SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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 HERCULES and LEO,

Petitioner,

-against-

SAMUEL L. STANLEY JR., M.D. as President of State University of New York at Stony Brook a/k/a Stony Brook University and STATE UNIVERSITY OF NEW YORK AT STONY BROOK a/k/a STONY BROOK UNIVERSITY,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR HABEAS CORPUS

Index No. 152736/15

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I. INTRODUCTION

Chimpanzees are autonomous and self-determining beings. They recall their past and anticipate their future, and when their future is incarceration, they suffer the pain of being unable to fulfill their goals or move around as they wish, much in the same way as a human being. In the last twenty-two months, three of the seven of these autonomous, self-determining beings imprisoned in the State of New York have died.

In December 2013, the Nonhuman Rights Project, Inc. ("Petitioner") filed near-identical petitions demanding that a Supreme Court issue a common law writ of habeas corpus and order to show cause in each of the three counties in which a survivor remained.[1] Oral argument was heard in the State of New York Supreme Court Appellate Division, Third Judicial Department ("Third Department") on October 8, 2014, in one case involving a chimpanzee named Tommy brought in the Supreme Court Fulton County.[2] The Third Department affirmed the ruling of the lower court denying the petition and held "that a chimpanzee is not a 'person' entitled to the rights and protections afforded by the writ of habeas corpus." *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 2014 NY Slip Op 08531, 2014 N.Y. App. Div. LEXIS 8451, *2 (3rd Dept. Dec. 4, 2014) ("Nonhuman Rights Project v. Lavery"). On December 16, 2014, Petitioner filed a motion for leave to appeal to the Court of Appeals in the Third Department arguing that the Third Department erred as a matter of law in denying personhood to a chimpanzee for the purpose of seeking a common law writ of habeas corpus for the reasons set forth in Section F of this Memorandum of Law. On January 30, 2015, the Third Department entered a Decision and Order on Motion denying Petitioner's motion for leave to appeal. Petitioner is filing a motion for

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

[2] The Third Department granted Petitioner's motion for a preliminary injunction to restrain the respondents from removing Tommy from the State of New York during the pendency of proceeding or further order of the court. A true and correct copy of the order is attached to the Habeas Petition as **Exhibit 4.**

leave to appeal with the Court of Appeals of the Third Department's refusal to grant permission pursuant to CPLR 5602(a).

A second oral argument was heard in the State of New York Supreme Court Appellate Division, Fourth Judicial Department ("Fourth Department") on December 2, 2014, in a case involving a chimpanzee named Kiko filed in the Supreme Court Niagara County. On January 2, 2015, the Fourth Department entered its memorandum and order affirming the lower court's dismissal of the petition erroneously concluding that "habeas corpus does not lie" in this case. *Matter of The Nonhuman Rights Project, Inc. v Presti*, 2015 N.Y. App. Div. LEXIS 148, No. CA 14-00357, 2015 WL 25923, *2 (4th Dept. Jan. 2, 2015) ("Nonhuman Rights Project v. Presti"). On January 15, 2015, Petitioner timely filed a motion for leave to appeal to the Court of Appeals in the Fourth Department arguing that the Fourth Department erred as a matter of law in the manner in which it interpreted the relief offered by a common law writ of habeas corpus in the State of New York for the reasons set forth in Section G of this Memorandum of Law. The Fourth Department has not yet ruled on Petitioner's motion for leave to appeal.

The third petition was filed in the Supreme Court Suffolk County on behalf of Hercules and Leo, the two chimpanzees detained in the case at bar. That court refused to sign the petition on a procedural ground and did not rule on the merits. A true and correct copy of the unsigned proposed order to show cause and writ of habeas corpus is attached to this Verified Petition for a Writ of Habeas Corpus and Order to Show Cause ("Habeas Petition") as **Exhibit 1**. The State of New York Supreme Court Appellate Division, Second Judicial Department ("Second Department") later *sua sponte* dismissed Petitioner's appeal on a different procedural ground, without reaching the briefing stage.[3] A true and correct copy of the order is attached to the

[3] The Second Department's dismissal of the 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 Exh. 2, attached to the Habeas Petition) was plainly erroneous, as CPLR 7011 provides that "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" and a petition may be made "without notice." CPLR 7002(a). Motions to appeal from orders refusing to grant virtually identical petitions were not dismissed in the Third and Fourth Departments.

Habeas Petition as **Exhibit 2**. Petitioner then filed a motion for reargument with the Second Department which was denied by the court. A true and correct copy of the order is attached to the Habeas Petition as **Exhibit 3**. Petitioner now brings this Habeas Petition, which is authorized by New York Civil Practice Law and Rules ("CPLR") Article 70 and not barred by res judicata, *infra*, seeking the release of Hercules and Leo, who are being unlawfully imprisoned as research subjects at the State University of New York at Stony Brook ("Stony Brook University").

New York has always recognized the common law writ of habeas corpus and there is no question this Court would release Hercules and Leo if they were human beings, for their detention grossly interferes with their exercise of bodily liberty. The question before this Court is whether Hercules and Leo, like human beings, are "legal persons" under New York habeas corpus common law and thus, CPLR Article 70, possess the common law right to bodily liberty protected by the common law of habeas corpus.

"Legal person" has never been a synonym for "human being." Instead, it designates Western law's most fundamental category by identifying those entities capable of possessing a legal right. "Legal personhood" determines who counts, who lives, who dies, who is enslaved, and who is free. Chimpanzees, as autonomous and self-determining beings, must be recognized as common law "persons" in New York, entitled to the common law right to bodily liberty protected by the common law of habeas corpus.

Nine prominent working primatologists from around the world have submitted affidavits ("Expert Affidavits") demonstrating that chimpanzees possess the autonomy and self-determination that allows them to choose how they will live their own emotionally, socially, and intellectually rich lives.[4] Pursuant to a New York common law that keeps abreast of evolving

[4] The Expert Affidavits attached to this Habeas Petition, which are, with one exception, copies of the affidavits filed in Petitioner's prior habeas corpus proceeding in the Supreme Court, Suffolk County, are properly before the Court. CPLR 2101(e) ("copies, rather than originals, of all papers, including orders, affidavits and exhibits may be served or filed. Where it is required that the original be served or filed and the original is lost or withheld, the court may authorize a copy to be served or filed."). *See Rechler Eq. B-1, LLC v. AKR Corp.*, 98 A.D.3d 496, 497 (2d Dept. 2012); *see also Brooke Bond India, Ltd. v. Gel Spice Co., Inc.*, 192 A.D.2d 458, 459-60 (1st

standards of justice, morality, experience, and scientific discovery, New York common law liberty and equality mandate that such autonomous beings as chimpanzees be recognized as common law "persons" entitled to the common law right to bodily liberty protected by the common law of habeas corpus.

The New York common law of liberty begins, as does the common law of every American state, with the premise that autonomy is a supreme common law value that trumps even the State's interest in life itself, and is therefore protected as a fundamental right that may be vindicated through a common law writ of habeas corpus.

New York common law equality forbids discrimination founded upon unreasonable means or unjust ends, and protects Hercules and Leo's common law right to bodily liberty free from unjust discrimination. Hercules and Leo's common law classification as "legal things," rather than "legal persons," rests upon the illegitimate end of enslaving them. Simultaneously, it classifies Hercules and Leo by the single trait of their being a chimpanzee, and then denies them the capacity to have a legal right. This discrimination is so fundamentally inequitable it violates basic common law equality. In fact, the New York legislature's recognition that some nonhuman animals, such as chimpanzees, are capable of having personhood rights by expressly allowing them to be trust "beneficiaries" pursuant to §7-8.1 of the Estates, Powers and Trusts Law ("EPTL") affirms that personhood may apply to natural persons other than human beings.

Petitioner now requests that this Court recognize Hercules and Leo's common law right to bodily liberty protected by the common law of habeas corpus, issue the Order to Show Cause & Writ of Habeas Corpus, and immediately release Hercules and Leo from their unlawful imprisonment at Stony Brook University to Save the Chimps, an extraordinary chimpanzee sanctuary in South Florida, where they will live out their lives with numerous other chimpanzees in an environment as close to their native Africa as may be found in North America.

Dept. 1993); *Bd. of Educ. of City Sch. Dist. of City of New York v. Iannelli Const. Co., Inc*., 906 N.Y.S.2d 778 (Sup. Ct. 2009); *R.M. v. Dr. R*., 855 N.Y.S.2d 865, 866 (Sup. Ct. 2008); *Matthews v. Gilleran*, 12 N.Y.S. 74, 78 (Gen. Term. 1890); *Barnard v. Heydrick*, 1866 WL 5268 (N.Y. Sup. Ct. 1866).

Petitioner further asks this Court to recognize that Hercules and Leo are "persons" within the meaning of New York habeas corpus common law and thus CPLR Article 70, issue the Order to Show Cause & Writ of Habeas Corpus that requires Respondents to provide a legally sufficient reason for their detention, and then proceed according to Article 70.

The Court need not make a judicial determination at this time, however, that Hercules and Leo are "persons" in order to issue the writ or show cause order. Instead, the Court may follow the laudatory procedure used both by Lord Mansfield in his common law habeas corpus ruling in *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772), where the great Chief Justice assumed, *without deciding*, that the slave, James Somerset, could possibly possess the right to bodily liberty protected by the common law of habeas corpus, and issued the writ that required the respondent to provide a legally sufficient reason for Somerset's detention, and by the Court in *In re Tom*, 5 Johns. 365 (N.Y. 1810) (*per curiam*), where it issued a writ of habeas corpus upon the petition of a slave who claimed he had been manumitted and was being unlawfully detained as property.[5] As in these cases, this Court may assume, without deciding, that Hercules and Leo *could be* legal persons, and issue the Order to Show Cause & Writ of Habeas Corpus that requires their captors to provide a legally sufficient reason for their detention, and then proceed according to Article 70.

Petitioner does not claim Respondents are violating any federal, state, or local animal welfare law in the manner in which they are detaining Hercules and Leo. The issue in this case is not the chimpanzees' welfare, any more than the issue would be the welfare of a human being detained against his or her will in a habeas corpus case. The issue in this habeas corpus action is

[5] New York's adoption of English common law as it existed prior to April 19, 1775, *Montgomery v. Daniels*, 338 N.Y.2d 41, 57 (1975); *Jones v. People*, 79 N.Y. 45, 48 (1879); N.Y. Const. Art. I, § 14; N.Y. Const. § 35 (1777), incorporated Lord Mansfield's common law habeas corpus ruling in *Somerset v. Stewart*. *See also Lemmon v. People*, 20 N.Y. 562 (1860).

whether Hercules and Leo, as autonomous and self-determining beings, may be legally detained at all.[6]

In the following Statement of Facts, Petitioner sets out the facts that demonstrate that Hercules and Leo's genetics and physiology have produced a brain that allows each of them the capacities of autonomy and self-determination, as well as the generally cognitive and emotional complexity sufficient for common law personhood and the possession of the common law right to bodily liberty protected by the common law of habeas corpus.

II. STATEMENT OF FACTS

The Expert Affidavits submitted in support of this Habeas Petition demonstrate that chimpanzees possess those complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty, as a matter of liberty, equality, or both, most especially autonomy and self-determination. These include possession of an autobiographical self, episodic memory, self-determination, self-consciousness, self-knowingness, self-agency, referential and intentional communication, empathy, a working memory, language, metacognition, numerosity, and material, social, and symbolic culture, their ability to plan, engage in mental time-travel, intentional action, sequential learning, mediational learning, mental state modeling, visual perspective-taking, cross-modal perception, their ability to understand cause-and-effect, the experiences of others, to imagine, imitate, engage in deferred imitation, emulate, to innovate and to use and make tools.

Humans and chimpanzees share almost 99% of their DNA (Affidavit of Tetsuro Matsuzawa ("Matsuzawa Aff."), at ¶10; Affidavit of Emily Sue Savage-Rumbaugh ("Savage-

[6] Even if Respondents were violating animal welfare statutes, habeas corpus would still be available, as the courts have made clear that alternative remedies do not alter one's ability to bring the writ. *People v. Schildhaus*, 8 N.Y.2d 33, 36 (1960). *See also Williams v. Dir. of Long Island Home, Ltd*., 37 A.D.2d 568, 570 (2d Dept. 1971) ("The fact that petitioner or the detainee may h[a]ve had an alternative avenue of relief by way of a statutory remedy in no way alters the right to broach the issue by way of habeas corpus."). Further, the remedy for a violation of an animal welfare statute does not necessarily entail the release of the animal, further rendering such a statute inapposite.

Rumbaugh Aff."), at ¶11). Chimpanzees are more closely related to human beings, than to gorillas (Affidavit of William McGrew ("McGrew Aff."), ¶11; Affidavit of James King ("King Aff."), at ¶12; Affidavit of Mathias Osvath ("Osvath Aff."), at ¶11). Both the brains and behavior of humans and chimpanzees are plastic, flexible, and heavily dependent upon learning (Savage-Rumbaugh Aff. at ¶11a). Both possess the brain asymmetry associated with sophisticated communication and language-like capacities (Matsuzawa Aff. at ¶12). Both share similar brain circuits involved in language and communication (Matsuzawa Aff. at ¶10), and have evolved the large frontal lobes involved in insight and foreplanning (*Id.*). Broca's Area and Wernicke's Area, which enable human symbolic communication, have corresponding areas in chimpanzee brains (Savage-Rumbaugh Aff. at ¶13).

Both share cell types involved in higher-order thinking, and functional characteristics related to sense of self (Matsuzawa Aff. at ¶10; Affidavit of Jennifer M.B. Fugate ("Fugate Aff."), at ¶14). Both brains possess spindle cells (or von Economo neurons) in the anterior cingulate cortex, involved in emotional learning, the processing of complex social information, decision-making, awareness, and, in humans, speech initiation (Matsuzawa Aff. at ¶14). This strongly suggests they share many higher-order brain functions (*Id.*). The chimpanzee brain is activated in the same areas and networks as the human brain during activities associated with planning, foresight, episodic memory, and memories of autobiographical events (Osvath Aff. at ¶12, ¶¶15-16).

That their brains develop and mature in similar ways indicates that humans and chimpanzees pass through similar cognitive developmental stages (Matsuzawa Aff. at ¶10). Brain developmental delay, which plays a role in the emergence of complex cognitive abilities, such as self-awareness, creativity, foreplanning, working memory, decision-making and social interaction, is a key feature of both chimpanzee and human prefrontal cortex brain evolution (Matsuzawa Aff. at ¶11; Savage-Rumbaugh Aff. at ¶11a, ¶12). Chimpanzee development of the use and understanding of sign language, along with their natural communicative gestures and vocalizations, parallels the development of language in children; this points to deep similarities

in the cognitive processes that underlie communication in both species (Jensvold Aff. at ¶9). Both develop increasing levels of consciousness, awareness, and self-understanding throughout adulthood, through culture and learning (Savage-Rumbaugh Aff. at ¶11d).

Numerous parallels in the way their communication skills develop suggest a similar unfolding of cognitive processes and an underlying neurobiological continuity (Jensvold Aff. at ¶10). The foundational stages of communication suggest striking similarities between human and chimpanzee cognition (*Id*. at ¶¶10-11). Chimpanzees show some of the same early developmental tendencies and changes in their communication skills as children (*Id.* at ¶10). Children and language-trained chimpanzees begin communicating using natural gestures before moving to more frequent use of symbols (*Id.*). In both, the ratio of symbol to gestures increases with age, with the overwhelming majority of gestures serving a communicative purpose (*Id.*). Both show a primacy of natural gestures in development over learning a symbolic system of communication (*Id.* at ¶¶9-10).

Chimpanzees and humans are autonomous (King Aff. at ¶¶11; Osvath Aff. at ¶11), which Professor King defines as freely choosing, not acting on reflex, innate behavior, or through any conventional category of learning such as conditioning, discrimination learning, or concept formation, directing behavior based on internal cognitive processes (King Aff. at ¶11). The simplest explanation for chimpanzee behavior that looks autonomous is they are based on similar human capacities (*Id.* at ¶12). Chimpanzees possess the "self" that is integral to autonomy, being able to have goals and desires, intentionally act towards those goals, and understand whether they are satisfied (Matsuzawa Aff. at ¶15).

Responding differently to one's own name than to other sounds, showing specific brain wave responses to the sound of one's name, signifies self in both chimpanzees and humans (*Id.* at ¶13). Chimpanzees recognize themselves in mirrors (*Id.* at ¶15), a marker of self-awareness (Anderson Aff. at ¶12; Savage-Rumbaugh Aff. at ¶16). They recognize themselves on television, in videos and photographs, and examine the interior of their mouths with flashlights (Savage-Rumbaugh Aff. at ¶16). They recognize pictures of themselves, and others, when they were very

young (*Id.*). Self-recognition requires that one hold a mental representation of what one looks like from another perspective (Anderson Aff. at ¶12). This capacity to reflect upon one's behavior allows one to become the object of one's own thought (Savage-Rumbaugh Aff. at ¶16). Chimpanzees show such capacities that stem from self-awareness, as self-monitoring, self-reflection, and metacognition (*Id.* at ¶15). They are aware of what they know and do not know (*Id.*). "Self-agency," a fundamental component of autonomy, allows one to distinguish one's own actions and effects from external events (Matsuzawa Aff. at ¶16). Both chimpanzees and humans share the fundamental cognitive processes underlying the sense of being an independent agent (Matsuzawa Aff. at ¶16; Savage-Rumbaugh Aff. at ¶11e).

Similar brain structures of humans and chimpanzees support the behavioral and cognitive evidence for both human and chimpanzee autobiographical selves (Osvath Aff. at ¶15). Both are aware of their past and envision their future (*Id.* at ¶16). Both share the sophisticated cognitive capacity necessary for the "mental time travel" the episodic system enables (Osvath Aff. at ¶10, ¶12, ¶15; Jensvold Aff. at ¶10). Without understanding one is an individual who exists through time, one cannot recollect past events in one's life and plan future events (Osvath Aff. at ¶12). Autonoetic, or self-knowing, consciousness allows an autobiographical sense of a self with a past and future (*Id.*).

Chimpanzees delay a strong current drive for a better future reward, generalize a novel tool for future use, and select objects for a much-delayed future task (*Id.* at ¶14). They can remember the "what, where and when" of events years later (*Id.* at ¶12). They can prepare themselves for such a future action as tool use a day in advance (*Id.*). Wild chimpanzees demonstrate such long-term planning for tool use as transporting stones to locations to be later used later as hammers to crack nuts; a captive chimpanzee routinely collected, stockpiled, and concealed stones he would later hurl at visitors when he was agitated (Osvath Aff. at ¶13; Anderson Aff. at ¶16). This ability to mentally construct a new situation to alter the future (in this case the behaviors of human zoo visitors) and plan for events where one is in a different psychological state signals the presence of an episodic system (Osvath Aff. at ¶13).

Autonomous individuals possess a self-control that depends upon the episodic system (*Id.* at ¶14). Chimpanzees, like humans, delay gratification for a future reward, indeed possess a high level of self-control under many circumstances (*Id.*). Chimpanzees plan for future exchanges with humans (*Id.*). They may use self-distraction (playing with toys) to cope with the impulse of grabbing immediate candies instead of waiting for more (*Id.*).

Perceptual simulations enabled by episodic memory bring the future into the present by braking current drives in favor of delayed rewards, and is available only those who a sufficiently sophisticated sense of self and autobiographical memory (*Id.*). Chimpanzees can disregard a small piece of food in favor of a tool that will allow them to obtain a larger piece of food later (*Id.*). They can select a tool they have never seen, guess its function, and use it appropriately (*Id.*). This would be impossible without being able to mentally represent the future event (*Id.*).

Chimpanzees re-experience and anticipate pains and pleasures (*Id.* at ¶16). Like humans, they experience pain around an anticipated future event (*Id.*). Confining someone in a prison or cage loses its power as punishment if the individual had no self-concept, as each moment will be a new with no conscious relation to any other (*Id.*). As chimpanzees conceive a personal past and future, and suffer the pain of being unable to fulfill their goals or move about as they wish, like humans they experience the pain of anticipating a never-ending situation (*Id.*).

Language, a volitional process that involves creating intentional sounds for the purpose of communication, reflects autonomous thinking and behavior (Matsuzawa Aff. at ¶13). Chimpanzees exhibit referential and intentional communication (Anderson Aff. at ¶15). They produce sounds to capture the attention of an inattentive audience (*Id.*). The development of their use and understanding of sign language, along with their natural communicative gestures and vocalizations, parallels the development of language in children, which points to deep similarities in the cognitive processes that underlie communication in both (Jensvold Aff. at ¶9).

They point and vocalize when they want another to notice something and adjust their gesturing to insure they are noticed (*Id.*). In tasks requiring cooperation, chimpanzees recruit the most skilled partners and take turns requesting, and helping a partner (*Id.*). They intentionally

and purposefully inform naïve chimpanzees about something (*Id.*). Wild chimpanzees direct alarm calls to friends arriving on the scene, who cannot see a snake, and stop calling once the others are safe from the predator (*Id.*).

Chimpanzees demonstrate purposeful communication, conversation, understanding of symbols, perspective-taking, imagination, and humor (Jensvold Aff. at ¶9; Savage-Rumbaugh Aff. at ¶¶14-15). They learn, and remember for decades, symbols for hundreds of items, events and locations; they learn new symbols just by observing others using them (Savage-Rumbaugh Aff. at ¶20). They master syntax (*Id.*). They understand such "if/then" clauses as, "if you share your cereal with Sherman, you can have some more" (*Id.* at ¶21). They announce important social events, what that they are about to do, where they are going, what assistance they want from others, and how they feel (*Id.* at ¶25). They announce what they are going to retrieve from an array of objects they've seen in another room (*Id.*). They recount what happened yesterday (*Id.* at ¶27).

There is no essential difference between what words chimpanzees learn mean to them, and what words humans learn mean to them (Savage-Rumbaugh Aff. at ¶20). They understand there is no one-to-one relationship between utterances and events, that there are infinite linguistic ways of communicating the same or similar things (*Id.* at ¶22). They use symbols to comment about other individuals as well as about past and future events (Jensvold Aff. at ¶10). They purposefully create declarative sentences and combine gestures with pointing to refer to objects (*Id.*).

Language-trained chimpanzees spontaneously use language to communicate with each other (Jensvold Aff. at ¶12; Savage-Rumbaugh Aff. at ¶15). Those who understand spoken English answer "yes/no" questions about their thoughts, plans, feelings, intentions, dislikes and likes (Savage-Rumbaugh Aff. at ¶15). They answer questions about their companions' likes and dislikes and tell researchers what other apes want (*Id.*). They use symbols to express themselves and to state what they are going to do, in advance of acting, then carry out their action (*Id.* at ¶17). An example is statements made by two language-trained chimpanzees trained with abstract

computer symbols, Sherman and Austin, who told each other the foods they intended to share, and told experimenters which items they were going to give to them (*Id.*). With the emergence of the ability to state their intentions, Sherman and Austin revealed that, not only did they recognize and understand differential knowledge states between themselves, but language allows beings to bring their different knowledge states into accord with their imminent intentions and to coordinate their actions (*Id.* at ¶¶18-19).

Sherman and Austin would state "Go outdoors," then head for the door, or "Apple refrigerator," then take an apple from the refrigerator (rather than any of the other foods in the refrigerator) (*Id.* at ¶18). To produce statements about intended actions for the purpose of co-coordinating future actions with others, one must be able to form a thought and hold it until agreement is reached between two parties (*Id.* at ¶20).

The chimpanzee Loulis was not raised with humans and was not taught ASL by humans (Jensvold Aff. at ¶12). Nor did humans use ASL in his presence (*Id.*). But he was the adopted son of Washoe, a signing chimpanzee. Loulis acquired signs from observing Washoe and other signing chimpanzees, as well as when Washoe molded his hands into the appropriate signs (*Id.*). Not only did Washoe's behavior toward Loulis show she was aware of his shortcomings in the use of signs as a communication skill, but she took steps to change that situation (*Id.*).

True communication is based on conversational interaction in which the participants takes turns communicating in a give-and-take manner and respond appropriately to the other's communicative actions (*Id.* at ¶11). When a conversation becomes confusing, participants make such contingent adjustments as offering a revised or alternative utterance/gesture or repeating a gesture or sign to continue the conversation (*Id.*). ASL-using chimpanzees demonstrate contingent communication with humans at the same level as young human children (*Id.*).

When a human conversation has broken down, they repeat their utterance and add information (*Id.*). Chimpanzees conversing in sign language with humans respond in the same way, reiterating, adjusting, and shifting their signs to create conversationally appropriate rejoinders; their reactions to and interactions with a conversational partner resemble patterns of

conversation found in studies of human children (*Id.*). When their request is satisfied, they cease signing it (*Id.*). When their request is misunderstood, refused or not acknowledged, they repeat and revise their signing until they get a satisfactory response (*Id.*). As in humans, this pattern of contingency in conversation demonstrates volitional and purposeful communication and thought (*Id.*).

Chimpanzees understand that conversation involves turn-taking and mutual attention and will try to alter the attentional state of the human (*Id.*). If they wish to communicate with a human whose back is turned to them they will make attention-getting sounds (*Id.*). If the human is turned to them, they switch to conversational sign language with few sounds (*Id.*).

Both language-using and wild chimpanzees understand conversational give-and-take and adjust their communication to the attentional state of the other participant, using visual gestures towards an attentive partner and tactile and auditory gestures more often toward inattentive partners. If the partner does not respond, they repeat the gesture (*Id.*). Even wild and captive chimpanzees untutored in American Sign Language string together multiple gestures to create gesture sequences, and combine gestures into long series, within which gestures may overlap, interspersed with bouts of response waiting or be exchanged back and forth between individuals (*Id.*).

When Sherman and Austin communicated, they paid close attention to the other's visual regard (Savage-Rumbaugh Aff. at ¶22). If Austin was looking away when Sherman selected a symbol, Sherman would wait until Austin looked back. Then he would point to the symbol he used. If Austin hesitated, Sherman would point to the food the symbol symbolized. If Austin's attention wandered further, Sherman would turn Austin's head toward the keyboard. If Sherman was not attending to Austin's request, Austin would gaze at the symbol until Sherman took note (*Id.*). Both recognized the speaker had to monitor the listener, watch what he was doing, make judgments about his state of comprehension, and decide how to proceed with conversational repair (*Id.*).

In a manner similar to two-through-seven year olds, sign-language trained chimpanzees and chimpanzees trained to use arbitrary computer symbols to communicate, sign among themselves and exhibit a telltale sign of volitional use of language, signing to themselves or "private speech" (Jensvold Aff. at ¶12; Savage-Rumbaugh Aff. at ¶14). Private speech has many functions, including self-guidance, self-regulation of behavior, planning, pacing, and monitoring skill, and is a part of normal development of communication (Jensvold Aff. at ¶13). Children use private speech during creative and imaginative play, often talking to themselves when playing imaginative and pretend games (*Id.* at ¶14). The more frequently children engage in private speech, the more creative, flexible, and original thought they display (*Id.*).

Imagination is a key component of mental representation, metacognition, and the ability to mentally create other realities (*Id.* at ¶15). Both captive and wild chimpanzees engage in at least six forms of imaginary play that are similar to the imaginary play of children ages two through six (*Id.*). These include Animation, Substitution, and imaginary private signing (*Id.*). Animation is pretending that an inanimate object is alive, such as talking to a teddy bear; substitution is pretending an object has a new identity, such as placing a block on the head as a hat (*Id.*). In imaginary private signing, chimpanzees transform a sign or its referent to a different meaning, whether it is present or not (*Id.* at ¶14). An example is placing a wooden block on one's head and referring to it as a hat (*Id.*). Chimpanzees use imagination to engage in pretend-aggression (Savage-Rumbaugh Aff. at ¶31). Sherman pretended that a King Kong doll was biting his fingers and toes and would pretend to be in pain, when he poked a needle in his skin and out the other side, being careful to just pierce the thick outer layer of skin (*Id.*).

Deception and imaginary play require behaviors directed toward something that is not there and often involve modeling mental states (Jensvold Aff. at ¶16). They are closely related and by age three chimpanzees engage in both (*Id.* at ¶15; Savage-Rumbaugh Aff. at ¶16). For example, a chimpanzee who cached stones to later throw at zoo visitors engaged in deception by constructing hiding places for his stone caches, then inhibiting those aggressive displays that signal upcoming throws (Osvath Aff. at ¶13).

Chimpanzees display a sense of humor, and laugh under many of the same circumstances in which humans laugh (Jensvold Aff. at ¶17).

Together these findings provide evidence for cognitive similarities between humans and chimpanzees in the domains of mental representation, intentionality, imagination, and mental state modeling – all fundamental components of autonomy (*Id.*).

Chimpanzees are attuned to the experiences, visual perspectives, knowledge states, emotional expressions and states of others (Anderson Aff. at ¶15; Fugate Aff. at ¶16; Matsuzawa Aff. at ¶¶17-18). They possess mirror neurons, which allow them to share and relate to another's emotional state (Fugate Aff. at ¶14). These specialized cells respond to actions performed by oneself, but also when one watches the same action performed by another, which forms the basis for empathy, the ability to put oneself in another's situation (Fugate Aff. at ¶14; Matsuzawa Aff. at ¶17). They have some theory of mind; they know they have minds, they know humans have minds, thoughts, intentions, feelings, needs, desires, and intentions, and they know these other minds and state of knowledge differ from what their minds know (Savage-Rumbaugh Aff. at ¶32). They know when another chimpanzee does not know something and inform the other about facts he does not know (*Id.*).

Chimpanzees observing another trying to complete a task anticipate their intentions (Matsuzawa Aff. at ¶17). They know what others can and cannot see (*Id.*). They know when another's behavior is accidental or intentional (*Id.*). They use their knowledge of others' perceptions to deceive them (*Id.*). In situations where two chimpanzees are competing for hidden food, they employ strategies and counter-strategies to throw each other off the trail and obtain the food for themselves (*Id.*). When placed in a situation where they must compete for food placed at various locations around visual barriers, subordinate chimpanzees only approach food they infer dominant chimpanzees cannot see (Anderson Aff. at ¶15). They can take the visual perspective of a chimpanzee competitor, and understand that what they see is not the same thing their competitor sees (*Id.*). When ASL-trained and wild chimpanzees adjust their gestures and gestural sequences to the attention state of the individual they are trying to communicate with,

using visual gestures towards an attentive partner and tactile and auditory gestures more often toward inattentive partners. If the partner does not respond, they repeat the gesture, demonstrating visual perspective-taking and mental state modeling (Jensvold Aff. at ¶11).

The capacity for self-recognition has been linked to empathy, which is the identifying with, and understanding of, another's situation, feelings and motives. Several lines of evidence indicate chimpanzees possess highly developed empathic abilities (Anderson Aff. at ¶13).

When tested in similar experimental situations using video stimuli, chimpanzees show contagious yawning in much the same way as humans do (Anderson Aff. at ¶18; Matsuzawa Aff. at ¶18). That chimpanzees yawn more frequently in response to seeing familiar individuals yawning compared to unfamiliar others supports a link between contagious yawning and empathy (*Id.*). Chimpanzees shown videos of other chimpanzees yawning or displaying open-mouth facial expressions that were not yawns, showed higher levels of yawning in response to the yawn videos but not to the open-mouth displays (Matsuzawa Aff. at ¶18). These findings are similar to contagious yawning effects observed in humans, and are based on the capacity for empathy (*Id*).

In the wild and in captivity, chimpanzees engage in sophisticated tactical deception that requires attributing mental states and motives to others (Anderson Aff. at ¶14). This is shown when individuals console an unrelated victim of aggression by a third-party (*Id.*). They show concern for others in risky situations. When a chimpanzee group crosses a road, the more capable adult males will investigate the situation before more vulnerable group-members cross, and take up positions at the front and rear of the procession (*Id.*). Knowledge of one's own and others' capabilities is probably at the origin of some instances of division of labor (*Id.*). This includes sex differences in cooperative hunting for live prey, and crop-raiding; these activities often lead to individuals in possession of food sharing it with those who do not (*Id.*).

One consequence of self-awareness may be awareness of death; chimpanzees demonstrate compassion, bereavement-induced depression, and an understanding of the distinction between living and non-living, in a manner similar to humans when a close relative

passes away, which strongly suggests that chimpanzees, like humans, feel grief and compassion when dealing with mortality (Anderson Aff. at ¶19).

An important indicator of intelligence is the capacity for tool-making and use (McGrew Aff. at ¶¶14-15). Tool-making implies complex problem-solving skills and evidences understanding of means-ends relations and causation, for it requires making choices, often in a specific sequence, towards a goal, which is a key aspect of intentional action (McGrew Aff. at ¶15; Fugate Aff. at 17).

Wild chimpanzees make and use tools of vegetation and stone for hunting, gathering, fighting, play, communication, courtship, hygiene and socializing (McGrew Aff. at ¶15). Chimpanzees make and use complex tools that require them to utilize two or more objects towards a goal (*Id.* at ¶16). They make compound tools by combining two or more components into a single unit (*Id.*). They make adjustments to attain their goal (*Id.*).

Chimpanzees 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 (*Id.* at ¶17). Such sophisticated tool-use involves choosing appropriate objects in a complex sequence to obtain a goal they keep in mind throughout the process (*Id.*). This sequencing and mental representation is a hallmark of intentionality and self-regulation (*Id.*).

Chimpanzees have taken tool-making and use into the cultural realm (*Id.*). Culture is normative (represents something most individuals do), collective (characteristic of a group or community), and socially-learned behavior (learned by watching others) (*Id.* at ¶18). It is transmitted by social and observational learning (learning by watching others), which characterizes a group or population (*Id.*). Culture is based on several high-level cognitive capacities, including imitation (directly mimicking bodily actions), emulation (learning the results of another's actions, then achieving those results in another way) and innovation (producing novel ways to do things and combining known elements in new ways), all of which chimpanzees share (*Id.*). Under natural conditions, different chimpanzee cultures construct

different rule-based social structures which they pass from one generation to the next (McGrew Aff. at ¶19; Savage-Rumbaugh Aff. at ¶11f).

Three general cultural domains are found in humans and chimpanzees: 1) material culture, the use of one or more physical objects as a means to achieve an end, 2) social culture, behaviors that allow individuals to develop and benefit from social living, and 3) symbolic culture, communicative gestures and vocalizations which are arbitrarily, that is symbolically, associated with intentions and behaviors (*Id.*).

Each wild chimpanzee cultural group makes and uses a unique "tool kit," which indicates that chimpanzees form mental representations of a sequence of acts aimed at achieving a goal (McGrew Aff. at ¶20; Anderson Aff. at ¶16). A chimpanzee tool kit is a unique set of about 20 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. (*Id.*). These "tool kits" vary across groups, are passed on by observing others using them, and found from savannah to rainforest (McGrew Aff. at ¶20).

Tool-making is neither genetically determined, fixed, "hard-wired," nor simple reflex (*Id.*). It depends on the mental abilities that underlie human culture, learning from others and deciding how to do things. Each chimpanzee group develops its own culture through its own behavioural choices (*Id.*). At least 40 chimpanzee cultures across Africa use combinations of over 65 identifiable behaviors (*Id.*).

Organic chimpanzee tool kits are not preserved in the archaeological record. But chimpanzee, like human, stone tools are. (*Id.* at ¶21). The foraging tool kits of some chimpanzee populations are indistinguishable in complexity from the tools kits of some of the simplest human material cultures, such as Tasmanian aborigines, and the oldest known human artefacts, such as the East African Oldowan Industry (*Id.*). Chimpanzee stone artefacts excavated in West Africa demonstrate there was once a chimpanzee "Stone Age," just as there was a human "Stone Age," that is at least 4,300 years old. This predates settled farming villages and Iron Age technology in West Africa (*Id.*). In one chimpanzee population, chimpanzee tool-making culture

has been passed down for 225 generations (*Id.*). With respect to social culture, chimpanzees pass widely variable social displays and social customs from one generation to the next (*Id.* at ¶22; for examples, see *id*.). Wild chimpanzees demonstrate symbolic element key to human (*Id.* at ¶23). Thus, in one chimpanzee group, arbitrary symbolic gestures communicate desire to have sex, in another group an entirely different symbolic gesture expresses the same sentiment (*Id.*).

Human and chimpanzee cultures are underwritten by a common set of mental abilities (*Id.* at ¶24). The most important are imitation and emulation. Learning by observation is key to both (*Id.*). Chimpanzees copy methods used by others to manipulate objects and use both direct imitation and emulation, depending on the circumstance (*Id.*). Imitation, which involves copying bodily actions, is a hallmark of self-awareness, as it suggests the individual has a sense of his own body and how it corresponds to another's body, and can manipulate his body in accordance with the other's actions (*Id.*). Chimpanzees precisely mimic the actions of others, even the correct sequence of actions to achieve a goal (McGrew Aff. at ¶24; Anderson Aff. ¶17).

Chimpanzee and human infants selectively imitate facial expressions (Anderson Aff. at ¶17). Chimpanzees directly imitate another's way to achieve a goal when they have not figured out their own way to achieve that same goal (McGrew Aff. at ¶24; Anderson Aff. ¶17). When chimpanzees have the skills to complete a task they tend to emulate, not imitate (McGrew Aff. at ¶24). These findings demonstrate that chimpanzees make choices about whether to directly copy someone else's actions based on whether they think they can figure out how to do the task themselves (*Id.*).

Chimpanzees know when they are being imitated, and respond as human toddlers do (*Id.*). Both "test out" the behavior of the imitator by making repetitive actions and looking to see if the imitator follows (*Id.*). This is similar to how chimpanzees and toddlers test whether an image in a mirror is herself (*Id.*). Called "contingency checking," this is another hallmark of self-awareness (*Id.*). Chimpanzees engage in "deferred imitation," copying actions they have seen in the past (McGrew Aff. at ¶24; Anderson Aff. at ¶17). Deferred imitation relies upon more

sophisticated capacities than direct imitation, as chimpanzees must remember the actions of another, while replicating them in real time (McGrew Aff. at ¶24).

These capacities for imitation and emulation are necessary for "cumulative cultural evolution" (McGrew Aff. at ¶25; Anderson Aff. at ¶17). This cultural capacity, found in humans and chimpanzees, involves the ability to build upon previous customs (McGrew Aff. at ¶25). Chimpanzees, like humans, tend to be social conformists, which allows them to maintain customs within groups (*Id.*). The evidence suggests a similarity between the mental capacities of humans and chimpanzees in the areas of observational learning, imitation (and thus self-awareness), decision-making, memory and innovation (*Id.*).

Chimpanzees have moral inclinations and some level of moral agency; they behave in ways that we would interpret as a reflection of moral imperatives in humans (*Id.* at ¶26). They ostracize individuals who violate social norms (*Id.*). They respond negatively to inequitable situations, e.g. when offered lower rewards than companions receiving higher ones, for the same task (*Id.*). When given a chance to play such economic games as the Ultimatum Game, they spontaneously make fair offers, even when not obliged to do so (*Id.*).

Chimpanzee social life is cooperative and represents a purposeful and well-coordinated social system (*Id.* at ¶27). They engage in collaborative hunting, in which hunters adopt different roles that increase the chances of success (*Id.*). They share meat from prey (*Id.*). Males cooperate in territorial defense, and engage in risky boundary patrolling (*Id.*).

Numerosity, the ability to understand numbers as a sequence of quantities, requires both sophisticated working memory (in order to keep numbers in mind), and conceptual understanding of a sequence (Matsuzawa Aff. at ¶19). This is closely related to "mental time travel" and planning the right sequence of steps towards a goal, two critical components of autonomy (*Id.*). Not only do chimpanzees excel at understanding sequences of numbers, they understand that Arabic symbols ("2", "5", etc.) represent discrete quantities (*Id.*).

Sequential learning is the ability to encode and represent the order of discrete items occurring in a sequence (*Id.*). It is critical for human speech and language processing, learning

action sequences, and any task that requires placing items in an ordered sequence (*Id.*). Chimpanzees count, sum arrays of real objects or Arabic numerals, and display ordinality and transitivity (if A = B and B = C, then A = C) when engaged in numerical tasks, demonstrating they understand the ordinal nature of numbers (*Id.*). Chimpanzees understand proportions (e.g., 1/2, 3/4, etc.) (*Id.*). They can name the number, color and type of object shown on a screen (*Id.*). They use a touch screen to count from 0 to 9 in sequence (*Id.*). They understand the concept of zero, using it appropriately in ordinal context (*Id.*). They count to 21 (Savage-Rumbaugh Aff. at ¶29). They display "indicating acts" (pointing, touching, rearranging) similar to what human children display when counting a sum (Matsuzawa Aff. at ¶19). Both chimpanzees and children touch each item when counting an array of items, suggesting further similarity in the way both conceptualize numbers and sequences (*Id.* at ¶20).

Chimpanzees have excellent working, or short-term, memory (*Id.*). Working memory is the ability to temporarily store, manipulate, and recall items (numbers, objects, names, etc.) (*Id.*). It deals with how good someone is at keeping several items in mind simultaneously (*Id.*). Working memory tasks require monitoring (manipulation of information or behaviors) as part of completing goal-directed actions in the setting of interfering processes and distractions (*Id.*). The cognitive processes needed to achieve this include attention and executive control (reasoning, planning and execution) (*Id.*). When chimpanzees are shown the numerals 1-9 spread randomly across a computer screen (*id.*), the numbers appearing for just 210, 430, and 650 milliseconds, then replaced by white squares, they touch them in the correct order (1-9) (*Id.*). In another version of the task, as soon as chimpanzees touched the number 1, the remaining numbers were immediately masked by white squares (*Id.*). They had to remember the location of each concealed number and touch them in the correct order (*Id.*). The performance of a number of the chimpanzees on these seemingly impossible memory tasks was not only accurate, but better than human adults (*Id.*). Chimpanzees have an extraordinary working memory capability for

numerical recollection, better than adult humans, which underlies a number of mental skills related to mental representation, attention, and sequencing (*Id.*).[7]

Chimpanzees 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 (Savage-Rumbaugh Aff. at ¶26). They match an audio or video vocalization recording of a familiar chimpanzee or human to her photograph (Fugate Aff. at ¶16). They translate symbolically encoded information and into any non-symbolic mode (Savage-Rumbaugh Aff. at ¶26). When shown an object's picture, they retrieve it by touch, and retrieve a correct object by touch when shown its symbol (*Id.*).

On June 26, 2013, the National Institutes of Health ("NIH") announced the agency's decisions with respect to recommendations concerning the use of chimpanzees in NIH-supported research by The Working Group on the Use of Chimpanzees in NIH-Supported Research within the Council of Councils' Recommendation. (Affidavit of Steven M. Wise ("Wise Aff.") annexed as Exhibit A). These included acceptance of the following recommendations of The Working Group:

1. Working Group Recommendation EA1: "Chimpanzees must have the opportunity to live in sufficiently large, complex, multi-male, multi-female social groupings, ideally consisting of at least 7 individuals. Unless dictated by clearly documented medical or social circumstances, no chimpanzee should be required to live alone for extended periods of time. Pairs, trios, and even small groups of 4 to 6 individuals do not provide the social complexity required to meet the social needs of this cognitively advanced species. When chimpanzees need to be housed in groupings that are smaller than ideal for longer than necessary, for example, during routine veterinary examinations or when they are introduced to a new social group, this need should be regularly reviewed and documented by a veterinarian and a primate behaviorist." (Wise Aff. Exh. A, p. 5).

[7] These remarkable similarities between humans and chimpanzees are not limited to autonomy, but extend to personality and emotion (King Aff. at ¶¶12-28).

2. Working Group Recommendation EA4: "Chimpanzees should have the opportunity to climb at least 20 ft (6.1m) vertically. Moreover, their environment must provide enough climbing opportunities and space to allow all members of larger groups to travel, feed, and rest in elevated spaces." (Wise Aff. Exh. A, pp. 8-9).
3. Working Group Recommendation EA5: "Progressive and ethologically appropriate management of chimpanzees must include provision of foraging opportunities and diets that are varied, nutritious, and challenging to obtain and process." (Wise Aff. Exh. A, pp. 9-10).
4. Working Group Recommendation EA6: "Chimpanzees must be provided with materials to construct new nests on a daily basis." The NIH *accepted* this recommendation. (Wise Aff. Exh. A, pp. 10-11).
5. Working Group Recommendation EA8: "Chimpanzee management staff must include experienced and trained behaviorists, animal trainers, and enrichment specialists to foster positive human-animal relationships and provide cognitive stimulation[.]" (Wise Aff. Exh. A, pp. 11-12).

Sitting on 190 acres in Fort Pierce, Florida, Save the Chimps provides permanent homes for roughly 260 chimpanzees on twelve three-to-five-acre open-air islands that contain hills and climbing structures and that provide the opportunity for the chimpanzees to make choices about their daily activities. (Affidavit of Molly Polidoroff ("Polidoroff Aff.") at ¶7, ¶10). Chimpanzees who previously lived alone or in very small groups for decades become part of large and natural chimpanzee families. (*Id.* at ¶7). 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. (*Id.* at ¶10). Save the Chimps has over 50 employees including two full time veterinarians that provide 24-hour coverage with a support staff of technicians and assistants. (*Id.* at ¶9, ¶15).

III. ARGUMENT

A. PETITIONER HAS STANDING TO FILE THIS PETITION.

For centuries, Anglo-American common law and statutory law have recognized that third parties may bring habeas corpus cases on behalf of detained persons. CPLR 7002(a) provides: "[a] person illegally imprisoned or otherwise restrained in his 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). *E.g.*, *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (unrelated third parties sought common law writ of habeas corpus on behalf of black slave imprisoned on a ship); *Case of the Hottentot Venus*, 13 East 185, 104 Eng. Rep. 344 (K.B. 1810) (Abolitionist Society sought common law writ of habeas corpus to determine whether an African woman was being exhibited in London of her own free will).

New York has long recognized broad common law next friend representation in habeas corpus cases. *See Lemmon v. People*, 20 N.Y. 562 (1860) (as he had in other cases, the free black abolitionist dock worker, Louis Napoleon, sought a writ of habeas corpus on behalf of eight detained slaves with whom he had no relationship); *Holzer v. Deutsche Reichsbahn Gesellschaft*, 290 N.Y.S. 181, 192 (Sup. Ct. 1936) ("[i]n 1852 Mrs. Lemmon, of Virginia, proceeded to Texas via New York, with eight negro slaves. . . . Upon her arrival in New York a free negro, as next friend, obtained a writ of habeas corpus which was sustained"), *aff'd in part, modified in part*, 277 N.Y. 474 (1938); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846) (as he would in *Lemmon*, *supra*, the dock worker, Louis Napoleon, sought a writ of habeas corpus on behalf of a slave with whom he had no relationship); *People v. McLeod*, 3 Hill 635, 647 note j (N.Y. 1842) ("every Englishman . . . imprisoned by any authority . . . has an undoubted right, by his agents or *friends*, to . . . obtain a writ of habeas corpus") (citations omitted, emphasis added). *See also People ex rel. Turano v. Cunningham*, 57 A.D.2d 801 (1st Dept. 1977) (habeas corpus petition filed by "next friend" of incarcerated inmate); *State v. Lascaris*, 37 A.D.2d 128 (4th Dept. 1971); *People ex rel. Hubert v. Kaiser*, 150 A.D. 541, 544 (1st Dept. 1912) (habeas corpus petition filed by "next friend" of incarcerated inmate); *People ex rel. Sheldon v. Curtin*, 152 A.D. 364 (4th

Dept. 1912) (habeas corpus petition filed by "next friend" of woman detained at the Western House of Refuge for Women); *People ex rel. Rao v. Warden of City Prison*, 11 N.Y.S.2d 63 (Sup. Ct. 1939) (habeas corpus petition filed by "next friend" of prisoner). In view of these authorities, Petitioner has standing to file the Habeas Petition on behalf of Hercules and Leo.

B. VENUE IS PROPER IN THIS COURT.

CPLR 7002(b) provides, in relevant part: "a petition for the writ shall be made to: 1. the supreme court in the judicial district in which the person is detained; or . . . 3. *any justice of the supreme court*[.]" (emphasis added). *See also People v. Hanna*, 3 How. Pr. 39, 41-43 (N.Y. Sup. Ct. 1847) ("a justice of the supreme court has power, under the provisions of the statute, to allow this writ, notwithstanding there may be an officer in the county where the relator is alleged to be restrained of his liberty, authorised to exercise the same power"). The Habeas Petition is therefore properly made to this Court notwithstanding that Hercules and Leo are not detained in New York County.

Further, this Court should make the Order to Show Cause & Writ of Habeas Corpus returnable to New York County. Pursuant to CPLR 7004(c), a writ *must* be returnable to the county in which it is issued except: a) where the writ is to secure the release of a person from a "state institution," it must be made returnable to the county of detention; or b) where the petition was made to a court outside of the county of detention, the court *may* make the writ returnable to such county. Hercules and Leo are not detained in a "state institution" within the meaning of 7004(c) because that section applies only to state institutions that incarcerate inmates or institutionalize mental patients; otherwise the writ should normally be returned to the county of issuance. *Hogan v. Culkin*, 18 N.Y.2d 330, 333 (1966); *Application of Holbrook*, 220 N.Y.S.2d 382, 384 (Sup. Ct. 1961). The "purpose of the rule is to relieve the wardens of State prisons of having to transport the inmates to a county other than the county of detention and incur travel expenses to distant courthouses." *People ex rel. Cordero v. Thomas*, 329 N.Y.S.2d 131, 133-34 (Sup. Ct. 1972) (return was not required to be made in the county of detention in an Adolescent Remand Shelter, as the "relator is not being detained in a State prison" and thus, the "writ was

properly issued and made returnable in Kings County"). *See also State ex rel. Cox v. Appelton*, 309 N.Y.S.2d 290, 292 (Sup. Ct. 1970) (holding that a state-run training school for children was not a "state institution" within the meaning of the rule and thus, the writ was properly returned to the county where the suit was filed).

Hercules and Leo are not inmates detained in a prison, state mental institution, or similar state institution. Furthermore, Petitioner is not demanding their production, but is seeking an order that requires Respondents to show cause, within the meaning of CPLR 7003(a), why the persons "detained should not be released." The provision regarding "state institutions" was added to the statute solely to "obviate the administrative, security and financial burdens entailed in requiring prison authorities to produce inmates pursuant to such writs in a county other than that in which they were detained[.]" *Hogan*, 18 N.Y.2d at 333 (citations omitted). None of those concerns are present in this case. *See Appelton*, 309 N.Y.S.2d at 292 (where habeas corpus action was commenced by show cause order because the petitioner's production was not necessary, the writ was returnable to the county of filing rather than the county of detention). This Court should therefore make the writ returnable to New York County, unless some good reason exists to make it returnable to the Supreme Court Suffolk County.

C. RES JUDICATA DOES NOT BAR THIS PETITION FOR A COMMON LAW WRIT OF HABEAS CORPUS.

Neither issue preclusion nor claim preclusion apply to the New York common law writ of habeas corpus. *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); *People ex rel. Sabatino v. Jennings*, 221 A.D. 418, 420 (4th Dept. 1927), *aff'd*, 246 N.Y. 624 (1927). 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). Where "a writ of habeas corpus has been dismissed and the prisoner continues to be held in custody, the prior adjudication is held not to be a bar to a new application for a writ of habeas corpus, even though the grounds may be the same as those previously passed upon." *Post v. Lyford*, 285 A.D. 101, 104-05 (3d Dept. 1954).

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." *Id.* Therefore, "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 Brady*, 56 N.Y. at 191-92; *Post*, 285 A.D. at 104-05; *Jennings*, 221 A.D. at 420; *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); *People ex rel. Butler v. McNeill*, 219 N.Y.S.2d 722 (Sup. Ct. 1961). 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. See Post*, 285 A.D. at 104-05.

A court is not required to issue a writ from a successive petition for a writ of habeas corpus 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. CPLR 7003(b). In the case *sub judice*, not one element is satisfied.

First, the legality of Hercules and Leo's detention has not been determined in a prior proceeding for a writ of habeas corpus by a court of this State.[8] The Supreme Court, Suffolk County construed the first petition for a common law writ of habeas corpus to demand an order to "show cause" presumably within the meaning of CPLR 403 and summarily denied it without a hearing and without issuing the writ, ordering: "The Court finds that pursuant to §2214(d) of the CPLR there is no reason [for] this matter to be brought by means of an OTC [order to show cause]." (Exh. 1). The Second Department then dismissed Petitioner's appeal on the ground the

[8] The burden is on the party asserting preclusion to demonstrate that any prior determination was on the merits. *Clark v. Scoville*, 198 N.Y. 279, 283-84 (1910); *Litz Enterprises, Inc. v. Stand. Steel Industries, Inc.*, 57 A.D.2d 34, 38 (4th Dept. 1977).

petition was an *ex parte* order to show cause, the denial of which was non-appealable, without providing Petitioner the opportunity of briefing the merits of the habeas corpus claim. (Exh. 2).

Although the Supreme Court suggested that chimpanzees are not "persons" within the meaning of Article 70 (Exh. 1), this was *not* a ruling on the merits. "[W]hen it appears therefrom that the judgment might have been rendered on the merits, or upon a ground not involving the merits, the presumption is that it was not upon the merits." *Clark*, 198 N.Y. at 283-84. It must appear, "'by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined.'" *Id.* (citation omitted). That the Second Department concluded that the "order to show cause" was a non-appealable order demonstrates that the prior determination was not a ruling on the merits. As such, Petitioner was not given a "full and fair" opportunity to litigate the legal issue of personhood for Hercules and Leo. *See Allen v. New York State Div. of Parole*, 252 A.D.2d 691 (3rd Dept. 1998) (court refused subsequent petition as petitioner had been afforded "a full and fair opportunity . . . to litigate the issues"); *McAllister v. Div. of Parole of New York State*, 186 A.D.2d 326, 327 (3rd Dept. 1992) (court refused subsequent petition as petitioner "had a full and fair opportunity to litigate the timeliness issue in the habeas corpus proceeding").

Moreover, the order summarily dismissing the first petition did not state that it was dismissing it "as a matter of law." (Exh. 1). The "presumption is that it was not upon the merits." *Clark*, 198 N.Y. at 283-84. *Cf. Mays v. Whitfield*, 282 A.D.2d 721 (2d Dept. 2001) (dismissal of a prior action for failure to prosecute is not a dismissal on the merits and does not bar a second action based upon the same facts unless the order specifies otherwise); *San Filippo v. Adler*, 278 A.D.2d 402 (2d Dept. 2000) (same); *Gallo v. Teplitz Tri-State Recycling, Inc.*, 254 A.D.2d 253, 253-54 (2d Dept. 1998) (trial court's failure to dismiss action with prejudice or on the merits cannot be construed as a dismissal on the merits); *Lewin v. Yedvarb*, 61 A.D.2d 1025 (2d Dept. 1978) (dismissal for failure to prosecute when trial court does not specifically state it was with prejudice, or on the merits, is not a dismissal on the merits); *Struve v. Bingham*, 244 A.D.2d 178 (1st Dept. 1997) (same); *Nems Enterprises, Ltd. v. Seltaeb, Inc.*, 24 A.D.2d 739 (1st Dept. 1965)

(trial court order of dismissal did not specify it was on the merits). The prior proceeding should therefore not influence this second proceeding. *Lowendahl v. Baltimore & O.R. Co*., 247 A.D. 144, 148-49 (1st Dept. 1936), *aff'd*, 272 N.Y. 360 (1936). *See* 73A N.Y. Jur. 2d Judgments § 411.

"Vexatious and harassing repetition of invalid claims already heard and decided, or purposeful withholding of alternative grounds for the writ in an earlier application 'in the hope of being granted two hearings rather than one or for some other such reason'" are also grounds to dismiss successive habeas corpus applications. *People ex rel. Leonard HH*, 148 A.D.2d at 80-81. With respect to the case at bar, no court in the State has determined the legality of the detention of Hercules and Leo. The first proceeding was decided on a procedural ground and not on the merits. Petitioner's claims are colorably valid. Hercules and Leo remain unlawfully confined and no court has required Respondents to justify their detention of them. Most importantly, no appellate court has heard and decided the legality of the merits. *Cf. People ex rel. Bravata v. Morhous*, 273 A.D. 929, 929 (3rd Dept. 1948).

In *McNeill*, the petitioner had made four prior applications for habeas corpus to the court, and in "none was he successful." 219 N.Y.S.2d at 724. Nevertheless, the court ruled that "the ban of res judicata cannot operate to preclude the present proceeding." *Id.* Significantly, this second attempt to invoke a common law writ of habeas corpus on behalf of these chimpanzees is necessary only because the Second Department erroneously concluded the Petitioner was unable to appeal. Most importantly, this Court should grant the petition and issue the Order to Show Cause & Writ of Habeas Corpus because justice so requires. The Habeas Petition, attached Expert Affidavits, and supporting Memorandum of Law demonstrate that Petitioner is presenting a meritorious argument. The intense local, state, national, and international news coverage of the Petitioner's New York habeas corpus litigation on behalf of chimpanzees over the previous twelve months also demonstrates that the issues raised are of great public interest.

If Petitioner is correct in its assertion of personhood and is refused the opportunity for a full and fair hearing, Hercules and Leo will be condemned to a lifetime of imprisonment in small

cages, biomedical research, the destruction of their autonomy, social isolation, intellectual, emotional, and social stunting, severe emotional distress, feelings of hopelessness, and more. Requiring Respondents, for the first time, to justify their detention of Hercules and Leo is their only remedy. *See* CPLR 7008 ("The [return] affidavit shall fully and explicitly state . . . the authority and cause of the detention . . ."). *See People ex rel. Anderson*, 325 N.Y.S.2d at 833.

D. A PERSON ILLEGALLY IMPRISONED IN NEW YORK IS ENTITLED TO A COMMON LAW WRIT OF HABEAS CORPUS.

1. "Person" is not a synonym for "human being," but designates an entity with the capacity for legal rights.

"[U]pon according legal personality to a thing the law affords it the rights and privileges of a legal person[.]" *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972) (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* 521-523 (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), 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). 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").[9] 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).

"Person" may designate an entity broader or qualitatively different than a human being. Corporations have long been "persons" within the meaning of the Fourteenth Amendment to the United States Constitution. *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 Zealand's Whanganui River Iwi as a legal person that owns its

[9] *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).

riverbed. [10] 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. This permitted that sacred text, the Sri Guru Granth Sahib, to own and possess property. Several 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, para, 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).

In short, the struggles over the legal personhood of human fetuses,[11] slaves,[12] Native Americans,[13] women,[14] corporations,[15] and other entities have never been over whether they are human, or whether they are able to bear duties and responsibilities, but whether justice demands that they count in law. That Hercules and Leo are chimpanzees does not mean they may never count as legal persons. Who is deemed a legal 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 before this Court is whether Hercules and Leo, two unlawfully imprisoned chimpanzees, are legal persons who "count" for the purpose of a common law writ of habeas corpus in the state of New

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[10] *WHANGANUI IWI and THE CROWN* (August 30, 2012), available at http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CWhanganuiRiverAgreement.pdf (last viewed November 20, 2013).

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

[12] *Compare 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) *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).

[13] *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (Native Americans are "persons" within the meaning of the Federal Habeas Corpus Act).

[14] *In re Goodell*, 39 Wis. 232, 240 (1875) (women could not be lawyers); Blackstone, *Commentaries on the Law of England* *442 (1765-1769) ("By marriage, the husband and wife are one person in law: that is the very being or legal existence of the woman is suspended during the marriage . . . ").

[15] 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).

York. In the following sections, Petitioner will demonstrate that, both as a matter of New York common law liberty and common law equality, Hercules and Leo should "count" and be recognized as legal persons possessed of the common law right to bodily liberty that the common law of habeas corpus protects.

2. New York recognizes the common law writ of habeas corpus.

Hercules and Leo are entitled to a common law writ of habeas corpus. The New York "common-law writ of habeas corpus [is] a writ in behalf of liberty, and its purpose [is] to deliver a prisoner from unjust imprisonment and illegal and improper restraint." *People ex rel. Pruyne v. Walts*, 122 N.Y. 238, 241-42 (1890). It "is not the creature of any statute . . . and exists as a part of the common law of the State." *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875). *E.g.*, *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. Patrick v. Frost*, 133 A.D. 179, 187-88 (2d Dept. 1909); *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). *See* Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013).

In New York, the common law writ of habeas corpus "lies in all cases of imprisonment by commitment, detention, confinement or restraint, for whatever cause, or under whatever pretence." *McLeod*, 3 Hill at 647 note j. Its "scope and flexibility . . . its capacity to reach all manner of illegal detention - its ability to cut through barriers of form and procedural mazes- have always been emphasized and jealously guarded by courts and lawmakers." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). *See, e.g.*, *People ex rel. Keitt v. McCann*, 18 N.Y.2d 257, 263 (1966).

The procedure for using the common law writ of habeas corpus is set forth in Article 70, CPLR 7001-7012.[16] However, "[t]he 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." Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013). *E.g.*, *Koehler*, 129 A.D.2d at 30.

3. Common law natural persons are presumed free and Respondents must therefore prove they are not unlawfully imprisoning Hercules and Leo.

Its roots anchored into the depths of English history, the common law has been "viewed as a principle safeguard against infringement of individual rights." Judith S. Kaye, *Forward: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L. J. 727, 730 (1992) (hereafter "Judith S. Kaye"). All 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) (on the question of 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.).

The common law of England, incorporated into New York law, was long *in favorem libertatis* ("in favor of liberty").[17] 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) ("prima facie, a man is entitled to personal freedom, and the absence of bodily

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

[17] References to the overarching value of bodily liberty may be found as early as Pericles' Funeral Oration, Thucydides, *The Complete Writings of Thucydides - The Peloponnesian War*, sec. II. 37, at 104 (1951).

restraint . . ."); *In re Kirk*, 1 Edm. Sel. Cas. at 327 ("In a case involving personal liberty [of a fugitive slave] where the fact is left in such obscurity that it can be helped out only by intendments, the well established rule of law requires that intendment shall be in favor of the prisoner"); *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 are in accord 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").

Respondents must prove their imprisonment of Hercules and Leo is legally sufficient. *See People ex rel. Lebelsky v. Warden of New York Cnty. Penitentiary*, 168 N.Y.S. 704, 706 (Sup. Ct. 1917). After a petitioner makes a prima facie showing of entitlement to the issuance of the writ by meeting the requirements of CPLR 7002(c) (requiring the petitioner to state that the person is "detained" and the "nature of the illegality"), the court must issue the writ, or show cause order, without delay. CPLR 7003(a). The burden then shifts to the respondents to present facts that show the detention is lawful. CPLR 7006(a). The respondents' return must:

> [f]ully and explicitly state whether the person detained is or has been in the custody of the person to whom the writ is directed, the authority and cause of the detention, whether custody has been transferred to another, and the facts of and authority for any such transfer.

CPLR 7008(b). If the respondents fail to set forth the cause of and authority for the detention, the petitioner must be discharged. CPLR 7010(a). *See People ex re. Wilson v. Flynn*, 106 N.Y.S. 1141 (Sup. Ct. 1907).

In the case at bar, if Hercules and Leo are "persons" for the purpose of a common law writ of habeas corpus because they are autonomous and self-determining, then their detention is unlawful in the absence of positive law. *See Somerset*, 98 Eng.Rep. 499; *Lemmon*, 20 N.Y. at 604-05, 617, *See also In re DeSanto*, 898 N.Y.S.2d 787, 789 (Sup. Ct. 2010).

Accordingly, this Court should issue the Order to Show Cause & Writ of Habeas Corpus on behalf of Hercules and Leo that requires Respondents to provide a reason for imprisoning them and then determine its legal sufficiency after full oral argument.

4. Because Hercules and Leo are being unlawfully detained, they are entitled to immediate discharge.

An unlawfully imprisoned person in New York must be discharged forthwith. *People ex re. Stabile v. Warden of City Prison*, 202 N.Y. 138, 152 (1911). This may require discharging the person 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. Before the Civil War, children detained as slaves were discharged through common law writs of habeas corpus into another's care. *Lemmon*, 20 N.Y. at 632 (discharged slaves included two seven-year-olds, a five-year-old, and a two-year-old); *Commonwealth v. Taylor*, 44 Mass. 72, 72-74 (1841) (seven or eight year old slave discharged into care of the Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Aves*, 35 Mass. 193 (1836) (seven-year-old girl discharged into custody of 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) (legally manumitted child discharged).

New York courts have frequently discharged free minors from industrial training schools or other detention facilities through the common law writ of habeas corpus, despite the fact that such minors would 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) ("petition granted and relator's son ordered discharged from custody forthwith."), *aff'd*, 29 N.Y.2d 17 (1971); *People ex rel. Silbert v. Cohen*, 36 A.D.2d 331, 332 (2d Dept. 1971) ("juveniles in question discharged"), *aff'd*, 29 N.Y. 2d 12 (1971); *People ex rel. Margolis v. Dunston*, 174 A.D.2d 516, 517 (1st Dept. 1991); *People ex rel. Kaufmann v. Davis*, 57 A.D.2d 597 (2d Dept. 1977); *People ex rel. Cronin v. Carpenter*, 25 Misc. 341, 342 (N.Y. Sup. Ct. 1898); *People ex rel. Slatzkata v. Baker*, 3 N.Y.S. 536, 539 (N.Y.

Super. Ct. 1888); *In re Conroy*, 54 How. Pr. at 433-34; *People ex rel. Soffer v. Luger*, 347 N.Y.S. 2d 345, 347 (N.Y. Sup. Ct. 1973).

Minors have been discharged from mental institutions pursuant to habeas corpus 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 have child apprentices, *People v. Hanna*, 3 How. Pr. 39, 45 (N.Y. Sup. Ct. 1847) (ordering "discharge" of a minor unlawfully held as an apprentice upon writ of habeas corpus brought on his behalf); *In re M'Dowle*, 8 Johns 328 (Sup. Ct. 1811), and incapacitated adults, *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996) (elderly and ill woman showing signs of dementia); *State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982) ("elderly and apparently sick lady"); *Siveke v. Keena*, 441 N.Y.S. 2d 631 (Sup. Ct. 1981) (elderly and ill man).

That Petitioner seeks the discharge of Hercules and Leo to a chimpanzee sanctuary rather than into the wild or onto the streets of New York does not preclude them from habeas corpus relief. *See 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); *People ex rel. LaBelle v. Harriman*, 35 A.D.2d 13, 15 (3rd Dept. 1970) ("Although relator is also incarcerated on the murder charge, a concededly valid detention, and this writ will not secure his freedom, *habeas corpus may be used to obtain relief other than immediate release* from physical custody.") (emphasis added); *People ex rel. Meltsner v. Follette*, 32 A.D.2d 389, 391 (2d Dept. 1969) ("The sustaining of the writ, however, does not require absolute discharge.") (citing *Johnston* and *Saia*); *cf. People ex rel. Rohrlich v. Follette*, 20 N.Y.2d 297, 302 (1967). The case at bar is exactly analogous to the relief accorded to child slaves, juveniles, and the incapacitated elderly, *supra*.

In *People ex rel. Ardito v. Trujillo*, 441 N.Y.S.2d 348, 350 (Sup. Ct. 1981), the petitioner, an adjudicated incompetent, sought a writ of habeas corpus to obtain a hearing to convert her criminal commitment to civil status. The respondent psychiatric center argued that the "availability of a writ of habeas corpus is rigidly restricted to situations in which the relator seeks absolute release from detention," citing "cases [then] decided nearly half a century ago[.]" *Id.* The court rejected the respondent's argument, noting that more recently, "the Court of Appeals has stated that the narrow view of the grounds for habeas corpus relief has . . . undergone a . . . change." *Id.* (citing *People ex rel. Keitt*, 18 N.Y.2d at 273). The court held that the term "discharge" under CPLR 7010 was broad and that relief "may be other than absolute discharge." *Id.* (citations omitted). The court made abundantly clear that the fact that the petitioner "is not seeking absolute release from detention does not function as a bar to her application for a writ of habeas corpus." *Id.*

As such, habeas corpus may even be used to seek a transfer from one facility to another. *See Mental Hygiene Legal Services ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989) (habeas corpus proper to transfer mental patient from secure facility to non-secure facility); *People ex rel. Jesse F. v. Bennett*, 242 A.D.2d 342 (2d Dept. 1997) ("habeas corpus is an appropriate mechanism for transfer"); *People ex rel. Richard S. v. Tekben*, 219 A.D.2d 609, 609 (2d Dept. 1995); *McGraw v. Wack*, 220 A.D.2d 291, 293 (2d Dept. 1995); *People ex rel. Meltsner*, 32 A.D.2d at 391-92 (sustaining writ of habeas corpus and holding that "the respondent should be directed to afford the relator treatment consistent with his sentence or, if such treatment not be readily available at Green Haven Prison, to transfer the relator to a correctional institution where such treatment is available or to release him."); *State ex rel. Henry L. v. Hawes*, 667 N.Y.S.2d 212, 217 (Co. Ct. 1997) ("this court will direct the *immediate transfer* of relator from Sunmount to a non-secure facility such as Wassaic.") (emphasis added). Such has been the law in New York for nearly a century.

Petitioner however is not challenging the conditions of Hercules and Leo's confinement, nor is Petitioner requesting the transfer of Hercules and Leo from one facility to another. Rather,

Petitioner is seeking their immediate release from Respondents' unlawful detention and placement in an environment in which their right to bodily liberty may be fully enjoyed. Habeas corpus is therefore available to them and this Court should order their discharge to Save the Chimps forthwith.

E. HERCULES AND LEO ARE "PERSONS" WITHIN THE MEANING OF THE COMMON LAW OF HABEAS CORPUS AND THEREFORE CPLR 7002(A).

1. The term "person" in Article 70 refers to its meaning at common law.

"Person" in Article 70 refers to its meaning under the New York common law of habeas corpus. This conclusion is supported by three reasons: (1) the legislature's decision not to define "person" in Article 70; (2) the fact that the CPLR, including Article 70 in particular, 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 the legislature did not define "person" in CPLR Article 70, a court must look to its common law meaning in a common law habeas corpus action. 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*, 441 N.Y.S. 2d at 633 ("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. A review of certain case law is further indication that the utilization of the writ is not to be so restrictively construed.").

Generally, in New York, procedural statutes that employ undefined words refer to their common law meaning, particularly where, as here, the action is derived from the common law. *See P.F. Scheidelman & Sons, Inc. v Webster Basket Co*., 257 N.Y.S. 552, 554-55 (Sup. Ct. 1932) (otherwise undefined, "distress" and "distrain" "must be given their common law meaning"), *aff'd*, 236 A.D. 774 (4th Dept. 1932); *Drost v. Hookey*, 25 Misc. 3d 210, 212 (Dist. Ct 2009) (as neither "tenant at will" nor licensee" were defined by Section 713(7) of the New York Property Actions and Proceedings Law, courts look to their common law definitions). This

is true in other states too. *E.g.*, *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); *Casto v. Casto*, 404 So. 2d 1046, 1048 (Fla. 1981) (courts look to common law definitions of otherwise undefined words "rendition" of judgment and "entry" of judgment to determine time limit in which to appeal); *Addington v. State*, 199 Kan. 554, 561 (1967) (courts look to common law definition of otherwise undefined word "venue" in habeas corpus petition).

Second, the CPLR governs only procedure and may neither abridge nor enlarge a party's substantive rights. CPLR 102; CPLR 101. Therefore it may not abridge Hercules and Leo's substantive common law habeas corpus rights. This necessarily includes the threshold determination of whether Hercules and Leo are "persons" within the meaning of the New York common law of habeas corpus. The *Tweed* Court emphasized, in reference to the procedural habeas corpus statute in effect at the time, that "the act needs no interpretation and is in full accord with the common law." 60 N.Y. at 569.

Third, 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). It "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." *Tweed*, 60 N.Y. at 566. *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"). *See also 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").

The question of 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. If Article 70 interferes with a court's ability to determine whether Hercules and Leo are "persons" within the meaning of the common law of habeas corpus, it violates the Suspension Clause. Otherwise the legislature could permanently strip judges of their ability to determine who lives, who dies, who is enslaved, and who is free.[18]

a. The New York common law freely changes when reason, facts, and an evolving sense of justice so require.

Hercules and Leo's legal thinghood derives from the common law. 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 slavery "so *odious* that nothing can be suffered to support it but positive law." Lofft at 19; 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.

[18] Petitioner argues, *infra* at Section G, that the recent Fourth Department decision in *Nonhuman Rights Project v. Presti* amounted to a judicial suspension of the common law writ of habeas corpus.

Cas. 315 (citing *Somerset* and *Forbes v. Cochran, 107 Eng. Rep. 450, 467 (K.B. 1824)*); *In re Tom*, 5 Johns. 365 (*per curiam*). Non-slaves have long employed it in New York, including (1) apprentices and indentured servants, *e.g.*, *People v. Weissenbach*, 60 N.Y. 385, 393 (1875); *In re M'Dowle*, 8 Johns. 328; (2) infants, *Weissenbach*; *M'Dowle*; (3) the incompetent elderly, *Schuse*, 227 A.D.2d 969; and (4) mental incompetents, *Johnston*, 9 N.Y.2d at 485; *Bennett*, 242 A.D.2d 342; *In re Cindy R.*, 970 N.Y.S.2d 853 (Sup. Ct. 2012).

It is not just in the area of habeas corpus that the New York courts freely revise the common law when justice requires, 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). "*We abdicate our own function*, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule" the Court in *Woods* declared. 303 N.Y. at 355 (emphasis added). *See also Flanagan v. Mount Eden General Hosp.*, 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") (emphasis added); *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").

The common law is "lawmaking and policymaking by judges . . . in principled fashion, to fit a changing society." Judith S. 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 of Appeals 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).

Therefore, 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). 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.* (emphasis added) (quoting *Funk v. United States*, 290 U.S. 371, 382 (1933)). *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"); *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 391 (1916) (legal principles "are whatever the needs of life in a developing civilization require them to be"); *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")).

b. As Hercules and Leo are autonomous and self-determining, they are common law "persons" entitled to the common law right to bodily liberty that the common law of habeas corpus protects.

"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 United States Supreme Court famously held that

> 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 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). *See State v. Perry*, 610 So. 2d 746, 767 (La. 1992) ("The retributory theory of punishment presupposes that each human being possesses autonomy, a kind of rational freedom which entitles him or her to dignity and respect as a person which is morally sacred and inviolate"). 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.*, *Matter of M.B.*, 6 N.Y.3d 437, 439 (2006); *Rivers*, 67 N.Y.2d at 492; *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (1914).[19]

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); *Matter of Storar*, 52 N.Y.2d 363, 378 (1981), *cert. denied*, 454 U.S. 858 (1981). This "insure[s]

[19] This common law right under New York law is co-extensive with the liberty interest protected by the Due Process Clause of the New York Constitution. *Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218, 226 (1990); *Rivers*, 67 N.Y.2d at 493.

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 guarantees the right to defend oneself against criminal charges without counsel. *Matter of Kathleen K.*, 17 N.Y.3d 380, 385 (2011). 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 at 378. Even the never-competent – severely mentally retarded, the severely mentally ill, and the permanently comatose – who will never be competent, lack the ability, 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; *Delio v. Westchester Cnty. Med. Ctr.*, 129 A.D.2d 1, 13-14 (2d Dept. 1987); *Matter of Mark C.H.*, 28 Misc. 3d 765, 775 n.25 (Sur. Ct. 2010) (quoting *Saikewicz*, 373 Mass. at 746); *In re New York Presbyterian Hosp.*, 181 Misc. 2d 142, 151 n.6 (Sup. Ct. 1999).[20]

Chimpanzees' capacities for autonomy and self-determination, which subsume many of their numerous complex cognitive abilities, as set forth in the Expert Affidavits, include possession of an autobiographical self, episodic memory, self-consciousness, self-knowingness, self-agency, referential and intentional communication, empathy, a working memory, language, metacognition, numerosity, and material, social, and symbolic culture, their ability to plan, engage in mental time-travel, intentional action, sequential learning, mediational learning, mental state modeling, visual perspective-taking, cross-modal perception; their ability to understand

[20] "[I]t is inconsistent with our fundamental commitment to the notion that no person or court should substitute its judgment as to what would be an acceptable quality of life for another." *O'Connor*, 72 N.Y. 2d. at 530. *But see id.* at 537 (Hancock, J. concurring) (criticizing *Storar* as it "ties the patient's right of self-determination and privacy solely to past expressions of subjective intent"); *id.* at 540-41 (Simons, J., dissenting) (criticizing *Storar's* refusal to adopt a substituted judgment rule). In 2002, the legislature adopted a substituted judgment rule, SCPA 1750(2).

cause-and-effect and the experiences of others, to imagine, imitate, engage in deferred imitation, emulate, to innovate and to use and make tools.

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*." (Wise Aff. Exh. A, p. 11) (emphasis added). 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*.) (emphasis added).

Autonomous, self-determined, able to choose how to live their lives, Hercules and Leo are entitled to common law personhood and the common law right to bodily liberty protected by New York common law habeas corpus.

2. Hercules and Leo are entitled to the common law equality right to bodily liberty that the common law of habeas corpus protects.

Hercules and Leo are 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.[21] Article 1, § 11 of the New York

[21] 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"); *Israel Women's Network v. Government*, HCJ 453/94. 454/94, ¶22 (Israel High Court of Justice 1994) ("The principle of equality, which . . . 'is merely the opposite of discrimination' . . . has long been recognized in our law as one of the principles of fairness and justice which every public authority is commanded to withhold") (citation omitted); *Mabo v. Queensland* (no. 2), 175 CLR 1 F.C. 92-014, ¶29 (Australian Supreme Court 1992) ("equality before the law . . . is [an] aspiration[] of the contemporary Australian legal system"). *See also* Alexis de Toqueville, *Democracy in America*, Book II, Chapter 1, at 65 (Digireads.com Publishing 2007) ("Democratic nations are at all times fond of equality . . . for equality their passion is ardent, insatiable, incessant, invincible; they call for equality in freedom; and if they

Constitution contains both an Equal Protection Clause, modeled on the Fourteenth Amendment to the United States Constitution, 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:

> The Equal Protection Clause of the Fourteenth Amendment had been thoroughly debated and adopted by Congress and ratified by our Legislature after the Civil War, and the concepts underlying it are older still. Indeed, 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 (*see [citation omitted]* Charter of Liberties and Privileges, 1683, § 15, reprinted in 1 Lincoln, Constitutional History of New York, at 101).

Id.

New York equality values are embedded into New York common law. For example, under the 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) (quoting *Root v. Long Island R. Co*., 114 N.Y. 300, 305 (1889) ("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.'")); *New York Tel. Co. v. Siegel-Cooper Co.*, 202 N.Y. 502, 508 (1911) (quoting *Lough v. Outerbridge*, 143 N.Y. 271, 278 (1894) ("'His charges must, therefore, be reasonable, and he must not unjustly discriminate against others")); *People v. King*, 110 N.Y. 418, 427 (1888) ("By the common law, innkeepers and common carriers are bound to furnish equal facilities to all, without discrimination, because public policy requires them so to do").

> The origins of the duty to serve and the recent direction of the case law suggest that a basic concern for individual autonomy animates the duty to serve. This concern recognizes the vulnerability of individuals to the arbitrary and unreasonable power of private entities. Realizing the importance to the individual of some goods, services, and associations, the duty to serve seeks to limit the

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cannot obtain that, they still call for equality in slavery"); United States Declaration of Independence (July 4, 1776) ("all men are created equal").

> power of the controlling entities by allowing exclusion only when based on fair and reasonable grounds.

Note, *The Antidiscrimination principle in the Common Law*, 102 HARVARD L. REV. 1993, 2001 (1989). Common law equality, which forbids discrimination founded on unreasonable means or unjust ends, also prohibits racial discrimination, and New York "has led in the proclamation and extension of its liberal policy favoring equality and condemning [racial] discrimination." *In re Young*, 211 N.Y.S 2d 621, 626 (Sup. Ct. 1961).

The Expert Affidavits demonstrate that genetically, physiologically, and psychologically, Hercules and Leo's interests in exercising their autonomy and self-determination is as fundamental to them as it is to a human being. Recall the United States Supreme Court's admonition 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[.]" *Botsford*, 141 U.S. at 251 (emphasis added). On this ground alone, this Court must hold that, as a matter of common law equality, Hercules and Leo are entitled to bodily liberty, and their right is protected by the common law of habeas corpus.

However, New York equality is not merely a product of its constitutions, statutes, and common law operating independently. Two decades ago, Chief Justice 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." Judith S. Kaye, *supra*, at 747. In harmony with the common law equality principles that forbid private discrimination founded on unreasonable means or unjust ends, the common law of equality embraces, at a 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) (quoting *Sweatt*

v. Painter, 339 U.S. 629, 635 (1950) ("'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities'")).[22]

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 of Appeals affirmed the constitutionality of New York's statutory limitation of marriage to opposite-sex couples. "*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 (emphasis added). The Court held the legislature could rationally conclude that same-sex relationships are more casual or temporary, to the detriment of children, and assume 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 (emphasis added).

In contrast, a classification's appropriateness is important to a court deciding the common law. It *should* decide what is right and wrong. Its job *is* to do the "right thing." This Court *should* recognize Hercules and Leo'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 Hercules and Leo have a common law right to bodily liberty sufficient to entitle them

[22] The New York Equal Protection Clause "is no broader in coverage than the federal provision." *Under 21, Catholic Home Bur. for Dependent Children v. City of New York*, 65 N.Y.2d 344, 360 n.6 (1985).

to a writ of habeas corpus and a chance to live the autonomous, self-determining life of which they are capable.

Hercules and Leo's common law classification as "legal things," unable to possess any legal rights, rests upon an illegitimate end. *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001), *cert. denied*, 534 U.S. 826 (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 United States Supreme Court struck down the so-called "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 (emphasis added). This statute 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), *cert. denied*, 525 U.S. 943 (1998) (emphasis added). *See Mason v. Granholm*, 2007 WL 201008 (E.D. Mich. 2007) (noting that *Romer* found that Colorado's Amendment 2 was "at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board," the Court struck down an amendment to the Michigan Civil Rights Act that prevented prisoners from suing for a violation of their civil rights while imprisoned as violating federal equal protection); *Goodridge*, 440 Mass. at 330 (same-sex marriage ban impermissibly "identifies persons by a single trait and then denies them protection across the board").

As it would be a tautology for the Equal Protection Clause to fail to demand that a legitimate public purpose or set of purposes based on some conception of the general good be the legislative end, it would be a tautology to determine whether class members are similarly situated for all purposes. The true test is "'whether they are similarly situated *for purposes of the law challenged.*'" *Kerrigan v. Comm'r of Public Health*, 289 Conn. 135, 158 (2008) (emphasis added) (quoting *Stuart v. Comm'r of Correction*, 266 Conn. 596, 601-02 (2003)).

Denying Hercules and Leo their common law right to bodily liberty solely because they are chimpanzees 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 Supreme Judicial Court of Massachusetts swept aside the argument that the legislature could refuse homosexuals 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 Hercules and Leo were human, this Court would instantly issue a writ of habeas corpus and discharge them immediately. Hercules and Leo are imprisoned for one reason: they are chimpanzees. Possessing that "single trait," they are "denie[d] . . . protection across the board," *Romer*, 517 U.S. at 633, to which their autonomy and ability to self-determine entitle them.

The great Yale historian of slavery, David Brion Davis, has recently written that human slaves were "animalized" to justify their brutal treatment and that "[t]he animalization of humans first required the 'animalization' of animals." David Brion Davis, *The Problem of Slavery in the Age of Emancipation*, 23 (2014). This required human "anthropodenial . . . a blindness to the humanlike characteristics of other animals, or the animal-like characteristics of ourselves." *Id.* at 24.

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 and the June 13, 2013 NIH acceptance of The Working Group on the Use of Chimpanzees in NIH-Supported Research within the Council of Councils' Recommendation 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.[23]

The Expert Affidavits attached to the Habeas Petition were submitted by some of the world's greatest working natural scientists. They confirm chimpanzees' extraordinarily complex, often human-like, autonomy and ability to self-determine. At every level, chimpanzees are today understood as beings entitled to extraordinary consideration; they have been edging toward personhood.

For centuries New York courts have rejected slavery. *See Jack v. Martin*, 14 Wend. 507, 533 (N.Y. 1835) ("Slavery is abhorred in all nations where the light of civilization and refinement has penetrated, as repugnant to every principle of justice and humanity, and deserving the condemnation of God and man"). The famous *Lemmon* case, 20 N.Y. 562, is acknowledged as "one of the most extreme examples of hostility to slavery in Northern courts[.]" Paul

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

Finkleman, *Slavery in the Courtroom* 57 (1985). Judges "kn[o]w 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." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). The legal thinghood of chimpanzees, at least with respect to their right to a common law writ of habeas corpus, has become an anachronism.[24]

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 Hercules and Leo's just equality claim to bodily liberty or reject equality. Abraham Lincoln understood that the act of extending equality protects it: "[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). The act of denying equality in order to enslave, based on a single trait, jeopardizes the equality of all.

Petitioner claims only that Hercules and Leo have a common law right to bodily liberty protected by the common law of habeas corpus. What, if any, other common law rights Hercules and Leo possess will be determined on a case-by-case basis. In *Byrn*, the Court of Appeals noted that fetuses are "persons" for some purposes in New York, 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. 31 N.Y.2d at 200. Equal protection

> can only be defined by the standards of each generation. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L.Rev. 1161, 1163 (1988) ("[T]he

[24] At least twenty-five large private research companies, including GlaxoSmithKline, PLC, Merck & Co., Inc., DuPont, AstraZeneca, PLC, Colgate-Palmolive Company, and Novo Nordisk have committed not to use chimpanzees in research. The Humane Society of the United States, "Companies with Invasive Chimpanzee Research Policies" (February 24, 2014), available at http://www.humanesociety.org/issues/chimpanzee_research/tips/companies_chimpanzee_policies.html#.Uwz6CvldWSo (last viewed October 27, 2014). The Board of Editors of *Scientific American* recently called for the end of captivity for such cognitively complex nonhuman animals as great apes, cetaceans, and elephants. "Free Willy – And His Pals," *Scientific American* 10 (March 2014).

> Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure."). The process of defining equal protection . . . begins by classifying people into groups. A classification persists until a new understanding of equal protection is achieved. The point in time when the standard of equal protection finally takes a new form is a product of the conviction of one, or many, individuals that a particular grouping results in inequality and the ability of the judicial system to perform its constitutional role free from the influences that tend to make society's understanding of equal protection resistant to change.

Varnum, 763 N.W. 2d at 877-78.

Finally, it is important to emphasize what Petitioner is *not* seeking. It is not seeking any rights on behalf of Hercules and Leo other than the common law right to bodily liberty that the common law of habeas corpus protects. Once deemed common law "persons" who possess the fundamental right to bodily liberty sufficient to trigger the protection of the common law of habeas corpus, what, if any, other common law rights Hercules and Leo may possess will be explored on a case-by-case basis.

3. <u>The New York legislature has determined that some nonhuman animals are capable of personhood rights.</u>

While this case presents a matter of first impression, it is noteworthy that New York public policy *already* recognizes personhood rights in some nonhuman animals, including Hercules and Leo. Specifically, New York is among the few states to *expressly* allow nonhuman animals to be trust "beneficiaries." *See* EPTL 7-8.1.

Hercules and Leo are beneficiaries of an *inter vivos* trust created by the Petitioner pursuant to EPTL 7-8.1 for the purpose of their care and maintenance once they are transferred to Save the Chimps. A true and correct copy of the trust is attached to the Habeas Petition as **Exhibit 5**. Consequently, they are "persons" 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) ("Beneficiaries may be natural or artificial persons, but they must be persons . . . In general, any person who is capable in law of taking an interest in property, may, to the extent of his legal capacity, and no further, become entitled to the benefits of the trust."), *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). *See In re Mills' Estate*, 111 N.Y.S.2d 622, 625 (Sur. Ct. 1952); *In re Estate of Howells*, 260 N.Y.S. 598, 607 (Sur. Ct. 1932). New York did not even recognize honorary trusts for nonhuman animals, which lack beneficiaries. *In re Voorhis' Estate*, 27 N.Y.S.2d 818, 821 (Sur. Ct. 1941).

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.[25] This section thereby acknowledged these nonhuman animals as "persons" capable of possessing legal rights. Accordingly, 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 Appellate Division 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 renumbered EPTL 7-6.1 as EPTL 7-8.1, removed "Honorary" from the statute's title, "Honorary Trusts for Pets," leaving it to read, "Trusts for Pets,"[26] and amended section (a) to read, in part: "A trust for the care of a designated domestic or pet animal is valid. . . . *Such trust shall terminate when the living animal beneficiary or beneficiaries of*

[25] The Sponsor's Memorandum attached to the bill that became EPTL 7-6.1 (and now EPTL 7-8.1) stated the statute's purpose was "to allow animals to be made the beneficiary of a trust." Sponsor's Mem. NY Bill Jacket, 1996 S.B. 5207, Ch. 159. The Senate Memorandum made clear the statute allowed "such animal to be made the beneficiary of a trust." Mem. of Senate, NY Bill Jacket, 1996 S.B. 5207, Ch. 159.

[26] The Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York's report to the legislature stated, "we recommend that the statute be titled 'Trusts for Pets' instead of 'Honorary Trusts for Pets,' as honorary means unenforceable, and pet trusts are presently enforceable under subparagraph (a) of the statute." N.Y. Bill Jacket, 2010 A.B. 5985, Ch. 70 (2010).

such trust are no longer alive." (emphasis added). In removing "Honorary" and the twenty-one year limitation on trust duration, the legislature dispelled any doubt that a nonhuman animal was capable of being a trust beneficiary in New York. By allowing "designated domestic or pet animals" to be trust beneficiaries able to own the trust corpus, New York recognized these nonhuman animals as "persons" with the capacity for legal rights.

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 persons capable of possessing one or more legal rights.

F. THE THIRD DEPARTMENT'S RECENT DECISION IN *PEOPLE EX REL. NONHUMAN RIGHTS PROJECT, INC. V. LAVERY* WAS WRONGLY DECIDED.

On December 4, 2014, the Third Department erroneously ruled, in a similar case, that a chimpanzee is not a legal person as he is unable to bear the duties and responsibilities it said are required to be deemed a "person' within the meaning of a common law writ of habeas corpus and Article 70. On December 16, 2014, Petitioner filed a Motion for Leave to Appeal to the Court of Appeals with the Third Department, as the appeal raises novel, important, and complex legal issues that are of great public importance and interest in New York, throughout the United States, and internationally, and because the Third Department committed serious errors of law and fact, as follows:

1. <u>The Third Department applied an incorrect standard of law.</u>

The Third Department wrote 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." *Nonhuman Rights Project v. Lavery*, at *3. However, *no federal or state court had ever rejected* the claim of personhood on behalf of an autonomous and self-determining nonhuman animal for the purpose of seeking common law habeas corpus relief, *as no such claim had ever been presented*.

None of the cases the Third Department cited supported its proposition quoted above. The decisions were all "standing" cases that were dismissed pursuant to Article III of the United States Constitution or because the specific definition of "person" provided by the enabling statute did not include nonhuman animals. Not one case involved common law claims, as in the case of Hercules and Leo or any of the other imprisoned chimpanzees; all involved statutory or constitutional interpretation. In *Lewis v. Burger King*, 344 Fed. Appx. 470 (10th Cir. 2009), *cert. den*., 558 US 1125 (2010), the *pro se* plaintiff, untrained in law, claimed her service dog had been given Article III standing to sue under the Americans with Disabilities Act of 1990, a claim the federal court properly rejected. In *Cetacean Community v. Bush*, 386 F. 3d 1169 (9th Cir. 2004), the federal court held that all the cetaceans of the world had not been given Article III standing to sue under the Federal Endangered Species Act and were not "persons" within that statute's definition of "person." In *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), the federal district court held that the legislative history of the Thirteenth Amendment to the United States Constitution (which, unlike the Fourteenth Amendment, does not contain the word "person") makes clear that it was only intended to apply to human beings. Finally, in *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993), the federal district court dismissed the case on the ground of Article III standing, stating that a dolphin was not a "person" within the meaning of Section 702 of Title 5 of the Federal Administrative Procedures Act.

The courts in the above cases however, agreed that a nonhuman animal *could be* a "person" if Congress so intended, but concluded that, with respect to the statutes or constitutional provisions involved in these cases, Congress had not so intended. *Lewis*, 344 Fed. Appx. at 472; *Cetacean Community*, 386 F.3d at 1175-1176; *Tilikum*, 842 F. Supp.2d at 1262, n.1; *Citizens to End Animal Suffering & Exploitation, Inc.*, 842 F. Supp.2d at 49.

Petitioner, which was an *amicus curiae* in the *Tilikum* case *supra*, and whose counsel was plaintiff's counsel in *Citizens to End Animal Suffering & Exploitation, Inc.*, *supra*, did not bring

the case of Tommy, Kiko, Hercules or Leo in a federal court subject to Article III.[27] Nor, importantly, did Petitioner base its claims on federal or state statutes or on constitutional provisions. Petitioner instead sought a New York writ of habeas corpus, which substantively is *entirely* a matter of *common law*. *See Nonhuman Rights Project v. Lavery*, at *3 ("we must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach."); CPLR 7001 ("the provisions of this article are applicable to common law or statutory writs of habeas corpus").

Similarly, none of the three cited cases supported the Third Department's statement that "habeas corpus has never been provided to any nonhuman entity," *Nonhuman Rights Project v. Lavery*, at *4, 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. In *United States v. Mett*, 65 F. 3d 1531, 1534 (9th Cir. 1995), *cert. den*., 519 US 870 (1996), the federal court *permitted* a corporation to utilize a writ of coram nobis. In *Waste Management of Wisconsin, Inc. v. Fokakis*, 614 F. 2d 138, 140 (7th Cir. 1980), *cert. den*., 449 US 1060 (1980), the federal court refused to grant habeas corpus to a corporation solely "because a corporation's entity status precludes it from being incarcerated or ever being held in custody." In *Sisquoc Ranch Co. v. Roth*, 153 F. 2d 437, 439 (9th Cir. 1946), the federal court held that the fact that a corporation has a contractual relationship with a human being did not give it standing to seek a writ of habeas corpus on its own behalf. Finally, in *Graham v. State of New York*, 25 A.D.2d 693 (3rd Dept. 1966), the Court stated that the purpose of a writ of habeas corpus is to free prisoners from detention, not to secure the return of *inanimate* personal property, which was the relief demanded.[28] In sum, no

[27] Petitioner filed an *amicus* brief in the *Tilikum* case in which it argued that the capacity of the orcas to sue should be determined by their domicile, as the Court *in Citizens to End Animal Suffering & Exploitation, Inc.*, 842 F. Supp.2d at 49, had stated.

[28] The court in *Graham* relied on *People ex rel. Tatra v. McNeill*, 19 A.D.2d 845, 846 (2d Dept. 1963), which held that habeas corpus could not be used to secure the return of an inmate's funds. There was no argument that the money was a legal person in *McNeill*, whereas here, the Petitioner has provided ample legal and scientific evidence that a chimpanzee has sufficient qualities for legal personhood.

nonhuman who could possibly be imprisoned has ever demanded the issuance of a writ of habeas corpus, whether common law or statutory in the United States.

The reason there is no precedent for treating nonhuman animals as persons for the purpose of securing habeas corpus relief then is *not* because the claim *has been rejected* by the courts. It is because no nonhuman entity capable *of being imprisoned* (unlike a corporation), certainly not a nonhuman animal, and most certainly not an autonomous self-determining being such as a chimpanzee, has ever *demanded* a writ of habeas corpus. Petitioner's cases in the Third and Fourth Departments and the case at bar are the *first* such demands ever made on behalf of a nonhuman animal in a common law jurisdiction. But the novelty of their claims is no reason to deny Hercules and Leo habeas corpus relief. *See, e.g.*, *Crook*, 25 F. Cas. at 697 (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*, 20 N.Y. 562.

2. <u>When the New York legislature enacted EPTL 7-8.1, it granted personhood to the nonhuman animals within its scope.</u>

Contrary to the Third Department's statement that nonhuman animals have never "been explicitly considered as persons or entities for the purpose of state or federal law," *Nonhuman Rights Project v. Lavery*, at *3, as argued, *supra* at Section E-3, New York is among the few states that *expressly allow* nonhuman animals to be trust beneficiaries and that, in addition to making nonhuman animals trust beneficiaries, provides for an enforcer for a nonhuman animal beneficiary who "performs *the same function as a guardian ad litem for an incapacitated person* [.]" *In re Fouts*, 677 N.Y.S.2d at 700 (emphasis added). As the personhood of the nonhuman animal beneficiaries is *not conditioned* upon their ability to bear duties and responsibilities, this statute directly *contradicts* the Third Department's assertion that legal personhood in New York

depends on the ability to bear duties and responsibilities and that nonhuman animals may therefore not be legal persons for any purpose.

3. Whether an individual can bear duties and responsibilities is irrelevant to whether that individual can be characterized as a "person" for the purposes of a common law writ of habeas corpus.

As mentioned, *supra*, the Third Department erred in requiring that a "person" for the purpose of securing a common law writ of habeas corpus be capable of bearing duties and responsibilities; in practical terms, that the claimant be a human being. *Nonhuman Rights Project v. Lavery*, at *4-6. In arriving at this conclusion, the Third Department relied on inapposite cases, cited law review articles that endorse a minority philosophical argument, and ignored not just EPTL 7-8.1, *supra*, but multiple teachings of the New York Court of Appeals set forth in the *Byrn* case establishing that personhood is a matter of public policy. *See* argument, *supra* at Section D-1. In *Lavery*, at *4, the court wrote:

> 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" (Richard L. Cupp Jr., "Children, Chimps, and Rights: Arguments from 'Marginal Cases,'" 45 *Ariz. St. LJ* 1, 13 (2013); Richard L. Cupp, Jr., "Moving Beyond Animal Rights: A Legal Contractualist Critique," 46 *San Diego L. Rev.* 27, 69 (2009)

The *Gault* court merely stated that "[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." 387 U.S. at 20-21. There is no relevance to the case at bar. In *United States v. Barona*, 56 F. 3d at 1093-94, the Ninth Circuit merely noted that resident aliens of the United States

> must first show that they are among the class of persons that the Fourth Amendment was meant to protect . . . . Unlike the Due Process Clause of the Fifth Amendment, which protects all "persons," the Fourth Amendment protects only "the People of the United States" [citations omitted] which "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community" [citation omitted]. The Fourth Amendment therefore protects a much narrower class of individuals than the Fifth Amendment. Because our constitutional theory is premised in large measure on the conception that our Constitution is a "social contract" [citation omitted], "the scope of an alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear." [citations omitted] . . . "Not until an alien has assumed the complete range of obligations that we impose on the citizenry may he be considered one of 'the people of the United States' entitled to the full panoply of rights guaranteed by our Constitution." [citation omitted]. The term "People of the United States" includes "American citizens at home and abroad" and lawful resident aliens within the borders of the United States "who are victims of actions taken *in the United States by American officials* [*citation omitted*] (emphasis in original). It is yet to be decided, however, whether a resident alien has undertaken sufficient obligations of citizenship or has "otherwise developed sufficient connection with this country" [citation omitted] to be considered one of the "People of the United States" even when he or she steps outside the territorial borders of the United States.

This case is not relevant to the case at bar because it: (1) deals with an interpretation of the United States Constitution, rather than New York common law, and (2) concerns the interpretation of the constitutional phrase "the People of the United States," not the New York common law meaning of the term "person," which is the issue in the case at bar. Finally, the two law review articles cited by the *Lavery* court merely set out Professor Cupp's personal preference for the philosophical theory of contractualism, in support of which he cites no cases.

The writ of habeas corpus has *always* been applied to aliens and others who may not be a part of the fictitious "social contract." In *Rasul v. Bush*, 542 U.S. 466, 481, 482 & n.11 (2004), the United States Supreme Court stated that:

> [a]pplication of the habeas statute to persons[29] detained at the base (in

[29] The Supreme Court noted that, after the September 11, 2001 attack, "the President sent U.S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it. Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban." 542 U.S. at 470-71. This Court may take judicial notice that not only were these petitioners not part of any "social contract," but the United States alleged they desired to destroy whatever social contract may exist. Still they were eligible to seek a writ of habeas corpus.

> 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, [n.11] *See, e.g., King v. Schiever,* 2 Burr. 765, 97 Eng. Rep. 551 (K.B.1759) (reviewing the habeas petition of a neutral alien deemed a prisoner of war because he was captured aboard an enemy French privateer during a war between England and France); *Sommersett v. Stewart*, 20 How. St. Tr. 1, 79–82 (K.B.1772) (releasing on habeas an African slave purchased in Virginia and detained on a ship docked in England and bound for Jamaica); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K.B.1810) (reviewing the habeas petition of a "native of South Africa" allegedly held in private custody).
>
> 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); *Ex parte D'Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813) (Story, J., on circuit) (ordering the release of Portuguese sailors arrested for deserting their ship); *Wilson v. Izard*, 30 F. Cas. 131 (No. 131 (No. 17, 810); (Livingston, J., on circuit) (reviewing the habeas petition of enlistees who claimed that they were entitled to discharge because of their status as enemy aliens).

In *Jackson v. Bulloch*, 12 Conn. 38, 42-43 (1837), the Supreme Court of Errors noted that the first section of the Connecticut Bill of Rights declares that "all men, when they form a social contract, are equal in rights . . . seems evidently to be limited to those who are parties to the social compact thus formed. Slaves cannot be said to be parties to that compact, or be represented in it." *Despite being excluded from the social compact*, the petitioner slave was freed pursuant to a writ of habeas corpus. One can imagine numerous other cases where persons who are not able because of culture or disability to be a part of our social compact, as chimpanzees may be, or who may loathe the very existence of our social compact and wish to destroy it, are nevertheless able to avail themselves of a common law writ of habeas corpus.

Moreover, "the words "duty," "duties," or "responsibility" do not appear anywhere in the *Byrn* majority opinion, which concerned the issue of whether a fetus was a "person" within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution.[30] The Third

[30] The words "duty," "duties, or "responsibility" do not appear anywhere in the Second Department's *Byrn* opinion either, with the single exception of the court noting that a lower federal court had upheld a restrictive abortion statute and stated that once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments

Department ignored the Court of Appeals' teaching of *Byrn* that "[w]hether the law should accord legal personality is a *policy question*." 31 N.Y.2d at 201 (emphasis added). "It is not true . . . that the legal order necessarily corresponds to the natural order." *Id.* "The point is that it is a *policy determination* whether legal personality should attach and *not a question of biological or 'natural' correspondence*." *Id*. (emphasis added). *See* Paton, *supra*, at 349-50, *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").

Moreover, as has been made clear in legal actions in sister common law countries, an individual may be a "person" without having the capacity to assume any duties or responsibilities. New Zealand's Whanganui River Iwi was designated a legal person though it *has no duties or responsibilities*. The Sikh's sacred text was designated as a legal person though it *has no duties or responsibilities*. Mosques were designated as legal persons, though they *had no duties or responsibilities*. A Hindu idol was designated as a "person" though it *has no duties or responsibilities.*

Esteemed commentators cited both by the *Byrn* majority and the Indian Supreme Court agree. "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). *Idols have no duties or responsibilities*. Indeed, John Chipman Gray, cited by the *Byrn* Court, makes clear that a "person" need not even be alive. "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) (emphasis added). *Such a being has no duties or responsibilities*. As Gray explained, there may also be

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impose upon the State the duty of safeguarding it. *Byrn v. New York City Health & Hospitals Corp*., 39 A.D.2d 600 (2d Dept. 1972).

> *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 (emphasis added).[31]

The Third Department therefore erred in *Nonhuman Rights Project v. Lavery*, by failing to recognize that the decision whether a chimpanzee is a "person" for the purpose of a common law writ of habeas corpus was entirely a *policy* question, 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 Petitioner presented in great detail both in that case, the Kiko case, and in the case at bar.

This left the Third Department's decision as the *first in Anglo-American history* in which an inability to bear duties and responsibilities constituted 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 entity who is autonomous and able to self-determine, much less an entity who is merely seeking the relief of a common law writ of habeas corpus.

Moreover, the Third Department in *Nonhuman Rights Project v. Lavery* mistook Petitioner's demand for the "immunity-right" of bodily liberty, to which the ability to bear duties and responsibilities is irrelevant, with a "claim-right." Linking personhood to an ability to bear duties and responsibilities is particularly inappropriate in the context of a common law writ of habeas corpus to enforce the fundamental common law immunity-right to bodily integrity. The Third Department's linkage of the two caused it to commit a serious "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). The great Yale jurisprudential professor, Wesley N. Hohfeld's, conception of the comparative structure of rights has, for a century, been employed as the overwhelming choice of courts,

[31] 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.

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.

With the greatest delicacy, Hohfeld gently pointed out, *id*. at 27, that even the distinguished jurisprudential writer, John Chipman Gray, made the same mistake as did the Third Department 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.'[32]

The reason is that a claim-right, which Petitioner did *not* demand in *Nonhuman Rights Project v. Lavery*, in *Nonhuman Rights Project v. Presti*, or in the case at bar, is comprised of a claim and a duty that correlate one with the other. Steven M. Wise, *Rattling the Cage – Toward Legal Rights for Animals* 56-57 (Perseus Publishing 2000); Steven M. Wise, "Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy," 22 VERMONT L. REV. 807-810 (1998). The most conservative, but hardly the most common, 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. Steven M. Wise, *Rattling the Cage*, at 57; Steven M. Wise, "Hardly a Revolution," at 808-810. This is roughly akin to the personhood test the Third Department applied in *Nonhuman Rights Project v. Lavery*.

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

In neither *Nonhuman Rights Project v. Lavery*, *Nonhuman Rights Project v. Presti*, nor in the case at bar, is Petitioner seeking a *claim-right* for a chimpanzee. Instead it is seeking the fundamental *immunity-right* to bodily liberty that is protected by a common law writ of habeas corpus. This immunity-right is what the United States Supreme Court was referring to when it famously stated 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."

Botsford, 141 U.S. at 251 (quoting *Cooley on Torts* 29) (emphasis added).

An *immunity-right* correlates *not* with a duty, but with a *disability*. Steven M. Wise, *Rattling the Cage*, at 57-59; Steven M. Wise, *Hardly a Revolution*, at 810-815. Other examples of fundamental immunity-rights are the right not to be enslaved guaranteed by the Thirteenth Amendment to the United States Constitution, in which all others are *disabled* from enslaving those covered by that Amendment, and the First Amendment right to free speech, which the government is *disabled* from abridging. One need *not* be able to bear duties or responsibilities to possess these fundamental rights to bodily liberty, freedom from enslavement, and free speech.

The decision of the United States Supreme Court in *Harris v. McRea*, 448 U.S. 297, 316-18, 331 (1980) illustrated the difference between a claim-right and an immunity-right. Eight years previous to *Harris*, the United States Supreme Court in *Roe v. Wade* recognized a woman's immunity right to privacy and against interference by the state with her decision to have an abortion in the earlier stages of her pregnancy. The *Harris* plaintiff claimed she *therefore* had the right to have the state pay for an abortion she was unable to afford. The Supreme Court recognized that the woman's *immunity-right* to an abortion correlated with the state's *disability* to interfere in her decision to have the abortion; it did *not* correlate with the state's *duty* to fund the abortion. Therefore she had no claim against the state for payment for her abortion.

Petitioner argues that Hercules and Leo have the common law immunity-right to the bodily liberty protected by the common law of habeas corpus. This fundamental immunity-right correlates solely with the Respondents' *disability* to imprison him. The existence or nonexistence of Hercules and Leo's ability to bear duties or responsibilities is *entirely irrelevant*; it is irrelevant to *every* immunity-right. It is *particularly inappropriate* to demand that, for Hercules and Leo to possess the fundamental immunity right to bodily liberty protected by the common law of habeas corpus, they must possess the ability to bear duties and responsibilities, when this ability has *nothing whatsoever to do* with their fundamental immunity-right to bodily liberty. It might make sense, for example, if Hercules and Leo were seeking to enforce a common law contractual right. But 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. Moreover, this statute actually does grant not just Hercules and Leo, who are both beneficiaries of a trust Petitioner created for them prior to the litigation, but every other "domestic or pet" animal in New York, the *claim right* to the money placed in the trust to which that nonhuman animal is a named beneficiary.[33]

4. The refusal to recognize the personhood of a nonhuman animal who, the uncontroverted evidence demonstrates, is an autonomous and self-determining being, for the purpose of a common law writ of habeas corpus, undermines the supreme common law values of liberty and equality.

Any requirement that an autonomous and self-determining 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 uncontrovertibly possesses the autonomy and self-determination that are supremely valued by the common law, even more than human life itself, *Rivers*, 67 N.Y. 2d at

[33] That "domestic or pet" animals in New York State are "persons" within the meaning of EPTL 7-8.1 does not necessarily mean they are purposes for any other reason, just as Hercules and Leo's being a "person" for the purpose of the common law writ of habeas corpus would not necessarily mean they are a "person" for any other purpose.

493; *Storar*, 52 N.Y.2d 363. It undermines fundamental equality both because it endorses the illegitimate end of the permanent enslavement of an uncontrovertibly autonomous and self-determining individual, *Affronti*, 95 N.Y.2d at 719 and because "[i]t identifies persons by a single trait and then denies them protection across the board," *Romer*, 517 U.S. at 633.[34]

G. THE FOURTH DEPARTMENT'S RECENT DECISION IN *NONHUMAN RIGHTS PROJECT V. PRESTI* WAS WRONGLY DECIDED.

The Fourth Department erroneously concluded in *Nonhuman Rights Project v. Presti* that the detained chimpanzee, Kiko, was not entitled to the relief afforded by a writ of habeas corpus, *not* because Kiko was not a "person," but on the mistaken ground that Petitioner was neither demanding Kiko's immediate release nor claiming that Kiko's detention was unlawful. Instead, the court erroneously asserted that Petitioner was merely demanding a transfer to a sanctuary, which, in the court's opinion, was not a remedy for a common law writ of habeas corpus.

In support of this factually and legally incorrect statement, the Fourth Department cited eight cases. Each case, *without exception*, featured a human prison inmate who had been convicted of a crime and was subsequently attempting to utilize the writ of habeas corpus for some reason other than to procure his immediate release from prison. Each case is therefore inapposite to the case at bar.

Several cases dealt exclusively with whether habeas corpus could be used merely to challenge alleged errors in parole revocation hearings. In *People ex rel. Gonzalez v Wayne County Sheriff*, 96 A.D.3d 1698 (4th Dept. 2012), the court held that habeas corpus relief was

[34] In *Nonhuman Rights Project v. Lavery*, at *5, n.3, the Third Department stated: "[t]o be sure, some humans are less able to bear legal duties or responsibilities than others. These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings." This is a controversial and minority opinion in the philosophical literature, *see, e.g.*, Daniel A. Dombrowski, *Babies and Beasts – The Argument From Marginal Cases* (University of Illinois Press 1997). It is also entirely irrelevant to the case at bar, as Hercules and Leo are seeking the protection of an *immunity-right* guaranteed by the common law of habeas corpus, to which *no corresponding duty exists*, and ignores both the teaching of the Court of Appeals in *Byrn, supra*, that personhood is an issue of *policy, and not of biology,* and the Legislature's grant of claim-rights to "pets and domestic" animals in EPTL 7-8.1 to the extent of being a *trust beneficiary*.

unavailable to a prisoner in his challenge to an administrative law judge's determination following a final parole revocation hearing. In *People ex rel. Shannon v. Khahaifa*, 74 A.D.3d 1867 (4th Dept. 2010), the prisoner sought habeas corpus on the grounds that "the determination that he violated a condition of his parole was arbitrary and capricious, and the time assessment for the violation was excessive." In both cases, the court concluded that habeas corpus should be denied where the inmates would not be entitled to release from prison even if errors were committed in connection with parole revocation.

In addition to these inapposite parole cases, the Fourth Department in *Nonhuman Rights Project v. Presti* cited inapplicable criminal habeas corpus cases such as *People ex rel. Hall v. Rock*, 71 A.D.3d 1303, 1304 (3rd Dept. 2010), which involved a prisoner's inappropriate challenge to the sufficiency of the evidence supporting his indictment. Likewise, in *People ex rel. Kaplan v. Commissioner of Correction*, 60 N.Y.2d 648, 649 (1983), the Court ruled that the inmate was not entitled to habeas corpus because the only remedy "to which he would be entitled would be a new trial or new appeal, and not a direction that he be immediately released from custody." The same was true in *People ex rel. Douglas v. Vincent*, 50 N.Y.2d 901, 903 (1980), where the Court held that "even if there were merit to the relator's contention that he was denied effective assistance of counsel at trial or on appeal he would not be entitled to habeas corpus relief because the only remedy he seeks would provide him a new trial or new appeal, and not a direction that he be immediately released from custody." In the above cases, unlike the case at bar, the inmates were not contending that the fact of their confinement was unlawful, but rather, asserted that some procedural error occurred in their underlying trial or hearing. In the present case, Petitioner has consistently maintained that Hercules and Leo's detention is unlawful, thus entitling them to immediate release.

In another case relied upon by the *Presti* court, *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 691 (1986), the Court of Appeals in fact, *reaffirmed* the notion 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[.]" (emphasis added) (citing

Johnston, 9 N.Y.2d 482). In distinguishing the case from *Johnston* however, the Court of Appeals 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 of Correctional Services is expressly authorized to impose on lawfully sentenced prisoners committed to its custody[.]" (citations omitted, emphasis added). In the case at bar, as in *Johnston* and unlike in *Dawson*, Petitioner seeks the *complete discharge* of Hercules and Leo from Respondents' custody into a chimpanzee sanctuary. As noted above, Petitioner's case is analogous to the case of a juvenile, elderly person, or mentally incompetent adult who simply cannot be released onto the streets of New York following a habeas determination that their detention is unlawful.

The Third Department in *Berrian v. Duncan*, 289 A.D.2d 655 (3rd Dept. 2001) and *People ex rel. McCallister v. McGinnis*, 251 A.D.2d 835 (3rd Dept. 1998), the final cases cited by the *Nonhuman Rights Project v. Presti* court, relied on *Dawson* in concluding that a prisoner could not use habeas corpus to seek release from a special housing unit of a prison. For the reasons set forth in *Dawson*, *supra*, such a ruling has no bearing here, where Petitioner seeks complete release of Hercules and Leo from their confinement by Respondents to an environment completely "separate and different in nature" from the facility of detention.

Notwithstanding the few cases cited by the Fourth Department in *Nonhuman Rights Project v. Presti*, it is established that convicted prisoners may use habeas corpus to challenge their conditions of confinement without seeking immediate release. *See Johnston*, 9 N.Y.2d at 485; *People ex rel. Jesse F.*, 242 A.D.2d at 342 ("habeas corpus is an appropriate mechanism for transfer from a secure to a nonsecure facility."); *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 251 (2d Dept. 1993) ("habeas corpus is available to challenge the conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. Ceschini v. Warden*, 30 A.D.2d 649, 649 (1st Dept. 1968); *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."); *People ex rel.*

Rockey v. Krueger, 306 N.Y.S.2d 359, 360 (Sup. Ct. 1969) ("Notwithstanding that relator does not contest the propriety of his confinement on the underlying charge, he may be [sic] a writ raise the issue whether restraint in excess of that permitted is being imposed upon him. . . Since the . . . relator is being held in solitary confinement and that an Orthodox Jew seeking to retain his beard would not be so held, relator is entitled to judgment requiring the respondent to release him from solitary confinement."); *McGrath*, 61 Misc. 2d at 116 (citing *People ex rel. Smith v. LaVallee*, 29 A.D.2d 248, 250 (4th Dept. 1968) ("the issues of whether a prisoner . . . had in fact been receiving adequate psychological and psychiatric treatment during his imprisonment has been held a proper subject for habeas corpus relief")).

Kiko is not a prison inmate convicted of a crime. Kiko is not attempting to utilize the writ of habeas corpus for some reason other than his immediate release from unlawful detention. Rather, Kiko is an autonomous, self-determining nonhuman individual who is utilizing the writ of habeas to secure immediate release from imprisonment and procure for himself the greatest amount of freedom he could possibly have given the fact that, as a chimpanzee, he can neither be released directly into the wild or onto the streets of New York State.

The Third Department in *Nonhuman Rights Project v. Lavery*, at *2, accurately stated that "[n]otably, we have not been asked to evaluate the quality of Tommy's current living conditions in an effort to improve his welfare. In fact, petitioner's counsel stated at oral argument that it does not allege that respondents are in violation of any state or federal statutes respecting the domestic possession of wild animals[.]" (citation omitted). In contrast, the Fourth Department appears to have misunderstood who Petitioner NhRP is and what it is demanding. No evidence supports any of the court's four startling statements that (1) Petitioner is "an organization seeking better treatment and housing of, inter alia, nonhuman primates,"[35] (2) "the

[35] Petitioner's 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 right, 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."

petition alleges that Kiko is illegally confined because he is kept in unsuitable conditions," (3) "petitioner does not seek Kiko's immediate release," or that (4) "nor does petitioner allege that Kiko's continued detention is unlawful." *Nonhuman Rights Project v. Presti*, at *1-2.

The uncontroverted facts set forth in the Verified Petition filed by Petitioner in the Supreme Court, Niagara County (Exhibit F to Wise Affidavit) demonstrate that none of the court's four statements are supported by the evidence, and directly contradict the Fourth Department's findings:

> ¶ 1 provides that "This petition is for a common law writ of habeas corpus pursuant to CPLR Article 70. It is an attempt to extend existing New York common law for the purpose of . . . granting [Kiko] immediate release from illegal detention."
>
> ¶12 provides that "[f]or the past 17 years, Petitioner NhRP has worked to change the status of such nonhuman animals as chimpanzees from legal things to legal persons."
>
> ¶9 provides that "Kiko is a solitary chimpanzee being detained by Respondents in a cage located in a cement storefront in a crowded residential area . . ."
>
> ¶3 "asks this Court to issue a writ recognizing that Kiko . . . [has] the fundamental legal right not to be imprisoned."
>
> ¶5 states that "this Petition seeks a determination forthwith that Kiko's detention is unlawful and demands Kiko's immediate release . . ."
>
> ¶17 states that "Petitioner NhRP will demonstrate that under New York law, Kiko, as a legal person, is entitled to the common law right to bodily liberty. Petitioner NhRP asserts that Kiko's detention by Respondents constitutes an unlawful deprivation of his right to bodily liberty and that he is entitled to test the legality of this detention through the issuance of a common law writ of habeas corpus by this Court."

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http://www.nonhumanrightsproject.org/about-us-2/ (visited January 8, 2015). Petitioner does not seek to reform animal welfare legislation.

The Verified Petition concludes by demanding, in part, "the following relief: A. Issuance of the attached writ demanding Respondents demonstrate forthwith the basis for the detention and denial of liberty of Petitioner Kiko: B. Upon a determination that Petitioner Kiko is being illegally detained, ordering his release and transfer forthwith to the primate sanctuary selected by the North American Primate Sanctuary Alliance."

One of four Questions presented in the Brief to the Fourth Department (Exhibit D to Wise Affidavit) was: "4. Is the Petitioner/Appellant chimpanzee, who is imprisoned in a cement storefront building in the State of New York, entitled to have a common law writ of habeas corpus issued on his behalf against the Respondents to determine the legality of his restraint?" In the Brief's Statement of the Case (Exhibit D), Petitioner stated that "Petitioner/Appellants petitioned the court to issue a writ of habeas corpus and thereafter order the immediate release of Kiko, who was being unlawfully detained in the State of New York by Respondents."

Finally, the answers to the questions posed to Petitioner's counsel by the Fourth Department at oral argument, the relevant pages of which are attached as Exhibit E to Wise's Affidavit, directly contradict the factual assertions made by the court in its decision as well as the legal conclusion that habeas corpus did not lie:[36]

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.

[36] As there is no official transcript of the oral argument, Petitioner's transcript is unofficial and was transcribed from a recording of the oral argument.

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.

02:42 For, example …. you have …. insane people have used the writ of habeas corpus, children, apprentices, endangered, I'm sorry, indentured servants, slave

03:04 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

03:22 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 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 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 …

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. . . .

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.

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…

In sum, the Verified Petition filed by Petitioner on behalf of Kiko alleged nothing about his welfare. At oral argument, Petitioner's counsel made clear that the case was brought as a

petition for a writ of habeas corpus in order to secure Kiko's physical liberty to the greatest extent possible, and had nothing whatsoever to do with his welfare or living conditions.

As a result of its misunderstanding of Petitioner and its claims, the Fourth Department erroneously ignored two centuries of controlling analogous cases the Petitioner brought to its attention in which such individuals as child slaves, child apprentices, child residents of training schools, child residents of mental institutions, and mentally incapacitated adults, none of whom could be immediately released onto the streets of the State of New York any more than Kiko could, were nevertheless released from the custody of one entity and immediately transferred into the custody of another.[37] Its ruling therefore erroneously contracted the Great Writ for both humans and chimpanzees.

This contraction also violated the Suspension Clause, Art. I, sec. 4, of the New York Constitution. As noted *supra*, at 40-41, to the extent a statute curtails the common law of habeas corpus, it constitutes a suspension of the Great Writ in violation of 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 however renders not just the legislature, but the *judiciary,* equally powerless to deprive an individual of the privilege of the common law writ of habeas corpus. *Tweed*, 60 N.Y. at 591-92 ("If a court . . . may impose any sentence other than the legal statutory judgment, and deny the aggrieved party all relief except upon writ of error, it is but a judicial suspension of the writ of habeas corpus. That writ is . . . a protection against encroachments upon the liberty of the citizen by the unauthorized acts of courts and judges."[38]

IV. CONCLUSION

When a 2005 case demanding a writ of habeas corpus pursuant to the Brazilian Civil

[37] The Memorandum of Law filed by Petitioner in the Supreme Court, Niagara County is part of the Record on Appeal to the Fourth Department. The relevant pages of the memorandum are attached as Exhibit F to Wise Affidavit.

[38] On January 15, 2015, Petitioner filed a Motion for Leave to Appeal to the Court of Appeals with the Fourth Department.

Procedure Code was filed on behalf of a confined chimpanzee named Suica in Salvador, Brazil, the trial judge noted the matter "is worthy of discussion, as this is a highly complex issue requiring an in-depth examination of 'pros and cons.'" *See In Favor of Suica*, annexed to the Habeas Petition as Exhibits B and C to the Affidavit of Steven M. Wise. Because Suica died on the eve of the judge's decision, he was required by statute to dismiss the case. This Court now has the opportunity to examine the matter that is so worthy of discussion and the subject of such great public concern. Hercules and Leo are autonomous and self-determining beings who can choose how to live their lives and who possess dozens of complex cognitive abilities that comprise and support their autonomy. They are entitled to legal personhood as a matter of common law liberty and equality, which in turn, entitles them to a writ of habeas corpus. They are further entitled to their bodily liberty and immediate discharge from what will otherwise be a decades-long imprisonment.

Professor Osvath made it clear that every day of Hercules and Leo's perpetual imprisonment is hellish, as chimpanzees "have a concept of their personal past and future and therefore suffer the pain of not being able to fulfill one's goals or move around as one wants; like humans they experience the pain of anticipating a never-ending situation." (Osvath Aff. at ¶16).

Hercules and Leo cannot be released to Africa or onto the streets of New York State. But they can be released from their imprisonment in New York. This Court should order them discharged from the Respondents' control and delivered into the care of Save the Chimps in Ft. Pierce, Florida, forthwith, there to spend the rest of their lives living like autonomous, self-determining chimpanzees to the greatest extent possible in North America, amongst chimpanzee friends, climbing, playing, socializing, feeling the sun, and seeing the sky.

Respectfully submitted,

Dated: February 12, 2015

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