
APPELLATE COURT
STATE OF CONNECTICUT

A.C. 41464

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 AMICI CURIAE JUSTIN MARCEAU, SAMUEL WISEMAN, AND
BRANDON L. GARRETT***

ATTORNEY FOR AMICI CURIAE:
Thomas R. Cherry
615 West Johnson Avenue, Suite 202
Cheshire, CT 06410
Tel: (203) 717-6692
Fax: (203) 717-6693
Email: tcherrylaw@comcast.net
Juris No. 308482

November 12, 2018

* Justin Marceau is the Animal Legal Defense Fund Professor of Law at the University of Denver, Sturm College of Law. Samuel Wiseman is the McConnaughay and Rissman Professor at Florida State University College of Law. Brandon L. Garrett is the inaugural L. Neil Williams, Jr. Professor of Law at Duke University School of Law.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICI CURIAE	1
ARGUMENT	3
I. Preliminary Statement	3
II. The NhRP’s Use of Habeas Corpus is Meritorious and Not “Wholly Frivolous” and is Consistent with the Historical Uses of the Writ	3
A. Family Law	4
B. Slavery	5
C. Guantanamo Bay	7
D. Applying Habeas Corpus to Nonhuman Animals like Beulah, Minnie, and Karen is Consistent with the Writ’s Historical Uses	8
III. Beulah, Minnie, and Karen Should be Classified as Persons Entitled to Habeas Corpus	9
A. They are Autonomous, Intelligent, and can Suffer	9
CONCLUSION	10

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>U.S. Cases</u>	
<i>Boumediene v. Bush</i> , 553 U.S. 723, 771 (2008).....	7
<i>Little v. Comm'r of Corr.</i> , 177 Conn. App. 337, 349 (2017).....	9
<i>Rasul v. Bush</i> , 542 U.S. 466, 483-84 (2004).....	7
 <u>Statutes</u>	
The Detainee Treatment Act of 2005.....	7
The Military Commissions Act of 2006.....	7
 <u>Other Authorities</u>	
Bekoff, Marc, Scientists Conclude Nonhuman Animals are Conscious Beings, <i>Psychology Today</i> (Aug. 10, 2012).....	10
Cambridge Declaration on Consciousness (2013).....	9
Freedman, Eric, Habeas by Any Other Name, 38 <i>Hofstra L. Rev.</i> 275 (2009).....	6
Halliday, Paul D., <i>Habeas Corpus: From England to Empire</i> (2010).....	4, 5
National Archives Microfilm Publication M434, Habeas Corpus Case Records of the U.S. Circuit Court for the District of Columbia, 1820–1863. M433.....	6
Wise, Steven M., <i>Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery</i> (Da Capo Press 2005).....	6
Wise, Steven M., Legal Personhood and the Nonhuman Rights Project, 17 <i>Animal L.</i> 1, (2010).....	6

STATEMENT OF INTEREST OF AMICI CURIAE¹

Professor Justin Marceau is a habeas corpus scholar and the Animal Legal Defense Fund Professor of Law at the University of Denver, Sturm College of Law. He has been a full-time law professor at the University of Denver, Sturm College of Law for ten years and was awarded tenure in 2012. He specializes in constitutional and criminal law with an emphasis on habeas corpus procedures and regularly writes in the field of habeas corpus. He co-authored Lyon, Andrea D., Hughes, Emily, Prosser, Mary & Marceau, Justin, *Federal Habeas Corpus* Carolina Academic Press, (2d ed. 2011), and has written approximately 15 scholarly papers dealing with habeas corpus issues. His publications have been cited by numerous courts, including the U.S. Supreme Court, as well as 200 scholarly works, including leading treatises such as *Federal Habeas Corpus Practice and Procedure and Criminal Procedure*. Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (6th ed. 2011); Wayne R. LaFave et al., *Criminal Procedure* (3d ed. 2014). His habeas corpus publications have appeared in the *Yale Law Journal*, the *William & Mary Law Review*, the *Hastings Law Journal*, and many others.

Professor Samuel Wiseman is the McConnaughay and Rissman Professor at Florida State University College of Law. He served as a law clerk to Chief Justice Wallace B. Jefferson of the Supreme Court of Texas and Judge Fortunato P. Benavides of the United States Court of Appeals for the Fifth Circuit. Between 2009 and 2010, Professor Wiseman served as a Fellow in the Texas Solicitor General's Office, focusing on post-conviction litigation before the Fifth Circuit. He has written numerous articles on habeas

¹ The amici Professors were assisted by an attorney for the Plaintiff in organizing and formatting their own work into this brief. No other party has contributed to the cost of preparation or submission of this brief. The amici were not compensated for this brief.

corpus and post-conviction remedies, and his works on these topics have appeared in the *Minnesota Law Review*, the *Boston College Law Review*, and the *Florida Law Review*.

Professor Brandon L. Garrett is the inaugural L. Neil Williams, Jr. Professor of Law at Duke University School of Law. He served as a law clerk to the Hon. Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit, and previously was the White Burkett Miller Professor of Law and Public Affairs and Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia. Professor Garrett is a leading scholar (research, writing, and teaching) on criminal justice outcomes, evidence, and constitutional rights, including on habeas corpus (he currently teaches a course on habeas corpus) and post-conviction remedies, an award-winning author of numerous articles published in leading law journals and books, and has served as an expert witness and joined in amicus briefs in numerous cases.

Professors Marceau, Wiseman, and Garrett (collectively referred to hereafter as the “Professors”) move to submit this brief as habeas corpus scholars and practitioners in support of the NhRP’s appeal to this Court and to attest that the case brought by the NhRP on behalf of three elephants named Beulah, Minnie, and Karen is not only not “wholly frivolous,” but is of significant importance to the meaning and development of habeas corpus as an equitable doctrine. The Trial Court’s determination that the case is “wholly frivolous” is in fundamental tension with core tenets of the historical writ of habeas corpus. With respect to the particular questions raised here, Justin Marceau has long taken an active interest in the issue of the law’s treatment of nonhuman animals and how their potential legal rights may be derived from existing rights for humans. Justin Marceau, Samuel Wiseman, and Brandon Garrett submit this brief because of their interest in

ensuring that the law is applied consistently and equally to those who deserve its protection and strongly urge this Court, in keeping with the long-established use of habeas corpus, and the policies motivating those long-settled legal standards, to reverse the lower court and remand with instructions to issue the writ of habeas corpus so that Beulah, Minnie, and Karen’s captors may have the burden of showing the lawful justification of their confinement. Professors Marceau, Wiseman, and Garrett offer, uncompensated, a brief as *amicus curiae* on the issue of frivolity in the above-captioned case.

Argument

I. Preliminary Statement

Three elephants, Beulah, Minnie, and Karen, sought a writ of habeas corpus on November 13, 2017 when the Nonhuman Rights Project (“NhRP”) demanded that the court recognize the elephants as persons, grant them their right to bodily liberty, and order their immediate release from captivity. This *amicus curiae* brief argues that the Appellate Court should set aside the lower court’s conclusion, *inter alia*, that the petition was “wholly frivolous on its face as a matter of law.” (“Decision” at 1).

II. The NhRP’s Use of Habeas Corpus is Meritorious and Not “Wholly Frivolous” and is Consistent with the Historical Uses of the Writ

One of the greatest blemishes on our justice system is the detention of innocent persons. The Writ of Habeas Corpus is intended to correct these injustices by requiring a person’s captors to justify the person’s imprisonment to the courts. While the Writ has helped exonerate hundreds of innocent human beings from unjust incarceration, this *amicus* brief argues that the time has come to consider its purpose in the context of other unjustly incarcerated beings. Nonhuman animals are unquestionably innocent. Their confinement, at least in some cases, is uniquely depraved; and their cognitive functioning

and their cognitive harm as a consequence of this imprisonment, is similar to that of human beings.

Beulah, Minnie, and Karen are innocent beings who are being actively and unjustly confined. Unless this Court allows them to use the Writ of Habeas Corpus to require their captors to justify their imprisonment, they will be unjustly confined for the remainder of their lives.

There are three primary reasons why this Court should recognize Beulah, Minnie, and Karen as legal persons able to utilize habeas corpus. First, throughout this nation's history, habeas corpus has had a symbolic and practical role in ending outdated or unjust social practices and has been used in situations where leaving the status quo unchallenged would be unjust. Halliday, Paul D., *Habeas Corpus: From England to Empire* 133 (2010). It has repeatedly been used in novel ways to bring about social and legal change, including within the realms of family law, slavery, and detainees being held in Guantanamo Bay. Second, applying habeas corpus to nonhuman animals like Beulah, Minnie, and Karen is consistent with the Writ's historical uses. Finally, Beulah, Minnie, and Karen should be classified as legal persons for the purpose of habeas corpus given the overwhelming amount of scientific evidence showing how cognitively complex and cognitively similar to humans elephants are.

A. Family Law

In the seventeenth century, England's King's Bench utilized habeas corpus to grant relief to women and children in novel family law situations. *Id.* at 121-32. At that time, women were considered the property of their husbands. *Id.* at 124. As such, women subjected to abusive situations had no legal vehicle to seek relief. *Id.* Similarly, children in

abusive environments had no legal means of escaping abusive environments. Many courts would have scoffed at the idea that habeas corpus would be available to such parties, deemed by the law to be less than persons. Yet time and again justice was sought and achieved through habeas corpus.

Instead of letting the women and children suffer, the King's Bench, under the leadership of Sir Matthew Hale, used the writ of habeas corpus to protect them from abusive, often politically powerful, husbands and fathers. *Id.* at 122-32. Habeas corpus became the only way they could seek protection from their "captors". *Id.* at 124. Importantly, habeas corpus was not used simply as a tool to freedom from abusive "captors", but was used to "assign custody", meaning that the women and children would be transferred to a different, non-abusive household. *Id.* at 129. This use of the writ demonstrates that it can be used for more than simply seeking release from custody. *Id.*

B. Slavery

Before the 19th century slavery was commonplace and legally unregulated; slavery had simply evolved as a custom, then received statutory recognition. It was not until years after English Colonization of the Americas that slavery became constrained by law. The King's Bench also used habeas corpus to give relief to slaves in England. The defining moment for the eighteenth century slave James Somerset was when he became legally visible. Wise, Steven M., *Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery IX* (Da Capo Press 2005). He was a legal "thing" when he landed in England in 1769, having been captured as a boy in Africa, then sold to a merchant in Virginia, Charles Stuart, for whom he slaved for two decades. *Id.* at XIII, 1-2.

James Somerset's owner was attempting to remove him from England when Somerset filed for habeas corpus relief in the King's Bench. *Id.*

As a legal thing, James Somerset existed in law for the sake of his owner, because legal "things", living and inanimate, exist in law solely for the sakes of legal persons, invisible to civil judges in their own rights. *Id.* at IX. Surprisingly, though no clear procedural or substantive basis existed for doing so, the King's Bench granted Somerset's requested habeas corpus relief. James Somerset's legal transubstantiation from thing to person at the hands of Lord Mansfield of the King's Bench in 1772 marked the beginning of the end of human slavery. Wise, Steven M., *Legal Personhood and the Nonhuman Rights Project*, 17 *Animal L.* 1, 1-2 (2010).

In America, in 1839, a free black man named Ralph Gould was being held innocently, wrongfully charged as a runaway slave. Gould had served in the U.S. Navy and had evidence of his military discharge and his freedom in his possession. Gould petitioned Chief Judge William Cranch for a writ of habeas corpus to avoid being sold as a slave. The Chief Judge then ordered Gould's release from prison. National Archives Microfilm Publication M434, *Habeas Corpus Case Records of the U.S. Circuit Court for the District of Columbia*, 1820–1863. M433. These two cases are illustrative of an important part of the history of habeas corpus. While they did not directly cause the end of slavery, cases such as these served as a symbolic demonstration that slaves had the ability to challenge a previously unchallenged class of people, slaveholders. Freedman, Eric M., *Habeas by Any Other Name*, 38 *Hofstra L. Rev.* 275, 277 (2009).

C. Guantanamo Bay

Habeas corpus has also been used to provide non-citizen detainees relief, despite their incarceration outside of the United States. The United States' efforts to combat terrorism after September 11, 2001 led to legislative action regarding the habeas corpus rights of aliens designated by military authorities as enemy combatants. The Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 eliminated such rights for enemy combatants detained at Guantanamo Bay, Cuba. The location of the Guantanamo Detainee Center was chosen not only for its large land availability and distance from known terrorist cells, but because it was thought that the statutory and constitutional rights of non-citizen detainees were very limited if they were not present in the United States itself. However, the United States Supreme Court in *Rasul v. Bush*, held that a district court does have jurisdiction to hear habeas corpus petitions by alien detainees at Guantanamo concerning the legality of their detentions. 542 U.S. 466, 483-84 (2004).

Additionally, in 2008, the Court ruled that Guantanamo detainees possessed habeas rights because the United States exercised some sovereignty over that territory. In *Boumediene v. Bush*, the Supreme Court held that the Suspension Clause had full effect at Guantanamo Bay, even though Congress had passed an act that stripped federal courts of jurisdiction to hear habeas claims. 553 U.S. 723, 771 (2008). Therefore, detainees are entitled to the privilege of habeas corpus to challenge the legality of their detention. *Id.* In holding that the Suspension Clause applied at Guantanamo Bay, the Court noted that “at the absolute minimum” the Clause protects the writ as it existed when the Constitution was ratified. *Id.* at 746-47. Moreover, the Court held that Guantanamo detainees were entitled to habeas corpus despite the fact that the Court had previously “never held that noncitizens

detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.” *Id.* at 771.

D. Applying Habeas Corpus to Nonhuman Animals like Beulah, Minnie, and Karen is Consistent with the Writ’s Historical Uses

Allowing Beulah, Minnie, and Karen the right to petition for habeas corpus is consistent with the writ’s history. Beulah, Minnie, and Karen share many similarities with the indigent women and children, slaves, and Guantanamo detainees discussed above. Like the abused women and children in England, Beulah, Minnie, and Karen are not seeking to be released into the public, but transferred to a facility that will allow the greatest possible autonomy.

Additionally, like slaves, Beulah, Minnie, and Karen are considered property. Property status did not stop the King’s Bench from allowing James Somerset to seek habeas relief, nor prevent Chief Judge Cranch from allowing slaves to petition to seek habeas corpus relief. Allowing James Somerset to seek relief did not end slavery, and granting Beulah, Minnie, and Karen the right to petition for habeas corpus will not result in all nonhuman animals being freed from cruel confinement. However, it would serve as an important step, possibly paving the way for certain nonhuman animals to be free from particularly cruel and unjust confinement.

Finally, like the Guantanamo detainees, Beulah, Minnie, and Karen have no other legal vehicle to challenge their confinement. Certainly, animal cruelty statutes, which provide remedies including criminal punishment for humans who harm nonhuman animals, exist. However, this type of statute provides no substantive basis for nonhuman animals to challenge their confinement; these statutes simply punish humans for their cruel treatment of nonhuman animals. Nor do these statutes usually provide for the nonhuman animals’

release as the remedy. As such, habeas corpus is the only substantive basis Beulah, Minnie, and Karen have to challenge and be released from their confinement.

While Beulah, Minnie, and Karen’s claim is admittedly novel (and as such, is *per se* not frivolous under controlling Connecticut precedent, *Little v. Comm’r of Corr.*, 177 Conn. App. 337, 349 (2017)), this novelty should not prevent their seeking habeas corpus relief. Habeas corpus is the only opportunity Beulah, Minnie, and Karen have to seek relief, and the writ has often been used at the forefront of social change. Therefore, consistent with the writ’s novel historical uses, the NhRP should be allowed to petition for a writ of habeas corpus to challenge their detention.

III. Beulah, Minnie, and Karen Should be Classified as Persons Entitled to Habeas Corpus

A. They are Autonomous, Intelligent, and can Suffer

In just the past decade, advances in the scientific community’s understanding of DNA has played a transformative role in our justice system. It has allowed us to exonerate and liberate innocent persons that were previously found under the highest standard of proof known to law—proof beyond a reasonable doubt—to be guilty. Science of a similarly profound and powerful character is beginning to change our understanding of who such nonhuman animals as elephants are and the effects of confinement on them.

There is a growing consensus that nonhuman animals have consciousness, emotions, and other brain functioning that is remarkably similar to that of humans. In 2013, a group of leading scientists signed the “Cambridge Declaration on Consciousness,” which explained that “non-human animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviors.” It went on to explain that “the weight of evidence indicates that

humans are not unique in possessing the neurological substrates that generate consciousness.”

The research is increasingly conclusive: nonhuman animals can feel, and suffer, and in fact have brains that function very similarly to our own. Bekoff, Marc, *Scientists Conclude Nonhuman Animals are Conscious Beings*, Psychology Today (Aug. 10, 2012).


Conclusion

The attempted application of habeas corpus to elephants is far from “wholly frivolous.” The history of habeas corpus is one of radical change and it has historically been used in novel factual situations where no other legal vehicle exists. Innocent humans who are given habeas corpus relief by the courts have many similarities to captive nonhuman animals like Beulah, Minnie, and Karen. Both have done nothing wrong, both are autonomous, and both suffer as a result of their unjust confinement. We respectfully request that this Court recognize an expanded – but still limited – universe of legal personhood that affords the possibility of providing relief to Beulah, Minnie, and Karen. The elephants should be classified as legal persons and granted a writ of habeas corpus.

Dated: Cheshire, Connecticut
November 12, 2018

Amici Curiae

JUSTIN MARCEAU, SAMUEL WISEMAN,
AND BRANDON L. GARRETT

By: 

Thomas R. Cherry
615 West Johnson Avenue, Suite 202
Cheshire, CT 06410
Tel: (203) 717-6692
Fax: (203) 717-6693
Email: tcherrylaw@comcast.net
Juris No. 308482

CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief complies with all provisions of Practice Book § 67-2, and that on this the 12th day of November 2018, the foregoing Brief was both mailed and electronically transmitted to the following:

David B. Zabel (Attorney for Plaintiff)
Cohen and Wolf, P.C.
1115 Broad Street
Bridgeport, CT 06604
Tel: (203) 368-0211
Fax: (203) 394-9901
Email: dzabel@cohenandwolf.com

R.W. Commerford & Sons (self-represented)
48 Torrington Rd.
Goshen, CT 06756
Tel: (860) 491-3421
Fax: (860) 491-9428
E-mail: commerfordzoo@yahoo.com

Steven M. Wise (Attorney for Plaintiff)
Nonhuman Rights Project, Inc.
5195 NW 112th Terrace
Coral Springs, FL 33076
Tel: (954) 648-9864
E-mail: WiseBoston@aol.com

William R. Commerford (self-represented)
48 Torrington Rd.
Goshen, CT 06756
Tel: (860) 491-3421
Fax: (860) 491-9428
E-mail: commerfordzoo@yahoo.com

This is further to certify pursuant to § 67-2(i) that the foregoing Brief is a true copy of the Brief submitted electronically to the Court on this day, and that the Brief does not contain any information prohibited from disclosure by rule, statute, court order, or case law. A copy of the electronic confirmation receipt is attached hereto.



THOMAS R. CHERRY



State of Connecticut Judicial Branch
Appellate/Supreme E-Filing



THOMAS RICHARD CHERRY (308482)

Email: tcherrylaw@comcast.net Logout

You have selected this case:

Number:
AC41464

Name of Case:
NONHUMAN RIGHTS PROJECT INC v. R.W. COMMERFORD & SONS, INC. Et Al

You have successfully E-Filed!

[View/Save/Print Brief document here:](#) 

[Print Confirmation of E-Filing here](#)

Confirmation of E-Filing

For questions regarding this payment: [Contact Us](#).

Supreme/Appellate Docket Number:	AC 41464
Trial Court Docket Number:	LLI-CV-17-5009822-S
Type of Transaction:	BRIEF
Fee Amount:	\$0.00
Service Fee:	\$0.00
Total Transaction Amount:	\$0.00
Date Filed:	11/13/2018
Filed By:	308482 - THOMAS RICHARD CHERRY
Date & Time of Transaction:	11/12/2018 09:17 AM
Documents Filed:	168391-BRIEF
Payment Confirmation Number:	

[Back to E-Filing Menu](#)

[Logout](#)