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

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

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

Petitioner-Appellant,

-against-

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

Respondents-Respondents,

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

Petitioner-Appellant,

-against-

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

Respondents-Respondents.

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

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

ARGUMENT

I. INTRODUCTION

Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), submits this Memorandum of Law in support of its Motion for Leave to Appeal to the Court of Appeals ("Motion for Leave to Appeal") pursuant to New York Civil Practice Law and Rules ("CPLR") 5602(a). The Appeal is from this Court's Decision and Order ("*Decision*"), dated June 8, 2017 affirming the judgments (denominated orders) of the Supreme Court, New York County (Barbara Jaffe, J.), which declined to sign orders to show cause sought by the NhRP seeking the immediate release of two chimpanzees, Tommy and Kiko, from their illegal detention. Index No. 162358/2015 (July 8, 2016, effective *nunc pro tunc* as of December 23, 2015), Appendix 12-14 ("*Tommy*"); Index No. 150149/2016 (January 29, 2016), Appendix 7-11 ("*Kiko*"). A copy of the *Decision* is attached to the annexed Affirmation of Elizabeth Stein, Esq., pursuant to 22 NYCRR § 600.14(b). This Motion for Leave to Appeal and its supporting Memorandum incorporate by reference, and fully adopt, all the arguments, evidence, exhibits, memoranda, testimony and authorities previously filed in these cases,[1] and are timely filed pursuant to CPLR 5513(b)[2] and 22 NYCRR § 600.14(b).

This Court should grant the Motion for Leave to Appeal for the following

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

[2] This Motion for Leave to Appeal and supporting Memorandum are timely as they were served on November 16, 2017.

reasons:

(1) the appeal raises novel and complex legal issues that are of great public importance and interest in New York, and throughout the United States and the world;

(2) the *Decision* conflicts with rulings of the Court of Appeals, this Court, and other judicial departments of the Appellate Division on such fundamental legal issues as the requirements for legal personhood and the availability of the writ of habeas corpus for both humans and chimpanzees, which may only be resolved by the Court of Appeals; and

(3) the *Decision* contains numerous substantial legal errors and erroneous factual assumptions that require review and correction by the Court of Appeals.

Among the novel, important, and complicated questions of law the Court of Appeals should consider, to which it has not spoken, are:

(1) May an autonomous being be denied the right to a common law writ of habeas corpus solely because she is not human?

(2) May a court refuse to issue a common law writ of habeas corpus or order to show cause from a successive petition under CPLR 7003(b) if (a) the legality of a detention has not been previously determined by a court of the State in a prior proceeding for a writ of habeas corpus, and/or (b) the petition presents new grounds not theretofore presented and determined, and/or (c) the ends of justice are served by granting it?

(3) Is habeas corpus available to an unlawfully imprisoned "person" who

must necessarily be released into the custody of another?

For the reasons set forth below, this Court should grant the NhRP's Motion for Leave to Appeal.

II. STANDARD OF REVIEW

In determining whether to grant leave to appeal, courts look to the novelty, difficulty, importance, and effect of the legal and public policy issues raised. *See In re Shannon B.*, 70 N.Y.2d 458, 462 (1987) (granting leave on an "important issue"); *Town of Smithtown v. Moore*, 11 N.Y.2d 238, 241 (1962) (granting leave "primarily to consider [a] question . . . of state-wide interest and application"); *Neidle v. Prudential Ins. Co. of Am.*, 299 N.Y. 54, 56 (1949) (granting leave because of "[t]he importance of the decision" and "its far-reaching consequences"); *People ex rel. Wood v. Graves*, 226 A.D. 714, 714 (3rd Dept. 1929) ("Motion to appeal granted as the questions of law presented are of general public importance and ought to be reviewed by the Court of Appeals."); *Hamlin v. Hamlin*, 224 A.D. 168, 172 (4th Dept. 1928) ("in order that the law applicable may be definitely settled, and the matter disposed of accordingly, leave to appeal to the Court of Appeals is granted"); *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898, 917 (Sup. Ct. 2015) ("Even were I not bound by the Third Department in Lavery, the issue of a chimpanzee's right to invoke the writ of habeas corpus is best decided, if not by the Legislature, then by the Court of Appeals, given its role in setting state policy"). *See also* 22 NYCRR § 500.22 (leave should be granted when "the issues are novel or of public importance"); COURT OF APPEALS OF THE STATE OF NEW YORK: ANNUAL REPORT OF THE CLERK

OF THE COURT: 2010, at 2 (2011) (leave is most often granted to address "novel and difficult questions of law having statewide importance").

Leave to appeal to the Court of Appeals is particularly warranted where, as here, a case presents important and novel issues of law of statewide, national, and international significance. *See, e.g.*, *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 38 (1996). This case and the arguments it raises have been the subject of thousands of legal commentaries, national and international news articles, radio and television programs, and podcasts. Specifically, in the two weeks before oral argument and on the day of and in the six months since, at least 2,095 media articles were published on the issue of whether a chimpanzee could have the right to a common law writ of habeas corpus. These outlets include, in the U.S.: *NBC News*, *Wall Street Journal*, *Washington Post*, *Associated Press*, *Law360*, *Gizmodo*, *Fox News*, and *Salon*); and around the world: *Sydney Morning Herald*, *Kremlin Express*, *Yahoo Japan*, Mexico's *Entrelíneas*, and India's *Economic Times*. The collective potential reach of this pre- and post-hearing media coverage is approximately 1.4 billion people, according to the media monitoring service Meltwater.[3] Moreover the issues raised by the NhRP, as well as the litigation itself, have captured the interest of the world's leading legal scholars and the most selective academic publications,[4] while catalyzing the development of a whole

[3] *See* attached as "Exhibit A" a PDF printout of a table showing approximately the 100 most highly circulated media stories on this case and the Decision. A spreadsheet containing the full list of 2,095 media items covering this case between the period of March-November, 2017 is available for download at: https://www.nonhumanrights.org/content/uploads/Media-Coverage-Tommy-Kiko-Appellate-Hearing-Raw-Data.csv (last accessed November 15, 2017).

[4] *See* Richard A. Epstein, *Animals as Objects of Subjects of Rights*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Richard

field of academic research and debate, generating extensive discussion in dozens of law review articles, multiple academic books, several science journals, and a variety of legal industry publications.[5] This case and the arguments it raises are

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[5] Richard A. Epstein, *Animals as Objects of Subjects of Rights*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Richard A. Posner, *Animal Rights: Legal Philosophical, and Pragmatic Perspectives,* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Justin F. Marceau and Steven M. Wise, "Exonerating the Innocent: Habeas for Nonhuman Animals," WRONGFUL CONVICTIONS AND THE DNA REVOLUTION - TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel S. Medwed, ed. Cambridge University Press 2017); Steven M. Wise, *A Great Shout: Legal Rights for Great Apes, in* THE ANIMAL ETHICS READER (Susan J Armstrong & Richard G. Botzler eds., 2017); Steven M. Wise, *Animal Rights, One Step at a Time*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Steven M. Wise, *The Capacity of Non-Human Animals for Legal Personhood and Legal Rights, in* THE POLITICS OF SPECIES: RESHAPING OUR RELATIONSHIPS WITH OTHER ANIMALS (Raymond Corbey & Annette Lanjouw eds., 2013); Katrina M. Albright, *The Extension of Legal Rights to Animals Under A Caring Ethic: An Ecofeminist Exploration of Steven Wise's Rattling the Cage*, 42 NAT. RESOURCES J. 915, 917 (2002); Jeffrey L. Amestoy, *Uncommon Humanity: Reflections on Judging in A Post-Human Era*, 78 N.Y.U. L. REV. 1581, 1591 (2003); Pat Andriola, *Equal Protection for Animals*, 6 BARRY U. ENVTL. &

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also having an impact on the courts in other states. By way of illustration, the Supreme Court of Oregon referenced the "ongoing litigation" brought by the NhRP, which "seeks to establish legal personhood for chimpanzees" and wrote:

> As we continue to learn more about the interrelated nature of all life, the day may come when humans perceive less separation between themselves and other living beings than the law now reflects. However, we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still[.]

State v. Fessenden, 355 Ore. 759, 769-70 (2014). Based in large part on the work of the NhRP, an Argentine civil law court in 2016 recognized a chimpanzee named Cecilia as a "non-human person," ordered her released from a Mendoza Zoo pursuant to a writ of habeas corpus, and sent to a sanctuary in Brazil. *In re Cecelia*, Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-23.

As discussed *infra*, leave to appeal to the Court of Appeals is further warranted where, as here, a decision of the Appellate Division conflicts with decisions of the Court of Appeals, *e.g.*, *Guice*, 89 N.Y.2d at 38, decisions within its own department, as well as decisions among the other judicial departments. *See also* 22 NYCRR § 500.22(b)(4) (leave should be granted when the issues "present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division."). The Court should also grant the NhRP's Motion for Leave to Appeal so that the Court of Appeals may determine whether this Court erred as a matter of law. *See*, *Shindler v. Lamb*, 9 N.Y.2d 621 (1961).

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

The question of who is a "person" within the meaning of New York's

common law of habeas corpus is the most important individual issue that can come before a New York court. Personhood determines who counts, who lives, who dies, who is enslaved, and who is free. As the NhRP argued to this Court, the term "person" is not now and has never been a synonym for "human."[6] Instead, it designates Western law's most fundamental category by identifying those entities capable of possessing a legal right. The Court of Appeals has made clear that this important determination is to be based on policy, and not biology, as this Court based its decision. *See Byrn v. New York City Health and Hospitals Corp*., 31 N.Y. 2d 194, 201 (1972).

The question of whether personhood should ever turn on an individual's ability to bear duties and responsibilities had never been addressed by an English-speaking court until the misguided outlier decision of the Appellate Division, Third Judicial Department ("Third Department") in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 149 (3rd Dept. 2014), *lv denied*, 26 N.Y.3d 902 (2015)[7] which held that an entity must have the capacity to bear duties and responsibilities to be a "person" for any purpose.[8] As *Lavery* was the only appellate court decision that directly touched upon the issue at the time, the

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

[7] The court in *Lavery* explicitly recognized that the issues raised in the case were novel and implicitly recognized their great importance and legal significance statewide, nationally and internationally when it wrote: "This appeal presents the novel question of whether a chimpanzee is a 'person' entitled to the rights and protections afforded by the writ of habeas corpus." 124 A.D.3d at 149.

[8] The *Lavery* court went on to erroneously take judicial notice of the mistaken fact that chimpanzees lack such capacity and thereby concluded that they could not be "persons" for purposes of habeas corpus protection.

Supreme Court, New York County in *Stanley*, 16 N.Y.S.3d at 915-17, felt bound to follow it. This Court had the opportunity to correct *Lavery*. Instead it implicitly accepted *Lavery*, thereby perpetuating its false notion that personhood is synonymous with being human.

The importance of addressing this unresolved issue of whether an autonomous being such as a chimpanzee may be denied the right to a common law writ of habeas corpus solely because he is not human cannot be overstated. New York has always vigorously embraced the common law writ of habeas corpus, *People ex rel. Pruyne v. Walts*, 122 N.Y. 238, 241-42 (1890), *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875), and there is no question that any court would release Tommy and Kiko if they were human beings, for their detention grossly interferes with their exercise of their autonomy and bodily liberty.

Until the Court of Appeals rules on this personhood issue, every lower court in the State of New York is bound by *Lavery*, as evidenced by this *Decision*, which undermines the value of habeas corpus for both humans and chimpanzees. The Court of Appeals must have the opportunity to determine whether an entity must be capable of bearing duties and responsibilities to be considered a "person" for the purpose of securing a common law writ of habeas corpus; in practical terms, whether the claimant must be a human being.

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

The Motion for Leave to Appeal should also be granted because the case raises complex questions of law and fact. *See Melenky v. Melen*, 206 A.D. 46, 51-

52 (4th Dept. 1923).[9] The question of whether a chimpanzee is entitled to legal personhood involves inquiry not only into the legal issue of personhood generally, but into the detailed uncontroverted expert evidence offered in support of the NhRP's assertion that chimpanzees possess the autonomy sufficient for personhood for the purpose of a common law writ of habeas corpus, as a matter of liberty, equality, or both. Nine prominent primatologists from around the world submitted uncontroverted Expert Affidavits demonstrating that chimpanzees possess the autonomy that allows them to choose how they will live their emotionally, socially, and intellectually rich lives. In response to *Lavery*, six uncontroverted Supplemental Affidavits were submitted by Dr. Jane Goodall and five other internationally-respected chimpanzee cognition experts that demonstrated that chimpanzees possess the capacity to bear duties and responsibilities both within chimpanzee communities and chimpanzee/human communities. Such complex scientific and legal issues regarding personhood and the scope of the common law writ of habeas corpus merit immediate attention by the Court of Appeals. *See Woods v. Lancet*, 303 N.Y. 349, 355 (1951) ("we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.").

V. The *Decision* requires review by the Court of Appeals as it conflicts with

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

prior decisions of that Court, this Court, and other Appellate Departments, and contains serious errors of law.

A. In affirming the lower court's refusal to issue the orders to show cause as an improper successive petition under CPLR 7003(b), this Court mistakenly limited the inquiry to the question of whether there were changed circumstances, then erroneously determined there were none.

"A court is always competent to issue a new habeas corpus writ on the same grounds as a prior dismissed writ." *People ex rel. Anderson v. Warden, New York City Correctional Instn. for Men*, 325 N.Y.S.2d 829, 833 (Sup. Ct. 1971). *See also Losaw v. Smith*, 109 A.D. 754 (3d Dept. 1905); *In re Quinn*, 2 A.D. 103, 103-04 (2d Dept. 1896), *aff'd*, 152 N.Y. 89 (1897). The rule permitting relitigation "after the denial of a writ, is based upon the fact that the detention of the prisoner is a continuing one and that the courts are under a continuing duty to examine into the grounds of the detention." *Post v. Lyford,* 285 A.D. 101, 104-05 (3rd Dept. 1954) (prior adjudication no bar to a new application on same grounds). *See People ex rel. Butler v. McNeill*, 219 N.Y.S.2d 722, 724 (Sup. Ct. 1961) ("the ban of res judicata cannot operate to preclude the present proceeding" despite the fact that it was petitioner's fifth application for habeas corpus to the court). This is because "[c]onventional notions of finality of litigation have no place where life or liberty is at stake[.]" *Sanders v. United States*, 373 U.S. 1, 8 (1963). The "inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ." *Id.*

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

to CPLR 7003(b). *See People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874); *People ex rel. Leonard HH v. Nixon*, 148 A.D.2d 75, 79 (3d Dept. 1989). *Stanley*, 16 N.Y.S.3d at 909-10 ("Notwithstanding the interest in issuing valid writs … the Legislature apparently found it necessary to include within the statute a provision permitting, but not requiring, a court to decline to issue a writ under certain circumstances, thereby permitting successive writs, a construction reflected in the traditional and general common law rule that res judicata has no application in habeas corpus proceedings."). As this Court stated: "CPLR 7003(b) permits a court to decline to issue a writ of habeas corpus if 'the legality of a detention has been determined by a court of the state in a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined, and the court is satisfied that the ends of justice will not be served by granting it." *Decision* at 76. While the statute is clear that all three elements must be met for a court to decline a petition for a writ of habeas corpus as successive, this Court erroneously confined its analysis solely to the issue of whether there were changed circumstances, then erroneously concluded that there were none. Yet not one of the elements of CPLR 7003(b) was satisfied.

1. **This Court erroneously concluded that the second petitions filed on behalf of Tommy and Kiko "were not warranted or supported by any changed circumstances."**

When the NhRP filed its original petitions for writs of habeas corpus and orders to show cause in December 2013 on behalf of Tommy, Kiko, and Hercules and Leo in the Supreme Courts of Fulton, Niagara and Suffolk Counties, respectively, none of the eleven supporting affidavits, and none of the petitions,

addressed whether a chimpanzee could bear duties and responsibilities. This was because the NhRP had no way of knowing that the Third Department in *Lavery* would, for the first time in the history of the law of English-speaking peoples, rule that an entity is required to have the capacity to bear duties and responsibilities in order to have any rights, let alone that of common law habeas corpus, then erroneously take judicial notice of the mistaken fact that chimpanzees are incapable of having this capacity.

In response to the Third Department's *Lavery* decision, the NhRP filed sixty pages of Supplemental Affidavits in all subsequent petitions solely for the purpose of demonstrating that chimpanzees possess the capacity to bear duties and responsibilities both within chimpanzee communities and human/chimpanzee communities, facts that had never been presented to any New York court.[10] Thus, this Court's statements that (1) "the motion court properly declined to sign the orders to show cause since these were successive proceedings which were not warranted or supported by any changed circumstances" (*Decision* at 75-76); (2) *every* petition for habeas corpus filed by the NhRP was accompanied by affidavits demonstrating that chimpanzees possess the ability "to fulfill certain duties and responsibilities" (*Id.* at 76); and (3) "[a]ny new expert testimony/affidavits cannot

[10] These uncontroverted facts set forth in the Supplemental Affidavits demonstrate that chimpanzees, among other capacities, possess the ability to understand and carry out duties and responsibilities while knowingly assuming obligations and then honoring them, behave in ways that seem both lawful and rule-governed, have moral inclinations and a level of moral agency, ostracize individuals who violate social norms, respond negatively to inequitable situations, have a social life that is cooperative and represents a purposeful and well-coordinated social system, routinely enter into contractual agreements, keep promises and secrets, prefer fair exchanges, perform death-related duties, and show concern for others' welfare.

be said to be in response to or counter to the reasoning underlying the decision of the Court in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery* (124 A.D.3d 148)" (*Id*.) are each plainly erroneous and illustrate this Court's misunderstanding of the nature and purpose of the Supplemental Affidavits.

Moreover, none of the three cases this Court cited, *People ex rel. Glendening v Glendening*, 259 App. Div. 384, 387 (1st Dept. 1940), *aff'd.* 284 NY 598 (1940); *People ex rel. Woodard v Berry*, 163 A.D.2d 759 (3d Dept 1990) *lv. denied* 76 N.Y.2d 712, 715 (1990); or *People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874), support its affirming the lower court's refusal to sign the orders to show cause.

In *Glendening*, 259 App. Div. at 387, the First Department provided the appropriate standard: "parties to the same habeas corpus proceeding may not continually relitigate *de novo* issues that were *fully litigated between them in prior applications in the same proceeding in which long and exhaustive hearings were held where there has been no change in the facts and circumstances determining such issues.*" (emphasis added). *Woodward* simply cites *Glendening* for this standard. However, it then supports the *opposite* conclusion that this Court drew. Moreover, *Woodward* was expressly relied upon by the Supreme Court, New York County in. *Stanley*, 16 N.Y.S.3d at 909, to justify the *issuance* of an order to show cause from a successive petition filed by the NhRP on behalf of Hercules and Leo. The successive petitions in both *Woodward*, 163 A.D.2d at 759-60, and *Glendening*, 259 A.D. 387-88, were dismissed *only* because, unlike in the case at bar, their merits had been "fully litigated" in a prior petition and either there were

no changed circumstances or none had been claimed. Finally, in *Brady*, 56 N.Y. at 192, the Court of Appeals stated "[i]n this case the relator is restrained of his liberty; and a decision under one writ refusing to discharge him, did not bar the issuing of a second writ by another court or officer."

The following four statements made by this Court further demonstrate its misunderstanding of NhRP's legal personhood and rights arguments and therefore its failure to grasp that the *sole purpose* of the Supplemental Affidavits was not to buttress its argument that chimpanzees are autonomous beings, but to rebut *Lavery's* unsupported claim that chimpanzees lack the capacity to possess duties and responsibilities.

(1) "The 'new' expert testimony presented by petition continues to support its basic position that chimpanzees exhibit many of the same social, cognitive and linguistic capabilities as humans and therefore should be afforded some of the same fundamental rights as humans." (*Decision* at 76);

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

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

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

This Court's claims that the NhRP's argument for legal personhood was that the chimpanzees possess "many of the same social, cognitive and linguistic capabilities as humans" or possess "human-like characteristics" or possess "intelligence and social capabilities" or "are intelligent, and have the ability to be trained by humans to be obedient to rules, and to fulfill certain duties and responsibilities" were merely straw man arguments, ironically ones the NhRP itself rejects as overly broad. This Court then, unsurprisingly, demolished its own straw men.

The NhRP's *actual* legal arguments were constructed only after it first determined that common law liberty[11] and equality[12] were fundamental legal values and principles that New York courts clearly believed in, as reflected in their judicial decisions. The NhRP then squarely rested both its liberty and equality arguments upon the "autonomy" — the ability freely to choose how to live one's life — not on a chimpanzee's similarities to a human being and ability to be trained that it demonstrated chimpanzees possess, through its original 100 pages of Expert Affidavits. These original Expert Affidavits did *not* address the chimpanzees' ability to bear duties and responsibilities, which is a matter distinct

[11] *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference from others, unless by clear and unquestionable authority of law.… The right to one's person may be said to be a right of complete immunity: to be let alone"); *Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986) ("the greatest possible protection is accorded [one's] autonomy and freedom from unwanted interference with the furtherance of his own desires").

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

from whether they are autonomous. Perhaps the starkest illustration of the failure of this Court to grasp the NhRP's actual arguments is that this Court never once mentioned "equality" or "autonomy," and did not use the word "liberty" at all in its analysis of the NhRP's argument. This is despite the fact that these three critical words "liberty," "equality," and "autonomy," beat at the heart of the NhRP's legal arguments, with the NhRP invoking "liberty" thirty-three times, "equality" twenty-two times, and "autonomy" sixteen times in its trial memorandum.

Finally, contrary to the Court's unsupported and palpably incorrect assertion that "[n]or, did it [the Third Department], as argued by petitioner, take judicial notice that chimpanzees cannot bear duties and responsibilities," *Decision* at 76, the Third Department in *Lavery unquestionably* took judicial notice of the fact that chimpanzees cannot bear duties and responsibilities. *No evidence was offered by any party* to the Third Department or the lower court in *Lavery* on the factual issue of whether chimpanzees can bear legal duties or submit to societal responsibilities. Instead, the Third Department simply noted that: "[U]nlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights — such as the fundamental right to liberty protected by the writ of habeas corpus — that have been afforded to human

beings." 124 A.D.3d at 152.[13] That this assertion is scientifically false was clearly demonstrated by the NhRP's Supplemental Affidavits.

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

Under CPLR 7003, a petition for a writ of habeas corpus may *only* be dismissed as successive under very narrow and specific circumstances, one of which being that the legality of the detention has to have been previously determined by a court of the State in a prior habeas corpus proceeding. Neither the Supreme Court, Fulton County in which the original petition on behalf Tommy was filed, nor the Supreme Court, Niagara County in which the original petition on behalf of Kiko was filed, actually *issued* the requested order to show cause on their behalf. Therefore, the legality of their detentions was never determined. *See Stanley*, 16 N.Y.S. at 909 ("there must be a final judgment on the merits in a prior proceeding …. Respondents cite no authority for the proposition that a declined order to show cause constitutes a determination on the merits, that is has any precedential value, or that a justice in one county is precluded from signing an order to show cause for relief previously sought from and denied by virtue of a justice in another county refusing to sign the order to show cause.").

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

As *Stanley* further recognized, "claim preclusion and issue preclusion contemplate 'that the parties had a full and fair' opportunity to litigate the initial determination." 16 N.Y.S.3d at 910 (citation omitted). Obviously, that was not the case for Tommy and Kiko. On appeal in Tommy's case, the Third Department affirmed the lower court ruling, *without reaching the legality of Tommy's detention*, on the ground that chimpanzees are unable to bear duties and responsibilities and therefore are not legal persons. *Lavery*, 124 A.D.3d at n.3. On appeal in Kiko's case, the Fourth Department affirmed, *without deciding the legality of Kiko's detention*, on the ground that Kiko's immediate release and subsequent placement in a sanctuary was inappropriate habeas corpus relief. *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti,* 124 A.D.3d 1334 (4th Dept. 2015), *lv denied*, 26 N.Y.3d 901 (2015). Thus, as the legality of Tommy's and Kiko's detention was never adjudicated by *any* New York court*,* this Court erroneously affirmed the lower court's refusal to issue the requested orders to show cause.

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

B. This Court's interpretation of "person" for purposes of a common law writ of habeas corpus and therefore CPLR Article 70 was erroneous.

This Court's statement that "[t]he common law writ of habeas corpus, *as codified by CPLR article 70,* provides a summary procedure by which a person who has been illegally imprisoned or otherwise restrained in his or her liberty can challenge the legality of the detention," *Decision* at 76, quoting *Lavery,* 124 A.D.3d at 150, quoting CPLR 7002(a) (emphasis added), demonstrates its misunderstanding of the nature of the *common law* writ of habeas corpus. Article 70 *does not* codify the common law; it merely provides the procedural vehicle by which a common law writ of habeas corpus is brought.[14] Nor does Article 70 control the substantive entitlement to the writ, which is entirely a common law matter.[15] Rather, by definition, it solely governs procedure, that is, *how* a lawsuit proceeds, *not who* is a common law "person" for the purpose of habeas corpus (CPLR 102, CPLR 101).[16]

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

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

[16] To the extent Article 70 limits who is a "person" able to bring a common law writ of habeas corpus, beyond the limitations of the common law itself, it violates the Suspension Clause of the New York Constitution, Art. 1 § 4, which provides that "[t]he privilege of a writ or order of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, or the public safety requires it." The Suspension Clause renders the legislature powerless to deprive an individual of

Thus, this Court's assertions: (1) "[w]hile the word 'person' is not defined in the statute, there is no support for the conclusion that the definition includes nonhumans, i.e. chimpanzees" (*Decision* at 77); (2) that there is no evidence "the Legislature intended the term 'person' in CPLR article 70 to expand the availability of habeas protection beyond humans" (*Id*. at 77); and (3) "petitioner does not cite any sources indicating that United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty" (*Id*.), are incorrect and inapposite as *legislative intent*, whether it be state, federal, constitutional, or statutory, is irrelevant to the *common law* determination of who may be a "person" for purposes of a common law writ of habeas corpus and therefore Article 70.[17] Simply stated, as the term "person" is undefined in Article 70, the Court must look to the common law, and only to the common law, for its meaning.

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the privilege of the common law writ of habeas corpus. *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939). *See e.g.*, *Matter of Morhous v. Supreme Ct. of State of N.Y.*, 293 N.Y. 131, 135 (1944) (Suspension Clause means that legislature has "no power" to "abridge the privilege of habeas corpus"); *People ex rel. Sabatino v. Jennings*, 246 N.Y. 258, 260 (1927) (by the Suspension Clause, "the writ of habeas corpus is preserved in all its ancient plenitude"); *People ex rel. Whitman v. Woodward*, 150 A.D. 770, 778 (2d Dept. 1912) (Suspension Clause gives habeas corpus "immunity from curtailment by legislative action").

[17] *See Tweed*, 60 N.Y. at 566 (The writ "cannot be abrogated, or its efficiency curtailed, by legislative action. . . . The remedy against illegal imprisonment afforded by this writ . . . is placed beyond the pale of legislative discretion."); *People ex rel. Bungart v. Wells*, 57 A.D. 140, 141 (2d Dept. 1901) (habeas corpus "cannot be emasculated or curtailed by legislation"); *Whitman*, 150 A.D. at 772 ("no sensible impairment of [habeas corpus] may be tolerated under the guise of either regulating its use or preventing its abuse"); *id.* at 781 (Burr, J., concurring) ("anything . . . essential to the full benefit or protection of the right which the writ is designed to safeguard is 'beyond legislative limitation or impairment'") (citations omitted); *Frost*, 133 A.D. at 187 (writ lies "beyond legislative limitation or impairment").

This Court further opined: "No precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a 'person' and entitled to habeas relief." *Decision* at 77-78. Again, such precedent is entirely irrelevant to a common law adjudication. As noted by the court in *Stanley*, "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" 16 N.Y.S.3d at 912. Moreover, "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Id.* (citing *Obergefell v. Hodges*, 135 S. Ct. 2602 (2015)).

Further, the reason there was no precedent for treating nonhuman animals as "persons" for the purpose of securing habeas corpus relief was *not* because the claim *had been rejected* by the courts. It was because no nonhuman entity capable *of being imprisoned* (unlike a corporation), certainly not a nonhuman animal, and most certainly not an autonomous being such as a chimpanzee, had ever *demanded* a writ of habeas corpus. This is the *first* such demand ever made by a nonhuman animal in a common law jurisdiction. But the novelty of this claim is no reason to deny Tommy or Kiko habeas corpus relief. *See, e.g.*, *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (that no Native American had previously sought relief pursuant to the Federal Habeas Corpus Act did not foreclose a Native American from being characterized as a "person" and being awarded the requested habeas corpus relief); *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (that no slave had ever been granted a writ of habeas corpus

was no obstacle to the court granting one to the slave petitioner); *see also Lemmon v. People*, 20 N.Y. 562 (1860). Finally, "person" is not a biological concept nor does it necessarily correspond to the natural order. *Byrn*, 31 N.Y.2d at 201. No entities' personhood depends upon whether they are presently "persons" or not. Once the demand for personhood is made, the court must engage in a mature weighing of public policy and moral principle. *Id.*

Contrary to this Court's assertion that "habeas relief has never been found applicable to any animal," *Decision* at 78, habeas relief has been ordered for at least two nonhuman animals, an orangutan named Sandra in Buenos Aires, Argentina, *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA, Sobre Amparo* (Association of Officials and Attorneys for the Rights of Animals and Others v. GCBA, on Amparo), EXPTE. A2174-2015 (October 21, 2015), and a chimpanzee named Cecilia in Mendoza, Argentina, *In re Cecilia*, File No. P-72.254/15 at 22-23. It also appears that the writ was issued to a captive bear in Colombia, though that ruling was subsequently overruled by a higher court and is pending appeal, *Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 (July 26, 2017). Moreover, none of the cases this Court cited in support of its statement (*United States v Mett*, 65 F.3d 1531 (9th Cir 1995), *cert denied* 519 U.S. 870 (1996); *Waste Mgt. of Wisconsin, Inc. v. Fokakis*, 614 F.2d 138 (7th Cir 1980), *cert denied* 449 U.S. 1060 (1980); and *Sisquoc Ranch Co. v. Roth*, 153 F.2d 437, 441 (9th Cir 1946)) have *anything whatsoever* to do with nonhuman animals. In *Mett*, the federal court merely permitted a corporation to

invoke the writ of *coram nobis*. In *Waste Management,* the federal court simply refused to grant habeas corpus to a corporation "because a corporation's entity status precludes it from being incarcerated or ever being held in custody," *id*. at 140. In *Sisquoc Ranch,* the federal court only held that the fact that a corporation has a contractual relationship with a human being did not give it standing to seek habeas corpus on its own behalf.

Finally, this Court's statement that "the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process (*see Lewis v. Burger King,* 344 Fed. Appx. 470, 472 [10th Cir 2009], *cert. denied,* 558 U.S. 1125 [2010])" further demonstrates its misunderstanding of how "person" should be interpreted under the *common law*. *Decision* at 80.

First, the *Lewis* case does not support this assertion. The NhRP filed its petitions in state court, not federal court, and sought a common law, not a statutory nor a constitutional remedy. The *Lewis* case has nothing whatsoever to do with the common law, but merely rejects the *pro se* plaintiff's claim that her service dog has standing under Article III of the United States Constitution to sue under the Americans with Disabilities Act of 1990, a ruling with which the NhRP agrees. However, the question of who is a *common law* "person" for the purpose of the *common law* writ of habeas corpus is *by definition uniquely* a question for the courts. The Legislature, *by definition*, does not make the *common law*.

The New York Court of Appeals has long rejected the claim that "change … should come from the Legislature, not the courts." *Woods v. Lancet*, 303 N.Y. 349,

355 (1951) ("We abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule."). New York courts have "not only the right, but the duty to re-examine a question where justice demands it" to "bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.'" *Id.* (citation omitted).

As Kiko's and Tommy's thinghood derives from the common law, their entitlement to personhood must be determined thereunder. When justice requires, it is the role of the courts to refashion the common law — most especially the common law of habeas corpus — with the directness Lord Mansfield displayed in *Somerset v. Stewart*, when he held human slavery "so *odious* that nothing can be suffered to support it but positive law." 98 Eng. Rep. at 510 (emphasis added). Thus, slaves employed the common law writ of habeas corpus to challenge their status as things in New York State. *Lemmon*, 20 N.Y. at 604-06, 618, 623, 630-31 (citing *Somerset*); *In re Belt*, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846) (citing *Somerset* and *Forbes v. Cochran,* 107 Eng. Rep. 450, 467 (K.B. 1824)); *In re Tom*, 5 Johns. 365 (N.Y. 1810).

In summary, the Court of Appeals should have the opportunity to determine whether this Court erroneously relied on legislative intent and the lack of exact precedent in ruling that Tommy and Kiko are not "persons" for the purpose of a common law writ of habeas corpus rather than applying the common law itself in reaching its conclusion.

C. This Court's analysis of personhood was erroneous and in conflict with precedent.

This Court's disregard of the teachings in *Byrn* by repeatedly conflating the term "person" with "human," while asserting that "petitioner's argument that the word 'person' is simply a legal term of art is without merit," *Decision* at 78, are ripe for Court of Appeals review. As the Court of Appeals noted in *Byrn*, "[upon according legal personality to a thing the law affords it the rights and privileges of a legal person[.]"31 N.Y.2d at 201 (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909) ("Gray"). *See also* Hans Kelsen, *General Theory of Law and State* 93-109 (1945); George Whitecross Paton, *A Textbook of Jurisprudence* 349-356 (4th ed., G.W. Paton & David P. Derham eds. 1972) ("Paton"); Wolfgang Friedman, *Legal Theory* 521-523 (5th ed. 1967)). Legal persons possess inherent value; "legal things," possessing merely instrumental value, exist for the sake of legal persons. 2 William Blackstone, *Commentaries on the Laws of England* *16 (1765-1769).

"*Whether the law should accord legal personality is a policy question*[.]" *Byrn*, 31 N.Y.2d at 201 (emphasis added). "Legal person" is not a biological concept; it does not "necessarily correspond" to the "natural order." *Id*. It is not a synonym for "human being." *See* Paton, *supra*, at 349-350, *Salmond on Jurisprudence* 305 (12th ed. 1928) ("A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination,"); IV Roscoe

Pound, *Jurisprudence* 192-193 (1959). "Legal personality may be granted to entities other than individual human beings, e.g., a group of human beings, a fund, an idol." George Whitecross Paton, *A Textbook of Jurisprudence* 393 (3rd ed. 1964). "There is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." Gray, *supra* Chapter II, 39 (1909), and at 43, that "animals may conceivably be legal persons," citing, among other authorities, those cited in *Byrn*, *supra*.

Moreover "person" is nothing *but* a legal "term of art." *Wartelle v. Womens' & Children's Hosp.*, 704 So. 2d 778, 781 (La. 1997). Persons count in law; things don't. *See* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1746 (2001). "[T]he significant fortune of legal personality is the capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). "Person" has never been equated with being human and many humans have not been persons. "Person" may be narrower than "human being." A human fetus, which the *Byrn* court acknowledged, 31 N.Y.2d at 199, "is human," was still not characterized by the *Byrn* court as a Fourteenth Amendment "person." *See also Roe v. Wade*, 410 U.S. 113 (1973). Human slaves were not "persons" in New York State until the last slave was freed in 1827. Human slaves were not "persons" throughout the entire United States prior to the ratification of the Thirteenth Amendment to the United States Constitution in 1865. *See, e.g.*, *Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828) ("Slaves, although they

are human beings . . . (are not treated as a person, but (*negotium*), a thing").[18] Women were not "persons" for many purposes until well into the twentieth century. *See* Robert J. Sharpe and Patricia I. McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (2007).

Significantly, the words "duty," "duties," or "responsibility" do not appear anywhere in the *Byrn* majority opinion. Other than *Lavery* and perhaps the case at bar, no court has ever ruled that an entity must be able to bear duties and responsibilities to be deemed a legal person. Nor should they. The NhRP has consistently argued that an entity is a "person" if she can *either* bear rights *or* responsibilities. It must be further noted that the Fourth Department in *Presti*, which was decided after *Lavery*, could have relied on *Lavery* in denying habeas corpus relief to a chimpanzee but chose not to thereby creating conflict among the judicial departments on this personhood issue.

The foundation for the Third Department's personhood decision in *Lavery*, at 151-152, was built on legal quicksand; it principally relied upon the definition of "person" found in *Black's Law Dictionary* and several cases that relied upon *Black's Law Dictionary* which defined a "person" as one with the capacity for both duties *and* responsibilities. However, in arriving at this definition, *Black's Law Dictionary* relied solely upon the 10th edition of *Salmond on Jurisprudence*. But when the NhRP located the 10th edition of *Salmond on Jurisprudence,* it found its definition of "person" actually supported the *NhRP's* definition of "person" as an

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

entity that can bear rights *or* responsibilities. When the NhRP pointed out this error, *Black's Law Dictionary* promptly promised to correct it in its next edition.[19] The NhRP then asked this Court, by motion, to consider the NhRP's exchange with *Black's Law Dictionary* and recognize that a major support for the Third Department's decision had collapsed. Inexplicably this Court *denied* the NhRP's motion. Then it perpetuated the Third Department's error in its decision.

In accordance with *Byrn,* a determination of an entity's personhood necessarily entails a mature weighing of public policy and moral principle in which that entity's capacity to bear duties and responsibilities plays no part. This is precisely the approach this Court should have taken. This Court should have rejected the correlative duties and responsibilities holding of the Third Department and determined that Tommy and Kiko are "persons" for purposes of securing their freedom.

As the NhRP has consistently maintained, millions of human beings lack the capacity to bear duties and responsibilities yet are legal persons. In response, this Court merely stated that "[t]his argument ignores the fact that these are still human beings, members of the human community." *Decision* at 78. Such assertion is bias. We have seen such biases before and they have always been tragic and ultimately regretted.

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

Before the United States Supreme Court in 1857, Dred Scott's lawyers "ignore[d] the fact" that he was not white. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).[20] The lawyers for the Native American, Chief Standing Bear, "ignore[d] the fact" that Standing Bear was not white when, in 1879, the United States Attorney argued that a Native American could never be a "person" for the purpose of habeas corpus after Standing Bear was jailed for returning to his ancestral lands. *Crook*, 25 F. Cas. at 700-01. A California District Attorney "ignore[d] the fact" that a Chinese person was not white when insisting, in 1854, without success before the California Supreme Court, that a Chinese person could testify against a white man in court. *People v. Hall*, 4 Cal. 399 (1854).[21] The lawyer for Ms. Lavinia Goodell "ignore[d] the fact" that she was not a man before the Wisconsin Supreme Court that, in 1876, denied her the right to practice law solely because she was a woman. *In re Goodell*, 39 Wis. 232 (1875). Let us not return to those dark places. Chimpanzees are autonomous. Habeas corpus protects autonomy. An autonomous being's species should be irrelevant to whether she should have the fundamental right to the bodily liberty — the autonomy — that habeas corpus protects.

Sister common law countries demonstrate the principle of law that prevails throughout the common law world that "person" and "human" are not synonyms and it is error to ignore them as being "not relevant to the definition of 'person' in the United States and certainly … of no guidance to the entitlement of habeas relief

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

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

by nonhumans in New York." *Decision* at 33. These include New Zealand, which bestowed personhood upon a river in 2017[22] and a national park in 2014,[23] and India, which bestowed personhood upon a river and a glacier in 2017, *Mohd. Salim v. State of Uttarakhand & Others*, (PIL) 126/2014 (High Court Uttarakhand, 03/20/2017) and a mosque, *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369, ¶15 (Lahore High Court, Full Bench), an idol, *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925), and the holy books of the Sikh religion, *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, A.I.R. 2000 S.C. 421. In 2016, an Argentine civil law court recognized a chimpanzee named Cecilia as a "non-human person," ordered her released from a Mendoza Zoo, and sent to a sanctuary in Brazil. *In re Cecelia*, File No. P-72.254/15 at 22-23.

Some of these cases cite to the *same secondary sources* as did the Court of Appeals in *Byrn.* These cases, as well as *Byrn* and the numerous sources it cited, make clear that "person" and "human" are not synonymous and never have been. Even the New York Legislature recognized, more than twenty years ago, that "human" and "person" are not synonyms when it designated certain nonhuman animals, including chimpanzees, *In re Fouts,* 677 N.Y.S.2d 699 (Sur. 1998) (five chimpanzees), as "persons" by enacting a Pet Trust Statute, EPTL 7-8.1, which

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

[23] Te Urewara Act 2014, Subpart 3, sec, 11(1), *available at*: http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183705.html (last accessed November 15, 2017).

allows nonhuman animals to be trust beneficiaries and therefore "persons" as only "persons" may be trust beneficiaries in New York. *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); *Gilman v. McCardle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883), *rev. on other grds*., 99 N.Y. 451 (1885).

The Court of Appeals must have the opportunity to determine whether this Court's decision contravened *Byrn* by failing to recognize that the decision of whether Tommy and Kiko are "persons" for the purpose of a common law writ of habeas corpus is entirely a policy — and not a biological — question and by also failing to address the powerful and uncontroverted policy arguments, based upon fundamental common law values of liberty and equality, that the NhRP presented in detail. This *Decision* perpetuates the erroneous statement in *Lavery* that an inability to bear duties and responsibilities may constitute the sole ground for denying such a fundamental common law right as bodily liberty to an individual — except in the interest of the individual's own protection — much less an autonomous entity who is merely seeking the relief of a common law writ of habeas corpus.

Any requirement that an autonomous individual must also be able to bear duties or responsibilities to be recognized as a "person" for the purpose of a common law writ of habeas corpus undermines both the fundamental common law values of liberty and of equality. It undermines fundamental liberty because it denies personhood and all legal rights to an individual who incontrovertibly possesses the autonomy that is supremely valued by New York common law, even more than human life itself, *Rivers*, 67 N.Y.2d at 493; *In re Storar*, 52 N.Y.2d 363

(1981), *cert. den*., 454 U.S. 858 (1981). It undermines fundamental equality both because it endorses the illegitimate end of the permanent imprisonment of an incontrovertibly autonomous individual, *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001), *cert. den.*, 534 U.S. 826 (2001), and because "[i]t identifies persons by a single trait and then denies them protection across the board," *Romer*, 517 U.S. at 633.

D. The NhRP was not required to demand Tommy's and Kiko's presence in court.

The fact that "[p]etitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that 'there are no adequate facilities to house [them] in proximity to the [c]ourt'" is irrelevant to the determination of whether Tommy and Kiko are entitled to habeas corpus relief. *Decision* at 79. CPLR 7003(a) specifically provides for those situations "where the petitioner does not demand production of the person detained" and requires the court to "order the respondent to show cause why the person detained should not be released."

The NhRP followed that statute by bringing its action as a petition for a common law writ of habeas corpus and order to show cause. *See, e.g., State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982). *See, e.g.*, *Callan v. Callan*, 494 N.Y.S.2d 32, 33 (2d Dept. 1985) ("Plaintiff obtained a writ of habeas corpus by order to show cause when defendant failed to return her infant daughter after her visitation. . . ."); *State ex rel. Soss v. Vincent*, 369 N.Y.S.2d 766, 767 (2d Dept. 1975) ("In a habeas corpus proceeding upon an order to show cause (CPLR 7003,

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

As there is no legal requirement that a detained party be brought before the court, any failure to do so is irrelevant to the determination of whether habeas corpus relief should be granted. Bringing Tommy and Kiko to court would have

been dangerous to both the chimpanzees and the public and was unnecessary to the adjudication of personhood and the legality of their detention. The NhRP followed the statute by bringing the petition as an order to show cause and must not be penalized for doing so.

E. The NhRP challenged the legality of Tommy's and Kiko's detention and sought appropriate habeas corpus relief in asking for their transfer to a sanctuary.

This Court's statement that "[s]ince Petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court" (*Decision* at 79) was flagrantly wrong as the illegality of Tommy's and Kiko's detention was the pervading theme of both their petitions.

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

The NhRP's *entire case* was a challenge to the legality of Tommy's and Kiko's detentions and an attempt to secure their immediate release. The NhRP *never argues that the illegality of their detention is based upon the conditions of*

their confinement. Even *Lavery* recognized this: "[n]otably, we have not been asked to evaluate the quality of Tommy's current living conditions in an effort to improve his welfare." 124 A.D.3d at 149 (citation omitted). So did *Stanley*: "[t]he conditions under which Hercules and Leo are confined are not challenged by petitioner. . . . [T]he sole issue is whether Hercules and Leo may be legally detained at all." 16 N.Y.S.3d at 901.

The NhRP argued that Tommy and Kiko are "illegally imprisoned," that their "detention is unlawful," and that they are "unlawfully detained." *See Tommy* Appellate Brief at 61-63, Verified Petition for Habeas Corpus at 1-5 (Appendix at 15-22); *Kiko* Appellate Brief at 60-61, Verified Petition for Habeas Corpus at 1-5 (Appendix at 15-22). The term "unlawful" appears six times in the appellate brief, *Tommy* Appellate Brief at 61-63, *Kiko* Appellate Brief at 60-62, and the NhRP concludes by asking the court to "issue the order to show cause for a hearing to determine the legality of [the chimpanzees'] detention." *Tommy* Appellate Brief at 67-68; *Kiko* Appellate Brief at 66-67. In addition, the memoranda of law that accompanied the petitions to the lower court with respect to both Tommy and Kiko contained the following sections in its Arguments, none of which deal with the issue of the conditions of the chimpanzees' confinement: "A PERSON ILLEGALLY IMPRISONED IN NEW YORK IS ENTITLED TO A COMMON LAW WRIT OF HABEAS CORPUS" and "As Common law natural persons are presumed free, Respondents must prove they are not unlawfully imprisoning [Tommy and Kiko]." *Tommy* Trial Memorandum at 65, 86 (Appendix at 752, 773); *Kiko* Trial Memorandum at 68, 88 (Appendix at 730, 750).

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

The Court of Appeals as well as the First Department and other judicial departments have for two centuries used the writ of habeas corpus to order the release of such incompetent humans as child slaves, child apprentices, child residents of training schools, child residents of mental institutions, and mentally incapacitated adults, from the custody of one entity that was illegally detaining them and into the custody of another. *See, e.g.*, *Lemmon*, 20 N.Y. at 632 (five slave children discharged); *People ex rel. Margolis v. Dunston*, 174 A.D.2d 516, 517 (1st Dept. 1991) (juvenile); *State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982) (elderly sick woman); *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996) (elderly and ill woman). The court in *Stanley* specifically recognized that there is authority in the First Department that allows for such a placement. 16 N.Y.S.3d at 917 n.2. This Decision therefore contravenes the decision of New York's highest court and conflicts with decisions of its own judicial department as well as others.

Parenthetically, the writ of habeas corpus is available in New York to challenge conditions of confinement. *See, e.g.*, *People ex rel. Brown v. Johnston*, 9

N.Y.2d 482, 485 (1961) (habeas corpus was proper remedy to test the validity of a prisoner's transfer from a state prison to a state hospital for the insane); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943) ("that the appellant is still under a legal commitment to Elmira Reformatory does not prevent him from invoking the remedy of habeas corpus as a means of avoiding the further enforcement of the order challenged.") (citation omitted); *Matter of MHLS ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989) (mental patient transferred from secure to non-secure facility); *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 251 (2d Dept. 1993) (habeas corpus "available to challenge conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. LaBelle v. Harriman*, 35 A.D.2d 13, 15 (3d Dept. 1970) (same); *People ex rel. Berry v. McGrath*, 61 Misc. 2d 113, 116 (N.Y. Sup. Ct. 1969) (an "individual . . . is entitled to apply for habeas corpus" upon a "showing of a course of cruel and unusual treatment").

In ruling that the NhRP could not use the writ of habeas corpus to challenge the conditions of the chimpanzees' confinement, this Court relied solely upon two inapt cases, *Presti* and *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986), while asserting *Dawson* is "analogous to the situation here." *Dawson* actually undermines this Court's ruling.

In *Dawson*, the Court of Appeals *affirmed* that habeas corpus *can* be used to seek a transfer to an "institution *separate and different in nature* from the correctional facility to which petitioner had been committed[.]" *Id*. at 691 (emphasis added) (citing *Johnston*). In distinguishing *Johnston*, the *Dawson* Court

explained, "[h]ere, by contrast, petitioner *does not seek his release from custody in the facility*, but only from confinement in the special housing unit, a particular type of confinement within the facility which the Department … is expressly authorized to impose on lawfully sentenced prisoners[.]" *Id.* (citations omitted, emphasis added). As in *Johnston*, and unlike *Dawson*, the NhRP seeks release of Tommy and Kiko from their imprisonments to an appropriate chimpanzee sanctuary, an environment obviously completely "separate and different in nature." Unlike the habeas corpus petitioner in *Dawson*, Kiko and Tommy are not inmates properly convicted of a crime. They can be legally ordered released from their illegal detention. The Fourth Department in *Presti* was wrong then for the same reasons this Court is wrong now. Notably, the court in *Stanley* specifically recognized that there was authority in the First Department which allowed for the relief requested by the NhRP on behalf of Hercules and Leo and consequently was not bound by the Fourth Department in *Presti*. *Stanley*, 16 N.Y.S.3d at n.2. Thus, the law in New York is clear that habeas corpus relief is available to unlawfully imprisoned beings who upon release must be placed into the care and custody of another or who are challenging the conditions of their confinement. As this *Decision* is in stark conflict with established precedent, it is incumbent upon the Court of Appeals to settle the controversy.

VI. CONCLUSION

This Court's *Decision* raises novel and complex legal issues that are of great public importance and interest not just in New York, but throughout the United

States and the world. These issues include (1) whether this court can deny an imprisoned autonomous being the right to a common law writ of habeas corpus solely because she is not human, (2) whether, under the circumstances of this case, this court may refuse to issue a common law writ of habeas corpus or order to show cause from a successive petition under CPLR 7003(b), and (3) whether habeas corpus is available to an unlawfully imprisoned "person" who must necessarily be released into the custody of another. This Court should therefore grant the Motion for Leave to Appeal to the Court of Appeals.

Dated: November 16, 2017

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