v. Ivers*, 1 Root 92 (Conn. Super. 1784), the court issued a writ of habeas corpus upon the petition of a slave who claimed he was being unlawfully detained.

29. In *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C. Neb. 1879), the court rejected the United States Attorney's argument that no Native American could ever be a "person" able to obtain a writ of habeas corpus and issued a writ of habeas corpus on behalf of the Ponca Chief, Standing Bear.

30. In *Stanley*, 16 N.Y.S.3d at 908, the court rejected respondents' argument that the issuance of the writ "inappropriately requires an initial, substantive finding that chimpanzees are not entitled to legal personhood for the purpose of obtaining a writ of habeas corpus."

31. This Court's determination of personhood will turn on whether elephants, as autonomous beings, should be recognized as "persons" pursuant to a Connecticut common law that keeps abreast of evolving standards of justice, morality, experience, and scientific discovery.

32. Autonomy is the supreme value at the heart of the Connecticut common law of *liberty*. Trumping even the State's interest in life, it mandates the protection of the fundamental interest of autonomous beings to their bodily liberty through the common law of habeas corpus.

33. Connecticut common law equality forbids discrimination based upon unreasonable means or illegitimate ends. Beulah's, Minnie's, and Karen's common law classification as rightless "things" rather than "persons" violates equality as it furthers the illegitimate end of depriving autonomous beings of their bodily liberty.

34. Connecticut common law equality further forbids the deprivation of fundamental rights based upon a single characteristic or trait. Classifying Beulah, Minnie, and Karen as "things" solely because they are not human, thereby denying them the capacity for any legal right, is so inequitable that it violates basic common law equality.

35. This Court must hold the required hearing and recognize Beulah's, Minnie's, and Karen's common law personhood and right to bodily liberty then order their immediate release from their unlawful confinement.

36. For the safety of the elephants as well as the public, this Court should consider releasing Beulah, Minnie, and Karen to the Performing Animal Welfare Society Sanctuary ("PAWS") near Sacramento, California, which has agreed to provide permanent sanctuary for them.[4]

37. At PAWS, Beulah, Minnie, and Karen, along with other elephants, will flourish in an environment that respects their autonomy to the greatest degree possible, as close to their native Asia and Africa as may be found in North America.

38. This habeas corpus case is not an "animal protection" or "animal welfare" case, any more than a habeas corpus case brought on behalf of a detained human would be a "human protection" or "human welfare" case. *See People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 149 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015); *Stanley*, 16 N.Y.S.3d at 901.

39. The issue before this Court, as it is in any habeas corpus action, is whether Beulah, Minnie, and Karen may be legally detained at all.

40. Even if Respondents were violating animal welfare statutes, habeas corpus remains available, as alternative remedies do not alter one's ability to bring the writ. *In re Jonathan M.*, 255 Conn. 208, 221 (2001); *Weidenbacher v. Duclos*, 234 Conn. 51, 64-65 (1995).

41. The determination of legal personhood is a matter for common law adjudication and is not a biological question. *Craig v. Driscoll*, 262 Conn. 312, 330 n.15 (2003); *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201-202 (1972).

42. As public policy determines personhood, and as the writ of habeas corpus in Connecticut is solely a common law remedy, it is for the courts *alone* to decide whether Beulah,

[4] Attached hereto is an affidavit from Ed Stewart, Co-Founder and President of PAWS. Affidavit of Ed Stewart ["Stewart Aff."] ¶2.

Minnie, and Karen are "persons" for purposes of the common law of habeas corpus. *E.g.*, *Craig*, 262 Conn. at 330 n.15.

43. Beulah's, Minnie's, and Karen's imprisonment and deprivation of bodily liberty by Respondents is unlawful under the common law, pursuant to which all persons are presumed free absent positive law. *Somerset, supra.*

44. The fact this Petition does not seek the immediate production of Beulah, Minnie, and Karen to the Court or placement in a temporary home and does not then seek their ultimate release into the wild or onto the streets of Connecticut but rather into the care of a sanctuary does not preclude them from habeas corpus relief. *See Dart v. Mecum*, 19 Conn. Supp. 428, 434 (Super. Ct. 1955); *Buster v. Bonzagni*, 1990 WL 272742, at *2 (Conn. Super. Ct. Apr. 5, 1990) *aff'd sub Comm'r of Correction*, 26 Conn. App. 48 (1991).

45. Beulah, Minnie and Karen are beneficiaries of an *inter vivos* trust created by the NhRP pursuant to C.G.S.A. § 45a-489a for the purpose of their care and maintenance once they are released from Respondents' unlawful custody as directed by this Court and are therefore already "persons" for that purpose as only "persons" may be trust beneficiaries. RESTATEMENT (THIRD) OF TRUSTS § 43 *Persons Who May Be Beneficiaries* (2003); RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No. 2, approved 1999); RESTATEMENT (SECOND) OF TRUSTS § 124 (1959); Kate McEvoy, "§ 2:16. Pet trusts," 20 CONN. PRAC., CONN. ELDER LAW § 2:16 (2014 ed.). A true and correct copy of the trust is attached hereto as **Exhibit 1.**

JURISDICTION AND STANDING

46. This Court has jurisdiction over Beulah, Minnie, and Karen, as they are owned by, and in the custody of, the Connecticut Respondents upon whom service of process will be delivered in Connecticut, even if one or more elephants are temporarily out of state. *See* C.G.S.A. § 52–466(a).

47. Connecticut courts have jurisdiction to issue writs of habeas corpus even on behalf of petitioners located outside of Connecticut so long as they remain in the *custody* of a Connecticut respondent. *See Wyman v. Commissioner of Correction,* 86 Conn. App. 98, 101

(2004); *Hickey v. Comm'r of Correction*, 82 Conn. App. 25, 31-32, 34, 36 (2004), *app. dism.*, 274 Conn. 553 (2005). *See also Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 495 (1973); *Peyton v. Rowe*, 391 U.S. 54, 58 (1968); Paul D. Halliday, *Habeas Corpus: From England to Empire* 42–43 (2010).

48. The NhRP has standing to bring this Petition both under the common law and the governing procedural statutes. Petitions may be brought by the corpus, the prisoner himself, or by another on behalf of the detained person even if she and the detainee are strangers. *E.g.*, *Jackson v. Bulloch*, 12 Conn. 38 (1837); *Rodd v. Norwich State Hosp.*, 5 Conn. Supp. 360, 360 (Super. Ct. 1937); *Moye v. Warden*, 2009 WL 3839292, at *2 n.1 (Conn. Super. 2009); *Suarez v. Warden-Chesire*, 2001 WL 291057, at *2 (Conn. Super. 2001); *Lemmon v. People*, 20 N.Y. 562 (1860); *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 75 n.1 (1st Dept. 2017) ("*Tommy*"); *Lavery*, 124 A.D.3d at 150-53; *Stanley*, 16 N.Y.S.3d at 905; *Somerset*, Lofft 1, 98 Eng. Rep. 499.

49. Connecticut procedural statutes continue the common law tradition of permitting unrelated third parties to file habeas petitions. Conn. Practice Book § 23-40(a); C.G.S.A. § 52-466(a); C.G.S.A. § 52-466(b).

STATEMENT PURSUANT TO PRACTICE BOOK § 23-22

50. Upon the NhRP's best knowledge and belief, the cause or pretense of Beulah's, Minnie's, and Karen's imprisonment is that they are owned by, and being used for, entertainment and profit by the Respondents in such a manner that they are deprived of their autonomy and consequently their ability to choose how to live their emotionally, socially, and cognitively complex lives. They are trucked from place-to-place. They are forced to give public performances, do tricks, and give rides to members of the public at such places as county fairs under fear of being struck with bullhooks. Upon information and belief, they are rented out for private use in weddings and other private events. One elephant was forced into the Cathedral of St. John the Divine in New York City. The Respondents have been frequently cited for violations of the Federal Animal Welfare Act for their treatment of the elephants in their custody.

51. While this Petition challenges neither the conditions of their confinement nor Respondents' treatment of the elephants, but rather the fact of their detention itself, the deplorable conditions of Beulah's, Minnie's, and Karen's confinement underscore the need for immediate relief and the degree to which their bodily liberty and autonomy are impaired.

52. No previous application for the writ of habeas corpus asked herein has been made.

53. No appeal has been taken from any order by virtue of which Beulah, Minnie, and Karen are detained.

COUNT 1

54. Attached are the following affidavits, including four affidavits from five of the world's most renowned experts on the cognitive abilities of elephants ("Expert Affidavits"). These affidavits include:

(a) Affidavit of Kevin R. Schneider, Esq.

(b) Joint Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D.

(c) Affidavit of Joyce Poole, Ph.D.

(d) Affidavit of Karen McComb, Ph.D.

(e) Affidavit of Cynthia Moss

(f) Affidavit of Ed Stewart

55. Expert Affidavits (b) through (e) demonstrate that elephants such as Beulah, Minnie, and Karen possess complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty, as a matter of common law liberty, equality, or both under Connecticut common law. These include: autonomy; empathy; self-awareness; self-determination; theory of mind (awareness others have minds); insight; working memory, and an extensive long-term memory that allows them to accumulate social knowledge; the ability to act intentionally and in a goal-oriented manner, and to detect animacy and goal directedness in others; to understand the physical competence and emotional state of others; imitate, including vocal imitation; point and understand pointing; engage in true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do); cooperate and build coalitions;

cooperative problem-solving, innovative problem-solving, and behavioral flexibility; understand causation; intentional communication, including vocalizations to share knowledge and information with others in a manner similar to humans; ostensive behavior that emphasizes the importance of a particular communication; wide variety of gestures, signals, and postures; use of specific calls and gestures to plan and discuss a course of action, adjust their plan according to their assessment of risk, and execute the plan in a coordinated manner; complex learning and categorization abilities, and; an awareness of and response to death, including grieving behaviors.

56. African and Asian elephants share numerous complex cognitive abilities with humans, such as self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities.[5]

57. Many of these capacities have been considered — erroneously — as uniquely human; each is a component of autonomy.[6] African and Asian elephants are autonomous, as they exhibit "self-determined behaviour that is based on freedom of choice. As a psychological concept it implies that the individual is directing their behaviour based on some non-observable, internal cognitive process, rather than simply responding reflexively."[7]

58. Elephants possess the largest absolute brain of any land animal.[8] Even relative to their body sizes, elephant brains are large.[9]

59. An encephalization quotient ("EQ") of 1.0 means a brain is exactly the size expected for that body size; values greater than 1.0 indicate a larger brain than expected for that

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[5] Joint Affidavit of Lucy Bates and Richard M. Byrne ["Bates & Byrne Aff."] ¶37; Affidavit of Karen McComb ["McComb Aff."] ¶31; Affidavit of Joyce Poole ["Poole Aff."] ¶29; Affidavit of Cynthia Moss ["Moss Aff."] ¶25.
[6] Bates & Byrne Aff. ¶37; McComb Aff. ¶31; Poole Aff. ¶29; Moss Aff. ¶25.
[7] Bates & Byrne Aff. ¶30, ¶60; McComb Aff. ¶24, ¶31, ¶54; Poole Aff. ¶22, ¶53; Moss Aff. ¶18; ¶48.
[8] Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.
[9] Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

body size. (*Id.*).[10] Elephants have an EQ of between 1.3 and 2.3 (varying between sex and African and Asian species).[11] This means an elephant's brain can be more than twice as large as is expected for an animal of its size.[12] These EQ values are similar to those of the great apes, with whom elephants have not shared a common ancestor for almost 100 million years.[13]

60. A large brain allows greater cognitive skill and behavioral flexibility.[14] Typically, mammals are born with brains weighing up to 90% of the adult weight.[15] This figure drops to about 50% for chimpanzees.[16] At birth, human brains weigh only about 27% of the adult brain weight and increase in size over a prolonged childhood period.[17] This lengthy period of brain development (termed "developmental delay") is a key feature of human brain evolution.[18] It provides a longer period in which the brain may be shaped by experience and learning, and plays a role in the emergence of complex cognitive abilities such as self-awareness, creativity, forward planning, decision making and social interaction.[19] Elephant brains at birth weigh only about 35% of their adult weight, and elephants accordingly undergo a similarly protracted period of growth, development and learning.[20] This similar developmental delay in the elephant brain is likewise associated with the emergence of analogous cognitive abilities.[21]

61. Physical similarities between human and elephant brains occur in areas that link to the capacities necessary for autonomy and self-awareness.[22] Elephant and human brains share

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[10] Encephalization quotients (EQ) are a standardized measure of brain size relative to body size, and illustrate by how much a species' brain size deviates from that expected for its body size. Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.
[11] Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.
[12] Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.
[13] Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.
[14] Bates & Byrne Aff. ¶¶32-33; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.
[15] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.
[16] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.
[17] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.
[18] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.
[19] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.
[20] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.
[21] Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.
[22] Bates & Byrne Aff. ¶34; Poole Aff. ¶26; McComb Aff. ¶28; Moss Aff. ¶22.

deep and complex foldings of the cerebral cortex, large parietal and temporal lobes, and a large cerebellum.[23] The temporal and parietal lobes of the cerebral cortex manage communication, perception, and recognition and comprehension of physical actions, while the cerebellum is involved in planning, empathy, and predicting and understanding the actions of others.[24]

62. Elephant brains hold nearly as many cortical neurons as do human brains, and a much greater number than do chimpanzees or bottlenose dolphins.[25] Elephants' pyramidal neurons — the class of neurons found in the cerebral cortex, particularly the pre-frontal cortex, which is the brain area that controls "executive functions" — are larger than in humans and most other species.[26] The term "executive function" refers to controlling operations, such as paying attention, inhibiting inappropriate responses, and deciding how to use memory search. These abilities develop late in human infancy and are often impaired in dementia. The degree of complexity of pyramidal neurons is linked to cognitive ability, with more complex connections between pyramidal neurons being associated with increased cognitive capabilities.[27] Elephant pyramidal neurons have a large number of connections with other neurons for receiving and sending signals, known as a dendritic tree.[28]

63. Elephants, like humans, great apes, and some cetaceans, possess *von Economo neurons*, or spindle cells, the so-called "air-traffic controllers for emotions," in the anterior cingulate, fronto-insular, and dorsolateral prefrontal cortex areas of the brain.[29] In humans, these cortical areas are involved, among other things, with the processing of complex social information, emotional learning and empathy, planning and decision-making, and self-awareness and self-control.[30] The presence of spindle cells in the same brain locations in elephants and

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[23] Bates & Byrne Aff. ¶34; McComb Aff. ¶28; Poole Aff. ¶26; Moss Aff. ¶22.
[24] Bates & Byrne Aff. ¶34; McComb Aff. ¶28; Poole Aff. ¶26; Moss Aff. ¶22.
[25] Humans: 1.15×10^{10}; elephants: 1.1×10^{10}, chimpanzees: 6.2×10^{9}; dolphins: 5.8×10^{9}. Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.
[26] Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.
[27] Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.
[28] Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.
[29] Bates & Byrne Aff. ¶36; McComb Aff. ¶30; Poole Aff. ¶28; Moss Aff. ¶24.
[30] Bates & Byrne Aff. ¶36; McComb Aff. ¶30; Poole Aff. ¶28; Moss Aff. ¶24.

humans strongly implies that these higher-order brain functions, which are the building blocks of autonomous, self-determined behavior, are common to both species.[31]

64. Elephants have extensive and long-lasting memories.[32] McComb et al. (2000), using experimental playback of long-distance contact calls in Amboseli National Park, Kenya, showed that African elephants remember and recognize the voices of at least 100 other elephants.[33] Each adult female elephant tested was familiar with the contact-call vocalizations of individuals from an average of 14 families in the population.[34] When the calls came from the test elephants' own family, they contact-called in response and approached the location of the loudspeaker; when they were from another non-related but familiar family, one that had been shown to have a high association index with the test group, they listened but remained relaxed.[35] However, when a test group heard unfamiliar contact calls from groups with a low association index with the test group, the elephants bunched together and retreated from the area.[36]

65. McComb et al. has demonstrated that this social knowledge accumulates with age, with older females having the best knowledge of the contact calls of other family groups, and that older females are better leaders than younger, with more appropriate decision-making in response to potential threats (in this case, in the form of hearing lion roars).[37] Younger matriarchs under-reacted to hearing roars from male lions, elephants, most dangerous predators.[38] Sensitivity to the roars of male lions increased with increasing matriarch age, with the oldest, most experienced females showing the strongest response to this danger.[39] These studies show that elephants continue to learn and remember information about their

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[31] Bates & Byrne Aff. ¶36; McComb Aff. ¶30; Poole Aff. ¶28; Moss Aff. ¶24.
[32] Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.
[33] Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.
[34] Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.
[35] Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.
[36] Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.
[37] Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.
[38] Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.
[39] Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.

environments throughout their lives, and this accrual of knowledge allows them to make better decisions and better lead their families as they age.[40]

66. Further demonstration of elephants' long-term memory emerges from data on their movement patterns.[41] African elephants move over very large distances in their search for food and water.[42] Leggett (2006) used GPS collars to track the movements of elephants living in the Namib Desert, with one group traveling over 600 km in five months.[43] Viljoen (1989) showed that elephants in the same region visited water holes approximately every four days, though some were more than 60 km apart.[44]

67. Elephants inhabiting the deserts of Namibia and Mali may travel hundreds of kilometers to visit remote water sources shortly after the onset of a period of rainfall, sometimes along routes that have not been used for many years.[45] These remarkable feats suggest exceptional cognitive mapping skills that rely upon the long-term memories of older individuals who may have traveled that same path decades earlier.[46] Thus, family groups headed by older matriarchs are better able to survive periods of drought.[47] These older matriarchs lead their families over larger areas during droughts than families headed by younger matriarchs, again drawing on their accrued knowledge, this time about the locations of permanent, drought-resistant sources of food and water, to better lead and protect their families.[48]

68. Studies reveal that long-term memories, and the decision-making mechanisms that rely on this knowledge, are severely disrupted in elephants who have experienced trauma or extreme disruption due to "management" practices initiated by humans.[49] Shannon *et al.* (2013)

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[40] Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.
[41] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[42] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[43] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[44] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[45] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[46] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[47] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[48] Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.
[49] Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.

demonstrated that South African elephants who experienced trauma decades earlier showed significantly reduced social knowledge.[50] As a result of archaic culling practices, these elephants had been forcibly separated from family members and subsequently taken to new locations.[51] Two decades later, their social knowledge and skills and decision-making abilities were impoverished compared to an undisturbed Kenyan population.[52] Disrupting elephants' natural way of life has substantial negative impacts on their knowledge and decision-making abilities.[53]

69. Elephants demonstrate advanced working memory skills.[54] Working memory is the ability to temporarily store, recall, manipulate and coordinate items from memory.[55] Working memory directs one's attention to relevant information, utilized in reasoning, planning, coordination, and execution of cognitive processes through a "central executive."[56] Adult human working memory has a capacity of around seven items.[57] When experiments were conducted with wild elephants in Kenya in which the locations of fresh urine samples from related or unrelated elephants were manipulated, the elephants responded by detecting urine from known individuals in surprising locations, thereby demonstrating the ability continually to track the locations of at least 17 family members in relation to themselves, as either absent, present in front of self, or present behind self.[58] This remarkable ability to hold in mind and regularly update information about the locations and movements of a large number of family members is best explained by the fact that elephants possess an unusually large working memory capacity that is much larger than that of humans.[59]

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[50] Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.
[51] Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.
[52] Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.
[53] Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.
[54] Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.
[55] Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.
[56] Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.
[57] Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.
[58] Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.
[59] Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

70. Elephants display a sophisticated categorization of their environment on par with humans.[60] Bates, Byrne, Poole, and Moss experimentally presented the elephants of Amboseli National Park, Kenya with garments that gave olfactory or visual information about their human wearers, either Maasai warriors who traditionally attack and spear elephants as part of their rite of passage, or Kamba men who are agriculturalists and traditionally pose little threat to elephants.[61] In the first experiment, the only thing that differed between the cloths was the smell, derived from the ethnicity and/or lifestyle of the wearers.[62] The elephants were significantly more likely to run away when they sniffed cloths worn by Maasai men than those worn by Kamba men or no one at all. (See "Video 7" attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit K").[63]

71. In a second experiment, they presented the elephants with two cloths that had not been worn by anyone; one was white (a neutral stimulus) and the other red, the color ritually worn by Maasai warriors.[64] With access only to these visual cues, the elephants showed significantly greater, sometimes aggressive, reactions to red garments than white.[65] They concluded that elephants are able to categorize a single species (humans) into sub-classes (i.e., "dangerous" or "low risk") based on either olfactory or visual cues alone.[66]

72. McComb et al. further demonstrated that these same elephants distinguish human groups based on voices.[67] The elephants reacted differently, and appropriately, depending on whether they heard Maasai or Kamba men speaking, and whether the speakers were male Maasai versus female Maasai, who also pose no threat.[68] Scent, sounds and visual signs associated specifically with Maasai men are categorized as "dangerous," while neutral signals are attended

[60] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[61] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[62] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[63] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[64] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[65] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[66] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[67] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[68] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

to but categorized as "low risk."[69] These sophisticated, multi-modal categorization skills may be exceptional among non-human animals and demonstrate elephants' acute sensitivity to the human world and how they monitor human behavior and learn to recognize when we might cause them harm.[70]

73. Human speech and language reflect autonomous thinking and intentional behavior.[71] Similarly, elephants vocalize to share knowledge and information.[72] Male elephants primarily communicate about their sexual status, rank and identity, whereas females and dependents emphasize and reinforce their social units.[73] Call types are separated into those produced by the larynx (such as "rumbles") and calls produced by the trunk (such as "trumpets"), with different calls in each category used in different contexts.[74] Field experiments have shown that African elephants distinguish between call types. For example, such contact calls as "rumbles" may travel kilometers and maintain associations between elephants, or "oestrus rumbles" may occur after a female has copulated, and these call types elicit different responses in listeners.[75]

74. Elephant vocalizations are not merely reflexive; they have distinct meanings to listeners and communicate in a manner similar to the way humans use language.[76] Elephants display more than two hundred gestures, signals and postures that they use to communicate information to their audience.[77] Such signals are adopted in many contexts, such as aggressive, sexual or socially integrative situations, are well-defined, carry a specific meaning both to the actor and recipient, result in predictable responses from the audience, and together demonstrate

[69] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[70] Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.
[71] Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.
[72] Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.
[73] Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.
[74] Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.
[75] Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.
[76] Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.
[77] Poole Aff. ¶43; Bates & Byrne Aff. ¶52; McComb Aff. ¶46; Moss Aff. ¶40.

intentional and purposeful communication intended to share information and/or alter the others' behavior to fit their own will.[78]

75. Elephants use specific calls and gestures to plan and discuss a course of action.[79] These may be to respond to a threat through a group retreating or mobbing action (including celebration of successful efforts), or planning and discussing where, when and how to move to a new location.[80] In group-defensive situations, elephants respond with highly coordinated behaviour, both rapidly and *predictably*, to specific calls uttered and particular gestures exhibited by group members.[81] These calls and gestures carry specific meanings not only to elephant listeners, but to experienced human listeners as well.[82] The rapid, predictable and collective response of elephants to these calls and gestures indicates that elephants have the capacity to understand the goals and intentions of the signalling individual.[83]

76. Elephant group defensive behavior is highly evolved and involves a range of different tactical maneuvers adopted by different elephants.[84] For example, matriarch Provocadora's contemplation of Poole's team through listening and "j-sniffing," followed by her purposeful "perpendicular-walk" (in relation to Poole's team) toward her family and her "ear-flap-slide" clearly communicated that her family should begin a "group-advance" upon Poole's team.[85] This particular elephant attack is a powerful example of elephants' use of empathy, coalition and cooperation.[86] Provocadora's instigation of the "group-advance" led to a two-and-a-half minute "group-charge" in which the three other large adult females of the 36-member family took turns leading the charge, passing the baton, in a sense, from one to the next.[87] Once

[78] Bates & Byrne Aff. ¶52; McComb Aff. ¶46; Poole Aff. ¶43; Moss Aff. ¶40.
[79] Poole Aff. ¶44.
[80] Poole Aff. ¶44.
[81] Poole Aff. ¶45.
[82] Poole Aff. ¶45.
[83] Poole Aff. ¶45.
[84] Poole Aff. ¶45.
[85] Poole Aff. ¶45.
[86] Poole Aff. ¶45.
[87] Poole Aff. ¶45.

they succeeded in their goal of chasing Poole's team away, they celebrated their victory by "high-fiving" with their trunks and engaging in an "end-zone-dance."[88] "High-fiving" is also typically used to initiate a coalition and is both preceded by and associated with other specific gestures and calls that lead to very goal oriented collective behavior.[89]

77. Ostensive communication refers to the way humans use particular behavior, such as tone of speech, eye contact, and physical contact, to emphasize that a particular communication is important.[90] Lead elephants in family groups use ostensive communication frequently as a way to say, "Heads up – I am about to do something that you should pay attention to."[91]

78. In planning and communicating intentions regarding a movement, elephants use both vocal and gestural communication.[92] For example, Poole has observed that a member of a family will use the axis of her body to point in the direction she wishes to go and then vocalize, every couple of minutes, with a specific call known as a "let's-go" rumble, "I want to go this way, let's go together."[93] The elephant will also use intention gestures — such as "foot-swinging" — to indicate her intention to move.[94] Such a call may be successful or unsuccessful at moving the group or may lead to a 45-minute or longer discussion (a series of rumble exchanges known as "cadenced rumbles") that researchers interpret as negotiation.[95] Sometimes such negotiation leads to disagreement that may result in the group splitting and going in different directions for a period of time.[96] In situations where the security of the group is at stake, such as when movement is planned through or near human settlement, all group members focus

[88] Poole Aff. ¶45.
[89] Poole Aff. ¶45.
[90] Poole Aff. ¶36.
[91] Poole Aff. ¶36.
[92] Poole Aff. ¶46.
[93] Poole Aff. ¶46.
[94] Poole Aff. ¶46.
[95] Poole Aff. ¶46.
[96] Poole Aff. ¶46.

on the matriarch's decision.[97] So while "let's go" rumbles are uttered, others adopt a "waiting" posture until the matriarch, after much "listening," "j-sniffing," and "monitoring," decides it is safe to proceed, where upon they bunch together and move purposefully, and at a fast pace in a "group-march."[98]

79. Elephants typically move through dangerous habitat and nighttime hours at high speed in a clearly goal-oriented manner known as "streaking," which has been described and documented through the movements of elephants wearing satellite tracking collars.[99] The many different signals — calls, postures, gestures and behaviors elephants use to contemplate and initiate such movement (including "ear-flap," "ear-flap-slide") — are clearly understood by other elephants (just as they can be understood after long-term study by human observers), mean very specific things, and indicate that elephants: 1) have a particular plan which they can communicate with others, 2) can adjust their plan according to their immediate assessment of risk or opportunity, and 3) can communicate and execute the plan in a coordinated manner.[100]

80. Elephants can vocally imitate sounds they hear, from the engines of passing trucks to the commands of human zookeepers.[101] Imitating another's behavior is demonstrative of a sense of self, as it is necessary to understand how one's own behavior relates to the behavior of others.[102] African elephants recognize the importance of visual attentiveness on the part of an intended recipient, elephant or human, and of gestural communication, which further demonstrates that elephants' gestural communications are intentional and purposeful.[103] This ability to understand the visual attentiveness and perspective of others is crucial for empathy, mental-state understanding, and "theory of mind," the ability to mentally represent and think

[97] Poole Aff. ¶46.
[98] Poole Aff. ¶46.
[99] Poole Aff. ¶46.
[100] Poole Aff. ¶46.
[101] Bates & Byrne Aff. ¶51; McComb Aff. ¶45; Poole Aff. ¶47; Moss Aff. ¶39.
[102] Bates & Byrne Aff. ¶51; McComb Aff. ¶45; Poole Aff. ¶47; Moss Aff. ¶39.
[103] Bates & Byrne Aff. ¶53; McComb Aff. ¶47; Poole Aff. ¶48; Moss Aff. ¶41.

about the knowledge, beliefs and emotional states of others, while recognizing that these can be distinct from your own knowledge, beliefs and emotions.[104]

81. As do humans, Asian elephants exhibit "mirror self-recognition" (MSR) using Gallup's classic "mark test."[105] MSR is the ability to recognize a reflection in the mirror as oneself, while the mark test involves surreptitiously placing a colored mark on an individual's forehead that she cannot see or be aware of without the aid of a mirror.[106] If the individual uses the mirror to investigate the mark, the individual must recognize the reflection as herself. (See "Video 1," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit D").[107]

82. MSR is significant because it is a key identifier of self-awareness.[108] Self-awareness is intimately related to autobiographical memory in humans and is central to autonomy and being able to direct one's own behavior to achieve personal goals and desires.[109] By demonstrating they can recognize themselves in a mirror, elephants must be holding a mental representation of themselves from another perspective and thus be aware that they are a separate entity from others.[110]

83. One who understands the concept of dying and death must possess a sense of self.[111] Both chimpanzees and elephants demonstrate an awareness of death by reacting to dead

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[104] Bates & Byrne Aff. ¶40, ¶53; McComb Aff. ¶34, ¶47; Poole Aff. ¶32, ¶48; Moss Aff. ¶28, ¶41.
[105] Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26. African elephants have not yet been tested.
[106] Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.
[107] Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.
[108] Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.
[109] "Autobiographical memory" refers to what one remembers about his or her own life; for example, not that "Paris is the capital of France," but the recollection that you had a lovely time when you went there. Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.
[110] Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.
[111] Poole Aff. ¶31; Bates & Byrne Aff. ¶39; Moss Aff. ¶27.

family or group members.[112] Having a mental representation of the self, which is a pre-requisite for mirror-self recognition, likely confers an ability to comprehend death.[113]

84. Wild African elephants have been shown experimentally to be more interested in the bones of dead elephants than the bones of other animals. (See "Video 2," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit E").[114] They have frequently been observed using their tusks, trunk or feet to attempt to lift sick, dying or dead individuals.[115] Although they do not give up trying to lift or elicit movement from a dead body immediately, elephants appear to realize that once dead, the carcass can no longer be helped; and instead they engage in more "mournful" or "grief-stricken" behavior, such as standing guard over the body with dejected demeanor and protecting it from predators. (See "Photographs," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit F").[116]

85. Wild African elephants have been observed to cover the bodies of their dead with dirt and vegetation.[117] Mothers who lose a calf may remain with the calf's body for an extended period, but do not behave towards the body as they would a live calf.[118] Indeed, the general demeanor of elephants attending to a dead elephant is one of grief and compassion, with slow movements and few vocalizations.[119] These behaviors are akin to human responses to the death of a close relative or friend and demonstrate that elephants possess some understanding of life and the permanence of death. (See "Photographs," attached to the Affidavit of Karen McComb, Ph.D. on CD as "Exhibit E").[120]

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[112] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[113] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[114] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[115] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[116] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[117] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[118] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[119] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.
[120] Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

86. Elephants' interest in the bodies, carcasses and bones of elephants who have passed is so marked that when one has died, trails to the site of death become worn into the ground by the repeated visits of many elephants over days, weeks, months, even years.[121] The accumulation of dung around the site attests to the extended time that visiting elephants spend touching and contemplating the bones.[122] Poole observed that, over years, the bones may become scattered over tens or hundreds of square meters as elephants pick up the bones and carry them away.[123] The tusks are of particular interest and may be carried and deposited many hundreds of meters from the site of death.[124]

87. The capacity for mentally representing the self as an individual entity has been linked to general empathic abilities.[125] Empathy is defined as identifying with and understanding another's experiences or feelings by relating personally to their situation.[126]

88. Empathy is an important component of human consciousness and autonomy and is a cornerstone of normal social interaction.[127] It requires modeling the emotional states and desired goals that influence others' behavior both in the past and future, and using this information to plan one's own actions; empathy is only possible if one can adopt or imagine another's perspective, and attribute emotions to that other individual.[128] Thus, empathy is a component of "theory of mind."[129]

89. Elephants frequently display empathy in the form of protection, comfort and consolation, as well as by actively helping those in difficulty, such as assisting injured individuals to stand and walk, or helping calves out of rivers or ditches with steep banks. (See

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[121] Poole Aff. ¶31.
[122] Poole Aff. ¶31.
[123] Poole Aff. ¶31.
[124] Poole Aff. ¶31.
[125] Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.
[126] Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.
[127] Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.
[128] Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.
[129] Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.

"Video 3," attached to the Affidavit of Karen McComb, Ph.D. on CD as "Exhibit F").[130] Elephants have been seen to react when anticipating the pain of others by wincing when a nearby elephant stretched her trunk toward a live wire, and have been observed feeding those unable to use their own trunks to eat and attempting to feed those who have just died.[131]

90. In an analysis of behavioural data collected from wild African elephants over a 40-year continuous field study, Bates and colleagues concluded that as well as possessing their own intentions, elephants can diagnose animacy and goal directedness in others, understand the physical competence and emotional state of others, and attribute goals and mental states (intentions) to others.[132]

91. This is borne out by examples such as:

> IB family is crossing river. Infant struggles to climb out of bank after its mother. An adult female [not the mother] is standing next to calf and moves closer as the infant struggles. Female does not push calf out with its trunk, but digs her tusks into the mud behind the calf's front right leg which acts to provide some anchorage for the calf, who then scrambles up and out and rejoins mother.
>
> At 11.10ish Ella gives a "lets go" rumble as she moves further down the swamp . . . At 11.19 Ella goes into the swamp. The entire group is in the swamp except Elspeth and her calf [<1 year] and Eudora [Elspeth's mother]. At 11.25 Eudora appears to "lead" Elspeth and the calf to a good place to enter the swamp — the only place where there is no mud.

(See "Video 3," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit G").[133]

92. In addition to the examples analyzed in Bates *et al.*, Poole observed two adult females rush to the side of a third female who had just given birth, back into her, and press their bodies to her in what appeared to be a spontaneous attempt to prevent injury to the newborn.[134] In describing the situation, Poole wrote:

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[130] Bates & Byrne Aff. ¶41; McComb Aff. ¶35; Poole Aff. ¶33; Moss Aff. ¶29.
[131] Poole Aff. ¶33; Bates & Byrne Aff. ¶41; McComb Aff. ¶35; Moss Aff. ¶29.
[132] Bates & Byrne Aff. ¶42; McComb Aff. ¶36; Poole Aff. ¶34; Moss Aff. ¶30.
[133] Bates & Byrne Aff. ¶42.
[134] Poole Aff. ¶34.

> The elephants' sounds [relating to the birth] also attracted the attention of several males including young and inexperienced, Ramon, who, picking up on the interesting smells of the mother [Ella], mounted her, his clumsy body and feet poised above the newborn. Matriarch Echo and her adult daughter Erin, rushed to Ella's side and, I believe, purposefully backed into her in what appeared to be an attempt to prevent the male from landing on the baby when he dismounted.[135]

93. Such examples demonstrate that the acting elephant(s) (the adult female in the first example, Eudora in the second, and Erin and Echo in the third) were able to understand the intentions or situation of the other (the calf in the first case, Elspeth in the second, Ella's newborn and the male in the third), and could adjust their own behavior to counteract the problem being faced by the other.[136]

94. In raw footage Poole acquired of elephant behavior filmed by her brother in the Mara, Kenya, an "allo-mother" (an elephant who cares for an infant and is not the infant's mother or father) moves a log from under the head of an infant in what appears to be an effort to make him more comfortable. (See "Video 1," attached to the Affidavit of Joyce Poole, Ph.D. on CD as "Exhibit C").[137] In a further example of the ability to understand goal directedness of others, elephants appear to understand that vehicles drive on roads or tracks and they further appear to know where these tracks lead.[138] In Gorongosa, Mozambique, where elephants exhibit a culture of aggression toward humans, charging, chasing and attacking vehicles, adult females anticipate the direction the vehicle will go and attempt to cut it off by taking shortcuts *before* the vehicle has begun to turn.[139]

95. Empathic behavior begins early in elephants. In humans, rudimentary sympathy for others in distress has been recorded in infants as young as 10 months old; young elephants similarly exhibit sympathetic behavior.[140] For example, during fieldwork in the Maasai Mara in 2011, Poole filmed a mother elephant using her trunk to assist her one-year-old female calf up a

[135] Poole Aff. ¶34.
[136] Bates & Byrne Aff. ¶42; McComb Aff. ¶36; Poole Aff. ¶34; Moss Aff. ¶30.
[137] Poole Aff. ¶34.
[138] Poole Aff. ¶34.
[139] Poole Aff. ¶34.
[140] Poole Aff. ¶34.

steep bank. Once the calf was safely up the bank she turned around to face her five-year-old sister, who was also having difficulties getting up the bank. As the older calf struggled to clamber up the bank the younger calf approached her and first touched her mouth (a gesture of reassurance among family members) and then reached her trunk out to touch the leg that had been having difficulty. Only when her sibling was safely up the bank did the calf turn to follow her mother. (See "Video 2," attached to the Affidavit of Joyce Poole, Ph.D. on CD as "Exhibit D").[141]

94. Captive African elephants attribute intentions to others, as they follow and understand human pointing gestures.[142] The elephants understood that the human experimenter was pointing to communicate information to them about the location of a hidden object. (See "Video 4," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit H").[143] Attributing intentions and understanding another's reference point is central to both empathy and "theory of mind."[144]

95. There is evidence of "natural pedagogy," or true teaching — whereby a teacher takes into account the knowledge states of the learner as she passes on relevant information — in elephants. Bates, Byrne, and Moss's analysis of simulated "oestrus behaviours"[145] in African elephants — whereby a non-cycling, sexually experienced older female will simulate the visual signals of being sexually receptive, even though she is not ready to mate or breed again — demonstrates that these knowledgeable females can adopt false "oestrus behaviours" to demonstrate to naïve young females how to attract and respond appropriately to suitable

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[141] Poole Aff. ¶34.
[142] Bates & Byrne Aff. ¶43; McComb Aff. ¶37; Poole Aff. ¶35; Moss Aff. ¶31.
[143] Bates & Byrne Aff. ¶43; McComb Aff. ¶37; Poole Aff. ¶35; Moss Aff. ¶31.
[144] Bates & Byrne Aff. ¶43; McComb Aff. ¶37; Poole Aff. ¶35; Moss Aff. ¶31.
[145] Bates & Byrne Aff. ¶44. Ostension is the way that we can "mark" our communications to show people that that is what they are. If you do something that another copies, that's imitation; but if you deliberately indicate what you are doing to be helpful, that's "ostensive" teaching. Similarly, we may "mark" a joke, hidden in seemingly innocent words; or "mark" our words as directed towards someone specific by catching their eye. Ostension implies that the signaller knows what she is doing.

males.[146] The experienced females may be taking the youngster's lack of knowledge into account and actively showing them what to do — a possible example of true teaching as it is defined in humans.[147] This evidence, coupled with the data showing they understand the ostensive cues in human pointing, suggests that elephants understand the intentions and knowledge states (minds) of others.[148]

96. Coalitions and cooperation have been frequently documented in wild African elephants, particularly to defend family members or close allies from (potential) attacks by outsiders, such as when one family group tries to "kidnap" a calf from an unrelated family.[149] These behaviors are generally preceded by gestural and vocal signals, typically given by the matriarch and acted upon by family members, and are based on one elephant understanding the emotions and goals of a coalition partner.[150]

97. Cooperation is evident in captive Asian elephants, who demonstrate they can work together in pairs to obtain a reward, but also understand the pointlessness of attempting the task if their partner was not present or could not access the equipment. (See "Video 5," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit I").[151] Problem-solving and working together to achieve a collectively desired outcome involve mentally representing both a goal and the sequence of behaviors that is required to achieve that goal; it is based on (at the very least) short-term action planning.[152]

98. Wild elephants have frequently been observed engaging in such cooperative problem-solving as retrieving calves kidnapped by other groups, helping calves out of steep, muddy river banks (see "Video 3," attached to the Affidavit of Karen McComb, Ph.D. on CD as "Exhibit F"), rescuing a calf attacked by a lion (acoustic recording calling to elicit help from

[146] Bates & Byrne Aff. ¶44; McComb Aff. ¶38; Poole Aff. ¶36; Moss Aff. ¶32.
[147] Bates & Byrne Aff. ¶44; McComb Aff. ¶38; Poole Aff. ¶36; Moss Aff. ¶32.
[148] Bates & Byrne Aff. ¶44; McComb Aff. ¶38; Poole Aff. ¶36; Moss Aff. ¶32.
[149] Bates & Byrne Aff. ¶45; McComb Aff. ¶39; Poole Aff. ¶37; Moss Aff. ¶33.
[150] Bates & Byrne Aff. ¶45; McComb Aff. ¶39; Poole Aff. ¶37; Moss Aff. ¶33.
[151] Bates & Byrne Aff. ¶46; McComb Aff. ¶40; Poole Aff. ¶38; Moss Aff. ¶34.
[152] Bates & Byrne Aff. ¶46; McComb Aff. ¶40; Poole Aff. ¶38; Moss Aff. ¶34.

others), and navigating through human-dominated landscapes to reach a desired destination such as a habitat, salt-lick, or waterhole.[153] These behaviors demonstrate the purposeful and well-coordinated social system of elephants and show that elephants can collectively hold specific aims in mind, then work together to achieve those goals.[154] Such intentional, goal-directed action forms the foundation of independent agency, self-determination, and autonomy.[155]

99. Elephants also show innovative problem-solving in experimental tests of insight, defined as the "a-ha" moment when a solution to a problem suddenly becomes clear.[156] A juvenile male Asian elephant demonstrated such a spontaneous action by moving a plastic cube and standing on it to obtain previously out-of-reach food.[157] After solving this problem once, he showed flexibility and generalization of the technique to other similar problems by using the same cube in different situations, or different objects in place of the cube when it was unavailable. (See "Video 6," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit J").[158] This experiment demonstrates that elephants can choose an appropriate action and incorporate it into a sequence of behavior to achieve a goal they kept in mind throughout the process.[159]

100. Asian elephants demonstrate the ability to understand goal-directed behavior.[160] When presented with food that was out of reach, but with some bits resting on a tray that could be pulled within reach, elephants learned to pull only those trays baited with food.[161] Success in this kind of "means-end" task demonstrates causal knowledge, which requires understanding not

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[153] Poole Aff. ¶39; Bates & Byrne Aff. ¶47; McComb Aff. ¶41; Moss Aff. ¶35.
[154] Bates & Byrne Aff. ¶47; McComb Aff. ¶41; Poole Aff. ¶39; Moss Aff. ¶35.
[155] Bates & Byrne Aff. ¶47; McComb Aff. ¶41; Poole Aff. ¶39; Moss Aff. ¶35.
[156] Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36. In cognitive psychology terms, "insight" is the ability to inspect and manipulate a mental representation of something, even when you can't physically perceive or touch the something at the time. Simply, insight is using only thinking to solve problems.
[157] Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36.
[158] Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36.
[159] Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36.
[160] Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.
[161] Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.

just that two events are associated with each other, but that some mediating force connects and affects the two which may be used to predict and control events.[162] Understanding causation and inferring object relations may be related to understanding psychological causation, which is appreciation that others are animate beings who generate their own behavior and have mental states (e.g., intentions).[163]

101. PAWS is a 501(c)(3) non-profit organization incorporated in 1984. It maintains three captive wildlife sanctuaries: the original 30-acre PAWS sanctuary in Galt, California; the 100-acre Amanda Blake Memorial Wildlife Refuge in Herald, California; and the 2,300-acre ARK 2000 sanctuary in San Andreas, California, that are home to elephants, bears, and big cats. The Galt sanctuary was the first sanctuary in the country equipped to care for elephants.[164] PAWS sanctuaries provide rescued animals with specially designed peaceful, natural habitats where they have the freedom to engage in natural autonomous behaviors that are as close to their native habitat as can be found in North America.

102. The mission of PAWS is to protect performing wild animals, provide sanctuary to abused, abandoned or retired captive wildlife, promote the best standards of care for all captive wildlife, preserve wild species and their habitat, and educate the public about captive wild animals.[165]

103. The ARK 2000 sanctuary is located near the Sierra Nevada Mountains in San Andreas, California, and has five elephant barns, one for female Asian elephants, one for female African elephants, and three for bull elephants. The property encompasses 2,300 acres of rolling foothills with varied natural terrain. Habitats include natural grasses, trees, lakes and pools in which the elephants may bathe. The Asian and African barns are each 20,000 square feet in size. Barns are equipped with heaters, hydraulic gates, restraint devices for veterinary procedures,

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[162] Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.
[163] Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.
[164] Stewart Aff. ¶4.
[165] Stewart Aff. ¶6.

heated and padded concrete floors, dirt floors, spacious sleeping stalls and pipe hallways for introduction and socialization of new elephants. The African barn has an indoor therapy pool. The Asian elephant barn contains dirt-floor sleeping stalls specially designed for older elephants with foot and joint problems.[166]

104. In support of this Petition, the NhRP has filed its Memorandum of Law in Support of Verified Petition for Common Law Writ of Habeas Corpus as well as an Appendix of Exhibits in Support of Verified Petition for Common Law Writ of Habeas Corpus which contains the exhibits referred to in this Petition. The Petitioner's proposed Writ of Habeas Corpus is attached hereto.

[166] Stewart Aff. ¶8.

DEMAND

WHEREFORE, Petitioner respectfully requests the following relief:

A. Issuance of the Writ of Habeas Corpus directing the Respondents to file a return to the Petition pursuant to Connecticut Practice Book § 23-21 *et seq.* including, *inter alia*, setting forth the facts claimed to justify the detention and denial of liberty of Beulah, Minnie, and Karen, three illegally confined elephants in Respondents' custody;

B. Upon a determination that Beulah, Minnie, and Karen are being unlawfully denied their liberty, detained and imprisoned, ordering their immediate release from Respondents' custody and illegal confinement forthwith to PAWS;

C. Awarding Petitioner NhRP its costs and disbursements in connection with this matter; and

D. Granting such other and further relief as this Court deems just and proper.

THE PETITIONER,
THE NONHUMAN RIGHTS PROJECT, INC.

BY: _____

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OATH

I, Kevin Schneider, Executive Director of The Nonhuman Rights Project, Inc., solemnly and sincerely affirm and declare that the statements contained herein are true to the best of my knowledge and belief, upon the pains and penalties of perjury or false statement.

Kevin Schneider

Kevin Schneider, being duly sworn, states that the above information is true to the best of his knowledge and belief.

Sworn to and subscribed before me this 13th day of November, 2017.

Notary Public
~~Commissioner of the Superior Court~~

PATRICIA Q. IACOZZA
Notary Public, State of Connecticut
My Commission Expires March 31, 2021

DOCKET NO. _____	:	SUPERIOR COURT
	:	
In the matter of the Petition for a Common Law Writ of Habeas Corpus,	:	JUDICIAL DISTRICT OF LITCHFIELD
	:	
	:	AT TORRINGTON
NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN,	:	
Petitioner,	:	
v.	:	
	:	
R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC.,	:	
Respondents.	:	

WRIT OF HABEAS CORPUS

WHEREAS, a Verified Petition for a Common Law Writ of Habeas Corpus dated November 13, 2017 (the "Petition") has been presented to the Court in the above-captioned matter by Petitioner Nonhuman Rights Project, Inc. ("NhRP"); and

WHEREAS, upon the Petition submitted by NhRP it appears that an order and writ of habeas corpus should be issued directing Respondents R.W. Commerford & Sons, Inc. and Willilam R. Commerford to file a return to the Petition as provided in ,

NOW, THEREFORE, BY THE AUTHORITY OF THE STATE OF CONNECTICUT,

IT IS ORDERED that Respondent R.W. Commerford & Sons, Inc., and Respondent William R. Commerford as the President of R.W. Commerford & Sons, Inc., be summoned to appear before the Superior Court for the Judicial District of Litchfield at Torrington, 50 Field Street, Torrington, Connecticut, on the following court appearance date and time:

_____, 2017, at _____ o'clock ____.m.,

then and there to file a return to the Petition in accordance with Section 23-30 of the Connecticut Practice Book; and

IT IS FURTHER ORDERED that

_____ on the aforesaid court appearance date and time, the Respondents shall bring the bodies of Beulah, Minnie, and Karen under safe and secure conduct before the Court by interactive audiovisual device (as permitted by Practice Book§ 23-68);

-OR-

_____ on the aforesaid court appearance date and time, the Respondents are excused from bringing the bodies of Beaulah, Minnie, and Karen under safe and secure conduct before the Court;

and

IT IS FURTHER ORDERED that the Petitioner shall serve on the Respondents true and attested copies of the Verified Petition for a Common Law Writ of Habeas Corpus, Memorandum of Law in Support of Verified Petition for a Common Law Writ of Habeas Corpus, Appendix of Exhibits in Support of Verified Petition for a Common Law Writ of Habeas Corpus, this Writ of Habeas Corpus, and Summons, on or before _____, 2017.

Dated at Torrington, Connecticut, this _____ day of _____, 2017.

BY THE COURT,

_____

DOCKET NO. LLI-CV-17-5009822-S NONHUMAN RIGHTS PROJECT, INC. EX REL. BEULAH, MINNIE, & KAREN V. R.W. COMMERFORD & SONS, INC.	SUPERIOR COURT JUDICIAL DISTRUCT OF LITCHFIELD AT TORRINGTON MAY 23, 2018

MEMORANDUM OF DECISION RE: MOTION FOR ARTICULATION

Pursuant to Practice Book § 66-5,[1] the petitioner, Nonhuman Rights Project, Inc., filed a motion for articulation with the Appellate Court on April 18, 2018. The petitioner seeks articulation of the trial court's December 26, 2017 and February 27, 2018 decisions, denying its petition for a writ of habeas corpus on behalf of three elephants, Beulah, Minnie, and Karen, and denying its motion to reargue and request for leave to amend the petition, respectively.

"[A]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . [P]roper utilization of the motion for articulation serves to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal. . . . In other words, an articulation elaborates upon, or explains, a matter that the trial court decided. A motion for articulation may not . . . be used to modify or to alter the substantive terms of a prior judgment . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Walker*, 319 Conn. 668, 680, 126 A.3d 1087 (2015). "An articulation may be necessary where the trial court fails completely to state any basis for its decision . . . or where the basis, although stated, is unclear."

[1] Practice Book § 66-5 provides in relevant part that "[a] motion seeking corrections in the transcript or the trial court record or seeking an articulation or further articulation of the discussion of the trial court shall be called a motion for rectification or a motion for articulation, whichever is applicable. Any motion filed pursuant to this section shall state with particularity the relief sought and shall be filed with the appellate clerk."

5/23/18 Copy of memo of decision mailed to:
Cohen & Wolf PC, P.O. Box 1821, Bridgeport, CT 06601; Reporter of Judicial Decisions, Supreme Court Bldg, 231 Capitol Ave., Hartford, CT 06106; Atty. Steven Wise, 5195 NW 112th Terr, Coral Springs, FL 33076. P.L. #111

(Internal quotation marks omitted.) *Nicefaro* v. *New Haven*, 116 Conn. App. 610, 617, 976 A.2d 75, cert. denied, 293 Conn. 937, 981 A.2d 1079 (2009). "An articulation is not an opportunity for a trial court to substitute a new decision nor to change the reasoning or basis of a prior decision." *Koper* v. *Koper*, 17 Conn. App. 480, 484, 553 A.2d 1162 (1989).

The petitioner's motion raises sixteen separate requests for articulation. Upon review, the court grants the motion as to request number ten to clarify the basis of its determination that the petition is wholly frivolous on its face in legal terms.

Request number ten provides: "If the *Lozada* [v. *Deeds*, 498 U.S. 430, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991),] standard for determining frivolousness set forth in *Fernandez* [v. *Commissioner of Correction*, 125 Conn. App. 220, 7 A.3d 432 (2010), cert. denied, 300 Conn. 924, 15 A.3d 630 (2011),] applies to Practice Book § 23-24 (a) (2),[2] articulate:

"a. Why the legal arguments presented in the petition and supporting memorandum of law are not debatable among jurists of reason, especially in light of the fact that the petition and motion to reargue cited at least four cases in which a writ of habeas corpus or its equivalent were in fact granted on behalf of nonhuman animals, and the fact that cases of first impression in Connecticut *per se* pass frivolousness review under *Lozada*"; (footnote added; footnote omitted); "b. Why courts could not possibly resolve the issues presented in the petition in a different manner, especially in light of the fact that courts have in fact granted the relief the [petitioner] seeks in this case on behalf of other nonhuman animals"; and "c. Why the arguments presented in the petition and supporting memorandum of law are not adequate to deserve encouragement to proceed further."

---

[2] Practice Book § 23-24 (a) (2) provides that "(a) [t]he judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that . . . (2) the petition is wholly frivolous on its face . . . ."

As to request number ten, the court's articulation is as follows: A writ of habeas corpus "is granted only in the exercise of sound judicial discretion." *Wojculewicz* v. *Cummings*, 143 Conn. 624, 627, 124 A.2d 886 (1956). In civil matters, Practice Book § 23-24 (a) (2) provides the Superior Court with the authority to deny the issuance of a writ of habeas corpus if it appears that the petition is wholly frivolous on its face. In family matters, Practice Book § 25-41[3] allows the Superior Court to deny the issuance of such a writ if the petition is not meritorious. The standard used to determine whether a petition for a writ of habeas corpus is frivolous is set forth in *Fernandez*, and the standard used to determine whether such a writ is meritorious is discussed in *Henry E. S.* v. *Hamilton*, Superior Court, judicial district of Stamford-Norwalk, Docket No. F02-CP-07-003237-A (February 28, 2008, *Maronich, J.*).

Under either standard, the court found the nonbinding legal[4] and nonlegal authority cited by the petitioner to be unpersuasive. Accordingly, the court expressly concluded that the petitioner was unable to point to any authority demonstrating a possibility or probability of victory for its theory that an elephant is a legal person for the purpose of issuing a writ of habeas corpus. In other words, the court determined that the petitioner failed to show that the issues presented are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are adequate to deserve encouragement to proceed further and failed to show that the petition merits a legal victory.

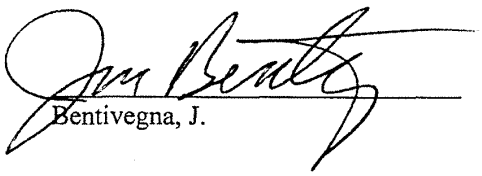
[3] Practice Book § 25-41 provides in relevant part that "(a) [t]he judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ if it appears that: (1) the court has jurisdiction; (2) the petition is meritorious; and (3) another proceeding is not more appropriate."

[4] The four decisions referenced in request number ten include international decisions.

As to the remaining requests, namely, numbers one through nine and eleven through sixteen, the court denies the motion because they are unambiguously addressed by the court's December 26, 2017 and February 27, 2018 memoranda of decision.

SO ORDERED.

BY THE COURT,



Bentivegna, J.

Connecticut General Statutes Annotated
Title 45a. Probate Courts and Procedure (Refs & Annos)
Chapter 802C. Trusts (Refs & Annos)
Part I. Trusts and Trustees in General

C.G.S.A. § 45a-489a

§ 45a-489a. Trust to provide for care of animal: Creation. Administration. Jurisdiction. Termination

Effective: October 1, 2009
Currentness

(a) A testamentary or inter vivos trust may be created to provide for the care of an animal or animals alive during the settlor's or testator's lifetime. The trust shall terminate upon the death of the last surviving animal. A trust created pursuant to this section shall designate a trust protector in the trust instrument whose sole duty shall be to act on behalf of the animal or animals provided for in the trust instrument. A trust protector shall be replaced in the same manner as a trustee under section 45a-474.

(b) Except as otherwise provided in this section, the provisions of the laws of this state that govern the creation and administration of trusts shall apply to a trust created to provide for the care of an animal or animals pursuant to this section.

(c) (1) The Superior Court, or a probate court described in subdivision (2) of this subsection, shall have jurisdiction over any trust created pursuant to this section.

(2) A probate court shall have jurisdiction over any trust created pursuant to this section if the trustee of the trust is otherwise subject to the jurisdiction of such probate court, or the trust is an inter vivos trust and the trust is or could be subject to the jurisdiction of such probate court for an accounting pursuant to section 45a-175.

(d) The trustee of a trust created pursuant to this section shall annually render an account for the trust, signed under penalty of false statement, to the trust protector.

(e) Any individual identified as a trust protector pursuant to this section may file a petition in the Superior Court or a probate court having jurisdiction pursuant to subsection (c) of this section to enforce the provisions of the trust, remove or replace any trustee of the trust, or require a trustee to render an account as required under subsection (d) of this section. The court may award costs and attorney's fees to the trust protector, from the trust property, if the trust protector prevails on a petition filed under this subsection and the court finds that the filing of the petition was necessary to fulfill the trust protector's duty to act on behalf of the animal or animals provided for in the trust instrument.

(f) If the trust protector determines that the trustee has used trust property for personal use or has otherwise committed fraud with respect to the trust, the trust protector may request the Attorney General to file a petition in the Superior Court or a probate court having jurisdiction pursuant to subsection (c) of this section to enforce the provisions of the trust, remove or replace any trustee of the trust or seek restitution from the trustee with respect to such trust property. The Attorney General may file such petition if the Attorney General determines that the circumstances warrant such filing.

(g) Trust property may be applied only to its intended use, subject to proper trust expenses including trustee fees, except to the extent the Superior Court or a probate court having jurisdiction pursuant to subsection (c) of this section, upon application by the trustee or trust protector, determines that the value of the trust property exceeds the amount required for its intended use. Trust property not required for its intended use, including trust property remaining upon termination of the trust, shall be distributed in the following order of priority:

(1) As directed by the terms of the trust instrument;

(2) To the remainder beneficiaries identified in the trust instrument, under the same terms provided in the trust for the remainder interest;

(3) To the settlor, if then living;

(4) Pursuant to the residuary clause of the settlor's or testator's will; or

(5) To the settlor's or testator's heirs in accordance with the laws of this state governing descent and distribution.

Credits
(2009, P.A. 09-169, § 1.)

C. G. S. A. § 45a-489a, CT ST § 45a-489a
The statutes and Constitution are current with enactments of Public Acts enrolled and approved by the Governor on or before July 1, 2018 and effective on or before July 1, 2018.

End of Document

Connecticut General Statutes Annotated
Title 52. Civil Actions
Chapter 915. Habeas Corpus (Refs & Annos)

C.G.S.A. § 52-466

§ 52-466. Application for writ of habeas corpus. Service. Return

Currentness

(a) (1) An application for a writ of habeas corpus, other than an application pursuant to subdivision (2) of this subsection, shall be made to the superior court, or to a judge thereof, for the judicial district in which the person whose custody is in question is claimed to be illegally confined or deprived of such person's liberty.

(2) An application for a writ of habeas corpus claiming illegal confinement or deprivation of liberty, made by or on behalf of an inmate or prisoner confined in a correctional facility as a result of a conviction of a crime, shall be made to the superior court, or to a judge thereof, for the judicial district of Tolland.

(b) The application shall be verified by the affidavit of the applicant for the writ alleging that he truly believes that the person on whose account the writ is sought is illegally confined or deprived of his liberty.

(c) The writ shall be directed to some proper officer to serve and return, who shall serve the same by putting a true and attested copy of it into the hands of the person who has the custody of the body of the person who is directed to be presented upon the writ. If the officer fails to make immediate return of the writ, with his actions thereon, he shall pay fifty dollars to the person so held in custody.

(d) Any judge of the Superior Court to whom an application for a writ of habeas corpus is made may make the writ returnable before any other judge of the court, the consent of the other judge being first obtained; and the other judge shall thereupon proceed with the matter with the same authority as though the application had been originally presented to him.

(e) If the application is made to a judge, the judge may certify the proceedings into court and the case shall thereupon be entered upon the docket and proceeded with as though the application had originally been made to the court.

(f) A foster parent or an approved adoptive parent shall have standing to make application for a writ of habeas corpus regarding the custody of a child currently or recently in his care for a continuous period of not less than ninety days in the case of a child under three years of age at the time of such application and not less than one hundred eighty days in the case of any other child.

Credits

(1949 Rev., § 8202; 1949, Supp. § 661a; 1955, Supp. § 3212d; 1963, P.A. 459, § 2, eff. June 19, 1963; 1965, Feb.Sp.Sess., P.A. 604; 1976, P.A. 76-436, § 410, eff. July 1, 1978; 1978, P.A. 78-280, §§ 1, 110, eff. July 1, 1978; 1982, P.A. 82-160, §

169; 1983, P.A. 83-5; 1985, P.A. 85-69; 1986, P.A. 86-186, § 18; 1987, P.A. 87-282, § 19; 1988, P.A. 88-332, § 3, eff. June 3, 1988; 2006, P.A. 06-152, § 5.)

C. G. S. A. § 52-466, CT ST § 52-466
The statutes and Constitution are current with enactments of Public Acts enrolled and approved by the Governor on or before July 1, 2018 and effective on or before July 1, 2018.

End of Document

Connecticut General Statutes Annotated
Title 52. Civil Actions
Chapter 915. Habeas Corpus (Refs & Annos)

C.G.S.A. § 52-467

§ 52-467. Punishment for refusal to obey writ or accept copy

Currentness

If any person having the custody of the body of anyone directed to be presented to the court or to a judge by a writ of habeas corpus duly served fails to present the body according to the command in the writ, or refuses to accept the copy of the writ offered in service, or in any way fraudulently avoids presenting the body according to the command, or, having presented the body, does not make return of the cause of detaining the person in custody, he shall be guilty of a contempt of court and may be punished for contempt by the court or judge by commitment, and shall pay to the person so held in custody two hundred dollars.

Credits

(1949 Rev., § 8203; 1982, P.A. 82-160, § 170.)

Notes of Decisions (1)

C. G. S. A. § 52-467, CT ST § 52-467
The statutes and Constitution are current with enactments of Public Acts enrolled and approved by the Governor on or before July 12, 2019 and effective on or before July 12, 2019. Some statute sections may be more current, see credits for details.

End of Document

Connecticut General Statutes Annotated
Title 52. Civil Actions
Chapter 915. Habeas Corpus (Refs & Annos)

C.G.S.A. § 52-468

§ 52-468. Commitment for contempt; application for discharge

Currentness

The court may commit to prison, for any contempt of which the respondent has been guilty in this proceeding, for a period not exceeding sixty days; and the respondent may, at any time within such time of imprisonment, appear before the court which made the order of commitment, and apply for a discharge from imprisonment, which the court may, for sufficient cause shown, direct.

Credits

(1949 Rev., § 8204; 1967, P.A. 656, § 48, eff. June 27, 1967; 1978, P.A. 78-280, § 111, eff. July 1, 1978.)

Notes of Decisions (1)

C. G. S. A. § 52-468, CT ST § 52-468
The statutes and Constitution are current with enactments of Public Acts enrolled and approved by the Governor on or before July 12, 2019 and effective on or before July 12, 2019. Some statute sections may be more current, see credits for details.

End of Document

Connecticut General Statutes Annotated
Title 52. Civil Actions
Chapter 915. Habeas Corpus (Refs & Annos)

C.G.S.A. § 52-470

§ 52-470. Summary disposal of habeas corpus case. Determination of good cause for trial. Appeal by person convicted of crime

Effective: October 1, 2012
Currentness

(a) The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require.

(b) (1) After the close of all pleadings in a habeas corpus proceeding, the court, upon the motion of any party or, on its own motion upon notice to the parties, shall determine whether there is good cause for trial for all or part of the petition.

(2) With respect to the determination of such good cause, each party may submit exhibits including, but not limited to, documentary evidence, affidavits and unsworn statements. Upon the motion of any party and a finding by the court that such party would be prejudiced by the disclosure of the exhibits at that stage of the proceedings, the court may consider some or all of the exhibits in camera.

(3) In order to establish such good cause, the petition and exhibits must (A) allege the existence of specific facts which, if proven, would entitle the petitioner to relief under applicable law, and (B) provide a factual basis upon which the court can conclude that evidence in support of the alleged facts exists and will be presented at trial, provided the court makes no finding that such evidence is contradicted by judicially noticeable facts. If the petition and exhibits do not establish such good cause, the court shall hold a preliminary hearing to determine whether such good cause exists. If, after considering any evidence or argument by the parties at such preliminary hearing, the court finds there is not good cause for trial, the court shall dismiss all or part of the petition, as applicable.

(c) Except as provided in subsection (d) of this section, there shall be a rebuttable presumption that the filing of a petition challenging a judgment of conviction has been delayed without good cause if such petition is filed after the later of the following: (1) Five years after the date on which the judgment of conviction is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2017; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction.

(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition

is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

(e) In a case in which the rebuttable presumption of delay under subsection (c) or (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section.

(f) Subsections (b) to (e), inclusive, of this section shall not apply to (1) a claim asserting actual innocence, (2) a petition filed to challenge the conditions of confinement, or (3) a petition filed to challenge a conviction for a capital felony for which a sentence of death is imposed under section 53a-46a.

(g) No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies.

Credits

(1949 Rev., § 8206; 1957, P.A. 482; 1967, P.A. 182; 1982, P.A. 82-160, § 171; 1983, June Sp.Sess., P.A. 83-29, § 47, eff. July 1, 1983; 2002, P.A. 02-132, § 78; 2012, P.A. 12-115, § 1.)

C. G. S. A. § 52-470, CT ST § 52-470

The statutes and Constitution are current with enactments of Public Acts enrolled and approved by the Governor on or before July 1, 2018 and effective on or before July 1, 2018.

End of Document

McKinney's CPLR § 7003

§ 7003. When the writ shall be issued

Currentness

(a) Generally. The court to whom the petition is made shall issue the writ without delay on any day, or, where the petitioner does not demand production of the person detained or it is clear that there is no disputable issue of fact, order the respondent to show cause why the person detained should not be released. If it appears from the petition or the documents annexed thereto that the person is not illegally detained or that a court or judge of the United States has exclusive jurisdiction to order him released, the petition shall be denied.

(b) Successive petitions for writ. A court is not required to issue a writ of habeas corpus if the legality of the detention has been determined by a court of the state on a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined and the court is satisfied that the ends of justice will not be served by granting it.

(c) Penalty for violation. For a violation of this section in refusing to issue the writ, a judge, or, if the petition was made to a court, each member of the court who assents to the violation, forfeits to the person detained one thousand dollars, to be recovered by an action in his name or in the name of the petitioner to his use.

Credits

(L.1962, c. 308.)

Editors' Notes

PRACTICE COMMENTARIES

by Vincent C. Alexander

CPLR 7003(a) provides that a writ of habeas corpus shall be issued "without delay on any day," thereby creating an exception to the general rule that prohibits the transaction of judicial business on Sundays. *See* N.Y.Jud.Law § 5. Issuance of the writ, however, is contingent upon the sufficiency of the petition. *See* CPLR 7002(c). The petition must be denied, *i.e.*, no writ should be issued, if it appears from the petition or documents attached thereto that the person is not illegally detained. CPLR 7003(a), second sentence. And no writ should issue unless the alleged grievance, if proven, would entitle the petitioner to immediate release. *People ex rel. Barnes v. Allard*, 2006, 25 A.D.3d 893, 807 N.Y.S.2d 688 (3d Dep't), *leave to appeal denied* 6 N.Y.3d 714, 816 N.Y.S.2d 750, 849 N.E.2d 973. The petition must also be denied if the federal courts have exclusive jurisdiction to order the detainee's

release.

As noted in the Practice Commentaries on CPLR 7001, the writ of certiorari to inquire into detention has been abolished. Its substance, however, is carried forward in CPLR 7003(a), which gives the court discretion to issue, instead of a writ of habeas corpus, an order to show cause why the person detained should not be released. Whereas habeas corpus requires that the detainee be produced for the hearing, the order to show cause can dispense with the detainee's presence. The court's discretion to substitute an order to show cause for the writ of habeas corpus is limited to two situations. First, the petitioner, perhaps in order to avoid the expense of producing the detainee (*see* CPLR 7004(e)), may forgo a demand for the detainee's presence. Second, the court, on its own initiative, may use the alternative of an order to show cause where it is clear, at the outset, that no disputable questions of fact exist. *See* Practice Commentaries on CPLR 7009. If such questions may exist, however, the detainee has a right to be present at the hearing regardless of whether he has testimony to give. *See* N.Y.Adv.Comm.on Prac. & Proc., Third Prelim.Rep., Legis.Doc.No.17, p.79 (1959) [hereinafter cited as Third Prelim.Rep.].

Subdivision (b) of CPLR 7003 is a response to the traditional doctrine that res judicata has no application to writs of habeas corpus. *See People ex rel. Lawrence v. Brady*, 1874, 56 N.Y. 182, 191-92. Successive applications for a writ, however, are looked upon with disfavor if the petition raises no new evidence or grounds. Third Prelim.Rep., *supra*, at 63-64. *See* CPLR 7002(c)(6) (petition must state all prior applications for writ "and the new facts, if any, presented in the petition that were not presented in any previous application").

Subdivision (c), which imposes an automatic $1,000 penalty on a judge who fails properly to issue a writ of habeas corpus, was omitted from the original draft of CPLR 7003 because of the lack of any evidence that financial penalties have ever been imposed on habeas judges, and the understandable hostility of courts toward such a rule. Third Prelim.Rep., *supra*, at 51. The drafters originally viewed the provision as an unfair remedy for a judge's honest mistake of law; any such error can be corrected either on an application to another judge or on appeal. *Id.* at 58. The penalty provision was later restored, however, perhaps for its in terrorem effect.

LEGISLATIVE STUDIES AND REPORTS

Subd. (a) of this section is derived from §§ 1231, 1235 (first and third sentences), 1252 and 1253 of the civil practice act. This subdivision also includes the writ of certiorari to inquire into detention by use of the phrase "or ... order the respondent to show cause."

The respondent, instead of being ordered to produce the body of the person detained, may be required to justify his continued imprisonment without bringing the prisoner to court. This function is served by the writ of certiorari under the civil practice act. Under the Federal statute, 28 U.S.C.A. § 2243, the device used is an order to "show cause why the writ [of habeas corpus] should not be granted." See, also, N.J.S.A. 2A:67-16. If the hearing under 28 U.S.C.A. § 2243 results in a finding that the imprisonment is unlawful, the prisoner should be released and there seems little reason to then issue a writ of habeas corpus. The Federal terminology is explicable on historical grounds. The Judicial Code did not contain this phrase. In order to avoid needless production of prisoners, the device of orders to show cause was developed. See Longsdorf, Habeas Corpus--A Protean Writ and Remedy, 8 F.R.D. 179, 187-88 (1949). This procedure was approved by the Supreme Court in Walker v. Johnston, 61 S.Ct. 574, 312 U.S. 275, 284, 85 L.Ed. 830 (1941), where the court noted: "By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact

emerging from the pleadings are tried as required by the statute." The procedure was then explicitly incorporated in the Judicial Code in 1948. See Hart & Wechsler, The Federal Courts and the Federal System 1311-12 (1953); cf. C.P.A. §§ 1261, 1263.

The Revisers further state that they limited the discretion of the court not to require production of the prisoner to cases where the petition does not request his production (in effect, a petition for a writ of certiorari) or where there are no disputed questions of fact. The first exception may be preferred by a petitioner who wishes to avoid the cost of producing a prisoner. See People ex rel. Semenoff v. Nagle, 118 Misc. 476, 478-79, 194 N.Y.S. 602, 604 (Sup.Ct.1922). The second exception incorporates that suggested for coram nobis cases by the Court of Appeals, since the "difference" between coram nobis and habeas corpus is "procedural only." People v. Richetti, 302 N.Y. 290, 97 N.E.2d 908 (1951); U.S. v. Hayman, 72 S.Ct. 263, 342 U.S. 205, 96 L.Ed. 232 (1952); see, also, Note, the Uniform Post-Conviction Procedure Act, 69 Harv.L.Rev. 1289, 1298-99 (1956). In view of the narrow scope of habeas corpus in criminal cases (see People v. Silberglitt, 4 N.Y.2d 59, 149 N.E.2d 76 (1958); Morhous v. New York Supreme Court, 293 N.Y. 131, 135, 56 N.E.2d 79, 81 (1944)), providing few possibilities for its abuse, and the limited authority of the Revisers to propose changes verging on the substantive, it was decided on the conservative position granting maximum protection to the prisoner which is reflected in this subdivision. The provision also reflects the desire to give the person for whose benefit the hearing is held the right to be present when a witness is heard, whether or not he himself has testimony to give.

It is also said in the Third Report that the second sentence of subd. (a) of this section replaces C.P.A. § 1231 dealing with restrictions on allowance of writs, § 1252, covering cases in which the prisoner must be remanded, and § 1253, listing situations in civil cases where the prisoner can be released. The grounds for issuance of the writ and for release of the person detained should be the same, since release will follow if the allegations on which the writ must issue are found to be true. The statutory scheme clearly reveals this identity by using almost the same language and organization in §§ 1231 and 1235 of the civil act. Integration of such sections is emphasized by a reference in § 7010(a) of CPLR to "a case in which the writ should issue."

Analysis of the specific provisions in C.P.A. §§ 1231, 1252 and 1253 indicates that they are misleading rather than helpful to the lawyer or layman attempting to determine when the writ should issue.

The phrase "or that a court or judge of the United States has exclusive jurisdiction to order him released" in subd. (a) of this section replaces subdivision 1 of §§ 1231 and 1252 of the civil practice act. The Revisers state that the restriction of the writ to exclude challenge of orders "issued by a court or judge of the United States in a case where such court or judges have exclusive jurisdiction," is found in §§ 1231 and 1252 of the civil practice act and in the laws of other states. E.g., Ill.Rev.Stat. c. 65, § 21(1) (1955); N.J.S.A. 2A:67-14(a) (1951). The words "exclusive jurisdiction" in these statutes are misleading, since they appear to mean that only if the state courts could not have issued the order upon which the detention rests are they prevented from issuing the writ. In fact, if a Federal court issued the order, whether it had concurrent or exclusive jurisdiction is irrelevant to the issue of immunity of Federal judicial process to interference by state judicial process. See Abelman v. Booth, 21 How. 506 (U.S.1858). Since the issue of the Federal court's having exceeded its jurisdiction could not be tested in a state habeas corpus proceeding, the only question for the state court when a writ is sought could be whether the order under which the prisoner was held was issued by a judge or court of the United States. Even a serious dispute about this issue would, it would seem, be one beyond the power of the state court to decide. Apparently the statutes in other states were copied from the New York statute or a common source for the New York statute read the same way it does now as early as 1829. N.Y.Rev.Stat. pt. 3, c. 9, tit. 1, art. 2, § 22 (1829). These statutes were adopted before decisions by the Supreme Court of the United States clarified the lack of power of the states to use habeas corpus to challenge a detention made on Federal order.

It seems clear that the state courts have also been denied power to issue the writ even in cases where there was no Federal court order where "the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the Constitution and laws of the United

States. If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release." Tarble's Case, 13 Wall. 397, 411 (U.S.1871); see Hart & Wechsler, The Federal Courts and the Federal System 388-390 (1953).

The Revisers explain that they decided against a formulation that would embody in New York statutes the rule of Tarble's Case and of the Abelman case. They believe the state writ should be available to prevent illegal imprisonment within the State in all cases except where Federal law prohibits its issuance. Since there is doubt of the wisdom of the Federal position on the matter, this subdivision makes the writ available in the state courts should the United States decide to give up its claim to exclusive jurisdiction.

Subd. 2 of § 1231 and subds. 2 and 3 of § 1252 of the civil practice act are designed to serve the same purpose. The first of these subdivisions appears to require the writ to issue whenever the prisoner is detained for any contempt. Section 1252 appears to require release wherever the imprisonment is based upon a civil contempt by "virtue of a final judgment or decree." This apparent inconsistency between when the writ should issue and when, if the allegations of the petition prove to be true, the prisoner should be released was introduced by the revision of 1880, evidently because of the confusion about what constituted a criminal contempt. See 2 N.Y.Code Civ.Prac. § 2016, note (Throop ed. 1880). Issuing a writ which on its face must result in a remand seems singularly useless.

It is difficult to justify any exception for contempts--whether civil or criminal--to the normal habeas corpus test or illegal detention. If the error is one which ought to be reviewed by appeal there should be no collateral attack, whether by habeas corpus or writ of certiorari. If the detention is one beyond the "jurisdiction" of the court, is should make no difference whether the "order" of commitment was final or not--a distinction that §§ 1231 and 1252, read literally, appear to make.

The law is not clear with respect to the proper mode of attacking a contempt order. If the adjudication, whether criminal or civil, is made by a court of civil jurisdiction, appeal is available under the civil practice act; except that an order punishing for contempt in the "immediate view and presence" of the court is reviewable under article 78 of the civil practice act and § 7801 of CPLR, whatever the nature of the court.

The Code of Criminal Procedure does not apply to reviews of criminal contempts (Code Crim.Proc. § 515), unless prosecution was for the crime of criminal contempt as a misdemeanor under McKinney's Penal Law, § 600. Therefore, since McKinney's Code of Criminal Procedure does not apply, review must be had by civil appeal, an article 78 proceeding in the nature of certiorari (Douglas v. Adel, 269 N.Y. 144, 149, 199 N.E. 35, 38 (1935); Knapp v. Schweitzer, 2 A.D.2d 579, 580, 157 N.Y.S.2d 158 (1st Dep't 1956), aff'd 2 N.Y.2d 913, 141 N.E.2d 825, certiorari granted 355 U.S. 804 (1957) (commitment for contempt for refusing to answer grand jury questions; article 78 proceeding in nature of prohibition) or by collateral attack through habeas corpus. People ex rel. Sarley v. Pope, 230 A.D. 649, 651, 246 N.Y.S. 414, 416 (3d Dep't 1930) (appeal from commitment order and appeal from denial of writ of habeas corpus heard together). The preferred practice is to review by civil appeal. See the full discussion in Matter of Grand Jury, County of Kings (Reardon), 278 A.D. 206, 209, 104 N.Y.S.2d 414, 417 (2d Dep't 1951); see, also, People v. De Feo, 308 N.Y. 595, 127 N.E.2d 592 (1955) (commitment for contempt for refusing to answer grand jury questions); Pawolowski v. Schenectady, 217 N.Y. 117, 111 N.E. 478 (1916); People v. Diefendorf, 281 A.D. 465, 468, 119 N.Y.S.2d 469, 473 (1st Dep't 1953), aff'd 306 N.Y. 818, 118 N.E.2d 824 (1954) ("There has been some confusion in the past as to the proper method of review but we regard it as settled practice now that an order of criminal contempt of the character here involved [juror discussing case outside jury room] is appealable.").

In view of the full review by direct civil appeal afforded, there seems no reason to permit review through a collateral attack by habeas corpus as § 1231 of the civil practice act seems to do. This is particularly true since, after issuing the writ by virtue of the command of § 1231, the court could not release the prisoner unless the committing court in a criminal contempt case lacked "authority to commit" (C.P.A. § 1252) or in a civil contempt case where the "jurisdiction" of the civil court was

"exceeded" or for some other jurisdictional reason set out in C.P.A. § 1253. In short, while apparently permitting a full review of contempt commitments, it is doubtful whether the habeas corpus provisions do so. The practitioner who attempts to use this method instead of appeal, having wended his way through the statutory maze, may find himself against a blank wall. But cf. People ex rel. Sarlay v. Pope, 230 A.D. 649, 651, 246 N.Y.S. 414, 416 (3d Dep't 1930).

Commitment for contempt should not be treated differently from any other commitment. Review of errors should be by appeal and only if there is a jurisdictional defect should habeas corpus be used. The exception for orders summarily punishing for contempt in the presence of the court is retained because of the possible absence of a record. See § 7801 of CPLR and notes thereunder.

Those portions of subd. 2 of §§ 1231 and 1252 which do not deal with contempt appear to prevent an attack on final orders or judgments, or process issued upon such orders or judgments by "a competent tribunal of civil or criminal jurisdiction." The scope of the limitation cannot be determined from the statute, however, but requires a review of what constitutes a "jurisdictional" defect under the cases. As the Court of Appeals stated in Morhous v. New York Supreme Court, 293 N.Y. 131, 135, 56 N.E.2d 79, 81 (1944): "The express statutory limitation was not intended to abridge the privilege of the writ of habeas corpus. Indeed, the Legislature had, under the Constitution of the State, no power to do that. The statute merely formulates the limitation which had generally been applied by the court of Kings Bench in England and by the courts of America."

In the original draft of subd. (a) of this section, the Revisers used the phrase "The person is lawfully detained" and said that the test of "lawfully detained" furnishes as precise a guide as do the sections of the civil practice act. The only sound alternative to such a test is an enumeration which at best can be only suggestive. The change will not result in any diminution of the rights of persons imprisoned; indeed, the grounds for the writ may not be decreased by the legislature. People ex rel. Tweed v. Liscomb, 60 N.Y. 559, 566 (1875). However, in the final draft of this subdivision, the Revisers substituted "the person is not illegally detained" for "the person is lawfully detained" to conform to terminology used generally.

The Third Report further notes that the listing contained in C.P.A. § 1236 is only slightly more helpful than that in §§ 1231 and 1252. Subds. 1, 3, 4 and 6 of C.P.A. § 1236 say no more than that the prisoner shall be discharged when he is detained on the authority of an order which was issued by an officer lacking jurisdiction to issue it. Subd. 5 of § 1236 appears to require release where the prisoner is detained by the wrong person. This is misleading because, in such a case, he should not be released, but should be remanded to the custody of the proper person. Subd. 2 of C.P.A. § 1253 provides for the case of lawful imprisonment where subsequent events entitle the prisoner to discharge. If the mandate to keep the prisoner expired by a condition subsequent, then his continued detention is "illegal" and he would be released under any formulation. If exercise of judgment with respect to the need for continued imprisonment is required, application should be made for a modification of the original order and not by collateral attacks.

Subd. (b) of this section is derived from 28 U.S.C.A. § 2244. It is stated by the Revisers in the Third Report to the Legislature that subd. (b) of this section continues the common law and present position in New York that res judicata has no application to the writ. See, e.g., People ex rel. Lawrence v. Brady, 56 N.Y. 182, 191-92 (1874). Nevertheless, courts do not look with favor on successive applications for the writ which raise no new grounds or supply no new facts, and they may give weight to a prior refusal to grant the writ. Ex parte Hawk, 321 U.S. 114, 118 (1944); Wong Doo v. United States, 265 U.S. 239, 240 (1924); see also Goodman, Use and Abuse of the Writ of Habeas Corpus, 7 F.R.D. 313, 314 ff. (1948); Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 174 (1949).

It is also said that the last paragraph of C.P.A. § 1234 is susceptible of being interpreted in the same way as subd. (b) of this section. It reads as follows: "For failure to ... state any new facts other than were stated in the previous applications the writ on such subsequent application may be vacated without notice or the application may be denied ..."

Subd. (c) of this section is from the second sentence of § 1235 of the civil practice act, substantially unchanged.

Official Reports to Legislature for this section:

3rd Report Leg.Doc. (1959) No. 17, p. 57.

5th Report Leg.Doc. (1961) No. 15, p. 158.

6th Report Leg.Doc. (1962) No. 8, p. 614.

Notes of Decisions (47)

McKinney's CPLR § 7003, NY CPLR § 7003
Current through L.2019, chapter 139. Some statute sections may be more current, see credits for details.

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2011 WL 2177152
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Tolland.

Jason DAY
v.
WARDEN.

No. TSRCV104003580.
|
May 12, 2011.

Opinion

CARL J. SCHUMAN, Judge.

*1 The respondent moves to dismiss the petitioner's latest pro se habeas petition on the ground that the petitioner has filed two previous petitions raising the same grounds. The court conducted a hearing on the motion at which the petitioner appeared and argued in opposition.

The petitioner was convicted of one count of capital felony, four counts of murder, and one count of assault in the third degree in 1991 and received a sentence of life imprisonment without the possibility of parole. The Supreme Court affirmed his conviction in 1995. *State v. Day,* 233 Conn. 813, 661 A.2d 539 (1995).[1] The petitioner was represented at trial by attorneys Patrick Culligan and William Holden and on appeal by attorney Richard Emmanuel.

In 2001, the petitioner filed his first habeas petition, which alleged ineffective assistance of all three of his previous attorneys. After a trial at which attorney James Ruane represented the petitioner, the court, Fuger, J., denied the petition. The habeas court found that "[criminal trial] counsel did a 'superb job' of representing the petitioner, as the state's case, which involved multiple homicide counts, was strong. Despite the petitioner's filing a pro se motion for a speedy trial, and electing to represent himself during jury selection and the first day of evidence, the petitioner's reappointed counsel were able to avoid the death penalty in a case in which one of the murder victims was a five-year-old child." *Day v. Commissioner of Correction,* 86 Conn.App. 522, 525–36, 862 A.2d 309 (2004). 'The petitioner, represented by attorney Lisa Steele, appealed the denial of habeas relief and the Appellate Court affirmed. *Id.*

In 2005, the petitioner filed a second petition alleging ineffective assistance by attorney Ruane. After a trial in 2007 in which the petitioner represented himself, the court, A. Santos, J., denied the petition. On appeal taken by attorney Mary Boehlert on the petitioner's behalf, the Appellate Court affirmed and the Supreme Court denied certification. *Day v. Commissioner of Correction,* 118 Conn.App. 130, 983 A.2d 869 (2009), cert. denied, 294 Conn. 930, 986 A.2d 1055 (2010).

The petitioner's latest pro se petition is at best rambling and, at worst, incomprehensible. To the extent ascertainable, the petitioner appears to allege additional ineffective assistance by all his previous attorneys as well as vague claims concerning false F.B.I. testimony at his criminal trial, violations of the Jencks Act, and denial of confrontation.

Upon review, the court dismisses the claims of ineffective assistance by Culligan, Holden, Emmanuel, and Ruane on the grounds of res judicata and Practice Book § 23–29(3). The latter provides for dismissal when the "petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition." These doctrines fully apply here even if the specifications of ineffective assistance differ from those in the previous cases, because ineffective assistance of the same attorney at the same trial seeking the same relief presents the same ground and cannot be litigated twice. See *Mejia v. Commissioner of Correction,* 98 Conn.App. 180, 187–90, 908 A.2d 581 (2006).

*2 The court dismisses the claim of ineffective assistance against Steele and the freestanding claims of confrontation clause violations at his criminal trial on the ground of abuse of the writ. As the Appellate Court has observed: "[H]abeas corpus has traditionally been regarded as governed by equitable principles ... Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks ... *Negron v. Warden,* 180 Conn. 153, 166 n. 6, 429 A.2d 841 (1980). Indeed, the ability to bring a habeas corpus petition at any time is limited by the equitable doctrine of abuse of the writ based on unnecessary successive petitions. See *Summerville v.. Warden,* 229 Conn. 397, 641 A.2d 1356 (1994)." (Internal quotation marks omitted.) *Dickinson v. Mullaney,* 92 Conn.App. 689, 694

n. 5, 887 A.2d 390 (2005), reversed on other grounds, 284 Conn. 673, 937 A.2d 667 (2007). See *Sherbo v. Manson,* 21 Conn.App. 172, 175, 572 A.2d 378, cert. denied, 215 Conn. 808, 576 A .2d 539 (1990).

In this case, the petitioner had ample opportunity to raise the claim of ineffective assistance against Steele and the free-standing confrontation clause claims in his prior pro se petition. He has no one to blame but himself for failing to do so. Allowance of these additional claims at this point, some twenty years after his conviction, would run contrary to society's "need for finality of convictions." (Internal quotation marks omitted.) *Young v. Commissioner of Correction,* 104 Conn.App. 188, 192, 932 A.2d 467 (2007), cert. denied, 285 Conn. 907, 942 A.2d 416 (2008). The latest petition, insofar as it raises claims that the petitioner could have raised previously, is an "unnecessary successive [petition]." (Internal citation omitted.) *Dickinson v. Mullaney, supra,* 92 Conn.App. at 694 n. 5. It thus constitutes an abuse of the writ.[2]

The only other possible claim concerns attorney Boehlert. The sole allegation in the current petition regarding Boehlert is as follows: "Because appellate attorney Steele failed/refused to raise these issues, appellate attorney Mary Boehlert failed/refused to raise these issues. *Day v. Comm. of Correction,* 118 Conn.App. 130 (2009)."[3] Petition supplement, p. E. There is no specific allegation that Boehlert rendered ineffective assistance of appellate counsel. Moreover, a review of the petition reveals that the phrase "these issues" refers to the free-standing claims of perjury and confrontation clause violations. Because the petitioner did not raise these free-standing issues in his second petition, Boehlert could not possibly have raised them on appeal.

At oral argument on the motion, the petitioner claimed that the petition alleges ineffective assistance against Boehlert because she failed to appeal the issue of whether Judge Dos Santos erred in denying his request to subpoena criminal trial counsel to his second habeas trial. The petition, however, mentions absolutely nothing of this claim. Further, the decision of Judge Dos Santos reveals that trial counsel Patrick Culligan did testify at the habeas hearing. *Day v. Warden,* Superior Court, judicial district of Tolland, Docket No. CV05 4000470, page 1 (August 27, 2007, Dos Santos, J) Finally, on appeal, the Appellate Court decided that the habeas court did not abuse its discretion in denying the petitioner a continuance to subpoena Culligan and Holden. *Day v. Commissioner of Correction, supra,* 118 Conn.App. at 135 n. 4. For all these reasons, to the extent the petitioner has even stated a claim of ineffective assistance against Boehlert, the court dismisses these allegations because the petition "fails to state a claim upon which habeas corpus relief can be granted." Practice Book § 23–29(2).

***3** The petition for a writ of habeas corpus is dismissed. Judgment shall enter for the respondent.

It is so ordered.

All Citations

Not Reported in A.3d, 2011 WL 2177152

Footnotes

1 The decision was overruled in part in *State v. Connor,* 292 Conn. 483, 528 n. 29, 973 A.2d 627 (2009).

2 Although the respondent failed to raise this ground, the court can dismiss a petition "upon its own motion" if it determines that: "any other legally sufficient ground for dismissal of the petition exists." Practice Book § 23–29(5).

3 The court has corrected obvious grammatical or spelling mistakes in the quotation so as not to distract from the substance of the discussion.

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.

Orion JONES,
v.
WARDEN-CHESHIRE.

No. CV990431378S.
|
April 2, 2002.

MEMORANDUM OF DECISION RE MOTION # 101, MOTION TO DISMISS

RICHARD A. ROBINSON, J.

*1 By way of a petition for writ of habeas corpus, dated September 27, 1999, petitioner brought this action alleging that his attorney did not properly represent him (habeas petition paragraph 5e) and that there were other "constitutional magnitude errors" (habeas petition paragraph 5h).

There is no indication on the petition that it was made under oath.

On February 27, 2002, the respondent filed a motion to dismiss the petition. The respondent makes such motion pursuant to the provisions of § 23-22 and 23-29(5) of the Connecticut Practice Book.[1]

On March 28, 2002, the petitioner filed an amended petition.

Section 23-22 of the Connecticut Practice Book concerns habeas corpus petitions. This section provides that:

> A petition for a writ of habeas corpus *shall* be under oath and shall state:
>
> (1) the specific facts upon which each specific claim of illegal confinement is based and the relief requested;
>
> (2) any previous petitions for the writ of habeas corpus challenging the same confinement and the dispositions taken thereon; and
>
> (3) whether the legal grounds upon which the petition is based were previously asserted at the criminal trial, on direct appeal or in any previous petition.

Section 23-29(5) of the Connecticut Practice Book concerns dismissals of habeas corpus actions. This section provides that:

> The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that:
>
> ...
>
> (5) any other legally sufficient ground for dismissal of the petition exists.

Upon hearing oral argument and completing its review of the habeas petition in this matter, the court ascertained that the habeas corpus petition in its file was not notarized and does not appear to comply with the provisions of § 23-22 of the Connecticut Practice Book. Specifically, the petition was not made under oath, and the original petition did not contain "specific facts upon which each specific claim or illegal confinement is based."

As previously stated, on March 28, 2002, the petitioner filed an Amended Petition. The Amended Petition appears to cure the issue concerning the omission of specific facts in its Amended Petition that was filed on March 28, 2002. However, it does not address the issue concerning the requirement of Section 23-22 of the Connecticut Practice Book that a habeas petition be filed under oath. This section provides in pertinent part that:

> A petition for a writ of habeas corpus *shall* be under oath ...

(Emphasis added.)

> "The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be

> accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience ... If it is a matter of substance, the statutory provision is mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory, especially where the requirement is stated in affirmative terms unaccompanied by negative words ... *Doe v. Statewide Grievance Committee,* 240 Conn. 671, 680-81, 694 A.2d 1218 (1997)." (Citation omitted; internal quotation marks omitted.) *State v. Pare,* 253 Conn. 611, 622-23, 755 A.2d 180 (2000) ...
>
> ***2** We have noted, however, that the use of the word shall, though significant, does not invariably establish a mandatory duty ...

State v. Murray, 254 Conn. 472, 489, 490, 757 A.2d 578 (2000).

This court comes to the conclusion that the filing of a habeas petition under oath relates to a matter of substance. In the instant action, neither the original petition, nor the amended petition were filed under oath and therefore the petition does not comply with the provisions of § 23-22 of the Connecticut Practice Book. The respondent's motion to dismiss is therefore *granted* pursuant to the provisions of § 23-29(5) of the Connecticut Practice Book.

All Citations

Not Reported in A.2d, 2002 WL 819213

Footnotes

1 The court notes that the motion to dismiss was not filed with a supporting memorandum of law.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Tolland.

Yves Henry LORTHE
v.
COMMISSIONER OF CORRECTION.

No. CV104003658.
|
April 10, 2013.

JOHN M. NEWSON, J.

I. Procedural History

*1 The petitioner was the defendant in a matter pending in the Judicial District of Stamford where he was charged with murder in violation of General Statutes § 53a–54a. Throughout all proceedings at the trial level relevant to the claims in this petition, he was represented by Attorney Gary Mastronardi (hereinafter "defense counsel"), an attorney privately retained by the petitioner's family. On April 16, 2001, with the advice of defense counsel, the petitioner entered a plea to the charge of murder pursuant to the terms of a plea agreement that would require a presentence investigation report ("PSI") to be prepared and would allow the parties a right to argue for a sentence of anywhere from twenty-five to thirty years to serve. On June 13, 2001, following a contested sentencing hearing, the court, Kavanewski, J., sentenced the petitioner to a sentence of twenty-seven years to serve.

On December 3, 2001, the petitioner filed a prior writ of habeas corpus in the Judicial District of Hartford which was eventually transferred to the Judicial District of Tolland under Docket No. CV 01 0813116. The petitioner was represented in that matter by Attorney Kenneth Fox (hereinafter "prior habeas counsel"), who ultimately filed a motion for leave to withdraw from representation pursuant to *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) (hereinafter "*Anders* motion").[1] The petitioner filed a written objection to the *Anders* motion, however, on April 21, 2004, the court, Kaplan, J., granted the motion to withdraw in a written memorandum of decision and then *sua sponte* dismissed the petition for writ of habeas corpus. On March 14, 2005, the court, Kaplan, J., granted a request to reconsider his grant of the motion to withdraw and the *sua sponte* dismissal of the petition filed by Attorney Martin Zeldis of the Division of Public Defender Services, but denied the relief requested. Attorney Damon Kirschbaum (hereinafter "appellate counsel"), a special public defender, was subsequently appointed to the case and, with the consent of the State's Attorney, first filed a motion asking the habeas court to reopen the judgment of dismissal on June 13, 2005, which was denied. Attorney Kirschbaum then took an appeal on the petitioner's behalf, which was affirmed in *Lorthe v. Commissioner of Correction,* 103 Conn.App. 662, 931 A.2d 348 (2007). He subsequently sought certification to the Supreme Court, which was denied in *Lorthe v. Commissioner of Correction,* 284 Conn. 939, 937 A.2d 696 (2007).

The petitioner commenced the present action by filing a petition for writ of habeas corpus on July 7, 2010. A three-count amended petition was filed on July 11, 2011, asserting claims of ineffective assistance of counsel against defense counsel, prior habeas counsel and appellate counsel. The respondent filed a return on August 12, 2011, generally denying the claims in the petition and also raising the special defenses that the claims of ineffective assistance against defense counsel in count one were successive, barred by the doctrine of res judicata, or barred by the doctrine of collateral estoppel. The petitioner filed a reply to the return on September 12, 2011, and the matter was tried to the court on May 24, June 12 and July 10, 2012. The parties were ordered to submit post-trial briefs, the last of which was timely filed on December 13, 2012. Additional background and procedural history will be related as necessary throughout the remainder of this decision.

II. Law and Discussion

A. SPECIAL DEFENSES

*2 The petitioner raises successive petition, res judicata and collateral estoppel as special defenses. It is the respondent's assertion that the decision by the court, Kaplan, J., granting the *Anders* motion filed by prior habeas counsel constituted a determination on the merits as to the petitioner's claims of ineffective assistance against defense counsel and that the petitioner should now be barred from trying to relitigate those claims.

First, although they appear to be asserted as separate special defense theories by the respondent, claims that the petition is successive and that it is barred by the doctrine of res judicata are actually not separate special defenses at all. *Kearney v. Commissioner of Correction,* 113 Conn.App. 223, 233–34, 965 A.2d 608 (2009). Instead, both are actually applications of the legal concept of claim preclusion. *Id.* "The doctrine of res judicata provides that a former judgment serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made or which might have been made. The doctrine ... applies to criminal as well as civil proceedings and to state habeas corpus proceedings ... However, [u]nique policy considerations must be taken into account in applying the doctrine of res judicata to a constitutional claim raised by a habeas petitioner ... Specifically, in the habeas context, in the interest of ensuring that no one is deprived of liberty in violation of his or her constitutional rights ... the application of the doctrine of res judicata ... [is limited] to claims that *actually have been raised and litigated* in an earlier proceeding. Thus, a habeas petition may be vulnerable to dismissal by reason of claim preclusion only if it is premised on the same ground actually litigated in a previously dismissed habeas petition. [T]he application of the doctrine of claim preclusion to a habeas petition is narrower than in a general civil context because of the nature of the Great Writ. [This] narrowing of the application of the doctrine of res judicata to habeas proceedings is encapsulated in Practice Book § 23–29, which states: 'The judicial authority, may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that ... (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or proffer new evidence not reasonably available at the time of the prior petition ...' (Emphasis added.) *Id.* "[A] petitioner may bring *successive petitions* on the same legal grounds if the petitions seek different relief ... But where successive petitions are premised on the same legal grounds and seek the same relief, the second petition will not survive a motion to dismiss unless the petition is supported by allegations and facts not reasonably available to the petitioner at the time of the original petition." (Emphasis added.) *Mejia v. Commissioner of Correction,* 98 Conn.App. 180, 189, 908 A.2d 581 (2006). Thus, a claim that the petitioner has filed a "successive petition" is simply a way of alleging that the petition violates the narrowed doctrine of res judicata—the doctrine of claim preclusion—as applied to habeas corpus proceedings. *Kearney v. Commissioner of Correction, supra,* 113 Conn.App. at 233–34.

*3 Also, "[d]espite being close cousins, [the doctrines of res judicata and collateral estoppel] are not alternate expressions of the same ... [C]ollateral estoppel operates to bar the reassertion of an issue already fully litigated, [while] res judicata precludes one from raising causes of action, facts or issues that either already were adjudicated or could have been litigated fully in a prior action between the same parties or those in privity with them." *Sellers v. Work Force One, Inc.,* 92 Conn.App. 683, 686, 886 A.2d 850 (2005). "[C]ollateral estoppel, or issue preclusion, is that aspect of res judicata that prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties or those in privity with them upon a different claim ... An issue is *actually litigated* if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined ... An issue is *necessarily determined* if, in the absence of a determination of the issue, the judgment could not have been validly rendered." *Id.*

In the present case, therefore, the question is whether the prior habeas court's granting of the *Anders* motion and dismissing the petition constituted a "determination on the merits" within the meaning of the claim preclusion doctrines above. At the time the petitioner's case was decided, Practice Book § 23–42 provided in relevant part:

> (a) The presiding judge shall fully examine the memoranda of law filed by counsel and the petitioner, together with any relevant portions of the records of prior trial court, appellate and post-conviction proceedings. If, after such examination, the presiding judge concludes that the submissions establish that petitioner's case is wholly frivolous, such judge shall grant counsel's motion to withdraw *and shall consider whether the petition shall be dismissed or allowed to proceed, with the petitioner pro se.*

(Emphasis added.) Therefore, in the first instance, the determination by a court that the *Anders* motion should be granted, which evidenced a finding that there were no non-frivolous issues to present, did not *mandate* dismissal of the petition. Giving the court discretion to allow the petitioner to continue to pursue his claims pro se would seem to run contrary to the notion that a court granting an *Anders* motion has reached the underlying merits of the claims. If so, the very rule cited by the respondent, res judicata, even given its narrower application in habeas corpus proceedings, should have absolutely precluded the court from considering whether the petitioner could continue to pursue those claims. *Kearney v. Commissioner of Correction, supra,* 113 Conn.App. at 233–34; but see *Coleman v. Warden,* Superior Court, Judicial District of Tolland, TSRCV 05 4000751S, TSRCV 08 4002275 (Schuman, J., Aug. 2, 2011) (granting summary judgment at least partly on res judicata grounds as to particular counts in petition where the legal and factual claims were the same as claims contained in a previous petition where an *Anders* motion had been granted). Further support for the conclusion that the granting of an *Anders* motion is not intended to be a final determination on the merits of the claims contained in the petition is the fact that in Section 23–42(a) was modified in 2009, in pertinent part, to state that:

> ***4** If, after such examination, the presiding judge concludes that the petitioner's case is wholly frivolous, such judge shall grant counsel's motion to withdraw *and permit the petitioner to proceed as a self-represented party.*

(Emphasis added.)

Finally, with the exception of the *Coleman v. Warden, supra,* the few other cases that have dealt with this issue directly in the habeas context also support this conclusion. *Gaffney v. Warden,* Superior Court, Judicial district of Tolland, Docket No. CV 05 4000811 (November 5, 2007, Fuger, J.) ("While the judgment of dismissal in the former petition may have been a judgment rendered because there was no merit to the claims, it was a judgment as to the merits but not *on* the merits. Thus, the court concludes res judicata is inapplicable" [emphasis in original]); *State v. Lyles,* 381 S.C. 442, 444–45, 673 S.E.2d 811, 813 (2009) ("[A] decision of the Court of Appeals dismissing an appeal after conducting a review pursuant to *Anders* is not a decision on the merits of the appeal, but simply reflects that the appellate court was unable to ascertain a non-frivolous issue which would require counsel to file a merits brief"); *U.S. ex rel. Frye v. Jungwirth,* 05 C 2279, 2006 WL 2437963 (N.D.Ill. Aug. 21, 2006) (dismissal of a defendant's appeal on grounds of res judicata based solely on previous granting of *Anders* motion improper "because, in light of appellate counsel's *Anders* motion, the issues continued in the petition were neither raised nor adjudicated on direct appeal," but upholding judgment on other grounds); *People v. Jones,* 364 Ill.App.3d 1, 5, 846 N.E.2d 947 (2005) ("We also find that res judicata does not preclude defendant's postconviction allegations because his direct appeal was decided on appellate counsel's *Anders* motion. Accordingly, our decision did not address any specific issue"); see also *Cayer Enterprises, Inc. v. DiMasi,* 84 Conn.App. 190, 194, 852 A.2d 758 (2004) (In considering a defense of res judicata, our Supreme Court has stated that "[t]he appropriate inquiry ... is whether the party had an *adequate opportunity to litigate the matter in the earlier proceeding* ... If not, res judicata is inappropriate ... [A] pretrial dismissal ... is not the logical or practical equivalent of a full and fair opportunity to litigate" [Citations omitted; emphasis in original.])

Therefore, based on the above, the court finds that the prior dismissal of a petition for writ of habeas corpus based solely on the granting of an *Anders* motion is not a determination on the merits of the claims within that petition such as would subject them to dismissal on grounds of res judicata when raised in a subsequent petition for writ of habeas corpus.

B. COUNT ONE—INEFFECTIVE ASSISTANCE—ATTORNEY MASTRONARDI

The petitioner claims that his criminal defense counsel was deficient in numerous ways. Generally, the petitioner claims that defense counsel failed to conduct a proper investigation into the facts of the case and potential defenses, failed to advise the petitioner fully about potential defenses, failed to retain a psychiatrist or to seek funding for one through the courts, failed to properly advise the petitioner of the terms, conditions and consequences relevant to his guilty plea, failed to secure a Haitian–Creole interpreter for him, that counsel coerced and coached the petitioner through the plea canvas, failed to advise the petitioner that he would not be eligible for parole following a murder conviction, and that counsel failed to properly prepare for and to present mitigating

evidence on the petitioner's behalf at sentencing.

*5 "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant ." (Internal quotation marks omitted.) *Hill v. Lockhart,* 474 U .S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (citing *North Carolina v. Alford,* 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

> [T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? On those facts would evidence seized without a warrant be admissible? Would the trier of fact on those facts find a confession voluntary and admissible? Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.
>
> That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing.

McMann v. Richardson, 397 U.S. 759, 769–70, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). "[The United States Supreme Court] has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington,* 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled." *Id.,* at 685.

"Where ... a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the 'range of competence demanded of attorneys in criminal cases ... [A] defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann.*" (Internal quotation marks omitted.) *Hill v. Lockhart, supra,* 474 U.S. at 56–57. "[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.,* at 57. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland v. Washington, supra,* 466 U.S. at 688. Even if the petitioner is able to show that counsel's performance was constitutionally deficient, the petitioner must also meet the second prong of the test, which "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the second prong of the test, the petitioner must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart, supra,* 474 U.S. at 59; see also *Johnson v. Commissioner of Correction,* 285 Conn. 556, 576, 941 A.2d 248 (2008). "In its analysis, a reviewing court may look to the performance [1st] prong or to the prejudice [2nd] prong, and the petitioner's failure to prove either is fatal to a habeas petition." *Hall v. Commissioner of Correction,* 124 Conn.App. 778, 783, 6 A.3d 827 (2010), cert. denied, 299 Conn. 928, 12 A.3d 571 (2011).

*6 The petitioner has failed to sustain his burden of proof as to any of his claims that he did not understand English, that counsel failed to properly advise him of the terms, conditions and consequences of his guilty plea, or that his plea was not knowingly, voluntarily and intelligently made.[2] The audio CD of the plea canvass provides unquestioned proof that the petitioner was fully aware of the terms, conditions, range and direct consequences of his plea. The petitioner clearly responds "guilty" when asked how he pleaded to the charge of murder,[3] and then proceeds to respond without hesitation as the court engages him in a thorough and detailed review of his rights and the conditions of the plea agreement.[4] There is no credible sign that the petitioner was not able to fully understand the court's questioning in English, and he responds that he has no questions to ask of the court or defense counsel when provided an opportunity to do so by the court.[5] There is also no credible proof to support the petitioner's claim that he was coerced through the plea canvass by defense counsel. The audio of the plea canvas is sensitive enough that you can hear defense counsel whispering to the petitioner during the one instance where the petitioner indicates he needs to ask him a question, but defense counsel is otherwise silent throughout the

canvass.[6] In sum, it is clear that the petitioner's guilty plea was made knowingly, intelligently and voluntarily in every sense of the constitution and that he had been properly advised and prepared by defense counsel.

The petitioner also alleges that defense counsel failed to advise him that he would not be eligible for parole if convicted of murder. There was no credible evidence that the petitioner was ever concerned about parole eligibility as making a difference in whether he would enter a plea. Unless and until a petitioner made defense counsel aware that parole eligibility was a substantive part of his consideration of the plea agreement, there was no independent duty for defense counsel to advise him of such. *Hall v. Commissioner of Correction, supra,* 124 Conn.App. at 784–85.

Based on the above, the petitioner has failed to prove that his defense counsel was deficient in any way as to his advice to the petitioner concerning the guilty plea. *Strickland v. Washington, supra,* 466 U.S. at 688. Even if the petitioner could have proven that counsel's representation was deficient, he still could not establish prejudice, because there was no credible evidence presented that he was otherwise prepared to reject the plea offer and proceed to trial. *Hill v. Lockhart, supra,* 474 U.S. at 59. Therefore, the petitioner's claims fail. *Hall v. Commissioner of Correction, supra,* 124 Conn.App. at 783.

The petitioner has also failed to establish that defense counsel failed to properly consider and advise him of any potential defenses to the charge of murder, such as manslaughter in the first degree[7] or self-defense or defense of others.[8] Some additional facts are necessary to address this claim.

*7 The facts of the case that could reasonably have been found were that the victim had a verbal and possibly physical dispute involving some pushing with the petitioner's mother and or father at the petitioner's residence. There is no evidence from any of the other witnesses that the victim was armed with anything at this time or that either of the petitioner's parents had been physically injured. After the victim had left the area, the petitioner, angered at the disrespect he believed had been shown to his parents, took one or two large kitchen knives from his home and left in his car to go looking for the victim. When he found the victim approximately ten or more minutes later, the victim was standing unarmed beside a vehicle talking to some friends and, even according to the petitioner's own statement to police, immediately attempted to retreat when he saw the petitioner was armed with a knife. The petitioner, again, according to his own admission, pursued the victim as he attempted to flee around a car or telephone pole. At some point, the victim slipped or tripped on a telephone pole wire and fell backwards, and the petitioner stabbed him with a fatal blow in the area of the neck and upper chest.

"One who uses a deadly weapon on the vital part of another will be deemed to have intended the probable result of that act [and] from such a circumstance a proper inference may be drawn that there was an intent to kill." *State v. Aponte,* 259 Conn. 512, 519–20, 790 A.2d 457 (2002). The petitioner presented no credible evidence that he was prepared to go to trial based on the overwhelming evidence against him for murder and a complete lack of any evidence to credibly support any of the proposed defenses. Therefore, he has failed to establish he was prejudiced. *Hill v. Lockhart, supra,* 474 U.S. at 59. Additionally, and for the same reasons as above—the substantial evidence of his intent to kill and lack of any credible defenses—the court finds that there was no deficiency even if defense counsel did fail to discuss the defenses of manslaughter with the petitioner, because there was no credible evidence upon which defense counsel could have reasonably relied to advise the petitioner that such a defense had any reasonable possibility of succeeding. *Strickland v. Washington, supra,* 466 U.S. at 688. Based on all the same reasoning, since there was no credible evidence presented that either the petitioner or his parents were ever in any actual physical danger at the time he attacked the victim, there was also no deficiency in defense counsel's alleged failure to have advised the petitioner as to self-defense or defense of others. *Id.* Therefore, for having failed to establish prejudice or deficient performance, the petitioner's claims fail. *Hall v. Commissioner of Correction, supra,* 124 Conn.App. at 783.

As to the petitioner's claim that defense counsel failed to provide the psychiatrist who had been retained by the defense team to look into the possibility of a defense of extreme emotional disturbance with information about the petitioner's culture, childhood and upbringing, the petitioner failed to present that expert, or any comparable witness, to testify how, if at all, such information would have modified the results of the psychiatrist's evaluation in a way that would have been beneficial to the petitioner. *Nieves v. Commissioner of Correction,* 51 Conn.App. 615, 622–24, 724 A.2d 508, cert. denied, 248 Conn. 905, 731 A.2d 309 (1999) (it is petitioner's burden to present witnesses or information at the habeas trial which petitioner claims defense counsel failed to obtain or use at the trial level). The petitioner's failure to do so is fatal to this claim. *Id.*

*8 The petitioner also claims that defense counsel was deficient for failing to attempt to obtain funding for a full psychiatric evaluation pursuant to *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), which holds that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.,* at 83. In short, the holding in *Ake* is inapplicable to the present case, if for nothing else, because the petitioner has failed to present any credible evidence before the habeas court to establish that his sanity was reasonably in question at the time he committed this offense. Additionally, unlike *Ake,* the petitioner here was not indigent. The petitioner's parents, who had paid defense counsel's initial retainer, were simply unwilling, as opposed to being unable, to pay the additional retainer required for a full evaluation after discussing with defense counsel that the initial report indicated that further evaluation was not likely to provide any beneficial results.[9] Therefore, there was no deficiency in counsel's representation, nor was there any prejudice suffered by his failure to pursue funding under *Ake. Hall v. Commissioner of Correction, supra,* 124 Conn.App. at 783.

The remainder of the petitioner's claims are regarding the PSI report and sentencing hearing. The essence of the petitioner's claims are that defense counsel was ineffective either because he failed to attend the presentence investigation, failed to correct certain inaccuracies within the presentence investigation, or failed to present sufficient evidence of mitigation at sentencing. In one way or another, the petitioner claims that the resulting prejudice was that he received a harsher sentence than he would have. In support of his claim, the petitioner presented substantial evidence about his childhood and upbringing in Haiti. Although the petitioner's upbringing was significantly harsh, the court finds that there was nothing presented that would lead this court to the conclusion that there is any reasonable probability to believe that the sentencing court would have given the petitioner a lesser sentence even if that information had been presented. The court also does not find any reasonable probability, even assuming all the mistakes and misstatements alleged by the petitioner in the presentence investigation report existed, that there would have been a different result at sentencing had defense counsel made those corrections. Additionally, defense counsel testified that he delivered comments in letter form to the court, which the court indicated it had read, referencing certain facts that he thought should be brought to the court's attention, and the petitioner has failed to present anything to support the notion that counsel was required to have brought those things to the court's attention verbally instead. In sum, the petitioner has failed to establish that any of the above resulted in any prejudice. As such, this claim must also fail. *Hall v. Commissioner of Correction, supra,* 124 Conn.App. at 783.

*9 In sum, the petitioner has failed to establish a claim of ineffective assistance against trial counsel on any of the claims presented. *Id.*

C. COUNT TWO—INEFFECTIVE ASSISTANCE AGAINST HABEAS COUNSEL

As the petitioner has failed to establish a claim of ineffective assistance against his defense counsel, he cannot, as a matter of law, prevail on his claim of ineffectiveness against habeas counsel, because he cannot establish prejudice—that, but for habeas counsel's errors, he would have been able to establish that defense counsel was ineffective. (Citations omitted; internal quotation marks omitted.) *Lozada v. Warden,* 223 Conn. 834, 842–44, 613 A.2d 818 (1992). As such, the petitioner's claim against habeas counsel also fails. *Id.*

D. COUNT THREE—INEFFECTIVE ASSISTANCE AGAINST APPELLATE COUNSEL

"[W]hen a petitioner is claiming ineffective assistance of appellate counsel, he must establish that there is a reasonable probability that but for appellate counsel's error, the petitioner would have prevailed in his direct appeal." (Internal quotation marks omitted.) *Davis v. Commissioner of Correction,* 117 Conn.App. 737, 740, 980 A.2d 933 (2009), cert. denied, 294 Conn. 923, 985 A.2d 1062 (2010). Based on the rulings above that the petitioner has failed to establish that defense counsel was ineffective, and, in turn, cannot establish that habeas counsel was ineffective, he would also be unable to establish that he was prejudiced by any alleged deficiencies in appellate counsel's performance. As such, this claim too must fail. *Id.*

III. Conclusion

Based on the foregoing, the petition for writ of habeas corpus is DENIED.

If the petitioner wishes to appeal this ruling, then counsel shall prepare and submit a judgment file to the clerk within thirty (30) days. All other necessary appellate forms shall be filed within the time-frames set forth in applicable Practice Book and/or statutory sections.

All Citations

Not Reported in A.3d, 2013 WL 1849280

Footnotes

1 "[Counsel's] role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Anders v. California, supra,* 386 U.S. at 744. This rule has also been codified in Practice Book § 23–41.

2 Exhibit P2–CD–ROM, File ID–00–001115 recording dB increase (audio of plea and canvass).

3 Exhibit P2–CD–ROM, File ID–00–001115, at 1:52.

4 Exhibit P2–CD–ROM, File ID–00–001115.

5 Exhibit P2–CD–ROM, File ID–00–001115. Additionally, the evidence, also reflected that the petitioner was taking 11th and 12th grade English classes at or around the time of this incident through a home tutor. Although the tutor spoke to the petitioner in Haitian–Creole, all of the tests and homework were given in English.

6 Exhibit P2–CD–ROM, File ID–00–001115.

7 General Statutes § 53a–55 Manslaughter in the first degree (a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed the proscribed act or acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a–54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

8 See General Statutes § 53a–19. Use of physical force in defense of person.

9 Exhibit D, Letter from Dr. Kenneth Selig, January 2, 2001.

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2013 WL 7854283
Only the Westlaw citation is currently available.
United States District Court,
S.D. Georgia,
Savannah Division.

Hezekiah MURDOCK, Petitioner,
v.
UNITED STATES of America, Respondent.

Nos. 4:12–cv–251, 4:10–cr–159.
|
Signed Aug. 29, 2013.

Attorneys and Law Firms

Hezekiah Murdock, Miami, FL, pro se.

R. Brian Tanner, James D. Durham, U.S. Attorney's Office, Savannah, GA, for Respondent.

ORDER

B. AVANT EDENFIELD, District Judge.

I. INTRODUCTION

1** Before the Court is Hezekiah Murdock's Application For a Certificate Of Appealability ("COA"). ECF No. 19. Murdock seeks to appeal the dismissal of his 28 U.S.C. § 2255 petition based on the appeal and collateral attack waivers in his plea agreement. *Id.* Because jurists of reason could debate whether such waivers bar ineffective assistance of counsel claims, like Murdock's, based on counsel's alleged failure to file a requested appeal, the Court ***GRANTS Murdock a COA.

II. BACKGROUND

After indictment on gun and drug charges, Murdock agreed to plead guilty to a lesser included offense. ECF Cr. No. 631.[1] In exchange, the government agreed not to seek a sentencing enhancement under 21 U.S.C. § 851. *Id* Murdock also agreed to waive his right to a direct appeal, and his right to collaterally attack his conviction and sentence on any ground.[2] *Id.* at 7. The Court accepted Murdock's plea and sentenced him to 160 months. ECF Cr. Nos. 686 at 32–34; 687 at 7.

Murdock took no direct appeal. His attorney, Tom Withers, attests that at no time did Murdock direct him to file an appeal and that he specifically advised Murdock that the plea agreement's appeal waiver prevented him from doing so. ECF Cr. No. 696–1 at 3. Murdock, on the other hand, says that he and his family tried numerous times to get Withers to file an appeal but were unsuccessful. ECF Cr. No. 678 at 16.

Murdock filed this 2255 petition asserting (1) ineffective assistance of counsel based on Withers' alleged refusal to file an appeal on Murdock's behalf; and (2) a breach of the plea agreement by the government. ECF No. 1. This Court dismissed Murdock's claims solely because of the appeal and collateral attack waivers in the plea agreement. Murdock appeals that decision.

III. DISCUSSION

"Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA...." *Miller–El v. Cockrell,* 537 U.S. 322, 335–36, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *see* 28 U.S.C. § 2253(c). The Court will issue a COA "where a petitioner has made a substantial showing of the denial of a constitutional right." *Miller–El,* 537 U.S. at 336; *see also* 28 U.S.C. § 2253(c)(2). Petitioners—must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.* (internal quotations omitted).

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that

> jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

*2 *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (emphasis added).

Here, the Court denied Murdock habeas relief because the collateral attack and appeal waivers in his plea agreement covered "any ground" of attack, including claims like Murdock's. ECF No. 13 at 11. The Court reasoned that *Roe v. Flores–Ortega's*[3] holding-that a lawyer's disregard of client instructions to file an appeal constitutes per se ineffective assistance-did not control this case, noting that "*Flores–Ortega* never addressed whether the presumed prejudice from an attorney's mishandling an appeal 'has any force, let alone controls, where the defendant has waived his right to appellate and collateral review." "ECF No. 13 at 9 (quoting *United States v. Mabry,* 536 F.3d 231, 240 (3d Cir.2008)).

Reasonable jurists could-and, in fact, do-disagree that Murdock's appeal and collateral attack waivers stymie his 2255 petition. *Compare United States v. Higgins,* 459 F. App'x 412, 413 (5th Cir.2012) (holding that *Flares–Ortega* applies even when a defendant waives his right to direct appeal and collateral attack), *with United States v. Morgan,* 284 F. App'x 79, 83 (4th Cir.2008) (holding that collateral attack waivers bar ineffective assistance claims like Murdock's). Although nothing specific in *Flores–Ortega* suggests that the right to appeal should trump a waiver in a plea agreement, that case does hold that attorney actions like those Murdock alleges Withers took (or did not take) effectively create a presumption of ineffective assistance. 528 U.S. at 476–78.

Because it is debatable among jurists of reason, the Court ***GRANTS*** Murdock a COA on the following issue:

Whether collateral attack and appeal waivers bar assertion of ineffective assistance of counsel claims predicated on counsel's disregard of his client's instruction to file a direct appeal.

All Citations

Not Reported in F.Supp.2d, 2013 WL 7854283

Footnotes

1 Record citations in this format are to Murdock's criminal case docket, 4:10–cr–159.

2 Murdock did not waive his right to appeal a sentence beyond either the statutory limit or one that exceeded the guidelines range. Since his sentence fell within the guidelines and statutory limit, neither waiver exception applies.

3 528 U.S. 470, 476–78, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

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2019 WL 1933645
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Tolland at Rockville.
Edwin SANCHEZ #239527

v.

COMMISSIONER OF CORRECTION
CV144005889
|
April 4, 2019

Hon. John M. Newson

I. Procedural History

*1 The petitioner was the defendant in a matter in the Judicial District of New Britain, where he was charged with murder and conspiracy to commit murder. He was represented at the trial level by Attorney Thomas Farver, and elected to be tried by a jury. The following are the facts that could have been reasonably found by the jury:

> Darence Delgado was murdered on May 2, 1995, on North Street in New Britain. Prior to the murder, Jose Pabon was with the defendant on Willow Street, across the street from a basketball court where Delgado and Jay Vasquez were talking. Pabon was a neighbor of the defendant. That afternoon, the defendant asked Pabon to retrieve a gun that Vasquez had left at Pabon's house. After returning with the gun, Pabon noticed that Delgado was no longer at the basketball court. Pabon offered the gun to the defendant, but the defendant told him to hold on to it. The defendant then told Pabon to walk with him to the corner of North and Willow Streets.
>
> When they arrived at the corner, the defendant told Pabon, "When I start shooting, you shoot." Turning onto North Street, they saw Vasquez and Delgado, who was sitting on a bicycle, approximately twenty-five feet away. The defendant approached them while Pabon remained at the corner. The defendant looked at Pabon and nodded his head. He then pulled out a black nine millimeter handgun, aimed it at Delgado's upper body and opened fire from close range. Delgado fell to the ground and the defendant continued to shoot him. The defendant turned around, looked at Pabon and spread his arms. Pabon pulled out the gun he had retrieved and fired four shots at Delgado. The defendant turned toward Delgado and again fired at him. The defendant and Pabon then ran from the scene and hid their guns.
>
> A week or so after the shooting, Pabon saw Miguel Colon carrying the gun that the defendant had used to shoot Delgado. Pabon and Colon smashed it with hammers and wrenches, destroying all but the barrel of the gun. They wrapped the barrel in bags and buried it in Pabon's backyard. The police later seized that barrel. Forensic testing revealed that it was a nine millimeter barrel and that the intact nine millimeter bullet removed from Delgado's body during the autopsy was consistent with having been fired from this barrel.

State v. Sanchez, 84 Conn.App. 583, 585-86, 854 A.2d 778, cert. denied, 271 Conn. 929, 859 A.2d 585 (2004). The jury returned verdicts of guilty on both charges on January 24, 2000, and the petitioner was subsequently sentenced to a total effective sentence of sixty years to serve. The petitioner appealed his convictions, which were affirmed. *Id.* The petitioner also filed a prior petition for habeas corpus collaterally attacking his convictions on November 2, 2004. Following a trial, that petition was denied; *Sanchez v. Warden,* Superior Court judicial district of Tolland, Docket No. CV04-4000221 (Newson, J., Dec. 15, 2011); and a subsequent appeal from that decision was dismissed. *Sanchez v. Commissioner of Correction,* 147 Conn.App. 903, 90 A.3d 934 (2013).

*2 The petitioner commenced the present action on December 20, 2013. The amended petition dated October 29, 2018, alleges four separate counts: Count One, ineffective assistance of criminal trial counsel; Count Two, ineffective assistance of prior habeas counsel; Count Three, actual innocence; and Count Four, denial of the right to due process because of the State's failure to disclose an agreement with a witness and also because of an improper jury instruction. The respondent filed a return[1] generally denying the allegation in the petition, and also raised the defense of procedural default to the petitioner's due process claims. The petitioner filed a reply refuting the respondent's procedural default defenses.

The trial commenced on October 30, 2018, where the Court raised, pursuant to Practice Book § 23-29, whether

Counts One, Three, and the claim of prosecutorial misconduct in Count Four were barred by *res judicata,* because the petitioner had raised and litigated those claims in previous actions. The Court also raised the issue of whether the claim of due process violation because of an improper jury instruction should not be dismissed on grounds of procedural default under Practice Book § 23-29(5), the "catchall" section. The parties were given the opportunity following the close of evidence to submit post-trial briefs on those issues. Further factual and procedural background will be addressed as needed throughout this decision.

II. Law and Discussion

Motion to Dismiss Count One

"The doctrine of res judicata provides that a former judgment [on the merits] serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made *or which might have been made* ..." (Emphasis added.) *Johnson v. Commissioner of Correction,* 168 Conn.App. 294, 305, 145 A.3d 416, cert. denied, 323 Conn. 937, 151 A.3d 385 (2016). "[I]n the habeas context, in the interest of ensuring that no one is deprived of liberty in violation of his or her constitutional rights ... the application of the doctrine of res judicata ... *[is limited] to claims that actually have been raised and litigated in an earlier proceeding.*" (Emphasis added.) *Carter v. Commissioner of Correction,* 133 Conn.App. 387, 393, 35 A.3d 1088 (2012). "[A] petitioner may bring successive petitions on the same legal grounds if the petitions seek different relief ... But where successive petitions are premised on the same legal grounds and seek the same relief, the second petition will not survive a motion to dismiss unless the petition is supported by allegations and facts not reasonably available to the petitioner at the time of the original petition." *Id.*

Count One of the present petition alleges ineffective assistance against the petitioner's criminal trial counsel based on various claims of failure to investigate witnesses, failure to conduct a more thorough factual investigation, and for abandoning the theory that the shooting of the victim was an unrelated gang retaliation perpetrated by other parties in the area. Although stated in somewhat different terms, the petitioner made nearly identical claims of ineffective assistance against his criminal trial counsel in CV04-4000221, and the present petition fails to allege any new facts or to set forth any new evidence not reasonably discoverable by the petitioner at the time of his prior habeas. Both petitions also seek the same relief, that the Habeas Court vacate the petitioner's conviction and order him released. Therefore, the claim of ineffective assistance against trial counsel in Count One is barred by the doctrine of *res judicata,* and is dismissed. *Id.*

Motion to Dismiss Count Three

***3** Count Three of the present petition claims actual innocence and asserts that the basis is that Angel Vasquez, Efrain Padua, and Juan Vazquez are expected to testify that petitioner was not the shooter of the victim. Specifically, the petition alleges that Angel Vazquez "will testify that he gave false testimony" that the petitioner was the shooter, that Efrain Padua "will testify that [the petitioner] was not the shooter," and that Juan Vazquez "will testify that the petitioner ... was not the shooter and that that he would have testified during the trial that Ian Tardiff and Ramon Pabon" were the actual shooters.

The petitioner also made a claim of actual innocence in Count Two of CV04-4000221, where he alleged that the victim was "killed by Mr. [Ramon] Pabon and one or more other persons" and that "Mr. Pabon in fact falsely testified against [the petitioner] to obtain the benefits he received [in a plea deal]." The request for relief in the current and former petition was for the petitioner's convictions to be vacated. The issue raised by the Court was whether the prior actual innocence claim, based on an allegation that one witness falsely testified, barred a subsequent actual innocence claim resting on a claim that a separate witness falsely testified about the same subject. More specifically, the question is whether the petitioner has asserted new facts or new evidence not reasonably discoverable at the time of the prior claim. Practice Book § 23-29(3).

To the extent that the present claim of actual innocence rests on allegations related to testimony offered by Juan Vazquez, that cannot be said to be information that could not have been discovered through due diligence at the time of the prior habeas, because he testified as a witness at the trial of CV04-4000221. Likewise, any information offered through Angel Vazquez would easily have been

discovered through due diligence, since he was a witness who testified against the petitioner at his criminal trial, and the petitioner himself referenced his allegedly false testimony when the petitioner testified before this Court in CV04-4000221. Even if the Court assumes the information credible that petitioner's trial counsel was prohibited from speaking to Angel Vasquez prior to the criminal trial by Mr. Vasquez's attorney, there is no evidence that he was similarly unavailable or unwilling to speak to anyone prior to the trial of CV040-4000221 nearly 11 years later. Finally, to the extent this "actual innocence" claim relies on testimony from Efrain Padua that the petitioner was hiding in a store vestibule at the time of the shooting, this also is not "newly discovered" evidence, it is merely the petitioner offering information he testified to in CV04-4002211 through a different witness.

In sum, the petitioner previously raised a claim of actual innocence in CV04-4000221, which was denied, and the present allegations fail to offer new facts or evidence that could not have been discovered through reasonable diligence at the time of the prior habeas trial. In fact, this Court finds that the current claim rests on information that was actually known to the petitioner at the time of the prior habeas proceeding. Since the petitioner also seeks the same relief now as he did in CV04-4000221, this claim is also barred on ground of *res judicata* and is dismissed. *Carter v. Commissioner of Correction, supra*, 133 Conn.App. at 393.

Motion to Dismiss Count Four

In Count Four, the petitioner alleges two separate violations of his right to due process at the trial level. The first claim asserts that he was denied due process because of the State's failure to disclose the full details of a pretrial agreement with a Jose Pabon, a cooperating witness. The Court raised the issue of whether *res judicata* barred the petitioner from litigating the issue here, since he raised a similar claim on direct appeal. Upon a more thorough review of the Appellate decision, however, the actual substance of the petitioner's attack on the State's deal with his coconspirator was whether allowing the co-conspirator, also a cooperating witness, to plead to a non-conspiracy offense undermined the legal ability to prosecute him for "conspiracy." *State v. Sanchez, supra*, 84 Conn.App. at 593. Therefore, consideration of the claim framed here would not be barred by *res judicata. Carter v. Commissioner of Correction, supra*, 133 Conn.App. at 393.

***4** The second claim in Count Four is that the petitioner was denied his right to a fair trial "when the Judge improperly instructed the jury regarding *double jeopardy,* which unfairly prejudiced the petitioner" in violation of his due process rights. The Court raised the issue whether this claim should be dismissed on grounds of procedural default under the authority of the "catchall" provision of Practice Book § 23-29, subsection (5).[2] In re-considering *Diaz v. Commissioner of Correction*, 157 Conn.App. 701, 706-07, 117 A.3d 1003 (2015), appeal dismissed, 326 Conn. 419, 165 A.3d 147 (2017) and *Barlow v. Commissioner of Correction,* 150 Conn.App. 781, 786-87, 93 A.3d 165 (2014), however, the Court has come to the conclusion that these decisions foreclose a Court from *sua sponte* raising procedural default, even under the "catch-all" provision of § 23-29. *Diaz v. Commissioner of Correction, supra*, 157 Conn.App. at 706.[3]

Since the respondent did raise procedural default as a special defense in its return, the Court will address the claim on that basis. "Generally, [t]he appropriate standard for reviewability of habeas claims that were not properly raised at trial ... or on direct appeal ... because of a procedural default is the cause and prejudice standard. Under this standard, the petitioner must demonstrate good cause for his failure to raise a claim at trial or on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition ... [T]he cause and prejudice test is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, inadvertence or ignorance ... Once the respondent has raised the defense of procedural default in the return, the burden is on the petitioner to prove cause and prejudice ... Because [c]ause and prejudice must be established conjunctively, we may dispose of this claim if the petitioner fails to meet either prong." (Citations omitted, internal quotation marks omitted.) *Zabian v. Commissioner of Correction,* 115 Conn.App. 144, 152, 971 A.2d 822 (2009).

The Court must first note that the written petition specifically claims that the jury instruction error was related to "double jeopardy," while the petitioner's post-trial brief on the matter, and the evidence elicited at trial, addressed whether the trial court's *Pinkerton* instruction on vicarious conspiratorial liability was erroneous because it eliminated one of the elements of the charge. The evidence adduced at trial also related to the *Pinkerton* charge. This is important, because the claim asserted in the post-trial brief rests on different factual grounds, and expresses a different legal theory, than the

allegations specified in the complaint. Given the respondent cross examined the petitioner's witness on the *Pinkerton* evidence, and did not otherwise raise an objection that it fell outside of the complaint, the Court will assume that the respondent was either aware that the petition contained a scrivener's error, or simply decided not to object that the evidence offered appeared to be beyond the scope of the petition.[4] In order to be fair to both sides, however, the Court will address the special defense of procedural default as if it were addressed to both "double jeopardy" and the *Pinkerton* instruction.

***5** Assuming that the intended claim was the "double jeopardy" claim reflected in the petition, there is nothing in the record of this case that the petitioner ever raised any claim regarding his "double jeopardy" rights prior to this petition. A "double jeopardy" claim is clearly one of constitutional magnitude that should be raised before the trial court. E.g., *State v. Price,* 208 Conn. 387, 390-91, 544 A.2d 184 (1988) (failure to raise double jeopardy claim prior to trial will be considered a waiver of the defense against prosecution). The petitioner has also offered no evidence before this Court as to any reason why the claim was not raised before the trial court, or as to the prejudice he suffered. As such, the due process claim on grounds of "double jeopardy" was procedurally defaulted and is dismissed. *Zabian v. Commissioner of Correction, supra,* 115 Conn.App. at 152.

Alternatively, assuming that the due process claim was that the *Pinkerton* vicarious liability jury instruction was erroneous, the Court also finds that claim has been procedurally defaulted. *Id.* First, there is nothing in the petition supporting the assertions in the petitioner's post-trial brief that the "cause" for failing to pursue this claim was based on trial counsel's ineffectiveness, nor did the petitioner elicit any such evidence from trial counsel. There was evidence elicited from trial counsel as to whether he was aware of, and generally objected to, the *Pinkerton* charge, because he believed the conspiracy instruction to the jury went beyond the original charges, *but* not as to whether he was aware, or why he failed to object to the jury instruction for allegedly being erroneous or missing an element. There was also no evidence presented before this Court as to why the claimed instructional error was not raised on appeal, or in the prior habeas petition. In other words, there is no evidence to support the "cause" for the petitioner missing several prior opportunities to have raised this issue. As such, this claim, too, is procedurally defaulted, and is dismissed. *Id.*

Count Two—Ineffective Assistance of Prior Habeas Counsel

The petitioner's sole remaining claim, which the Court will address on its merits, is the claim that prior habeas counsel, Attorney Joseph Visone, rendered ineffective assistance in representing the petitioner in TSR-CV04-4000221. Specifically, the petitioner alleges that Attorney Visone was ineffective for not presenting the testimony of Efrain Padua and the victim's mother,[5] failed to properly question Juan Vazquez about his knowledge of the actual shooters, and failed to present evidence that the shooting of the victim was a gang-related retaliation.[6] To succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ... has two components. First, the defendant must show that counsel's performance was deficient ... Second, the defendant must show that the deficient performance prejudiced the defense. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable ... Only if the petitioner succeeds in what he admits is a herculean task will he receive a new trial." (Citations omitted.) *Lozada v. Warden,* 223 Conn. 834, 842-44, 613 A.2d 818 (1992). "In its analysis, a reviewing court may look to the performance [1st] prong or to the prejudice [2nd] prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Internal quotation marks omitted.) *Hall v. Commissioner of Correction,* 124 Conn.App. 778, 783, 6 A.3d 827 (2010), cert. denied, 299 Conn. 928, 12 A.3d 571 (2011).

***6** With regards to Juan Vazquez the Court first notes that Attorney Joseph Visone did not testify in this matter. While calling the attorney in question is not a legal requirement in pursuing a claim of ineffectiveness, the trial Court recognizes the general presumption of competence and deference afforded to trial counsel in the strategic decisions on which witnesses to call and the questions to ask those witnesses. "[T]here is a strong presumption that the trial strategy employed by ... counsel is reasonable and is a result of the exercise of professional judgment ... It is well established that [a] reviewing court must view counsel's conduct with a strong presumption that it falls within the wide range of reasonable professional assistance and that a tactic that appears ineffective in hindsight may have been sound trial strategy at the time." (Citations omitted; internal quotation marks omitted.) *Boyd v. Commissioner of Correction,* 130 Conn.App. 291, 297-98, 21 A.3d 969, 974, cert. denied, 302 Conn. 926, 28 A.3d 337 (2011).

Notwithstanding, the petitioner confuses ineffective assistance in his prior habeas with the lack of credibility of his witness.

This Court is in the unique position that it personally heard Juan Vazquez testify at the prior habeas, as well as now. First, the witness did not add anything substantive to the testimony he provided in 2011. This is significant, because the petitioner's burden in showing prejudice requires some evidence that current habeas counsel was able to elicit some substantive and material information from this witness that prior habeas counsel failed to. *Hall v. Commissioner of Correction, supra*, 124 Conn.App. 783. Additionally, the Court did not find Mr. Vazquez credible in his identification of Ian Tardiff as the actual shooter back in 2011, and his present testimony did not change the Court's assessment. For instance, Mr. Vazquez continues to attempt to exonerate the petitioner in his testimony, has he did back in 2011, by insisting that the petitioner was not present at the scene of the shooting, despite the fact that the petitioner admits to being present in his 1996 statement to the police,[7] in his 2011 testimony, and when he testified during the present trial. In conclusion, having failed to elicit any substantively different or new information from Angel Vazquez from he testified to back in 2011, and having failed to rehabilitate his credibility issues, the petitioner has failed to establish any prejudice resulted because of prior habeas counsel's questioning of this witness. As such, the claim fails. *Hall v. Commissioner of Correction, supra*, 124 Conn.App. *supra*, 783.

III. Conclusion

Based on the foregoing, the petition for writ of habeas corpus on Count Two, after consideration on the merits, is *DENIED.* Counts One and Three are *DISMISSED* on grounds of *res judicata.* The Court finds in favor of the respondent on the affirmative defense to Count Four, which is *DISMISSED* on grounds of procedural default.

All Citations

Not Reported in Atl. Rptr., 2019 WL 1933645

Footnotes

1 The return and reply to the return in this case are actually dated after the operative petition, because the parties agreed that the petitioner could file an amended petition just before trial that removed certain claims and corrected some scriveners errors, but which did not materially impact the return or reply that had already been filed.

2 Practice Book § 23-29—Dismissal. The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that:
(1) the court lacks jurisdiction;
(2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted;
(3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or proffer new evidence not reasonably available at the time of the prior petition;
(4) the claims asserted in the petition are moot or premature;
(5) any other legally sufficient ground for dismissal of the petition exists.

3 "[I]n Connecticut, although the petitioner has the burden of proving cause and prejudice ... that burden does not arise until after the respondent raises the claim of procedural default in [the] return ... [When] the respondent [does] not plead procedural default as an affirmative defense ... the court [may] not find that the petitioner was procedurally defaulted ..." (citing *Barlow v. Commissioner of Correction,* 150 Conn.App. 781, 786-87, 93 A.3d 165 (2014)).

4 Both parties were also provided with the opportunity to submit post-trial briefs in this matter to address the merits of the case, however, the respondent indicated in writing that they wished to waive that right and rest on the record before the Court.

5 To the extent the claim that Attorney Visone was ineffective for failing to present the testimony of "the victim's mother" (Petition, ¶46), that witness did not testify at the habeas trial. Therefore, that claim fails, as a matter of law, and no further analysis is necessary. *Nieves v. Commissioner of Correction,* 51 Conn.App. 615, 622-24, 724 A.2d 508, cert. denied, 248 Conn. 905, 731 A.2d 309 (1999).

6 This claim is really just another way of asserting the petitioner's third-party culpability claim that Pabon and/or Tardiff were responsible for the shooting of the victim, so the Court will view it as that, instead of addressing it separately.

7 Exhibit D.

End of Document

2007 WL 4216254
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Tolland.

Kevin STANLEY
v.
The WARDEN, State Prison.

No. CV040004423S.
|
Nov. 5, 2007.

Attorneys and Law Firms

Genevieve Salvatore, Milford, for Kevin Stanley.

State's Attorney, State's Attorney Office, New Haven, for The Warden, State Prison.

Opinion

SCHUMAN, J.

*1 The motion to dismiss is granted and in the alternative the petition is denied on the merits for procedural default.

The motion to dismiss is granted because count two of the petition presents the same ground as a prior petition previously denied and fails to state new facts or proffer new evidence not recently available at the time of the prior petition.

Under Section 23-29(3) of the Practice Book, count two, when construed in light of the reply, presents a claim that trial counsel was ineffective in failing to object to portions of the closing argument. This could well have been raised thirteen years ago when the first habeas petition which addressed multiple grounds of ineffective assistance of counsel or multiple specifications; this is simply another specification of the same general ground of ineffective assistance of trial counsel.

The record was fully adequate in 1994 to raise this in the habeas petition. It's a matter of record and there's no reason why it could not have been raised.

The petitioner does not state new facts or proffer new evidence, not reasonably available at the time of the prior petition.

Alternatively, I'm dismissing it under 23-29(5), which provides for dismissal for any other legally sufficient ground for dismissal of the petition and I find that claim of ineffective assistance of counsel for failure to challenge the closing argument is procedurally defaulted and that's a legally sufficient ground for dismissal of the petition. If it's not, and again in the alternative, if it's not a ground for dismissal, then procedural default is a ground for denial of the petition on the merits.

I'll now explain my basis for concluding that this claim is procedurally defaulted.

If we construe the claim as one of prosecutorial improprieties in closing argument, then this claim could have been raised on direct appeal. It's a matter of record. The fact that there were no objections at trial would not have precluded review any more than review precluded-was precluded in *State v. Williams,* which was 1987, and, in fact, review was granted in *State v. Williams* under the *State v. Evans* doctrine. Similarly, this could have been raised on direct appeal in 1992 under *State v. Evans.*

Alternatively, even if it wasn't raised on direct appeal and it wasn't, the claim for prosecutorial misconduct could have been raised in the 1994 petition and it could have been supplemented by a claim of ineffective assistance of counsel for failure to object to the allegedly improper closing argument; although, and there has been no adequate cause shown for not raising it on direct appeal or on in the first habeas petition; although, certainly there are more cases now, thirteen years having elapsed. The law has not changed and the same law that the petitioner relies on today existed in 1992 and 1994. It's been applied to other circumstances as cases have arisen, but the same fundamental elements and rules apply in closing argument. So, there is no cause that can be presented why this was not raised in 1992 and 1994, and to the extent that trial counsel's failure to object at trial is interwoven with the claim of prosecutorial misconduct or impropriety, again, I see no prejudice because-or it's partly caused, partly prejudice, but again this matter would have been fully reviewable under our simultaneous objection rules in *State v. Evans* type exception that existed at the time. So, there's simply no cause for not raising this in two prior occasions: One, appeal. The second, the previous habeas petition. And society's

interest in finality of convictions, interests of the victim and the public in justice being carried out are really the foundation of the cause and prejudice procedural default rule and prevent habeas petitioners from deciding to raise three claims or so in 1994, and then waiting another thirteen years to raise other claims that could have been raised at the time. So, the claim is procedurally defaulted and that may be a ground for dismissal or alternatively it's a ground for denial of the petition on the merits.

***2** The fact that, as we discussed during colloquy, that *Golding Review* no longer applies to claims of prosecutorial impropriety doesn't change the analysis because these claims were always reviewable under *Golding. Golding* standards were really the same as *Williams,* so in *Stevenson* the court just eliminated the duplication of analysis and said it's reviewable under *Williams* instead of reviewable under *Golding,* but either way it would have been reviewable on direct appeal and at the very least it could have been raised in the first habeas petition.

So, for these reasons the petition is dismissed and in the alternative it's denied for procedural default.

THE COURT: Is there any correction or-obviously, the petitioner may well disagree and is free to, but is there any correction or clarification that's needed?

MS. SALVATORE: No, Your Honor, I'd only ask for the purposes of his petition for certification that the clerk prepare a transcript order for Your Honor to sign.

THE COURT: I'll order that.

MS. SALVATORE: Thank you, Your Honor.

MS. HOWE: Thank you, Your Honor. I have nothing further.

THE COURT: All right. Thank you, counsel.

(End of excerpt as ordered.)

(The hearing concluded.)

All Citations

Not Reported in A.2d, 2007 WL 4216254

End of Document

At I.A.S Part — of the Supreme Court of the State of New York, held in and for the County of Orleans, at the Courthouse thereof, 1 South Main Street, Suite 3, Albion, NY on the 16th day of October, 2018
November

PRESENT: HON. Tracey A. Bannister
Justice of the Supreme Court

COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HAPPY,

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY,

Respondents.

TMB
~~[PROPOSED]~~ **ORDER TO SHOW CAUSE**

Index No.: 18-45164

TO THE ABOVE-NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause of Elizabeth Stein, Esq. and Steven M. Wise, Esq. (subject to *pro hac vice* admission), filed the second day of October, 2018, the exhibits and

affidavits attached thereto, the Memorandum of Law in support thereof, and upon all pleadings and proceedings herein, the Respondents JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY, or their attorneys, are hereby ORDERED to SHOW CAUSE at I.A.S. Part ___, Room ___, of this Court to be held at the Courthouse located at Courthouse Square, 1 South Main Street Suite 3, Albion, New York 14411-1497, on the 14th day of December, 2018 at 11:30 o'clock in the fore of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting the Nonhuman Rights Project, Inc. ("Petitioner"), the following relief:

A. Upon a determination that Happy is being unlawfully imprisoned order her immediate release from Respondents' custody to an appropriate sanctuary, preferably the Performing Animal Welfare Society;

B. Awarding Petitioner the costs and disbursements of this action; and

C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY, by personal delivery, on or before the 20th day of November, 2018, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, no later than the 3rd day of December, 2018. Reply papers, if any, must be served on or before the 10th day of December 2018.

Dated: 11/16, 2018
Albion, New York

Honorable Tracey A. Bannister

ENTER:

proceeding for the future, and as a proof of the detestation of the jury to the action itself.†

As to the proof of what papers were taken away, the plaintiff could have no account of them; and those who were able to have given an account (which might have been an extenuation of their guilt) have produced none. It lays upon the jury to allow what weight they think proper to that part of the evidence. It is my opinion the office precedents, which had been produced since the Revolution, are no justification of a practice in itself illegal, and contrary to the fundamental principles of the constitution; though its having been the constant practice of the office, might fairly be pleaded in mitigation of damages.*

He then told the jury they had a very material affair to determine upon, and recommended it to them to be particularly cautious in bringing in their verdict. Observed, that if the jury found Mr. Wilkes the author or publisher of No. 45, it will be filed, and stand upon record in the Court of Common Pleas, and of course be produced as proof, upon the criminal cause depending, in barr of any future more ample discussion of that matter on both sides; that on the other side they should be equally careful to do justice, according to the evidence; he therefore left it to their consideration.

The jury, after withdrawing for near half an hour, returned, and found a general verdict upon both issues for the plaintiff, with a thousand pounds damages.

After the verdict was recorded, the Solicitor-General offered to prefer a bill of exceptions, which the Lord Chief Justice refused to accept, saying it was out of time.

The Court sat at nine o'clock in the morning, and the verdict was brought in at twenty minutes past eleven o'clock at night.

[1] Easter Term, 12 Geo. 3, 1772, K. B.

Somerset *against* Stewart. May 14, 1772.

On return to an habeas corpus, requiring Captain Knowles to shew cause for the seizure and detainure of the complainant Somerset, a negro—the case appeared to be this—

That the negro had been a slave to Mr. Stewart, in Virginia, had been purchased from the African coast, in the course of the slave-trade, as tolerated in the plantations; that he had been brought over to England by his master, who intending to return, by force sent him on board of Captain Knowles's vessel, lying in the river; and was there, by the order of his master, in the custody of Captain Knowles, detained against his consent; until returned in obedience to the writ. And under this order, and the facts stated, Captain Knowles relied in his justification.

Upon the second argument, (Serjeant Glynn was in the first, and, I think, Mr. Mansfield) the pleading on behalf of the negro was opened by Mr. Hargrave. I need not say that it will be found at large, and I presume has been read by most of the profession, he having obliged the public with it himself: but I hope this summary note, which I took of it at the time, will not be thought impertinent; as it is not easy for a cause in which that gentleman has appeared, not to be materially injured by a total omission of his share in it.

Mr. Hargrave.—The importance of the question will I hope justify to your Lordships the solicitude with which I rise to defend it; and however unequal I feel myself, will command attention. I trust, indeed, this is a cause sufficient to support my own [2] unworthiness by its single intrinsic merit. I shall endeavour to state the grounds from which Mr. Stewart's supposed right arises; and then offer, as appears to me, sufficient confutation to his claim over the negro, as property, after having him brought over to England; (an absolute and unlimited property, or as right accruing from contract;) Mr. Stewart insists on the former. The question on that is not whether slavery is lawful in the colonies, (where a concurrence of unhappy circumstances has caused it to be established as necessary;) but whether in England? Not whether it

† Vita reipublicæ pax, et animi libertas et libertatis, firmissimum propugnaculum sua cuique domus legibus munita.

* Ut pœna ad paucos, metus ad omnes pertingat,
Judicandum est legibus non exemplis.

ever has existed in England; but whether it be not now abolished? Various definitions have been given of slavery: one of the most considerable is the following; a service for life, for bare necessaries. Harsh and terrible to human nature as even such a condition is, slavery is very insufficiently defined by these circumstances—it includes not the power of the master over the slave's person, property, and limbs, life only excepted; it includes not the right over all acquirements of the slave's labour; nor includes the alienation of the unhappy object from his original master, to whatever absolute lord, interest, caprice or malice, may chuse to transfer him; it includes not the descendible property from father to son, and in like manner continually of the slave and all his descendants. Let us reflect on the consequences of servitude in a light still more important. The corruption of manners in the master, from the entire subjection of the slaves he possesses to his sole will; from whence spring forth luxury, pride, cruelty, with the infinite enormities appertaining to their train; the danger to the master, from the revenge of his much injured and unredressed dependant; debasement of the mind of the slave, for want of means and motives of improvement; and peril to the constitution under which the slave cannot but suffer, and which he will naturally endeavour to subvert, as the only means of retrieving comfort and security to himself.—The humanity of modern times has much mitigated this extreme rigour of slavery; shall an attempt to introduce perpetual servitude here to this island hope for countenance? Will not all the other mischiefs of mere utter servitude revive, if once the idea of absolute property, under the immediate sanction of the laws of this country, extend itself to those who have been brought over to a soil whose air is deemed too pure for slaves to breathe in it; but the laws, the genius and spirit of the constitution, forbid the approach of slavery; will not suffer it's existence here. This point, I conceive, needs no further enlargement: I mean, the proof of our mild and just constitution is ill adapted to the reception of arbitrary maxims and practices. But it has been said by great authorities, though slavery in its full extent be incompatible with the natural rights of mankind, and the principles of good government, yet a moderate servitude may be tolerated; nay, sometimes must be maintained. Captivity in war is the principal ground of slavery: contract another. Grotius De [3] J. B. & P. and Pufendorf, b. 6, c. 3, § 5, approves of making slaves of captives in war. The author of the Spirit of Laws denies, except for self-preservation, and then only a temporary slavery. Dr. Rutherforth, in his Principles of Natural Law, and Locke, absolutely against it. As to contract; want of sufficient consideration justly gives full exception to the considering of it as contract. If it cannot be supported against parents, certainly not against children. Slavery imposed for the performance of public works for civil crimes, is much more defensible, and rests on quite different foundations. Domestic slavery, the object of the present consideration, is now submitted to observation in the ensuing account, its first commencement, progress, and gradual decrease: it took origin very early among the barbarous nations, continued in the state of the Jews, Greeks, Romans, and Germans; was propagated by the last over the numerous and extensive countries they subdued. Incompatible with the mild and humane precepts of Christianity, it began to be abolished in Spain, as the inhabitants grew enlightened and civilized, in the 8th century; its decay extended over Europe in the 4th; was pretty well perfected in the beginning of the 16th century. Soon after that period, the discovery of America revived those tyrannic doctrines of servitude, with their wretched consequences. There is now at last an attempt, and the first yet known, to introduce it into England; long and uninterrupted usage from the origin of the common law, stands to oppose its revival. All kinds of domestic slavery were prohibited, except villenage. The villain was bound indeed to perpetual service; liable to the arbitrary disposal of his lord. There were two sorts; villain regardant, and in gross: the former as belonging to a manor, to the lord of which his ancestors had done villain service; in gross, when a villain was granted over by the lord. Villains were originally captives at the Conquest, or troubles before. Villenage could commence no where but in England, it was necessary to have prescription for it. A new species has never arisen till now; for had it, remedies and powers there would have been at law: therefore the most violent presumption against is the silence of the laws, were there nothing more. 'Tis very doubtful whether the laws of England will permit a man to bind himself by contract to serve for life: certainly will not suffer him to invest another man with despotism, nor prevent his own right to dispose of property. If disallowed by consent of parties, much more when by force; if made void when commenced here,

much more when imported. If these are true arguments, they reach the King himself as well as the subject. Dr. Rutherforth says, if the civil law of any nation does not allow of slavery, prisoners of war cannot be made slaves. If the policy of our laws admits not of slavery, neither fact nor reason are for it. A man, it is said, told the Judges of the Star-Chamber, in the case of a Russian slave whom they had ordered to be scourged and imprisoned, that the air of England was too pure for slavery. The Parliament afterwards punished the Judges of the Star-Chamber for such usage of the [4] Russian, on his refusing to answer interrogatories. There are very few instances, few indeed, of decisions as to slaves, in this country. Two in Charles the 2d, where it was adjudged trover would lie. *Chamberlayne and Perrin*, Will. 3d, trover brought for taking a negro slave, adjudged it would not lie.—4th Ann. action of trover; judgment by default: on arrest of judgment, resolved that trover would not lie. Such the determinations in all but two cases; and those the earliest, and disallowed by the subsequent decisions. Lord Holt.—As soon as a slave enters England he becomes free. *Stanley and Harvey*, on a bequest to a slave; by a person whom he had served some years by his former master's permission, the master claims the bequest; Lord Northington decides for the slave, and gives him costs. 29th of George the 2d, c. 31, implies permission in America, unhappily thought necessary; but the same reason subsists not here in England. The local law to be admitted when no very great inconvenience would follow; but otherwise not. The right of the master depends on the condition of slavery (such as it is) in America. If the slave be brought hither, it has nothing left to depend on but a supposed contract of the slave to return; which yet the law of England cannot permit. Thus has been traced the only mode of slavery ever been established here, villenage, long expired; I hope it has shewn, the introducing new kinds of slavery has been cautiously, and, we trust, effectually guarded against by the same laws. Your Lordships will indulge me in reciting the practice of foreign nations. 'Tis discountenanced in France; Bartholinus De Republicâ denies its permission by the law of France. Molinus gives a remarkable instance of the slave of an ambassador of Spain brought into France: he claims liberty; his claim allowed. France even mitigates the ancient slavery, far from creating new. France does not suffer even her King to introduce a new species of slavery. The other Parliaments did indeed; but the Parliament of Paris, considering the edict to import slavery as an exertion of the Sovereign to the breach of the constitution, would not register that edict. Edict 1685, permits slavery in the colonies. Edict in 1716, recites the necessity to permit in France, but under various restraints, accurately enumerated in the Institute of French Laws. 1759 Admiralty Court of France; Causes Celebrées, title Negro. A French gentleman purchased a slave, and sent him to St. Malo's entrusted with a friend. He came afterwards, and took him to Paris. After ten years the servant chuses to leave France. The master not like Mr. Stewart hurries him back by main force, but obtains a process to apprehend him, from a Court of Justice. While in prison, the servant institutes a process against his master, and is declared free. After the permission of slaves in the colonies, the edict of 1716 was necessary, to transfer that slavery to Paris; not without many restraints, as before remarked; otherwise the ancient principles would have prevailed. The author De Jure Novissimo, though the natural tendency of his book, as appears by the title, leads the other way, concurs with [5] diverse great authorities, in reprobating the introduction of a new species of servitude. In England, where freedom is the grand object of the laws, and dispensed to the meanest individual, shall the laws of an infant colony, Virginia, or of a barbarous nation, Africa, prevail? From the submission of the negro to the laws of England, he is liable to all their penalties, and consequently has a right to their protection. There is one case I must still mention; some criminals having escaped execution in Spain, were set free in France. [Lord Mansfield.—Rightly: for the laws of one country have not whereby to condemn offences supposed to be committed against those of another.]

An objection has arisen, that the West India Company, with their trade in slaves, having been established by the law of England, its consequences must be recognized by that law; but the establishment is local, and these consequences local; and not the law of England, but the law of the plantations.

The law of Scotland annuls the contract to serve for life; except in the case of colliers, and one other instance of a similar nature. A case is to be found in the History of the Decisions, where a term of years was discharged, as exceeding the usual limits of human life. At least, if contrary to all these decisions, the Court

should incline to think Mr. Stewart has a title, it must be by presumption of contract, there being no deed in evidence: on this supposition, Mr. Stewart was obliged, undoubtedly, to apply to a Court of Justice. Was it not sufficient, that without form, without written testimony, without even probability of a parol contract, he should venture to pretend to a right over the person and property of the negro, emancipated, as we contend, by his arrival hither, at a vast distance from his native country, while he vainly indulged the natural expectation of enjoying liberty, where there was no man who did not enjoy it? Was not this sufficient, but he must still proceed, seize the unoffending victim, with no other legal pretence for such a mode of arrest, but the taking an ill advantage of some inaccurate expressions in the Habeas Corpus Act; and thus pervert an establishment designed for the perfecting of freedom? I trust, an exception from a single clause, inadvertently worded, (as I must take the liberty to remark again) of that one statute, will not be allowed to over-rule the law of England. I cannot leave the Court, without some excuse for the confusion in which I rose, and in which I now appear: for the anxiety and apprehension I have expressed, and deeply felt. It did not arise from want of consideration, for I have considered this cause for months, I may say years; much less did it spring from a doubt, how the cause might recommend itself to the candour and wisdom of the Court. But I felt myself over-powered by the weight of the question. I now, in full [6] conviction how opposite to natural justice Mr. Stewart's claim is, in firm persuasion of its inconsistency with the laws of England, submit it chearfully to the judgment of this honourable Court: and hope as much honour to your Lordships from the exclusion of this new slavery, as our ancestors obtained by the abolition of the old.

Mr. Alleyne.—Though it may seem presumption in me to offer any remarks, after the elaborate discourse but now delivered, yet I hope the indulgence of the Court; and shall confine my observations to some few points, not included by Mr. Hargrave. 'Tis well known to your Lordships, that much has been asserted by the ancient philosophers and civilians, in defence of the principles of slavery: Aristotle has particularly enlarged on that subject. An observation still it is, of one of the most able, most ingenious, most convincing writers of modern times, whom I need not hesitate, on this occasion, to prefer to Aristotle, the great Montesquieu, that Aristotle, on this subject, reasoned very unlike the philosopher. He draws his precedents from barbarous ages and nations, and then deduces maxims from them, for the contemplation and practice of civilized times and countries. If a man who in battle has had his enemy's throat at his sword's point, spares him, and says therefore he has power over his life and liberty, is this true? By whatever duty he was bound to spare him in battle, (which he always is, when he can with safety) by the same he obliges himself to spare the life of the captive, and restore his liberty as soon as possible, consistent with those considerations from whence he was authorised to spare him at first; the same indispensible duty operates throughout. As a contract: in all contracts there must be power on one side to give, on the other to receive; and a competent consideration. Now, what power can there be in any man to dispose of all the rights vested by nature and society in him and his descendants? He cannot consent to part with them, without ceasing to be a man; for they immediately flow from, and are essential to, his condition as such: they cannot be taken from him, for they are not his, as a citizen or a member of society merely; and are not to be resigned to a power inferior to that which gave them. With respect to consideration, what shall be adequate? As a speculative point, slavery may a little differ in its appearance, and the relation of master and slave, with the obligations on the part of the slave, may be conceived; and merely in this view, might be thought to take effect in all places alike; as natural relations always do. But slavery is not a natural, 'tis a municipal relation; an institution therefore confined to certain places, and necessarily dropt by passage into a country where such municipal regulations do not subsist. The negro making choice of his habitation here, has subjected himself to the penalties, and is therefore entitled to the protection of our laws. One remarkable case seems to require being mentioned: some Spanish criminals having escaped from execution, were set free in France. [Lord Mansfield.—Note the distinction in the case: in this case, [7] France was not bound to judge by the municipal laws of Spain; nor was to take cognizance of the offences supposed against that law.] There has been started an objection, that a company having been established by our Government for the trade of slaves, it were unjust to deprive them here.—No: the Government incorporated

them with such powers as individuals had used by custom, the only title on which that trade subsisted; I conceive, that had never extended, nor could extend, to slaves brought hither; it was not enlarged at all by the incorporation of that company, as to the nature or limits of its authority. 'Tis said, let slaves know they are all free as soon as they arrive here, they will flock over in vast numbers, over-run this country, and desolate the plantations. There are too strong penalties by which they will be kept in; nor are the persons who convey them over much induced to attempt it; the despicable condition in which negroes have the misfortune to be considered, effectually prevents their importation in any considerable degree. Ought we not, on our part, to guard and preserve that liberty by which we are distinguished by all the earth! to be jealous of whatever measure has a tendency to diminish the veneration due to the first of blessings? The horrid cruelties, scarce credible in recital, perpetrated in America, might, by the allowance of slaves amongst us, be introduced here. Could your Lordship, could any liberal and ingenuous temper indure, in the fields bordering on this city, to see a wretch bound for some trivial offence to a tree, torn and agonizing beneath the scourge? Such objects might by time become familiar, become unheeded by this nation; exercised, as they are now, to far different sentiments, may those sentiments never be extinct! the feelings of humanity! the generous sallies of free minds! May such principles never be corrupted by the mixture of slavish customs! Nor can I believe, we shall suffer any individual living here to want that liberty, whose effects are glory and happiness to the public and every individual.

Mr. Wallace.—The question has been stated, whether the right can be supported here; or, if it can, whether a course of proceedings at law be not necessary to give effect to the right? 'Tis found in three quarters of the globe, and in part of the fourth. In Asia the whole people; in Africa and America far the greater part; in Europe great numbers of the Russians and Polanders. As to captivity in war, the Christian princes have been used to give life to the prisoners; and it took rise probably in the Crusades, when they gave them life, and sometimes franchised them, to enlist under the standard of the Cross, against the Mahometans. The right of a conqueror was absolute in Europe, and is in Africa. The natives are brought from Africa to the West Indies; purchase is made there, not because of positive law, but there being no law against it. It cannot be in consideration by this or any other Court, to see, whether the [8] West India regulations are the best possible; such as they are, while they continue in force as laws, they must be adhered to. As to England, not permitting slavery, there is no law against it; nor do I find any attempt has been made to prove the existence of one. Villenage itself has all but the name. Though the dissolution of monasteries, amongst other material alterations, did occasion the decay of that tenure, slaves could breathe in England: for villains were in this country, and were mere slaves, in Elizabeth. Sheppard's Abridgment, afterwards, says they were worn out in his time. [Lord Mansfield mentions an assertion, but does not recollect the author, that two only were in England in the time of Charles the 2d, at the time of the abolition of tenures.] In the cases cited, the two first directly affirm an action of trover, an action appropriated to mere common chattels. Lord Holt's opinion, is a mere dictum, a decision unsupported by precedent. And if it be objected, that a proper action could not be brought, 'tis a known and allowed practice in mercantile transactions, if the cause arises abroad, to lay it within the kingdom: therefore the contract in Virginia might be laid to be in London, and would not be traversable. With respect to the other cases, the particular mode of action was alone objected to; had it been an action per quod servitium amisit, for the loss of service, the Court would have allowed it. The Court called the person, for the recovery of whom it was brought, a slavish servant, in *Chamberlayne's case*. Lord Hardwicke, and the afterwards Lord Chief Justice Talbot, then Attorney and Solicitor-General, pronounced a slave not free by coming into England. 'Tis necessary the masters should bring them over; for they cannot trust the whites, either with the stores or the navigating the vessel. Therefore, the benefit taken on the Habeas Corpus Act ought to be allowed.

Lord Mansfield observes, the case alluded to was upon a petition in Lincoln's Inn Hall after dinner; probably, therefore, might not, as he believes the contrary is not usual at that hour, be taken with much accuracy. The principal matter was then, on the earnest solicitation of many merchants, to know, whether a slave was freed by being made a Christian? And it was resolved, not. 'Tis remarkable, tho' the English took

infinite pains before to prevent their slaves being made Christians, that they might not be freed, the French suggested they must bring their's into France, (when the edict of 1706 was petitioned for,) to make them Christians. He said, the distinction was difficult as to slavery, which could not be resumed after emancipation, and yet the condition of slavery, in its full extent, could not be tolerated here. Much consideration was necessary, to define how far the point should be carried. The Court must consider the great detriment to proprietors, there being so great a number in the ports of this kingdom, that many thousands of pounds would be lost to the owners, by setting them free. (A gentleman observed, no great danger; for in a whole fleet, usually, there would not be six slaves.) As to France, the case stated decides no [9] farther than that kingdom; and there freedom was claimed, because the slave had not been registered in the port where he entered, conformably to the edict of 1706. Might not a slave as well be freed by going out of Virginia to the adjacent country, where there are no slaves, if change to a place of contrary custom was sufficient? A statute by the Legislature, to subject the West India property to payment of debts, I hope, will be thought some proof; another Act devests the African Company of their slaves, and vests them in the West India Company: I say, I hope, these are proofs the law has interfered for the maintenance of the trade in slaves, and the transferring of slavery. As for want of application properly to a Court of Justice; a common servant may be corrected here by his master's private authority. Habeas corpus acknowledges a right to seize persons by force employed to serve abroad. A right of compulsion there must be, or the master will be under the ridiculous necessity of neglecting his proper business, by staying here to have their service, or must be quite deprived of those slaves he has been obliged to bring over. The case, as to service for life was not allowed, merely for want of a deed to pass it.

The Court approved Mr. Alleyne's opinion of the distinction, how far municipal laws were to be regarded: instanced the right of marriage; which, properly solemnized, was in all places the same, but the regulations of power over children from it, and other circumstances, very various; and advised, if the merchants thought it so necessary, to apply to Parliament, who could make laws.

Adjourned till that day se'night.

Mr. Dunning.—'Tis incumbent on me to justify Captain Knowles's detainer of the negro; this will be effected, by proving a right in Mr. Stewart; even a supposed one: for till the matter was determined, it were somewhat unaccountable that a negro should depart his service, and put the means out of his power of trying that right to effect, by a flight out of the kingdom. I will explain what appears to me the foundation of Mr. Stewart's claim. Before the writ of habeas corpus issued in the present case, there was, and there still is, a great number of slaves in Africa, (from whence the American plantations are supplied) who are saleable, and in fact sold. Under all these descriptions is James Somerset. Mr. Stewart brought him over to England; purposing to return to Jamaica, the negro chose to depart the service, and was stopt and detained by Captain Knowles, 'till his master should set sail and take him away to be sold in Jamaica. The gentlemen on the other side, to whom I impute no blame, but on the other hand much commendation, have advanced many ingenious propositions; part of which are undeniably true, and part (as is usual in compositions of ingenuity) very disputable. 'Tis my misfortune [10] to address an audience, the greater part of which, I fear, are prejudiced the other way. But wishes, I am well convinced, will never enter into your Lordships minds, to influence the determination of the point: this cause must be what in fact and law it is: it's fate, I trust, therefore, depends on fixt invariable rules, resulting by law from the nature of the case. For myself, I would not be understood to intimate a wish in favour of slavery, by any means; nor on the other side, to be supposed maintainer of an opinion contrary to my own judgment. I am bound by duty to maintain those arguments which are most useful to Captain Knowles, as far as is consistent with truth; and if his conduct has been agreeable to the laws throughout, I am under a farther indispensable duty to support it. I ask no other attention than may naturally result from the importance of the question: less than this I have no reason to expect; more, I neither demand nor wish to have allowed. Many alarming apprehensions have been entertained of the consequence of the decision, either way. About 14,000 slaves, from the most exact intelligence I am able to procure are at present here; and some little time past,

166,914 in Jamaica; there are, besides, a number of wild negroes in the woods. The computed value of a negro in those parts 50l. a head. In the other islands I cannot state with the same accuracy, but on the whole they are about as many. The means of conveyance, I am told, are manifold; every family almost brings over a great number; and will, be the decision on which side it may. Most negroes who have money (and that description I believe will include nearly all) make interest with the common sailors to be carried hitherto. There are negroes not falling under the proper denomination of any yet mentioned, descendants of the original slaves, the aborigines, if I may call them so; these have gradually acquired a natural attachment to their country and situation; in all insurrections they side with their masters: otherwise, the vast disproportion of the negroes to the whites, (not less probably than that of 100 to one) would have been fatal in it's consequences. There are very strong and particular grounds of apprehension, if the relation in which they stand to their masters is utterly to be dissolved on the instant of their coming into England. Slavery, say the gentlemen, is an odious thing; the name is: and the reality; if it were as one has defined, and the rest supposed it. If it were necessary to the idea and the existence of James Somerset, that his master, even here, might kill, nay, might eat him, might sell living or dead, might make him and his descendants property alienable, and thus transmissible to posterity; this, how high soever my ideas may be of the duty of my profession, is what I should decline pretty much to defend or assert, for any purpose, seriously; I should only speak of it to testify my contempt and abhorrence. But this is what at present I am not at all concerned in; unless Captain Knowles, or Mr. Stewart, have killed or eat him. Freedom has been asserted as a natural right, and therefore unalienable and unrestrainable; there is perhaps no branch of this right, but in some [11] at all times, and in all places at different times, has been restrained: nor could society otherwise be conceived to exist. For the great benefit of the public and individuals, natural liberty, which consists in doing what one likes, is altered to the doing what one ought. The gentlemen who have spoke with so much zeal, have supposed different ways by which slavery commences; but have omitted one, and rightly; for it would have given a more favourable idea of the nature of that power against which they combate. We are apt (and great authorities support this way of speaking) to call those nations universally, whose internal policy we are ignorant of, barbarians; (thus the Greeks, particularly, stiled many nations, whose customs, generally considered, were far more justifiable and commendable than their own:) unfortunately, from calling them barbarians, we are apt to think them so, and draw conclusions accordingly. There are slaves in Africa by captivity in war, but the number far from great; the country is divided into many small, some great territories, who do, in their wars with one another, use this custom. There are of these people, men who have a sense of the right and value of freedom; but who imagine that offences against society are punishable justly by the severe law of servitude. For crimes against property, a considerable addition is made to the number of slaves. They have a process by which the quantity of the debt is ascertained; and if all the property of the debtor in goods and chattels is insufficient, he who has thus dissipated all he has besides, is deemed property himself; the proper officer (sheriff we may call him) seizes the insolvent, and disposes of him as a slave. We don't contend under which of these the unfortunate man in question is; but his condition was that of servitude in Africa; the law of the land of that country disposed of him as property, with all the consequences of transmission and alienation; the statutes of the British Legislature confirm this condition; and thus he was a slave both in law and fact. I do not aim at proving these points; not because they want evidence, but because they have not been controverted, to my recollection, and are, I think, incapable of denial. Mr. Stewart, with this right, crossed the Atlantic, and was not to have the satisfaction of discovering, till after his arrival in this country, that all relation between him and the negro, as master and servant, was to be matter of controversy, and of long legal disquisition. A few words may be proper, concerning the Russian slave, and the proceedings of the House of Commons on that case. 'Tis not absurd in the idea, as quoted, nor improbable as matter of fact; the expression has a kind of absurdity. I think, without any prejudice to Mr. Stewart, or the merits of this cause, I may admit the utmost possible to be desired, as far as the case of that slave goes. The master and slave were both, (or should have been at least) on their coming here, new

creatures. Russian slavery, and even the subordination amongst themselves, in the degree they use it, is not here to be tolerated. Mr. Alleyne justly observes, the municipal [12] regulations of one country are not binding on another; but does the relation cease where the modes of creating it, the degrees in which it subsists, vary? I have not heard, nor, I fancy, is there any intention to affirm, the relation of master and servant ceases here? I understand the municipal relations differ in different colonies, according to humanity, and otherwise. A distinction was endeavoured to be established between natural and municipal relations; but the natural relations are not those only which attend the person of the man, political do so too; with which the municipal are most closely connected: municipal laws, strictly, are those confined to a particular place; political, are those in which the municipal laws of many States may and do concur. The relation of husband and wife, I think myself warranted in questioning, as a natural relation: does it subsist for life; or to answer the natural purposes which may reasonably be supposed often to terminate sooner? Yet this is one of those relations which follow a man every where. If only natural relations had that property, the effect would be very limited indeed. In fact, the municipal laws are principally employed in determining the manner by which relations are created; and which manner varies in various countries, and in the same country at different periods; the political relation itself continuing usually unchanged by the change of place. There is but one form at present with us, by which the relation of husband and wife can be constituted; there was a time when otherwise: I need not say other nations have their own modes, for that and other ends of society. Contract is not the only means, on the other hand, of producing the relation of master and servant; the magistrates are empowered to oblige persons under certain circumstances to serve. Let me take notice, neither the air of England is too pure for a slave to breathe in, nor the laws of England have rejected servitude. Villenage in this country is said to be worn out; the propriety of the expression strikes me a little. Are the laws not existing by which it was created? A matter of more curiosity than use, it is, to enquire when that set of people ceased. The Statute of Tenures did not however abolish villenage in gross; it left persons of that condition in the same state as before; if their descendants are all dead, the gentlemen are right to say the subject of those laws is gone, but not the law; if the subject revives, the law will lead the subject. If the Statute of Charles the 2d ever be repealed, the law of villenage revives in it's full force. If my learned brother, the serjeant, or the other gentlemen who argued on the supposed subject of freedom, will go thro' an operation my reading assures me will be sufficient for that purpose, I shall claim them as property. I won't, I assure them, make a rigorous use of my power; I will neither sell them, eat them, nor part with them. It would be a great surprize, and some inconvenience, if a foreigner bringing over a servant, as soon as he got hither, must take care of his carriage, his horse, and himself, in whatever method he might have the luck to [13] invent. He must find his way to London on foot. He tells his servant, Do this; the servant replies, Before I do it, I think fit to inform you, sir, the first step on this happy land sets all men on a perfect level; you are just as much obliged to obey my commands. Thus neither superior, or inferior, both go without their dinner. We should find singular comfort, on entering the limits of a foreign country, to be thus at once devested of all attendance and all accommodation. The gentlemen have collected more reading than I have leisure to collect, or industry (I must own) if I had leisure: very laudable pains have been taken, and very ingenious, in collecting the sentiments of other countries, which I shall not much regard, as affecting the point or jurisdiction of this Court. In Holland, so far from perfect freedom, (I speak from knowledge) there are, who without being conscious of contract, have for offences perpetual labour imposed, and death the condition annext to non-performance. Either all the different ranks must be allowed natural, which is not readily conceived, or there are political ones, which cease not on change of soil. But in what manner is the negro to be treated? How far lawful to detain him? My footman, according to my agreement, is obliged to attend me from this city; or he is not; if no condition, that he shall not be obliged to attend, from hence he is obliged, and no injury done.

A servant of a sheriff, by the command of his master, laid hand gently on another servant of his master, and brought him before his master, who himself compelled the servant to his duty; an action of assault and battery, and false imprisonment, was brought; and the principal question was, on demurrer, whether the master could

command the servant, tho' he might have justified his taking of the servant by his own hands? The convenience of the public is far better provided for, by this private authority of the master, than if the lawfulness of the command were liable to be litigated every time a servant thought fit to be negligent or troublesome.

Is there a doubt, but a negro might interpose in the defence of a master, or a master in defence of a negro? If to all purposes of advantage, mutuality requires the rule to extend to those of disadvantage. 'Tis said, as not formed by contract, no restraint can be placed by contract. Which ever way it was formed, the consequences, good or ill, follow from the relation, not the manner of producing it. I may observe, there is an establishment, by which magistrates compel idle or dissolute persons, of various ranks and denominations, to serve. In the case of apprentices bound out by the parish, neither the trade is left to the choice of those who are to serve, nor the consent of parties necessary; no contract therefore is made in the former instance, none in the latter; the duty remains the same. The case of contract for life quoted from the Year-Books, was recognized as valid; the solemnity only of an instru-[14]-ment judged requisite. Your Lordships, (this variety of service, with diverse other sorts, existing by law here,) have the opinion of classing him amongst those servants which he most resembles in condition: therefore, (it seems to me) are by law authorised to enforce a service for life in the slave, that being a part of his situation before his coming hither; which, as not incompatible, but agreeing with our laws, may justly subsist here: I think, I might say, must necessarily subsist, as a consequence of a previous right in Mr. Stewart, which our institutions not dissolving, confirm. I don't insist on all the consequences of villenage; enough is established for our cause, by supporting the continuance of the service. Much has been endeavoured, to raise a distinction, as to the lawfulness of the negro's commencing slave, from the difficulty or impossibility of discovery by what means, under what authority, he became such. This, I apprehend, if a curious search were made, not utterly inexplicable; nor the legality of his original servitude difficult to be proved. But to what end? Our Legislature, where it finds a relation existing, supports it in all suitable consequences, without using to enquire how it commenced. A man enlists for no specified time; the contract in construction of law, is for a year: the Legislature, when once the man is enlisted, interposes annually to continue him in the service, as long as the public has need of him. In times of public danger he is forced into the service; the laws from thence forward find him a soldier, make him liable to all the burthen, confer all the rights (if any rights there are of that state) and enforce all penalties of neglect of any duty in that profession, as much and as absolutely, as if by contract he had so disposed of himself. If the Court see a necessity of entering into the large field of argument, as to right of the unfortunate man, and service appears to them deducible from a discussion of that nature to him, I neither doubt they will, nor wish they should not. As to the purpose of Mr. Stewart and Captain Knowles, my argument does not require trover should lie, as for recovering of property, nor trespass: a form of action there is, the writ per quod servitium amisit, for loss of service, which the Court would have recognized; if they allowed the means of suing a right, they allowed the right. The opinion cited, to prove the negroes free on coming hither, only declares them not saleable; does not take away their service. I would say, before I conclude, not for the sake of the Court, of the audience; the matter now in question, interests the zeal for freedom of no person, if truly considered; it being only, whether I must apply to a Court of Justice, (in a case, where if the servant was an Englishman I might use my private authority to enforce the performance of the service, according to it's nature,) or may, without force or outrage, take my servant myself, or by another. I hope, therefore, I shall not suffer in the opinion of those whose honest passions are fired at the name of slavery. I hope I have not transgressed my duty to humanity; nor doubt I your Lordships discharge of yours to justice.

[15] Serjeant Davy.—My learned friend has thought proper to consider the question in the beginning of his speech, as of great importance: 'tis indeed so; but not for those reasons principally assigned by him. I apprehend, my Lord, the honour of England, the honour of the laws of every Englishman, here or abroad, is now concerned. He observes, the number of 14,000 or 15,000; if so, high time to put an end to the practice; more especially, since they must be sent back as slaves, tho' servants here. The increase of such inhabitants, not interested in the prosperity of

a country, is very pernicious; in an island, which can, as such, not extend its limits, nor consequently maintain more than a certain number of inhabitants, dangerous in excess. Money from foreign trade (or any other means) is not the wealth of a nation; nor conduces any thing to support it, any farther than the produce of the earth will answer the demand of necessaries. In that case money enriches the inhabitants, as being the common representative of those necessaries; but this representation is merely imaginary and useless, if the encrease of people exceeds the annual stock of provisions requisite for their subsistence. Thus, foreign superfluous inhabitants augmenting perpetually, are ill to be allowed; a nation of enemies in the heart of a State, still worse. Mr. Dunning availed himself of a wrong interpretation of the word natural: it was not used in the sense in which he thought fit to understand that expression; 'twas used as moral, which no laws can supercede. All contracts, I do not venture to assert are of a moral nature; but I know not any law to confirm an immoral contract, and execute it. The contract of marriage is a moral contract, established for moral purposes, enforcing moral obligations; the right of taking property by descent, the legitimacy of children; (who in France are considered legitimate, tho' born before the marriage, in England not:) these, and many other consequences, flow from the marriage properly solemnized; are governed by the municipal laws of that particular State, under whose institutions the contracting and disposing parties live as subjects; and by whose established forms they submit the relation to be regulated, so far as its consequences, not concerning the moral obligation, are interested. In the case of *Thorn and Watkins*, in which your Lordship was counsel, determined before Lord Hardwicke, a man died in England, with effects in Scotland; having a brother of the whole, and a sister of the half blood: the latter, by the laws of Scotland could not take. The brother applies for administration to take the whole estate, real and personal, into his own hands, for his own use; the sister files a bill in Chancery. The then Mr. Attorney-General puts in answer for the defendant; and affirms, the estate, as being in Scotland, and descending from a Scotchman, should be governed by that law. Lord Hardwicke over-ruled the objection against the sister's taking; declared there was no pretence for it; and spoke thus, to this effect, and nearly in the following [16] words—Suppose a foreigner has effects in our stocks, and dies abroad; they must be distributed according to the laws, not of the place where his effects were, but of that to which as a subject he belonged at the time of his death. All relations governed by municipal laws, must be so far dependent on them, that if the parties change their country the municipal laws give way, if contradictory to the political regulations of that other country. In the case of master and slave, being no moral obligation, but founded on principles, and supported by practice, utterly foreign to the laws and customs of this country, the law cannot recognize such relation. The arguments founded on municipal regulations, considered in their proper nature, have been treated so fully, so learnedly, and ably, as scarce to leave any room for observations on that subject: any thing I could offer to enforce, would rather appear to weaken the proposition, compared with the strength and propriety with which that subject has already been explained and urged. I am not concerned to dispute, the negro may contract to serve; nor deny the relation between them, while he continues under his original proprietor's roof and protection. 'Tis remarkable, in all Dyer, for I have caused a search to be made as far as the 4th of Henry 8th, there is not one instance of a man's being held a villain who denied himself to be one; nor can I find a confession of villenage in those times. [Lord Mansfield, the last confession of villenage extant, is in the 19th of Henry the 6th.] If the Court would acknowledge the relation of master and servant, it certainly would not allow the most exceptionable part of slavery; that of being obliged to remove, at the will of the master, from the protection of this land of liberty, to a country where there are no laws; or hard laws to insult him. It will not permit slavery suspended for a while, suspended during the pleasure of the master. The instance of master and servant commencing without contract; and that of apprentices against the will of the parties, (the letter found in it's consequences exceedingly pernicious;) both these are provided by special statutes of our own municipal law. If made in France, or any where but here, they would not have been binding here. To punish not even a criminal for offences against the laws of another country; to set free a galley-slave, who is a slave by his crime; and make a slave of a negro, who is one, by his complexion; is a cruelty and absurdity that I trust will never take place here: such as

if promulged, would make England a disgrace to all the nations under earth: for the reducing a man, guiltless of any offence against the laws, to the condition of slavery, the worst and most abject state, Mr. Dunning has mentioned, what he is pleased to term philosophical and moral grounds, I think, or something to that effect, of slavery; and would not by any means have us think disrespectfully of those nations, whom we mistakenly call barbarians, merely for carrying on that trade: for my part, we may be warranted, I believe, in affirming the morality or propriety of the practice does not enter their heads; **[17]** they make slaves of whom they think fit. For the air of England; I think, however, it has been gradually purifying ever since the reign of Elizabeth. Mr. Dunning seems to have discovered so much, as he finds it changes a slave into a servant; tho' unhappily, he does not think it of efficacy enough to prevent that pestilent disease reviving, the instant the poor man is obliged to quit (voluntarily quits, and legally, it seems we ought to say,) this happy country. However, it has been asserted, and is now repeated by me, this air is too pure for a slave to breathe in: I trust, I shall not quit this Court without certain conviction of the truth of that assertion.

Lord Mansfield.—The question is, if the owner had a right to detain the slave, for the sending of him over to be sold in Jamaica. In five or six cases of this nature, I have known it to be accommodated by agreement between the parties: on its first coming before me, I strongly recommended it here. But if the parties will have it decided, we must give our opinion. Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law: in which the difficulty will be principally from the inconvenience on both sides. Contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of enquiry; which makes a very material difference. The now question is, whether any dominion, authority or coercion can be exercised in this country, on a slave according to the American laws? The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme; and yet, many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate the conditions in which law shall operate. On the other hand, should we think the coercive power cannot be exercised: 'tis now about fifty years since the opinion given by two of the greatest men of their own or any times, (since which no contract has been brought to trial, between the masters and slaves;) the service performed by the slaves without wages, is a clear indication they did not think themselves free by coming hither. The setting 14,000 or 15,000 men at once free loose by a solemn opinion, is much disagreeable in the effects it threatens. There is a case in Hobart, (*Coventry and Woodfall*,) where a man had contracted to go as a mariner: but the now case will not come within that decision. Mr. Stewart advances no claim on contract; he rests his whole demand on a right to the negro as slave, and mentions the purpose of detainure to be the sending of him over to be sold in Jamaica. If the parties will have judgment, fiat justitia, ruat cœlum, let justice be done whatever be the consequence. 50l. a head may not be a high price; then a loss follows to the proprietors of above 700,000l. sterling. How would the law stand with respect to their settlement; their wages? **[18]** How many actions for any slight coercion by the master? We cannot in any of these points direct the law; the law must rule us. In these particulars, it may be matter of weighty consideration, what provisions are made or set by law. Mr. Stewart may end the question, by discharging or giving freedom to the negro. I did think at first to put the matter to a more solemn way of argument: but if my brothers agree, there seems no occasion. I do not imagine, after the point has been discussed on both sides so extremely well, any new light could be thrown on the subject. If the parties chuse to refer it to the Common Pleas, they can give them that satisfaction whenever they think fit. An application to Parliament, if the merchants think the question of great commercial concern, is the best, and perhaps the only method of settling the point for the future. The Court is greatly obliged to the gentlemen of the Bar who have spoke on the subject; and by whose care and abilities so much has been effected, that the rule of decision will be reduced to a very easy compass. I cannot omit to express particular happiness in seeing young men, just called to the Bar, have been able so much to profit by their reading. I think it right the matter should stand over; and if we are called on for a decision, proper notice shall be given.

Trinity Term, June 22, 1772.

Lord Mansfield.—On the part of Somerset, the case which we gave notice should be decided this day, the Court now proceeds to give its opinion. I shall recite the return to the writ of habeas corpus, as the ground of our determination; omitting only words of form. The captain of the ship on board of which the negro was taken, makes his return to the writ in terms signifying that there have been, and still are, slaves to a great number in Africa; and that the trade in them is authorized by the laws and opinions of Virginia and Jamaica; that they are goods and chattels; and, as such, saleable and sold. That James Somerset, is a negro of Africa, and long before the return of the King's writ was brought to be sold, and was sold to Charles Stewart, Esq. then in Jamaica, and has not been manumitted since; that Mr. Stewart, having occasion to transact business, came over hither, with an intention to return; and brought Somerset, to attend and abide with him, and to carry him back as soon as the business should be transacted. That such intention has been, and still continues; and that the negro did remain till the time of his departure, in the service of his master Mr. Stewart, and quitted it without his consent; and thereupon, before the return of the King's writ, the said Charles Stewart did commit the slave on board the "Ann and Mary," to save custody, to be kept till he should set sail, and then to be taken with him to Jamaica, and there sold as a slave. And this is the cause why he, Captain Knowles, who was then and now is, commander of the above vessel, then and now lying in the river of [19] Thames, did the said negro, committed to his custody, detain; and on which he now renders him to the orders of the Court. We pay all due attention to the opinion of Sir Philip Yorke, and Lord Chief Justice Talbot, whereby they pledged themselves to the British planters, for all the legal consequences of slaves coming over to this kingdom or being baptized, recognized by Lord Hardwicke, sitting as Chancellor on the 19th of October 1749, that trover would lie: that a notion had prevailed, if a negro came over, or became a Christian, he was emancipated, but no ground in law; that he and Lord Talbot, when Attorney and Solicitor-General, were of opinion, that no such claim for freedom was valid; that tho' the Statute of Tenures had abolished villains regardant to a manor, yet he did not conceive but that a man might still become a villain in gross, by confessing himself such in open Court. We are so well agreed, that we think there is no occasion of having it argued (as I intimated an intention at first,) before all the Judges, as is usual, for obvious reasons, on a return to a habeas corpus; the only question before us is, whether the cause on the return is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

PITT *against* HARBIN.

Mrs. Harbin devised to her four nieces, and on the death of any of them without issue, the whole should go to the survivor or survivors; but if any of her said nieces died, having child or children, then the share to go to such child or children; if all died without issue, then the whole to her nephew.

Catherine Pitt, one of the nieces, married G. Pitt, and had issue W. and G. Both died in the life of the mother; G. Pitt left issue Eliz. and G. grand-children of C. the three other nieces died without issue, one in 1712, C. in 1745, and another in 1759, and F. in 1765. The will was made in 1705.

[20] On the death of F. the grand-children of C. claim the whole. On the other hand, the representatives of Mrs. Harbin say, that nothing but the single share which C. took by survivorship goes to the grand-children of C.