Niagara County Clerk's Index No. 151725
Appellate Division, Fourth Department Docket No. CA 2014-00357

Court of Appeals

STATE OF NEW YORK

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

THE NONHUMAN RIGHTS PROJECT, INC. on behalf of 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.

MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

ELIZABETH STEIN, ESQ.
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726

and

STEVEN M. WISE, ESQ.
(subject to pro hac vice admission)
5195 NW 112th Terrace
Coral Springs, Florida 33076
954-648-9864

Attorneys for Petitioner-Appellant

Date Completed: April 10, 2015

COURT OF APPEALS OF THE STATE OF NEW YORK

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

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

Petitioner-Appellant,

v.

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.

Docket No. CA 14-00357

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

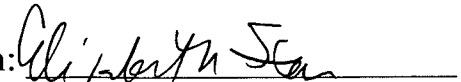
PLEASE TAKE NOTICE that, upon the annexed affidavit of Elizabeth Stein, Esq., attorney for Appellant Nonhuman Rights Project, Inc. ("NhRP") in support of the NhRP's Notice of Motion for Leave to Appeal to the Court of Appeals, upon the annexed Memorandum of Law in Support of this Notice of Motion for Leave to Appeal to the Court of Appeals, upon the briefs and record entered in the New York State Supreme Court Appellate Division, Fourth Judicial Department (" Appellate Division, Fourth Department") on the prior appeal in this

action, and upon all papers and prior proceedings in this action, the NhRP will move this Court at the Courthouse of the Court of Appeals, Court of Appeals Hall, Albany, New York, on Monday, April 27, 2015, for an order granting the NhRP leave to appeal to the Court of Appeals from the order of the Appellate Division, Fourth Department dated March 20, 2015, denying the NhRP's Motion for Leave to Appeal to the Court of Appeals from the order of the Supreme Court, Niagara County, which denied the NhRP's petition for a writ of habeas corpus and order to show cause, and for such other and further relief as this Court finds just and proper.

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

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

Dated: April 9, 2015

From: 

Elizabeth Stein, Esq.
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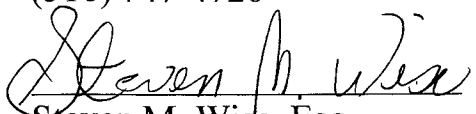

Steven M. Wise, Esq.
Subject to *pro hac vice* admission
Attorney for Petitioner-Appellant
5195 NW 112th Terrace
Coral Springs, Florida 33076

(954) 648-9864

To: Clerk of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207
(518) 455-7700

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.
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COURT OF APPEALS OF THE STATE OF NEW YORK

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

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

Petitioner-Appellant,

v.

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.

Docket No. CA 14-00357

AFFIDAVIT IN SUPPORT OF APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

STATE OF NEW YORK)
) ss:
COUNTY OF Nassau)

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

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

2. On behalf of the NhRP, I am submitting a letter to request that the Court grant *pro hac vice* admission to Steven M. Wise, Esq., to brief and argue the above-referenced appeal pursuant to 22 NYCRR §§ 500.4, 500.11(a).

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

4. This affidavit is submitted in support of the NhRP's 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)(1)(i).

PROCEDURAL HISTORY

5. On December 3, 2013, the NhRP filed an application for an order to show cause and verified petition for a common law writ of habeas corpus (Index No. 151725) pursuant to CPLR Article 70 in the New York State Supreme Court, Niagara County ("Supreme Court, Niagara County") on behalf of Kiko, a chimpanzee unlawfully detained in the State of New York. (R. 23). As the NhRP was not demanding production of Kiko, it asked the court to "order the respondent to show cause why the person detained should not be released" pursuant to CPLR 7003(a). (R.21-22).

6. On December 9, 2013, the Honorable Ralph A. Boniello, III, Justice of the Supreme Court, Niagara County, held an *ex parte* telephone hearing on the

record with deponent and Steven M. Wise, attorney admitted *pro hac vice* for the NhRP. (R. 5).

7. On December 11, 2013, an order of the Supreme Court, Niagara County denying the NhRP's petition for a writ of habeas corpus and order to show cause was entered in the Office of the Clerk of the County of Niagara. (R. 4). A true and correct copy of the order is attached hereto as Exhibit A.

8. On January 9, 2014, the NhRP filed a timely Notice of Appeal with the Office of the Clerk of the County of Niagara and served the Respondents on the same date.

9. On June 3, 2014, the NhRP served Respondents with a Brief and Record on Appeal (App. Div. No. 2014-00357) and filed these documents with the Office of the Clerk of the New York State Supreme Court Appellate Division, Fourth Judicial Department ("Office of the Clerk") on the same date.

10. On May 6, 2014, the Supreme Court, Niagara County ordered that the Record on Appeal, numbering pages 1 to 543, was settled as complete and accurate. A true and correct copy of the order is attached hereto as Exhibit B.

11. On June 4, 2014, the Office of the Clerk entered an order of the New York State Supreme Court Appellate Division, Fourth Judicial Department ("Appellate Division, Fourth Department") which stated that the appeal had been perfected and scheduled for the December term of the court. A true and correct

copy of the order is attached hereto as Exhibit C. Respondents did not file a reply brief.

12. Oral argument was heard on December 2, 2014 in the Appellate Division, Fourth Department.

13. On December 22, 2014, the NhRP served Respondents by regular mail with a Motion for Leave to File a Proposed Supplemental Brief and filed the motion with proof of service thereof in the Office of the Clerk.

14. On January 2, 2015, the Appellate Division, Fourth Department affirmed the order of the Supreme Court, Niagara County denying the NhRP's petition for a writ of habeas corpus and order to show cause. *Matter of The Nonhuman Rights Project, Inc. v Presti*, 124 A.D.3d 1334 (4th Dept. 2015) ("Opinion"). A true and correct copy of the Opinion is attached hereto as Exhibit D. Respondents did not serve the NhRP with the order of the court.

15. On January 15, 2015, the NhRP served Respondents by regular mail with a Motion for Leave to Appeal to the Court of Appeals in the Appellate Division, Fourth Department and filed the motion with proof of service thereof with the Office of the Clerk on the same date. Respondents filed no opposition.

16. On March 20, 2015, the Office of the Clerk entered an order of the Appellate Division, Fourth Department denying the NhRP's motion for leave to

appeal to the Court of Appeals from its order entered January 2, 2015. A true and correct copy of the order is attached hereto as Exhibit E.

17. This Motion for Leave to Appeal to the Court of Appeals ("Motion for Leave to Appeal") is filed fewer than thirty days from the date of the written notice of entry of the appellate court's order and is therefore timely filed pursuant to CPLR 5513(b).

JURISDICTIONAL STATEMENT

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

QUESTIONS PRESENTED

19. The NhRP moves this Court to review the following legal issues that it asked the lower courts to address: (a) Does the word "person" in CPLR Article 70, which is undefined in the statute, refer to its meaning under the New York common law of habeas corpus?; (b) Is a chimpanzee, who is a member of a species that possess the capacities for autonomy and self-determination, a "person" under

the New York common law of habeas corpus?; (c) Is a chimpanzee, who is a member of a species that possess the capacities for autonomy and self-determination, a "person" within the meaning of CPLR Article 70?; and (d) Is Kiko, a chimpanzee who is imprisoned in a cement storefront building in the State of New York, entitled to have a common law writ of habeas corpus issued on his behalf to determine the legality of his restraint? (R. 452-542).

REASONS FOR GRANTING THE NHRP'S MOTION FOR LEAVE TO APPEAL[1]

20. In determining whether to grant leave to appeal, the Court looks to the novelty, difficulty, and importance of the legal and public policy issues the appeal raises. *See In re Shannon B.*, 70 N.Y.2d 458, 462 (1987); *Town of Smithtown v. Moore*, 11 N.Y.2d 238, 241 (1962); *Neidle v. Prudential Ins. Co. of Am.*, 299 N.Y. 54, 56 (1949); *see also* 22 NYCRR § 500.22; COURT OF APPEALS OF THE STATE OF NEW YORK: ANNUAL REPORT OF THE CLERK OF THE COURT: 2010, at 2 (2011). This appeal raises novel issues of statewide, national and even international importance as explicitly recognized by the New York State Supreme Court Appellate Division, Third Judicial Department when it wrote that its "appeal presents the novel question of whether a chimpanzee is a 'person' entitled to the rights and protections afforded by the writ of habeas corpus." *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 149 (3rd Dept. 2014).[2]

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

[2] The NhRP's Motion for Leave to Appeal to this Court is presently under consideration.

21. In addition to the issues stated in paragraph 18 above, this Court should grant the NhRP's Motion for Leave to Appeal as it raises the following novel, important, and complex legal issues that are of great public importance and interest in New York, throughout the United states, and internationally: (a) May an autonomous and self-determining individual, whether that individual is a human or a chimpanzee, utilize the common law writ of human corpus to demand the immediate release and transfer from a place of detention that treats him as a "thing" and does not respect his autonomy and ability to self-determine, to another place that treats him as a "person" and respects his autonomy and self-determination to the greatest extent possible when it is impossible to release him unconditionally? (b) May an autonomous and self-determining individual be denied the relief of a common law writ of habeas corpus, and thereby be condemned to suffer a lifetime of arbitrary imprisonment, solely because he is a chimpanzee?

22. The initial determination of whether a chimpanzee is entitled to legal personhood is complex as it involves inquiry not only into the legal issue of personhood generally, but into the detailed scientific evidence offered in support of the NhRP's assertion that chimpanzees possess sufficient qualities for legal personhood. Nine prominent working primatologists from around the world have submitted expert affidavits demonstrating that chimpanzees possess the autonomy and self-determination that allows them to choose how they will live their own emotionally, socially, and intellectually rich lives. These scientific affidavits demonstrate that chimpanzees possess those complex cognitive abilities, including

autonomy and self-determination, that the NhRP argues are sufficient for personhood for the purpose of a common law writ of habeas corpus, as a matter of liberty, equality, or both. The question of a chimpanzee's personhood for the purpose of a common law writ of habeas corpus has not been decided by the Court of Appeals.

23. This Court should grant the NhRP's Motion for Leave to Appeal because the Appellate Division, Fourth Department erred as a matter of law in its ruling that "a habeas corpus proceeding must be dismissed where the subject of the petition is not entitled to immediate release from custody" and that "habeas corpus does not lie where a petitioner seeks only to change the conditions of confinement rather than the confinement itself." *Presti*, 124 A.D.3d at 1335. This holding directly conflicts with decades of New York decisions which illustrate that immediate release merely relates to releasing the individual from unlawful confinement and does not prevent the individual from being lawfully placed elsewhere. *See Hogan v. Culkin*, 18 N.Y.2d 330, 334 (1966); *People ex rel. Ardito v. Trujillo*, 109 Misc. 2d 1009, 1011 (N.Y. Sup. Ct. 1981). Specifically, this Court has granted habeas corpus relief in cases involving child slaves, child apprentices, child residents of training schools, child residents of mental institutions and mentally incompetent adults, in which each individual was released from unlawful confinement and placed into the custody of another. Although inapposite to the case at bar, New York courts have also made clear that even convicted prison inmates may use habeas corpus to challenge their conditions of confinement without seeking immediate release. As early as 1943, this Court held that habeas

corpus was available to challenge the validity of the transfer of a prisoner from a reformatory to a state prison, even though the petitioner would not be entitled to unconditional release. *People ex rel Saia v. Martin*, 289 N.Y. 471, 477 (1943).

24. The Appellate Division, Fourth Department therefore misinterpreted the notion of "immediate release" and erroneously concluded that Kiko was not entitled to the relief afforded by a writ of habeas corpus, not because Kiko was not a "person" (as the court twice assumed, without deciding, that Kiko was a "person"), but on the mistaken grounds that the NhRP was neither demanding Kiko's immediate release nor claiming that Kiko's detention was unlawful. The court asserted that the NhRP was merely demanding Kiko's transfer to a sanctuary, which, in the Appellate Division, Fourth Department's erroneous opinion, was not a remedy appropriate for a common law writ of habeas corpus. That Kiko may not be released absolutely onto the streets of New York does not mean he is not entitled to "immediate release" from his present unlawful confinement. There is no question that if Kiko was an incapacitated adult or minor human, he would be entitled to release from his unlawful detention and placement into the custody of another. This holding is therefore not only legally erroneous and in direct contravention of the decisions of this Court but severely constricts the scope of the writ both with respect to chimpanzees who are found to be "persons" and human beings. Consequently, the Opinion violates the Suspension Clause, Art. I, sec. 4, of the New York Constitution 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 not just the

legislature, but the judiciary, equally powerless to deprive an individual of the privilege of the common law writ of habeas corpus.

25. In support of its ruling, the Appellate Division, Fourth Department further misapplied the applicable standard of law. Each case it cited, without exception, featured a human prison inmate who had been convicted of a crime and was subsequently attempting to utilize the writ of habeas corpus for some reason other than to procure his immediate release from prison. As Kiko has not been convicted of a crime and is seeking immediate release from his unlawful confinement, these cases are inapposite and have no application to the case at bar.

26. This Court should also grant the NhRP's Motion for Leave to Appeal because the Appellate Division, Fourth Department committed critical and unsubstantiated factual errors when it stated that: (1) the NhRP is "an organization seeking better treatment and housing of, inter alia, nonhuman primates," (2) "the petition alleges that Kiko is illegally confined because he is kept in unsuitable conditions," (3) "petitioner does not seek Kiko's immediate release," or (4) "nor does petitioner allege that Kiko's continued detention is unlawful." *Presti*, 124 A.D.3d at 1334-35.

27. The uncontroverted facts set forth in the Verified Petition filed by the NhRP in the Supreme Court, Niagara County in this action directly contradict every factual allegation made by the Appellate Division, Fourth Department in its holding. Specifically, the NhRP's Verified Petition states, among other things, that: (a) ¶ 17 "Petitioner NhRP will demonstrate that under New York law, Kiko, as a legal person, is entitled to the common law right to bodily liberty. Petitioner NhRP

asserts that Kiko's detention by Respondents constitutes an unlawful deprivation of his right to bodily liberty and that he is entitled to test the legality of this detention through the issuance of a common law writ of habeas corpus by this Court."; (b) ¶ 5 "this Petition seeks a determination forthwith that Kiko's detention is unlawful and demands Kiko's immediate release ..."; and (c) ¶ 12 "[f]or the past 17 years, Petitioner NhRP has worked to change the status of such nonhuman animals as chimpanzees from legal things to legal persons." Finally, the answers to the questions posed to the NhRP's counsel by the Appellate Division, Fourth Department at oral argument directly contradict the factual assertions made by the court in its decision as well as the legal conclusion that habeas corpus did not lie.

28. In sum, the NhRP is seeking the immediate release of Kiko from confinement which it maintains is unlawful not because of the conditions of the confinement but because the confinement itself grossly interferes with Kiko's exercise of autonomy, self-determination, and bodily liberty. That Kiko may not be released absolutely onto the streets of New York and must be placed into the custody of another does not change the fact that the NhRP is demanding his immediate release from an unlawful detention.

29. The Court of Appeals should determine whether, and to what extent, the Appellate Division, Fourth Department erred as a matter of law.

30. The Court of Appeals should determine whether, and to what extent, the Appellate Division, Fourth Department erred as a matter of fact.

CONCLUSION

31. As this appeal raises novel and complex issues of law that are of state, national, and international importance and that have not been reviewed by the Court of Appeals; as the Appellate Division, Fourth Department made substantial errors of law and fact in rendering its Opinion that ought to be reviewed by the Court of Appeals; and as the Opinion directly contradicts opinions of the Court of Appeals and violates Art. I, sec. 4, of the New York Constitution, the NhRP's Motion for Leave to Appeal should be granted.

WHEREFORE, I respectfully pray that the Court grant the NhRP's Motion for Leave to Appeal to the Court of Appeals and the relief prayed for in the annexed proposed order.

Dated: April 9, 2015

Respectfully submitted:

Elizabeth Stein, Esq.
Attorney for Appellant
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726

Sworn to before me this:

9 day of April, 2015

STUART DAVIS
Notary Public, State of New York
No. 01DA0882240
Qualified in Nassau County
Commission Expires December 31, 2015

Notary Public

Exhibit "A"

At a Regular Term of the Supreme Court held in and for the County of Niagara at the Angelo A. DelSignore Civic Building in the City of Niagara Falls, New York on the 9th day of December, 2013.

PRESENT: Hon. Ralph A. Boniello, III, Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

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,

Petitioners,

vs.

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.

Index No. 151725

ORDER

A request for an Order to Show Cause and Writ of Habeas Corpus having been presented to this Court and hearing Elizabeth Stein, Esq. and Steven M. Wise, Esq., in support of the Petition for the Order to Show Cause and Writ of Habeas Corpus, it is hereby

ORDERED that the request for an Order to Show Cause and Writ of Habeas Corpus is denied.

Enter:

RALPH A. BONIELLO, III
Justice of the Supreme Court

GRANTED

DEC 10 2013

BY Cynthia A. Warren
CYNTHIA A. WARREN
COURT CLERK

Exhibit “B”

At a Special Term of the Supreme Court, held in and for the County of Niagara, at the Courthouse located at 775 Third Street, in the City of Niagara Falls, New York, on the 26th day of February, 2014.

PRESENT: HON. RALPH A. BONIELLO, III., J.S.C.
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

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,

Petitioners,

ORDER

-against-

Index No. 151725

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.

Upon reading the Notice of Motion to Settle the Record dated January 30, 2014, submitted by Elizabeth Stein, Esq., attorney for Petitioners The Nonhuman Rights Project, Inc. on behalf of Kiko, and having reviewed the proposed Record on Appeal attached thereto, and no opposing papers having been submitted by Respondents, it is hereby

ORDERED, that the foregoing Record on Appeal, numbering pages 1 to543, is hereby settled as complete and accurate.

GRANTED
MAY 6 2014
COURT CLERK

RALPH A. BONIELLO, III.
Supreme Court Justice

Dated: May 6, 2014
Niagara Falls, New York

Exhibit "C"

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

(APPEAL)

DOCKET NUMBER CA 14-00357

IN THE MATTER OF THE NONHUMAN RIGHTS PROJECT, INC., ON BEHALF OF KIKO, PETITIONER-APPELLANT,

V

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.

NIAGARA COUNTY INDEX NO. 2014-00357

The above-referenced appeal has been perfected and has been scheduled for the DECEMBER term of Court, which commences on MONDAY, DECEMBER 1, 2014 and will be approximately 10 days in length. Counsel, or the parties, if not represented by counsel, will receive a notice to appear for oral argument not less than 20 days prior to the term, pursuant to section 1000.10 (e) of the Court's Rules.

Pursuant to sections 1000.2 (d) and 1000.3 (e) of the Court's Rules, ten (10) copies of respondent's brief must be filed with proof of service of 2 copies of the brief on or before JULY 8, 2014. The time requested for oral argument, if any, must be noted on the upper right-hand corner of the brief. If no time is requested, the matter will be deemed submitted (see 22 **NYCRR** 1000.11 [b] and [d]). If no respondent's brief will be filed, counsel or respondent, if not represented by counsel, shall notify this office in writing within thirty (30) days of service of appellant's brief (see 22 **NYCRR** 1000.2 [d]). If the deadline set by this scheduling order cannot be met, a motion for an extension of time must be filed and served within (30) days of service of appellant's brief (see 22 **NYCRR** 1000.13 [h]).

Counsel or the parties, if not represented by counsel, must notify this office in writing within fifteen (15) days of the date that this scheduling order was mailed of unavailability for oral argument on a specific day or dates during the term (see 22 **NYCRR** 1000.10 [c]).

All papers filed and served in this matter shall bear the above-referenced Appellate Division docket number (see 22 **NYCRR** 1000.4 [a] [3]; [f] [4]; 1000.13 [a] [5] [ii]).

Please note that failure to comply with any provision of the Court's Rules, including the failure to comply with applicable deadlines, may result in the imposition of sanctions pursuant to section 1000.16 of the Court's Rules.

This scheduling order constitutes the order of the Court.

Entered: June 4, 2014 **FRANCES E. CAFARELL, Clerk**

Exhibit "D"

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1300

CA 14-00357

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF THE NONHUMAN RIGHTS PROJECT, INC., ON BEHALF OF KIKO, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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.

STEVEN M. WISE, CORAL SPRINGS, FLORIDA, OF THE MASSACHUSETTS BAR, ADMITTED PRO HAC VICE, AND ELIZABETH STEIN, NEW HYDE PARK, FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 11, 2013 in a proceeding pursuant to CPLR article 70. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner, an organization seeking better treatment and housing of, inter alia, nonhuman primates, commenced this proceeding seeking a writ of habeas corpus on behalf of Kiko, a chimpanzee. Rather than seeking Kiko's immediate release, however, the petition alleges that Kiko is illegally confined because he is kept in unsuitable conditions, and it seeks to have Kiko's confinement transferred to a different facility selected by The North American Primate Sanctuary Alliance. On appeal from a judgment dismissing the petition, petitioner contends that Kiko is entitled to the relief sought. Contrary to petitioner's contention, we conclude that Supreme Court properly dismissed the petition.

Regardless of whether we agree with petitioner's claim that Kiko is a person within the statutory and common-law definition of the writ, " 'habeas corpus relief nonetheless is unavailable as [that] claim[], even if meritorious, would not entitle [Kiko] to immediate release' " (*People ex rel. Gonzalez v Wayne County Sheriff*, 96 AD3d 1698, 1699, *lv denied* 21 NY3d 852; *see People ex rel. Shannon v*

Khahaifa, 74 AD3d 1867, 1867, *lv dismissed* 15 NY3d 868; *People ex rel. Hall v Rock*, 71 AD3d 1303, 1304, *appeal dismissed* 14 NY3d 882, *lv denied* 15 NY3d 703). It is well settled that a habeas corpus proceeding must be dismissed where the subject of the petition is not entitled to immediate release from custody (*see People ex rel. Kaplan v Commissioner of Correction of City of N.Y.*, 60 NY2d 648, 649; *People ex rel. Douglas v Vincent*, 50 NY2d 901, 903). Here, petitioner does not seek Kiko's immediate release, nor does petitioner allege that Kiko's continued detention is unlawful. Rather, petitioner seeks to have Kiko placed in a different facility that petitioner deems more appropriate. Consequently, even assuming, arguendo, that we agreed with petitioner that Kiko should be deemed a person for the purpose of this application, and further assuming, arguendo, that petitioner has standing to commence this proceeding on behalf of Kiko, this matter is governed by the line of cases standing for the proposition that habeas corpus does not lie where a petitioner seeks only to change the conditions of confinement rather than the confinement itself (*see generally People ex rel. Dawson v Smith*, 69 NY2d 689, 690-691; *Matter of Berrian v Duncan*, 289 AD2d 655, 655; *People ex rel. McCallister v McGinnis*, 251 AD2d 835, 835). We therefore conclude that habeas corpus does not lie herein.

Entered: January 2, 2015

Frances E. Cafarell
Clerk of the Court

Exhibit "E"

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

MOTION NO. 1300/14
DOCKET NO. CA 14-00357

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF THE NONHUMAN RIGHTS PROJECT, INC., ON BEHALF OF KIKO, PETITIONER-APPELLANT,

V

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.

Appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered January 2, 2015,

Now, upon reading and filing the affidavit of Elizabeth Stein, Esq., sworn to January 15, 2015, the notice of motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is denied.

Entered: March 20, 2015 **FRANCES E. CAFARELL, Clerk**

COURT OF APPEALS OF THE STATE OF NEW YORK

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

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

Petitioner-Appellant,

v.

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.

Docket No. CA 14-00357

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

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I. PRELIMINARY STATEMENT

On December 3, 2013, the Appellant Nonhuman Rights Project, Inc. ("NhRP") filed a petition for a common law writ of habeas corpus on behalf of Kiko, an autonomous and self-determining chimpanzee imprisoned in the State of New York. The NhRP selected New York as the first state in which to bring such an action because, for more than two centuries, New York's courts have regarded the common law writ of habeas corpus with that high esteem that the Great Writ has earned through centuries of protecting human beings from unlawful and arbitrary detentions. *See People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875); *People v. McLeod*, 3 Hill 635, 647 note j (N.Y. 1842). The NhRP argued that the Great Writ's broad and sacred protection should be extended to an unlawfully detained chimpanzee. It was therefore ironic that the State of New York Supreme Court Appellate Division, Fourth Judicial Department's ("Appellate Division, Fourth Department") Opinion and Order in *Matter of The Nonhuman Rights Project, Inc. v Presti*, 124 A.D.3d 1334 (4th Dept. 2015) ("Opinion") twice assumed, without deciding, that Kiko could be a legal person, then not only failed to extend the Great Writ's protection to him, but constricted its availability to human beings.

As discussed below, the Opinion's legally-unsupported constriction of the centuries-long availability of the Great Writ to individuals demanding release from unlawful detention to another place, *e.g.*, *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943); *People ex rel. Jesse F. v. Bennett*, 242 A.D.2d 342 (2d Dept. 1997) ("habeas

corpus is an appropriate mechanism for transfer"), or into the custody of an appropriate third party, *e.g.*, *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996); *In re M'Dowle*, 8 Johns 328 (Sup. Ct. 1811), now affects the fundamental liberties of every human being, and chimpanzee, in the State of New York.

The NhRP submits this Memorandum of Law in support of its Motion for Leave to Appeal to the Court of Appeals pursuant to New York Civil Practice Law and Rules ("CPLR") 5602(a) ("Motion for Leave to Appeal") from the Opinion, which affirmed the Supreme Court, Niagara County's refusal to issue a common law writ of habeas corpus and order to show cause on Kiko's behalf. [1]

This Court should grant the NhRP's Motion for Leave to Appeal as it raises the following novel, important, and complex legal issues that are of great public significance and interest in New York, throughout the United States, and internationally:

(1) May an autonomous and self-determining individual, whether that individual is a human or a chimpanzee, utilize the common law writ of human corpus to demand the immediate release and transfer from a place of detention that treats him as a "thing" and does not respect his autonomy and ability to self-determine, to another place that treats him as a "person" and

[1] This Memorandum of Law incorporates by reference, and fully adopts, all the arguments, evidence, exhibits, memoranda, testimony and authorities previously filed in this case.

respects his autonomy and self-determination to the greatest extent possible when it is impossible to release him unconditionally?

(2) May an autonomous and self-determining individual be denied the relief of a common law writ of habeas corpus, and thereby be condemned to suffer a lifetime of arbitrary imprisonment, solely because he is a chimpanzee?

The Court should also grant the Motion for Leave to Appeal because the Opinion contains substantial legal errors that conflict with the decisions of this Court and rests upon unsupported factual assumptions.

II. STANDARD OF REVIEW

In determining whether to grant leave to appeal, the Court looks to the novelty, difficulty, and importance of the legal and public policy issues the appeal raises. *See In re Shannon B.*, 70 N.Y.2d 458, 462 (1987); *Town of Smithtown v. Moore*, 11 N.Y.2d 238, 241 (1962); *Neidle v. Prudential Ins. Co. of Am.*, 299 N.Y. 54, 56 (1949); *see also* 22 NYCRR § 500.22; COURT OF APPEALS OF THE STATE OF NEW YORK: ANNUAL REPORT OF THE CLERK OF THE COURT: 2010, at 2 (2011). This appeal raises novel issues of statewide, national and even international importance. *See, e.g.*, *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 149 (3rd Dept. 2014) ("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.").

In addition to being the subject of hundreds of ongoing legal commentaries and national and international news articles and reports, this case is already being

cited by the courts in other states. By way of illustration, the Supreme Court of Oregon recently cited the present case 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).

Moreover, leave to appeal to this Court is particularly warranted where, as here, a decision of the Appellate Division conflicts with a decision of this Court, *e.g.*, 22 NYCRR § 500.22(b)(4); *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 38 (1996). As discussed in more detail below, the Court should grant the NhRP's Motion for Leave to Appeal so that it may determine whether the appellate court erred as a matter of law.

III. THE NOVEL AND IMPORTANT QUESTIONS REQUIRE CONSIDERATION BY THE COURT OF APPEALS.

There are several fundamental reasons why the novel and important issues raised on appeal should be reviewed by this Court.

First, the Opinion's legally unsupported and erroneous withdrawal of the Great Writ to individuals demanding release from an unlawful detention to another place, *e.g.*, *Saia*, 289 N.Y. at 477; *Jesse F.*, 242 A.D.2d at 342 ("habeas corpus is an appropriate mechanism for transfer"), or into the custody of an appropriate third party, *e.g.*, *Brevorka*, 227 A.D.2d 969; *In re M'Dowle*, 8 Johns 328, affects the liberty of every human being, and chimpanzee, in the State of New York.

Second, the question of who is a "person" 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. *E.g.*, *Byrn v. New York City Health & Hospitals Corporation*, 31 N.Y.2d 194, 201 (1972); *Lemmon v. People*, 20 N.Y. 562 (1860); *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"). The question presented in this case is whether chimpanzees, because they are, *inter alia*, autonomous and self-determining, are legal "persons" for the limited purpose of seeking a common law writ of habeas corpus.

Questions involving the scope of the common law writ of habeas corpus are critical. 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), *Tweed*, 60 N.Y. at 565, and there is no question that a court would release Kiko if he were a human being, for his detention grossly interferes with his exercise of his autonomy, self-determination, and bodily liberty. As the NhRP argued to the Appellate Division, Fourth Department, the term "person" has never been a synonym for "human being." Instead, it designates Western law's most fundamental category by identifying those entities capable of possessing a legal right. On this ground alone, the Court should grant the NhRP's Motion for Leave to Appeal. *See Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 N.Y.2d 174, 183 (1988) ("[T]here being novel and significant issues tendered for review, we grant the application for leave [to appeal].").

Third, while such novel and significant questions raised by this appeal alone merit this Court's review, the Motion for Leave to Appeal should also be granted because the case raises complicated questions of law and fact. *See, e.g.*, *Hamilton v. Miller*, 23 N.Y.3d 592, 603 (2014) (leave to appeal was granted in a "scientifically complicated" case); *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 249-50 (1999) (leave to appeal granted in case involving "complicated legal questions associated with electronic bulletin board messages" for defamation purposes); *Matter of George L.*, 85 N.Y.2d 295, 298, 302 (1995) (granting leave to appeal in case presenting a "difficult question [regarding] a mentally ill individual"); *Schulz v. State*, 81 N.Y.2d 336, 344 (1993); *Sukljian v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 95 (1986); *Melenky v. Melen*, 206 A.D. 46, 51-52 (4th Dept. 1923). The question of whether a chimpanzee is entitled to legal personhood is complicated as it involves inquiry not only into the legal issue of personhood generally, but into the complex and detailed scientific evidence offered in support of the NhRP's assertion that chimpanzees possess sufficient qualities for legal personhood. Nine prominent working primatologists from around the world have submitted expert affidavits demonstrating that chimpanzees possess the autonomy and self-determination that allows them to choose how they will live their own emotionally, socially, and intellectually rich lives. These scientific affidavits demonstrate that chimpanzees possess those complex cognitive abilities, including autonomy and self-determination, that the NhRP argues are sufficient for personhood for the purpose of a common law writ of habeas corpus, as a matter of liberty, equality, or both.

Such complex issues regarding personhood and the scope of the common law writ of habeas corpus merit this Court's immediate attention. *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.").

IV. THIS COURT SHOULD DETERMINE WHETHER THE APPELLATE DIVISION, FOURTH DEPARTMENT ERRED AS A MATTER OF LAW AND WHETHER ITS OPINION IS IN CONFLICT WITH DECISIONS OF THIS COURT.

In addition to presenting novel and complex questions of law and issues of state, national, and international importance, the Appellate Division, Fourth Department should be reversed by this Court because it erred as a matter of law. *See Shindler v. Lamb*, 9 N.Y.2d 621 (1961); *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"). Specifically, the court twice assumed, without deciding, that Kiko, was a legal person for purposes of the common law writ of habeas corpus, but then erroneously concluded that he was not entitled to habeas corpus relief because he may not, for safety purposes, be released outright. This holding directly conflicts with decades of decisions of this Court and severely contracts the availability of habeas corpus both to humans and chimpanzees, *infra*.

A. The Appellate Division, Fourth Department applied an incorrect standard of law.

1. The New York common law of habeas corpus is not limited to unconditional release.

The Appellate Division, Fourth Department, erred as a matter of law in finding that Kiko, even if a legal person, is not entitled to habeas corpus relief. It ruled:

> It is well settled that a habeas corpus proceeding must be dismissed where the subject of the petition is not entitled to immediate release from custody . . . Here, petitioner does not seek Kiko's immediate release, nor does petitioner allege that Kiko's continued detention is unlawful. . . . [E]ven assuming, arguendo, that we agreed with petitioner that Kiko should be deemed a person for the purpose of this application, . . . this matter is governed by the line of cases standing for the proposition that habeas corpus does not lie where a petitioner seeks only to change the conditions of confinement rather than the confinement itself.

Presti, 124 A.D.3d at 1335 (citations omitted). This conclusion is erroneous for the following reasons: (1) New York courts, including this Court, have for nearly two centuries granted habeas corpus when the detainee is not entitled to immediate release from custody; (2) habeas corpus may be used in New York to challenge conditions of confinement; (3) the NhRP repeatedly claims that Kiko's continued detention is unlawful (and to that extent, the court below seriously misapprehended the facts) and seeks Kiko's immediate release to a sanctuary (akin to releasing a minor unlawfully detained in a juvenile facility to his parent's custody); and (4) as a result, even assuming *arguendo*, New York did not allow habeas corpus to be

used to challenge conditions of confinement (an untenable position), those cases do not govern this matter.

That Kiko may not be released onto the streets of New York does not mean he is not entitled to "immediate release" from his present unlawful confinement. An unlawfully imprisoned person in New York must be discharged forthwith. *People ex re. Stabile v. Warden of City Prison*, 202 N.Y. 138, 152 (1911). As the NhRP argued in its Brief, at 30-31, this may require discharging the person into the care or custody of another. *See People ex rel. Ardito v. Trujillo*, 109 Misc. 2d 1009, 1011 (N.Y. Sup. Ct. 1981) ("The fact that Ardito is not seeking absolute release from detention does not function as a bar to her application for a writ of habeas corpus."). Imprisoned children and incapacitated adults have been discharged from slavery, industrial training schools, mental institutions, and other unlawful imprisonments into the custody of another.

Before the Civil War, children detained as slaves were routinely discharged through common law writs of habeas corpus into another's care. *Lemmon*, 20 N.Y. at 632 (discharged slaves included two seven-year-olds, a five-year-old, and a two-year-old); *Commonwealth v. Taylor*, 44 Mass. 72, 72-74 (1841) (seven or eight-year-old slave discharged into care of the Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Aves*, 35 Mass. 193 (1836) (seven year old girl discharged into custody of Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Holloway*, 2 Serg. & Rawle 305 (Pa. 1816) (slave child discharged); *State v. Pitney*, 1 N.J.L. 165 (N.J. 1793) (legally manumitted child discharged).

New York courts have frequently discharged free minors from industrial training schools or other detention facilities through the common law writ of habeas corpus, despite the fact that such minors remain subject to the custody of their parents or guardians. *People ex rel. F. v. Hill*, 36 A.D.2d 42, 46 (2d Dept. 1971) ("petition granted and relator's son ordered discharged from custody forthwith."), *aff'd*, 29 N.Y.2d 17 (1971); *People ex rel. Silbert v. Cohen*, 36 A.D.2d 331, 332 (2d Dept. 1971) ("juveniles in question discharged"), *aff'd*, 29 N.Y. 2d 12 (1971); *People ex rel. Margolis v. Dunston*, 174 A.D.2d 516, 517 (1st Dept. 1991); *People ex rel. Kaufmann v. Davis*, 57 A.D.2d 597 (2d Dept. 1977); *People ex rel. Cronin v. Carpenter*, 25 Misc. 341, 342 (N.Y. Sup. Ct. 1898); *People ex rel. Slatzkata v. Baker*, 3 N.Y.S. 536, 539 (Super. Ct. 1888); *In re Conroy*, 54 How. Pr. 432, 433-34 (N.Y. Sup. Ct. 1878); *People ex rel. Soffer v. Luger*, 347 N.Y.S. 2d 345, 347 (Sup. Ct. 1973).

Minors have been discharged from mental institutions pursuant to habeas corpus into the custody of another, *People ex rel. Intner on Behalf of Harris v. Surles*, 566 N.Y.S.2d 512, 515 (Sup. Ct. 1991), as have child apprentices, *People v. Hanna*, 3 How. Pr. 39, 45 (N.Y. Sup. Ct. 1847) (ordering "discharge" of a minor unlawfully held as an apprentice upon writ of habeas corpus brought on his behalf); *In re M'Dowle*, 8 Johns 328, and incapacitated adults, *Brevorka*, 227 A.D.2d 969 (elderly and ill woman showing signs of dementia); *State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982) ("elderly and apparently sick lady"); *Siveke v. Keena*, 441 N.Y.S. 2d 631 (Sup. Ct. 1981) (elderly and ill man).

As the above cases illustrate, "immediate release" simply relates to releasing the individual from the unlawful confinement; it does not mean the person may not be lawfully placed elsewhere. *See Hogan v. Culkin*, 18 N.Y.2d 330, 334 (1966); *Ardito*, 109 Misc. 2d at 1011 (explaining that "'discharge', as it is used in the CPLR, comprehends conversion of criminal detention to civil status" and does not apply "solely to absolute release from detention."). Consequently, if Kiko's detention is found unlawful, he is entitled to "immediate release" within the meaning of these cases.

2. The Appellate Division, Fourth Department relied on inapposite prisoner cases to deny Kiko habeas corpus relief.

The Appellate Division, Fourth Department erroneously concluded that Kiko was not entitled to the relief afforded by a writ of habeas corpus, not because Kiko was not a "person," but on the mistaken grounds that the NhRP was neither demanding Kiko's immediate release nor claiming that Kiko's detention was unlawful. The court erroneously asserted that the NhRP was merely demanding a transfer to a sanctuary, which, in the Appellate Division, Fourth Department's opinion, was not a remedy appropriate for a common law writ of habeas corpus.

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

Several cases dealt exclusively with whether habeas corpus could be used to challenge alleged errors in parole revocation hearings. In *People ex rel. Gonzalez v Wayne County Sheriff*, 96 A.D.3d 1698 (4th Dept. 2012), the court held that habeas corpus relief was unavailable to a prison inmate in his challenge to an administrative law judge's determination following a final parole revocation hearing. In *People ex rel. Shannon v. Khahaifa*, 74 A.D.3d 1867 (4th Dept. 2010), the prison inmate sought habeas corpus on the grounds that "the determination that he violated a condition of his parole was arbitrary and capricious, and the time assessment for the violation was excessive." In both cases, the court concluded that habeas corpus should be denied where the inmates would not be entitled to release from prison even if errors were committed in connection with parole revocation.

In addition to these inapposite parole cases, the Appellate Division, Fourth Department cited such other inapplicable criminal habeas corpus cases as *People ex rel. Hall v. Rock*, 71 A.D.3d 1303, 1304 (3rd Dept. 2010), which involved a prison inmate's inappropriate challenge to the sufficiency of the evidence supporting his indictment, and *People ex rel. Kaplan v. Commissioner of Correction*, 60 N.Y.2d 648, 649 (1983), in which the Court ruled the prison inmate was not entitled to habeas corpus because the only remedy "to which he would be entitled would be a new trial or new appeal, and not a direction that he be immediately released from custody." The same was true in *People ex rel. Douglas v. Vincent*, 50 N.Y.2d 901, 903 (1980), where the Court held that "even if there were merit to the relator's contention that he was denied effective assistance of counsel at trial or on appeal he would not be entitled to habeas corpus relief

because the only remedy he seeks would provide him a new trial or new appeal[.]" In the above cases, unlike the case at bar, the inmates were not contending that the fact of their confinement was unlawful, but that some procedural error occurred in their underlying trial or hearing. In the case at bar, the NhRP has consistently maintained that Kiko's detention is unlawful, thus entitling him to immediate release.

The Appellate Division, Fourth Department further relied upon, *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 691 (1986), in which this Court reaffirmed 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[.]" (citing *Johnston*, 9 N.Y.2d 482). In distinguishing the case from *Johnston* however, the 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 of Correctional Services is expressly authorized to impose on lawfully sentenced prisoners committed to its custody[.]" *Id.* (citations omitted).

In the case *sub judice*, as in *Johnston* and unlike *Dawson*, the NhRP seeks the complete discharge of Kiko from Respondents' custody into a chimpanzee sanctuary. As noted above, this case is analogous to the case of a juvenile, elderly person, or mentally incompetent adult who simply may not be released onto the streets of New York following a habeas determination that his or her detention is unlawful and not a convicted prison inmate who is not seeking immediate discharge from prison.

The New York Supreme Court Appellate Division, Third Judicial Department ("Appellate Division, Third Department") in *Berrian v. Duncan*, 289 A.D.2d 655 (3rd Dept. 2001) and *People ex rel. McCallister v. McGinnis*, 251 A.D.2d 835 (3rd Dept. 1998), the final cases cited by the Appellate Division, Fourth Department, relied on *Dawson* to conclude that a prisoner could not use habeas corpus to seek release from a special housing unit of a prison. For the reasons set forth in *Dawson*, *supra*, such a ruling has no bearing here, where the NhRP seeks complete release of Kiko from his confinement by Respondents to an environment completely "separate and different in nature" from the facility of detention.

3. Relief other than complete release is available for habeas corpus petitioners.

Regardless of the above prisoner cases, the courts have made clear that even convicted prison inmates may use habeas corpus to challenge their conditions of confinement without seeking immediate release. *See Johnston*, 9 N.Y.2d at 485; *Jesse F.*, 242 A.D.2d at 342 ("habeas corpus is an appropriate mechanism for transfer from a secure to a nonsecure facility."); *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 251 (2d Dept. 1993) ("habeas corpus is available to challenge the conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. Ceschini v. Warden*, 30 A.D.2d 649, 649 (1st Dept. 1968); *People ex rel. Berry v. McGrath*, 61 Misc. 2d 113, 116 (N.Y. Sup. Ct. 1969) (an "individual . . . is entitled to apply for habeas corpus" upon a "showing of a course of cruel and unusual treatment."); *People ex*

rel. Rockey v. Krueger, 306 N.Y.S.2d 359, 360 (Sup. Ct. 1969) ("Notwithstanding that relator does not contest the propriety of his confinement on the underlying charge, he may be [sic] a writ raise the issue whether restraint in excess of that permitted is being imposed upon him . . . Since the . . . relator is being held in solitary confinement and that an Orthodox Jew seeking to retain his beard would not be so held, relator is entitled to judgment requiring the respondent to release him from solitary confinement."); *Berry*, 61 Misc. 2d at 116 (citing *People ex rel. Smith v. LaVallee*, 29 A.D.2d 248, 250 (4th Dept. 1968) ("the issues of whether a prisoner . . . had in fact been receiving adequate psychological and psychiatric treatment during his imprisonment has been held a proper subject for habeas corpus relief")). *See also People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 262 (1966) (habeas corpus can be used to vindicate other statutory and constitutional violations).

As early as 1943, this Court held that habeas corpus was available to challenge the validity of the transfer of a prisoner from a reformatory to a state prison, even though the petitioner would not be entitled to complete release. *Saia*, 289 N.Y. at 477. In so ruling, the Court declared: "Under the rule prevailing in this jurisdiction the fact 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." *Id.* (citations omitted). Later in *Johnston*, this Court unequivocally ruled that relief pursuant to the writ, "'other than that of absolute discharge' should be forthcoming." 9 N.Y.2d at 485. Relying on *Johnston*, the court in *Berry*, 61 Misc. 2d at 116, found that

although the conditions of a prisoner's detention did not render it "illegal so as to require his discharge," the court stressed that "in a habeas corpus proceeding properly entertained, is not limited to a simple discharge."

Even prior to this Court's decisions in *Saia* and *Johnston*, New York courts did not deem absolute discharge as a requirement for entitlement to habeas corpus relief. In *Parker v. Bernstein*, 125 Misc. 92, 95 (N.Y. Co. Ct. 1925), a writ of habeas corpus was sought on behalf of a girl who had been committed to a training school for girls and was subsequently transferred to a school for mental defectives. The court found that her detention at the school for mental defectives was unlawful but not at the training school. Thus, the court granted her habeas corpus relief despite the fact that she was not entitled to complete discharge. Instead, the court ordered her to be transferred back to the training school. *See also People ex rel. Beldstein v. Thayer*, 121 Misc. 745 (N.Y. County Ct. 1923).

In view of the above, the Appellate Division, Fourth Department's conclusion that a "habeas corpus proceeding must be dismissed where the subject of the petition is not entitled to immediate release from custody" and that "habeas corpus does not lie where a petitioner seeks only to change the conditions of confinement" *Presti*, 124 A.D.3d at 1335, directly conflicts with decisions of this Court. On this ground alone, the Court should grant the NhRP's Motion for Leave to Appeal.

Clearly, these "conditions of confinement" cases are inapposite to and do not govern the present matter. Kiko is not a prison inmate convicted of a crime. Kiko is not attempting to utilize the writ of habeas corpus for some reason other than his

immediate release from unlawful detention. Rather, Kiko is an autonomous, self-determining nonhuman being who is utilizing common law habeas corpus to secure his immediate release from imprisonment in a cage and to procure the greatest amount of freedom he may possibly have given the fact that, as a chimpanzee, he may not be released onto the streets of New York State.

B. The Appellate Division, Fourth Department misapprehended the facts in its assertion that the NhRP did not claim Kiko's detention is unlawful.

Beyond applying the incorrect legal standard, *supra*, the Appellate Division, Fourth Department misapprehended the facts as set forth in the Verified Petition. The Appellate Division, Third Department in *Lavery*, 124 A.D. 3d, at 149-50, accurately stated that "[n]otably, we have not been asked to evaluate the quality of Tommy's current living conditions in an effort to improve his welfare. In fact, petitioner's counsel stated at oral argument that it does not allege that respondents are in violation of any state or federal statutes respecting the domestic possession of wild animals[.]" (citation omitted). However, the NhRP has consistently asserted that the imprisonment of the chimpanzees and denial of their fundamental right to bodily liberty is in of itself unlawful. Thus, the Appellate Division, Fourth Department misunderstood who the NhRP is and what it is demanding.

No evidence supports any of the Appellate Division, Fourth Department's statements that: (1) the NhRP is "an organization seeking better treatment and housing of, inter alia, nonhuman primates,"[2] (2) "the petition alleges that Kiko is

[2] The NhRP's mission is "to change the common law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any

illegally confined because he is kept in unsuitable conditions," (3) "petitioner does not seek Kiko's immediate release," or (4) "nor does petitioner allege that Kiko's continued detention is unlawful." *Presti*, 124 A.D.3d at 1334-35.

The uncontroverted facts set forth in the Verified Petition filed by the NhRP in the Supreme Court, Niagara County (Appendix at 23-39) directly contradict the court's statements:

¶ 1 provides that "This petition is for a common law writ of habeas corpus pursuant to CPLR Article 70. It is an attempt to extend existing New York common law for the purpose of . . . granting [Kiko] immediate release from illegal detention."

¶12 provides that "[f]or the past 17 years, Petitioner NhRP has worked to change the status of such nonhuman animals as chimpanzees from legal things to legal persons."

¶9 provides that "Kiko is a solitary chimpanzee being detained by Respondents in a cage located in a cement storefront in a crowded residential area . . ."

¶3 "asks this Court to issue a writ recognizing that Kiko . . . [has] the fundamental legal right not to be imprisoned."

¶5 states that "this Petition seeks a determination forthwith that Kiko's detention is unlawful and demands Kiko's immediate release ..."

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legal right, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them." http://www.nonhumanrightsproject.org/about-us-2/ (visited January 8, 2015). The NhRP does not seek to reform animal welfare legislation.

¶17 states that "Petitioner NhRP will demonstrate that under New York law, Kiko, as a legal person, is entitled to the common law right to bodily liberty. Petitioner NhRP asserts that Kiko's detention by Respondents constitutes an unlawful deprivation of his right to bodily liberty and that he is entitled to test the legality of this detention through the issuance of a common law writ of habeas corpus by this Court."

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

One of four Questions presented in the Brief to the Appellate Division, Fourth Department was: "4. Is the Petitioner/Appellant chimpanzee, who is imprisoned in a cement storefront building in the State of New York, entitled to have a common law writ of habeas corpus issued on his behalf against the Respondents to determine the legality of his restraint?" (Brief at 2). In the Brief's Statement of the Case, the NhRP stated that "Petitioners/Appellants petitioned the court to issue a writ of habeas corpus and thereafter order the immediate release of Kiko, who was being unlawfully detained in the State of New York by Respondents." (Brief at 2-3).

Finally, the answers to the questions posed to the NhRP's counsel by the Appellate Division, Fourth Department at oral argument, the relevant pages of

which are attached as Exhibit 1, directly contradict the factual assertions made by the court in its decision as well as the legal conclusion that habeas corpus did not lie:[3]

00:54 JUSTICE: Well, can I ask you a question? If Kiko were to be let out of where Kiko is currently being held, you're not asking that Kiko go out in the street, you're saying that Kiko would still be confined, but in a sanctuary. Is that correct?

01:12 STEVEN WISE: That is correct. Kiko would go to Save the Chimps, which is a sanctuary with islands in it and a lake in South Florida.

01:20 JUSTICE: Right, but it would still be confinement. You're not saying that Kiko should go off into the street?

01:28 STEVEN WISE: That would be dangerous for Kiko and dangerous for us. But he would not be imprisoned. He would not be confined in the way he is confined now. It would be a sanctuary…

01:34 JUSTICE: Right, it would be a better condition, but he's still not free to go where, where Kiko wishes to go.

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[3] As there are no official transcripts of this oral argument, Appellant's transcript is unofficial and transcribed from a private recording of the oral argument.

better.

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03:04 endangered, I'm sorry, indentured servants, slave children, when slavery was legal, who were seven or eight years old. I cite, we cite

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kind of a state that is permanent, you will be permanently moved there, but you will go out of one place, and you'll be moved into another place. This is especially important because the expert affidavits show clearly that Kiko indeed is a being who is autonomous and can self-determine, and his ability to be autonomous and self-determined is not being allowed to express themselves, and...

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

06:21 STEVEN WISE: No.

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

06:31 STEVEN WISE: Yes.

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

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

06:53 JUSTICE: So if you're right, then you could have a zoo, say the Toronto Zoo or the San Diego Zoo, that has the best accommodations for chimpanzees you can imagine. They have acres and acres, bananas everywhere. If you're right here, well,

someone brings a habe on those animals, and say, they should be released from the zoo?

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

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

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

12:06 STEVEN WISE: Yes …you have…

12:08 JUSTICE: As the intermediate appellate court?

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

12:23 JUSTICE: We understand.

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

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

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

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

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

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

In sum, the NhRP is not "an organization seeking better treatment and housing of, inter alia, nonhuman primates." The petition does not allege that Kiko is illegally confined because he is kept in unsuitable conditions. The NhRP repeatedly demands Kiko's immediate release. That Kiko must be released to the custody of another does not change this conclusion, *supra.* Finally the NhRP repeatedly alleges that Kiko's continued detention is unlawful because it grossly interferes with his exercise of autonomy, self-determination, and bodily liberty.

As a result of these misunderstandings of the NhRP and its claims, the Appellate Division, Fourth Department ignored two centuries of controlling cases the NhRP cited in which child slaves, child apprentices, child residents of training schools, child residents of mental institutions, and mentally incapacitated adults, none of whom could be immediately released onto the streets of the State of New York any more than Kiko could, were nevertheless released from the custody of one entity and immediately transfer into the custody of another (Brief at 30-31; Memorandum to the Niagara Count Supreme Court, Appendix at 511-12). Its

ruling therefore erroneously contracted the Great Writ for both humans and chimpanzees.

This severe contraction violates the Suspension Clause, Art. I, sec. 4, of the New York Constitution. To the extent a statute or ruling curtails the common law of habeas corpus, it suspends the Great Writ in violation of New York Constitution, Art. 1 § 4, which provides that "[t]he privilege of a writ or order of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, or the public safety requires it." The Suspension Clause however renders not just the legislature, but the judiciary, equally powerless to deprive an individual of the privilege of the common law writ of habeas corpus. *Tweed*, 60 N.Y. at 591-92 ("If a court . . . may impose any sentence other than the legal statutory judgment, and deny the aggrieved party all relief except upon writ of error, it is but a judicial suspension of the writ of habeas corpus. That writ is . . . a protection against encroachments upon the liberty of the citizen by the unauthorized acts of courts and judges.") See argument in Brief at 25-26.

V. CONCLUSION

As this appeal raises novel legal issues, as the novel legal issues it raises are of great public importance and interest within New York and throughout the United States and internationally, as the Appellate Division, Fourth Department's opinion contradicts decisions of this Court and violates Art. I, sec. 4, of the New York Constitution, as the NhRP raises numerous complex legal arguments establishing that the Appellate Division, Fourth Department made substantial legal errors that ought to be reviewed by the Court, and as the Appellate Division,

Fourth Department's statements regarding the NhRP and the nature of the relief it seeks on behalf of Kiko are unsupported by the factual record, this Court should grant the NhRP's Motion for Leave to Appeal.

Respectfully Submitted,

Dated: April 9, 2015

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Exhibit "1"

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

00:16 STEVEN WISE: May it please the court, my name is Steven Wise. I want to thank you for the privilege of allowing me to appear before you *pro hac vice* on behalf of the Nonhuman Rights Project, which petitioned for a common law writ of habeas corpus, pursuant to CPLR Article 70, on behalf of Kiko, who is a chimpanzee who is detained in a cement storefront in Niagara Falls. In *Hoff vs. State*, the Court of Appeals stated that experience has taught us, over the years, that the writ of habeas corpus is - and I quote - the only reliable protection of freedom, unquote. The question is - whether or not that applies to chimpanzees?

00:54 JUSTICE: Well, can I ask you a question? If Kiko were to be let out of where Kiko is currently being held, you're not asking that Kiko go out in the street, you're saying that Kiko would still be confined, but in a sanctuary. Is that correct?

01:12 STEVEN WISE: That is correct. Kiko would go to Save the Chimps, which is a sanctuary with islands in it and a lake in South Florida.

01:20 JUSTICE: Right, but it would still be confinement. You're not saying that Kiko should go off into the street?

01:28 STEVEN WISE: That would be dangerous for Kiko and dangerous for us. But he would not be imprisoned. He would not be confined in the way he is confined now. It would be a sanctuary…

01:34 JUSTICE: Right, it would be a better condition, but he's still not free to go where, where Kiko wishes to go.

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

03:44 JUSTICE: Counsel, the record in that regard I found very impressive, and I think the experts that you relied upon were ... very impressive. Let me ask you a question though, kind of different. What's the proof in the record of Kiko's current condition and that it's a condition that warrants habeas corpus? In other—and I'm talking about current condition and ... Has somebody seen Kiko, that has testified, or that, as to the specifics?
04:14 STEVEN WISE: No. Other than that we allege that he is detained in a cement storefront in Niagara Falls. We know that from the Facebook pages, for example, that show pictures of Kiko with a chain around his neck. So we, and ... that's what the Respondents, who are, alas, who are not here. But they show that on their Facebook page, although that is not a part of the record. However, we know...
04:39 JUSTICE: That's why I'm asking...
04:40 STEVEN WISE: We know that.
04:40 JUSTICE: In the record itself, other than an attorney's affirmation that says that this is the condition, which does not appear to be on direct knowledge, I wonder where the evidence is that the condition does exist? That's what I'm asking.
04:53 STEVEN WISE: Well, I think that the fact that as a writ of habeas corpus ... can be brought in a couple ways. One, is the person who's being detained, him or herself can go into court. But that's not usually the case. So you have to have a third party. So, a third party, who has some kind, who has a reasonable belief, that someone else is being detained...
05:14 JUSTICE: But, it has ... but I believe, what Justice [ ] is saying, is there's nothing in the record that says: I, with direct knowledge, have seen Kiko in this condition and this is untenable, or whatever.
05:31 STEVEN WISE: Well, it's ... Kiko is there...
05:34 JUSTICE: That's...that's what we're asking....
05:37 STEVEN WISE: There, there, it is alleged that Kiko is there.
05:44 JUSTICE: Oh, no, no. I'm not saying that that hasn't been alleged. But I'm saying - has anybody from the Nonhuman Rights Project actually gone to see, to Niagara Falls to see this?
05:50 STEVEN WISE: I have, Your Honor. I've gone to the place. I saw ... I was, unable to see Kiko. I spoke to the Respondent before the case was ever filed, and also was handed a monkey, and saw monkeys and birds. And I left. I had no doubt that Kiko and Charlie, who died before we were able to file a suit on his behalf, were indeed back there. But I did not see them.
06:18 JUSTICE: Does it matter what conditions Kiko's being held, or...

06:21 STEVEN WISE: No.

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

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

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

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

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

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

07:46 STEVEN WISE: You know … that's our one hundred pages of expert affidavits tell you, that chimpanzees can self-determine and are autonomous. They list about forty-five separate advanced cognitive abilities that include, specifically, autonomy and self-determination, and the other ones are tied into that. So what the remedy that we would ask is that this Court either: a) assume, without deciding, that Kiko is a person within the meaning of the common law writ of

08:19 habeas corpus, remand the case to the supreme court, with an order to issue the writ of habeas corpus, and decide the issue of personhood based upon the evidence below, or, in the alternative, to have this Court find that Kiko is a person and remand and order the court to proceed according to Article 70. Now a person - and we've kind of touched upon this - is not synonymous with human being, and we cite a series of cases; the *Byrn* case is probably the most

08:52 important one for us. The Court of Appeals in 1972 cited John Chipman Gray, George Whitecross Patten, and many other secondary sources, where they made it clear that the issue of a person is not a human being, but it's a matter of policy that each jurisdiction must settle for itself. And those secondary sources said that nonhuman animals could be persons, Even deities could be persons. I cited…

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

09:36 STEVEN WISE: Yes.

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

different legal benefits.

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

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

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

10:17 JUSTICE: Okay.

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

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

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

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

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

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12:23 JUSTICE: We understand.

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

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

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

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

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

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

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

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

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

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

15:52 JUSTICE: Part of the problem…

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

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