STATE OF NEW YORK
SUPREME COURT COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus and Order to Show Cause,

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

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY,

Respondents.

Index No.: 18-45164

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR PERMISSION TO APPEAL

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I. Preliminary statement

Petitioner, the Nonhuman Rights Project, Inc. ("NhRP") submits this Memorandum of Law in support of its motion for permission to appeal to the New York State Supreme Court Appellate Division, Fourth Judicial Department ("Fourth Department") ("Motion to Appeal"), pursuant to CPLR 5701(c) from the January 18, 2019 order of the Supreme Court, Orleans County ("Transfer Order"), granting the motion by Respondents, James J. Breheny and the Wildlife Conservation Society ("Bronx Zoo"), to transfer the venue of this proceeding from Orleans County to Bronx County ("Motion to Transfer").

As will be explained, this Court should grant the Motion to Appeal as the Transfer Order was based on the following legal errors. First, contrary to the Bronx Zoo's claims and this Court's finding, venue is clearly proper in Orleans County, for two reasons. As CPLR 7002(b)(3) authorizes the filing of a habeas corpus petition before any Supreme Court Justice, the NhRP's filing of the petition in the Orleans County Supreme Court was proper. Further, as the Bronx Zoo is not a "state institution," this Court properly made the Order to Show Cause[1] returnable to Orleans County (the county of issuance) pursuant to CPLR 7004(c).

Second, after making the Order to Show Cause returnable in Orleans County, this Court had no discretion to transfer venue to Bronx County. This Court may *only* order a change in venue pursuant to one of the three grounds specified under CPLR 510. The Bronx Zoo filed a motion to change venue, but did not satisfy any of the requirements of CPLR 510. Therefore, the Transfer Order was error and venue must remain in Orleans County.

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[1] The NhRP uses the terms "Order to Show Cause" and "writ" interchangeably when describing where the writ is made returnable under CPLR 7004(c). *See The Nonhuman Rights Project, Inc. v. Stanley*, 16 N.Y.S.3d 898, 906, 907 (Sup. Ct. 2015) (after signing petitioner's Order to Show Cause in New York County, respondents maintained that "the writ should have been made returnable in Suffolk County," but the court held "the writ here is to be made returnable in the county of issuance, namely, New York County.").

II. Proceedings to date[2]

On October 2, 2018, the NhRP filed a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") pursuant to CPLR Article 70 on behalf of Happy, a 47-year old Asian elephant alleged to be illegally imprisoned at the Bronx Zoo by Respondents.

On November 16, 2018, the Orleans County Supreme Court granted the NhRP's requested Order to Show Cause and made the writ returnable in Orleans County on December 14, 2018. On November 21, 2018, the Bronx Zoo filed a Demand for Change of Venue stating that venue was "improperly placed" in Orleans County and must be changed to Bronx County "where venue would be proper, as provided by CPLR 503, 510(1), and 7004(c)." On December 3, 2018, the Bronx Zoo made a motion pursuant to CPLR 511 and CPLR 7004(c) to transfer venue of this habeas corpus proceeding from Orleans County to Bronx County ("Motion to Transfer"). On December 14, 2018, this Court held a hearing on the Order to Show Cause. At its conclusion, the Court stated that it would grant the Bronx Zoo's Motion to Transfer.

On January 8, 2019, the NhRP moved this Court by an order to show cause for a stay of the Court's then-forthcoming transfer order until final resolution of the NhRP's then-forthcoming motion for leave to reargue pursuant to CPLR Rule 2221(d) ("Motion to Reargue").[3] On January 14, 2019, this Court issued the order to show cause and set oral argument for February 1, 2019.

On January 18, 2019, this Court entered the Transfer Order, about which the NhRP was notified on January 22, 2019.[4]

On January 23, 2019, the NhRP filed its Motion to Reargue, which is scheduled to be heard

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[2] As this Court is in possession of all the papers and documents submitted in this action, the NhRP incorporates them by reference with the approval of the office of the Chief Clerk of the Supreme Court, Orleans County.

[3] In that motion, the NhRP attached a draft memorandum of law in support of its then-forthcoming motion for leave to reargue.

[4] In the Motion to Reargue, the NhRP attached the transcript of the decision of this Court (herein referred to as "Transcript") and the Transfer Order as Exhibit 1 and Exhibit 3 respectively.

at oral argument on February 1, 2019.

In a motion dated January 24, 2019 filed concurrently with the Motion to Appeal, the NhRP filed a motion pursuant to CPLR 2201 and 5519(c) requesting the Court to stay the Transfer Order ("Motion to Stay") until final resolution of any appeal taken from the Transfer Order, should this Court deny the NhRP's Motion to Reargue or adhere to its prior decision.

In this present Motion to Appeal, made pursuant to CPLR 5701(c), the NhRP seeks leave of this Court to appeal the Transfer Order to the Fourth Department, should the Court deny the Motion to Reargue or adhere to its prior decision.

III. Jurisdiction

Under CPLR 5701(c), "[a]n appeal may be taken to the appellate division from any order which is not appealable as of right in an action originating in the supreme court by permission of a judge who made the order granted before application to a justice of the appellate division." In appealing an order granting a motion to change venue, CPLR 511(d) provides that such appeal "shall be taken in the department in which the motion for the order was heard and determined."

While "[n]o appeal lies as of right" from the Transfer Order as it is an intermediate nonfinal order, this Court is authorized under CPLR 5701(c) to grant the NhRP's Motion to Appeal. *Brevorka ex rel Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996) ("No appeal lies as of right from an intermediate order in a habeas corpus proceeding (see, CPLR 5701[a]; 7011). In the exercise of our discretion, we treat the notice of appeal as an application for permission to appeal and grant permission (see, CPLR 5701[c])."). *See also Reilly v. City of Rome*, 114 A.D.3d 1255 (4th Dept. 2014) (while no appeal as of right lies from an intermediate order in an article 78 proceeding, "we treat the notice of appeal as an application for leave to appeal from the order and grant the application"); *Engelbert v. Warshefski*. 289 A.D.2d 972 (4th Dept. 2001) (granting permission to appeal a nonfinal intermediate order in a CPLR article 78 proceeding); *Coor*

Development Corp v. Weber, 41 A.D.2d 689 (4th Dept. 1973) (intermediate and nonfinal order "not appealable as of right but only upon obtaining leave to appeal"); *Conde v. Aiello*, 204 A.D.2d 1029 (4th Dept. 1994) ("No appeal of right lies from an intermediate order in an article 78 proceeding (CPLR 5701[b][1]). We treat the notice of appeal as a request for permission to appeal and grant leave so that we may address the merits (see, CPLR 5701[c])."); *Driscoll v. Department of Fire of City of Syracuse*, 112 A.D.2d 751 (4th Dept. 1985) (appeal from a non-final intermediate order in an article 78 proceeding "authorized only upon permission of the judge who made the order or from a justice of the Appellate Division (CPLR 5701[c]).")

IV. Standard of Review

"The Appellate Division has not attempted to set forth the standards to be employed when deciding whether to grant leave, nor does any clear standard emerge from the reported cases." 12 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5701.27. However, this Court has the discretion to do so under CPLR 5701(c) when it would be "in the interest of justice." *Majuk v. Carbone*, 129 A.D.3d 1485 (4th Dept. 2015) (granting application for leave to appeal "in the interest of justice"); *Tarrazi v. 2025 Richmond Ave Associates*, 296 A.D.2d 542, 543 (2d Dept. 2002) (granting application for leave to appeal "in the interest of justice.") *Sena v. Nationwide Mut Fire Ins Co*, 198 A.D.2d 345, 346 (2d Dept. 1993) (leave to appeal "may be granted in the interest of justice"); *Greenfield v. Greenfield*, 147 A.D.2d 440, 441 (2d Dept. 1989) ("However, in the interest of justice, and under the particular circumstances of this case, we treat the plaintiff's notice of appeal as an application for leave to appeal"); *Mulligan v. New York Cornell Medical Center*, 304 A.D.2d 492 (1st Dept. 2003) ("In the interest of justice, however, we deem the notice of appeal to be an application for leave to appeal to this Court, and, as such, grant leave for a determination on the merits"). In the case at bar, the "interest of justice" weighs heavily in favor of granting leave, as demonstrated in *infra*, at 18 – 24.

Further, this Court's errors of law in (1) determining that venue in Orleans County is improper, and (2) determining that it had discretion to transfer the proceeding to Bronx County warrant review by the Fourth Department. Specifically, under the venue rules in CPLR Article 5, specifically CPLR 510, there are only three possible grounds on which to base a motion to transfer venue, as in the case at bar. CPLR 510 provides that:

> The court, upon motion, may change the place of trial of an action where:
>
> 1. the county designated for that purpose is not a proper county; or
> 2. there is reason to believe that an impartial trial cannot be had in the proper county; or
> 3. the convenience of material witnesses and the ends of justice will be promoted by the change.

The Bronx Zoo limited its Demand for Change of Venue and Motion to Transfer to CPLR 510(1), alleging that venue was improper in Orleans County. In the Transfer Order, this Court erred in the following two fundamental respects by: (1) determining that venue in Orleans County is improper, and (2) determining that it had discretion to transfer the proceeding to Bronx County.

As shown below, since the Bronx Zoo did not and could establish that venue is improper in Orleans County, as venue is clearly proper in Orleans County, this Court had no authority to grant the Bronx Zoo's motion to transfer venue on that ground. Further, as the Bronx Zoo failed to make any timely and proper motions pursuant to either CPLR 510(2) or (3) and in fact never raised either section in the motion to transfer venue, this Court had no authority at all to change venue.

V. Venue in Orleans County is Proper.

This Court granted the Bronx Zoo's Motion to Transfer made on the ground that, under CPLR 503(a), venue in Orleans County was improper and venue in Bronx County is proper. *See*

Demand for Change of Venue[5] (Respondents "hereby demand, pursuant to CPLR 511, that the venue of the above-captioned proceeding be changed from County of Orleans, where it has been improperly placed, to the County of Bronx, where venue would be proper, as provided by CPLR 503, 510(1), and 7004(c)"); *Zoo Memorandum 3*,[6] at 3 ("CPLR 503(a) controls, and mandates venue in Bronx County."); Zoo *Memorandum 2*,[7] at 6 ("Respondents seek to transfer venue because pursuant to CPLR Articles 5 and 70, the proper venue for this action is Bronx County.") (citing CPLR 503(a)); *Zoo Memorandum 2*, at 6 ("Respondents' motion to transfer venue should be granted because NRP has not and cannot identify any nexus between this litigation and Orleans County."); *Manning Affidavit*,[8] at para. 16 ("Respondents move to change venue to Bronx County pursuant to CPLR 510 and CPLR 7004(c). Because NRP brought this proceeding to challenge allegedly unlawful detention, venue should be in the county where that alleged detention occurred, and where the subject of the proceeding is located."); *Transcript*[9] at 15 ("CPLR Article 5 indicates that this matter should be held in the Bronx").

A. This Court's reliance upon CPLR 503(a) was error, as habeas corpus venue is governed by CPLR 506(a), CPLR 7002(b), and CPLR 7004(c).

A habeas corpus case is a special proceeding. CPLR 7001.[10] Only in cases that are *not* special proceedings is venue determined by CPLR 503(a), which states that "the place of trial shall be in the county in which one of the parties resided when it was commenced; the county in which a substantial part of the events or omissions giving rise to the claim occurred; or, if none of the

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[5] Dated November 21, 2018.

[6] Respondents' Reply Memorandum of Law in Further Support of Motion to Dismiss or Transfer Venue and in Opposition to Petitioner's Motion for Preliminary Injunction, dated December 13, 2018.

[7] Respondents' Memorandum of Law in Support of Motion to Dismiss or Transfer Venue and in Opposition to petition for Habeas Corpus, dated December 3, 2018.

[8] Affidavit of Kenneth A. Manning, dated December 3, 2018.

[9] Transcript of the Order to Show Cause hearing held on December 14, 2018.

[10] CPLR 7001 states: "Except as otherwise prescribed by statute, the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention. A proceeding under this article is a special proceeding."

parties then resided in the state, in any county designated by the plaintiff." However, CPLR 503(a) contains the relevant exception, "*where otherwise prescribed by law*."[11]

Special proceeding venue is "otherwise prescribed by law," specifically CPLR 506(a),[12] which provides that "a special proceeding may be commenced in any county within the judicial district *where the proceeding is triable*." (emphasis added). *See Greene v. Supreme Ct State of NY Westchester County Special Term, Part I,* 31 A.D.2d 649 (2d Dept. 1968) ("We think that a habeas corpus proceeding, a special proceeding (CPLR 7001), is subject to the practice provisions governing venue generally (cf. CPLR 506)."); *Weingarten v. Board of Educ of City School Dist of City of New York*, 3 Misc.3d 418, 424 (Sup. Ct. 2004) ("CPLR 506 governs the venue of special proceedings").

CPLR 506(a) does not state *where* "the proceeding is triable." To determine venue in a special proceeding "the statute authorizing the particular proceeding must be consulted." Joseph L. Marino, 4 *West's McKinney's Forms Civil Practice Law and Rules* § 10:2 (2015); Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 506 ("In order to determine the venue for a special proceeding, counsel must begin by consulting the statute authorizing the particular proceeding. *See*, *e.g., CPLR 7002(b) (habeas corpus)*; CPLR 7502(a) (proceedings relating to arbitration)") (emphasis added).[13]

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[11] *See Regal Boy Enterprises Intern VII Inc v. MLQ Realty Management LLC*, 22 A.D.3d 738, 739 (2d Dept. 2005) ("this action is one whose venue is '*otherwise prescribed by law*'") (emphasis added); *Paraco Gas of New York Inc v. Colonial Coal Yard Inc*, 20 Misc.3d 1112(A) at *5 (Sup. Ct. 2008) ("While CPLR 503 provides generally that a civil action may be venued in any county where a party resides, it also makes clear that *this is a general rule and, like all general rules, may be displaced by an exception.* CPLR 503 is explicit that its authorization for residence-based venue will be overcome 'where otherwise prescribed by law'.") (emphasis added).

[12] In its Memorandum of Law in Opposition to Proposed Order to Show Cause, dated October 9, 2018 ("*Zoo Memorandum I*"), at 9 - 10, the Bronx Zoo erroneously argued that CPLR 506(b) governs venue in a habeas corpus proceeding. It does not. Instead it governs venue in Article 78 proceedings. *See* 5 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 506.01 ("Venue of [Article 78 proceedings] is now covered by CPLR 506(b) and CPLR 7804(b)"). As this case is a habeas corpus proceeding, only the venue provision in CPLR 506(a) applies.

[13] *See also* 5 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 506.01 ("The county in which the proceeding is triable will be determined, *absent a more particular provision*, by the same provisions that govern venue of actions.") (emphasis added); 4 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 401.02[2] ("Venue in special proceedings is governed by CPLR

Article 70 venue is governed by two provisions. First, CPLR 7002(b)(3) permits a petitioner to file the petition with "any justice of the supreme court." *See The Nonhuman Rights Project, Inc. v. Stanley*, 16 N.Y.S.3d 898, 906 (Sup, Ct. 2015) ("I commence with CPLR 7002(b)"); *see also People ex rel. Van Buren v. Superintendent of New York State Reformatory for Women at Bedford*, 192 N.Y.S. 511, 512 (N.Y. Sup. Ct. 1922) ("Section 1232 of the Civil Practice Act provides that the application for the writ may be made to a justice of the Supreme Court *in any part of the state*.") (emphasis added). Second, CPLR 7004(c) provides where the issued writ shall be made returnable.

As shown below, these provisions made venue proper in Orleans County.

B. Because the Bronx Zoo is not a "state institution," Orleans County is the presumptive venue under CPLR 7004(c).

At the hearing held on December 14, 2018, this Court correctly noted that CPLR 7004(c) "tells you *where* it's returnable." (emphasis added) (*Transcript*, at 28). CPLR 7004(c), however, is comprised of two sentences, each addressing a different category of case. Only the second sentence applies to this case. The first sentence requires that writs filed to secure the discharge of prisoners in a "*state institution*" must be returnable in the county of detention:

> A writ to secure the discharge of a person from a *state institution* shall be made returnable before a justice of the supreme court or a county judge being or residing within the county in which the person is detained; if there is no such judge it shall be made returnable before the nearest accessible supreme court justice or county judge.

CPLR 7004(c) (emphasis added).

506, which *in turn recognizes that many of the specific statutes authorizing special proceedings* include controlling venue provisions.") (emphasis added); David D. Siegal, New York Practice § 549 at 1056 [6th Ed] (explaining that CPLR 506(a) "take[s] whatever county the *special statute offers as proper venue in the given instance* and authorizes the proceeding to be brought in that county or any other 'within the judicial district.'") (emphasis added).

The second sentence makes clear that, when a prisoner is *not* detained in a "state institution," the court must make the writ returnable in the county of issuance unless, within its sound discretion, the court makes the writ returnable in the county of detention:

> *In all other cases, the writ shall be made returnable in the county where it was issued*, except that where the petition was made to the supreme court or to a supreme court justice outside the county in which the person is detained, such court or justice *may* make the writ returnable before any judge authorized to issue it in the county of detention.

CPLR 7004(c) (emphasis added).

In *Hogan v. Culkin*, 18 N.Y.2d 330, 335 (1966), the Court of Appeals explained the difference between the two sentences. CPLR 7004(c) "distinguishes between writs of habeas corpus concerning the inmates of State institutions, in the first instance, and writs '[i]n all other cases', in the second." In "state institution" cases, "it *must* be returnable in the county of detention." *Id.* (emphasis added). But "*[i]n all other cases*, the writ *is to be made returnable in the county of issuance*, unless the issuing judge should decide in his discretion to make it returnable in the county of detention." *Id* (emphasis added). *See Morton v. Morton*, 79 Misc.2d 915, 917 (Family Court 1974) ("Section 7004(c) of the CPLR provides that a writ of habeas corpus, *when the person detained is not confined in an institution*, *shall be made returnable in the county where issued*, but if the person detained is not in the county where the writ is issued, then the writ may be made returnable before any judge authorized to issue it in the county of detention.") (emphasis added).

The Bronx Zoo conceded,[14] as it must, that it is not a "state institution" but a "non-profit conservation organization,"[15] thereby making Orleans County the presumptive venue. However,

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[14] *See Zoo Memorandum 3*, at 2 ("*Respondents are not prisons or any other state institution*. Instead, Mr. Breheny and the Bronx Zoo are an individual and a non-profit conservation organization, respectively…") (emphasis added).
[15] *Id*. As the Bronx Zoo is managed by Respondent Wildlife Conservation Society, which is a 501(c) non-profit organization, it is not a "state institution." *See Stanley*, 16 N.Y.S.3d at 907, which noted that "the term 'state institution' was directed at 'reliev [ing] wardens of State prisons from the burden of producing inmates out of the county of detention, under guard, and often at great distances and great expense') (quoting *Hogan v. Culkin*, 18 N.Y.2d 330, 334–335 [1966]).

at the December 14, 2018 hearing, this Court erroneously treated the Bronx Zoo as a "state institution" anyway and misapplied the first sentence of CPLR 7004(c):

> I believe that you could have asked any judge in the Supreme Court to sign your papers to start off your writ of the habeas corpus proceeding, but it needed to be made returnable before some county that had any—some nexus to this elephant and his condition—his conditions of captivity.
>
> *I'll just read this part. It says, "It shall be made returnable before a justice of the Supreme Court or a County Court judge being or residing within the county where the person is detained."*
>
> If we accept your belief that an animal—or this animal is a person within the meaning of the law, that animal is being detained in the Bronx County. I don't think it's even questionable that this proceeding should be here. [...]

Transcript, at 28-29 (emphasis added).

As Happy is not a prisoner in a "state institution," the *second* sentence of CPLR 7004(c) governs: "[*i*]*n all other cases*, the writ shall be returnable *in the county where it was issued. . .*" (emphasis added). It authorized this Court to do exactly what it did: make the writ returnable in Orleans County, where the writ originally issued. *See Hogan*, 18 N.Y.2d at 335 ("In all other cases, the writ is to be made returnable in the county of issuance, unless the issuing judge should decide in his discretion to make it returnable in the county of detention."); *Stanley*, 16 N.Y.S.3d at 907 ("Consequently, as 'in all other cases,' the writ here is to be made returnable in the county of issuance, namely, New York County."). While this Court had the discretion to make the Order to Show Cause returnable in Bronx County as the county of detention, it chose not to do so. Venue is therefore proper in Orleans County.

VI. The Bronx Zoo failed to meet the requirements of CPLR 510 for transferring venue from Orleans County to Bronx County.

A. As venue is proper in Orleans County, this Court was prohibited from granting the Bronx Zoo's Motion to Transfer pursuant to CPLR 510(1).

As noted, *supra* at 5, CPLR 510 provides just three grounds for transferring venue:

> The court, upon motion, may change the place of trial of an action where:
> 1. the county designated for that purpose is not a proper county; or
> 2. there is reason to believe that an impartial trial cannot be had in the proper county; or
> 3. the convenience of material witnesses and the ends of justice will be promoted by the change.[16]

CPLR 510(1) provides for a change of venue "as of right" only when the present venue is improper and requires a showing by the moving party both that "plaintiff's choice of venue is improper and that defendant's is proper." *Agway, Inc. v. Kervin*, 188 A.D.2d 1076, 1077 (4th Dept. 1992). The Bronx Zoo erroneously claimed that venue in Orleans County was improper and that venue in Bronx County was proper. However, as demonstrated, *supra* at 5 – 10, venue is proper in Orleans County and improper in Bronx County.

In attempting to establish that venue is proper in Bronx County, the Bronx Zoo cannot rely upon the residency requirements of CPLR 503(a), as it is CPLR 506, not CPLR 503(a), that applies. *See Greene,* 31 A.D.2d at 649 ("(w)e think that a habeas corpus proceeding, a special proceeding (CPLR 7001), is subject to the practice provisions governing venue generally (cf. *CPLR 506*)") (emphasis added). Since habeas corpus is a special proceeding, *Greene* correctly cites to CPLR 506 and *not* CPLR 503(a), as it is the provision that applies to special proceedings, *see Weingarten v. Board of Educ of City School Dist of City of New York*, 3 Misc.3d 418, 424 (Sup. Ct. 2004) ("CPLR 506 governs the venue of special proceedings"), and is the starting point for a venue analysis that "recognizes that many of the specific statutes authorizing special proceedings include controlling venue provisions." 4 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 401.02[2]. CPLR 506(a) requires applying CPLR 700b(2) and CPLR 7004(c) to determine proper habeas corpus venue, not CPLR 503(a).

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[16] CPLR 511 provides the time limits and procedures for making a motion pursuant to CPLR 510.

Moreover, unlike Happy, Mr. Greene was an inmate imprisoned in a "state institution." After properly commencing his habeas petition in Westchester County, where he was imprisoned, Greene was moved to Clinton County. This transfer "suspended the jurisdiction of the Supreme Court, Westchester County, to continue the proceeding (CPLR 7004, subd. [c])," as the requirement in the first sentence of 7004(c) that the writ "shall be made returnable" in the county of detention could no longer be met. 31 A.D.2d at 649. *See Hogan*, 18 N.Y.2d at 335 ("Where the writ is directed to the warden of a State prison. . . it *must* be made returnable in the county of detention, subject to the exception applicable when there is no available judge in that county.") (emphasis added).

The first sentence of CPLR 7004(c), requiring that the writ "shall be made returnable" in the county of detention, is simply the habeas corpus version of the residence-based venue requirements for a "person" detained in a "state institution." But the Bronx Zoo, as Respondents conceded, "[is] not [a] prison[] or any other state institution" within the meaning of CPLR 7004(c), *Zoo Memorandum 3*, at 2, and therefore any reliance upon *Greene* is misplaced.

As the Bronx Zoo cannot "effect a change of venue as of right" on the ground that venue in Orleans County is improper, this Court "was without power to change venue pursuant to CPLR 510(1)." *Agway, Inc.* 188 A.D.2d at 1077 (4th Dept. 1992); *see Schapiro And Reich Esqs v. Fuchsberg*, 172 A.D.2d 1080, 1081 (4th Dept. 1991) (defendant "not entitled to an order changing venue as of right because Suffolk County is a proper County").

B. As the Bronx Zoo did not move to change venue under CPLR 510(2) or 510(3), this Court had no discretion to transfer the proceeding to Bronx County pursuant to those provisions.

At the December 14, 2018 hearing, this Court stated, *sua sponte,* that its decision to grant the Bronx Zoo's Motion to Transfer was based on the convenience of witnesses, the ground set forth in CPLR 510(3):

> [This proceeding] will require experts to testify on both sides, and I probably can't imagine a more inconvenient place for this case to be than in Albion New York. I might be able to think of a couple, but this would be among the most inconvenient places for the parties to actually have any kind of a hearing. I certainly am not going to be bringing up employees and experts and having them fly to cities in New York and drive an hour to get there.
>
> The Bronx is a convenient place. The witnesses of the conditions of Happy's confinement are there, and I would say that any experts that you would bring in or alert folks to contest that—they would also find it much easier to get to the Bronx than to Albion, New York.

Transcript, at 30.

Because CPLR 7004(c) is silent on changing venue after a writ of habeas corpus has been "made returnable in the county where it was issued," a motion to change venue required this Court to apply the general venue rules in CPLR Article 5. *See* Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 506 ("If the authorizing statute is silent as to venue, the general venue rules of CPLR Article 5. . .would be applicable."); CPLR 103(b).[17] Thus, after making the Order to Show Cause returnable in Orleans County, this Court was required to apply CPLR 510 to any motion seeking a change of venue. *See Greene*, 31 A.D.2d at 649 ("a habeas corpus proceeding . . .is subject to the practice provisions governing venue generally").

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[17] CPLR 103(b) provides: "Except where otherwise prescribed by law, procedure in special proceedings shall be the same as in actions, and *the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings*." (emphasis added); *see also Travelers Indem. Co. of Illinois v. Nnamani*, 286 A.D.2d 769, 770 (2d Dept. 2001) (Citing CPLR 103(b), holding that "CPLR article 5 procedures for changing venue are applicable to this" Article 75 proceeding even though "the specific venue provisions of CPLR 7502(a)(i) supersede the general venue provisions for special proceedings"); *Phoenix Ins Co v. Casteneda*, 287 A.D.2d 507 (2d Dept. 2001) ("While the specific venue provisions of CPLR 7502(a)(i) supersede the general venue provisions for special proceedings (see, CPLR 506), the CPLR article 5 procedures for changing venue are applicable to this proceeding (see, CPLR 103 [b]; 105[b])."); *In re Jewish Assn for Services for Aged*, 19 Misc.3d 1145(A) at *2 (Sup. Ct. 2008) ("Any argument that CPLR Section 510 does not apply in Article 81 matters is specious as the result would remain same since a change of venue for an improper County is not permitted pursuant to Section 81.07 but only by CPLR Section 510 and that Section clearly reserves the right to change venue to a party and only upon motion."); 1 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 103.05[4] ("The second sentence of CPLR 103(b) makes the *general practice provisions of the CPLR applicable to special proceedings*, as well as to actions, except where otherwise prescribed by law.") (emphasis added); Vincent C. Alexander, *McKinney's Practice Commentary*, CPLR 401 (2014) ("If the authorizing statute is silent on the particular problem, Article 4 must be consulted. If neither the authorizing statute nor Article 4 addresses the point, CPLR 103(b) specifies that 'procedure in special proceedings shall be the same as in actions,' i.e., the *CPLR provisions that govern actions also apply to special proceedings* except where otherwise prescribed by law.") (emphasis added).

CPLR 510 precluded this Court from transferring venue on any ground *sua sponte*. *See Mimassi v. Town of Whitestown Zoning Bd of Appeals*, 104 A.D.3d 1280 (4th Dept. 2013) (A court "'is authorized to change venue only upon motion and may not do so upon its own initiative.'") (citation omitted); *Travelers Indem. Co. of Illinois v. Nnamani*, 286 A.D.2d 769, 770 (2d Dept. 2001) ("a court may not sua sponte transfer venue."); *see also* Vincent C. Alexander, *Practice Commentaries*, MicKinney's CPLR 510 at C510:1 ("The drafters of the CPLR noted that the words 'upon motion' were inserted in the introductory sentence of CPLR 510 'to avoid any implication that the court may change the place of venue on its own motion.' N.Y.Sen.Fin.Comm. et al., Fifth Prelim.Rep., Legis.Doc.No.15, p.78 (1961)").

CPLR 510(2) and 510(3) support a change of venue only upon motion and upon a legally sufficient showing by the movant. *DeBolt v. Barbosa,* 280 A.D.2d 821, 822 (3d Dept. 2001) (While 510(2) authorizes a court, upon motion, to change venue, "defendants' submissions. . .fall short of establishing the requisite facts to invoke the discretion of Supreme Court."); *Peoples v. Vohra*, 113 A.D.3d 664, 665 (2d Dept. 2014) ("defendants failed to establish grounds supporting a change of venue under" CPLR 510(3).). The Bronx Zoo did not move to change venue under CPLR 510(2) and never raised the issue of impartiality in its papers or at the hearing. This Court therefore had no discretion to transfer venue *sua sponte* on the basis of impartiality concerns, and there is no indication that it did.

Instead, this Court erroneously, and *sua sponte*, grounded its ruling upon CPLR 510(3) ("the convenience of material witnesses and the ends of justice will be promoted by the change"). However, neither in its Demand for Change of venue nor in its Motion to Transfer did the Bronx Zoo invoke CPLR 510(3); it moved to transfer venue *solely* under CPLR 510(1). Accordingly, this Court had no discretion to grant the Bronx Zoo's motion made on the ground that venue in Orleans

County is improper, "as if it had been made upon the ground of convenience of material witnesses." *Rubens v. Fund*, 23 A.D.3d 636, 637 (2d Dept. 2005) (Supreme Court erred in granting "defendants' motion as if it had been made upon the ground of convenience of material witnesses," as it was "a ground not raised in the original notice of motion…"); *Mejia v. J Crew Operating Corp*, 140 A.D.3d 505 (1st Dept. 2016) ("Supreme Court erred by treating defendants' motion to change venue as of right under CPLR 510(1) as having been made under CPLR 510(3).").

"(T)he Appellate Divisions have specified a rigorous set of evidentiary requirements for the motion to change venue to promote the convenience of material witnesses and the ends of justice (CPLR 510(3))." Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 510 at C510:3. The *Practice Commentaries* noted that in *O'Brien v. Vassar Brothers Hospital,* 207 A.D.2d 169, 172-73 (2d Dept. 1995), drawing upon caselaw from all of the departments, the court delineated four requirements that *must be* satisfied by the moving party:

> 1. The movant's affidavit must list the names, addresses and occupations of the witnesses who are expected to be called.
> 2. The movant must disclose the facts to which such witnesses will testify so that the court may determine whether the testimony of the proposed witnesses is "necessary and material."
> 3. The movant must demonstrate that the witnesses are actually willing to testify.
> 4. The movant must show that the witnesses would in fact be inconvenienced in the absence of a change of venue.

See O'Brien, 207 A.D.2d at 171 (observing the "general consensus among appellate courts as to the existence, if not as to the absolute rigidity and inexorability, of four criteria which should be established by the movant in order to demonstrate his or her entitlement to relief pursuant to CPLR 510 (3).") (emphasis added).[18]

[18] "Countless motions to change venue pursuant to CPLR 510(3) are denied on a daily basis simply because of the movant's failure to provide the necessary information demanded by the foregoing caselaw." Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 510 at C510:3. This should have been one of them.

The Fourth Department has adopted these requirements. *See Rochester Drug Coop Inc v. Marcott Pharmacy N Corp*, 15 A.D.3d 899 (4th Dept. 2005) ("The party moving for a change of venue pursuant to CPLR 510 (3) has the burden of demonstrating that the convenience of material witnesses would be better served by the change.") (emphasis added) (citations omitted); *Rochester Drug Coop Inc*, 15 A.D.3d at 899 (movant "identified four nonparty witnesses, but failed to provide their residence addresses, establish that any of the witnesses had been contacted, or indicate that they were available and willing to testify.") (citations omitted); *Rochester Drug Coop Inc*, 15 A.D.3d at 899 ("the brief and vague descriptions of the witnesses' expected testimony are *insufficient to assess the materiality of that testimony*") (emphasis added); *Zinker v. Zinker*, 185 A.D.2d 698 (4th Dept. 1992) ("To *demonstrate entitlement to a discretionary change of venue*, the moving party must submit 'the names, addresses and occupations of the prospective witnesses; a full and fair statement of what the moving party expects to prove by the witnesses; the facts to which the prospective witnesses will testify; and the basis for the moving party's belief that the witnesses will testify as stated'") (emphasis added) (citations omitted); *Zinker*, 185 A.D.2d at 698 ("The moving party *must also demonstrate* that the matter will not be unduly delayed by transfer to another county.") (emphasis added).[19]

Further, "[c]ourts have identified a number of guidelines and factors regarding the substance of motions made under CPLR 510(3). *First and foremost*, the focus must be on the

[19] *See also Pittman v. Maher*, 202 A.D.2d 172, 176 (1st Dept. 1994) ("Though a motion pursuant to CPLR 510(3) is addressed to the sound discretion of the court, defendants' submissions were legally insufficient to support an exercise of that discretion… Defendants submitted no affidavit as to the convenience of a medical technician who will ostensibly testify on their behalf."); *Stainbrook v. Colleges of Senecas*, 237 A.D.2d 865 (3d Dept. 1997) (under 510(3), "party seeking the change of venue bears the burden of proof"); *Cardona v. Aggressive Heating Inc.*, 180 A.D.2d 572 (1st Dept. 1992) ("Upon a motion made pursuant to CPLR 510 (3), the movant bears the burden of demonstrating that the convenience of material witnesses would be better served by the change. This showing must include (1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the manner in which the anticipated testimony is material to the issues raised in the case") (citations omitted).

convenience of material *nonparty* witnesses. The convenience of *parties, their employees, persons under their control*, or family members is given little if any weight." *See Said v. Strong Mem Hosp*, 255 A.D.2d 953, 954 (4th Dept. 1998) ("It is well established that the *convenience of the parties, their agents and employees, or others under their control carries little if any weight*") (emphasis added); *Schapiro And Reich Esqs v. Fuchsberg*, 172 A.D.2d 1080, 1081 (4th Dept. 1991) ("There is no showing that venue in Suffolk County would cause inconvenience to nonparty material witnesses and *the convenience of the parties is not relevant* unless the inconvenience relates to a party's health, a situation not argued here") (emphasis added).[20]

With respect to the testimony of material nonparty *experts*, "*[c]ourts usually give no weight to the location of expert witnesses* unless such witnesses can also testify to personal fact-based observations." Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 510 at C510:3; *see State v. Floyd Y*, 43 Misc.3d 1202(A) at *6 (Sup. Ct. 2014) ("The *convenience of witnesses who are testifying only as experts is usually accorded no weight in venue change motions*.") (emphasis added).

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[20] *See also Pittman*, 202 A.D.2d at 176-177 ("Though the non-party witnesses reside outside Bronx County, *no statement was submitted specifying how they would be inconvenienced by testifying there*, and defendants therefore failed to satisfy their burden to establish that a change of venue is appropriate. *A presumption that a witness will be inconvenienced merely because the courthouse is located in a different county is unwarranted*.") (emphasis added); *Transportation Microwave Corp. v. Venrock Associates*, 91 A.D.2d 913 (1st Dept. 1983) ("The *convenience of the parties, their employees and members of their families are excluded from consideration* in determining a motion under CPLR 510 (subd. 3)") (emphasis added) (internal quotations and citations omitted); *Jacobs v. Banks Shapiro Gettinger Waldinger & Brennan*, LLP, 9 A.D.3d 299 (1st Dept. 2004) ("A change of venue based on the convenience of witnesses may only be granted after there has been a detailed evidentiary showing that the convenience of nonparty witnesses would in fact be served by the granting of such relief"); *Mroz v. Ace Auto Body And Towing Ltd*, 307 A.D.2d 403, 404 (3d Dept. 2003) ("In addition, eight of defendants' witnesses are their own employees or agents who worked on plaintiff's car at its behest, *whose convenience carries little if any weight* on a motion pursuant to CPLR 510(3)") (emphasis added); *Leake v. Constellation Brands Inc*, 112 A.D.3d 792, 793 (2d Dept. 2013) ("However, the *convenience of the parties, their employees, and their experts is not relevant to a determination of a change of venue* under CPLR 510(3)") (emphasis added); *Nova Cas Co v. RPE LLC*, 115 A.D.3d 717, 718 (2d Dept. 2014) ("*the convenience of the parties, their employees, and their experts is not relevant to a determination* of a motion for a change of venue under CPLR 510(3)") (emphasis added)

Yet, at the December 14, 2018 hearing, this Court made clear that its order to transfer venue to the Bronx was grounded on the following.

> The experts that were—or the learned opinions that I got on behalf of Happy to move or change his conditions indicated that there were certain facts that they relied upon, and the experts or learned information that I got with regards to the Bronx Zoo and the folks on the other side indicated that, in fact, Happy is happy where he is at, and that there, in fact, would be impacts on Happy if changes were to be made to his conditions that he is currently being held in.
>
> So I definitely believe that regardless of any of the big underlying issues, that it's going to come down at some point for a judge of the Supreme Court to decide whether or not Happy needs to be moved and where, and those decisions will require, in my opinion, adhering.
>
> It will require experts to testify on both sides…[].
>
> *Transcript*, at 29-30.

Accordingly, as the Bronx Zoo made no motion to change venue under CPLR 510(3) and made no effort to satisfy its detailed and rigorous requirements demonstrating that "the convenience of material witnesses and the ends of justice will be promoted by the change," this Court had no discretion to *sua sponte* change venue on the basis of some possible convenience of some unknown possible experts who might possibly testify upon some unknown subject.

VII. This Court's errors warrant review by the Fourth Department in the interest of justice, as transferring venue would only "cause delay and prolong the injustice" to Happy.

In the interest of justice, this Court should grant the NhRP's Motion to Appeal not only because the transfer of venue was legally incorrect, but because the denial of immediate review would likely "cause delay and prolong the injustice" to Happy, who presently faces the almost certain prospect of a lifetime of illegal imprisonment. *People ex rel. Robertson v New York State Div. of Parole*, 67 N.Y.2d 197, 201 (1986) (The writ of habeas corpus "*tolerates no delay except of necessity*, and is hindered by no obstacle except the limits set by the law of its creation. Hence the legislature commanded that no appeal should be taken from incidental orders made in the

course of the proceeding, as *that might cause delay and prolong the injustice*.") (quoting *People ex rel. Duryee v. Duryee*,188 NY 440, 445-446 (1907)) (emphasis added).

A. Transferring venue would delay resolution of this proceeding far beyond necessity and improperly frustrate the essential purpose of "the greatest of all writs."

"The right to invoke habeas corpus, 'the historic writ of liberty', 'the greatest of all writs', is *so primary and fundamental that it must take precedence over considerations of procedural orderliness and conformity*." *People v. Schildhaus*, 8 N.Y.2d 33, 36 (1960) (emphasis added); *People ex rel Sabatino v. Jennings*, 246 N.Y. 258, 269 (1927) ("The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty") (quoting SHAW, Ch. J., in *Wyeth v. Richardson*, 10 Gray, 240); *People ex rel. DeLia v. Munsey*, 26 N.Y.3d 124, 130 (2015); *Stanley*, 16 N.Y.S.3d at 908.

Transferring venue will delay a just resolution of this proceeding for even "considerations of procedural orderliness and conformity" weigh heavily in favor of keeping venue in Orleans County. "In the case at bar. . . there is no need for the production of the petitioner before this Court.[21] All pleadings have been fully submitted and no hearing is to be scheduled. All that remains is for the Court to issue its decision." *Chaney v. Evans*, 2013 WL 2147533 at *3 (Sup. Ct., Franklin County 2013) ("*form would be elevated over substance*, to the detriment of the petitioner, if the Court were to require the transfer of venue to Columbia County at this late juncture") (emphasis added).

[21] There is no possibility that Happy's physical presence will be required at any hearing, contrary to the Bronx Zoo's ludicrous suggestion that either "the Court or NRP" might make such a demand. *Zoo Memorandum 1*, at 10; Aff. of James J. Breheny, paras. 16 – 17. The Petition explicitly sought, and received, an order to show cause, thus making clear that "the NhRP does not demand that Respondents produce Happy. . ." Petition, para. 50. *See* CPLR 7003(a) ("where the petitioner does not demand production of the person detained. . .[the court shall] order the respondent to show cause why the person detained should not be released").

Moreover, the statement of this Court that the determination of the merits of the NhRP's habeas corpus claim "will require experts to testify on both sides," *Transcript*, at 30, was wrong in three critical respects.

First, *there are no experts* on both sides. In fact, there are only experts on the NhRP's side. In listing their qualifications, none of the Bronx Zoo's affiants all of whom are Wildlife Conservation Society employees, not James J. Breheny, not Patrick Thomas, and not Paul P. Calle, claimed to possess any specialized or professional knowledge, training, education, or experience concerning elephant cognition or behavior. Nor did any of them purport to have published any relevant peer-reviewed articles or have engaged in any relevant scientific scholarship or research.[22] In contrast, the NhRP's experts include some of the most experienced and qualified elephant cognition and behavior experts in the world.[23]

Second, this Court misapprehended which facts are relevant in this proceeding. The NhRP has repeatedly emphasized that it is only challenging Happy's unlawful imprisonment at the Bronx Zoo,[24] not the welfare conditions of her prison. As the NhRP explained at oral argument:

> [I]f this Court was kidnapped and brought to some place and sought a writ of habeas corpus, the subject of the writ of habeas corpus wouldn't be whether this Court was being fed properly or…getting medical care. That wouldn't be the issue. The question wouldn't be a matter of your welfare or your conditions of confinement.
>
> The question would be whether or not you have a right not to be there at all. It's the exact same thing with Happy, the elephant.

Transcript, at 8.

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[22] *See* Aff. of James J. Breheny, para. 1; Aff. of Paul P. Calle, paras. 1 – 3; Aff. of Patrick Thomas, paras. 1- 3.
[23] *See* Aff. Joyce Poole, Ph.D. paras. 1 – 20; Joint Aff. of Lucy Bates, Ph.D. and Richard M. Byrne, Ph.D., paras 1 – 29; Aff. of Karen McComb, Ph.D. paras. 1 – 22; Aff. of Cynthia Moss paras. 1 – 16.
[24] *See* Petition, at paras. 1, 2, 8, 13, 54, 56, 57, 58 n.16.; *Memorandum of Law*, at 3, Part V, Part VI; *Reply Memorandum of Law*, at 3 – 5, 19 – 20, Part IV.

Habeas corpus focuses on the *single question* of whether an imprisonment is illegal, *not* whether those depriving the prisoner of her freedom are adequately looking after her health. *See People ex. rel Sabatino v. Jennings*, 246 N.Y. 258, 260 (1927) ("The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty") (quoting Shaw, C. J., in *Wyeth v. Richardson*, 10 Gray (Mass.) 240).

Expert testimony in this case is required *solely* on the question of whether an autonomous being such as Happy should be recognized as a legal person for purposes of the common law writ of habeas corpus.[25] If she is a "person," her imprisonment is illegal. *But the facts relevant to that question are not in dispute.*[26] An elephant's autonomy is the subject of numerous *uncontroverted* NhRP affidavits; it is not contested in any the Bronx Zoo's affidavits.[27] Only the undisputed scientific facts establishing Happy's autonomy are relevant, as this proceeding is neither "an animal protection" nor "animal welfare case," just as a habeas corpus proceeding brought on behalf of a detained human would not be a "human protection" or "human welfare" case, for the sole question before this Court is whether Happy should be imprisoned *at all*. The conditions of Happy's confinement at the Bronx Zoo have no legal bearing whatsoever on whether she is being unlawfully imprisoned.[28]

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[25] *See* Petition, at para. 5, 18.

[26] *See* Petition, at paras. 69 – 117 (summarizing the uncontroverted evidence establishing that Happy's interest in exercising her autonomy is as vital to her as it is to humans); *Memorandum of Law*, at 2 n. 5, 3 n.6.

[27] *Compare*: Joint Aff. of Lucy Bates, Ph.D. and Richard M. Byrne, Ph.D., paras. 30 – 59; Aff. of Karen McComb, Ph.D. paras. 24 – 55; Aff. of Cynthia Moss, paras. 18 – 49; and Aff. of Joyce Poole, Ph.D. paras. 22 – 55; *with*: Aff. of James Breheny, paras. 11 – 19; Aff. of James J. Breheny, paras. 3 – 19; Aff. of Supplemental Aff. of James Breheny, paras. 5 – 30; Aff. of Paul P. Calle, paras. 7 – 16; and Aff. of Patrick Thomas, Ph.D. paras. 7 – 30.

[28] At the December 14, 2018 hearing, counsel for the Bronx Zoo noted that, among Respondents' requests for admissions, the NhRP was asked to admit: (a) it does not allege that Happy's living conditions are unsuitable, and (b) it does not seek improved welfare for Happy. The NhRP objected to those requests in a protective order on the ground that the admissions sought, as *conceded* by the Bronx Zoo, constitute the very dispute of this lawsuit. *Transcript*, at 16-17. By now, it should be clear why that is so: the relevance or irrelevance of Happy's welfare is a crucial dispute in this litigation, and the issue has unfortunately influenced this Court's decision to transfer venue. The dispute is *not* whether the Bronx Zoo is caring properly for Happy. The dispute is whether the manner in which the Bronx Zoo is caring for Happy has any relevance at all to this habeas corpus case. The NhRP, backed by numerous habeas corpus

Third, only after this Court rules in Happy's favor on the sole issue of her illegal imprisonment may it appropriately consider *where* she should be relocated. When a released prisoner is unable to properly look after her own welfare, as with a child of tender years, a nonhuman animal such as Happy, or a human adult with dementia, habeas corpus requires a second step: the court to decide where the liberty, autonomy, and welfare of the former prisoner will be most appropriately protected.

This was the procedure used by an Argentine court in a habeas corpus case involving a chimpanzee named Cecilia in 2016. First, the court recognized Cecilia as a "non-human person" and ordered her released from a Mendoza Zoo pursuant to habeas corpus. Then the court determined that Cecilia should be sent to a sanctuary in Brazil. *In re Cecilia*, Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-23 (November 3, 2016). The New York Courts, as well as the courts of other free states, routinely utilized this same procedure when confronted with the case of a child of tender years, sometimes a slave child or apprentice ordered freed from her illegal imprisonment. *E.g.*, *People ex rel. Pruyne v. Walts*, 77 Sickels 238 (2d Dept. 1890); *Lemmon v. People*, 20 N.Y. 562 (1860) (slaves); *People ex rel. Trainer v. Cooper*, 8 How. Pr. 288 (Supr. Ct. 1853); *People v. Hanna*, 3 How. Pr. 39 (Supr. Ct. 1847) (apprentice); *Commonwealth v. Taylor*, 44 Mass. 72 (1841) (slave); *Commonwealth v. Aves*, 18 Pick. 193 (Mass. 1836) (Shaw, CJ) (slave); *In re McDowle*, 8 Johns. 328 (Supr. Ct. 1811) (apprentice).

If, at the second step in the habeas corpus process, the Court believes it would benefit from hearing expert testimony to determine *where* Happy should best be placed, and this Court thinks it appropriate, the NhRP is willing to pay any extra reasonable travel costs of any witness required to travel to Orleans County to testify on that issue, instead of testifying in Bronx County. That is

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cases, insists that the manner in which the Bronx Zoo is caring for Happy is utterly irrelevant. The Bronx Zoo, without any legal support, merely claims that it is relevant and has made it an issue in this case.

unlikely though; the parties could agree, for example, to transfer Happy to The Elephant Sanctuary in Tennessee, which is an institution accredited by the Association of Zoos and Aquariums ("AZA"). *Transcript*, at 12.

Accordingly, since there is no need for expert witnesses to testify in this proceeding on the elements of the habeas corpus claim, there is no justification to transfer venue on the basis of convenience, especially when all the relevant, undisputed facts and submissions are already before this Court. *See* CPLR 409(b) ("The court shall make a summary determination upon the pleadings, papers and admissions *to the extent that no triable issues of fact are raised*.") (emphasis added); *Stanley*, 16 N.Y.S.3d at 908. An ordered change of venue only improperly frustrates the essential purpose of "the greatest of all writs," delaying it far beyond necessity.

B. Transferring venue would endanger the liberty of an imprisoned, autonomous being facing a lifetime of illegal imprisonment.

At stake in this proceeding is Happy's liberty. If this case is heard in Bronx County, the prospect of securing Happy's freedom will drastically diminish. Current precedent of the New York State Supreme Court Appellate Division, First Judicial Department ("First Department") is openly hostile to protecting the liberty interests of even the most autonomous and extraordinarily cognitively complex nonhuman petitioners, just because they are not human. *See Matter of Nonhuman Rights Project Inc v. Lavery*, 152 A.D.3d 73, 28 (1st Dept. 2017) (unlike chimpanzees, human beings unable to bear legal duties and responsibilities are entitled to habeas relief because "these are still human beings, members of the human community.").

This hostility is not only improper, as Judge Fahey explained in his concurrence in *Nonhuman Rights Project, Inc. on Behalf of Tommy v. Lavery*, 31 N.Y. 3d 1054, 1057 (Fahey, J., concurring), but is in deep and irreconcilable conflict with both (1) the controlling precedent of *Byrn v. New York City Health & Hosp. Corp.*, 31 N.Y.2d 194, 201 (1972), which held that

"personhood is 'not a question of biological or 'natural' correspondence,'" *People v Graves*, 163 A.D. 3d 16, 21 (4th Dept. 2018) (quoting *Bryn*), but "a policy determination," *Byrn*, 31 N.Y.2d at 201, and (2) with the public policy of New York, as set forth in the Pet Trust Statute,[29] which has long designated certain nonhuman animals as "persons" with the rights of a trust beneficiary. *See Stanley*, 16 N.Y.S.3d at 901.

In contrast to the First Department, and in harmony with *Byrn* and the public policy of New York as set forth in the Pet Trust Statute, the Fourth Department has recognized that "it is common knowledge that personhood can and sometimes does attach to . . . animals." *Id.* Retaining venue in this case merely provides the NhRP with the opportunity to place before this Court and, if necessary, the Fourth Department, the powerful public policy arguments that *Byrn* mandated establishing Happy's entitlement to habeas corpus. *See* NhRP's Reply Memorandum,[30] at 20-30.

VIII. Conclusion

For the foregoing reasons, the NhRP respectfully requests that the Court grant its Motion to Appeal for leave to appeal the Transfer Order to the Fourth Department, should the Court deny the Motion to Reargue or adhere to its prior decision.

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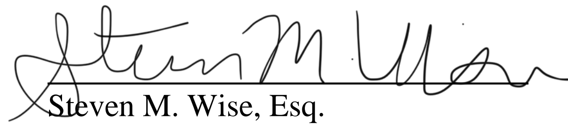
[29] The Sponsor's Memorandum of EPTL 7-6 (now EPTL 7-8) stated that its purpose was "to allow animals to be made the beneficiary of a trust." Sponsor's Mem. NY Bill Jacket, 1996 S.B. 5207, Ch. 159. *See also* Mem.of Senate, NY Bill Jacket, 1996 S.B. 5207, Ch. 159 (same).

[30] NhRP's Reply Memorandum of Law dated December 10, 2018.



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