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.**

BRIEF OF PLAINTIFF-APPELLANT

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NATURE OF THE PROCEEDINGS AND STATEMENT OF FACTS

I. Nature Of The Proceedings

Plaintiff, the Nonhuman Rights Project, Inc. ("NhRP"), filed a second Verified Petition for a Common Law Writ of Habeas Corpus ("Petition II") seeking a good faith extension or modification of the Connecticut common law of habeas corpus on behalf of three elephants, Beulah, Minnie, and Karen. The NhRP seeks recognition of their common law right to bodily liberty protected by common law habeas corpus, and alleges that these three autonomous beings are unlawfully detained and deprived of their bodily liberty by Defendants, R.W. Commerford & Sons, Inc., a Connecticut corporation, and William R. Commerford, its President. If the trial court determines that Beulah, Minnie, and Karen are "persons" for the purpose of common law habeas corpus with the right to bodily liberty, their detention is *per se* unlawful.[1]

This appeal, brought as of right under Practice Book § 61-1, is taken from the trial court's decision to dismiss Petition II. The NhRP requests this Court to reverse the trial court's decision and remand with instructions for the trial court to issue a writ of habeas corpus and proceed according to the Practice Book.

Connecticut courts are "charged with the ongoing responsibility to revisit our common-law doctrines when the need arises." *State v. Brocuglio*, 264 Conn. 778, 793 (2003); *State v. Guess*, 244 Conn. 761, 775-76 (1998). Connecticut common law is broad,

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[1] *See State v. Oquendo*, 223 Conn. 635, 650 (1992) ("[N]o man can be restrained of his liberty; be prevented from removing himself from place to place, as he chooses; 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 System of the Laws of the State of Connecticut* 180 (1796)); *see also Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep. 499, 510 (K.B. 1772).

flexible, and adaptable, and keeps abreast of evolving standards of justice, morality, experience, and scientific discovery.[2] "The 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. Such statutes have not been intended to detract from its force, but rather to add to its efficiency." *Hudson v. Groothoff*, 10 Conn. Supp. 275, 278-79 (1942) (internal citation omitted).[3] Accordingly, it is for the Connecticut courts to decide whether Beulah, Minnie, and Karen are entitled to the right to bodily liberty protected by common law habeas corpus.

II. Procedural History

On November 13, 2017, the NhRP filed its first Verified Petition for a Common Law Writ of Habeas Corpus ("Petition I") on behalf of Beulah, Minnie, and Karen. Part Two A100. On December 27, 2017, the trial court dismissed Petition I on the ground that the NhRP lacked standing under Practice Book § 23-24(a)(1) and, alternatively, on the ground that Petition I was "wholly frivolous on its face" under Practice Book § 23-24(a)(2).[4] The NhRP's appeal of the decision in Petition I is pending (A.C. 41464).

On June 11, 2018, NhRP filed Petition II in the Superior Court for the Judicial District of Tolland at Rockville on behalf of Beulah, Minnie, and Karen. Part One A4. On June 15, 2018, that case was transferred to the Judicial District of Litchfield at Torrington. On

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[2] *See Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184, 196 (1996); *Dacey v. Connecticut Bar Association*, 184 Conn. 21, 25-26 (1981).

[3] These statutes and rules are set forth in General Statutes §§ 52-466 – 52-470, and Practice Book §§ 23-21 – 23-40 and do not affect the substantive entitlement to the writ.

[4] Practice Book § 23-24(a)(1) and (a)(2) provide: "(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. . . ."

January 28, 2019, the trial court heard oral argument on NhRP's Motion to Rule, which urged the court to "promptly review" Petition II in accordance with Practice Book § 23-24(a). Part One A59.

On February 13, 2019, the trial court issued its decision and dismissed Petition II pursuant to Practice Book § 23-29(3).[5] ("Decision" at 8-9) Part One A86-87. In a footnote, the trial court stated without elaboration that "dismissal would also be appropriate under Practice Book § 23-29(5)."[6] (Decision at 9 n.9) Part One A87.

On March 4, 2019, the NhRP filed a Motion to Reargue pursuant to Practice Book § 11-11, arguing that the Decision erroneously overlooked controlling decisions and principles of law. Part One A90. On March 26, 2019, the trial court denied the NhRP's Motion to Reargue without issuing an opinion. Part One A93.

III. Background and Elephant Facts

Respondents are R.W. Commerford & Sons, Inc. (a/k/a Commerford Zoo), a Connecticut corporation, and its President. (Petition II at ¶¶ 2-3) Part One A5.

The NhRP is a nonprofit legal 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

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[5] Practice Book § 23-29(3) permits a court to dismiss a habeas corpus petition if it determines that "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."

[6] Under Practice Book § 23-29(5), a court may dismiss a habeas corpus petition if it determines that "any other legally sufficient ground for dismissal of the petition exists."

morality, scientific discovery, and human experience entitle them." (Petition II at ¶ 1) Part One A5.[7]

Karen is a female African elephant in her mid-thirties. She was captured from the wild around 1983. Defendants have owned Karen since 1984. (Petition II at ¶ 4) Part One A5. Beulah is a female Asian elephant in her mid-forties. She was captured from the wild in 1967 in Myanmar. Defendants have owned Beulah since 1973. (Petition II at ¶ 5) Part One A5. Minnie is a female Asian elephant. Defendants have owned Minnie since at least 1989. (Petition II at ¶ 6) Part One A5. Beulah, Minnie and Karen are beneficiaries of an *inter vivos* trust created by the NhRP pursuant to General Statutes § 45a-489a for the purpose of their care and maintenance should they be released from Defendants' unlawful detention. (Petition II at ¶ 7) Part One A5-6.

The NhRP's four Expert Scientific Affidavits from five leading elephant scientists (Entry Nos. 104-116) demonstrate that elephants possess complex cognitive abilities such as 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; understanding the physical competence and emotional state of others; imitation, including vocal imitation; pointing and understanding pointing; engaging in true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do); cooperation and coalition

[7] In 2013, the NhRP filed the first-ever habeas corpus petition on behalf of a nonhuman animal in the United States when it filed in New York State on behalf of a chimpanzee named Tommy. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal denied*, 26 N.Y.3d 902 (2015).

building; cooperative problem-solving, innovative problem-solving, and behavioral flexibility; understanding 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; utilization of a 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.

ARGUMENT

I. The Trial Court Erred in Dismissing Petition II Under Practice Book § 23-29(3).

A. Standard of Review.

As the trial court's dismissal of Petition II was a matter of law, the Decision is subject to plenary review by this Court. *In re Jonathan M.*, 255 Conn. 208, 217 (2001); *In re David W.*, 254 Conn. 676, 686 (2000).

B. Practice Book § 23-29(3) does not apply to Petition II because the NhRP did not actually litigate Petition I and its dismissal was not a judgment on the merits.

Practice Book § 23-29(3) provides 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." This provision encapsulates a "narrow[ed] . . . application of the doctrine of res judicata to habeas proceedings. . ." *Kearney v. Commissioner of Correction*, 113 Conn. App. 223, 234 (2009). *See, e.g., Johnson v.*

Commissioner of Correction, 168 Conn. App. 294, 305, *cert. denied*, 323 Conn. 937 (2016) ("res judicata in the habeas context must be read in conjunction with Practice Book § 23–29(3), which narrows its application") (quoting *Kearney*, 113 Conn. App. at 235).[8] Accordingly, if a habeas corpus petition cannot be dismissed under the doctrine of res judicata, it cannot be dismissed under Practice Book § 23-29(3).

The dismissal of a prior habeas corpus petition cannot bar a subsequent petition as a matter of res judicata unless: (1) the petitioner had actually litigated the prior petition, *and* (2) the dismissal was a judgment on the merits. As discussed below, the dismissal of Petition I satisfied neither prerequisite: the NhRP did not actually litigate Petition I, and its dismissal was not a judgment on the merits. Therefore, as the dismissal of Petition I cannot bar Petition II, the trial court's dismissal of Petition II under Practice Book § 23-29(3) was erroneous.

1. The dismissal of Petition I cannot bar Petition II because the NhRP did not actually litigate Petition I.

"[T]he appropriate inquiry with respect to [claim] preclusion is whether the party had an *adequate opportunity to litigate the matter in the earlier proceeding*." *Connecticut National Bank v. Rytman, 241 Conn.* 24, 43–44 (1997) (internal quotation marks and citations omitted) (emphasis in original). Where a party in "the prior proceeding had no opportunity to litigate its claims fully and fairly," the application of res judicata is improper. *Cayer Enterprises, Inc. v. DiMasi*, 84 Conn. App. 190, 194 (2004).

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[8] *See also Lorthe v. Commissioner of Correction*, 2013 WL 1849280 at *2 (Conn. Super.), *appeal dismissed*, 153 Conn. App. 903 (2014) ("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.") (citing *Kearney*, 113 Conn. App. at. 233-34)

In the habeas corpus context, courts further "limit the application of the doctrine of res judicata . . . to claims that *actually* have been raised and litigated in an earlier proceeding." *In re Ross*, 272 Conn. 653, 662 (2005) (quoting *Thorpe v. Commissioner of Correction*, 73 Conn. App. 773, 778 n.7 (2002)) (emphasis added); *accord Boria v. Commissioner of Correction*, 186 Conn. App. 332, 347 (2018); *Johnson*, 168 Conn. App. at 305; *Kearney*, 113 Conn. App. at 233.[9]

The NhRP did not actually litigate Petition I or even have the opportunity to do so as the petition was dismissed for lack of standing, the writ was neither issued nor served, and no hearing on the merits occurred. Therefore the dismissal of Petition I cannot bar Petition II. *See Cayer Enterprises Inc.*, 84 Conn. App. at 194 (as "prior judgment was a dismissal merely for lack of standing . . . . the plaintiff in the prior proceeding had no opportunity to litigate its claims fully and fairly."); *see also State v. Ellis*, 197 Conn. 436, 469 (1985) ("a pretrial dismissal, based on the statute of limitations, is not the logical or practical equivalent of a full and fair opportunity to litigate.").

2. The dismissal of Petition I cannot bar Petition II because it was not a judgment on the merits.

"There must be a judgment on the merits . . . in order to invoke the doctrine of res judicata." *Cain v. Moore*, 182 Conn. 470, 474 (1980), *cert. denied*, 454 U.S. 844 (1981) (citations omitted). "A judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form." *Rosenfield v. Cymbala*, 43 Conn. App. 83, 91 (1996) (internal quotation marks and citation omitted). "In

[9] The same is true with respect to collateral estoppel, or issue preclusion, which is an aspect of res judicata; its application is limited to issues that have been actually litigated. *See State v. Charlotte Hungerford Hosp*, 308 Conn. 140, 145-146 (2013); *Boria,* 186 Conn. App. at 348 (2018).

a habeas corpus case, the adjudication on the merits is the judgment on the habeas petition. . ." *Franko v. Bronson*, 19 Conn. App. 686, 694 (1989), *overruled in part on other grounds, Vazquez v. Commissioner of Correction*, 88 Conn. App. 226, 234 (2005).

Assuming arguendo that the NhRP actually litigated Petition I, which it did not, its dismissal for lack of standing was not a judgment on the merits and therefore cannot bar Petition II. *See U.S. Bank N.A. v. Foote*, 151 Conn. App. 620, 626, *cert. denied*, 314 Conn. 930 (2014) ("Judgments based on the following reasons are not rendered on the merits: want of jurisdiction . . . *lack of standing.*") (quoting *Bruno v. Geller*, 136 Conn. App. 707, 725, *cert. denied*, 306 Conn. 905 (2012)) (emphasis in original).[10]

The alternative ground for dismissal of Petition I under Practice Book § 23-24(a)(2)—that the petition was frivolous—was mere dictum and also without res judicata effect. *See Ajadi v. Commissioner of Correction*, 280 Conn. 514, 535 (2006) ("a judgment rendered without subject matter jurisdiction is void."); *State v. Singleton*, 274 Conn. 426, 440 (2005) ("when a court dismisses a case for lack of subject matter jurisdiction, any further discussion of the merits of that case is dicta."); *State v. Jason B.*, 176 Conn. App. 236, 237 n.1 (2017) ("Here, because the Superior Court determined that it lacked jurisdiction, it was improper for the court to address the merits of the motion. Its alternative conclusions in that regard, therefore, are mere dicta, lacking the force and effect of a

[10] *Accord Cayer Enterprises, Inc.*, 84 Conn. App. at 193; *Legassey v. Shulansky*, 28 Conn. App. 653, 658 (1992).

judgment, and are void.").[11]

C. Petition II stated "new facts" and proffered "new evidence" within the meaning of Practice Book § 23-29(3) and therefore cannot be dismissed under that provision.

As demonstrated above, the dismissal of Petition I cannot bar Petition II under Practice Book § 23-29(3) because the NhRP did not actually litigate Petition I and its dismissal was not a judgment on the merits. As demonstrated below, Petition II cannot be dismissed under Practice Book § 23-29(3) because it stated "new facts" and proffered "new evidence" within the meaning of the provision.

In response to the NhRP's request for clarity in its motion for articulation on the issue of frivolousness, the Petition I trial court stated that "[t]he standard used to determine whether a petition for a writ of habeas corpus is frivolous is set forth in" *Fernandez v. Commissioner of Correction*, 125 Conn. App. 220, 223 (2010), *appeal denied*, 300 Conn. 924 (2011) ("Art. Decision" at 3) Part Two A141, which is the disjunctive three-criteria test derived from *Lozada v. Deeds*, 498 U.S. 430, 432 (1991) (the "*Lozada* criteria"); *Fernandez*, 125 Conn. App. at. 223-224.

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[11] *See also Lawson v. Commissioner of Motor Vehicles*, 134 Conn. App. 614, 619 n.4, *cert. denied*, 305 Conn. 914 (2012) ("The court proceeded to analyze the merits of the plaintiff's claim, however, '[o]nce it becomes clear that the trial court lacked subject matter jurisdiction to hear the [action], any further discussion of the merits is pure dicta.'") (quoting *PHH Mortg. Corp. v. Cameron,* 130 Conn. App. 238, 242 (2011)).

Under *Lozada*, a habeas claim is not frivolous if any *one* of the following criteria are satisfied: (1) "the issues are debatable among jurists of reason,"[12] (2) "a court could resolve the issues [in a different manner]," *or* (3) "the questions are adequate to deserve encouragement to proceed further." *Id* at 223.[13]

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[12] The fact that "jurists of reason" could or may disagree on an issue is sufficient to render it at least "debatable" and thus non-frivolous. *See State v. James*, 261 Conn. 395, 409-410 (2002) ("reasonable minds may disagree as to whether a particular [set of facts] establishes probable cause," and thus "the very nature of the probable cause issues presented in this case make them 'debatable among jurists of reason' or subject to resolution in a different manner.") (internal quotation marks and citations omitted); *Anderson v. Commissioner of Correction*, 128 Conn. App. 585, 590-91 (2011), *aff'd*, 313 Conn. 360 (2014) (ineffective assistance of counsel claim "debatable" because "reasonable jurists could disagree as to whether the petitioner has demonstrated that he was prejudiced by counsel's deficiencies in performance."); *Koslik v. Commissioner of Correction*, 127 Conn. App. 801, 810, *cert. granted in part*, 301 Conn. 913 (2011) (issues "debatable" where "[r]easonable jurists could disagree. . .").

[13] *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*).

In finding that Petition I was frivolous, the previous trial court opined that Petition I failed to satisfy *any* of the *Lozada* criteria on the issue of whether "an elephant is a legal person for the purpose of issuing a writ of habeas corpus." (Art. Decision at 3) Part Two A141. In direct response to this finding, the NhRP in Petition II presented the following new facts and evidence (not available at the time of Petition I) conclusively demonstrating that it satisfied *all three Lozada* criteria.[14]

First, Petition II cited *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054 (2018) ("*Tommy*") (Fahey, J., concurring), decided on May 8, 2018.[15] In *Tommy*, Judge Eugene M. Fahey of the New York Court of Appeals penned the first opinion of any American high court judge on the issue of whether a nonhuman animal can be a "person" for purposes of habeas corpus relief. His concurring opinion supported the NhRP's arguments on behalf of two imprisoned chimpanzees named Tommy and Kiko, and concluded:

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[14] The cited opinions and rulings discussed below are "facts" in the general understanding of that term as expressed in dictionaries. *E.g.*, fact: "2. An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." Black's Law Dictionary (11th ed. 2019). "[W]here a statute does not define a term, it is appropriate to look to the common understanding of the term as expressed in a dictionary." *State v. Kalman*, 93 Conn. App. 129, 136, *cert. denied*, 277 Conn. 915 (2006) (internal quotation marks and citation omitted). And "[t]he rules of statutory construction apply with equal force to Practice Book rules." *Zollo v. Commissioner of Correction*, 133 Conn. App. 266, 278, *cert. granted in part*, 304 Conn. 910 (2012) (internal quotation marks and citation omitted). Accordingly, as "fact" is not statutorily defined, the trial court erred in failing to look to the common understanding of that term as expressed in dictionaries.

[15] *Tommy* is cited in Petition II at ¶¶ 13, 14, 39, 48, 52, 53, 76 n.17, 85, and 86. Part One A4, 17, 19, 20, 21, 32, 35, and 36; and discussed in Petitioner's Status Conference Memorandum at 6–7 (Part One A73-74) .

> 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 (Fahey, J., concurring).[16]

Second, Petition II was accompanied by an expert affidavit signed by Mark A. Dubois, Esq. (dated May 23, 2018), Connecticut's first Chief Disciplinary Counsel, who testified that, in his "professional opinion, this action is not frivolous, in whole or in part," as "the case is supported by facts and an objectively reasonable argument for the expansion of the existing law."[17] Affidavit of Mark A. Dubois ¶¶ 3, 9 (Entry No. 116).

Third, Petition II cited an *amicus curiae* brief (dated February 23, 2018)[18] authored by seventeen moral philosophers who supported the expansion of habeas corpus to

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[16] Judge Fahey concurred in the decision of the Court of Appeals to deny the NhRP's motion for leave to appeal, but "underscore[d] that denial of leave to appeal is not a decision on the merits of petitioner's claims." *Tommy*, 31 N.Y.3d at 1056 (Fahey, J., concurring).

[17] Cited in Petition II at ¶¶ 40, 42, Part One A17, 18; discussed in Petitioner's Status Conference Memorandum at 8 (Part One A75).

[18] Cited in Petition II at ¶¶ 53, 86, Part One A21, 36; discussed in Petitioner's Status Conference Memorandum at 7 (Part One A74).

chimpanzees.[19] As noted in Petition II, Judge Fahey cited this *amicus curiae* brief with approval.[20] *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring) (noting that the amici philosophers have "expertise in animal ethics and related areas").

Fourth, Petition II cited a recent decision by the Colombian Supreme Court (issued on April 5, 2018) that designated part of the Amazon rainforest as a "subject of rights"—in other words, a legal person.[21]

The NhRP also notified the trial court of two rulings decided after the filing of Petition II relevant to the issue of frivolousness, *People v. Graves*, 163 A.D.3d 16, 21 (2018) and *The Nonhuman Rights Project, Inc., on Behalf of Happy, v. Breheny*, Index No. 1845164 (November 16, 2018). In *Graves*, the New York State Supreme Court Appellate Division, Fourth Judicial Department ("Fourth Department") stated that:

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[19] Those philosophers were: 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).

[20] Cited in Petition II at ¶53; Part One A21.

[21] Cited in Petition II at ¶ 87; Part One A36.

> it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals [citations omitted, citing, *inter alia*, *Matter of Nonhuman Rights Project, Inc. v. Presti*, 124 AD3d 1334, 1335 (4th Dept 2015), *lv denied* 26 NY3d 901 (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 NY2d 194, 201 [1972], *appeal dismissed* 410 US 949 [1973], *reh denied* 411 US 940 [1973]).

In *Breheny*, the Orleans County Supreme Court in New York issued an order to show cause[22] on behalf of an imprisoned elephant named Happy. Both *Graves* and *Breheny* were discussed in Petitioner's Status Conference Memorandum at 8-9 (Part One A75-76) as well as during the January 28, 2019 oral argument on the NhRP's Motion to Rule (Tr. 1/28/19 at 11).

Judge Fahey of the New York Court of Appeals, the Justices of the Fourth Department, Justice Tracey A. Bannister of the Orleans County Supreme Court, and the magistrates on the Colombian Supreme Court may reasonably be presumed to be "jurists of reason" whose opinions render the issue of elephant legal personhood "debatable."[23]

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[22] In New York, an order to show cause is the equivalent of a writ of habeas corpus for purposes of habeas corpus. N.Y. CPLR 7003(a).

[23] Moreover, there is no requirement that reasonable jurists must be from the same jurisdiction. *See Lambright v. Stewart*, 220 F.3d 1022, 1025-1026 (9th Cir. 2000) (noting that the United States Supreme Court in *Lozada* found that "[t]he fact that another circuit had decided the issue in a different manner, in other words, rendered a seemingly well-established issue in our circuit debatable. . . ."); *Murdock v. U.S.*, 2013 WL 7854283 at *2 (S.D. Georgia 2013) (issue "debatable" because "[r]easonable jurists could-and, in fact, do-disagree. . ." [citing circuit split on issue]).

Likewise, reasonable jurists can and should recognize the expert affidavit of Mark A. Dubois, Esq. and the *amicus curiae* brief of seventeen distinguished philosophers as proper and compelling evidence in this debate. Thus, Petition II is clearly not frivolous as it satisfies the first *Lozada* criterion.

Additionally, Petition II is not frivolous as it also satisfies the second and third *Lozada* criteria, specifically because: (a) a court could resolve the issue of elephant legal personhood in a different manner, as evidenced by the *Breheny* court when it issued the order to show cause on behalf of an elephant, and (b) the questions presented by *that issue* are adequate to deserve encouragement to proceed further, as evidenced by Judge Fahey when he stated that "[t]he issue of whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching." *Tommy*, 31 N.Y.3d at 1059.

The above opinions and rulings by jurists and experts are exactly the type of facts and evidence sufficient to refute the frivolousness finding in Petition I, and thus the trial court erred when it characterized those opinions and rulings as "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." (Decision at 6) Part One A84.[24] Accordingly, as Petition II stated "new

[24] *But cf Asif v. Commissioner of Correction*, 132 Conn. App. 526, 530 (2011), *cert. denied*, 304 Conn. 901 (2012) and *Day v. Commissioner of Correction*, 151 Conn. App. 754, 763, *cert. denied*, 314 Conn. 936 (2014) (denying "that the holding of a judicial opinion constitutes a new fact or new evidence as contemplated by Practice Book § 23–29(3).") These decisions are easily distinguishable from the case at bar because: (1) they did not involve prior dismissals on the ground of frivolousness where the application of the *Lozada* criteria to subsequent petitions became relevant; and (2) the NhRP presented new judicial opinions, not for their holdings, but for the fact that judges are taking seriously the issues relating to nonhuman animal personhood.

facts" and proffered "new evidence" within the meaning of Practice Book § 23-29(3), the trial court erred in dismissing Petition II under that provision.

II. The Trial Court Erred in Finding That Petition II Would Be Subject To Dismissal Under Practice Book § 23-29(5).

A. Standard of Review.

As the trial court's dismissal of Petition II was a matter of law, the Decision is subject to plenary review by this Court. *In re Jonathan M.*, 255 Conn. 208, 217 (2001); *In re David W.*, 254 Conn. 676, 686 (2000).

B. The NhRP did not have the opportunity to respond to any alternative grounds for dismissal, as the trial court identified none.

In a footnote, the trial court stated without elaboration that "dismissal would also be appropriate under Practice Book § 23-29(5)." (Decision at 9 n.9) Part One A87. Practice Book § 23-29(5) provides that a court may dismiss a petition if it determines that "any other legally sufficient ground for dismissal of the petition exists." But, as this Court has held: "Dismissal of a claim on alternative grounds is proper when those grounds present pure questions of law, the record is adequate for review, and the petitioner will suffer *no prejudice because he has the opportunity to respond to proposed alternative grounds in the reply brief.*" *Johnson*, 168 Conn. App. at 308 n.8 (citing *State v. Martin M.*, 143 Conn. App. 140, 151-53, *cert. denied*, 309 Conn. 919 (2013)) (emphasis added).

As the trial court did not identify the alleged "other legally sufficient ground for dismissal," the NhRP was necessarily prejudiced by the lack of opportunity to respond to it—specifically in the NhRP's Motion to Reargue. *Cf. Sanchez v. Commissioner of Correction*, 2019 WL 1933645 at *2 (Conn. Super.) (dismissing petitioner's due process claims under Practice Book §23-29(5) on the grounds of procedural default, and the

"parties were given the opportunity following the close of evidence to submit post-trial briefs on those issues.").[25] Accordingly, the trial court's finding that Petition II would be subject to dismissal under Practice Book § 23-29(5) was improper and erroneous.

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

The trial court erred in dismissing Petition II under Practice Book § 23-29(3) and in finding that Petition II would be subject to dismissal under Practice Book § 23-29(5). This Court should reverse the trial court's judgment and remand with instructions for the trial court to issue the writ of habeas corpus and proceed according to Practice Book § 23-24.

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[25] Courts that have dismissed habeas claims under Practice Book § 23-29(5) have, *at a minimum*, identified the actual ground for dismissal. *See, e.g.*, *Crawford v. Commissioner of Correction*, 294 Conn. 165, 176 (2009) ("claims are procedurally defaulted"); *Day v. Warden*, 2011 WL 2177152 at *2 (Conn. Super.) (petition "constitutes an abuse of the writ"); *Stanley v. Warden*, 2007 WL 4216254 at *1 (Conn. Super.) (claim "procedur[ally] default[ed]"); *Jones v. Warden*, 2002 WL 819213 at *2 (Conn. Super.) ("petition does not comply with the provisions of § 23-22 of the Connecticut Practice Book").

CERTIFICATION

I hereby certify that: copies of the foregoing brief and appendix have been delivered electronically to the last known e-mail address of each counsel of record and the non-appearing defendants for whom an e-mail address has been provided on this 9th day of August, 2019; I have included counsel's and defendants' names, mailing addresses, e-mail addresses, and telephone numbers below; copies of the foregoing brief and appendix have been sent by first-class U.S. mail, postage prepaid to the trial judge listed below on this 9th day of August, 2019; the foregoing brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and the foregoing brief and appendix comply with all applicable rules of appellate procedure, including Practice Book Section 67-2.

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