

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

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

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

Petitioner-Appellant,

-against-

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

Respondents.

**NOTICE OF
MOTION TO
APPEAL AS OF
RIGHT**

Index No.: 150149/16
(New York County)

PLEASE TAKE NOTICE that upon Petitioner-Appellant, the Nonhuman Rights Project Inc's. ("NhRP"), annexed Memorandum of Law in Support of Motion to Appeal as of Right and the attached Exhibits 1 and 2 thereto, the undersigned moves this Court to accept the above-captioned appeal as of right pursuant to CPLR 7011. As set forth in the attached memorandum of law, the NhRP sought to perfect its appeal from the lower court's denial of a verified petition for a common law writ of habeas corpus and order to show cause ("Petition") filed by the NhRP on behalf of a chimpanzee named Kiko (Exhibit 1).

The Petition was styled as a “show cause” order pursuant to CPLR 7003(a) as the NhRP was not demanding Kiko’s production to the court. The NhRP’s counsel was contacted by the Clerk’s Office of this Court and informed that it did not have a proper order from which an appeal may be taken and that it did not have an appeal as of right from the court’s denial of the Petition. In response to the NhRP’s written request, the court filed an appropriate Order from which this appeal may be taken (Exhibit 2). As CPLR 7011 specifically grants a right to appeal from the refusal of “an order to show cause issued under subdivision (a) of section 7003[,]” the NhRP respectfully requests that this Court accept its appeal as of right.

PLEASE TAKE FURTHER NOTICE, that the motion is returnable at 10 o’clock in the forenoon on Monday, June 6th, 2016 which is at least 9 days from the date of service of these papers. The Respondents are hereby given notice that the motion will be submitted on the papers and their personal appearance in opposition is neither required nor permitted.

Dated: May 26, 2016



Elizabeth Stein, Esq.
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516-747-4726
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Steven M. Wise, Esq.
(of the bar of the State of
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By permission of the Court
5195 NW 112th Terrace
Coral Springs, Florida 33076
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Attorneys for Petitioner-Appellant

To:

New York State Supreme Court
Appellate Division – First Department
Clerk’s Office
27 Madison Avenue
New York, New York 10010
(212) 340-0400

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**SUPREME COURT OF THE STATE OF NEW YORK
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Respondents.

Attorney Affirmation

Index No.: 150149/16
(New York County)

I, Elizabeth Stein, an attorney duly admitted to practice law in the State of
New York affirms the following under the penalty of perjury:

1. I am an attorney of record for Petitioner-Appellant, the Nonhuman Rights
Project, Inc., in the above-captioned matter and am not a party in this
action.
2. I am fully familiar with the pleadings and proceedings in this matter,
have read and know the contents thereof and submit this affirmation in
support of the within Notice of Motion to Appeal as of Right,

memorandum of law in support thereof, and all exhibits and other documents annexed thereto.

3. Pursuant to 22 N.Y.C.R.R. §1301.1, that this motion is not frivolous.

Dated: May 26, 2016



Elizabeth Stein, Esq.
Attorney for Petitioner-Appellant
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
liddystein@aol.com

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

In the Matter of a Proceeding under Article 70 of the CPLR
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Index No.: 150149/16
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Respondents.

**PETITIONER-APPELLANT'S MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO APPEAL AS OF RIGHT**

ELIZABETH STEIN, ESQ.
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
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STEVEN M. WISE, ESQ.
(of the bar of the State of Massachusetts)
by permission of the Court
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wiseboston@aol.com

Attorneys for Petitioner-Appellant

I. STATEMENT OF FACTS

This memorandum of law is submitted in support of Petitioner-Appellant, the Nonhuman Rights Project Inc's ("NhRP"), motion to appeal the above-captioned matter as of right pursuant to New York Civil Practice Law and Rules ("CPLR") 7011.

This appeal is taken from the lower court's denial of a verified petition for a common law writ of habeas corpus and order to show cause ("Petition") filed by the NhRP on behalf of a chimpanzee named Kiko.¹ Specifically, on January 29, 2016, the court entered a copy of the NhRP's proposed writ and order to show cause stamped "DECLINED TO SIGN" and an annexed memorandum of law (both attached as Exhibit 1). The NhRP then filed and served a timely notice of appeal on February 9, 2016.²

The NhRP sought to perfect its appeal and on May 18, 2016 filed with this Court the Record on Appeal which includes the order of the lower court and Brief. NhRP's counsel was then contacted by the Clerk's Office and informed that the NhRP did not have a proper order from which an appeal may be taken and that the NhRP did not have an appeal as of right from the court's denial of the Petition.

¹ As discussed below, the NhRP was required by CPLR 7003(a) to include the "show cause" language in its Petition insofar as it was not demanding Kiko's production in court.

² Respondents have been served in all phases of these proceedings.

In response to the Clerk's input regarding the sufficiency and appropriateness of the appeal, on May 20, 2016, the NhRP submitted a letter to the lower court requesting that it enter an appropriate Order with the New York County Clerk from which an appeal may be taken, which the court issued on the same date and which is being filed as a supplemental record on appeal (attached as Exhibit 2).

The NhRP respectfully submits this memorandum of law to demonstrate the applicability of CPLR 7011, which specifically permits this appeal as of right.

II. THE NhRP IS ENTITLED TO APPEAL AS OF RIGHT

The NhRP filed its Petition pursuant to CPLR Article 70, which exclusively governs the procedure applicable to common law writs of habeas corpus. *See* CPLR 7001 (“the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention.”). The NhRP did not intend to seek an order to show cause that was independent of Article 70, as that would have been prohibited by and contrary to Article 70.

Specifically, the Petition did not seek a traditional “order to show cause” under CPLR 403, the appeal of which is not permissible, but under CPLR 7003,

the appeal of which is specifically granted under CPLR 7011, which provides, in relevant part.:

§ 7011. Appeal. An appeal may be taken from a judgment refusing to grant a writ of habeas corpus or refusing an order to show cause issued under subdivision (a) of section 7003, or from a judgment made upon the return of such a writ or order to show cause.

The NhRP therefore may appeal to this Court as of right, just as the NhRP appealed as of right the refusal to issue a nearly identical petition for a common law writ of habeas corpus and order to show cause in the Third Department, *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015), and in the Fourth Department, *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den.*, 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015).³

Article 70, like its predecessors, “contains elaborate provisions regulating the exercise of the common-law power to issue and adjudge it . . . including those relating to rights of appealing.” *People ex rel. Curtis v. Kidney*, 225 N.Y. 299, 303 (1919). “The writ existed at common law, but the proceedings of the court with respect to it are regulated by statute, and the courts must be governed by that

³ *But see, Nonhuman Rights Project, Inc., et al. v. Samuel L. Stanley, et al.*, (2nd Dept. April 3, 2014) (Suffolk County Index No. 32098/2014) (denying motion *pro hac vice*).

statute.” *People ex rel. Billotti v. New York Juvenile Asylum*, 57 A.D. 383, 384, 68 N.Y.S. 279 (1st Dept. 1901).

The practice commentaries to CPLR 401 note that a “particular authorizing statute may contain some unique rules that would, of course, take precedence over those of Article 4.” Vincent C. Alexander, *Practice Commentaries: C401:1 Special Proceedings, In General*, N.Y. C.P.L.R. 401 (McKinney). Only if Article 70 “is silent on the particular problem, [must] Article 4 [] be consulted.” *Id.* As Article 70 expressly provides the manner of appeal, it takes precedence over all other provisions of the CPLR.

It was necessary, under CPLR 7003(a), for the NhRP to style its Petition as an Order to Show Cause with the Verified Petition for a Writ of Habeas Corpus as it was not demanding Kiko’s production to the court. CPLR 7003(a) provides that “[t]he court to whom the petition is made shall issue the writ without delay on any day, or where the petitioner does not demand production of the person detained. . . order the respondent to *show cause* why the person detained should not be released” (emphasis added). *See, e.g., Callan v. Callan*, 494 N.Y.S.2d 32, 33 (2d Dept. 1985) (“Plaintiff obtained a writ of habeas corpus by order to **show cause** when defendant failed to return her infant daughter after her visitation . . . ”); *State ex rel. Soss v. Vincent*, 369 N.Y.S.2d 766, 767 (2d Dept. 1975) (“In a habeas corpus proceeding upon an order to **show cause (CPLR 7003, subd. (a))**, the

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

Once a petitioner’s demand for an order to show cause why a detention is not illegal is refused, CPLR 7011 “governs the right of appeal in habeas corpus proceedings.” *Wilkes v. Wilkes*, 622 N.Y.S.2d 608 (2d Dept. 1995). It “authorizes an appeal in two situations: (1) from a judgment *refusing, at the outset*, to grant a writ of habeas corpus or to issue an order to *show cause* (CPLR 7003(a)); or (2) from a judgment made upon the return of a writ or order to show cause (CPLR 7010).” Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), CPLR 7011* (West 2014) (emphasis added). See *People ex rel. Tatra v. McNeill*, 244 N.Y.S.2d 463, 464 (2d Dept. 1963) (an appeal “from an order refusing to grant a writ or from a judgment made upon the return of a writ” is “authorized by statute in a habeas corpus proceeding (CPLR § 7011).”). CPLR 7011’s allowance of an appeal to be taken “from a judgment refusing to grant a writ of habeas corpus *or refusing an order to show cause* issued under subdivision (a) of section 7003” is therefore an *exception* to the general rule that the denial of an *ex parte* order is not appealable (emphasis added).

Appellate courts routinely authorize petitioners to appeal from a court’s *refusal*, at the outset, to issue the writ or a CPLR 7003 show cause order, as CPLR 7011 authorizes such appeals. See, e.g., *People ex rel. Silbert v. Cohen*, 29 N.Y.2d 12, 14 (1971); *Callan*, 494 N.Y.S.2d at 33; *People ex rel. Bell*, 801 N.Y.S.2d 101 (“Supreme Court dismissed the petition without issuing an order to show cause or

writ of habeas corpus. Petitioner now appeals”); *Application of Mitchell*, 421 N.Y.S.2d at 444; *People ex rel. Peoples v. New York State Dept. of Correctional Services*, 967 N.Y.S.2d 848 (4th Dept. 2013) (entertaining appeal from the dismissal of a habeas corpus petition); *People ex rel. Flemming v. Rock*, 972 N.Y.S.2d 901 (1st Dept. 2013) (same); *People ex rel. Jenkins v. Rikers Island Correctional Facility Warden*, 976 N.Y.S.2d 915 (4th Dept. 2013) (entertaining appeal from order dismissing petition for habeas corpus); *People ex rel. Harrington v. Cully*, 958 N.Y.S.2d 633 (4th Dept. 2013) (same); *People ex rel. Aikens v. Brown*, 958 N.Y.S.2d 913 (4th Dept. 2013) (same); *People ex rel. Holmes v. Heath*, 965 N.Y.S.2d 881 (2d Dept. 2013) (entertaining appeal from denial of petition for habeas corpus without hearing); *People ex rel. Allen v. Maribel*, 966 N.Y.S.2d 685 (2d Dept. 2013) (same); *People ex rel. Bazil v. Marshall*, 910 N.Y.S.2d 494, 495 (2d Dept. 2010) (same); *People ex rel. Sailor v. Travis*, 786 N.Y.S.2d 548, 549 (2d Dept. 2004) (same); *People ex rel. Gonzalez v. New York State Div. of Parole*, 682 N.Y.S.2d 602 (2d Dept. 1998) (entertaining an appeal “[i]n a habeas corpus proceeding,” where supreme court “refused an application for an order to show cause”); *People ex rel. Mabery v. Leonardo*, 578 N.Y.S.2d 427 (3d Dept. 1992) (entertaining appeal from supreme court’s denial of “petitioner's application for a writ of habeas corpus, in a proceeding pursuant to CPLR article 70, without a hearing.”); *People ex rel. Deuel v. Campbell*, 572

N.Y.S.2d 879 (3d Dept. 1991) (same); *People ex rel. Johnson v. New York State Bd. of Parole*, 580 N.Y.S.2d 957, 959 (3d Dept. 1992) (entertaining appeal where petitioner “commenced this proceeding for habeas corpus relief by order to show cause and petition” and supreme court “dismissed the petition”); *People ex rel. Cook v. New York State Bd. of Parole*, 505 N.Y.S.2d 383 (2d Dept. 1986) (appeal from dismissal of writ of habeas corpus); *People ex rel. Boyd v. LeFevre*, 461 N.Y.S.2d 667 (3d Dept. 1983) (entertaining appeal from a judgment of the Supreme Court “which denied petitioner's application for a writ of habeas corpus, without a hearing.”); *People ex rel. Steinberg v. Superintendent, Green Haven Correctional Facility*, 391 N.Y.S.2d 915, 916 (2d Dept. 1977); *People ex rel. Boutelle v. O'Mara*, 390 N.Y.S.2d 19 (3d Dept. 1976) (entertaining an appeal from the supreme court’s denial of “petitioner's application for a writ of habeas corpus, without a hearing.”); *People ex rel. Edmonds v. Warden, Queens H. of Detention for Men*, 269 N.Y.S.2d 787, 788 (2d Dept. 1966) (“In a habeas corpus proceeding, relator appeals from a judgment of the Supreme Court, . . . which dismissed the writ.”); *People ex rel. Leonard v. Denno*, 219 N.Y.S.2d 955 (2d Dept. 1961).

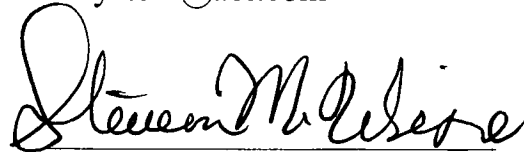
Accordingly, the NhRP has an appeal as of right from the Supreme Court’s refusal to issue the requested writ and order to show cause, as the “show cause” language was required by CPLR 7003(a) because the NhRP was not demanding the production of Kiko to court and CPLR 7011 specifically grants the NhRP this

right in these circumstances. The unique procedures in Article 70 are intended not just to give habeas petitioners a speedy initial hearing to determine their liberty, but a right to appeal even a refusal to issue a writ of habeas corpus or order to show cause. The NhRP respectfully submits that it should be afforded this opportunity.

Dated: May 26, 2016



Elizabeth Stein, Esq.
5 Dunhill Road
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516-747-4726
liddystein@aol.com



Steven M. Wise, Esq.
(of the bar of the State of
Massachusetts)
By permission of the Court
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954-648-9864
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Attorneys for Petitioner-Appellant

EXHIBIT 1

At I.A.S Part ____ of the
Supreme Court of the State of
New York, held in and for the
County of New York, at the
Courthouse thereof, 80 Centre
Street, New York, NY, on the
____ day of _____, 2016

PRESENT: HON. _____
Justice of the Supreme Court

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

-----x

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

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

Petitioner,

-against-

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

Respondents.

-----x

**ORDER TO SHOW CAUSE &
WRIT OF HABEAS CORPUS**

Index No.: **150149/2016**

DECLINED TO SIGN
see annexed memorandum

TO THE ABOVE NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition of Elizabeth Stein,
Esq. and Steven M. Wise, Esq. (subject to *pro hac vice* admission), with Exhibits and
Memorandum of Law, dated January 6, 2016, and upon all pleadings and proceedings herein, let
the Respondents CARMEN PRESTI, individually and as an officer and director of The Primate

Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC., or their attorneys, SHOW CAUSE at I.A.S. Part _____, Room _____, of this Court to be held at the Courthouse located at 80 Centre Street, New York, New York 10013, on the _____ day of _____, 2016 at _____ o'clock in the _____ of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting Petitioner, The Nonhuman Rights Project, Inc. ("NhRP"), the following relief:

- A. Upon a determination that Kiko is being unlawfully detained, ordering his immediate release and transfer forthwith to an appropriate primate sanctuary;
- B. Awarding the NhRP the costs and disbursements of this action; and
- C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC. by personal delivery, on or before the _____ of _____, 2016, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, and electronically filed with the NYSCEF system, no later than the _____ of _____, 2016.

Dated: _____
New York, New York

_____ Honorable

ENTER:

DECLINED TO SIGN
REASON _____

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 12

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

Index No. 150149/16

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

MEMORANDUM

Mot. seq. no. 001

Petitioner,

- against -

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

Respondents.

-----X
JAFFE, BARBARA, J.:

For petitioner:

Elizabeth Stein, Esq.
5 Dunhill Rd.
New Hyde Park, NY 11040
516-747-4726

Steven M. Wise, Esq., pro hac vice
Nonhuman Rights Project
5195 NW 112th Terrace
Coral Springs, FL 33076

I decline to sign the order to show cause filed by petitioner for the following reasons:

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

Here, between 2013 and 2014, petitioner filed four identical petitions with four state trial courts, each in a different county. With each petition, it offered the same nine affidavits. It then recently filed another two petitions in New York County which are identical to those previously filed, except for the addition of affidavits from five of the nine original affiants, along with a

sixth from a member of its board of directors. All of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the first four petitions.

In any event, whether evidence of the ability of some chimpanzees to shoulder certain kinds responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me (*Nonhuman Rights Project v Stanley*, 49 Misc 3d 746 [Sup Ct, New York County 2015 [Jaffe, J.]], are determinations that are best addressed there.


BARBARA JAFFE
J.S.C.

EXHIBIT 2

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Supplemental Decision
PART 12

PRESENT: BARBARA JAFFE
J.S.C.
Justice

Nonhuman Rights Project
vs.
Presti, Carmen

INDEX NO. 150149/2016
MOTION DATE _____
MOTION SEQ. NO. Seq 001

The following papers, numbered 1 to _____, were read on this motion to/for Habeas Corpus
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In response to Petitioner's request, the Declined Order to show cause and annexed memorandum (NYSCEF #48) constitute the court's Decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: MAY 20 2016

[Signature], J.S.C.
BARBARA JAFFE
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE



Nonhuman Rights Project

By Hand

May 20, 2016

Supreme Court of the State of New York
New York County
Barbara Jaffe, JSC
80 Centre Street
Room 279
New York, New York 10013

Re: *Nonhuman Rights Project, Inc., on behalf of Kiko v. Carmen Presti et al.*,
(150149/2016)

Dear Justice Jaffe,

I am a counsel of record for Petitioner-Appellant, the Nonhuman Rights Project, Inc. (“NhRP”) in the above-captioned matter. The NhRP filed in the Supreme Court, New York County a verified petition for a writ of habeas corpus and order to show cause on behalf of a chimpanzee named Kiko. On January 29, 2016, you entered with the Clerk of the Court a copy of the proposed writ of habeas corpus and order to show cause which was stamped “DECLINED TO SIGN” and an annexed memorandum of law. The NhRP then filed and served a timely notice of appeal on February 9, 2016.

The NhRP seeks to perfect its appeal. This week it filed the record on appeal and brief in the New York State Supreme Court Appellate Division, First Judicial Department. I was contacted by Don Ramos of the Clerk’s Office and informed that we did not have a proper order from which an appeal may be taken. I am therefore writing to request that you enter an actual Order with the New York County Clerk denying the NhRP’s petition for a writ of habeas corpus and order to show cause. I will submit this Order to the First Department along with a memorandum of law explaining why the NhRP has an appeal as of right from the

5195 NW 112th Terrace · Coral Springs · FL 33076 · (954) 648-9864
www.nonhumanrights.org · info@nonhumanrights.org

RECEIVED

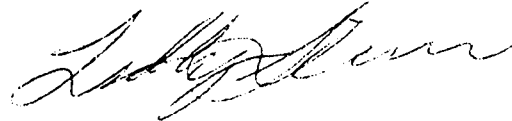
MAY 20 2016

PART 12

denial of an order to show cause in the context of a habeas corpus petition pursuant to Article 70 of the CPLR.

Thank you for your kind consideration of this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Elizabeth Stein', written in a cursive style.

Elizabeth Stein

CC: Carmen Presti
Christie E. Presti
The Primate Sanctuary, Inc.

At I.A.S Part ____ of the
Supreme Court of the State of
New York, held in and for the
County of New York, at the
Courthouse thereof, 80 Centre
Street, New York, NY, on the
____ day of _____, 2016

PRESENT: HON. _____
Justice of the Supreme Court

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

-----x
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Respondents.
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**ORDER TO SHOW CAUSE &
WRIT OF HABEAS CORPUS**

Index No.: **150149/2016**

DECLINED TO SIGN
see annexed memorandum

TO THE ABOVE NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition of Elizabeth Stein,
Esq. and Steven M. Wise, Esq. (subject to *pro hac vice* admission), with Exhibits and
Memorandum of Law, dated January 6, 2016, and upon all pleadings and proceedings herein, let
the Respondents CARMEN PRESTI, individually and as an officer and director of The Primate

Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC., or their attorneys, SHOW CAUSE at I.A.S. Part _____, Room _____, of this Court to be held at the Courthouse located at 80 Centre Street, New York, New York 10013, on the _____ day of _____, 2016 at _____ o'clock in the _____ of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting Petitioner, The Nonhuman Rights Project, Inc. ("NhRP"), the following relief:

- A. Upon a determination that Kiko is being unlawfully detained, ordering his immediate release and transfer forthwith to an appropriate primate sanctuary;
- B. Awarding the NhRP the costs and disbursements of this action; and
- C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC. by personal delivery, on or before the _____ of _____, 2016, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, and electronically filed with the NYSCEF system, no later than the _____ of _____, 2016.

Dated: _____
New York, New York

_____ Honorable

ENTER:

DECLINED TO SIGN
REASON _____

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 12

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

Index No. 150149/16

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

MEMORANDUM

Mot. seq. no. 001

Petitioner,

- against -

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

Respondents.

-----X
JAFJE, BARBARA, J.:

For petitioner:
Elizabeth Stein, Esq.
5 Dunhill Rd.
New Hyde Park, NY 11040
516-747-4726

Steven M. Wise, Esq., pro hac vice
Nonhuman Rights Project
5195 NW 112th Terrace
Coral Springs, FL 33076

I decline to sign the order to show cause filed by petitioner for the following reasons:

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

Here, between 2013 and 2014, petitioner filed four identical petitions with four state trial courts, each in a different county. With each petition, it offered the same nine affidavits. It then recently filed another two petitions in New York County which are identical to those previously filed, except for the addition of affidavits from five of the nine original affiants, along with a

sixth from a member of its board of directors. All of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the first four petitions.

In any event, whether evidence of the ability of some chimpanzees to shoulder certain kinds responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me (*Nonhuman Rights Project v Stanley*, 49 Misc 3d 746 [Sup Ct, New York County 2015 [Jaffe, J.]], are determinations that are best addressed there.


BARBARA JAFFE
J.S.C.