

The Nonhuman Rights Project
Kiko – Appellate Court Hearing – Dec. 2nd 2014
Transcript

- 00:16 STEVEN WISE: May it please the court, my name is Steven Wise. I want to thank you for the privilege of allowing me to appear before you *pro hac vice* on behalf of the Nonhuman Rights Project, which petitioned for a common law writ of habeas corpus, pursuant to CPLR Article 70, on behalf of Kiko, who is a chimpanzee who is detained in a cement storefront in Niagara Falls. In *Hoff vs. State*, the Court of Appeals stated that experience has taught us, over the years, that the writ of habeas corpus is - and I quote - the only reliable protection of freedom, unquote. The question is - whether or not that applies to chimpanzees?
- 00:54 JUSTICE: Well, can I ask you a question? If Kiko were to be let out of where Kiko is currently being held, you're not asking that Kiko go out in the street, you're saying that Kiko would still be confined, but in a sanctuary. Is that correct?
- 01:12 STEVEN WISE: That is correct. Kiko would go to Save the Chimps, which is a sanctuary with islands in it and a lake in South Florida.
- 01:20 JUSTICE: Right, but it would still be confinement. You're not saying that Kiko should go off into the street?
- 01:28 STEVEN WISE: That would be dangerous for Kiko and dangerous for us. But he would not be imprisoned. He would not be confined in the way he is confined now. It would be a sanctuary...
- 01:34 JUSTICE: Right, it would be a better condition, but he's still not free to go where, where Kiko wishes to go.
- 01:39 STEVEN WISE: He's not. He has to go in a place that's going to be safe for him and safe for the population.
- 01:43 JUSTICE: So he's confined from ... he's going from one confinement—which is bad—to another confinement, which is better.
- 01:48 STEVEN WISE: Much, much better, and it also takes into account it's a place in which his autonomy and his ability to self-determine will be allowed to flourish in a way that it's not allowed to flourish now.
- 02:04 JUSTICE: But if Kiko were a person, we wouldn't say, we're going to take him from one confinement to another. We would say - Kiko, free to go, wherever Kiko wishes to roam.
- 02:15 STEVEN WISE: Most of the habeas corpus cases have involved an adult human being in which that is the remedy. It's not the remedy, and it hasn't been so, in a series of cases throughout the United States and England as well. For, example you have insane people have used the writ of habeas corpus, children, apprentices, endangered, I'm sorry, indentured servants, slave children, when slavery was legal, who were seven or eight years old. I cite, we cite the *Commonwealth vs. Aves* case in Massachusetts, the *Commonwealth vs. Taylor* case. There's a New York case called *Cooper vs. Traynor*, involving an eight year old child, a mixed white-black child, and she was living in a brothel. There was a writ of habeas corpus that removed her from a brothel into the
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03:04 custody of her father. So, when you are a ... when you are not an adult human being, you will be moved from one place to another place, and it may be permanent. If you're ... an elderly person, who is in some kind of a state that is permanent, you will be permanently moved there, but you will go out of one

03:22 place, and you'll be moved into another place. This is especially important because the expert affidavits show clearly that Kiko indeed is a being who is autonomous and can self-determine, and his ability to be autonomous and self-determined is not being allowed to express themselves, and...

03:44 JUSTICE: Counsel, the record in that regard I found very impressive, and I think the experts that you relied upon were ... very impressive. Let me ask you a question though, kind of different. What's the proof in the record of Kiko's current condition and that it's a condition that warrants habeas corpus? In other—and I'm talking about current condition and ... Has somebody seen Kiko, that has testified, or that, as to the specifics?

04:14 STEVEN WISE: No. Other than that we allege that he is detained in a cement storefront in Niagara Falls. We know that from the Facebook pages, for example, that show pictures of Kiko with a chain around his neck. So we, and ... that's what the Respondents, who are, alas, who are not here. But they show that on their Facebook page, although that is not a part of the record. However, we know...

04:39 JUSTICE: That's why I'm asking...

04:40 STEVEN WISE: We know that.

04:40 JUSTICE: In the record itself, other than an attorney's affirmation that says that this is the condition, which does not appear to be on direct knowledge, I wonder where the evidence is that the condition does exist? That's what I'm asking.

04:53 STEVEN WISE: Well, I think that the fact that as a writ of habeas corpus ... can be brought in a couple ways. One, is the person who's being detained, him or herself can go into court. But that's not usually the case. So you have to have a third party. So, a third party, who has some kind, who has a reasonable belief, that someone else is being detained...

05:14 JUSTICE: But, it has ... but I believe, what Justice [] is saying, is there's nothing in the record that says: I, with direct knowledge, have seen Kiko in this condition and this is untenable, or whatever.

05:31 STEVEN WISE: Well, it's ... Kiko is there...

05:34 JUSTICE: That's...that's what we're asking....

05:37 STEVEN WISE: There, there, it is alleged that Kiko is there.

05:44 JUSTICE: Oh, no, no. I'm not saying that that hasn't been alleged. But I'm saying - has anybody from the Nonhuman Rights Project actually gone to see, to Niagara Falls to see this?

05:50 STEVEN WISE: I have, Your Honor. I've gone to the place. I saw ... I was, unable to see Kiko. I spoke to the Respondent before the case was ever filed, and also was handed a monkey, and saw monkeys and birds. And I left. I had no doubt that Kiko and Charlie, who died before we were able to file a suit on his behalf, were indeed back there. But I did not see them.

06:18 JUSTICE: Does it matter what conditions Kiko's being held, or...

06:21 STEVEN WISE: No.

06:22 JUSTICE: It could be a wonderful place, but if his—if you're right that he's a person, he, regardless of the conditions, he should go.

06:31 STEVEN WISE: Yes.

06:31 JUSTICE: He should be free to go.

06:32 STEVEN WISE: Absolutely, and, in the Nonhuman Rights Project, we call that the Bill Gates problem. What happens if Bill Gates takes my child and brings him to wherever he is and puts him up and maintains him in a way that's far beyond a way I would ever be able to do it. Does a judge weigh ... is the child going to be better if he's Bill Gates' child, or do I get my child back?

06:53 JUSTICE: So if you're right, then you could have a zoo, say the Toronto Zoo or the San Diego Zoo, that has the best accommodations for chimpanzees you can imagine. They have acres and acres, bananas everywhere. If you're right here, well, someone brings a habe on those animals, and say, they should be released from the zoo?

07:17 STEVEN WISE: There comes some point, that if the zoo is treating them in a way that respects their self-determination and autonomy - even then you might want to issue the writ of habeas corpus - because ... so that a judge could see what was going on. But if it turned out that their autonomy and self-determination is being respected already, then the judge would have no reason to issue a writ of habeas corpus.

07: 43 JUSTICE: How do you know the self-determination of a chimpanzee?

07:46 STEVEN WISE: You know ... that's our one hundred pages of expert affidavits tell you, that chimpanzees can self-determine and are autonomous. They list about forty-five separate advanced cognitive abilities that include, specifically, autonomy and self-determination, and the other ones are tied into that. So what the remedy that we would ask is that this Court either: a) assume, without deciding, that Kiko is a person within the meaning of the common law writ of habeas corpus, remand the case to the supreme court, with an order to issue the writ of habeas corpus, and decide the issue of personhood based upon the evidence below, or, in the alternative, to have this Court find that Kiko is a person and remand and order the court to proceed according to Article 70. Now a person - and we've kind of touched upon this - is not synonymous with human being, and we cite a series of cases; the *Byrn* case is probably the most important one for us. The Court of Appeals in 1972 cited John Chipman Gray, George Whitecross Patten, and many other secondary sources, where they made it clear that the issue of a person is not a human being, but it's a matter of policy that each jurisdiction must settle for itself. And those secondary sources said that nonhuman animals could be persons, Even deities could be persons. I cited...

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09:29 JUSTICE: Isn't it important, the context within which the legal rights or benefits are being sought, as to what legal person means?

09:36 STEVEN WISE: Yes.

09:36 JUSTICE: And what sorts of benefits they're going to get? In other words, when we're talking about habeas corpus, that's different than for example a case where the trust is set up on behalf of say a dog or a cat? They're getting

different legal benefits.

09:51 STEVEN WISE: Yes. The sole remedy here for the writ of habeas corpus, would be to release Kiko to Save the Chimps, because that's the major purpose of a writ of habeas corpus, is to vindicate...

10:11 JUSTICE: Is ... the procedural purpose would be to release—whomever—from custody, correct?

10:15 STEVEN WISE: From, yes. Yes.

10:17 JUSTICE: Okay.

10:17 JUSTICE: Is there a property right question here? Who owns Kiko?

10:22 STEVEN WISE: It's not clear that you can own Kiko. But I would say that the Respondents would claim that they did indeed own Kiko.

10:32 JUSTICE: Alright, so don't they have a property right to Kiko? How can, how can he be removed from their presence if they do own Kiko?

10:39 STEVEN WISE: Because, if Kiko is a common law ... person within the meaning of a writ of habeas corpus, then at that point that would override it. That was exactly what occurred, for example, in the momentous case of ... the *Somerset* case, where you had a slave, James Somerset, who was then held to be a person, and then ... said, you are free, even though his owner did not want him to be free.

11:08 JUSTICE: Let me just get back to ... some of the questions that have been asked earlier. You are not seeking complete liberty for Kiko. It seems to me that the New York Court of Appeals, in the past, has required that request for relief in order for a habeas corpus petition to be granted. Why do you say we have the authority to do so in this case?

11:37 STEVEN WISE: Well the cases that we cite in our brief that involve very elderly people, insane people, indentured servants, apprentices; they did not get, ... they did not ask for that relief, and that was not the relief. And then there were two cases from the Supreme Judicial Court of Massachusetts in the middle of the 1830's and 40's, which...

12:00 JUSTICE: Are any of those, do any, are any of those cases New York authority; can you rely on that authority?

12:06 STEVEN WISE: Yes ...you have...

12:08 JUSTICE: As the intermediate appellate court?

12:09 STEVEN WISE: Uh, no. It's persuasive authority for you, as a matter of common law. But there is the *Cooper vs. Traynor* case, and then there are the cases we cite, again, involving apprentices and indentured servants.

12:23 JUSTICE: We understand.

12:25 STEVEN WISE: Now, relying on ... many of the secondary sources that the Court of Appeals cited in *Byrn*, you had the Indian Supreme Court hold that the holy books of the Sikh religion was a person. You had pre-independence Indian courts say that a mosque was a person, that a Hindu idol was a person. In 2012, you had a treaty between the indigenous peoples of New Zealand and the Crown in which it was agreed that a river was a person, and it owned its own bed.

13:01 JUSTICE: Just had, we just learned from the U.S. Supreme Court, in the *Citizens United* case that, a corporation...

13:07 STEVEN WISE: That a corporation was a person. Yes, well the answer is that what is a person, or who is a person, is strictly a matter of public policy, and there are three ways that you can find them: you can get there through the constitution, through the legislature, and through the courts. Now the reason that this is not a legislative issue, for example, is that habeas corpus, almost uniquely, the Court of Appeals has said, is not a creature of any statute. It exists as a part of the common law...

13:38 JUSTICE: Right, but can't you go to the Legislature? There are laws in New York State that provide how you can treat dogs, okay, as far as dogs are outside there's very detailed regulations, where the dog can be, the shade, the housing, and everything. Can't you go the State Legislature and say, there should be a law, if you're going to have an animal of this nature, that there should be certain minimum requirements for his habitation? And because that's what you're concerned about; you're concerned about Kiko's living conditions?

14:12 STEVEN WISE: No, no, we are not.

14:15 JUSTICE: You're not concerned about his living conditions?

14:16 STEVEN WISE: No, no. We are concerned about his being detained, is that, his detention. He is being imprisoned in such a way that his autonomy and his self-determination are not being allowed to express themselves, which happens to be the very reason that a writ of habeas corpus...

14:32 JUSTICE: So if you're right, there's no chimpanzees to be held in any zoo, in the United States, they should all be let go?

14:37 STEVEN WISE: There are ... well we would like to take Kiko to Africa, but he couldn't do that. There's no record of captive-bred chimpanzees being able to thrive there. So we want Kiko to go to the place in North America where he has the best opportunity to express his self-determination...

14:59 JUSTICE: But shouldn't every chimpanzee in a zoo go with him, then?

15:01 STEVEN WISE: Well, I think, I think there are zoos, and there are zoos. There ... aren't any in the state of New York actually that we haven't sued over. There, you have... in fact, there aren't any chimpanzees in a zoo in the state of New York.

15:14 JUSTICE: How about dolphins? Should they all be released?

15:17 STEVEN WISE: There aren't any dolphins in the state of New York.

15:19 JUSTICE: Well, in the United States?

15:20 STEVEN WISE: In the United States, if you have a dolphin, who say is at SeaWorld, who's being made to stay in a very small pool, I think there's a very powerful argument, if you can bring in the hundred pages of experts that we were able to bring in on behalf of chimpanzees. If you bring those in, say, for orcas or dolphins, then if you could show that they have the kind of self-determination and autonomy that a chimpanzee has, then indeed – yes - they should also be able to be released through a common law writ of habeas corpus...

15:52 JUSTICE: Part of the problem...

15:53 STEVEN WISE: ...at least in the state of New York, which is, which has an incredibly powerful writ of habeas corpus that is entirely common law.

15:58 JUSTICE: Part of the problem I'm having with your argument Counsel, is that,

and it is impressive, the experts, that announce that chimpanzees are autonomous, have self-determination, and, through the tests and things that have been done and the observation. But it's that self-determination itself that causing you problems, because, if that's true, then a self-determination would not to be kept in another captive environment, it would be to be free.

16:26 STEVEN WISE: Well, Kiko would not...

16:28 JUSTICE: Your client would be determining for Kiko where Kiko lives, what Kiko gets in terms of food, exercise, you know, exposure to outdoors and indoors. All those determinations would be made by someone other than Kiko if your client gets the full relief.

16:47 STEVEN WISE: But, that, see, but that is going to have to be so when you're dealing with someone who's not an adult human being. The same thing happens with a child ... the child cannot do whatever he wants. Someone else is going to make the call for him. But the important thing is that it's the interests of the child that are being taken into account. And here, it would be the interests of Kiko that are being taken into account, not the interests of a person

17:14 who calls himself his owner, and who has him with a chain around his neck in a cage. The... important part, or the part... the reason I accentuate the issues of autonomy and self-determination, is that they are critical for liberty, and for the equality argument. That, in the state of New York, liberty, self-determination and autonomy are seen as being of supreme value. I cite the *Schloendorff* case, I cite *Rivers vs. Katz*, the *Storer* case, the Court of Appeals of New York goes out of its way to say that it will respect the self-determination and autonomy of someone, even if it means that they're going to die. If they want to say, I don't want a blood transfusion, or I won't take these drugs ... the Court of Appeals will respect that. Which shows how supreme the value is in the state of New York of autonomy and self-determination over anything else.

17:51 JUSTICE: How do we know he even wants to leave?

18:19 JUSTICE: How do we know he even wants to leave?

18:20 STEVEN WISE: The reason that we know that Kiko wants to leave is because he is a chimpanzee. That would be like—and, and the one hundred pages of expert affidavits show—what, that a chimpanzee, you know, is an autonomous and self-determining being.

18:39 JUSTICE: Considering the example...

18:40 STEVEN WISE: Autonomous and self-determining beings want to be that way. I'm sorry.

18:41 JUSTICE: The example you just gave is somebody wants to die and not take the drugs. Well, the same could be said of, well, why would a person do that, a person would want to live. You're making assumptions, correct?

18:52 STEVEN WISE: If you have an adult ... the *Storer* case, for example; if you have Brother Fox, for example who had said that he wanted to die—or, he did not want extraordinary measures taken to save his life - the Court of Appeals said, because, we know that we're going to respect that. In the *Storer* case...

19:18 JUSTICE: Because you know that. That's what I'm saying. Because you know that. But, but we don't know that for Kiko.

19:22 STEVEN WISE: Well, the problem that you have here is not a problem that is individual to Kiko, in that it's the same problem that someone has with any

incompetent human being or minor human being. And ... it would not be our decision, it would be the decision of the supreme court below, to monitor or to have a guardian of some kind appointed, someone who would ensure that, indeed, Kiko was being sent to a place and being treated in such a way that

19:52 would, indeed, protect his self-determination and his autonomy.

19:56 JUSTICE: So, Kiko, in your mind, Kiko is akin to a mentally retarded adult?

20:00 STEVEN WISE: I would not, I would not say that. I think Kiko is probably akin to a normal human child...

20:07 JUSTICE: Child?

20:09 STEVEN WISE: Say of, of the age of five.

20:10 JUSTICE: Who will never grow up, though?

20:13 STEVEN WISE: He will never grow up, so it would be someone who is always going to be five, five years old, or six years old. That's true, so, so, he'll never ... he's kind of like the man in the *Storer* case, kind of like *Storer* himself. So, someone is going to have to make the call. But the thing is, they make the call based on Kiko's interest, and try to allow him, as they did in the *Storer* case, try to allow him to vindicate the degree of self-determination and autonomy that ... they can. Rather than have him live the life, essentially, of a chimpanzee slave, who has a chain around his neck, who is living according to how someone else wants to treat him.

20:58 JUSTICE: Thank you for your argument.

21:00 STEVEN WISE: Thank you very much, Your Honors.

21:01 JUSTICE: Thank you.

21:02 CLERK: This court, there is a recess.