COURT OF APPEALS OF THE STATE OF NEW YORK

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In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Petitioner-Appellant,

-against-

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

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Index Nos. 162358/15 (New York County); 150149/16 (New York County)

NOTICE OF MOTION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Elizabeth Stein, Esq., attorney for Petitioner-Appellant The Nonhuman Rights Project, Inc. ("NhRP"), upon the annexed Memorandum of Law in Support, upon the briefs and record entered in the New York State

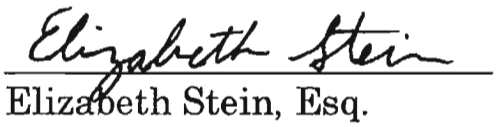
Supreme Court Appellate Division, First Judicial Department ("Appellate Division, First Department") on the prior appeal in this action, upon the denial of the NhRP's Motion for Leave to Appeal to the Court of Appeals in the Appellate Division, First Department, entered January 18, 2018, and upon all papers and prior proceedings in the above-captioned actions (which were joined by the Appellate Division, First Department on or about February 15, 2017), the NhRP will move this Court at the Courthouse of the Court of Appeals, Court of Appeals Hall, Albany, New York, on Monday, March 5, 2018, for an order granting the NhRP permission to appeal to the Court of Appeals from the order of the Appellate Division, First Department entered June 8, 2017, affirming an order and judgment of the Supreme Court, New York County, which denied the NhRP's petition for a writ of habeas corpus and order to show cause, and for such other and further relief as this Court finds just and proper.

The Respondents are hereby given notice that the motion will be submitted on the papers and their personal appearance in opposition thereto is neither required nor permitted.

Answering papers, if any, must be served and filed in the Court of Appeals with proof of service on or before the return date of this motion.

Dated: February 21, 2018

Respectfully submitted:



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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

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ARGUMENT

I. Preliminary Statement

Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), submits this Memorandum of Law in support of its Motion for Permission to Appeal to the Court of Appeals ("Motion for Permission to Appeal") pursuant to New York Civil Practice Law and Rules ("CPLR") 5602(a) from the State of New York Supreme Court Appellate Division, First Judicial Department's ("First Department") Decision and Order dated June 8, 2017 ("*Decision*") affirming the judgments (denominated orders) of the Supreme Court, New York County (Barbara Jaffe, J.), which declined to sign petitions for writs of habeas corpus and orders to show cause sought by the NhRP seeking the immediate release of two chimpanzees, Tommy and Kiko, from their illegal detention. Index No. 162358/2015 (July 8, 2016, effective *nunc pro tunc* as of December 23, 2015), Appendix 12-14 ("*Tommy*"); Index No. 150149/2016 (January 29, 2016), Appendix 7-11 ("*Kiko*"). A complete copy of both the *Tommy* and *Kiko* appendices are provided to the Court along with this motion, in accordance with 22 NYCRR § 500.22(c). A copy of the *Decision* is attached as "Exhibit 17" to the annexed Affirmation of Elizabeth Stein,

Esq., in accordance with 22 NYCRR § 500.22(b)(6). This Motion for Permission to Appeal and its supporting Memorandum of Law incorporate by reference, and fully adopt, all the arguments, evidence, exhibits, memoranda, testimony and authorities previously filed in these cases,[1] and are timely filed pursuant to CPLR 5513(b) and 22 NYCRR § 600.14(b). The accompanying Affirmation of Elizabeth Stein, Esq. contains the procedural timeline including statement of timeliness, in accordance with 22 NYCRR § 600.14(b)(2).

This Court should grant this Motion for Permission to Appeal for four reasons. First, the appeal raises novel and complex legal issues that are of great public importance and interest in New York, the United States, and the world. Second, the *Decision* conflicts with the plain language of CPLR 7003(b), which makes clear that a petition for a writ of habeas corpus cannot be dismissed as improperly successive if it raises new grounds or if the legality of the detention has never been ruled upon. Third, the *Decision* conflicts with rulings of this Court, the First Department, and other judicial departments of the Appellate

[1] The statement of facts in *Tommy* is found at p. 7 of the Appellate Brief, with a longer version at p. 8 of the Trial Memorandum of Law (Appendix p. 695). The statement of facts in *Kiko* is found at p. 8 of the Appellate Brief with a longer version at p. 11 of the Trial Memorandum of Law (Appendix p. 673).

Division on the following three important issues that can only be resolved by this Court: (1) whether the determination of common law personhood is a matter for the legislature or the courts; (2) whether common law personhood necessarily requires a capacity to bear duties and responsibilities; and (3) whether habeas corpus is appropriate only when the unconditional release of the imprisoned individual is demanded. Fourth, the *Decision* contains numerous substantial legal errors and erroneous factual assumptions that require review and correction by this Court.

II. Statement of the Issues

The novel, important, and complicated questions of law presented in this appeal are:

1. May a court refuse to issue a common law writ of habeas corpus or order to show cause as an improper successive petition under CPLR 7003(b) if all three statutory requirements for dismissal have not been satisfied?

2. May a court properly deny an autonomous being the right to common law habeas corpus solely because she is not human?

3. Is the capacity to bear duties and responsibilities necessary to

possess the common law right to bodily liberty protected by common law habeas corpus?

4. May a court properly refuse to issue a common law writ of habeas corpus solely because the "person" unlawfully imprisoned cannot be released unconditionally and must necessarily be released into the custody of another?

III. Standard of Review

In determining whether to grant a motion for permission to appeal to the Court of Appeals, this Court looks to whether: "the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 NYCRR § 500.22(b)(4). This Court also grants leave to appeal to "[d]evelop emerging areas of common law," as well as "[r]eevaluate outmoded precedent," "[c]orrect error[s] below,"[2] and to "cure substantial injustice." New York Court of Appeals Clerk's Office, *The New York Court of Appeals Civil Jurisdiction and Practice Outline*, available at https://www.nycourts.gov/ctapps/forms/civiloutline.pdf (last

[2] *See* Top of Form*Matter of Ferrara,* 2006 NY Slip Op 5156, ¶ 5, 7 N.Y.3d 244, 251 (2006); *Metro. Life Ins. Co. v. Noble Lowndes Int'l*, 84 N.Y.2d 430, 434 (1994); Top of Form*Perlmutter v. Beth David Hosp*., 308 N.Y. 100, 103-04 (1954); *Hurlburt v. Hurlburt*, 128 N.Y. 420, 426 (1891); *Griffin v. Marquardt*, 17 N.Y. 28, 33 (1858).

accessed February 15, 2018). As discussed below, each of these factors weigh heavily in favor of granting the NhRP's Motion for Permission to Appeal, *infra*.

IV. The novel and important questions raised in this appeal require review by the Court of Appeals.

A. This case presents novel and important issues of law of statewide, national, and international significance.

This case necessitates review by this Court based on the novelty, difficulty, importance, and effect of the legal and public policy issues raised alone. 22 NYCRR § 500.22 (leave should be granted when "the issues are novel or of public importance"); COURT OF APPEALS OF THE STATE OF NEW YORK: ANNUAL REPORT OF THE CLERK OF THE COURT: 2010, at 2 (2011) (leave most often granted to address "novel and difficult questions of law having statewide importance"). *See, e.g.*, *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 38 (1996).[3]

[3] *See also In re Shannon B.*, 70 N.Y.2d 458, 462 (1987) (granting leave on an "important issue"); *Town of Smithtown v. Moore*, 11 N.Y.2d 238, 241 (1962) (granting leave "primarily to consider [a] question . . . of state-wide interest and application"); *Neidle v. Prudential Ins. Co. of Am.*, 299 N.Y. 54, 56 (1949) (granting leave because of "[t]he importance of the decision" and "its far-reaching

The Supreme Court, New York County agreed that, "the issue of a chimpanzee's right to invoke the writ of habeas corpus is best decided . . . by the Court of Appeals, given its role in setting state policy." *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898, 917 (Sup. Ct. 2015) ("*Stanley*"). The New York Supreme Court Appellate Division, Third Judicial Department ("Third Department") also emphasized the novelty and importance of the issues raised in this case: "This appeal presents the novel question of whether a chimpanzee is a 'person' entitled to the rights and protections afforded by the writ of habeas corpus." *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 149 (3rd Dept. 2014), *lv denied*, 26 N.Y.3d 902 (2015) ("*Lavery*").

This case and the arguments it raises have been the subject of thousands of legal commentaries, national and international news articles, radio and television programs, and podcasts. For example, from March 1, 2017 through September 30, 2017, 2,095 media articles were published on the NhRP's claim that a chimpanzee should have the right

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consequences"); *People ex rel. Wood v. Graves*, 226 A.D. 714, 714 (3rd Dept. 1929) ("the questions of law presented are of general public importance").

to a writ of habeas corpus.[4] In the United States, these outlets ranged from *NBC News* and the *Wall Street Journal* to the *Washington Post*, *Associated Press*, *Law360*, *Gizmodo*, *Fox News*, and *Salon*. Around the world they included the *Sydney Morning Herald*, *Kremlin Express*, *Yahoo Japan*, Mexico's *Entrelíneas*, and India's *Economic Times*. Moreover the issues raised by the NhRP, as well as the litigation itself, have captured the interest of the world's leading legal scholars and the most selective academic publications,[5] while catalyzing the development

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

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

of a whole field of academic research and debate, generating extensive discussion in almost one hundred law review articles, multiple academic books, science journals, and a variety of legal industry publications.[6] Notable scholars of American jurisprudence have

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[6] Richard A. Epstein, *Animals as Objects of Subjects of Rights*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Richard A. Posner, *Animal Rights: Legal Philosophical, and Pragmatic Perspectives,* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Justin F. Marceau and Steven M. Wise, "Exonerating the Innocent: Habeas for Nonhuman Animals," WRONGFUL CONVICTIONS AND THE DNA REVOLUTION - TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel S. Medwed, ed. Cambridge University Press 2017); Steven M. Wise, *A Great Shout: Legal Rights for Great Apes, in* THE ANIMAL ETHICS READER (Susan J Armstrong & Richard G. Botzler eds., 2017); Steven M. Wise, *Animal Rights, One Step at a Time*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Steven M. Wise, *The Capacity of Non-Human Animals for Legal Personhood and Legal Rights, in* THE POLITICS OF SPECIES: RESHAPING OUR RELATIONSHIPS WITH OTHER ANIMALS (Raymond Corbey & Annette Lanjouw eds., 2013); Katrina M. Albright, *The Extension of Legal Rights to Animals Under A Caring Ethic: An Ecofeminist Exploration of Steven Wise's Rattling the Cage*, 42 NAT. RESOURCES J. 915, 917 (2002); Jeffrey L. Amestoy, *Uncommon Humanity: Reflections on Judging in A Post-Human Era*, 78 N.Y.U. L. REV. 1581, 1591 (2003); Pat Andriola, *Equal Protection for Animals*, 6 BARRY U. ENVTL. & EARTH L.J. 50, 64 (2016); Louis Anthes & Michele Host, *Rattling the Cage: Toward Legal Rights for Animals. by Steven M. Wise*, 25 N.Y.U. REV. L. & SOC. CHANGE 479, 482 (1999); Matthew Armstrong*, Cetacean Community v. Bush: The False Hope of Animal Rights Lingers on*, 12 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 185, 200 (2006); Rich Barlow, *Nonhuman Rights: Is It Time to Unlock the Cage?*, BOSTON UNIVERSITY SCHOOL OF LAW, July, 18, 2017, https://www.bu.edu/law/2017/07/18/nonhuman-rights-is-it-time-to-unlock-the-cage/; David Barton, *A Death-Struggle Between Two Civilizations,* 13 REGENT U. L. REV. 297, 349 (2001); Douglas E. Beloof, *Crime Victims' Rights: Critical Concepts for*

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submitted briefs as *amicus curiae* in favor of habeas corpus relief and personhood for chimpanzees, including in the case at bar (these include constitutional law expert Laurence Tribe of Harvard Law School and habeas corpus experts Justin Marceau, of the University of Denver Law School and Samuel Wiseman, of the Florida State University College of Law, all of whom were admitted as *amicus curiae* by the First Department and are listed in the caption of the *Decision*).[7] This case and the arguments it raises are also having an impact on the courts in

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Sebastian Beaudry, *From Autonomy to Habeas Corpus: Animal Rights Activists Take the Parameters of Legal Personhood to Court*, 4(1) Global Journal of Animal Law (2016); Natalie Prosin and Steven M. Wise, *The Nonhuman Rights Project - Coming to a Country Near You*, in 2(2) Global Journal of Animal Law (2014); "Why Things Can Hold Rights: Reconceptualizing the Legal Person," LEGAL PERSONHOOD: ANIMALS, ARTIFICIAL INTELLIGENCE AND THE UNBORN (Tomasz Pietrzykowski and Visa Kurki, eds., Springer, 2017); Brandon Keim, *The Eye of the Sandpiper: Stories from the Living World*, Comstock (2017), pp. 132-150; Charles Seibert, "Should a Chimp Be Able to Sue Its Owner?", *New York Times Magazine* (April 23, 2014), *available at:* https://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html (last accessed February 15, 2018); Astra Taylor, "Who Speaks for the Trees?", *The Baffler*, (Sept. 7, 2016), *available at*: thebaffler.com/salvos/speaks-trees-astra-taylor (last accessed February 15, 2018); Sindhu Sundar, "Primal Rights: One Attorney's Quest for Chimpanzee Personhood.", Law360 (March 10, 2017), *available at*: https://www.law360.com/articles/900753 (last accessed February 15, 2018).

[7] The *amicus curiae* brief of Laurence Tribe in *Kiko* is available at: https://www.nonhumanrights.org/content/uploads/2016_150149_Tribe_ITMO-The-NonHuman-Right-Project-v.-Presti_Amicus-1-2.pdf (last accessed February 19, 2018). The *amicus curiae* brief of Justin Marceau and Samuel Wiseman in *Kiko* is available at: https://www.nonhumanrights.org/content/uploads/2016_150149_ITMO-The-Nonjuman-Rights-Project-v.-Presti_Amici.pdf (last accessed February 19, 2018). The authors submitted near-identical briefs in *Tommy*. The First Department also admitted Richard Cupp, professor of law at Pepperdine University, as *amicus curiae* in opposition.

other states. *See State v. Fessenden*, 355 Ore. 759, 769-70 (2014) (referring to the "ongoing litigation" brought by the NhRP that "seeks to establish legal personhood for chimpanzees," and noting that "we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still[.])"

Deciding a case based in part upon the NhRP's work, an Argentine court in November, 2016 recognized a chimpanzee named Cecilia as a "non-human person," ordered her released from a Mendoza Zoo pursuant to a writ of habeas corpus, and sent her to a sanctuary in Brazil. *In re Cecelia*, Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-23.

B. The question of who is a "person," and the extent to which "personhood" might be limited by one's capacity to bear duties and responsibilities, is perhaps the most important question that could come before a court.

Permission to appeal is especially warranted in this case to "[d]evelop emerging areas of common law," as well as "[r]eevaluate

outmoded precedent."[8] This appeal calls upon the Court to reevaluate the outmoded common law classification of all nonhuman animals as mere "things," regardless of their autonomy, and to determine whether the common law of habeas corpus should extend to such autonomous individuals as chimpanzees. *See Woods v. Lancet*, 303 N.Y. 349, 355 (1951) ("we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.").

The question of who is a "person" within the meaning of New York's common law of habeas corpus is perhaps the most important individual issue that can come before a New York court. Personhood determines who counts, who lives, who dies, who is enslaved, and who is free. *See* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1746 (2001). Legal persons possess inherent value and exist for their own sakes; legal things possess merely instrumental value and exist for the sakes of legal persons. 2 William Blackstone, *Commentaries on the Laws of*

[8] New York Court of Appeals Clerk's Office, *The New York Court of Appeals Civil Jurisdiction and Practice Outline*, available at https://www.nycourts.gov/ctapps/forms/civiloutline.pdf (last accessed February 15, 2018).

England *16 (1765-1769). The term "person" is not now and has never been a synonym for "human."[9] Instead, it designates Western law's most fundamental category by identifying those entities capable of possessing a legal right. This Court has made clear that this important determination is to be based on policy, and not biology. *See Byrn v. New York City Health and Hospitals Corp.*, 31 N.Y. 2d 194, 201 (1972).

As this Court noted in *Byrn*, "upon according legal personality to a thing the law affords it the rights and privileges of a legal person[.]" *Id.* (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909) ("Gray"). *See also* Hans Kelsen, *General Theory of Law and State* 93-109 (1945); George Whitecross Paton, *A Textbook of Jurisprudence* 349-356 (4th ed., G.W. Paton & David P. Derham eds. 1972) ("Paton"); Wolfgang Friedman, *Legal Theory* 521-523 (5th ed. 1967)).

The First Department concluded that chimpanzees are not and can never be legal persons because: "[n]o precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a 'person' and entitled to habeas relief." (*Decision*, at 77-

[9] *See Tommy* Appellate Brief at 31 and Trial Court Memorandum at 66 (Appendix at 753); *Kiko* Appellate Brief at 30 and Trial Court Memorandum at 69 (Appendix at 731).

78). But, as *Stanley* correctly noted, "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" 16 N.Y.S.3d at 912.

The reason no precedent exists specifically for treating nonhuman animals as "persons" for the purpose of securing habeas corpus relief was *not* because the claim had been *rejected* by the courts. It was because no autonomous nonhuman entity, such as a chimpanzee, had ever *demanded* a writ of habeas corpus. The NhRP's cases represent the *first* such demand ever made by a nonhuman animal in any common law jurisdiction.[10]

The mere novelty of their claim however is insufficient to deny Tommy or Kiko habeas corpus relief. *See, e.g.*, *United States ex rel.*

[10] It is worth noting that none of the cases cited in *Lavery* support its statement that "habeas corpus has never been provided to any nonhuman entity." 124 A.D.3d at 150 (citing *United States v Mett*, 65 F.3d 1531 (9th Cir 1995), *cert denied* 519 U.S. 870 (1996); *Waste Mgt. of Wisconsin, Inc. v. Fokakis*, 614 F.2d 138 (7th Cir 1980), *cert denied* 449 U.S. 1060 (1980); and *Sisquoc Ranch Co. v. Roth*, 153 F.2d 437, 441 (9th Cir 1946)). Apart from being federal cases interpreting federal law, none of these cases have *anything* to do with nonhuman animals. In *Mett*, the court permitted a corporation to invoke the writ of *coram nobis*. In *Waste Management,* the federal court simply refused to grant habeas corpus to a corporation for the obvious reason that "a corporation's entity status precludes it from being incarcerated or ever being held in custody." *Waste Management*, 614 F.2d at 140. In *Sisquoc Ranch,* the federal court merely held that the fact that a corporation has a contractual relationship with a human being did not give it standing to seek habeas corpus on its own behalf.

Standing Bear v. Crook, 25 F. Cas. 695, 697 (D. Neb. 1879) (that no Native American had previously sought relief pursuant to the Federal Habeas Corpus Act did not foreclose a Native American from being characterized as a "person" and being awarded the requested habeas corpus relief); *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (that no slave had ever been granted a writ of habeas corpus was no obstacle to the court granting one to the slave petitioner); *see also Lemmon v. People*, 20 N.Y. 562 (1860). "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Stanley*, 16 N.Y.S.3d at 912 (citing *Obergefell v. Hodges*, 135 S. Ct. 2602 (2015)).

Further, this Court must grant leave to determine the overwhelmingly important and novel question raised by the appeal of whether legal personhood turns on an individual's ability to bear duties and responsibilities. This question had never been addressed in New York, or by any English-speaking court until the Third Department in *Lavery* affirmed the refusal of the Supreme Court, Fulton County to issue the requested order to show cause in the first Tommy habeas

corpus case. *Lavery* held, for the first time in the history of the common law, that an entity must have the capacity to bear duties and responsibilities to be a "person" for any purpose. The court then declared, without any evidence having been presented, that chimpanzees lack such capacity and concluded that they therefore could not be "persons" for purposes of habeas corpus protection. 124 A.D. 3d at 152.

After *Lavery*, the Supreme Court in *Stanley* properly issued the order to show cause sought by the NhRP on behalf of two chimpanzees, Hercules and Leo, and ordered the Respondent Stony Brook University to justify its detention of the chimpanzees at a hearing pursuant to CPLR Article 70. 16 N.Y.S.3d at 915-17. Although the court found NhRP's arguments compelling, it believed itself bound by *Lavery*, as that was the only appellate court decision that had directly addressed the issue of personhood for chimpanzees at the time.

The First Department subsequently adopted *Lavery*'s standard for determining personhood — which, as discussed below, directly conflicts with *Byrn* — thereby perpetuating its false and dangerous statement of law that personhood requires the capacity to bear both rights *and*

duties rather than either rights *or* duties, as the NhRP had argued. (*Decision* at 76). Specifically, the First Department ruled that an inability to bear duties and responsibilities may constitute the sole ground for denying such a fundamental common law right as bodily liberty even to an autonomous individual. Not only did the First Department adopt *Lavery*'s standard, but it also held that "person" is synonymous with "human," in further defiance of *Byrn*, *infra.* (*Decision* at 79).

Byrn teaches that the determination of an entity's personhood necessarily entails a mature weighing of public policy and moral principle in which that entity's capacity to bear duties and responsibilities plays no part. The words "duty," "duties," or "responsibility" do not even appear in the *Byrn* majority opinion. Other than *Lavery* and the case at bar, no court has ever ruled that an entity must be able to bear duties and responsibilities to be deemed a legal person. Nor should they. An entity is a "person" if she can *either* bear rights *or* duties.

Moreover, the First and Third Department's decisions are in tension with the Fourth Department's decision in *Nonhuman Rights*

Project, Inc., ex rel. Kiko v. Presti, 124 A.D.3d 1334 (4th Dept. 2015), *lv denied*, 26 N.Y.3d 901 (2015) ("*Presti*"), which was decided after *Lavery*, and yet ignored its sweeping new rule that one must have the capacity to bear duties and responsibilities in order to be accorded legal rights in New York. The Fourth Department in *Presti*, aware of *Lavery*, with every opportunity to follow it, chose not to. Instead, the Fourth Department assumed, *without deciding*, that Kiko could be a legal person, but affirmed the denial of the writ on the erroneous ground that Kiko could not be released unconditionally. *Id.* Thus, at present, personhood rights vary depending on whether one is detained in the First and Third Departments or in the Fourth Department, and only this Court can resolve the conflict, a conflict which of course has serious and fundamental implications for individuals detained in New York.

A major flaw in *Lavery's* and this *Decision's* holdings is the fact that millions of New Yorkers lack the capacity to bear duties and responsibilities and yet are legal persons. When this was pointed out to the First Department, the court merely replied that "[t]his argument ignores the fact that these are still human beings, members of the human community." *Decision* at 78 (emphasis added). Such a

"distinction without a difference" is, alas, mere bias. We have seen similar biases expressed before and they have always been tragic and ultimately regretted.

Before the United States Supreme Court in 1857, Dred Scott's lawyers "ignore[d] the fact" that he was not white. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).[11] The lawyers for the Native American, Chief Standing Bear, "ignore[d] the fact" that Standing Bear was not white when, in 1879, the United States Attorney argued that a Native American could never be a "person" for the purpose of habeas corpus after Standing Bear was jailed for returning to his ancestral lands. *Crook*, 25 F. Cas. at 700-01. A California District Attorney "ignore[d] the fact" that a Chinese person was not white when insisting, in 1854, without success before the California Supreme Court, that a Chinese person could testify against a white man in court. *People v. Hall*, 4 Cal. 399 (1854).[12] The lawyer for Ms. Lavinia Goodell "ignore[d] the fact" that she was not a man before the Wisconsin Supreme Court that, in 1876, denied her the right to practice law solely because she was a woman. *In re Goodell*, 39 Wis. 232 (1875).

[11] Has there been a more regretted judicial decision than *Dred Scott*?

[12] The California Supreme Court unanimously regretted its history of anti-Chinese bigotry in California in *In re Hong Yen Chang*, 60 Cal. 4th 1169 (Cal. 2015).

Let us not return to those dark places. Chimpanzees are autonomous. Habeas corpus protects autonomy. An autonomous individual's species should be irrelevant to whether she should have the fundamental right to the bodily liberty — the autonomy — that habeas corpus protects.

Any requirement that an autonomous individual must also be able to bear duties and responsibilities to be recognized as a "person" for the purpose of a common law writ of habeas corpus, not only contravenes *Byrn*, *infra*, but undermines both fundamental common law values of liberty and of equality. It undermines fundamental liberty because it denies personhood and all legal rights to an individual who incontrovertibly possesses the autonomy that is supremely valued by New York common law, even more than human life itself, *Rivers v. Katz*, 67 N.Y. 2d 485, 493 (1986); *In re Storar*, 52 N.Y.2d 363 (1981), *cert. den.*, 454 U.S. 858 (1981). It undermines fundamental equality both because it endorses the illegitimate end of the permanent imprisonment of an incontrovertibly autonomous individual, *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001), *cert. den.*, 534 U.S. 826 (2001), and

because "[i]t identifies persons by a single trait and then denies them protection across the board." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

Until this Court rules on this personhood issue, every lower court in the First Department will be bound by the *Decision*, every lower court in the Third Department will continue to be bound by *Lavery*, and all other lower courts of the Second and Fourth Departments will be bound by both *Lavery* and this *Decision* as those appellate courts have not decided this personhood issue. This Court should determine whether an individual must be capable of bearing rights *and* duties to be considered a "person" for the purpose of securing common law habeas corpus relief and whether even an autonomous claimant must be a human being. Based on the novelty and significance of this issue alone, the Court should grant the NhRP's Motion for Permission to Appeal. *See Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174, 183 (1988) ("[T]here being novel and significant issues tendered for review, we grant the application for leave [to appeal].").

C. The complex questions of law and fact raised in this appeal require review by the Court of Appeals.

The Motion for Permission to Appeal should also be granted because the case raises complex questions of law and fact. *See, e.g.*, *Hamilton v. Miller*, 23 N.Y.3d 592, 603 (2014) (leave to appeal was granted in a "scientifically complicated" case); *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 249-50 (1999) (leave to appeal granted in case involving "complicated legal questions associated with electronic bulletin board messages" for defamation purposes); *Matter of George L.*, 85 N.Y.2d 295, 298, 302 (1995) (granting leave to appeal in case presenting a "difficult question [regarding] a mentally ill individual"); *Schulz v. State*, 81 N.Y.2d 336, 344 (1993); *Sukljian v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 95 (1986); *Melenky v. Melen*, 206 A.D. 46, 51-52 (4th Dept. 1923). The question of whether a chimpanzee is entitled to legal personhood involves inquiry not only into the legal issue of personhood, but into the significance of the detailed uncontroverted expert scientific evidence offered to support the NhRP's allegation that chimpanzees are extraordinarily cognitively complex beings who possess the autonomy sufficient (though not necessary) for personhood

for the purpose of a common law writ of habeas corpus, as a matter of liberty, equality, or both.

Nine prominent primatologists from around the world submitted detailed uncontroverted Expert Affidavits proving that chimpanzees possess the autonomy that allows them to choose how they will live emotionally, socially, and intellectually rich lives. Solely in response to *Lavery*, detailed uncontroverted Supplemental Affidavits were submitted in the cases at bar by Dr. Jane Goodall and five other internationally-respected chimpanzee cognition experts proving that chimpanzees possess not just autonomy, but the capacity to bear duties and responsibilities both within chimpanzee communities and chimpanzee/human communities. Such complex scientific and legal issues regarding personhood and the scope of the common law writ of habeas corpus merit immediate attention by the Court of Appeals. *See Woods*, 303 N.Y. at 355.

V. The *Decision* requires review by the Court of Appeals to resolve the conflicts it creates with CPLR Article 70 as interpreted by New York Courts.

Review by this Court is further necessary because the *Decision* conflicts with the plain language of CPLR 7003(b) and New York precedent. CPLR 7003(b) "continues the common law and present position in New York that *res judicata has no application* to the writ." Advisory Committee Notes to CPLR 7003(b) (emphasis added). *See People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874); *People ex rel. Leonard HH v. Nixon*, 148 A.D.2d 75, 79 (3d Dept. 1989). This is because the "inapplicability of res judicata to habeas . . . is inherent in the very role and function of the writ." *Sanders v. United States*, 373 U.S. 1, 8 (1963).

As the Third Department recognized, "[t]he rule permitting relitigation . . . after the denial of a writ, is based upon the fact that the detention of the prisoner is a continuing one and that the courts are under a continuing duty to examine into the grounds of the detention." *Post v. Lyford*, 285 A.D. 101, 104-05 (3rd Dept. 1954) (prior adjudication no bar to a new application on same grounds). *See also People ex rel.*

Butler v. McNeill, 219 N.Y.S.2d 722, 724 (Sup. Ct. 1961) ("the ban of res judicata cannot operate to preclude the present proceeding" despite the fact it was petitioner's fifth habeas corpus application).

A court may *only* "decline to issue a writ under certain circumstances, thereby permitting successive writs, a construction reflected in the traditional and general common law rule that res judicata has no application in habeas corpus proceedings." *Stanley*, 16 N.Y.S.3d at 909-10. Those circumstances are narrow, few, and inapplicable to the cases at bar. "CPLR 7003(b) *permits* a court to decline to issue a writ of habeas corpus if 'the legality of a detention has been determined by a court of the state in a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined, and the court is satisfied that the ends of justice will not be served by granting it.'" *Decision* at 76 (emphasis added).

As CPLR 7003(b) makes clear, a court only has discretion to deny a petition as improperly successive if all three statutory elements have been satisfied. When this is not the case, as in the appeal at bar, a court has no such discretion and must issue the writ regardless of the fact

that the petition is successive.

Yet the First Department, despite the plain language of CPLR 7003(b) and the decisions of other appellate divisions, dismissed NhRP's petition as improperly successive though none of the elements of CPLR 7003(b) were present, *infra.* This Court must resolve this question of fundamental importance to all habeas corpus litigants, both human and nonhuman.

A. The legality of Tommy's and Kiko's detention has never been determined by a court of New York State in any proceeding and the ends of justice will only be served by issuing the orders to show cause.

Pursuant to CPLR 7003(b), one of the three elements that must be satisfied for a court to dismiss a petition as improperly successive is that the legality of the detention must have been previously determined by a court of the State in a prior habeas corpus proceeding. In the case at bar, neither the Supreme Court, Fulton County, where Tommy's original petition was filed, nor the Supreme Court, Niagara County where Kiko's original petition was filed, ever *issued* the requested order to show cause. The respondents were never served. No hearing

occurred. No decision on the merits issued. There was no final judgment on the merits. Therefore, the legality of the detentions were never determined. The Supreme Court in *Stanley* understood this, and appropriately issued the order to show cause on behalf of Hercules and Leo, despite the fact that it was a successive petition, because no prior determination on the merits had been made. 16 N.Y.S. at 909. The court explained: "there must be a final judgment on the merits in a prior proceeding. Respondents cite no authority for the proposition that a declined order to show cause constitutes a determination on the merits, that is has any precedential value, or that a justice in one county is precluded from signing an order to show cause for relief previously sought from and denied by virtue of a justice in another county refusing to sign the order to show cause." *Id.*

On appeal in Tommy's first case, the Third Department affirmed the lower court ruling, *without deciding the legality of Tommy's detention*, on the ground that chimpanzees are unable to bear duties and responsibilities and therefore could not be legal persons for any purpose. *Lavery*, 124 A.D.3d at 152. On appeal in Kiko's first case, the Fourth Department affirmed, *without deciding the legality of Kiko's*

detention, on the ground that Kiko's immediate release and subsequent placement in a sanctuary was inappropriate habeas corpus relief. *Presti*, 124 A.D.3d 1334. As the legality of Tommy's and Kiko's detention was never adjudicated by *any* New York court, the First Department erroneously affirmed the lower court's refusal to issue the requested orders to show cause under 7003(b).

Further, none of the three cases the First Department cited support its affirmation of the lower court's refusal to sign the orders to show cause. (*Decision* at 75-76) (citing *People ex rel. Glendening v Glendening*, 259 App. Div. 384, 387 (1st Dept. 1940), *aff'd.* 284 NY 598 (1940); *People ex rel. Woodard v Berry*, 163 A.D.2d 759 (3d Dept. 1990) *lv. denied* 76 N.Y.2d 712, 715 (1990); *People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874)). The successive petitions in both *Woodward*, 163 A.D.2d at 759-60, and *Glendening*, 259 A.D. 387-88, were dismissed *only* because, unlike in the case at bar, their merits *were* "fully litigated" in a prior petition and either there were no changed circumstances or none were claimed. In *Glendening*, 259 App. Div. at 387, the First Department set forth the appropriate standard: "parties to the same habeas corpus proceeding may not continually relitigate *de*

novo issues that were *fully litigated between them in prior applications in the same proceeding in which long and exhaustive hearings were held where there has been no change in the facts and circumstances determining such issues*." (emphasis added). Not only were the issues raised in the prior applications in this case not "fully litigated," they were not litigated at all. To the contrary, the trial courts refused to even issue the orders to show cause. *Woodward* simply cited *Glendening* for this same standard. *Stanley*, 16 N.Y.S.3d at 909, actually relied upon *Woodward* to justify its *issuance* of an order to show cause from a *successive* petition filed by the NhRP on behalf of Hercules and Leo. Finally, in *Brady*, 56 N.Y. at 192, this Court stated "[i]n this case the relator is restrained of his liberty; and a decision under one writ refusing to discharge him, did not bar the issuing of a second writ by another court or officer."

CPLR 7003 further requires that the ends of justice not be served by granting the second petition. In the present case, the ends of justice will only be served if the NhRP is given a full and fair opportunity to litigate the legality of Tommy and Kiko's detentions. *See Allen v. New York State Div. of Parole*, 252 A.D.2d 691 (3d Dept. 1998). Otherwise

these autonomous individuals will be condemned to a lifetime of imprisonment.

B. The second petitions presented grounds not previously presented and determined.

CPLR 7003(b) precludes a court from dismissing a successive petition if it presents new grounds or changed circumstances. The First Department ruled that "the motion court properly declined to sign the orders to show cause since these were successive proceedings which were not warranted or supported by any changed circumstances." (*Decision* at 75-76). This was error. The second petitions brought on behalf of Tommy and Kiko presented changed circumstances that could not have been raised in the first petitions.

When the NhRP filed its first habeas petitions in December 2013 on behalf of Tommy, Kiko, and Hercules and Leo, neither the petitions nor the eleven supporting affidavits addressed whether a chimpanzee could bear duties and responsibilities.[13] The reason was that the NhRP

[13] Copies of all original memoranda, petitions, and affidavits in both Tommy's and Kiko's cases are available and listed chronologically on the Nonhuman Rights Project website, on the following pages, respectively: https://www.nonhumanrights.org/client-tommy/; https://www.nonhumanrights.org/client-kiko/ (last accessed February 15, 2018).

had no way of knowing that the Third Department in *Lavery* would, for the first time in history, rule that a prisoner is required to have the capacity for rights *and* duties in order to have the right to bodily liberty protected by common law habeas corpus. Nor did the NhRP have any reason to believe that the court would take judicial notice that chimpanzees lack this capacity without having received any evidence on that issue or giving the NhRP any opportunity to rebut that conclusion.

Only to directly respond to *Lavery* did the NhRP file sixty pages of expert Supplemental Affidavits in all subsequent petitions in the Supreme Court, New York County, including the two cases at bar. Their sole purpose was to prove that chimpanzees actually possess the capacity to bear duties and responsibilities both within chimpanzee communities and human/chimpanzee communities, even though that is not the correct standard for personhood. These facts had never been presented to any New York court. These uncontroverted affidavits proved, *for the first time*, that chimpanzees:

- possess the ability to understand and carry out duties and responsibilities while knowingly assuming obligations and then honoring them

- behave in ways that seem both lawful and rule-governed
- have moral inclinations and a level of moral agency
- ostracize individuals who violate social norms
- respond negatively to inequitable situations
- have a social life that is cooperative and represents a purposeful and well-coordinated social system
- routinely enter into contractual agreements, keep promises and secrets, prefer fair exchanges
- perform death-related duties
- and show concern for others' welfare.

(*Decision* at 77).[14]

Clearly the First Department's assertion that these "successive proceedings" were "not warranted or supported by any changed circumstances" (*Decision* at 75-76) is demonstrably false. Likewise, the First Department's assertion that *every* prior petition for habeas corpus

[14] The complete Statement of Facts is found in the Memorandum of Law to the First Department and is near-identical in both *Kiko* and *Tommy*. *See Kiko* Record on Appeal at 673-724.

filed by the NhRP was accompanied by affidavits demonstrating that chimpanzees possess the ability "to fulfill certain duties and responsibilities," (*Id.* at 76) is demonstrably false. So too is the First Department's assertion that "[a]ny new expert testimony/affidavits cannot be said to be in response to or counter to the reasoning underlying the decision of the Court in [*Lavery*]." (*Id.*). The NhRP only filed the supplemental affidavits about duties and responsibilities *because of Lavery*. There was no reason prior to *Lavery* for the NhRP to allege that chimpanzees possess the ability to bear duties and responsibilities as no such standard for personhood had ever existed. The First Department's conclusion that the new affidavits were not "in response" to *Lavery* is simply wrong.

The First Department's failure to realize that the *sole purpose* of the Supplemental Affidavits was *not* to buttress NhRP's argument that chimpanzees are autonomous beings, but to rebut *Lavery*'s taking of judicial notice that chimpanzees lack the capacity to possess duties and responsibilities, is underscored by its following assertions:

(1) "The 'new' expert testimony presented by petition continues to support its basic position that chimpanzees exhibit many of the same

social, cognitive and linguistic capabilities as humans and therefore should be afforded some of the same fundamental rights as humans." (*Decision* at 76);

(2) "The gravamen of petitioner's argument that chimpanzees are entitled to habeas relief is that the human-like characteristics of chimpanzees render them 'persons'" (*Id*. at 76-77);

(3) "While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees" (*Id*. at 77); and

(4) "chimpanzees are intelligent, and have the ability to be trained by humans to be obedient to rules, and to fulfill certain duties and responsibilities." (*Id*. at 76).

The First Department's failure to recognize that *Lavery* created the changed circumstances which necessitated the expert Supplemental Affidavits stemmed from its misunderstanding of the NhRP's claims. The First Department contended, for instance, that the NhRP's argument for legal personhood was that the chimpanzees possess "many of the same social, cognitive and linguistic capabilities as humans" or possess "human-like characteristics" or possess "intelligence and social capabilities" or "are intelligent, and have the ability to be trained by

humans to be obedient to rules, and to fulfill certain duties and responsibilities" (*Decision* at 76-77). But these were straw man arguments. The NhRP never made these claims, and finds them erroneous. The First Department then, unsurprisingly, demolished its own straw man arguments.

The NhRP's *actual* legal arguments were grounded upon the common law liberty and equality[15] that New York courts powerfully embrace in their judicial decisions. Both its liberty and equality arguments rested upon the uncontroverted proof that chimpanzees are autonomous, that they can freely choose how to live their lives, *not on chimpanzee' similarities to human beings*, and not upon their alleged ability to be trained, as set forth in its *original* 100 pages of Expert Affidavits. Moreover, these original Expert Affidavits did *not* address the chimpanzees' ability to bear duties and responsibilities, which is a matter distinct from whether they are autonomous. Liberty, equality,

[15] *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001); *Romer v. Evans*, 517 U.S. 620, 633 (1996) (equal protection prohibits both discrimination based upon either irrational means or illegitimate ends, with illegitimate end being the unlawful detention of an autonomous being, and the identification of persons "by a single trait then deny[ing] them protection across the board").

and autonomy beat at the heart of the NhRP's legal arguments.[16] That the *Decision never once* mentioned "equality" or "autonomy," and *never uses* the word "liberty" as part of its analysis of the NhRP's argument provides stark evidence of the failure of the First Department to understand the NhRP's basic claims and thereafter to engage in the required mature weighing of policy and principle. *See Byrn*, 31 N.Y.2d 194.

Contrary to the First Department's assertion that *Lavery* did not "take judicial notice that chimpanzees cannot bear duties and responsibilities," *Decision* at 76, the Third Department in *Lavery unquestionably* took judicial notice of the fact that chimpanzees cannot bear duties and responsibilities. The Third Department stated, *as a fact* that: "[U]nlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights — such as the fundamental

[16] The NhRP invoked "liberty" thirty-three times, "equality" twenty-two times, and "autonomy" sixteen times in its trial memorandum, which was made part of the Record. *Tommy* Trial Memorandum (Appendix at 669); *Kiko* Trial Memorandum (Appendix at 644).

right to liberty protected by the writ of habeas corpus — that have been afforded to human beings." 124 A.D.3d at 152.[17] No evidence was offered by either party on this issue and the assertion itself was subsequently and persuasively refuted by the NhRP's uncontroverted expert Supplemental Affidavits.

VI. The *Decision* conflicts with this Court's decisions, the decisions of the First Department, and the decisions of other Appellate Departments.

Review by the Court of Appeals is further warranted where, as here, a decision of the Appellate Division conflicts with decisions of the Court of Appeals, *e.g.*, *Guice*, 89 N.Y.2d at 38, decisions within its own department, as well as decisions among the other judicial departments. *See* 22 NYCRR § 500.22(b)(4) (leave should be granted when the issues "present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division."). As shown below,

[17] A New York court may only take judicial notice of indisputable facts. *TOA Construction Co. v. Tsitsires*, 54 A.D.3d 109, 115 (1st Dept. 2008). When it takes judicial notice, a court must first notify the parties of its intention to do so, which the Third Department did not do. *Brown v. Muniz*, 61 A.D.3d 526, 528 (1st Dept. 2009). Not only is a chimpanzee's ability to bear duties not indisputable and therefore improper for judicial notice, but the conclusion that a chimpanzee has no such ability is demonstrably false.

the *Decision* readily conflicts with this Court's precedent as well as the decisions of the other judicial departments.

A. The First Department's *Decision* conflicts with this Court's ruling in *Byrn v. New York City Health & Hospitals Corporation*, 31 N.Y.2d 194 (1972).

This Court in *Byrn* made clear more than forty years ago that no entities' personhood depends upon whether they are presently considered to be "persons," and that once a demand for personhood is made, the court must engage in a mature weighing of public policy and moral principle. 31 N.Y.2d at 201.

The *Decision* defied this Court's express admonishment that: "*Whether the law should accord legal personality is a policy question*[.]" *Id.* (emphasis added). "Legal person" is not a biological concept; it does not "necessarily correspond" to the "natural order." *Id*. And as a result of the First Department's failure to recognize personhood as a policy question, it failed to address the NhRP's detailed policy arguments, based upon fundamental common law values of liberty and equality, and not mere biology.

The *Decision* also conflicts with *Byrn* by repeatedly conflating the term "person" with "human," and asserting that "petitioner's argument that the word 'person' is simply a legal term of art is without merit," *Decision* at 78. Both errors require Court of Appeals review, as "person" is not a synonym for "human." *Byrn*, 31 N.Y.2d at 201. *See also* Paton, *supra*, at 349-350; *Salmond on Jurisprudence* 305 (12th ed. 1928) ("A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination,"); IV Roscoe Pound, *Jurisprudence* 192-193 (1959). "Legal personality may be granted to entities other than individual human beings, e.g., a group of human beings, a fund, an idol." George Whitecross Paton, *A Textbook of Jurisprudence* 393 (3rd ed. 1964). "There is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." Gray, *supra* Chapter II, 39 (1909), and at 43, that "animals may conceivably be legal persons," citing, among other authorities, those cited in *Byrn*, *supra*.

"Person" *is* a legal "term of art." *Wartelle v. Womens' & Children's Hosp.*, 704 So. 2d 778, 781 (La. 1997). "[T]he significant fortune of legal personality is the capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). "Person" has *never* been equated with merely being human; many humans have not been "persons" and many nonhumans have been "persons." A human fetus, which this Court in *Byrn* acknowledged, 31 N.Y.2d at 199, "is human," was not deemed a Fourteenth Amendment "person." *See also Roe v. Wade*, 410 U.S. 113 (1973). All humans were not "persons" in New York State until its last slave was freed in 1827. All humans were not "persons" throughout the entire United States until the Thirteenth Amendment to the United States Constitution was ratified in 1865. *See, e.g.*, *Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828) ("Slaves, although they are human beings . . . (are not treated as a person, but (*negotium*), a thing").[18] Women were not "persons" for many purposes until well into the twentieth century. *See* Robert J. Sharpe and Patricia I. McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (2007).

[18] *See, e.g., Trongett v. Byers*, 5 Cow. 480 (N.Y. Sup. Ct. 1826) (recognizing slaves as property); Smith v. Hoff, 1 Cow. 127, 130 (N.Y. 1823) (same); *In re Mickel*, 14 Johns. 324 (N.Y. Sup. Ct. 1817) (same); *Sable v. Hitchcock*, 2 Johns. Cas. 79 (N.Y. Sup. Ct. 1800) (same).

There is simply no precedent to support the First and Third Department's equation of "person" with "human." The *Decision's* analysis of personhood relied entirely upon *Lavery*, 124 A.D.3d at 151-52, which, in turn, had substantially relied upon the definition of "person" found in *Black's Law Dictionary* as one with the capacity for both rights *and* duties. *Lavery*, 124 A.D.3d at 151-52. The problem however was that *Black's Law Dictionary* had relied solely upon the definition of "person" in the 10th edition of *Salmond on Jurisprudence.* But here *Black's* had made a mistake, for the 10th edition of *Salmond on Jurisprudence* unequivocally supports the NhRP's definition of "person" as an entity that can bear rights *or* duties. When the NhRP pointed out its error to the Editor-in-Chief of *Black's Law Dictionary,* he promptly promised to correct it in its next edition.[19] The NhRP then asked the First Department, by motion, to consider this exchange and recognize that the major support for *Lavery* had collapsed. Inexplicably, the First Department denied the motion. Then it perpetuated the Third Department's error in its *Decision*.

[19] James Trimarco, "Chimps Could Soon Win Legal Personhood," YES! Magazine, April 28, 2017, available at: http://www.yesmagazine.org/peace-justice/chimps-could-soon-win-legal-personhood-20170428 (last accessed February 15, 2018).

This Court's decision in *Byrn* is consistent with the growing international precedent in recognizing that "person" is not a biological concept. Sister common law countries demonstrate the principle of law that prevails throughout the common law world that "person" and "human" are not synonyms and it is error to ignore the principles they embody, as did the First Department, as being "not relevant to the definition of 'person' in the United States and certainly . . . of no guidance to the entitlement of habeas relief by nonhumans in New York." *Decision* at 79. These include New Zealand, which bestowed personhood upon a river in 2017[20] and a national park in 2014,[21] and India, which bestowed personhood upon a river and a glacier in 2017, *Mohd. Salim v. State of Uttarakhand & Others*, (PIL) 126/2014 (High Court Uttarakhand, 03/20/2017) and a mosque, *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369, ¶15 (Lahore High Court, Full Bench), an idol, *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925),

[20] New Zealand Parliament, "Innovative bill protects Whanganui River with legal personhood," March 28, 2017, available at: https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/ (last accessed February 15, 2018).

[21] Te Urewara Act 2014, Subpart 3, sec, 11(1), available at: http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183705.html (last accessed February 15, 2018).

and the holy books of the Sikh religion, *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, A.I.R. 2000 S.C. 421. Contrary to the First Department's assertion that "habeas relief has never been found applicable to any animal," *Decision* at 78, habeas relief *has* been ordered for at least two nonhuman animals, an orangutan named Sandra in Buenos Aires, Argentina, *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA, Sobre Amparo* (Association of Officials and Attorneys for the Rights of Animals and Others v. GCBA, on Amparo), EXPTE. A2174-2015 (October 21, 2015), and a chimpanzee named Cecilia in Mendoza, Argentina, *In re Cecilia*, File No. P-72.254/15 at 22-23. The writ has also issued on behalf of a captive bear in Colombia, though that ruling was overruled by a higher court and is under appeal, *Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 (July 26, 2017).

Some of these cases cite to the same secondary sources as did this Court in *Byrn*. These cases, as well as *Byrn* and the numerous sources it cited, make clear that "person" and "human" are not synonymous, and never have been. Even the New York Legislature recognized, more than

twenty years ago, that "human" and "person" are not synonyms when it designated certain nonhuman animals, including chimpanzees, *In re Fouts,* 677 N.Y.S.2d 699 (Sur. 1998) (five chimpanzees), as "persons" by enacting EPTL 7-8.1, which allows nonhuman animals to be trust beneficiaries and therefore "persons" as only "persons" may be trust beneficiaries in New York. *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); *Gilman v. McCardle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883), *rev. on other grounds*, 99 N.Y. 451 (1885).

Finally, the First Department's ruling is also in tension with this Court's precedent expressly allowing the common law writ to be used to establish personhood. Specifically, slaves employed the common law writ of habeas corpus to challenge their status as things in New York State. *Lemmon*, 20 N.Y. at 604-06, 618, 623, 630-31 (citing *Somerset*); *In re Belt*, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846) (citing *Somerset* and *Forbes v. Cochran,* 107 Eng. Rep. 450, 467 (K.B. 1824)); *In re Tom*, 5 Johns. 365 (N.Y. 1810).

In sum, the Court of Appeals should grant NhRP's Motion for Permission to Appeal to resolve the *Decision*'s conflict with *Byrn* in ruling that Tommy and Kiko are not, and can never be, "persons" for

the purpose of a common law writ of habeas corpus, merely because they are not human.

B. The First Department's statement that the determination of who is a "person" under the common law is better suited to the legislature, and that CPLR Article 70 codified the common law of habeas corpus, conflicts with precedent of this Court and the First and Second Departments.

1. The common law writ of habeas corpus has not been codified by legislation.

This Court must also grant review to clarify that the common law writ of habeas corpus continues to exist and is not "codified" by legislation. The First Department ruled that "[t]he common law writ of habeas corpus, *as codified by CPLR article 70,* provides a summary procedure by which a person who has been illegally imprisoned or otherwise restrained in his or her liberty can challenge the legality of the detention." *Decision* at 76 (quoting *Lavery*, 124 A.D.3d at 150, quoting CPLR 7002(a)) (emphasis added). However, this Court's

precedent, and even the First Department's own precedent, make clear that substantive entitlement to the writ is entirely a common law matter.[22] *See People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875) ("[It] is not the creature of any statute . . . and exists as a part of the common law of the State."); *People ex rel. Lobenthal v. Koehler*, 129 A.D.2d 28, 30 (1st Dept. 1987) ("The 'great writ', although regulated procedurally by article 70 of the CPLR, is not a creature of statute, but a part of the common law of this State"); *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 40 (Sup. Ct. 1907) ("A writ of habeas corpus is a common law writ and not a statutory one. If every provision of statute respecting it were repealed, it would still exist and could be enforced."), *aff'd*, 195 N.Y. 610 (1909); Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013) ("The drafters of the CPLR made no attempt to specify the circumstances in which habeas corpus is a proper remedy. This was viewed as a matter of substantive law."). Rather, by definition, CPLR 7002(a) solely governs procedure, that is, *how* a

[22] CPLR 7001 provides in part: "the provisions of this article are applicable to common law or statutory writs of habeas corpus."

lawsuit proceeds, *not who* is a common law "person" for the purpose of habeas corpus (CPLR 102, CPLR 101).[23]

In turn, the First Department's focus on legislative intent in interpreting "person"[24] was a legal *non sequitor*, as legislative intent is *irrelevant* to the *common law* determination of who may be a "person" for purposes of a common law writ of habeas corpus and therefore Article 70. *See Tweed*, 60 N.Y. at 566 (The writ "cannot be abrogated, or its efficiency curtailed, by legislative action. . . . The remedy against illegal imprisonment afforded by this writ . . . is placed beyond the pale of legislative discretion."); *People ex rel. Bungart v. Wells*, 57 A.D. 140,

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[23] To the extent Article 70 limits who is a "person" able to bring a common law writ of habeas corpus, beyond the limitations of the common law itself, it violates the Suspension Clause of the New York Constitution, Art. 1 § 4, which provides that "[t]he privilege of a writ or order of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, or the public safety requires it." The Suspension Clause renders the legislature powerless to deprive an individual of the privilege of the common law writ of habeas corpus. *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939). *See e.g., Matter of Morhous v. Supreme Ct. of State of N.Y.*, 293 N.Y. 131, 135 (1944) (Suspension Clause means that legislature has "no power" to "abridge the privilege of habeas corpus"); *People ex rel. Sabatino v. Jennings*, 246 N.Y. 258, 260 (1927) (by the Suspension Clause, "the writ of habeas corpus is preserved in all its ancient plenitude"); *People ex rel. Whitman v. Woodward*, 150 A.D. 770, 778 (2d Dept. 1912) (Suspension Clause gives habeas corpus "immunity from curtailment by legislative action").

[24] The First Department made the following assertions: (1) "[w]hile the word 'person' is not defined in the statute, there is no support for the conclusion that the definition includes nonhumans, i.e. chimpanzees" (*Decision* at 77); (2) that there is no evidence "the Legislature intended the term 'person' in CPLR article 70 to expand the availability of habeas protection beyond humans" (*Id.* at 77); and (3) "petitioner does not cite any sources indicating that United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty" (*Id.*).

141 (2d Dept. 1901) (habeas corpus "cannot be emasculated or curtailed by legislation").[25] Unless this Court intervenes, the First Department's erroneous ruling that the common law writ of habeas corpus may be abrogated by legislation will stand.

2. New York courts have a duty to reevaluate the common law classification of all nonhuman animals as things for the purposes of the common law writ of habeas corpus, and cannot merely defer to the legislature.

The First Department's ruling that "the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process" (*Decision* at 80) (citing *Lewis v. Burger King,* 344 Fed. Appx. 470, 472 [10th Cir 2009], *cert. denied,* 558 U.S. 1125 [2010])), conflicts with this Court's longstanding rejection of the claim that change should come only from

[25] *See also Whitman*, 150 A.D. at 772 ("no sensible impairment of [habeas corpus] may be tolerated under the guise of either regulating its use or preventing its abuse"); *id.* at 781 (Burr, J., concurring) ("anything . . . essential to the full benefit or protection of the right which the writ is designed to safeguard is 'beyond legislative limitation or impairment'") (citations omitted); *People ex rel. Patrick v. Frost*, 133 A.D. 179, 187 (2nd Dept. 1909) (writ lies "beyond legislative limitation or impairment").

the legislature, especially when the change sought is to the common law of habeas corpus.

Specifically, the *Decision* conflicts with *Woods* and numerous similar cases in which this Court rejected the claim that "change . . . should come from the Legislature, not the courts." 303 N.Y. at 355. In *Woods*, the Court admonished that New York courts have "not only the right, but the duty to re-examine a question where justice demands it" to "bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.'" *Id.* (citation omitted). *See also Flanagan v. Mount Eden General Hospital*, 24 N.Y. 2d 427, 434 (1969) ("we would surrender our own function if we were to refuse to deliberate upon unsatisfactory court-made rules simply because a period of time has elapsed and the legislature has not seen fit to act").

As Kiko's and Tommy's thinghood derives from the common law, their entitlement to personhood must be determined thereunder. When justice requires, it is the role of the courts to refashion the common law — most especially the common law of habeas corpus — with the directness Lord Mansfield displayed in *Somerset v. Stewart*, when he

held human slavery "so *odious* that nothing can be suffered to support it but positive law." 98 Eng. Rep. at 510 (emphasis added).

In response to the question in *Woods* whether the Court should bring "the common law of this state, on this question [of whether an infant could bring suit for injuries suffered before birth] into accord with justice[,]" it answered: "we should make the law conform to right." 303 N.Y. at 351. It explained that "Chief Judge Cardozo's preeminent work *The Nature of Judicial Process* captures our role best if judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." *Caceci v. Do Canto, Const. Corp.*, 72 N.Y.2d 52, 60 (1988) (citing Cardozo, *Nature of Judicial Process*, at 152). In New York, "'[w]hen the ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.' [The Court] act[s] in the finest common-law tradition when [it] adapt[s] and alter[s] decisional law to produce common-sense justice." *Woods*, 303 N.Y. at 355 (quoting *United Australia, Ltd., v. Barclay's Bank, Ltd.*, (1941) A.C. 1, 29). *See, e.g.*, *Gallagher v. St. Raymond's R.C. Church*, 21 N.Y.2d 554, 558 (1968)

("the common law of the State is not an anachronism, but is a living law which responds to the surging reality of changed conditions"); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 508 (1968) ("No recitation of authority is needed to indicate that this court has not been backward in overturning unsound precedent"); *Bing v. Thunig*, 2 N.Y.2d 656, 668 (1957) (a rule of law "out of tune with the life about us, at variance with modern day needs and with concepts of justice and fair dealing . . . [i]t should be discarded"); *Silver v. Great American Ins. Co.*, 29 N.Y.2d 356, 363 (1972) ("Stare decisis does not compel us to follow blindly a court-created rule . . . once we are persuaded that reason and a right sense of justice recommend its change").[26]

The First Department's conclusion that common law personhood is a matter reserved for the legislature relied solely on *Lewis*, 344 Fed. Appx. 470. (*Decision* at 80). But *Lewis* does not support this position. For one, the NhRP filed its petitions in state court, not federal court, and sought a common law, and neither a statutory nor a constitutional,

[26] *See also W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007, 1009 (Sup. Ct. 1998), *aff'd.* 267 A.D.2d 233 (1999) ("For those who feel that the incremental change allowed by the Common Law is too slow compared to statute, we refer those disbelievers to the holding in *Somerset v. Stewart*, . . . which stands as an eloquent monument to the fallacy of this view"). *Greenburg v. Lorenz*, 9 N.Y. 2d 195, 199-200 (1961) ("Alteration of the law [when the legislature is silent] has been the business of the New York courts for many years").

remedy. The *Lewis* case has nothing to do with the common law, but merely rejected the *pro se* plaintiff's claim that her service dog has standing under Article III of the United States Constitution to sue under the Americans with Disabilities Act of 1990. The question of who is a *common law* "person" for the purpose of the *common law* writ of habeas corpus is *by definition uniquely* a question for the courts. The legislature, *by definition*, does not make the *common law*.

C. The *Decision*'s holding that habeas corpus is limited to unconditional release conflicts with decades of Court of Appeals and Appellate Department precedent.

This Court must also grant the NhRP's Motion for Permission to Appeal to resolve the clear conflict between the *Decision*, which forecloses habeas corpus relief to anyone who cannot be released unconditionally, and the longstanding precedent of this Court and other judicial departments that unconditional release is not required. The First Department affirmed the dismissal of the petitions in part on the grounds that, "[s]ince Petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different

facility, habeas relief was properly denied by the motion court." (*Decision* at 79). This holding is flawed for two reasons: (1) it runs directly counter to precedent; and (2) it misapprehends the relief sought by NhRP's habeas corpus petitions, *infra*.

First, New York courts at every level have for two centuries used the writ of habeas corpus to order the release of such incompetent humans as child slaves, child apprentices, child residents of training schools, child residents of mental institutions, and mentally incapacitated adults, from the custody of one entity that was illegally detaining them and into the custody of another. *See, e.g.*, *Lemmon*, 20 N.Y. at 632 (five slave children discharged); *People ex rel. Margolis v. Dunston*, 174 A.D.2d 516, 517 (1st Dept. 1991) (juvenile); *State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982) (elderly sick woman); *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996) (elderly and ill woman). The court in *Stanley* correctly recognized that the First Department allows such a placement. 16 N.Y.S.3d at 917 n.2. The *Decision* therefore not only contravenes the decision of New York's highest Court but it conflicts with its own decisions.

The writ of habeas corpus can even be used solely to challenge conditions of confinement, even where no release from imprisonment is sought. *See, e.g.*, *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961) (habeas corpus was proper remedy to test the validity of a prisoner's transfer from a state prison to a state hospital for the insane); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943) ("that the appellant is still under a legal commitment to Elmira Reformatory does not prevent him from invoking the remedy of habeas corpus as a means of avoiding the further enforcement of the order challenged.") (citation omitted); *Matter of MHLS ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989) (mental patient transferred from secure to non-secure facility); *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 251 (2d Dept. 1993) (habeas corpus "available to challenge conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. LaBelle v. Harriman*, 35 A.D.2d 13, 15 (3d Dept. 1970) (same); *People ex rel. Berry v. McGrath*, 61 Misc. 2d 113, 116 (N.Y. Sup. Ct. 1969) (an "individual . . . is entitled to apply for habeas corpus" upon a "showing of a course of cruel and unusual treatment"). The First Department's holding that habeas corpus is only available to prisoners

capable of immediate and unconditional release obviously and squarely conflicts with the foregoing authorities.

In ruling that the NhRP could not use the writ of habeas corpus to challenge the conditions of the chimpanzees' confinement, the First Department relied solely upon two inapt cases, *Presti*, *supra,* and *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986). *Dawson,* it asserted, is "analogous to the situation here." (*Decision* at 80). Yet in *Dawson*, this Court *affirmed* that habeas corpus *can* be used to seek a transfer to an "institution *separate and different in nature* from the correctional facility to which petitioner had been committed[.]" *Dawson* at 691 (emphasis added) (citing *Johnston*). In distinguishing *Johnston*, the *Dawson* Court explained, "[h]ere, by contrast, petitioner *does not seek his release from custody in the facility*, but only from confinement in the special housing unit, a particular type of confinement within the facility which the Department . . . is expressly authorized to impose on lawfully sentenced prisoners[.]" *Id.* (citations omitted, emphasis added). As in *Johnston*, and unlike *Dawson*, the NhRP seeks release of Tommy and Kiko from their imprisonments to an appropriate chimpanzee sanctuary, an environment manifestly "separate and different in

nature." Unlike the habeas corpus petitioner in *Dawson*, Kiko and Tommy are not inmates properly convicted of a crime. They can be legally ordered released from their illegal detention. The Fourth Department in *Presti* was wrong then for the same reasons the First Department is wrong now.

Second, the First Department fundamentally misunderstood the nature of relief sought by the NhRP. Oddly, the First Department first appeared to recognize that the NhRP "requests that respondents be ordered to show 'why [the chimpanzees] should not be discharged, and thereafter, [the court] make a determination that [their] detention is *unlawful* and order [their] *immediate release* to an appropriate primate sanctuary.'" (*Decision* at 79) (emphasis added). However, in the very next paragraph, the court stated the opposite, that the NhRP "does not challenge the legality of the chimpanzees' detention," and that "[s]eeking transfer of Kiko and Tommy to a facility petitioner asserts is more suited to chimpanzees as opposed to challenging the illegal detention of Kiko and Tommy does not state a cognizable habeas claim." (*Id.*)

To be clear, the NhRP's *entire case* is a challenge to the *legality* of Tommy's and Kiko's detentions and an attempt to secure their immediate release. The NhRP argued that Tommy and Kiko are "illegally imprisoned," that their "detention is unlawful," and that they are "unlawfully detained." *See Tommy* Appellate Brief at 61-63, Verified Petition for Habeas Corpus at 1-5 (Appendix at 15-22); *Kiko* Appellate Brief at 60-61, Verified Petition for Habeas Corpus at 1-5 (Appendix at 15-22).[27] The NhRP never argued that the illegality of their detention is based upon *the conditions of their confinement.* Even *Lavery* recognized this: "[n]otably, we have not been asked to evaluate the quality of Tommy's current living conditions in an effort to improve his welfare." 124 A.D.3d at 149 (citation omitted). So too did *Stanley*: "[t]he conditions under which Hercules and Leo are confined are not

27 The term "unlawful" appears six times in the appellate brief, *Tommy* Appellate Brief at 61-63, *Kiko* Appellate Brief at 60-62, and the NhRP concludes by asking the court to "issue the order to show cause for a hearing to determine the legality of [the chimpanzees'] detention." *Tommy* Appellate Brief at 67-68; *Kiko* Appellate Brief at 66-67. In addition, the memoranda of law that accompanied the petitions to the lower court with respect to both Tommy and Kiko contained the following sections in its Arguments, none of which deal with the issue of the conditions of the chimpanzees' confinement: "A PERSON ILLEGALLY IMPRISONED IN NEW YORK IS ENTITLED TO A COMMON LAW WRIT OF HABEAS CORPUS" and "As Common law natural persons are presumed free, Respondents must prove they are not unlawfully imprisoning [Tommy and Kiko]." *Tommy* Trial Memorandum at 65, 86 (Appendix at 752, 773); *Kiko* Trial Memorandum at 68, 88 (Appendix at 730, 750).

challenged by petitioner. . . . [T]he sole issue is whether Hercules and Leo may be legally detained at all." 16 N.Y.S.3d at 901.

Only after issuing an order to release would the court need to determine where the chimpanzees should live, as they are neither competent nor indigenous to North America. But this determination had nothing to do with the conditions of Tommy's and Kiko's current confinement. Instead the court was required to determine where the chimpanzees should be sent after their release so that they might exercise their common law right to bodily liberty to the greatest extent possible while remaining in the care and custody of another, which is precisely the remedy afforded by habeas corpus.

Equally concerning was the First Department's finding that habeas corpus relief is unavailable given that "[p]etitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that 'there are no adequate facilities to house [them] in proximity to the [c]ourt.'" (*Decision* at 79). Whether or not Tommy and Kiko could be immediately produced in court after the writ is issued is of course irrelevant to the determination of whether they are entitled to habeas corpus relief.

CPLR 7003(a) even specifically provides for those situations "where the petitioner does not demand production of the person detained" and requires the court to "order the respondent to show cause why the person detained should not be released." The NhRP followed that statute by bringing its action as a petition for a common law writ of habeas corpus and order to show cause. *See, e.g., State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982); *Callan v. Callan*, 494 N.Y.S.2d 32, 33 (2d Dept. 1985) ("Plaintiff obtained a writ of habeas corpus by order to show cause when defendant failed to return her infant daughter after her visitation. . . .").[28] As there is no legal requirement that a detained

[28] *See also State ex rel. Soss v. Vincent*, 369 N.Y.S.2d 766, 767 (2d Dept. 1975) ("In a habeas corpus proceeding upon an order to show cause (CPLR 7003, subd. (a)), the appeal is from a judgment of the Supreme Court . . . which granted the petition and ordered petitioner released"); *People ex rel. Bell v. Santor*, 801 N.Y.S.2d 101 (3d Dept. 2005) ("Petitioner commenced this CPLR article 70 proceeding seeking habeas corpus relief. . . . Supreme Court dismissed the petition without issuing an order to show cause or writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell*, 421 N.Y.S.2d 443, 444 (4th Dept. 1979) ("This matter originated when petitioner . . . sought, by an order and petition, a *writ of habeas corpus* (Respondents) to show cause why Ricky Brandon, an infant . . . should not be released and placed in petitioner's custody."); *People ex rel. Smith v. Greiner*, 674 N.Y.S.2d 588 (Sup. Ct. 1998) ("This is a habeas corpus proceeding brought by the petitioner pro se and commenced via Order to Show Cause"); *People ex rel. Goldstein on Behalf of Coimbre v. Giordano*, 571 N.Y.S.2d 371 (Sup. Ct. 1991) ("By order to show cause, in the nature of a Writ of Habeas Corpus proceeding, the petitioner seeks his release from the custody of the New York State Division for Youth. . . . [T]he Court grants the petition and directs that this petitioner be forthwith released"); *In re Henry*, 1865 WL 3392 (N.Y. Sup. Ct. 1865) ("the party arrested can apply for a habeas corpus, calling on the officer to show cause why he is detained, and with the return to the writ the rule is that where the arrest is upon suspicion,

party be brought before the court, any failure to do so is irrelevant to the determination of whether habeas corpus relief should be granted.[29]

As the *Decision* is in stark conflict with established New York precedent at every judicial level, it is incumbent upon the Court of Appeals to settle the controversy.

VII. Conclusion

This appeal raises the important question of whether an autonomous individual may be deprived of her right to bodily liberty protected by common law habeas corpus and relegated to a life of imprisonment merely because she is not human. The First and Third Departments have required every individual who seeks habeas corpus to have the capacity to bear duties and responsibilities. The appellate courts claim, without having been presented with any supporting evidence, that this standard is satisfied by all, but only, human beings, despite the fact that millions of New Yorkers lack that capacity. Moreover, the courts did not even attempt to provide a rational connection between possession of this capacity and the ability to possess

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and without a warrant, proof must be given to show the suspicion to be well founded") (emphasis added in each).

[29] Bringing Tommy and Kiko to court might have been dangerous to both the chimpanzees and the public and was unnecessary to the adjudication of personhood and the legality of their detention.

the fundamental right to bodily liberty that is protected by common law habeas corpus. This standard has never been applied by any other English-speaking court, is arbitrary, and conflicts with this Court's precedent. On these grounds alone, this Court should welcome the opportunity to decide this case of first impression and grant the NhRP's Motion for Permission to Appeal.

In addition, this case warrants the Court's review as the *Decision* from which this appeal is taken: (1) conflicts with the plain language of CPLR 7003(b) which makes clear that a petition for a writ of habeas corpus cannot be dismissed as improperly successive if it raises new grounds or if the legality of the detention has never been ruled upon; (2) conflicts with this Court's, the First Department's, and other Departments' precedent that habeas corpus relief is appropriate and available when the imprisoned "person" must be released into the custody of another; and (3) conflicts with this Court's, the First Department's, and other Departments' precedent that eligibility for common law habeas corpus is a matter uniquely for the courts and not the legislature. As these issues apply to all future habeas corpus

claimants, the failure to address them will adversely impact nonhuman animals and human beings alike.

Finally, the *Decision* contains numerous substantial legal errors and erroneous factual assumptions that require review and correction by this Court.

For the above reasons, this Court should grant the NhRP's Motion for Permission to Appeal to the Court of Appeals.

Dated: February 21, 2018

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF NEW YORK

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In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Petitioner-Appellant,

-against-

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

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Index Nos. 162358/15 (New York County); 150149/16 (New York County)

Affirmation of Elizabeth Stein, Esq. in Support of Motion for Permission to Appeal to the Court of Appeals

ELIZABETH STEIN, ESQ. being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the courts of the State of New York and am an attorney of record for the above-named Petitioner-Appellant, The Nonhuman Rights Project, Inc. ("NhRP"), with respect to the proceedings in the New York State Supreme Court,

New York County ("Supreme Court, New York County") and the appeal taken from those proceedings.

2. I am familiar with the facts and with the questions of law involved in the appeal.

3. This affirmation is submitted in support of the NhRP's Motion for Permission to Appeal to the Court of Appeals ("Motion for Permission to Appeal") pursuant to New York Civil Practice Law and Rules ("CPLR") 5602(a)(1)(i).

PROCEDURAL HISTORY

4. Paragraphs 5-26 detail the procedural history of the two cases joined in the present appeal: paragraphs 5-9 detail Tommy's case prior to joining; paragraphs 10-20 detail Kiko's case prior to joining, and; paragraphs 21-26 detail both cases after they were joined by the New York State Supreme Court Appellate Division, First Judicial Department ("First Department").

5. On December 4, 2015, the NhRP filed a second Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause (Index No. 162358/2015) pursuant to CPLR Article 70 in the Supreme Court, New York County on behalf of Tommy, a chimpanzee unlawfully

detained in the State of New York. (Tommy R. at 15) (the entire Record on Appeal in Tommy's case is annexed hereto).[1] As the NhRP was not demanding production of Tommy, it asked the court to "order the respondent to show cause why the person detained should not be released" pursuant to CPLR 7003(a).

6. On December 23, 2015, the Honorable Supreme Court Justice Barbara Jaffe ("Justice Jaffe") declined to issue the order to show cause on the grounds she was bound by a decision of the New York State Supreme Court Appellate Decision, Third Judicial Department, ("Third Department"), *Nonhuman Rights Project, Inc. v. Lavery, et al*., 124 AD 3d 148, 150 (3d Dept. 2014), *leave to appeal denied*, 26 NY3d 902 (2015), ("*Lavery*")[2] and that the petition did not present allegations or grounds sufficiently distinct from the facts of *Lavery*. (Tommy R. at 13).

7. On October 6, 2016, the NhRP filed a timely Notice of Appeal of Justice Jaffe's December 23 decision with the Supreme Court, New

[1] The NhRP had filed the first Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause on behalf of Tommy on December 2, 2013 in the New York State Supreme Court, Fulton County. That court had refused to issue the order to show cause.

[2] As discussed at length throughout this Affirmation and the attached Memorandum of Law, the Third Department in *Lavery* held that an entity must have the capacity to bear duties and responsibilities to be a legal person and that chimpanzees do not possess this capacity.

York County. (Tommy R. at 7). The next day, the NhRP filed with the Clerk of the First Department a letter motion for leave to file an oversized appellate brief, which was granted (a copy of the letter motion is annexed hereto as **Exhibit 1**).

8. On or about October 28, 2016, the NhRP filed with the Clerk of the First Department the following papers: Notice of Appeal, completed Request for Appellate Intervention, Order of the Supreme Court, New York County, and affidavit of service. The NhRP also filed the Record on Appeal, which included the order of the lower court and Opening Brief (a copy of the Opening Brief is annexed hereto as **Exhibit 2**) and Letter Motion for Steven M. Wise to appear and argue *Pro Hac Vice* (which was granted, a copy of which is annexed hereto as **Exhibit 3**).

9. On December 11, 2016, the NhRP filed a motion seeking leave to reply to an *amicus curiae* brief filed in opposition to the NhRP by Richard Cupp, law professor at Pepperdine University.[3] The First Department denied the NhRP's motion (a copy of the motion is annexed

[3] A copy of Professor Cupp's *amicus curiae* brief, which was accepted by the First Department, is available at: https://www.nonhumanrights.org/content/uploads/CuppAmicus.pdf (last accessed February 20, 2018). Professor Cupp did not file a brief in Kiko's case.

hereto as **Exhibit 4** and a copy of the decision denying that motion is annexed hereto as **Exhibit 5**).

10. On January 7, 2016, the NhRP filed a second Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause (Index No. 150149/2016) pursuant to CPLR Article 70 in the Supreme Court, New York County on behalf of Kiko, a chimpanzee unlawfully detained in the State of New York. (Kiko R. at 13) (the entire Record on Appeal in Kiko's case is annexed hereto).[4] As the NhRP was not demanding production of Kiko, it asked the court to "order the respondent to show cause why the person detained should not be released" pursuant to CPLR 7003(a).

11. On January 29, 2016, Justice Jaffe refused to issue the order to show cause on the grounds that the NhRP had failed to allege "changed circumstances" adequate to support a successive petition for a writ of habeas corpus, and that, "In any event, whether evidence of the ability of some chimpanzees to shoulder certain kinds of responsibilities is sufficiently distinct from that offered with the first four petitions, and

[4] The NhRP had filed the first Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause on behalf of Kiko on December 3, 2013 in the New York State Supreme Court, Niagara County. That court had refused to issue the order to show cause.

whether that evidence would pass muster in the Third Department, the decision of which remains binding on me (*Nonhuman Rights Project v. Stanley*, 49 Misc. 3d 746 [Sup Ct, New York County 2015 [Jaffe, J.]), are determinations that are best addressed there." Kiko R. at 7.

12. On February 9, 2016, the NhRP filed with the Clerk of the First Department the following papers: Notice of Appeal, completed Request for Appellate Intervention, Order of the Supreme Court, New York County, and affidavit of service. The NhRP then sought to perfect its appeal. On May 18, 2016, it filed the Record on Appeal, which included the order of the lower court and Opening Brief (a copy of the Opening Brief is annexed hereto as **Exhibit 6**).

13. I was then contacted by the First Department Clerk's Office and informed both that the NhRP did not have a proper order from which an appeal could be taken and that the NhRP could not take an appeal as of right from the lower court's refusal to issue the order to show cause or writ of habeas corpus.

14. The NhRP also filed the following documents with the First Department: Letter Motion to File an Oversize Brief, which was denied

(a copy of the letter motion is annexed hereto as **Exhibit 7**); a second Letter Motion to File an Oversize Brief, which was granted (a copy of the letter motion is annexed hereto as **Exhibit 8**), and; Motion for Steven M. Wise to appear and argue *Pro Hac Vice*, which was granted (a copy of the motion is annexed hereto as **Exhibit 9**).

15. In response to the Clerk's statement that the NhRP did not have a proper order from which an appeal could be taken, on May 20, 2016, the NhRP submitted a letter to the lower court requesting that it enter an appropriate order with the New York County Clerk from which an appeal may be taken. In response, that same day the lower court issued the appropriate order that the NhRP desired to file as a supplemental record on appeal. Because this order post-dated all filings in this appeal, on July 6, 2016, the lower court granted NhRP's motion for an order that the judgment of May 20, 2016 be issued *nunc pro tunc* to the date of the lower court's original final order of January 29, 2016.

16. In response to the Clerk's statement that the NhRP did not have an appeal as of right from the lower court's refusal to issue the order to show cause or writ of habeas corpus, the NhRP filed a Motion

to Appeal as of Right pursuant to CPLR 7011 (a copy of the motion is annexed hereto as **Exhibit 10**).

17. On July 28, 2016, the Honorable Justice Webber of the First Department *sua sponte* converted the NhRP's motion into a Motion for Leave to Appeal pursuant to CPLR 5701(c), then denied it (a copy of the decision is annexed hereto as **Exhibit 11**).

18. On August 19, 2016, the NhRP filed a Motion to Reargue or, in the Alternative, for Leave to Appeal to the Court of Appeals from the order of July 28, 2016. On October 25, 2016, the First Department entered an order denying this motion (a copy of the motion is annexed hereto as **Exhibit 12**, and the decision denying the motion is annexed hereto as **Exhibit 13**).

19. On November 1, 2016, the NhRP filed an Article 78 Petition for Mandamus in the First Department claiming that it was entitled to mandamus relief both because Justice Webber had erred in *sua sponte* converting the NhRP's Motion to Appeal as of Right pursuant to CPLR 7011 into a motion for leave to appeal under CPLR 5701(c), then denying the NhRP its right to appeal, and because the First Department had erred in denying the NhRP's Motion to Reargue or, in

the Alternative, for Leave to Appeal to the Court of Appeals, both of which served to deprive the NhRP of its right to appeal (a copy of the petition for mandamus is annexed hereto as **Exhibit 14**).

20. On November 10, 2016, I was contacted by the First Department Clerk's office and informed that the NhRP would now be permitted to appeal as of right. That same day, the First Department issued a ruling reversing itself and granting NhRP's motion to appeal as of right (a copy of the decision is attached hereto as **Exhibit 15**). The NhRP was asked by the First Department Clerk's office to withdraw its Article 78 Petition for Mandamus, which it did.

21. On February 15, 2017, the First Department joined Tommy's and Kiko's cases, and on March 16, 2017 the First Department heard argument in both cases.

22. On April 11, 2017, after oral argument but before a decision was rendered, the NhRP filed a motion in the First Department seeking to supplement the record to reflect that the Editor-in-Chief of *Black's Law Dictionary* had agreed to change that publication's erroneous definition of "person" in response to a request from the NhRP in order to reflect that a "person" is the subject of rights *or*

duties, not rights *and* duties. The First Department denied that motion (a copy of the motion is annexed hereto as **Exhibit 16**, and a copy of the decision denying the motion is annexed hereto as **Exhibit 17**).

23. On June 8, 2017, the First Department issued a single decision denying habeas relief to both Tommy and Kiko ("*Decision*"). a copy of which is annexed hereto as **Exhibit 18**.

24. On November 16, 2017, the NhRP filed a motion in the First Department seeking leave to appeal Tommy's and Kiko's cases to the Court of Appeals (a copy of the motion is annexed hereto as **Exhibit 19**).

25. On January 18, 2018, the First Department denied the NhRP's motion for leave to appeal in Tommy's and Kiko's cases. A copy of the decision is annexed hereto as **Exhibit 20**.

26. This Motion for Permission to Appeal to the Court of Appeals is served and filed fewer than thirty days from the date of the written notice of entry of the appellate court's order and is therefore timely filed pursuant to CPLR 5513(b). A copy of the notice of entry with proof of service is annexed hereto as **Exhibit 21**.

JURISDICTIONAL STATEMENT

27. This Court has jurisdiction over the NhRP's Motion for Permission to Appeal pursuant to CPLR 5602(a)(1)(i), which provides that permission by the Court of Appeals for leave to appeal may be taken "in an action originating in the supreme court . . . from an order of the appellate division which finally determines the action and which is not appealable as of right." *See* CPLR 5611 ("If the appellate division disposes of all issues in the action its order shall be considered a final one.").

QUESTIONS PRESENTED

28. The NhRP moves this Court to review the following legal issues raised in this appeal: (a) May a court refuse to issue a common law writ of habeas corpus or order to show cause as an improper successive petition under CPLR 7003(b) if all three statutory requirements for dismissal have not been satisfied; (b) May a court properly deny an autonomous individual the right to common law habeas corpus solely because she is not human; (c) Is the capacity to bear duties and responsibilities necessary to possess the common law right to bodily liberty protected by common law habeas corpus; and (d) May a court properly refuse to issue a common law writ of habeas corpus solely

because the "person" unlawfully imprisoned cannot be released unconditionally and must necessarily be released into the custody of another?

REASONS FOR GRANTING THE NHRP'S MOTION FOR LEAVE TO APPEAL[5]

29. First, the appeal raises novel and complex legal issues that are of great public importance and interest in New York, the United States, and the world. Second, the *Decision* conflicts with the plain language of CPLR 7003(b), which makes clear that a petition for a writ of habeas corpus cannot be dismissed as improperly successive if it raises new grounds not previously presented or if the legality of the detention has never been ruled upon. Third, the *Decision* conflicts with rulings of this Court, the First Department and other judicial departments of the Appellate Division on the following three important issues that can only be resolved by this Court: (1) whether the determination of common law personhood is a matter for the legislature or the courts; (2) whether common law personhood necessarily requires a capacity to bear duties and responsibilities; and (3) whether habeas corpus is appropriate only when the unconditional release of the imprisoned individual is demanded. Fourth, the *Decision* contains numerous substantial legal errors and erroneous factual

[5] The reasons why this Court should grant the NhRP's Motion for Leave to Appeal are discussed in detail in the accompanying Memorandum of Law.

assumptions that require review and correction by this Court.

30. In determining whether to grant permission to appeal, this Court looks to the novelty, difficulty, and importance of the legal and public policy issues the appeal raises. *See In re Shannon B.*, 70 N.Y.2d 458, 462 (1987); *Town of Smithtown v. Moore*, 11 N.Y.2d 238, 241 (1962); *Neidle v. Prudential Ins. Co. of Am.*, 299 N.Y. 54, 56 (1949); *Lavery*, 124 A.D.3d at 149 ("appeal presents the novel question of whether a chimpanzee is a 'person' entitled to the rights and protections afforded by the writ of habeas corpus."); *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898, 917 (Sup. Ct. 2015) ("the issue of a chimpanzee's right to invoke the writ of habeas corpus is best decided . . . by the Court of Appeals, given its role in setting state policy."); *see also* 22 NYCRR § 500.22; COURT OF APPEALS OF THE STATE OF NEW YORK: ANNUAL REPORT OF THE CLERK OF THE COURT: 2010, at 2 (2011).

31. This case and the arguments it raises have: (a) been the subject of thousands of legal commentaries, national and international news articles, radio and television programs, and podcasts;[6] (b) captured the attention of the world's leading legal scholars generating extensive discussion in almost one hundred law review articles, legal industry

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

publications, multiple academic books, and science journals;[7] (c) been noted by courts in other states, *see State v. Fessenden*, 355 Ore. 759, 769-70 (2014); and (d) partly been the basis of an Argentine court's decision in November, 2016 which recognized a chimpanzee named Cecilia as a "non-human person," ordered her released from a Mendoza Zoo pursuant to a writ of habeas corpus, and sent to a sanctuary in Brazil. *In re Cecelia*, Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-23.

32. This Court also grants leave to appeal to "[d]evelop emerging areas of common law," as well as "[r]eevaluate outmoded precedent," "[c]orrect error[s] below,"[8] and to "cure substantial injustice." New York Court of Appeals Clerk's Office, *The New York Court of Appeals Civil Jurisdiction and Practice Outline*, available at https://www.nycourts.gov/ctapps/forms/civiloutline.pdf (last accessed February 20, 2018).

33. This appeal requests this Court to re-evaluate the anachronistic common law classification of all nonhuman animals as mere "things," regardless of their autonomy or complex cognition, and determine whether common law personhood should extend to

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[7] See footnotes 5-6 of the attached Memorandum of Law in support of this motion for a full list of citations.

[8] *See Matter of Ferrara,* 2006 NY Slip Op 5156, ¶ 5, 7 N.Y.3d 244, 251 (2006); *Metro. Life Ins. Co. v. Noble Lowndes Int'l*, 84 N.Y.2d 430, 434 (1994); *Perlmutter v. Beth David Hosp*., 308 N.Y. 100, 103-04 (1954); *Hurlburt v. Hurlburt*, 128 N.Y. 420, 426 (1891); *Griffin v. Marquardt*, 17 N.Y. 28, 33 (1858).

chimpanzees, as extraordinarily cognitively complex and autonomous individuals, for purposes of common law habeas corpus.

THE FIRST DEPARTMENT'S DEFINITION OF COMMON LAW PERSONHOOD REQUIRES REVIEW BY THIS COURT AS IT IS ERRONEOUS AND CONFLICTS WITH THIS COURT'S PRECEDENT

34. The Third Department in *Lavery* held for the first time by any English-speaking court that an entity must have the capacity to bear duties and responsibilities to be a "person" for any purpose, including having "the fundamental right to liberty protected by the writ of habeas corpus." The court then declared, without any evidence having been presented in support, that chimpanzees lack such capacity and they therefore could not be "persons" for purposes of habeas corpus protection. 124 A.D. 3d at 152.

35. As *Lavery* was the only appellate court decision that directly touched upon the issue at the time the NhRP filed its second petitions on behalf of Tommy and Kiko, the Supreme Court, New York County determined that it was bound to follow it.

36. Rather than ignoring *Lavery* and appropriately applying this Court's precedent in ruling on this issue of personhood (as discussed below), the First Department on appeal in this case adopted *Lavery*'s erroneous standard.

37. The requirement enunciated by the First Department and *Lavery* that an entity must be able to bear duties and responsibilities

to be a "person" for any purpose directly conflicts with this Court's precedent in *Byrn v. New York City Health and Hospitals Corp*., 31 N.Y. 2d 194, 201 (1972), in which this Court made clear that the determination of personhood – the most important issue that may come before a court - is to be based on policy, and not biology.

38. As this Court noted in *Byrn*, "upon according legal personality to a thing the law affords it the rights and privileges of a legal person[.]"31 N.Y.2d at 201 (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909) ("Gray"). *See also* Hans Kelsen, *General Theory of Law and State* 93-109 (1945); George Whitecross Paton, *A Textbook of Jurisprudence* 349-356 (4th ed., G.W. Paton & David P. Derham eds. 1972) ("Paton"); Wolfgang Friedman, *Legal Theory* 521-523 (5th ed. 1967)).

39. In accordance with *Byrn,* a determination of an entity's personhood necessarily entails a mature weighing of public policy and moral principle in which that entity's capacity to bear duties and responsibilities plays no part. The words "duty," "duties," or "responsibility" do not even appear in the *Byrn* majority opinion.

40. The *Decision* also conflicts with *Byrn* by repeatedly conflating the term "person" with "human," and asserting that "petitioner's argument that the word 'person' is simply a legal term of art is without merit," *Decision* at 78. Both errors require Court of Appeals review, as "person" is not a synonym for "human." *Byrn*, 31 N.Y.2d at 201(a fetus

is human, but not a person"). *See also* Paton, *supra*, at 349-350; *Salmond on Jurisprudence* 305 (12th ed. 1928) ("Th(e) extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination,"); IV Roscoe Pound, *Jurisprudence* 192-193 (1959). "Legal personality may be granted to entities other than individual human beings, e.g., a group of human beings, a fund, an idol." George Whitecross Paton, *A Textbook of Jurisprudence* 393 (3rd ed. 1964). "There is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." Gray, *supra* Chapter II, 39 (1909), and at 43, that "animals may conceivably be legal persons," citing, among other authorities, those cited in *Byrn*, *supra.*

41. A major flaw in both *Lavery's* and this *Decision's* holdings is the fact that millions of New Yorkers lack the capacity to bear duties and responsibilities yet are legal persons. *See Decision* at 78 ("Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lack sentience, yet both have legal rights.") In response, the First Department merely replied that "[t]his argument *ignores the fact* that these are still human beings, members of the human community." *Id.* (emphasis added). Such a "distinction without a difference" is mere bias and must not be

countenanced by this Court.

42. As has been consistently argued by the NhRP, an entity is a "person" if she can *either* bear rights *or* duties not rights *and* duties. In this regard, it should be noted that the *Lavery* decision—upon which the First Department relied exclusively in its analysis of personhood—relied significantly on the definition of "person" found in *Black's Law Dictionary* which did define "person" in terms of rights and duties. This definition however was proven incorrect by the NhRP when it determined that the definition of "person" in the 10th edition of *Salmond on Jurisprudence*, upon which *Black's Law Dictionary* exclusively relied, spoke in terms of duties *or* rights not duties *and* rights. This error was brought to the attention of the Editor-in-Chief of *Black's Law Dictionary* who has agreed to correct it in the next edition. Thus, the basis of both the First and Third Department's holding has been discredited and proven wrong.

43. The First Department further concluded erroneously that chimpanzees are not and can never be legal persons based on a lack of precedent "under New York law, or English common law." *Decision*, at 77-78. But, as *Stanley* correctly noted, "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" 16 N.Y.S.3d at 912.

44. Specifically, the reason no precedent exists for treating

nonhuman animals as "persons" for the purpose of securing habeas corpus relief was *not* because the claim had been *rejected* by the courts. It was because no autonomous nonhuman entity, such as a chimpanzee, had ever *demanded* a writ of habeas corpus. The NhRP's cases represent the *first* such demand ever made by a nonhuman animal in any common law jurisdiction.[9]

45. The mere novelty of their claim however is insufficient to deny Tommy or Kiko habeas corpus relief. *See, e.g.*, *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (that no Native American had previously sought relief pursuant to the Federal Habeas Corpus Act did not foreclose a Native American from being characterized as a "person" and being awarded the requested habeas corpus relief); *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (that no slave had ever been granted a writ of habeas corpus was no obstacle to the court granting one to the slave petitioner); *see also Lemmon v. People*, 20 N.Y. 562 (1860). "If rights were defined by who exercised them in the past, then received practices could serve as their

[9] Moreover, none of the cases cited in *Lavery* support its statement that "habeas corpus has never been provided to any nonhuman entity." 124 A.D.3d at 150 (citing *United States v Mett*, 65 F.3d 1531 (9th Cir 1995), *cert denied* 519 U.S. 870 (1996); *Waste Mgt. of Wisconsin, Inc. v. Fokakis*, 614 F.2d 138 (7th Cir 1980), *cert denied* 449 U.S. 1060 (1980); and *Sisquoc Ranch Co. v. Roth*, 153 F.2d 437, 441 (9th Cir 1946)). In fact, none of these cases have *anything whatsoever* to do with nonhuman animals.

own continued justification and new groups could not invoke rights once denied." *Stanley*, 16 N.Y.S.3d at 912 (citing *Obergefell v. Hodges*, 135 S. Ct. 2602 (2015)).

46. As the erroneous and misguided personhood standard articulated by the First and Third Departments has not been addressed by this Court or the courts of the Second and Fourth Departments, all lowers courts in New York remain bound by it.

THIS APPEAL RAISES COMPLEX QUESTIONS OF LAW AND FACT

47. The Motion for Permission to Appeal should be granted because the case raises complex questions of law and fact. *Melenky v. Melen*, 206 A.D. 46, 51-52 (4th Dept. 1923). *See, e.g.*, *Hamilton v. Miller*, 23 N.Y.3d 592, 603 (2014) (leave to appeal was granted in a "scientifically complicated" case); *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 249-50 (1999) (leave to appeal granted in case involving "complicated legal questions associated with electronic bulletin board messages" for defamation purposes); *Matter of George L.*, 85 N.Y.2d 295, 298, 302 (1995) (granting leave to appeal in case presenting a "difficult question [regarding] a mentally ill individual"); *Schulz v. State*, 81 N.Y.2d 336, 344 (1993); *Sukljian v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 95 (1986).

48. The question of whether a chimpanzee is entitled to legal

personhood involves inquiry not only into the legal issue of personhood, but into the significance of the detailed uncontroverted Expert Affidavits submitted by respected scientists to support the NhRP's allegation that chimpanzees are extraordinarily cognitively complex beings who possess the autonomy sufficient (though not necessary) for personhood for the purpose of a common law writ of habeas corpus, as a matter of liberty, equality, or both.

49. For the sole purpose of responding to the unprecedented personhood standard articulated in *Lavery* that only individuals able to bears duties and responsibilities can be "persons" for the purpose of habeas corpus and that court's taking of judicial notice that chimpanzees could not bear duties and responsibilities, the NhRP submitted expert Supplemental Affidavits from six internationally renowned chimpanzee cognition experts to the lower court for the purpose of proving that chimpanzees do in fact possess the capacity to bear duties and responsibilities in both chimpanzee communities and human/chimpanzee communities.

50. Such complex scientific and legal issues regarding personhood and the scope of the common law writ of habeas corpus merit immediate attention by the Court of Appeals. *See Woods v. Lancet*, 303 N.Y. 349, 355 (1951) ("we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.").

THE FIRST DEPARTMENT MISAPPLIED AND MISINTERPRETED CPLR 7003(b)

51. The Motion for Permission to Appeal should be granted because the First Department's reliance on CPLR 7003(b) for its denial of the NhRP's second petitions on behalf of Tommy and Kiko as improperly successive violates CPLR 7003(b) and conflicts with established New York precedent interpreting the statute.

52. CPLR 7003(b) "continues the common law and present position in New York that *res judicata has no application* to the writ." Advisory Committee Notes to CPLR 7003(b) (emphasis added). *See People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874); *People ex rel. Leonard HH v. Nixon*, 148 A.D.2d 75, 79 (3d Dept. 1989).

53. As recognized by the First Department: "CPLR 7003(b) *permits* a court to decline to issue a writ of habeas corpus if 'the legality of a detention has been determined by a court of the state in a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined, and the court is satisfied that the ends of justice will not be served by granting it.'" *Decision* at 76 (emphasis added).

54. Thus, a court may only refuse to issue a writ as an improper successive petition if all three statutory elements are satisfied. In the case at bar, none of the three required elements of CPLR 7703(b) was satisfied.

55. With respect to the first element, the legality of Tommy's and Kiko's detentions have never determined by any lower court in this state as an order to show cause has never been issued on their behalf. *See Stanley*, 16 N.Y.S. at 909 ("there must be a final judgment on the merits in a prior proceeding. Respondents cite no authority for the proposition that a declined order to show cause constitutes a determination on the merits, that is has any precedential value, or that a justice in one county is precluded from signing an order to show cause for relief previously sought from and denied by virtue of a justice in another county refusing to sign the order to show cause.").

56. On appeal in Tommy's first case, the Third Department affirmed the lower court ruling, *without deciding the legality of Tommy's detention*, on the ground that chimpanzees are unable to bear duties and responsibilities and therefore could not be legal persons for any purpose. *Lavery*, 124 A.D.3d at 152.

57. On appeal in Kiko's first case, the Fourth Department affirmed, *without deciding the legality of Kiko's detention*, on the ground that Kiko's immediate release and subsequent placement in a sanctuary was inappropriate habeas corpus relief. *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *lv denied*, 26 N.Y.3d 901 (2015).

58. The *Decision* further violates the plain language of CPLR 7003(b) as the second petitions brought on behalf of Tommy and Kiko

clearly presented changed circumstances that could not have been raised in the first petitions.

59. The statement made by the First Department that "the motion court properly declined to sign the orders to show cause since these were successive proceedings which were not warranted or supported by any changed circumstances." (*Decision* at 75-76) is demonstrably false.

60. None of the eleven affidavits attached to the first petitions for writs of habeas corpus and orders to show cause filed by the NhRP in December 2013 on behalf of Tommy, Kiko, and Hercules and Leo addressed whether a chimpanzee could bear duties and responsibilities as the NhRP, at that time, had no way of knowing that the Third Department would render such an unprecedented and erroneous legal ruling regarding personhood and then would take judicial notice that chimpanzees lacked the capacity for the required duties and responsibilities.

61. In *direct response* to *Lavery*, the NhRP then filed sixty pages of expert Supplemental Affidavits in all subsequent petitions in the Supreme Court, New York County, including the two cases at bar. Their sole purpose was to prove that chimpanzees actually possess the capacity to bear duties and responsibilities both within chimpanzee communities and human/chimpanzee communities, even though that is not the correct standard for personhood. These facts had never been presented to any New York court.

62. The First Department's failure to recognize the changed circumstances that *Lavery* necessitated and that the sole purpose for the expert Supplemental Affidavits was to rebut *Lavery*'s statements stemmed from its misunderstanding of the NhRP's *actual* legal arguments based upon the common law liberty and equality that New York courts powerfully embrace in their judicial decisions. *See Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001).

63. Both its liberty and equality arguments rested upon the uncontroverted proof that chimpanzees are autonomous, that they can freely choose how to live their lives, *not on chimpanzee' similarities to human beings* and did *not* address the chimpanzees' ability to bear duties and responsibilities, which is a matter distinct from whether they are autonomous.

64. With respect to the final element required by CPLR 700(b), the ends of justice will only be served if the NhRP is given a full and fair opportunity to litigate the legality of Tommy and Kiko's detentions. *See Allen v. New York State Div. of Parole*, 252 A.D.2d 691 (3d Dept. 1998). Otherwise these autonomous individuals will be condemned to a lifetime of imprisonment.

THE FIRST DEPARTMENT MISINTERPRETED THE PURPOSE OF ARTICLE 70 AND ABDICATED ITS ROLE IN INTERPRETING THE COMMON LAW BY DEFERRING TO THE LEGISLATURE

65. The Motion for Permission to Appeal should be granted to

correct the conflict created by the First Department's erroneous statement that "[t]he common law writ of habeas corpus, *as codified by CPLR article 70,* provides a summary procedure by which a person who has been illegally imprisoned or otherwise restrained in his or her liberty can challenge the legality of the detention." *Decision* at 76 (quoting *Lavery,* 124 A.D.3d at 150, quoting CPLR 7002(a)) (emphasis added). This Court's precedent, as well as that of the First Department, make clear that substantive entitlement to the writ is entirely a common law matter. *See People ex rel. Tweed v. Liscomb,* 60 N.Y. 59, 565 (1875) ("[It] is not the creature of any statute . . . and exists as a part of the common law of the State."); *People ex rel. Lobenthal v. Koehler*, 129 A.D.2d 28, 30 (1st Dept. 1987); *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 40 (Sup. Ct. 1907), *aff'd*, 195 N.Y. 610 (1909); Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013). By definition, CPLR 7002(a) solely governs procedure, that is, *how* a lawsuit proceeds, *not who* is a common law "person" for the purpose of habeas corpus (CPLR 102, CPLR 101).

66. The Motion for Permission to Appeal should be granted to correct the erroneous statement made by the First Department that "the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process (*see Lewis v. Burger King,* 344 Fed. Appx. 470, 472 [10th Cir 2009], *cert. denied,* 558 U.S. 1125 [2010])," (*Decision* at 80), as this

statement is in direct conflict with this Court's decision in *Woods v. Lancet*, 303 N.Y. 349 (1951), in which this Court rejected the claim that change should come only from the legislature, 303 N.Y. at 355 ("We abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.") and has admonished that New York courts have "not only the right, but the duty to re-examine a question where justice demands it" to "bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.'" *Id.* (citation omitted).

THE FIRST DEPARTMENT'S ASSERTION THAT AN INCOMPETENT HABEAS CORPUS CLAIMANT MAY NOT BE RELEASED INTO THE CUSTODY OF ANOTHER CONFLICTS WITH COURT OF APPEALS AND FIRST DEPARTMENT PRECEDENT

67. The Motion for Permission to Appeal should be granted to resolve the conflict created by the First Department's erroneous assertion that habeas corpus relief is unavailable to an individual who must be released into the custody of another. *See Decision* at 79, ("Since Petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court."). If the *Decision* is allowed to stand, it will effectively foreclose habeas corpus relief to anyone who cannot be released unconditionally.

68. The First Department's holding on this issue is flawed for two reasons: (1) it runs directly counter to precedent; and (2) it misapprehends the relief sought by NhRP's habeas corpus petitions.

69. New York courts at every level have for two centuries used the writ of habeas corpus to order the release of such incompetent humans as child slaves, child apprentices, child residents of training schools, child residents of mental institutions, and mentally incapacitated adults, from the custody of one entity that was illegally detaining them and into the custody of another. *See, e.g.*, *Lemmon*, 20 N.Y. at 632 (five slave children discharged); *People ex rel. Margolis v. Dunston*, 174 A.D.2d 516, 517 (1st Dept. 1991) (juvenile); *State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982) (elderly sick woman); *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996) (elderly and ill woman). The court in *Stanley* correctly recognized that the First Department allows such a placement. 16 N.Y.S.3d at 917 n.2. Thus, the placement of Tommy and Kiko into the custody of a sanctuary completely separate and apart from their imprisonment where they could enjoy their autonomy to the fullest extent possible is not only proper habeas corpus relief but in keeping with the spirit of all New York precedent.

70. The First Department also fundamentally misunderstood the nature of relief sought by the NhRP. To be clear, the NhRP's *entire case* is a challenge to the *legality* of Tommy's and Kiko's detentions and an

attempt to secure their immediate release. The NhRP never argued that the illegality of their detention is based upon *the conditions of their confinement.* Even *Lavery* recognized this: "[n]otably, we have not been asked to evaluate the quality of Tommy's current living conditions in an effort to improve his welfare." 124 A.D.3d at 149 (citation omitted). So too did *Stanley*: "[t]he conditions under which Hercules and Leo are confined are not challenged by petitioner. . . . [T]he sole issue is whether Hercules and Leo may be legally detained at all." 16 N.Y.S.3d at 901.

71. Even if the NhRP was challenging the conditions of Tommy's and Kiko's confinement, which it was not, the law in New York is clear that the writ of habeas corpus may be used solely to challenge conditions of confinement, *even where no release from imprisonment is sought*. *See, e.g.*, *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961) (habeas corpus was proper remedy to test the validity of a prisoner's transfer from a state prison to a state hospital for the insane); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943) ("that the appellant is still under a legal commitment to Elmira Reformatory does not prevent him from invoking the remedy of habeas corpus as a means of avoiding the further enforcement of the order challenged.") (citation omitted); *Matter of MHLS ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989) (mental patient transferred from secure to non-secure facility); *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250,

251 (2d Dept. 1993) (habeas corpus "available to challenge conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. LaBelle v. Harriman*, 35 A.D.2d 13, 15 (3d Dept. 1970) (same); *People ex rel. Berry v. McGrath*, 61 Misc. 2d 113, 116 (N.Y. Sup. Ct. 1969) (an "individual . . . is entitled to apply for habeas corpus" upon a "showing of a course of cruel and unusual treatment").

72. The First Department's holding that habeas corpus is only available to prisoners capable of immediate and unconditional release obviously and squarely conflicts with the foregoing authorities.[10]

73. The Motion for Permission to Appeal should be granted to correct the First Department's erroneous assertion that the NhRP was required to produce Tommy and Kiko to the court, (*Decision* at 79), a fact utterly irrelevant to the determination of whether they are entitled to habeas corpus relief and which contravenes the plain language of CPLR Article 70. *See* CPLR 7003(a), "where the petitioner does not demand production of the person detained" the court shall "order the respondent to show cause why the person detained should not be released." This is precisely why the NhRP brought its action as a petition for a common law writ of habeas corpus and order to show cause. *See, e.g., State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept.

[10] As discussed in greater detail in the accompanying memorandum, the two cases relied upon by the First Department in support of its holding, *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986) and *Presti,* are completely inapposite to the case at bar.

1982); *Callan v. Callan*, 494 N.Y.S.2d 32, 33 (2d Dept. 1985) ("Plaintiff obtained a writ of habeas corpus by order to show cause when defendant failed to return her infant daughter after her visitation. . . .").

CONCLUSION

74. Who is a "person" is one of the most important questions that will come before this Court or any court in New York. When the issue involves the interpretation of "person" for purposes of common law habeas corpus relief and the individuals involved are proven autonomous beings who suffer from their continued imprisonment, the stakes are then even greater. It is a matter for the courts and not the legislature to determine who such a "person" is and whether this "person" must have the capacity to bear duties and responsibilities. In its "finest tradition," this Court should grant the NhRP's Motion for Permission to Appeal so that it may resolve the many conflicts and errors of law and fact that have been created by the First and Third Departments when grappling with this issue. Without so doing, the foundation of common law habeas corpus and the scope of its protection

continue to be compromised for both nonhuman animals and human beings alike.

WHEREFORE, I respectfully pray that the Court grant the NhRP's Motion for Permission to Appeal to the Court of Appeals together with all other relief the Court finds just and proper.

Dated: February 22, 2018

Respectfully submitted,

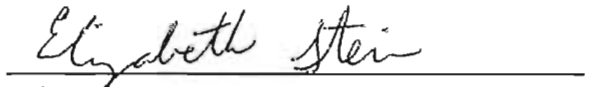

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EXHIBIT 1

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By Hand

October 7, 2016

Deputy Clerk of the Court
Margaret Sowha
Supreme Court of the State of New York
Appellate Division, First Judicial Department
27 Madison Avenue
New York, New York 10010

Re: *Nonhuman Rights Project, Inc., on behalf of Tommy v. Patrick C. Lavery, et al.* (162358/2015) (New York County)

Dear Deputy Clerk Sowha:

I am a counsel of record for Petitioner-Appellant, The Nonhuman Rights Project, Inc. ("NhRP"), on behalf of Tommy, a chimpanzee, in the above-captioned matter. I write to request leave to file an oversize principal brief in accordance with Rule of Procedure 600.10(d)(1). A copy of the proposed brief is enclosed, which consists of 16,095 words, excluding those portions exempt from the word requirement.

In a case of first impression in this Appellate Department, NhRP brought a petition for a common law writ of habeas corpus and for an order to show cause under CPLR Article 70 in the New York County Supreme Court to determine whether Tommy was being unlawfully detained in the State of New York and whether he was entitled to be released to an appropriate primate sanctuary.

The facts underlying the petition are founded on approximately 165 pages of affidavits from ten of the world's leading experts on chimpanzee cognition from

Japan, Germany, Sweden, England, Scotland, and the United States, 65 pages of which are devoted to facts not previously presented with respect to Tommy, nor determined by any New York court. These affidavits, including one from Dr. Jane Goodall, established, through their review of hundreds of scientific articles and thousands of hours of personal observations, that chimpanzees are autonomous, self-aware, and self-determining beings who can bear duties and responsibilities both within chimpanzee communities and within human/chimpanzee communities.

These facts establish NhRP's legal arguments that chimpanzees are common law "persons" entitled to the common law right to bodily liberty protected by the common law of habeas corpus both as a matter of common liberty and common law equality. These arguments are novel, complex, and highly fact-driven. They can only be effectively addressed and understood by a comprehensive review of all of the available science that NhRP provided to the lower court in the fact section of its memorandum of law.

NhRP has gone to great lengths to make the voluminous and complex expert affidavits easily accessible to the Court in the Statement of Facts section of the proposed Brief. Pages 7-21 of the enclosed brief are therefore devoted exclusively to categorizing and summarizing the experts' extensive findings and conclusions. We respectfully submit to the Court that we cannot effectively present the mass of relevant scientific data necessary to establish our argument for Tommy's personhood in fewer words.

In addition to requiring extra space for the complex factual discussion, NhRP also requires additional space to fully present its legal argument. Because of the novelty of the legal issue of whether a chimpanzee is a common law legal person for purposes of common law habeas corpus relief, our legal arguments draw on numerous aspects of the common law. We demonstrate how the common law right to bodily liberty was developed and applied historically as a matter of common law liberty and equality. We demonstrate the necessity and importance of further developing and expanding the common law as standards of justice, morality, experience, and scientific discovery continue to evolve. This extensive discussion is critical to our arguments for why it is appropriate to apply these common law principles underlying the right to bodily liberty to chimpanzees, who, as discussed, are now recognized—as a matter of scientific certainty—as autonomous, self-aware, and self-determining beings who can bear duties and responsibilities both within chimpanzee communities and within human/chimpanzee communities.

We have painstakingly edited and re-edited this section of the brief for conciseness and to eliminate repetition. We respectfully submit to the Court that we cannot properly convey our legal arguments in fewer words.

Finally, we anticipate Respondents will not be participating in the appeal as they did not appear on our application at the Supreme Court and we have received no indication that they will appear before this Court. Because we do not expect an opposing brief, we address points in our principal brief that would likely have been saved for our reply brief. This principal brief will allow the Court the benefit of our position on certain potential adverse arguments on which the Court may have wished to have had our rebuttal.

Respectfully submitted,

Elizabeth Stein

cc:

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EXHIBIT 2

To Be Argued By:
Steven M. Wise
(*of the bar of the State of Massachusetts)*
by permission of the Court

New York County Clerk's Index No. 162358/15

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Petitioner-Appellant,

against

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE L. LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents.

BRIEF FOR PETITIONER-APPELLANT

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QUESTIONS PRESENTED

1. Does the capacity to bear duties and responsibilities have any relationship to being deemed a "person" for the purpose of demanding a writ of habeas corpus under the common law of New York and CPLR Article 70, as articulated for the first time in Anglo-American law by the Third Department in *Lavery*?

The lower court ruled it was bound by *Lavery*, which held this capacity was a prerequisite to legal personhood.

2. Did the lower court err in failing to consider the petitioner's affidavits demonstrating that chimpanzees have the capacity to bear duties and responsibilities after the Third Department in *Lavery* took judicial notice that chimpanzees do not?

The lower court refused to consider these affidavits.

3. Did the lower court err in dismissing the Second Tommy Petition (a) as an improper successive petition, after (b) finding "no ground sufficiently distinct from those set forth in the [first] petition," even though petitioner introduced sixty pages of expert affidavit evidence not previously presented in the First Tommy Petition?

The lower court did not apply the requirements of CPLR 7003(b) for dismissing successive petitions or consider petitioner's new evidence demonstrating changed circumstances.

4. Did the lower court err by failing to consider sixty pages of expert affidavit evidence not previously presented in the First Tommy Petition that were solely directed to the Third Department's articulation of both a novel legal standard and judicial notice of facts in *Lavery*, neither of which the petitioner could have reasonably anticipated at the time it filed its first habeas corpus petition?

The lower court did not apply the requirements of CPLR 7003(b) for

dismissing successive petitions or consider petitioner's new evidence demonstrating changed circumstances.

5. Is the undefined term "person" in CPLR Article 70 to be interpreted under the New York common law of habeas corpus?

The lower court did not reach this question because it refused to issue the order to show cause and reach the merits of the petition.

6. Is a chimpanzee a "person" for the purpose of common law habeas corpus as a matter of common law liberty?

The lower court did not reach this question because it refused to issue the order to show cause and reach the merits of the petition.

7. Is a chimpanzee a "person" for the purpose of common law habeas corpus as a matter of common law equality?

The lower court did not address this issue because it refused to issue the writ and reach the merits of the petition.

STATEMENT OF THE CASE

I. INTRODUCTION AND PROCEDURAL HISTORY

Who is a "person" within the meaning of the common law of habeas corpus is the most important individual issue that can come before a court. It is a matter of life and death, freedom and slavery. Whether that "person" may be a chimpanzee is the issue at hand. As demonstrated herein, chimpanzees are autonomous, cognitively and emotionally complex, self-aware, self-conscious and self-determining beings. They routinely bear duties and responsibilities within

chimpanzee communities and human/chimpanzee communities. They have the capacity to live intellectually rich and sophisticated individual, family and community lives. They can recall their past and anticipate their future, and when their future is imprisonment, they suffer the enduring pain of isolation and the inability to fulfill their life's goals or to move about as they wish, much in the same way as do human beings. (R.114-197;277-666). Pursuant to a New York common law that keeps abreast of evolving standards of justice, morality, experience, and scientific discovery, Petitioner-Appellant The Nonhuman Rights Project, Inc. ("NhRP") argued that both New York common law liberty and equality mandate that chimpanzees be granted the common law right to bodily liberty and be recognized as common law "persons" under the common law of habeas corpus and New York Civil Practice Law and Rules ("CPLR") Article 70.

During the first week of December 2013, NhRP filed three verified petitions demanding that a branch of the Supreme Court issue common law writs of habeas corpus or orders to show cause pursuant to Article 70 in each of the three New York counties in which a chimpanzee was being illegally detained. A petition was filed in (a) Fulton County on behalf of Tommy, a solitary chimpanzee living in a cage in a warehouse on a used trailer lot ("First Tommy Petition"); (b) Niagara County on behalf of Kiko, a solitary chimpanzee living in a cage in a cement storefront in a crowded residential neighborhood ("First Kiko Petition"); and (c)

Suffolk County on behalf of Hercules and Leo, two young chimpanzees on lease from Louisiana's New Iberia Research Institute to the State University of New York at Stony Brook ("Stony Brook") for locomotion research ("First Hercules and Leo Petition"). Each court refused to issue the requested order to show cause. (R.19-22). Each appellate department affirmed on a different ground, without citing any of the previous decisions. (*Id.*) Attached to each of the three petitions were approximately 100 pages of expert affidavits from many of the most respected chimpanzee cognition researchers in the world. Not one fact was controverted.

On appeal of the denial of the First Tommy Petition, the New York State Supreme Court Appellate Division, Third Judicial Department ("Third Department"), in December 2014, affirmed and, for the first time in Anglo-American history, held that only entities capable of bearing duties and responsibilities can be "persons" for any purpose, even for the purpose of demanding a common law writ of habeas corpus. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015). The court then took judicial notice, *sua sponte*, that chimpanzees lack this capacity. *Id.*

On appeal of the denial of the First Kiko Petition, the New York State Supreme Court Appellate Division, Fourth Judicial Department ("Fourth

Department") affirmed on the ground that NhRP did not seek Kiko's unconditional release onto the streets of New York, but to an appropriate sanctuary. The Fourth Department assumed, without deciding, Kiko could be a "person." *Nonhuman Rights Project, Inc.*, *ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den*., 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015).

The New York State Supreme Court Appellate Division, Second Judicial Department ("Second Department") dismissed NhRP's timely appeal from the order of the Supreme Court, Suffolk County on procedural grounds. (R.20).

On December 2, 2015, NhRP filed a second Verified Petition for a Writ of Habeas Corpus and Order to Show Cause on behalf of Tommy in the New York County Supreme Court from which this appeal is taken. *See Nonhuman Rights Project, Inc. on behalf of Tommy v*. *Patrick C. Lavery, et al.*, Index #: 162358/2015 (Dec. 2, 2015) ("Second Tommy Petition"). In direct response to *Lavery*, NhRP presented approximately sixty pages of new expert supplemental affidavits directed solely to demonstrating that chimpanzees routinely bear duties and responsibilities within chimpanzee communities and mixed chimpanzee/human communities. NhRP further argued that the Supreme Court was not bound by the Third Department's erroneous ruling that legal personhood is contingent upon the ability to bear duties and responsibilities.

Nonetheless, on December 23, 2015, the court (Jaffe, J.) declined to sign the order to show cause, writing: "Declined, to the extent that the courts in the Third Dept. determined the legality of Tommy's detention, an issue best addressed there, & absent any allegation or ground that is sufficiently distinct from those set forth in the first petition (CPLR 7003(b)[)]." (R.14). On July 8, 2016, the court filed a final Order made effective *nunc pro tunc* as of December 23, 2015, reiterating the reasons stated therein for declining to sign the order to show cause. (R.12). In refusing to issue an order to show cause, the court ignored its own recent precedent, *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898 (Sup. Ct. 2015), in which it entertained a *second* petition for habeas corpus on behalf of Hercules and Leo ("Second Hercules and Leo Petition"), issued the requested order to show cause, and required the State to justify its detention of the chimpanzees in a hearing. *The Nonhuman Rights Project, Inc. v. Stanley Jr., M.D.*, 2015 WL 1804007 (Sup. 2015) *amended in part*, 2015 WL 1812988 (Sup. 2015), 16 N.Y.S.3d 898, 903 (Sup. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015). Unlike the present case, no "distinct" circumstances were presented in the successive petitions brought on behalf of Hercules and Leo. Ultimately, the court refused to grant their release on the merits because it believed itself bound by *Lavery* regarding the necessary showing of duties and responsibilities. 16 N.Y.S.3d at 903.

NhRP respectfully submits that the lower court erred in refusing to issue the order to show cause because: (1) contrary to *Lavery*, the capacity to bear duties and responsibilities is irrelevant to a determination of personhood; (2) the court erred in failing to consider the affidavits demonstrating that chimpanzees bear duties and responsibilities after the Third Department in *Lavery* took judicial notice they do not; and (3) the correct standard to be applied in determining common law personhood was set forth by the Court of Appeals in *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972).

This Court need not determine that Tommy is a "person" in order to reverse and remand with instructions to issue an order to show cause. Rather it should follow the laudatory procedure used by the *Stanley* court and by Lord Mansfield in the famous common law habeas corpus case of *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) and assume, without deciding, that Tommy could be a common law "person" and remand with instructions to hold an Article 70 hearing to determine whether Tommy is a "person" under Article 70 and the common law of habeas corpus.

II. STATEMENT OF FACTS

Chimpanzees are autonomous. (R.375-76;469). They can freely choose without acting on reflex or innate behavior. (R.375-76). They possess the "self" integral to autonomy, have goals and desires, intentionally act towards those goals,

and understand whether they are satisfied. (R.398;280).

Chimpanzees and humans share almost 99% of DNA. (R.395-96;481). Our brains are plastic, flexible, and heavily dependent upon learning, share similar circuits, symmetry, cell types, and stages of cognitive development. (R.334;342-45;395-96;397-98;469-70;481;483). We share similar behavior, and emotional and mental processes (R.545-46), including self-recognition, self-awareness, self-agency, and metacognition. (R.280;399;483-85;634). Chimpanzees are aware of their past, mentally represent their future, have an autobiographical sense of self with a past and future, engage in "mental time travel" and long-term planning, and can remember something for decades. (R.281;470-71;486). They imagine and pretend. (R.347-49;470;484;490).

Chimpanzees exhibit referential and intentional communication; they inform others, engage in complex conversations, engage in "private speech," ensure they are understood in conversations, use language and syntax, create declarative sentences, point, comment on individuals, as well as on past and future events, state what they intend to do, then do it, and coordinate their actions. (R.281;342-46;396;486;488). They understand symbols and "if/then" clauses, learn new symbols by observation, and demonstrate perspective-taking, imagination, and humor. (R.342-43;349;483-86). They announce important social events, what they are about to do, where they are going, what assistance they want from others, and

how.

Chimpanzees have mirror neurons and are therefore attuned to the experiences, visual perspectives, knowledge states, emotional expressions and states of others. (R.281-82;334--35;399-400). They have theory of mind; they know they have minds; they know humans and other chimpanzees have minds, thoughts, feelings, needs, desires, perspectives, intentions, and that these other minds and states of knowledge differ from their minds. They know that what they see is not the same thing others see. (R.344-46;490-91).

Chimpanzees possess highly developed empathic abilities. (R.280-82;400). They engage in sophisticated deception that requires attributing mental states and motives to others. They show concern for others in risky situations. (R.280-81). They demonstrate compassion, bereavement-induced depression, and an understanding of the distinction between living and non-living; they feel grief and compassion when dealing with mortality. (R.283-84).

Wild chimpanzees make and use tools from vegetation and stone for hunting, gathering, fighting, playing, communicating, courtship, hygiene, and socializing. Chimpanzees make and use complex tools that require them to utilize two or more objects towards a goal. They make compound tools by combining two or more components into a single unit. They use "tool sets," two or more tools in an obligate sequence to achieve a goal, such as a set of five objects – pounder,

perforator, enlarger, collector, and swab – to obtain honey. (R.427-28). Tool-making implies complex problem-solving skills and evidences understanding of means-ends relations and causation. (R.335-36;427-28).

Each wild chimpanzee cultural group makes and uses a unique "tool kit" comprised of about twenty different tools often used in a specific sequence for foraging and processing food, making comfortable and secure sleeping nests in trees, and personal hygiene and comfort. (R.429;482-83). The foraging tool kits of some chimpanzee populations are indistinguishable in complexity from the tool kits of some simple human material cultures, such as Tasmanian aborigines, and the oldest known human artifacts, such as the East African Oldowan industry. In one chimpanzee population, chimpanzee tool-making culture has passed through 225 generations. With respect to social culture, chimpanzees pass widely variable social displays and social customs from one generation to the next. Arbitrary symbolic gestures communicated in one group may mean something entirely different in another group. (R.430-32). Chimpanzees transmit their material, social, and symbolic culture by social and observational learning through innovation, as well as precise imitation and emulation. These latter capacities are necessary for "cumulative cultural evolution," which involves the ability to build upon previous customs. (R.282-83;433).

Chimpanzees possess "numerosity," the ability to understand numbers as a

sequence of quantities, which requires both sophisticated working memory and conceptual understanding of a sequence. This is closely related to "mental time travel" and planning the right sequence of steps towards a goal, two critical components of autonomy. Not only do chimpanzees excel at understanding sequences of numbers, they understand that Arabic symbols ("2", "5", etc.) represent discrete quantities. (R.400;642).

Chimpanzees demonstrate sequential learning, the ability to encode and represent the order of discrete items occurring in a sequence, and understand the ordinal nature of numbers. They understand proportions (e.g., 1/2, 3/4, etc.), and can count and understand the meaning of zero (R.400-402;490).

Chimpanzees have excellent working, or short-term, memory, and exceed the ability of humans to recall numbers. (R.401-402). They are competent at "cross-modal perceptions." They obtain information in one modality, such as vision or hearing, and internally translate it to information in another modality. (R.488-89). They can match an audio or video vocalization recording of a familiar chimpanzee or human to her photograph. (R.335). They translate symbolically encoded information into any non-symbolic mode. When shown an object's picture, they retrieve it by touch, and retrieve a correct object by touch when shown its symbol.

(R.488-89).[1]

Chimpanzees bear well-defined duties and responsibilities both within their own communities and within human/chimpanzee communities. (R.546-47;55;560-61;575;619;610;632-33). Chimpanzees understand and carry out duties and responsibilities while knowingly assuming obligations, then honoring them. (R.624;632-33;638-39). Chimpanzees have duties to each other and behave in ways that seem both lawful and rule-governed. (R.622;578;564;634-44;611;546). Both chimpanzee and human adult members of chimpanzee/human communities behave in morally responsible ways as they understand them. (R.549;633;640;646). Chimpanzees possess moral inclinations and a level of moral agency. They ostracize individuals who violate social norms. They respond negatively to inequitable situations, such as being offered lower rewards than companions for the same task. When given a chance to play the Ultimatum Game, they spontaneously make fair offers, even when not obliged to do so. (R.624).

Chimpanzee social life is cooperative and represents a purposeful and well-coordinated social system. They engage in collaborative hunting, in which hunters adopt different roles that increase the chances of success. They share meat from prey. (R.624). Males cooperate in territorial defense, and engage in risky boundary patrolling. (R.546-47;624).

[1] These remarkable similarities between humans and chimpanzees are not limited to autonomy, but extend to personality and emotion. (R.375-80).

Chimpanzees show concern for others' welfare, and they have expectations about appropriate behavior in a range of situations (*i.e.*, social norms). (R.550-51). Such behaviour is essential for the maintenance of chimpanzee society, and it can be extended to human beings when necessary. (R.624;524;632-33;636-39;643-44;550-51). No chimpanzee group could survive in the wild if its members failed to carry out their assigned duties and responsibilities to the group. (R.650).

Chimpanzee mothers show a duty of care to their offspring that rivals humans. (R.619). The duties and responsibilities of a mother chimpanzee towards her offspring are many and onerous and last an average of five and a half years. Young female chimpanzees practice their future maternal behavior by using sticks as "dolls," while young males do not, in a form of symbolic play. Most adult males act paternally toward all infants in their community, rushing to their aid when necessary. (R.564-65;575-76;611;619). Familial duties are not restricted just to mothers and fathers. (R.619;577). Juveniles and adolescents frequently act responsibly toward their infant siblings. (R.577).

Chimpanzee duties of care extend beyond shared genes. (R.620;611;564-65;557;546). Evidence from both captive and wild chimpanzees indicates that they possess highly developed empathic abilities. (R.546-47;564-65;611;620;636-41). This includes the adoption of orphans. (R.546;564-65;577; 611;620).

Chimpanzee duties and responsibilities extend beyond the family and cross

into the realm of the community. (R.560-61;611;546). In tasks requiring cooperation, chimpanzees recruit the most skilled partners and take turns requesting and helping a partner. (R.281-82). Chimpanzees show "community concern," such as by working as a team to patrol boundaries and defending territory, and concern for individuals. (R.546). Wild chimpanzees call to warn approaching friends about a potentially dangerous object of which the latter is unaware. (R.547). The same males whose lives depend on one another in the patrol will later compete robustly with one another over access to a receptive female. Somehow, they resolve the contradictions involved in having conflicting interests in different contexts, which implies their mutual recognition of shared responsibilities. Male group members rescue individuals taken prisoner by intruders. This spontaneous high level of altruism toward group members in this chimpanzee population reveals the sense of obligation felt by them to help and protect one another. (R.546-47;561-63;620-21).

Participation in a hierarchy of social dominance is another chimpanzee universal that necessarily entails duties and responsibilities. (R.621;610). Male chimpanzees rank-order themselves from alpha (top) to omega (bottom) in linear fashion. (R.621). Usually there is a single dominant male, but often he only holds that position because of the support of other males. In those cases, these dominant males demonstrate a sense of duty to their supporters. Chimpanzees are highly

protective of their communities and will go to great lengths to defend them. (R.610).

High-ranking males take on a policing role to ensure group stability, patrolling their territory, and chasing away or attacking individuals from neighboring communities. This may take the form of specific, targeted ostracism of individuals who violate norms. The alpha male assumes the duty of exercising community "policing" powers, such as intervening in quarrels or fights between other community members, thus maintaining community integrity and preventing injury. (R.546;578;621-22).

Another indicator of rule-governed social interaction within a group is systematic, long-term reciprocity of favors or benefits among its members. (R.623;561-62;634-35). Chimpanzees cooperate and understand each other's roles. (R.547;549). They reward others and keep track of others' acts and outcomes. (R.548).

Chimpanzees make numerous behavioral adjustments to ensure the welfare of injured or disabled members of the group. When crossing a potentially dangerous road, stronger and more capable adult males investigate the situation before more vulnerable group-members, waiting by the roadside, venture onto the road. The males remain vigilant while taking up positions at the front and rear of the procession. (R.546-47). Taï forest chimpanzees have been seen to help and tend

to the injuries of wounded individuals for extended periods of time. (R.561-62).

Wild chimpanzees have duties to see that all members of the group have access to food, that all group members arrive at a feeding source together, and that all group members have access to that source in a manner as to benefit the entire group. (R.632-33;546-47). This requires cognitive concentration, social rules, and a greater sense of social responsibility for the good of the group rather than fulfilling the desires of the individual. (R.632-33).

Advance planning and sharing of information are duties and responsibilities that lie at the heart of chimpanzee survival. (R.650). They react to any change in the group balance of power, distribution of resources, or inappropriate behaviors and/or alliances, even friendly alliances. Punishment is part of the meat sharing rules. (R.548;562-63).

Chimpanzees engage in remarkably balanced exchanges of food between individuals. Not only do food exchanges occur in both directions, individuals are more likely to share with another chimpanzee who groomed them earlier that day. This pattern of grooming and food transfers suggests the presence of reciprocal obligations. In captivity, when presented with an "Ultimatum Game" in which both partners need to cooperate in order to split available rewards equally, chimpanzees ensure a fair distribution of rewards. (R.548-49).

Chimpanzees demonstrate a high sense of solidarity towards ignorant group

members, who they will inform about the presence of a danger. (R.564;342-43; 564;634;644). Chimpanzees who acquire language recognize the need to inform others of information of import, and they understand the circumstances that lead to others lacking information they themselves have. (R.644).

Chimpanzees can be trained or learn spontaneously to work collaboratively with at least one other individual to solve a common problem that cannot be solved by a single individual. After experiencing working alongside two different collaborators, chimpanzees prefer to work with a collaborator who has proven more effective in the past; thus, they attribute different degrees of competence to other individuals. (R.547-48).

Chimpanzees readily understand social roles and intentions. They distinguish between individuals who have harmful versus prosocial intentions either towards them or to another, and will direct friendly individuals one way and unfriendly individuals to another. They adapt quickly to role-reversal in cooperative tasks. ASL-trained chimpanzees take appropriate turns conversing with humans. (R.549-50).

Chimpanzees bear duties and responsibilities within chimpanzee/human communities. They prefer fair exchanges, are intolerant of unfair treatment, and keep promises and secrets. Captives who acquire language may remind others of events such as their birthdays and days visitors are expected, that trash needs to be

carried out, that drains are clogged, that computer programs are misperforming. Chimpanzees taken outdoors may be asked to promise to be good, not to harm anyone, and to return when asked, and they keep their promises. (R.549;645-46).

Chimpanzees evidence understanding of their duties and responsibilities both in their interactions with human beings and in their interactions with each other. (R.623;634-49). They treat humans with care, understanding they are stronger, faster, and more agile than humans. (R.550;632-33).

A chimpanzee bite can kill a human. Yet, in almost 60 years of observations at Gombe National Park, no chimpanzee has bitten a human. Seven times chimpanzees charged Jane Goodall and her videographer when they were above a steep drop, but did not make contact. These examples of intentions not to harm likely demonstrate that chimpanzees see the long-established relationship with these familiar humans as something they are duty-bound to uphold. (R.578;623).

Captive chimpanzees understand they must remain in certain areas and not harm or scare human beings. When doors are left open they refuse to go into prohibited areas. If unknown humans enter their areas, the chimpanzees avoid them, recognizing that interaction is prohibited by the facility's rules. (R.644).

Any disagreement between a human and a language-using chimpanzee can be solved by explaining the reasons for the action. (R.644-45).

Chimpanzees raised in a setting where humans expect them to become

linguistically and socially competent group members, as other chimpanzees expect of chimpanzee children in natural settings, exhibit enhanced abilities to bear duties and responsibilities. (R.610;634-49). They become increasingly trustworthy and responsible as they move into adulthood. (R.644). Having acquired language, they expect humans to explain their intentions and they reciprocate. Each interaction becomes a linguistically negotiated contract that can apply and be remembered for days, weeks, even years. (R.645).

At Central Washington University, chimpanzees participated in numerous activities with caregivers. Mornings, researchers required the chimpanzees to help clean enclosures by returning their blankets from the night before. The chimpanzees all participated. At lunchtime, they were served soup, followed by fresh vegetables only if all chimpanzees ate their soup. If one refused, the others pressured the noneater by offering her the soup and a spoon. The noneater nearly always ate the soup. This individual behavior that affected the group demonstrated their sense of responsibility and duty. (R.610-11).

Both ape and human adult members constantly behave in morally responsible ways as they understand them. Ape children acquire the moral sense, duties, and languages of both cultures, and come to desire to engage in mutually responsible moral actions and display a sense of loyalty, duty, honor, and mutual respect that takes cognizance of the individuality and free will of other self-aware

beings. (R.549;633;646).

Adults become capable of "self-assigned" duties and responsibilities and understand how to behave in a manner culturally appropriate for humans. As this occurs, they begin to demonstrate a sense of responsibility. (R.646). Chimpanzees who act aggressively towards a human or other chimpanzee often responded with "SORRY." (R. 611-12).

A critical component of the ape child's desire to adopt and to accept duties and responsibilities resided in the emotional cross-cultural attachments between group members. These attachments were identical to those one finds in a human group or in any ape group, but transcended the species boundary. Both ape and human group members express a sense of responsibility to one another and mutually cooperate. (R.634;648).

All members of this cross-cultural linguistic *Pan/Homo* culture treated each other as members of one group in which each had rights, roles, and responsibilities in accord with their abilities and maturity (R.633;635-36;646-47). They understood not only what they were doing, but why they were doing it, and their understanding increased with age and experience. As they grew older, they assumed a variety of duties for the purpose of demonstrating their abilities to outsiders. (R.648). When outsiders were present, they would assume a responsibility to do things that were more "human-like." (R.633-43;648).

Similarly, their recognition of the degree to which persons outside their immediate *Pan/Homo* family misunderstood them increased. They slowed their actions and sounds, exaggerated them, repeated them, blended sounds, gestures and lexigrams, and waited until they noted the humans were observing before they engaged them. Close observation of others' behavior while reflecting on their intent requires knowledge that the "other" has a mind, that the contents of two minds may differ, and that one must pay attention to the "attention" of the other if one wishes to successfully redirect their perspectives, ideas, and views. (R.648).

As do human children, individual chimpanzees vary widely in their interests and in the particular capacities they sought to master. Often, if one chimpanzee excelled in some skill, those close in age sought to excel in other skills. This demonstrates an awareness of their individual responsibility to fill a particular niche within the community to maximize group utility. (R.634-35).

Set out in detail at R.633-43 are capacities indicative of chimpanzees' ability to routinely assume duties and responsibilities and to make contractual agreements in the groups with which Dr. Savage-Rumbaugh worked.

In light of these facts that demonstrate the autonomy of chimpanzees, NhRP seeks to have Tommy sent to Save the Chimps, a 190 acre premiere chimpanzee sanctuary in Ft. Pierce, Florida. It provides permanent homes for 260 chimpanzees on twelve three-to-five-acre open-air islands that contain hills and climbing

structures and provides the opportunity for chimpanzees to make choices about their daily activities. (R.114;117). Chimpanzees who previously lived alone or in very small groups for decades become part of large and natural chimpanzee families. (R.114). Grass, palm trees, hills, and climbing structures allow the chimpanzees places to run and roam, visit with friends, bask in the sun, curl up in the shade, or whatever else they may wish to do. (R.117). Save the Chimps has over fifty employees, including two full time veterinarians that provide twenty-four-hour coverage, with a support staff of technicians and assistants. (R.117-18).

III. ARGUMENT

A. NhRP MAY APPEAL AS OF RIGHT

CPLR Article 70 exclusively governs the procedure applicable to common law writs of habeas corpus, including the right to appeal. *See* CPLR 7001 ("the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention."). NhRP styled its Second Tommy Petition as an order to show cause as it was not demanding Tommy's production to the court. *See* CPLR 7003(a): "[t]he court to whom the petition is made shall issue the writ without delay on any day, *or where the petitioner does not demand production of the person detained*…order the respondent to *show cause* why the person detained should not be released" (emphasis added). *See, e.g.*, *Application of Mitchell*, 421 N.Y.S.2d 443, 444 (4th

Dept. 1979)("This matter originated when petitioner…sought, by an order and petition, a *writ of habeas corpus* (Respondents) to *show cause* why Ricky Brandon, an infant…should not be released and placed in petitioner's custody."); *People ex rel. Smith v. Greiner*, 674 N.Y.S.2d 588, 588 (Sup. Ct. 1998)("This is a habeas corpus proceeding brought by the petitioner pro se and commenced via Order to *Show Cause*"); *People ex rel. Goldstein on Behalf of Coimbre v. Giordano*, 571 N.Y.S.2d 371, 371 (Sup. Ct. 1991)("By order to *show cause*, in the nature of a Writ of Habeas Corpus proceeding, the petitioner seeks his release from the custody of the New York State Division for Youth…."); *In re Henry*, 1865 WL 3392 (N.Y. Sup. Ct. 1865)("the party arrested can apply for a habeas corpus, calling on the officer to *show cause* why he is detained")(emphasis added in each). NhRP did not seek an order to show cause that was independent of Article 70, as that would have been prohibited by, and contrary to, Article 70.

Once a petitioner's demand for an order to show cause why a detention is not illegal is refused, CPLR 7011 plainly and specifically "governs the right of appeal in habeas corpus proceedings." *Wilkes v. Wilkes*, 622 N.Y.S.2d 608 (2d Dept. 1995). That section expressly authorizes an appeal as of right "from a judgment *refusing, at the outset*, to grant a writ of habeas corpus or to issue an order to *show cause* (CPLR 7003(a))…" Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), CPLR 7011* (West 2014)(emphasis

added). Both the Third and Fourth Departments correctly recognized NhRP's right to appeal the refusal to issue the First Tommy Petition and First Kiko Petition, respectively.[2] *See, e.g.*, *State ex rel. Soss v. Vincent*, 369 N.Y.S.2d 766, 767 (2d Dept. 1975)("In a habeas corpus proceeding upon an order to show cause (CPLR 7003, subd. (a)), the appeal is from a judgment of the Supreme Court…which granted the petition and ordered petitioner released"); *People ex rel. Bell v. Santor*, 801 N.Y.S.2d 101 (3d Dept. 2005)("Petitioner commenced this CPLR article 70 proceeding seeking habeas corpus relief…Supreme Court dismissed the petition without issuing an order to show cause or writ of habeas corpus. Petitioner now appeals").

An appeal pursuant to CPLR 7011 is therefore an *exception* to the general rule that the denial of an order to show cause is not appealable. *See also People ex rel. Silbert v. Cohen*, 29 N.Y.2d 12 (1971); *Callan v. Callan*, 494 N.Y.S.2d 32, 33 (2d Dept. 1985); *Application of Mitchell*, 421 N.Y.S.2d at 444; *People ex rel. Flemming v. Rock*, 972 N.Y.S.2d 901 (1st Dept. 2013)(same). Accordingly, NhRP has an appeal as of right in this case as the "show cause" language was required by CPLR 7003(a) and the denial of this order to show cause is specifically appealable pursuant to CPLR 7011.

[2] The Second Department's plainly erroneous *sua sponte* dismissal of NhRP's appeal of the First Hercules and Leo Petition, which was made without notice, was correctly ignored by the Third and Fourth Departments.

B. NhRP HAS STANDING

Anglo-American and New York law have long recognized that interested unrelated third parties, even those who have never met the detained person, may bring habeas corpus cases on their behalf. *E.g.*, *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772)(godparents for slave); *Case of the Hottentot Venus*, 13 East 185, 104 Eng. Rep. 344 (K.B. 1810)(Abolitionist Society); *Lemmon v. People*, 20 N.Y. 562 (1860)(unrelated abolitionist dockworker); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846)(same petitioner); *People v. McLeod*, 3 Hill 635, 647 note j (N.Y. 1842)("every Englishman…has an undoubted right, by his agents or friends, to…obtain a writ of habeas corpus")(citations omitted).

CPLR 7002(a) provides: "[a] person illegally imprisoned or otherwise restrained of liberty within the state, *or one acting on his behalf*…may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance." (emphasis added). *See People ex rel. Turano v. Cunningham*, 57 A.D.2d 801 (1st Dept. 1977)(friend of incarcerated inmate).

No court has found that NhRP lacks standing on behalf of a chimpanzee. On the contrary, the court below, in *Stanley*, expressly held NhRP had standing on behalf of the chimpanzees Hercules and Leo. 16 N.Y.S.3d at 905. [3]

[3] Venue is proper. *See* CPLR 7002(b). *See also Stanley*, 16 N.Y.S.3d at 905-07.

C. NEITHER RES JUDICATA, COLLATERAL ESTOPPEL, NOR CPLR 7003(B) BARS THIS PETITION.

"A court is always competent to issue a new habeas corpus writ on the same grounds as a prior dismissed writ." *People ex rel. Anderson v. Warden, New York City Correctional Instn. for Men*, 325 N.Y.S.2d 829, 833 (Sup. Ct. 1971). The common law rule permitting relitigation "after the denial of a writ, is based upon the fact that the detention of the prisoner is a continuing one and that the courts are under a continuing duty to examine into the grounds of the detention." *Post v. Lyford*, 285 A.D. 101, 104-05 (3d Dept. 1954)(prior adjudication no bar to new application on same grounds). *See People ex rel. Butler v. McNeill*, 219 N.Y.S.2d 722, 724 (Sup. Ct. 1961)("the ban of res judicata cannot operate to preclude the present proceeding;" petitioner's fifth application). This is because "[c]onventional notions of finality of litigation have no place where life or liberty is at stake[.]" *Sanders v. United States*, 373 U.S. 1, 8 (1963).

CPLR 7003(b) "continues the common law and present position in New York that res judicata has no application to the writ." ADVISORY COMMITTEE NOTES TO CPLR 7003(b). *See People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874); *People ex rel. Leonard HH v. Nixon*, 148 A.D.2d 75, 79 (3d Dept. 1989).

But the court declined to issue the order to show cause in the Second Tommy Petition, asserting:

> Declined, to the extent that the courts in the Third Dept. determined the legality of Tommy's detention, an issue best addressed there, & absent any allegation or ground that is sufficiently distinct from those set forth in the first petition (CPLR 7003(b)[)]." (Index No. 162358/2015, Doc.57).

(R.12;R.14). The court's conclusion is unsupported by the common law, CPLR 7003, and the cases cited, and is inconsistent with its recent ruling.

Six months earlier, the same court, in *Stanley*, properly held that neither issue preclusion nor claim preclusion barred the Second Hercules and Leo Petition, despite the absence of any "allegation or ground that is sufficiently distinct from those set forth in the first petition," *id.*, as there was no final judgment in the prior proceeding. 16 N.Y.S.3d at 908-10. It wrote:

> there must be a final judgment on the merits in a prior proceeding…. Respondents cite no authority for the proposition that a declined order to show cause constitutes a determination on the merits, that it has any precedential value, or that a justice in one county is precluded from signing an order to show cause for relief previously sought from and denied by virtue of a justice in another county refusing to sign the order to show cause.

Id. As in *Stanley*, this is merely the second petition filed on Tommy's behalf. An order to show cause was not issued in the First Tommy Petition, and personhood was never adjudicated by the Third Department. *Id*. at 902-03.

The Suffolk County Supreme Court's refusal to issue the order to show cause in the First Hercules and Leo Petition did not bar a second petition. The *Stanley* court stated:

> the governing statute itself poses no obstacle to this litigation.… [T]he Legislature apparently found it necessary to include within the statute a provision permitting, but not requiring, a court to decline to issue a writ under certain circumstances, thereby permitting successive writs a construction reflected in the traditional and general common law rule that *res judicata* has no application in habeas corpus proceedings.

Id. at 908-10.

The lower court also improperly failed to apply the standards for denying successive petitions as set forth in CPLR 7003(b), which states that a court is not required to issue a writ from a successive petition for a writ of habeas corpus *only* if: (1) the legality of a detention has been previously determined by a court of the State in a prior proceeding for a writ of habeas corpus, (2) the petition presents no ground not theretofore presented and determined, *and* (3) the court is satisfied that the ends of justice will not be served by granting it. In this case, none of the elements are satisfied.

First, although NhRP was granted an *ex parte* hearing in the First Tommy Petition, the court refused to issue the requested order to show cause and therefore did not determine the legality of Tommy's detention. (R.12-14). That alone is insufficient for preclusion, as *Stanley* recognized:

> Respondents cite no authority for the proposition that a declined order to show cause constitutes a determination on the merits, that it has any precedential value, or that a justice in one county is precluded from signing an order to show cause for relief previously sought from and denied by virtue of a justice in another county refusing to sign the order to show cause.

16 N.Y.S.3d at 909. The Third Department then affirmed, without reaching the legality of Tommy's detention, on the erroneous and novel ground that a chimpanzee such as Tommy is unable to bear duties and responsibilities and therefore is not a "person" for purposes of demanding a common law writ of habeas corpus. *Id.* at 902.

Second, the Second Tommy Petition presented substantial new grounds not previously presented and determined in response to *Lavery.* While NhRP disagreed with *Lavery*'s novel personhood standard, it nevertheless provided the lower court with sixty new pages of affidavits that contained facts neither previously presented with respect to Tommy, nor determined by any New York court. These new uncontroverted affidavits demonstrated that chimpanzees routinely bear duties and responsibilities and therefore can be "persons" even under the erroneous *Lavery* holding. As such, the court below was wrong in concluding that the Second Tommy Petition presented no "ground that is sufficiently distinct from those set forth in the first petition." (R.14).

Third, the court's refusal to issue an order to show cause undermined, rather than furthered, the ends of justice. Given the novelty of the personhood issue, NhRP could not have foreseen that the Third Department (the first English-speaking appellate court to decide a nonhuman habeas corpus case) would, for the first time in Anglo-American legal history, hold that a capacity to bear duties and

responsibilities was required for personhood. Consequently, NhRP did not anticipate or argue that issue or include such facts in the original expert affidavits filed in the First Tommy Petition. These changed circumstances alone make the court's dismissal erroneous. This is especially so given there were no changed circumstances presented in the Second Hercules and Leo Petition, yet the same court issued that order to show cause.

Moreover, because the Fulton County Supreme Court refused to issue the order to show cause, NhRP was no more given the required full and fair opportunity to litigate the legal issue of Tommy's personhood than it was given a full and fair opportunity to litigate the legal personhood of Hercules and Leo in Suffolk County. *Stanley*, 16 N.Y.S.3d at 909. *See Allen v. New York State Div. of Parole*, 252 A.D.2d 691 (3d Dept. 1998). As *Stanley* recognized, "claim preclusion and issue preclusion contemplate 'that the parties had a full and fair' opportunity to litigate the initial determination.'" 16 N.Y.S.3d at 910 (citation omitted). NhRP was "thus not barred by the [Suffolk] County disposition from proceeding here." *Id.* "Nor should it be." *Id.* As *Stanley* made clear, the "writ is 'so primary and fundamental,' 'that it must take precedence over considerations of procedural orderliness and conformity.'" *Id.* (citation omitted).

D. TOMMY IS A "PERSON" UNDER THE COMMON LAW OF HABEAS CORPUS AND CPLR 7002(A).

1. Person is not synonymous with "human being."

"[L]egal personhood ask[s] in effect, who counts under our law." *Stanley*, 16 N.Y.S.3d at 912 (citing *Byrn,* 31 N.Y.2d at 201). "[U]pon according legal personality to a thing the law affords it the rights and privileges of a legal person[.]" *Byrn*, 31 N.Y.2d at 201 (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909)("Gray"); Hans Kelsen, *General Theory of Law and State* 93-109 (1945); George Whitecross Paton, *A Textbook of Jurisprudence* 349-356 (4th ed., G.W. Paton & David P. Derham eds. 1972)("Paton"); Wolfgang Friedman, *Legal Theory* 521-23 (5th ed. 1967)). Legal persons possess inherent value; "legal things," possessing merely instrumental value, exist for the sake of legal persons. 2 William Blackstone, *Commentaries on the Laws of England* *16 (1765-1769).

"Whether the law should accord legal personality is a policy question[.]" *Byrn*, 31 N.Y.2d at 201 (emphasis added).[4] "Legal person" does not "necessarily correspond" to the "natural order." *Id*; *Accord Stanley*, 16 N.Y.S.3d at 916-17. It is not synonymous with human being. *Id. See* Paton, at 349-50, *Salmond on*

[4] The Court of Appeals' broad use of the word "policy" in *Byrn* encompasses not just what is good and bad, but "principle," what is right or wrong, for "[e]thical considerations can no more be excluded from the administration of justice…than one can exclude the vital air from his room and live." Benjamin N. Cardozo, *The Nature of the Judicial Process* 66 (Yale Univ. Press 1921)(citations omitted).

Jurisprudence 305 (12th ed. 1928)("Th[e] extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination,"); IV Roscoe Pound, *Jurisprudence* 192-93 (1959). "Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol." Paton, *supra* at 393. "There is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." Gray, *supra* Chapter II, 39, citing, among other authorities, those cited in *Byrn*, *supra*.

NhRP's arguments that autonomy is sufficient for common law habeas corpus personhood and that, as an autonomous being, Tommy is entitled to the protections of common law habeas corpus, both as a matter of common law liberty and common law equality, are the policy arguments *Byrn* required. *See Stanley*, 16 N.Y.S.3d at 911-12. The common law of personhood is no different than any other determination of the common law, which itself "consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy, modified and adapted to all the circumstance of all the particular cases that fall within it." *Norway Plains Co. v. Boston and Maine Railroad*, 67 Mass (1 Gray) 263, 267 (1854)(Shaw, C.J.).

"Person" is a legal "term of art." *Wartelle v. Womens' & Children's Hosp.*, 704 So. 2d 778 (La. 1997). "[T]he significant fortune of legal personality is the

capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). "Person" has never been equated with being human, being human has never been either a necessary or a sufficient condition for personhood, and accordingly many humans have not been persons. "Person" may be narrower than "human being." A human fetus, which *Byrn*, 31 N.Y.2d at 199, acknowledged "is human," was not characterized as a Fourteenth Amendment "person." *See Roe v. Wade*, 410 U.S. 113 (1973). Black slaves were not "persons" in New York until the last slave was freed in 1827 or throughout the entire United States prior to the ratification of the Thirteenth Amendment in 1865. *See, e.g.*, *Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828).[5] Women were not "persons" for many purposes until well into the twentieth century. *See* Robert J. Sharpe and Patricia I. McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (2007). *Accord Stanley*, 16 N.Y.S.3d at 912.

On the other hand, corporations have long been "persons" within the meaning of the Fourteenth Amendment. *Santa Clara Cnty. v. Southern Pacific Railroad*, 118 U.S. 394 (1886). An agreement between the indigenous peoples of New Zealand and the Crown, p.10, ¶¶ 2.6, 2.7, and 2.8, recently granted New Zealand's Whanganui River Iwi "legal personality" so that it owns its riverbed and

[5] *E.g.*, *Trongett v. Byers*, 5 Cow. 480 (N.Y. Sup. Ct. 1826)(recognizing slaves as property); *Smith v. Hoff*, 1 Cow. 127, 130 (N.Y. 1823)(same); *In re Mickel*, 14 Johns. 324 (N.Y. Sup. Ct. 1817)(same); *Sable v. Hitchcock*, 2 Johns. Cas. 79 (N.Y. Sup. Ct. 1800)(same).

is itself incapable of being owned. [6] In July of 2014, the Te Urewara park in New Zealand was designated as a "legal entity, and has all the rights, powers, duties, and liabilities of a person." http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183705.html. The Indian Supreme Court has designated the Sikh's sacred text as a "legal person." *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, A.I.R. 2000 S.C. 421. Pre-Independence Indian courts designated Punjab mosques as legal persons, to the same end. *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369, ¶15 (Lahore High Court, Full Bench). A pre-Independence Indian court designated a Hindu idol as a "person" with the capacity to sue. *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925).

The struggles over the legal personhood of human fetuses,[7] black slaves,[8] Jews,[9] Native Americans,[10] women,[11] corporations,[12] and other entities have never

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[6] *WHANGANUI IWI and THE CROWN* (August 30, 2012), available at http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CWhanganuiRiverAgreement.pdf (last viewed September 3, 2015).

[7] *Roe*, 410 U.S. 113; *Byrn*, 31 N.Y.2d 194.

[8] *Compare Trongett*, 5 Cow. 480 (recognizing slaves as property), with *Lemmon*, 20 N.Y. 562 (slaves are free) and *Somerset*, 98 Eng. Rep. at 510 (slavery is "so *odious* that nothing can be suffered to support it but positive law")(emphasis added).

[9] RA Routledge, "The Legal Status of the Jews in England," 3 The Journal of Legal History 91, 93, 94, 98, 103 (1982)(At least during the 13th century the Jews were the chattel of the King).

[10] *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879)(though Crook argued that Native Americans "had no more rights in a court of law than beasts of the field", they were, for the first time, deemed "persons" within the meaning of the Federal Habeas

been over whether they are human, but whether justice demands that they "count." As to who "counts," *Stanley* noted the "concept of legal personhood, that is, who or what may be deemed a person under the law, and for what purposes, has evolved significantly since the inception of the United States." 16 N.Y.S.3d at 912. Not "very long ago, only caucasian male, property-owning citizens were entitled to the full panoply of legal rights under the United States Constitution." *Id.* "'If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.'" *Id.* (citing *Obergefell v. Hodges*, 135 S.Ct. 2602 (2015)).

Who is deemed a person is a "matter which each legal system must settle for itself." *Byrn*, 31 N.Y.2d at 202 (quoting Gray, *supra*, at 3). The historic question here is whether Tommy should "count" under the common law of habeas corpus.

2. The meaning of "person" in Article 70 is a common law determination.

Whether the term "person" in Article 70 may include a chimpanzee is a matter which must be determined under the New York common law of habeas corpus because: (1) the legislature chose not to define "person" in Article 70; (2)

Corpus Act); Stephen Dando Collins, *Standing Bear is a Person – The True Story of a Native American's Quest for Justice* 117 (Da Capo Press 2004).

[11] Blackstone, *Commentaries on the Law of England* *442 (1765-1769)("the very being or legal existence of the woman is suspended during the marriage").

[12] While corporations are Fourteenth Amendment "persons," *Santa Clara*, 118 U.S. 394, they are not protected by the Fifth Amendment's Self-Incrimination Clause. *Bellis v. United States*, 417 U.S. 85 (1974).

the CPLR, particularly Article 70, solely governs procedure; and (3) if Article 70 limits the substantive common law of habeas corpus, it violates the "Suspension Clause" of the New York Constitution, Art. 1, §4.

First, as "person" is undefined in Article 70, its meaning is to be judicially determined as a matter of common law. *Oppenheim v. Kridel*, 236 N.Y. 156, 163 (1923). When the legislature intends to define a word in the CPLR, it does. *See* CPLR Article 105. But it neither defined "person" nor intended the word to have any meaning apart from its common law meaning. *Siveke v. Keena*, 441 N.Y.S.2d 631, 633 (Sup. Ct. 1981)("Had the legislature so intended to restrict the application of Article 70 of the CPLR to [infants or persons held by state] it would have done so by use of the appropriate qualifying language."). *See P.F. Scheidelman & Sons, Inc. v Webster Basket Co*., 257 N.Y.S. 552, 554-55 (Sup. Ct. 1932), *aff'd*, 236 A.D. 774 (4th Dept. 1932). *See also State v. A.M.R.*, 147 Wash. 2d 91, 94-95 (2002)(en banc)(courts look to common law definitions of otherwise undefined word "person" to determine who may appeal certain orders).

Second, the CPLR governs only procedure and may neither abridge nor enlarge a party's substantive rights. CPLR 101 & 102. Therefore, it may not abridge substantive common law habeas corpus rights. This necessarily includes the threshold determination of whether Tommy is a "person" within the context of the New York common law of habeas corpus. *See People ex rel. Keitt v. McCann*,

18 N.Y.2d 257, 263 (1966)("Legislature did not intend to change the instances in which the writ was available"); *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 569 (1875)("the act needs no interpretation and is in full accord with the common law."); *Lavery*, 124 A.D.3d at 150 ("[W]e must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach.").

Third, if Article 70 prevents the court from determining that Tommy is a "person" within the meaning of the common law of habeas corpus, it violates the Suspension Clause of the New York Constitution, Art. 1, §4, which renders the legislature powerless to deprive an individual of the privilege of the common law writ of habeas corpus. *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939). It "cannot be abrogated, or its efficiency curtailed, by legislative action." *Tweed*, 60 N.Y. at 566. Otherwise the legislature could permanently strip judges of their ability to determine who lives, who dies, who is enslaved, and who is free.

Tommy's thinghood derives from the common law. However, when justice requires, New York courts refashion the common law—especially the common law of habeas corpus—with the directness Lord Mansfield displayed in *Somerset v. Stewart*, when he held human slavery "so *odious* that nothing can be suffered to support it but positive law." 98 Eng. Rep. at 510 (emphasis added). "One of the hallmarks of the writ [is]…its great flexibility and vague scope." *McCann*, 18

N.Y.2d at 263 (citation omitted). Slaves employed the common law writ of habeas corpus to challenge their imprisonment as things. *Lemmon*, 20 N.Y. at 604-06, 618, 623, 630-31 (citing *Somerset*); *In re Belt*, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848); *In re Kirk*, 1 Edm. Sel. Cas. 315 (citing *Somerset* and *Forbes v. Cochran*, 107 Eng. Rep. 450, 467 (K.B. 1824); *In re Tom*, 5 Johns. 365). Non-slaves long employed it in New York, including (1) apprentices and indentured servants;[13] (2) infants,[14] (3) the incompetent elderly;[15] and (4) mental incompetents.[16]

It is not just in habeas corpus that New York courts freely revise the common law, though habeas corpus law is the broadest and most flexible of all. The Court of Appeals has long rejected the claim that common law "change…should come from the Legislature, not the courts." *Woods v. Lancet*, 303 N.Y. 349, 355 (1951). *See W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007, 1009 (Sup. Ct. 1998)("For those who feel that the incremental change allowed by the Common Law is too slow compared to statute, we refer those disbelievers to the holding in *Somerset v. Stewart*…which stands as an eloquent monument to the fallacy of this view"), *aff'd*, 267 A.D.2d 233 (2d Dept. 1999). The *Woods* Court declared: "We abdicate our own function, in a field peculiarly nonstatutory, when

[13] *People v. Weissenbach*, 60 N.Y. 385, 393 (1875); *In re M'Dowle*, 8 Johns 328 (Sup. Ct. 1811).
[14] *Weissenbach*; *M'Dowle*, *supra.*
[15] *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996).
[16] *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961); *People ex rel. Jesse F. v. Bennett*, 242 A.D.2d 342 (2d Dept. 1997); *In re Cindy R.*, 970 N.Y.S.2d 853 (Sup. Ct. 2012).

we refuse to reconsider an old and unsatisfactory court-made rule." 303 N.Y. at 355.

Common law is "lawmaking and policymaking by judges…in principled fashion, to fit a changing society." Kaye, *supra*, at 729. In response to the question in *Woods* whether the Court should bring "the common law of this state, on this question [of whether an infant could bring suit for injuries suffered before birth] into accord with justice[,]" it answered: "we should make the law conform to right." 303 N.Y. at 351. The Court has explained that "Chief Judge Cardozo's preeminent work *The Nature of Judicial Process* captures our role best if judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." *Caceci v. Do Canto, Const. Corp.*, 72 N.Y.2d 52, 60 (1988)(citing Cardozo, *Nature of Judicial Process*, at 152).

New York courts have "not only the right, but the duty to re-examine a question where justice demands it" to "bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.'" *Woods*, 303 N.Y. at 355 (citation omitted). *See, e.g.*, *Gallagher v. St. Raymond's R.C. Church*, 21 N.Y.2d 554, 558 (1968)("the common law of the State is not an anachronism, but is a living law which responds to the surging reality of changed conditions"); *Millington v. Southeastern Elevator*

Co., 22 N.Y.2d 498, 508 (1968)("this court has not been backward in overturning unsound precedent."); *Bing v. Thunig*, 2 N.Y.2d 656, 668 (1957)(a rule of law "out of tune with the life about us, at variance with modern day needs and with concepts of justice and fair dealing…[i]t should be discarded"); *Silver v. Great American Ins. Co*., 29 N.Y.2d 356, 363 (1972)("Stare decisis does not compel us to follow blindly a court-created rule…once we are persuaded that reason and a right sense of justice recommend its change."); *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 391 (1916); *Rumsey v. New York and New England Railway Co*., 133 N.Y. 79, 85 (1892)(quoting 1 *Kent's Commentaries* 477 (13th edition 1884)("cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error")).

The uncontroverted expert affidavits confirm chimpanzees' extraordinarily complex, often human-like, autonomy and ability to self-determine. At every level, chimpanzees are today understood as beings entitled to consideration; they have long been edging toward personhood. Justice requires that the common law of habeas corpus be refashioned in accordance with these present day standards to include Tommy as a common law "person."

3. As an autonomous being Tommy is a common law person entitled to the common law right to bodily liberty that the common law of habeas corpus protects.

The common law writ of habeas corpus is so "deeply rooted in our cherished ideas of individual autonomy and free choice," *Stanley*, 16 N.Y.S.3d at 903-04, that "Anglo-American law starts with the premise of thorough-going self determination." *Natanson v. Kline*, 186 Kan. 393, 406 (1960), *decision clarified on den. of reh'g*, 187 Kan. 186 (1960). The Supreme Court famously held that

> [n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.…"The right to one's person may be said to be a right of complete immunity: to be let alone."

Union P. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)(quoting *Cooley on Torts* 29).

The word "autonomy" derives from the Greek "autos" ("self") and "nomos" (law"). Michael Rosen, *Dignity – Its History and Meaning* 4-5 (2012). Its deprivation is a deprivation of common law dignity, *People v. Rosen*, 81 N.Y.2d 237, 245 (1993); *Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986); *In re Gabr*, 39 Misc. 3d 746, 748 (Sup. Ct. 2013), that "long recognized the right of competent individuals to decide what happens to their bodies." *Grace Plaza of Great Neck, Inc. v. Elbaum*, 82 N.Y.2d 10, 15 (1993). *See*, *e.g.*, *Rivers*, 67 N.Y.2d at 492; *Schloendorff v. Soc'y of N.Y. Hosp*., 211 N.Y. 125, 129-30 (1914).

New York common law so supremely values autonomy that it permits competent adults to decline life-saving treatment. *Matter of Westchester Cnty. Med. Ctr. (O'Connor)*, 72 N.Y.2d 517, 526-28 (1988); *Rivers*, 67 N.Y.2d. at 493; *People v. Eulo*, 63 N.Y.2d 341, 357 (1984). This "insure[s] that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires." *Rivers*, 67 N.Y.2d at 493. It permits a permanently incompetent, once-competent human to refuse medical treatment, if he clearly expressed his desire to refuse treatment before incompetence silenced him, and no over-riding state interest exists. *Matter of Storar*, 52 N.Y.2d 363, 378 (1981). Even those who will never be competent, who have always lacked the ability and always will lack the ability, to choose, understand, or make a reasoned decision about medical treatment possess common law autonomy and dignity equal to the competent. *Matter of M.B.*, 6 N.Y.3d at 440; *Rivers*, 67 N.Y.2d at 493 (citing *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728 (1977)); *Matter of Storar*, 52 N.Y.2d at 380.

The capacity of chimpanzees such as Tommy for autonomy, which subsumes many of their numerous complex cognitive abilities, are set forth in the Expert Affidavits attached to the Second Tommy Petition. In June 2013, the NIH recognized the ability of chimpanzees to choose and self-determine. Accepted Recommendation EA7 states: "The environmental enrichment program developed

for chimpanzees must provide for relevant opportunities for choice and self determination." (R.211). The NIH noted "[a] large number of commenters who responded to this topic strongly supported this recommendation as a way to ensure both the complexity of the captive environment and chimpanzees' ability to exercise volition with respect to activity, social grouping, and other opportunities." (*Id*.)

4. Fundamental principles of equality entitle Tommy to the bodily liberty that the common law of habeas corpus protects.

Tommy is entitled to common law personhood and the right to bodily liberty as a matter of common law equality. Equality has always been a vital New York value, embraced by constitutional law, statutes, and common law.[17] Article 1, §11 of the New York Constitution contains both an Equal Protection Clause, modeled on the Fourteenth Amendment, and an anti-discrimination clause. "[T]he principles expressed in those sections [of the Constitution] were hardly new." *Brown v. State*, 89 N.Y.2d 172, 188 (1996). As the Court of Appeals explained: "cases may be found in which this Court identified a prohibition against discrimination in the Due Process Clauses of earlier State Constitutions, clauses with antecedents traced to colonial times" *Id.* (citations omitted).

[17] Equality is a fundamental value throughout Western jurisprudence. *See Vriend v. Alberta*, 1 R.C.S. 493, 536 (Canadian Supreme Court 1998)(Cory and Iacobucci, JJ)("The concept and principle of equality is almost intuitively understood and cherished by all."); *Miller v. Minister of Defence*, HCJ 4541/94, 49(4) P.D. 94, ¶6 (Israel High Court of Justice 1995)(Strasberg-Cohen, T., J.)("It is difficult to exaggerate the importance and stature of the principle of equality in any free democratic society.").

New York equality values are embedded into New York common law. At common law, such private entities as common carriers, victualers, and innkeepers may not discriminate unreasonably or unjustly. *See*, *e.g.*, *Hewitt v. New York*, *N.H. & H.R. Co.*, 284 N.Y. 117, 122 (1940)("At common law, railroad carriers are under a duty to serve all persons without unjust or unreasonable advantage to any. So this court has said that a carrier should not 'be permitted to unreasonably or unjustly discriminate against other individuals to the injury of their business where the conditions are equal.'")(citation omitted); *New York Tel. Co. v. Siegel-Cooper Co.*, 202 N.Y. 502, 508 (1911); *Lough v. Outerbridge*, 143 N.Y. 271, 278 (1894); *People v. King*, 110 N.Y. 418, 427 (1888).

New York equality is not merely a product of its constitutions, statutes, and common law operating independently. Two decades ago, Chief Judge Kaye confirmed that the two-way street between common law decision-making and constitutional decision-making had resulted in a "common law decision making infused with constitutional values." Kaye, *supra*, at 747. In harmony with common law equality principles that forbid private discrimination, the common law of equality embraces, at minimum, its sister fundamental constitutional equality value—embedded within the New York and the United States Constitutions—that prohibits discrimination based on irrational means or illegitimate ends. *Romer v.*

Evans, 517 U.S. 620, 633 (1996)("'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.'")(citation omitted).

Common law equality decision-making differs from constitutional equal protection decision-making in that it has nothing to do with a "respect for the separation of powers." *Cleburne v. Cleburne Living Ctr., Inc*., 473 U.S. 432, 441-42 (1985). Instead it applies constitutional equal protection values to an evolving common law. The outcomes of similar common law and constitutional cases may therefore be different.

For example, in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), the Court affirmed the constitutionality of New York's statutory limitation on same-sex marriage. "The critical question [wa]s whether a rational legislature could decide that these benefits should be given to members of opposite-sex couples, but not same-sex couples." *Id.* at 358. The Court held the legislature could rationally decide that children do best with a mother and father. *Id.* at 359-60. In the face of a dissent that concluded, "I am confident that future generations will look back on today's decision as an unfortunate misstep," *id*. at 396 (Kaye, C.J., dissenting), the majority "emphasize[d]…we are deciding only this constitutional question. It is not for us to say whether same-sex marriage is right or wrong." *Id.* at 366.

In contrast, a classification's appropriateness is crucial to a court deciding common law. It *should* decide what is right and wrong. Its job *is* to do the "right

thing." When it is time to rule on the merits, this Court *should* recognize Tommy's common law personhood. This Court *should* determine that the classification of a chimpanzee as a "legal thing" invokes an illegitimate end. This Court *should* decide that Tommy has a common law right to bodily liberty sufficient to entitle him to a writ of habeas corpus and a chance to live the autonomous, self-determining life of which he is capable.

Tommy's common law classification as a "thing," unable to possess any legal rights, rests upon an illegitimate end. *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001). *See*, *e.g.*, *Goodridge v. Dep't of Public Health*, 440 Mass. 309, 330 (2003); *Cleburne*, 473 U.S. at 452 (Stevens, J., concurring).

> Without such a requirement of legitimate public purpose it would seem useless to demand even the most perfect congruence between means and ends, for each law would supply its own indisputable - and indeed tautological fit: if the means chosen burdens one group and benefits others, then the means perfectly fits the end of burdening just those whom the law disadvantage and benefitting just those it assists.

Laurence H. Tribe, *American Constitutional Law* 1440 (second ed. 1988).

In *Romer*, the Court struck down "Amendment 2," because its purpose of repealing all existing anti-discrimination positive law based upon sexual orientation was illegitimate. 517 U.S. at 626. It violated equal protection because "[i]t is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board." *Id.* at 633. Amendment 2 was "simply so obviously and fundamentally inequitable, arbitrary, and oppressive that

it literally violated basic equal protection values." *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997); *Mason v. Granholm*, 2007 WL 201008 (E.D. Mich. 2007); *Goodridge*, 440 Mass. at 330 (same-sex marriage ban impermissibly "identifies persons by a single trait and then denies them protection across the board"). The true test is whether persons are similarly situated for purposes of the law challenged. *Kerrigan v. Comm'r of Public Health*, 289 Conn. 135, 158 (2008).

Denying Tommy his common law right to bodily liberty solely because he is a chimpanzee is a tautology. "'[S]imilarly situated' [cannot] mean simply 'similar in the possession of the classifying trait.' All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test." *Varnum v. O'Brien*, 763 N.W.2d 862, 882-83 (Iowa 2009)(citations omitted). The "equal protection guarantee requires that laws treat all those who are similarly situated with respect to the purposes of law alike." *Id.*

In *Goodridge*, the court swept aside the argument that the legislature could refuse same-sex couples the right to marry because the purpose of marriage is procreation, which they could not accomplish. 440 Mass. at 330. This argument "singles out the one unbridgeable difference between same-sex and opposite sex couples, and transforms that difference into the essence of legal marriage." *Id.* at 333.

No one doubts that, if Tommy were human, the court would instantly issue a writ of habeas corpus and discharge him immediately. Tommy is imprisoned for one reason: he is a chimpanzee. Possessing that "single trait," he is "denie[d]…protection across the board," *Romer*, 517 U.S. at 633, to which his autonomy and ability to self-determine entitle him.

All nonhuman animals were once believed unable to think, believe, remember, reason, and experience emotion. Richard Sorabji, *Animal Minds & Human Morals – The Origins of the Western Debate* 1-96 (1993). Today, not only do the Expert Affidavits attached to the Second Tommy Petition and the June 13, 2013 NIH acceptance of The Working Group's recommendations confirm chimpanzees' extraordinarily complex, often human-like, autonomy and ability to self-determine and expose those ancient, pre-Darwinian prejudices as untrue, but so does the 2011 report of the Institute of Medicine and National Research Council of the National Academies discussing the use of chimpanzees in biomedical research:

> Chimpanzees live in complex social groups characterized by considerable interindividual cooperation, altruism, deception, and cultural transmission of learned behavior (including tool use). Furthermore, laboratory research has demonstrated that chimpanzees can master the rudiments of symbolic language and numericity, that they have the capacity for empathy and self-recognition, and that they have the human-like ability to attribute mental states to themselves and others (known as the "theory of mind"). Finally, in appropriate circumstances, chimpanzees display grief and signs of depression that

are reminiscent of human responses to similar situations.[18]

For centuries New York courts rejected human slavery, a status that stripped the slave of her autonomy and harnessed her to her master's will. *Lemmon*, 20 N.Y. 562, is acknowledged as "one of the most extreme examples of hostility to slavery in Northern courts[.]" Paul Finkleman, *Slavery in the Courtroom* 57 (1985). "'[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.'" 16 N.Y.S.3d at 917-18 (citation omitted). The legal personhood of chimpanzees, at least with respect to their right to a common law writ of habeas corpus, is one of those truths; their legal thinghood has become an embarrassing anachronism.

Even humans born with anencephaly, who have never been sentient or conscious or possessed of a brain, have, and *should* have, basic legal rights. But if humans bereft even of sentience are entitled to personhood, then this Court must either recognize Tommy's just equality claim to bodily liberty or reject equality. Abraham Lincoln understood that the act of extending equality protects everyone: "[i]n *giving* freedom to the slave, we *assure* freedom to the free, honorable alike in what we give, and what we preserve." 5 *Collected Works of Abraham Lincoln* 537 (Roy P. Basler, ed. 1953)(annual message to Congress of December 1, 1862)(emphasis in original).

[18] *Chimpanzees in Biomedical and Behavioral Research - Assessing the Necessity* 27 (Bruce M. Altevogt, *et al.*, eds., The National Academies Press 2011).

NhRP claims only that Tommy has a common law right to bodily liberty protected by the common law of habeas corpus. What, if any, other common law rights Tommy possesses will be determined on a case-by-case basis. *See Byrn*, 31 N.Y.2d at 200 (fetuses are "persons" for some purposes including inheritance, devolution of property, and wrongful death, while not being "persons in the law in the whole sense," such as being subject to abortion).

E. THE THIRD DEPARTMENT'S TWO NOVEL RULINGS IN *LAVERY* WERE ERRONEOUS.

1. *Lavery* erroneously held that the capacity to bear duties and responsibilities "collectively" at the level of species is necessary for being a legal "person."

In arriving at the erroneous ruling, *Lavery*: (1) relied on inapposite cases; (2) failed to recognize that the legislature has already determined some nonhuman animals are persons under Estates Powers and Trusts Law ("EPTL") 7-8.1; (3) relied almost exclusively on two law review articles that contain a lone professor's minority personal philosophical preference; (4) ignored *Byrn's* establishing that personhood is a matter of policy, *supra*; and (5) failed to address the detailed uncontroverted policy arguments, based upon fundamental common law values of liberty and equality.

Lavery is the first English-speaking court's decision to hold that an inability to bear duties and responsibilities allows that court to deny a fundamental common law right to an individual (except in the individual's own interests), much less an

autonomous, self-determining entity seeking a common law writ of habeas corpus. Significantly, however, *Lavery* was based neither on precedent nor sound policy. It stated that "animals have never been considered persons for the purpose of habeas corpus relief, nor have they been explicitly considered as persons or entities for the purpose of state or federal law." 124 A.D.3d at 150. This is true only because no such claim had ever been presented. Moreover, the New York statute that allows nonhuman animals to be trust beneficiaries and provides for an enforcer who "performs the same function as a guardian ad litem for an incapacitated person," *In re Fouts*, 677 N.Y.S.2d 699, 700 (Sur. Ct. 1998), undermines *Lavery*'s assertion that New York legal personhood is premised upon the ability to bear duties and responsibilities and that nonhuman animals have never been considered "persons" under New York law.

Further, NhRP did not bring its cases in federal court or ground its claims on any statute or constitution. Its cause of action is common law. The cases cited in *Lavery* were therefore irrelevant because they were federal cases that had either been dismissed for lacking Article III standing or because the enabling statute's definition of "person" did not include nonhuman animals. 124 A.D.3d at 150. None were common law claims; all involved statutory or constitutional interpretation. *See Lewis v. Burger King*, 344 Fed. Appx. 470 (10th Cir. 2009)(rejecting plaintiff's claim that her service dog had standing to sue under the

Americans with Disabilities Act of 1990); *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004)(all cetaceans of the world lacked standing under the Endangered Species Act and were not within that statute's definition of "person"); *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012)(legislative history makes clear Thirteenth Amendment was only intended to apply to human beings); *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993)(dolphin not a "person" within meaning of Administrative Procedures Act, sec. 702). Each court, however, agreed that a nonhuman animal could be a "person" if Congress intended, but concluded that, with respect to the enactments involved, Congress had not so intended. *Lewis*, 344 Fed. Appx. at 472; *Cetacean Community*, 386 F.3d at 1175-76; *Tilikum*, 842 F. Supp. 2d at 1262 n.1; *New England Aquarium*, 842 F. Supp. 2d at 49. *See Lavery*, 124 A.D.3d at 150 ("we must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach").

Similarly, none of the cases cited in *Lavery* support its statement that "habeas corpus has never been provided to any nonhuman entity," *id.*, if what that court meant was that no entity that could possibly be detained against its will has ever been denied a writ of habeas corpus. *See United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995)(corporation permitted to utilize writ of *coram nobis*); *Waste*

Management of Wisconsin, Inc. v. Fokakis, 614 F.2d 138, 140 (7th Cir. 1980)(corporation refused habeas corpus "because a corporation's entity status precludes it from being incarcerated or ever being held in custody"); *Graham v. State of New York*, 25 A.D.2d 693 (3d Dept. 1966)(habeas corpus purpose is to free prisoners from detention, not secure return of inanimate personal property); *Sisquoc Ranch Co. v. Roth*, 153 F.2d 437, 439 (9th Cir. 1946)(corporation with contractual relationship with human lacked standing to seek corporate habeas corpus). Thus, no nonhuman who could possibly be imprisoned had ever sought a writ of habeas corpus.

The novelty of Tommy's claim is no reason to deny him relief. *See, e.g.*, *Crook*, 25 F. Cas. at 697 (that no Native American had sought habeas relief did not foreclose petitioner from being designated a "person" and awarded habeas relief); *Somerset*, *supra* (that no human slave had been granted habeas relief was no obstacle to court's grant of habeas relief); *see also Lemmon*, 20 N.Y. 562.

Lavery did not base its ruling that duties and responsibilities are required for personhood on relevant precedent. It merely noted that:

> the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity of rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system. (see Richard L. Cupp, Jr., "Children, Chimps, and Rights: Arguments from 'Marginal' Cases,'" 45 *Ariz. St. LJ* 1, 12-14 (2013); Richard L. Cupp, Jr., "Moving Beyond Animal Rights: A Legal Contractualist Critique," 46 *San Diego L. Rev.* 27, 69-70 (2009); *see*

> *also Matter of Gault*, 387 U.S. 1, 20-21 (1967); *United States v. Barona*, 56 F.3d 1087, 1093-1094 (9th Cir. 1995), *cert. denied* 516 US 1092 (1996). Under this view, society extends rights in exchange for an express or implied agreement of its members to submit to social responsibilities. In other words, "Rights [are] connected to moral agency and the ability to accept societal responsibility for [those] rights" [citing the two Cupp articles].

124 A.D.3d at 151. Neither *Gault* nor *Barona* are relevant. *Gault*'s unexplained and isolated mention of a "social compact" was irrelevant to its determination that children were entitled to due process and is irrelevant to the case at bar. *Barona* merely concerned an interpretation of the phrase "the People of the United States." 56 F.3d at 1093-94. The two Cupp articles merely set forth one professor's unsupported preference for a narrow philosophical contractualism that arbitrarily excludes every nonhuman animal, while including every human being, in support of which he cites no cases.[19]

Habeas corpus has always been available to aliens and others not part of a fictitious "social contract." In *Rasul v. Bush*, 542 U.S. 466, 481-82 & n.11 (2004), the Supreme Court stated:

> Application of the habeas statute to persons[20] detained at the base (in Guantanamo) is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm …[Citing, *inter alia*, *Somerset* and *Case of the Hottentot Venus*]

[19]Even contractualist philosophers may argue it embraces nonhuman animals. *E.g.*, Thomas M. Scanlon, *What We Owe Each Other* 179, 183 (1998).

[20]These Guantanamo petitioners were not part of any "social contract," as the United States alleged they desired to destroy any social contract that may exist. Still they were eligible for habeas corpus.

> American courts followed a similar practice in the early years of the Republic. See, *e.g., United States v. Villato*, 2 Dall. 379 (CC Pa. 1797)(granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States) [citations omitted]

In *Jackson v. Bulloch*, 12 Conn. 38, 42-43 (1837), a slave was freed pursuant to habeas corpus despite being excluded from the social compact. Because of culture or disability, many are unable to be part of a social compact, as chimpanzees may be; others may loathe our social compact and seek to destroy it. Nevertheless they may avail themselves of habeas corpus.

Lavery ignored the teachings of *Byrn* that "[w]hether the law should accord legal personality is a policy question," "[i]t is not true…that the legal order necessarily corresponds to the natural order," and "[t]he point is that it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence." 31 N.Y.2d at 201; *see* Paton, *supra* at 349-50. *Lavery* failed to recognize that whether a chimpanzee is a "person" for the purpose of demanding a common law writ of habeas corpus is entirely a policy, and not a biological, question. It further failed to address the powerful uncontroverted policy arguments, based upon fundamental common law values of liberty and equality, that NhRP presented in detail (R.752-800), and ignored the fact that, in such sister common law countries as New Zealand and India, entities

have been designated as a "person" though lacking the capacity to bear duties or responsibilities, *supra.*

Esteemed commentators cited both by the *Byrn* majority and the Indian Supreme Court agree, *supra*. As Gray explained, there may be:

> systems of law in which animals have legal rights…animals may conceivably be legal persons…when, if ever, this is the case, the wills of human beings must be attributed to the animals. There seems no essential difference between the fiction in such cases and those where, to a human being wanting in legal will, the will of another is attributed.

Id. at 43. The New York Legislature recognized this when it enacted EPTL 7-8.1, which provided for an "enforcer" to enforce the nonhuman animal beneficiary's right to the trust corpus.

Further, *Lavery* mistook NhRP's demand for the "immunity-right" of bodily liberty, to which the ability to bear duties and responsibilities is by definition irrelevant, for a "claim-right." Linking personhood to an ability to bear duties and responsibilities is particularly inappropriate in the context of common law habeas corpus to enforce the fundamental common law immunity-right to bodily integrity. The court's linkage of the two caused it to commit a "category of rights" error by mistaking an "immunity-right" for a "claim-right." *See generally*, Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913). Hohfeld's conception of the comparative structure of rights has long been employed as the overwhelming choice of courts,

jurisprudential writers, and moral philosophers when they discuss what rights are. Hohfeld began his famous article by noting that "[o]ne of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties'" and that "the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense." *Id*. at 28, 30.

Hohfeld noted, *id*. at 27, that even John Chipman Gray made the same mistake as did the *Lavery* court in his *Nature and Sources of the Law*.

> In [Gray's] chapter on "Legal Rights and Duties," the distinguished author takes the position that a right always has a duty as its correlative; and he seems to define the former relation substantially according to the more limited meaning of 'claim.' Legal privileges, powers, and immunities are *prima facie* ignored, and the impression conveyed that all legal relations can be comprehended under the conceptions, 'right' and 'duty.'[21]

A claim-right, which NhRP did not demand either in *Lavery* or the case at bar, is comprised of a correlative claim and duty. Steven M. Wise, *Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VERMONT L. REV. 807-10 (1998). The most conservative, narrow, and uncommon way to identify which entity possesses a claim-right is to require

[21] Gray's error becomes obvious when one recalls that Gray also agreed that both animals and supernatural beings could be "persons." *See* Gray, *supra* at 10.

that entity to have the capacity to assert claims within a moral community. *Id*. at 808-10. This is akin to the personhood test applied in *Lavery*.

In neither *Lavery* nor the case at bar did NhRP seek a claim-right. Instead it sought the immunity-right to bodily liberty protected by the common law of habeas corpus. This is the sort of immunity-right that the Supreme Court was referring to in *Botsford*, 141 U.S. at 251, *supra* at 41. An immunity-right correlates not with a duty, but with a disability. Wise, *Hardly a Revolution*, *supra* at 810-15. Other examples of fundamental immunity-rights are the Thirteenth Amendment right not to be enslaved, which disables others from enslaving those covered by that Amendment, and the First Amendment right to free speech, which the government is disabled from abridging. The ability to bear duties and responsibilities is logically not necessary to possess the rights to bodily liberty, freedom from enslavement, and free speech.

Harris v. McRea, 448 U.S. 297, 316-18, 331 (1980) illustrates the difference between a claim-right and an immunity-right. The plaintiff claimed she had the claim right to have the state pay for an abortion she was unable to afford because of *Roe v. Wade's* recognition of a woman's right to privacy against interference by the state with her decision to have an abortion. The Court recognized her immunity right to an abortion correlated with the state's disability to interfere in her decision to have the abortion, not with the state's duty to fund the abortion. NhRP argues

Tommy has the common law immunity right to bodily liberty protected by common law habeas corpus, which correlates with Respondents' disability to imprison him. Tommy's ability to bear duties and responsibilities is irrelevant to his fundamental immunity-right to bodily liberty.

The ability to bear duties and responsibilities is not even a prerequisite for the claim-right of a "domestic or pet" animal in New York, pursuant to EPTL 7-8.1, to the money placed in the trust to which that nonhuman animal is a named beneficiary.

2. The Third Department improperly took judicial notice that chimpanzees lack the capacity to bear duties and responsibilities.

Lavery improperly took judicial notice of the alleged scientific fact that chimpanzees cannot bear duties and responsibilities. 124 A.D.3d at 151. *See Hamilton v. Miller*, 23 N.Y.3d 592, 603-04 (2014). A New York court may only take judicial notice of facts "which everyone knows," *States v. Lourdes Hosp*., 100 N.Y.2d 208, 213 (2003), or which are indisputable. *TOA Const. Co. v. Tsitsires*, 54 A.D.3d 109, 115 (1st Dept. 2008). "'The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof.'" *Dollas v. W.R. Grace & Co*., 225 A.D.2d 319, 320 (1st Dept. 1996)(citation omitted).

That chimpanzees cannot bear duties and responsibilities is not an adjudicative fact. Judicial notice is generally inappropriate in "scientifically

complex cases." *Hamilton*, 23 N.Y.3d at 603-04. As it is inappropriate to take judicial notice of scientific facts found in "statutory preambles," *id.*, it was inappropriate for the Third Department to take judicial notice of a complex scientific fact based on two law review articles. *Lavery*, 124 A.D.3d at 151. The source of the underlying information must be of "indisputable accuracy," *Crater Club v. Adirondack Park Agency*, 86 A.D.2d 714, 715 (3d Dept. 1982), and so "patently trustworthy as to be self-authenticating." *People v. Kennedy*, 68 N.Y.2d 569, 577 (1986). Judicial notice was further inappropriate "because of the novelty of the issue in this State." *Brown v. Muniz*, 61 A.D.3d 526, 528 (1st Dept. 2009).

3. Tommy can bear duties and responsibilities.

If this Court finds the capacity to bear duties and responsibilities has some relationship to being a "person" for the purpose of a common law writ of habeas corpus and Article 70, the uncontroverted expert evidence presented by NhRP in the supplemental affidavits, attached to the Second Tommy Petition, prove that chimpanzees routinely bear duties and responsibilities in their own communities and human/chimpanzee communities. This is sufficient, according to *Lavery*, for personhood to the extent of Tommy's ability to invoke common law habeas corpus.

If this Court further agrees with *Lavery* that being a member of a species that "collectively" has the capacity to bear duties and responsibilities is necessary to be

a "person," 124 A.D.3d at 152 n.3, then the uncontroverted supplemental affidavits attached to the Second Tommy Petition make clear that chimpanzees "collectively" possess this capacity.

F. AS TOMMY IS ILLEGALLY IMPRISONED, HE IS ENTITLED TO A COMMON LAW WRIT OF HABEAS CORPUS.

1. As an autonomous "person" entitled to bodily liberty, Tommy's detention is unlawful.

All autonomous common law natural persons are presumed to be entitled to personal liberty (*in favorem libertatis*). *See Oatfield v. Waring*, 14 Johns. 188, 193 (Sup. Ct. 1817)(concerning a slave's manumission, "all presumptions in favor of personal liberty and freedom ought to be made"); *Fish v. Fisher*, 2 Johns. Cas. 89, 90 (Sup. Ct. 1800)(Radcliffe, J.); *People ex. rel Caldwell v Kelly*, 13 Abb. Pr. 405, 35 Barb. 444, 457-58 (Sup Ct. 1862)(Potter, J.). As the uncontroverted Expert Affidavits make clear, Tommy is autonomous; his detention is therefore unlawful.

New York common law incorporated the common law of England, which was long *in favorem libertatis* ("in favor of liberty"). Francis Bacon, "The argument of Sir Francis Bacon, His Majesty's Solicitor General, in the Case of the Post-Nati of Scotland," in IV *The Works of Francis Bacon, Baron of Verulam, Viscount St. Alban, and Lord High Chancellor of England* 345 (1845)(1608); 1 Sir Edward Coke, *The First Part of the Institutes of the Laws of England* sec. 193, at *124b (1628); Sir John Fortescue, *De Laudibus Legum Angliae* 105 (S.B. Chrimes,

trans. 1942 [1545]). *See, e.g.*, *Moore v. MacDuff*, 309 N.Y. 35, 43 (1955); *Whitford v. Panama R. Co*., 23 N.Y. 465, 467-68 (1861); *In re Kirk*, 1 Edm. Sel. Cas. at 327; *Oatfield*, 14 Johns. at 193; *Fish*, 2 Johns. Cas. at 90 (Radcliffe, J.); *Kelly*, 33 Barb. at 457-58 (Potter, J.)("Liberty and freedom are man's natural conditions; presumptions should be in favor of this construction"). New York statutes harmonize with this common law presumption. *See* N.Y. Stat. Law §314 (McKinney)("A statute restraining personal liberty is strictly construed"); *People ex rel. Carollo v. Brophy*, 294 N.Y. 540, 545 (1945); *People v. Forbes*, 19 How. Pr. 457, 11 Abb. Pr. 52 (N.Y. Sup. Ct. 1860)(statutes must be "executed carefully in favor of the liberty of the citizen").

After petitioner makes a *prima facie* showing of illegal detention, a court must issue the order to show cause without delay. CPLR 7003(a). Respondent must then present facts that show the detention is lawful. CPLR 7006(a); CPLR 7008 (b). As with any other unlawfully imprisoned "person" in New York, if Respondents fail to set forth the cause of and sufficient authority for Tommy's detention, he must be discharged forthwith. *See* CPLR 7010(a); *People ex rel. Stabile v. Warden of City Prison*, 202 N.Y. 138, 152 (1911).

2. Tommy, being unlawfully detained, is entitled to immediate discharge to a sanctuary.

That NhRP seeks Tommy's discharge to a sanctuary rather than unconditional release onto the streets of New York does not preclude habeas

corpus relief. *Stanley* properly rejected the argument that because NhRP sought "[Hercules' and Leo's] transfer to a chimpanzee sanctuary, it has no legal recourse to habeas corpus," concluding that *Presti* conflicted with First Department and Court of Appeals precedent. 16 N.Y.S.3d at 917 n.2 (citing *McGraw*, 220 A.D.2d at 292; *Matter of MHLS ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989)). *See McCann*, 18 N.Y.2d at 273; *Johnston*, 9 N.Y.2d at 485 (habeas proper remedy to test validity of transfer from state prison to state hospital for the insane); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943)(commitment to reformatory); *People ex rel. LaBelle v. Harriman*, 35 A.D.2d 13, 15 (3d Dept. 1970)("Although relator is incarcerated and the writ will not secure his freedom, habeas may be used to obtain relief other than immediate release from physical custody"); *People ex rel. Meltsner v. Follette*, 32 A.D.2d 389, 391 (2d Dept. 1969)(discharge not required); *People ex rel. Ardito v. Trujillo*, 441 N.Y.S.2d 348, 350 (Sup. Ct. 1981). Tommy's case is analogous to the relief accorded to child slaves, juveniles, and the incapacitated elderly.

An unlawfully detained person may be discharged into the care or custody of another. Imprisoned children and incapacitated adults have been discharged from slavery, industrial training schools, mental institutions, and other unlawful imprisonments into the custody of another. *See Lemmon*, 20 N.Y. at 632 (five slave children discharged); *Commonwealth v. Taylor*, 44 Mass. 72, 72-74 (1841)(slave

child discharged into care of Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Aves*, 35 Mass. 193 (1836)(slave child discharged to Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Holloway*, 2 Serg. & Rawle 305 (Pa. 1816)(slave child discharged); *State v. Pitney*, 1 N.J.L. 165 (N.J. 1793)(manumitted child discharged).

New York courts have discharged minors from industrial training schools or other detention facilities through the common law writ of habeas corpus, though they remain subject to the custody of their parents or guardians. *People ex rel. F. v. Hill*, 36 A.D.2d 42, 46 (2d Dept. 1971), *aff'd*, 29 N.Y.2d 17 (1971); *People ex rel. Silbert v. Cohen*, 36 A.D.2d 331, 332 (2d Dept. 1971), *aff'd*, 29 N.Y.2d 12 (1971); *People ex rel. Margolis v. Dunston*, 174 A.D.2d 516, 517 (1st Dept. 1991); *In re Conroy*, 54 How. Pr. 432, 433-34 (N.Y. Sup. Ct. 1878).

Minors have been discharged from mental institutions into the custody of another, *People ex rel. Intner on Behalf of Harris v. Surles*, 566 N.Y.S.2d 512, 515 (Sup. Ct. 1991), as were child apprentices, *People v. Hanna*, 3 How. Pr. 39, 45 (N.Y. Sup. Ct. 1847); *In re M'Dowle*, 8 Johns 328, and incapacitated adults, *Schuse*, 227 A.D.2d 969 (elderly and ill woman showing signs of dementia); *State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982)(elderly sick woman); *Siveke*, 441 N.Y.S.2d 631 (elderly ill man).

Habeas corpus may even be used to seek a transfer from one prison or hospital facility to another. *See Wack*, 75 N.Y.2d 751 (mental patient transferred from secure to non-secure facility); *Bennett*, 242 A.D.2d 342; *People ex rel. Richard S. v. Tekben*, 219 A.D.2d 609, 609 (2d Dept. 1995); *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 251 (2d Dept. 1993)(habeas corpus "available to challenge conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. Meltsner*, 32 A.D.2d at 391-92 (transfer from prison to correctional institution proper); *People ex rel. Ceschini v. Warden*, 30 A.D.2d 649, 649 (1st Dept. 1968).

G. NEW YORK PUBLIC POLICY RECOGNIZES PERSONHOOD FOR SOME NONHUMAN ANIMALS.

The *Byrn* Court made clear that the determination of personhood is a matter of public policy. New York public policy supports Tommy's personhood, as it already recognizes personhood rights in some nonhuman animals, including Tommy, by allowing them to be trust "beneficiaries." *See* EPTL 7-8.1; *Stanley*, 16 N.Y.S.3d at 901. Tommy is a beneficiary of an *inter vivos* trust created by NhRP under EPTL 7-8.1. (R.79-82). Consequently, he is a "person" under that statute, as only "persons" may be trust beneficiaries. *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); *Gilman v. McArdle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) *rev'd on other grounds*, 99 N.Y. 451 (1885). "Before this statute [EPTL 7-8.1] trusts for animals were void, because a private express trust cannot exist without a

beneficiary capable of enforcing it, and because nonhuman lives cannot be used to measure the perpetuities period." Margaret Turano, *Practice Commentaries*, N.Y. Est. Powers & Trusts Law 7-8.1 (2013).

In 1996, the Legislature enacted EPTL 7-6 (now EPTL 7-8) (a), which permitted "domestic or pet animals" to be designated as trust beneficiaries. The Sponsor's Memorandum stated the statute's purpose was "to allow animals to be made the beneficiary of a trust."[22] This section thereby acknowledged these nonhuman animals as "persons" capable of possessing legal rights. In *In re Fouts*, 677 N.Y.S.2d 699 (Sur. Ct. 1998), the court recognized that five chimpanzees were "income and principal beneficiaries of the trust" and referred to its chimpanzees as "beneficiaries" throughout. See *Feger v. Warwick Animal Shelter*, 59 A.D.3d 68, 72 (2d Dept. 2008)("the law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner.").

In 2010, the legislature removed "Honorary" from the title, removed the twenty-one year limitation on trust duration, and amended section (a) to read: "Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive," thereby dispelling any doubt that animals are capable of being beneficiaries in New York.

[22] Sponsor's Mem. NY Bill Jacket, 1996 S.B. 5207, Ch. 159.

As EPTL 7-8.1 created legal personhood in those nonhuman animals within its reach, New York public policy already recognizes that at least some nonhuman animals are capable of possessing one or more legal rights.

IV. CONCLUSION

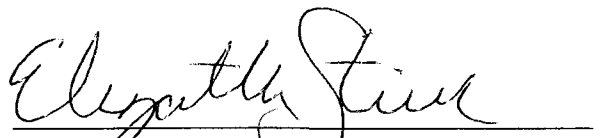
The facts underlying this petition are founded on approximately 165 pages of affidavits from nine of the world's leading experts on chimpanzee cognition from Japan, Germany, Sweden, England, Scotland, and the United States. Based upon the experts' review of hundreds of scientific articles and thousands of hours of personal observations, these affidavits establish that chimpanzees are autonomous, self-aware, and self-determining beings who can bear duties and responsibilities within chimpanzee communities and human/chimpanzee communities, freely choose how to live their lives and suffer from imprisonment. These facts support NhRP's legal arguments that chimpanzees, such as Tommy, are common law "persons" entitled to the common law right to bodily liberty protected by the common law of habeas corpus both as a matter of common liberty and common law equality.

Tommy is further entitled to immediate discharge from what will otherwise be a decades-long imprisonment. Tommy cannot be released to Africa or onto the streets of New York State. But he can be released from his imprisonment. This

Court should therefore reverse and remand with instructions to issue the order to show cause for a hearing to determine the legality of Tommy's detention.

Dated:

Respectfully submitted,



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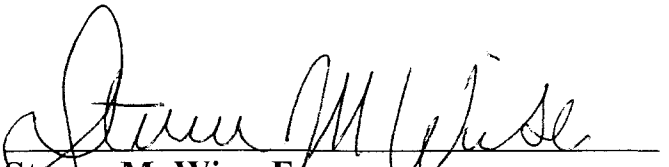

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 600.10(d)(1)(v)

The foregoing brief was prepared on a computer. A proportional typeface was used, as follows:

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Petitioner-Appellant.

-against-

PATRICK C. LAVERY, individually and as an officer and director of Circle L Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents.

PRE-ARGUMENT STATEMENT

Index No.: 162358/15
NYSCEF Doc. No. 68
(New York County)

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1. Respondents-Respondents were not represented by counsel in the lower court.

2. There is no additional appeal pending in this action.

3. There are no related actions pending.

4. The nature of the underlying proceeding in this action is a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") brought by Petitioner-Appellant, The Nonhuman Rights Project, Inc. ("NhRP"), on behalf of a chimpanzee named Tommy, under CPLR Article 70 seeking a determination of the legality of Tommy's detention and an order requiring his immediate release and transfer to an appropriate primate sanctuary. *See Nonhuman Rights Project, Inc. on behalf of Tommy v. Patrick C. Lavery, et al.*, Index #: 162358/2015 (Dec. 2, 2015).

5. The appeal is taken from a final Order of the Supreme Court, New York County, that the Honorable Barbara Jaffe entered on July 8, 2016 and made effective *nunc pro tunc* as of December 23, 2015, the date the lower court had declined to sign the order to show cause. *Nonhuman Rights Project, Inc. on behalf of Tommy v. Patrick C. Lavery, et al.*, Index #: 162358/2015 (Dec. 2, 2015), NYSCEF 68 (July 8, 2016 order), NYSCEF 57 (Dec. 23, 2015 order).

6. NhRP was required to style the Petition as an order to show cause pursuant to CPLR 7003(a) as it did not demand production of Tommy to the court. CPLR 7011 authorizes an appeal as of right "from a judgment refusing an order to show cause issued under subdivision (a) of section 7003." This case is therefore properly before this Court.

7. The lower court declined to sign the order to show cause on the grounds that: (a) the issue of the legality of Tommy's detention had been decided by the New York State Supreme Court Appellate Division, Third Judicial Department ("Third Department") in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015) and NhRP's arguments were best addressed there; and (b) there were no allegations or grounds sufficiently distinct from those set forth in the first petition filed by NhRP on behalf of Tommy, citing CPLR 7003(b).

The grounds for seeking reversal of the lower court's order are: (a) Tommy is a "person" within the meaning of CPLR Article 70 and the common law of habeas corpus; (b) *Lavery*'s holding that chimpanzees are not "persons" for the purpose of demanding a common law writ of habeas corpus rests upon the erroneous legal ruling, unprecedented in any common law court anywhere in the world, that the capacity to bear duties and responsibilities individually or "collectively" at the level of species is necessary for a petitioner to be deemed a "person" for the purpose of a common law writ of habeas corpus, or for any other purpose; (c) the Third Department erroneously took judicial notice of the complex scientific "fact" that chimpanzees could not bear duties and responsibilities, as no evidence bearing on that fact was introduced before either the lower court or on appeal, nor were the parties given notice of the Court's intention to take judicial notice of this fact,; (d) in response to the erroneous legal rulings in *Lavery,* NhRP provided the lower court with approximately 60 pages of new and distinct expert supplemental affidavits not previously presented that were directed solely to demonstrating that chimpanzees routinely bear duties and responsibilities both within chimpanzee communities and mixed chimpanzee/human communities; (e) these new facts and grounds were not previously presented in the petition brought by NhRP on behalf of Tommy in the Supreme Court, Fulton County as NhRP could not have reasonably anticipated *Lavery's* unprecedented rulings; (f) the

lower court cited, then improperly failed to apply, the standards for denying successive petitions as set forth in CPLR 7003(b); (g) the question of whether the ability to bear duties and responsibilities is necessary for a determination of personhood is not "best addressed" by the Third Department, but by this Court, as this Court has never ruled on this issue; and (h) based upon the uncontroverted facts, Tommy is entitled to the immediate issuance of the requested order to show cause, an appropriate hearing, and an order releasing him forthwith from detention and transfer to an appropriate sanctuary, which NhRP suggests is Save the Chimps, in Ft. Pierce, Florida.

Date: 10/6/16

Submitted by:

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Attachments:

1. Copy of Order appealed from.
2. Copy of Notice of Appeal.

EXHIBIT 3

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Attorney for Petitioner-Appellant

By Hand

October 7, 2016

Clerk of the Court
Susanna Rojas
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Re: *Nonhuman Rights Project, Inc., on behalf of Tommy v. Patrick C. Lavery, et al.* (162358/2015) (New York County)

Dear Clerk Rojas:

On behalf of Appellant, the Nonhuman Rights Project, Inc., I am submitting this letter to respectfully request that the Court grant pro hac vice admission to Steven M. Wise, Esq. to brief and argue the above-referenced appeal as he is the most qualified and competent in the matters of this case in the United States and his assistance is necessary.

Attorney Wise is a member in good standing of the Massachusetts Bar and has been admitted to appear pro hac vice with me on the same matter in the New York Supreme Court, Fulton County and the Supreme Court of the State of New York Appellate Division, Third Judicial Department and in similar cases brought in this Court, the New York Supreme Court Counties of New York and Niagara, the Supreme Court of the State of New York Appellate Division, Fourth Judicial Department and the Court of Appeals on the appeals taken from the decisions of the Third and Fourth Departments. He also has been admitted to appear in matters pro hac vice in Connecticut, New Hampshire, Vermont, Illinois, Florida, Tennessee, and Texas.

I am a member in good standing of the New York Bar, am an attorney of record in all matters concerning this case, shall appear with Attorney Wise on the appeal, and shall be the person upon whom all papers in connection with the cause shall be served.

Thank you for your kind consideration of this matter.

Very truly yours,

Elizabeth Stein, Esq.

cc:

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Supreme Court Appellate Division
First Department

27 Madison Avenue
New York, N.Y. 10010
212-340-0400

Susanna Molina Rojas
Clerk of the Court

October 21, 2016

Elizabeth Stein, Esq.
5 Dunhill Road
New York, NY 11040

Re: Nonhuman Rights Project, Inc., on behalf of Tommy v. Patrick C. Lavery, et al. Index 162358.2015

Dear Ms. Stein:

The Court has granted your application for permission to have Steven M. Wise, Esq., member of the bar of the State of Massachusetts, appear pro hac vice in connection with this appeal.

At the top of the front cover of the brief, at the right, the following should appear:

"To be argued [submitted] by Steven M. Wise, Esq. (of the bar of the State of Massachusetts) by permission of the Court."

At the end of the brief, after the name of the New York attorney for the plaintiffs Nonhuman Rights Project, Inc., Mr. Wise's name should appear as follows:

"Steven M. Wise, Esq., of the bar of the State of Massachusetts) by permission of the Court."

When the case is called on its appointed date, you should introduce Mr. Wise and request that he be permitted to participate in the appeal. In addition, a copy of this letter must be submitted together with the notice of appearance on the day of oral argument.

Very truly yours,

Susanna M. Rojas

SMR:dt

EXHIBIT 4

To Be Argued By:
Steven M. Wise
(of the bar of the State of Massachusetts)
by permission of the Court

New York County Clerk's Index No. 162358/15

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Petitioner-Appellant,

against

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE L. LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents.

REPLY TO AMICUS CURIAE LETTER-BRIEF OF RICHARD L. CUPP BY PETITIONER-APPELLANT

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Attorneys for Petitioner-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. INTRODUCTION

In his *amicus* letter brief, Professor Cupp focuses almost exclusively on the Third Department's decision in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015). However, Professor Cupp fails to cite to the law of New York or of any other jurisdiction. Instead he offers a personal philosophy shared by a small minority of outlier professors that draws from old and debunked philosophical arguments. Finally, Professor Cupp unsuccessfully tries to buttress the justification offered by the Third Department that a "social contract" somehow compelled its decision.

In this Reply, Petitioner will demonstrate the flaws that have long existed in the philosophical arguments upon which Professor Cupps draws and that the "social contract" claim that Professor Cupp and the Third Department offer rely upon misunderstandings of what "social contract" means.

II. ARGUMENT

1. Background to Professor Cupp's arguments.

The modern "animal rights" movement began with the 1975 publication of the Australian philosopher, Peter Singer's powerful book, *Animal Liberation.* Industries that exploited nonhuman animals began to solicit brief philosophical articles intended to construct arguments purporting to prove that all humans, but no

nonhuman animals, could ever be entitled to any moral or legal right. Professor Cupp's *amicus* letter brief is their epigone.

An early example appeared in the *New England Journal of Medicine*, which is published by that defender of vivisection, the Massachusetts Medical Society. In it the philosopher Christina Hoff's article, "Immoral and moral uses of animals," 302 NEJM 115 (1980), set forth what would become a familiar pattern of argument.

First, the writer explicitly or implicitly acknowledges that mere membership in the species *Homo sapiens* is insufficient for rights. "It is sometimes asserted," wrote Hoff, "that 'just being human' is a sufficient basis for a protected moral status, that sheer membership in the species confers exclusive moral rights. . . . One may speak of this as the humanistic principle . . . Without further argument the humanistic principle is arbitrary. What must be adduced is an acceptable criterion for awarding special rights." *Id.* at 115.

Second, the writer proposes some characteristic that all humans, but no nonhuman animals, allegedly possess. Hoff rested her argument upon the claim that nonhuman animals live merely "the life of the moment," while humans have projects, friendships, and a sense of themselves that set them apart. *Id.* at 116.

However, scientists soon began to detect these allegedly uniquely human characteristics in many nonhuman animals. As the NhRP's affidavits demonstrate,

the overwhelming evidence that has accrued in the last 36 years make it limpid that Hoff's distinction is, as a matter of scientific fact, untrue, at least with respect to chimpanzees.

Six years later, the *New England Journal of Medicine* published an article by the philosopher, Carl Cohen, to whom Professor Cupp frequently cites, and whose ideas he espouses. In "The Case for the Use of Animals in Biomedical Research, " 315(14) *NEJM* 865, 865 (October 2, 1986), Cohen also made no attempt to argue that mere membership in the human species could be rationally sufficient for personhood. Instead he chose as his uniquely human characteristic such a high level of cognition that he believed it could never be found in any nonhuman animal. However, his argument immediately encountered the obstacle that vast numbers of human beings lack that degree of cognition.

Worse, Cohen's argument betrayed a serious misunderstanding about what rights are. "(T)his much is clear about rights in general", Cohen wrote, "they are in every case claims or potential claims, within a community of moral agents, . . . Animals are of such a kind that it is impossible for them, in principle, to give or withhold voluntary consent or to make a moral choice." Id. at 865.

However, the NhRP's affidavits and supplemental affidavits demonstrate that, with respect to chimpanzees, the scientific evidence that has accrued in the last 30 years reveals Cohen's distinction as illusory. Moreover, Cohen plainly erred

in his assertion that all rights are claims. As the NhRP explained in its Opening Brief, at 56, only "claim-rights" possibly require (in a small minority view) an ability to make claims; moreover adherence to Cohen's theory that claim-rights-are-the-only-rights would exclude millions of human beings from being rights-bearers as well as many nonhuman animals. More fundamentally, the right to bodily liberty that the NhRP assets on behalf of Tommy is an "immunity-right" that has nothing to do with making a claim or bearing a duty. *See* Steven M. Wise, *Rattling the Cage – Toward Legal Rights for Animals*, 56-59, 253-254 (Perseus Books 2000). It therefore remains both irrational and fundamentally unfair to consign an autonomous being, such as a chimpanzee, to perpetual detention simply because he allegedly can't make a claim.

Cohen's argument, which he supports with no scientific evidence whatsoever, is essentially the claim of Professor Cupp, who likewise fails to support his argument with any scientific evidence. Yet the *Lavery* court perpetuated these errors that Hoff and Cohen made and now Professor Cupp makes in his *amicus* brief.

2. The Second Tommy Petition presented new grounds not previously presented in the First Tommy Petition specifically pertaining to duties and responsibilities.

The Second Tommy Petition presented substantial new grounds, not previously presented, below that were intended specifically to respond to *Lavery.*

(Cupp. Br. 2). While NhRP disagrees with *Lavery*'s novel personhood legal standard, it provided the lower court with *sixty new pages* of affidavits that contained hundreds of facts neither previously presented with respect to Tommy nor determined by any New York court. These new and *uncontroverted* affidavits demonstrated that chimpanzees routinely bear duties and responsibilities both in chimpanzee societies and in chimpanzee-human societies, and therefore can be "persons" even under the erroneous *Lavery* holding. (NhRP Br. 29).

In his attempt to demonstrate that the NhRP failed to provide new grounds not previously presented in the First Tommy Petition, Professor Cupp points to just six lines in the first Tommy Petition. In those lines, NhRP merely mentioned broad evidence that chimpanzees "possess moral agency." (Cupp Br. 3). But a broad claim of "moral agency" is not synonymous with the specific capacity to shoulder duties and responsibilities the *Lavery* court unexpectedly focused upon. NhRP could not have known that duties and responsibilities would be relevant to its argument for personhood at the time it filed the First Tommy Petition in December, 2103. Once the *Stanley* court determined itself bound by *Lavery* in *Matter of Nonhuman Rights Project Inc. v. Stanley*, 16 N.Y.S.3d 898, 903 (Sup. Ct.

2015), the NhRP immediately assembled affidavits to establish that chimpanzees do, in fact, bear duties and responsibilities.[1]

3. Professor Cupp's argument that legal personhood is contingent upon the ability to bear legal duties and responsibilities simply because this is the "norm" lacks legal precedent and would establish dangerous precedent for human beings and misapprehends the nature of the common law

a. The "norm" is a grossly insufficient basis for denying legal rights to Tommy.

Fatal alone to Professor Cupp's argument is his claim that "(t)he pertinent question is not whether chimpanzees possess anything that could be characterized as a sense of responsibility (which he appears to concede), but rather whether they possess a *sufficient* level of moral agency to be justly held legally accountable as well as to possess legal rights under our human legal system." (Cupp, Br. 5) (emphasis in the original). Temporarily putting to one side (1) the fact theis standard does not exist in New York or American law and that Professor Cupp cites no cases or other authority in support; and (2) *Lavery* improperly took judicial notice of the allegedly deficient cognitive abilities of chimpanzees without providing the NhRP with any notice or opportunity to place such facts into evidence, and therefore should not be followed for that reason alone, Cupp's claim

[1] *Lavery* took judicial notice of the fact that chimpanzees do not bear duties and responsibilities, which demonstrates that this evidence was not previously before the court on the First Tommy Petition. *Lavery*, 124 A.D 3rd at 151-152, Petitioner's Opening Brief at 59.

illustrates why this Court must reverse and remand to the lower court with an order to issue the requested order to show cause with the purpose of bringing the factual arguments of the parties before the court so that it might rule on the vital issue of the nature of a chimpanzee's cognition. Similarly confused is Cupp's claim that it is somehow relevant that unnamed prosecutors in distant jurisdictions did not bring criminal prosecutions against chimpanzees who allegedly committed certain acts. (Cupp, Br. 5-6). Millions of human New Yorkers, the young, the old, the insane, the forever incapacitated, and others, possess fundamental rights that protect their most fundamental interests without their being criminally liable for their actions either.

It is beyond cavil that many humans are accorded legal personhood *despite* lacking the capacity to shoulder duties and responsibilities. If Professor Cupp's standard was adopted, these humans would lose all their legal rights. Professor Cupp offers no rational reason for granting legal rights to incapacitated human beings who have *no agency*, moral or otherwise, while denying all legal rights to chimpanzees who, he concedes, possess vastly greater cognitive abilities than do such humans.[2]

[2] This is the problem that the NhRP refers to in its brief, at 54, when it argues that *Lavery* merely relied on a couple pages from two of Cupp's articles "that express his personal preference for a narrow philosophical contractualism that arbitrarily excludes every nonhuman animal while including every human being" and that no philosophers or jurisprudential writers support the idea that that humans should have rights for just being human without pointing to any objective characteristic about being human that would justify rights. Cupp's only rebuttal is to cite an

Professor Cupp's argument requires adherence to the "norm" that legal rights have never been accorded to nonhuman animals and therefore legal rights may never be accorded to them because this would defy "the norm." (Cupp Br. 12). This reveals a serious misunderstanding of how the common law evolves. *See generally*, Melvin Aron Eisenberg, *The Nature of the Common Law* (1991); Oliver Wendell Holmes, Jr. *The Common Law* (1881). Perhaps realizing the weakness of his claims, Professor Cupp falls back on his version of the thoroughly-discredited humanistic principle, which is merely an irrational bias. (See Cupp Br. 16-17) ("appropriate legal personhood is anchored in the human moral community, and we include humans with severe cognitive impairments in that community because they are first and foremost humans living in our society"). This "justification," however, merely embodies the very prejudice and inequality that NhRP seeks to remedy. *See, e.g., Miss. Univ. Women v. Hogan*, 458 U.S. 718, 724-25 (1982) ("[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions").

Cupp's rationale that the norm is unchangeable is identical to that relied upon by southern slave-owners to justify denying legal rights to human slaves. (Cupp Br. 12). The same rationale was used to perpetuate segregation following

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amicus brief that Bob Kohn filed in the *Lavery* case that notes "the vast western philosophical canons to the contrary" then provides a *single example*, Bob Kohn's mentor, the philosopher and educator, Mortimer J. Adler , and then we are cited merely to two entire books with no hint provided as to where in those two entire books is there language to support Kohn's astounding proposition. (Cupp Br. 7).

the Thirteenth Amendment. For example, the court in *West Chester & P.R. Co. v. Miles*, 55 Pa. 209, 213 (1867) upheld racial segregation based solely a moral norm:

> Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them.

E.g., *Loving v. Virginia*, 388 US. 1, 3 (1967)(noting the trial court stated "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix").

More recently, opponents of marriage equality utilized this moral "norm" or tradition justification to deny same-sex couples the right to marry. *Obergefell v. Hodges*, __U.S. ___, 135 S.Ct. 2584, 2602 (2015)(The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.). As the United States Supreme Court recognized, "for centuries there have been powerful voices to condemn homosexual conduct as immoral . . . shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Lawrence v. Texas*, 539 U.S. 558, 571 (2003). Rejecting

lawmaking grounded in moral commands, the Court declared that its "obligation is to define the liberty of all, not to mandate our own moral code." *Id.*

In overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court condemned *Bower*'s misguided reliance on "the history of Western civilization and Judeo-Christian moral and ethical standards." *Id.* at 572. It advised courts to look forward, just as the authors of the Fourteenth Amendment did, who "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Id.* at 579. Rather than bowing to a "history and tradition" of legal discrimination against gays and lesbians, the new, more inclusive direction of "our laws and traditions in the past half century are of most relevance here." *Id.* at 571-72.

Lawrence reaffirmed that the Court has "*never* held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Id.* at 582 (O'Connor, J., concurring) (emphasis added). *Bowers*, the outlier, "was not correct when it was decided, and it is not correct today." *Id.* at 578. Consequently, "[m]oral disapproval of [a] group . . . is an interest that is insufficient to satisfy [even] rational basis review[.]" *Id.* at 582 (O'Connor, J., concurring) (citations omitted). *See also Kerrigan* v. Commissioner of Public Health, 289 Conn. 135, 256-57 (2008) (same).

The present case involves the reach of the broad, flexible, and ancient common law writ of habeas corpus. Contrary to Professor Cupp's position, this Court's ability, and indeed duty, to change the norm is at its apex. Tommy's thinghood derives from the common law. It is now time to bring this extraordinary being within the protection of the common law.

b. Professor Cupp Fails to Support the *Lavery* Court's Failure to differentiate between a "Claim" and an "Immunity"

In its Brief, at 56, the NhRP engaged in extensive discussion of how *Lavery* misunderstood the NhRP's argument that Tommy was entitled to the "immunity-right" of bodily liberty protected by the common law writ of habeas corpus, which correlates with a "disability." *Lavery* mistakenly believed that the NhRP was arguing that Tommy was entitled to a "claim-right," which correlates with a "duty, when it was seeking only an "immunity right" of bodily liberty." Professor Cupp's does noit challenge this. Instead his brief response was that Hohfeld described his system of rights with respect to "persons" and believed that "persons" meant human beings. (Cupp. Br. 13).

But Hohfeld knew that such human beings as fetuses were not "persons". *See Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 15-16 (1884) (Holmes. J.) Moreover, who or what Hohfeld understood to be a "person," a century ago is irrelevant to the his entire system of legal rights operates. It does not require the

State of New York to apply Hohfeldian rights only to those persons Hohfeld may have imagined. This is especially so in the State of New York, where "person" is specifically not synonymous with "human," and where the determination of who and who is not a "person" turns not on biology, but on public policy and moral principle, *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972). In sum, it is no better public policy or good moral principle to act irrationally in determining who *is* a person than it is in determining what rights one should have *as* a person.

4. Professor Cupp erred in contending that personhood is limited to those who participate in a "social contract"

Professor Cupp's discussion of social contract reveals him to be, again, an outlier, while demonstrating his fundamental misunderstanding of what "social contract" means. Traditionally, social contract has addressed the authority of the State over the individual. J.W. Gough, *The Social Contract* 2-3 (Oxford Clarendon Press 1936). At its most elementary, social contract is *not* about the participation of individuals, but *is* about the idea that individuals submit some freedoms to the power of the State in exchange for the State's protection of their other freedoms. Social contract incapacitates tyranny. *See e.g., Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874) ("There are limitations on [State] power which grow out of the essential nature of all free governments. Implied reservations of individual

rights, without which the social compact could not exist, and which are respected by all governments entitled to the name").

Professor Cupp's position, erroneously embraced by the Third Department, that social contract means that "[s]ociety extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities" is unfounded. *Lavery*, 124 A.D. 3d at 151. To the contrary, it is the *government* that grants express or implied agreement to be responsible. *See* generally *Lemmon v. People*, 20 N.Y. 562 (1860) (comity between states "has its foundation in compact, express or implied. The social or international compact between the States, as such, was fixed by the Federal Constitution. (*Const. U. S., art.* 1, § 10.) (2.)"). In *Moving Beyond Animal Rights: A Legal/Contractualist Critique,* 46 San Diego L. Rev. 27, 70 (2009), cited by *Lavery*, Professor Cupp begins by discussing the social contract justification for the Revolutionary War as a basic lesson for children and immigrants. Without explanation, Professor Cupp inexplicably segues from providing a lesson in limited government to providing an erroneous lesson in contracted rights and responsibilities: "We are taught from a young age that just as government must give us representation to go along with taxation, it must give us rights that correlate with our societal responsibilities." Professor Cupp fails even to try to substantiate his peculiar notion that the social contract requires that rights correlate with responsibilities or to explain his reasons for making the leap from

the government owing duties and responsibilities to the requirement that beings owe those duties as well to bear rights.

The social contract theorist, John Locke, argued that individuals are bound morally by the law of nature not to harm each other, but that without government to defend them people's rights are not secure. Under the social contract, as Locke imagined it, "the State has an interest in protecting its citizens . . . ; this surely is at the core of the Lockean 'social contract' idea." *Roberts v. Louisiana*, 431 U.S. 633, 646 (1977). To this end fundamental rights impede and temper the exercise of *State* power.

Thus, contrary to Professor Cupp's interpretation, rights cases invoke a breach of *State* responsibilities, not social responsibilities of the individual. *In re Foster Care Status of Shakiba P.*, 181 A.D.2d 138, 140, 587 N.Y.S.2d 300, 301 (App. Div. 1992) ("Recognizing that 'it is the unique mandate of our courts to enforce the obligations we owe to children under our social contract'"); *People v. Wynn*, 102 Misc. 2d 785, 790, 424 N.Y.S.2d 664, 667 (Sup. Ct. 1980) (holding criminal rights to be from "a system of justice evolved over centuries from origins rooted in a fundamental philosophy processed from experience in our political and social ascent from historical tyrannies. It is a corporal part of our social contract covenanted by the Constitution"); *500 W. 174 St. v. Vasquez*, 325 N.Y.S.2d 256, 257 (Civ. Ct. 1971) ("Perhaps chief among the assurances which together make up

the social contract is the judiciary's promise never to close the courthouse doors. Through them should walk unhindered every citizen with a dispute to settle or a grievance to air").

Contrary to Professor Cupp's position, social contract does *not* require concurrent holding of rights and responsibilities. The holder of the right is the individual and the holder of the responsibility is the government. *In re Gualt*, the *Lavery* court's own authority, states the social compact "defines the rights of the individual and delimits the powers which the state may exercise." 387 U.S. 1, 20, 87 S. Ct. 1428, 1440 (1967). Professor Cupp's assertion that the right of habeas corpus relief requires that a person must be capable of reciprocal rights and responsibilities is entirely at odds with the basic tenets of social contract which focuses on the rights and responsibilities of the government, not individual beings.

Moreover, the entire emphasis of the *Lavery* court on social contract as the ground for the express and particular purpose of denying all rights to Tommy was misplaced. The United States Supreme Court has long recognized that the social contract lies "among the great juristic myths of history . . . . *As a practical concept, from which practical conclusions can be drawn, it is valueless.*" *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 605 n.6 (1942) (emphasis added) (citing Henderson, Railway Valuation and the Courts, 33 Harv. L. Rev. 1031, 1051); *see also Ky. v. Dennison*, 65 U.S. 66, 95 (1861)(emphasis added) (discussing the

imperfect obligation within the social compact "which binds every organized political community to avenge all injuries aimed at the being or welfare of its society. Certainly, this is the first and highest of all governmental duties; but nevertheless it is, in juridical language, a 'duty of imperfect obligation,' incapable in its essence of precise exposition or admeasurement, and its fulfilement depends on moral and social considerations, accosting the community at large, which a judicial tribunal can neither weigh, define, nor enforce" [sic]); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 79 n.2, (1954) ("Phrases like . . . 'the principles of the social compact' were in fashion . . . for stating intrinsic limitations on the exercise of all political power. More recently, the power of this Court to strike down legislation has been more acutely analyzed and less loosely expressed. Rhetorical generalizations have not been deemed sufficient justification for invalidating legislation").

In its Opening Brief, at 54, the NhRP demonstrated that habeas corpus has always been available to those not part of a fictitious "social contract." (citing *Rasul v. Bush*, 542 U.S. 466, 481-82 & n.11 (2004); *Jackson v. Bulloch*, 12 Conn. 38, 42-43 (1837). The fact that sister common law countries characterize as "persons" entities that lack the capacity to assume any duties or responsibilities conflicts with Professor Cupp's view of social contract as part and parcel of

personhood. Mosques, parks and rivers were designated as legal persons, though they *had no duties or responsibilities*. *See* Opening Brief at 33-34.

Finally, Professor Cupp's position directly contradicts *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972), which made clear that the determination of personhood is a matter of public policy. *Id.*; Opening Brief at 31. Cupp wholly ignores the standard set in *Byrn* that "[w]hether the law should accord legal personality is a policy question," "[i]t is not true...that the legal order necessarily corresponds to the natural order," and "[t]he point is that it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence." *Id.*

5. According personhood rights to Tommy would pose no threat to vulnerable human beings.

Professor Cupp has it exactly backwards when he argues that granting Tommy the basic common law right to bodily liberty would somehow threaten the rights of vulnerable human beings. It is Professor Cupp's position, not the NhRP's, that poses a threat not just to the most vulnerable human beings, but to all rights-holders, for arbitrarily denying personhood to any being undermines every rational claim of every human to personhood and fundamental rights.

Professor Cupp's "slippery slope" argument was made by slave owners and opponents of same-sex marriage. *See also Lawrence*, 539 U.S. at 590 (Scalia, J.,

dissenting) (expressing concern for the implication on "laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity"). Even the court below, in a case involving different chimpanzees, recognized that the "floodgates argument is not a cogent reason for denying relief." *The Nonhuman Rights Project, Inc. v. Stanley Jr., M.D.*, 2015 WL 1804007 (N.Y. Sup. 2015) *amended in part*, *The Nonhuman Rights Project, Inc. v. Stanley*, 2015 WL 1812988 (N.Y. Sup. 2015).

Nor does any difficulty of line-drawing preclude Tommy's personhood. The common law intentionally expands on a case-by-case basis. Line-drawing only becomes problematic when it results in arbitrary distinctions. But, at present, the law is arbitrary when it accords a human being with no cognition legal rights while denying personhood for any purpose to an autonomous chimpanzee. It is incumbent upon this Court to modify the common law to rectify this gross disparity, at least as applied to Tommy.

Whatever "line-drawing" difficulties may appear in future cases, they will be decided based on proven facts and sound public policy and moral principles. Today, justice, liberty, equality, and scientific facts demand that Tommy be recognized as a legal person for purposes of bodily liberty. *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 156 (2004)("To be sure, line drawing is often an inevitable element of the common-law process, but the imperative to define the scope of a duty—the

need to draw difficult distinctions—does not justify our clinging to a line that has proved indefensible"). The line set out in *Lavery* is indefensible.

III. CONCLUSION

Professor Cupp's *amicus* letter brief, and his articles upon which it relies follow a small minority tradition of philosophical opposition to rights for nonhuman animals that lack scientific and legal support. Professor Cupp offers neither science nor law to support his positions. Accordingly, this Court should reject Professor Cupp's arguments.

Dated: December 7, 2016 Respectfully submitted,

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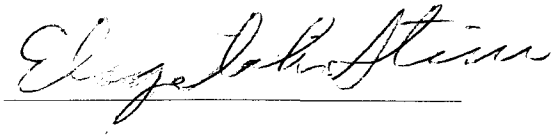
Dated: December 7, 2016



Elizabeth Stein

EXHIBIT 5

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on December 22, 2016.

PRESENT - Hon. Peter Tom, Justice Presiding,
David B. Saxe
Rosalyn H. Richter
Judith J. Gische
Ellen Gesmer, Justices.

In the Matter of a Proceeding Under Article 70 of the CPLR for a Writ of Habeas Corpus,

The Nonhuman Rights Project, Inc., on behalf of Tommy,
Petitioner-Appellant,

-against-

M-5956
Index No. 162358/15

Patrick C. Lavery, etc., et al.,
Respondents-Respondents.

- - - - - - - - - - - - -

Richard L. Cupp, Jr., Pepperdine University School of Law,
Amicus Curiae.

An appeal having been taken from the order of the Supreme Court, New York County, entered on or about July 8, 2016,

And Richard L. Cupp, Jr., Pepperdine University School of Law, having moved for leave to file a brief amicus curiae in connection with the aforesaid appeal,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon, it is

Ordered that the motion is granted to the extent of directing movant to file an original and 8 copies of a brief amicus curiae, submitted with the moving papers, but in compliance with CPLR 5529 and 22NYCRR 600.10, with this Court

together with proof of service on counsel for petitioner and on all respondents on or before January 4, 2017, for the February Term, to which Term the perfected appeal is adjourned. Sua sponte, the instant appeal (Cal. No. 2358) is to be placed on the same day calendar as the appeal in Matter of Nonhuman Rights Project v Presti (Cal. No. 2483).

ENTER:

DEPUTY CLERK

EXHIBIT 6

To Be Argued By:
Steven M. Wise, Esq.
(of the bar of the State of Massachusetts)
by permission of the Court

New York County Clerk's Index No. 150149/16

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

In the Matter of a Proceeding under Article 70
of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

against

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY INC.,

Respondents.

BRIEF FOR PETITIONER-APPELLANT

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QUESTIONS PRESENTED

1. Does the capacity to bear duties and responsibilities have any relationship to being deemed a "person" for the purpose of demanding a writ of habeas corpus under the common law of New York and CPLR Article 70, as articulated for the first time in Anglo-American law by the Third Department in *Lavery*?

The lower court ruled it was bound by *Lavery*, which held this capacity was a prerequisite to legal personhood.

2. Did the lower court err in failing to consider the petitioner's affidavits demonstrating that chimpanzees have the capacity to bear duties and responsibilities after the Third Department in *Lavery* took judicial notice that chimpanzees do not?

The lower court refused to consider these affidavits stating "whether evidence of the ability of some chimpanzees to shoulder certain kinds [of] responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me...are determinations that are best addressed there."

3. Did the lower court err in dismissing the Second Kiko Petition (a) as an improper "successive petition," after (b) finding no showing of "changed

circumstances" though petitioner introduced sixty pages of expert affidavit evidence not previously presented in the First Kiko Petition?

The lower court did not apply the requirements of CPLR 7003(b) for dismissing successive petitions or consider petitioner's new evidence demonstrating "changed circumstances," stating "[w]hile successive petitions for a writ of habeas corpus based on the same ground are permissible, "orderly administration would require, at least, a showing of changed circumstances."

4. Did the lower court err by failing to consider sixty pages of expert affidavit evidence not previously presented in the First Kiko Petition that were solely directed to the Third Department's articulation of both a novel legal standard and judicial notice of facts in *Lavery*, neither of which the petitioner could have reasonably anticipated at the time it filed its first habeas corpus petition?

The lower court stated, without making a determination, that the new affidavits "rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offered no explanation as to why they were withheld from the first petition."

5. In refusing to entertain the Second Kiko Petition, did the lower court err by considering as relevant the total number of petitions filed by petitioner on behalf of other chimpanzees imprisoned in the State of

New York?

The lower court did not consider the Second Kiko Petition in part because "between 2013 and 2014, petitioner filed four identical petitions [on behalf of four chimpanzees] with four state trial courts, each in a different county...It then recently filed another two petitions in New York County..."

6. Is the undefined term "person" in CPLR Article 70 to be interpreted under the New York common law of habeas corpus?

The lower court did not reach this question because it refused to issue the order to show cause and reach the merits of the petition.

7. Is a chimpanzee a "person" for the purpose of common law habeas corpus as a matter of common law liberty?

The lower court did not reach this because it refused to issue the order to show cause and reach the merits of the petition.

8. Is a chimpanzee a "person" for the purpose of common law habeas corpus as a matter of common law equality?

The lower court did not address this issue because it refused to issue the writ and reach the merits of the petition.

STATEMENT OF THE CASE

I. INTRODUCTION AND PROCEDURAL HISTORY

Chimpanzees are autonomous, cognitively and emotionally complex, self-aware, self-conscious and self-determining beings. They routinely bear duties and responsibilities within chimpanzee communities and human/chimpanzee communities. They have the capacity to live intellectually rich and sophisticated individual, family and community lives. They can recall their past and anticipate their future, and when their future is imprisonment, they suffer the enduring pain of isolation and the inability to fulfill their life's goals or to move about as they wish, much in the same way as do human beings. (R.93-176;249-640).

During the first week of December 2013, Appellant, the Nonhuman Rights Project Inc. ("NhRP"), filed three verified petitions demanding common law writs of habeas corpus and orders to show cause pursuant to New York Civil Practice Law and Rules ("CPLR") Article 70 in the Supreme Court in each of the three counties in which a chimpanzee was being illegally detained.[1] Specifically, a petition was filed in the New York Supreme Court a) Fulton County on behalf of Tommy, a solitary chimpanzee living in a cage in a warehouse on a used trailer lot; b) Niagara County on behalf of Kiko, a solitary chimpanzee living in a cage in a cement storefront in a crowded residential neighborhood ("First Kiko Petition");

[1] NhRP asked the courts to issue orders to show cause pursuant to CPLR 7003(a), as NhRP did not demand the production of the chimpanzees in court.

and c) Suffolk County on behalf of Hercules and Leo, two young chimpanzees on lease from Louisiana's New Iberia Research Institute to the State University of New York at Stony Brook ("Stony Brook") for locomotion research ("First Hercules and Leo Petition"). Each court refused to issue the requested order to show cause. (R.14-18). Each appellate department then affirmed on a different ground, and without citing any of the previous decisions. (*Id.*).

Attached to each of the three petitions were approximately 100 pages of expert affidavits from many of the most respected chimpanzee cognition researchers in the world. Not one fact was controverted. Pursuant to a New York common law that keeps abreast of evolving standards of justice, morality, experience, and scientific discovery, NhRP argued that both New York common law liberty and equality mandate that chimpanzees be recognized as common law "persons" who possess the common law right to bodily liberty.

On appeal of the denial of Tommy's first petition, the Third Department in December 2014, affirmed and, for the first time in Anglo-American history, held that only entities capable of bearing duties and responsibilities can be "persons" for any purpose, even for the purpose of demanding a common law writ of habeas corpus. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015). The court then took judicial notice, *sua sponte*, that chimpanzees lack this capacity. *Id.*

On appeal of the denial of the First Kiko Petition, the Fourth Department affirmed on the ground that NhRP did not seek Kiko's unconditional release onto the streets of New York, but to an appropriate sanctuary. The Fourth Department assumed, without deciding, Kiko could be a "person." *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den.*, 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015).

On January 7, 2016, a year after *Lavery*, NhRP filed Kiko's second petition ("Second Kiko Petition") in the New York County Supreme Court from which this appeal is taken. In direct response to *Lavery*, NhRP presented approximately sixty pages of new expert affidavit evidence directed solely to demonstrating that chimpanzees routinely bear duties and responsibilities within chimpanzee communities and mixed chimpanzee/human communities. The lower court refused to issue the order to show cause on the grounds it was an improper successive petition, as the NhRP had not demonstrated "changed circumstances," and because the court felt itself bound by *Lavery*. (R.10-11)

In refusing to issue an order to show cause, the lower court ignored its own recent precedent, *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898 (Sup. Ct. 2015), in which it entertained a *second* petition for habeas corpus on behalf of Hercules and Leo ("Second Hercules and Leo

Petition"), issued the requested order to show cause, and required the State to justify its detention of the chimpanzees in a hearing. *The Nonhuman Rights Project, Inc. v. Stanley Jr., M.D.*, 2015 WL 1804007 (Sup. 2015) *amended in part*, 2015 WL 1812988 (Sup. 2015), 16 N.Y.S.3d 898, 903 (Sup. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015). Unlike the present case, no "changed circumstances" were presented in the successive petitions brought on behalf of Hercules and Leo. Ultimately, the court refused to grant their release on the merits because it believed itself bound by *Lavery* regarding the necessary showing of duties and responsibilities.

NhRP demonstrates herein that the lower court erred in refusing to issue the order to show cause because: (1) contrary to *Lavery*, the capacity to bear duties and responsibilities is irrelevant to a determination of personhood; (2) the court erred in failing to consider the affidavits demonstrating that chimpanzees bear duties and responsibilities after the Third Department in *Lavery* took judicial notice they do not; and (3) the correct standard to be applied in determining common law personhood was set forth by the Court of Appeals in *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972). Finally, the evidence presented in NhRP's affidavits demonstrates a strong *prima facie* case that Kiko is a "person" for the purpose of a common law writ of habeas corpus and CPLR Article 70. (R.93-176;249-560;673-724).

But, this Court need not determine that Kiko is a "person" in order to reverse and remand with instructions to issue an order to show cause. Rather it should follow the laudatory procedure used by the *Stanley* court and by Lord Mansfield in the famous common law habeas corpus case of *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) and assume, without deciding, that Kiko could be a common law person and remand with instructions to hold an Article 70 hearing to determine whether Kiko is a person under Article 70 and the common law of habeas corpus.

II. STATEMENT OF FACTS

Chimpanzees are autonomous (R.349;443). They can freely choose without acting on reflex or innate behavior (R.349). They possess the "self" integral to autonomy, have goals and desires, intentionally act towards those goals, and understand whether they are satisfied. (R.371;252).

Chimpanzees and humans share almost 99% of DNA (R.368-69;454). Our brains are plastic, flexible, and heavily dependent upon learning, share similar circuits, symmetry, cell types, and stages of cognitive development. (R.306;315-18;368-69;370-71;443-45;454;456). We share similar behaviour, emotional and mental processes. (R.518-19), including self-recognition, self-awareness, self agency, and metacogtition (R.252;372;455-7;608). Chimpanzees are aware of their past, mentally represent their future, have an autobiographical sense of self with a

past and future, engage in "mental time travel" and long-term planning; and can remember something for decades. (R.253;444-46;459). They imagine and pretend (R.320-2;444;457;463).

Chimpanzees exhibit referential and intentional communication; they inform others, engage in complex conversations, engage in "private speech," ensure they are understood in conversations, use language and syntax, create declarative sentences, point, comment on individuals, as well as on past and future events, state what they intend to do, then do it, and coordinate their actions (R.253;315-19; 369;459;461). They understand symbols and "if/then" clauses, learn new symbols by observation, and demonstrate perspective-taking, imagination, and humor. (R.315-16;322;456-9). They announce important social events, what they are about to do, where they are going, what assistance they want from others, and how

Chimpanzees have mirror neurons and are therefore attuned to the experiences, visual perspectives, knowledge states, emotional expressions and states of others (R.253-54;306-7;372-73). They have theory of mind; they know they have minds; they know humans and other chimpanzees have minds, thoughts, feelings, needs, desires, perspectives, intentions, and that these other minds and states of knowledge differ from their minds. They know that what they see is not the same thing others see. (R.317-19;463-64).

Chimpanzees possess highly developed empathic abilities. (R.252-54;373). They engage in sophisticated deception that requires attributing mental states and motives to others. They show concern for others in risky situations (R.252-53). They demonstrate compassion, bereavement-induced depression, and an understanding of the distinction between living and non-living; they feel grief and compassion when dealing with mortality. (R.255-56).

Wild chimpanzees make and use tools from vegetation and stone for hunting, gathering, fighting, playing, communicating, courtship, hygiene, and socializing. Chimpanzees make and use complex tools that require them to utilize two or more objects towards a goal. They make compound tools by combining two or more components into a single unit. They use "tool sets," two or more tools in an obligate sequence to achieve a goal, such as a set of five objects – pounder, perforator, enlarger, collector, and swab – to obtain honey. (R.400-01). Tool-making implies complex problem-solving skills and evidences understanding of means-ends relations and causation. (R.307-308;400-01).

Each wild chimpanzee cultural group makes and uses a unique "tool kit" comprised of about twenty different tools often used in a specific sequence for foraging and processing food, making comfortable and secure sleeping nests in trees, and personal hygiene and comfort. (R.402;455-56). The foraging tool kits of some chimpanzee populations are indistinguishable in complexity from the tool

kits of some simple human material cultures, such as Tasmanian aborigines, and the oldest known human artefacts, such as the East African Oldowan Industry. In one chimpanzee population, chimpanzee tool-making culture has passed through the 225 generations. With respect to social culture, chimpanzees pass widely variable social displays and social customs from one generation to the next. Arbitrary symbolic gestures communicate in one group may mean something entirely different in another group. (R.403-05). Chimpanzees transmit their material, social, and symbolic culture by social and observational learning, through innovation, as well as precise imitation and emulation. These latter capacities are necessary for "cumulative cultural evolution," which involves the ability to build upon previous customs. (R.254-55;406).

Chimpanzees possess "numerosity," the ability to understand numbers as a sequence of quantities, which requires both sophisticated working memory and conceptual understanding of a sequence. This is closely related to "mental time travel" and planning the right sequence of steps towards a goal, two critical components of autonomy. Not only do chimpanzees excel at understanding sequences of numbers, they understand that Arabic symbols ("2", "5", etc.) represent discrete quantities. (R.373;616).

Chimpanzees demonstrate sequential learning, the ability to encode and represent the order of discrete items occurring in a sequence, and understand the

ordinal nature of numbers. They understand proportions (e.g., 1/2, 3/4, etc.), can count and understand the meaning if zero (R.373-75;463).

Chimpanzees have excellent working, or short-term, memory, and exceed the ability of humans to recall numbers (R.374-75). They are competent at "cross-modal perceptions." They obtain information in one modality such as vision or hearing and internally translate it to information in another modality. (R.461-62). They can match an audio or video vocalization recording of a familiar chimpanzee or human to her photograph. (R.307). They translate symbolically encoded information into any non-symbolic mode. When shown an object's picture, they retrieve it by touch, and retrieve a correct object by touch when shown its symbol. (R.461-62).[2]

Chimpanzees bear well-defined duties and responsibilities both within their own communities and within human/chimpanzee communities (R.519-520;523-24;534;548;593;583;606-07). Chimpanzees understand and carry out duties and responsibilities while knowingly assuming obligations then honoring them (R.598;606-07;613-14). Chimpanzees have duties to each other and behave in ways that seem both lawful and rule-governed. (R.596;551;537;609-618;584;519). Both chimpanzee and human adult members of chimpanzee/human communities behave in morally responsible ways as they understand them.

[2] These remarkable similarities between humans and chimpanzees are not limited to autonomy, but extend to personality and emotion. (R.349-353).

(R.522;607;614;620). Chimpanzees possess moral inclinations and a level of moral agency. They ostracize individuals who violate social norms. They respond negatively to inequitable situations, such as being offered lower rewards than companions for the same task. When given a chance to play the Ultimatum Game, they spontaneously make fair offers, even when not obliged to do so. (R.598).

Chimpanzee social life is cooperative and represents a purposeful and well-coordinated social system. They engage in collaborative hunting, in which hunters adopt different roles that increase the chances of success. They share meat from pre. (R.598). Males cooperate in territorial defense, and engage in risky boundary patrolling (R.519-520;598).

Chimpanzees show concern for others' welfare, and they have expectations about appropriate behaviour in a range of situations, *i.e.* social norms. (R.523-24). Such behaviour is essential for the maintenance of chimpanzee society, and it can be extended to human beings when necessary. (R.598;.551;606-07;611-13;617-618;523-24). No chimpanzee group could survive in the wild if its members failed to carry out their assigned duties and responsibilities to the group. (R.624).

Chimpanzee mothers show a duty of care to their offspring that rivals humans. (R.593). The duties and responsibilities of a mother chimpanzee towards her offspring are many and onerous and last an average of five and a half years. Young female chimpanzees practice their future maternal behaviour by using

sticks as 'dolls,' while young males do not, in a form of symbolic play. Most adult males act paternally toward all infants in their community, rushing to their aid when necessary. (R.537-38;584;548-50;584;593). Familial duties are not restricted just to mothers and fathers. (R.593;550). Juveniles and adolescents frequently act responsibly towards their infant siblings. (R.550).

Chimpanzee duties of care extend beyond shared genes (kinship) (R.594;584;537-38;550;519). Evidence from both captive and wild chimpanzees indicates that they possess highly developed empathic abilities. (R.519-20;537-38; 584;594;611-15). This includes the adoption of orphans. (R.519;537-538;550;584; 594).

Chimpanzee duties and responsibilities extend beyond the family and cross into the realm of the community. (R.594;534;584;519). In tasks requiring cooperation, chimpanzees recruit the most skilled partners and take turns requesting, and helping a partner. (R.243-43;253-54). Chimpanzees show "community concern," such as by working as a team to patrol boundaries and defending territory, and concern for individuals. (R.519). Wild chimpanzees call to warn approaching friends about a potentially dangerous object of which the latter is unaware. (R.520). The same males whose lives depend on one another in the patrol will later compete robustly with one another over access to a receptive female. Somehow, they resolve the contradictions involved in having conflicting

interests in different contexts, which implies their mutual recognition of shared responsibilities. Male group members rescue individuals taken prisoner by intruders. This spontaneous high level of altruism toward group members in this chimpanzee population reveals the sense of obligation felt by them to help and protect one another. (R.519-20;534-35;594-95).

Another chimpanzee universal that necessarily entails duties and responsibilities is participation in a hierarchy of social dominance. (R.595;583). Male chimpanzees rank-order themselves from alpha (top) to omega (bottom) in linear fashion. (R.595). Usually there is a single dominant male; but often he only holds that position by the support of other males. In these cases these dominant males demonstrate a sense of duty to their supporters. Chimpanzees are highly protective of their communities, and will go to great lengths to defend them. (R.583).

High-ranking males take on a policing role to ensure group stability, patrolling their territory, chasing away or attacking individuals from neighboring communities. This may take the form of specific, targeted ostracism of individuals who violate norms. The alpha male assumes the duty of exercising community "policing" powers, such as intervening in quarrels or fights between other community members, thus maintaining community integrity and preventing injury. (R.519;551;595-96).

Another indicator of rule-governed social interaction within a group is systematic, long-term reciprocity of favours or benefits among its members. (R.597;535;597;608-09). Chimpanzees cooperate and understand each other's roles. (R.520;522). They reward others and keep track of others' acts and outcomes. (R.521).

Chimpanzees make numerous behavioural adjustments to ensure the welfare of injured or disabled members of the group. When crossing a potentially dangerous road, stronger and more capable adult males investigate the situation before more vulnerable group-members, waiting by the roadside, venture onto the road. The males remain vigilant while taking up positions at the front and rear of the procession. (R.519-20). Taï forest chimpanzees have been seen to help and tend the injuries of wounded individuals for extended periods of time. (R.535).

Wild chimpanzees have duties to see that all members of the group have access to food, that all group members arrive at a feeding source together, and that all group members have access to that source in a manner as to benefit the entire group. (R.606-07;519-20). This requires cognitive concentration, social rules, and a greater sense of social responsibility for the good of the group rather than fulfilling the desires of the individual. (R.606-07).

Advance planning and sharing of information are duties and responsibilities that lies at the heart of chimpanzee survival. (R.624). They react to any change in

the group balance of power, distribution of resources, or inappropriate behaviors and/or alliances, even friendly alliances. Punishment is part of the meat sharing rules. (R.521;536-37).

Chimpanzees engage in remarkably balanced exchanges of food between individuals: not only do food exchanges occur in both directions, individuals are more likely to share with another chimpanzee who groomed them earlier that day. This pattern of grooming and food transfers suggests the presence of reciprocal obligations. In captivity, when presented with an "Ultimatum Game" in which both partners need to cooperate in order to split available rewards equally, chimpanzees ensure a fair distribution of rewards. (R.521-22).

Chimpanzees demonstrate a high sense of solidarity towards ignorant group members, who they will inform about the presence of a danger. (R.537;315-16; 537;608;618). Chimpanzees who acquire language recognize the need to inform others of information of import, and they understand the circumstances that lead to others lacking information they themselves have. (R.618).

Chimpanzees can be trained or learn spontaneously to work collaboratively with at least one other individual to solve a common problem that cannot be solved by a single individual. After experiencing working alongside two different collaborators, chimpanzees prefer to work with a collaborator who has proven

more effective in the past; thus they attribute different degrees of competence to other individuals. (R.520-21).

Chimpanzees readily understand social roles and intentions. They distinguish between individuals who have harmful versus prosocial intentions either towards them or to another, and will direct friendly individuals one way and unfriendly individuals to another. They adapt quickly to role-reversal in cooperative tasks while, in conversations with humans, ASL-trained chimpanzees took turns appropriately. (R.522-23).

Chimpanzees bear duties and responsibilities within chimpanzee/human communities. They prefer fair exchanges, are intolerant of unfair treatment, and keep promises and secrets. Captives who acquire language may remind others of events such as their birthdays and days visitors are expected, that trash needs to be carried out, that drains are clogged, that computer programs are misperforming. Chimpanzees taken outdoors may be asked to promise to be good, not to harm anyone, and to return when asked, and they keep their promises. (R.522;619-20).

Chimpanzees evidence understanding of their duties and responsibilities both in their interactions with human beings and in their interactions with each other (R.597;609-23). They treat humans with care, understanding they are stronger, faster, and more agile than humans (R.523-24;606-07).

A chimpanzee bite can kill a human. Yet, in almost 60 years of observations at Gombe National Park, no chimpanzee has bitten a human. Seven times chimpanzees charged Jane Goodall and her videographer when they were above a steep drop, but did not make contact. These examples of intentions not to harm likely demonstrate that chimpanzees see the long-established relationship with these familiar humans as something they are duty-bound to uphold. (R.551;597).

Captive chimpanzees understand they must remain in certain areas and not harm or scare human beings. When doors are left open they refuse to go into prohibited areas. If unknown humans enter their areas, the chimpanzees avoid them, recognizing that interaction is prohibited by the facility's rules. (R.618).

Any disagreement between a human and a language-using chimpanzee can be solved by explaining the reasons for the action. (R.618-9).

Chimpanzees raised in a setting where humans expect them to become linguistically and socially competent group members, as other chimpanzees expect of chimpanzee children in natural settings, exhibit enhanced abilities to bear duties and responsibilities. (R.583;609-23). They become increasingly trustworthy and responsible as they move into adulthood. (R.618). Having acquired language, they expect humans to explain their intentions and they reciprocate Each interaction becomes a linguistically negotiated contract that can apply and be remembered for days, weeks even years. (R.619).

At Central Washington University, chimpanzees participated in numerous activities with caregivers. Mornings, researchers required the chimpanzees to help clean enclosures by returning their blankets from the night before. The chimpanzees all participated. At lunchtime, they were served soup followed by fresh vegetables only if all chimpanzees ate their soup. If one refused, the others pressured the noneater by offering her the soup and a spoon. The noneater nearly always ate the soup. This individual behavior that affected the group demonstrated their sense of responsibility and duty. (R.583-84).

Both ape and human adult members constantly behave in morally responsible ways as they understand them. Ape children acquire the moral sense, duties, and languages of both cultures and come to desire to engage in mutually responsible moral actions, and display a sense of loyalty, duty, honor, and mutual respect which takes cognizance of the individuality and free will of other self-aware beings. (R.522;607;620).

Adults become capable of "self-assigned" duties and responsibilities and understand how to behave in a manner culturally appropriate for humans. As this occurs, they begin to demonstrate a sense of responsibility. (R.620). Chimpanzees who act aggressively towards a human or other chimpanzee often responded with "SORRY." (R.584-5).

A critical component of the ape child's desire to adopt and to accept duties and responsibilities resided in the emotional cross-cultural attachments between group members. These attachments were identical to those one finds in a human group or in any ape group, but transcended the species boundary. Both ape and human group members express a sense of responsibility to one another and mutually cooperate. (R.608;622).

All members of this cross-cultural linguistic *Pan/Homo* culture treated each other as members of one group in which each had rights, roles, and responsibilities in accord with their abilities and maturity (R.607;609;620-21) for numerous examples. They understood not only what they were doing, but why they were doing it and their understanding increased with age and experience. As they grew older, they assumed a variety of duties for the purpose of demonstrating their abilities to outsiders. (R.622). When outsiders were present, they would assume a responsibility to do things that were more "human-like." (R.609-17;622).

Similarly their recognition of the degree to which persons outside their immediate *Pan/Homo* family misunderstood them increased. They slowed their actions and sounds, exaggerated them, repeated them, blended sounds, gestures and lexigrams and waited until they noted the humans were observing before they engaged them. Close observation of others' behavior while reflecting on their intent, requires knowledge that the "other" has a mind, that the contents of two

minds may differ, and that one must pay attention to the "attention" of the other if one wishes to successfully redirect their perspectives, ideas, and views. (R.622).

Individual chimpanzees vary widely in their interests and in the particular capacities they sought to master, as do human children. Often, if one chimpanzee excelled in some skill, those close in age sought to excel in other skills; this demonstrates an awareness of their individual responsibility to fill a particular niche within the community to maximize group utility. (R.609).

Capacities indicative of chimpanzees' ability routinely to assume duties and responsibilities and to make contractual agreements in the groups with which Dr. Savage-Rumbaugh worked are set out in detail at R.609-17.

NhRP seeks to have Kiko sent to Save the Chimps, a 190 acre premiere chimpanzee sanctuary in Ft. Pierce, Florida. It provides permanent homes for 260 chimpanzees on twelve three-to-five-acre open-air islands that contain hills and climbing structures and provides the opportunity for chimpanzees to make choices about their daily activities (R.93;96). Chimpanzees who previously lived alone or in very small groups for decades become part of large and natural chimpanzee families. (R.93). Grass, palm trees, hills, and climbing structures allow the chimpanzees places to run and roam, visit with friends, bask in the sun, or curl up in the shade, or whatever else they may wish to do (R.96). Save the Chimps has

over fifty employees including two full time veterinarians that provide twenty-four-hour coverage with a support staff of technicians and assistants. (R.96-97).

III. ARGUMENT

A. NhRP HAS STANDING

Anglo-American and New York law have long recognized that interested, though unrelated, third parties, including those who have never met the detained persons, may bring habeas corpus cases on their behalf. *E.g.*, *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772)(godparents for slave); *Case of the Hottentot Venus*, 13 East 185, 104 Eng. Rep. 344 (K.B. 1810)(Abolitionist Society for possible slave); *Lemmon v. People*, 20 N.Y. 562 (1860)(unrelated abolitionist dockworker for slaves); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846)(same petitioner); *People v. McLeod*, 3 Hill 635, 647 note j (N.Y. 1842)("every Englishman...has an undoubted right, by his agents or friends, to...obtain a writ of habeas corpus")(citations omitted).

CPLR 7002(a) provides: "[a] person illegally imprisoned or otherwise restrained of liberty within the state, *or one acting on his behalf*...may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance." (emphasis added). *See People ex rel. Turano v. Cunningham*, 57 A.D.2d 801 (1st Dept. 1977)(friend of incarcerated inmate).

No court has ruled that NhRP lacks standing in any previous petition filed on behalf of a chimpanzee. To the contrary, the court below, in *Stanley*, expressly held NhRP had standing on behalf of Hercules and Leo. 16 N.Y.S.3d at 905.[3]

B. NEITHER RES JUDICATA, COLLATERAL ESTOPPEL, NOR CPLR 7003(B) BARS THIS PETITION.

"A court is always competent to issue a new habeas corpus writ on the same grounds as a prior dismissed writ." *People ex rel. Anderson v. Warden, New York City Correctional Instn. for Men*, 325 N.Y.S.2d 829, 833 (Sup. Ct. 1971). The common law rule permitting relitigation "after the denial of a writ, is based upon the fact that the detention of the prisoner is a continuing one and that the courts are under a continuing duty to examine into the grounds of the detention." *Post v. Lyford*, 285 A.D. 101, 104-05 (3d Dept. 1954)(prior adjudication no bar to new application on same grounds). *See People ex rel. Butler v. McNeill*, 219 N.Y.S.2d 722, 724 (Sup. Ct. 1961)("the ban of res judicata cannot operate to preclude the present proceeding;" petitioner's fifth application). This is because "[c]onventional notions of finality of litigation have no place where life or liberty is at stake[.]" *Sanders v. United States*, 373 U.S. 1, 8 (1963).

CPLR 7003(b) "continues the common law and present position in New York that res judicata has no application to the writ." ADVISORY COMMITTEE

[3] Venue is proper. *See* CPLR 7002(b). *See also Stanley*, 16 N.Y.S.3d at 905-07.

NOTES TO CPLR 7003(b). *See People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874); *People ex rel. Leonard HH v. Nixon*, 148 A.D.2d 75, 79 (3d Dept. 1989).

But the court declined to issue the order to show cause in the Second Kiko Petition on the erroneous grounds that:

> [w]hile successive petitions for a writ of habeas corpus based on the same ground are permissible, 'orderly administration would require, at least, a showing of changed circumstances.' (*People ex rel. Woodward v Berry*, 163 A.D.2d 759, 760 (3rd Dept. 1990), *lv denied* 76 NY2d 712; *People ex rel. Glendening v. Glendening*, 259 A.D. 384, 387 (1st Dept 1940), a*ffd* 284 NYT 598; see *People ex rel. Leonard HH v. Nixon*, 148 AD2d 75, 80-81 (3d Dept 1989).

(R.10). The court's conclusion is unsupported by the common law, CPLR 7003, and the cases cited, and is inconsistent with its recent ruling.

Six months earlier, the same court, in *Stanley*, properly held that neither issue preclusion nor claim preclusion barred the Second Hercules and Leo Petition, despite the absence of any "changed circumstances," *id.*, as there was no final judgment in the prior proceeding. 16 N.Y.S.3d at 908-10. It wrote:

> there must be a final judgment on the merits in a prior proceeding....Respondents cite no authority for the proposition that a declined order to show cause constitutes a determination on the merits, that it has any precedential value, or that a justice in one county is precluded from signing an order to show cause for relief previously sought from and denied by virtue of a justice in another county refusing to sign the order to show cause.

Id. As in *Stanley*, this is merely the second petition filed on Kiko's behalf.[4] An order to show cause was not issued in the First Kiko Petition and personhood was never adjudicated by the Fourth Department. *Id.* at 902-03.

The Suffolk County Supreme Court's refusal to issue the order to show cause in the First Hercules and Leo Petition did not bar a second petition. The *Stanley* court stated:

> the governing statute itself poses no obstacle to this litigation....[T]he Legislature apparently found it necessary to include within the statute a provision permitting, but not requiring, a court to decline to issue a writ under certain circumstances, thereby permitting successive writs a construction reflected in the traditional and general common law rule that *res judicata* has no application in habeas corpus proceedings.

Id. at 908-10.

The lower court also improperly failed to apply the standards for denying successive petitions as set forth in CPLR 7003(b), which states that a court is not required to issue a writ from a successive petition for a writ of habeas corpus *only* if: (1) the legality of a detention has been previously determined by a court of the State in a prior proceeding for a writ of habeas corpus, (2) the petition presents no ground not theretofore presented and determined, *and* (3) the court is satisfied that the ends of justice will not be served by granting it. In this case, none of the elements are satisfied.

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[4] That NhRP may have filed other petitions on behalf of other chimpanzees is irrelevant to the case at bar. (R.10).

First, *Presti* never reached the issue of Kiko's legal personhood. 124 A.D.3d at 1335. Nor did it cite *Lavery*. Its decision rested solely on NhRP's seeking of Kiko's discharge to an appropriate sanctuary rather than unconditional release. *Id.*

Second, the Second Kiko Petition presented substantial new grounds not previously presented and determined in response to *Lavery*. While NhRP disagreed with *Lavery*'s novel personhood standard, it nevertheless provided the lower court with sixty new pages of affidavits that contained facts neither previously presented with respect to Kiko, nor determined by any New York court. These new uncontroverted affidavits demonstrated that chimpanzees routinely bear duties and responsibilities and therefore can be "persons" even under the flawed *Lavery* holding.

As the First Kiko Petition was filed prior to *Lavery*, NhRP could not have anticipated its novel holding. These "changed circumstances" (R.10) alone make the court's dismissal erroneous. This is especially so given there were no changed circumstances presented in the Second Hercules and Leo Petition, yet the same court issued that order to show cause, *supra*.

Third, the court's refusal to issue an order to show cause undermined, rather than furthered the ends of justice. Given the novelty of the personhood issue, NhRP could not have foreseen that the Third Department (the first appellate court to decide a nonhuman habeas corpus case) would, for the first time in the history of

Anglo-American law, hold that a showing of capacity to bear duties and responsibilities was required for legal personhood. Consequently, NhRP did not anticipate or argue the issue or include such facts in the original expert affidavits filed in the First Kiko Petition. Thus, the court's statement that "[a]ll of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the first four petitions," is a *non sequitur*. "Inexcusable neglect exists when the petitioner was aware of the newly presented evidence or ground at the time of a previous application but fails to explain why he did not avail himself of the opportunity then to submit them." *Nixon*, 148 A.D.2d at 81 (citations omitted, emphasis added). NhRP could not have known that duties and responsibilities would be relevant to its argument for personhood at the time it filed the First Kiko Petition. Once *Stanley* determined itself bound by *Lavery*, NhRP immediately assembled affidavits that establish that chimpanzees do bear duties and responsibilities.

Moreover, as the Niagara County Supreme Court refused to issue an order to show cause in the First Kiko Petition, NhRP was never given the required "full and fair opportunity" to litigate the issue of Kiko's personhood. *Allen v. New York State Div. of Parole*, 252 A.D.2d 691 (3d Dept. 1998). As *Stanley* recognized, "claim preclusion and issue preclusion contemplate 'that the parties had a full and

fair' opportunity to litigate the initial determination.'" 16 N.Y.S.3d at 910 (citation omitted). NhRP was "thus not barred by the [Niagara] County disposition from proceeding here." *Id.* "Nor should it be." *Id.* As *Stanley* made clear, the "writ is 'so primary and fundamental,' 'that it must take precedence over considerations of procedural orderliness and conformity.'" *Id.* (citation omitted).

Finally, the three cases relied upon by the court below do not support its ruling. To the contrary, *Woodward* and *Leonard* support the opposite conclusion; both were relied upon by the same court in *Stanley* to justify the issuance of a successive writ. 16 N.Y.S.3d at 909-10. Successive petitions in *Woodward*, 163 A.D.2d at 759-60, and *Glendening*, 259 A.D. 387-88, were dismissed only because their merits had been "fully litigated" in a prior petition and either there were no changed circumstances or none had been claimed. *Glendening* made this clear: "parties to the same habeas corpus proceeding may not continually relitigate *de novo* issues that were fully litigated between them in prior applications in the same proceeding in which long and exhaustive hearings were held where there has been no change in the facts and circumstances determining such issues." *Id.* Kiko's personhood had not been previously decided and there were substantial additional facts presented to meet the unprecedented requirements for legal personhood set forth in *Lavery, supra.*

Without this opportunity to fully litigate Kiko's personhood, Kiko will be

condemned to a lifetime of imprisonment and certain destruction of his bodily liberty and autonomy.

C. KIKO IS A "PERSON" UNDER THE COMMON LAW OF HABEAS CORPUS AND CPLR 7002(A).

1. Person is not synonymous with "human being."

"[L]egal personhood ask[s] in effect, who counts under our law." *Stanley*, 16 N.Y.S.3d at 912 (citing *Byrn*, 31 N.Y.2d at 201). "[U]pon according legal personality to a thing the law affords it the rights and privileges of a legal person[.]" *Byrn*, 31 N.Y.2d at 201 (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909)("Gray"); Hans Kelsen, *General Theory of Law and State* 93-109 (1945); George Whitecross Paton, *A Textbook of Jurisprudence* 349-356 (4th ed., G.W. Paton & David P. Derham eds. 1972)("Paton"); Wolfgang Friedman, *Legal Theory* 521-23 (5th ed. 1967)). Legal persons possess inherent value; "legal things," possessing merely instrumental value, exist for the sake of legal persons. 2 William Blackstone, *Commentaries on the Laws of England* *16 (1765-1769).

"Whether the law should accord legal personality is a policy question[.]" *Byrn*, 31 N.Y.2d at 201 (emphasis added).[5] "Legal person" does not "necessarily

[5] The Court of Appeals' broad use of the word "policy" in *Byrn* encompasses not just what is good and bad, but "principle," what is right or wrong, for "[e]thical considerations can no more be excluded from the administration of justice...than one can exclude the vital air from his room and live." Benjamin N. Cardozo, *The Nature of the Judicial Process* 66 (Yale Univ. Press 1921)(citations omitted).

correspond" to the "natural order." *Id*; *Accord Stanley*, 16 N.Y.S.3d at 916-17. It is not synonymous with human being. *Id. See* Paton, at 349-50, *Salmond on Jurisprudence* 305 (12th ed. 1928)("Th[e] extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination,"); IV Roscoe Pound, *Jurisprudence* 192-93 (1959). "Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol." Paton, *supra* at 393. "There is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." Gray, *supra* Chapter II, 39, citing, among other authorities, those cited in *Byrn*, *supra*.

NhRP's arguments that autonomy is sufficient for common law habeas corpus personhood and that, as an autonomous being, Kiko is entitled to the protections of common law habeas corpus, both as a matter of common law liberty and common law equality, are the policy arguments *Byrn* required. *See Stanley*, 16 N.Y.S.3d at 911-12. The common law of personhood is no different than any other determination of the common law, which itself "consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy, modified and adapted to all the circumstance of all the particular cases that fall within it." *Norway Plains Co. v. Boston and Maine Railroad*, 67 Mass (1 Gray) 263, 267 (1854)(Shaw, C.J.).

"Person" is a legal "term of art." *Wartelle v. Womens' & Children's Hosp.*, 704 So. 2d 778 (La. 1997). "[T]he significant fortune of legal personality is the capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). "Person" has never been equated with being human and many humans have not been persons. "Person" may be narrower than "human being." A human fetus, which *Byrn*, 31 N.Y.2d at 199, acknowledged, "is human," was not characterized as a Fourteenth Amendment "person." *See Roe v. Wade*, 410 U.S. 113 (1973). Human slaves were not "persons" in New York until the last slave was freed in 1827 or throughout the entire United States prior to the ratification of the Thirteenth Amendment in 1865. *See, e.g., Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828).[6] Women were not "persons" for many purposes until well into the twentieth century. *See* Robert J. Sharpe and Patricia I. McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (2007). *Accord Stanley*, 16 N.Y.S.3d at 912.

On the other hand, corporations have long been "persons" within the meaning of the Fourteenth Amendment. *Santa Clara Cnty. v. Southern Pacific Railroad*, 118 U.S. 394 (1886). An agreement between the indigenous peoples of New Zealand and the Crown, p.10, ¶¶ 2.6, 2.7, and 2.8, recently designated New

[6] *E.g., Trongett v. Byers*, 5 Cow. 480 (N.Y. Sup. Ct. 1826)(recognizing slaves as property); *Smith v. Hoff*, 1 Cow. 127, 130 (N.Y. 1823)(same); *In re Mickel*, 14 Johns. 324 (N.Y. Sup. Ct. 1817)(same); *Sable v. Hitchcock*, 2 Johns. Cas. 79 (N.Y. Sup. Ct. 1800)(same).

Zealand's Whanganui River Iwi as a legal person that owns its riverbed.[7] The Indian Supreme Court designated the Sikh's sacred text as a "legal person." *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, A.I.R. 2000 S.C. 421. Pre-Independence Indian courts designated Punjab mosques as legal persons, to the same end. *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369, ¶15 (Lahore High Court, Full Bench). A pre-Independence Indian court designated a Hindu idol as a "person" with the capacity to sue. *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925).

The struggles over the legal personhood of human fetuses,[8] slaves,[9] Native Americans,[10] women,[11] corporations,[12] and other entities have never been over whether they are human, but whether justice demands that they "count." As to who

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[7] *WHANGANUI IWI and THE CROWN* (August 30, 2012), available at http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CWhanganuiRiverAgreement.pdf (last viewed September 3, 2015).

[8] *Roe*, 410 U.S. 113; *Byrn*, 31 N.Y.2d 194.

[9] *Compare Trongett*, 5 Cow. 480 (recognizing slaves as property), *with Lemmon*, 20 N.Y. 562 (slaves are free) and *Somerset*, 98 Eng. Rep. at 510 (slavery is "so *odious* that nothing can be suffered to support it but positive law")(emphasis added).

[10] *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879)(though Crook argued that Native Americans "had no more rights in a court of law than beasts of the field", they were, for the first time, deemed "persons" within the meaning of the Federal Habeas Corpus Act); Stephen Dando Collins, *Standing Bear is a Person – The True Story of a Native American's Quest for Justice* 117 (Da Capo Press 2004).

[11] Blackstone, *Commentaries on the Law of England* *442 (1765-1769)("the very being or legal existence of the woman is suspended during the marriage").

[12] While corporations are Fourteenth Amendment "persons," *Santa Clara*, 118 U.S. 394, they are not protected by the Fifth Amendment's Self-Incrimination Clause. *Bellis v. United States*, 417 U.S. 85 (1974).

"counts," *Stanley* noted the "concept of legal personhood, that is, who or what may be deemed a person under the law, and for what purposes, has evolved significantly since the inception of the United States." 16 N.Y.S.3d at 912. Not "very long ago, only caucasian male, property-owning citizens were entitled to the full panoply of legal rights under the United States Constitution." *Id.* "'If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.'" *Id.* (citing *Obergefell v. Hodges*, 135 S.Ct. 2602 (2015)).

Who is deemed a person is a "matter which each legal system must settle for itself." *Byrn*, 31 N.Y.2d at 202 (quoting Gray, *supra*, at 3). The historic question here is whether Kiko should "count" under the common law of habeas corpus.

2. The meaning of "person" in Article 70 is a common law determination.

Who is a "person" within the meaning of the common law of habeas corpus is the most important individual issue that may come before a court. Whether the term "person" in Article 70 may include a chimpanzee is a matter which must be determined under the New York common law of habeas corpus because: (1) the legislature chose not to define "person" in Article 70; (2) the CPLR, particularly Article 70, solely governs procedure; and (3) if Article 70 limits the substantive common law of habeas corpus, it violates the "Suspension Clause" of the New York Constitution, Art. 1 § 4.

First, as "person" is undefined in Article 70, its meaning is to be judicially determined as a matter of common law. *Oppenheim v. Kridel*, 236 N.Y. 156, 163 (1923). When the legislature intends to define a word in the CPLR, it does. *See* CPLR Article 105. But it neither defined "person" nor intended the word to have any meaning apart from its common law meaning. *Siveke v. Keena*, 441 N.Y.S. 2d 631, 633 (Sup. Ct. 1981)("Had the legislature so intended to restrict the application of Article 70 of the CPLR to [infants or persons held by state] it would have done so by use of the appropriate qualifying language."). *See P.F. Scheidelman & Sons, Inc. v Webster Basket Co.*, 257 N.Y.S. 552, 554-55 (Sup. Ct. 1932), *aff'd*, 236 A.D. 774 (4th Dept. 1932). *See also State v. A.M.R.*, 147 Wash. 2d 91, 94-95 (2002)(en banc)(courts look to common law definitions of otherwise undefined word "person" to determine who may appeal certain orders).

Second, the CPLR governs only procedure and may neither abridge nor enlarge a party's substantive rights. CPLR 101 & 102. Therefore it may not abridge substantive common law habeas corpus rights. This necessarily includes the threshold determination of whether Kiko is a "person" within the context of the New York common law of habeas corpus. *See People ex rel. Keitt v. McCann*, 18 N.Y.2d 257, 263 (1966)("Legislature did not intend to change the instances in which the writ was available"); *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 569 (1875)("the act needs no interpretation and is in full accord with the common

law."); *Lavery*, 124 A.D.3d at 150 ("[W]e must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach.").

Third, if Article 70 prevents the court from determining that Kiko is a "person" within the meaning of the common law of habeas corpus, it violates the Suspension Clause of the New York Constitution, Art. 1 § 4, which renders the legislature powerless to deprive an individual of the privilege of the common law writ of habeas corpus. *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939). It "cannot be abrogated, or its efficiency curtailed, by legislative action." *Tweed*, 60 N.Y. at 566. Otherwise the legislature could permanently strip judges of their ability to determine who lives, who dies, who is enslaved, and who is free.

Kiko's thinghood derives from the common law. However, when justice requires, New York courts refashion the common law—especially the common law of habeas corpus—with the directness Lord Mansfield displayed in *Somerset v. Stewart*, when he held human slavery "so *odious* that nothing can be suffered to support it but positive law." 98 Eng. Rep. at 510 (emphasis added). "One of the hallmarks of the writ [is]...its great flexibility and vague scope." *McCann*, 18 N.Y.2d at 263 (citation omitted). Slaves employed the common law writ of habeas corpus to challenge their imprisonment as things. *Lemmon*, 20 N.Y. at 604-06, 618, 623, 630-31 (citing *Somerset*); *In re Belt*, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848); *In*

re Kirk, 1 Edm. Sel. Cas. 315 (citing *Somerset* and *Forbes v. Cochran*, 107 Eng. Rep. 450, 467 (K.B. 1824); *In re Tom*, 5 Johns. 365. Non-slaves long employed it in New York, including (1) apprentices and indentured servants;[13] (2) infants,[14] (3) the incompetent elderly;[15] and (4) mental incompetents.[16]

It is not just in habeas corpus that New York courts freely revise the common law, though habeas corpus law is the broadest and most flexible of all. The Court of Appeals has long rejected the claim that "change...should come from the Legislature, not the courts." *Woods v. Lancet*, 303 N.Y. 349, 355 (1951). *See W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007, 1009 (Sup. Ct. 1998)("For those who feel that the incremental change allowed by the Common Law is too slow compared to statute, we refer those disbelievers to the holding in *Somerset v. Stewart*,...which stands as an eloquent monument to the fallacy of this view"), *aff'd*, 267 A.D.2d 233 (2d Dept. 1999). The *Woods* Court declared: "We abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." 303 N.Y. at 355.

Common law is "lawmaking and policymaking by judges...in principled fashion, to fit a changing society." Kaye, *supra*, at 729. In response to the question in *Woods* whether the Court should bring "the common law of this state, on this

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[13] *People v. Weissenbach*, 60 N.Y. 385, 393 (1875); *In re M'Dowle*, 8 Johns 328 (Sup. Ct. 1811)
[14] *Weissenbach*; *M'Dowle*, *supra*.
[15] *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996)
[16] *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961); *People ex rel. Jesse F. v. Bennett*, 242 A.D.2d 342 (2d Dept. 1997); *In re Cindy R.*, 970 N.Y.S.2d 853 (Sup. Ct. 2012).

question [of whether an infant could bring suit for injuries suffered before birth] into accord with justice[,]" it answered: "we should make the law conform to right." 303 N.Y. at 351. The Court has explained that "Chief Judge Cardozo's preeminent work *The Nature of Judicial Process* captures our role best if judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." *Caceci v. Do Canto, Const. Corp.*, 72 N.Y.2d 52, 60 (1988)(citing Cardozo, *Nature of Judicial Process*, at 152).

New York courts have "not only the right, but the duty to re-examine a question where justice demands it" to "bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past." *Woods*, 303 N.Y. at 355 (citation omitted). *See, e.g.*, *Gallagher v. St. Raymond's R.C. Church*, 21 N.Y.2d 554, 558 (1968)("the common law of the State is not an anachronism, but is a living law which responds to the surging reality of changed conditions"); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 508 (1968)("this court has not been backward in overturning unsound precedent."); *Bing v. Thunig*, 2 N.Y.2d 656, 668 (1957)(a rule of law "out of tune with the life about us, at variance with modern day needs and with concepts of justice and fair dealing...[i]t should be discarded"); *Silver v. Great American Ins. Co.*, 29 N.Y.2d 356, 363 (1972)("Stare decisis does not compel us to follow

blindly a court-created rule...once we are persuaded that reason and a right sense of justice recommend its change."); *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 391 (1916); *Rumsey v. New York and New England Railway Co.*, 133 N.Y. 79, 85 (1892)(quoting 1 *Kent's Commentaries* 477 (13th edition 1884)("cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error")).

The uncontroverted expert affidavits confirm chimpanzees' extraordinarily complex, often human-like, autonomy and ability to self-determine. At every level, chimpanzees are today understood as beings entitled to consideration; they have long been edging toward personhood. Justice therefore requires that the common law of habeas corpus be refashioned in accordance with these present day standards to include Kiko as a common law "person."

3. As an autonomous and self-determining being, Kiko is a common law person entitled to the common law right to bodily liberty that the common law of habeas corpus protects.

The common law writ of habeas corpus is so "deeply rooted in our cherished ideas of individual autonomy and free choice," *Stanley*, 16 N.Y.S.3d at 903-04, that "Anglo-American law starts with the premise of thorough-going self determination." *Natanson v. Kline*, 186 Kan. 393, 406 (1960), *decision clarified on den. of reh'g*, 187 Kan. 186 (1960). The Supreme Court famously held that

> [n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law...."The right to one's person may be said to be a right of complete immunity: to be let alone."

Union P. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)(quoting *Cooley on Torts* 29).

The word "autonomy" derives from the Greek "autos" ("self") and "nomos" (law"). Michael Rosen, *Dignity – Its History and Meaning* 4-5 (2012). Its deprivation is a deprivation of common law dignity, *People v. Rosen*, 81 N.Y. 2d 237, 245 (1993); *Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986); *In re Gabr*, 39 Misc. 3d 746, 748 (Sup. Ct. 2013), that "long recognized the right of competent individuals to decide what happens to their bodies." *Grace Plaza of Great Neck, Inc. v. Elbaum*, 82 N.Y.2d 10, 15 (1993). *See, e.g.*, *Rivers*, 67 N.Y.2d at 492; *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (1914).

New York common law so supremely values autonomy that it permits competent adults to decline life-saving treatment. *Matter of Westchester Cnty. Med. Ctr. (O'Connor)*, 72 N.Y.2d 517, 526-28 (1988); *Rivers*, 67 N.Y.2d. at 493; *People v. Eulo*, 63 N.Y. 2d 341, 357 (1984). This "insure[s] that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires." *Rivers*, 67 N.Y.2d at 493. It

permits a permanently incompetent, once-competent human to refuse medical treatment, if he clearly expressed his desire to refuse treatment before incompetence silenced him, and no over-riding state interest exists. *Matter of Storar*, 52 N.Y.2d 363, 378 (1981). Even those who will never be competent, who have always lacked the ability and always will lack the ability, to choose, understand, or make a reasoned decision about medical treatment possess common law autonomy and dignity equal to the competent. *Matter of M.B.*, 6 N.Y.3d at 440; *Rivers*, 67 N.Y.2d at 493 (citing *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728 (1977)); *Matter of Storar*, 52 N.Y.2d at 380

The capacity of chimpanzees such as Kiko for autonomy and self-determination, which subsume many of their numerous complex cognitive abilities, are set forth in the Expert Affidavits attached to the Second Kiko Petition. In June 2013, the NIH recognized the ability of chimpanzees to choose and self-determine. Accepted Recommendation EA7 states: "The environmental enrichment program developed for chimpanzees must provide for relevant opportunities for choice and self determination." (R.190). The NIH noted "[a] large number of commenters who responded to this topic strongly supported this recommendation as a way to ensure both the complexity of the captive environment and chimpanzees' ability to exercise volition with respect to activity, social grouping, and other opportunities." (*Id.*)

4. Fundamental principles of equality entitle Kiko to the bodily liberty that the common law of habeas corpus protects.

Kiko is entitled to common law personhood and the right to bodily liberty as a matter of common law equality, too. Equality has always been a vital New York value, embraced by constitutional law, statutes, and common law.[17] Article 1, § 11 of the New York Constitution contains both an Equal Protection Clause, modeled on the Fourteenth Amendment, and an anti-discrimination clause. "[T]he principles expressed in those sections [of the Constitution] were hardly new." *Brown v. State*, 89 N.Y.2d 172, 188 (1996). As the Court of Appeals explained: "cases may be found in which this Court identified a prohibition against discrimination in the Due Process Clauses of earlier State Constitutions, clauses with antecedents traced to colonial times" *Id.* (citations omitted).

New York equality values are embedded into New York common law. At common law, such private entities as common carriers, victualers, and innkeepers may not discriminate unreasonably or unjustly. *See, e.g., Hewitt v. New York, N.H. & H.R. Co.*, 284 N.Y. 117, 122 (1940)("At common law, railroad carriers are under a duty to serve all persons without unjust or unreasonable advantage to any. So this court has said that a carrier should not 'be permitted to unreasonably or

[17] Equality is a fundamental value throughout Western jurisprudence. *See Vriend v. Alberta*, 1 R.C.S. 493, 536 (Canadian Supreme Court 1998)(Cory and Iacobucci, JJ)("The concept and principle of equality is almost intuitively understood and cherished by all."); *Miller v. Minister of Defence*, HCJ 4541/94, 49(4) P.D. 94, ¶6 (Israel High Court of Justice 1995)(Strasberg-Cohen, T., J.)("It is difficult to exaggerate the importance and stature of the principle of equality in any free democratic society.").

unjustly discriminate against other individuals to the injury of their business where the conditions are equal.'")(citation omitted); *New York Tel. Co. v. Siegel-Cooper Co.*, 202 N.Y. 502, 508 (1911); *Lough v. Outerbridge*, 143 N.Y. 271, 278 (1894); *People v. King*, 110 N.Y. 418, 427 (1888).

New York equality is not merely a product of its constitutions, statutes, and common law operating independently. Two decades ago, Chief Judge Kaye confirmed that the two-way street between common law decision-making and constitutional decision-making had resulted in a "common law decision making infused with constitutional values." Kaye, *supra*, at 747. In harmony with common law equality principles that forbid private discrimination, the common law of equality embraces, at minimum, its sister fundamental constitutional equality value—embedded within the New York and the United States Constitutions—that prohibits discrimination based on irrational means or illegitimate ends. *Romer v. Evans*, 517 U.S. 620, 633 (1996)("'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.'")(citation omitted).

Common law equality decision-making differs from constitutional equal protection decision-making in that it has nothing to do with a "respect for the separation of powers." *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985). Instead it applies constitutional equal protection values to an evolving

common law. The outcomes of similar common law and constitutional cases may therefore be different.

For example, in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), the Court affirmed the constitutionality of New York's statutory limitation of on same-sex marriage. "The critical question [wa]s whether a rational legislature could decide that these benefits should be given to members of opposite-sex couples, but not same-sex couples." *Id.* at 358. The Court held the legislature could rationally decide that children do best with a mother and father. *Id.* at 359-60. In the face of a dissent that concluded, "I am confident that future generations will look back on today's decision as an unfortunate misstep," *id.* at 396 (Kaye, C.J., dissenting), the majority "emphasize[d]...we are deciding only this constitutional question. It is not for us to say whether same-sex marriage is right or wrong." *Id.* at 366.

In contrast, a classification's appropriateness is crucial to a court deciding common law. It *should* decide what is right and wrong. Its job *is* to do the "right thing." When it is time to rule on the merits, this Court *should* recognize Kiko's common law personhood. This Court *should* determine that the classification of a chimpanzee as a "legal thing" invokes an illegitimate end. This Court *should* decide that Kiko has a common law right to bodily liberty sufficient to entitle him to a writ of habeas corpus and a chance to live the autonomous, self-determining life of which he is capable.

Kiko's common law classification as a "thing," unable to possess any legal rights, rests upon an illegitimate end. *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001). *See, e.g., Goodridge v. Dep't of Public Health*, 440 Mass. 309, 330 (2003); *Cleburne*, 473 U.S. at 452 (Stevens, J., concurring).

> Without such a requirement of legitimate public purpose it would seem useless to demand even the most perfect congruence between means and ends, for each law would supply its own indisputable - and indeed tautological fit: if the means chosen burdens one group and benefits others, then the means perfectly fits the end of burdening just those whom the law disadvantage and benefitting just those it assists.

Laurence H. Tribe, *American Constitutional Law* 1440 (second ed. 1988).

In *Romer*, the Court struck down "Amendment 2," because its purpose of repealing all existing anti-discrimination positive law based upon sexual orientation, was illegitimate. 517 U.S. at 626. It violated equal protection because "[i]t is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board." *Id.* at 633. Amendment 2 was "simply so obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violated basic equal protection values." *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997); *Mason v. Granholm*, 2007 WL 201008 (E.D. Mich. 2007); *Goodridge*, 440 Mass. at 330 (same-sex marriage ban impermissibly "identifies persons by a single trait and then denies them protection across the board"). The true test is whether persons are

similarly situated for purposes of the law challenged. *Kerrigan v. Comm'r of Public Health*, 289 Conn. 135, 158 (2008).

Denying Kiko his common law right to bodily liberty solely because he is a chimpanzee is a tautology. "'[S]imilarly situated' [cannot] mean simply 'similar in the possession of the classifying trait.' All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test." *Varnum v. O'Brien*, 763 N.W. 2d 862, 882-83 (Iowa 2009)(citations omitted). The "equal protection guarantee requires that laws treat all those who are similarly situated with respect to the purposes of law alike." *Id.*

In *Goodridge*, the court swept aside the argument that the legislature could refuse same-sex couples the right to marry because the purpose of marriage is procreation, which they could not accomplish. 440 Mass. at 330. This argument "singles out the one unbridgeable difference between same-sex and opposite sex couples, and transforms that difference into the essence of legal marriage." *Id.* at 333.

No one doubts that, if Kiko were human, the court would instantly issue a writ of habeas corpus and discharge him immediately. Kiko is imprisoned for one reason: he is a chimpanzee. Possessing that "single trait," he is "denie[d]...protection across the board," *Romer*, 517 U.S. at 633, to which his autonomy and ability to self-determine entitle him.

All nonhuman animals were once believed unable to think, believe, remember, reason, and experience emotion. Richard Sorabji, *Animal Minds & Human Morals – The Origins of the Western Debate* 1-96 (1993). Today, not only do the Expert Affidavits attached to the Second Kiko Petition and the June 13, 2013 NIH acceptance of The Working Group's recommendations confirm chimpanzees' extraordinarily complex, often human-like, autonomy and ability to self-determine and expose those ancient, pre-Darwinian prejudices as untrue, but so does the 2011 report of the Institute of Medicine and National Research Council of the National Academies discussing the use of chimpanzees in biomedical research:

> Chimpanzees live in complex social groups characterized by considerable interindividual cooperation, altruism, deception, and cultural transmission of learned behavior (including tool use). Furthermore, laboratory research has demonstrated that chimpanzees can master the rudiments of symbolic language and numericity, that they have the capacity for empathy and self-recognition, and that they have the human-like ability to attribute mental states to themselves and others (known as the "theory of mind"). Finally, in appropriate circumstances, chimpanzees display grief and signs of depression that are reminiscent of human responses to similar situations.[18]

For centuries New York courts rejected slavery, a status that strips the slave of her autonomy and harnesses her to her master's will. *Lemmon*, 20 N.Y. 562, is acknowledged as "one of the most extreme examples of hostility to slavery in

[18] *Chimpanzees in Biomedical and Behavioral Research - Assessing the Necessity* 27 (Bruce M. Altevogt, *et. al*, eds., The National Academies Press 2011).

Northern courts[.]" Paul Finkleman, *Slavery in the Courtroom* 57 (1985). "'[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.'" 16 N.Y.S.3d at 917-18 (citation omitted). The legal personhood of chimpanzees, at least with respect to their right to a common law writ of habeas corpus, is one of those truths; their legal thinghood has become an anachronism.

Humans who have never been sentient or conscious or possessed of a brain *should* have basic legal rights. But if humans bereft even of sentience are entitled to personhood, then this Court must either recognize Kiko's just equality claim to bodily liberty or reject equality. Abraham Lincoln understood that the act of extending equality protects everyone: "[i]n *giving* freedom to the slave, we *assure* freedom to the free, honorable alike in what we give, and what we preserve." 5 *Collected Works of Abraham Lincoln* 537 (Roy P. Basler, ed. 1953)(annual message to Congress of December 1, 1862)(emphasis in original).

NhRP claims only that Kiko has a common law right to bodily liberty protected by the common law of habeas corpus. What, if any, other common law rights Kiko possesses will be determined on a case-by-case basis. *See Byrn*, 31 N.Y.2d at 200 (fetuses are "persons" for some purposes including inheritance, devolution of property, and wrongful death, while not being "persons in the law in the whole sense," such as being subject to abortion).

D. THE THIRD DEPARTMENT'S TWO NOVEL RULINGS IN *LAVERY* WERE ERRONEOUS.

1. *Lavery* erroneously held that the capacity to bear duties and responsibilities "collectively" at the level of species is necessary for being a legal "person."

In arriving at the erroneous ruling, *Lavery*: (1) relied on inapposite cases; (2) failed to recognize that the legislature has already determined some animals are persons under Estates Powers and Trusts Law ("EPTL") 7-8.1; (3) relied almost exclusively on two law review articles that contain a lone professor's minority personal philosophical preference; (4) ignored *Byrn's* establishing that personhood is a matter of policy, *supra*; and (5) failed to address the detailed uncontroverted policy arguments, based upon fundamental common law values of liberty and equality.

Lavery is the first decision to hold that an inability to bear duties and responsibilities allows a court to deny a fundamental common law right to an individual (except in the individual's own interests), much less an autonomous, self-determining entity seeking a common law writ of habeas corpus. Significantly however, *Lavery* was based neither on precedent nor sound policy. It stated that "animals have never been considered persons for the purpose of habeas corpus relief, nor have they been explicitly considered as persons or entities for the purpose of state or federal law." 124 A.D.3d at 150. This is true only because no such claim had ever been presented. Moreover, the New York statute that allows

nonhuman animals to be trust beneficiaries and provides for an enforcer who "performs the same function as a guardian ad litem for an incapacitated person," *In re Fouts*, 677 N.Y.S.2d 699, 700 (Sur. Ct. 1998), contradicts *Lavery*'s assertion that New York legal personhood is premised upon the ability to bear duties and responsibilities and that nonhuman animals have never been considered "persons" under New York law.

Further, NhRP did not bring its cases in federal court or ground its claims on any statute or constitution. Its cause of action is common law. The cases cited in *Lavery* were therefore irrelevant because they were federal cases that had either been dismissed pursuant to Article III or because the enabling statute's definition of "person" did not include nonhuman animals. 124 A.D.3d at 150. None were common law claims; all involved statutory or constitutional interpretation. *See Lewis v. Burger King*, 344 Fed. Appx. 470 (10th Cir. 2009)(rejecting plaintiff's claim that her service dog had standing to sue under the Americans with Disabilities Act of 1990); *Cetacean Community v. Bush*, 386 F. 3d 1169 (9th Cir. 2004)(all cetaceans of the world lacked standing under the Endangered Species Act and were not within that statute's definition of "person."); *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment*, 842 F. Supp.2d 1259 (S.D. Cal. 2012)(legislative history makes clear Thirteenth Amendment was only intended to apply to human beings); *Citizens to End Animal*

Suffering & Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45 (D. Mass. 1993)(dolphin not a "person" within meaning of Administrative Procedures Act, sec. 702). Each court, however, agreed that a nonhuman animal could be a "person" if Congress intended, but concluded that, with respect to the enactments involved, Congress had not so intended. *Lewis*, 344 Fed. Appx. at 472; *Cetacean Community*, 386 F.3d at 1175-76; *Tilikum*, 842 F. Supp.2d at 1262 n.1; *New England Aquarium*, 842 F. Supp.2d at 49. *See Lavery*, 124 A.D.3d at 150 ("we must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach").

Similarly, none of the cases cited in *Lavery* support its statement that "habeas corpus has never been provided to any nonhuman entity," *id.*, if what that court meant was that no entity that could possibly be detained against its will has ever been denied a writ of habeas corpus. *See United States v. Mett*, 65 F. 3d 1531, 1534 (9th Cir. 1995)(corporation permitted to utilize writ of *coram nobis*); *Waste Management of Wisconsin, Inc. v. Fokakis*, 614 F. 2d 138, 140 (7th Cir. 1980)(corporation refused habeas corpus "because a corporation's entity status precludes it from being incarcerated or ever being held in custody."); *Graham v. State of New York*, 25 A.D.2d 693 (3d Dept. 1966)(habeas corpus purpose is to free prisoners from detention, not secure return of inanimate personal property); *Sisquoc Ranch Co. v. Roth*, 153 F. 2d 437, 439 (9th Cir. 1946)(corporation with

contractual relationship with human lacked standing to seek corporate habeas corpus). Thus, no nonhuman who could possibly be imprisoned had ever sought a writ of habeas corpus.

The novelty of Kiko's claim is no reason to deny him relief. *See, e.g.*, *Crook*, 25 F. Cas. at 697 (that no Native American had sought habeas relief did not foreclose petitioner from being designated a "person" and awarded habeas relief); *Somerset*, *supra* (that no human slave had been granted habeas relief was no obstacle to court's grant of habeas relief); *see also Lemmon*, 20 N.Y. 562.

Lavery did not ground its ruling that duties and responsibilities are required for personhood on relevant precedent. It merely noted that

> the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity of rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system. (see Richard L. Cupp, Jr., "Children, Chimps, and Rights: Arguments from 'Marginal' Cases,'" 45 *Ariz. St. LJ* 1, 12-14 (2013); Richard L. Cupp, Jr., "Moving Beyond Animal Rights: A Legal Contractualist Critique," 46 *San Diego L. Rev.* 27, 69-70 (2009); *see also Matter of Gault*, 387 U.S. 1, 20-21 (1967); *United States v. Barona*, 56 F.3d 1087, 1093-1094 (9th Cir. 1995), *cert. denied* 516 US 1092 (1996). Under this view, society extends rights in exchange for an express or implied agreement of its members to submit to social responsibilities. In other words, "Rights [are] connected to moral agency and the ability to accept societal responsibility for [those] rights" [citing the two Cupp articles].

124 A.D.3d at 151. Neither *Gault* nor *Barona* are relevant. *Gault*'s unexplained and isolated mention of a "social compact" was irrelevant to its determination that

children were entitled to due process and is irrelevant to the case at bar. *Barona* merely concerned an interpretation of the phrase "the People of the United States." 56 F.3d at 1093-94. The two Cupp articles merely set forth one professor's unsupported preference for a narrow philosophical contractualism that arbitrarily excludes every nonhuman animal, while including every human being, in support of which he cites no cases.[19]

Habeas corpus has always been available to aliens and others not part of a fictitious "social contract." In *Rasul v. Bush*, 542 U.S. 466, 481-82 & n.11 (2004), the Supreme Court stated:

> Application of the habeas statute to persons[20] detained at the base (in Guantanamo) is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm ...[Citing, *inter alia*, *Somerset* and *Case of the Hottentot Venus*]
>
> American courts followed a similar practice in the early years of the Republic. See, *e.g.*, *United States v. Villato*, 2 Dall. 379 (CC Pa. 1797)(granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States) [citations omitted]

In *Jackson v. Bulloch*, 12 Conn. 38, 42-43 (1837), a slave was freed pursuant to habeas corpus despite being excluded from the social compact. Because of culture or disability, many are unable to be part of a social compact, as chimpanzees may

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[19]Even contractualist philosophers may argue it embraces nonhuman animals. *E.g.*, Thomas M. Scanlon, *What We Owe Each Other* 179, 183 (1998).

[20]These Guantanamo petitioners were not part of any "social contract," as the United States alleged they desired to destroy any social contract that may exist. Still they were eligible for habeas corpus.

be; others may loathe our social compact and seek to destroy it. Nevertheless they may avail themselves of habeas corpus.

Lavery ignored the teachings of *Byrn* that "[w]hether the law should accord legal personality is a policy question," "[i]t is not true...that the legal order necessarily corresponds to the natural order," and "[t]he point is that it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence." 31 N.Y.2d at 201; *see* Paton, *supra* at 349-50. *Lavery* failed to recognize that whether a chimpanzee is a "person" for the purpose of demanding a common law writ of habeas corpus is entirely a policy, and not a biological, question. It further failed to address the powerful uncontroverted policy arguments, based upon fundamental common law values of liberty and equality, that NhRP presented in detail. (R.730-777).

In sister common law countries, an entity may be a "person" without having the capacity to shoulder duties or responsibilities, *supra.*

Esteemed commentators cited both by the *Byrn* majority and the Indian Supreme Court agree, *supra.* As Gray explained, there may be

> systems of law in which animals have legal rights...animals may conceivably be legal persons...when, if ever, this is the case, the wills of human beings must be attributed to the animals. There seems no essential difference between the fiction in such cases and those where, to a human being wanting in legal will, the will of another is attributed.

Id. at 43. The New York Legislature recognized this when it enacted EPTL 7-8.1, which provided for an "enforcer" to enforce the nonhuman animal beneficiary's right to the trust corpus.

Further, *Lavery* mistook NhRP's demand for the "immunity-right" of bodily liberty, to which the ability to bear duties and responsibilities is by definition irrelevant, for a "claim-right." Linking personhood to an ability to bear duties and responsibilities is particularly inappropriate in the context of common law habeas corpus to enforce the fundamental common law immunity-right to bodily integrity. The court's linkage of the two caused it to commit a "category of rights" error by mistaking an "immunity-right" for a "claim-right." *See generally*, Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913). Hohfeld's conception of the comparative structure of rights has long been employed as the overwhelming choice of courts, jurisprudential writers, and moral philosophers when they discuss what rights are. Hohfeld began his famous article by noting that "[o]ne of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties'" and that "the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense." *Id.* at 28, 30.

Hohfeld noted, *id.* at 27, that even John Chipman Gray made the same mistake as did the *Lavery* court in his *Nature and Sources of the Law*.

> In [Gray's] chapter on "Legal Rights and Duties," the distinguished author takes the position that a right always has a duty as its correlative; and he seems to define the former relation substantially according to the more limited meaning of 'claim.' Legal privileges, powers, and immunities are *prima facie* ignored, and the impression conveyed that all legal relations can be comprehended under the conceptions, 'right' and 'duty.'[21]

A claim-right, which NhRP did not demand either in *Lavery* or the case at bar, is comprised of a correlative claim and duty. Steven M. Wise, *Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VERMONT L. REV. 807-10 (1998). The most conservative, narrow, and uncommon, way to identify which entity possesses a claim-right is to require that entity to have the capacity to assert claims within a moral community. *Id.* at 808-10. This is akin to the personhood test applied in *Lavery*.

In neither *Lavery* nor the case at bar did NhRP seek a claim-right. Instead it sought the immunity-right to bodily liberty protected by a common law writ of habeas corpus. This is the sort of immunity right that the Supreme Court was referring to in *Botsford*, 141 U.S. at 251, *supra* at XXX. An immunity-right correlates not with a duty, but with a disability. Wise, *Hardly a Revolution*, *supra* at 810-15. Other examples of fundamental immunity-rights are the Thirteenth

[21] Gray's error becomes obvious when one recalls that Gray also agreed that both animals and supernatural beings could be "persons." *See* Gray, *supra* at 10.

Amendment right not to be enslaved, which disables others from enslaving those covered by that Amendment, and the First Amendment right to free speech, which the government is disabled from abridging. The ability to bear duties and responsibilities is logically not necessary to possess the rights to bodily liberty, freedom from enslavement, and free speech.

Harris v. McRea, 448 U.S. 297, 316-18, 331 (1980) illustrates the difference between a claim-right and an immunity-right. The plaintiff claimed she had the claim right to have the state pay for an abortion she was unable to afford because of *Roe v. Wade's* recognition of a woman's right to privacy against interference by the state with her decision to have an abortion. The Court recognized her immunity right to an abortion correlated with the state's disability to interfere in her decision to have the abortion, not with the state's duty to fund the abortion. NhRP argues Kiko has the common law immunity right to bodily liberty protected by common law habeas corpus which correlates with Respondents' disability to imprison him. Kiko's ability to bear duties and responsibilities is irrelevant to his fundamental immunity-right to bodily liberty.

The ability to bear duties and responsibilities is not even a prerequisite for the claim-right of a "domestic or pet" animal in New York, pursuant to EPTL 7-8.1, to the money placed in the trust to which that nonhuman animal is a named beneficiary.

2. The Third Department improperly took judicial notice that chimpanzees lack the capacity to bear duties and responsibilities.

Lavery improperly took judicial notice of the alleged scientific fact that chimpanzees cannot bear duties and responsibilities. 124 A.D.3d at 151. *See Hamilton v. Miller*, 23 N.Y.3d 592, 603-04 (2014). A New York court may only take judicial notice of facts "which everyone knows," *States v. Lourdes Hosp.*, 100 N.Y.2d 208, 213 (2003), or which are indisputable. *TOA Const. Co. v. Tsitsires*, 54 A.D.3d 109, 115 (1st Dept. 2008). "'The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof.'" *Dollas v. W.R. Grace & Co.*, 225 A.D.2d 319, 320 (1st Dept. 1996)(citation omitted).

That chimpanzees cannot bear duties and responsibilities is not an adjudicative fact. Judicial notice is generally inappropriate in "scientifically complex cases." *Hamilton*, 23 N.Y.3d at 603-04. As it is inappropriate to take judicial notice of scientific facts found in "statutory preambles," *id.*, it was inappropriate for the Third Department to take judicial notice of a complex scientific fact based on two law review articles. *Lavery*, 124 A.D.3d at 151. The source of the underlying information must be of "indisputable accuracy," *Crater Club v. Adirondack Park Agency*, 86 A.D.2d 714, 715 (3d Dept. 1982), and so "patently trustworthy as to be self-authenticating." *People v. Kennedy*, 68 N.Y.2d

569, 577 (1986). Judicial notice was further inappropriate "because of the novelty of the issue in this State." *Brown v. Muniz*, 61 A.D.3d 526, 528 (1st Dept. 2009).

3. Kiko can bear duties and responsibilities.

If this Court finds the capacity to bear duties and responsibilities has some relationship to being a "person" for the purpose of a common law writ of habeas corpus and Article 70, the uncontroverted expert evidence presented by the NhRP in the Supplemental Affidavits and Affidavit of Dr. Jane Goodall, both attached to the Second Kiko Petition, prove that chimpanzees routinely bear duties and responsibilities in their own communities and human/chimpanzee communities. This is sufficient, according to *Lavery*, for personhood to the extent of Kiko's ability to invoke common law habeas corpus.

If this Court further agrees with *Lavery* that being a member of a species that "collectively" has the capacity to bear duties and responsibilities is necessary to be a "person," 124 A.D.3d at 152 n.3, then the uncontroverted Supplemental Affidavits and the Affidavit of Jane Goodall attached to the Second Kiko Petition make clear that chimpanzees "collectively" possess this capacity.

E. AS KIKO IS ILLEGALLY IMPRISONED, HE IS ENTITLED TO A COMMON LAW WRIT OF HABEAS CORPUS.

1. As an autonomous "person" entitled to bodily liberty, Kiko's detention is unlawful.

All autonomous common law natural persons are presumed to be entitled to personal liberty (*in favorem libertatis*). *See Oatfield v. Waring*, 14 Johns. 188, 193 (Sup. Ct. 1817)(concerning a slave's manumission, "all presumptions in favor of personal liberty and freedom ought to be made"); *Fish v. Fisher*, 2 Johns. Cas. 89, 90 (Sup. Ct. 1800)(Radcliffe, J.); *People ex. rel Caldwell v Kelly*, 13 Abb.Pr. 405, 35 Barb. 444, 457-58 (Sup Ct. 1862)(Potter, J.). As the uncontroverted Expert Affidavits make clear, Kiko is autonomous; his detention is therefore unlawful.

New York common law incorporated the common law of England, which was long *in favorem libertatis* ("in favor of liberty"). Francis Bacon, "The argument of Sir Francis Bacon, His Majesty's Solicitor General, in the Case of the Post-Nati of Scotland," in IV *The Works Of Francis Bacon, Baron of Verulam, Viscount St. Alban And Lord Chancellor* 345 (1845)(1608); 1 Sir Edward Coke, *The First Part of the Institutes of the Laws of England* sec. 193, at *124b (1628); Sir John Fortescue, *De Laudibus Legum Angliae* 105 (S.B. Chrimes, trans. 1942 [1545]). *See, e.g., Moore v. MacDuff*, 309 N.Y. 35, 43 (1955); *Whitford v. Panama R. Co.*, 23 N.Y. 465, 467-68 (1861); *In re Kirk*, 1 Edm. Sel. Cas. at 327; *Oatfield*, 14 Johns. at 193; *Fish*, 2 Johns. Cas. at 90 (Radcliffe, J.); *Kelly*, 33 Barb. at 457-58

(Potter, J.)("Liberty and freedom are man's natural conditions; presumptions should be in favor of this construction."). New York statutes harmonize with this common law presumption. *See* N.Y. Stat. Law § 314 (McKinney)("A statute restraining personal liberty is strictly construed"); *People ex rel. Carollo v. Brophy*, 294 N.Y. 540, 545 (1945); *People v. Forbes*, 19 How. Pr. 457, 11 Abb.Pr. 52 (N.Y. Sup. Ct. 1860)(statutes must be "executed carefully in favor of the liberty of the citizen").

After petitioner makes a *prima facie* showing of illegal detention, a court must issue the order to show cause without delay. CPLR 7003(a). Respondent must then present facts that show the detention is lawful. CPLR 7006(a); CPLR 7008 (b). As with any other unlawfully imprisoned "person" in New York, if Respondents fail to set forth the cause of and sufficient authority for Kiko's detention, he must be discharged forthwith. *See* CPLR 7010(a); *People ex re. Stabile v. Warden of City Prison*, 202 N.Y. 138, 152 (1911).

2. Kiko, being unlawfully detained, is entitled to immediate discharge to a sanctuary.

That NhRP seeks Kiko's discharge to a sanctuary rather than unconditional release onto the streets of New York does not preclude habeas corpus relief. *Stanley* properly rejected the argument that because NhRP sought "[Hercules and Leo's] transfer to a chimpanzee sanctuary, it has no legal recourse to habeas corpus," concluding that *Presti* conflicted with First Department and Court of

Appeals precedent. 16 N.Y.S.3d at 917 n.2 (citing *McGraw*, 220 A.D.2d at 292; *Matter of MHLS ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989)). *See McCann*, 18 N.Y.2d at 273; *Johnston*, 9 N.Y.2d at 485 (habeas proper remedy to test validity of transfer from state prison to state hospital for the insane); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943)(commitment to reformatory)' *People ex rel. LaBelle v. Harriman*, 35 A.D.2d 13, 15 (3d Dept. 1970)("Although relator is incarcerated and the writ will not secure his freedom, habeas may be used to obtain relief other than immediate release from physical custody"); *People ex rel. Meltsner v. Follette*, 32 A.D.2d 389, 391 (2d Dept. 1969)(discharge not required); *People ex rel. Ardito v. Trujillo*, 441 N.Y.S.2d 348, 350 (Sup. Ct. 1981). Kiko's case is analogous to the relief accorded to child slaves, juveniles, and the incapacitated elderly.

An unlawfully detained person may be discharged into the care or custody of another. Imprisoned children and incapacitated adults have been discharged from slavery, industrial training schools, mental institutions, and other unlawful imprisonments into the custody of another. *See Lemmon*, 20 N.Y. at 632 (five slave children discharged); *Commonwealth v. Taylor*, 44 Mass. 72, 72-74 (1841)(slave child discharged into care of Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Aves*, 35 Mass. 193 (1836)(slave child discharged to Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Holloway*, 2 Serg. &

Rawle 305 (Pa. 1816)(slave child discharged); *State v. Pitney*, 1 N.J.L. 165 (N.J. 1793)(manumitted child discharged).

New York courts have discharged minors from industrial training schools or other detention facilities through the common law writ of habeas corpus, though they remain subject to the custody of their parents or guardians. *People ex rel. F. v. Hill*, 36 A.D.2d 42, 46 (2d Dept. 1971), *aff'd*, 29 N.Y.2d 17 (1971); *People ex rel. Silbert v. Cohen*, 36 A.D.2d 331, 332 (2d Dept. 1971), *aff'd*, 29 N.Y. 2d 12 (1971); *People ex rel. Margolis v. Dunston*, 174 A.D.2d 516, 517 (1st Dept. 1991); *In re Conroy*, 54 How. Pr. 432, 433-34 (N.Y. Sup. Ct. 1878)

Minors have been discharged from mental institutions into the custody of another, *People ex rel. Intner on Behalf of Harris v. Surles*, 566 N.Y.S.2d 512, 515 (Sup. Ct. 1991), as were child apprentices, *People v. Hanna*, 3 How. Pr. 39, 45 (N.Y. Sup. Ct. 1847); *In re M'Dowle*, 8 Johns 328, and incapacitated adults, *Schuse*, 227 A.D.2d 969 (elderly and ill woman showing signs of dementia); *State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982)(elderly sick woman); *Siveke*, 441 N.Y.S. 2d 631 (elderly ill man).

Habeas corpus may even be used to seek a transfer from one prison or hospital facility to another. *See Wack*, 75 N.Y.2d 751 (mental patient transferred from secure to non-secure facility); *Bennett*, 242 A.D.2d 342; *People ex rel. Richard S. v. Tekben*, 219 A.D.2d 609, 609 (2d Dept. 1995); *People ex rel.*

Kalikow on Behalf of Rosario v. Scully, 198 A.D.2d 250, 251 (2d Dept. 1993)(habeas corpus "available to challenge conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. Meltsner*, 32 A.D.2d at 391-92 (transfer from prison to correctional institution proper); *People ex rel. Ceschini v. Warden*, 30 A.D.2d 649, 649 (1st Dept. 1968).

F. NEW YORK PUBLIC POLICY RECOGNIZES PERSONHOOD FOR SOME NONHUMAN ANIMALS.

The *Byrn* Court made clear that the determination of personhood is a matter of public policy. New York public policy supports Kiko's personhood, as it already recognizes personhood rights in some nonhuman animals, including Kiko, by allowing them to be trust "beneficiaries." *See* EPTL 7-8.1; *Stanley*, 16 N.Y.S.3d at 901. Kiko is a beneficiary of an *inter vivos* trust created by NhRP under EPTL 7-8.1. (R.79-82). Consequently, he is a "person" under that statute, as only "persons" may be trust beneficiaries. *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); *Gilman v. McArdle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) *rev'd on other grounds*, 99 N.Y. 451 (1885). "Before this statute [EPTL 7-8.1] trusts for animals were void, because a private express trust cannot exist without a beneficiary capable of enforcing it, and because nonhuman lives cannot be used to measure the perpetuities period." Margaret Turano, *Practice Commentaries*, N.Y. Est. Powers & Trusts Law 7-8.1 (2013).

In 1996, the Legislature enacted EPTL 7-6 (now EPTL 7-8) (a), which permitted "domestic or pet animals" to be designated as trust beneficiaries. The Sponsor's Memorandum stated the statute's purpose was "to allow animals to be made the beneficiary of a trust."[22] This section thereby acknowledged these nonhuman animals as "persons" capable of possessing legal rights. In *In re Fouts*, 677 N.Y.S.2d 699 (Sur. Ct. 1998), the court recognized that five chimpanzees were "income and principal beneficiaries of the trust" and referred to its chimpanzees as "beneficiaries" throughout.

In *Feger v. Warwick Animal Shelter*, 59 A.D.3d 68, 72 (2d Dept. 2008), the court observed "[t]he reach of our laws has been extended to animals in areas which were once reserved only for people. For example, the law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner."

In 2010, the legislature removed "Honorary" from the title, removed the twenty-one year limitation on trust duration, and amended section (a) to read: "Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive," thereby dispelling any doubt that animals are capable of being beneficiaries in New York.

[22] Sponsor's Mem. NY Bill Jacket, 1996 S.B. 5207, Ch. 159.

As EPTL 7-8.1 created legal personhood in those nonhuman animals within its reach, New York public policy already recognizes that at least some nonhuman animals are capable of possessing one or more legal rights.

IV. CONCLUSION

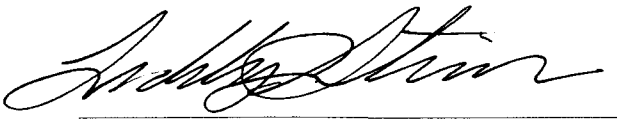
The facts underlying this petition are founded on approximately 165 pages of affidavits from nine of the world's leading experts on chimpanzee cognition from Japan, Germany, Sweden, England, Scotland, and the United States. Based upon the experts' review of hundreds of scientific articles and thousands of hours of personal observations, these affidavits establish that chimpanzees are autonomous, self-aware, and self-determining beings who can bear duties and responsibilities within chimpanzee communities and human/chimpanzee communities, freely choose how to live their lives and suffer from imprisonment. These facts support NhRP's legal arguments that chimpanzees, such as Kiko, are common law "persons" entitled to the common law right to bodily liberty protected by the common law writ of habeas corpus both as a matter of common liberty and common law equality.

Kiko is further entitled to immediate discharge from what will otherwise be a decades-long imprisonment. Kiko cannot be released to Africa or onto the streets of New York State. But he can be released from his imprisonment in New York.

This Court should therefore reverse and remand with instructions to issue the order to show cause for a hearing to determine the legality of Kiko's detention.

Dated: May 17, 2016

Respectfully submitted,



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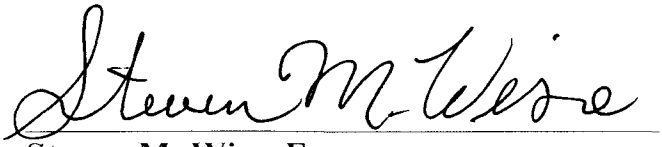

Steven M. Wise, Esq.
(of the bar of the State of Massachusettss)
By permission of the Court
Attorney for Petitioner-Appellant
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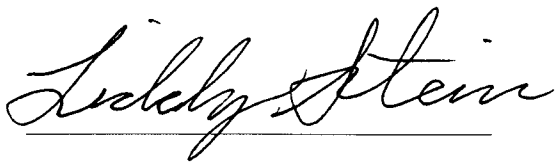
PRINTING SPECIFICATIONS STATEMENT

This brief complies with the page limitation of § 600.10 (d)(1)(i) because it is under 70 pages, excluding the parts of the brief exempted by the rule.

This brief has been prepared in a proportionally spaced typeface using Microsoft® Word 12.2.8 in 14-point font size in Times New Roman. It is 15,633 words, excluding the parts of the brief exempted by § 600.10 (d)(1)(i).

Dated: May 17, 2016



SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary Inc., and THE PRIMATE SANCTUARY INC.,

Respondents-Respondents.

PRE-ARGUMENT STATEMENT

Index No. 150149/2016
NYSCEF Doc. No. 48
Proceeding Commenced
January 7, 2016

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Respondents-Respondents were not represented by counsel in the lower court.

The appeal is taken from an Order of the Supreme Court, New York County
Honorable Barbara Jaffe, J.S.C. entered January 29, 2016.

There is no additional appeal pending in this action.

There are no related actions pending.

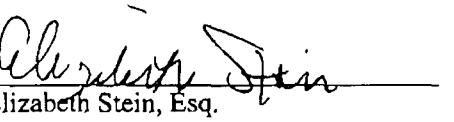
The nature of the underlying proceeding in this action is a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause brought by Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), on behalf of a chimpanzee named Kiko, under CPLR Article 70 seeking a determination of the legality of Kiko's detention and an order requiring his immediate release and transfer to an appropriate primate sanctuary.

The lower court declined to sign the Order to Show Cause on the grounds that: (a) the NhRP "filed four identical petitions with four state trial courts, each in a different county. With each petition, it offered the same nine affidavits. It then recently filed another two petitions in New York County which are identical to those previously filed, except for the addition of affidavits from five of the nine original affiants, along with a sixth from a member of its board of directors. All of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the last four petitions"; (b) it was bound by *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015) in which the court stated that chimpanzees are not "persons" for the purpose of demanding a common law writ of habeas corpus because they are unable to shoulder duties and responsibilities; and (c) "whether evidence of the ability of some chimpanzees to shoulder certain kinds of responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me (*Nonhuman Rights Project v Stanley*, 49 Misc 3d 746 [Sup Ct, New York County 2015 [Jaffe, J.]), are determinations that are best addressed there." A true and correct copy of the Memorandum Opinion is attached herein.

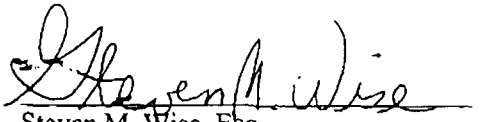
The grounds for seeking reversal of the lower court's order are: (a) Kiko is a "person" within the meaning of CPLR Article 70 and the common law of habeas corpus; (b) the lower court's statement that the NhRP "filed four identical petitions with four state trial courts, each in a different county" is both erroneous and irrelevant to the determination of whether a successive writ of habeas corpus should be granted. Only a single habeas corpus petition was filed on behalf of Kiko and that petition was before the Supreme Court, Niagara County, which refusal to issue an order to show cause was affirmed by the Supreme Court of the State of New York Appellate Division, Fourth Judicial Department in *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den.*, 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015) on the sole ground that Kiko's transfer to a primate sanctuary was an inappropriate remedy for habeas corpus, which directly conflicts with the holding of this Court in *McGraw v. Wack*, 220 A.D.2d 291, 292 (1st Dept. 1995) and *Matter of MHLS v. Wack*, 75 N.Y.2d 751 (1989); (c) the Supreme Court of the State of New York Appellate Division, Third Judicial Department's ("Third Department") ruling in *Lavery* that chimpanzees are not "persons" for the purpose of demanding a common law writ of habeas corpus rested upon the erroneous legal ruling, unprecedented in Anglo-American jurisprudence, that only an entity able to shoulder duties and responsibilities can be a "person" for the purpose of a common law writ of habeas corpus, or for any other purpose; (d) the Third Department's ruling in *Lavery* was erroneous because it improperly took judicial notice of the "fact" that chimpanzees could not shoulder duties and responsibilities, as no evidence bearing on that fact was introduced before either the lower court or the Third Department; the decision therefore is not binding on either the Supreme Court, New York County or this Court; (e) in response to the Third Department's erroneous legal ruling, unprecedented in Anglo-American jurisprudence, that only an entity able to shoulder duties and responsibilities can be a "person" for the purpose of a common law writ of habeas corpus, or for any other purpose, and the Third Department's improper taking of judicial notice of the "fact" that chimpanzees could not shoulder duties and responsibilities, as no evidence bearing on that fact had been introduced before either the lower court or the Third Department, the NhRP provided the lower court in this case with approximately 60 pages of new facts and grounds not previously presented that specifically demonstrated that chimpanzees routinely shoulder duties and responsibilities both within chimpanzee communities and mixed chimpanzee/human communities; (f) these new facts and grounds had not been previously presented in the petition brought by the NhRP on behalf of Kiko in the Supreme Court, Niagara County as it was filed prior to *Lavery* and because neither *Lavery's* unprecedented statement that the ability to shoulder duties and responsibilities is required for personhood nor *Lavery's* improper taking of judicial notice of the "fact' that chimpanzees could not shoulder duties and responsibilities could have been reasonably anticipated; (g) the question of whether the ability to shoulder duties and responsibilities is necessary for a determination of personhood is not "best addressed" by the Third Department, but by this Court, as this Court has never ruled on this issue; and (h) based upon the unrebutted facts presented to the lower court, Kiko is entitled to the immediate issuance of the requested

Order to Show Cause, an appropriate hearing, and an order releasing him forthwith from detention and transfer to an appropriate sanctuary, which the NhRP suggests is Save the Chimps, in Ft. Pierce, Florida.

Date: February 9, 2016

Submitted by: 

Elizabeth Stein, Esq.
Attorney for Petitioner-Appellant



Steven M. Wise, Esq.
Attorney for Petitioner-Appellant
(subject to admission *pro hac vice*)

Attachments:

1. Copy of Order appealed from.
2. Copy of memorandum opinion.
3. Copy of Notice of Appeal.

EXHIBIT 7

Nonhuman Rights Project

By Hand

April 15, 2016

Deputy Clerk of the Court
Margaret Sowha
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Re: *Nonhuman Rights Project, Inc., on behalf of Kiko v. Carmen Presti et al.*, (150149/2016) (New York County)

Dear Deputy Clerk Sowha:

I am a counsel of record for Appellant, The Nonhuman Rights Project, Inc. ("NhRP"), on behalf of Kiko, a chimpanzee, in the above-captioned matter. I write to request leave to file an oversize principal brief in accordance with Rule of Procedure 600.10(d)(1). A copy of the proposed brief is enclosed, which consists of 30,664 words, excluding those portions exempt from the word requirement.

In a case of first impression in this Appellate Department, NhRP brought a petition for a common law writ of habeas corpus and for an order to show cause under CPLR Article 70 in the New York County Supreme Court to determine whether Kiko was being unlawfully detained in the State of New York and whether he was entitled to be released to an appropriate primate sanctuary.

The facts underlying the petition are founded on approximately 165 pages of affidavits from ten of the world's leading experts on chimpanzee cognition from Japan, Germany, Sweden, England, Scotland, and the United States. These affidavits, including one from Dr. Jane Goodall, established, through their review of hundreds of scientific articles and thousands of hours of personal observations, that chimpanzees are autonomous, self-aware, and self-determining beings who

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www.nonhumanrights.org · info@nonhumanrights.org

can bear duties and responsibilities both within chimpanzee communities and within human/chimpanzee communities.

These facts establish the NhRP's legal arguments that chimpanzees are common law "persons" entitled to the common law right to bodily liberty protected by the common law writ of habeas corpus both as a matter of common liberty and common law equality. These arguments are novel, complex, and highly fact-driven. They can only be effectively addressed and understood by a comprehensive review of all of the available science that the NhRP provided to the lower court in the fact section of its memorandum of law.

NhRP has gone to great lengths to make the voluminous and complex expert affidavits easily accessible to the Court in the Statement of Facts section of the proposed Brief. Pages 9-82 of the enclosed brief are therefore devoted exclusively to categorizing and summarizing the experts' extensive findings and conclusions. We respectfully submit to the Court that we cannot effectively present the mass of relevant scientific data necessary to establish our argument for Kiko's personhood in fewer words.

In addition to requiring extra space for the complex factual discussion, NhRP also requires additional space to fully present its legal argument. Because of the novelty of the legal issue of whether a chimpanzee is a common law legal person for purposes of common law habeas corpus relief, our legal arguments draw on numerous aspects of the common law. We demonstrate how the common law right to bodily liberty was developed and applied historically as a matter of common law liberty and equality. We demonstrate the necessity and importance of further developing and expanding the common law as standards of justice, morality, experience, and scientific discovery continue to evolve. This extensive discussion is critical to our arguments for why it is appropriate to apply these common law principles underlying the right to bodily liberty to chimpanzees, who, as discussed, are now recognized—as a matter of scientific certainty—as autonomous, self-aware, and self-determining beings who can bear duties and responsibilities both within chimpanzee communities and within human/chimpanzee communities.

We have painstakingly edited and re-edited this section of the brief over a period of three months for conciseness and to eliminate repetition. We respectfully submit to the Court that we cannot properly convey our legal arguments in fewer words.

Finally, we anticipate Respondents will not be participating in the appeal as they did not appear on our application at the Supreme Court and we have received no indication that they will appear before this Court. Because we do not expect an opposing brief, we address points in our principal brief that would likely have been saved for our reply brief. This principal brief will allow the Court the benefit of our position on certain potential adverse arguments on which the Court may have wished to have had our rebuttal.

Respectfully submitted,

Elizabeth Stein

cc:

Carmen Presti
2764 Livingston Avenue
Niagara Falls, NY 14303

Christie E. Presti
2764 Livingston Avenue
Niagara Falls, NY 14303

The Primate Sanctuary, Inc.
2764 Livingston Avenue
Niagara Falls, NY 14303

EXHIBIT 8

Nonhuman Rights Project

By Hand

April 25, 2016

Deputy Clerk of the Court
Margaret Sowha
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Re: *Nonhuman Rights Project, Inc., on behalf of Kiko v. Carmen Presti et al.*, (150149/2016) (New York County)

Dear Deputy Clerk Sowha:

On April 15, 2016, I submitted a request for leave to file an oversize principal brief in accordance with Rule of Procedure 600.10(d)(1) in the above-captioned matter (see attached), which was denied. The proposed brief consisted of 30,664 words, excluding those portions exempt from the word requirement.

As indicated in my previous letter, a significant portion of our proposed brief was then devoted to the Statement of Facts section that supports the NhRP's legal arguments that chimpanzees are common law "persons" entitled to the common law right to bodily liberty protected by the common law writ of habeas corpus both as a matter of common liberty and common law equality. In drafting and editing that brief, we went to great lengths to categorize and summarize the mass of expert affidavit evidence so that it would be easily accessible to the Court.

In addition, we painstakingly edited and re-edited the legal argument sections of the brief for conciseness and to eliminate repetition. Because we anticipate Respondents will not be participating in the appeal and because we do not expect an opposing brief, we also addressed points in our principal brief that would likely have been saved for our reply brief.

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In response to the denial of our request, we further edited the brief so as to reduce it nearly by half so that it now consists of 15,633 words, excluding those portions exempt from the word requirement. In so doing, we briefly summarized each expert's affidavit in the Statement of Facts and provided the Court with references to the facts in the record. We have also edited our legal arguments to the greatest extent possible while still maintaining their legal integrity.

We therefore respectfully submit to the Court that we cannot properly convey these exceedingly novel, complex, and highly fact-driven arguments in fewer words and respectfully request that the Court grant our request to file the enclosed oversize brief.

Respectfully submitted,

Elizabeth Stein

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EXHIBIT 9

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY INC.,

Respondents-Respondents.

----------x

Affidavit of Elizabeth Stein, Esq. in Support of Motion for Admission of Steven M. Wise *Pro Hac Vice*

STATE OF NEW YORK }
ss:
COUNTY OF NASSAU }

Elizabeth Stein, Esq., being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the courts of the State of New York and am an attorney of record for Petitioner-Appellant, The Nonhuman Rights Project, Inc., ("NhRP") with respect to the above-captioned matter.
2. I am submitting this affidavit in support of the NhRP's motion for the admission *pro hac vice* of Steven M. Wise, Esq. to appear and participate in this action on behalf of the NhRP as he is the most qualified lawyer on the matters at issue in the United States.

3. Attorney Wise is a member in good standing of the Massachusetts Bar and has been admitted to appear *pro hac vice* with me on the same matter in the New York Supreme Court, Niagara County and the Supreme Court of the State of New York Appellate Division, Fourth Judicial Department and in near-identical cases brought in the New York Supreme Court Counties of New York and Fulton, the Supreme Court of the State of New York Appellate Division, Third Judicial Department and the Court of Appeals on the appeals taken from the decisions of the Third and Fourth Departments. He also has been admitted to appear in matters *pro hac vice* in Connecticut, New Hampshire, Vermont, Illinois, Florida, Tennessee and Texas.

4. Attorney Wise is highly qualified and competent in the matters of this case and his assistance is necessary, as set forth in his attached Affidavit.

WHEREFORE, I respectfully pray that the Court grant the NhRP's Notice of Motion for Admission *Pro Hac Vice* of Steven M. Wise, Esq.

Dated: April 22, 2016

Elizabeth Stein, Esq.

Subscribed and Sworn to
before me this
22 day of April, 2016

Notary Public

ELINOR MOLBEGOTT
Notary Public, State Of New York
No. 02MO4674213
Qualified In Nassau County
Commission Expires October 31, 2018

Supreme Court, Appellate Division
First Department
27 Madison Avenue
New York, N.Y. 10010
212-340-0400

Susanna Molina Rojas
Clerk of the Court

May 11, 2016

Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, NY 11040

Re: Nonhuman Rights Project, Inc., on behalf of Kiko v. Carmen Presti et al., Index No. 150149.2016

Dear Ms. Stein:

The Court has granted your application for permission to have Steven M. Wise, Esq., member of the bar of the State of Massachusetts, appear pro hac vice in connection with this appeal.

At the top of the front cover of the brief, at the right, the following should appear:

"To be argued [submitted] by Steven M. Wise, Esq. (of the bar of the State of Massachusetts) by permission of the Court."

At the end of the brief, after the name of the New York attorney for appellant the Nonhuman Rights Project, Inc., Mr. Wise's name should appear as follows:

"Steven M. Wise, Esq. (of the bar of the State of Massachusetts) By permission of the Court."

When the case is called on its appointed date, you should introduce Mr. Wise and request that he be permitted to participate in the appeal. In addition, a copy of this letter must be submitted together with the notice of appearance on the day of oral argument.

Very truly yours,

Susanna M. Rojas

SMR:dt

When the case is called on its appointed date, you should introduce Mr. Wise and request that he be permitted to participate in the appeal. In addition, a copy of this letter must be submitted together with the notice of appearance on the day of oral argument.

Very truly yours,

Susanna M. Rojas

SMR:dt

EXHIBIT 10

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents.

NOTICE OF MOTION TO APPEAL AS OF RIGHT

Index No.: 150149/16
(New York County)

PLEASE TAKE NOTICE that upon Petitioner-Appellant, the Nonhuman Rights Project Inc's. ("NhRP"), annexed Memorandum of Law in Support of Motion to Appeal as of Right and the attached Exhibits 1 and 2 thereto, the undersigned moves this Court to accept the above-captioned appeal as of right pursuant to CPLR 7011. As set forth in the attached memorandum of law, the NhRP sought to perfect its appeal from the lower court's denial of a verified petition for a common law writ of habeas corpus and order to show cause ("Petition") filed by the NhRP on behalf of a chimpanzee named Kiko (Exhibit 1).

The Petition was styled as a "show cause" order pursuant to CPLR 7003(a) as the NhRP was not demanding Kiko's production to the court. The NhRP's counsel was contacted by the Clerk's Office of this Court and informed that it did not have a proper order from which an appeal may be taken and that it did not have an appeal as of right from the court's denial of the Petition. In response to the NhRP's written request, the court filed an appropriate Order from which this appeal may be taken (Exhibit 2). As CPLR 7011 specifically grants a right to appeal from the refusal of "an order to show cause issued under subdivision (a) of section 7003[,]" the NhRP respectfully requests that this Court accept its appeal as of right.

PLEASE TAKE FURTHER NOTICE, that the motion is returnable at 10 o'clock in the forenoon on Monday, June 6th, 2016 which is at least 9 days from the date of service of these papers. The Respondents are hereby given notice that the motion will be submitted on the papers and their personal appearance in opposition is neither required nor permitted.

Dated: May 26, 2016

Elizabeth Stein, Esq.
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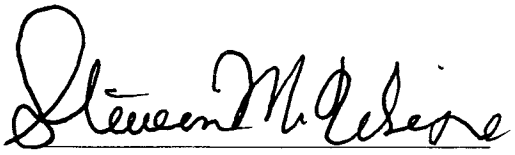
516-747-4726
liddystein@aol.com



Steven M. Wise, Esq.
(of the bar of the State of Massachusetts)
By permission of the Court
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Coral Springs, Florida 33076
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Attorneys for Petitioner-Appellant

To:

New York State Supreme Court
Appellate Division – First Department
Clerk's Office
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents.

Attorney Affirmation

Index No.: 150149/16
(New York County)

I, Elizabeth Stein, an attorney duly admitted to practice law in the State of New York affirms the following under the penalty of perjury:

1. I am an attorney of record for Petitioner-Appellant, the Nonhuman Rights Project, Inc., in the above-captioned matter and am not a party in this action.
2. I am fully familiar with the pleadings and proceedings in this matter, have read and know the contents thereof and submit this affirmation in support of the within Notice of Motion to Appeal as of Right,

memorandum of law in support thereof, and all exhibits and other documents annexed thereto.

3. Pursuant to 22 N.Y.C.R.R. §1301.1, that this motion is not frivolous.

Dated: May 26, 2016

Elizabeth Stein, Esq.
Attorney for Petitioner-Appellant
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
liddystein@aol.com

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

Index No.: 150149/16
(New York County)

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents.

PETITIONER-APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO APPEAL AS OF RIGHT

ELIZABETH STEIN, ESQ.
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STEVEN M. WISE, ESQ.
(of the bar of the State of Massachusetts)
by permission of the Court
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Coral Springs, Florida 33076
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wiseboston@aol.com

*Attorneys for Petitioner-Appell*ant

I. STATEMENT OF FACTS

This memorandum of law is submitted in support of Petitioner-Appellant, the Nonhuman Rights Project Inc's ("NhRP"), motion to appeal the above-captioned matter as of right pursuant to New York Civil Practice Law and Rules ("CPLR") 7011.

This appeal is taken from the lower court's denial of a verified petition for a common law writ of habeas corpus and order to show cause ("Petition") filed by the NhRP on behalf of a chimpanzee named Kiko.[1] Specifically, on January 29, 2016, the court entered a copy of the NhRP's proposed writ and order to show cause stamped "DECLINED TO SIGN" and an annexed memorandum of law (both attached as Exhibit 1). The NhRP then filed and served a timely notice of appeal on February 9, 2016. [2]

The NhRP sought to perfect its appeal and on May 18, 2016 filed with this Court the Record on Appeal which includes the order of the lower court and Brief. NhRP's counsel was then contacted by the Clerk's Office and informed that the NhRP did not have a proper order from which an appeal may be taken and that the NhRP did not have an appeal as of right from the court's denial of the Petition.

[1] As discussed below, the NhRP was required by CPLR 7003(a) to include the "show cause" language in its Petition insofar as it was not demanding Kiko's production in court.
[2] Respondents have been served in all phases of these proceedings.

In response to the Clerk's input regarding the sufficiency and appropriateness of the appeal, on May 20, 2016, the NhRP submitted a letter to the lower court requesting that it enter an appropriate Order with the New York County Clerk from which an appeal may be taken, which the court issued on the same date and which is being filed as a supplemental record on appeal (attached as Exhibit 2).

The NhRP respectfully submits this memorandum of law to demonstrate the applicability of CPLR 7011, which specifically permits this appeal as of right.

II. THE NhRP IS ENTITLED TO APPEAL AS OF RIGHT

The NhRP filed its Petition pursuant to CPLR Article 70, which exclusively governs the procedure applicable to common law writs of habeas corpus. *See* CPLR 7001 ("the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention."). The NhRP did not intend to seek an order to show cause that was independent of Article 70, as that would have been prohibited by and contrary to Article 70.

Specifically, the Petition did not seek a traditional "order to show cause" under CPLR 403, the appeal of which is not permissible, but under CPLR 7003,

the appeal of which is specifically granted under CPLR 7011, which provides, in relevant part:.

> § 7011. Appeal. An appeal may be taken from a judgment refusing to grant a writ of habeas corpus or refusing an order to show cause issued under subdivision (a) of section 7003, or from a judgment made upon the return of such a writ or order to show cause.

The NhRP therefore may appeal to this Court as of right, just as the NhRP appealed as of right the refusal to issue a nearly identical petition for a common law writ of habeas corpus and order to show cause in the Third Department, *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015), and in the Fourth Department, *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den.*, 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015).[3]

Article 70, like its predecessors, "contains elaborate provisions regulating the exercise of the common-law power to issue and adjudge it . . . including those relating to rights of appealing." *People ex rel. Curtis v. Kidney,* 225 N.Y. 299, 303 (1919). "The writ existed at common law, but the proceedings of the court with respect to it are regulated by statute, and the courts must be governed by that

[3] *But see, Nonhuman Rights Project, Inc., et al. v. Samuel L. Stanley, et al.*, (2nd Dept. April 3, 2014) (Suffolk County Index No. 32098/2014) (denying motion *pro hac vice*).

statute." *People ex rel. Billotti v. New York Juvenile Asylum*, 57 A.D. 383, 384, 68 N.Y.S. 279 (1st Dept. 1901).

The practice commentaries to CPLR 401 note that a "particular authorizing statute may contain some unique rules that would, of course, take precedence over those of Article 4." Vincent C. Alexander, *Practice Commentaries: C401:1 Special Proceedings, In General,* N.Y. C.P.L.R. 401 (McKinney). Only if Article 70 "is silent on the particular problem, [must] Article 4 [] be consulted." *Id.* As Article 70 expressly provides the manner of appeal, it takes precedence over all other provisions of the CPLR.

It was necessary, under CPLR 7003(a), for the NhRP to style its Petition as an Order to Show Cause with the Verified Petition for a Writ of Habeas Corpus as it was not demanding Kiko's production to the court. CPLR 7003(a) provides that "[t]he court to whom the petition is made shall issue the writ without delay on any day, *or where the petitioner does not demand production of the person detained. . .* order the respondent to ***show cause*** why the person detained should not be released" (emphasis added). *See, e.g.*, *Callan v. Callan*, 494 N.Y.S.2d 32, 33 (2d Dept. 1985) ("Plaintiff obtained a writ of habeas corpus by order to **show cause** when defendant failed to return her infant daughter after her visitation . . . "); *State ex rel. Soss v. Vincent*, 369 N.Y.S.2d 766, 767 (2d Dept. 1975) ("In a habeas corpus proceeding upon an order to **show cause (CPLR 7003, subd. (a)),** the

appeal is from a judgment of the Supreme Court ... which granted the petition and ordered petitioner released"); *People ex rel. Bell v. Santor*, 801 N.Y.S.2d 101 (3d Dept. 2005) ("Petitioner commenced this CPLR article 70 proceeding seeking habeas corpus relief . . . Supreme Court dismissed the petition without issuing an **order to show** cause or writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell*, 421 N.Y.S.2d 443, 444 (4th Dept. 1979) ("This matter originated when petitioner . . . sought, by an order and petition, a *writ of habeas corpus* (Respondents) to **show cause** why Ricky Brandon, an infant . . . should not be released and placed in petitioner's custody."); *People ex rel. Smith v. Greiner*, 674 N.Y.S.2d 588 (Sup. Ct. 1998) ("This is a habeas corpus proceeding brought by the petitioner pro se and commenced via Order to **Show Cause**"); *People ex rel. Goldstein on Behalf of Coimbre v. Giordano*, 571 N.Y.S.2d 371 (Sup. Ct. 1991) ("By order to **show cause**, in the nature of a Writ of Habeas Corpus proceeding, the petitioner seeks his release from the custody of the New York State Division for Youth. . . . [T]he Court grants the petition and directs that this petitioner be forthwith released"); *In re Henry*, 1865 WL 3392 (N.Y. Sup. Ct. 1865) ("the party arrested can apply for a habeas corpus, calling on the officer to **show cause** why he is detained, and with the return to the writ the rule is that where the arrest is upon suspicion, and without a warrant, proof must be given to show the suspicion to be well founded") (emphasis added in each).

Once a petitioner's demand for an order to show cause why a detention is not illegal is refused, CPLR 7011 "governs the right of appeal in habeas corpus proceedings." *Wilkes v. Wilkes*, 622 N.Y.S.2d 608 (2d Dept. 1995). It "authorizes an appeal in two situations: (1) from a judgment *refusing, at the outset*, to grant a writ of habeas corpus or to issue an order to *show cause* (CPLR 7003(a)); *or* (2) from a judgment made upon the return of a writ or order to show cause (CPLR 7010)." Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), CPLR 7011* (West 2014) (emphasis added). *See People ex rel. Tatra v. McNeill*, 244 N.Y.S.2d 463, 464 (2d Dept. 1963) (an appeal "from an order refusing to grant a writ or from a judgment made upon the return of a writ" is "authorized by statute in a habeas corpus proceeding (CPLR § 7011)."). CPLR 7011's allowance of an appeal to be taken "from a judgment refusing to grant a writ of habeas corpus *or refusing an order to show cause* issued under subdivision (a) of section 7003" is therefore an *exception* to the general rule that the denial of an *ex parte* order is not appealable (emphasis added).

Appellate courts routinely authorize petitioners to appeal from a court's *refusal*, at the outset, to issue the writ or a CPLR 7003 show cause order, as CPLR 7011 authorizes such appeals. *See, e.g.*, *People ex rel. Silbert v. Cohen*, 29 N.Y.2d 12, 14 (1971); *Callan*, 494 N.Y.S.2d at 33; *People ex rel. Bell*, 801 N.Y.S.2d 101 ("Supreme Court dismissed the petition without issuing an order to show cause or

writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell*, 421 N.Y.S.2d at 444; *People ex rel. Peoples v. New York State Dept. of Correctional Services*, 967 N.Y.S.2d 848 (4th Dept. 2013) (entertaining appeal from the dismissal of a habeas corpus petition); *People ex rel. Flemming v. Rock*, 972 N.Y.S.2d 901 (1st Dept. 2013) (same); *People ex rel. Jenkins v. Rikers Island Correctional Facility Warden*, 976 N.Y.S.2d 915 (4th Dept. 2013) (entertaining appeal from order dismissing petition for habeas corpus); *People ex rel. Harrington v. Cully,* 958 N.Y.S.2d 633 (4th Dept. 2013) (same); *People ex rel. Aikens v. Brown*, 958 N.Y.S.2d 913 (4th Dept. 2013) (same); *People ex rel. Holmes v. Heath*, 965 N.Y.S.2d 881 (2d Dept. 2013) (entertaining appeal from denial of petition for habeas corpus without hearing); *People ex rel. Allen v. Maribel*, 966 N.Y.S.2d 685 (2d Dept. 2013) (same); *People ex rel. Bazil v. Marshall*, 910 N.Y.S.2d 494, 495 (2d Dept. 2010) (same); *People ex rel. Sailor v. Travis*, 786 N.Y.S.2d 548, 549 (2d Dept. 2004) (same); *People ex rel. Gonzalez v. New York State Div. of Parole*, 682 N.Y.S.2d 602 (2d Dept. 1998) (entertaining an appeal "[i]n a habeas corpus proceeding," where supreme court "refused an application for an order to show cause"); *People ex rel. Mabery v. Leonardo*, 578 N.Y.S.2d 427 (3d Dept. 1992) (entertaining appeal from supreme court's denial of "petitioner's application for a writ of habeas corpus, in a proceeding pursuant to CPLR article 70, without a hearing."); *People ex rel. Deuel v. Campbell*, 572

N.Y.S.2d 879 (3d Dept. 1991) (same); *People ex rel. Johnson v. New York State Bd. of Parol*e, 580 N.Y.S.2d 957, 959 (3d Dept. 1992) (entertaining appeal where petitioner "commenced this proceeding for habeas corpus relief by order to show cause and petition" and supreme court "dismissed the petition"); *People ex rel. Cook v. New York State Bd. of Parole*, 505 N.Y.S.2d 383 (2d Dept. 1986) (appeal from dismissal of writ of habeas corpus); *People ex rel. Boyd v. LeFevre*, 461 N.Y.S.2d 667 (3d Dept. 1983) (entertaining appeal from a judgment of the Supreme Court "which denied petitioner's application for a writ of habeas corpus, without a hearing."); *People ex rel. Steinberg v. Superintendent, Green Haven Correctional Facilit*y, 391 N.Y.S.2d 915, 916 (2d Dept. 1977); *People ex rel. Boutelle v. O'Mara*, 390 N.Y.S.2d 19 (3d Dept. 1976) (entertaining an appeal from the supreme court's denial of "petitioner's application for a writ of habeas corpus, without a hearing."); *People ex rel. Edmonds v. Warden, Queens H. of Detention for Men*, 269 N.Y.S.2d 787, 788 (2d Dept. 1966) ("In a habeas corpus proceeding, relator appeals from a judgment of the Supreme Court, . . . which dismissed the writ."); *People ex rel. Leonard v. Denno*, 219 N.Y.S.2d 955 (2d Dept. 1961).

Accordingly, the NhRP has an appeal as of right from the Supreme Court's refusal to issue the requested writ and order to show cause, as the "show cause" language was required by CPLR 7003(a) because the NhRP was not demanding the production of Kiko to court and CPLR 7011specifically grants the NhRP this

right in these circumstances. The unique procedures in Article 70 are intended not just to give habeas petitioners a speedy initial hearing to determine their liberty, but a right to appeal even a refusal to issue a writ of habeas corpus or order to show cause. The NhRP respectfully submits that it should be afforded this opportunity.

Dated: May 26, 2016

Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
liddystein@aol.com

Steven M. Wise, Esq.
(of the bar of the State of Massachusetts)
By permission of the Court
5195 NW 112th Terrace
Coral Springs, Florida 33076
954-648-9864
wiseboston@aol.com

Attorneys for Petitioner-Appellant

EXHIBIT 1

At I.A.S Part _____ of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 80 Centre Street, New York, NY, on the _____day of _____, 2016

PRESENT: HON._____
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents.
----------x

ORDER TO SHOW CAUSE & WRIT OF HABEAS CORPUS

Index No.: **150149/2016**

DECLINED TO SIGN See annexed Memorandum

TO THE ABOVE NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition of Elizabeth Stein, Esq. and Steven M. Wise, Esq. (subject to *pro hac vice* admission), with Exhibits and Memorandum of Law, dated January 6, 2016, and upon all pleadings and proceedings herein, let the Respondents CARMEN PRESTI, individually and as an officer and director of The Primate

Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC., or their attorneys, SHOW CAUSE at I.A.S. Part _____, Room _____, of this Court to be held at the Courthouse located at 80 Centre Street, New York, New York 10013, on the _____ day of _____, 2016 at _____o'clock in the _____ of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting Petitioner, The Nonhuman Rights Project, Inc. ("NhRP"), the following relief:

A. Upon a determination that Kiko is being unlawfully detained, ordering his immediate release and transfer forthwith to an appropriate primate sanctuary;

B. Awarding the NhRP the costs and disbursements of this action; and

C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC. by personal delivery, on or before the _____ of _____, 2016, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, and electronically filed with the NYSCEF system, no later than the _____ of _____, 2016.

Dated: _____
New York, New York

_____
Honorable

ENTER:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 12

----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

- against -

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY INC.,

Respondents.

----------x

Index No. 150149/16

MEMORANDUM

Mot. seq. no. 001

JAFFE, BARBARA, J.:

For petitioner:
Elizabeth Stein, Esq.
5 Dunhill Rd.
New Hyde Park, NY 11040
516-747-4726

Steven M. Wise, Esq., pro hac vice
Nonhuman Rights Project
5195 NW 112th Terrace
Coral Springs, FL 33076

I decline to sign the order to show cause filed by petitioner for the following reasons:

While successive petitions for a writ of habeas corpus based on the same ground are permissible, "orderly administration would require, at least, a showing of changed circumstances." (*People ex rel. Woodard v Berry*, 163 AD2d 759, 760 [3d Dept 1990], *lv denied* 76 NY2d 712; *People ex rel. Glendening v Glendening*, 259 AD 384, 387 [1st Dept 1940], *affd* 284 NY 598; *see People ex rel. Leonard HH v Nixon*, 148 AD2d 75, 80-81 [3d Dept 1989]).

Here, between 2013 and 2014, petitioner filed four identical petitions with four state trial courts, each in a different county. With each petition, it offered the same nine affidavits. It then recently filed another two petitions in New York County which are identical to those previously filed, except for the addition of affidavits from five of the nine original affiants, along with a

sixth from a member of its board of directors. All of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the first four petitions.

In any event, whether evidence of the ability of some chimpanzees to shoulder certain kinds responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me (*Nonhuman Rights Project v Stanley*, 49 Misc 3d 746 [Sup Ct, New York County 2015 [Jaffe, J.]), are determinations that are best addressed there.

EXHIBIT 2

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Supplemental Decision

PRESENT: BARBARA JAFFE J.S.C. PART 12
Justice

Nonhuman Rights Project -v- Presti, Carmen

INDEX NO. 150149/2016
MOTION DATE
MOTION SEQ. NO. Seq 001

The following papers, numbered 1 to ____, were read on this motion to/for Habeus Corpus

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____
Answering Affidavits — Exhibits ____ No(s). ____
Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is

In response to Petitioner's request, the Declined Order to Show Cause and annexed Memorandum (NYSCEF #48) constitute the court's Decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: MAY 20 2016

BARBARA JAFFE, J.S.C.
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☑ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Nonhuman Rights Project

By Hand

May 20, 2016

Supreme Court of the State of New York
New York County
Barbara Jaffe, JSC
80 Centre Street
Room 279
New York, New York 10013

Re: *Nonhuman Rights Project, Inc., on behalf of Kiko v. Carmen Presti et al.*, (150149/2016)

Dear Justice Jaffe,

I am a counsel of record for Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP") in the above-captioned matter. The NhRP filed in the Supreme Court, New York County a verified petition for a writ of habeas corpus and order to show cause on behalf of a chimpanzee named Kiko. On January 29, 2016, you entered with the Clerk of the Court a copy of the proposed writ of habeas corpus and order to show cause which was stamped "DECLINED TO SIGN" and an annexed memorandum of law. The NhRP then filed and served a timely notice of appeal on February 9, 2016.

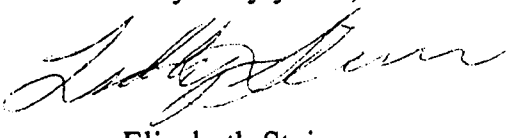
The NhRP seeks to perfect its appeal. This week it filed the record on appeal and brief in the New York State Supreme Court Appellate Division, First Judicial Department. I was contacted by Don Ramos of the Clerk's Office and informed that we did not have a proper order from which an appeal may be taken. I am therefore writing to request that you enter an actual Order with the New York County Clerk denying the NhRP's petition for a writ of habeas corpus and order to show cause. I will submit this Order to the First Department along with a memorandum of law explaining why the NhRP has an appeal as of right from the

5195 NW 112th Terrace · Coral Springs · FL 33076 · (954) 648-9864
www.nonhumanrights.org · info@nonhumanrights.org

denial of an order to show cause in the context of a habeas corpus petition pursuant to Article 70 of the CPLR.

Thank you for your kind consideration of this matter.

Very truly yours,



Elizabeth Stein

CC: Carmen Presti

Christie E. Presti

The Primate Sanctuary, Inc.

5195 NW 112th Terrace · Coral Springs · FL 33076 · (954) 648-9864
www.nonhumanrights.org · info@nonhumanrights.org

At I.A.S Part _____ of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 80 Centre Street, New York, NY, on the _____day of _____, 2016

PRESENT: HON._____
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents.
----------x

DECLINED TO SIGN - see annexed memorandum

ORDER TO SHOW CAUSE & WRIT OF HABEAS CORPUS

Index No.: **150149/2016**

TO THE ABOVE NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition of Elizabeth Stein, Esq. and Steven M. Wise, Esq. (subject to *pro hac vice* admission), with Exhibits and Memorandum of Law, dated January 6, 2016, and upon all pleadings and proceedings herein, let the Respondents CARMEN PRESTI, individually and as an officer and director of The Primate

Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC., or their attorneys, SHOW CAUSE at I.A.S. Part _____, Room _____, of this Court to be held at the Courthouse located at 80 Centre Street, New York, New York 10013, on the _____ day of _____, 2016 at _____o'clock in the _____ of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting Petitioner, The Nonhuman Rights Project, Inc. ("NhRP"), the following relief:

A. Upon a determination that Kiko is being unlawfully detained, ordering his immediate release and transfer forthwith to an appropriate primate sanctuary;

B. Awarding the NhRP the costs and disbursements of this action; and

C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC. by personal delivery, on or before the _____ of _____, 2016, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, and electronically filed with the NYSCEF system, no later than the _____ of _____, 2016.

Dated: _____
New York, New York

_____
Honorable

ENTER:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 12

----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

- against -

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY INC.,

Respondents.

----------x

Index No. 150149/16

MEMORANDUM

Mot. seq. no. 001

JAFFE, BARBARA, J.:

For petitioner:
Elizabeth Stein, Esq.
5 Dunhill Rd.
New Hyde Park, NY 11040
516-747-4726

Steven M. Wise, Esq., pro hac vice
Nonhuman Rights Project
5195 NW 112th Terrace
Coral Springs, FL 33076

I decline to sign the order to show cause filed by petitioner for the following reasons:

While successive petitions for a writ of habeas corpus based on the same ground are permissible, "orderly administration would require, at least, a showing of changed circumstances." (*People ex rel. Woodard v Berry*, 163 AD2d 759, 760 [3d Dept 1990], *lv denied* 76 NY2d 712; *People ex rel. Glendening v Glendening*, 259 AD 384, 387 [1st Dept 1940], *affd* 284 NY 598; *see People ex rel. Leonard HH v Nixon*, 148 AD2d 75, 80-81 [3d Dept 1989]).

Here, between 2013 and 2014, petitioner filed four identical petitions with four state trial courts, each in a different county. With each petition, it offered the same nine affidavits. It then recently filed another two petitions in New York County which are identical to those previously filed, except for the addition of affidavits from five of the nine original affiants, along with a

sixth from a member of its board of directors. All of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the first four petitions.

In any event, whether evidence of the ability of some chimpanzees to shoulder certain kinds responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me (*Nonhuman Rights Project v Stanley*, 49 Misc 3d 746 [Sup Ct, New York County 2015 [Jaffe, J.]), are determinations that are best addressed there.

BARBARA JAFFE
J.S.C.

EXHIBIT 11

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

BEFORE: Hon. Troy K. Webber
Associate Justice of the Appellate Division

----------X

The Nonhuman Rights Project, Inc., on behalf of Kiko,
Petitioner-Appellant,

-against-

Carmen Presti, individually and as an officer and director of the Primate Sanctuary, Inc., Christie E. Presti, individually and as an officer and director of the Primate Sanctuary, Inc.,
Respondents.

M-2819
Ind. No. 150149/16

----------X

Petitioner-Appellant moved to appeal the matter as of right pursuant to CPLR 7011. I, Troy K. Webber, a Justice of the Appellate Division, deem this a motion brought pursuant to CPLR 5701(c), for leave to appeal to the Appellate Division, First Department, from the order of Supreme Court Justice Barbara Jaffe of the Supreme Court, New York County, entered on or about January 29, 2016,

Now, upon reading the papers with respect to the motion, and due deliberation having been had thereon, it is

Ordered that the application for leave to appeal is denied.

Dated: June 30, 2016
New York, New York

Hon. Troy K. Webber
Associate Justice

ENTERED

JUL 28 2016

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

BEFORE: Hon. Marcy L. Kahn
Justice of the Appellate Division

----------X
The People of the State of New York,

M-2638
Ind. No. 5809/13

-against-

CERTIFICATE
DENYING LEAVE

Dary Ramirez,
Defendant.
----------X

I, Marcy L. Kahn, a Justice of the Appellate Division, First Judicial Department, do hereby certify that, upon application timely made by the above-named defendant for a certificate pursuant to Criminal Procedure Law, sections 450.15 and 460.15, and upon the record and proceedings herein, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Judicial Department, and permission to appeal from the order of the Supreme Court, New York County (Hon. Richard D. Carruthers), entered on or about December 17, 2015, is hereby denied.

Associate ~~Justice~~

Dated: New York, New York
June 23, 2016

ENTERED:
JUL 28 2016

EXHIBIT 12

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

----------x

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

----------x

Index No. 150149/16
(New York County)

Notice of Motion

PLEASE TAKE NOTICE that, upon Petitioner-Appellant, the Nonhuman Rights Project, Inc's. ("NhRP"), annexed Memorandum of Law in support of its Motion to Reargue or, in the alternative, for Leave to Appeal to the Court of Appeals, the annexed affirmation of Elizabeth Stein, Esq. dated August 17, 2016, the Exhibits 1-5 annexed thereto, and upon all pleadings and proceedings heretofore had herein, the undersigned will move this Court at the Appellate Division, First Department Courthouse, 27 Madison Avenue, New York, New York, for an Order:

(1) To reargue this Court's order construing the NhRP's motion to appeal as of right under CPLR 7011 as a motion for leave to appeal under CPLR

5701(c) and then denying the NhRP's absolute right to appeal (Exhibit 1, attached to Stein Affirmation), or, in the alternative,

(2) Granting leave to appeal to the Court of Appeals.

PLEASE TAKE FURTHER NOTICE, that the motion is returnable at 10 o'clock in the forenoon on Monday, August 29, 2016, which is at least 9 days from the date of service of these papers. The Respondents are hereby given notice that the motion will be submitted on the papers and their personal appearance in opposition is neither required nor permitted.

Dated: Respectfully submitted,

_____

Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726
liddystein@aol.com

_____

Steven M. Wise, Esq.
(of the bar of the State of Massachusetts)
By permission of the Court
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864
wiseboston@aol.com

Attorneys for Petitioner-Appellant

To:

New York State Supreme Court
Appellate Division – First Department
Clerk's Office
27 Madison Avenue
New York, New York 10010
(212) 340-0400

Carmen Presti, individually and as an officer and director of The Primate Sanctuary, Inc.
2764 Livingston Avenue, Niagara Falls, New York 14303
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

----------x

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

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Index No. 150149/16
(New York County)

PETITIONER-APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO REARGUE OR, IN THE ALTERNATIVE, FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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Printed on Recycled Paper

INTRODUCTION

Petitioner-Appellant, Nonhuman Rights Project, Inc. ("NhRP"), respectfully submits this memorandum of law in support of its Motion to Reargue or, in the alternative, for Leave to Appeal ("Motion to Reargue") the order of The Honorable Associate Justice Troy K. Webber ("Justice Webber"), entered July 28, 2016, construing the NhRP's motion to appeal as of right under New York Civil Practice Law and Rules ("CPLR") 7011 as a motion for leave to appeal under CPLR 5701(c)–which the NhRP intentionally did not seek–and then denying the NhRP its absolute right to appeal, without specifying why the NhRP was not entitled to its absolute right to appeal pursuant to CPLR 7011.[1]

QUESTIONS OF LAW TO REARGUE OR TO PRESENT UPON APPEAL

The NhRP raises the following questions to reargue or, alternatively, to present upon appeal to the Court of Appeals:

1. Does a habeas corpus petitioner have an absolute right to appeal to the Appellate Division pursuant to CPLR 7011 from a judgment refusing to issue a writ of habeas corpus or an order to show cause under CPLR 7003(a)?

2. Did Justice Webber err in denying the NhRP the ability to appeal to this Court as a matter of right under CPLR 7011?

[1] Submitted herewith in support of its Motion to Reargue is the Affirmation of Elizabeth Stein, Esq. ("Stein Aff.")

PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

This memorandum of law is submitted in support of the NhRP's Motion to Reargue pursuant to 22A NYCRR § 600.14 and CPLR 2221(d). The NhRP respectfully submits that Justice Webber erred in denying its motion to appeal as of right the lower court's refusal to issue a writ of habeas corpus or order to show cause pursuant to CPLR 7003(a) to the New York State Supreme Court Appellate Division, First Judicial Department ("First Department") under CPLR 7011. (Exhibit 1, attached to Stein Aff.).

The NhRP's Motion to Reargue arises from an order of the Supreme Court New York County, dated January 29, 2016, denying its Verified Petition for a common law writ of habeas corpus and order to show cause ("Petition"), filed on behalf of a chimpanzee named Kiko pursuant to CPLR Article 70. On February 9, 2016, the NhRP filed with the Clerk of this Court the following papers: Notice of Appeal (Exhibit 2, attached to Stein Aff.), completed Request for Appellate Intervention, Order of the Supreme Court New York County, and affidavit of service. The NhRP then sought to perfect its appeal. On May 18, 2016, it filed with this Court the Record on Appeal, which included the order of the lower court and brief. NhRP's counsel was then contacted by the First Department Clerk's Office and informed that the NhRP did not have a proper order from which an appeal could be taken and that the NhRP did not have an appeal as of right from the lower

court's refusal to issue an order or show cause or writ of habeas corpus. The NhRP also filed the following documents with this Court: Appendix, Motion to File an Oversize Brief (which was denied); a second Motion to File an Oversize Brief (which was granted); Motion for Steven M. Wise to appear and argue *Pro Hac Vice* (which was granted); Motion to Amend the Record on Appeal, and; Motion to Appeal as of Right, from which this Motion to Reargue is taken (Exhibit 3, attached to Stein Aff.).

In response to the Clerk's statement regarding the sufficiency of the order and appropriateness of the appeal, on May 20, 2016, the NhRP submitted a letter to the lower court requesting that it enter an appropriate order with the New York County Clerk from which an appeal may be taken, which the court issued on the same date (Exhibit 4, attached to Stein Aff.) and which the NhRP seeks to file as a supplemental record on appeal (the NhRP's Motion to Amend the Record on Appeal is pending before this Court). Because this judgment post-dated all of the filings in this appeal, on July 6, 2016, the lower court then granted the NhRP's motion for an order that the judgment of May 20, 2016 be issued *nunc pro tunc* to the date of the lower court's original final order of January 29, 2016 (Exhibit 5 attached to Stein Aff.).

On July 28, 2016, Justice Webber entered an order denying the appeal, asserting:

> Petitioner-Appellant moved to appeal the matter as of right pursuant to CPLR 7011.
>
> I, Troy K. Webber, a Justice of the Appellate Division, deem this a motion brought pursuant to CPLR 5701(c), for leave to appeal to the Appellate Division, First Department, from the order of Supreme Court Justice Barbara Jaffe of the Supreme Court, New York County, entered on or about January 29, 2016,
>
> Now, upon reading the papers with respect to the motion, and due deliberation having been had thereon, it is Ordered that the application for leave to appeal is denied.

(Exhibit 1 attached to Stein Aff.).

ARGUMENT

I. THE NhRP'S MOTION TO REARGUE SHOULD BE GRANTED.

A motion to reargue should be granted upon a showing that the Court "overlooked or misapprehended" relevant facts or law. CPLR 2221(d)(2); *see also*, 22 NYCRR § 600.14. *Accord People v. McCoy*, 974 N.Y.S.2d 6, 7 (1st Dept. 2013) (granting motion to reargue under § 600.14); *Martin v. Portexit Corp*., 98 A.D.3d 63, 65 (1st Dept. 2012) ("The motion for reargument was properly granted because the court overlooked the arguments plaintiff initially set forth in opposition to defendant's motion . . . ").

A motion to reargue is "designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." *Foley v. Roche*, 418 N.Y.S.2d 588, 593 (1st Dept. 1979). *See C. Sav. Bank in City of New York v. City of New York*, 19 N.E.2d 659

(N.Y. 1939). Its purpose "is to offer the unsuccessful party an opportunity to persuade the court to change its decision." *People v. Alamo*, 961 N.Y.S.2d 359 (Sup. Ct. 2012). In this case, Justice Webber's denial of the NhRP's motion to appeal as of right pursuant to CPLR 7011 from a judgment issued under CPLR 7003(a) deprived the NhRP of its statutorily granted absolute right to appeal.

It is an abuse of discretion to deny a motion to reargue where the movant clearly demonstrates, as does the NhRP here, that the court misapplied controlling law. *See, e.g., Highgate Pictures, Inc. v. De Paul*, 549 N.Y.S.2d 386, 388-89 (1st Dept. 1990); *Denihan v. Denihan*, 468 N.Y.S.2d 614, 618 (1st Dept. 1983). *See also Scarito v. St. Joseph Hill Acad.*, 878 N.Y.S.2d 460, 462 (2d Dept. 2009).[2] A motion to reargue should especially be granted in situations, such as the one at bar, where there is a "'strong public policy in favor of resolving cases on the merits'" *Id.*

The lack of opposition, as in this case, also weighs in favor of granting such a motion. *E.g., HSBC Bank USA, Nat. Ass'n v. Community Parking Inc.*, 970 N.Y.S.2d 508, 509 (1st Dept. 2013) (granting motion for reargument in part because of the "the lack of opposition to Pena's motion for reargument of this Court's prior decision and order").

[2] "[E]ven in situations where the criteria for granting a reconsideration motion are not technically met, courts retain flexibility to grant such a motion when it is deemed appropriate." *Loris v. S & W Realty Corp.*, 790 N.Y.S.2d 579, 580-81 (3d Dept. 2005).

When, as in the case at bar, a party demonstrates that a court clearly misapplied controlling law, the court should vacate its prior decision.[3] As discussed, *infra*, Justice Webber misapprehended the nature of the NhRP's appeal and misapplied the controlling law governing it. Therefore this Court should grant NhRP's Motion to Reargue.

II. THE COURT ERRED AS A MATTER OF LAW IN RELYING UPON CPLR 5701(c) TO DISMISS THE NhRP'S MOTION TO APPEAL AS OF RIGHT RATHER THAN CORRECTLY APPLYING CPLR 7011 WHICH GRANTS THE NhRP AN ABSOLUTE APPEAL AS OF RIGHT.

Justice Webber's reliance on CPLR 5701(c) in dismissing NhRP's motion to appeal as of right misapprehended the applicable law. The NhRP filed its Petition pursuant to CPLR 70, which exclusively governs the procedure for common law writs of habeas corpus. See CPLR 7001 ("the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention.").

It was necessary, under CPLR 7003(a), for the NhRP to style its Petition as an order to show cause with the verified petition for a writ of habeas corpus as it was not demanding Kiko's production to the court. CPLR 7003(a) provides that

[3] *E.g., K2 Inv. Group, LLC v. American Guarantee & Liability Ins. Co*., 22 N.Y.3d 578 (2014); *Auqui v. Seven Thirty One Ltd. Partn*., 22 N.Y. 3d 226 (2013); *People v. Boyland*, 17 N.Y. 3d 852 (2011); *Weissblum v. Mostafzafan Found. of New York*, 60 N.Y. 2d 637, 639 (1983); *Porcelli v. N. Westchester Hosp. Ctr*., 977 N.Y.S.2d 32, 33 (2d Dept. 2013); *People v. Springer*, 970 N.Y.S.2d 462 (2d Dept. 2013); *People v. Morales*, 930 N.Y.S.2d 884 (2d Dept. 2011); *Kennedy v. Bennett*, 818 N.Y.S.2d 776 (2d Dept. 2006)

"[t]he court to whom the petition is made shall issue the writ without delay on any day, *or where the petitioner does not demand production of the person detained* . . . order the respondent to ***show cause*** why the person detained should not be released" (emphasis added).[4] Justice Webber clearly misapprehended the nature of the order to show cause and controlling law in applying CPLR 5701(c), which requires permission for leave to appeal when there is no right to appeal. But CPLR 7011 expressly grants the NhRP the absolute right to appeal the lower court's refusal to issue the order to show cause. Article 70, like its predecessors, "contains elaborate provisions regulating the exercise of the common-law power to issue and adjudge it . . . including those relating to rights of appealing." *People ex rel. Curtis v. Kidney,* 225 N.Y. 299, 303 (1919). "The writ existed at common law, but the proceedings of the court with respect to it are regulated by statute, and the courts

[4] *See, e.g.*, *Callan v. Callan*, 494 N.Y.S.2d 32, 33 (2d Dept. 1985) ("Plaintiff obtained a writ of habeas corpus by order to **show cause** when defendant failed to return her infant daughter after her visitation . . . "); *State ex rel. Soss v. Vincent*, 369 N.Y.S.2d 766, 767 (2d Dept. 1975) ("In a habeas corpus proceeding upon an order to **show cause (CPLR 7003, subd. (a)),** the appeal is from a judgment of the Supreme Court … which granted the petition and ordered petitioner released"); *People ex rel. Bell v. Santor*, 801 N.Y.S.2d 101 (3d Dept. 2005) ("Petitioner commenced this CPLR article 70 proceeding seeking habeas corpus relief . . . Supreme Court dismissed the petition without issuing an **order to show** cause or writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell,* 421 N.Y.S.2d 443, 444 (4th Dept. 1979) ("This matter originated when petitioner . . . sought, by an order and petition, a *writ of habeas corpus* (Respondents) to **show cause** why Ricky Brandon, an infant . . . should not be released and placed in petitioner's custody."); *People ex rel. Smith v. Greiner,* 674 N.Y.S.2d 588 (Sup. Ct. 1998) ("This is a habeas corpus proceeding brought by the petitioner pro se and commenced via Order to **Show Cause**"); *People ex rel. Goldstein on Behalf of Coimbre v. Giordano,* 571 N.Y.S.2d 371 (Sup. Ct. 1991) ("By order to **show cause**, in the nature of a Writ of Habeas Corpus proceeding, the petitioner seeks his release from the custody of the New York State Division for Youth. . . . [T]he Court grants the petition and directs that this petitioner be forthwith released") (emphasis added in each).

must be governed by *that statute*." *People ex rel. Billotti v. New York Juvenile Asylum*, 57 A.D. 383, 384, 68 N.Y.S. 279 (1st Dept. 1901) (emphasis added).

"An appeal from a judgment dismissing a habeas corpus petition lies as of right rather than by permission." *People ex rel. St. Germain v. Walker*, 595 N.Y.S.2d 707 (4th Dept. 1993). CPLR 7011, which "governs the right of appeal in habeas corpus proceedings," *Wilkes v. Wilkes*, 622 N.Y.S.2d 608 (2d Dept. 1995) (emphasis added), "authorizes an appeal in two situations: (1) from a judgment *refusing, at the outset*, to grant a writ of habeas corpus or to issue an order to *show cause* (CPLR 7003(a)); *or* (2) from a judgment made upon the return of a writ or order to show cause (CPLR 7010)." Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), CPLR 7011* (West 2014) (emphasis added). *See People ex rel. Tatra v. McNeill*, 244 N.Y.S.2d 463, 464 (2d Dept. 1963) (an appeal "from an order refusing to grant a writ or from a judgment made upon the return of a writ" is "authorized by statute in a habeas corpus proceeding (CPLR § 7011).").[5]

[5] *See, e.g.*, *People ex rel. Silbert v. Cohen*, 29 N.Y.2d 12, 14 (1971); *Callan*, 494 N.Y.S.2d at 33; *People ex rel. Bell*, 801 N.Y.S.2d 101 ("Supreme Court dismissed the petition without issuing an order to show cause or writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell*, 421 N.Y.S.2d at 444; *People ex rel. Peoples v. New York State Dept. of Correctional Services*, 967 N.Y.S.2d 848 (4th Dept. 2013) (entertaining appeal from the dismissal of a habeas corpus petition); *People ex rel. Flemming v. Rock*, 972 N.Y.S.2d 901 (1st Dept. 2013) (same); *People ex rel. Jenkins v. Rikers Island Correctional Facility Warden*, 976 N.Y.S.2d 915 (4th Dept. 2013)(entertaining appeal from order dismissing petition for habeas corpus); *People ex rel. Harrington v. Cully*, 958 N.Y.S.2d 633 (4th Dept. 2013) (same); *People ex rel. Aikens v. Brown*, 958 N.Y.S.2d 913 (4th Dept. 2013) (same); *People ex rel. Holmes v. Heath*, 965 N.Y.S.2d 881 (2d Dept. 2013) (entertaining appeal from denial of petition for habeas corpus without hearing); *People ex rel. Allen v. Maribel*, 966 N.Y.S.2d 685 (2d Dept. 2013) (same); *People ex rel. Bazil v. Marshall*, 910 N.Y.S.2d 494, 495 (2d Dept. 2010) (same); *People ex rel. Sailor v. Travis*, 786

The NhRP's right to appeal to the Appellate Division under CPLR 7011 from the Supreme Courts' refusal to issue a requested CPLR 7003(a) order to show cause has been recognized by the Third and Fourth Judicial Department in litigation brought by the NhRP on behalf of Kiko and another chimpanzee named Tommy. *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den*., 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015). The Appellate Division, Third Judicial Department ruled: "As Supreme Court's judgment finally determined the matter by refusing to issue an order to show cause to commence a habeas corpus proceeding, it is

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N.Y.S.2d 548, 549 (2d Dept. 2004) (same); *People ex rel. Gonzalez v. New York State Div. of Parole*, 682 N.Y.S.2d 602 (2d Dept. 1998) (entertaining an appeal "[i]n a habeas corpus proceeding," where supreme court "refused an application for an order to show cause"); *People ex rel. Mabery v. Leonardo*, 578 N.Y.S.2d 427 (3d Dept. 1992) (entertaining appeal from supreme court's denial of "petitioner's application for a writ of habeas corpus, in a proceeding pursuant to CPLR article 70, without a hearing."); *People ex rel. Deuel v. Campbell*, 572 N.Y.S.2d 879 (3d Dept. 1991) (same); *People ex rel. Johnson v. New York State Bd. of Parol*e, 580 N.Y.S.2d 957, 959 (3d Dept. 1992) (entertaining appeal where petitioner "commenced this proceeding for habeas corpus relief by order to show cause and petition" and supreme court "dismissed the petition"); *People ex rel. Cook v. New York State Bd. of Parole*, 505 N.Y.S.2d 383 (2d Dept. 1986) (appeal from dismissal of writ of habeas corpus); *People ex rel. Boyd v. LeFevre*, 461 N.Y.S.2d 667 (3d Dept. 1983) (entertaining appeal from a judgment of the Supreme Court "which denied petitioner's application for a writ of habeas corpus, without a hearing."); *People ex rel. Steinberg v. Superintendent, Green Haven Correctional Facilit*y, 391 N.Y.S.2d 915, 916 (2d Dept. 1977); *People ex rel. Boutelle v. O'Mara*, 390 N.Y.S.2d 19 (3d Dept. 1976) (entertaining an appeal from the supreme court's denial of "petitioner's application for a writ of habeas corpus, without a hearing."); *People ex rel. Edmonds v. Warden, Queens H. of Detention for Men*, 269 N.Y.S.2d 787, 788 (2d Dept. 1966) ("In a habeas corpus proceeding, relator appeals from a judgment of the Supreme Court, . . . which dismissed the writ."); *People ex rel. Leonard v. Denno*, 219 N.Y.S.2d 955 (2d Dept. 1961).

appealable as of right." *Id*. at 149 n.1 (citing CPLR 7011; *People ex rel. Seals v New York State Dept. of Correctional Servs*., 32 A.D.3d 1262, 1263 (4th Dept. 2006); *People ex rel. Tatra v McNeill*, 19 A.D.2d 845, 846 (2d Dept. 1963)). [6]

CPLR Article 70 exclusively governs the procedure for common law habeas corpus proceedings. *See* CPLR 7001; *People ex rel. Delia v. Munsey*, 26 N.Y.3d 124, 127-128 (2015) ("article 70 of the CPLR governs special proceedings for a writ of habeas corpus, the historic common-law writ that protects individuals from unlawful restraint or imprisonment and provides a means for those illegally detained to obtain release"). Because CPLR 7011 authorizes an appeal *as of right* from the refusal to issue the writ or a CPLR 7003 show cause order, this Court erred as a matter of law in relying upon CPLR 5701(c) in dismissing the appeal. The unique procedures in Article 70 are intended not just to give habeas petitioners a speedy initial hearing to determine their liberty, but the right to appeal a refusal to issue a writ of habeas corpus or order to show cause. The NhRP is absolutely entitled to, and must be afforded, this opportunity.

[6] The Appellate Division, Second Judicial Department, "dismissed petitioner's appeal 'on the ground that no appeal lies as of right from an order that is not the result of a motion made on notice (see CPLR 5701),' and declined to grant leave to appeal or reargue. (Aff. in Opp., Exh. G)." *Matter of Nonhuman Rights Project Inc. v. Stanley*, 16 N.Y.S.3d 898, 903 (Sup. Ct. 2015). Although Justice Webber's order did not specify why the NhRP did not have an appeal as of right under CPLR 7011, to the degree it was based on the notion that orders to show cause are generally not appealable as of right when they are *ex parte*, this reasoning is not apposite to the case at bar, as the NhRP's request for an order to show cause was made with notice to all Respondents.

Moreover, even if CPLR 5701 applied to this habeas corpus proceeding, the NhRP's would still be entitled to the right to appeal under CPLR 5701(a), rather than by permission under 5701(c). CPLR 5701(a) provides in part: "Appeals as of right. An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court: 1. from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action; . . ." In the present case, the case originated in the Supreme Court and the Supreme Court entered a final judgment disposing of all the issues in the action.

Accordingly, this Court should not have deemed the appeal as one seeking permission under 5701(c) and should not have dismissed NhRP's appeal from the Supreme Court's refusal to issue the requested order to show cause as CPLR 7011 or 5701(a) grants it the right to such an appeal.

III. IN THE ALTERNATIVE, THE COURT SHOULD GRANT THE NhRP LEAVE TO APPEAL TO THE COURT OF APPEALS.

In the alternative, the Court should grant leave to appeal to allow the Court of Appeals to resolve the critically important questions presented in this motion. Under CPLR 5602(a)(l), with the permission of the Appellate Division, appeals may be taken to the Court of Appeals from a final order not appealable as of right. Leave to appeal should be granted, as in the case at bar, "when required in the interest of substantial justice[,]" N.Y. Const. art. VI, § 3(b)(6), a standard that is

satisfied when an appeal presents "a question of law important enough to warrant the immediate attention of the Court of Appeals[,]" David D. Siegel, Practice Commentaries, CPLR 5602 (McKinney 1995), such as an issue that is "novel or of public importance, present[s] a conflict with prior decisions of [the Court of Appeals], or involve[s] a conflict among the departments of the Appellate Division." 22 NYCRR 500.22(b)(4). *E.g*., *Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 N.Y.2d 174, 183 (1988) (granting leave to appeal in light of "novel and significant issues tendered for review"); *Mead v. Levitt*, 143 A.D.2d 560, 561 (1st Dept. 1988) (granting leave to appeal where First Department's decision conflicted with Fourth Department authority and another First Department decision).

The question presented here – whether a habeas corpus petitioner has an appeal as of right under CPLR 7011 from the refusal of a court to issue a writ of habeas corpus or order to show cause, is a matter of great public significance, as Justice Webber's ruling strips petitioners, human and nonhuman, of their absolute statutory right to appeal a refusal of the Supreme Court to issue a requested writ of habeas corpus or an order to show cause pursuant to CPLR 7003. Moreover the ruling from which NhRP appeals places this Court directly in conflict with the correct rulings of the Third and Fourth Judicial Departments.

IV. CONCLUSION

In view of the above, the NhRP respectfully requests that this Court grant the NhRP's Motion to Reargue, vacate its order of dismissal, and allow the appeal to proceed as of right under CPLR 7011. To refuse, where it is has been demonstrated that the Court misapplied the controlling law, would be an abuse of discretion. If this Court does not grant reargument in this case, the NhRP respectfully requests leave to appeal this vitally important habeas corpus issue to the Court of Appeals as a severe injustice has occurred in the lower court and Justice Webber's ruling strips millions of New Yorkers of their absolute statutory right under CPLR 7011 to appeal the refusal of a Supreme Court to issue a writ of habeas corpus or order to show cause under CPLR 7003(a).

Dated: Respectfully submitted,

_____

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_____

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By permission of the Court
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EXHIBIT 13

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on October 25, 2016.

PRESENT: Hon. John W. Sweeny, Jr., Justice Presiding,
Rolando T. Acosta
Paul G. Feinman
Barbara R. Kapnick
Troy K. Webber, Justices.

The Nonhuman Rights Project, Inc.,
on behalf of Kiko,
Petitioner-Appellant,

M-4175

-against- Index No. 150149/16

Carmen Presti, et al.,
Respondents-Respondents.

A motion having been made by petitioner-appellant to this Court from a decision of the Supreme Court, New York County, entered on or about January 29, 2016, in which the Court declined to sign an order to show cause,

And an order by a Justice of this Court, entered on July 28, 2016, denying petitioner's motion for leave to appeal from the aforesaid January 29, 2016 decision,

And petitioner-appellant having moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals, from the aforesaid order of a Justice of this Court, entered on July 28, 2016,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTER:

CLERK

EXHIBIT 14

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of a Proceeding under Article 78 of the CPLR for a Writ of Mandamus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

TROY K. WEBBER, in her official capacity as an Associate Justice of the New York State Supreme Court Appellate Division, First Judicial Department,

Respondent

-and-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

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Index No. 150149/16
(New York County)

Notice of Verified Petition for Writ of Mandamus

PLEASE TAKE NOTICE that upon the annexed Verified Petition for Writ of Mandamus filed pursuant to New York Civil Practice Law and Rules ("CPLR") Article 78, Memorandum of Law in support thereof, and Affirmation of Elizabeth Stein, Esq. and the attachments thereto, Petitioner-Appellant, The Nonhuman Rights Project, Inc. ("NhRP") moves this Court to order Respondent, Honorable

Associate Justice Troy K. Webber of the New York State Supreme Court Appellate Division, First Judicial Department, to grant NhRP's motion to appeal as of right, as required by CPLR 7011.

PLEASE TAKE FURTHER NOTICE, that the petition is returnable at 10 o'clock in the forenoon on Monday, November 28th, 2016, which is at least 22 days from the date of service of these papers. Respondents are given notice that opposition papers must be filed with the clerk on or before November 23, 2016.

Dated: November 1, 2016

By: _____

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_____

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To:

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Appellate Division – First Judicial Department
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of a Proceeding under Article 78 of the CPLR for a Writ of Mandamus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

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TROY K. WEBBER, in her official capacity as an Associate Justice of the New York State Supreme Court Appellate Division, First Judicial Department,

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-and-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

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Index No. 150149/16
(New York County)

Verified Petition for Writ of Mandamus

TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT:

Petitioner-Appellant, The Nonhuman Rights Project, Inc. ("NhRP"), on behalf of a chimpanzee named Kiko, by their attorneys, Elizabeth Stein, Esq. and

Steven M. Wise, Esq., *pro hac vice*, as and for a Verified Petition ("Petition") pursuant to Article 78 of the CPLR respectfully show to this Court as follows:

1. This is special proceeding brought pursuant to New York Civil Practice Law and Rules ("CPLR") Article 78 for relief in the nature of mandamus to compel the Respondent, Honorable Associate Justice Troy K. Webber ("Justice Webber") of the New York State Supreme Court Appellate Division, First Judicial Department ("First Department"), to grant NhRP's motion to appeal as of right, as required by CPLR 7011.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this proceeding under CPLR 506(b)(1), which provides that an Article 78 proceeding "against a justice of the supreme court . . . shall be commenced in the appellate division in the judicial department where the action, in the course of which the matter sought to be enforced or restrained originated, is triable." CPLR 506(b)(1). CPLR 506(b)(1)'s language "justice of the supreme court" applies to the Appellate Division and its Justices. *E.g.*, *Dinsio v. S. Ct. App. Div., Third Jud. Dept*., 125 A.D.3d 1313 (4th Dept. 2015), *leave to appeal denied*, 25 N.Y.3d 908, (N.Y. 2015), *reargument denied*, 26 N.Y.3d 1134 (N.Y. 2016); *Stein v. Murphy*, 439 N.Y.S.2d 221 (2d Dept. 1981); *Gold v. Shapiro*, 62 A.D.2d 62 (2d Dept. 1978), *aff'd*, 45 N.Y.2d 849 (N.Y. 1978);

Nichols v. Gamso, 42 A.D.2d 630 (3d Dept. 1973), *modified*, 35 N.Y.2d 35 (N.Y. 1974).

3. Although a Justice of this Court is a named Respondent, this Court need not recuse itself if it can adjudicate the merits impartially. *New York State Ass'n of Criminal Def. Lawyers v. Kaye*, 95 N.Y.2d 556, 558 (2000); *Gold*, 62 A.d.2d 62.

4. If the Court cannot be impartial, it must transfer the Petition to a different Appellate Division. *E.g.*, *Dinsio*, 125 A.D.3d 1313, *Nichols*, 42 A.D. 630. The New York State Supreme Court Appellate Division, Third Judicial Department ("Third Department") has already carefully considered the issue.

PARTIES

5. NhRP is a tax exempt Sec. 501(c)(3) not-for-profit corporation organized under the laws of the State of Massachusetts, with its primary place of business located at 5195 NW 112th Terrace, Coral Springs, Florida 33076.

6. At all relevant times, upon information and belief, Respondents Carmen Presti and Christie E. Presti have resided at 2764 Livingston Avenue, Niagara Falls, New York 14303.

7. At all relevant times, upon information and belief, Respondent The Primate Sanctuary, Inc.'s primary place of business has been located at 2764 Livingston Avenue, Niagara Falls, New York 14303.

8. At all relevant times, Respondent Justice Webber has been an Associate Justice of the First Department.

FACTS

9. On January 7, 2016, NhRP filed a verified petition for a common law writ of habeas corpus and order to show cause ("Habeas Petition") on behalf of Kiko with the Supreme Court, New York County pursuant to CPLR Article 70.

10. On January 29, 2016, the court entered an order denying the Habeas Petition, which stated "declined to sign." (Exhibit 6 attached to Stein Aff.).

11. On February 9, 2016, NhRP filed with the Clerk of this Court the following papers: Notice of Appeal (Exhibit 2 attached to Stein Aff.), completed Request for Appellate Intervention, Order of the Supreme Court New York County, and affidavit of service.

12. On May 18, 2016, NhRP filed the Record on Appeal, which included the order of the lower court and Opening Brief.

13. NhRP's counsel was subsequently contacted by the First Department Clerk's Office, informed that NhRP did not have a proper order from which an appeal could be taken, and that NhRP did not have an appeal as of right from the lower court's refusal to issue the order to show cause or writ of habeas corpus.

14. NhRP subsequently filed with this Court the following documents: Appendix, Motion to File an Oversize Brief (which was denied), a second Motion

to file an Oversize Brief (which was granted), and Motion for Steven M. Wise to appear and argue *Pro Hac Vice* (which was granted).

15. On May 20, 2016, NhRP requested that the lower court enter an appropriate order from which an appeal may be taken, which the court issued on the same date (Exhibit 3 attached to Stein Aff.). NhRP then sought to file this order as a supplemental record on appeal.

16. On May 26, 2016, NhRP filed with this Court a Motion to Appeal as of Right (Exhibit 4 attached to Stein Aff.)

17. On July 6, 2016, NhRP filed a motion with the lower court for an order stating that the final order of May 20, 2016 be issued *nunc pro tunc* to the original order of January 29, 2016, which was granted the following day (Exhibit 5 attached to Stein Aff.).

18. On July 28, 2016, Justice Webber entered an order in which she *sua sponte* converted NhRP's Motion to Appeal as of Right into a Motion for Leave to Appeal pursuant to CPLR 5701(c), then denied this motion, which NhRP neither filed, nor intended to file as it has an absolute right to appeal, nor was given an opportunity to oppose (Exhibit 1 attached to Stein Aff.).

19. On August 19, 2016, NhRP filed with this Court a Motion to Reargue or, in the alternative, for Leave to Appeal to the Court of Appeals from the order of July 28, 2016 (Exhibit 7 attached to Stein Aff.).

20. On October 25, 2016, the Court entered an order denying NhRP's Motion to Reargue or, in the alternative, for Leave to appeal to the Court of Appeals (Exhibit 8 attached to Stein Aff.).

LEGAL ANALYSIS

21. Article 78 mandamus is proper where, as here, an "officer failed to perform a duty enjoined upon it by law." CPLR 7801 and 7803. *See generally Korn v. Gulotta*, 72 N.Y.2d 363, 370 (1988); *People ex rel. Welling v. Meakim*, 24 Abb. N. Cas. 477, 482-83 (N.Y. 1890). Despite CPLR 7801(2)'s general proscription against the use of Article 78 to challenge determinations made in connection with civil and criminal actions, if the challenged matter is the performance of an official duty in the nature of a ministerial act, no "determination" is being reviewed. *See*, *Nat'l Auto Weld, Inc. v. Clynes*, 454 N.Y.S.2d 33, 34-34 (3rd Dept) ("In the instant situation, petitioner's article 78 proceeding for a judgment of mandamus was proper. *Petitioner simply sought an order to compel the Judge to hear his claim*. The City Court Judge acted without authority when he dismissed petitioner's claim.") (emphasis added). *E.g.*, *Brusco v. Braun*, 84 N.Y.2d 674 (1994); *Sackinger v. Nevins*, 451 N.Y.S.2d 1005 (Sup.Ct. 1982). Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 7801 at C7801:3.

22. "An appeal from a judgment dismissing a habeas corpus petition lies *as of right* rather than by permission," *People ex rel. St. Germain v. Walker*, 191 A.D.2d 1049 (4th Dept. 1993) (emphasis added). Justice Webber therefore had a non-discretionary duty to grant NhRP's motion and accept NhRP's appeal as of right under CPLR 7011.

23. CPLR 7011 "governs the *right* of appeal in habeas corpus proceedings," *Wilkes v. Wilkes*, 212 A.D.2d 719, 720 (2d Dept. 1995) (emphasis added), and permits an appeal either "(1) from a judgment *refusing, at the outset*, to grant a writ of habeas corpus or to issue an order to *show cause* (CPLR 7003(a)) *or* (2) from a judgment made upon the return of a writ or order to show cause (CPLR 7010)."

24. NhRP was *not* requesting an order to show cause under CPLR Article 22. Rather, it was necessary under CPLR 7003(a), for NhRP to style its habeas petition relief as an order to show cause as it was not demanding Kiko's production to the court. CPLR 7003(a) provides that "[t]he court to whom the petition is made shall issue the writ without delay on any day, *or where the petitioner does not demand production of the person detained* . . . order the respondent to ***show cause*** why the person detained should not be released" (emphasis added).

25. The lower court's refusal to sign the order to show cause pursuant to 7003(a) is appealable as of right by NhRP pursuant to CPLR 7011.

26. Justice Webber erred in not recognizing the absolute right of NhRP to appeal under CPLR 7011, in not ruling on the motion, and in *sua sponte* converting NhRP's motion to appeal as of right under CPLR 7011 into a motion seeking leave to appeal under CPLR 5701(c), thereby depriving NhRP of its absolute right to appeal.

27. NhRP filed its Habeas Petition pursuant to CPLR 70, which exclusively governs the procedure for common law writs of habeas corpus including those relating to rights of appealing, (*See* CPLR 7001 "the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention."), including those relating to rights of appealing. *People ex rel. Curtis v. Kidney*, 225 N.Y. 299, 303 (1919).

28. NhRP's right to appeal to the Appellate Division under CPLR 7011 from the Supreme Court's refusal to issue a requested CPLR 7003(a) order to show cause was specifically and correctly recognized by the Third and Fourth Department in litigation brought by NhRP on behalf of Kiko and a different chimpanzee named Tommy. *Nonhuman Rights Project, Inc.*, *ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den*., 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015).

29. Because CPLR 7011 grants NhRP an appeal *as of right* from the lower court's refusal to issue the writ or a CPLR 7003 show cause order, Justice Webber was required to recognize this right and grant NhRP's motion to appeal. Accordingly, the Justice must be compelled under Article 78 to grant NhRP's motion.

WHEREFORE, NhRP respectfully requests an order compelling Justice Webber to grant its motion to appeal as of right.

Dated: November 1, 2016

By: _____

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Troy K. Webber, in her official capacity as an Associate Justice of the New York State Supreme Court Appellate Division, First Judicial Department
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

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In the Matter of a Proceeding under Article 78 of the CPLR for a Writ of Mandamus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

TROY K. WEBBER, in her official capacity as an Associate Justice of the New York State Supreme Court Appellate Division, First Judicial Department,

Respondent

and

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

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Index No. 150149/16
(New York County)

Memorandum of Law in Support of Verified Petition for Writ of Mandamus

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I. Preliminary Statement

This memorandum is submitted in support of The Nonhuman Rights Project, Inc.'s ("NhRP") Article 78 Verified Petition for Writ of Mandamus ("Petition") in which NhRP respectfully requests this Court to order Respondent, Honorable Associate Justice Troy K. Webber ("Justice Webber") of the New York State Supreme Court Appellate Division, First Judicial Department ("First Department"), to grant NhRP's motion to appeal as of right, as required by New York Civil Practice Law and Rules ("CPLR") 7011.[1]

II. Statement of Facts and Procedural History

On January 29, 2016, the Supreme Court, New York County denied a verified petition for a common law writ of habeas corpus and order to show cause ("Habeas Petition") filed pursuant to CPLR Article 70 by NhRP on behalf of a chimpanzee named Kiko (Exhibit 6 attached to Stein Aff.).

On February 9, 2016, NhRP filed with the Clerk of this Court the following papers: Notice of Appeal (Exhibit 2 attached to Stein Aff.), completed Request for Appellate Intervention, Order of the Supreme Court New York County, and affidavit of service. NhRP then sought to perfect its appeal. On May 18, 2016, it filed the Record on Appeal, which included the order of the lower court and Opening Brief. NhRP's counsel was then contacted by the First Department

[1] Submitted herewith in support of its Article 78 Petition is the Affirmation of Elizabeth Stein, Esq. ("Stein Aff.")

Clerk's Office, informed that NhRP did not have a proper order from which an appeal could be taken, and that NhRP did not have an appeal as of right from the lower court's refusal to issue an order to show cause or writ of habeas corpus. NhRP also filed the following documents with this Court: Appendix, Motion to File an Oversize Brief (which was denied); a second Motion to File an Oversize Brief (which was granted), Motion for Steven M. Wise to appear and argue *Pro Hac Vice* (which was granted), and Motion to Appeal as of Right (Exhibit 4 attached to Stein Aff.).

In response to the Clerk's statement regarding the sufficiency of the order and appropriateness of the appeal, on May 20, 2016, NhRP submitted a letter to the lower court requesting that it enter an appropriate order with the New York County Clerk from which an appeal may be taken, which the court issued on the same date (Exhibit 3 attached to Stein Aff.) and which NhRP sought to file as a supplemental record on appeal. Because this judgment post-dated all filings in this appeal, on July 6, 2016, the lower court granted NhRP's motion for an order that the judgment of May 20, 2016 be issued *nunc pro tunc* to the date of the lower court's original final order of January 29, 2016 (Exhibit 5 attached to Stein Aff.).

On July 28, 2016, Justice Webber entered an order denying NhRP's Motion to Appeal as of Right pursuant to CPLR 7011 by *sua sponte* converting it into a

Motion for Leave to Appeal pursuant to CPLR 5701(c), then denying this Motion, which NhRP neither filed nor intended to file, asserting:

> Petitioner-Appellant moved to appeal the matter as of right pursuant to CPLR 7011.
>
> I, Troy K. Webber, a Justice of the Appellate Division, deem this a motion brought pursuant to CPLR 5701(c), for leave to appeal to the Appellate Division, First Department, from the order of Supreme Court Justice Barbara Jaffe of the Supreme Court, New York County, entered on or about January 29, 2016,
>
> Now, upon reading the papers with respect to the motion, and due deliberation having been had thereon, it is Ordered that the application for leave to appeal is denied.

(Exhibit 1 attached to Stein Aff.).

On August 19, 2016, NhRP filed with this Court a Motion to Reargue or, in the alternative, for Leave to Appeal to the Court of Appeals from the order of July 28, 2016 (Exhibit 7 attached to Stein Aff.). On October 25, 2016, the Court entered an order denying NhRP's motion (Exhibit 8 attached to Stein Aff.).

As discussed below, NhRP is entitled to mandamus relief because NhRP has an absolute right to appeal under CPLR 7011 which Justice Webber had no discretion to deny by construing its motion to appeal as of right under CPLR 7011 as a motion for leave to appeal under CPLR 5701(c), which NhRP intentionally neither sought nor briefed.

III. While venue is proper in this Appellate Division, this Court has the discretion to transfer NhRP's Article 78 Petition to an adjoining

Appellate Division if it cannot reasonably rule impartially.

NhRP's Article 78 Petition is properly filed in this Court. CPLR 7804(b) must be read in conjunction with CPLR 506(b). CPLR 506(b)(1) provides that an Article 78 proceeding "against a justice of the supreme court . . . shall be commenced in the appellate division in the judicial department where the action, in the course of which the matter sought to be enforced or restrained originated, is triable." CPLR 506(b)(1).

CPLR 506(b)(1)'s language "justice of the supreme court" applies to the Appellate Division and its Justices. *E.g.*, *Dinsio v. S. Ct. App. Div., Third Jud. Dept*., 125 A.D.3d 1313 (4th Dept. 2015), *leave to appeal denied*, 25 N.Y.3d 908, (N.Y. 2015), *reargument denied*, 26 N.Y.3d 1134 (N.Y. 2016); *Stein v. Murphy*, 439 N.Y.S.2d 221 (2d Dept. 1981) (Article 78 petition filed in Second Department to compel Presiding Justice of the First Department); *Gold v. Shapiro*, 62 A.D.2d 62 (2d Dept. 1978), *aff'd*, 45 N.Y.2d 849 (N.Y. 1978) (Article 78 petition properly filed in Appellate Division to enjoin an Appellate Division justice from effectuating a decision); *Nichols v. Gamso*, 42 A.D.2d 630 (3d Dept. 1973), *modified*, 35 N.Y.2d 35 (N.Y. 1974) (Article 78 petition filed against Appellate Division properly filed in Appellate Division).

Although a Justice of this Court is the named Respondent, this Court need not recuse itself if it can adjudicate the merits impartially. *See New York State*

Ass'n of Criminal Def. Lawyers v. Kaye, 95 N.Y.2d 556, 558 (2000); *Gold*, 62 A.D.2d 62. Such was the case in *Gold* where the petition was filed in the Second Judicial Department ("Second Department") against an Associate Justice of the Second Department. *Id*. The court granted the petition, ordering that the respondent Justice was prohibited from signing an order effectuating his determination to grant bail. *Id.* at 68.

Significantly, in *Kaye*, an Article 78 proceeding against the Court of Appeals in its administrative capacity was filed in the Supreme Court. 95 N.Y.2d at 558. The issue on appeal was whether Chief Judge Kaye and the other judges named as parties should be disqualified from participating in the decision. *Id.* The Court concluded that recusal was not required, reasoning in part, as relevant here:

> "The fact is that our promulgation of the [rule] is not a prior determination that it is valid and constitutional. That determination must await the adjudication in this or a future case" [citation omitted]. **To the extent that a decision in this article 78 proceeding may involve reevaluation by this Court of limited aspects of its own prior determination, this Court may reconsider its own decision** (*see, Matter of Rules of Ct. of Appeals for Admission of Attorneys & Counselors at Law, . . .* [Judges of this Court decided application for reconsideration of administrative order they participated in adopting]; *see also, Ex parte Farley, supra* [comparing review of administrative determination to motion for new trial or petition for rehearing]; *Board of Overseers of Bar v. Lee,* 422 A.2d 998, *appeal dismissed . . .* [comparing challenge to constitutionality of rule to reconsideration in a litigated case of issue decided in Judge's prior advisory opinion]).

Id. at 560-61 (emphasis added).

If the Court cannot be impartial, it must transfer the Petition to a different Appellate Division. *E.g.*, *Dinsio*, 125 A.D.3d 1313. In *Dinsio*, for instance, a prisoner brought an Article 78 proceeding in the Appellate Division, Third Judicial Department ("Third Department") to compel it to determine issues raised in his motions to vacate. *Id.* The Third Department transferred the proceeding to the Appellate Division, Fourth Judicial Department. 125 A.D.3d 1314 (4th Dept. 2015). Likewise, in *Nichols v. Gamso*, an Article 78 petition was filed in the First Department against the Chief Clerk of the First Department; the First Department transferred the petition to the Third Department. 42 A.D.2d 630. The Third Department then ruled against the Respondent First Department Clerk, directing respondent to make the file of the First Department available for public inspection." *Id*. As in *Nichols*, NhRP requests that this Court transfer the proceeding to the Third Department if it cannot render a fair and impartial decision, as that Department has already carefully considered the issue.

IV. NhRP is entitled to mandamus relief because Justice Webber failed to perform a duty required by CPLR 7011.

A. Mandamus may be used to compel a judicial officer to exercise a non-discretionary duty in connection with a civil or criminal proceeding.

Article 78 mandamus is proper where, as here, an "officer failed to perform a duty enjoined upon it by law." CPLR 7801 and 7803. *See generally Korn v. Gulotta*, 72 N.Y.2d 363, 370 (1988); *People ex rel. Welling v. Meakim*, 24 Abb. N.

Cas. 477, 482-83 (N.Y. 1890). Despite CPLR 7801(2)'s general proscription against the use of Article 78 to challenge determinations made in connection with civil and criminal actions, if the challenged matter is the performance of an official duty in the nature of a ministerial act, no "determination" is being reviewed. *See*, *Nat'l Auto Weld, Inc. v. Clynes*, 454 N.Y.S.2d 33, 34-34 (3rd Dept) ("In the instant situation, petitioner's article 78 proceeding for a judgment of mandamus was proper. *Petitioner simply sought an order to compel the Judge to hear his claim*. The City Court Judge acted without authority when he dismissed petitioner's claim.") (emphasis added). *E.g.*, *Brusco v. Braun*, 84 N.Y.2d 674 (1994); *Sackinger v. Nevins*, 451 N.Y.S.2d 1005 (Sup.Ct. 1982). Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 7801 at C7801:3.

B. CPLR 7011 required Justice Webber to grant NhRP's motion to appeal as of right and vested it with no discretion to convert the motion to one seeking leave to appeal under CPLR 5701(c) *sua sponte* and then deny the motion.

As "[a]n appeal from a judgment dismissing a habeas corpus petition lies *as of right* rather than by permission," *People ex rel. St. Germain v. Walker*, 191 A.D.2d 1049 (4th Dept. 1993) (emphasis added), Justice Webber had a non-discretionary duty to grant NhRP's motion and accept NhRP's appeal as of right under CPLR 7011. CPLR 7011 "governs the *right* of appeal in habeas corpus proceedings," *Wilkes v. Wilkes*, 212 A.D.2d 719, 720 (2d Dept. 1995) (emphasis added), and permits an appeal either "(1) from a judgment *refusing, at the outset*,

to grant a writ of habeas corpus or to issue an order to *show cause* (CPLR 7003(a)) *or* (2) from a judgment made upon the return of a writ or order to show cause (CPLR 7010)." Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), CPLR 7011* (West 2014) (emphasis added). *See People ex rel. Tatra v. McNeill*, 19 A.D.2d 845, 846 (2d Dept. 1963) (an appeal "from an order refusing to grant a writ or from a judgment made upon the return of a writ" is "authorized by statute in a habeas corpus proceeding (CPLR § 7011).").[2]

Justice Webber had no discretion *sua sponte* to convert NhRP's motion to appeal as of right under CPLR 7011 into a motion seeking leave to appeal under CPLR 5701(c). NhRP filed its Habeas Petition pursuant to CPLR 70, which exclusively governs the procedure for common law writs of habeas corpus. *See*

[2] *See also People ex rel. Silbert v. Cohen*, 29 N.Y.2d 12, 14 (1971); *Callan v. Callan*, 114 A.D.2d 348, 350 (2d Dept. 1985); *Bell v. Santor*, 21 A.D.3d 1192, 1192 (3d Dept. 2005); Application of Mitchell, 70 A.D.2d at 368 (4th Dept. 1979); *People ex rel. Peoples v. New York State Dept. of Correctional Services*, 107 A.D.3d 1648 (4th Dept. 2013) (entertaining appeal from the dismissal of a habeas corpus petition); *People ex rel. Flemming v. Rock*, 110 A.D.3d 533 (1st Dept. 2013) (same); *People ex rel. Jenkins v. Rikers Island Correctional Facility Warden*, 112 A.D.3d 135 (4th Dept. 2013) (entertaining appeal from order dismissing petition for habeas corpus); *People ex rel. Holmes v. Heath*, 107 A.D.3d 748 (2d Dept. 2013) (entertaining appeal from denial of petition for habeas corpus without hearing); *People ex rel. Gonzalez v. New York State Div. of Parole*, 255 A.D.2d 611 (2d Dept. 1998) (entertaining an appeal "[i]n a habeas corpus proceeding," where supreme court "refused an application for an order to show cause"); *People ex rel. Mabery v. Leonardo*, 179 A.D.2d 848 (3d Dept. 1992) (entertaining appeal from supreme court's denial of "petitioner's application for a writ of habeas corpus, in a proceeding pursuant to CPLR article 70, without a hearing."); *People ex rel. Johnson v. New York State Bd. of Parole*, 180 A.D.2d 914, 915-16 (3d Dept. 1992) (entertaining appeal where petitioner "commenced this proceeding for habeas corpus relief by order to show cause and petition" and supreme court "dismissed the petition"); *People ex rel. Edmonds v. Warden, Queens H. of Detention for Men*, 25 A.D.2d 860 (2d Dept. 1966) ("In a habeas corpus proceeding, relator appeals from a judgment of the Supreme Court, . . . which dismissed the writ.").

CPLR 7001 ("the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention."); *People ex rel. Delia v. Munsey*, 26 N.Y.3d 124, 127-28 (2015) ("article 70 of the CPLR governs special proceedings for a writ of habeas corpus . . . "). Article 70, like its predecessors, "contains elaborate provisions regulating the exercise of the common-law power to issue and adjudge it . . . including those relating to rights of appealing." *People ex rel. Curtis v. Kidney*, 225 N.Y. 299, 303 (1919). "The writ existed at common law, but the proceedings of the court with respect to it are regulated by statute, and the courts must be governed by *that statute*." *People ex rel. Billotti v. New York Juvenile Asylum*, 57 A.D. 383, 384 (1st Dept. 1901) (emphasis added).

It was necessary, under CPLR 7003(a), for NhRP to style its habeas petition relief as an order to show cause as it was not demanding Kiko's production to the court. CPLR 7003(a) provides that "[t]he court to whom the petition is made shall issue the writ without delay on any day, *or where the petitioner does not demand production of the person detained* . . . order the respondent to ***show cause*** why the person detained should not be released" (emphasis added).[3] Justice Webber clearly

[3] *See, e.g., Callan v. Callan*, 114 A.D.2d at 350 494 N.Y.S.2d 32, 33 (2d Dept. 1985) ("Plaintiff obtained a writ of habeas corpus by order to **show cause** when defendant failed to return her infant daughter after her visitation . . . "); *State ex rel. Soss v. Vincent*, 48 A.D.2d 911, 911 369 N.Y.S.2d 766, 767 (2d Dept. 1975) ("In a habeas corpus proceeding upon an order to **show cause (CPLR 7003, subd. (a)),** the appeal is from a judgment of the Supreme Court … which granted the petition and ordered petitioner released"); *People ex rel. Bell v. Santor*, 21 A.D.3d at

misapprehended the nature of the order to show cause and controlling law in applying CPLR 5701(c), which requires permission for leave to appeal when there is no right to appeal, *supra*.

NhRP's right to appeal to the Appellate Division under CPLR 7011 from the Supreme Court's refusal to issue a requested CPLR 7003(a) order to show cause was specifically and correctly recognized by the Third and Fourth Department in litigation brought by NhRP on behalf of Kiko and a different chimpanzee named Tommy. *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den*., 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015). The Third Department stated that: "[a]s Supreme Court's judgment finally determined the matter by refusing to issue an order to show cause to commence a habeas corpus proceeding, it is appealable as of right."

1192 801 N.Y.S.2d 101 (3d Dept. 2005) ("Petitioner commenced this CPLR article 70 proceeding seeking habeas corpus relief . . . Supreme Court dismissed the petition without issuing an **order to show** cause or writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell*, 70 A.D.2d at 368 421 N.Y.S.2d 443, 444 (4th Dept. 1979) ("This matter originated when petitioner . . . sought, by an order and petition, a *writ of habeas corpus* (Respondents) to **show cause** why Ricky Brandon, an infant . . . should not be released and placed in petitioner's custody."); *People ex rel. Smith v. Greiner*, 674 N.Y.S.2d 588 (Sup. Ct. 1998) ("This is a habeas corpus proceeding brought by the petitioner pro se and commenced via Order to **Show Cause**"); *People ex rel. Goldstein on Behalf of Coimbre v. Giordano*, 571 N.Y.S.2d 371 (Sup. Ct. 1991) ("By order to **show cause**, in the nature of a Writ of Habeas Corpus proceeding, the petitioner seeks his release from the custody of the New York State Division for Youth. . . . [T]he Court grants the petition and directs that this petitioner be forthwith released") (emphasis added in each).

Id. at 149 n.1 (citing CPLR 7011; *People ex rel. Seals v New York State Dept. of Correctional Servs*., 32 A.D.3d 1262, 1263 (4th Dept. 2006); *People ex rel. Tatra v McNeill*, 19 A.D.2d 845, 846 (2d Dept. 1963)).[4]

Because CPLR 7011 grants an appeal *as of right* from the refusal to issue the writ or a CPLR 7003 show cause order, Justice Webber was required to grant NhRP's motion to appeal. Accordingly, the Justice must be compelled under Article 78 to grant NhRP's motion.[5]

Justice Webber's failure to comply with her judicial obligation under CPLR 7011 also frustrates the right to a speedy determination guaranteed to a habeas corpus petitioner. *See, e.g.*, CPLR 7003 (court must "issue the writ without delay"); CPLR 7009(c) (court required to proceed in a summary manner); *People ex rel. Duryee v. Duryee*, 188 N.Y. 440, 445-46 (1907) (habeas corpus "tolerates no delay except of necessity"). As this Court held in *People ex rel. Garber v. Garber*, "procedures tending to delay (habeas corpus) are incompatible with its primary objective of prompt disposition." 18 A.D.2d 990, 990 (1st Dept. 1963).

[4] The Appellate Division, Second Judicial Department, "dismissed petitioner's appeal 'on the ground that no appeal lies as of right from an order that is not the result of a *motion made on notice* (see CPLR 5701),' and declined to grant leave to appeal or reargue. (Aff. in Opp., Exh. G)." *Matter of Nonhuman Rights Project Inc. v. Stanley*, 16 N.Y.S.3d 898, 903 (Sup. Ct. 2015) (emphasis added). That dismissal also violated CPLR 7011. However, in the case at bar, NhRP's request for an order to show cause was intentionally made *with* notice.

[5] Moreover, even if CPLR 5701 applied to this habeas corpus proceeding, NhRP would still be entitled to the right to appeal under CPLR 5701(a), rather than by permission under 5701(c). In the present case, the case originated in the Supreme Court and the Supreme Court entered a final judgment disposing of all the issues in the action.

The unique procedures in Article 70 are intended not just to give habeas petitioners a speedy initial hearing to determine their liberty, but the right to appeal a refusal to issue a writ of habeas corpus or order to show cause. NhRP is absolutely entitled to, and must be afforded, this opportunity forthwith.

V. Conclusion

As CPLR 7011 confers upon NhRP an absolute right to appeal from the lower court's denial of its Habeas Petition, Justice Webber lacked discretion to deny NhRP's motion to appeal as of right. NhRP respectfully requests that this Court grant its Article 78 petition for a writ of mandamus and compel the Justice to grant NhRP's CPLR 7011 motion to appeal as of right.

Dated: November 1, 2016 Respectfully submitted,

_____

Elizabeth Stein, Esq.
Attorney for Petitioner-Appellant
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726
liddystein@aol.com

_____

Steven M. Wise, Esq.
(of the bar of the State of Massachusetts)
By permission of the Court
Attorney for Petitioner-Appellant
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864
WiseBoston@aol.com

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

----------x

In the Matter of a Proceeding under Article 78 of the CPLR for a Writ of Mandamus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

TROY K. WEBBER, in her official capacity as an Associate Justice of the New York State Supreme Court Appellate Division, First Judicial Department,

Respondent

-and-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

----------x

Index No. 150149/16
(New York County)

Attorney Affirmation

I, Elizabeth Stein, an attorney duly admitted to practice law in the State of New York, affirms the following under the penalty of perjury:

1. I am an attorney of record for Petitioner-Appellant, The Nonhuman Rights Project, Inc. ("NhRP"), in the above-captioned matter and am not a party in this action.

2. I am fully familiar with the pleadings and proceedings in this matter, have read and know the contents thereof and submit this affirmation in support of the within Verified Petition for Writ of Mandamus and all exhibits and other documents annexed thereto compelling Respondent, the Honorable Associate Justice Troy Webber of this Court ("Justice Webber") to grant NhRP's Motion to Appeal as of Right.

3. Attached hereto as Exhibit 1 is an order entered July 28, 2016 issued by Justice Webber, in which she *sua sponte* converted NhRP's Motion to Appeal as of Right into a Motion for Leave to Appeal pursuant to CPLR 5701(c) then denied this motion.

4. Attached hereto as Exhibit 2 is a Notice of Appeal filed by NhRP on February 9, 2016.

5. Attached hereto as Exhibit 3 is an order dated May 20, 2016 issued by the Honorable Justice Barbara Jaffe of the Supreme Court, New York County ("Justice Jaffe").

6. Attached hereto as Exhibit 4 is NhRP's Motion to Appeal as of Right, which was filed with this Court on May 26, 2016.

7. Attached hereto as Exhibit 5 is an order of Justice Jaffe, dated July 6, 2016, stating that the final order of May 20, 2016 (Exhibit 3) be issued *nunc pro tunc* to the original order of January 29, 2016.

8. Attached hereto as Exhibit 6 is an order of Justice Jaffe, dated January 29, 2016, denying NhRP's verified petition for a common law writ of habeas corpus and order to show cause, which stated "declined to sign."

9. Attached hereto as Exhibit 7 is NhRP's Motion to Reargue or, in the alternative, for Leave to Appeal to the Court of Appeals from the order of July 28, 2016, which was filed with this Court on August 19, 2016 (exhibits omitted).

10. Attached hereto as Exhibit 8 is an order of this Court, dated October 25, 2016, denying NhRP's Motion to Reargue or, in the alternative, for Leave to appeal to the Court of Appeals.

11. Pursuant to 22 N.Y.C.R.R. §1301.1, I affirm that this action is not frivolous.

Dated: November 1, 2016

_____

Elizabeth Stein, Esq.
Attorney for Petitioner-Appellant
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726
liddystein@aol.com

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

BEFORE: Hon. Troy K. Webber
Associate Justice of the Appellate Division

----------X

The Nonhuman Rights Project, Inc., on behalf of Kiko,
Petitioner-Appellant,

-against-

Carmen Presti, individually and as an officer and director of the Primate Sanctuary, Inc., Christie E. Presti, individually and as an officer and director of the Primate Sanctuary, Inc.,
Respondents.

M-2819
Ind. No. 150149/16

----------X

Petitioner-Appellant moved to appeal the matter as of right pursuant to CPLR 7011. I, Troy K. Webber, a Justice of the Appellate Division, deem this a motion brought pursuant to CPLR 5701(c), for leave to appeal to the Appellate Division, First Department, from the order of Supreme Court Justice Barbara Jaffe of the Supreme Court, New York County, entered on or about January 29, 2016,

Now, upon reading the papers with respect to the motion, and due deliberation having been had thereon, it is

Ordered that the application for leave to appeal is denied.

Dated: June 30, 2016
New York, New York

Hon. Troy K. Webber
Associate Justice

ENTERED

JUL 28 2016

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

BEFORE: Hon. Marcy L. Kahn
Justice of the Appellate Division

----------X
The People of the State of New York,

M-2638
Ind. No. 5809/13

-against-

CERTIFICATE
DENYING LEAVE

Dary Ramirez,
Defendant.
----------X

I, Marcy L. Kahn, a Justice of the Appellate Division, First Judicial Department, do hereby certify that, upon application timely made by the above-named defendant for a certificate pursuant to Criminal Procedure Law, sections 450.15 and 460.15, and upon the record and proceedings herein, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Judicial Department, and permission to appeal from the order of the Supreme Court, New York County (Hon. Richard D. Carruthers), entered on or about December 17, 2015, is hereby denied.

Associate ~~Justice~~

Dated: New York, New York
June 23, 2016

ENTERED:
JUL 28 2016

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary Inc., and THE PRIMATE SANCTUARY INC.,

Respondents.

NOTICE OF APPEAL

Index No. 150149/2016
NYSCEF Doc. No. 48
Proceeding Commenced
January 7, 2016

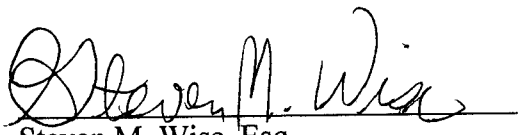
Honorable Barbara Jaffe
Justice of the Supreme Court
New York County

PLEASE TAKE NOTICE that the Petitioner, THE NONHUMAN RIGHTS PROJECT, INC. on behalf of KIKO, hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from an Order and Memorandum Opinion entered in the above entitled action in the office of the Clerk of New York County on January 29, 2016, denying a Petition for a Writ of Habeas Corpus and Order to Show Cause, and this appeal is taken from each and every part of that Order and Memorandum Opinion.

Dated: February 9, 2016

Respectfully submitted,

Elizabeth Stein, Esq.
Attorney for Petitioner
5 Dunhill Road
New Hyde Park, New York 11040
516 -747-4726



Steven M. Wise, Esq.
Attorney for Petitioner
(subject to admission *pro hac vice*)
5195 NW 112th Terrace
Coral Springs, Florida 33076
954-648-9864

BY NYSCEF TO:

The Supreme Court of the State of New York, New York County
Office of the Clerk

BY NYSCEF AND MAIL TO:

Carmen Presti, individually and as an officer and director of The Primate Sanctuary Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
716-284-6118

Christie E. Presti, individually and as an officer and director of The Primate Sanctuary Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
716-284-6118

The Primate Sanctuary Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
716-284-6118

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary Inc., and THE PRIMATE SANCTUARY INC.,

Respondents-Respondents.

PRE-ARGUMENT STATEMENT

Index No. 150149/2016
NYSCEF Doc. No. 48
Proceeding Commenced
January 7, 2016

Elizabeth Stein, Esq.
Attorney for Petitioner-Appellant
5 Dunhill Road
New Hyde Park, New York 11040
Phone - 516-747-4726
Email – liddystein@aol.com

Steven M. Wise, Esq.
Attorney for Petitioner-Appellant
(subject to admission *pro hac vice*)
5195 NW 112th Terrace
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Phone - 954-648-9864
Email – WiseBoston@aol.com

Carmen Presti, individually and as an officer and director of The Primate Sanctuary Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
Phone – 716-284-6118

Christie E. Presti, individually and as an officer and director of The Primate Sanctuary Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
Phone – 716-284-6118

The Primate Sanctuary Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
Phone – 716-284-6118

Respondents-Respondents were not represented by counsel in the lower court.

The appeal is taken from an Order of the Supreme Court, New York County
Honorable Barbara Jaffe, J.S.C. entered January 29, 2016.

There is no additional appeal pending in this action.

There are no related actions pending.

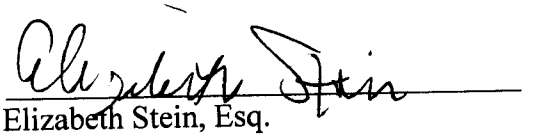
The nature of the underlying proceeding in this action is a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause brought by Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), on behalf of a chimpanzee named Kiko, under CPLR Article 70 seeking a determination of the legality of Kiko's detention and an order requiring his immediate release and transfer to an appropriate primate sanctuary.

The lower court declined to sign the Order to Show Cause on the grounds that: (a) the NhRP "filed four identical petitions with four state trial courts, each in a different county. With each petition, it offered the same nine affidavits. It then recently filed another two petitions in New York County which are identical to those previously filed, except for the addition of affidavits from five of the nine original affiants, along with a sixth from a member of its board of directors. All of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the last four petitions"; (b) it was bound by *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015) in which the court stated that chimpanzees are not "persons" for the purpose of demanding a common law writ of habeas corpus because they are unable to shoulder duties and responsibilities; and (c) "whether evidence of the ability of some chimpanzees to shoulder certain kinds of responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me (*Nonhuman Rights Project v Stanley*, 49 Misc 3d 746 [Sup Ct, New York County 2015 [Jaffe, J.]), are determinations that are best addressed there." A true and correct copy of the Memorandum Opinion is attached herein.

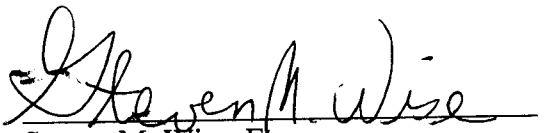
The grounds for seeking reversal of the lower court's order are: (a) Kiko is a "person" within the meaning of CPLR Article 70 and the common law of habeas corpus; (b) the lower court's statement that the NhRP "filed four identical petitions with four state trial courts, each in a different county" is both erroneous and irrelevant to the determination of whether a successive writ of habeas corpus should be granted. Only a single habeas corpus petition was filed on behalf of Kiko and that petition was before the Supreme Court, Niagara County, which refusal to issue an order to show cause was affirmed by the Supreme Court of the State of New York Appellate Division, Fourth Judicial Department in *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den.*, 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015) on the sole ground that Kiko's transfer to a primate sanctuary was an inappropriate remedy for habeas corpus, which directly conflicts with the holding of this Court in *McGraw v. Wack*, 220 A.D.2d 291, 292 (1st Dept. 1995) and *Matter of MHLS v. Wack*, 75 N.Y.2d 751 (1989); (c) the Supreme Court of the State of New York Appellate Division, Third Judicial Department's ("Third Department") ruling in *Lavery* that chimpanzees are not "persons" for the purpose of demanding a common law writ of habeas corpus rested upon the erroneous legal ruling, unprecedented in Anglo-American jurisprudence, that only an entity able to shoulder duties and responsibilities can be a "person" for the purpose of a common law writ of habeas corpus, or for any other purpose; (d) the Third Department's ruling in *Lavery* was erroneous because it improperly took judicial notice of the "fact" that chimpanzees could not shoulder duties and responsibilities, as no evidence bearing on that fact was introduced before either the lower court or the Third Department; the decision therefore is not binding on either the Supreme Court, New York County or this Court; (e) in response to the Third Department's erroneous legal ruling, unprecedented in Anglo-American jurisprudence, that only an entity able to shoulder duties and responsibilities can be a "person" for the purpose of a common law writ of habeas corpus, or for any other purpose, and the Third Department's improper taking of judicial notice of the "fact" that chimpanzees could not shoulder duties and responsibilities, as no evidence bearing on that fact had been introduced before either the lower court or the Third Department, the NhRP provided the lower court in this case with approximately 60 pages of new facts and grounds not previously presented that specifically demonstrated that chimpanzees routinely shoulder duties and responsibilities both within chimpanzee communities and mixed chimpanzee/human communities; (f) these new facts and grounds had not been previously presented in the petition brought by the NhRP on behalf of Kiko in the Supreme Court, Niagara County as it was filed prior to *Lavery* and because neither *Lavery's* unprecedented statement that the ability to shoulder duties and responsibilities is required for personhood nor *Lavery's* improper taking of judicial notice of the "fact' that chimpanzees could not shoulder duties and responsibilities could have been reasonably anticipated; (g) the question of whether the ability to shoulder duties and responsibilities is necessary for a determination of personhood is not "best addressed" by the Third Department, but by this Court, as this Court has never ruled on this issue; and (h) based upon the unrebutted facts presented to the lower court, Kiko is entitled to the immediate issuance of the requested

Order to Show Cause, an appropriate hearing, and an order releasing him forthwith from detention and transfer to an appropriate sanctuary, which the NhRP suggests is Save the Chimps, in Ft. Pierce, Florida.

Date: February 9, 2016

Submitted by: 

Elizabeth Stein, Esq.
Attorney for Petitioner-Appellant



Steven M. Wise, Esq.
Attorney for Petitioner-Appellant
(subject to admission *pro hac vice*)

Attachments:

1. Copy of Order appealed from.
2. Copy of memorandum opinion.
3. Copy of Notice of Appeal.

At I.A.S Part _____ of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 80 Centre Street, New York, NY, on the _____day of _____, 2016

PRESENT: HON._____
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents.
----------x

ORDER TO SHOW CAUSE & WRIT OF HABEAS CORPUS

Index No.: **150149/2016**

DECLINED TO SIGN See annexed memorandum

TO THE ABOVE NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition of Elizabeth Stein, Esq. and Steven M. Wise, Esq. (subject to *pro hac vice* admission), with Exhibits and Memorandum of Law, dated January 6, 2016, and upon all pleadings and proceedings herein, let the Respondents CARMEN PRESTI, individually and as an officer and director of The Primate

Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC., or their attorneys, SHOW CAUSE at I.A.S. Part _____, Room _____, of this Court to be held at the Courthouse located at 80 Centre Street, New York, New York 10013, on the _____ day of _____, 2016 at _____o'clock in the _____ of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting Petitioner, The Nonhuman Rights Project, Inc. ("NhRP"), the following relief:

A. Upon a determination that Kiko is being unlawfully detained, ordering his immediate release and transfer forthwith to an appropriate primate sanctuary;

B. Awarding the NhRP the costs and disbursements of this action; and

C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC. by personal delivery, on or before the _____ of _____, 2016, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, and electronically filed with the NYSCEF system, no later than the _____ of _____, 2016.

Dated: _____
New York, New York

_____
Honorable

ENTER:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 12

----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

- against -

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY INC.,

Respondents.

----------x

Index No. 150149/16

MEMORANDUM

Mot. seq. no. 001

JAFFE, BARBARA, J.:

For petitioner:
Elizabeth Stein, Esq.
5 Dunhill Rd.
New Hyde Park, NY 11040
516-747-4726

Steven M. Wise, Esq., pro hac vice
Nonhuman Rights Project
5195 NW 112th Terrace
Coral Springs, FL 33076

I decline to sign the order to show cause filed by petitioner for the following reasons:

While successive petitions for a writ of habeas corpus based on the same ground are permissible, "orderly administration would require, at least, a showing of changed circumstances." (*People ex rel. Woodard v Berry*, 163 AD2d 759, 760 [3d Dept 1990], *lv denied* 76 NY2d 712; *People ex rel. Glendening v Glendening*, 259 AD 384, 387 [1st Dept 1940], *affd* 284 NY 598; *see People ex rel. Leonard HH v Nixon*, 148 AD2d 75, 80-81 [3d Dept 1989]).

Here, between 2013 and 2014, petitioner filed four identical petitions with four state trial courts, each in a different county. With each petition, it offered the same nine affidavits. It then recently filed another two petitions in New York County which are identical to those previously filed, except for the addition of affidavits from five of the nine original affiants, along with a

sixth from a member of its board of directors. All of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the first four petitions.

In any event, whether evidence of the ability of some chimpanzees to shoulder certain kinds responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me (*Nonhuman Rights Project v Stanley*, 49 Misc 3d 746 [Sup Ct, New York County 2015 [Jaffe, J.]), are determinations that are best addressed there.

BARBARA JAFFE
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary Inc., and THE PRIMATE SANCTUARY INC.,

Respondents.

AFFIDAVIT OF SERVICE

Index No. 150149/2016
NYSCEF Doc. No. 48
Proceeding Commenced
January 7, 2016

Honorable Barbara Jaffe
Justice Supreme Court
New York County

STATE OF NEW YORK}
ss. :}
COUNTY OF NASSAU

I, Elizabeth Stein, Esq., being duly sworn, state that I am not a party to the action, am over 18 years of age and reside at 5 Dunhill Road, New Hyde Park, New York 11040.

I hereby certify that on February 9, 2016, I mailed first class and deposited in a post office depository under the exclusive care and custody of the United States Postal Service within New York State, in a postpaid, sealed envelope properly addressed to each Respondent at their last known location listed below, a copy of the Notice of Appeal, a copy of the Order appealed from, a copy of the memorandum opinion attached to the Order and a copy of the Pre-Argument Statement.

1. Carmen Presti, individually and as an officer and director of The Primate Sanctuary Inc.
   2764 Livingston Avenue
   Niagara Falls, New York 14303
2. Christie E. Presti, individually and as an officer and director of The Primate Sanctuary Inc.
   2764 Livingston Avenue
   Niagara Falls, New York 14303

3. The Primate Sanctuary Inc.
   2764 Livingston Avenue
   Niagara Falls, New York 14303

Sworn to me this
9th day of February, 2016

Notary Public

PHILIP V. MATHAI
Notary Public, State of New York
Qualified in Nassau County
No. 01MA6206319
My Commission Expires May 18, 201

Elizabeth Stein

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Supplemental Decision

PRESENT: BARBARA JAFFE J.S.C. PART 12
Justice

Nonhuman Rights Project -v- Presti, Carmen

INDEX NO. 150149/2016
MOTION DATE
MOTION SEQ. NO. Seq 001

The following papers, numbered 1 to ____, were read on this motion to/for Habeus Corpus

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s).
Answering Affidavits — Exhibits ____ | No(s).
Replying Affidavits ____ | No(s).

Upon the foregoing papers, it is ordered that this motion is

In response to Petitioner's request, the Declined Order to Show Cause and annexed Memorandum (NYSCEF #48) constitute the court's Decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: MAY 20 2016

BARBARA JAFFE, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☑ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Nonhuman Rights Project

By Hand

May 20, 2016

Supreme Court of the State of New York
New York County
Barbara Jaffe, JSC
80 Centre Street
Room 279
New York, New York 10013

Re: *Nonhuman Rights Project, Inc., on behalf of Kiko v. Carmen Presti et al.*, (150149/2016)

Dear Justice Jaffe,

I am a counsel of record for Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP") in the above-captioned matter. The NhRP filed in the Supreme Court, New York County a verified petition for a writ of habeas corpus and order to show cause on behalf of a chimpanzee named Kiko. On January 29, 2016, you entered with the Clerk of the Court a copy of the proposed writ of habeas corpus and order to show cause which was stamped "DECLINED TO SIGN" and an annexed memorandum of law. The NhRP then filed and served a timely notice of appeal on February 9, 2016.

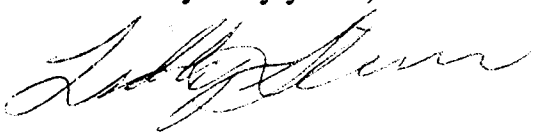
The NhRP seeks to perfect its appeal. This week it filed the record on appeal and brief in the New York State Supreme Court Appellate Division, First Judicial Department. I was contacted by Don Ramos of the Clerk's Office and informed that we did not have a proper order from which an appeal may be taken. I am therefore writing to request that you enter an actual Order with the New York County Clerk denying the NhRP's petition for a writ of habeas corpus and order to show cause. I will submit this Order to the First Department along with a memorandum of law explaining why the NhRP has an appeal as of right from the

5195 NW 112th Terrace · Coral Springs · FL 33076 · (954) 648-9864
www.nonhumanrights.org · info@nonhumanrights.org

denial of an order to show cause in the context of a habeas corpus petition pursuant to Article 70 of the CPLR.

Thank you for your kind consideration of this matter.

Very truly yours,



Elizabeth Stein

CC: Carmen Presti

Christie E. Presti

The Primate Sanctuary, Inc.

5195 NW 112th Terrace · Coral Springs · FL 33076 · (954) 648-9864
www.nonhumanrights.org · info@nonhumanrights.org

At I.A.S Part _____ of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 80 Centre Street, New York, NY, on the _____day of _____, 2016

PRESENT: HON._____
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents.
----------x

DECLINED TO SIGN see annexed memorandum

ORDER TO SHOW CAUSE & WRIT OF HABEAS CORPUS

Index No.: **150149/2016**

TO THE ABOVE NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition of Elizabeth Stein, Esq. and Steven M. Wise, Esq. (subject to *pro hac vice* admission), with Exhibits and Memorandum of Law, dated January 6, 2016, and upon all pleadings and proceedings herein, let the Respondents CARMEN PRESTI, individually and as an officer and director of The Primate

Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC., or their attorneys, SHOW CAUSE at I.A.S. Part _____, Room _____, of this Court to be held at the Courthouse located at 80 Centre Street, New York, New York 10013, on the _____ day of _____, 2016 at _____o'clock in the _____ of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting Petitioner, The Nonhuman Rights Project, Inc. ("NhRP"), the following relief:

A. Upon a determination that Kiko is being unlawfully detained, ordering his immediate release and transfer forthwith to an appropriate primate sanctuary;

B. Awarding the NhRP the costs and disbursements of this action; and

C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC. by personal delivery, on or before the _____ of _____, 2016, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, and electronically filed with the NYSCEF system, no later than the _____ of _____, 2016.

Dated: _____
New York, New York

_____
Honorable

ENTER:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 12

----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

- against -

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY INC.,

Respondents.

----------x

Index No. 150149/16

MEMORANDUM

Mot. seq. no. 001

JAFFE, BARBARA, J.:

For petitioner:
Elizabeth Stein, Esq.
5 Dunhill Rd.
New Hyde Park, NY 11040
516-747-4726

Steven M. Wise, Esq., pro hac vice
Nonhuman Rights Project
5195 NW 112th Terrace
Coral Springs, FL 33076

I decline to sign the order to show cause filed by petitioner for the following reasons:

While successive petitions for a writ of habeas corpus based on the same ground are permissible, "orderly administration would require, at least, a showing of changed circumstances." (*People ex rel. Woodard v Berry*, 163 AD2d 759, 760 [3d Dept 1990], *lv denied* 76 NY2d 712; *People ex rel. Glendening v Glendening*, 259 AD 384, 387 [1st Dept 1940], *affd* 284 NY 598; *see People ex rel. Leonard HH v Nixon*, 148 AD2d 75, 80-81 [3d Dept 1989]).

Here, between 2013 and 2014, petitioner filed four identical petitions with four state trial courts, each in a different county. With each petition, it offered the same nine affidavits. It then recently filed another two petitions in New York County which are identical to those previously filed, except for the addition of affidavits from five of the nine original affiants, along with a

sixth from a member of its board of directors. All of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the first four petitions.

In any event, whether evidence of the ability of some chimpanzees to shoulder certain kinds responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me (*Nonhuman Rights Project v Stanley*, 49 Misc 3d 746 [Sup Ct, New York County 2015 [Jaffe, J.]), are determinations that are best addressed there.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents.

NOTICE OF MOTION TO APPEAL AS OF RIGHT

Index No.: 150149/16
(New York County)

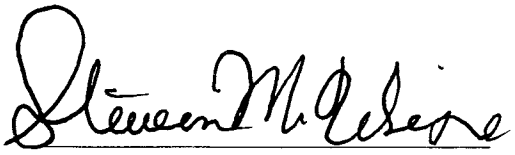
PLEASE TAKE NOTICE that upon Petitioner-Appellant, the Nonhuman Rights Project Inc's. ("NhRP"), annexed Memorandum of Law in Support of Motion to Appeal as of Right and the attached Exhibits 1 and 2 thereto, the undersigned moves this Court to accept the above-captioned appeal as of right pursuant to CPLR 7011. As set forth in the attached memorandum of law, the NhRP sought to perfect its appeal from the lower court's denial of a verified petition for a common law writ of habeas corpus and order to show cause ("Petition") filed by the NhRP on behalf of a chimpanzee named Kiko (Exhibit 1).

The Petition was styled as a "show cause" order pursuant to CPLR 7003(a) as the NhRP was not demanding Kiko's production to the court. The NhRP's counsel was contacted by the Clerk's Office of this Court and informed that it did not have a proper order from which an appeal may be taken and that it did not have an appeal as of right from the court's denial of the Petition. In response to the NhRP's written request, the court filed an appropriate Order from which this appeal may be taken (Exhibit 2). As CPLR 7011 specifically grants a right to appeal from the refusal of "an order to show cause issued under subdivision (a) of section 7003[,]" the NhRP respectfully requests that this Court accept its appeal as of right.

PLEASE TAKE FURTHER NOTICE, that the motion is returnable at 10 o'clock in the forenoon on Monday, June 6th, 2016 which is at least 9 days from the date of service of these papers. The Respondents are hereby given notice that the motion will be submitted on the papers and their personal appearance in opposition is neither required nor permitted.

Dated: May 26, 2016

Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
liddystein@aol.com



Steven M. Wise, Esq.
(of the bar of the State of Massachusetts)
By permission of the Court
5195 NW 112th Terrace
Coral Springs, Florida 33076
954-648-9864
wiseboston@aol.com

Attorneys for Petitioner-Appellant

To:

New York State Supreme Court
Appellate Division – First Department
Clerk's Office
27 Madison Avenue
New York, New York 10010
(212) 340-0400

Carmen Presti, individually and as an officer and director of The Primate Sanctuary, Inc.
2764 Livingston Avenue, Niagara Falls, New York 14303
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kikoapeman@roadrunner.com

Christie E. Presti, individually and as an officer and director of The Primate Sanctuary, Inc.
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The Primate Sanctuary, Inc.
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents.

Attorney Affirmation

Index No.: 150149/16
(New York County)

I, Elizabeth Stein, an attorney duly admitted to practice law in the State of New York affirms the following under the penalty of perjury:

1. I am an attorney of record for Petitioner-Appellant, the Nonhuman Rights Project, Inc., in the above-captioned matter and am not a party in this action.
2. I am fully familiar with the pleadings and proceedings in this matter, have read and know the contents thereof and submit this affirmation in support of the within Notice of Motion to Appeal as of Right,

memorandum of law in support thereof, and all exhibits and other documents annexed thereto.

3. Pursuant to 22 N.Y.C.R.R. §1301.1, that this motion is not frivolous.

Dated: May 26, 2016

Elizabeth Stein, Esq.
Attorney for Petitioner-Appellant
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
liddystein@aol.com

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

Index No.: 150149/16
(New York County)

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents.

PETITIONER-APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO APPEAL AS OF RIGHT

ELIZABETH STEIN, ESQ.
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
liddystein@aol.com

STEVEN M. WISE, ESQ.
(of the bar of the State of Massachusetts)
by permission of the Court
5195 NW 112th Terrace
Coral Springs, Florida 33076
954-648-9864
wiseboston@aol.com

*Attorneys for Petitioner-Appell*ant

I. STATEMENT OF FACTS

This memorandum of law is submitted in support of Petitioner-Appellant, the Nonhuman Rights Project Inc's ("NhRP"), motion to appeal the above-captioned matter as of right pursuant to New York Civil Practice Law and Rules ("CPLR") 7011.

This appeal is taken from the lower court's denial of a verified petition for a common law writ of habeas corpus and order to show cause ("Petition") filed by the NhRP on behalf of a chimpanzee named Kiko.[1] Specifically, on January 29, 2016, the court entered a copy of the NhRP's proposed writ and order to show cause stamped "DECLINED TO SIGN" and an annexed memorandum of law (both attached as Exhibit 1). The NhRP then filed and served a timely notice of appeal on February 9, 2016. [2]

The NhRP sought to perfect its appeal and on May 18, 2016 filed with this Court the Record on Appeal which includes the order of the lower court and Brief. NhRP's counsel was then contacted by the Clerk's Office and informed that the NhRP did not have a proper order from which an appeal may be taken and that the NhRP did not have an appeal as of right from the court's denial of the Petition.

[1] As discussed below, the NhRP was required by CPLR 7003(a) to include the "show cause" language in its Petition insofar as it was not demanding Kiko's production in court.
[2] Respondents have been served in all phases of these proceedings.

In response to the Clerk's input regarding the sufficiency and appropriateness of the appeal, on May 20, 2016, the NhRP submitted a letter to the lower court requesting that it enter an appropriate Order with the New York County Clerk from which an appeal may be taken, which the court issued on the same date and which is being filed as a supplemental record on appeal (attached as Exhibit 2).

The NhRP respectfully submits this memorandum of law to demonstrate the applicability of CPLR 7011, which specifically permits this appeal as of right.

II. THE NhRP IS ENTITLED TO APPEAL AS OF RIGHT

The NhRP filed its Petition pursuant to CPLR Article 70, which exclusively governs the procedure applicable to common law writs of habeas corpus. *See* CPLR 7001 ("the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention."). The NhRP did not intend to seek an order to show cause that was independent of Article 70, as that would have been prohibited by and contrary to Article 70.

Specifically, the Petition did not seek a traditional "order to show cause" under CPLR 403, the appeal of which is not permissible, but under CPLR 7003,

the appeal of which is specifically granted under CPLR 7011, which provides, in relevant part:.

> § 7011. Appeal. An appeal may be taken from a judgment refusing to grant a writ of habeas corpus or refusing an order to show cause issued under subdivision (a) of section 7003, or from a judgment made upon the return of such a writ or order to show cause.

The NhRP therefore may appeal to this Court as of right, just as the NhRP appealed as of right the refusal to issue a nearly identical petition for a common law writ of habeas corpus and order to show cause in the Third Department, *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015), and in the Fourth Department, *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den.*, 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015).[3]

Article 70, like its predecessors, "contains elaborate provisions regulating the exercise of the common-law power to issue and adjudge it . . . including those relating to rights of appealing." *People ex rel. Curtis v. Kidney,* 225 N.Y. 299, 303 (1919). "The writ existed at common law, but the proceedings of the court with respect to it are regulated by statute, and the courts must be governed by that

[3] *But see, Nonhuman Rights Project, Inc., et al. v. Samuel L. Stanley, et al.*, (2nd Dept. April 3, 2014) (Suffolk County Index No. 32098/2014) (denying motion *pro hac vice*).

statute." *People ex rel. Billotti v. New York Juvenile Asylum*, 57 A.D. 383, 384, 68 N.Y.S. 279 (1st Dept. 1901).

The practice commentaries to CPLR 401 note that a "particular authorizing statute may contain some unique rules that would, of course, take precedence over those of Article 4." Vincent C. Alexander, *Practice Commentaries: C401:1 Special Proceedings, In General,* N.Y. C.P.L.R. 401 (McKinney). Only if Article 70 "is silent on the particular problem, [must] Article 4 [] be consulted." *Id.* As Article 70 expressly provides the manner of appeal, it takes precedence over all other provisions of the CPLR.

It was necessary, under CPLR 7003(a), for the NhRP to style its Petition as an Order to Show Cause with the Verified Petition for a Writ of Habeas Corpus as it was not demanding Kiko's production to the court. CPLR 7003(a) provides that "[t]he court to whom the petition is made shall issue the writ without delay on any day, *or where the petitioner does not demand production of the person detained. . .* order the respondent to ***show cause*** why the person detained should not be released" (emphasis added). *See, e.g.*, *Callan v. Callan*, 494 N.Y.S.2d 32, 33 (2d Dept. 1985) ("Plaintiff obtained a writ of habeas corpus by order to **show cause** when defendant failed to return her infant daughter after her visitation . . . "); *State ex rel. Soss v. Vincent*, 369 N.Y.S.2d 766, 767 (2d Dept. 1975) ("In a habeas corpus proceeding upon an order to **show cause (CPLR 7003, subd. (a)),** the

appeal is from a judgment of the Supreme Court ... which granted the petition and ordered petitioner released"); *People ex rel. Bell v. Santor*, 801 N.Y.S.2d 101 (3d Dept. 2005) ("Petitioner commenced this CPLR article 70 proceeding seeking habeas corpus relief . . . Supreme Court dismissed the petition without issuing an **order to show** cause or writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell*, 421 N.Y.S.2d 443, 444 (4th Dept. 1979) ("This matter originated when petitioner . . . sought, by an order and petition, a *writ of habeas corpus* (Respondents) to **show cause** why Ricky Brandon, an infant . . . should not be released and placed in petitioner's custody."); *People ex rel. Smith v. Greiner*, 674 N.Y.S.2d 588 (Sup. Ct. 1998) ("This is a habeas corpus proceeding brought by the petitioner pro se and commenced via Order to **Show Cause**"); *People ex rel. Goldstein on Behalf of Coimbre v. Giordano*, 571 N.Y.S.2d 371 (Sup. Ct. 1991) ("By order to **show cause**, in the nature of a Writ of Habeas Corpus proceeding, the petitioner seeks his release from the custody of the New York State Division for Youth. . . . [T]he Court grants the petition and directs that this petitioner be forthwith released"); *In re Henry*, 1865 WL 3392 (N.Y. Sup. Ct. 1865) ("the party arrested can apply for a habeas corpus, calling on the officer to **show cause** why he is detained, and with the return to the writ the rule is that where the arrest is upon suspicion, and without a warrant, proof must be given to show the suspicion to be well founded") (emphasis added in each).

Once a petitioner's demand for an order to show cause why a detention is not illegal is refused, CPLR 7011 "governs the right of appeal in habeas corpus proceedings." *Wilkes v. Wilkes*, 622 N.Y.S.2d 608 (2d Dept. 1995). It "authorizes an appeal in two situations: (1) from a judgment *refusing, at the outset*, to grant a writ of habeas corpus or to issue an order to *show cause* (CPLR 7003(a)); *or* (2) from a judgment made upon the return of a writ or order to show cause (CPLR 7010)." Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), CPLR 7011* (West 2014) (emphasis added). *See People ex rel. Tatra v. McNeill*, 244 N.Y.S.2d 463, 464 (2d Dept. 1963) (an appeal "from an order refusing to grant a writ or from a judgment made upon the return of a writ" is "authorized by statute in a habeas corpus proceeding (CPLR § 7011)."). CPLR 7011's allowance of an appeal to be taken "from a judgment refusing to grant a writ of habeas corpus *or refusing an order to show cause* issued under subdivision (a) of section 7003" is therefore an *exception* to the general rule that the denial of an *ex parte* order is not appealable (emphasis added).

Appellate courts routinely authorize petitioners to appeal from a court's *refusal*, at the outset, to issue the writ or a CPLR 7003 show cause order, as CPLR 7011 authorizes such appeals. *See, e.g.*, *People ex rel. Silbert v. Cohen*, 29 N.Y.2d 12, 14 (1971); *Callan*, 494 N.Y.S.2d at 33; *People ex rel. Bell*, 801 N.Y.S.2d 101 ("Supreme Court dismissed the petition without issuing an order to show cause or

writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell*, 421 N.Y.S.2d at 444; *People ex rel. Peoples v. New York State Dept. of Correctional Services*, 967 N.Y.S.2d 848 (4th Dept. 2013) (entertaining appeal from the dismissal of a habeas corpus petition); *People ex rel. Flemming v. Rock*, 972 N.Y.S.2d 901 (1st Dept. 2013) (same); *People ex rel. Jenkins v. Rikers Island Correctional Facility Warden*, 976 N.Y.S.2d 915 (4th Dept. 2013) (entertaining appeal from order dismissing petition for habeas corpus); *People ex rel. Harrington v. Cully,* 958 N.Y.S.2d 633 (4th Dept. 2013) (same); *People ex rel. Aikens v. Brown*, 958 N.Y.S.2d 913 (4th Dept. 2013) (same); *People ex rel. Holmes v. Heath*, 965 N.Y.S.2d 881 (2d Dept. 2013) (entertaining appeal from denial of petition for habeas corpus without hearing); *People ex rel. Allen v. Maribel*, 966 N.Y.S.2d 685 (2d Dept. 2013) (same); *People ex rel. Bazil v. Marshall*, 910 N.Y.S.2d 494, 495 (2d Dept. 2010) (same); *People ex rel. Sailor v. Travis*, 786 N.Y.S.2d 548, 549 (2d Dept. 2004) (same); *People ex rel. Gonzalez v. New York State Div. of Parole*, 682 N.Y.S.2d 602 (2d Dept. 1998) (entertaining an appeal "[i]n a habeas corpus proceeding," where supreme court "refused an application for an order to show cause"); *People ex rel. Mabery v. Leonardo*, 578 N.Y.S.2d 427 (3d Dept. 1992) (entertaining appeal from supreme court's denial of "petitioner's application for a writ of habeas corpus, in a proceeding pursuant to CPLR article 70, without a hearing."); *People ex rel. Deuel v. Campbell*, 572

N.Y.S.2d 879 (3d Dept. 1991) (same); *People ex rel. Johnson v. New York State Bd. of Parol*e, 580 N.Y.S.2d 957, 959 (3d Dept. 1992) (entertaining appeal where petitioner "commenced this proceeding for habeas corpus relief by order to show cause and petition" and supreme court "dismissed the petition"); *People ex rel. Cook v. New York State Bd. of Parole*, 505 N.Y.S.2d 383 (2d Dept. 1986) (appeal from dismissal of writ of habeas corpus); *People ex rel. Boyd v. LeFevre*, 461 N.Y.S.2d 667 (3d Dept. 1983) (entertaining appeal from a judgment of the Supreme Court "which denied petitioner's application for a writ of habeas corpus, without a hearing."); *People ex rel. Steinberg v. Superintendent, Green Haven Correctional Facilit*y, 391 N.Y.S.2d 915, 916 (2d Dept. 1977); *People ex rel. Boutelle v. O'Mara*, 390 N.Y.S.2d 19 (3d Dept. 1976) (entertaining an appeal from the supreme court's denial of "petitioner's application for a writ of habeas corpus, without a hearing."); *People ex rel. Edmonds v. Warden, Queens H. of Detention for Men*, 269 N.Y.S.2d 787, 788 (2d Dept. 1966) ("In a habeas corpus proceeding, relator appeals from a judgment of the Supreme Court, . . . which dismissed the writ."); *People ex rel. Leonard v. Denno*, 219 N.Y.S.2d 955 (2d Dept. 1961).

Accordingly, the NhRP has an appeal as of right from the Supreme Court's refusal to issue the requested writ and order to show cause, as the "show cause" language was required by CPLR 7003(a) because the NhRP was not demanding the production of Kiko to court and CPLR 7011specifically grants the NhRP this

right in these circumstances. The unique procedures in Article 70 are intended not just to give habeas petitioners a speedy initial hearing to determine their liberty, but a right to appeal even a refusal to issue a writ of habeas corpus or order to show cause. The NhRP respectfully submits that it should be afforded this opportunity.

Dated: May 26, 2016

Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
liddystein@aol.com

Steven M. Wise, Esq.
(of the bar of the State of Massachusetts)
By permission of the Court
5195 NW 112th Terrace
Coral Springs, Florida 33076
954-648-9864
wiseboston@aol.com

Attorneys for Petitioner-Appellant

EXHIBIT 1

At I.A.S Part _____ of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 80 Centre Street, New York, NY, on the _____day of _____, 2016

PRESENT: HON._____
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents.
----------x

ORDER TO SHOW CAUSE & WRIT OF HABEAS CORPUS

Index No.: **150149/2016**

DECLINED TO SIGN See annexed Memorandum

TO THE ABOVE NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition of Elizabeth Stein, Esq. and Steven M. Wise, Esq. (subject to *pro hac vice* admission), with Exhibits and Memorandum of Law, dated January 6, 2016, and upon all pleadings and proceedings herein, let the Respondents CARMEN PRESTI, individually and as an officer and director of The Primate

Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC., or their attorneys, SHOW CAUSE at I.A.S. Part _____, Room _____, of this Court to be held at the Courthouse located at 80 Centre Street, New York, New York 10013, on the _____ day of _____, 2016 at _____o'clock in the _____ of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting Petitioner, The Nonhuman Rights Project, Inc. ("NhRP"), the following relief:

A. Upon a determination that Kiko is being unlawfully detained, ordering his immediate release and transfer forthwith to an appropriate primate sanctuary;

B. Awarding the NhRP the costs and disbursements of this action; and

C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC. by personal delivery, on or before the _____ of _____, 2016, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, and electronically filed with the NYSCEF system, no later than the _____ of _____, 2016.

Dated: _____
New York, New York

_____
Honorable

ENTER:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 12

----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

- against -

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY INC.,

Respondents.

----------x

Index No. 150149/16

MEMORANDUM

Mot. seq. no. 001

JAFFE, BARBARA, J.:

For petitioner:
Elizabeth Stein, Esq.
5 Dunhill Rd.
New Hyde Park, NY 11040
516-747-4726

Steven M. Wise, Esq., pro hac vice
Nonhuman Rights Project
5195 NW 112th Terrace
Coral Springs, FL 33076

I decline to sign the order to show cause filed by petitioner for the following reasons:

While successive petitions for a writ of habeas corpus based on the same ground are permissible, "orderly administration would require, at least, a showing of changed circumstances." (*People ex rel. Woodard v Berry*, 163 AD2d 759, 760 [3d Dept 1990], *lv denied* 76 NY2d 712; *People ex rel. Glendening v Glendening*, 259 AD 384, 387 [1st Dept 1940], *affd* 284 NY 598; *see People ex rel. Leonard HH v Nixon*, 148 AD2d 75, 80-81 [3d Dept 1989]).

Here, between 2013 and 2014, petitioner filed four identical petitions with four state trial courts, each in a different county. With each petition, it offered the same nine affidavits. It then recently filed another two petitions in New York County which are identical to those previously filed, except for the addition of affidavits from five of the nine original affiants, along with a

sixth from a member of its board of directors. All of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the first four petitions.

In any event, whether evidence of the ability of some chimpanzees to shoulder certain kinds responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me (*Nonhuman Rights Project v Stanley*, 49 Misc 3d 746 [Sup Ct, New York County 2015 [Jaffe, J.]), are determinations that are best addressed there.

EXHIBIT 2

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Supplemental Decision

PRESENT: BARBARA JAFFE J.S.C. PART 12
Justice

Nonhuman Rights Project -v- Presti, Carmen

INDEX NO. 150149/2016
MOTION DATE
MOTION SEQ. NO. Seq 001

The following papers, numbered 1 to ____, were read on this motion to/for Habeus Corpus

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____
Answering Affidavits — Exhibits ____ No(s). ____
Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is

In response to Petitioner's request, the Declined Order to Show Cause and annexed Memorandum (NYSCEF #48) constitute the court's Decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: MAY 20 2016

BARBARA JAFFE, J.S.C.
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☑ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Nonhuman Rights Project

By Hand

May 20, 2016

Supreme Court of the State of New York
New York County
Barbara Jaffe, JSC
80 Centre Street
Room 279
New York, New York 10013

Re: *Nonhuman Rights Project, Inc., on behalf of Kiko v. Carmen Presti et al.*, (150149/2016)

Dear Justice Jaffe,

I am a counsel of record for Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP") in the above-captioned matter. The NhRP filed in the Supreme Court, New York County a verified petition for a writ of habeas corpus and order to show cause on behalf of a chimpanzee named Kiko. On January 29, 2016, you entered with the Clerk of the Court a copy of the proposed writ of habeas corpus and order to show cause which was stamped "DECLINED TO SIGN" and an annexed memorandum of law. The NhRP then filed and served a timely notice of appeal on February 9, 2016.

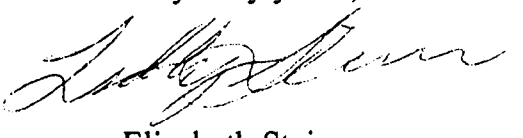
The NhRP seeks to perfect its appeal. This week it filed the record on appeal and brief in the New York State Supreme Court Appellate Division, First Judicial Department. I was contacted by Don Ramos of the Clerk's Office and informed that we did not have a proper order from which an appeal may be taken. I am therefore writing to request that you enter an actual Order with the New York County Clerk denying the NhRP's petition for a writ of habeas corpus and order to show cause. I will submit this Order to the First Department along with a memorandum of law explaining why the NhRP has an appeal as of right from the

5195 NW 112th Terrace · Coral Springs · FL 33076 · (954) 648-9864
www.nonhumanrights.org · info@nonhumanrights.org

denial of an order to show cause in the context of a habeas corpus petition pursuant to Article 70 of the CPLR.

Thank you for your kind consideration of this matter.

Very truly yours,



Elizabeth Stein

CC: Carmen Presti

Christie E. Presti

The Primate Sanctuary, Inc.

5195 NW 112th Terrace · Coral Springs · FL 33076 · (954) 648-9864
www.nonhumanrights.org · info@nonhumanrights.org

At I.A.S Part _____ of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 80 Centre Street, New York, NY, on the _____day of _____, 2016

PRESENT: HON._____
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents.
----------x

DECLINED TO SIGN - see annexed memorandum

ORDER TO SHOW CAUSE & WRIT OF HABEAS CORPUS

Index No.: **150149/2016**

TO THE ABOVE NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition of Elizabeth Stein, Esq. and Steven M. Wise, Esq. (subject to *pro hac vice* admission), with Exhibits and Memorandum of Law, dated January 6, 2016, and upon all pleadings and proceedings herein, let the Respondents CARMEN PRESTI, individually and as an officer and director of The Primate

Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC., or their attorneys, SHOW CAUSE at I.A.S. Part _____, Room _____, of this Court to be held at the Courthouse located at 80 Centre Street, New York, New York 10013, on the _____ day of _____, 2016 at _____o'clock in the _____ of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting Petitioner, The Nonhuman Rights Project, Inc. ("NhRP"), the following relief:

A. Upon a determination that Kiko is being unlawfully detained, ordering his immediate release and transfer forthwith to an appropriate primate sanctuary;

B. Awarding the NhRP the costs and disbursements of this action; and

C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC. by personal delivery, on or before the _____ of _____, 2016, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, and electronically filed with the NYSCEF system, no later than the _____ of _____, 2016.

Dated: _____
New York, New York

_____
Honorable

ENTER:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 12

----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

- against -

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY INC.,

Respondents.

----------x

Index No. 150149/16

MEMORANDUM

Mot. seq. no. 001

JAFFE, BARBARA, J.:

For petitioner:
Elizabeth Stein, Esq.
5 Dunhill Rd.
New Hyde Park, NY 11040
516-747-4726

Steven M. Wise, Esq., pro hac vice
Nonhuman Rights Project
5195 NW 112th Terrace
Coral Springs, FL 33076

I decline to sign the order to show cause filed by petitioner for the following reasons:

While successive petitions for a writ of habeas corpus based on the same ground are permissible, "orderly administration would require, at least, a showing of changed circumstances." (*People ex rel. Woodard v Berry*, 163 AD2d 759, 760 [3d Dept 1990], *lv denied* 76 NY2d 712; *People ex rel. Glendening v Glendening*, 259 AD 384, 387 [1st Dept 1940], *affd* 284 NY 598; *see People ex rel. Leonard HH v Nixon*, 148 AD2d 75, 80-81 [3d Dept 1989]).

Here, between 2013 and 2014, petitioner filed four identical petitions with four state trial courts, each in a different county. With each petition, it offered the same nine affidavits. It then recently filed another two petitions in New York County which are identical to those previously filed, except for the addition of affidavits from five of the nine original affiants, along with a

sixth from a member of its board of directors. All of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the first four petitions.

In any event, whether evidence of the ability of some chimpanzees to shoulder certain kinds responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me (*Nonhuman Rights Project v Stanley*, 49 Misc 3d 746 [Sup Ct, New York County 2015 [Jaffe, J.]), are determinations that are best addressed there.

BARBARA JAFFE
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. BARBARA JAFFE **PART 12**
Justice

THE NONHUMAN RIGHTS PROJECT, INC.,
on behalf of Kiko,

Petitioner,

- v -

CARMEN PRESTI, *et al.*,

Defendants.

INDEX NO. 150149/16
MOTION DATE _____
MOTION SEQ. NO. _____
CALENDAR NO. _____

The following paper, numbered 1, was read on this motion:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answer — Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ **Yes** ☐ **No**

On January 29, 2016, I declined to sign petitioner's order to show cause, and appended thereto an accompanying memorandum (NYSCEF 48). Then, on May 20, 2016, at petitioner's request, I filed a supplemental order and accompanying memorandum constituting the court's decision. (NYSCEF 51).

Now, on petitioner's motion (sequence 3, NYSCEF 52-55), it is hereby

ORDERED, that my May 20, 2016 order and memorandum are effective, *nunc pro tunc*, as of January 29, 2016.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
DATED: _____ ***J.S.C.***

Dated: 7/6/16

BARBARA JAFFE ***J.S.C.***
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

At I.A.S Part _____ of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 80 Centre Street, New York, NY, on the _____day of _____, 2016

PRESENT: HON._____
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents.
----------x

ORDER TO SHOW CAUSE & WRIT OF HABEAS CORPUS

Index No.: **150149/2016**

DECLINED TO SIGN See annexed memorandum

TO THE ABOVE NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition of Elizabeth Stein, Esq. and Steven M. Wise, Esq. (subject to *pro hac vice* admission), with Exhibits and Memorandum of Law, dated January 6, 2016, and upon all pleadings and proceedings herein, let the Respondents CARMEN PRESTI, individually and as an officer and director of The Primate

Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC., or their attorneys, SHOW CAUSE at I.A.S. Part _____, Room _____, of this Court to be held at the Courthouse located at 80 Centre Street, New York, New York 10013, on the _____ day of _____, 2016 at _____o'clock in the _____ of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting Petitioner, The Nonhuman Rights Project, Inc. ("NhRP"), the following relief:

A. Upon a determination that Kiko is being unlawfully detained, ordering his immediate release and transfer forthwith to an appropriate primate sanctuary;

B. Awarding the NhRP the costs and disbursements of this action; and

C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC. by personal delivery, on or before the _____ of _____, 2016, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, and electronically filed with the NYSCEF system, no later than the _____ of _____, 2016.

Dated: _____
New York, New York

_____
Honorable

ENTER:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 12

----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner,

- against -

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY INC.,

Respondents.

----------x

Index No. 150149/16

MEMORANDUM

Mot. seq. no. 001

JAFFE, BARBARA, J.:

For petitioner:
Elizabeth Stein, Esq.
5 Dunhill Rd.
New Hyde Park, NY 11040
516-747-4726

Steven M. Wise, Esq., pro hac vice
Nonhuman Rights Project
5195 NW 112th Terrace
Coral Springs, FL 33076

I decline to sign the order to show cause filed by petitioner for the following reasons:

While successive petitions for a writ of habeas corpus based on the same ground are permissible, "orderly administration would require, at least, a showing of changed circumstances." (*People ex rel. Woodard v Berry*, 163 AD2d 759, 760 [3d Dept 1990], *lv denied* 76 NY2d 712; *People ex rel. Glendening v Glendening*, 259 AD 384, 387 [1st Dept 1940], *affd* 284 NY 598; *see People ex rel. Leonard HH v Nixon*, 148 AD2d 75, 80-81 [3d Dept 1989]).

Here, between 2013 and 2014, petitioner filed four identical petitions with four state trial courts, each in a different county. With each petition, it offered the same nine affidavits. It then recently filed another two petitions in New York County which are identical to those previously filed, except for the addition of affidavits from five of the nine original affiants, along with a

sixth from a member of its board of directors. All of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the first four petitions.

In any event, whether evidence of the ability of some chimpanzees to shoulder certain kinds responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me (*Nonhuman Rights Project v Stanley*, 49 Misc 3d 746 [Sup Ct, New York County 2015 [Jaffe, J.]), are determinations that are best addressed there.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

----------x

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

----------x

Index No. 150149/16
(New York County)

Notice of Motion

PLEASE TAKE NOTICE that, upon Petitioner-Appellant, the Nonhuman Rights Project, Inc's. ("NhRP"), annexed Memorandum of Law in support of its Motion to Reargue or, in the alternative, for Leave to Appeal to the Court of Appeals, the annexed affirmation of Elizabeth Stein, Esq. dated August 17, 2016, the Exhibits 1-5 annexed thereto, and upon all pleadings and proceedings heretofore had herein, the undersigned will move this Court at the Appellate Division, First Department Courthouse, 27 Madison Avenue, New York, New York, for an Order:

(1) To reargue this Court's order construing the NhRP's motion to appeal as of right under CPLR 7011 as a motion for leave to appeal under CPLR

5701(c) and then denying the NhRP's absolute right to appeal (Exhibit 1, attached to Stein Affirmation), or, in the alternative,

(2) Granting leave to appeal to the Court of Appeals.

PLEASE TAKE FURTHER NOTICE, that the motion is returnable at 10 o'clock in the forenoon on Monday, August 29, 2016, which is at least 9 days from the date of service of these papers. The Respondents are hereby given notice that the motion will be submitted on the papers and their personal appearance in opposition is neither required nor permitted.

Dated: Respectfully submitted,

_____

Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726
liddystein@aol.com

_____

Steven M. Wise, Esq.
(of the bar of the State of Massachusetts)
By permission of the Court
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864
wiseboston@aol.com

Attorneys for Petitioner-Appellant

To:

New York State Supreme Court
Appellate Division – First Department
Clerk's Office
27 Madison Avenue
New York, New York 10010
(212) 340-0400

Carmen Presti, individually and as an officer and director of The Primate Sanctuary, Inc.
2764 Livingston Avenue, Niagara Falls, New York 14303
(716) 284-6118
kikoapeman@roadrunner.com

Christie E. Presti, individually and as an officer and director of The Primate Sanctuary, Inc.
2764 Livingston Avenue, Niagara Falls, New York 14303
(716) 284-6118
kikoapeman@roadrunner.com

The Primate Sanctuary, Inc.
2764 Livingston Avenue, Niagara Falls, New York 14303
(716) 284-6118
kikoapeman@roadrunner.com

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

----------x

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

----------x

Index No. 150149/16
(New York County)

PETITIONER-APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO REARGUE OR, IN THE ALTERNATIVE, FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, NY 11040
Phone (516) 747-4726
liddystein@aol.com

Steven M. Wise, Esq.
(of the bar of the State of Massachusetts)
By permission of the Court
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864
wiseboston@aol.com
Attorneys for Petitioner- Appellant

Printed on Recycled Paper

INTRODUCTION

Petitioner-Appellant, Nonhuman Rights Project, Inc. ("NhRP"), respectfully submits this memorandum of law in support of its Motion to Reargue or, in the alternative, for Leave to Appeal ("Motion to Reargue") the order of The Honorable Associate Justice Troy K. Webber ("Justice Webber"), entered July 28, 2016, construing the NhRP's motion to appeal as of right under New York Civil Practice Law and Rules ("CPLR") 7011 as a motion for leave to appeal under CPLR 5701(c)–which the NhRP intentionally did not seek–and then denying the NhRP its absolute right to appeal, without specifying why the NhRP was not entitled to its absolute right to appeal pursuant to CPLR 7011.[1]

QUESTIONS OF LAW TO REARGUE OR TO PRESENT UPON APPEAL

The NhRP raises the following questions to reargue or, alternatively, to present upon appeal to the Court of Appeals:

1. Does a habeas corpus petitioner have an absolute right to appeal to the Appellate Division pursuant to CPLR 7011 from a judgment refusing to issue a writ of habeas corpus or an order to show cause under CPLR 7003(a)?

2. Did Justice Webber err in denying the NhRP the ability to appeal to this Court as a matter of right under CPLR 7011?

[1] Submitted herewith in support of its Motion to Reargue is the Affirmation of Elizabeth Stein, Esq. ("Stein Aff.")

PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

This memorandum of law is submitted in support of the NhRP's Motion to Reargue pursuant to 22A NYCRR § 600.14 and CPLR 2221(d). The NhRP respectfully submits that Justice Webber erred in denying its motion to appeal as of right the lower court's refusal to issue a writ of habeas corpus or order to show cause pursuant to CPLR 7003(a) to the New York State Supreme Court Appellate Division, First Judicial Department ("First Department") under CPLR 7011. (Exhibit 1, attached to Stein Aff.).

The NhRP's Motion to Reargue arises from an order of the Supreme Court New York County, dated January 29, 2016, denying its Verified Petition for a common law writ of habeas corpus and order to show cause ("Petition"), filed on behalf of a chimpanzee named Kiko pursuant to CPLR Article 70. On February 9, 2016, the NhRP filed with the Clerk of this Court the following papers: Notice of Appeal (Exhibit 2, attached to Stein Aff.), completed Request for Appellate Intervention, Order of the Supreme Court New York County, and affidavit of service. The NhRP then sought to perfect its appeal. On May 18, 2016, it filed with this Court the Record on Appeal, which included the order of the lower court and brief. NhRP's counsel was then contacted by the First Department Clerk's Office and informed that the NhRP did not have a proper order from which an appeal could be taken and that the NhRP did not have an appeal as of right from the lower

court's refusal to issue an order or show cause or writ of habeas corpus. The NhRP also filed the following documents with this Court: Appendix, Motion to File an Oversize Brief (which was denied); a second Motion to File an Oversize Brief (which was granted); Motion for Steven M. Wise to appear and argue *Pro Hac Vice* (which was granted); Motion to Amend the Record on Appeal, and; Motion to Appeal as of Right, from which this Motion to Reargue is taken (Exhibit 3, attached to Stein Aff.).

In response to the Clerk's statement regarding the sufficiency of the order and appropriateness of the appeal, on May 20, 2016, the NhRP submitted a letter to the lower court requesting that it enter an appropriate order with the New York County Clerk from which an appeal may be taken, which the court issued on the same date (Exhibit 4, attached to Stein Aff.) and which the NhRP seeks to file as a supplemental record on appeal (the NhRP's Motion to Amend the Record on Appeal is pending before this Court). Because this judgment post-dated all of the filings in this appeal, on July 6, 2016, the lower court then granted the NhRP's motion for an order that the judgment of May 20, 2016 be issued *nunc pro tunc* to the date of the lower court's original final order of January 29, 2016 (Exhibit 5 attached to Stein Aff.).

On July 28, 2016, Justice Webber entered an order denying the appeal, asserting:

> Petitioner-Appellant moved to appeal the matter as of right pursuant to CPLR 7011.
>
> I, Troy K. Webber, a Justice of the Appellate Division, deem this a motion brought pursuant to CPLR 5701(c), for leave to appeal to the Appellate Division, First Department, from the order of Supreme Court Justice Barbara Jaffe of the Supreme Court, New York County, entered on or about January 29, 2016,
>
> Now, upon reading the papers with respect to the motion, and due deliberation having been had thereon, it is Ordered that the application for leave to appeal is denied.

(Exhibit 1 attached to Stein Aff.).

ARGUMENT

I. THE NhRP'S MOTION TO REARGUE SHOULD BE GRANTED.

A motion to reargue should be granted upon a showing that the Court "overlooked or misapprehended" relevant facts or law. CPLR 2221(d)(2); *see also*, 22 NYCRR § 600.14. *Accord People v. McCoy*, 974 N.Y.S.2d 6, 7 (1st Dept. 2013) (granting motion to reargue under § 600.14); *Martin v. Portexit Corp*., 98 A.D.3d 63, 65 (1st Dept. 2012) ("The motion for reargument was properly granted because the court overlooked the arguments plaintiff initially set forth in opposition to defendant's motion . . . ").

A motion to reargue is "designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." *Foley v. Roche*, 418 N.Y.S.2d 588, 593 (1st Dept. 1979). *See C. Sav. Bank in City of New York v. City of New York*, 19 N.E.2d 659

(N.Y. 1939). Its purpose "is to offer the unsuccessful party an opportunity to persuade the court to change its decision." *People v. Alamo*, 961 N.Y.S.2d 359 (Sup. Ct. 2012). In this case, Justice Webber's denial of the NhRP's motion to appeal as of right pursuant to CPLR 7011 from a judgment issued under CPLR 7003(a) deprived the NhRP of its statutorily granted absolute right to appeal.

It is an abuse of discretion to deny a motion to reargue where the movant clearly demonstrates, as does the NhRP here, that the court misapplied controlling law. *See, e.g., Highgate Pictures, Inc. v. De Paul*, 549 N.Y.S.2d 386, 388-89 (1st Dept. 1990); *Denihan v. Denihan*, 468 N.Y.S.2d 614, 618 (1st Dept. 1983). *See also Scarito v. St. Joseph Hill Acad.*, 878 N.Y.S.2d 460, 462 (2d Dept. 2009).[2] A motion to reargue should especially be granted in situations, such as the one at bar, where there is a "'strong public policy in favor of resolving cases on the merits'" *Id.*

The lack of opposition, as in this case, also weighs in favor of granting such a motion. *E.g., HSBC Bank USA, Nat. Ass'n v. Community Parking Inc.*, 970 N.Y.S.2d 508, 509 (1st Dept. 2013) (granting motion for reargument in part because of the "the lack of opposition to Pena's motion for reargument of this Court's prior decision and order").

[2] "[E]ven in situations where the criteria for granting a reconsideration motion are not technically met, courts retain flexibility to grant such a motion when it is deemed appropriate." *Loris v. S & W Realty Corp.*, 790 N.Y.S.2d 579, 580-81 (3d Dept. 2005).

When, as in the case at bar, a party demonstrates that a court clearly misapplied controlling law, the court should vacate its prior decision.[3] As discussed, *infra*, Justice Webber misapprehended the nature of the NhRP's appeal and misapplied the controlling law governing it. Therefore this Court should grant NhRP's Motion to Reargue.

II. THE COURT ERRED AS A MATTER OF LAW IN RELYING UPON CPLR 5701(c) TO DISMISS THE NhRP'S MOTION TO APPEAL AS OF RIGHT RATHER THAN CORRECTLY APPLYING CPLR 7011 WHICH GRANTS THE NhRP AN ABSOLUTE APPEAL AS OF RIGHT.

Justice Webber's reliance on CPLR 5701(c) in dismissing NhRP's motion to appeal as of right misapprehended the applicable law. The NhRP filed its Petition pursuant to CPLR 70, which exclusively governs the procedure for common law writs of habeas corpus. See CPLR 7001 ("the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention.").

It was necessary, under CPLR 7003(a), for the NhRP to style its Petition as an order to show cause with the verified petition for a writ of habeas corpus as it was not demanding Kiko's production to the court. CPLR 7003(a) provides that

[3] *E.g., K2 Inv. Group, LLC v. American Guarantee & Liability Ins. Co*., 22 N.Y.3d 578 (2014); *Auqui v. Seven Thirty One Ltd. Partn*., 22 N.Y. 3d 226 (2013); *People v. Boyland*, 17 N.Y. 3d 852 (2011); *Weissblum v. Mostafzafan Found. of New York*, 60 N.Y. 2d 637, 639 (1983); *Porcelli v. N. Westchester Hosp. Ctr*., 977 N.Y.S.2d 32, 33 (2d Dept. 2013); *People v. Springer*, 970 N.Y.S.2d 462 (2d Dept. 2013); *People v. Morales*, 930 N.Y.S.2d 884 (2d Dept. 2011); *Kennedy v. Bennett*, 818 N.Y.S.2d 776 (2d Dept. 2006)

"[t]he court to whom the petition is made shall issue the writ without delay on any day, *or where the petitioner does not demand production of the person detained* . . . order the respondent to ***show cause*** why the person detained should not be released" (emphasis added).[4] Justice Webber clearly misapprehended the nature of the order to show cause and controlling law in applying CPLR 5701(c), which requires permission for leave to appeal when there is no right to appeal. But CPLR 7011 expressly grants the NhRP the absolute right to appeal the lower court's refusal to issue the order to show cause. Article 70, like its predecessors, "contains elaborate provisions regulating the exercise of the common-law power to issue and adjudge it . . . including those relating to rights of appealing." *People ex rel. Curtis v. Kidney,* 225 N.Y. 299, 303 (1919). "The writ existed at common law, but the proceedings of the court with respect to it are regulated by statute, and the courts

[4] *See, e.g.*, *Callan v. Callan*, 494 N.Y.S.2d 32, 33 (2d Dept. 1985) ("Plaintiff obtained a writ of habeas corpus by order to **show cause** when defendant failed to return her infant daughter after her visitation . . . "); *State ex rel. Soss v. Vincent*, 369 N.Y.S.2d 766, 767 (2d Dept. 1975) ("In a habeas corpus proceeding upon an order to **show cause (CPLR 7003, subd. (a)),** the appeal is from a judgment of the Supreme Court … which granted the petition and ordered petitioner released"); *People ex rel. Bell v. Santor*, 801 N.Y.S.2d 101 (3d Dept. 2005) ("Petitioner commenced this CPLR article 70 proceeding seeking habeas corpus relief . . . Supreme Court dismissed the petition without issuing an **order to show** cause or writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell,* 421 N.Y.S.2d 443, 444 (4th Dept. 1979) ("This matter originated when petitioner . . . sought, by an order and petition, a *writ of habeas corpus* (Respondents) to **show cause** why Ricky Brandon, an infant . . . should not be released and placed in petitioner's custody."); *People ex rel. Smith v. Greiner,* 674 N.Y.S.2d 588 (Sup. Ct. 1998) ("This is a habeas corpus proceeding brought by the petitioner pro se and commenced via Order to **Show Cause**"); *People ex rel. Goldstein on Behalf of Coimbre v. Giordano,* 571 N.Y.S.2d 371 (Sup. Ct. 1991) ("By order to **show cause**, in the nature of a Writ of Habeas Corpus proceeding, the petitioner seeks his release from the custody of the New York State Division for Youth. . . . [T]he Court grants the petition and directs that this petitioner be forthwith released") (emphasis added in each).

must be governed by *that statute*." *People ex rel. Billotti v. New York Juvenile Asylum*, 57 A.D. 383, 384, 68 N.Y.S. 279 (1st Dept. 1901) (emphasis added).

"An appeal from a judgment dismissing a habeas corpus petition lies as of right rather than by permission." *People ex rel. St. Germain v. Walker*, 595 N.Y.S.2d 707 (4th Dept. 1993). CPLR 7011, which "governs the right of appeal in habeas corpus proceedings," *Wilkes v. Wilkes*, 622 N.Y.S.2d 608 (2d Dept. 1995) (emphasis added), "authorizes an appeal in two situations: (1) from a judgment *refusing, at the outset*, to grant a writ of habeas corpus or to issue an order to *show cause* (CPLR 7003(a)); *or* (2) from a judgment made upon the return of a writ or order to show cause (CPLR 7010)." Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), CPLR 7011* (West 2014) (emphasis added). *See People ex rel. Tatra v. McNeill*, 244 N.Y.S.2d 463, 464 (2d Dept. 1963) (an appeal "from an order refusing to grant a writ or from a judgment made upon the return of a writ" is "authorized by statute in a habeas corpus proceeding (CPLR § 7011).").[5]

[5] *See, e.g.*, *People ex rel. Silbert v. Cohen*, 29 N.Y.2d 12, 14 (1971); *Callan*, 494 N.Y.S.2d at 33; *People ex rel. Bell*, 801 N.Y.S.2d 101 ("Supreme Court dismissed the petition without issuing an order to show cause or writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell*, 421 N.Y.S.2d at 444; *People ex rel. Peoples v. New York State Dept. of Correctional Services*, 967 N.Y.S.2d 848 (4th Dept. 2013) (entertaining appeal from the dismissal of a habeas corpus petition); *People ex rel. Flemming v. Rock*, 972 N.Y.S.2d 901 (1st Dept. 2013) (same); *People ex rel. Jenkins v. Rikers Island Correctional Facility Warden*, 976 N.Y.S.2d 915 (4th Dept. 2013)(entertaining appeal from order dismissing petition for habeas corpus); *People ex rel. Harrington v. Cully*, 958 N.Y.S.2d 633 (4th Dept. 2013) (same); *People ex rel. Aikens v. Brown*, 958 N.Y.S.2d 913 (4th Dept. 2013) (same); *People ex rel. Holmes v. Heath*, 965 N.Y.S.2d 881 (2d Dept. 2013) (entertaining appeal from denial of petition for habeas corpus without hearing); *People ex rel. Allen v. Maribel*, 966 N.Y.S.2d 685 (2d Dept. 2013) (same); *People ex rel. Bazil v. Marshall*, 910 N.Y.S.2d 494, 495 (2d Dept. 2010) (same); *People ex rel. Sailor v. Travis*, 786

The NhRP's right to appeal to the Appellate Division under CPLR 7011 from the Supreme Courts' refusal to issue a requested CPLR 7003(a) order to show cause has been recognized by the Third and Fourth Judicial Department in litigation brought by the NhRP on behalf of Kiko and another chimpanzee named Tommy. *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den*., 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015). The Appellate Division, Third Judicial Department ruled: "As Supreme Court's judgment finally determined the matter by refusing to issue an order to show cause to commence a habeas corpus proceeding, it is

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N.Y.S.2d 548, 549 (2d Dept. 2004) (same); *People ex rel. Gonzalez v. New York State Div. of Parole*, 682 N.Y.S.2d 602 (2d Dept. 1998) (entertaining an appeal "[i]n a habeas corpus proceeding," where supreme court "refused an application for an order to show cause"); *People ex rel. Mabery v. Leonardo*, 578 N.Y.S.2d 427 (3d Dept. 1992) (entertaining appeal from supreme court's denial of "petitioner's application for a writ of habeas corpus, in a proceeding pursuant to CPLR article 70, without a hearing."); *People ex rel. Deuel v. Campbell*, 572 N.Y.S.2d 879 (3d Dept. 1991) (same); *People ex rel. Johnson v. New York State Bd. of Parol*e, 580 N.Y.S.2d 957, 959 (3d Dept. 1992) (entertaining appeal where petitioner "commenced this proceeding for habeas corpus relief by order to show cause and petition" and supreme court "dismissed the petition"); *People ex rel. Cook v. New York State Bd. of Parole*, 505 N.Y.S.2d 383 (2d Dept. 1986) (appeal from dismissal of writ of habeas corpus); *People ex rel. Boyd v. LeFevre*, 461 N.Y.S.2d 667 (3d Dept. 1983) (entertaining appeal from a judgment of the Supreme Court "which denied petitioner's application for a writ of habeas corpus, without a hearing."); *People ex rel. Steinberg v. Superintendent, Green Haven Correctional Facilit*y, 391 N.Y.S.2d 915, 916 (2d Dept. 1977); *People ex rel. Boutelle v. O'Mara*, 390 N.Y.S.2d 19 (3d Dept. 1976) (entertaining an appeal from the supreme court's denial of "petitioner's application for a writ of habeas corpus, without a hearing."); *People ex rel. Edmonds v. Warden, Queens H. of Detention for Men*, 269 N.Y.S.2d 787, 788 (2d Dept. 1966) ("In a habeas corpus proceeding, relator appeals from a judgment of the Supreme Court, . . . which dismissed the writ."); *People ex rel. Leonard v. Denno*, 219 N.Y.S.2d 955 (2d Dept. 1961).

appealable as of right." *Id*. at 149 n.1 (citing CPLR 7011; *People ex rel. Seals v New York State Dept. of Correctional Servs*., 32 A.D.3d 1262, 1263 (4th Dept. 2006); *People ex rel. Tatra v McNeill*, 19 A.D.2d 845, 846 (2d Dept. 1963)). [6]

CPLR Article 70 exclusively governs the procedure for common law habeas corpus proceedings. *See* CPLR 7001; *People ex rel. Delia v. Munsey*, 26 N.Y.3d 124, 127-128 (2015) ("article 70 of the CPLR governs special proceedings for a writ of habeas corpus, the historic common-law writ that protects individuals from unlawful restraint or imprisonment and provides a means for those illegally detained to obtain release"). Because CPLR 7011 authorizes an appeal *as of right* from the refusal to issue the writ or a CPLR 7003 show cause order, this Court erred as a matter of law in relying upon CPLR 5701(c) in dismissing the appeal. The unique procedures in Article 70 are intended not just to give habeas petitioners a speedy initial hearing to determine their liberty, but the right to appeal a refusal to issue a writ of habeas corpus or order to show cause. The NhRP is absolutely entitled to, and must be afforded, this opportunity.

[6] The Appellate Division, Second Judicial Department, "dismissed petitioner's appeal 'on the ground that no appeal lies as of right from an order that is not the result of a motion made on notice (see CPLR 5701),' and declined to grant leave to appeal or reargue. (Aff. in Opp., Exh. G)." *Matter of Nonhuman Rights Project Inc. v. Stanley*, 16 N.Y.S.3d 898, 903 (Sup. Ct. 2015). Although Justice Webber's order did not specify why the NhRP did not have an appeal as of right under CPLR 7011, to the degree it was based on the notion that orders to show cause are generally not appealable as of right when they are *ex parte*, this reasoning is not apposite to the case at bar, as the NhRP's request for an order to show cause was made with notice to all Respondents.

Moreover, even if CPLR 5701 applied to this habeas corpus proceeding, the NhRP's would still be entitled to the right to appeal under CPLR 5701(a), rather than by permission under 5701(c). CPLR 5701(a) provides in part: "Appeals as of right. An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court: 1. from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action; . . ." In the present case, the case originated in the Supreme Court and the Supreme Court entered a final judgment disposing of all the issues in the action.

Accordingly, this Court should not have deemed the appeal as one seeking permission under 5701(c) and should not have dismissed NhRP's appeal from the Supreme Court's refusal to issue the requested order to show cause as CPLR 7011 or 5701(a) grants it the right to such an appeal.

III. IN THE ALTERNATIVE, THE COURT SHOULD GRANT THE NhRP LEAVE TO APPEAL TO THE COURT OF APPEALS.

In the alternative, the Court should grant leave to appeal to allow the Court of Appeals to resolve the critically important questions presented in this motion. Under CPLR 5602(a)(l), with the permission of the Appellate Division, appeals may be taken to the Court of Appeals from a final order not appealable as of right. Leave to appeal should be granted, as in the case at bar, "when required in the interest of substantial justice[,]" N.Y. Const. art. VI, § 3(b)(6), a standard that is

satisfied when an appeal presents "a question of law important enough to warrant the immediate attention of the Court of Appeals[,]" David D. Siegel, Practice Commentaries, CPLR 5602 (McKinney 1995), such as an issue that is "novel or of public importance, present[s] a conflict with prior decisions of [the Court of Appeals], or involve[s] a conflict among the departments of the Appellate Division." 22 NYCRR 500.22(b)(4). *E.g*., *Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 N.Y.2d 174, 183 (1988) (granting leave to appeal in light of "novel and significant issues tendered for review"); *Mead v. Levitt*, 143 A.D.2d 560, 561 (1st Dept. 1988) (granting leave to appeal where First Department's decision conflicted with Fourth Department authority and another First Department decision).

The question presented here – whether a habeas corpus petitioner has an appeal as of right under CPLR 7011 from the refusal of a court to issue a writ of habeas corpus or order to show cause, is a matter of great public significance, as Justice Webber's ruling strips petitioners, human and nonhuman, of their absolute statutory right to appeal a refusal of the Supreme Court to issue a requested writ of habeas corpus or an order to show cause pursuant to CPLR 7003. Moreover the ruling from which NhRP appeals places this Court directly in conflict with the correct rulings of the Third and Fourth Judicial Departments.

IV. CONCLUSION

In view of the above, the NhRP respectfully requests that this Court grant the NhRP's Motion to Reargue, vacate its order of dismissal, and allow the appeal to proceed as of right under CPLR 7011. To refuse, where it is has been demonstrated that the Court misapplied the controlling law, would be an abuse of discretion. If this Court does not grant reargument in this case, the NhRP respectfully requests leave to appeal this vitally important habeas corpus issue to the Court of Appeals as a severe injustice has occurred in the lower court and Justice Webber's ruling strips millions of New Yorkers of their absolute statutory right under CPLR 7011 to appeal the refusal of a Supreme Court to issue a writ of habeas corpus or order to show cause under CPLR 7003(a).

Dated: Respectfully submitted,

_____

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_____

Steven M. Wise, Esq.
(of the bar of the State of Massachusetts)

By permission of the Court
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At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on October 25, 2016.

PRESENT: Hon. John W. Sweeny, Jr., Justice Presiding,
Rolando T. Acosta
Paul G. Feinman
Barbara R. Kapnick
Troy K. Webber, Justices.

The Nonhuman Rights Project, Inc.,
on behalf of Kiko,
Petitioner-Appellant,

M-4175

-against- Index No. 150149/16

Carmen Presti, et al.,
Respondents-Respondents.

A motion having been made by petitioner-appellant to this Court from a decision of the Supreme Court, New York County, entered on or about January 29, 2016, in which the Court declined to sign an order to show cause,

And an order by a Justice of this Court, entered on July 28, 2016, denying petitioner's motion for leave to appeal from the aforesaid January 29, 2016 decision,

And petitioner-appellant having moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals, from the aforesaid order of a Justice of this Court, entered on July 28, 2016,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTER:

CLERK

EXHIBIT 15

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on November 10, 2016.

PRESENT: Hon. John W. Sweeny, Jr., Justice Presiding,
Rolando T. Acosta
Paul G. Feinman
Barbara R. Kapnick
Troy K. Webber, Justices.

The Nonhuman Rights Project, Inc.,
on behalf of Kiko,
Petitioner-Appellant,

-against-

M-4175A
Index No. 150149/16

Carmen Presti, et al.,
Respondents-Respondents.

A motion having been made by petitioner-appellant to this Court to appeal, as of right, from a memorandum decision and order, hereby deemed a judgment under CPLR 7011, of Supreme Court, New York County, entered on or about January 29, 2016, in which Supreme Court declined to sign an Order to Show Cause seeking the issue of a writ of habeas corpus,

And an order by a Justice of this Court, having been entered on July 28, 2016, denying petitioner-appellant's motion to appeal as of right from the aforesaid January 29, 2016 judgment,

And petitioner-appellant having moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals from the aforesaid order of a Justice of this Court, entered on July 28, 2016,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that that branch of the motion which seeks reargument is granted, and upon reargument, the order of this Court, entered October 25, 2016 (M-4175), is hereby recalled and vacated, and the motion brought by petitioner-appellant for leave to appeal, as of right, from the January 29, 2016 judgment of Supreme Court refusing an order to show cause (CPLR 7011), is granted.

ENTER:

CLERK

EXHIBIT 16

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

----------x

Index No. 150149/16
(New York County)

NOTICE OF MOTION FOR LEAVE TO FILE RESPONSE OF EDITOR-IN-CHIEF OF *BLACK'S LAW DICTIONARY* REGARDING ERRONEOUS DEFINITION OF "PERSON"

PLEASE TAKE NOTICE, that upon the annexed affirmation of Elizabeth Stein, Esq. dated April 11, 2017 and the papers attached thereto, Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP") will move this Court, at a term of the Appellate Division of the Supreme Court, First Judicial Department, at the Courthouse located at 27 Madison Avenue, New York, New York for an order granting leave to file: 1) Petitioner-Appellant's April 6, 2017 letter to Bryan Garner, editor-in-chief of *Black's Law Dictionary,* regarding the erroneous definition of "person" in that volume (a copy of the letter is annexed to the

Affirmation of Elizabeth Stein as "Exhibit 2"); and 2) Mr. Garner's email response dated April 6, 2016 (a copy of which is annexed to the Affirmation of Elizabeth Stein as "Exhibit 3").

PLEASE TAKE FURTHER NOTICE, that the motion is returnable at 10 o'clock in the forenoon on, April 21, 2017, which is at least 9 days from the date of service of these papers.

Dated: April 11, 2017

Elizabeth Stein, Esq.
Attorney for Petitioner-Appellant
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liddystein@aol.com

NOTICE TO:

New York State Supreme Court
Appellate Division – First Department
27 Madison Avenue
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(212) 340-0400

Carmen Presti, individually and as an officer and director of The Primate Sanctuary, Inc.
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Christie E. Presti, individually and as an officer and director of The Primate Sanctuary, Inc.

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc, and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

Index No.: 150149/16
(New York County)

Attorney Affirmation

I, Elizabeth Stein, an attorney duly admitted to practice law in the State of New York, affirm the following under the penalty of perjury:

1. I am an attorney of record for Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), in the above-captioned matter and am not a party in this action.

2. I am fully familiar with the pleadings and proceedings in this matter, have read and know the contents thereof, and submit this affirmation in support of the within Motion for Leave to File Response of Editor-In-Chief of *Black's Law*

Dictionary Regarding Erroneous Definition of "Person," and the papers annexed hereto.

3. On March 27, 2017, I submitted a letter to this Court which, among other things, brought to this Court's attention the erroneous definition of "person" in *Black's Law Dictionary*, upon which the Third Department in part based its ruling in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 151-52 (3d Dept. 2014) in denying personhood to a chimpanzee (attached as "Exhibit 1" is a copy of that letter).

4. On April 6, 2017, the NhRP notified the editor-in-chief of *Black's Law Dictionary*, Bryan Garner, of *Black's* erroneous definition of "person" and requested the error be corrected to define a "legal person" as an entity who is the subject of "rights *or* duties," not "rights *and* duties" (attached as "Exhibit 2" is the letter to Mr. Garner from Kevin Schneider, Esq., including the referenced pages from the 10th edition of Salmond's *Jurisprudence*).

5. Mr. Garner responded by email on April 6, 2017, "I've marked it for correction in the 11th edition" (attached as "Exhibit 3" is a copy of the email communication).

6. The NhRP seeks to bring the above to the Court's attention as it directly bears upon the validity of the *Lavery* decision, which was deemed binding by the lower court in the case at bar.

7. Pursuant to 22 N.Y.C.R.R. §1301.1, I affirm that this action is not frivolous.

WHEREFORE, NhRP respectfully requests that this Court enter an order (i) granting it leave to submit the attached letter to Bryan Garner, editor-in-chief of *Black's Law Dictionary* ("Exhibit 2") and his email response ("Exhibit 3"), and (ii) granting such other and further relief as this Court deems just and proper.

Dated: April 11, 2016

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EXHIBIT 1

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Attorney for Petitioner-Appellant

By Hand Delivery

March 27, 2017

Clerk of the Court
Susanna Rojas
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Re: *Nonhuman Rights Project, Inc., on behalf of Tommy v. Patrick C. Lavery, et al.* (162358/2015) (New York County) and *Nonhuman Rights Project, Inc., on behalf of Kiko v. Carmen Presti et al.*, (150149/2016) (New York County)

Dear Clerk Rojas:

Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), hereby notifies this Court of three matters: (1) a relevant case rendered after oral argument in the above-captioned actions (which took place on March 16, 2017), (2) the publication of a relevant law review article, and (3) a mistake of law made by the Third Judicial Department in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 151-52 (3d Dept. 2014) upon which the lower court in the present cases relied, that came to the NhRP's attention immediately before oral argument, but which the NhRP was unable to bring to the attention of the Court during argument.

First, on March 20, 2017, the High Court of Uttarakhand declared two rivers in India — the Ganga and Yamuna — as "legal persons" with rights under the Constitution of India. *See Mohd. Salim v. State of Uttarakhand & Others*, (PIL) 126/2014 (High Court Uttarakhand, 03/20/2017) (enclosed). Relying heavily upon

Salmond[1] and *Paton*,[2] the court concluded that it would "'define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights *or* duties may be attributed.'" *Id.* at ¶14, ¶19 (emphasis added) (citing *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & others*, AIR 2000 SC 1421 (Supreme Court of India, 2000)).

Second, the decision of the Third Department in *Lavery* is critiqued in the just-published Craig Ewasiuk law review article, "Escape Routes: The Possibility of Habeas Corpus Protection for Animals Under Modern Social Contract Theory," 48.2 *The Columbia Human Rights Law Review* 69 (Winter 2017).

Third, the *Lavery* decision relied upon *Black's Law Dictionary* (7th ed.) for the proposition that "the legal meaning of a 'person' is 'a subject of legal rights *and* duties.'" Critically, however, the two supporting sources that *Black's Law Dictionary* cites, the tenth edition of *Salmond on Jurisprudence* and Gray's *The Nature and Sources of the Law*[3] support the opposite proposition. **Both use the disjunctive "or" rather than the conjunctive "and," making clear that a "person" may be the subject of rights "*or*" duties.** The NhRP only recently discovered this error when it finally was able to locate the tenth edition of *Salmond on Jurisprudence* at the Library of Congress.

Every edition of *Salmond on Jurisprudence,* including the tenth edition, repeats: "a person is any being whom the law regards as capable of legal rights *or* duties."[4] Gray's states that "[o]ne who has rights *but not duties*, or has duties but no rights, is ... a person."[5]

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[1] *Id.* at ¶14, ¶16 (citing John Salmond, *Salmond on Jurisprudence* (Patrick John Fitzgerald, Sweet & Maxwell, 12 ed. 1966) 305-306).

[2] *Id.* at ¶14 (citing George Whitecross Paton, *A Textbook of Jurisprudence* (3rd ed. 1964) 349-350).

[3] ch. II at 27 (Quid Pro Books 2012) (2d ed. 1921), and p. 39 (1st ed. 1909).

[4] John Salmond, *Salmond on Jurisprudence* (Patrick John Fitzgerald, Sweet & Maxwell, 12 ed. 1966) 299; John Salmond, *Salmond on Jurisprudence* (Glanville Williams, London, Sweet & Maxwell, Limited, 11th ed. 1957) 350; Glanville L. Williams, *Salmond on Jurisprudence* 318 (10th ed. 1947); John Salmond, *Jurisprudence* (C.A.W. Manning, London: Sweet & Maxwell, Limited, 8th ed. 1930) 329; John Salmond, *Jurisprudence*, 7th ed. (London: Sweet & Maxwell, Limited, 1924) 329; John Salmond, *Jurisprudence*, 6th ed. (London: Sweet & Maxwell, Limited, 1920) 272; John Salmond, *Jurisprudence*, 4th ed. (London, Stevens and Haynes, 1913) 272; John Salmond, Jurisprudence, 2nd ed. (London: Stevens and Haynes 1907) 275; and John Salmond, *Jurisprudence or The Theory of the Law* (London, Stevens & Haynes 1902) 334 (emphasis added).

[5] Gray, at 27 (emphasis added).

Likewise, most of the few cases cited in *Lavery* to support the holding that personhood is contingent upon the ability to shoulder duties *and* responsibilities also rely upon the same erroneous *Black's Law Dictionary* definition. *See Western Sur. Co. v ADCO Credit, Inc.*, 251 P3d 714, 716 (Nev. 2011); *State of Washington v A.M.R.*, 147 Wash. 2d 91, 94, 51 P3d 790, 791 (2002); *State of West Virginia v Zain*, 207 W. Va. 54, 65, 528 SE2d 748, 755 (1999), *cert den.*, 529 US 1042 (2000)); *Amadio v Levin*, 501 A2d at 1098; *Western Sur. Co*, 251 P3d at 716; *State of Washington v A.M.R.*, 51 P3d at 791; *State of West Virginia v Zain*, 528 SE2d at 755.

Sincerely,

Elizabeth Stein, Esq.
Attorney for Petitioner-Appellant

Encl.

Cc:

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EXHIBIT 2

Kevin Schneider, Esq.
68 West 107th St. #62
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kschneider@nonhumanrights.org

By Regular Mail and Email

April 6, 2017

Bryan Garner
c/o LawProse, Inc.
14180 Dallas Parkway
Suite 280
Dallas, TX 75254
Email to: bgarner@lawprose.org and info@lawprose.org

Re: Serious error in Black's Law Dictionary (Definition of "Person")

Dear Mr. Garner:

I am a New York attorney and the Executive Director of the Nonhuman Rights Project, Inc. ("NhRP"). I am writing to call your attention to a serious error in *Black's Law Dictionary*, specifically, its definition of "person." This error has had grave implications for the NhRP's litigation to secure habeas corpus rights for chimpanzees. *See People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 151-52 (3d Dept. 2014) (chimpanzees cannot be "legal persons" because they are unable to bear correlative duties and responsibilities).

The *Lavery* court, in partial reliance upon *Black's Law Dictionary* (7th ed.), quoted a passage from the 10th edition of Salmond's *Jurisprudence* that was alleged to support the proposition that "legal personhood has consistently been defined in terms of both rights *and duties*." *Id.* (emphasis in original). In *Black's*, the passage reads in part: "So far as legal theory is concerned, a person is any being whom the law regards as capable of **rights *and* duties**."

However, that is not what *Jurisprudence* stated.[1] In the original quote—as can be seen in the attached scanned pages of Salmond's *Jurisprudence* (10th ed.) which attorney Spencer Lo obtained from the Library of Congress—the conjunctive "and" does not appear; rather, the disjunctive "or" is used in the phrase "**rights or duties.**" Every edition of Salmond's *Jurisprudence* repeats: "a person is any being whom the law regards as capable of rights or duties."[2] This "rights and duties" error persists even in the latest edition of *Black's Law Dictionary*.

[1] The court erred in citing Gray's *Nature and Sources of Law* at 27, as well. However, Gray states that "[o]ne who has rights *but not duties*, or has duties but no rights, is ... a person."

[2] John Salmond, *Salmond on Jurisprudence* (Patrick John Fitzgerald, Sweet & Maxwell, 12 ed. 1966) 299; John Salmond, *Salmond on Jurisprudence* (Glanville Williams, London, Sweet & Maxwell, Limited, 11th ed. 1957) 350; Glanville L. Williams, *Jurisprudence* 318 (10th ed. 1947); John Salmond, *Jurisprudence* (C.A.W. Manning, London: Sweet & Maxwell, Limited, 8th ed. 1930) 329; John Salmond, *Jurisprudence*, 7th ed. (London: Sweet & Maxwell, Limited, 1924) 329; John Salmond, *Jurisprudence*, 6th ed. (London: Sweet & Maxwell, Limited, 1920)

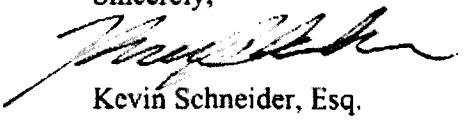
Likewise, some of the very few cases *Lavery* cited to support its statement that personhood is contingent upon the ability to shoulder duties *and* responsibilities unfortunately relied upon the same erroneous *Black's Law Dictionary* definition. *See Western Sur. Co. v ADCO Credit, Inc.*, 251 P3d 714, 716 (Nev. 2011); *State of Washington v A.M.R.*, 147 Wash. 2d 91, 94, 51 P3d 790, 791 (2002); *Amadio v Levin*, 501 A2d at 1098.

Other courts, which did not rely upon *Black's*, have correctly applied personhood to entities able to bear rights *or* duties. The latest example was on March 20, 2017, when the High Court of Uttarakhand declared two rivers in India — the Ganga and Yamuna — "legal persons" with rights under the Constitution of India. *See Mohd. Salim v. State of Uttarakhand & Others*, (PIL) 126/2014 (High Court Uttarakhand, 03/20/2017). The judge subsequently enlarged the order to extend legal personhood to the glaciers which feed the Ganga and Yamuna rivers (the Gangotri & Yamunotri), as well as connected rivers, streams, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls. Relying in part upon the 12th edition of *Salmond on Jurisprudence*[3] the court stated that it would "'define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights *or* duties may be attributed.'" *Id.* at ¶14, ¶19 (emphasis added) (citing *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & others*, AIR 2000 SC 1421 (Supreme Court of India, 2000)).

This erroneous definition of legal personhood in *Black's* has the potential to wreak more havoc. In his *amicus curiae* brief in support of NhRP's ongoing habeas corpus litigation in New York, Professor Laurence H. Tribe argued that the "court in *Lavery* reached its conclusion on the basis of a fundamentally flawed definition of legal personhood."[4] He explained that this "definition, which would appear on its face to exclude third-trimester fetuses, children, and comatose adults (among other entities whose rights as persons the law protects), importantly misunderstood the relationship among rights, duties, and personhood." *Id.*

I urge that you correct this serious error to make plain in *Black's Law Dictionary* that a "legal person" can be the subject of "rights *or* duties," not "rights *and* duties," so that this erroneous definition may not be cited by courts in the future.

Sincerely,



Kevin Schneider, Esq.

Encl.

272; John Salmond, *Jurisprudence*, 4th ed. (London, Stevens and Haynes, 1913) 272; John Salmond, *Jurisprudence*, 2nd ed. (London: Stevens and Haynes 1907) 275; and John Salmond, *Jurisprudence or The Theory of the Law* (London, Stevens & Haynes 1902) 334 (emphasis added).

[3] *Id.* at ¶14, ¶16 (citing John Salmond, *Salmond on Jurisprudence* (Patrick John Fitzgerald, Sweet & Maxwell, 12 ed. 1966) 305-306).

[4] *See* "Brief of Amicus Curiae Laurence H. Tribe in Support of Petitioner-Appellant," at pg. 2, available at: https://www.nonhumanrightsproject.org/content/uploads/2016_150149_Tribe_ITMO-The-NonHuman-Right-Project-v.-Presti_Amicus-1-2.pdf.

JURISPRUDENCE

BY

SIR JOHN SALMOND

A JUDGE OF THE SUPREME COURT OF NEW ZEALAND

TENTH EDITION

BY

GLANVILLE L. WILLIAMS, LL.D. (CANTAB.)

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW; READER IN ENGLISH LAW IN THE UNIVERSITY OF LONDON

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CHAPTER 15

PERSONS

§ 111. The Nature of Personality

THE purpose of this chapter is to investigate the legal conception of personality. It is not permissible to adopt the simple device of saying that a person means a human being, for even in the popular or non-legal use of the term there are persons who are not men. Personality is a wider and vaguer term than humanity. Gods, angels, and the spirits of the dead are persons, no less than men are. And in the law this want of coincidence between the class of persons and that of human beings is still more marked. In the law there may be men who are not persons; slaves, for example, are destitute of legal personality in any system which regards them as incapable of either rights or liabilities. Like cattle, they are things and the objects of rights; not persons and the subjects of them. Conversely there are, in the law, persons who are not men. A joint-stock company or a municipal corporation is a person in legal contemplation. So also, in Hindu law, idols are legal persons, and this has been recognised by the Privy Council (*a*). What, then, is the legal meaning of a "person"?

So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties (*b*). Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition.

Persons as so defined are of two kinds, distinguishable as natural and legal. A natural person is a human being. Legal persons are beings, real or imaginary, who for the purpose of

(*a*) *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (1925), L. R. 52 Ind. App. 245. See Duff, "The Personality of an Idol" (1927), 3 C. L. J. 42; Vesey-Fitzgerald, "*Idolon Fori*" (1925), 41 L. Q. R. 419.

(*b*) For a full discussion see Alexander Nékám, *The Personality Conception of the Legal Entity* (1938).

legal reasoning are treated in greater or less degree in the same way as human beings (*c*).

§ 112. The Legal Status of the Lower Animals

The only natural persons are human beings. Beasts are not persons, either natural or legal. They are merely things—often the objects of legal rights and duties, but never the subjects of them. Beasts, like men, are capable of acts and possess interests. Yet their acts are neither lawful nor unlawful; they are not recognised by the law as the appropriate subject-matter either of permission or of prohibition. Archaic codes did not scruple, it is true, to punish with death in due course of law the beast that was guilty of homicide. "If an ox gore a man or a woman that they die: then the ox shall be surely stoned and his flesh shall not be eaten" (*d*). A conception such as this pertains to a stage that is long since past; but modern law shows us a relic of it in the rule that a trespassing beast may be distrained damage feasant, and kept until its owner or some one else interested in the beast pays compensation (*e*). Distress damage feasant does not, however, in modern law involve any legal recognition of the personality of the animal.

A beast is as incapable of legal rights as of legal duties, for its interests receive no recognition from the law. *Hominum causa omne jus constitutum* (*f*). The law is made for men, and allows no fellowship or bonds of obligation between them and the lower animals. If these last possess moral rights—as utilitarian ethics at least need not scruple to admit—those rights are not recognised by any legal system. That which is done to the hurt of a beast may be a wrong to its owner or to the society of mankind, but it is no wrong to the beast. No animal can be the owner of any property, even through the medium of a human trustee. If a testator vests property in trustees for the maintenance of his favourite horses or dogs, he will thereby create no valid trust enforceable in any way by or on behalf of these non-human beneficiaries. The only effect of such provisions is to authorise the trustees, if they think fit, to expend the property

(*c*) Legal persons are also termed fictitious, juristic, artificial, or moral.
(*d*) Exodus xxi. 28. To the same effect see Plato's *Laws*, 873.
(*e*) Williams, *Liability for Animals*, chaps. 1, 7.
(*f*) D. 1. 5. 2.

EXHIBIT 3

Kevin Schneider <kschneider@nonhumanrights.org>

Serious Error in Black's Law Dictionary (Definition of "Person")

Bryan <bgarner@lawprose.org> Thu, Apr 6, 2017 at 11:53 PM
To: Kevin Schneider <kschneider@nonhumanrights.org>

Kevin—
Thank you for this. I've marked it for correction in the 11th edition. Many thanks.
Sincerely,
Bryan

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On Apr 6, 2017, at 13:38, Kevin Schneider <kschneider@nonhumanrights.org> wrote:

> Dear Mr. Garner,
>
> Please find attached, in PDF, a copy of the letter I mailed to you today as well as the referenced pages from Salmond's *Jurisprudence* (10th ed.).
>
> Best regards,
> --
> Kevin Schneider, Esq.
> Executive Director
> Nonhuman Rights Project
> www.nonhumanrights.org
> 857-991-4148
>
> ---
>
>
>
> <Letter to Black's re Def. of Person 4.6.17.pdf>
>
> <Salmond 10th Ed Person as Subject of Rights OR Duties.pdf>

EXHIBIT 17

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on June 6, 2017.

Present: Hon. Dianne T. Renwick, Justice Presiding,
Angela M. Mazzarelli
Sallie Manzanet-Daniels
Paul G. Feinman
Troy K. Webber, Justices.

In the Matter of a Proceeding Under Article 70 of the CPLR for a Writ of Habeas Corpus,

M-2025

The Nonhuman Rights Project, Inc., on behalf of Tommy,
Petitioner-Appellant,

Index No. 162358/15

-against-

Patrick C. Lavery, individually and as an officer of Circle L. Trailers Sales, Inc., Diane Lavery, and Circle L. Trailer Sales, Inc.,
Respondents-Respondents.

In the Matter of a Proceeding Under Article 70 of the CPLR for a Writ of Habeas Corpus,

The Nonhuman Rights Project, Inc., On behalf of Kiko,
Petitioner-Appellant,

M-2026

Index No. 150149/16

-against-

Carmen Presti, individually and as an officer and director of the Primate Sanctuary, Inc., Christie E. Presti, individually and as an officer and director of The Primate Sanctuary, Inc.,
Respondents-Respondents.

An appeal having been perfected and argued before this Court on March 16, 2017 (Appeal Nos. 3648-3649), and said appeal is currently pending before this Court,

And, by separate motions, petitioner in each action having moved for leave to file a letter dated April 6, 2017 sent to Bryan Garner, editor in chief of Black's Law Dictionary, and his email response, and for other related relief (M-2025/M-2026),

Now, upon reading and filing the papers with respect to the motions, and due deliberation having been had thereon, it is

Ordered that the motions are both denied in their entirety.

ENTERED:

CLERK

EXHIBIT 18

Matter of Nonhuman Rights Project, Inc. v Lavery

2017 NY Slip Op 04574 [152 AD3d 73]

June 8, 2017

Webber, J.

Appellate Division, First Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, August 9, 2017

[*1]

In the Matter of Nonhuman Rights Project, Inc., on Behalf of Tommy, Appellant,
v
Patrick C. Lavery et al., Respondents.

In the Matter of Nonhuman Rights Project, Inc., on Behalf of Kiko, Appellant,
v
Carmen Presti et al., Respondents.

First Department, June 8, 2017 [*2]

APPEARANCES OF COUNSEL

Law Office of Elizabeth Stein, New Hyde Park (*Elizabeth Stein* of counsel), and *Steven M. Wise*, of the Massachusetts bar, admitted pro hac vice, of counsel, for appellant.

Justin Marceau, Denver, Colorado, amicus curiae pro se.

Samuel R. Wiseman, Tallahasse, Florida, amicus curiae pro se.

Laurence H. Tribe, Cambridge, Massachusetts, amicus curiae pro se.

Richard L. Cupp, Jr., Malibu, California, amicus curiae pro se.

{**152 AD3d at 74} OPINION OF THE COURT

Webber, J.

Petitioner seeks reversal of the motion court's judgment declining to extend habeas corpus relief to two adult male chimpanzees, Tommy and Kiko.

Petitioner is a Massachusetts nonprofit corporation whose stated mission is "to change the common-law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal rights, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them" {**152 AD3d at 75}to—certain fundamental rights which include entitlement to habeas relief.[FN*]

The petition as to Tommy was brought in December 2015. It is alleged that Tommy, who is owned by respondents Circle L Trailer Sales, Inc. and its officers, is in a cage in a warehouse in Gloversville, New York. The petition as to Kiko was brought in January 2016. Kiko, who is owned by respondents the Primate Sanctuary, Inc. and its officers and directors, is allegedly in a cage in a cement storefront in a crowded residential area in Niagara Falls, New York.

These are not the first petitions for habeas relief filed by petitioner on behalf of Tommy and Kiko. In December 2013, petitioner filed a petition on behalf of Kiko, in Supreme Court, Niagara County. There, the trial court declined to sign an order to show cause seeking habeas relief and the Fourth Department affirmed (*Matter of Nonhuman Rights Project, Inc. v Presti*, 124 AD3d 1334 [4th Dept 2015], *lv denied* 26 NY3d 901 [2015]).

Also in December 2013, petitioner brought a habeas proceeding on behalf of Tommy, in Supreme Court, Fulton County. There, the trial court declined to sign an order to show cause and the Third Department affirmed the decision (*People ex rel. Nonhuman Rights Project, Inc. v Lavery*, 124 AD3d 148 [3d Dept 2014], *lv denied* 26 NY3d 902 [2015]).

Petitioner has also brought a habeas petition seeking the release of two chimpanzees not at issue here, Hercules and Leo, who, according to petitioner are confined for research purposes, at the State University of New York at Stony Brook. In that proceeding, Supreme Court, Suffolk County, declined to sign an order to show cause and in 2014, the Second Department dismissed petitioner's appeal (*Matter of Nonhuman Rights Project, Inc. v Stanley*, 2014 NY Slip Op 68434[U] [2d Dept 2014]).

[*3]

Without even addressing the merits of petitioner's arguments, we find that the motion court properly declined to sign the orders to show cause since these were successive habeas

proceedings which were not warranted or supported by any changed circumstances (*see People ex rel. Glendening v Glendening*, 259 App Div 384, 387 [1st Dept 1940], *affd* 284 NY 598 {**152 AD3d at 76} [1940]; *People ex rel. Woodard v Berry*, 163 AD2d 759 [3d Dept 1990], *lv denied* 76 NY2d 712, 715 [1990]; *see also People ex rel. Lawrence v Brady*, 56 NY 182, 192 [1874]).

CPLR 7003 (b) permits a court to decline to issue a writ of habeas corpus if

> "the legality of the detention has been determined by a court of the state on a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined and the court is satisfied that the ends of justice will not be served by granting it."

Petitioner has filed four identical petitions in four separate state courts in four different counties in New York. Each petition was accompanied by virtually the same affidavits, all attesting to the fact that chimpanzees are intelligent, and have the ability to be trained by humans to be obedient to rules, and to fulfill certain duties and responsibilities. Petitioner has failed to present any new information or new ground not previously considered. The "new" expert testimony presented by petitioner continues to support its basic position that chimpanzees exhibit many of the same social, cognitive and linguistic capabilities as humans and therefore should be afforded some of the same fundamental rights as humans.

Any new expert testimony/affidavits cannot be said to be in response to or counter to the reasoning underlying the decision of the Court in *People ex rel. Nonhuman Rights Project, Inc. v Lavery* (124 AD3d at 148). In declining to extend habeas relief to chimpanzees, the Court in *Lavery* did not dispute the cognitive or social capabilities of chimpanzees. Nor, did it, as argued by petitioner, take judicial notice that chimpanzees cannot bear duties and responsibilities. Rather, it concluded:

> "[U]nlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings" (*id.* at 152).

The gravamen of petitioner's argument that chimpanzees are entitled to habeas relief is that the human-like characteristics {**152 AD3d at 77} of chimpanzees render them

"persons" for purposes of CPLR article 70. This position is without legal support or legal precedent.

In support of its argument, petitioner submits several expert affidavits, including one by Dr. Jane Goodall, the well-known primatologist, purportedly showing, based on academic research and hands-on experience, that chimpanzees have many human-like capabilities. These include recognizing themselves in reflections; setting and acting toward goals such as obtaining food; undergoing cognitive development with brains having similar structures to those of humans; communicating about events in the past and their intentions for the future, such as by pointing or using sign language; exhibiting an awareness of others' different visual perspectives, such as by taking food only when it is out of their competitors' line of sight; protecting others in risky situations, such as when relatively strong chimpanzees will examine a road before guarding more vulnerable chimpanzees as they cross the road; deceiving others (implying that they are able to anticipate others' thoughts); making and using complex tools for hygiene, socializing, communicating, hunting, gathering, and fighting; counting and ordering items using numbers; [*4]engaging in moral behavior, such as choosing to make fair offers and ostracizing chimpanzees who violate social norms; engaging in collective behavior such as hunting in groups of chimpanzees adopting different roles; showing concern for the welfare of others, particularly their offspring, siblings, and even orphans they adopt; protecting territory and group security; resolving conflicts; and apologizing.

"The common law writ of habeas corpus, as codified by CPLR article 70, provides a summary procedure by which a 'person' who has been illegally imprisoned or otherwise restrained in his or her liberty can challenge the legality of the detention" (*id*. at 150, quoting CPLR 7002 [a]). While the word "person" is not defined in the statute, there is no support for the conclusion that the definition includes nonhumans, i.e., chimpanzees. While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees, petitioner does not cite any sources indicating that the United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty, or that the legislature intended the term "person" in CPLR article 70 to expand the availability of habeas protection beyond humans. No precedent exists, under{**152 AD3d at 78} New York law, or English common law, for a finding that a chimpanzee could be considered a "person" and entitled to habeas relief. In fact, habeas relief has never been found applicable to any animal (*see e.g. United States v Mett*, 65 F3d 1531 [9th Cir 1995], *cert denied* 519 US 870 [1996]; *Waste Mgt. of*

Wisconsin, Inc. v Fokakis, 614 F2d 138 [7th Cir 1980], *cert denied* 449 US 1060 [1980]; *Sisquoc Ranch Co. v Roth*, 153 F2d 437, 441 [9th Cir 1946]).

The asserted cognitive and linguistic capabilities of chimpanzees do not translate to a chimpanzee's capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions. Petitioner does not suggest that any chimpanzee charged with a crime in New York could be deemed fit to proceed, i.e., to have the "capacity to understand the proceedings against him or to assist in his own defense" (CPL 730.10 [1]). While in an amicus brief filed by Professor Laurence H. Tribe of Harvard Law School, it is suggested that it is possible to impose legal duties on nonhuman animals, noting the "long history, mainly from the medieval and early modern periods, of animals being tried for offenses such as attacking human beings and eating crops," none of the cases cited took place in modern times or in New York. Moreover, as noted in an amicus brief submitted by Professor Richard Cupp, nonhumans lack sufficient responsibility to have any legal standing, which, according to Cupp is why even chimpanzees who have caused death or serious injury to human beings have not been prosecuted.

Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community.

Similarly, petitioner's argument that the word "person" is simply a legal term of art is without merit. As evidence, petitioner points to the doctrine of corporate personhood. In support of this argument, petitioner cites *Santa Clara County v Southern Pacific R. Co.* (118 US 394 [1886]), where the United States Supreme Court reaffirmed that a corporation is a person for purposes of the Fourteenth Amendment and, thus, its property cannot be taxed differently from the property of individuals. The underlying reasoning was that the corporation's property{**152 AD3d at 79} was really just the property of the individual shareholders who owned the corporation, and therefore should be protected in the same manner. Again, an acknowledgment that such laws are referenced to humans or individuals in a human community.

Petitioner's additional argument that "person" need not mean "human," as evidenced by a river in New Zealand designated as a legal person owning its own riverbed pursuant to a

public agreement with indigenous peoples of New Zealand and pre-independence Indian court decisions recognizing various sacred entities as legal persons, is not relevant to the definition of "person" [*5]here in the United States and certainly is of no guidance to the entitlement of habeas relief by nonhumans in New York.

Even assuming, however, that habeas relief is potentially available to chimpanzees, the common-law writ of habeas corpus does not lie on behalf of the two chimpanzees at issue in these proceedings. Petitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that "there are no adequate facilities to house [them] in proximity to the [c]ourt." Instead, petitioner requests that respondents be ordered to show "why [the chimpanzees] should not be discharged, and thereafter, [the court] make a determination that [their] detention is unlawful and order [their] immediate release to an appropriate primate sanctuary." Petitioner submits an affidavit from the executive director of Save the Chimps stating that this organization agrees to provide a permanent sanctuary to any and all chimpanzees released by court order. Save the Chimps maintains that the warm, humid climate in southern Florida is "ideal for chimpanzees," as it is similar to the species' native Africa.

Since petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court (*see Matter of Nonhuman Rights Project, Inc. v Presti*, 124 AD3d at 1334; *compare People ex rel. Dawson v Smith*, 69 NY2d 689 [1986], *with People ex rel. Brown v Johnston*, 9 NY2d 482 [1961]).

Seeking transfer of Kiko and Tommy to a facility petitioner asserts is more suited to chimpanzees as opposed to challenging the illegal detention of Kiko and Tommy does not state a cognizable habeas claim. Petitioner's reliance upon *Brown v* {**152 AD3d at 80} *Johnston* (9 NY2d at 482) as standing for an opposite result is misplaced. In *Brown*, the Court of Appeals found that the writ was properly sought by an inmate who had been transferred from prison to "an institution for custody of prisoners who are declared insane," based on his contention that he was "sane" and should accordingly be returned to prison (*Dawson v Smith*, 69 NY2d at 691).

> "The confinement in *People ex rel. Brown v Johnston* . . . was in an institution separate and different in nature from the correctional facility to which petitioner had been committed pursuant to the sentence of the court, and was not within the

specific authorization conferred on the Department of Correctional Services by that sentence" (*id*.).

By contrast, in *Dawson*, the Court found that habeas relief was properly denied as petitioner did "not seek his release from custody in the facility, but only from confinement in the special housing unit, a particular type of confinement within the facility which the Department of Correctional Services [was] expressly authorized to impose on lawfully sentenced prisoners committed to its custody" (*id*.). This is analogous to the situation here.

While petitioner's avowed mission is certainly laudable, the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process (*see Lewis v Burger King*, 344 Fed Appx 470, 472 [10th Cir 2009], *cert denied* 558 US 1125 [2010]).

Accordingly, the judgment (denominated an order) of the Supreme Court, New York County (Barbara Jaffe, J.), entered January 29, 2016, declining to sign an order to show cause seeking the transfer of Kiko to a primate sanctuary, and the judgment (denominated an order) of the same court and Justice, entered July 8, 2016, effective nunc pro tunc as of December 23, 2015, declining to sign an order to show cause seeking such relief on behalf of Tommy, should be affirmed, without costs.

Renwick, J.P., Mazzarelli, Manzanet-Daniels and Feinman, JJ., concur.

Judgment (denominated an order), Supreme Court, New York County, entered January 29, 2016, and judgment (denominated an order), same court and Justice, entered July 8, 2016, affirmed, without costs.

Footnotes

Footnote *: Assuming habeas relief may be sought on behalf of a chimpanzee, petitioner undisputedly has standing pursuant to CPLR 7002 (a), which authorizes anyone to seek habeas relief on behalf of a detainee.

EXHIBIT 19

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Petitioner-Appellant,

-against-

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

----------x

Index Nos. 162358/15 (New York County); 150149/16 (New York County)

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that the within is a true copy of the Decision and Order of the Court, dated June 8, 2017, affirming the judgments (denominated orders) of the Supreme Court, New York County (Barbara Jaffe, J.), which declined to sign

orders to show cause seeking the immediate release of two chimpanzees, Tommy and Kiko. Index No. 162358/2015 (July 8, 2016, effective *nunc pro tunc* as of December 23, 2015) (Tommy); Index No. 150149/2016 (January 29, 2016) (Kiko).

Dated: November 16, 2017

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Matter of Nonhuman Rights Project, Inc. v Lavery
2017 NY Slip Op 04574
Decided on June 8, 2017
Appellate Division, First Department
Webber, J., J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on June 8, 2017 SUPREME COURT, APPELLATE DIVISION First Judicial Department
Dianne T. Renwick,J.P.
Angela M. Mazzarelli
Sallie Manzanet-Daniels
Paul G. Feinman
Troy K. Webber, JJ.

150149/16 162358/15

[*1]In re the Nonhuman Rights Project, Inc., on behalf of Tommy, Petitioner-Appellant,

v

Patrick C. Lavery, etc., et al., Respondents-Respondents. Laurence H. Tribe, Richard L. Cupp Jr. and Samuel R. Wiseman, Amici Curiae.

In re the Nonhuman Rights Project, Inc., on behalf of Kiko, Petitioner-Appellant,

v

Carmen Presti, etc., et al., Respondents. Justin Marceau, Samuel R. Wiseman and Laurence H. Tribe, Amici Curiae.

Petitioner appeals from the judgment (denominated an order) of the Supreme Court, New York County (Barbara Jaffe, J.), entered January 29, 2016, declining to sign an order to show cause seeking the transfer of Kiko, a chimpanzee, to a primate sanctuary, and the judgment

(denominated an order) of the same court and Justice, entered July 8, 2016, effective nunc pro tunc as of December 23, 2015, declining to sign an order to show cause seeking such relief on behalf of Tommy, a chimpanzee.

Law Office of Elizabeth Stein, New Hyde Park (Elizabeth Stein of counsel), and Steven M. Wise, Coral Springs, FL, of the bar of the State of Massachusetts, admitted pro hac vice, of counsel, for appellant.

Justin Marceau, Denver, CO, amicus curiae pro se.

Samuel R. Wiseman, Tallahasse, FL, amicus curiae pro se.

Laurence H. Tribe, Cambridge, MA, amicus curiae pro se.

Richard L. Cupp, Jr., Malibu, CA, amicus curiae pro se.

WEBBER, J.

Petitioner seeks reversal of the motion court's judgment declining to extend habeas corpus relief to two adult male chimpanzees, Tommy and Kiko.

Petitioner is a Massachusetts nonprofit corporation whose stated mission is "to change the common-law status of at least some nonhuman animals from mere things,' which lack the capacity to possess any legal rights, to persons,' who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them" to certain fundamental rights which include entitlement to habeas relief.[FN1]

The petition as to Tommy was brought in December 2015. It is alleged that Tommy, who is owned by respondents Circle L Trailer Sales, Inc. and its officers, is in a cage in a warehouse in Gloversville, New York. The petition as to Kiko was brought in January 2016. Kiko, who is owned by respondents the Primate Sanctuary, Inc. and its officers and directors,

is allegedly in a cage in a cement storefront in a crowded residential area in Niagara Falls, New York.

These are not the first petitions for habeas relief filed by petitioner on behalf of Tommy and Kiko. In December 2013, petitioner filed a petition on behalf of Kiko, in Supreme Court, Niagara County. There, the trial court declined to sign an order to show cause seeking habeas relief and the Fourth Department affirmed (*Matter of Nonhuman Rights Project, Inc. v Presti*, 124 AD3d 1334 [4th Dept 2015], *lv denied* 26 NY3d 901 [2015]).

Also in December 2013, petitioner brought a habeas proceeding on behalf of Tommy, in Supreme Court, Fulton County. There, the trial court declined to sign an order to show cause and the Third Department affirmed the decision (*People ex rel. Nonhuman Rights Project, Inc. v Lavery*, 124 AD3d 148 [3d Dept 2014], *lv denied* 26 NY3d 902 [2015]).

Petitioner has also brought a habeas petition seeking the release of two chimpanzees not at issue here, Hercules and Leo, who, according to petitioner are confined for research purposes, at the State University of New York at Stony Brook. In that proceeding, Supreme Court, Suffolk County, declined to sign an order to show cause and in 2014, the Second Department dismissed petitioner's appeal (*Matter of Nonhuman Rights Project, Inc. v Stanley*, 2014 NY Slip Op 68434(U) [2d Dept 2014]).

Without even addressing the merits of petitioner's arguments, we find that the motion court properly declined to sign the orders to show cause since these were successive habeas proceedings which were not warranted or supported by any changed circumstances (*see People ex rel. Glendening v Glendening*, 259 App Div 384, 387 [1st Dept 1940], *affd* 284 NY 598 [1940]; *People ex rel. Woodard v Berry*, 163 AD2d 759 [3d Dept 1990], *lv denied* 76 NY2d 712, 715 [1990]; *see also People ex rel. Lawrence v Brady*, 56 NY 182, 192 [1874]).

CPLR 7003(b) permits a court to decline to issue a writ of habeas corpus if

"the legality of the detention has been determined by a court of the state on a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined and the court is satisfied that the ends of justice will not be served by granting it."

Petitioner has filed four identical petitions in four separate state courts in four different counties in New York. Each petition was accompanied by virtually the same affidavits, all attesting to the fact that chimpanzees are intelligent, and have the ability to be trained by

humans to be obedient to rules, and to fulfill certain duties and responsibilities. Petitioner has failed to present any new information or new ground not previously considered. The "new" expert testimony presented by petitioner continues to support its basic position that chimpanzees exhibit many of the same social, cognitive and linguistic capabilities as humans and therefore should be afforded some of the same fundamental rights as humans.

Any new expert testimony/affidavits cannot be said to be in response to or counter to the reasoning underlying the decision of the Court in *People ex rel. Nonhuman Rights Project, Inc. v Lavery* (124 AD3d at 148). In declining to extend habeas relief to chimpanzees, the Court in *Lavery* did not dispute the cognitive or social capabilities of chimpanzees. Nor, did it, as argued by petitioner, take judicial notice that chimpanzees cannot bear duties and responsibilities. Rather, it concluded:

"[U]nlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer

upon chimpanzees the legal rights — such as the

fundamental right to liberty protected by the writ of

habeas corpus — that have been afforded to human beings" (*id.* at 152).

The gravamen of petitioner's argument that chimpanzees are entitled to habeas relief is that the human-like characteristics of chimpanzees render them "persons" for purposes of CPLR article 70. This position is without legal support or legal precedent.

In support of its argument, petitioner submits several expert affidavits, including one by Dr. Jane Goodall, the well-known primatologist, purportedly showing, based on academic research and hands-on experience, that chimpanzees have many human-like capabilities. These include recognizing themselves in reflections; setting and acting toward goals such as obtaining food; undergoing cognitive development with brains having similar structures to those of humans; communicating about events in the past and their intentions for the future, such as by pointing or using sign language; exhibiting an awareness of others' different visual perspectives, such as by taking food only when it is out of their competitors' line of sight; protecting others in risky situations, such as when relatively strong chimpanzees will examine a road before guarding more vulnerable chimpanzees as they cross the road; deceiving others

(implying that they are able to anticipate others' thoughts); making and using complex tools for hygiene, socializing, communicating, hunting, gathering, and fighting; counting and ordering items using numbers; [*2]engaging in moral behavior, such as choosing to make fair offers and ostracizing chimpanzees who violate social norms; engaging in collective behavior such as hunting in groups of chimpanzees adopting different roles; showing concern for the welfare of others, particularly their offspring, siblings, and even orphans they adopt; protecting territory and group security; resolving conflicts; and apologizing.

"The common law writ of habeas corpus, as codified by CPLR article 70, provides a summary procedure by which a person' who has been illegally imprisoned or otherwise restrained in his or her liberty can challenge the legality of the detention" (*id*. at 150, quoting CPLR 7002 [a]). While the word "person" is not defined in the statute, there is no support for the conclusion that the definition includes nonhumans, i.e., chimpanzees. While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees, petitioner does not cite any sources indicating that the United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty, or that the Legislature intended the term "person" in CPLR article 70 to expand the availability of habeas protection beyond humans. No precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a "person" and entitled to habeas relief. In fact, habeas relief has never been found applicable to any animal (*see e.g. United States v Mett*, 65 F3d 1531 [9th Cir 1995], *cert denied* 519 US 870 [1996]; *Waste Mgt. of Wisconsin, Inc. v Fokakis*, 614 F2d 138 [7th Cir 1980], *cert denied* 449 US 1060 [1980]; *Sisquoc Ranch Co. v Roth*, 153 F2d 437, 441 [9th Cir 1946]).

The asserted cognitive and linguistic capabilities of chimpanzees do not translate to a chimpanzee's capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions. Petitioner does not suggest that any chimpanzee charged with a crime in New York could be deemed fit to proceed, i.e., to have the "capacity to understand the proceedings against him or to assist in his own defense" (CPL 730.10[1]). While in an amicus brief filed by Professor Laurence H. Tribe of Harvard Law School, it is suggested that it is possible to impose legal duties on nonhuman animals, noting the "long history, mainly from the medieval and early modern periods, of animals being tried for offenses such as attacking human beings and eating crops," none of the cases cited took place in modern times or in New York. Moreover, as noted in an amicus brief submitted by Professor Richard Cupp, nonhumans lack sufficient responsibility to have any legal standing, which, according to Cupp

is why even chimpanzees who have caused death or serious injury to human beings have not been prosecuted.

Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community.

Similarly, petitioner's argument that the word "person" is simply a legal term of art is without merit. As evidence, petitioner points to the doctrine of corporate personhood. In support of this argument, petitioner cites *Santa Clara County v South Pac. RR. Co.* (118 US 394 [1886]), where the United States Supreme Court reaffirmed that a corporation is a person for purposes of the Fourteenth Amendment and, thus, its property cannot be taxed differently from the property of individuals. The underlying reasoning was that the corporation's property was really just the property of the individual shareholders who owned the corporation, and therefore should be protected in the same manner. Again, an acknowledgment that such laws are referenced to humans or individuals in a human community.

Petitioner's additional argument that "person" need not mean "human," as evidenced by a river in New Zealand designated as a legal person owning its own riverbed pursuant to a public agreement with indigenous peoples of New Zealand and pre-independence Indian court decisions recognizing various sacred entities as legal persons is not relevant to the definition of "person" [*3]here in the United States and certainly is of no guidance to the entitlement of habeas relief by nonhumans in New York.

Even assuming, however, that habeas relief is potentially available to chimpanzees, the common-law writ of habeas corpus does not lie on behalf of the two chimpanzees at issue in these proceedings. Petitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that "there are no adequate facilities to house [them] in proximity to the [c]ourt." Instead, petitioner requests that respondents be ordered to show "why [the chimpanzees] should not be discharged, and thereafter, [the court] make a determination that [their] detention is unlawful and order [their] immediate release to an appropriate primate sanctuary." Petitioner submits an affidavit from the Executive Director of Save the Chimps stating that this organization agrees to provide a permanent sanctuary to any and all chimpanzees released by court order. Save the Chimps

maintains that the warm, humid climate in southern Florida is "ideal for chimpanzees," as it is similar to the species' native Africa.

Since petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court (*see Matter of Nonhuman Rights Project, Inc. v Presti*, 124 AD3d at 1334; *compare People ex rel. Dawson v Smith*, 69 NY2d 689 [1986], *with People ex rel. Brown v Johnston*, 9 NY2d 482 [1961]).

Seeking transfer of Kiko and Tommy to a facility petitioner asserts is more suited to chimpanzees as opposed to challenging the illegal detention of Kiko and Tommy does not state a cognizable habeas claim. Petitioner's reliance upon *Brown v Johnston* (9 NY2d at 482) as standing for an opposite result is misplaced. In *Brown*, the Court of Appeals found that the writ was properly sought by an inmate who had been transferred from prison to "an institution for custody of prisoners who are declared insane," based on his contention that he was "sane" and should accordingly be returned to prison (*Dawson v Smith*, 69 NY2d at 691). "The confinement in *People ex rel. Brown v Johnston* . . . was in an institution separate and different in nature from the correctional facility to which petitioner had been committed pursuant to the sentence of the court, and was not within the specific authorization conferred on the Department of Correctional Services by that sentence" (*id.*). By contrast, in *Dawson*, the Court found that habeas relief was properly denied as petitioner did "not seek his release from custody in the facility, but only from confinement in the special housing unit, a particular type of confinement within the facility which the Department of Correctional Services [was] expressly authorized to impose on lawfully sentenced prisoners committed to its custody" (*id.*). This is analogous to the situation here.

While petitioner's avowed mission is certainly laudable, the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process (*see Lewis v Burger King,* 344 Fed Appx 470, 472 [10th Cir 2009], *cert denied* 558 US 1125 [2010]).

Accordingly, the judgment (denominated an order) of the Supreme Court, New York County (Barbara Jaffe, J.), entered January 29, 2016, declining to sign an order to show cause seeking the transfer of Kiko to a primate sanctuary, and the judgment (denominated an order) of [*4]the same court and Justice, entered July 8, 2016, effective nunc pro tunc as of

December 23, 2015, declining to sign an order to show cause seeking such relief on behalf of Tommy, should be affirmed, without costs.

All concur.

Judgment (denominated an order), Supreme Court, New York County (Barbara Jaffe, J.), entered January 29, 2016, and judgment, same court and Justice, entered July 8, 2016, affirmed, without costs.

Opinion by Webber, J. All concur.

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 8, 2017

CLERK

Footnotes

Footnote 1: Assuming habeas relief may be sought on behalf of a chimpanzee, petitioner undisputedly has standing pursuant to CPLR 7002(a), which authorizes anyone to seek habeas relief on behalf of a detainee.

Return to Decision List

AFFIRMATION OF SERVICE OF PAPERS (CPLR 2103)

STATE OF NEW YORK, COUNTY OF NEW YORK ss.: (If more than one box is checked indicate after names type of service used.)

I, the undersigned, an attorney admitted to practice in New York State, with offices at the address set forth on the reverse side, affirm under penalties of perjury:

On November 16, 2017, I personally served the within **Notice of Entry of Decision and Order**

X Service by Mail	by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:
Individual Personal Service	by delivering a copy to each of the following *attorney(s)* at the last known address set forth after each name below. I knew the *attorney(s)* served to be the *attorney(s) for* the *party(ies)* stated below.
Hand Delivery Service	by dispatching a copy by a messenger delivery service to each of the persons at the last known address set forth after each name below.
Service by Mail and Additional Copy by Electronic Means	by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name and by transmitting a copy to the following persons by email to the address set forth after each name below:

To:

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_____

Elizabeth Stein, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Petitioner-Appellant,

-against-

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents,

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Petitioner-Appellant,

-against-

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Respondents-Respondents.

----------x

Index Nos. 162358/15 (New York County); 150149/16 (New York County)

NOTICE OF MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Elizabeth Stein, Esq., an attorney of record for Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), the Memorandum of Law in Support of this Notice of

Motion for Leave to Appeal, the briefs and record entered in this Court on the prior appeal in this action, a copy of the order of this Court from which leave to appeal is requested, all papers and prior proceedings in this action, and all other papers attached to the Affirmation of Elizabeth Stein, Esq., the NhRP will move this Court, at a term of the Appellate Division of the Supreme Court, First Judicial Department, at the Courthouse located at 27 Madison Avenue, New York, New York, for an order granting leave to appeal to the Court of Appeals this Court's Decision and Order of July 8, 2017.

PLEASE TAKE FURTHER NOTICE, that the motion is returnable at 10 o'clock in the forenoon on, December 4, 2017, which is at least 9 days from the date of service of these papers.

Dated: November 16, 2017

_____

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Attorney for Petitioner-Appellant

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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-against-

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Respondents-Respondents.

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Index Nos. 162358/15 (New York County); 150149/16 (New York County)

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

ARGUMENT

I. INTRODUCTION

Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), submits this Memorandum of Law in support of its Motion for Leave to Appeal to the Court of Appeals ("Motion for Leave to Appeal") pursuant to New York Civil Practice Law and Rules ("CPLR") 5602(a). The Appeal is from this Court's Decision and Order ("*Decision*"), dated June 8, 2017 affirming the judgments (denominated orders) of the Supreme Court, New York County (Barbara Jaffe, J.), which declined to sign orders to show cause sought by the NhRP seeking the immediate release of two chimpanzees, Tommy and Kiko, from their illegal detention. Index No. 162358/2015 (July 8, 2016, effective *nunc pro tunc* as of December 23, 2015), Appendix 12-14 ("*Tommy*"); Index No. 150149/2016 (January 29, 2016), Appendix 7-11 ("*Kiko*"). A copy of the *Decision* is attached to the annexed Affirmation of Elizabeth Stein, Esq., pursuant to 22 NYCRR § 600.14(b). This Motion for Leave to Appeal and its supporting Memorandum incorporate by reference, and fully adopt, all the arguments, evidence, exhibits, memoranda, testimony and authorities previously filed in these cases,[1] and are timely filed pursuant to CPLR 5513(b)[2] and 22 NYCRR § 600.14(b).

This Court should grant the Motion for Leave to Appeal for the following

[1] The statement of facts in *Tommy* is found at p. 7 of the Appellate Brief, with a longer version at p. 8 of the Trial Memorandum of Law (Appendix p. 695). The statement of facts in *Kiko* is found at p. 8 of the Appellate Brief with a longer version at p. 11 of the Trial Memorandum of Law (Appendix p. 673).

[2] This Motion for Leave to Appeal and supporting Memorandum are timely as they were served on November 16, 2017.

reasons:

(1) the appeal raises novel and complex legal issues that are of great public importance and interest in New York, and throughout the United States and the world;

(2) the *Decision* conflicts with rulings of the Court of Appeals, this Court, and other judicial departments of the Appellate Division on such fundamental legal issues as the requirements for legal personhood and the availability of the writ of habeas corpus for both humans and chimpanzees, which may only be resolved by the Court of Appeals; and

(3) the *Decision* contains numerous substantial legal errors and erroneous factual assumptions that require review and correction by the Court of Appeals.

Among the novel, important, and complicated questions of law the Court of Appeals should consider, to which it has not spoken, are:

(1) May an autonomous being be denied the right to a common law writ of habeas corpus solely because she is not human?

(2) May a court refuse to issue a common law writ of habeas corpus or order to show cause from a successive petition under CPLR 7003(b) if (a) the legality of a detention has not been previously determined by a court of the State in a prior proceeding for a writ of habeas corpus, and/or (b) the petition presents new grounds not theretofore presented and determined, and/or (c) the ends of justice are served by granting it?

(3) Is habeas corpus available to an unlawfully imprisoned “person” who

must necessarily be released into the custody of another?

For the reasons set forth below, this Court should grant the NhRP's Motion for Leave to Appeal.

II. STANDARD OF REVIEW

In determining whether to grant leave to appeal, courts look to the novelty, difficulty, importance, and effect of the legal and public policy issues raised. *See In re Shannon B.*, 70 N.Y.2d 458, 462 (1987) (granting leave on an "important issue"); *Town of Smithtown v. Moore*, 11 N.Y.2d 238, 241 (1962) (granting leave "primarily to consider [a] question . . . of state-wide interest and application"); *Neidle v. Prudential Ins. Co. of Am.*, 299 N.Y. 54, 56 (1949) (granting leave because of "[t]he importance of the decision" and "its far-reaching consequences"); *People ex rel. Wood v. Graves*, 226 A.D. 714, 714 (3rd Dept. 1929) ("Motion to appeal granted as the questions of law presented are of general public importance and ought to be reviewed by the Court of Appeals."); *Hamlin v. Hamlin*, 224 A.D. 168, 172 (4th Dept. 1928) ("in order that the law applicable may be definitely settled, and the matter disposed of accordingly, leave to appeal to the Court of Appeals is granted"); *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898, 917 (Sup. Ct. 2015) ("Even were I not bound by the Third Department in Lavery, the issue of a chimpanzee's right to invoke the writ of habeas corpus is best decided, if not by the Legislature, then by the Court of Appeals, given its role in setting state policy"). *See also* 22 NYCRR § 500.22 (leave should be granted when "the issues are novel or of public importance"); COURT OF APPEALS OF THE STATE OF NEW YORK: ANNUAL REPORT OF THE CLERK

OF THE COURT: 2010, at 2 (2011) (leave is most often granted to address "novel and difficult questions of law having statewide importance").

Leave to appeal to the Court of Appeals is particularly warranted where, as here, a case presents important and novel issues of law of statewide, national, and international significance. *See, e.g.*, *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 38 (1996). This case and the arguments it raises have been the subject of thousands of legal commentaries, national and international news articles, radio and television programs, and podcasts. Specifically, in the two weeks before oral argument and on the day of and in the six months since, at least 2,095 media articles were published on the issue of whether a chimpanzee could have the right to a common law writ of habeas corpus. These outlets include, in the U.S.: *NBC News*, *Wall Street Journal*, *Washington Post*, *Associated Press*, *Law360*, *Gizmodo*, *Fox News*, and *Salon*); and around the world: *Sydney Morning Herald*, *Kremlin Express*, *Yahoo Japan*, Mexico's *Entrelíneas*, and India's *Economic Times*. The collective potential reach of this pre- and post-hearing media coverage is approximately 1.4 billion people, according to the media monitoring service Meltwater.[3] Moreover the issues raised by the NhRP, as well as the litigation itself, have captured the interest of the world's leading legal scholars and the most selective academic publications,[4] while catalyzing the development of a whole

[3] *See* attached as "Exhibit A" a PDF printout of a table showing approximately the 100 most highly circulated media stories on this case and the Decision. A spreadsheet containing the full list of 2,095 media items covering this case between the period of March-November, 2017 is available for download at: https://www.nonhumanrights.org/content/uploads/Media-Coverage-Tommy-Kiko-Appellate-Hearing-Raw-Data.csv (last accessed November 15, 2017).

[4] *See* Richard A. Epstein, *Animals as Objects of Subjects of Rights*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Richard

field of academic research and debate, generating extensive discussion in dozens of law review articles, multiple academic books, several science journals, and a variety of legal industry publications.[5] This case and the arguments it raises are

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also having an impact on the courts in other states. By way of illustration, the Supreme Court of Oregon referenced the "ongoing litigation" brought by the NhRP, which "seeks to establish legal personhood for chimpanzees" and wrote:

> As we continue to learn more about the interrelated nature of all life, the day may come when humans perceive less separation between themselves and other living beings than the law now reflects. However, we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still[.]

State v. Fessenden, 355 Ore. 759, 769-70 (2014). Based in large part on the work of the NhRP, an Argentine civil law court in 2016 recognized a chimpanzee named Cecilia as a "non-human person," ordered her released from a Mendoza Zoo pursuant to a writ of habeas corpus, and sent to a sanctuary in Brazil. *In re Cecelia*, Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-23.

As discussed *infra*, leave to appeal to the Court of Appeals is further warranted where, as here, a decision of the Appellate Division conflicts with decisions of the Court of Appeals, *e.g.*, *Guice*, 89 N.Y.2d at 38, decisions within its own department, as well as decisions among the other judicial departments. *See also* 22 NYCRR § 500.22(b)(4) (leave should be granted when the issues "present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division."). The Court should also grant the NhRP's Motion for Leave to Appeal so that the Court of Appeals may determine whether this Court erred as a matter of law. *See, Shindler v. Lamb*, 9 N.Y.2d 621 (1961).

III. The novel and important questions raised in this appeal require further review by the Court of Appeals.

The question of who is a "person" within the meaning of New York's

common law of habeas corpus is the most important individual issue that can come before a New York court. Personhood determines who counts, who lives, who dies, who is enslaved, and who is free. As the NhRP argued to this Court, the term "person" is not now and has never been a synonym for "human."[6] Instead, it designates Western law's most fundamental category by identifying those entities capable of possessing a legal right. The Court of Appeals has made clear that this important determination is to be based on policy, and not biology, as this Court based its decision. *See Byrn v. New York City Health and Hospitals Corp.*, 31 N.Y. 2d 194, 201 (1972).

The question of whether personhood should ever turn on an individual's ability to bear duties and responsibilities had never been addressed by an English-speaking court until the misguided outlier decision of the Appellate Division, Third Judicial Department ("Third Department") in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 149 (3rd Dept. 2014), *lv denied*, 26 N.Y.3d 902 (2015)[7] which held that an entity must have the capacity to bear duties and responsibilities to be a "person" for any purpose.[8] As *Lavery* was the only appellate court decision that directly touched upon the issue at the time, the

[6] *See Tommy* Appellate Brief at 31 and Trial Court Memorandum at 66 (Appendix at 753); *Kiko* Appellate Brief at 30 and Trial Court Memorandum at 69 (Appendix at 731).

[7] The court in *Lavery* explicitly recognized that the issues raised in the case were novel and implicitly recognized their great importance and legal significance statewide, nationally and internationally when it wrote: "This appeal presents the novel question of whether a chimpanzee is a 'person' entitled to the rights and protections afforded by the writ of habeas corpus." 124 A.D.3d at 149.

[8] The *Lavery* court went on to erroneously take judicial notice of the mistaken fact that chimpanzees lack such capacity and thereby concluded that they could not be "persons" for purposes of habeas corpus protection.

Supreme Court, New York County in *Stanley*, 16 N.Y.S.3d at 915-17, felt bound to follow it. This Court had the opportunity to correct *Lavery*. Instead it implicitly accepted *Lavery*, thereby perpetuating its false notion that personhood is synonymous with being human.

The importance of addressing this unresolved issue of whether an autonomous being such as a chimpanzee may be denied the right to a common law writ of habeas corpus solely because he is not human cannot be overstated. New York has always vigorously embraced the common law writ of habeas corpus, *People ex rel. Pruyne v. Walts*, 122 N.Y. 238, 241-42 (1890), *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875), and there is no question that any court would release Tommy and Kiko if they were human beings, for their detention grossly interferes with their exercise of their autonomy and bodily liberty.

Until the Court of Appeals rules on this personhood issue, every lower court in the State of New York is bound by *Lavery*, as evidenced by this *Decision*, which undermines the value of habeas corpus for both humans and chimpanzees. The Court of Appeals must have the opportunity to determine whether an entity must be capable of bearing duties and responsibilities to be considered a "person" for the purpose of securing a common law writ of habeas corpus; in practical terms, whether the claimant must be a human being.

IV. The complex questions of law and fact raised in this appeal require further review by the Court of Appeals.

The Motion for Leave to Appeal should also be granted because the case raises complex questions of law and fact. *See Melenky v. Melen*, 206 A.D. 46, 51-

52 (4th Dept. 1923).[9] The question of whether a chimpanzee is entitled to legal personhood involves inquiry not only into the legal issue of personhood generally, but into the detailed uncontroverted expert evidence offered in support of the NhRP's assertion that chimpanzees possess the autonomy sufficient for personhood for the purpose of a common law writ of habeas corpus, as a matter of liberty, equality, or both. Nine prominent primatologists from around the world submitted uncontroverted Expert Affidavits demonstrating that chimpanzees possess the autonomy that allows them to choose how they will live their emotionally, socially, and intellectually rich lives. In response to *Lavery*, six uncontroverted Supplemental Affidavits were submitted by Dr. Jane Goodall and five other internationally-respected chimpanzee cognition experts that demonstrated that chimpanzees possess the capacity to bear duties and responsibilities both within chimpanzee communities and chimpanzee/human communities. Such complex scientific and legal issues regarding personhood and the scope of the common law writ of habeas corpus merit immediate attention by the Court of Appeals. *See Woods v. Lancet*, 303 N.Y. 349, 355 (1951) ("we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.").

V. The *Decision* requires review by the Court of Appeals as it conflicts with

[9] *See, e.g.*, *Hamilton v. Miller*, 23 N.Y.3d 592, 603 (2014) (leave to appeal was granted in a "scientifically complicated" case); *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 249-50 (1999) (leave to appeal granted in case involving "complicated legal questions associated with electronic bulletin board messages" for defamation purposes); *Matter of George L.*, 85 N.Y.2d 295, 298, 302 (1995) (granting leave to appeal in case presenting a "difficult question [regarding] a mentally ill individual"); *Schulz v. State*, 81 N.Y.2d 336, 344 (1993); *Sukljian v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 95 (1986); *Melenky v. Melen*, 206 A.D. 46, 51-52 (4th Dept. 1923).

prior decisions of that Court, this Court, and other Appellate Departments, and contains serious errors of law.

A. In affirming the lower court's refusal to issue the orders to show cause as an improper successive petition under CPLR 7003(b), this Court mistakenly limited the inquiry to the question of whether there were changed circumstances, then erroneously determined there were none.

"A court is always competent to issue a new habeas corpus writ on the same grounds as a prior dismissed writ." *People ex rel. Anderson v. Warden, New York City Correctional Instn. for Men*, 325 N.Y.S.2d 829, 833 (Sup. Ct. 1971). *See also Losaw v. Smith*, 109 A.D. 754 (3d Dept. 1905); *In re Quinn*, 2 A.D. 103, 103-04 (2d Dept. 1896), *aff'd*, 152 N.Y. 89 (1897). The rule permitting relitigation "after the denial of a writ, is based upon the fact that the detention of the prisoner is a continuing one and that the courts are under a continuing duty to examine into the grounds of the detention." *Post v. Lyford*, 285 A.D. 101, 104-05 (3rd Dept. 1954) (prior adjudication no bar to a new application on same grounds). *See People ex rel. Butler v. McNeill*, 219 N.Y.S.2d 722, 724 (Sup. Ct. 1961) ("the ban of res judicata cannot operate to preclude the present proceeding" despite the fact that it was petitioner's fifth application for habeas corpus to the court). This is because "[c]onventional notions of finality of litigation have no place where life or liberty is at stake[.]" *Sanders v. United States*, 373 U.S. 1, 8 (1963). The "inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ." *Id.*

CPLR 7003(b) "continues the common law and present position in New York that res judicata has no application to the writ." Advisory Committee Notes

to CPLR 7003(b). *See People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874); *People ex rel. Leonard HH v. Nixon*, 148 A.D.2d 75, 79 (3d Dept. 1989). *Stanley*, 16 N.Y.S.3d at 909-10 ("Notwithstanding the interest in issuing valid writs … the Legislature apparently found it necessary to include within the statute a provision permitting, but not requiring, a court to decline to issue a writ under certain circumstances, thereby permitting successive writs, a construction reflected in the traditional and general common law rule that res judicata has no application in habeas corpus proceedings."). As this Court stated: "CPLR 7003(b) permits a court to decline to issue a writ of habeas corpus if 'the legality of a detention has been determined by a court of the state in a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined, and the court is satisfied that the ends of justice will not be served by granting it." *Decision* at 76. While the statute is clear that all three elements must be met for a court to decline a petition for a writ of habeas corpus as successive, this Court erroneously confined its analysis solely to the issue of whether there were changed circumstances, then erroneously concluded that there were none. Yet not one of the elements of CPLR 7003(b) was satisfied.

1. **This Court erroneously concluded that the second petitions filed on behalf of Tommy and Kiko "were not warranted or supported by any changed circumstances."**

When the NhRP filed its original petitions for writs of habeas corpus and orders to show cause in December 2013 on behalf of Tommy, Kiko, and Hercules and Leo in the Supreme Courts of Fulton, Niagara and Suffolk Counties, respectively, none of the eleven supporting affidavits, and none of the petitions,

addressed whether a chimpanzee could bear duties and responsibilities. This was because the NhRP had no way of knowing that the Third Department in *Lavery* would, for the first time in the history of the law of English-speaking peoples, rule that an entity is required to have the capacity to bear duties and responsibilities in order to have any rights, let alone that of common law habeas corpus, then erroneously take judicial notice of the mistaken fact that chimpanzees are incapable of having this capacity.

In response to the Third Department's *Lavery* decision, the NhRP filed sixty pages of Supplemental Affidavits in all subsequent petitions solely for the purpose of demonstrating that chimpanzees possess the capacity to bear duties and responsibilities both within chimpanzee communities and human/chimpanzee communities, facts that had never been presented to any New York court.[10] Thus, this Court's statements that (1) "the motion court properly declined to sign the orders to show cause since these were successive proceedings which were not warranted or supported by any changed circumstances" (*Decision* at 75-76); (2) *every* petition for habeas corpus filed by the NhRP was accompanied by affidavits demonstrating that chimpanzees possess the ability "to fulfill certain duties and responsibilities" (*Id.* at 76); and (3) "[a]ny new expert testimony/affidavits cannot

[10] These uncontroverted facts set forth in the Supplemental Affidavits demonstrate that chimpanzees, among other capacities, possess the ability to understand and carry out duties and responsibilities while knowingly assuming obligations and then honoring them, behave in ways that seem both lawful and rule-governed, have moral inclinations and a level of moral agency, ostracize individuals who violate social norms, respond negatively to inequitable situations, have a social life that is cooperative and represents a purposeful and well-coordinated social system, routinely enter into contractual agreements, keep promises and secrets, prefer fair exchanges, perform death-related duties, and show concern for others' welfare.

be said to be in response to or counter to the reasoning underlying the decision of the Court in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery* (124 A.D.3d 148)" (*Id*.) are each plainly erroneous and illustrate this Court's misunderstanding of the nature and purpose of the Supplemental Affidavits.

Moreover, none of the three cases this Court cited, *People ex rel. Glendening v Glendening*, 259 App. Div. 384, 387 (1st Dept. 1940), *aff'd.* 284 NY 598 (1940); *People ex rel. Woodard v Berry*, 163 A.D.2d 759 (3d Dept 1990) *lv. denied* 76 N.Y.2d 712, 715 (1990); or *People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874), support its affirming the lower court's refusal to sign the orders to show cause.

In *Glendening*, 259 App. Div. at 387, the First Department provided the appropriate standard: "parties to the same habeas corpus proceeding may not continually relitigate *de novo* issues that were *fully litigated between them in prior applications in the same proceeding in which long and exhaustive hearings were held where there has been no change in the facts and circumstances determining such issues.*" (emphasis added). *Woodward* simply cites *Glendening* for this standard. However, it then supports the *opposite* conclusion that this Court drew. Moreover, *Woodward* was expressly relied upon by the Supreme Court, New York County in. *Stanley*, 16 N.Y.S.3d at 909, to justify the *issuance* of an order to show cause from a successive petition filed by the NhRP on behalf of Hercules and Leo. The successive petitions in both *Woodward*, 163 A.D.2d at 759-60, and *Glendening*, 259 A.D. 387-88, were dismissed *only* because, unlike in the case at bar, their merits had been "fully litigated" in a prior petition and either there were

no changed circumstances or none had been claimed. Finally, in *Brady*, 56 N.Y. at 192, the Court of Appeals stated "[i]n this case the relator is restrained of his liberty; and a decision under one writ refusing to discharge him, did not bar the issuing of a second writ by another court or officer."

The following four statements made by this Court further demonstrate its misunderstanding of NhRP's legal personhood and rights arguments and therefore its failure to grasp that the *sole purpose* of the Supplemental Affidavits was not to buttress its argument that chimpanzees are autonomous beings, but to rebut *Lavery's* unsupported claim that chimpanzees lack the capacity to possess duties and responsibilities.

(1) "The 'new' expert testimony presented by petition continues to support its basic position that chimpanzees exhibit many of the same social, cognitive and linguistic capabilities as humans and therefore should be afforded some of the same fundamental rights as humans." (*Decision* at 76);

(2) "The gravamen of petitioner's argument that chimpanzees are entitled to habeas relief is that the human-like characteristics of chimpanzees render them 'persons'…" (*Id*. at 76-77);

(3) "While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees …" (*Id*. at 77); and

(4) "chimpanzees are intelligent, and have the ability to be trained by humans to be obedient to rules, and to fulfill certain duties and responsibilities." (*Id*. at 76).

This Court's claims that the NhRP's argument for legal personhood was that the chimpanzees possess "many of the same social, cognitive and linguistic capabilities as humans" or possess "human-like characteristics" or possess "intelligence and social capabilities" or "are intelligent, and have the ability to be trained by humans to be obedient to rules, and to fulfill certain duties and responsibilities" were merely straw man arguments, ironically ones the NhRP itself rejects as overly broad. This Court then, unsurprisingly, demolished its own straw men.

The NhRP's *actual* legal arguments were constructed only after it first determined that common law liberty[11] and equality[12] were fundamental legal values and principles that New York courts clearly believed in, as reflected in their judicial decisions. The NhRP then squarely rested both its liberty and equality arguments upon the "autonomy" — the ability freely to choose how to live one's life — not on a chimpanzee's similarities to a human being and ability to be trained that it demonstrated chimpanzees possess, through its original 100 pages of Expert Affidavits. These original Expert Affidavits did *not* address the chimpanzees' ability to bear duties and responsibilities, which is a matter distinct

[11] *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference from others, unless by clear and unquestionable authority of law.… The right to one's person may be said to be a right of complete immunity: to be let alone"); *Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986) ("the greatest possible protection is accorded [one's] autonomy and freedom from unwanted interference with the furtherance of his own desires").

[12] *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001); *Romer v. Evans*, 517 U.S. 620, 633 (1996) (equal protection prohibits both discrimination based upon either irrational means or illegitimate ends, with illegitimate end being the unlawful detention of an autonomous being, and the identification of persons "by a single trait then deny[ing] them protection across the board").

from whether they are autonomous. Perhaps the starkest illustration of the failure of this Court to grasp the NhRP's actual arguments is that this Court never once mentioned "equality" or "autonomy," and did not use the word "liberty" at all in its analysis of the NhRP's argument. This is despite the fact that these three critical words "liberty," "equality," and "autonomy," beat at the heart of the NhRP's legal arguments, with the NhRP invoking "liberty" thirty-three times, "equality" twenty-two times, and "autonomy" sixteen times in its trial memorandum.

Finally, contrary to the Court's unsupported and palpably incorrect assertion that "[n]or, did it [the Third Department], as argued by petitioner, take judicial notice that chimpanzees cannot bear duties and responsibilities," *Decision* at 76, the Third Department in *Lavery unquestionably* took judicial notice of the fact that chimpanzees cannot bear duties and responsibilities. *No evidence was offered by any party* to the Third Department or the lower court in *Lavery* on the factual issue of whether chimpanzees can bear legal duties or submit to societal responsibilities. Instead, the Third Department simply noted that: "[U]nlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights — such as the fundamental right to liberty protected by the writ of habeas corpus — that have been afforded to human

beings." 124 A.D.3d at 152.[13] That this assertion is scientifically false was clearly demonstrated by the NhRP's Supplemental Affidavits.

2. The legality of Tommy's and Kiko's detention has never been determined by a court of New York State in any proceeding and the ends of justice will only be served by issuing the orders to show cause.

Under CPLR 7003, a petition for a writ of habeas corpus may *only* be dismissed as successive under very narrow and specific circumstances, one of which being that the legality of the detention has to have been previously determined by a court of the State in a prior habeas corpus proceeding. Neither the Supreme Court, Fulton County in which the original petition on behalf Tommy was filed, nor the Supreme Court, Niagara County in which the original petition on behalf of Kiko was filed, actually *issued* the requested order to show cause on their behalf. Therefore, the legality of their detentions was never determined. *See Stanley*, 16 N.Y.S. at 909 ("there must be a final judgment on the merits in a prior proceeding …. Respondents cite no authority for the proposition that a declined order to show cause constitutes a determination on the merits, that is has any precedential value, or that a justice in one county is precluded from signing an order to show cause for relief previously sought from and denied by virtue of a justice in another county refusing to sign the order to show cause.").

[13] A New York court may only take judicial notice of indisputable facts. *TOA Construction Co. v. Tsitsires*, 54 A.D.3d 109, 115 (1st Dept. 2008). When it takes judicial notice, a court must first notify the parties of its intention to do so, which the Third Department did not do. *Brown v. Muniz*, 61 A.D.3d 526, 528 (1st Dept. 2009). Not only is a chimpanzee's ability to bear duties and responsibilities not indisputable and therefore improper for judicial notice, but the conclusion that a chimpanzee has no such ability is demonstrably false.

As *Stanley* further recognized, "claim preclusion and issue preclusion contemplate 'that the parties had a full and fair' opportunity to litigate the initial determination." 16 N.Y.S.3d at 910 (citation omitted). Obviously, that was not the case for Tommy and Kiko. On appeal in Tommy's case, the Third Department affirmed the lower court ruling, *without reaching the legality of Tommy's detention*, on the ground that chimpanzees are unable to bear duties and responsibilities and therefore are not legal persons. *Lavery*, 124 A.D.3d at n.3. On appeal in Kiko's case, the Fourth Department affirmed, *without deciding the legality of Kiko's detention*, on the ground that Kiko's immediate release and subsequent placement in a sanctuary was inappropriate habeas corpus relief. *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *lv denied*, 26 N.Y.3d 901 (2015). Thus, as the legality of Tommy's and Kiko's detention was never adjudicated by *any* New York court, this Court erroneously affirmed the lower court's refusal to issue the requested orders to show cause.

Additionally, CPLR 7003 requires that the ends of justice will not be served by granting the second petition. In the present case, the ends of justice will *only be served* if the NhRP is given a full and fair opportunity to litigate the legality of Tommy and Kiko's detentions. *See Allen v. New York State Div. of Parole*, 252 A.D.2d 691 (3d Dept. 1998). Otherwise these autonomous beings will be condemned to a lifetime of imprisonment.

B. This Court's interpretation of "person" for purposes of a common law writ of habeas corpus and therefore CPLR Article 70 was erroneous.

This Court's statement that "[t]he common law writ of habeas corpus, *as codified by CPLR article 70*, provides a summary procedure by which a person who has been illegally imprisoned or otherwise restrained in his or her liberty can challenge the legality of the detention," *Decision* at 76, quoting *Lavery*, 124 A.D.3d at 150, quoting CPLR 7002(a) (emphasis added), demonstrates its misunderstanding of the nature of the *common law* writ of habeas corpus. Article 70 *does not* codify the common law; it merely provides the procedural vehicle by which a common law writ of habeas corpus is brought.[14] Nor does Article 70 control the substantive entitlement to the writ, which is entirely a common law matter.[15] Rather, by definition, it solely governs procedure, that is, *how* a lawsuit proceeds, *not who* is a common law "person" for the purpose of habeas corpus (CPLR 102, CPLR 101).[16]

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[14] CPLR 7001 provides in part: "the provisions of this article are applicable to common law or statutory writs of habeas corpus."

[15] *See Tweed*, 60 N.Y. at 565 ("[It] is not the creature of any statute . . . and exists as a part of the common law of the State."); *People ex rel. Lobenthal v. Koehler*, 129 A.D.2d 28, 30 (1st Dept. 1987) ("The 'great writ', although regulated procedurally by article 70 of the CPLR, is not a creature of statute, but a part of the common law of this State"); *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 40 (Sup. Ct. 1907) ("A writ of habeas corpus is a common law writ and not a statutory one. If every provision of statute respecting it were repealed, it would still exist and could be enforced."), *aff'd*, 195 N.Y. 610 (1909); Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013) ("The drafters of the CPLR made no attempt to specify the circumstances in which habeas corpus is a proper remedy. This was viewed as a matter of substantive law.") .

[16] To the extent Article 70 limits who is a "person" able to bring a common law writ of habeas corpus, beyond the limitations of the common law itself, it violates the Suspension Clause of the New York Constitution, Art. 1 § 4, which provides that "[t]he privilege of a writ or order of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, or the public safety requires it." The Suspension Clause renders the legislature powerless to deprive an individual of

Thus, this Court's assertions: (1) "[w]hile the word 'person' is not defined in the statute, there is no support for the conclusion that the definition includes nonhumans, i.e. chimpanzees" (*Decision* at 77); (2) that there is no evidence "the Legislature intended the term 'person' in CPLR article 70 to expand the availability of habeas protection beyond humans" (*Id*. at 77); and (3) "petitioner does not cite any sources indicating that United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty" (*Id*.), are incorrect and inapposite as *legislative intent*, whether it be state, federal, constitutional, or statutory, is irrelevant to the *common law* determination of who may be a "person" for purposes of a common law writ of habeas corpus and therefore Article 70.[17] Simply stated, as the term "person" is undefined in Article 70, the Court must look to the common law, and only to the common law, for its meaning.

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the privilege of the common law writ of habeas corpus. *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939). *See e.g.*, *Matter of Morhous v. Supreme Ct. of State of N.Y.*, 293 N.Y. 131, 135 (1944) (Suspension Clause means that legislature has "no power" to "abridge the privilege of habeas corpus"); *People ex rel. Sabatino v. Jennings*, 246 N.Y. 258, 260 (1927) (by the Suspension Clause, "the writ of habeas corpus is preserved in all its ancient plenitude"); *People ex rel. Whitman v. Woodward*, 150 A.D. 770, 778 (2d Dept. 1912) (Suspension Clause gives habeas corpus "immunity from curtailment by legislative action").

[17] *See Tweed*, 60 N.Y. at 566 (The writ "cannot be abrogated, or its efficiency curtailed, by legislative action. . . . The remedy against illegal imprisonment afforded by this writ . . . is placed beyond the pale of legislative discretion."); *People ex rel. Bungart v. Wells*, 57 A.D. 140, 141 (2d Dept. 1901) (habeas corpus "cannot be emasculated or curtailed by legislation"); *Whitman*, 150 A.D. at 772 ("no sensible impairment of [habeas corpus] may be tolerated under the guise of either regulating its use or preventing its abuse"); *id.* at 781 (Burr, J., concurring) ("anything . . . essential to the full benefit or protection of the right which the writ is designed to safeguard is 'beyond legislative limitation or impairment'") (citations omitted); *Frost*, 133 A.D. at 187 (writ lies "beyond legislative limitation or impairment").

This Court further opined: "No precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a 'person' and entitled to habeas relief." *Decision* at 77-78. Again, such precedent is entirely irrelevant to a common law adjudication. As noted by the court in *Stanley*, "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" 16 N.Y.S.3d at 912. Moreover, "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Id.* (citing *Obergefell v. Hodges*, 135 S. Ct. 2602 (2015)).

Further, the reason there was no precedent for treating nonhuman animals as "persons" for the purpose of securing habeas corpus relief was *not* because the claim *had been rejected* by the courts. It was because no nonhuman entity capable *of being imprisoned* (unlike a corporation), certainly not a nonhuman animal, and most certainly not an autonomous being such as a chimpanzee, had ever *demanded* a writ of habeas corpus. This is the *first* such demand ever made by a nonhuman animal in a common law jurisdiction. But the novelty of this claim is no reason to deny Tommy or Kiko habeas corpus relief. *See, e.g.*, *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (that no Native American had previously sought relief pursuant to the Federal Habeas Corpus Act did not foreclose a Native American from being characterized as a "person" and being awarded the requested habeas corpus relief); *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (that no slave had ever been granted a writ of habeas corpus

was no obstacle to the court granting one to the slave petitioner); *see also Lemmon v. People*, 20 N.Y. 562 (1860). Finally, "person" is not a biological concept nor does it necessarily correspond to the natural order. *Byrn*, 31 N.Y.2d at 201. No entities' personhood depends upon whether they are presently "persons" or not. Once the demand for personhood is made, the court must engage in a mature weighing of public policy and moral principle. *Id.*

Contrary to this Court's assertion that "habeas relief has never been found applicable to any animal," *Decision* at 78, habeas relief has been ordered for at least two nonhuman animals, an orangutan named Sandra in Buenos Aires, Argentina, *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA, Sobre Amparo* (Association of Officials and Attorneys for the Rights of Animals and Others v. GCBA, on Amparo), EXPTE. A2174-2015 (October 21, 2015), and a chimpanzee named Cecilia in Mendoza, Argentina, *In re Cecilia*, File No. P-72.254/15 at 22-23. It also appears that the writ was issued to a captive bear in Colombia, though that ruling was subsequently overruled by a higher court and is pending appeal, *Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 (July 26, 2017). Moreover, none of the cases this Court cited in support of its statement (*United States v Mett*, 65 F.3d 1531 (9th Cir 1995), *cert denied* 519 U.S. 870 (1996); *Waste Mgt. of Wisconsin, Inc. v. Fokakis*, 614 F.2d 138 (7th Cir 1980), *cert denied* 449 U.S. 1060 (1980); and *Sisquoc Ranch Co. v. Roth*, 153 F.2d 437, 441 (9th Cir 1946)) have *anything whatsoever* to do with nonhuman animals. In *Mett*, the federal court merely permitted a corporation to

invoke the writ of *coram nobis*. In *Waste Management*, the federal court simply refused to grant habeas corpus to a corporation "because a corporation's entity status precludes it from being incarcerated or ever being held in custody," *id*. at 140. In *Sisquoc Ranch*, the federal court only held that the fact that a corporation has a contractual relationship with a human being did not give it standing to seek habeas corpus on its own behalf.

Finally, this Court's statement that "the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process (*see Lewis v. Burger King*, 344 Fed. Appx. 470, 472 [10th Cir 2009], *cert. denied*, 558 U.S. 1125 [2010])" further demonstrates its misunderstanding of how "person" should be interpreted under the *common law*. *Decision* at 80.

First, the *Lewis* case does not support this assertion. The NhRP filed its petitions in state court, not federal court, and sought a common law, not a statutory nor a constitutional remedy. The *Lewis* case has nothing whatsoever to do with the common law, but merely rejects the *pro se* plaintiff's claim that her service dog has standing under Article III of the United States Constitution to sue under the Americans with Disabilities Act of 1990, a ruling with which the NhRP agrees. However, the question of who is a *common law* "person" for the purpose of the *common law* writ of habeas corpus is *by definition uniquely* a question for the courts. The Legislature, *by definition*, does not make the *common law*.

The New York Court of Appeals has long rejected the claim that "change … should come from the Legislature, not the courts." *Woods v. Lancet*, 303 N.Y. 349,

355 (1951) ("We abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule."). New York courts have "not only the right, but the duty to re-examine a question where justice demands it" to "bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.'" *Id.* (citation omitted).

As Kiko's and Tommy's thinghood derives from the common law, their entitlement to personhood must be determined thereunder. When justice requires, it is the role of the courts to refashion the common law — most especially the common law of habeas corpus — with the directness Lord Mansfield displayed in *Somerset v. Stewart*, when he held human slavery "so *odious* that nothing can be suffered to support it but positive law." 98 Eng. Rep. at 510 (emphasis added). Thus, slaves employed the common law writ of habeas corpus to challenge their status as things in New York State. *Lemmon*, 20 N.Y. at 604-06, 618, 623, 630-31 (citing *Somerset*); *In re Belt*, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846) (citing *Somerset* and *Forbes v. Cochran*, 107 Eng. Rep. 450, 467 (K.B. 1824)); *In re Tom*, 5 Johns. 365 (N.Y. 1810).

In summary, the Court of Appeals should have the opportunity to determine whether this Court erroneously relied on legislative intent and the lack of exact precedent in ruling that Tommy and Kiko are not "persons" for the purpose of a common law writ of habeas corpus rather than applying the common law itself in reaching its conclusion.

C. This Court's analysis of personhood was erroneous and in conflict with precedent.

This Court's disregard of the teachings in *Byrn* by repeatedly conflating the term "person" with "human," while asserting that "petitioner's argument that the word 'person' is simply a legal term of art is without merit," *Decision* at 78, are ripe for Court of Appeals review. As the Court of Appeals noted in *Byrn*, "[upon according legal personality to a thing the law affords it the rights and privileges of a legal person[.]"31 N.Y.2d at 201 (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909) ("Gray"). *See also* Hans Kelsen, *General Theory of Law and State* 93-109 (1945); George Whitecross Paton, *A Textbook of Jurisprudence* 349-356 (4th ed., G.W. Paton & David P. Derham eds. 1972) ("Paton"); Wolfgang Friedman, *Legal Theory* 521-523 (5th ed. 1967)). Legal persons possess inherent value; "legal things," possessing merely instrumental value, exist for the sake of legal persons. 2 William Blackstone, *Commentaries on the Laws of England* *16 (1765-1769).

"*Whether the law should accord legal personality is a policy question*[.]" *Byrn*, 31 N.Y.2d at 201 (emphasis added). "Legal person" is not a biological concept; it does not "necessarily correspond" to the "natural order." *Id*. It is not a synonym for "human being." *See* Paton, *supra*, at 349-350, *Salmond on Jurisprudence* 305 (12th ed. 1928) ("A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination,"); IV Roscoe

Pound, *Jurisprudence* 192-193 (1959). "Legal personality may be granted to entities other than individual human beings, e.g., a group of human beings, a fund, an idol." George Whitecross Paton, *A Textbook of Jurisprudence* 393 (3rd ed. 1964). "There is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." Gray, *supra* Chapter II, 39 (1909), and at 43, that "animals may conceivably be legal persons," citing, among other authorities, those cited in *Byrn*, *supra*.

Moreover "person" is nothing *but* a legal "term of art." *Wartelle v. Womens' & Children's Hosp.*, 704 So. 2d 778, 781 (La. 1997). Persons count in law; things don't. *See* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1746 (2001). "[T]he significant fortune of legal personality is the capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). "Person" has never been equated with being human and many humans have not been persons. "Person" may be narrower than "human being." A human fetus, which the *Byrn* court acknowledged, 31 N.Y.2d at 199, "is human," was still not characterized by the *Byrn* court as a Fourteenth Amendment "person." *See also Roe v. Wade*, 410 U.S. 113 (1973). Human slaves were not "persons" in New York State until the last slave was freed in 1827. Human slaves were not "persons" throughout the entire United States prior to the ratification of the Thirteenth Amendment to the United States Constitution in 1865. *See, e.g.*, *Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828) ("Slaves, although they

are human beings . . . (are not treated as a person, but (*negotium*), a thing").[18] Women were not "persons" for many purposes until well into the twentieth century. *See* Robert J. Sharpe and Patricia I. McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (2007).

Significantly, the words "duty," "duties," or "responsibility" do not appear anywhere in the *Byrn* majority opinion. Other than *Lavery* and perhaps the case at bar, no court has ever ruled that an entity must be able to bear duties and responsibilities to be deemed a legal person. Nor should they. The NhRP has consistently argued that an entity is a "person" if she can *either* bear rights *or* responsibilities. It must be further noted that the Fourth Department in *Presti*, which was decided after *Lavery*, could have relied on *Lavery* in denying habeas corpus relief to a chimpanzee but chose not to thereby creating conflict among the judicial departments on this personhood issue.

The foundation for the Third Department's personhood decision in *Lavery*, at 151-152, was built on legal quicksand; it principally relied upon the definition of "person" found in *Black's Law Dictionary* and several cases that relied upon *Black's Law Dictionary* which defined a "person" as one with the capacity for both duties *and* responsibilities. However, in arriving at this definition, *Black's Law Dictionary* relied solely upon the 10th edition of *Salmond on Jurisprudence*. But when the NhRP located the 10th edition of *Salmond on Jurisprudence*, it found its definition of "person" actually supported the *NhRP's* definition of "person" as an

[18] *See, e.g.*, *Trongett v. Byers*, 5 Cow. 480 (N.Y. Sup. Ct. 1826) (recognizing slaves as property); *Smith v. Hoff*, 1 Cow. 127, 130 (N.Y. 1823) (same); *In re Mickel*, 14 Johns. 324 (N.Y. Sup. Ct. 1817) (same); *Sable v. Hitchcock*, 2 Johns. Cas. 79 (N.Y. Sup. Ct. 1800) (same).

entity that can bear rights *or* responsibilities. When the NhRP pointed out this error, *Black's Law Dictionary* promptly promised to correct it in its next edition.[19] The NhRP then asked this Court, by motion, to consider the NhRP's exchange with *Black's Law Dictionary* and recognize that a major support for the Third Department's decision had collapsed. Inexplicably this Court *denied* the NhRP's motion. Then it perpetuated the Third Department's error in its decision.

In accordance with *Byrn,* a determination of an entity's personhood necessarily entails a mature weighing of public policy and moral principle in which that entity's capacity to bear duties and responsibilities plays no part. This is precisely the approach this Court should have taken. This Court should have rejected the correlative duties and responsibilities holding of the Third Department and determined that Tommy and Kiko are "persons" for purposes of securing their freedom.

As the NhRP has consistently maintained, millions of human beings lack the capacity to bear duties and responsibilities yet are legal persons. In response, this Court merely stated that "[t]his argument ignores the fact that these are still human beings, members of the human community." *Decision* at 78. Such assertion is bias. We have seen such biases before and they have always been tragic and ultimately regretted.

[19] James Trimarco, "Chimps Could Soon Win Legal Personhood," YES! Magazine, April 28, 2017, *available at*: http://www.yesmagazine.org/peace-justice/chimps-could-soon-win-legal-personhood-20170428 (last accessed November 15, 2017).

Before the United States Supreme Court in 1857, Dred Scott's lawyers "ignore[d] the fact" that he was not white. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).[20] The lawyers for the Native American, Chief Standing Bear, "ignore[d] the fact" that Standing Bear was not white when, in 1879, the United States Attorney argued that a Native American could never be a "person" for the purpose of habeas corpus after Standing Bear was jailed for returning to his ancestral lands. *Crook*, 25 F. Cas. at 700-01. A California District Attorney "ignore[d] the fact" that a Chinese person was not white when insisting, in 1854, without success before the California Supreme Court, that a Chinese person could testify against a white man in court. *People v. Hall*, 4 Cal. 399 (1854).[21] The lawyer for Ms. Lavinia Goodell "ignore[d] the fact" that she was not a man before the Wisconsin Supreme Court that, in 1876, denied her the right to practice law solely because she was a woman. *In re Goodell*, 39 Wis. 232 (1875). Let us not return to those dark places. Chimpanzees are autonomous. Habeas corpus protects autonomy. An autonomous being's species should be irrelevant to whether she should have the fundamental right to the bodily liberty — the autonomy — that habeas corpus protects.

Sister common law countries demonstrate the principle of law that prevails throughout the common law world that "person" and "human" are not synonyms and it is error to ignore them as being "not relevant to the definition of 'person' in the United States and certainly … of no guidance to the entitlement of habeas relief

[20] Has there been a more regretted judicial decision than *Dred Scott*?

[21] The California Supreme Court unanimously regretted the whole ugly history of anti-Chinese bigotry in California in *In re Hong Yen Chang*, 60 Cal. 4th 1169 (2015).

by nonhumans in New York." *Decision* at 33. These include New Zealand, which bestowed personhood upon a river in 2017[22] and a national park in 2014,[23] and India, which bestowed personhood upon a river and a glacier in 2017, *Mohd. Salim v. State of Uttarakhand & Others*, (PIL) 126/2014 (High Court Uttarakhand, 03/20/2017) and a mosque, *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369, ¶15 (Lahore High Court, Full Bench), an idol, *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925), and the holy books of the Sikh religion, *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, A.I.R. 2000 S.C. 421. In 2016, an Argentine civil law court recognized a chimpanzee named Cecilia as a "non-human person," ordered her released from a Mendoza Zoo, and sent to a sanctuary in Brazil. *In re Cecelia*, File No. P-72.254/15 at 22-23.

Some of these cases cite to the *same secondary sources* as did the Court of Appeals in *Byrn.* These cases, as well as *Byrn* and the numerous sources it cited, make clear that "person" and "human" are not synonymous and never have been. Even the New York Legislature recognized, more than twenty years ago, that "human" and "person" are not synonyms when it designated certain nonhuman animals, including chimpanzees, *In re Fouts*, 677 N.Y.S.2d 699 (Sur. 1998) (five chimpanzees), as "persons" by enacting a Pet Trust Statute, EPTL 7-8.1, which

[22] New Zealand Parliament, "Innovative bill protects Whanganui River with legal personhood," March 28, 2017, *available at*: https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/ (last accessed November 15, 2017).

[23] Te Urewara Act 2014, Subpart 3, sec, 11(1), *available at*: http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183705.html (last accessed November 15, 2017).

allows nonhuman animals to be trust beneficiaries and therefore "persons" as only "persons" may be trust beneficiaries in New York. *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); *Gilman v. McCardle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883), *rev. on other grds.*, 99 N.Y. 451 (1885).

The Court of Appeals must have the opportunity to determine whether this Court's decision contravened *Byrn* by failing to recognize that the decision of whether Tommy and Kiko are "persons" for the purpose of a common law writ of habeas corpus is entirely a policy — and not a biological — question and by also failing to address the powerful and uncontroverted policy arguments, based upon fundamental common law values of liberty and equality, that the NhRP presented in detail. This *Decision* perpetuates the erroneous statement in *Lavery* that an inability to bear duties and responsibilities may constitute the sole ground for denying such a fundamental common law right as bodily liberty to an individual — except in the interest of the individual's own protection — much less an autonomous entity who is merely seeking the relief of a common law writ of habeas corpus.

Any requirement that an autonomous individual must also be able to bear duties or responsibilities to be recognized as a "person" for the purpose of a common law writ of habeas corpus undermines both the fundamental common law values of liberty and of equality. It undermines fundamental liberty because it denies personhood and all legal rights to an individual who incontrovertibly possesses the autonomy that is supremely valued by New York common law, even more than human life itself, *Rivers*, 67 N.Y.2d at 493; *In re Storar*, 52 N.Y.2d 363

(1981), *cert. den.*, 454 U.S. 858 (1981). It undermines fundamental equality both because it endorses the illegitimate end of the permanent imprisonment of an incontrovertibly autonomous individual, *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001), *cert. den.*, 534 U.S. 826 (2001), and because "[i]t identifies persons by a single trait and then denies them protection across the board," *Romer*, 517 U.S. at 633.

D. The NhRP was not required to demand Tommy's and Kiko's presence in court.

The fact that "[p]etitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that 'there are no adequate facilities to house [them] in proximity to the [c]ourt'" is irrelevant to the determination of whether Tommy and Kiko are entitled to habeas corpus relief. *Decision* at 79. CPLR 7003(a) specifically provides for those situations "where the petitioner does not demand production of the person detained" and requires the court to "order the respondent to show cause why the person detained should not be released."

The NhRP followed that statute by bringing its action as a petition for a common law writ of habeas corpus and order to show cause. *See, e.g., State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982). *See, e.g.*, *Callan v. Callan*, 494 N.Y.S.2d 32, 33 (2d Dept. 1985) ("Plaintiff obtained a writ of habeas corpus by order to show cause when defendant failed to return her infant daughter after her visitation. . . ."); *State ex rel. Soss v. Vincent*, 369 N.Y.S.2d 766, 767 (2d Dept. 1975) ("In a habeas corpus proceeding upon an order to show cause (CPLR 7003,

subd. (a)), the appeal is from a judgment of the Supreme Court . . . which granted the petition and ordered petitioner released"); *People ex rel. Bell v. Santor*, 801 N.Y.S.2d 101 (3d Dept. 2005) ("Petitioner commenced this CPLR article 70 proceeding seeking habeas corpus relief. . . . Supreme Court dismissed the petition without issuing an order to show cause or writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell*, 421 N.Y.S.2d 443, 444 (4th Dept. 1979) ("This matter originated when petitioner . . . sought, by an order and petition, a *writ of habeas corpus* (Respondents) to show cause why Ricky Brandon, an infant . . . should not be released and placed in petitioner's custody."); *People ex rel. Smith v. Greiner*, 674 N.Y.S.2d 588 (Sup. Ct. 1998) ("This is a habeas corpus proceeding brought by the petitioner pro se and commenced via Order to Show Cause"); *People ex rel. Goldstein on Behalf of Coimbre v. Giordano*, 571 N.Y.S.2d 371 (Sup. Ct. 1991) ("By order to show cause, in the nature of a Writ of Habeas Corpus proceeding, the petitioner seeks his release from the custody of the New York State Division for Youth. . . . [T]he Court grants the petition and directs that this petitioner be forthwith released"); *In re Henry*, 1865 WL 3392 (N.Y. Sup. Ct. 1865) ("the party arrested can apply for a habeas corpus, calling on the officer to show cause why he is detained, and with the return to the writ the rule is that where the arrest is upon suspicion, and without a warrant, proof must be given to show the suspicion to be well founded") (emphasis added in each).

As there is no legal requirement that a detained party be brought before the court, any failure to do so is irrelevant to the determination of whether habeas corpus relief should be granted. Bringing Tommy and Kiko to court would have

been dangerous to both the chimpanzees and the public and was unnecessary to the adjudication of personhood and the legality of their detention. The NhRP followed the statute by bringing the petition as an order to show cause and must not be penalized for doing so.

E. The NhRP challenged the legality of Tommy's and Kiko's detention and sought appropriate habeas corpus relief in asking for their transfer to a sanctuary.

This Court's statement that "[s]ince Petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court" (*Decision* at 79) was flagrantly wrong as the illegality of Tommy's and Kiko's detention was the pervading theme of both their petitions.

First, the Court properly recognized that the NhRP "requests that respondents be ordered to show 'why [the chimpanzees] should not be discharged, and thereafter, [the court] make a determination that [their] detention is *unlawful* and order [their] *immediate release* to an appropriate primate sanctuary.'" *Decision* at 79 (emphasis added). Oddly, in the next paragraph, the Court stated that the NhRP "does not challenge the legality of the chimpanzees' detention," and that "[s]eeking transfer of Kiko and Tommy to a facility petitioner asserts is more suited to chimpanzees as opposed to challenging the illegal detention of Kiko and Tommy does not state a cognizable habeas claim." *Id*.

The NhRP's *entire case* was a challenge to the legality of Tommy's and Kiko's detentions and an attempt to secure their immediate release. The NhRP *never argues that the illegality of their detention is based upon the conditions of*

their confinement. Even *Lavery* recognized this: "[n]otably, we have not been asked to evaluate the quality of Tommy's current living conditions in an effort to improve his welfare." 124 A.D.3d at 149 (citation omitted). So did *Stanley*: "[t]he conditions under which Hercules and Leo are confined are not challenged by petitioner. . . . [T]he sole issue is whether Hercules and Leo may be legally detained at all." 16 N.Y.S.3d at 901.

The NhRP argued that Tommy and Kiko are "illegally imprisoned," that their "detention is unlawful," and that they are "unlawfully detained." *See Tommy* Appellate Brief at 61-63, Verified Petition for Habeas Corpus at 1-5 (Appendix at 15-22); *Kiko* Appellate Brief at 60-61, Verified Petition for Habeas Corpus at 1-5 (Appendix at 15-22). The term "unlawful" appears six times in the appellate brief, *Tommy* Appellate Brief at 61-63, *Kiko* Appellate Brief at 60-62, and the NhRP concludes by asking the court to "issue the order to show cause for a hearing to determine the legality of [the chimpanzees'] detention." *Tommy* Appellate Brief at 67-68; *Kiko* Appellate Brief at 66-67. In addition, the memoranda of law that accompanied the petitions to the lower court with respect to both Tommy and Kiko contained the following sections in its Arguments, none of which deal with the issue of the conditions of the chimpanzees' confinement: "A PERSON ILLEGALLY IMPRISONED IN NEW YORK IS ENTITLED TO A COMMON LAW WRIT OF HABEAS CORPUS" and "As Common law natural persons are presumed free, Respondents must prove they are not unlawfully imprisoning [Tommy and Kiko]." *Tommy* Trial Memorandum at 65, 86 (Appendix at 752, 773); *Kiko* Trial Memorandum at 68, 88 (Appendix at 730, 750).

Second, only after issuing an order to release would the court have to determine where the chimpanzees should live, as they are neither competent nor indigenous to North America. But this determination had nothing whatsoever to do with the conditions of Tommy's and Kiko's current confinement. Instead the court was required to determine where the chimpanzees should be sent after their release so that they might exercise their common law right to bodily liberty to the greatest extent possible while remaining in the care and custody of another.

The Court of Appeals as well as the First Department and other judicial departments have for two centuries used the writ of habeas corpus to order the release of such incompetent humans as child slaves, child apprentices, child residents of training schools, child residents of mental institutions, and mentally incapacitated adults, from the custody of one entity that was illegally detaining them and into the custody of another. *See, e.g., Lemmon*, 20 N.Y. at 632 (five slave children discharged); *People ex rel. Margolis v. Dunston*, 174 A.D.2d 516, 517 (1st Dept. 1991) (juvenile); *State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982) (elderly sick woman); *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996) (elderly and ill woman). The court in *Stanley* specifically recognized that there is authority in the First Department that allows for such a placement. 16 N.Y.S.3d at 917 n.2. This Decision therefore contravenes the decision of New York's highest court and conflicts with decisions of its own judicial department as well as others.

Parenthetically, the writ of habeas corpus is available in New York to challenge conditions of confinement. *See, e.g., People ex rel. Brown v. Johnston*, 9

N.Y.2d 482, 485 (1961) (habeas corpus was proper remedy to test the validity of a prisoner's transfer from a state prison to a state hospital for the insane); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943) ("that the appellant is still under a legal commitment to Elmira Reformatory does not prevent him from invoking the remedy of habeas corpus as a means of avoiding the further enforcement of the order challenged.") (citation omitted); *Matter of MHLS ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989) (mental patient transferred from secure to non-secure facility); *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 251 (2d Dept. 1993) (habeas corpus "available to challenge conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. LaBelle v. Harriman*, 35 A.D.2d 13, 15 (3d Dept. 1970) (same); *People ex rel. Berry v. McGrath*, 61 Misc. 2d 113, 116 (N.Y. Sup. Ct. 1969) (an "individual . . . is entitled to apply for habeas corpus" upon a "showing of a course of cruel and unusual treatment").

In ruling that the NhRP could not use the writ of habeas corpus to challenge the conditions of the chimpanzees' confinement, this Court relied solely upon two inapt cases, *Presti* and *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986), while asserting *Dawson* is "analogous to the situation here." *Dawson* actually undermines this Court's ruling.

In *Dawson*, the Court of Appeals *affirmed* that habeas corpus *can* be used to seek a transfer to an "institution *separate and different in nature* from the correctional facility to which petitioner had been committed[.]" *Id*. at 691 (emphasis added) (citing *Johnston*). In distinguishing *Johnston*, the *Dawson* Court

explained, "[h]ere, by contrast, petitioner *does not seek his release from custody in the facility*, but only from confinement in the special housing unit, a particular type of confinement within the facility which the Department … is expressly authorized to impose on lawfully sentenced prisoners[.]" *Id*. (citations omitted, emphasis added). As in *Johnston*, and unlike *Dawson*, the NhRP seeks release of Tommy and Kiko from their imprisonments to an appropriate chimpanzee sanctuary, an environment obviously completely "separate and different in nature." Unlike the habeas corpus petitioner in *Dawson*, Kiko and Tommy are not inmates properly convicted of a crime. They can be legally ordered released from their illegal detention. The Fourth Department in *Presti* was wrong then for the same reasons this Court is wrong now. Notably, the court in *Stanley* specifically recognized that there was authority in the First Department which allowed for the relief requested by the NhRP on behalf of Hercules and Leo and consequently was not bound by the Fourth Department in *Presti*. *Stanley*, 16 N.Y.S.3d at n.2. Thus, the law in New York is clear that habeas corpus relief is available to unlawfully imprisoned beings who upon release must be placed into the care and custody of another or who are challenging the conditions of their confinement. As this *Decision* is in stark conflict with established precedent, it is incumbent upon the Court of Appeals to settle the controversy.

VI. CONCLUSION

This Court's *Decision* raises novel and complex legal issues that are of great public importance and interest not just in New York, but throughout the United

States and the world. These issues include (1) whether this court can deny an imprisoned autonomous being the right to a common law writ of habeas corpus solely because she is not human, (2) whether, under the circumstances of this case, this court may refuse to issue a common law writ of habeas corpus or order to show cause from a successive petition under CPLR 7003(b), and (3) whether habeas corpus is available to an unlawfully imprisoned "person" who must necessarily be released into the custody of another. This Court should therefore grant the Motion for Leave to Appeal to the Court of Appeals.

Dated: November 16, 2017

Respectfully submitted,

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Attorneys for Petitioner-Appellant

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Petitioner-Appellant,

-against-

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

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Index Nos. 162358/15 (New York County); 150149/16 (New York County)

ATTORNEY AFFIRMATION

I, Elizabeth Stein, an attorney duly admitted to practice law in the State of New York, affirm the following under the penalty of perjury:

1. I am an attorney of record for Petitioner-Appellant, The Nonhuman Rights Project, Inc. ("NhRP"), in the above-captioned matter and was not a party in either action in the lower court and am not a party in this action.

2. I am fully familiar with the pleadings and proceedings in this matter, have read and know the contents thereof and submit this affirmation in support of the within Motion for Leave to Appeal to Court of Appeals and all exhibits and other documents annexed thereto.

3. Pursuant to 22 NYCRR § 600.14(b), a copy of the Order of this Court being appealed from is attached hereto.

4. Pursuant to 22 N.Y.C.R.R. §1301.1, I affirm that this action is not frivolous.

Dated: November 16, 2017

_____

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Attorney for Petitioner-Appellant

Date	Headline	Source	Reach
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09-Jun-2017 07:0	Appeals court says chimpanzees don’t have rights of people	Breitbart	6652032
11-Jun-2017 08:3	Content from this publisher is not available in your country	The Sydney Morning Herald (Licensed by Copyright Agency)	5616787
10-Jun-2017 10:1	Content from this publisher is not available in your country	The Sydney Morning Herald (Licensed by Copyright Agency)	5616787
16-Mar-2017 12:	The Latest: Lawyer argues that a chimp is legally a person	The Washington Times	5573077
16-Mar-2017 08:	NY court asked to determine if chimp is legally a person	The Washington Times	5573077
11-Jun-2017 12:3	保　替黑猩猩 求人　法官:　回，非人！	ETtoday	5300445
16-Mar-2017 06:	N.Y. court to determine whether chimp is legally a person	The Boston Globe	5175900
08-Jun-2017 06:3	Appeals court says chimpanzees don’t have rights of people	The Boston Globe	5092341
08-Jun-2017 04:0	The Latest: Group to appeal denial of chimps' legal rights	The Globe and Mail	4851893
17-Mar-2017 09:	Corte determinará si chimpancés tienen personalidad jurídica	El Comercio	4771633
16-Mar-2017 05:	Corte determinará si chimpancés tienen personalidad jurídica	AP (Hosted)	4646523
16-Mar-2017 04:	New York court to determine if chimp is legally a person	AP (Hosted)	4646523
16-Mar-2017 03:	A panel of five judges questions the NhRP's Steven M. Wise: Why rights?; Ruling expected in 5-8 weeks	AP (Hosted)	4646523
16-Mar-2017 12:	The Latest: Lawyer argues that a chimp is legally a person	AP (Hosted)	4646523
16-Mar-2017 10:	NY court asked to determine if chimp is legally a person	AP (Hosted)	4646523
16-Mar-2017 01:	The Latest: Lawyer argues that a chimp is legally a person	Miami Herald	4605661
16-Mar-2017 11:	Corporations can be people. A river was just made a person. What about chimpanzees?	Miami Herald	4605661
16-Mar-2017 08:	NY court asked to determine if chimp is legally a person	Miami Herald	4605661
16-Mar-2017 11:	NY court asked to determine if chimp is legally a person	India.com	4288980
08-Jun-2017 01:4	Chimpanzees do not have same legal rights as humans, US appeals court rules	The Guardian	3914642
10-Jun-2017 01:4	Šimpanzi nemají nárok na lidská práva, rozhodl soud v New Yorku	Novinky.cz	3772070
08-Jun-2017 04:1	Appeals court says chimpanzees don't have rights of people	AP (Hosted)	3754298
08-Jun-2017 03:5	The Latest: Group to appeal denial of chimps' legal rights	AP (Hosted)	3754298
08-Jun-2017 02:0	Steven Wise	AP (Hosted)	3754298
08-Jun-2017 05:3	Chimps don’t have same rights as people, appeals court rules	Thestar.com	3638772
13-Mar-2017 07:	New York court to consider whether a chimpanzee is a 'person'	Washington Examiner	3637135

AFFIRMATION OF SERVICE OF PAPERS (CPLR 2103)

STATE OF NEW YORK, COUNTY OF NEW YORK ss.: (If more than one box is checked indicate after names type of service used.)

I, the undersigned, an attorney admitted to practice in New York State, with offices at the address set forth on the reverse side, affirm under penalties of perjury:

On November 16, 2017, I personally served the within **Notice of Motion for Leave to Appeal to the Court of Appeals**

X Service by Mail	by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:
Individual Personal Service	by delivering a copy to each of the following *attorney(s)* at the last known address set forth after each name below. I knew the *attorney(s)* served to be the *attorney(s) for* the *party(ies)* stated below.
Hand Delivery Service	by dispatching a copy by a messenger delivery service to each of the persons at the last known address set forth after each name below.
Service by Mail and Additional Copy by Electronic Means	by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name and by transmitting a copy to the following persons by email to the address set forth after each name below:

To:

Patrick Lavery, individually and as an officer of Circle L Trailer Sales, Inc.
3032 State Highway 30
Gloversville, New York 12078
(518) 661-5038

Diane Lavery
3032 State Highway 30

Gloversville, New York 12078
(518) 661-5038

Circle L Trailer Sales, Inc.
3032 State Highway 30
Gloversville, New York 12078
(518) 661-5038

Carmen Presti, individually and as an officer and director of The Primate Sanctuary, Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
(716) 284-6118
kikoapeman@roadrunner.com

Christie E. Presti, individually and as an officer and director of The Primate Sanctuary, Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
(716) 284-6118
kikoapeman@roadrunner.com

The Primate Sanctuary, Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
(716) 284-6118
kikoapeman@roadrunner.com

_____

Elizabeth Stein, Esq.

EXHIBIT 20

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on January 18, 2018.

PRESENT: Hon. Dianne T. Renwick, Justice Presiding,
Sallie Manzanet-Daniels
Angela M. Mazzarelli
Troy K. Webber, Justices.

In re Nonhuman Rights Project, Inc.,
on behalf of Tommy,
Petitioner-Appellant,

-against-

Patrick C. Lavery, etc., et al.,
Respondents-Respondents.

- - - - -

M-6068
Justin Marceau, Samuel R. Wiseman, Index Nos. 162358/15
Lawrence H. Tribe and Richard L. Cupp, Jr., 150149/16
Amici Curiae.

- - - - -

In re Nonhuman Rights Project, Inc.,
on behalf of Kiko,
Petitioner-Appellant,

-against-

Carmen Presti, etc., et al.,
Respondents.

- - - - -

Justin Marceau, Samuel R. Wiseman
and Laurence H. Tribe,
Amici Curiae.

Petitioner-appellant having moved for leave to appeal to the Court of Appeals from the decision and order of this Court, entered on June 8, 2017 (Appeal Nos. 3648-3649),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:

CLERK

EXHIBIT 21

COURT OF APPEALS OF THE STATE OF NEW YORK

----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Petitioner-Appellant,

-against-

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

----------x

Index Nos. 162358/15 (New York County); 150149/16 (New York County)

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that the within is a true copy of the Decision and Order of the Appellate Division, First Judicial Department, dated January 18, 2018, denying Petitioner-Appellant leave to appeal to the Court of Appeals.

Dated: February 22, 2018

Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
liddystein@aol.com
Attorney for Petitioner-Appellant

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At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on January 18, 2018.

PRESENT: Hon. Dianne T. Renwick, Justice Presiding,
Sallie Manzanet-Daniels
Angela M. Mazzarelli
Troy K. Webber, Justices.

In re Nonhuman Rights Project, Inc.,
on behalf of Tommy,
Petitioner-Appellant,

-against-

Patrick C. Lavery, etc., et al.,
Respondents-Respondents.

- - - - -

M-6068
Justin Marceau, Samuel R. Wiseman, Index Nos. 162358/15
Lawrence H. Tribe and Richard L. Cupp, Jr., 150149/16
Amici Curiae.

- - - - -

In re Nonhuman Rights Project, Inc.,
on behalf of Kiko,
Petitioner-Appellant,

-against-

Carmen Presti, etc., et al.,
Respondents.

- - - - -

Justin Marceau, Samuel R. Wiseman
and Laurence H. Tribe,
Amici Curiae.

Petitioner-appellant having moved for leave to appeal to the Court of Appeals from the decision and order of this Court, entered on June 8, 2017 (Appeal Nos. 3648-3649),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:

CLERK

AFFIRMATION OF SERVICE OF PAPERS (CPLR 2103)

STATE OF NEW YORK, COUNTY OF NEW YORK ss.: (If more than one box is checked indicate after names type of service used.)

I, the undersigned, an attorney admitted to practice in New York State, with offices at the address set forth on the reverse side, affirm under penalties of perjury:

On February 22, 2018, I personally served the within **Notice of Entry of Decision and Order Denying Leave to Appeal, Dated January 18, 2018**

X **Service by Mail**	by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:
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Elizabeth Stein

Elizabeth Stein, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

----------x

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Petitioner-Appellant,

-against-

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,

Petitioner-Appellant,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

----------x

Index Nos. 162358/15 (New York County); 150149/16 (New York County)

Notice of Entry

ELIZABETH STEIN, ESQ.
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726
liddystein@aol.com
Attorney for Petitioner-Appellant

Continued on reverse

To:

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Niagara Falls, New York 14303

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Circle L Trailer Sales, Inc.
3032 State Highway 30
Gloversville, New York 12078
(518) 661-5038

Respondents-Respondents

Dated: November 16, 2017

Attorney for Petitioner-Appellant