APPENDIX A

Date Filed: 03/15/2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2966

BRIAN COLBRY, *et al.*,
Appellant
v.
DIRECTOR NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY, *et al.*,

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, and GREENBERG,* *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,
s/ Joseph A. Greenaway, Jr.
Circuit Judge

Dated: March 15, 2018 JK/cc: Kenneth J. Rosellini, Esq. Randall B. Weaver, Esq.

* Judge GREENBERG's vote is limited to panel rehearing only.

APPENDIX B

Date Filed: 02/09/2018

CLD-092 January 4, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 17-2966

BRIAN COLBRY, ET AL., Appellants

VS.

DIRECTOR NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY, ET AL.

(D.N.J. Civ. No. 3-17-cv-00003)

Present: CHAGARES, GREENAWAY, JR. and GREENBERG, Circuit Judges

Submitted are:

(1) Appellants' notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

(2) Appellants' concise summary of the case in support of appeal

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellants' request for a certificate of appealability is denied. Jurists of reason would agree with the District Court's conclusion that it lacked jurisdiction to consider the petition. See

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "A federal court has jurisdiction to entertain a habeas petition under 28 U.S.C. § 2254(a) only if [a petitioner] is in custody in violation of the constitution or federal law," which is measured from the date that the habeas petition was filed. See Leyva v. Williams, 504 F.3d 357, 362 (3d Cir. 2007); Barry v. Bergen Cty. Prob. Dep't, 128 F.3d 152, 159 (3d Cir. 1997). Because appellants have alleged that A.L. was in a foster home placement when they filed their

habeas petition on A.L.'s behalf, A.L. was not "in custody" at the time the petition was filed. See Lehman v. Lycoming Cty. Children's Servs. Agency, 458 U.S. 502, 511 (1982).

By the Court,
s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: February 9, 2018
CJG/cc: Kenneth J. Rosellini, Esq.
Randall B. Weaver, Esq.

APPENDIX C

Filed 11/17/17

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 17-003 (BRM)

BRIAN COLBRY, et al.,

Petitioners, ORDER

v.

LISA VON PIER, et al.,

Respondents.

THIS MATTER is opened to the Court by the Third Circuit's Order remanding this matter for the purpose of determining whether a certificate of appealability should issue. (ECF No. 24.) The Court, having reviewed its prior opinions (ECF Nos. 4 and 19) and the records of proceedings in this matter, and for the reasons set forth in the accompanying Memorandum Opinion,

IT IS on this 17th day of November 2017,

ORDERED that the Clerk of the Court shall re-open this matter for the purpose of this Order only; and it is further

ORDERED that a certificate of appealability as to the dismissal of Petitioners' habeas petition for lack of jurisdiction is **DENIED**; and it is finally

ORDERED that the Clerk of the Court shall serve a copy of this Order and the accompanying Memorandum Opinion upon the parties electronically and shall **CLOSE** the file.

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

APPENDIX D

Filed 11/17/17

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 17-003 (BRM)

BRIAN COLBRY, et al.,

Petitioners, MEMORANDUM OPINION

v.

LISA VON PIER, et al.,

Respondents.

MARTINOTTI, DISTRICT JUDGE

Before this Court is the Third Circuit's order remanding Petitioners Brian and Stephanie Colbry's ("Petitioners") appeal of the dismissal of their habeas petition (the "Petition")—brought on behalf of A.L., a minor child related to both Petitioners—for lack of jurisdiction for the purpose of determining whether a certificate of appealability should issue. (ECF No. 24.) For the reasons set forth below, a certificate of appealability is DENIED.

In a habeas proceeding, a certificate of appealability may only be issued "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Additionally:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000).

As explained in both this Court's opinion dismissing the Petition (ECF No. 4) and the opinion denying Petitioners' motion for reconsideration (ECF No. 19), this Court lacks jurisdiction over the Petition insomuch as A.L. was not "in custody" at the time Petitioners' filed their Petition. *See Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 508-12 (1982); *Amerson v. State of Iowa, Dep't of Human Servs.*, 59 F.3d 92, 94 (8th Cir. 1995); *see also Maleng v. Cook*, 490 U.S. 488, 490-91 (1989); *Obado v. New Jersey*, 328 F.3d 716, 717 (3d Cir. 2003); *Young v. Vaughn*, 83 F.3d 72, 73 (3d Cir. 1996). Because jurists of reason would not dispute this Court was correct in finding a lack of jurisdiction over the Petition as A.L. was not "in custody" at the time it was filed, the Petition does not deserve encouragement to proceed further. A certificate of appealability is therefore DENIED. An appropriate order will follow.

Date: November 17, 2017

*/s/ Brian R. Martinotti*____

HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

APPENDIX E

Date Filed: 11/16/2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 17-2966

Colbry, et al. v. Director New Jersey Division, et al.
(D.N.J. Civ. No. 17-cv-00003)

To: Clerk

1) Request by Appellants for Remand to District Court

Insofar as it appears that the District Court has not issued a certificate of appealability or stated reasons why a certificate of appealability should not issue pursuant to Fed. R. App. P. 22(b) and 28 U.S.C. Section 2253, Appellants' request is granted. See also 3rd Circ. LAR 22.2. The appeal is hereby remanded to the District Court for the purpose of either issuance of a certificate of appealability or a statement of reasons why one should not issue. Appeal is stayed pending determination by the District Court. If the District Court declines to issue a certificate of appealability, Appellants may file an application for a certificate of appealability in the Court of Appeals within 21 days of such District Court Order.

For the Court,
Marcia M. Waldron, Clerk
Dated: November 16, 2017
JK/cc: Kenneth J. Rosellini, Esq.
Randall B. Weaver, Esq.

APPENDIX F

Date Filed: 08/17/2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIAN COLBRY, et al., Civil Action No. 17-003 (BRM)

Petitioners,

v. ORDER

LISA VON PIER, et al.,

Respondents.

THIS MATTER having been opened to the Court by Petitioners Brian and Stephanie Colbry's ("Petitioners") Motion for Reconsideration (ECF No. 6) of this Court's Order and Opinion dismissing their habeas petition for lack of jurisdiction (ECF Nos. 4-5); the Court having reviewed Petitioner's Motion, the records of proceedings in this matter, the response of Respondents (ECF No. 16), and for the reasons set forth in the accompanying Opinion,

IT IS on this 17th day of August 2017,

ORDERED that the Clerk of the Court shall re-open this matter for the purpose of this Order only; and it is further

ORDERED that Petitioners' Motion for Reconsideration (ECF No. 6) is hereby **DENIED**; and it is further

ORDERED that the Clerk of the Court shall serve a copy of this Order and the accompanying Opinion upon the parties electronically and shall **CLOSE** the file.

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

APPENDIX G

Date Filed: 08/17/2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIAN COLBRY, et al., Civil Action No. 17-003 (BRM)
Petitioners,

v. OPINION

LISA VON PIER, et al.,
Respondents.

MARTINOTTI, DISTRICT JUDGE

Before this Court is Petitioners Brian and Stephanie Colbry's ("Petitioners") Motion for Reconsideration of this Court's dismissal of their petition for a writ of habeas corpus, brought on behalf of A.L., a minor child related to both Petitioners, pursuant to 28 U.S.C. § 2254. (ECF No. 6.) Respondents oppose the motion. (ECF No. 16.) Pursuant to Federal Rule of Civil Procedure 78(b), the Court did not hear oral argument. For the reasons set forth below, the motion is DENIED.

I. BACKGROUND

Petitioners, A.L.'s biological grandfather and aunt, filed a habeas petition challenging the New Jersey Division of Child Protection & Permanency's (the "Division") care and custody of A.L. in several foster homes and group settings. (Habeas Petition (ECF No. 1) ¶¶ 1-41.) According to Petitioners, as of June 13, 2016, the Division obtained legal custody of A.L. via a proceeding instituted in the Superior Court of New Jersey, Hunterdon County, Family Part, brought pursuant to New Jersey Statute section 30:4C-12 *et seq.* (*Id.* ¶ 13.) Petitioners attempted to litigate the

custody and care of A.L. in both the New Jersey courts and in federal court through their petition for a writ of habeas corpus. (*Id.*) Litigation in state court appears to be ongoing, at least as to the visitation rights of Petitioners in relation to A.L. (*See B.C. v. N.J. Div. of Child Prot. & Permanency*, 450 N.J. Super. 197 (App. Div. 2017) (ECF No. 18-1).)

On January 2, 2017, Petitioners filed their petition for a writ of habeas corpus, challenging A.L.'s "custody" on his behalf as "next friends" of A.L. (ECF No. 1.) On February 16, 2017, the Court screened the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases and dismissed the petition for lack of jurisdiction. (ECF Nos. 4-5.) In that decision, the Court noted it was not clear whether next friend jurisdiction existed to grant Petitioners standing to bring their petition, but ultimately found the Court lacked jurisdiction over a petition challenging the custody and care of a minor who had been placed in the foster care system by the state, and that the petition therefore had to be dismissed even assuming next friend jurisdiction were available to Petitioners. (ECF No. 4 at 4-9.) On March 2, 2017, Petitioners filed their motion for reconsideration. (ECF No. 6.) Respondents oppose the motion (ECF No. 16.) On May 14, 2017, Petitioners filed a reply in which they argue certain characterizations made in Respondents opposition amount to a "fraud upon the court," based on situations that occurred *after* the filing of Petitioners' habeas petition. (ECF No. 18.)

II. LEGAL STANDARD

Whether brought pursuant to Local Civil Rule 7.1(i) or pursuant to Federal Rule of Civil Procedure 59(e), the scope of a motion for reconsideration is extremely limited, and such motions should only be granted sparingly. *Delanoy v. Twp. Of Ocean*, No. 13-1555, 2015 WL 2235103, at *2 (D.N.J. May 12, 2015) (discussing Local Civil Rule 7.1(i)); *see also Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011) (discussing Rule 59(e)). An order of the Court may be altered or amended pursuant to such a motion only where the moving party establishes one of the following grounds for relief: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [issued its order]; or (3) the need to correct a clear error of law or fact to prevent manifest injustice." *Delanoy*, 2015 WL 2235106 at *2 (quoting *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)); *see also Blystone*, 664 F.3d at 415 (applying same standard to 59(e) motions). In the context of a reconsideration motion, manifest injustice will generally arise only where "the Court overlooked some dispositive factual or legal matter that was presented to it," or committed a "direct, obvious, and observable" error. *See Brown v. Zickefoose*, No. 11-3330, 2011 WL 5007829, at *2, n.3 (D.N.J. 2011). Reconsideration motions may not be used to relitigate old matters, raise new arguments, or present evidence or allegations that could have been raised prior to entry of the original order. *Delanoy*, 2015 WL 2235106 at *2. As such, courts should grant a motion for reconsideration onlywhere its prior decision "overlooked a factual or legal issue that may alter the disposition of the matter." *Id.*

III. DECISION

In their motion for reconsideration, Petitioners present two arguments: (1) "next friend" jurisdiction is appropriate in this matter, a point which this Court's prior order did not decide but assumed *arguendo* to be the case; and (2) this Court should find habeas jurisdiction exists based on the summary of the common law history of the writ of habeas corpus provided by the dissent in *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502 (1982). (*See* ECF No. 6-1.) Essentially, Petitioners argue the Division's foster care system, regardless of whether a child is placed in an institution or a foster home, is more restrictive than any system imagined by the majority in *Lehman* and that a foster home in New Jersey is essentially the same as an institution, therefore habeas jurisdiction exists. (*Id.* at 12-13.)

There are several complications with Petitioners' argument. First, as this Court explained in its original opinion, the Court has jurisdiction to hear a writ of habeas corpus petition under § 2254 only for those individuals who are "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Although the definition of "custody" for § 2254 has been expanded beyond mere criminal detention to include those under parole supervision or subject to certain classes of collateral consequences, this "in custody" requirement is only met where the individual in question is "subject both to significant restraints on liberty . . . which were not shared by the public

generally, along with some type of continuing governmental supervision." *Obado v. New Jersey*, 328 F.3d 716, 717 (3d Cir. 2003). In their habeas petition, Petitioners asserted A.L. was placed in various group homes or shelters and was only recently moved into foster care. (ECF No. 1 ¶¶ 39-41.) Petitioners now assert A.L. has been in an "institutional setting" since mid-February. (*See* ECF No. 18-1 at 4.)

As this Court explained, the Supreme Court has held a child being placed into foster care does not involve sufficient restraints on the child's liberty to qualify as being "in custody" for the purposes of habeas jurisdiction. *See Lehman*, 458 U.S. at 509-15. The Supreme Court majority in *Lehman* explained:

> Although the language of § 2254(a), especially in light of § 2241, suggests that habeas corpus is available only to challenge the convictions of prisoners actually in the physical custody of the State, three modern cases have extended it to other situations involving challenges to state-court decisions. The first of these cases is *Jones v. Cunningham*, 371 U.S. 236[] (1963), in which the Court allowed a parolee to challenge his conviction by a habeas petition. The Court considered the parolee in "custody" for purposes of § 2254(b) because "the custody and control of the Parole Board involve significant restraints on petitioner's liberty . . . which are in addition to those imposed by the State upon the public generally." [*Jones*,] 371 U.S. [] at 242[.] And in *Carafas v. LaVallee*, 391 U.S. 234[] (1968), the Court allowed the writ in a challenge to a state-court judgment even though the prisoner,

incarcerated at the time the writ was filed, had finished serving his sentence during the proceedings. The custody requirement had, of course, been met at the time the writ was filed, and the case was not moot because Carafas was subject to "[]collateral consequences[]" as a result of his conviction, *id.*[] at 237[], and "is suffering, and will continue to suffer, serious disabilities[]." *Id.*[] at 239[]. Most recently, in *Hensley v. Municipal Court*, 411 U.S. 345[] (1973), the Court allowed the writ to be used to challenge a state-court conviction even though the defendant had been released on his own recognizance after sentencing but prior to the commencement of his incarceration. The Court held that the defendant was in the custody of the State for purposes of § 2254(b) because he was "subject to restraints 'not shared by the public generally,'" 411 U.S.[] at 351 [](citation omitted)—indeed, his arrest was imminent.

Thus, although the scope of the writ of habeas corpus has been extended beyond that which the most literal reading of the statute might require, the Court has never considered it a generally available federal remedy for every violation of federal rights. Instead, past decisions have limited the writ's availability to challenges to state-court judgments in situations where—as a result of a state-court criminal conviction—a petitioner has suffered substantial restraints not shared by the public generally. In addition, in each of these cases the Court considered whether the habeas petitioner was "in custody" within the meaning of § 2254.

[The petitioner] argues that her sons are involuntarily in the custody of the State for purposes of § 2254 because they are in foster homes pursuant to an order issued by a state court. Her sons, of course, are not prisoners. Nor do they suffer any restrictions imposed by a state criminal justice system. These factors alone distinguish this case from all other cases in which this Court has sustained habeas challenges to state-court judgments. Moreover, although the children have been placed in foster homes pursuant to an order of a Pennsylvania court, they are not in the "custody" of the State in the sense in which that term has been used by this Court in determining the availability of the writ of habeas corpus. They are in the "custody" of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents. Their situation in this respect differs little from the situation of other children in the public generally; they suffer no unusual restraints not imposed on other children. They certainly suffer no restraint on liberty as that term is used in *Hensley* and *Jones*, and they suffer no "collateral consequences"—like those
in *Carafas*—sufficient to outweigh the need for finality. The "custody" of foster or adoptive parents over a child is not the type of custody that traditionally has been challenged through federal habeas. [The petitioner] simply seeks to relitigate, through federal habeas, not any liberty interest of her sons, but the interest in her own parental rights.

> Although a federal habeas corpus statute has existed ever since 1867, federal habeas has never been available to challenge parental rights or child custody. Indeed, in two cases, the Court refused to allow the writ in such instances. *Matters v. Ryan*, 249 U.S. 375[] (1919); *In re Burrus*, 136 U.S. 586[] (1890). These decisions rest on the absence of a federal question, but the opinions suggest that federal habeas corpus is not available to challenge child custody. Moreover, federal courts consistently have shown special solicitude for state interests "in the field of family and family-property arrangements." *United States v. Yazell*, 382 U.S. 341, 352[] (1966). Under these circumstances, extending the federal writ to challenges to state child-custody decisions-challenges based on alleged constitutional defects collateral to the actual custody decision-would be an unprecedented expansion of the jurisdiction of the lower federal courts.

458 U.S. at 508-12 (footnotes omitted). The Supreme Court concluded neither the termination of parental rights nor the taking of one's children into state custody via a foster home is sufficient to meet the custody requirement of § 2254, and habeas corpus jurisdiction does not exist to challenge judgments causing those events as a result. *Id.* at 515-16.

As this Court stated in its opinion, however, the Supreme Court left open the question of whether "a child confined in a state institution rather than being at liberty in the custody of a foster parent pursuant to a court order" is "in custody." *Id.* at 511 n.12. While

neither the Third Circuit nor the Supreme Court has taken up that question, this Court is aware of no cases finding habeas jurisdiction exists to challenge state custody of a child after *Lehman*. The Eighth Circuit court has held whether an individual is "in custody" should not "turn on [the Division's] determination that [the child] would be better able to receive the type of educational and psychological services he needed in the structured settings of institutions, rather than in a private foster home" and instead gave weight to whether "the state incarcerated [the child]or imposed penal restrictions upon him." *Amerson v. State of Iowa, Dep't of Human Servs*, 59 F.3d 92, 94 (8th Cir. 1995).

Based on this case law, the Court found habeas jurisdiction did not exist because A.L. was not in habeas "custody," as nothing in the petition suggested A.L. was subject to penal restrictions or actual incarceration, but rather he had simply been placed into the Division's foster care system in the form of shelters and foster homes. *See Lehman*, 458 U.S. at 510-11 (children in foster care differ "little from the situation of other children in the public generally, they suffer no unusual restraints not imposed on other children"). Petitioners provide no change in the case law or "new evidence" which was not previously available, but instead insist the Court overlooked the "common law" underpinning the writ of habeas corpus proposed by the dissent in *Lehman*. (ECF No. 6-1 at 12-13.) That dissent, however, runs counter to the conclusions of the *Lehman* majority, that federal courts should not seek to expand federal habeas jurisdiction to impugn the "special solicitude" provided to the interests of the states and state courts

regarding finality in child and family issues. *Lehman*, 458 U.S. at 512. Neither the *Lehman* dissent nor Petitioners' arguments provide a valid basis for the Court to overturn its earlier decision, which directly and correctly applied *Lehman* and its progeny.

The Court notes that in one of their reply briefs, Petitioners informed the Court that A.L. was moved into an institutional setting on February 23, 2017, *after* this Court dismissed this matter. (ECF No. 18.) Petitioners also assert Respondents fraudulently misrepresented to and/or omitted from its submissions to this Court that A.L. was institutionalized. (*Id.* at 2-7.) The Court finds no basis for concluding Respondents have committed a "fraud upon the Court," especially if A.L. was "institutionalized" after this Court issued its opinion.

To the extent Petitioners contend this new institutional setting has a bearing on whether habeas jurisdiction exists, the existence of habeas jurisdiction is determined based on the status of the subject of the petition at the time the petition was filed, and not based on events occurring thereafter. *See, e.g., Carafas*, 391 U.S. at 238 (noting that petitioner must be "in custody" at the time the petition is filed for habeas jurisdiction to exist); *see also Maleng v. Cook*, 490 U.S. 488, 490-91 (1989); *Young v. Vaughn*, 83 F.3d 72, 73 (3d Cir. 1996). Therefore, Petitioner being placed into an institution *after* his petition had not only been filed, but, indeed, after it was dismissed, has no bearing on the jurisdictional question presented by this habeas petition.1 Because Petitioners present no clear error of law or fact made by the Court, they have not provided

any basis for reconsideration, and therefore their motion is DENIED.

IV. CONCLUSION

For the reasons stated above, Petitioners' motion for reconsideration (ECF No. 6) is DENIED. An appropriate order will follow.

Date: August 17, 2017

/s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

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1 Notably, Petitioners have not demonstrated the institution into which A.L. was placed represents "incarceration" or the imposition of "penal" restrictions, rather than simply the taking of one's child into state custody via a foster home. *Lehman*, 458 U.S. at 511 n.12; *Amerson*, 59 F.3d at 94. Therefore, habeas jurisdiction does not exist in this matter even if the Court were to consider A.L.'s later placement into an unspecified "institutional" setting.

APPENDIX H

Date Filed: 02/16/2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIAN COLBRY, et al., Civil Action No. 17-003 (BRM)
Petitioners,

v. ORDER

LISA VON PIER, et al.,
Respondents.

THIS MATTER is opened to the Court on the Court's *sua sponte* screening of the petition for a writ of habeas corpus (ECF No. 1) of Petitioners Brian and Stephanie Colbry, brought on behalf of their minor relative, A.L., pursuant to Rule 4 of the Rules Governing Section 2254 Cases. The Court having reviewed Petitioner's habeas petition, and the Court finding that the petition must be dismissed without prejudice for lack of jurisdiction for the reasons expressed in the accompanying Opinion,

IT IS on this 16 day of February 2017,

ORDERED that Petitioners' habeas petition (ECF No. 1) is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction; and it is further

ORDERED that Petitioners' motion for an order to show cause (ECF No. 3) is **DENIED WITHOUT PREJUDICE AS MOOT**; and it is further

ORDERED that the Clerk of the Court shall serve a copy of this Order and the accompanying Opinion upon Petitioners by regular mail and shall **CLOSE** the file.

/s/Brian R. Martinotti HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

APPENDIX I

Date Filed: 02/16/2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIAN COLBRY, et al., Civil Action No. 17-003 (BRM)
Petitioners,

v. OPINION

LISA VON PIER, et al.,
Respondents.

MARTINOTTI, DISTRICT JUDGE

Before this Court is the petition for a writ of habeas corpus (the "Petition") of Petitioners Brian and Stephanie Colbry ("Petitioners") on behalf and as "next friends" of A.L., a minor child related to both Petitioners, brought pursuant to 28 U.S.C. § 2254. (ECF No. 1.) Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, this Court is required to screen the petition and determine whether it "plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." 28 U.S.C. § 2254 Rule 4. For the reasons set forth below, Petitioners' habeas Petition is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction, and Petitioners' application for emergent relief is **DENIED WITHOUT PREJUDICE AS MOOT.**

I. BACKGROUND

This habeas Petition focuses on the current custody situation of A.L., a minor child currently in the care and custody of the New Jersey Division of Child Protection & Permanency (the "Division") in a foster home. (ECF No. 1 at ¶ 1-41.) Petitioners are A.L.'s

biological grandfather and aunt, respectively. (*Id.* at ¶ 1-2.) According to the Petition, as of June 13, 2016, the Division obtained legal custody of A.L. via a proceeding instituted in the Superior Court of New Jersey, Hunterdon County, Family Part, brought pursuant to N.J. Stat. Ann. § 30:4C-12 *et seq.* Petitioners provide little information about the nature of that proceeding, other than it resulted in the Division taking legal custody over A.L. Prior to June 2016, A.L. and his three siblings had apparently been in the physical custody and care of Petitioner Brian Colbry. (*Id.* at ¶ 16-18.) On June 13, 2016, however, the Family Part Judge assigned to A.L.'s case ordered that A.L. be removed from the care and custody of Brian Colbry. (*Id.* at ¶ 20-28.)

The following day, the Division met Brian Colbry and the children at a dentist appointment and took all four children into its custody. (*Id.* at ¶ 28-31.) Although A.L.'s siblings were all eventually returned to the custody of their mother, A.L. remained in the custody of the Division. (*Id.* at ¶ 32-33.) A.L. was, according to the Petition, first placed in a youth shelter with other children between 13 and 21 years of age, and has since been moved to several different foster homes. (*Id.* at ¶ 39-41.) Petitioners contend, since his placement into the Division's custody and care, A.L. has suffered mental harm and has had to undergo mental health treatment arising out of his separation from family and friends. (*Id.* at ¶ 37-42.) Although Petitioners allege A.L. is subject to "a significant restraint on [his] liberty not shared by the public generally," Petitioners do not explain what this restraint is other than his separation

from his family and friends as a result of A.L.'s having been moved into foster care. (*Id.* at ¶ 63-64.)

Brian Colbry thereafter sought to have visitation rights with A.L. restored. (*Id.* at ¶ 34-36.) The Family Part judge denied that request, and Brian Colbry filed a pending appeal. (*Id.*) Petitioners contend Brian Colbry has not been in communication with A.L. since A.L.'s removal from his care, whereas Stephanie Colbry has been able to communicate with A.L. since being in the Division's custody. (*Id.* at ¶ 38-39.) Petitioners assert that A.L.'s being taken into custody was done in violation of A.L.'s constitutional rights and now seek to use 28 U.S.C. § 2254 to challenge (*Id.* at 69-80.) A.L.'s continued presence in the Division's custody. (*Id.*at ¶ 63-68.) Petitioners further assert that A.L. is being denied counsel of his choice, and thus assert that they bring this Petition on his behalf as "next friends" of A.L.(*Id.*) Although Petitioners have filed a habeas petition in this matter, they seek not only A.L.'s release into his family's custody, but also various forms of monetary damages.[1](*Id.*at 69-80.)

II.LEGAL STANDARD

Under 28 U.S.C. § 2254(a), the district court "shall entertain an application for a writ of habeas corpus[o]n behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Where a claim has been adjudicated on the merits by the state courts, the district courts hall not grant an application for a writ of habeas corpus unless the state court adjudication

(1)resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). "[C]learlyestablished federal law. . . includesonly the holdings, asopposed to the dicta" ofUnited States Supreme Courtdecisions. *SeeWoods v. Donald*, 135 S. Ct.1372, 1376 (2015).

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[1]Although the Court need not reach the issue because the Court lacks jurisdiction over this matterfor thereasons expressed below, a petition forawrit of habeascorpus is"not an appropriate oravailable federal remedy" for those seeking monetary damages. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 493-94(1973). A claim for damages based on a deprivation of constitutional rightswould instead need to be made via a civil rights action brought pursuant to 42 U.S.C. § 1983 orother similar mechanism. Petitioners state no intention to raise such a claim, and this Court doesnot construe the petitionas raising anyclaim under § 1983. Thus, Petitioners' claims for damageswould be subject to dismissal even if this Court did have jurisdiction over

Under this statute, as amended by the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2244 ("AEDPA"), district courts are required to give great deference to the determinations of the state trial and appellate courts. *Renico v. Lett*, 559 U.S. 766, 772-

73 (2010); *Eley v. Erickson*, 712 F.3d 837, 845 (3d Cir. 2013). A habeas petitioner has the burden rebutting the presumption of correctness provided to the State courts by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Eley*, 712 F.3d at 846; *see also Parker v. Matthews*, 567 U.S. 37, ---, 132 S. Ct. 2148, 2151 (2012). Specifically, "a determination of a factual issue made by a State court shall be presumed to be correct [and the] applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Rule 4 of the Rules Governing Section 2254 Cases instructs this Court to preliminarily review a petitioner's habeas petition and determine whether it "plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." 28 U.S.C. § 2254 Rule 4. Pursuant to this rule, a district court is "authorized to dismiss summarily any habeas petition that appears legally insufficient on its face." *McFarland v. Scott*, 512 U.S. 849, 856 (1994).

III. DECISION

In their Petition, Petitioners challenge A.L.'s "custody" on his behalf as "next friends" of A.L. Generally, a person cannot bring a habeas petition on behalf of another. *See, e.g., Jenicek v. Sorenson Ranch School, Utah*, No. 14-4422, 2014 WL 7332039, at *2 (D.N.J. Dec. 16, 2014). A custodial parent has standing to bring a habeas petition on behalf of his minor children. *Id.* However, under the "next friend" doctrine established in *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990), some courts have held that a close relative other than a custodial parent may, under

certain circumstances, bring a "next friend" petition on a minor child's behalf. *Jenicek*, 2014 WL 7332039 at *2; *see also Amerson v. State of Iowa, Dep't of Human Servs*, 59 F.3d 92, 93 n.3 (8th Cir. 1995); *Carner v. Davis*, 988 F. Supp. 2d 33, 36 (D.D.C. 2013). These courts have held that, to establish "next friend" status, the party acting as such "must show 'why [the] real party in interest cannot prosecute [the] habeas petition, that [the] next friend is truly dedicated to [the] best interests of [the] person on whose behalf she litigates, and that she has some special relationship with [the] real party in interest." *Jenicek*, 2014 WL 7332039 at *2 (quoting *Amerson*, 59 F.3d at 93 n.3). It is unclear whether a grandparental or aunt relationship is sufficient to warrant "next friend" status, but, even assuming it is sufficient,

> [j]urisdiction over a habeas petition brought by a next friend exists only if the litigation actually involves the concerns of the real party in interest and not simply the grievances of the next friend. Particularly when a habeas petition is brought by a parent seeking the release of a child . . . , the action may really involve an assertion of the parent's rights, not the liberty interests of the child.

Amerson, 59 F.3d at 93; *see also Lehman v. Lycomng Cnty. Children's Servs. Agency*, 458 U.S. 502, 509-12 (1982). Although Petitioners assert they seek A.L.'s release from a situation they contend is causing him mental anguish in violation of the constitution, the primary concerns which give rise to this Petition come from Brian Colbry's dissatisfaction with the

termination of his custody of A.L. rather than claims on behalf of A.L. Thus, it is not clear that next friend jurisdiction would exist in this matter. *Amerson*, 59 F.3d at 93.

Moreover, the Court lacks jurisdiction because Petitioners are not in custody of A.L. for the purpose of 28 U.S.C. § 2254. This Court has jurisdiction to hear a petition under § 2254 only for those individuals who are "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Although the definition of "custody" for § 2254 has been expanded beyond mere criminal detention to include those under parole supervision or subject to certain classes of collateral consequences, this "in custody" requirement is only met where the individual in question is "subject both to significant restraints on liberty . . . which were not shared by the public generally, along with some type of continuing governmental supervision." *Obado v. New Jersey*, 328 F.3d 716, 717 (3d Cir. 2003).

Petitioners contend that A.L. was first placed into a "youth shelter," but that he has since been moved into a variety of foster homes. (ECF No. 1 at ¶ 39-41.) The Supreme Court, however, has held that a child's being placed into foster care does not involve sufficient restraints on the child's liberty to qualify as being "in custody" for the purposes of habeas jurisdiction. *See Lehman*, 458 U.S. at 509-15. The Supreme Court explained:

> Although the language of § 2254(a), especially in light of § 2241, suggests that habeas corpus is

available only to challenge the convictions of prisoners actually in the physical custody of the State, three modern cases have extended it to other situations involving challenges to state-court decisions. The first of these cases is *Jones v. Cunningham*, 371 U.S. 236[] (1963), in which the Court allowed a parolee to challenge his conviction by a habeas petition. The Court considered the parolee in "custody" for purposes of § 2254(b) because "the custody and control of the Parole Board involve significant restraints on petitioner's liberty ... which are in addition to those imposed by the State upon the public generally." 371 U.S., at 242[.] And in *Carafas v. LaVallee*, 391 U.S. 234[] (1968), the Court allowed the writ in a challenge to a state-court judgment even though the prisoner, incarcerated at the time the writ was filed, had finished serving his sentence during the proceedings. The custody requirement had, of course, been met at the time the writ was filed, and the case was not moot because Carafas was subject to "'collateral consequences'" as a result of his conviction, [*id.* at 237], and "is suffering, and will continue to suffer, serious disabilities ...." *Id.* [at 239]. Most recently, in *Hensley v. Municipal Court*, 411 U.S. 345[] (1973), the Court allowed the writ to be used to challenge a state-court conviction even though the defendant had been released on his own recognizance after sentencing but prior to the commencement of his incarceration. The Court held that the defendant was in the custody of the State for purposes of §

2254(b) because he was "subject to restraints 'not shared by the public generally,'" 411 U.S. at 351 [(citation omitted),] indeed, his arrest was imminent.

Thus, although the scope of the writ of habeas corpus has been extended beyond that which the most literal reading of the statute might require, the Court has never considered it a generally available federal remedy for every violation of federal rights. Instead, past decisions have limited the writ's availability to challenges to state-court judgments in situations where-as a result of a state-court criminal conviction-a petitioner has suffered substantial restraints not shared by the public generally. In addition, in each of these cases the Court considered whether the habeas petitioner was "in custody" within the meaning of § 2254.

[The petitioner] argues that her sons are involuntarily in the custody of the State for purposes of § 2254 because they are in foster homes pursuant to an order issued by a state court. Her sons, of course, are not prisoners. Nor do they suffer any restrictions imposed by a state criminal justice system. These factors alone distinguish this case from all other cases in which this Court has sustained habeas challenges to state-court judgments. Moreover, although the children have been placed in foster homes pursuant to an order of a Pennsylvania court, they are not in the "custody" of the State in the sense in which that term has been used by this Court in

determining the availability of the writ of habeas corpus. They are in the "custody" of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents. Their situation in this respect differs little from the situation of other children in the public generally; they suffer no unusual restraints not imposed on other children. They certainly suffer no restraint on liberty as that term is used in *Hensley* and *Jones*, and they suffer no "collateral consequences" like those in *Carafas* sufficient to outweigh the need for finality. The "custody" of foster or adoptive parents over a child is not the type of custody that traditionally has been challenged through federal habeas. [The petitioner] simply seeks to relitigate, through federal habeas, not any liberty interest of her sons, but the interest in her own parental rights.

Although a federal habeas corpus statute has existed ever since 1867, federal habeas has never been available to challenge parental rights or child custody. Indeed, in two cases, the Court refused to allow the writ in such instances. *Matters v. Ryan*, 249 U.S. 375[] (1919); *In re Burrus*, 136 U.S. 586[] (1890). These decisions rest on the absence of a federal question, but the opinions suggest that federal habeas corpus is not available to challenge child custody. Moreover, federal courts consistently have shown special solicitude for state interests "in the field of family and family-property arrangements." *United States v. Yazell*,

> 382 U.S. 341, 352[] (1966). Under these circumstances, extending the federal writ to challenges to state child-custody decisions-challenges based on alleged constitutional defects collateral to the actual custody decision-would be an unprecedented expansion of the jurisdiction of the lower federal courts.

Lehman, 458 U.S. at 509-12 (footnotes omitted). The Supreme Court has ruled neither the termination of parental rights nor the taking of one's children into state custody via a foster home is sufficient to meet the custody requirement of § 2254, and habeas corpus jurisdiction does not exist to challenge judgments causing those events as a result. *Id.* at 515-16. In so holding, however, the Court did leave open the question of whether "a child confined in a state institution rather than being at liberty in the custody of a foster parent pursuant to a court order" is "in custody." *Id.* at 511 n.12. While the Supreme Court has not addressed that question since *Lehman*, other courts have held that the determination of whether an individual is "in custody" should not "turn on [the Division's] determination that [the child] would be better able to receive the type of educational and psychological services he needed in the structured settings of institutions, rather than in a private foster home, . . . [but rather on whether the child has been] incarcerated [or had] penal restrictions [imposed] upon him." *Amerson*, 59 F.3d at 95.

In this matter, Petitioners assert a single basis for finding A.L. to be "in custody" – that he has been removed from the care of his grandfather and placed into the care of the Division, first in a "youth shelter"