MEMOPRO

DOCKET NO. LLI-CV-17-5009822-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.	:	January 16, 2018

OFFICE OF THE CLERK
SUPERIOR COURT
2018 JAN 16 PM 2 46
JUDICIAL DISTRICT OF
LITCHFIELD
STATE OF CONNECTICUT

MEMORANDUM OF LAW IN SUPPORT OF MOTION
TO REARGUE AND FOR LEAVE TO AMEND THE PETITION

I. This Court's ruling that the Petition was "wholly frivolous" within the meaning of Practice Book § 23-24(a)(2) erroneously conflated "frivolous" with "novel" and conflicts with controlling precedent, rules, judicial norms, and Connecticut public policy.

A. As the NhRP's Petition raises well-researched and novel legal issues, refers to analogous cases in which the requested relief was granted in other jurisdictions, notes that its legal arguments have substantial academic support, and states that it seeks a good faith extension of the common law, the Petition cannot be "wholly frivolous" with no "possibility of victory."

Practice Book § 23-24(a)(2) states that this Court shall issue the writ unless it appears that "the petition is wholly frivolous on its face." This Court dismissed the Nonhuman Right Project Inc.'s ("NhRP") Verified Petition for a Common Law Writ of Habeas Corpus ("Petition") under this section, stating "the petition is wholly frivolous on its face in legal terms." (Decision at 1). It is unclear precisely what this means as the word

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"frivolous" is not found in this Court's discussion of the applicability of § 23-24(a)(2) to the Petition. (Decision at 9-12). Moreover, this Court cited no authority to support its conclusion that an elephant is not now a "person" in Connecticut for the purpose of a common law writ of habeas corpus nor that an elephant could never possibly be a "person" in Connecticut for the purpose of a common law writ of habeas corpus.

As cited by this Court, the standard under § 23-24 (a)(2) is set forth in *Henry E.S., Sr. v. Hamilton*, 2008 WL 1001969 (Conn. Super): it "is that of a *possibility* of victory." A related standard for whether a habeas corpus appeal is not "frivolous and warrants appellate review [is] if the appellant can show: that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Fernandez v. Commission of Correction*, 125 Conn. App. 220, 223-224, *cert. den.*, 300 Conn. 924 (2011) (petitioner's case was frivolous because he alleged he was a slave and a prisoner of war, when he was merely a prisoner who had been convicted of crimes).

The case at bar turns on whether Beulah, Minnie, and Karen, the elephants detained in Respondents custody, are "persons" solely for the purpose of possessing the common law right to bodily liberty that is protected by the common law of habeas corpus. The entirety of the discussion of this Court on the issue of whether they could possibly be "persons" was this: "The petitioner is unable to point to any authority which has held so, but instead relies on basic *human* rights of freedom and equality, and points to expert averments of similarities between elephants and human beings as evidence that this court must forge new law." (Decision at 12) (emphasis in original).

However, in support of its argument, the NhRP filed a 34-page Petition, ¶ 9 of which stated:

> Connecticut courts have long recognized the common law writ of habeas corpus (citation omitted). This Petition is filed as an application in good faith for an extension of the Connecticut 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 a common law habeas corpus.

The NhRP also filed a 35-page supporting Memorandum of Law ("Memorandum") that argued, at 11-13, that as a matter of common law *liberty*, autonomy is a fundamental interest protected by Connecticut courts and that the species of the autonomous being is, and ought to be, irrelevant. In support thereof, the NhRP filed five uncontroverted affidavits from the greatest elephant cognition experts in the world that proved that elephants are autonomous and extraordinarily cognitively and socially complex beings. In the Memorandum, at 13-20, as well as the Petition, at ¶¶ 33-34, the NhRP also argued that the elephants are entitled to the common law liberty that is protected by the common law writ of habeas corpus as a matter of common law *equality*.

Neither the NhRP's argument that the elephants were "persons" as a matter of either common law liberty or equality were discussed by this Court in its decision. Instead this Court wrongly conflated the NhRP's *novel* case — seeking a good faith extension of the common law — with a "frivolous" case, which it is clearly not.

A failure to distinguish between a "novel" claim and a "frivolous" claim saps "(t)he vitality of our common law system (which) is dependent upon the freedom of attorneys to pursue novel, although potentially unsuccessful, legal theories." *Falls Church Grp., Ltd. v. Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 104 (2007) (citation omitted).

That is why the Connecticut Rules of Professional Conduct 3.1 specifies that a "good faith argument for an extension, modification or reversal of existing law" is "*not frivolous*."

These rules and precedents support the strong public policy in Connecticut against deterring attorneys from pursuing causes of action that may have a very low likelihood of success or advocating for changes in the law. *Ogren v. Lassen*, 2013 WL 6916695, at *11 (Super. Ct. Nov. 27, 2013).

This Court's statement that the instant claim was "frivolous" rather than "novel" was made despite the fact that the Petition, at ¶ 24, and the supporting Memorandum, at 1-6, extensively documented that "humans" and "persons" are not now, and never have been, synonymous, that the Memorandum, at 2-3, 5, documented that, for many centuries, in Connecticut and elsewhere, vast numbers of humans were not "persons," but "things," including slaves and women, that the Memorandum, at 3-5, lays out that in every common law national jurisdiction today there are numerous nonhuman entities that have been deemed legal persons, including corporations, ships, rivers, national parks, holy books, and idols, and that a chimpanzee has been declared to be a "non-human person" for the purpose of habeas corpus in Argentina. Moreover, as the NhRP alleged in its Petition, at ¶¶ 15-19, 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. Additionally, the NhRP noted in its Petition, at ¶ 21, that the arguments it makes have captured the interest of the world's leading scholars and the most selective academic publications and catalyzed the development of a whole field of academic research and debate, in dozens of law review articles, numerous academic books and science journals, and a variety of legal industry publications. It listed well over one hundred examples of

such books and articles, and noted that such a widely-respected scholar as John Chipman Gray expressly noted that nonhuman animals may be legal "persons." Memorandum at 3.

With respect to this Court's statement that the NhRP's argument should be rejected solely because it relies on "*human*" rights (emphasis of the court) to make its case that elephants should have the common law right to bodily liberty that is protected by the common law of habeas corpus, the NhRP in its Petition, at ¶ 27, reminded this Court that, at one time, black people were slaves in all common law jurisdictions and that, beginning with the famous 1772 London case of *Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep. 499 (K.B. 1772), attained their personhood and fundamental common law rights by relying upon the rights that only white people had at the time. The NhRP further reminded this Court that the most shameful legal episodes in all American jurisprudence occurred when black people, Native Americans, and Chinese, and other nonwhites were denied personhood and/or legal rights because they were not white and could not rely upon *white* rights of freedom and equality, when women were denied personhood and/or legal rights because they were not men and could not rely upon *male* rights of freedom and equality, and when gays and lesbians were denied personhood and/or legal rights of freedom and equality because they were not heterosexual and could not rely upon *straight* rights of freedom and equality. Petition, at ¶¶ 28, 29; Memorandum at 5, 16-17.

But, as the NhRP noted in its Petition, at ¶ 8, "the common law of Connecticut . . . is broad, flexible, and adaptable." Every Connecticut common law rule that exists today once did not exist. Every common law rule that exists today was once the subject of a lawsuit that sought to extend existing common law. Connecticut common law has been extended many dozens of times. *See, e.g.*, *Simon v. Mullin*, 34 Conn. Supp. 139 (1977)

(recognizing cause of action for prenatal injuries regardless of viability of fetus when child is subsequently born alive); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 127 (1982) (recognizing common law cause of action for invasion of privacy and citing *McCormack v. Oklahoma Publishing Co.*, 613 P.2d 737 (Okla. 1980) for the premise that "the common law is not static, but is a dynamic and growing thing and its rules arise from the application of reason to the changing conditions of society."); *Craig v. Driscoll*, 262 Conn. 312 (2003) (recognizing common law cause of action for negligent infliction of emotional distress on a bystander against purveyor of alcohol, even where Legislature had purportedly occupied the field by operation of Dram Shop Act).[1]

Not only are the issues the NhRP raised debatable among jurists of reason, but jurists of reason have already granted such relief in other jurisdictions. Not only could a

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[1] The same has been true for statutory interpretation in Connecticut. In *In re Hall*, 50 Conn. 131 (1882), a woman demanded the right to practice law in Connecticut under a statute she conceded limited that right to "persons" and was not intended to apply to women.

> [H]ere the statute is ample for removing that disability if we can construe it as applying to women; so that we come back to the question whether we are by construction to limit the application of the statute to men alone, by reason of the fact that in its original enactment its application to women was not intended by the legislators that enacted it . . . if we hold that the construction of the statute is to be determined by the admitted fact that its application to women was not in the minds of the legislators when it was passed, where shall we draw the line? All progress in social matters is gradual. We pass almost imperceptibly from a state of public opinion that utterly condemns some course of action to one that strongly approves it. At what point in the history of this change shall we regard a statute, the construction of which is to be affected by it, as passed in contemplation of it? When the statute we are now considering was passed it probably never entered the mind of a single member of the legislature that black men would ever be seeking for admission under it. Shall we now hold that it cannot apply to black men?

Id. at 132-13. This Court would have, wrongly, considered Mary Hall's novel lawsuit to have been "frivolous."

court resolve the issues in a different manner, but they have. Not only are the legal questions presented adequate to deserve encouragement to proceed further, but numerous legal academics and writers have long been debating them. There is an obvious possibility of victory in Connecticut as well.

In short, it is so extremely rare in Connecticut, as to be a virtual legal *non sequitor,* for a trial court to rule that a serious, complex, well-researched, well-written, scholarly Petition and Memorandum, that are grounded in numerous complex and relevant expert opinions, that possess substantial and broad academic support, that cite other jurisdictions have already granted the relief requested, and expressly state that the claim is being brought in good faith seeking to extend the common law, could be categorized as "frivolous." With respect, this was error.

II. This Court should not have dismissed the Petition for lack of subject matter jurisdiction, and erroneously relied on *Whitmore v. Arkansas* and specifically, its second prong and its *dicta* regarding a significant relationship, neither of which have been adopted by Connecticut courts as requirements for standing.

A. This Court should have followed the procedure set forth in *Lebron v. Commissioner of Correction*, 82 Conn. App. 475, 477-79 (2004) in determining whether it had subject matter jurisdiction.

This Court determined that it lacked subject matter jurisdiction on a matter of first impression without granting the NhRP a hearing. Instead, it should have followed the procedure set forth in *Lebron.* That petitioner claimed that the Superior Court had improperly concluded that it lacked subject matter jurisdiction because the petitioner was not in "custody" at the time he filed his petition pursuant to § 52-466. But that habeas court had not deprived Lebron of a hearing on his matter of first impression. Instead it had properly issued the writ, then dismissed the case after the respondent filed an appropriate motion to dismiss, and a hearing was conducted. *See Lebron v. Commissioner of*

Correction, 82 Conn. App. 475, 477-79 (2004). This Court should do the same upon reargument.

B. Connecticut common law permits strangers to file habeas corpus petitions on another's behalf outside of the prisoner and child-custody context.

This Court concluded that it lacked subject matter jurisdiction because the NhRP lacked standing to bring the Petition on behalf of Beulah, Minnie, and Karen (Decision at 3-9). In reaching its conclusion that NhRP lacked standing, this Court: (1) misinterpreted General Statutes § 52-466; (2) relied upon child-custody and prisoner cases, both inapposite areas of habeas corpus standing jurisprudence; (3) erroneously relied on *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990); and (4) ignored long-standing Connecticut precedent that permits a stranger to file a habeas petition on behalf of another who is not a child, ward, or prisoner, such as a slave.

This court ruled against the background that "[i]t 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 that "[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). Moreover, no habeas corpus petition should ever be dismissed *sua sponte* unless its lack of merit is "unmistakable." *Ron v. Wilkinson*, 565 F. 2d 1254, 1259 (2d Cir. 1977).

The Court improperly interpreted § 52-466 as establishing two separate standards for habeas corpus standing — one for criminal cases and one for all others — when the statute does not concern standing at all. This Court stated that "[a]lthough for persons confined as a result of a criminal conviction, § 52-466(a)(2) provides that an application

for a writ of habeas corpus may be 'made by or on behalf of an inmate,' § 52-466(a)(1) does *not* provide language regarding a petition being made 'on behalf of' the person whose noncriminal custody is in question." (Decision at 4) (emphasis in original). Yet without any support, this Court interpreted this silence about non-criminal cases to mean that *only* in criminal cases may a petition be brought by a stranger. This statute, however, does not concern *who* may bring a habeas corpus petition, but merely confers subject matter jurisdiction on a court to hear a habeas corpus case when an imprisoned person is in "custody" and determines venue for the situation when an inmate is in "custody" seeks habeas corpus.[2]

Section 52-466 was enacted against a background of three centuries of an Anglo-American habeas corpus law that has long recognized that strangers may bring habeas corpus petitions in those exceedingly rare non-child custody cases (such as this), where one *private* individual is alleged to have illegally detained another *private* individual. These cases are especially important, as private detainees are, by definition, unable to bring a habeas corpus petition on their own, for their private jailer is under no public duty to assist their prisoners in seeking the Great Writ, as they would be with regard to a prisoner accused or, or convicted of, a crime. In short, no jailer of an illegally detained individual ever has, or ever will, release his detainee for the purpose of allowing her to

[2] "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 (2004) (citing *Abed v. Commissioner of Correction*, 43 Conn.App. 176, 179, cert. denied, 239 Conn. 937 (1996)). "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." (in the context of the court's ability to inquire into the legality of the detention). *Hickey*, 82 Conn. App. at 31.

seek a writ of habeas corpus. That is why anyone with knowledge of the detention has long been able to seek the Great Writ on that detainee's behalf.

The leading case of strangers having standing to file a common law writ of habeas corpus on behalf of a privately detained individual in Connecticut remains *Jackson v. Bulloch*, 12 Conn. 38 (1837). In *Jackson*, the famed black abolitionist and former slave, James Mars, received 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. *Jackson* has never been overruled because it sets out the common law for habeas corpus standing that has been in effect in England and in the United States for centuries. *E.g.*, *Lemmon v. People*, 20 NY 562 (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); *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 (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 (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 in Boston) (*Aves* was cited with approval by the Connecticut Supreme Court of Errors 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); *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).

The NhRP's' standing to bring the Petition, as in all the above cases, is grounded in the substantive common law of habeas corpus. To the extent that a statute is named, it merely regulates the procedure under which the common law writ of habeas corpus may be litigated. 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 (C.P. 1942). Thus the New York State Supreme Court recognized the standing of the NhRP to bring a common law writ of habeas corpus on behalf of two chimpanzees in *Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S. 3d 898 (N.Y. Supr. Ct. 2015). 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 standing that New York, English, and Connecticut cases had employed long before it, or its predecessors, had been enacted. *See People v. McLeod*, 3 Hill 635 fn. j sec.7 (N.Y. Supr. Ct. for the Correction of Errors 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).

Similarly, the language of § 52-466(a)(2) merely 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 purport to contract the long-standing Connecticut law that common law writs of habeas corpus may be sought by strangers on behalf of detained individuals. It does not purport to create a broader law of habeas corpus for inmates or prisoners than that which has long existed for both privately and publicly detained individuals. Instead it simply requires that when an inmate who is in "custody" seeks habeas relief, the writ must be sought solely in the judicial district of Tolland. The reason is judicial practicality; Connecticut wants all habeas corpus cases involving convicted inmates to be filed in a single judicial district.[3]

While recognizing that Connecticut law allows for third parties to file habeas corpus petitions in noncriminal cases (Decision at 5) ("[a]lthough § 52-466(a)(1) does not contain language regarding a petition made 'on behalf of' someone else, this does not mean that one cannot make such a petition thereunder"), this Court erroneously applied

[3] The issue of whether the three elephants are "persons" is jurisdictional, as is the matter of "custody," but the place where the inmates and prisoners must seek their writs of habeas corpus is a matter of venue. *Lebron v. Commissioner of Correction*, 274 Conn. 507, 527 (2005), *overruled on other grounds*, *State v. Elson*, 311 Conn. 726 (2014).

standing requirements to this private detention habeas corpus case that are limited to child custody and prisoner habeas corpus cases.

With respect to child custody habeas corpus cases, this Court relied heavily upon *Weidenbacher v. Duclos*, 234 Conn. 51 (1995) for the proposition that a third-party petitioner in a noncriminal habeas corpus case must be "related" to the party in custody to establish standing. The issue of standing in child custody cases, however, requires a different analysis from all other habeas cases, for it has nothing whatsoever to do with detention in general, much less with the unique situation of a private detention. *Weidenbacher v. Duclos*, 34 Conn. App. 129, 132 (1994), *rev'd on other grounds*, 234 Conn. 51 (1995) ("In contrast to the usual habeas corpus case, the illegality of confinement is not at issue in a custody matter.").

Moreover this Court erred in stating that "were the court to determine that the elephants are 'persons,' it is the *respondents* who are more akin to parents of Beulah, Minnie, and Karen" (Decision at 6) (emphasis in original) as a "person" is merely an entity who has the capacity for legal rights. Petition at ¶ 24; Memorandum at 1-5. Just because an entity is a "person" for the purpose of one legal right does not necessarily mean she is a "person" for the purpose of any other legal right. Cognizant of this, the NhRP has not argued that Beulah, Minnie, and Karen are "persons" with any legal right other than the common law right to bodily liberty protected by the common law writ of habeas corpus. The NhRP emphatically does not claim that the elephants are children, but "persons." "Person" is a legal term of art; "child" is a biological fact.

This Court stated that "[o]utside the context of child custody, a petitioner deemed to be a 'next friend' of a detainee has standing to bring a petition for writ of habeas on the

detainee's behalf" (Decision at 7) (citing *State v. Ross*, 272 Conn. 577, 597 (2005)). As set forth below, the Court's reliance on *Ross* and the *Whitmore* test discussed in *Ross*, was mistaken.

C. This Court's reliance on *Whitmore* was erroneous.

In ruling that the NhRP lacked standing to bring the Petition on behalf of Beulah, Minnie, and Karen, this Court relied on *Whitmore*, a federal habeas corpus case involving a death row inmate,[4] and cited *Ross* for the proposition that the next friend standard enunciated in *Whitmore* has been adopted by the highest court in Connecticut. (Decision at 7).[5] But, contrary to this Court's opinion, the Connecticut Supreme Court has never adopted the *entire Whitmore* test, even for prisoners. It has merely applied the first of its two prongs (regarding incapacity to sue). The *Whitmore* language this Court relied upon regarding a "significant relationship" was not one of the two prongs, but mere *dicta*, a "suggestion" made by a single United States District Court, and while some federal courts have relied on this *dicta*, many have not, and it has certainly never been adopted in Connecticut, nor should it be, *infra*.

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[4] *Whitmore* involved federal standing under the "Case or Controversy" requirements of Art. III of the U.S. Constitution. But the Connecticut Constitution contains no "Case or Controversy requirement" and there is no reason why the Connecticut courts should suddenly create one. *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*, No. CV054003674, 2006 WL 894921, at *4 (Conn. Super. Ct. Mar. 21, 2006) ("The court notes that the standing issue presented in *Linda R.S. v. Richard D.*, [citation] 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).

[5] *Whitmore*, 495 U.S. at 164-5, stated that "the scope of any federal doctrine of 'next friend' standing is no broader than what is permitted by the habeas corpus statute, which codified the historical practice," which NhRP set forth, *supra*.

i. *Whitmore*'s language regarding a significant relationship is *dicta.*

In *Whitmore*, 495 U.S. at 151-53, the United States Supreme Court considered the question of whether a third party had standing to challenge the validity of a death sentence imposed on a competent capital defendant who had elected to forgo his right of appeal. Whitmore, a fellow death row inmate, then sought permission to intervene in the proceeding both individually and as next friend. *Id.* The Supreme Court of Arkansas concluded that Whitmore lacked standing and the United States Supreme Court granted his petition for certiorari. *Id.* at 153-54.

Whitmore established two requirements for next friend standing for purposes of federal jurisprudence under Article III. First, 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). Second, 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 Court noted in *dicta* that "it has been further suggested 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 (citing only *Davis v. Austin*, 492 F. Supp. 273, 275-76 (N.D. Ga. 1980) (minister and first cousin of prisoner denied "next friend" standing)).[6] The Supreme Court concluded that because the death row inmate's competency had been established at the

[6] The *Whitmore* dissent, at 177 n.6 (Brennan, J. and Marshall, J., dissenting) correctly noted that "[i]f the Court's suggestion were true, it would necessitate abolishing next-friend standing entirely. In terms of Article III, a next friend who represents the interests of an incompetent person with whom he has a significant relation is no different from a next friend who pursues a claim on behalf of a competent stranger; both rely wholly on the injury to the real party in interest to satisfy constitutional standing requirements."

competency hearing, Whitmore lacked standing to proceed as next friend, as he had failed the first requirement. *Id.* at 165-66.

Many federal courts have recognized that the language this Court relied upon regarding the "significant relationship" is both mere *dicta* and not a requirement for next friend standing, even under *federal* jurisprudence. *See ACLU Found. v. Mattis*, 2017 WL6558503 at *4 (D.D.C. December 23, 2017) ("*Whitmore* . . . noted *in dicta* that 'it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest,' but did not opine on that issue (citation omitted)'"). The Second Circuit in *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) properly observed:

> Whether a person seeking next friend status must have a "significant relationship" to the petitioner has not been resolved by this Court or by the Supreme Court. The Supreme Court merely said that "it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest." *Whitmore*, 495 U.S. at 163-64.

The First Circuit agreed that:

> While the Supreme Court recognized that some courts have "suggested" that a Next Friend must also have a significant relationship with the real party in interest, the Court did not hold that a significant relationship is a necessary prerequisite for Next Friend status. *Id.* at 163-64; *see also Whitmore*, 495 U.S. at 177 (Marshall, J., dissenting) (recognizing that the majority opinion suggested, without holding, that a Next Friend may have to prove she has "some significant relationship with the real party in interest" . . .
>
> In evaluating an individual's capacity to serve as Next Friend for minors who lack ties with their parents and family members, federal courts have rejected a rigid application of the significant relationship requirement, holding that the common-law concept of Next Friend is capacious enough to include individuals who pursue a suit in good faith on behalf of a minor or incompetent.

Sam M. v. Carcieri, 608 F.3d 77, 90-91 (1st Cir. 2010). The D.C. Circuit has not adopted the significant relationship requirement for next friend standing either. *See ACLU Found. v. Mattis*, 2017WL6558503 at *4; *Does v. Bush*, 2006 U.S. Dist. LEXIS 79175, 2006 WL 3096685, at *6 (D.D.C. Oct. 31, 2006). The Eleventh Circuit has indicated that such language from *Whitmore* is not a requirement for federal standing. *See Sanchez-Velasco v. Secretary of Dept. of Corrections*, 287 F.3d 1015, 1026 (11th Cir. 2002) ("'[S]ome significant relationship,'. . . may not be an additional, independent requirement but instead may be one means by which the would-be next friend can show true dedication to the best interests of the person on whose behalf he seeks to litigate."). Justice Berzon's concurring opinion in *Coal. of Clergy v. Bush*, 310 F.3d 1153, 1165-66 (9th Cir. 2002) cogently explained that *Whitmore* did not establish a "significant relationship" as a next friend standing requirement because:

> the Supreme Court in *Whitmore* did not indicate that a "significant relationship" was part of the second *Whitmore* prong. Rather, only after stating the two-prong *Whitmore* test did the Court add "it has been *suggested* that a 'next friend' must have some significant relationship with the real party in interest." *Whitmore*, 495 U.S. at 164 (emphasis added).

See also Nichols v. Nichols, 2011WL2470135, at *4 (D. Or. June 20, 2011) ("The Supreme Court did not hold that a significant relationship is a necessary prerequisite for Next Friend status, but noted that some courts have 'suggested' that a Next Friend must also have a significant relationship with the real party in interest."). Even in the case of *Hamdi v. Rumsfeld*, 294 F.3d 598, 604 n.3 (4th Cir. 2002), upon which this Court relied in its statement that a "significant relationship" was required for standing (Decision at 7), the

Fourth Circuit admonished that "we reserve the case of someone who possesses no significant relationships at all."[7]

In summary, *Whitmore* involved an interpretation of Article III of the United States Constitution to which Connecticut has no analogue, the "significant relationship" requirement was *dicta* even in *Whitmore* and was based upon a single suggestion by a Georgia district court, many federal courts have not followed this *dicta*, other federal courts like *Hamdi* specify that *Whitmore* is not a bar to a petitioner who has no "significant relationships" and, as set forth below, no Connecticut case has ever adopted the "significant relationship" requirement.

ii. Connecticut has only adopted *Whitmore*'s first prong regarding incapacity to sue, but not the second prong regarding dedication to the party or the *dicta* regarding significant relationship.

This Court wrongly relied on the second prong of *Whitmore* and the *dicta* regarding a "significant relationship" to hold that a pre-existing significant relationship is required in order to bring a habeas petition on behalf of the three elephants unlawfully detained in Respondents' custody in Connecticut. (Decision at 7-8). Connecticut courts

[7] This Court properly recognized that "[t]he court in *Hamdi* indicated that the situation might be different in the case of a detainee that has no significant relationships." (Decision at 8 n.3). It then stated "[t]he petitioner here makes no such allegation, and thus, the court shall not make the allegation for it" citing *Moye v. Commissioner of Correction*, 315 Conn. 779, 789 (2015) for the proposition that "a habeas petitioner is limited to the allegations in his petition." *Moye v. Commissioner of Correction*, 316 Conn. 779, 789 (2015). This Court's reliance on the case is misplaced because in *Moye*, the habeas petitioner made two distinct ineffective assistance of counsel claims: one at the habeas court under one theory, and a second on appeal under a *different* theory. At issue was whether the petitioner was entitled to have his second, *concededly* unpreserved claim—raised for the *first time* on appeal—reviewed by the Appellate Court, and the Connecticut's Supreme Court held that he was not so entitled. Unlike *Moye*, the allegation that the elephants have no significant relationships would not amount to alleging a totally different theory of next friend standing.

have never adopted this test as part of its habeas corpus standing jurisprudence, as evidenced by this Court's resort to *federal* cases alone interpreting *Whitmore*'s second prong and its *dicta* pertaining to a "significant relationship." (Decision at 8). Absent from this Court's opinion is any *Connecticut* case holding that a preexisting or "significant relationship" is required to bring a habeas corpus petition on behalf of another (other than *sui generis* child custody cases).

The only habeas corpus proceeding in which the Connecticut Supreme Court addressed *Whitmore* was *State v. Ross*, 272 Conn. 577, 596-611 (2005) (and its subsequent proceedings) which involved nearly identical facts as *Whitmore*. In *Ross*, however, the Court only applied the first prong of *Whitmore* (involving incapacity to sue) rather than the second prong (regarding dedication to the party) or the *dicta* about "significant relationship," adopted by this Court in holding that the NhRP lacked standing to sue. While this Court cited *Ross* at 599, quoting *Whitmore*, to support its preexisting and "significant relationship test" (Decision at 9), it is clear that in the context of *Ross* that such language was clearly *dicta*. The Supreme Court in *Ross* only mentioned that portion of *Whitmore* in passing. 272 Conn. at 599-600. There is no Connecticut case adopting or applying the second prong of *Whitmore* or the *dicta* regarding the statement that the next friend "must have some significant relationship with the real party in interest."

In Connecticut's first case mentioning *Whitmore*, *Phoebe G. v. Solnit*, 252 Conn. 68, 71 (1999), the issue was whether "a next friend has standing to bring an action on behalf of a conserved person rather than her conservators." (footnote omitted). The Supreme Court held "that a conserved person may bring an action on her own behalf pursuant to the patients' bill of rights," and that "an action on behalf of a conserved person

may be brought by a next friend . . . where there are exceptional circumstances." *Id.* at 71-72. The Court cited *Whitmore* only once and for the following narrow, and obvious, proposition unrelated to the second *Whitmore* prong or the "significant relationship" *dicta*, that

> the general rule is that a next friend may not bring an action for a competent person. *See Whitmore v. Arkansas,* 495 U.S. 149, 166, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (dismissing next friend's writ of habeas corpus because he did not demonstrate that real party in interest was unable to litigate claim himself).

Id. at 77.

The second Connecticut Supreme Court case to mention *Whitmore* was *Ross*, 272 Conn. 577. Again, the Court only relied on the first prong of *Whitmore*; it never adopted either *Whitmore*'s second prong or its "significant relationship" *dicta*. In *Ross*, the chief public defender together with the father of a death row inmate, sought habeas corpus relief as "next friends" on behalf of Ross, seeking to stay his execution.[8] But Ross did not wish to stay his execution. *Id.* at 583-84. The trial court found that Ross had made a knowing, voluntary, and intelligent waiver. *Id.* at 592. The Connecticut Supreme Court found that the first prong of the *Whitmore* test was therefore lacking as Ross was competent. *Id.* at 611. The Court concluded that the putative next friend public defender had

> not presented any meaningful evidence that the defendant is incompetent . . . In the absence of such evidence, the [public defender] is not entitled to an evidentiary hearing at which it may attempt to establish the defendant's incompetence and its standing to appear as the defendant's next friend under *Whitmore v. Arkansas*, supra, 495 U.S. at 161-66, 110 S.Ct. 1717.

Id. After discussing the two-part *Whitmore* test, the Court in a footnote reiterated that it had *only* adopted the first prong:

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[8] *See In re Ross*, 272 Conn. 653, 655-56 (2005).

> The United States Supreme Court stated that "[w]ithout deciding whether a 'next friend' may ever invoke the jurisdiction of a federal court absent congressional authorization, we think the scope of any federal doctrine of 'next friend' standing is no broader than what is permitted by the habeas corpus statute, which codified the historical practice. 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 is unable to litigate his own cause due *to mental incapacity, lack of access to court, or other similar disability*." Id., at 164-65, 110 S.Ct. 1717. This court has adopted *that standard* as a matter of state common law. *See Phoebe G. v. Solnit*, 252 Conn. 68, 77, 743 A.2d 606 (1999).

Id. at 600 n.11 (quoting *Whitmore*) (emphasis added). The Court later emphasized the importance of *Whitmore*'s first-prong requirement of incompetence, especially in cases such as *Whitmore* and *Ross* where the putative next friends ask the Court to take the "extraordinary" step of acting against the express wishes of the death-row inmate:

> In cases where a person claims standing as a party, a determination that the party has no standing means that the entire matter is thrown out of court. It is clear that denying access to the courts without the benefit of an evidentiary hearing to determine whether access should be provided is a denial of due process. In the present case, however, the plaintiff in error is asking the court to take the extraordinary step of allowing it to appear in a matter that is already before the court as the next friend of a party who is represented by qualified counsel.

Id. at 608-09.

The Court subsequently considered a writ of error brought by Ross' father and the chief public defender, as putative next friends, challenging the dismissal of their respective petitions for habeas corpus on the grounds that they lacked standing. *In re Ross*, 272 Conn. at 655-56. The Court affirmed. In summarizing its prior opinion, the Court confirmed it had only adopted and applied the first *Whitmore* prong and not the significant relationship *dicta*:

> We evaluated the evidence according to standards set forth in *Whitmore* . . . We concluded that the chief public defender had not presented any

> "meaningful evidence" of incompetence that would have entitled it to an evidentiary hearing. . . . Consequently, we determined that the chief public defender did not have standing as next friend to represent Michael Ross.

Id. at 659-660. As to the father, the Court again focused only on the first *Whitmore* prong:

> Dan Ross had a full and fair opportunity to litigate Michael Ross' alleged incompetency before the District Court when he sought next friend status for the purpose of challenging the constitutionality of Connecticut's lethal injection protocol. *See Ross v. Rell,* supra, 2005 WL 61494, at *2-*3. The court held a hearing on the standing issue, at which Dan Ross and his attorney were allowed to proffer evidence of Michael Ross' incompetency. See id., at *1. Despite that opportunity, the court concluded that "Dan Ross ha[d] failed to meet his burden of showing that Michael Ross, the real party in interest, is unable to litigate his own claim, and therefore that it would not be justified to allow Dan Ross to proceed as next friend." *Id.*, at *2.
>
> . . . . "Nor, given Michael Ross' reasoned and rational decision not to pursue this action, is there any basis for allowing a 'next friend' to pursue it on his behalf."

Id. at 663-64. The Court concluded: "In sum, the plaintiffs in error have been given every reasonable opportunity to demonstrate that Michael Ross is incompetent and have failed to sustain their burden." *Id.* at 666.

Other than *Phoebe G.* and the *Ross* cases, the only other Connecticut Supreme Court case referring to *Whitmore* was *Carrubba v. Moskowitz*, 274 Conn. 533, 549 (2005), where a father, as putative next friend of his child, sued his child's court-appointed counsel for legal malpractice arising from a marital dissolution action. The father argued that the lower court erred in finding that he lacked standing. *Id.* Rather than relying on *Whitmore*, the Appellate Court found that "the only real test to determine whether a person is a proper or improper person to act as a guardian or next friend for a minor is whether that person's interests are adverse to those of the child." *Carrubba v. Moskowitz*, 81 Conn. App. 382, 402 (2004) (citing *Caron v. Adams*, 33 Conn. App. 673, 682 (1994)). The Supreme Court affirmed, reasoning:

> We agree with the Appellate Court [regarding] the proper test for determining whether a person is the proper party to bring an action on behalf of a minor child . . . [and] that, because the [father's] interests were adverse to those of [the child], he lacked standing to bring the action . . . as his next friend.

274 Conn. at 550. The Court refers to *Whitmore* only in passing:

> Under normal circumstances parents of a minor child satisfy both prongs of this [*Whitmore*] test because they are presumed to act in the best interests of the minor child.
>
> We agree with the Appellate Court, however, that, in a custody dispute, "parents lack the necessary professional and emotional judgment to further the best interests of their children. . . . ."

Id. at 552-53.

In sum, *Whitmore*'s *dicta* concerning a "significant relationship" is not generally accepted as a requirement even for *federal* court standing. The Connecticut Supreme Court has never adopted this *dicta* as a requirement for Connecticut standing, nor has it adopted the second prong of the test generally. Regardless, as shown below, the federal courts that have adopted the "significant relationship" requirement relied upon by this Court have also recognized relevant exceptions to that rule in situations, such as these, where the real party lacks any significant relationships.

III. Even if *Whitmore* is applied in its entirety, the NhRP has next friend standing.

Even if the Connecticut Supreme Court had adopted the second prong of *Whitmore* and its *dicta* about a "significant relationship," this Court's finding that NhRP lacks standing would still be erroneous. There is ample authority, even among the federal courts cited by this Court (Decision at 7-8), including *Hamdi*, that have adopted the significant-relationship *dicta* as a standing requirement (either as a third *Whitmore* prong or as a component of the second prong), to conclude that a "significant relationship" is not necessary where: (1) the real party has no "significant relationships," (2) in "desperate

circumstances," or (3) "extreme cases." As the Ninth Circuit observed in *Coal. Of Clergy, Lawyers & Professors*, "[n]ot all detainees may have a relative, friend, or even a diplomatic delegation able or willing to act on their behalf." 310 F.3d 1153, 1162 (9th Cir. 2002). Sometimes this absence of someone willing to serve as a next friend is due to, as in the recent case of *American Civil Liberties Union Foundation on behalf of Unnamed US Citizen v. Mattis*, 2017 WL 6558503 (District of Columbia 2017), impediments caused by the entity in control of the detainee, which is precisely the situation in the case at bar.

In *Mattis*, a U.S. citizen held in custody for over three months was denied all ability to contact or communicate with any non-government personnel, including counsel. The Defense Department opposed the ACLUF's attempt to represent the detainee as a "next friend" on the ground that it did not meet the second prong of the *Whitmore* test, despite the fact that the lack of a relationship between the two parties was due solely to the actions of the Defense Department.

"The Defense Department argue[d] that next friend standing should be denied because the ACLUF has not conferred or met with the detainee, and therefore cannot prove that it is pursuing his best interests, and, most importantly, the ACLUF does not know if the detainee wants the ACLUF to pursue habeas relief on his behalf." *Id.* at *3. The court found the "Defense Department's position to be disingenuous at best, given that the Department is the sole impediment to the ACLUF's ability to meet and confer with the detainee." *Id.* The court went on to note, "[e]ven where no relationship—significant or otherwise—exists, next friend standing may be warranted in extreme circumstances." *Id.* at *4, and held that the ACLUF has "standing for the limited purpose of ascertaining whether the detainee wishes for it to file a petition on his behalf." *Id.* at *1.

Beulah, Minnie, and Karen, who are incompetent, have no, and can have no, "significant relationships" with any "person" willing, able, and competent to serve as their "next friend" in a habeas corpus action, particularly where, as here, Respondents have owned, controlled, and economically exploited them for decades, making their interests powerfully adverse to the elephants. The only issue for this Court to address, again assuming arguendo that *Whitmore* is applicable, is whether the NhRP is "'truly dedicated to the best interests of the [elephants.]'" *Id.* at *3 (quoting *Whitmore*).

The NhRP is undeniably dedicated to the best interests of the elephants. Its Mission Statement makes clear that is seeks to gain the fundamental legal right of bodily liberty for Beulah, Minnie, and Karen. Petition at ¶ 1. The NhRP has not only set up a trust pursuant to C.G.S.A. §45a-489a for the purpose of their care and maintenance, Petition at ¶45, but it has arranged for a world-renowned elephant sanctuary to accept Beulah, Minnie, and Karen for the rest of their lives where they will "flourish in an environment that respects their autonomy to the greatest degree possible, as close to their native Asia or Africa as may be found in North America." Petition at ¶¶ 36, 37, 101-103, Affidavit of Ed Stewart, Co-Founder and President of the Performing Animal Welfare Society.

IV. The Court's refusal to construe the NhRP's Petition broadly and realistically to include an allegation, that the elephants have no "significant relationship" for next friend standing purposes was error and its reliance on *Moye v. Commissioner of Correction* misplaced.

A. The Petition contained an implied allegation that the elephants lack any "significant relationships" because they are owned and forced to perform for the financial gain of their owners, the Respondents.

In Connecticut, "'[i]t is well settled that 'the petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil

action.'" *Lebron*, 274 Conn. at 519 (citations omitted), *overruled on other grounds*, *State v. Elson*, 311 Conn. 726 (2014). And that

> [w]hen comparing [the original and proposed amended] pleadings, we are mindful that, '[i]n Connecticut, we have long eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension.

Briere v. Greater Hartford Orthopedic Group PC, 325 Conn. 198, 209 (2017) (citations omitted). The Court's reliance on *Moye*, 316 Conn. at 789 (Decision at 8, n.3), merely refers to the required content of the Petition as read in harmony with the *Briere* standards, *supra*. Properly construed, the NhRP's Petition explicitly alleged that the elephants are "owned" by the Respondents (Petition at ¶¶ 4, 5, 6, 46, 50) and in the "custody" of the Respondents (Petition at ¶¶ 7, 45, 46, 47), that their situation is one of "imprisonment" (Memorandum of Law at 17, Petition at ¶¶ 7, 9, 43, 50), that they are forcibly being used for "entertainment and profit" even under fear of physical force from bullhooks (Petition at ¶ 50), and that the manner of their imprisonment constitutes a deprivation of their autonomy (Memorandum of Law at 21, 22, Petition at ¶¶ 43, 50). They are plainly incompetent.

Reasonably, even necessarily, implied in these allegations is that the elephants have no "significant relationships" for "next friend" purposes—certainly nothing analogous to a relative or a personal friend able and willing to challenge the Respondents' imprisonment of them for the purpose of economic exploitation and imprisonment. Under

these circumstances, it is highly unlikely that the elephants can ever have any significant relations, and certainly not with any "person" willing and able to bring a habeas corpus action on their behalf against the Respondents.

Further, the Court's statement that "it is *the respondents* who are more akin to parent of Beulah, Minnie, and Karen" (Decision at 6) and thus may be the elephants' "significant relationship" for the habeas corpus case at bar cannot be true as Respondents' ownership interests in exploiting the elephants economically are *adverse* to the elephants' interests in their freedom and autonomy. *See Carrubba*, 274 Conn. at 550 (father seeking to assert a legal malpractice claim on behalf of his child lacked next friend standing because his "interests were adverse to those of" his son).

B. If the Court does not grant the motion to reargue based on a determination that the NhRP failed to sufficiently allege that the elephants lacked the required "significant relationship," it should grant leave to the NhRP to amend the Petition to make explicit that the elephants lack any "significant relationships"

"Factors to be considered in passing on a motion to amend are the length of delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The motion to amend is addressed to the trial court's discretion which may be exercised to restrain the amendment of pleadings so far as necessary to prevent unreasonable delay of the trial." *Mozell v. Commissioner of Correction*, 147 Conn.App. 748, 753-54 (2014). Trial courts have "wide discretion in granting or denying amendments before, during, or after trial." *Sherman v Ronco*, 294 Conn. 548, 554 n.10 (2010); *Ideal Financing Ass'n v. La Bonte*, 120 Conn. 190 (1935) (amendment permitted after judgment). Moreover, "[o]ur courts are liberal in allowing amendments, and, unless there is sound reason for denying permission to amend, it should be granted." *Bennett v. United*

Lumber & Supply Co., 114 Conn. 614, 617 (1932). "The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." *Cook v. Lawler*, 139 Conn. 68, 72 (1952) (court stated it would be an abuse of discretion to deny a motion to amend that was vital to the defense of a case when trial was not imminent).

In the case at bar, the Petition was filed on November 13, 2017. This Court's decision was entered on December 26, 2017. The Motion to Amend the Petition is being filed on January 16, 2018. There has been no unreasonable delay — indeed no delay at all — as the Respondents have not even been served and only two months have elapsed since the Petition was filed. There was no negligence by the NhRP, which believes both that there is no requirement of a *Whitmore*-style "significant relationship" in Connecticut and that, if there is, a fair reading of the Petition demonstrates that it sufficiently alleged that the elephants could not have any "significant relationship" with any person able and willing to seek a writ if habeas corpus on their behalf against the respondents, as the elephants are "owned" by and in the "custody" of the respondents, that their situation is one of "imprisonment," that they are forcibly being used for "entertainment and profit"—even under fear of physical force from bullhooks—and that the manner of their imprisonment constitutes a deprivation of their autonomy. There can be no unfairness or surprise to the Respondents or any delay of trial as they have not been served.

Consequently, it would be an abuse of discretion for this Court not to allow the Motion to Amend the Petition especially in light of the fact that "[t]he writ is not now and never has been a static, narrow, formalistic remedy." *Buster v. Bonzagni*, 1990 WL 272742, at *3 (Conn. Super. Ct. Apr. 5, 1990), *aff'd sub nom. Buster v. Comm'r of*

Correction, 26 Conn. App. 48, 596 A.2d 943 (1991) (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)).

V. Conclusion

This Court should not have dismissed the Petition on either "wholly frivolous" or standing grounds thereby depriving the NhRP of all right to be heard. First, the NhRP's Petition is novel, not "frivolous," and constitutes a good faith attempt to extend the Connecticut common law of habeas corpus to imprisoned elephants.

Second, this Court should have followed the *Lebron* procedure, issued the writ of habeas corpus, and allowed the Respondents, if they chose, to file a motion to dismiss. This would have allowed the NhRP the opportunity to have the hearing to which it was entitled. If this Court then concluded the elephants were not "persons" it could have dismissed the Petition.

Third, this Court erroneously concluded that the *Whitmore* suggestion that a next friend be required to have a significant relationship with the real party in interest is the law of Connecticut and that, if it is the law of Connecticut, the NhRP failed to allege that the elephants had no significant relationships. It should not have dismissed the Petition for lack of standing. It should now grant the Motion to Reargue and also grant the Motion to Amend the Petition if it determines that a "significant relationship" is required for standing in a Connecticut common law habeas corpus case to allow the NhRP to allege that the elephants have no relevant significant relationships and that the NhRP failed to allege that the elephants had no significant relationships.

Respectfully submitted,

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