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

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

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

Petitioner,

-against-

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

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR HABEAS CORPUS

Index No.

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January_____, 2016

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This is the second Verified Petition for a Writ of Habeas Corpus and Order to Show Cause filed by the Petitioner, the Nonhuman Rights Project, Inc. ("NhRP"), pursuant to New York Civil Practice Law and Rules ("CPLR") Article 70, on behalf of Kiko, a chimpanzee who has long been imprisoned in a cement storefront in Niagara Falls, New York ("Second Kiko Petition"). This Second Kiko Petition sets forth grounds distinct from the first petitions filed on behalf of Kiko, as well as a chimpanzee named Tommy, *infra*, none of which were determined by this Court or any other court. *See* CPLR 7003(b).

The first Verified Petition for a Writ of Habeas Corpus and Order to Show Cause was filed on behalf of Kiko ("First Kiko Petition") in the New York State Supreme Court, Niagara County, on December 3, 2013. That Supreme Court refused to issue the order to show cause and its refusal was affirmed by the New York State Supreme Court Appellate Division, Fourth Judicial Department ("Fourth Department") in *Nonhuman Rights Project, Inc.*, *ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den*., 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015).

On December 2, 2015, the NhRP filed a second Verified Petition for a Writ of Habeas Corpus and Order to Show Cause on behalf of Tommy in this Court. *See Nonhuman Rights Project, Inc. on behalf of Tommy v. Patrick C. Lavery et al*, Index #: 162358/2015 (Dec. 2, 2015) ("Second Tommy Petition"). On December 23, 2015, this Court declined to sign the order to show cause in the Second Tommy Petition, writing, "to the extent that the courts in the Third Dept. determined the legality of Tommy's detention, an issue best addressed there, & absent any allegation or ground that is sufficiently distinct from those set forth in the first petition (CPLR 7003(b)[])." (Index #: 162358/2015, Doc. No. 57).

The NhRP had filed the first Verified Petition for a Writ of Habeas Corpus and Order to Show Cause on behalf of Tommy in the New York State Supreme Court, Fulton County on

December 2, 2013 ("First Tommy Petition"). That Supreme Court's refusal to issue the order to show cause was affirmed by the New York State Supreme Court Appellate Division, Third Judicial Department ("Third Department") on the novel legal ground that only those entities able to shoulder duties and responsibilities can be "persons." In addition, the court made a factual finding that chimpanzees lack the capacity to shoulder duties and responsibilities that was not based upon any facts presented to either the Supreme Court or the Third Department, as no relevant facts were introduced by either party. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015)). *See infra* at 85-88.

In this second attempt to secure habeas corpus relief for Kiko, the NhRP has supplied this Court with approximately sixty pages of new affidavits from six of the world's leading primatologists, including Dr. Jane Goodall, that are distinct from those set forth in the First Kiko Petition. For the first time**,** they demonstrate that chimpanzees not only have the capacity to shoulder duties and responsibilities but, as a matter of fact, routinely shoulder duties and responsibilities both within chimpanzee societies and within mixed chimpanzee/human societies. These six new affidavits are as follows:

(a) Supplemental Affidavit of James R. Anderson

(b) Supplemental Affidavit of Christophe Boesch

(c) Affidavit of Jane Goodall

(d) Supplemental Affidavit of Mary Lee Jensvold

(e) Supplemental Affidavit of William C. McGrew

(f) Supplemental Affidavit of Emily Sue Savage-Rumbaugh

Section III-B of this Memorandum of Law sets forth the facts contained in these six new affidavits and specifically demonstrate that chimpanzees such as Kiko do, as a matter of scientific fact, possess the capacity to shoulder duties and responsibilities both within chimpanzee societies and mixed chimpanzee/human societies. This capacity includes, but is not limited to, the ability to understand and carry out duties and responsibilities while knowingly

assuming obligations and then honoring them, to behave in ways that seem both lawful and rule-governed, to have moral inclinations and a level of moral agency, to ostracize individuals who violate social norms, to respond negatively to inequitable situations, to have a social life that is cooperative and represents a purposeful and well-coordinated social system, to routinely enter into contractual agreements, keep promises and secrets, prefer fair exchanges, perform death-related duties and show concern for others' welfare.[1] These entirely new facts presented in the six new affidavits now comprise nearly sixty percent of the total facts presented in this Second Kiko Petition.

Pursuant to CPLR 7003(b), a court is not required to issue a writ from a successive petition for a writ of habeas corpus only if: (1) the legality of a detention has been previously determined by a court of the State in a prior proceeding for a writ of habeas corpus, (2) the petition presents no ground not theretofore presented and determined, and (3) the court is satisfied that the ends of justice will not be served by granting it.[2] The ground that chimpanzees routinely shoulder duties and responsibilities both within chimpanzee societies and within mixed chimpanzee/human societies and therefore can be "persons" for the purpose of demanding a common law writ of habeas corpus, and the facts that support it, have never been presented to this Court or any other court on behalf of Kiko. With the exception of the Second Tommy Petition, the facts supporting the ground that chimpanzees shoulder duties and responsibilities have never been presented to any court in the State of New York.

The NhRP, both in this Second Kiko Petition and in this supporting Memorandum of Law, demonstrates that the Third Department in *Lavery* improperly concluded as a matter of *fact* that chimpanzees are not "persons" as they are unable to shoulder duties and responsibilities and

[1] Chimpanzees exhibit capacities for charity, fairness, reciprocity, compassion, empathy, peace-making, and impartial leadership, all of which lead to their sense of justice. John Berkman, "Just Chimpanzees? – A Thomistic Perspective of Ethics in a Nonhuman Species," in *Beastly Morality – Animals as Ethical Agents* 195, 202-219 (Jonathan K. Crane, ed. Columbia University Press 2016).

[2] *See* Section IV-C of this Memorandum of Law, pages 65-68, *infra*, in which the NhRP demonstrates that this Court may issue this order to show cause as none of the elements of CPLR 7003(b) are satisfied in the case at bar.

that this Court is not bound by that specific factual finding. The NhRP also alleges and demonstrates that the grounds set forth in the Second Kiko Petition are sufficiently distinct both from the grounds it set forth in the First Kiko Petition and from the grounds it alleged in *Lavery*, that this Court should, as a matter of justice, issue the requested order to show cause.

Significantly, the Fourth Department in *Presti* never determined the legality of Kiko's detention, did not reach the issue of Kiko's legal personhood, and did not cite to *Lavery*. Instead, it affirmed the dismissal of the First Kiko Petition on the sole ground that the NhRP was not seeking Kiko's immediate and unconditional release, but was seeking instead to have Kiko placed in an appropriate primate sanctuary. *Presti*, 124 A.D.3d at 1335. The Fourth Department twice suggested, without deciding, that it might agree with the NhRP's claim that Kiko was a "person" for the purpose of Article 70, stating that "[r]egardless of whether we agree with petitioner's claim that Kiko is a person within the statutory and common law definition of the writ . . ." and "even assuming, *arguendo*, that we agreed with petitioner that Kiko should be deemed a person for the purpose of the application." *Id*. These statements were made with full knowledge of the fact that the month before, the Third Department in *Lavery* had affirmed the Fulton County Supreme Court's refusal to issue the order to show cause for Tommy by setting forth the unprecedented legal rule that only entities capable of shouldering duties and responsibilities could be "persons."

On March 19, 2015, the NhRP filed with this Court a second Verified Petition for a Writ of Habeas Corpus and Order to Show Cause on behalf of two chimpanzees named Hercules and Leo, who had been imprisoned for six years at the State University of New York at Stony Brook ("Second Hercules and Leo Petition"). On April 21, 2015, the Court issued an amended order to show cause requiring the respondents to appear before the Court to justify their imprisonment of Hercules and Leo. *See The Nonhuman Rights Project, Inc. v. Stanley Jr., M.D.*, 2015 WL 1804007 (Sup. 2015) *amended in part*, *The Nonhuman Rights Project, Inc. v. Stanley*, 2015 WL 1812988 (Sup. 2015). In its decision, this Court stated that it was not bound by the Fourth Department's decision in *Presti* and rejected respondents' argument that, because the NhRP

sought Hercules and Leo's "transfer to a chimpanzee sanctuary, it has no legal recourse to habeas corpus," as habeas corpus has been used to "secure [the] transfer of [a] mentally ill individual to another institution." *Stanley*, 16 N.Y.S.3d at 917 n.2. Instead, this Court recognized that the New York State Supreme Court Appellate Division, First Judicial Department ("First Department"), unlike the Fourth Department, has acknowledged that the Great Writ may be used to transfer an imprisoned person from an unlawful place of custody to another lawful form of confinement. *See id.* (citing *McGraw v. Wack*, 220 A.D.2d 291, 292 (1st Dept. 1995); *Matter of MHLS v. Wack*, 75 N.Y.2d 751 (1989)).

For the purpose of Kiko's Second Petition at bar, the NhRP understands, albeit respectfully disagrees, that this Court considers itself bound by the Third Department's novel legal rule in *Lavery*. However, the Third Department ventured far beyond merely promulgating a novel legal rule. It further stated that chimpanzees are incapable of shouldering duties and responsibilities, thereby effectively and erroneously taking judicial notice of the plainly erroneous scientific fact that chimpanzees lack the capacity to shoulder duties and responsibilities, *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015), as the NhRP never presented any facts relevant to the issue of duties and responsibilities to either the Fulton County Supreme Court or the Third Department, and neither did the Respondent, as the Supreme Court denied the requested order to show cause *ex parte*.[3]

The NhRP has failed to locate a single New York case in which *stare decisis* was applied to a finding of *fact*, much less a fact found by judicial notice by an appellate court, much less a fact found in an entirely different case in a different judicial department. This Court is therefore not bound by this entirely unsupported finding of *fact*, as opposed to a binding *ruling of law*, made by an appellate court in a different case, especially when no relevant facts were presented to that court and that court erroneously took judicial notice of a hotly disputed fact. "The doctrine of

[3] See the argument, *infra* at 85-88, as to why it was improper for the Third Department to take judicial

stare decisis 'recognizes that *legal questions*, once resolved, should not be reexamined every time they are presented." *Dufel v. Green*, 198 A.D.2d 640, 640 (3d Dept. 1993), *affd.* 84 N.Y.2d 795 (1995). "'The doctrine . . . rests upon the principle that a court is an institution, not merely a collection of individuals, and that governing *rules of law* do not change merely because the personnel of the court changes.'" *People v. Bing*, 76 N.Y.2d 331, 338 (1990) (emphasis added). *Accord People v. Taylor*, 9 N.Y.3d 129, 148 (2007) (same).

The Third Department's statement, not of law but of scientific fact, that chimpanzees lack the capacity to shoulder duties and responsibilities, was made without the benefit of any briefing, argument, or reference to scientific authority by either party or the court. Given that the NhRP now sets forth approximately sixty pages of expert affidavits regarding the capacity of chimpanzees to shoulder duties and responsibilities — allegations and grounds more than "sufficiently distinct" from the first petition – applying *stare decisis* to the Third Department's erroneous fact-finding in Tommy's case to Kiko's case would only serve to perpetuate that court's plain and unreasonable fact-finding error.

II. INTRODUCTION

Chimpanzees are autonomous and self-determining beings who are capable of shouldering duties and responsibilities. They recall their past and anticipate their future, and when their future is incarceration, they suffer the pain of being unable to fulfill their life's goals or move about as they wish, much in the same way as human beings.

This Second Kiko Petition and Memorandum of Law establish as a matter of law and fact that Kiko is a "person" for purposes of demanding a common law writ of habeas corpus both as a matter of common law equality and liberty. Justice demands that this Court exercise its discretion under the Great Writ and issue the requested Order to Show Cause pursuant to CPLR 7003(a), hold the required hearing in order to determine the legality of Kiko's detention, release Kiko from unlawful imprisonment, and then decide where best to place him. The NhRP strongly urges that Kiko be placed in the custody of Save the Chimps, a premier chimpanzee sanctuary located on 190 acres in Fort Pierce, Florida, where he will live out his life with numerous other

chimpanzees in an environment as close to Africa as may be found in North America that allows him to freely exercise his autonomy.

This Court need not make a determination at this time, however, that Kiko is a "person" in order to issue the Order to Show Cause. Rather it should follow the laudatory procedure used by this Court in *Stanley* in which it properly assumed, without deciding, that Hercules and Leo were "persons" and "signed petitioner's order to show cause." *Stanley*, 16 N.Y.S.3d at 900; *see also id.* at 904-05 ("Petitioner invokes CPLR 7003 (a). . . . That statute provides, . . . 'where the petitioner does not demand production of the person detained . . . order the respondent to show cause why the person detained should not be released.' This proceeding thus commenced with the signing of an order to show cause."). This was the procedure used by Lord Mansfield in the famous common law habeas corpus case of *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772), where the great Chief Justice assumed, without deciding, that the slave, James Somerset, could possibly possess the right to bodily liberty protected by the common law of habeas corpus, and issued the writ that required the respondent to provide a legally sufficient reason for Somerset's detention, and by the Court for the Correction of Errors in *In re Tom*, 5 Johns. 365 (N.Y. 1810) (*per curiam*), which issued a writ of habeas corpus upon the petition of a slave who claimed he had been manumitted and was being unlawfully detained as property.[4]

The New York "common-law writ of habeas corpus [is] a writ in behalf of liberty, and its purpose [is] to deliver a prisoner from unjust imprisonment and illegal and improper restraint." *People ex rel. Pruyne v. Walts*, 122 N.Y. 238, 241-42 (1890). It "is not the creature of any statute . . . and exists as a part of the common law of the State." *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875). *E.g.*, *People ex rel Lobenthal v. Koehler*, 129 A.D.2d 28, 30 (1st Dept. 1987) ("The 'great writ', although regulated procedurally by article 70 of the CPLR, is not a creature of statute, but a part of the common law of this State."); *People ex rel. Patrick v. Frost*,

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

133 A.D. 179, 187-88 (2d Dept. 1909); *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 40 (Sup. Ct. 1907) ("A writ of habeas corpus is a common law writ and not a statutory one. If every provision of statute respecting it were repealed, it would still exist and could be enforced."), *aff'd*, 195 N.Y. 610 (1909). *See* Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013). This Court agreed that the "writ 'is a part of the common law of this State.'" *Stanley*, 16 N.Y.S.3d at 904 (citations omitted).

In New York, the common law writ of habeas corpus "lies in all cases of imprisonment by commitment, detention, confinement or restraint, for whatever cause, or under whatever pretence." *People v. McLeod*, 3 Hill 635, 647 note j (N.Y. 1842). Its "scope and flexibility . . . its capacity to reach all manner of illegal detention - its ability to cut through barriers of form and procedural mazes-have always been emphasized and jealously guarded by courts and lawmakers." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). *See, e.g.*, *People ex rel. Keitt v. McCann*, 18 N.Y.2d 257, 263 (1966).

The procedure for using the common law writ of habeas corpus is set forth in Article 70, CPLR 7001-7012.[5] However, "[t]he drafters of the CPLR made no attempt to specify the circumstances in which habeas corpus is a proper remedy. This was viewed as a matter of substantive law." Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013). *E.g.*, *Koehler*, 129 A.D.2d at 30.

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

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

This Court noted that a chimpanzee's right to invoke the writ of habeas corpus is best decided either by the legislature or the Court of Appeals, which is "'the state's policy-making tribunal.'" *Stanley*, 16 N.Y.S.3d at 917 (citing *People v. Scott*, 79 N.Y.2d 474 (1992)).[6] The Court in *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972), noted that the issue of who is a person usually devolves on the legislature. But this is an observation about legal history, not jurisprudence. Nothing restricts the question of who is a person to the legislature, while the specific question of who is a common law person for the purpose of the common law writ of habeas corpus is *uniquely* a question for the courts of New York. In recognition thereof, this Court cited *Tweed*, 60 N.Y. at 566, for the notion that the writ of habeas corpus is "[s]afeguarded by the United States and New York Constitutions" and "'cannot be abrogated, or its efficiency curtailed, by legislative action." *Stanley*, 16 N.Y.S.3d at 904.

Nine prominent working primatologists from around the world have submitted Expert Affidavits demonstrating that chimpanzees such as Kiko possess the autonomy and self-determination that allows them to choose how they will live their emotionally, socially, and intellectually rich lives.[7] Five of these primatologists have also submitted Supplemental Affidavits demonstrating that chimpanzees such as Kiko possess the capacity to shoulder duties and responsibilities, as has Dr. Jane Goodall. Pursuant to a New York common law that keeps abreast of evolving standards of justice, morality, experience, and scientific discovery, New York common law liberty and equality mandate that such autonomous beings as chimpanzees be

[6] The NhRP, of course, must begin its journey to the Court of Appeals by filing suit in the Supreme Court.
[7] The original Expert Affidavits attached to this Second Kiko Petition are copies of the affidavits filed in the NhRP's prior habeas corpus proceedings in the Niagara County (First Kiko Petition) and New York County Supreme Courts (Second Hercules and Leo Petition and Second Tommy Petition) and are properly before the Court. CPLR 2101(e) ("copies, rather than originals, of all papers, including orders, affidavits and exhibits may be served or filed. Where it is required that the original be served or filed and the original is lost or withheld, the court may authorize a copy to be served or filed."). *See Rechler Eq. B-1, LLC v. AKR Corp*., 98 A.D.3d 496, 497 (2d Dept. 2012); *see also Brooke Bond India, Ltd. v. Gel Spice Co., Inc*., 192 A.D.2d 458, 459-60 (1st Dept. 1993); *Bd. of Educ. of City Sch. Dist. of City of New York v. Iannelli Const. Co., Inc*., 906 N.Y.S.2d 778 (Sup. Ct. 2009); *R.M. v. Dr. R*., 855 N.Y.S.2d 865, 866 (Sup. Ct. 2008); *Matthews v. Gilleran*, 12 N.Y.S. 74, 78 (Gen. Term. 1890); *Barnard v. Heydrick*, 1866 WL 5268 (N.Y. Sup. Ct. 1866).

recognized as common law "persons" entitled to the common law right to bodily liberty protected by the common law of habeas corpus.

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

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

The NhRP does not claim Respondents are violating any federal, state, or local animal welfare law in the manner in which they are detaining Kiko. The issue is not Kiko's welfare, any more than the issue is the welfare of a human detained against his will in a habeas corpus case. *See Stanley*, 16 N.Y.S.3d at 901 (recognizing that the Hercules and Leo habeas corpus case was not about "animal welfare"). The issue is whether Kiko, an autonomous and self-determining being, may be detained at all.[8]

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

In the following section, the NhRP sets out the facts that demonstrate chimpanzees such as Kiko possess the capacities for autonomy and self-determination sufficient for common law personhood and the possession of the common law right to bodily liberty protected by the common law of habeas corpus. These include possession of an autobiographical self, episodic memory, self-determination, self-consciousness, self-knowingness, self-agency, referential and intentional communication, empathy, a working memory, language, metacognition, numerosity, and material, social, and symbolic culture, their ability to plan, engage in mental time-travel, intentional action, sequential learning, mediational learning, mental state modeling, visual perspective-taking, cross-modal perception, the ability to understand cause-and-effect and the experiences of others, to imagine, imitate, engage in deferred imitation, emulate, to innovate and to use and make tools.

III. STATEMENT OF FACTS

A. CHIMPANZEE AUTONOMY

1. INTRODUCTION

Chimpanzees, like humans, are "autonomous" (Affidavit of James King ("King Aff.), at ¶11; Affidavit of Mathias Osvath ("Osvath Aff."), at ¶11), which Professor James King defines as freely choosing, not acting on reflex, innate behavior, or through any conventional category of learning such as conditioning, discrimination learning, or concept formation, directing behavior based on internal cognitive processes. (King Aff. at ¶11). The simplest explanation for chimpanzees' autonomous behavior is that it is based on similar human capacities. (*Id.* at ¶12). Chimpanzees possess the "self" that is integral to autonomy, being able to have goals and desires, intentionally act towards those goals, and understand whether they are satisfied. (Affidavit of Tetsuro Matsuzawa ("Matsuzawa Aff."), at ¶15; Affidavit of James Anderson ("Anderson Aff.") at ¶21).

2. SIMILARITIES BETWEEN CHIMPANZEES AND HUMANS: PHYSIOLOGY, DNA, AND COGNITION

Humans and chimpanzees share almost 99% of their DNA. (Matsuzawa Aff. at ¶10; Affidavit of Emily Sue Savage-Rumbaugh ("Savage-Rumbaugh Aff."), at ¶11). Chimpanzees are more closely related to human beings than to gorillas. (Affidavit of William McGrew ("McGrew Aff."), ¶11; King Aff. at ¶12; Osvath Aff. at ¶11). Both the brains and behavior of humans and chimpanzees are plastic, flexible, and heavily dependent upon learning. (Savage-Rumbaugh Aff. at ¶11a). Both possess the brain asymmetry associated with sophisticated communication and language-like capacities. (Matsuzawa Aff. at ¶12). Both share similar brain circuits involved in language and communication (Matsuzawa Aff. at ¶10), and have evolved the large frontal lobes involved in insight and foreplanning. (*Id.*). Broca's Area and Wernicke's Area, which enable human symbolic communication, have corresponding areas in chimpanzee brains. (Savage-Rumbaugh Aff. at ¶13).

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

That their brains develop and mature in similar ways indicates that humans and chimpanzees pass through similar cognitive developmental stages. (Matsuzawa Aff. at ¶10). Brain developmental delay, which plays a role in the emergence of complex cognitive abilities, such as self-awareness, creativity, foreplanning, working memory, decision-making and social interaction, is a key feature of both chimpanzee and human prefrontal cortex brain evolution.

(Matsuzawa Aff. at ¶11; Savage-Rumbaugh Aff. at ¶11a, ¶12). Chimpanzee development of the use and understanding of sign language, along with their natural communicative gestures and vocalizations, parallels the development of language in children; this points to deep similarities in the cognitive processes that underlie communication in both species. (Affidavit of Mary Lee Jensvold ("Jensvold Aff") Aff. at ¶9). Both develop increasing levels of consciousness, awareness, and self-understanding throughout adulthood, through culture and learning. (Savage-Rumbaugh Aff. at ¶11d).

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

3. SIMILARITIES BETWEEN CHIMPANZEES AND HUMANS: BEHAVIOR, MENTAL AND EMOTIONAL PROCESSES

The close evolutionary relationship between chimpanzees (and the closely related bonobos) and humans is evident not only in terms of physical structure but also in behaviour, emotional and mental processes. (Supplemental Affidavit of James Anderson ("Anderson Supp. Aff.") at ¶14). Chimpanzees were the first nonhuman species shown to be capable of mirror-mediated self-recognition. (Anderson Supp. Aff. at ¶14). The developmental emergence of self-recognition in chimpanzees is similar to that in humans. (*Id.*). Furthermore, as in humans, self-recognition in adult chimpanzees is highly stable across time, with some decline in old age. (*Id.*).

a. Self-recognition and self-awareness

Chimpanzees and bonobos demonstrate they can step outside of themselves and look upon themselves apart from the actions in which they are engaging. (Supplemental Affidavit of Emily Sue Savage-Rumbaugh ("Savage-Rumbaugh Supp. Aff."), at ¶16). They recognize their shadows; they recognize themselves in mirrors; they apply bodily decorations, they intend beyond the immediacy of the current social situations in which they are engaged; they signal intent by means other than through the use of incipient actions; and they prevent their offspring from engaging in behaviors that could be dangerous. (*Id.*).

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

b. Self-control and episodic memory

Similar brain structures of humans and chimpanzees support the behavioral and cognitive evidence for both human and chimpanzee autobiographical selves. (Osvath Aff. at ¶15). Both are aware of their past and envision their future. (*Id.* at ¶16). Both share the sophisticated cognitive capacity necessary for the "mental time travel" the episodic system enables. (Osvath Aff. at ¶10, ¶12, ¶15; Jensvold Aff. at ¶10). Without understanding one is an individual who exists through

time, one cannot recollect past events in one's life and plan future events. (Osvath Aff. at ¶12). Autonoetic, or self-knowing, consciousness allows an autobiographical sense of a self with a past and future. (*Id.*).

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

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

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

Chimpanzees re-experience and anticipate pains and pleasures. (*Id.* at ¶16). Like humans, they experience pain around an anticipated future event. (*Id.*). Confining someone in a prison or cage loses its power as punishment if the individual had no self-concept, as each moment will be

a new with no conscious relation to any other. (*Id.*). As chimpanzees conceive a personal past and future, and suffer the pain of being unable to fulfill their goals or move about as they wish, like humans they experience the pain of anticipating a never-ending situation. (*Id.*).

c. Language, communication, and intention

Language, a volitional process that involves creating intentional sounds for the purpose of communication, reflects autonomous thinking and behavior. (Matsuzawa Aff. at ¶13). Chimpanzees exhibit referential and intentional communication. (Anderson Aff. at ¶15). They produce sounds to capture the attention of an inattentive audience. (*Id.*). The development of their use and understanding of sign language, along with their natural communicative gestures and vocalizations, parallels the development of language in children, which points to deep similarities in the cognitive processes that underlie communication in both. (Jensvold Aff. at ¶9). They point and vocalize when they want another to notice something and adjust their gesturing to insure they are noticed. (*Id.*). They intentionally and purposefully inform naïve chimpanzees about something. (*Id.*).

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

There is no essential difference between what words chimpanzees learn mean to them, and what words humans learn mean to them. (Savage-Rumbaugh Aff. at ¶20). They understand there is no one-to-one relationship between utterances and events, that there are infinite linguistic

ways of communicating the same or similar things. (*Id.* at ¶22). They use symbols to comment about other individuals as well as about past and future events. (Jensvold Aff. at ¶10). They purposefully create declarative sentences and combine gestures with pointing to refer to objects. (*Id.*).

Language-trained chimpanzees spontaneously use language to communicate with each other. (Jensvold Aff. at ¶12; Savage-Rumbaugh Aff. at ¶15). Those who understand spoken English answer "yes/no" questions about their thoughts, plans, feelings, intentions, dislikes, and likes. (Savage-Rumbaugh Aff. at ¶15). They answer questions about their companions' likes and dislikes and tell researchers what other apes want. (*Id.*). They use symbols to express themselves and to state what they are going to do, in advance of acting, then carry out their action. (*Id.* at ¶17). An example is statements made by two language-trained chimpanzees trained with abstract computer symbols, Sherman and Austin, who told each other the foods they intended to share, and told experimenters which items they were going to give to them. (*Id.*). With the emergence of the ability to state their intentions, Sherman and Austin revealed that, not only did they recognize and understand differential knowledge states between themselves, but language allows beings to bring their different knowledge states into accord with their imminent intentions and to coordinate their actions. (*Id.* at ¶¶18-19).

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

The chimpanzee Loulis was not raised with humans and was not taught American Sign Language ("ASL") by humans. (Jensvold Aff. at ¶12). Nor did humans use ASL in his presence. (*Id.*). But he was the adopted son of Washoe, a signing chimpanzee. Loulis acquired signs from observing Washoe and other signing chimpanzees, as well as when Washoe molded his hands into the appropriate signs. (*Id.*). Not only did Washoe's behavior toward Loulis show she was

aware of his shortcomings in the use of signs as a communication skill, but she took steps to change that situation. (*Id.*).

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

When a human conversation has broken down, they repeat their utterance and add information. (*Id.*). Chimpanzees conversing in sign language with humans respond in the same way, reiterating, adjusting, and shifting their signs to create conversationally appropriate rejoinders; their reactions to and interactions with a conversational partner resemble patterns of conversation found in studies of human children. (*Id.*). When their request is satisfied, they cease signing it. (*Id.*). When their request is misunderstood, refused or not acknowledged, they repeat and revise their signing until they get a satisfactory response. (*Id.*). As in humans, this pattern of contingency in conversation demonstrates volitional and purposeful communication and thought. (*Id.*).

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

Both language-using and wild chimpanzees understand conversational give-and-take and adjust their communication to the attentional state of the other participant, using visual gestures towards an attentive partner and tactile and auditory gestures more often toward inattentive partners. If the partner does not respond, they repeat the gesture. (*Id.*). Even wild and captive chimpanzees untutored in ASL string together multiple gestures to create gesture sequences, and

combine gestures into long series, within which gestures may overlap, interspersed with bouts of response waiting or be exchanged back and forth between individuals. (*Id.*).

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

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

d. Imagination and humor

Imagination is a key component of mental representation, metacognition, and the ability to mentally create other realities. (*Id.* at ¶15). Both captive and wild chimpanzees engage in at least six forms of imaginary play that are similar to the imaginary play of children ages two through six. (*Id.*). These include Animation, Substitution, and imaginary private signing (*Id.*). Animation is pretending that an inanimate object is alive, such as talking to a teddy bear; substitution is pretending an object has a new identity, such as placing a block on the head as a

hat. (*Id.*). In imaginary private signing, chimpanzees transform a sign or its referent to a different meaning, whether it is present or not. (*Id.* at ¶14). An example is placing a wooden block on one's head and referring to it as a hat (*Id.*). Chimpanzees use imagination to engage in pretend-aggression. (Savage-Rumbaugh Aff. at ¶31). Sherman pretended that a King Kong doll was biting his fingers and toes and would pretend to be in pain, when he poked a needle in his skin and out the other side, being careful to just pierce the thick outer layer of skin. (*Id.*).

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

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

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

e. Theory of mind

Chimpanzees are attuned to the experiences, visual perspectives, knowledge states, emotional expressions and states of others. (Anderson Aff. at ¶15; Fugate Aff. at ¶16; Matsuzawa Aff. at ¶¶17-18). They possess mirror neurons, which allow them to share and relate to another's emotional state. (Fugate Aff. at ¶14). These specialized cells respond to actions performed by oneself, but also when one watches the same action performed by another, which forms the basis for empathy, the ability to put oneself in another's situation. (Fugate Aff. at ¶14; Matsuzawa Aff. at ¶17). They have some theory of mind; they know they have minds, they know humans have minds, thoughts, intentions, feelings, needs, desires, and intentions, and they know these other minds and state of knowledge differ from what their minds know. (Savage-

Rumbaugh Aff. at ¶32). They know when another chimpanzee does not know something and inform the other about facts he does not know. (*Id.*).

Chimpanzees observing another trying to complete a task anticipate their intentions. (Matsuzawa Aff. at ¶17). They know what others can and cannot see. (*Id.*). They know when another's behavior is accidental or intentional. (*Id.*). They use their knowledge of others' perceptions to deceive them. (*Id.*). In situations where two chimpanzees are competing for hidden food, they employ strategies and counter-strategies to throw each other off the trail and obtain the food for themselves. (*Id.*). When placed in a situation where they must compete for food placed at various locations around visual barriers, subordinate chimpanzees only approach food they infer dominant chimpanzees cannot see. (Anderson Aff. at ¶15). They can take the visual perspective of a chimpanzee competitor, and understand that what they see is not the same thing their competitor sees. (*Id.*). When ASL-trained and wild chimpanzees adjust their gestures and gestural sequences to the attention state of the individual they are trying to communicate with, using visual gestures towards an attentive partner and tactile and auditory gestures more often toward inattentive partners. If the partner does not respond, they repeat the gesture, demonstrating visual perspective-taking and mental state modeling. (Jensvold Aff. at ¶11).

f. Empathy

The capacity for self-recognition has been linked to empathy, which is the identifying with, and understanding of, another's situation, feelings and motives. Several lines of evidence indicate chimpanzees possess highly developed empathic abilities. (Anderson Aff. at ¶13; Anderson Supp. Aff. at ¶15).

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

yawn videos, but not to the open-mouth displays. (Matsuzawa Aff. at ¶18). These findings are similar to contagious yawning effects observed in humans, and are based on the capacity for empathy. (*Id*).

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

g. Awareness of death

One consequence of self-awareness may be awareness of death. Chimpanzees demonstrate compassion, bereavement-induced depression, and an understanding of the distinction between living and non-living, in a manner similar to humans when a close relative passes away, which strongly suggests that chimpanzees, like humans, feel grief and compassion when dealing with mortality. (Anderson Aff. at ¶19).

h. Tool-making and chimpanzee culture

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

Wild chimpanzees make and use tools of vegetation and stone for hunting, gathering, fighting, play, communication, courtship, hygiene, and socializing. (McGrew Aff. at ¶15). Chimpanzees make and use complex tools that require them to utilize two or more objects

towards a goal. (*Id.* at ¶16). They make compound tools by combining two or more components into a single unit (*Id.*). They make adjustments to attain their goal. (*Id.*).

Chimpanzees use "tool sets," two or more tools in an obligate sequence to achieve a goal, such as a set of five objects – pounder, perforator, enlarger, collector, and swab – to obtain honey. (*Id.* at ¶17). Such sophisticated tool-use involves choosing appropriate objects in a complex sequence to obtain a goal they keep in mind throughout the process. (*Id.*). This sequencing and mental representation is a hallmark of intentionality and self-regulation. (*Id.*).

Chimpanzees have taken tool-making and use into the cultural realm (*Id.*). Culture is normative (represents something most individuals do), collective (characteristic of a group or community), and socially-learned behavior (learned by watching others). (*Id.* at ¶18). It is transmitted by social and observational learning (learning by watching others), which characterizes a group or population. (*Id.*). Culture is based on several high-level cognitive capacities, including imitation (directly mimicking bodily actions), emulation (learning the results of another's actions, then achieving those results in another way), and innovation (producing novel ways to do things and combining known elements in new ways), all of which chimpanzees share. (*Id.*). Under natural conditions, different chimpanzee cultures construct different rule-based social structures which they pass from one generation to the next. (McGrew Aff. at ¶19; Savage-Rumbaugh Aff. at ¶11f).

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

Each wild chimpanzee cultural group makes and uses a unique "tool kit," which indicates that chimpanzees form mental representations of a sequence of acts aimed at achieving a goal. (McGrew Aff. at ¶20; Anderson Aff. at ¶16). A chimpanzee tool kit is a unique set of about twenty different tools, often used in a specific sequence for foraging and processing food,

making comfortable and secure sleeping nests in trees, and personal hygiene and comfort. (*Id.*). These "tool kits" vary across groups, are passed on by observing others using them, and found from savannah to rainforest. (McGrew Aff. at ¶20).

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

Organic chimpanzee tool kits are not preserved in the archaeological record. But chimpanzee, like human, stone tools are. (*Id.* at ¶21). The foraging tool kits of some chimpanzee populations are indistinguishable in complexity from the tools kits of some of the simplest human material cultures, such as Tasmanian aborigines, and the oldest known human artefacts, such as the East African Oldowan Industry. (*Id.*). Chimpanzee stone artefacts excavated in West Africa demonstrate there was once a chimpanzee "Stone Age," just as there was a human "Stone Age," that is at least 4,300 years old. This predates settled farming villages and Iron Age technology in West Africa. (*Id.*). In one chimpanzee population, chimpanzee tool-making culture has been passed down for 225 generations. (*Id.*). With respect to social culture, chimpanzees pass widely variable social displays and social customs from one generation to the next. (*Id.* at ¶22; for examples, see *id*.). Wild chimpanzees demonstrate symbolic element key to human. (*Id.* at ¶23). Thus, in one chimpanzee group, arbitrary symbolic gestures communicate desire to have sex, in another group an entirely different symbolic gesture expresses the same sentiment. (*Id.*).

i. Imitation and emulation

Human and chimpanzee cultures are underwritten by a common set of mental abilities. (*Id.* at ¶24). The most important are imitation and emulation. Learning by observation is key to both (*Id.*). Chimpanzees copy methods used by others to manipulate objects and use both direct imitation and emulation, depending on the circumstance. (*Id.*). Imitation, which involves copying bodily actions, is a hallmark of self-awareness, as it suggests the individual has a sense of his

own body and how it corresponds to another's body, and can manipulate his body in accordance with the other's actions. (*Id.*). Chimpanzees precisely mimic the actions of others, even the correct sequence of actions to achieve a goal. (McGrew Aff. at ¶24; Anderson Aff. ¶17).

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

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

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

4. SIMILARITIES BETWEEN HUMANS AND CHIMPANZEES: NUMEROSITY, SEQUENTIAL LEARNING AND MEMORY

Numerosity, the ability to understand numbers as a sequence of quantities, requires both sophisticated working memory (in order to keep numbers in mind), and conceptual understanding of a sequence. (Matsuzawa Aff. at ¶19). This is closely related to "mental time travel" and planning the right sequence of steps towards a goal, two critical components of autonomy. (*Id.*). Chimpanzees have a conscious awareness of numerosity, which gives them a grasp of numbers to twelve or more without actually counting. (Savage-Rumbaugh Supp. Aff. at ¶19n). Not only do chimpanzees excel at understanding sequences of numbers, they understand that Arabic symbols ("2", "5", etc.) represent discrete quantities. (Matsuzawa Aff. at ¶19).

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

Chimpanzees have excellent working, or short-term, memory. (*Id.*). Working memory is the ability to temporarily store, manipulate, and recall items (numbers, objects, names, etc.). (*Id.*). It deals with how good someone is at keeping several items in mind simultaneously. (*Id.*). Working memory tasks require monitoring (manipulation of information or behaviors) as part of

completing goal-directed actions in the setting of interfering processes and distractions. (*Id.*). The cognitive processes needed to achieve this include attention and executive control (reasoning, planning and execution). (*Id.*). When chimpanzees are shown the numerals 1-9 spread randomly across a computer screen (*id.*), the numbers appearing for just 210, 430, and 650 milliseconds, then replaced by white squares, they touch them in the correct order (1-9). (*Id.*). In another version of the task, as soon as chimpanzees touched the number 1, the remaining numbers were immediately masked by white squares. (*Id.*). They had to remember the location of each concealed number and touch them in the correct order. (*Id.*). The performance of a number of the chimpanzees on these seemingly impossible memory tasks was not only accurate, but better than human adults. (*Id.*). Chimpanzees have an extraordinary working memory capability for numerical recollection, better than adult humans, which underlies a number of mental skills related to mental representation, attention, and sequencing. (*Id.*).[9]

Chimpanzees are competent at "cross-modal perceptions." They obtain information in one modality such as vision or hearing, and internally translate it to information in another modality. (Savage-Rumbaugh Aff. at ¶26). They match an audio or video vocalization recording of a familiar chimpanzee or human to her photograph. (Fugate Aff. at ¶16). They translate symbolically encoded information and into any non-symbolic mode. (Savage-Rumbaugh Aff. at ¶26). When shown an object's picture, they retrieve it by touch, and retrieve a correct object by touch when shown its symbol. (*Id.*).

B. CHIMPANZEES SHOULDER DUTIES AND RESPONSIBILITIES BOTH WITHIN CHIMPANZEE SOCIETIES AND WITHIN CHIMPANZEE/ HUMAN SOCIETIES.

1. INTRODUCTION

Chimpanzees shoulder well-defined duties and responsibilities both within their own societies and within human/chimpanzee societies. (Goodall Aff. at ¶14-¶15; Supplemental Affidavit of William McGrew ("McGrew Supp. Aff."), at ¶13; Supplemental Affidavit of

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

Christophe Boesch ("Boesch Supp. Aff."), at ¶14; Supplemental Affidavit of Mary Lee Jensvold ("Jensvold Supp. Aff."), at ¶10; Savage-Rumbaugh Supp. Aff. at ¶¶13-14; Anderson Supp. Aff. at ¶16, ¶24).[10] Chimpanzees understand and carry out duties and responsibilities while knowingly assuming obligations then honouring them. (McGrew Supp. Aff. at ¶27; Savage-Rumbaugh Supp. Aff. at ¶¶13-14, ¶19d-e). Chimpanzees have duties to each other and behave in ways that seem both lawful and rule-governed. (McGrew Supp. Aff. at ¶23; Goodall Aff. at ¶23; Boesch Supp. Aff. at ¶20; Savage-Rumbaugh Supp. Aff. at ¶19, ¶¶22-23; Jensvold Supp. Aff. at ¶15; Anderson Supp. Aff. at ¶15). Both ape and human adult members of chimpanzee/human societies constantly behave in morally responsible ways as they understand them. (Savage-Rumbaugh Supp. Aff. at ¶14, ¶19r, ¶29; Anderson Supp. Aff. at ¶20). Chimpanzees have moral inclinations and a level of moral agency. (McGrew Aff. at ¶26). They ostracize individuals who violate social norms. (*Id.*). They respond negatively to inequitable situations, e.g. when offered lower rewards than companions receiving higher ones, for the same task. (*Id.*). When given a chance to play such economic games as the Ultimatum Game, they spontaneously make fair offers, even when not obliged to do so. (*Id.*).

Chimpanzee social life is cooperative and represents a purposeful and well-coordinated social system. (*Id.* at ¶27). They engage in collaborative hunting, in which hunters adopt different roles that increase the chances of success. (*Id.*). They share meat from prey. (*Id.*). Males cooperate in territorial defense, and engage in risky boundary patrolling. (*Id.*; Anderson Supp. Aff. at ¶16).

Chimpanzees and bonobos who acquire language are often asked to carry out duties and responsibilities, and succeed. (Savage-Rumbaugh Supp. Aff. at ¶13). They routinely enter into contractual agreements. (*Id.* at ¶13, ¶19, ¶25). They show concern for others' welfare, and they

[10] Among its various definitions for 'duty', the *Oxford English Dictionary* gives "behaviour due to a superior", "deference", "obligation", and "the binding force of what is morally right." Similarly, for 'responsibility', the *OED* gives "a charge, trust, or duty, for which one is responsible." (McGrew Supp. Aff. at ¶12). It defines "responsible" as "accountable for one's actions", "having authority or control", and "capable of rational conduct ... of fulfilling an obligation or trust." (*Id.*).

have expectations about appropriate behaviour in a range of situations, i.e. social norms. (Anderson Supp. Aff. at ¶24). Such behaviour is essential for the maintenance of chimpanzee society, and it can be extended to human beings when necessary. (McGrew Supp. Aff. at ¶27; Goodall Aff. at ¶24; Savage-Rumbaugh Supp. Aff. at ¶13, ¶19c, ¶20, ¶22; Anderson Supp. Aff. at ¶24). No bonobo or chimpanzee group could survive in the wild if its members failed to carry out their assigned duties and responsibilities to the group. (Savage-Rumbaugh Supp. Aff. at ¶37). They would cease to locate sufficient food, their youngsters would become easy prey, or they would have to try to make it on their own, which would be dangerous. (*Id.*).

2. CHIMPANZEES ROUTINELY SHOULDER DUTIES AND RESPONSIBILITIES WITHIN WILD CHIMPANZEE SOCIETIES.

a. Familial duties and responsibilities

1) Maternal duties

Chimpanzee mothers show a "duty of care" to their offspring that rivals that of humans. (McGrew Supp. Aff. at ¶14). Their maternal behavior is a clear indicator of responsibility. (Jensvold Supp. Aff. at ¶14; McGrew Supp. Aff. at ¶14; Goodall Aff. at ¶15; Boesch Supp. Aff. at ¶21).

The duties and responsibilities of a mother towards her offspring are many and often onerous. (Goodall Aff. at ¶15; McGrew Supp. Aff. at ¶14). As single mothers, they feed, protect, carry, shelter, and train their infants, for an average of five and a half years, from birth until weaning. (McGrew Supp. Aff. at ¶14). Without this succour, infant chimpanzees die (unless adopted). (*Id.*). For three years the infant is dependent on breast milk, and continues to suckle though less often for the next two years until the next baby is born. (Goodall Aff. at ¶15). Throughout this period the mother continues to carry the infant, at first clinging to her belly and then riding on her back. (*Id.*). During this time the mother waits for the child before moving off. (*Id.*). She constructs a nest large enough for herself and her child until the next baby is born. (*Id.*).

The mother's duties and responsibilities do not end when a new infant is born. (Goodall Aff. at ¶¶16-18; McGrew Supp. Aff. at ¶¶14-15). After weaning, chimpanzee mothers continue to groom, support and cooperate with their offspring for the rest of their lives, even into the adulthood of their offspring and the old age of the mothers. (McGrew Supp. Aff. at ¶14).

For the next couple years she waits for the older child before moving from one place to another. (Goodall Aff. at ¶16). When the older child is male, he is often anxious to join groups of adult males, particularly when there is a lot of excitement. (*Id.*). Mothers with small infants often prefer to avoid such groups. (*Id.*). Sometimes a mother, after setting off in her chosen direction, stops when her young son whimpers and refuses to follow, going some distance towards the males. (*Id.*). Each time she moves, he cries louder. (*Id.*). Some mothers then give in, and join the males in order to provide support for their sons. (*Id.*).

Chimpanzee mothers may continue this care, even after the death of an infant. (McGrew Supp. Aff. at ¶15). They may carry and safeguard the infant's corpse for days, or even weeks, until it has perished to the point of disintegration. (*Id.*). Moreover, young female chimpanzees practice their future maternal behaviour by using sticks as 'dolls', while young males do not, in a form of symbolic play. (*Id.*).

An important component of maternal responsibility is to provide support for her child. (Goodall Aff. at ¶17). During a play session her infant sometimes gets hurt and screams – the mother will hasten to support her child, reprimanding the rough playmate even though this may entail retaliation from a more dominant mother. (*Id.*). There have been many instances when mothers have gone to help their fully-grown offspring. (*Id.*).

2) Paternal duties

Chimpanzee paternity can be determined from DNA profiling of fecal samples but, as a female may be mated by most or all males during periods of receptivity, it seems unlikely that a male recognizes his own biological offspring. (Goodall Aff. at ¶19). Most adult males of a community act in a paternal way to all infants in their community, rushing to their aid when necessary. (*Id.*). On one occasion two hunters (human) shot a female chimpanzee, seized her

infant, and tried to push it into a sack. (*Id.*). As the infant screamed, a male chimpanzee rushed out of the forest, attacked the two men, grabbed the baby, and disappeared into the forest. Both hunters ended up in the hospital. (*Id.*). There are many other tales of adult males protecting – or trying to protect – infants from hunters across Africa. Tragically they often get killed themselves. (*Id.*).

3) Sibling duties

Such familial duties are not restricted just to mothers and fathers, however. (McGrew Supp. Aff. at ¶16; Goodall Aff. at ¶20). Juveniles and adolescents very frequently act responsibly towards their infant siblings. (Goodall Aff. at ¶20). One nine-year-old female, who had run in terror from a large poisonous snake, nevertheless climbed down from her tree to gather up and carry to safety her three-year-old brother, who seemed unaware of the danger. (*Id.*). A different adolescent female prevented her infant brother from following their mother when the trail passed through a clump of tall grasses. (*Id.*). He screamed loudly, but she persisted until the grasses were behind them – it was infested with tiny ticks. (Subsequently the mother sat picking ticks off herself for a long time.) (*Id.*).

An older sibling will almost always adopt an infant if that infant's mother dies. (*Id.* at ¶21). Under the age of three, an infant, dependent on breast milk, will die. (*Id.*). One five-year-old male carried his one and a half year old sister around until she died a few months later. (*Id.*). Older infants usually survive when they are adopted. (*Id.*). This responsibility is clearly not socially advantageous for the young caregiver, who spends a lot of time and energy carrying out his or her duties. (*Id.*).

Maternal siblings of both sexes also supplement the mother with similar care-giving behaviours (except for suckling). (McGrew Supp. Aff. at ¶16; Goodall Aff. at ¶20). This preferential treatment endures throughout their lives; for example, adult brothers may work together in alliance to strive to rise in the community's dominance hierarchy. (McGrew Supp. Aff. at ¶16). The two highest-ranking female kinship lineages (matrilines) at Gombe, the longest-studied population of wild chimpanzees, in western Tanzania, are the F and G families. (*Id.*). In

these families, patterns of familial duties have extended through three generations, that is, grandmothers also participate in the upbringing of their grandchildren. These families also show the highest reproductive success, in terms of offspring survival. (*Id.*).

b. Duties beyond kinship: adoption

Chimpanzee duties of care extend beyond shared genes (kinship). (McGrew Supp. Aff. at ¶17; Jensvold Supp. Aff. at ¶14; Boesch Supp. Aff. at ¶21; Goodall Aff. at ¶¶21-22; Anderson Supp. Aff. at ¶15). Evidence from both captive and wild chimpanzees indicates that they possess highly developed empathic abilities. (Boesch Supp. Aff. at ¶21; Savage-Rumbaugh Supp. Aff. at ¶19c, 19i; Anderson Supp. Aff. at ¶15).

A chimpanzee infant orphaned by the death of the mother may be adopted by others to whom that infant is not related. (McGrew Supp. Aff. at ¶17; Jensvold Supp. Aff. at ¶14; Anderson Supp. Aff. at ¶15). Young chimpanzees are breast-fed and cared for five years by their mothers, so that if the youngsters lose them they remain especially vulnerable. (Boesch Supp. Aff. at ¶21; Goodall Aff. at ¶21). Adopted orphans are more likely to survive, while unadopted orphans below the age of weaning almost always perish. (McGrew Supp. Aff. at ¶17; Goodall Aff. at ¶21). Adoption is a very costly behaviour as it may require carrying the infant over long distances for days and months, sharing the nest and food with them and protecting them in cases of social squabbles. (Boesch Supp. Aff. at ¶21).

Adoption of orphans is common in chimpanzees, and as seen in other primate species, females are often the main adopters of orphans. (*Id.*). These foster parents need not be female, nor even adult. (McGrew Supp. Aff. at ¶17; Goodall Aff. at ¶21). Such bonds may last a lifetime, even between unrelated males in adulthood, as expressed in the 'currency' of chimpanzee social life, grooming. (McGrew Supp. Aff. at ¶17).

Among the Ivory Coast's Taï forest chimpanzees, researchers observed that half of the adoptions were done by adult males; in a few cases researchers could show that the males were not genetically related to the adopted ones. (Boesch Supp. Aff. at ¶21). At Gombe a twelve-year-old adolescent male cared for a three and a half year old male orphan, and saved his life.

(Goodall Aff. at ¶22). His sense of responsibility was most impressive when he ran to seize the orphan when he got too close to socially roused males – despite the fact that adolescent males normally keep well away from the adult males at such times. (*Id.*). He often got beaten up for his altruistic behavior, but this did not prevent him from acting in the same way the next time his help was needed. (*Id.*).

The signing chimpanzee Washoe adopted a ten-month-old chimpanzee named Loulis. (Jensvold Supp. Aff. at ¶14). While they bore no genetic relationship, Washoe was a very protective adopted mother. (*Id.*). Even at Loulis' late childhood age, Washoe was still very protective of him. (*Id.*). Graduate assistants lived in fear of Loulis' screams, whether warranted or not, as they would bring Washoe down upon them in an instant. (*Id.*). Washoe would then immediately display aggressive behaviors to the caregiver in defense of her son. (*Id.*).

c. Cooperation and group belonging: solidarity in between-group contexts

Chimpanzee duties and responsibilities beyond the family (or lineage) cross over into the realm of the community (or unit-group), which is the basic social unit of chimpanzees. (McGrew Supp. Aff. at ¶18; Boesch Supp. Aff. at ¶15; Jensvold Supp. Aff. at ¶15; Anderson Supp. Aff. at ¶15). In tasks requiring cooperation, chimpanzees recruit the most skilled partners and take turns requesting, and helping a partner. (Jensvold Aff. at ¶9). Chimpanzees show "community concern" and concern for individuals. (Anderson Supp. Aff. at ¶15). As noted above, chimpanzees are capable of highly developed empathic abilities. (*Id.*). They surpass other species in terms of concern for others' welfare, as shown when individuals console an unrelated victim of aggression by a third-party. (*Id.*).

One simple example is territorial defense. (McGrew Supp. Aff. at ¶18; Boesch Supp. Aff. at ¶15; Anderson Supp. Aff. at ¶15). Territories are aggressively defended in all chimpanzee populations that have been studied and the participants in patrols controlling the borders are mainly the adult males. (Boesch Supp. Aff. at ¶15; Anderson Supp. Aff. at ¶16). Chimpanzee territories are defended collectively, unlike the individual territories of most animals; they must

work together to defend themselves and their resources against their neighbours. (McGrew Supp. Aff. at ¶18; Anderson Supp. Aff. at ¶16).

Whenever intruders are spotted, males converge to defend their territory as a team. (Boesch Supp. Aff. at ¶15). If not enough males are present, the first to arrive silently sit and wait for other group members to join. (*Id.*). Only once a large enough group assembles will they confront the others. (*Id.*). This reveals expectations about the social participations of group members. (*Id.*).

Relations with neighbouring communities are hostile, so that stronger communities may displace weaker ones, resulting in loss of resources or reproductive partners. (McGrew Supp. Aff. at ¶18). Such extreme competition can enact a fatal toll: A single male caught in the border zone by the neighbours may be killed; a single female with infant similarly caught may have her baby killed and eaten by them. (*Id.*). Xenophobia exacts a cost on outsiders. (*Id.*).

To maintain territorial integrity, males cooperate regularly to patrol the boundaries of the community's territory. (McGrew Supp. Aff. at ¶19; Anderson Supp. Aff. at ¶16). If their territory is invaded, they display together against the intruders, or if necessary, attack them. This is a necessary chore. Numbers count, so any individual shirking responsibility lets down the group. (McGrew Supp. Aff. at ¶19). In a border skirmish, a male deserted by comrades may perish. (*Id.*). On the other hand, a united group may prevail and win rewards. (*Id*.). Such patrols are conducted cautiously and silently; a male who makes noise may give away his colleagues. (*Id.*). Even a snapped twig leads to disapproving glances from the others. (*Id.*). What makes this shared responsibility so impressive is that the same males whose lives depend on one another in the patrol will later compete robustly with one another over access to a receptive female. (*Id.*). Somehow, they can resolve the contradictions involved in having conflicting interests in different contexts. (*Id.*). This implies their mutual recognition of shared responsibilities. (*Id.*).

In many localities in Africa, adult male chimpanzees regularly patrol the boundaries of their community's territory; encounters with members of a neighbouring community may result in violent, even lethal aggression. (Anderson Supp. Aff. at ¶16). Males engage in patrols with

partners who are especially likely to be other males with whom individuals groom and form intra-community coalitions, in other words, individuals that can be trusted for support in the event of aggression breaking out. (*Id.*). Wild chimpanzees will call to warn approaching friends about the presence of a potentially dangerous object that the latter is unaware of. (*Id.*). These examples indicate the existence of well-defined roles within the community and mutual expectations about how individuals should behave in a range of situations. (*Id.*).

Impressive supports by male group members are provided to rescue isolated individuals that have been taken prisoner by intruders. (Boesch Supp. Aff. at ¶16). Outnumbered individuals during intergroup encounter were observed to sustain severe injuries in forty percent of the cases, leading to death in fifteen percent of the severe attacks. (*Id.*). In one example in the Taï forest, a single adult male with an adopted infant on his back rushed for 600 meters to rescue an adult female from his group that was trapped and beaten up by five male intruders. (*Id.*). His appearance created enough of a havoc to allow the female to escape. In Taï chimpanzees, such risky supports are provided in twenty-eight percent of the intergroup encounters. (*Id.*). This spontaneous high level of altruism toward group members in this chimpanzee population reveals the sense of obligation felt by them to help and protect one another. (*Id.*).

Chimpanzees' relationships to each other are even more supportive of each other than to a caregiver, no matter their level of fondness for the human. (Jensvold Supp. Aff. at ¶15). If a chimpanzee gives an aggressive display of behavior or indicator of being hurt or offended, the other chimpanzees always come to that chimpanzee's support by making aggressive barks at the human. (*Id.*). Again this is regardless of the individual relationship with the human. (*Id.*).

d. Social dynamics: male hierarchy

Another chimpanzee universal that necessarily entails duties and responsibilities is participation in a hierarchy of social dominance. (McGrew Supp. Aff. at ¶20; Jensvold Supp. Aff. at ¶10). Male chimpanzees rank-order themselves from alpha (top) to omega (bottom) in linear fashion. (McGrew Supp. Aff. at ¶20). Usually there is a single dominant male; but often he only holds that position by the support of other males. (Jensvold Supp. Aff. at ¶10). In these

cases these dominant males demonstrate a sense of duty to their supporters. (*Id.*). For example, the dominant male will provide grooming, access to females, and perhaps access to meat to his primary supporter. (*Id.*). Chimpanzees are also highly protective of their communities, and will go to great lengths to defend them. (*Id.*). This involves their shouldering responsibility. (*Id.*).

The advantages of high rank and the disadvantages of low rank are obvious: More dominant individuals win more resources and mates. (McGrew Supp. Aff. at ¶20). Two reasons stand out for why low-rankers take part in the system. It is better to be low-ranking in a group than to be unranked in solitude. (*Id.*). And, there are costs as well as benefits to being high-ranking, which low-rankers avoid. (*Id.*).

e. Lawful and rule-governed/policing within chimpanzee societies

High-ranking individuals in chimpanzee groups may take on the role of policing—defined as impartial interventions in conflicts by bystanders—to ensure group stability. (Anderson Supp. Aff. at ¶15). The adult males of a community are responsible for patrolling their territory, chasing away or attacking individuals from neighboring communities—this serves to protect and sometimes increase resources for their own females and young. (Goodall Aff. at ¶23; McGrew Supp. Aff. at ¶21, ¶23). Sometimes this takes the form of specific, targeted ostracism of individuals who violate norms, such as a young adult male who disrespected higher-ranking males, who was fatally punished. (McGrew Supp. Aff. at ¶23). This requires close cooperation and gang attacks. Even two males who may be engaged in challenging each other for social dominance within the community will join in an attack on a stranger. (Goodall Aff. at ¶23).

One of the costs of alpha status is the duty to exercise 'policing' powers in the community. (McGrew Supp. Aff. at ¶21, ¶23). The alpha male's role includes a variety of time- and energy-sapping activities, such as intervening in quarrels or fights between other community members, thus maintaining community integrity and preventing injury. (*Id.* at ¶21). He oversees the distribution of valuable resources, such as meat, after a successful hunt. (This is not to say that such activities are altruistic, and some males may be less responsible than others, or more

self-serving, but these activities do help to maintain the common good.) (*Id.*). Finally, there are other, less obvious 'chores' associated with high rank: When crossing roads, high-ranking males lead the way, being vigilant for traffic, and bring up the rear, making sure that others are not left behind. (*Id.*).

f. Cooperation and group belonging: within-group solidarity

Another indicator of rule-governed social interaction within a group is systematic, long-term reciprocity of favours or benefits among its members. (McGrew Supp. Aff. at ¶24; Boesch Supp. Aff. at ¶17; Savage-Rumbaugh Supp. Aff. at ¶16, ¶18). Chimpanzees cooperate, and understand each other's roles. (Anderson Supp. Aff. at ¶17, ¶21). Chimpanzees reward others, and keep track of others' acts and outcomes. (*Id.* at ¶18). That is, "you scratch my back, I scratch yours." (McGrew Supp. Aff. at ¶24). A simple form is literally this, that is, like-for-like social grooming, but a more complex form is the exchange of differing goods or services, for example, if I provision you with prized food, such as meat, then at a later point, you will favour me as a mate. (*Id.*). Or, if you support me in my aggressive attempts to rise in dominance, then I will allow you access to females for mating. (*Id.*). Such arrangements only work in the long term (i.e. over years) if participants assume and carry out obligations offered and accepted. (*Id.*).

1) Help and tending of injured or vulnerable group members

Chimpanzees may make numerous behavioural adjustments—sometimes markedly so—in order to ensure the welfare of injured or disabled members of the group. (Anderson Supp. Aff. at ¶15). When crossing a potentially dangerous road, stronger and more capable adult males investigate the situation before more vulnerable group-members, waiting by the roadside, venture onto the road. (*Id.* at ¶16). The males remain vigilant while taking up positions at the front and rear of the procession. (*Id.*).

Taï forest chimpanzee group members have been seen to help and tend the injuries of wounded individuals for extended periods of time. (Boesch Supp. Aff. at ¶17). What is striking in this helping of others is that upon hearing the alarm calls of an attacked individual (through a leopard or another chimpanzee), the males hearing the calls within seconds would make loud

supporting whaa-barks, reassure one another and rush towards the caller to help. (*Id.*). The rapidity of the help is decisive in the case of a leopard attack. (*Id.*). All males visibly present will rush in to support, so as if this within-group solidarity was obvious to them. (*Id.*). If callers had sustained injuries, the rescuers and other group members would converge towards the injured and clean and lick the wounds for many hours, and in some cases such help would be extended for many days as long as the wounds were not healed and presented a risk of infection. (*Id.*).

2) Food sharing and hunting duties

Chimpanzees and bonobos in the wild have duties to see that all members of the group have access to food, that all group members arrive at a feeding source together, and that all group members have access to that source in a manner as to benefit the entire group. (Savage-Rumbaugh Supp. Aff. at ¶13; Anderson Supp. Aff. at ¶16). This requires cognitive concentration, social rules, and a greater sense of social responsibility for the 'good' of the group rather than fulfilling the desires of the individual. (Savage-Rumbaugh Supp. Aff. at ¶13). Chimpanzees inhabit sparser environments than bonobos and therefore must travel in smaller parties, and generally feed at separate locations. (*Id.*). However the larger "unit group" does travel together, though out of sight of one another. (*Id.*). Individuals sleep separately, but in vocal contact with each other. The distances between a travelling group of chimpanzees make it mandatory for them to share similar information with one another. (*Id.*). It appears that long distance vocalizations are employed to announce arrival at large food patches, and other information regarding food and planned travel patterns are shared among group members. (*Id.*).

At Bossou, Guinea, adult male chimpanzees are significantly more likely than other age-sex classes to raid human-cultivated crops near villages; these foods are then taken back into the forest and shared with more timid capable members of the community, who hang back and allow the males to raid. (Anderson Supp. Aff. at ¶16).

Wild bonobos and chimpanzees demonstrate the ability to harvest a constantly changing forest. (Savage-Rumbaugh Supp. Aff. at ¶36). Their mental mapping is extremely fluid, rapid and highly accurate. (*Id.*). Chimpanzees and bonobos obtain food without weapons and hunting

is more of luxury than common event. (*Id.*) Meat is the only food reportedly shared by chimpanzees, who inhabit sparser environments and who are thus moving farther toward the lifestyles of human beings. Bonobos share all foods in their diet. (*Id.*). For bonobos to harvest their territories without the swidden agricultural practices[11] (employed by human beings living in the same areas) requires considerable planning, group communication, group coordination and cooperation. Everyone must fulfill his or her responsibilities for it to succeed. (*Id.*). The group must agree to travel together long distances each day—without food—in order to arrive at a particular food resource together. (*Id.*). The resource the group agrees to harvest one day will determine the options for travel that it will encounter the following day. Incorrect choices will lead to hunger for the entire group as the forest is a plentiful larder, but only if it is well known, well predicted and the entire group, infants, juveniles, pregnant females and the elderly are able to travel, as a group, the long distances required for harvesting. The planning required to make those critical decisions must be agreed to by the entire group and communicated, for the groups split up during travel, but arrive together at a common feeding resource. The mapping problem for traveling through a forest that is ripening in a very complex and somewhat variable manner is similar to the traveling salesman problem. (*Id.*). This not only requires advance planning but constantly updated information as well in order to maximize options for scheduling, sequencing, resource allocation and time investment planning. (*Id.*).

Advance planning and sharing of information is a duty and responsibility that lies at the heart of bonobo and chimpanzee survival in the wild. (Savage-Rumbaugh Supp. Aff. at ¶37). Chimpanzees and bonobos place great emphasis on activities that are devoted to monitoring one another and to the deep insults, threats, fears and angers that are generated when the actions of any group member threaten the unity and cohesion of the group. (*Id.*). Chimpanzees and bonobos take immediate insult and vociferous exception to all such actions. They are monitoring themselves and their rivals and react to any disturbances in what they perceive as a balance of

[11] An area cleared for cultivation through slash and burn.

power directed toward them. Chimpanzees and bonobos react to what they perceive as any change in the group balance of power, distribution of resources, or inappropriate behaviors and/or alliances, even friendly alliances. (*Id.*).

Important social contributions are rewarded in the hunting context. (Boesch Supp. Aff. at ¶18; Anderson Supp. Aff. at ¶18). Wild chimpanzees cooperate when hunting. (Anderson Supp. Aff. at ¶18). The striking fact in the hunting context is the very high level of cooperation between the males that act as a team to capture small monkeys up in the trees. (Boesch Supp. Aff. at ¶18; Anderson Supp. Aff. at ¶18). When a subgroup of chimpanzees moves into hunting mode in the presence of monkeys, individuals take up positions in trees or on the ground corresponding to different roles such as chaser and blocker. (Anderson Supp. Aff. at ¶18). If the hunt is successful, a monkey will eventually be caught and killed by one of the group of hunters. (*Id.*). In Taï, once a capture has been made, the meat-sharing rules favor the hunters; males receive more meat if they participated in the hunt and even more so if they made an important contribution to the hunt. (Boesch Supp. Aff. at ¶18; Anderson Supp. Aff. at ¶18).

Hunting roles requiring anticipation of the prey movements are as equally well rewarded as capturing the prey, even if the individuals doing such movements were not making a capture. (Boesch Supp. Aff. at ¶18). Somehow, the group members realize that anticipating a prey is an essential part of a successful hunting team and they value this equally high as the one doing the capture itself (capturing the prey and performing complex anticipation ensures the same amount of meat). (*Id.*). Less important hunting movements, such as chasing or driving the prey, are not valued so highly by other group members, as they rarely make a decisive contribution to the capture. (*Id.*). This higher social valuing of hunting contribution by other group members allows for this cooperative system to be stable. (*Id.*).

Punishment is part of the meat sharing rules. (Boesch Supp. Aff. at ¶19; Anderson Supp. Aff. at ¶18). The rewarding of certain action leads to the passive punishment of individuals that are looking to access meat, but because they did not contribute to the hunt are only meagerly receiving some: Individuals that were present during the hunt but did not participate in it,

received 2.6 times less meat than hunters. (Boesch Supp. Aff. at ¶19). This rewarding of one's hunting contribution is often in conflict with dominance hierarchy (as dominant males are not always present during a hunt or simply not hunting), and despite the impressive and sometimes violent attempts by the dominant males to access the meat, hunters will be reliably allowed access to more meat by the sharing group (this observation applies only to the Taï chimpanzees and not to other chimpanzee populations where the meat sharing patterns follow different rules). (*Id.*). Regularly, dominant males, which want to access meat, display violently towards meat eaters, but access to meat is denied by the group of chimpanzees present. (*Id.*). In other feeding contexts, like in fruiting trees or when large amounts of fruit are clustered on the ground, alpha males can ascertain their priority of access; only in meat eating is his access denied or limited, when he did not participate in the hunt. (*Id.*).

A study of more than 4,600 interactions over food in a captive chimpanzee group recorded remarkably balanced exchanges of food between individuals: not only did food exchanges occur in both directions, individuals were more likely to share with another chimpanzee who had groomed them earlier that day. (Anderson Supp. Aff. at ¶18). The observed pattern of grooming and food transfers suggests the presence of reciprocal obligations. (*Id.*). In captivity, when presented with an "ultimatum game" in which both partners need to cooperate in order to split available rewards equally, chimpanzees and three-year-old human children behave similarly: both perform in a way that ensures a fair distribution of rewards. (Anderson Supp. Aff. at ¶19). Other studies show that human adults behave fairly in similar situations. In a "trust game" in which two chimpanzees can take a small reward for themselves or send a larger reward to a partner and trust that the partner will return some of it, chimpanzees spontaneously trust each other. Furthermore, they flexibly adjust their actions in the game depending on the degree of trustworthiness of the partner. (*Id.*).

3) Informing group members about danger

Chimpanzees have demonstrated a high sense of solidarity towards ignorant group members, which they would inform about the presence of a danger, like a snake for example.

(Boesch Supp. Aff. at ¶20; Jensvold Aff. at ¶9; Savage-Rumbaugh Supp. Aff. at ¶16). In a series of experiments, it was possible to show that if a chimpanzee discovers a snake near a path and he is followed at some distance by another chimpanzee that is ignorant about the danger, the first individual will make alarm calls until the follower sees the danger. (Boesch Supp. Aff. at ¶20; Jensvold Aff. at ¶9). In addition, he will position himself such that his body is pointing towards the snake. (*Id.*). If, however, he is followed by a chimpanzee that is aware of the presence of the snake, he will remain silent. (*Id.*). This was observed with chimpanzees living in the Budongo forest in Uganda. (*Id.*). This reveals that such a high sense of within-group solidarity is not restricted to one population or a response to one specific environmental condition, but is more a general property of social life in chimpanzees. (*Id.*).

Bonobos and chimpanzees who have acquired language also recognize the need to inform others of information of import, and they understand the circumstances that lead to others lacking information they themselves have. (Savage-Rumbaugh Supp. Aff. at ¶21). For example, they inform others of things that have led to danger, such as potential fires, wild dog packs nearby, branches on trees that are unstable, foods that are poisonous, location of hidden objects, causes of death of other group members, mistreatment of group members, deceit on the part of others, etc. (*Id.*).

4) Death-related duties

An impressive example of collective community action is what sometimes occurs after the death of a community member. (McGrew Supp. Aff. at ¶22). Others may perform what amounts to a funeral ceremony, or at least a wake. (*Id.*). They congregate around the corpse, groom and test it for viability, seeming to seek to arouse it. (*Id.*). Then, as if accepting that death has occurred, they maintain a silent vigil that may last for hours. (*Id.*). This collective action occurs both in nature and in captivity. (*Id.*). This appears to involve the exercise of duty or responsibility as there is no obvious material pay-off to the individuals who join in. (*Id.*).

3. CHIMPANZEES SHOULDER DUTIES AND RESPONSIBILITIES WITHIN CAPTIVE CHIMPANZEE SOCIETIES.

Research in captivity has established that chimpanzees can be trained or can learn spontaneously to work collaboratively with at least one other individual to solve a common problem that cannot be solved by a single individual. (Anderson Supp. Aff. at ¶17). After experiencing working alongside two different collaborators, chimpanzees prefer to work with a collaborator who has proved more effective in the past; thus they attribute different degrees of competence to other individuals. (*Id.*). In many cooperation tasks the outcome is that each partner receives a reward such as food. (*Id.*). However, immediate reward is not a prerequisite for cooperation: if one chimpanzee sees another trying to solve a problem and can also see the problem, the former may provide the precise tool that the latter requires, especially—but not only—if the latter requests the tool. (*Id.*). Notably, such helping persists even in the absence of reciprocation by the tool-user: chimpanzees continue to help partners in need of help despite receiving no obvious reward. (*Id.*). Similarly, when young chimpanzees observe a human trying to retrieve an out-of-reach object, they sometimes spontaneously retrieve the object and give it to the human although they receive no reward for doing so. (*Id.*). Chimpanzees will also perform a newly acquired skill (pulling a chain to open a door) so that another chimpanzee can gain access to food; again, the helper obtains no obvious payoff in this situation. (*Id.*).

Chimpanzees readily understand social roles and intentions. (Anderson Supp. Aff. at ¶21). In Premack and Woodruff's (1978) pioneering study, a chimpanzee was presented with videotaped scenes of a human actor faced with different problems, for example trying to reach inaccessible food, or trying to listen to a gramophone record. (*Id.*). When given a choice between a photograph of the solution to a problem (e.g., a stick with which to reach the food, or record player plugged in) alongside decoy photographs (e.g., irrelevant objects, or a gramophone cable plugged in but cut), the chimpanzee consistently chose the correct solution, i.e., that which the actor in the videos required to solve his problem. (*Id.*).

Chimpanzees distinguish between individuals who have harmful versus prosocial intentions. (Anderson Supp. Aff. at ¶22). They will point toward the one of two locations that is baited with hidden food if this results in a naïve, cooperative human finding the food and sharing it with the chimpanzee. (Chimpanzees in the wild have a communicative repertoire of more than 60 distinct nonverbal gestures). (*Id.*). But they also learn to point deceptively in the presence of a non-cooperative, selfish human – deliberately directing him toward the wrong location. (*Id.*). Chimpanzees discriminate between prosocial and antisocial individuals based not only on how those individuals behave toward the chimpanzees themselves, but also based on their treatment toward third parties: generous individuals are preferred to selfish individuals. (*Id.*).

Chimpanzees can adapt quickly to role-reversal in cooperative tasks. (Anderson Supp. Aff. at ¶23). In one study, chimpanzees were either trained to follow a human's pointing gesture in order to find food, or trained to gesture to direct a naïve human toward hidden food. (*Id.*). Once this relationship was established, the roles were reversed: indicator chimpanzees now became the recipients of the communicative gesture, while previous recipients were now required to actively point for the human. (*Id.*). Unlike monkeys, for whom spontaneous role reversal appears very difficult, three quarters of the chimpanzees tested showed immediate comprehension of the changing roles and performed appropriately. (*Id.*). In conversations with a human, ASL-trained chimpanzees took turns appropriately, and as in humans their conversational turn-taking developed with experience. (*Id.*).

4. CHIMPANZEES SHOULDER DUTIES AND RESPONSIBILITIES WITHIN CHIMPANZEE/HUMAN SOCIETIES.

a. Promise-keeping and fair exchanges in chimpanzee/human societies

Chimpanzees prefer fair exchanges. (Anderson Supp. Aff. at ¶20). Chimpanzees and bonobos keep promises and secrets. (Savage-Rumbaugh Supp. Aff. at ¶¶27-28). In the wild, adult males employ this capacity to stealthily approach other groups for purposes of surprise attack. (*Id.*). In captivity, having acquired language, they remind others of events such as their

birthdays, days visitors are expected, etc. (*Id.*). They remind caretakers of trash that has not been carried out, drains that are clogged, computer programs that are mis-performing, etc. (*Id.*).

When apes are taken out of doors on leads they can be asked to promise to be good, not to harm anyone and to return when asked. (Savage-Rumbaugh Supp. Aff. at ¶28). If they promise these things they will keep their promise. (*Id.*). Should they decide they are not going to keep such a promise, reminding them of the promise, the need for and the reason for it, has always been sufficient to reinstate the promise. If they are not capable of understanding language at that level, they do not make and/or keep promises except for the immediate future (five minutes). (*Id.*). But language extends the time of promise keeping to years, thus serving as an extremely power mechanism for the development of very complex group networks of social obligations, responsibilities and duties. (*Id.*).

In the well-known inequity aversion procedure, a subject and a partner each exchange a token with an experimenter, who in turn rewards each individual with a food item. (Anderson Supp. Aff. at ¶20). Two chimpanzees will take turns exchanging with the experimenter as long as the value of the reward that each receives is the same. But when one chimpanzee sees the partner receive a higher-value reward for completing the same exchange (e.g., partner receives a grape, subject receives a small piece of cucumber), she is likely to either refuse to accept the reward or refuse to return the token. (*Id.*). In other words, they are intolerant of unfair treatment. (*Id.*). Furthermore, as in humans, chimpanzees' responses to reward inequity may vary with the quality of the relationship between subject and partner: they react less emotionally to unfairness if the partner is a close friend or relative. (*Id.*).

b. Duties and responsibilities in interactions with humans

Chimpanzees and bonobos evidence understanding of their duties and responsibilities both in their interactions with human beings and in their interactions with each other. (Savage-Rumbaugh Supp. Aff. at ¶13; Anderson Supp. Aff. at ¶24). Chimpanzees and bonobos have a clear understanding of their strength relative to that of humans (much greater) and their speed and agility (far greater). (Savage-Rumbaugh Supp. Aff. at ¶20). They demonstrate that they

understand the need to treat humans with care, whether the interactions be grooming, play, tree climbing, etc. (*Id.*). They slow down their pace, they exert exact control over their bodies and their teeth, with exceeding care and precision. (*Id.*).

A male chimpanzee in captivity rescued his human caretaker, Mark Cusano, with whom he had a close relationship, from a very bad attack from three adult females. (Goodall Aff. at ¶25). According to Mr. Cusana, the chimpanzee saved his life. (*Id.*).

There are fewer examples of wild chimpanzees exhibiting duties and responsibilities with respect to humans, although many examples can be found in relationships between captive chimpanzees and humans. (McGrew Supp. Aff. at ¶25; Savage-Rumbaugh Supp. Aff. at ¶¶19-34). Perhaps the best example in the wild is the simplest one: Researchers at Gombe National Park in Tanzania have studied wild chimpanzees for more than fifty-five years. (McGrew Supp. Aff. at ¶25). Tens of thousands of observation hours at close quarters have accumulated over these decades. (McGrew Supp. Aff. at ¶25; Goodall Aff. at ¶24). Most of the chimpanzees studied have spent time with researchers from birth onwards, their whole lives, on a daily basis. (McGrew Supp. Aff. at ¶25; Goodall Aff. at ¶24). Chimpanzees have impressive slashing canine teeth, such that a single bite to a human could cause serious injury, even death. (McGrew Supp. Aff. at ¶25; Goodall Aff. at ¶24). Yet, not a single instance has occurred of a chimpanzee biting a researcher. (McGrew Supp. Aff. at ¶25; Goodall Aff. at ¶24). They have been hit, stamped on, and dragged during displays, but never received bite wounds. (Goodall Aff. at ¶24).

One male in particular, Frodo, was continually charging people and hitting them, and sometimes pushing Dr. Goodall. (*Id.*). It is clear, however, that these chimpanzees only intend to impress, to emphasize their superiority. (*Id.*). Dr. Goodall recounts that on three separate occasions, when she was above a very steep drop, Frodo charged her, but did not make contact. (*Id.*). Their videographer, Bill Wallauer, reported four such occasions. (*Id.*). It was very clear to them that Frodo understood what would have happened on those seven occasions. (*Id.*). The same thing happened to Dr. Goodall with a different alpha male. They are clear examples of intention not to harm. (Goodall Aff. at ¶¶24-25). At the very least, it shows remarkable tolerance

or, more likely, they see the long-established relationship with these familiar humans as something they are duty-bound to uphold. (McGrew Supp. Aff. at ¶25).

When chimpanzees and local humans live at close quarters, especially in unprotected areas, outside of national parks or reserves, both parties must adjust to one another. (McGrew Supp. Aff. at ¶26; Savage-Rumbaugh Supp. Aff. at ¶22). Each impinges on the other, sometimes negatively (crop-raiding by apes; deforestation by humans), sometimes positively (each tolerates disturbance of their preferred daily routines). (McGrew Supp. Aff. at ¶26). Humans who tap wild palm trees for sap, which ferments into 'palm wine', allow chimpanzees to pilfer this beverage from their containers. (*Id.*).

Chimpanzees and bonobos living in captivity understand that they must remain in certain areas and not harm or scare human beings who are visitors or who do not know them. (Savage-Rumbaugh Supp. Aff. at ¶22). Frequently, when doors are left open they refuse to go into areas where they are not allowed. If humans whom they do not know inadvertently enter their areas, they avoid those human beings, in recognition that interaction with them is prohibited by rules of the facility, unless they feel threatened. (*Id.*).

Having acquired language, if chimpanzees or bonobos harm human beings, it is inevitably the case that they perceive those human beings as either having broken rules of conduct, having said something insulting (often out of another's persons earshot) or having threatened them or persons they trust. (Savage-Rumbaugh Supp. Aff. at ¶23). Whenever there exists a disagreement between a human and a chimpanzee or bonobo who has acquired language, the disagreement can be solved by explaining the reasons for the action. (*Id.* at ¶26). For example, if a bonobo does not wish a person to leave and stands in front of the door, repeatedly insisting they remain in the cage; this behavior can be negotiated by an explanation of the reason for leaving, such as dentist appointment, etc. (*Id.*).

c. Language-trained chimpanzees exhibit an enhanced ability to shoulder duties and responsibilities.

Chimpanzees and bonobos who have been raised in a research setting that required human beings to expect them to become linguistically and socially competent group members, much as other bonobos and chimpanzees expect of bonobo and chimpanzee children in natural settings, exhibit unique duties and responsibilities. (Savage-Rumbaugh Supp. Aff. at ¶¶19-34); Jensvold Supp. Aff. at ¶12). Having acquired language, chimpanzees and bonobos become increasingly trustworthy and responsible as they pass out of adolescence and into adulthood. (Savage-Rumbaugh Supp. Aff. at ¶24). They assume roles of group monitoring and teaching of children. (*Id.*). Having acquired language, they presume that humans will explain their intentions and that they are to do likewise. (*Id.* at ¶25). Every interaction becomes a linguistically negotiated contract. (*Id.*). These contracts can apply to time periods that are days, weeks and even years ahead and will be remembered and enacted at the appropriate time. (*Id.*).

1) Chores

Dr. Jensvold worked with five chimpanzees over nearly three decades studying how they use ASL to communicate with humans and each other. (Jensvold Supp. Aff. at ¶11). For decades, the daily routine at their Central Washington University laboratory in Ellensburg, Washington, involved the chimpanzees participating in numerous activities with caregivers. These included husbandry duties. (*Id.*).

In the mornings, the chimpanzees helped clean enclosures by returning their blankets from the night before. (Jensvold Supp. Aff. at ¶12). The chimpanzees all participated; it was the duty that the researchers placed upon them. (*Id.*). When new caregivers appeared, the chimpanzees sometimes made an attempt at ditching their duties, but eventually they bore the responsibility of returning blankets and other objects in the enclosure to the caregiver. This was done without bribery. (*Id.*).

At lunchtime, all of the chimpanzees were served a course of soup followed by a course of fresh vegetables that was offered only if all of the chimpanzees ate their soup. (Jensvold Supp.

Aff. at ¶13). If one of the chimpanzees refused to eat their soup, the others put pressure on the noneater by offering her the soup and a spoon. The noneater nearly always capitulated and ate the soup. This individual behavior that affected the group demonstrated their sense of responsibility and duty. (*Id.*).

2) Moral behavior

As noted, *supra*, at Section III-B-1, both ape and human adult members constantly behave in morally responsible ways as they understand them. (Savage-Rumbaugh Supp. Aff. at ¶14; Anderson Supp. Aff. at ¶20). Ape children acquire the moral sense and duties of both cultures and the languages of both cultures. (Savage-Rumbaugh Supp. Aff. at ¶29). Self-aware beings cognizant of their own identity, they come to desire to engage in mutually responsible moral actions. They come to display a sense of loyalty, duty, honor, and mutual respect which takes cognizance of the individuality and free-will of other self-aware beings. However, they extend this to human begins only as long as they are, in turn, treated similarly. (*Id.*).

Adult chimpanzees and bonobos, when reared in the proper manner, also become capable of duties and responsibilities that are "self-assigned." (Savage-Rumbaugh Supp. Aff. at ¶30). They also acquire an understanding of how to behave in a manner that they begin to perceive as culturally appropriate for humans. (*Id.*). As this occurred, they began to demonstrate a sense of responsibility to help the human members of their Pan/Homo world attempt to show visitors how to begin to cross the species boundary. Additionally some *Pan* members, as they entered their decade of life, began to study this problem themselves and reflect upon it. This surprising event occurred when the Pan/Homo group found themselves relocated to a new facility where they had to cope with large numbers of people who viewed the *Pan* members as basically nonsentient, nonknowing, nonself-reflective beings. (*Id.*).

Moral behavior can be demonstrated in the chimpanzees' use of the sign "SORRY," which they acquired while reared as deaf human children. (Jensvold Supp. Aff. at ¶16). If they did something aggressive to a human, the chimpanzees often responded with "SORRY." (*Id.*). These apologies go with morals and a sense of right and wrong. (*Id.*). When the Central

Washington University facility closed, the two remaining sign-language-using chimpanzees in the group, Tatu and Loulis, moved to a sanctuary with eleven other chimpanzees, none of whom knew sign language. (*Id.*). Tatu sometimes antagonized her new neighbors by poking sticks at them through the fencing. (*Id.*). That often elicited aggressive behavioral displays, to which Tatu would sometimes respond by signing "SORRY" to the offended chimpanzee. (*Id.*).

A critical component of the ape child's desire to adopt and to accept duties and responsibilities resided in the emotional cross-cultural attachments between group members. (Savage-Rumbaugh Supp. Aff. at ¶16). These attachments were identical to those one finds in a human group or in any ape group, but transcended the species boundary. (*Id.*). Both apes and humans feel and openly express a deep sense of responsibility to one another. (*Id.*).

Both species in a *Pan/Homo* world become intensely aware of their differences and their similarities and engage in real and mutual trust and cooperation. (*Id.* at ¶34). Both species understand the magnitude of this event and that it requires far more than simple friendship. All sentient self-knowing entities, such as chimpanzees and bonobos, endowed with a sense of "I am" manifest the self-understanding, self-knowledge and self-choice that enable them to recognize, respect and acknowledge *the existence of a similar capacity* in the other species. (*Id.*). In this regard it is noteworthy, that while both apes and humans can love, rear, care for and interact with canids, adults of both species recognize that canids are incapable of the kind of self-knowledge that adult humans and adults apes possess. Therefore, neither species holds dogs responsible for "intentional actions" in the same way that hold other adult humans and/or apes responsible for such actions. (*Id.*). Apes did however, display far less patience with misbehavior on the part of dogs than the human members of their *Pan/Homo* culture. In part this was because when dogs attached themselves and their allegiance to particular apes and not others, this proved unsettling to the group. (*Id.*).

When apes are not reared as pets, these innate capacities enable attachments to emerge that are born of moral awareness of the needs of one's group and one's role within that group. (*Id.* at ¶15, ¶18). When not displaying their "human" skills for outsiders, all members of the

cross-cultural linguistic *Pan/Homo* culture that Dr. Savage-Rumbaugh created treated each other as members of one group. (*Id.* at ¶14, ¶18, ¶31). In that group all members had rights, roles, and responsibilities in accord with their abilities and maturity. (*Id.*).

In response to the highly distressing event of relocation to facility where they were all were treated very differently than had been the case at the Language Research Center where they were reared, Kanzi, Panbanisha and Nyota each began to try to find their own ways to help shoulder the new responsibilities imposed upon this *Pan/Homo* group. (*Id.* at ¶31). They started to assist those that the outsiders viewed as their "experimenters." (*Id.*). Panbanisha began to repeatedly watch and comment on documentaries about human/ape differences. The earliest that caught her attention was "Harry and the Hendersons," which she watched over and over as child. (*Id.*). As an adult, she studied the specials on PBS and the Discovery Channel. She also began to translate Kanzi's vocal utterances onto the keyboard. Elykia began to understand some English and started to offer running translations of what humans were saying for her mother Matata, and her brother Maisha, knowing that they could not understand human language. Kanzi began to pose for photographers, doing precisely as they asked, so the photographers did not have to watch and "wait" for their shot. He began to carry out scenes for videographers precisely as they asked. Kanzi also taught Elykia (his mother Matata's fourth daughter) how to smile for the camera, and for visitors. Panbanisha began teaching Matata how to use the symbol board filled with lexigrams, which she had acquired spontaneously as an infant, even before she began to speak "bonobo." (*Id.*).

Maturation in the Pan/Homo world began to reflect back upon the wild caught bonobo matriarch of the group Matata. (*Id.* at ¶32). She had *refused* for decades to view the keyboard as a linguistic device. Once her children, Kanzi and Panbanisha, grew up and were regularly employing it to communicate with humans, each other, and their offspring, Matata started to show a greater interest in the potential of this device. (*Id.*). Also at this point, her children began to be able to vocally translate lexigrams into bonobo speech for her. As she began to grasp the true function of the keyboard, she started to study it for hours at a time; but always hid it, if

caught doing so. She continued to act as though she did not know lexigrams, but when the situation was urgent or critical, she could produce fully complete appropriate sentences; for example, one day when she became ill, she requested, "Give green medicine." (*Id.*).

3) Other "human-like" duties

As they grew older, the chimpanzees and bonobos reared by Dr. Savage-Rumbaugh increasingly assumed a variety of duties for the purpose of demonstrating their abilities to outsiders. (Savage-Rumbaugh Supp. Aff. at ¶33). When outsiders were present, they would assume a responsibility to do things that were more "human-like." (*Id.* at ¶19, ¶33).

It was in the conscious awareness of the bonobos and chimpanzees of the implicit agendas and external goals of their *Pan/Homo* group that one could most clearly discern the emergence of their capacity to assume duties and responsibilities in a human-like manner. (*Id.* at ¶33). They understood not only what they were doing, but why they were doing it. As is the case with humans, their understanding increased with age and experience. (*Id.*). Similarly their recognition of the degree to which persons who were outside their immediate *Pan/Homo* family *misunderstood* them increased. They became highly creative in trying to reach across the divide to even the most incredulous human beings. They slowed down their actions and sounds, they exaggerated them, they repeated them, they blended sounds, gestures and lexigrams and they waited till they noted that the humans were observing or their cameras were turned off before they engaged them. While these were skills that the human members of the group could model, they could never have been taught. Close observation of the behavior of others, while reflecting on the intent of others, requires the knowledge that the "other" has a mind, that the contents of two minds are not always the same, and that one must pay attention to the "attention" of the other if one wishes to successfully redirect their perspectives, ideas, views, etc. (*Id.*).

Individual chimpanzees and bonobos vary widely in their interests and in the particular capacities they sought to master, as do human children. (Savage-Rumbaugh Supp. Aff. at ¶18). Often, if one chimpanzee or bonobo excels in some skill, those close in age seek to excel in other skills; this demonstrates an awareness of their individual responsibility to fill a particular niche

within the community to maximize group utility. (*Id.*). For example, Kanzi viewed himself as the expert stone tool maker and the expert fire maker in the group. He felt it was his responsibility to demonstrate these skills, and to practice them. He did not appreciate that Panbanisha took this role, or was asked to take this role by humans in the name of research. Panbanisha was the artist and story manufacturer, Elykia was the translator between languages, Teco was the one who found a way to cheer up the group when their spirits were low, Matata taught the skills of the forest, Nathan was the mediator between the worlds, P-Suke was the sex symbol, Panzee was the puzzle resolver, Maisha was the show-off, Sherman was the leader, Lana was the critic and Austin was the careful one. Each of these apes recognized the roles of the others and "stood down" when the recognized expert set about to demonstrate these capacities for human visitors. (*Id.*).

As language comprehension increases in the human or ape, it allows the intent, and underlying behaviors, to be overtly expressed. (Savage-Rumbaugh Supp. Aff. at ¶25). As noted above, chimpanzees and bonobos who acquire language are often asked to carry out duties and responsibilities, and succeed. (Savage-Rumbaugh Supp. Aff. at ¶13). They routinely enter into contractual agreements. (*Id.*). Capacities indicative of the chimpanzees' ability to assume duties and responsibilities and to make contractual agreements in the groups with which Dr. Savage-Rumbaugh worked included:

a. A conscious awareness of the fundamental importance of fire, accompanied by an understanding that fire is produced by a variety of different kinds of activities.

    1) A conscious awareness of the need to responsibly practice this skill and to demonstrate it to human beings who place great value on it.

    2) A conscious awareness of all the component skills required (finding dry twigs and leaves, placing them in a pile, lighting them, adding additional larger pieces of wood as fuel, not adding to much fuel

and the need to keep the fire contained, the need to take to avoid being burned, and the need to put the fire out, lest it spread).

3) A conscious awareness of the way in which fire alters the texture, taste, and desirably of various foods, making some better and others worse.

4) A conscious awareness of the properties and material required to start fire, i.e., small dry sticks, paper, etc.

b. A conscious awareness of how to cook a meal as a human would, accompanied by an understanding of the responsibility to practice this and to demonstrate to human beings this ability. Within activities that dealt with cooking, they were many sub-components they were willing to demonstrate, including:

1) Obtaining pots and pans
2) Obtaining foods
3) Chopping foods
4) Mixing and stirring foods
5) Heating foods
6) Serving foods
7) Extracting juices
8) Crushing seeds
9) Blending foods as they processed them through different stages of heat

c. Within their own social group they assumed responsibilities listed below:

1) Teaching younger group members rules about food sharing
2) Teaching younger group members rules for how to interact with human beings
3) Teaching younger group members about dangerous animals

4) Protecting younger group members from dangerous animals
5) Teaching younger group members about dangerous objects and/or locations in the environment
6) Protecting younger group members from dangerous objects and/or locations in the environment
7) Conveying vital information to other group members about the actions of humans as well as other group members that were out of site
8) Teaching those members of the bonobo group who had little human contact how to employ lexical symbols in communicative exchanges with human
9) Teaching those group members who had little human contact how to employ vocal symbols in exchanges with humans
10) Informing group members of any unusual or suspicious actions on the part of humans
11) Informing group members of any unusual or suspicious actions on the part of animals
12) Those who could comprehend spoken English assuming the responsibility to translate for other members that were unable to comprehend spoken English
13) Taking into account which members were not receiving sufficient food from human caretakers who made their own rules about how much food various bonobos were allowed and flaunting human rules by hiding food for those members who were being underfed
14) Protecting young humans and young apes from falling or engaging in activities that could lead to harm

15) Seeing that needed items, such as blankets were distributed among the group in a responsible manner
16) Conveying to human beings whom they trusted, information regarding deceitful actions of other human beings
17) Conveying to human beings whom they trusted, information regarding physical harm done to them by human beings who tried to intimidate and frighten the bonobos by violent means
18) Reminding human beings of promises that had been made to themselves or to other members of their own social group
19) Taking responsibility for care of dogs and making certain that dogs were properly treated
20) Taking responsibility for care of orangutans and making requests for their needs when the orangutans were unable to do so for themselves
21) A conscious awareness of the importance painting and writing serve as symbolic modes of expression. An understanding of the need to paint in a manner that is interpretable by human beings, and an ability to so do.

d. A conscious awareness of the importance of making and understanding contractual agreements and promises ("If you do X I will do Y", or "I do Y, will you promise to do X?") and to keep them. These agreements are made linguistically and cover all manner of situations with both humans and other chimpanzees. Examples include:
    1) "If you promise to stay with me, we will go outdoors."
    2) "If you will watch Teco for me, while I go get tea, I will bring you some."

3) "If you want some Austin's Cheerios, please give some of your peanuts to him."
4) "If you promise not the tear up this computer, you may use it."
5) "If you will show the visitors how to use the keyboard now, we will go outdoors and make a fire later."
6) "If you will promise to take care of the dog, I will let it play with you."
7) "If you will translate what Matata is saying, I will take you for a car ride."
8) "If you leave a written note in the sand, X will read it on another day and leave here what you request."
9) "If you are good and help me while the visitors are here they will bring you a surprise."
10) "If you are quiet, no one will know we are here and we can listen to what they are saying."

e. A conscious awareness that humans are expected to uphold their end of contractual agreements and promises which they make to apes as well as to one another.

f. A conscious awareness of the importance humans attach to being able to tie knots and to link things together through this method.

g. A conscious awareness of the need to keep blankets and other nest-building materials laundered and folded and an awareness of the need to utilize clean blankets on the top side of the nest.

h. A conscious awareness of the importance humans place on the apes' capacity to make stone tools, bone tools, and stick tools.

1) A conscious awareness of the requirements of the various properties of these different classes of tools (i.e. stick tools can be

fashioned with hands and teeth, stone tools must be fashioned with other stone, bones can be split lengthwise in a manner that stone and wood cannot, etc.).

2) A conscious awareness of the uses to which tools of different shapes can be addressed.

i. A conscious awareness of the need for child-care. This includes a great sensitivity to the needs of infants, both those belonging to self and those belonging to others. It includes a conscious monitoring of what the infant can and cannot do, as well as what an infant can and cannot understand. It demands a conscious understanding of the kinds of things that must be done to ensure an infant's safety. This includes an understanding that the needs of human infants and bonobos differ considerably. (This skill was not highly developed in Matata; however Panbanisha's monitoring of infants and their requirements was essentially at the human level). This care and caution is not only exhibited when the infant is in clear and present danger (as is the case with most animal.). The care and caution is exerted long before the infant becomes endangered.

j. A conscious awareness of the need to keep the living facility clean according to human standards and to remove what humans designate as trash. Also a conscious awareness of what USDA inspectors search as demonstrated by helping to prepare for inspections (by hiding items they might asked to be removed from the enclosures, etc.).

k. A conscious awareness of the importance of sharing food among group members in an appropriate manner according to bonobo food rules as taught by Matata who was wild-reared.

l. A conscious awareness that most human beings neither understand, nor respect their capacity to employ symbols creatively and in contextually

appropriate novel manners. They attempt to meet such persons more than halfway, because they are keenly aware and understand that humans fail to grasp that any kind of symbolic system except their own could be symbolic or complex. Bonobos will go to great lengths to teach human words, preferring to do so only in contextually appropriate meaningful communicative contexts; because humans cannot grasp symbol meanings devoid of context.

m. A conscious awareness that many humans fail to grasp that they understand spoken words and sentences at a high level. They will take great care to try and demonstrate this to humans in novel socially appropriate contexts. They have learned that responding in "test" situations, when humans repeat trials over and over, does little to convey their actual abilities and desire to avoid these settings. Some apes completely refuse them.

n. A conscious awareness of numerosity, which gives them a grasp of numbers to twelve or more without actually counting. This can become accompanied by an awareness of the human desire for counting, and some apes have demonstrated behaviors that are true counting and reading.

o. A conscious awareness of, and interest in, similar to that of human children, pretend play. This can be accompanied by a fascination with that play. This can take the form of object play, as when figures (toys representing apes) are engaged in actions of pretend attack. It can also take the form of pretending to do things to others such as pretending to be afraid, pretending to be angry, pretending to be asleep, pretending to hide, pretending to be another entity (as in wearing a mask), or pretending not to hear or see something obvious. This fascination can extend to pretending to do things to other chimpanzee and/or bonobos to determine if they

understand the pretense; for example whether other bonobos or chimpanzees understand that a plastic snake is not real, or that a person in a gorilla suit is not a gorilla.

p. A conscious awareness of the power of deceit. This includes knowledge of "good" and "bad" and the capacity to label one's own actions as belonging to one or the other of these categories.

q. A conscious awareness of their ability to plan and co-ordinate group actions. This can be as simple as making a plan to make a fire and being sure that the needed items are packed, or as complex as making a plan to attack human beings who are perceived as deceitful or devious. Such plans are exchanged vocally and coordinated across space and time.

r. A conscious awareness of the need to attempt to form connections with human beings on levels that human beings can understand. As experience with a variety of humans began to take place, the apes recognized that they needed to stretch their communicative competencies to try and enable human beings to understand their communications, their rules, and their view of what moral treatment entailed.

(Savage-Rumbaugh Supp. Aff. at ¶19).

C. NATIONAL INSTITUTION OF HEALTH STUDIES AND SAVE THE CHIMPS

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

1. Working Group Recommendation EA1: "Chimpanzees must have the opportunity to live in sufficiently large, complex, multi-male, multi-female social groupings, ideally consisting of at least 7 individuals. Unless dictated by clearly documented medical or social circumstances, no chimpanzee should be required to live alone for extended periods of time. Pairs, trios, and even small groups of 4 to 6 individuals do not provide the social complexity required to meet the social needs of this cognitively advanced species. When chimpanzees need to be housed in groupings that are smaller than ideal for longer than necessary, for example, during routine veterinary examinations or when they are introduced to a new social group, this need should be regularly reviewed and documented by a veterinarian and a primate behaviorist." (Wise Aff. Ex. A, p. 5) (*Stanley*).
2. Working Group Recommendation EA4: "Chimpanzees should have the opportunity to climb at least 20 ft (6.1m) vertically. Moreover, their environment must provide enough climbing opportunities and space to allow all members of larger groups to travel, feed, and rest in elevated spaces." (*Id.* at Ex. A. pp. 8-9).
3. Working Group Recommendation EA5: "Progressive and ethologically appropriate management of chimpanzees must include provision of foraging opportunities and diets that are varied, nutritious, and challenging to obtain and process." (*Id.* at Ex. A, pp. 9-10).
4. Working Group Recommendation EA6: "Chimpanzees must be provided with materials to construct new nests on a daily basis." The NIH *accepted* this recommendation. (*Id.* at Ex. A, pp. 10-11).
5. Working Group Recommendation EA8: "Chimpanzee management staff must include experienced and trained behaviorists, animal trainers, and enrichment specialists to foster positive human-animal relationships and provide cognitive stimulation[.]" (*Id.* at Ex. A, pp. 11-12).

Sitting on 190 acres in Fort Pierce, Florida, Save the Chimps provides permanent homes for roughly 260 chimpanzees on twelve three-to-five-acre open-air islands that contain hills and

climbing structures and that provide the opportunity for the chimpanzees to make choices about their daily activities. (Affidavit of Molly Polidoroff ("Polidoroff Aff.") at ¶7, ¶10). Chimpanzees who previously lived alone or in very small groups for decades become part of large and natural chimpanzee families. (*Id.* at ¶7). Grass, palm trees, hills, and climbing structures allow the chimpanzees places to run and roam, visit with friends, bask in the sun, or curl up in the shade, or whatever else they may wish to do. (*Id.* at ¶10). Save the Chimps has over fifty employees including two full time veterinarians that provide twenty-four-hour coverage with a support staff of technicians and assistants. (*Id.* at ¶9, ¶15).

IV. ARGUMENT

A. THE NhRP HAS STANDING TO BRING THIS HABEAS CORPUS PETITION.

Anglo-American law has long recognized that third parties may bring habeas corpus cases on behalf of detained third parties. CPLR 7002(a) provides: "[a] person illegally imprisoned or otherwise restrained of liberty within the state, *or one acting on his behalf* . . . may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance." (emphasis added). *E.g.*, *Somerset*, Lofft 1, 98 Eng. Rep. 499 (unrelated third parties sought common law writ of habeas corpus on behalf of black slave imprisoned on a ship); *Case of the Hottentot Venus*, 13 East 185, 104 Eng. Rep. 344 (K.B. 1810) (Abolitionist Society sought common law writ of habeas corpus to determine whether an African woman was being exhibited in London of her own free will).

This Court correctly found that the NhRP had standing in *Stanley*, explaining as is relevant here: "[a]s the statute places no restriction on who may bring a petition for habeas on behalf of the person restrained, . . . petitioner has met its burden of demonstrating that it has standing." *Stanley*, 16 N.Y.S.3d at 905. This ruling is supported by a long line of New York cases recognizing broad common law next friend representation in habeas corpus cases. *See Lemmon v. People*, 20 N.Y. 562 (1860) (as he had in other cases, the free black abolitionist dock worker, Louis Napoleon, sought a writ of habeas corpus on behalf of eight detained slaves with

whom he had no relationship); *Holzer v. Deutsche Reichsbahn Gesellschaft*, 290 N.Y.S. 181, 192 (Sup. Ct. 1936) ("In 1852 Mrs. Lemmon, of Virginia, proceeded to Texas via New York, with eight negro slaves. . . . Upon her arrival in New York a free negro, as next friend, obtained a writ of habeas corpus which was sustained."), *aff'd in part, modified in part*, 277 N.Y. 474 (1938); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846) (as he would in *Lemmon*, *supra*, the dock worker, Louis Napoleon, sought a writ of habeas corpus on behalf of a slave with whom he had no relationship); *McLeod*, 3 Hill at 647 note j ("every Englishman . . . imprisoned by any authority . . . has an undoubted right, by his agents or *friends*, to . . . obtain a writ of habeas corpus") (citations omitted, emphasis added). *See also People ex rel. Turano v. Cunningham*, 57 A.D.2d 801 (1st Dept. 1977) (habeas corpus petition filed by "next friend" of incarcerated inmate); *State v. Lascaris*, 37 A.D.2d 128 (4th Dept. 1971); *People ex rel. Hubert v. Kaiser*, 150 A.D. 541, 544 (1st Dept. 1912) (habeas corpus petition filed by "next friend" of incarcerated inmate); *People ex rel. Sheldon v. Curtin*, 152 A.D. 364 (4th Dept. 1912) (habeas corpus petition filed by "next friend" of woman detained at the Western House of Refuge for Women); *People ex rel. Rao v. Warden of City Prison*, 11 N.Y.S.2d 63 (Sup. Ct. 1939) (habeas corpus petition filed by "next friend" of prisoner). The NhRP therefore has standing to seek a common law writ of habeas corpus and order to show cause on behalf of Kiko.

B. VENUE IS PROPER IN NEW YORK COUNTY.

Against a claim of improper venue, this Court ruled that venue was proper in New York County, despite the fact that Hercules and Leo were being detained in Suffolk County. *Stanley*, 16 N.Y.S.3d at 905-07. CPLR 7002(b) provides, in relevant part: "a petition for the writ shall be made to: 1. the supreme court in the judicial district in which the person is detained; or . . . 3. *any justice of the supreme court*[.]" (emphasis added). *See also People v. Hanna*, 3 How. Pr. 39, 41-43 (N.Y. Sup. Ct. 1847) ("a justice of the supreme court has power, under the provisions of the statute, to allow this writ, notwithstanding there may be an officer in the county where the relator is alleged to be restrained of his liberty, authorised to exercise the same power").

The *Stanley* order to show cause was properly made returnable to New York County just as an order to show cause would properly be made returnable to New York County in the present case. Pursuant to CPLR 7004(c), a writ *must* be returnable to the county in which it is issued except: a) where the writ is to secure the release of a person from a "state institution," it must be made returnable to the county of detention; or b) where the petition was made to a court outside of the county of detention, the court *may* make the writ returnable to such county. In *Stanley*, the Court properly found that Hercules and Leo were not being detained in a "state institution" within the meaning of 7004(c), even though Hercules and Leo were being detained in a state educational facility, because that section applies only to state institutions that incarcerate inmates or institutionalize mental patients; otherwise the writ should normally be returned to the county of issuance. 16 N.Y.S.3d at 907. *See Hogan v. Culkin*, 18 N.Y.2d 330, 333 (1966); *Application of Holbrook*, 220 N.Y.S.2d 382, 384 (Sup. Ct. 1961). The "purpose of the rule is to relieve the wardens of State prisons of having to transport the inmates to a county other than the county of detention and incur travel expenses to distant courthouses." *People ex rel. Cordero v. Thomas*, 329 N.Y.S.2d 131, 133-34 (Sup. Ct. 1972) (return was not required to be made in the county of detention in an Adolescent Remand Shelter, as the "relator is not being detained in a State prison" and thus, the "writ was properly issued and made returnable in Kings County"). *See also State ex rel. Cox v. Appelton*, 309 N.Y.S.2d 290, 292 (Sup. Ct. 1970) (holding that a state-run training school for children was not a "state institution" within the meaning of the rule and thus, the writ was properly returned to the county where the suit was filed). *A fortiori*, venue is proper here because unlike Hercules and Leo, Kiko is not being detained in a state facility of any kind, but in a cage in a privately-owned cement storefront. As venue was proper in New York County in Hercules and Leo's case, it is proper here.

Furthermore, as with Hercules and Leo, the NhRP does not demand Kiko's production, but an order requiring Respondents to show cause, within the meaning of CPLR 7003(a), why Kiko "should not be released." The provision regarding "state institutions" was added to the statute solely to "obviate the administrative, security and financial burdens entailed in requiring

prison authorities to produce inmates pursuant to such writs in a county other than that in which they were detained[.]" *Hogan*, 18 N.Y.2d at 333 (citations omitted). None of those concerns are present. *See Appelton*, 309 N.Y.S.2d at 292 (where habeas corpus action was commenced by show cause order because petitioner's production was not necessary, writ was returnable to the county of filing rather than the county of detention).

This Court rejected respondents' arguments to the contrary explaining:

> Here, if issued, the writ would not be directed to a state prison warden. Consequently, as "in all other cases," the writ here is to be made returnable in the county of issuance, namely, New York County. That the University is denominated a "state-operated institution" in the Education Law is irrelevant. Moreover, where no factual issues are raised, no one sought the production in court of Hercules or Leo, and "[a]ll that remains is for the Court to issue its decision," a change of venue is not required. (*Chaney v. Evans*, 2013 WL 2147533 at *3, 2013 N.Y. Slip Op 31025[U] [Sup Ct, Franklin County 2013] [even though petitioner administratively transferred to other county during pendency of habeas proceeding and no longer detained in Franklin County, change of venue not required]).

16 N.Y.S.3d at 907-08. This Court added: "In any event, '[s]o primary and fundamental' is the writ of habeas corpus 'that it must take precedence over considerations of procedural orderliness and conformity.' . . . And the Legislature was so concerned that judges issue valid writs that it enacted a provision, unique in all respects, requiring that a judge or group of judges who refuse to issue a valid writ must forfeit $1,000 to the person detained." *Id.* (citations omitted).

C. NEITHER RES JUDICATA, COLLATERAL ESTOPPEL, NOR CPLR 7003(b) BARS THE ISSUANCE OF AN ORDER TO SHOW CAUSE IN THIS SECOND KIKO PETITION.

This Court in *Stanley* ruled that neither issue preclusion nor claim preclusion barred the issuance of an order to show cause in the NhRP's second petition on behalf of Hercules and Leo. *Id.* at 908-10. The same applies to Kiko's case at bar. *See People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874); *People ex rel. Leonard HH v. Nixon*, 148 A.D.2d 75, 79 (3d Dept. 1989); *People ex rel. Sabatino v. Jennings*, 221 A.D. 418, 420 (4th Dept. 1927), *aff'd*, 246 N.Y. 624 (1927). CPLR 7003(b) "continues the common law and present position in New York that res judicata has no application to the writ." ADVISORY COMMITTEE NOTES TO CPLR 7003(b). Where

"a writ of habeas corpus has been dismissed and the prisoner continues to be held in custody, the prior adjudication is held not to be a bar to a new application for a writ of habeas corpus, even though the grounds may be the same as those previously passed upon." *Post v. Lyford*, 285 A.D. 101, 104-05 (3d Dept. 1954). *People ex rel. Butler v. McNeill*, 219 N.Y.S.2d 722, 724 (Sup. Ct. 1961), was the petitioner's fifth application for habeas corpus to the court, and in none of the previous four was he successful. Nevertheless, the court ruled that "the ban of res judicata cannot operate to preclude the present proceeding." *Id.*

The rule "permitting relitigation . . . after the denial of a writ, is based upon the fact that the detention of the prisoner is a continuing one and that the courts are under a continuing duty to examine into the grounds of the detention." *Id.* Therefore, "a court is always competent to issue a new habeas corpus writ on the same grounds as a prior dismissed writ." *People ex rel. Anderson v. Warden, New York City Correctional Instn. for Men*, 325 N.Y.S.2d 829, 833 (Sup. Ct. 1971). *See Brady*, 56 N.Y. at 191-92; *Post*, 285 A.D. at 104-05; *Jennings*, 221 A.D. at 420; *Losaw v. Smith*, 109 A.D. 754 (3d Dept. 1905); *In re Quinn*, 2 A.D. 103, 103-04 (2d Dept. 1896), *aff'd*, 152 N.Y. 89 (1897); *McNeill*, *supra*. This is because "[c]onventional notions of finality of litigation have no place where life or liberty is at stake[.]" *Sanders v. United States*, 373 U.S. 1, 8 (1963). The "inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ." *Id. See Post*, 285 A.D. at 104-05.

A court is not required to issue a writ from a successive petition for a writ of habeas corpus only if: (1) the legality of a detention has been previously determined by a court of the State in a prior proceeding for a writ of habeas corpus, (2) the petition presents no ground not theretofore presented and determined, and (3) the court is satisfied that the ends of justice will not be served by granting it. CPLR 7003(b). In this case none of the elements are satisfied. *See Stanley*, 16 N.Y.S.3d at 909 ("the governing statute itself poses no obstacle to this litigation").

With respect to the second element of CPLR 7003(b), the NhRP has demonstrated in this Second Kiko Petition and in this accompanying Memorandum of Law, *supra* at 1, that the case at bar is quite distinct both legally and factually from the First Kiko Petition, First Tommy Petition

and *Lavery*. With respect to the first element of 7003(b), the legality of Kiko's detention has not been determined in a prior proceeding for a writ of habeas corpus by a court of this State. Notwithstanding the fact that the NhRP was granted an *ex parte* hearing (by telephone) on the issue of the availability of the common law writ of habeas corpus to chimpanzees, the Niagara County Supreme Court refused to issue the requested order to show cause and therefore did not determine the legality of Kiko's detention. That alone is insufficient for preclusion, as this Court noted, "[r]espondents cite no authority for the proposition that a declined order to show cause constitutes a determination on the merits, that it has any precedential value, or that a justice in one county is precluded from signing an order to show cause for relief previously sought from and denied by virtue of a justice in another county refusing to sign the order to show cause." *Stanley*, 16 N.Y.S.3d at 909.

The Fourth Department then upheld the lower court, finding, without reaching the issue of legal personhood, that the First Kiko Petition should have been dismissed on the ground that the NhRP did not seek Kiko's immediate release but sought to have him placed in an appropriate primate sanctuary. *Presti*, 124 A.D.3d at 1335. Significantly, the court suggested twice, without deciding, that it might agree with the NhRP's claim that Kiko was a "person" for the purpose of Article 70, stating, "[r]egardless of whether we agree with petitioner's claim that Kiko is a person within the statutory and common law definition of the writ . . ." and "even assuming, *arguendo*, that we agreed with petitioner that Kiko should be deemed a person for the purpose of the application." 124 A.D.3d at 1335.

Because the Niagara County Supreme Court refused to issue the order to show cause, the NhRP was no more given the required full and fair opportunity to litigate the legal issue of Kiko's personhood than it was given a full and fair opportunity to litigate the legal personhood of Hercules and Leo in Suffolk County. *Stanley*, 16 N.Y.S.3d at 909. *See Allen v. New York State Div. of Parole*, 252 A.D.2d 691 (3d Dept. 1998) (court refused subsequent petition as petitioner had been afforded "a full and fair opportunity . . . to litigate the issues"); *McAllister v. Div. of Parole of New York State*, 186 A.D.2d 326, 327 (3d Dept. 1992) (court refused subsequent

petition as petitioner "had a full and fair opportunity to litigate the timeliness issue in the habeas corpus proceeding").

Further, this second attempt to invoke a common law writ of habeas corpus on behalf of Kiko is necessary only because the Fourth Department erroneously concluded the NhRP was unable to invoke the writ of habeas corpus at all, *infra.* Most importantly, if the NhRP is correct in its assertion of personhood and is refused the opportunity for a full and fair hearing, Kiko will be condemned to a lifetime of imprisonment and suffer certain destruction of his autonomy, social isolation, intellectual, emotional, and social stunting, severe emotional distress, feelings of hopelessness, and more.

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

The common law writ of habeas corpus "is deeply rooted in our cherished ideas of individual autonomy and free choice." *Stanley*, 16 N.Y.S.3d at 903-04. "[T]he parameters of legal personhood have long been and will continue to be discussed and debated by legal theorists, commentators, and courts, and will not be focused on semantics or biology, or even philosophy, but on the proper allocation of rights under the law, asking, in effect, who counts under our law." *Id.* at 912 (citing *Byrn*, 31 N.Y.2d at 201). In sum, "person" has *never* been synonymous with "human being." Instead, it designates Western law's most fundamental category by identifying those entities capable of possessing legal rights.

The NhRP does not claim Respondents are violating any federal, state, or local animal welfare law in the *manner* in which they are detaining Kiko. The issue in this case is not Kiko's welfare, any more than a human prisoner's welfare is at issue when he is being detained against his will in a habeas corpus case. The issue is whether Kiko, as an autonomous and self-determining being, may be legally detained at all.

As this section will demonstrate, the New York common law of *liberty* is, like the common law writ of habeas corpus itself, deeply rooted in autonomy. *Stanley*, 16 N.Y.S.3d at 903-04. It is a supreme common law value that trumps even the State's interest in life, and is

protected as a fundamental right that may be vindicated through a common law writ of habeas corpus. New York common law *equality* forbids discrimination founded upon unreasonable means or unjust ends, and protects Kiko's common law right to bodily liberty free from unjust discrimination. Kiko's common law classification as a "legal thing," rather than "legal person," rests upon the illegitimate end of enslaving him. Simultaneously, it classifies Kiko by the single trait of being a chimpanzee, and then denies him the capacity to have any legal right. This discrimination is so fundamentally inequitable it violates basic common law equality. The New York legislature's recognition that some nonhuman animals, such as chimpanzees, are capable of having personhood rights by expressly allowing them to be trust "beneficiaries" pursuant to EPTL 7-8.1 affirms that personhood may apply to natural entities other than human beings.

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

"[U]pon according legal personality to a thing the law affords it the rights and privileges of a legal person[.]" *Byrn*, 31 N.Y.2d at 201 (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909) ("Gray"); Hans Kelsen, *General Theory of Law and State* 93-109 (1945); George Whitecross Paton, *A Textbook of Jurisprudence* 349-356 (4th ed., G.W. Paton & David P. Derham eds. 1972) ("Paton"); Wolfgang Friedman, *Legal Theory* 521-523 (5th ed. 1967)). Legal persons possess inherent value; "legal things," possessing merely instrumental value, exist for the sake of legal persons. 2 William Blackstone, *Commentaries on the Laws of England* *16 (1765-1769).

"Whether the law should accord legal personality is a policy question[.]" *Byrn*, 31 N.Y.2d at 201 (emphasis added). "Legal person" is not a biological concept; it does not "necessarily correspond" to the "natural order." *Id*; *see Stanley*, 16 N.Y.S.3d at 916-17 (same). It is not synonymous with human being. *Id. See* Paton, *supra*, at 349-50, *Salmond on Jurisprudence* 305 (12th ed. 1928) ("A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy

feats of the legal imagination,"); IV Roscoe Pound, *Jurisprudence* 192-93 (1959). "Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol." George Whitecross Paton, *A Textbook of Jurisprudence* 393 (3rd ed. 1964). "There is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." Gray, *supra* Chapter II, 39 (1909), citing, among other authorities, those cited in *Byrn*, *supra*.

The NhRP's arguments, *infra*, that an autonomous being is entitled to the common law right to bodily liberty protected by the common law writ of habeas corpus and CPLR Article 70, both as a matter of common law liberty and common law equality, are the policy arguments required by *Byrn. See Stanley*, 16 N.Y.S.3d at 911-12. The Court of Appeals' use of the word "policy" in *Byrn* encompasses not just what is good and bad, but what is right or wrong, meaning "principle." Benjamin N. Cardozo, *The Nature of the Judicial Process* 66 (Yale Univ. Press 1921) ("Ethical considerations can no more be excluded from the administration of justice … than one can exclude the vital air from his room and live."), quoting John F. Dillon, *The Laws and Jurisprudence of England and America* 18 (Little, Brown & Co. 1894), quoted by Roscoe Pound, 27 HARVARD L. REV. 731, 722 (1914). The common law of personhood is no different than any other determination of the common law, which itself "consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy, modified and adapted to all the circumstance of all the particular cases that fall within it." *Norway Plains Co. v. Boston and Maine Railroad*, 67 Mass (1 Gray) 263, 367 (1854) (Shaw, C.J.).

"Person" is a legal "term of art." *Wartelle v. Womens' & Children's Hosp.*, 704 So. 2d 778, 781 (La. 1997). Persons count in law; things don't. *See* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1746 (2001). "[T]he significant fortune of legal personality is the capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). "Person" has never been equated with being human and many humans have not been persons. "Person" may be narrower than "human being." A human fetus,

which the *Byrn* Court acknowledged, 31 N.Y.2d at 199, "is human," but did not characterize as a Fourteenth Amendment "person." *See also Roe v. Wade*, 410 U.S. 113 (1973). Human slaves were not "persons" in New York State until the last slave was freed in 1827. Human slaves were not "persons" throughout the entire United States prior to the ratification of the Thirteenth Amendment to the United States Constitution in 1865. *See, e.g.*, *Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828) ("Slaves, although they are human beings . . . (are not treated as a person, but (*negotium*), a thing").[12] Women were not "persons" for many purposes until well into the twentieth century. *See* Robert J. Sharpe and Patricia I. McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (2007). As this Court noted in *Stanley*, "Married women were once considered the property of their husbands, and before marriage were often considered family property, denied the full array of rights accorded to their fathers, brothers, uncles, and male cousins." 16 N.Y.S.3d at 912 (citing Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 DUKE J GENDER L & POLICY 45, 48–51 [2012]).

"Person" may designate an entity qualitatively different from a human being. Corporations have long been "persons" within the meaning of the Fourteenth Amendment to the United States Constitution. *Santa Clara Cnty. v. Southern Pacific Railroad*, 118 U.S. 394 (1886). An agreement between the indigenous peoples of New Zealand and the Crown, p.10, ¶¶ 2.6, 2.7, and 2.8, recently designated New Zealand's Whanganui River Iwi as a legal person that owns its riverbed.[13] The Indian Supreme Court has designated the Sikh's sacred text as a "legal person." *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, A.I.R. 2000 S.C. 421. Pre-Independence Indian courts designated Punjab mosques as legal persons, to the same end. *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R

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

[13] *WHANGANUI IWI and THE CROWN* (August 30, 2012), available at http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CWhanganuiRiverAgreement.pdf (last viewed December 29, 2015).

1938 369, para, 15 (Lahore High Court, Full Bench). A pre-Independence Indian court designated a Hindu idol as a "person" with the capacity to sue. *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925).

In short, the struggles over the legal personhood of human fetuses,[14] slaves,[15] Native Americans,[16] women,[17] corporations,[18] and other entities have never been over whether they are human, or anything other than whether justice demands that they "count." *See Stanley*, 16 N.Y.S.3d at 912 ("the parameters of legal personhood have long been and will continue to be discussed and debated by legal theorists, commentators, and courts, and will not be focused on semantics or biology, or even philosophy, but on the proper allocation of rights under the law, asking, in effect, who counts under our law"). As to who "counts," this Court explained that the "concept of legal personhood, that is, who or what may be deemed a person under the law, and for what purposes, has evolved significantly since the inception of the United States." *Id.* Not "very long ago, only caucasian male, property-owning citizens were entitled to the full panoply of legal rights under the United States Constitution." *Id. See also id.* at 912 ("For purposes of establishing rights, the law presently categorizes entities in a simple, binary, 'all-or-nothing' fashion. . . . Animals, including chimpanzees and other highly intelligent mammals, are considered as property under the law."). This Court opined that "'[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued

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

[15] *Compare Trongett v. Byers*, 5 Cow. 480 (N.Y. Sup. Ct. 1826) (recognizing slaves as property), *Smith v. Hoff*, 1 Cow. 127, 130 (N.Y. 1823) (same), *In re Mickel*, 14 Johns. 324 (N.Y. Sup. Ct. 1817) (same); *Sable v. Hitchcock*, 2 Johns. Cas. 79 (N.Y. Sup. Ct. 1800) (same) *with Lemmon*, 20 N.Y. 562 (slaves are free) and *Somerset*, 98 Eng. Rep. at 510 (slavery is "so *odious* that nothing can be suffered to support it but positive law") (emphasis added).

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

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

[18] While corporations are Fourteenth Amendment "persons," *Santa Clara*, 118 U.S. 394, they are not protected by the Fifth Amendment's Self-Incrimination Clause. *Bellis v. United States*, 417 U.S. 85 (1974).

justification and new groups could not invoke rights once denied.'" *Id.* (citing *Obergefell v. Hodges*, 135 S.Ct. 2602 (2015)).[19]

That Kiko is a chimpanzee does not necessarily mean that he may never count as a person. Who is deemed a person is a "matter which each legal system must settle for itself." *Byrn*, 31 N.Y.2d at 202 (quoting Gray, *supra*, at 3). The historic question is whether Kiko "counts" for the purpose of a common law writ of habeas corpus. In the following sections, the NhRP will demonstrate that, both as a matter of New York common law liberty and common law equality, Kiko should "count" and be recognized as a legal person possessed of the common law right to bodily liberty that the common law of habeas corpus protects.

2. The Third Department's *Lavery* decision does not bind this Court.

The Third Department's *Lavery* decision that limits "persons" to those who can shoulder duties and responsibilities does not bind this Court. A court's determination becomes "binding" only when it involves "settled principles of law and legal issues." *State v. Moore*, 298 A.D. 2d 814, 815 (3d Dept. 2002). *E.g.*, *Samuels v. High Braes Refuge, Inc*., 8 A.D.3d 1110, 1111 (4th Dept. 2004); *Killeen v. Crosson*, 218 A.D. 2d 217, 220 (4th Dept. 1996). *Lavery* did not involve a settled principle of law or legal issue for the following reasons.

First, *Lavery*'s assertion that a chimpanzee may not be a legal person for purposes of a common law writ of habeas corpus and Article 70 because he is unable to shoulder duties and responsibilities was wrong as a matter of law. In his letter brief to the Court of Appeals in support of the NhRP's motion for further review, Harvard Law School Professor Laurence H. Tribe noted that "the lower courts fundamentally misunderstood the purpose of the common law writ of habeas corpus" and "reached its conclusion on the basis of a fundamentally flawed definition of legal personhood." *Letter Brief of Amicus Curiae Laurence H. Tribe*, at 1, a true and correct copy of which is attached to the Second Kiko Petition as Exhibit 8. In his letter brief to the Court of Appeals, Professor Justin Marceau stated: "This may be one of the most

[19] Similarly, Justice Cardozo noted that the personhood of corporations was the product of logic and not history, Benjamin N. Cardozo, *The Nature of the Judicial Process* 53 (Yale Univ. Press 1921).

important habeas corpus issues in decades and the lower court's resolution of the matter is in fundamental tension with core tenets of the historical writ of habeas corpus." *Letter Brief of Amicus Curiae Justin Marceau*, at 3, a true and correct copy of which is attached to the Second Kiko Petition as Exhibit 9. Taken together, it is clear that *Lavery* does not enunciate a settled principle of law or legal issue.

Second, that the Fourth Department decided *Presti* a month after the Third Department decided *Lavery*, failed to cite *Lavery* for the proposition that a chimpanzee could not be a "person" for the purpose of a common law writ of habeas corpus, or for any other proposition, and twice suggested, without deciding, that it might agree with the NhRP's claim that Kiko was a "person" for the purpose of Article 70, *Presti*, 124 A.D.3d at 1335, implies that the issue of chimpanzees not being persons for the purpose of habeas corpus was not settled.

Third, *Lavery* directly conflicts with the decision of the Court of Appeals in *Byrn*, 31 N.Y. 2d 194. As noted, in *Byrn*, the Court of Appeals made clear that the determination of personhood is a matter of public policy, not biology (in *Byrn* a fetus was declared both human and not a person). *Id.* at 201. *Lavery* erroneously concluded that only a human could be a "person," and as a result, failed to address the detailed public policy analysis in favor of personhood that the NhRP proffered in its brief and that *Byrn* required. 124 A.D.3d at 148-53. When faced with a choice of being bound by the Court of Appeals decision in *Byrn*, which demands that a decision regarding personhood be made only after a careful public policy analysis, or the conflicting decision of the Third Department in *Lavery*, which makes personhood a mere biological decision, this Court must be bound by *Byrn.*

3. *Lavery* was wrongly decided.

    a. The ability to shoulder duties and responsibilities is not, and has never been, necessary for legal personhood, especially for the purpose of a common law writ of habeas corpus.

Lavery is an outlier. It was the first decision in Anglo-American history to hold that an inability to shoulder duties and responsibilities is a sufficient ground for denying a fundamental

common law right to an individual (except in the interest of the individual's own interest), much less an autonomous, self-determining entity who is seeking the relief of a common law writ of habeas corpus. The *Lavery* court wrote that "animals have never been considered persons for the purpose of habeas corpus relief, nor have they been explicitly considered as persons or entities for the purpose of state or federal law." *Lavery*, 124 A.D.3d at 150. However, that is because no federal or state court had ever rejected the claim of personhood on behalf of an autonomous and self-determining nonhuman animal for the purpose of seeking common law habeas corpus relief, as no such claim had ever been presented. Moreover, New York expressly allows nonhuman animals to be trust beneficiaries and provides for an enforcer for a nonhuman animal beneficiary who "performs the same function as a guardian ad litem for an incapacitated person[.]" *In re Fouts*, 677 N.Y.S.2d 699, 700 (Sur. Ct. 1998). *See* argument, *infra*, at Section IV-E-4. The legislature's refusal to condition the personhood of nonhuman animal beneficiaries upon their ability to shoulder duties and responsibilities, *directly contradicts* the Third Department's assertion that legal personhood in New York is premised upon the ability to shoulder duties and responsibilities and that no nonhuman animal may be a "person" for any purpose.

Moreover, none of the cases the Third Department cited supported its proposition quoted above. The decisions were all "standing" cases that were dismissed pursuant to Article III of the United States Constitution or because the specific definition of "person" provided by the enabling statute did not include nonhuman animals. Not one case involved common law claims, as in the case of Kiko or any of the other imprisoned chimpanzees; all involved statutory or constitutional interpretation. In *Lewis v. Burger King*, 344 Fed. Appx. 470 (10th Cir. 2009), the *pro se* plaintiff, untrained in law, claimed her service dog had been given Article III standing to sue under the Americans with Disabilities Act of 1990, a claim the federal court properly rejected. In *Cetacean Community v. Bush*, 386 F. 3d 1169 (9th Cir. 2004), the federal court held that all the cetaceans of the world had not been given Article III standing to sue under the Federal Endangered Species Act and were not "persons" within that statute's definition of "person." In *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks*

& Entertainment, 842 F. Supp.2d 1259 (S.D. Cal. 2012), the federal district court held that the legislative history of the Thirteenth Amendment to the United States Constitution (which, unlike the Fourteenth Amendment, does not contain the word "person") makes clear that it was only intended to apply to human beings. Finally, in *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993), the federal district court dismissed the case on the ground of Article III standing, stating that a dolphin was not a "person" within the meaning of Section 702 of Title 5 of the Federal Administrative Procedures Act.

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

The NhRP, which was an *amicus curiae* in the *Tilikum* case *supra*, and whose counsel was plaintiff's counsel in *Citizens to End Animal Suffering & Exploitation, Inc.*, *supra*, did not bring the cases of Tommy, Kiko, and, Hercules or Leo in a federal court subject to Article III.[20] Nor, importantly, did the NhRP base its claims on federal or state statutes or on constitutional provisions. It instead sought a New York writ of habeas corpus, which substantively is entirely a matter of common law. *See Lavery*, 124 A.D.3d at 150 ("we must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach"); CPLR 7001 ("the provisions of this article are applicable to common law or statutory writs of habeas corpus").

Similarly, none of the three cited cases supported the Third Department's statement that "habeas corpus has never been provided to any nonhuman entity," *Lavery*, 124 A.D.3d at 150, if what that court meant was that no entity that could possibly be detained against its will has ever

[20] The NhRP (under its former name of The Center for the Expansion of Fundamental Rights, Inc.) filed an *amicus* brief in the *Tilikum* case in which it argued that the capacity of the orcas to sue should be determined by their domicile, as the Court *in Citizens to End Animal Suffering & Exploitation, Inc.*, 842 F. Supp.2d at 49, had stated.

been denied a writ of habeas corpus. In *United States v. Mett*, 65 F. 3d 1531, 1534 (9th Cir. 1995), the federal court *permitted* a corporation to utilize a writ of coram nobis. In *Waste Management of Wisconsin, Inc. v. Fokakis*, 614 F. 2d 138, 140 (7th Cir. 1980) the federal court refused to grant habeas corpus to a corporation solely "because a corporation's entity status precludes it from being incarcerated or ever being held in custody." In *Sisquoc Ranch Co. v. Roth*, 153 F. 2d 437, 439 (9th Cir. 1946), the federal court held that the fact that a corporation has a contractual relationship with a human being did not give it standing to seek a writ of habeas corpus on its own behalf. Finally, in *Graham v. State of New York*, 25 A.D.2d 693 (3d Dept. 1966), the Court stated that the purpose of a writ of habeas corpus is to free prisoners from detention, not to secure the return of *inanimate* personal property, which was the relief demanded.[21] In sum, no nonhuman who could possibly be imprisoned has ever demanded the issuance of a writ of habeas corpus, whether common law or statutory in the United States.

The reason there is no precedent for treating nonhuman animals as persons for the purpose of securing habeas corpus relief then is not because the claim has been rejected by the courts. It is because no nonhuman entity capable of being imprisoned (unlike a corporation), certainly not a nonhuman animal, and most certainly not an autonomous, self-determining being such as a chimpanzee, has ever demanded a writ of habeas corpus. The NhRP's cases are the first such demands ever made on behalf of a nonhuman animal in a common law jurisdiction. But the novelty of their claim is no reason to deny Kiko, or any of the imprisoned chimpanzees, habeas corpus relief. *See, e.g.*, *Crook*, 25 F. Cas. at 697 (that no Native American had previously sought relief pursuant to the Federal Habeas Corpus Act did not foreclose a Native American from being characterized as a "person" and being awarded the requested habeas corpus relief); *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (that no human slave had ever been

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

granted a writ of habeas corpus was no obstacle to the court granting one to the slave petitioner); *see also Lemmon*, 20 N.Y. 562.

In *Lavery*, 124 A.D.3d at 151, the court wrote:

> [T]he ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity of rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system. (see Richard L. Cupp, Jr., "Children, Chimps, and Rights: Arguments from 'Marginal' Cases,'" 45 *Ariz. St. LJ* 1, 12-14 (2013); Richard L. Cupp, Jr., "Moving Beyond Animal Rights: A Legal Contractualist Critique," 46 *San Diego L. Rev.* 27, 69-70 (2009); *see also Matter of Gault*, 387 U.S. 1, 20-21 (1967); *United States v. Barona*, 56 F.3d 1087, 1093-1094 (9th Cir. 1995), *cert. denied* 516 US 1092 (1996). Under this view, society extends rights in exchange for an express or implied agreement of its members to submit to social responsibilities. In other words, "Rights [are] connected to moral agency and the ability to accept societal responsibility for [those] rights" (Richard L. Cupp Jr., "Children, Chimps, and Rights: Arguments from 'Marginal Cases,'" 45 *Ariz. St. LJ* 1, 13 (2013); Richard L. Cupp, Jr., "Moving Beyond Animal Rights: A Legal Contractualist Critique," 46 *San Diego L. Rev.* 27, 69 (2009).

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

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

> "People of the United States" even when he or she steps outside the territorial borders of the United States.

This case is not relevant to the case at bar because it: (1) deals with an interpretation of the United States Constitution, rather than New York common law, and (2) concerns the interpretation of the constitutional phrase "the People of the United States," not the New York common law meaning of the term "person," which is the issue in the case at bar. Finally, the two law review articles cited by the *Lavery* court do not rely upon law or legal reasoning, but merely set forth Professor Cupp's personal preference for an exceedingly narrow branch of philosophical theory of contractualism that arbitrarily excludes every nonhuman animal, while including every human being, in support of which he cites no cases.[22] This caused the Third Department similarly to arbitrarily exclude every nonhuman animal, while including every human being.

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

> Application of the habeas statute to persons[23] detained at the base (in Guantanamo) is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, [n.11] *See, e.g.*, *King v. Schiever,* 2 Burr. 765, 97 Eng. Rep. 551 (K.B.1759) (reviewing the habeas petition of a neutral alien deemed a prisoner of war because he was captured aboard an enemy French privateer during a war between England and France); *Sommersett v. Stewart*, 20 How. St. Tr. 1, 79–82 (K.B.1772) (releasing on habeas an African slave purchased in Virginia and detained on a ship docked in England and bound for Jamaica); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K.B.1810) (reviewing the habeas petition of a "native of South Africa" allegedly held in private custody).

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[22] Even contractualist philosophers may argue that it embraces nonhuman animals. *E.g*., Thomas M. Scanlon, *What We Owe Each Other* 179, 183 (1998).

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

> American courts followed a similar practice in the early years of the Republic. See, *e.g., United States v. Villato*, 2 Dall. 379 (CC Pa. 1797) (granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States); *Ex parte D'Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813) (Story, J., on circuit) (ordering the release of Portuguese sailors arrested for deserting their ship); *Wilson v. Izard*, 30 F. Cas. 131 (No. 131 (No. 17, 810); (Livingston, J., on circuit) (reviewing the habeas petition of enlistees who claimed that they were entitled to discharge because of their status as enemy aliens).

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

Moreover, the words "duty," "duties," or "responsibility" do not appear in the *Byrn* majority opinion, which concerned the issue of whether a fetus was a "person" within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution.[24] This was no accident. The Third Department ignored the Court of Appeals' teaching of *Byrn* that "[w]hether the law should accord legal personality is a *policy question*." 31 N.Y.2d at 201 (emphasis added). "It is not true . . . that the legal order necessarily corresponds to the natural order." *Id.* "The point is that it is a *policy determination* whether legal personality should attach and *not a question of biological or 'natural' correspondence*." *Id*. (emphasis added). *See* Paton, *supra*, at 349-50, *Salmond on Jurisprudence* 305 (12th ed. 1928) ("A legal person is any subject-

[24] The words "duty," "duties, or "responsibility" do not appear anywhere in the Second Department's *Byrn* opinion either, with the single exception of the court noting that a lower federal court had upheld a restrictive abortion statute and stated that once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the State the duty of safeguarding it. *Byrn v. New York City Health & Hospitals Corp*., 39 A.D.2d 600 (2d Dept. 1972).

matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination.").

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

Esteemed commentators cited both by the *Byrn* majority and the Indian Supreme Court agree. "Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol." George Whitecross Paton, *A Textbook of Jurisprudence* 393 (3rd ed. 1964). *Idols have no duties or responsibilities*. Indeed, John Chipman Gray, cited by the *Byrn* Court, makes clear that a "person" need not even be alive. "There is no difficulty giving legal rights to a *supernatural* being and thus making him or her a legal person." Gray, *supra* Chapter II, 39 (1909) (emphasis added). *Such a being has no duties or responsibilities*. As Gray explained, there may also be

> *systems of law in which animals have legal rights . . . animals may conceivably be legal persons* . . . when, if ever, this is the case, the wills of human beings must be attributed to the animals. *There seems no essential difference between the fiction in such cases and those where, to a human being wanting in legal will, the will of another is attributed*.

Id. at 43 (emphasis added).[25]

The Third Department therefore erred in *Lavery* by failing to recognize that the decision whether a chimpanzee such as Kiko is a "person" for the purpose of demanding a common law writ of habeas corpus was entirely a *policy* question, and not a biological question. It further

[25] The New York Legislature recognized this when it enacted EPTL 7-8.1, which provided for an "enforcer" to enforce the nonhuman animal beneficiary's right to the trust corpus.

failed to address the powerful uncontroverted policy arguments, based upon fundamental common law values of liberty and equality, that the NhRP presented in great detail both in that case, the Hercules and Leo cases, and in the case at bar.

Further, the Third Department in *Lavery* mistook the NhRP's demand for the "immunity-right" of bodily liberty, to which the ability to shoulder duties and responsibilities is irrelevant, with a "claim-right." Linking personhood to an ability to shoulder duties and responsibilities is particularly inappropriate in the context of a common law writ of habeas corpus to enforce the fundamental common law immunity-right to bodily integrity. The Third Department's linkage of the two caused it to commit a serious "category of rights" error by mistaking an "immunity-right" for a "claim-right." *See generally*, Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913). The great Yale jurisprudential professor, Wesley N. Hohfeld's, conception of the comparative structure of rights has, for a century, been employed as the overwhelming choice of courts, jurisprudential writers, and moral philosophers when they discuss what rights are. Hohfeld began his famous article by noting that "[o]ne of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties'" and that "the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense." *Id*. at 28, 30.

With the greatest delicacy, Hohfeld gently pointed out, *id*. at 27, that even the distinguished jurisprudential writer, John Chipman Gray, made the same mistake as did the Third Department Court in his *Nature and Sources of the Law*.

> In [Gray's] chapter on "Legal Rights and Duties," the distinguished author takes the position that a right always has a duty as its correlative; and he seems to define the former relation substantially according to the more limited meaning of 'claim.' Legal privileges, powers, and immunities are *prima facie* ignored, and the

> impression conveyed that all legal relations can be comprehended under the conceptions, 'right' and 'duty.'[26]

The reason is that a claim-right, which the NhRP has *not* demanded in any previous habeas corpus petition on behalf of a chimpanzee, is comprised of a claim and a duty that correlate one with the other. Steven M. Wise, *Rattling the Cage – Toward Legal Rights for Animals* 56-57 (Perseus Publishing 2000); Steven M. Wise, *Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VERMONT L. REV. 807-10 (1998). The most conservative, but hardly the most common, way to identify which entity possesses a claim-right is to require that entity to have the capacity to assert claims within a moral community. Steven M. Wise, *Rattling the Cage*, at 57; Steven M. Wise, *Hardly a Revolution*, at 808-10. This is roughly akin to the personhood test the Third Department applied in *Lavery*.

Instead it is seeking the fundamental *immunity-right* to bodily liberty that is protected by a common law writ of habeas corpus. This immunity-right is what the United States Supreme Court was referring to when it stated that "'[t]he right to one's person may be said to be a right of complete *immunity*: to be let alone.'" *Union P. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (quoting *Cooley on Torts* 29) (emphasis added).

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

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

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

The NhRP argues that Kiko has the common law immunity-right to the bodily liberty protected by the common law of habeas corpus. This fundamental immunity-right correlates solely with the Respondents' disability to imprison him. The existence or nonexistence of Kiko's ability to shoulder duties and responsibilities is entirely irrelevant; it is irrelevant to every immunity-right. It is particularly inappropriate to demand that, for Kiko to possess the fundamental immunity right to bodily liberty protected by the common law of habeas corpus, he must possess the ability to shoulder duties and responsibilities, when this ability has nothing whatsoever to do with his fundamental immunity-right to bodily liberty. It might make sense, for example, if Kiko was seeking to enforce a common law contractual right. But the ability to shoulder duties and responsibilities is not even a prerequisite for the claim-right of a "domestic or pet" animal in New York, pursuant to EPTL 7-8.1 Furthermore, this statute actually does grant not just Kiko, who is a beneficiary of a trust the NhRP created for him prior to the litigation, but every other "domestic or pet" animal in New York, the claim right to the money placed in the trust to which that nonhuman animal is a named beneficiary.[27]

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

The Third Department thus erred in requiring that a "person" for the purpose of securing a common law writ of habeas corpus be capable of shouldering duties and responsibilities; in practical terms, that the claimant be a human being. *Lavery*, 124 A.D.3d at 151-53. In arriving at this conclusion, the court relied on inapposite cases, cited law review articles that endorse a minority philosophical argument, and ignored not just EPTL 7-8.1, *supra*, but multiple teachings of the New York Court of Appeals set forth in the *Byrn* case establishing that personhood is a matter of public policy, *supra*.

b. The Third Department exceeded its authority by taking judicial notice, without notice to the parties, that chimpanzees lack the capacity to shoulder duties and responsibilities.

The Third Department further improperly took judicial notice of the alleged scientific fact that chimpanzees lack the capacity to shoulder duties and responsibilities. *Lavery*, 124 A.D.3d at 151. *See Hamilton v. Miller*, 23 N.Y.3d 592, 603-04 (2014) ("scientific" facts are inappropriate for judicial notice); *TOA Const. Co. v. Tsitsires*, 54 A.D.3d 109, 115 (1st Dept. 2008). A New York court may only take judicial notice of facts "which everyone knows," *States v. Lourdes Hosp*., 100 N.Y.2d 208, 213 (2003) or which are common knowledge, notorious, or indisputable. *TOA Const.*, 54 A.D.3d at 115; *People v. Darby*, 263 A.D.2d 112, 114 (1st Dept. 2000); *People v. Jovanovic*, 263 A.D.2d 182, 203 (1st Dept. 1999). Judicial notice of a fact is only proper when adjudicative facts are commonly known to exist. *Dollas v. W.R. Grace & Co*., 225 A.D.2d 319, 320 (1st Dept. 1996). "Adjudicative facts" are "propositions of general knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." Jack B. Weinstein, Harold Korn & Arthur R. Miller, *New York Civil Practice*, § 4511.02 (2d Ed. 2005). *See People v. Jones*, 73 N.Y.2d 427, 431 (1989) (same). A "court may only apply judicial notice to matters 'of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain. The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof.'" *Dollas*, 225 A.D.2d at 320 (quoting *Ecco High Frequency Corp. v. Amtorg Trading Corp*., 81 N.Y.S.2d

610, 617 (N.Y. Sup. Ct. 1948) ("It is quite clear that within this rule the doctrine has no place in this case.").

That chimpanzees cannot shoulder duties and responsibilities is not an adjudicative fact, but a scientific fact that requires proof through expert testimony. Judicial notice is inappropriate in "scientifically complex cases." *Hamilton*, 23 N.Y.3d at 603-04. In *Hamilton*, the Court of Appeals admonished, "[w]hat Hamilton really wanted was to have Supreme Court take judicial notice of the fact that exposure to lead paint can cause injury. . . . But general causation, at least in scientifically complex cases, is not such a fact. Hamilton needs to prove, through scientific evidence, that exposure to lead-based paint can cause the injuries of which he complains." *Id.* (citing *Parker v. Mobil Oil Corp*., 7 N.Y.3d 434, 448 (2006)). The Court added, "[h]e cannot avoid that burden simply because Congress, in statutory preambles, has opined on the dangers of lead-based paint." *Id.* As it is inappropriate to take judicial notice of scientific facts found in "statutory preambles," *id.*, it was inappropriate for the Third Department to take judicial notice of scientific facts based solely upon two law review articles written by a lawyer, who is not a scientist, neither of which even cited to any peer-reviewed scientific evidence of the alleged incapacity of chimpanzees to shoulder duties and responsibilities. *See Lavery*, 124 A.D.3d at 151 (relying on two law review articles by Richard L. Cupp. Jr. for its conclusion).[28]

[28] Some facts considered "scientific" are appropriate for judicial notice. But they must be "notorious facts" that cannot be disputed and are supported by reference "to sources of indisputable reliability." *In re Perra*, 827 N.Y.S.2d 587, 592 (Sup. Ct. 2006). For instance, in *Perra*, the court took "judicial notice that smoking while pregnant has a harmful effect on the fetus, leading to the increased possibility of Sudden Infant Death Syndrome, or SIDS, after the baby is born," reasoning, "[i]t is well-established that notorious facts relating to human life can be judicially noticed." *Id.* (citing Prince, Richardson on Evidence, § 2–204 et seq. (Farrell 11th ed.)). In so doing, the court based its notice on a number of "indisputably reliable" sources including "the *2006 Surgeon General's Report On The Health Consequences of Involuntary Exposure to Tobacco Smoke*," a "document created by the Office of the Surgeon General and the U.S. Department of Health and Human Services." The "Report collects and analyzes the vast amount of research, both past and current, performed in the area of tobacco smoking and its effects on various aspects of health. The Surgeon General has released its report documenting the health effects of tobacco smoke since 1977 (DHHS 2006 I). Since that time, the Surgeon General's report has been much discussed and its findings much publicized in the years since, such that no reasonable person could state their lack of awareness as to the deleterious effects of tobacco smoking." *Id.* The court even observed: "Indeed, the findings of the Surgeon General are so well-respected and well-publicized

For a court to take judicial notice of a fact, the source of the underlying information must be of "indisputable accuracy." *Crater Club v. Adirondack Park Agency*, 86 A.D.2d 714, 715 (3d Dept. 1982). The use of judicial notice as a substitute for foundation testimony should be limited to those situations in which the records are so "patently trustworthy as to be self-authenticating." *People v. Kennedy*, 68 N.Y.2d 569, 577 (1986). Neither of the law review articles relied upon by the Third Department is a source of "indisputable accuracy" nor "patently trustworthy as to be self-authenticating" on the fact that chimpanzees lack the capacity to shoulder duties and responsibilities. *Id. See*, *e.g.*, *TOA Const.*, 54 A.D.3d at 115. *See also Robinson ex rel. Chapman v. Bartlett*, 95 A.D.3d 1531, 1536 (3d Dept. 2012).

Judicial notice by the Third Department was further inappropriate "because of the novelty of the issue in this State." *Brown v. Muniz*, 61 A.D.3d 526, 528 (1st Dept. 2009). In *Brown*, the First Department refused to take judicial notice of the fact that a driver can react to an emergency situation in less than a second because it was novel in New York State. *Id.* There is not a single case in New York, or in any other state to the NhRP's 's knowledge, where a court has taken judicial notice of the "fact" that chimpanzees cannot shoulder duties and responsibilities.[29]

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that other nations, such as Great Britain, base their anti-smoking laws on the Surgeon General's reports." *Id.* (citations omitted). Respectfully, the same cannot be said of the Cupp articles.

[29] Assuming, *arguendo*, that the Third Department properly considered chimpanzees' capacity for shouldering duties and responsibilities appropriate for judicial notice, the Third Department's *sua sponte* judicial notice of that fact, without providing the NhRP notice or opportunity to be heard, deprived the NhRP of its right to fundamental fairness. *Brown*, 61 A.D.3d at 528 (fairness "require[s] that we 'afford the parties the opportunity to be heard as to the propriety of taking judicial notice in the particular instance.'") (citing Prince, Richardson On Evidence § 2–202 [Farrell 11th ed.])). "[F]undamental fairness dictates that [the court] should provide the parties with advance notice of its intention to" take judicial notice of facts. *Chasalow v. Bd. of Assessors*, 176 A.D.2d 800, 804 (2d Dept. 1991) (citing Richardson, Evidence § 14 [Prince 10th Ed]). *See Am. Exp. Bank, FSB v. Bienenstock*, 17 N.Y.S.3d 381, 2015 N.Y. Misc. LEXIS 2116, *1-2 (2d Dept. 2015) (same). As the Third Department "did not give the parties advance notice of its intention to take judicial notice, the court improperly considered the 'facts' of which it took judicial notice." *Id. See also Brown*, 61 A.D.3d at 528 ("Here, neither party requested that we take judicial notice of the "fact" that a driver can react to an emergency situation in less than a second, and thus the parties have not had the opportunity to address this issue.").

c. If the capacity to shoulder duties and responsibilities is required for habeas corpus personhood, then the NhRP has demonstrated that Kiko possesses that capacity.

As argued, *supra*, the Third Department in *Lavery* erred in holding that the capacity to shoulder duties and responsibilities is required for habeas corpus personhood. Even if this Court agrees with the Third Department's erroneous premise – that rights are contingent upon the ability to shoulder duties and responsibilities – or disagrees but believes it is bound to follow that court's holding, it must still order Kiko discharged as the evidence presented in this case demonstrates, *supra* at Section III-B, that Kiko possesses the capacity to shoulder duties and responsibilities and has otherwise met every fair requirement to be considered a "person" for the purpose of demanding a common law writ of habeas corpus.

In the attached Supplemental Affidavits and the affidavit of Dr. Jane Goodall, some of the world's greatest experts in chimpanzee cognition set forth facts that conclusively demonstrate that chimpanzees such as Kiko understand and shoulder duties and responsibilities, in their own societies and human/chimpanzee societies, including, among others, the capacity to knowingly assume obligations then honor them, behave in ways both lawful and rule-governed, have moral inclinations and a level of moral agency, ostracize individuals who violate social norms, respond negatively to inequitable situations, have a social life that is cooperative and represents a purposeful and well-coordinated social system, routinely enter into contractual agreements, keep promises and secrets, assume death-related duties, prefer fair exchanges, and show concern for others' welfare. This is far and away a showing sufficient for personhood to the limited extent of Kiko's being able to invoke the common law writ of habeas corpus and thereby seek the aid of this Court to prevent his being condemned to a lifetime of imprisonment.

4. As common law natural persons are presumed free, Respondents must prove they are not unlawfully imprisoning Kiko.

Its roots anchored into the depths of English history, the common law has been "viewed as a principle safeguard against infringement of individual rights." Judith S. Kaye, *Forward: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual*

Rights, 23 RUTGERS L. J. 727, 730 (1992) (hereafter "Judith S. Kaye"). All autonomous common law natural persons are presumed to be entitled to personal liberty (*in favorem libertatis*). *See Oatfield v. Waring*, 14 Johns. 188, 193 (Sup. Ct. 1817) (on the question of a slave's manumission, "all presumptions in favor of personal liberty and freedom ought to be made"); *Fish v. Fisher*, 2 Johns. Cas. 89, 90 (Sup. Ct. 1800) (Radcliffe, J.); *People ex. rel Caldwell v Kelly*, 13 Abb.Pr. 405, 35 Barb. 444, 457-58 (Sup Ct. 1862) (Potter, J.).

The common law of England, incorporated into New York law, was long *in favorem libertatis* ("in favor of liberty").[30] Francis Bacon, "The argument of Sir Francis Bacon, His Majesty's Solicitor General, in the Case of the Post-Nati of Scotland," in IV *The Works Of Francis Bacon, Baron of Verulam, Viscount St. Alban And Lord Chancellor* 345 (1845) (1608); 1 Sir Edward Coke, *The First Part of the Institutes of the Laws of England* sec. 193, at *124b (1628); Sir John Fortescue, *De Laudibus Legum Angliae* 105 (S.B. Chrimes, trans. 1942 [1545]). *See, e.g.*, *Moore v. MacDuff*, 309 N.Y. 35, 43 (1955); *Whitford v. Panama R. Co.*, 23 N.Y. 465, 467-68 (1861) ("prima facie, a man is entitled to personal freedom, and the absence of bodily restraint . . ."); *In re Kirk*, 1 Edm. Sel. Cas. at 327 ("In a case involving personal liberty [of a fugitive slave] where the fact is left in such obscurity that it can be helped out only by intendments, the well established rule of law requires that intendment shall be in favor of the prisoner."); *Oatfield*, 14 Johns. at 193; *Fish*, 2 Johns. Cas. at 90 (Radcliffe, J.); *Kelly*, 33 Barb. at 457-58 (Potter, J.) ("Liberty and freedom are man's natural conditions; presumptions should be in favor of this construction."). New York statutes are in accord with this common law presumption. *See* N.Y. Stat. Law § 314 (McKinney) ("A statute restraining personal liberty is strictly construed"); *People ex rel. Carollo v. Brophy*, 294 N.Y. 540, 545 (1945); *People v. Forbes*, 19 How. Pr. 457, 11 Abb.Pr. 52 (N.Y. Sup. Ct. 1860) (statutes must be "executed carefully in favor of the liberty of the citizen").

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

After a petitioner makes a *prima facie* showing it meets the requirements of CPLR 7002(c) (requiring petitioner to state that the person is "detained" and the "nature of the illegality"), the court must issue the writ, or show cause order, without delay. CPLR 7003(a). The burden then shifts to the respondents to present facts that show the detention is lawful. CPLR 7006(a). The respondents' return must:

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

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

As demonstrated herein, Kiko is a "person" for the purpose of a common law writ of habeas corpus because he is autonomous and self-determining and his detention is therefore unlawful. *See Somerset*, 98 Eng.Rep. 499; *Lemmon*, 20 N.Y. at 604-05, 617. *See also In re DeSanto*, 898 N.Y.S.2d 787, 789 (Sup. Ct. 2010).

5. Because Kiko is being unlawfully detained, he is entitled to immediate discharge.

An unlawfully imprisoned "person" in New York must be discharged forthwith. *People ex re. Stabile v. Warden of City Prison*, 202 N.Y. 138, 152 (1911). This may require discharging the person into the care or custody of another. Imprisoned children and incapacitated adults have been discharged from slavery, industrial training schools, mental institutions, and other unlawful imprisonments into the custody of another. Before the Civil War, children detained as slaves were discharged through common law writs of habeas corpus into another's care. *Lemmon*, 20 N.Y. at 632 (discharged slaves included two seven-year-olds, a five-year-old, and a two-year-old); *Commonwealth v. Taylor*, 44 Mass. 72, 72-74 (1841) (seven or eight-year-old slave discharged into care of the Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Aves*, 35 Mass. 193 (1836) (seven-year-old girl discharged into custody of Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Holloway*, 2 Serg. & Rawle 305 (Pa. 1816)

(slave child discharged); *State v. Pitney*, 1 N.J.L. 165 (N.J. 1793) (legally manumitted child discharged).

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

Minors have been discharged from mental institutions pursuant to habeas corpus into the custody of another, *People ex rel. Intner on Behalf of Harris v. Surles*, 566 N.Y.S.2d 512, 515 (Sup. Ct. 1991), as have child apprentices, *People v. Hanna*, 3 How. Pr. 39, 45 (N.Y. Sup. Ct. 1847) (ordering "discharge" of a minor unlawfully held as an apprentice upon writ of habeas corpus brought on his behalf); *In re M'Dowle*, 8 Johns 328 (Sup. Ct. 1811), and incapacitated adults, *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996) (elderly and ill woman showing signs of dementia); *State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982) ("elderly and apparently sick lady"); *Siveke v. Keena*, 441 N.Y.S. 2d 631 (Sup. Ct. 1981) (elderly and ill man).

That the NhRP seeks Kiko's ultimate discharge to a primate sanctuary rather than into the wild or onto the streets of New York does not preclude him from habeas corpus relief. *See People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961) (habeas corpus was proper remedy to test the validity of a prisoner's transfer from a state prison to a state hospital for the insane); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943) ("that the appellant is still under a legal

commitment to Elmira Reformatory does not prevent him from invoking the remedy of habeas corpus as a means of avoiding the further enforcement of the order challenged.") (citation omitted); *People ex rel. LaBelle v. Harriman*, 35 A.D.2d 13, 15 (3d Dept. 1970) ("Although relator is also incarcerated on the murder charge, a concededly valid detention, and this writ will not secure his freedom, *habeas corpus may be used to obtain relief other than immediate release* from physical custody.") (emphasis added); *People ex rel. Meltsner v. Follette*, 32 A.D.2d 389, 391 (2d Dept. 1969) ("The sustaining of the writ, however, does not require absolute discharge.") (citing *Johnston* and *Saia*); *cf. People ex rel. Rohrlich v. Follette*, 20 N.Y.2d 297, 302 (1967). The case at bar is exactly analogous to the relief accorded to child slaves, juveniles, and the incapacitated elderly, *supra*.

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

Habeas corpus may even be used to seek a transfer from one facility to another. *See Mental Hygiene Legal Services ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989) (habeas corpus proper to transfer mental patient from secure facility to non-secure facility); *People ex rel. Jesse F. v. Bennett*, 242 A.D.2d 342 (2d Dept. 1997) ("habeas corpus is an appropriate mechanism for transfer"); *People ex rel. Richard S. v. Tekben*, 219 A.D.2d 609, 609 (2d Dept. 1995); *McGraw*

v. Wack, 220 A.D.2d 291, 293 (1st Dept. 1995); *People ex rel. Meltsner*, 32 A.D.2d at 391-92 (sustaining writ of habeas corpus and holding that "the respondent should be directed to afford the relator treatment consistent with his sentence or, if such treatment not be readily available at Green Haven Prison, to transfer the relator to a correctional institution where such treatment is available or to release him."); *State ex rel. Henry L. v. Hawes*, 667 N.Y.S.2d 212, 217 (Co. Ct. 1997) ("this court will direct the *immediate transfer* of relator from Sunmount to a non-secure facility such as Wassaic.") (emphasis added). Such has been the law in New York for nearly a century. Again, the Court in *Stanley* properly rejected Respondents' argument that because the NhRP sought "their transfer to a chimpanzee sanctuary, it has no legal recourse to habeas corpus." 16 N.Y.S.3d at 917 n.2. The Court reasoned that habeas corpus has been used to "secure [the] transfer of [a] mentally ill individual to another institution." *Id.* (citation omitted).

As noted, the Court properly concluded that it was not bound by *Presti* because it conflicts with the First Department and Court of Appeals precedent. *Id.* (citing *McGraw*, 220 A.D.2d at 292; *Matter of MHLS*, 75 N.Y.2d 751). In *Presti*, the 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 ground that the NhRP was neither demanding Kiko's immediate release nor claiming that Kiko's detention was unlawful. Instead, the court incorrectly asserted that the NhRP was merely demanding a transfer to a sanctuary, which, in the court's opinion, was not a remedy for a common law writ of habeas corpus.

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

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

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

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

In the above cases, unlike the case at bar, the inmates were not contending that the fact of their confinement was unlawful, but rather, asserted that some procedural error occurred in their underlying trial or hearing. In the present case, the NhRP has consistently maintained that Kiko's detention is unlawful, thus entitling him to immediate release. Again, this Court recognized as much in the Second Hercules and Leo Petition. *Stanley*, 16 N.Y.S.3d at 917 n.2.

In another case relied upon in *Presti*, *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 691 (1986), the Court of Appeals *reaffirmed* the notion that habeas corpus can be used to seek a transfer to an "institution *separate and different* in nature from the correctional facility to which

petitioner had been committed[.]" (emphasis added) (citing *Johnston*, 9 N.Y.2d 482). In distinguishing the case from *Johnston*, the Court of Appeals explained, "[h]ere, by contrast, petitioner *does not seek his release from custody in the facility*, but only from confinement in the special housing unit, a particular type of confinement within the facility which the Department of Correctional Services is expressly authorized to impose on lawfully sentenced prisoners committed to its custody[.]" *Id.* (citations omitted, emphasis added). In the case at bar, as in *Johnston* and unlike *Dawson*, the NhRP seeks the *complete discharge* of Kiko from Respondents' custody with ultimate placement in a primate sanctuary. As noted, the NhRP's case is analogous to the case of a juvenile, elderly person, or mentally incompetent adult who simply cannot be released onto the streets of New York following a habeas corpus determination that his or her detention is unlawful.

The Third Department in *Berrian v. Duncan*, 289 A.D.2d 655 (3d Dept. 2001) and *People ex rel. McCallister v. McGinnis*, 251 A.D.2d 835 (3d Dept. 1998), the final cases cited by the *Presti* court, relied on *Dawson* in concluding that a prisoner could not use habeas corpus to seek release from a special housing unit of a prison. For the reasons set forth in *Dawson*, *supra*, such a ruling has no bearing here, where 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.

Notwithstanding the few cases cited by the Fourth Department in *Presti*, it is established that even convicted prisoners *may* use habeas corpus to challenge their conditions of confinement without seeking immediate release. *See Johnston*, 9 N.Y.2d at 485; *People ex rel. Jesse F.*, 242 A.D.2d at 342 ("habeas corpus is an appropriate mechanism for transfer from a secure to a nonsecure facility"); *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 251 (2d Dept. 1993) ("habeas corpus is available to challenge the conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. Ceschini v. Warden*, 30 A.D.2d 649, 649 (1st Dept. 1968); *People ex rel. Berry v. McGrath*, 61 Misc. 2d 113, 116 (N.Y. Sup. Ct. 1969) (an "individual . . . is entitled to apply for habeas

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

However, 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 who is utilizing the writ of habeas corpus to secure immediate release from imprisonment and procure for himself the greatest amount of freedom he can possibly have given the fact that, as a chimpanzee, he can neither be released directly into the wild nor onto the streets of New York State.

As a result of its misunderstanding the NhRP and its claims, as well as the law, the Fourth Department erroneously ignored two centuries of case law that the NhRP brought to its attention in which such individuals as child slaves, child apprentices, child residents of training schools, child residents of mental institutions, and mentally incapacitated adults, none of whom could be immediately released onto the streets of the State of New York any more than Kiko could, were nevertheless released from the custody of one entity and immediately transferred into the custody of another. The Third Department in *Lavery* accurately stated: "Notably, 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[.]" 124 A.D.3d at 149 (citation omitted).

This Court properly understood what the NhRP is and the nature of the relief it is seeking. *Stanley*, 16 N.Y.S.3d at 900. As the Court noted at the outset:

> Petitioner is a non-profit organization with a mission to "change the common law status of at least some nonhuman animals from mere things,' which lack the capacity to possess any legal rights, 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." (Pet., ¶¶ 11, 18; Memorandum of Law in Support of Petition [Pet. Memo. of Law] at 71 n 35; *see generally* NhRP website (www.nonhumanrights project.org). . . .
>
> In accordance with its mission, petitioner commenced this litigation and has filed similar cases in several other New York courts with the goal of obtaining legal rights for chimpanzees, and ultimately for other animals.

Id. at 900-01. The Court continued:

> The conditions under which Hercules and Leo are confined are not challenged by petitioner, which denies that they are relevant to the relief it seeks, and it advances no allegation that respondents are violating any federal, state or local laws by holding Hercules and Leo (Pet., ¶¶ 5, 8), nor does it "seek improved welfare for Hercules or Leo" (id.), or otherwise "to reform animal welfare legislation" (id., ¶ 11; see Pet. Memo. of Law at 5). Rather, according to petitioner, the sole issue is whether Hercules and Leo may be legally detained at all.

Id. at 901.

The Fourth Department's *Presti* ruling therefore erroneously contracted the Great Writ for both humans and chimpanzees. This contraction violated the Suspension Clause, Art. I, sec. 4, of the New York Constitution. As noted below, to the extent a statute 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.").

The NhRP however is not challenging the conditions of Kiko's confinement, nor is it requesting his transfer from one facility to another. Rather, the NhRP is first seeking Kiko's immediate release from Respondents' unlawful detention and then a decision on placement in a primate sanctuary in which his right to bodily liberty may be fully enjoyed.

E. KIKO IS A "PERSON" WITHIN THE MEANING OF THE COMMON LAW OF HABEAS CORPUS AND THEREFORE CPLR 7002(A).

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

"Person" in Article 70 refers to its meaning under the New York common law of habeas corpus. This conclusion is supported by three reasons: (1) the legislature's decision not to define "person" in Article 70; (2) the fact that the CPLR, including Article 70 in particular, solely governs procedure; and (3) if Article 70 limits the substantive common law of habeas corpus, it violates the "Suspension Clause" of the New York Constitution, Art. 1 § 4.

First, as the legislature did not define "person" in CPLR Article 70, a court must look to its common law meaning in a common law habeas corpus action. When the legislature intends to define a word in the CPLR, it does. *See* CPLR Article 105. But it neither defined "person" nor intended the word to have any meaning apart from its common law meaning. *Siveke*, 441 N.Y.S. 2d at 633 ("Had the legislature so intended to restrict the application of Article 70 of the CPLR to [infants or persons held by state] it would have done so by use of the appropriate qualifying language. A review of certain case law is further indication that the utilization of the writ is not to be so restrictively construed.").

Generally, in New York, procedural statutes that employ undefined words refer to their common law meaning, particularly where, as here, the action is derived from the common law. *See P.F. Scheidelman & Sons, Inc. v Webster Basket Co*., 257 N.Y.S. 552, 554-55 (Sup. Ct. 1932) (otherwise undefined, "distress" and "distrain" "must be given their common law meaning"), *aff'd*, 236 A.D. 774 (4th Dept. 1932); *Drost v. Hookey*, 25 Misc. 3d 210, 212 (Dist.

Ct 2009) (as neither "tenant at will" nor licensee" were defined by Section 713(7) of the New York Property Actions and Proceedings Law, courts look to their common law definitions). This is true in other states too. *E.g.*, *State v. A.M.R.*, 147 Wash. 2d 91, 94-95 (2002) (en banc) (courts look to common law definitions of otherwise undefined word "person" to determine who may appeal certain orders); *Casto v. Casto*, 404 So. 2d 1046, 1048 (Fla. 1981) (courts look to common law definitions of otherwise undefined words "rendition" of judgment and "entry" of judgment to determine time limit in which to appeal); *Addington v. State*, 199 Kan. 554, 561 (1967) (courts look to common law definition of otherwise undefined word "venue" in habeas corpus petition).

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

Third, to the extent Article 70 limits who is a "person" able to bring a common law writ of habeas corpus, beyond the limitations of the common law itself, it violates the Suspension Clause of the New York Constitution, Art. 1 § 4, which provides that "[t]he privilege of a writ or order of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, or the public safety requires it." The Suspension Clause renders the legislature powerless to deprive an individual of the privilege of the common law writ of habeas corpus. *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939). It "cannot be abrogated, or its efficiency curtailed, by legislative action . . . The remedy against illegal imprisonment afforded by this writ . . . is placed beyond the pale of legislative discretion." *Tweed*, 60 N.Y. at 566. *See, e.g.*, *Matter of Morhous v. Supreme Ct. of State of N.Y.*, 293 N.Y. 131, 135 (1944) (Suspension Clause means that legislature has "no power" to "abridge the privilege of habeas corpus"); *People ex rel. Sabatino*

v. Jennings, 246 N.Y. 258, 260 (1927) (by the Suspension Clause, "the writ of habeas corpus is preserved in all its ancient plenitude"); *People ex rel. Whitman v. Woodward*, 150 A.D. 770, 778 (2d Dept. 1912) (Suspension Clause gives habeas corpus "immunity from curtailment by legislative action"). *See also People ex rel. Bungart v. Wells*, 57 A.D. 140, 141 (2d Dept. 1901) (habeas corpus "cannot be emasculated or curtailed by legislation"); *Whitman*, 150 A.D. at 772 ("no sensible impairment of [habeas corpus] may be tolerated under the guise of either regulating its use or preventing its abuse"); *id.* at 781 (Burr, J., concurring) ("anything . . . essential to the full benefit or protection of the right which the writ is designed to safeguard is 'beyond legislative limitation or impairment'") (citations omitted); *Frost*, 133 A.D. at 187 (writ lies "beyond legislative limitation or impairment").

The question of who is a "person" within the meaning of the common law of habeas corpus is the most important individual issue that may come before a court. If Article 70 interferes with a court's ability to determine whether Kiko is a "person" within the meaning of the common law of habeas corpus, it violates the Suspension Clause. Otherwise the legislature could permanently strip judges of their ability to determine who lives, who dies, who is enslaved, and who is free.

> "Person" is not defined in CPLR article 70, or by the common law of habeas corpus. Petitioner agrees that there exists no legal precedent for defining "person" under article 70 or the common law to include chimpanzees or any other nonhuman animals, or that a writ of habeas corpus has ever been granted to any being other than a human being. Nonetheless, as the Third Department noted in *People ex rel Nonhuman Rights Project, Inc. v. Lavery*, *the lack of precedent does not end the inquiry into whether habeas corpus relief may be extended to chimpanzees.* (124 A.D.3d 148, 150–151, 998 N.Y.S.2d 248 [3d Dept 2014]).

Stanley, 16 N.Y.S.3d at 911 (emphasis added).

Kiko's legal thinghood derives from the common law. However, when justice requires, New York courts refashion the common law—especially the common law of habeas corpus—with the directness Lord Mansfield displayed in *Somerset v. Stewart*, when he held human slavery "so *odious* that nothing can be suffered to support it but positive law." Lofft at 19; 98 Eng. Rep. at 510 (emphasis added). "One of the hallmarks of the writ [is] . . . its great flexibility

and vague scope." *McCann*, 18 N.Y.2d at 263 (citation omitted). Slaves employed the common law writ of habeas corpus to challenge their imprisonment as things. *Lemmon*, 20 N.Y. at 604-06, 618, 623, 630-31 (citing *Somerset*); *In re Belt*, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848); *In re Kirk*, 1 Edm. Sel. Cas. 315 (citing *Somerset* and *Forbes v. Cochran*, 107 Eng. Rep. 450, 467 (K.B. 1824)); *In re Tom*, 5 Johns. 365 (*per curiam*). Non-slaves long employed it in New York, including (1) apprentices and indentured servants, *e.g.*, *People v. Weissenbach*, 60 N.Y. 385, 393 (1875); *In re M'Dowle*, 8 Johns. 328; (2) infants, *Weissenbach*; *M'Dowle*; (3) the incompetent elderly, *Schuse*, 227 A.D.2d 969; and (4) mental incompetents, *Johnston*, 9 N.Y.2d at 485; *Bennett*, 242 A.D.2d 342; *In re Cindy R.*, 970 N.Y.S.2d 853 (Sup. Ct. 2012).

It is not just in the area of habeas corpus that the New York courts freely revise the common law when justice requires, though habeas corpus law is the broadest and most flexible of all. The Court of Appeals has long rejected the claim that "change . . . should come from the Legislature, not the courts." *Woods v. Lancet*, 303 N.Y. 349, 355 (1951). *See W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007, 1009 (Sup. Ct. 1998) ("For those who feel that the incremental change allowed by the Common Law is too slow compared to statute, we refer those disbelievers to the holding in *Somerset v. Stewart*, . . . which stands as an eloquent monument to the fallacy of this view"), *aff'd*, 267 A.D.2d 233 (2d Dept. 1999). "We abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule" the Court in *Woods* declared. 303 N.Y. at 355. *See also Flanagan v. Mount Eden General Hosp.*, 24 N.Y. 2d 427, 434 (1969) ("we would *surrender our own function* if we were to refuse to deliberate upon unsatisfactory court-made rules simply because a period of time has elapsed and the legislature has not seen fit to act") (emphasis added); *Greenburg v. Lorenz*, 9 N.Y. 2d 195, 199-200 (1961) ("Alteration of the law [when the legislature is silent] has been the business of the New York courts for many years.").

The common law is "lawmaking and policymaking by judges . . . in principled fashion, to fit a changing society." Judith S. Kaye, *supra*, at 729. In response to the question in *Woods* whether the Court should bring "the common law of this state, on this question [of whether an

infant could bring suit for injuries suffered before birth] into accord with justice[,]" it answered: "we should make the law conform to right." 303 N.Y. at 351. The Court of Appeals has explained that "Chief Judge Cardozo's preeminent work *The Nature of Judicial Process* captures our role best if judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." *Caceci v. Do Canto, Const. Corp.*, 72 N.Y.2d 52, 60 (1988) (citing Cardozo, *Nature of Judicial Process*, at 152).

Therefore, in New York, "'[w]hen the ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.' [The Court] act[s] in the finest common-law tradition when [it] adapt[s] and alter[s] decisional law to produce common-sense justice." *Woods*, 303 N.Y. at 355 (quoting *United Australia, Ltd., v. Barclay's Bank, Ltd.*, (1941) A.C. 1, 29). New York courts have "*not only the right, but the duty to re-examine a question where justice demands it*" to "bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past." *Id.* (emphasis added) (quoting *Funk v. United States*, 290 U.S. 371, 382 (1933)). *See, e.g.*, *Gallagher v. St. Raymond's R.C. Church*, 21 N.Y.2d 554, 558 (1968) ("the common law of the State is not an anachronism, but is a living law which responds to the surging reality of changed conditions"); *Millington v. Southeastern Elevator Co*., 22 N.Y.2d 498, 508 (1968) ("No recitation of authority is needed to indicate that this court has not been backward in overturning unsound precedent."); *Bing v. Thunig*, 2 N.Y.2d 656, 668 (1957) (a rule of law "out of tune with the life about us, at variance with modern day needs and with concepts of justice and fair dealing . . . [i]t should be discarded"); *Silver v. Great American Ins. Co*., 29 N.Y.2d 356, 363 (1972) ("Stare decisis does not compel us to follow blindly a court-created rule . . . once we are persuaded that reason and a right sense of justice recommend its change."); *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 391 (1916) (legal principles "are whatever the needs of life in a developing civilization require them to be"); *Rumsey v. New York and New England Railway Co*., 133 N.Y. 79, 85 (1892) (quoting 1 *Kent's Commentaries* 477 (13th edition

1884) ("cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error")).

2. As Kiko is autonomous and self-determining, he is a common law "person" entitled to the common law right to bodily liberty that the common law of habeas corpus protects.

"Anglo-American law starts with the premise of thorough-going self determination." *Natanson v. Kline*, 186 Kan. 393, 406 (1960), *decision clarified on den. of reh'g*, 187 Kan. 186 (1960). The United States Supreme Court famously held that

> [n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . "The right to one's person may be said to be a right of complete immunity: to be let alone."

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

The word "autonomy" derives from the Greek "autos" ("self") and "nomos" (law"). Michael Rosen, *Dignity – Its History and Meaning* 4-5 (2012). *See State v. Perry*, 610 So. 2d 746, 767 (La. 1992) ("The retributory theory of punishment presupposes that each human being possesses autonomy, a kind of rational freedom which entitles him or her to dignity and respect as a person which is morally sacred and inviolate."). Its deprivation is a deprivation of common law dignity, *People v. Rosen*, 81 N.Y. 2d 237, 245 (1993); *Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986); *In re Gabr*, 39 Misc. 3d 746, 748 (Sup. Ct. 2013), that "long recognized the right of competent individuals to decide what happens to their bodies." *Grace Plaza of Great Neck, Inc. v. Elbaum*, 82 N.Y.2d 10, 15 (1993). *See*, *e.g.*, *Matter of M.B.*, 6 N.Y.3d 437, 439 (2006); *Rivers*, 67 N.Y.2d at 492; *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (1914).[31]

New York common law so supremely values autonomy that it permits competent adults to decline life-saving treatment. *Matter of Westchester Cnty. Med. Ctr. (O'Connor)*, 72 N.Y.2d

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

517, 526-28 (1988); *Rivers*, 67 N.Y.2d. at 493; *People v. Eulo*, 63 N.Y. 2d 341, 357 (1984); *Matter of Storar*, 52 N.Y.2d 363, 378 (1981), *cert. denied*, 454 U.S. 858 (1981). This "insure[s] that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires." *Rivers*, 67 N.Y.2d at 493. It guarantees the right to defend oneself against criminal charges without counsel. *Matter of Kathleen K.*, 17 N.Y.3d 380, 385 (2011). It permits a permanently incompetent, once-competent human to refuse medical treatment, if he clearly expressed his desire to refuse treatment before incompetence silenced him, and no over-riding state interest exists. *Matter of Storar*, 52 N.Y.2d at 378. Even the never-competent—severely mentally retarded, the severely mentally ill, and the permanently comatose—who will never be competent, lack the ability, have always lacked the ability, and always will lack the ability, to choose, understand, or make a reasoned decision about medical treatment possess common law autonomy and dignity equal to the competent. *Matter of M.B.*, 6 N.Y.3d at 440; *Rivers*, 67 N.Y.2d at 493 (citing *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728 (1977)); *Matter of Storar*, 52 N.Y.2d at 380; *Delio v. Westchester Cnty. Med. Ctr.*, 129 A.D.2d 1, 13-14 (2d Dept. 1987); *Matter of Mark C.H.*, 28 Misc. 3d 765, 775 n.25 (Sur. Ct. 2010) (quoting *Saikewicz*, 373 Mass. at 746); *In re New York Presbyterian Hosp.*, 181 Misc. 2d 142, 151 n.6 (Sup. Ct. 1999).[32]

Chimpanzees' capacities for autonomy and self-determination, which subsume many of their numerous complex cognitive abilities, as set forth in the original Expert Affidavits and certain of the Supplemental Affidavits, include possession of an autobiographical self, episodic memory, self-consciousness, self-knowingness, self-agency, referential and intentional communication, empathy, a working memory, language, metacognition, numerosity, and material, social, and symbolic culture, their ability to plan, engage in mental time-travel,

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

intentional action, sequential learning, mediational learning, mental state modeling, visual perspective-taking, cross-modal perception; their ability to understand cause-and-effect and the experiences of others, to imagine, imitate, engage in deferred imitation, emulate, to innovate and to use and make tools.

In June 2013, the NIH recognized the ability of chimpanzees to choose and self-determine. Accepted Recommendation EA7 states: "The environmental enrichment program developed for chimpanzees must provide for relevant opportunities for *choice and self determination*." (Wise Aff. Ex. A, p. 11) (*Stanley*) (emphasis added). The NIH noted "[a] large number of commenters who responded to this topic strongly supported this recommendation as a way to ensure both the complexity of the captive environment and chimpanzees' ability to *exercise volition with respect to activity, social grouping, and other opportunities*." (*Id*.) (emphasis added).

Autonomous, self-determined, able to choose how to live his life, Kiko is entitled to common law personhood and the common law right to bodily liberty protected by New York common law habeas corpus.

3. Kiko is entitled to the common law equality right to bodily liberty that the common law of habeas corpus protects.

Kiko is entitled to common law personhood and the right to bodily liberty as a matter of common law equality, too. Equality has always been a vital New York value, embraced by constitutional law, statutes, and common law.[33] Article 1, § 11 of the New York Constitution

[33] Equality is a fundamental value throughout Western jurisprudence. *See Vriend v. Alberta*, 1 R.C.S. 493, 536 (Canadian Supreme Court 1998) (Cory and Iacobucci, JJ) ("The concept and principle of equality is almost intuitively understood and cherished by all."); *Miller v. Minister of Defence*, HCJ 4541/94, 49(4) P.D. 94, ¶6 (Israel High Court of Justice 1995) (Strasberg-Cohen, T., J.) ("It is difficult to exaggerate the importance and stature of the principle of equality in any free democratic society."); *Israel Women's Network v. Government*, HCJ 453/94. 454/94, ¶22 (Israel High Court of Justice 1994) ("The principle of equality, which . . . 'is merely the opposite of discrimination' . . . has long been recognized in our law as one of the principles of fairness and justice which every public authority is commanded to withhold.") (citation omitted); *Mabo v. Queensland* (no. 2), 175 CLR 1 F.C. 92-014, ¶29 (Australian Supreme Court 1992) ("equality before the law . . . is [an] aspiration[] of the contemporary Australian legal system"). *See also* Alexis de Toqueville, *Democracy in America*, Book II, Chapter 1, at 65 (Digireads.com Publishing 2007) ("Democratic nations are at all times fond of equality . . . for equality their passion is ardent, insatiable, incessant, invincible; they call for equality in freedom; and if they cannot obtain that, they still

contains both an Equal Protection Clause, modeled on the Fourteenth Amendment to the United States Constitution, and an anti-discrimination clause. "[T]he principles expressed in those sections [of the Constitution] were hardly new." *Brown v. State*, 89 N.Y.2d 172, 188 (1996). As the Court of Appeals explained:

> The Equal Protection Clause of the Fourteenth Amendment had been thoroughly debated and adopted by Congress and ratified by our Legislature after the Civil War, and the concepts underlying it are older still. Indeed, cases may be found in which this Court identified a prohibition against discrimination in the Due Process Clauses of earlier State Constitutions, clauses with antecedents traced to colonial times (*see* [citation omitted] Charter of Liberties and Privileges, 1683, § 15, reprinted in 1 Lincoln, Constitutional History of New York, at 101).

Id.

New York equality values are embedded into New York common law. For example, under the common law, such private entities as common carriers, victualers, and innkeepers may not discriminate unreasonably or unjustly. *See*, *e.g.*, *Hewitt v. New York*, *N.H. & H.R. Co.*, 284 N.Y. 117, 122 (1940) (quoting *Root v. Long Island R. Co*., 114 N.Y. 300, 305 (1889) ("At common law, railroad carriers are under a duty to serve all persons without unjust or unreasonable advantage to any. So this court has said that a carrier should not 'be permitted to unreasonably or unjustly discriminate against other individuals to the injury of their business where the conditions are equal.'")); *New York Tel. Co. v. Siegel-Cooper Co.*, 202 N.Y. 502, 508 (1911) (quoting *Lough v. Outerbridge*, 143 N.Y. 271, 278 (1894) ("'His charges must, therefore, be reasonable, and he must not unjustly discriminate against others.")); *People v. King*, 110 N.Y. 418, 427 (1888) ("By the common law, innkeepers and common carriers are bound to furnish equal facilities to all, without discrimination, because public policy requires them so to do.").

The common-law duty-to-serve on a non-discriminatory basis doctrine is concerned with two distinct yet overlapping interests: equality and autonomy.

> The origins of the duty to serve and the recent direction of the case law suggest that a basic concern for individual autonomy animates the duty to serve. This concern recognizes the vulnerability of individuals to the arbitrary and

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call for equality in slavery."); United States Declaration of Independence (July 4, 1776) ("all men are created equal").

> unreasonable power of private entities. Realizing the importance to the individual of some goods, services, and associations, the duty to serve seeks to limit the power of the controlling entities by allowing exclusion only when based on fair and reasonable grounds.

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

The Expert Affidavits demonstrate that genetically, physiologically, and psychologically, Kiko's interests in exercising his autonomy and self-determination is as fundamental to him as it is to a human being. Recall the United States Supreme Court's admonition that "[n]o right is held more sacred, or is more carefully guarded, by *the common law*, than the right of every individual to the possession and control of his own person[.]" *Botsford*, 141 U.S. at 251 (emphasis added).[34]

However, New York equality is not merely a product of its constitutions, statutes, and common law operating independently. Two decades ago, Chief Justice Kaye confirmed that the two-way street between common law decision-making and constitutional decision-making had resulted in a "common law decision making infused with constitutional values." Judith S. Kaye, *supra*, at 747. In harmony with the common law equality principles that forbid private discrimination founded on unreasonable means or unjust ends, the common law of equality embraces, at a minimum, its sister fundamental constitutional equality value—embedded within the New York and the United States Constitutions—that prohibits discrimination based on irrational means or illegitimate ends. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Sweatt*

[34] On this ground alone, this Court must eventually hold (after it issues the Order to Show Cause) that, as a matter of common law equality, Kiko is entitled to bodily liberty, and his right is protected by the common law of habeas corpus.

v. Painter, 339 U.S. 629, 635 (1950) ("'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.'")).[35]

Common law equality decision-making differs from constitutional equal protection decision-making in that it has nothing to do with a "respect for the separation of powers." *Cleburne v. Cleburne Living Ctr., Inc*., 473 U.S. 432, 441-42 (1985). Instead it applies constitutional equal protection values to an evolving common law. The outcomes of similar common law and constitutional cases may therefore be different.

For example, in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), the Court of Appeals affirmed the constitutionality of New York's statutory limitation of marriage to opposite-sex couples. "The critical question [wa]s whether a rational legislature could decide that these benefits should be given to members of opposite-sex couples, but not same-sex couples." *Id.* at 358. The Court held the legislature could rationally conclude that same-sex relationships are more casual or temporary, to the detriment of children, and assume children do best with a mother and father. *Id.* at 359-60. In the face of a dissent that concluded, "I am confident that future generations will look back on today's decision as an unfortunate misstep," *id*. at 396 (Kaye, C.J., dissenting), the majority "emphasize[d] . . . we are deciding only this constitutional question. *It is not for us to say whether same-sex marriage is right or wrong.*" *Id.* at 366 (emphasis added).

In contrast, a classification's appropriateness is important to a court deciding the common law. It *should* decide what is right and wrong. Its job *is* to do the "right thing." Thus, when it is time for the Court to rule on the merits, the Court *should* recognize Kiko's common law personhood. This Court *should* determine that the classification of a chimpanzee as a "legal thing" invokes an illegitimate end. This Court *should* decide that Kiko has a common law right to bodily liberty sufficient to entitle him to a writ of habeas corpus and a chance to live the autonomous, self-determining life of which he is capable.

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

Kiko's common law classification as a "legal thing," unable to possess any legal rights, rests upon an illegitimate end. *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001). *See*, *e.g.*, *Goodridge v. Dep't of Public Health*, 440 Mass. 309, 330 (2003); *Cleburne*, 473 U.S. at 452 (Stevens, J., concurring).

> Without such a requirement of legitimate public purpose it would seem useless to demand even the most perfect congruence between means and ends, for each law would supply its own indisputable - and indeed tautological fit: if the means chosen burdens one group and benefits others, then the means perfectly fits the end of burdening just those whom the law disadvantage and benefitting just those it assists.

Laurence H. Tribe, *American Constitutional Law* 1440 (second ed. 1988).

In *Romer*, the United States Supreme Court struck down the so-called "Amendment 2," because its purpose of repealing all existing anti-discrimination positive law based upon sexual orientation, was illegitimate. 517 U.S. at 626. It violated equal protection because "*[i]t is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board*." *Id.* at 633 (emphasis added). This statute was "simply so obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violated *basic equal protection values*." *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) (emphasis added). *See Mason v. Granholm*, 2007 WL 201008 (E.D. Mich. 2007) (noting that *Romer* found that Colorado's Amendment 2 was "at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board," the Court struck down an amendment to the Michigan Civil Rights Act that prevented prisoners from suing for a violation of their civil rights while imprisoned as violating federal equal protection); *Goodridge*, 440 Mass. at 330 (same-sex marriage ban impermissibly "identifies persons by a single trait and then denies them protection across the board").

As it would be a tautology for the Equal Protection Clause to fail to demand that a legitimate public purpose or set of purposes based on some conception of the general good be the legislative end, it would be a tautology to determine whether class members are similarly

situated for all purposes. The true test is "'whether they are similarly situated *for purposes of the law challenged.*'" *Kerrigan v. Comm'r of Public Health*, 289 Conn. 135, 158 (2008) (emphasis added) (quoting *Stuart v. Comm'r of Correction*, 266 Conn. 596, 601-02 (2003)).

Denying Kiko his common law right to bodily liberty solely because he is a chimpanzee is a tautology. "'[S]imilarly situated' [cannot] mean simply 'similar in the possession of the classifying trait.' All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test." *Varnum v. O'Brien*, 763 N.W. 2d 862, 882-83 (Iowa 2009) (citations omitted). The "equal protection guarantee requires that laws treat all those who are similarly situated with respect to the purposes of law alike." *Id.* In *Goodridge*, the Supreme Judicial Court of Massachusetts swept aside the argument that the legislature could refuse homosexuals the right to marry because the purpose of marriage is procreation, which they could not accomplish. 440 Mass. at 330. This argument "singles out the one unbridgeable difference between same-sex and opposite sex couples, and transforms that difference into the essence of legal marriage." *Id.* at 333. No one doubts that, if Kiko were human, this Court would instantly issue a writ of habeas corpus and discharge him immediately. Kiko is imprisoned for one reason: he is a chimpanzee. Possessing that "single trait," [he is]"denie[d] . . . protection across the board," *Romer*, 517 U.S. at 633, to which his autonomy and ability to self-determine entitle him.

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

All nonhuman animals were once believed unable to think, believe, remember, reason, and experience emotion. Richard Sorabji, *Animal Minds & Human Morals – The Origins of the Western Debate* 1-96 (1993). Today, not only do the Expert Affidavits and the June 13, 2013

NIH acceptance of The Working Group on the Use of Chimpanzees in NIH-Supported Research within the Council of Councils' Recommendation confirm chimpanzees' extraordinarily complex, often human-like, autonomy and ability to self-determine and expose those ancient, pre-Darwinian prejudices as untrue, but so does the 2011 report of the Institute of Medicine and National Research Council of the National Academies discussing the use of chimpanzees in biomedical research:

> Chimpanzees live in complex social groups characterized by considerable interindividual cooperation, altruism, deception, and cultural transmission of learned behavior (including tool use). Furthermore, laboratory research has demonstrated that chimpanzees can master the rudiments of symbolic language and numericity, that they have the capacity for empathy and self-recognition, and that they have the human-like ability to attribute mental states to themselves and others (known as the "theory of mind"). Finally, in appropriate circumstances, chimpanzees display grief and signs of depression that are reminiscent of human responses to similar situations.[36]

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

For centuries New York courts have rejected slavery, the essence of which is a stripping the slave of her autonomy and harnessing it to the will of the master. *See Jack v. Martin*, 14 Wend. 507, 533 (N.Y. 1835) ("Slavery is abhorred in all nations where the light of civilization and refinement has penetrated, as repugnant to every principle of justice and humanity, and deserving the condemnation of God and man"). The famous *Lemmon* case, 20 N.Y. 562, is acknowledged as "one of the most extreme examples of hostility to slavery in Northern courts[.]" Paul Finkleman, *Slavery in the Courtroom* 57 (1985). In *Stanley*, the Court noted that "'times can blind us to certain truths and later generations can see that laws once thought necessary and

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

proper in fact serve only to oppress.'" 16 N.Y.S.3d at 917-18 (quoting *Lawrence v. Texas*, 539 U.S. 558, 579 (2003)). The legal personhood of chimpanzees, at least with respect to their right to a common law writ of habeas corpus, is one of those truths; their legal thinghood has become an anachronism.[37]

Humans who have never been sentient or conscious or possessed of a brain *should* have basic legal rights. But *if* humans bereft even of sentience are entitled to personhood, *then* this Court must either recognize Kiko's just equality claim to bodily liberty or reject equality. Abraham Lincoln understood that the act of extending equality protects it: "[i]n *giving* freedom to the slave, we *assure* freedom to the free, honorable alike in what we give, and what we preserve." 5 *Collected Works of Abraham Lincoln* 537 (Roy P. Basler, ed. 1953) (annual message to Congress of December 1, 1862) (emphasis in original). The act of denying equality in order to enslave, based on a single trait, jeopardizes the equality of all.

The NhRP claims only that Kiko has a common law right to bodily liberty protected by the common law of habeas corpus. What, if any, other common law rights Kiko possesses will be determined on a case-by-case basis. In *Byrn*, the Court of Appeals noted that fetuses are "persons" for some purposes in New York, including inheritance, devolution of property, and wrongful death, while not being "persons in the law in the whole sense," such as being subject to abortion. 31 N.Y.2d at 200. Equal protection

> can only be defined by the standards of each generation. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L.REV. 1161, 1163 (1988) ("[T]he Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure."). The

[37] As of February 2014, at least twenty-five large private research companies, including GlaxoSmithKline, PLC, Merck & Co., Inc., DuPont, AstraZeneca, PLC, Colgate-Palmolive Company, and Novo Nordisk have committed not to use chimpanzees in research. The Humane Society of the United States, "Companies with Invasive Chimpanzee Research Policies" (February 24, 2014), available at http://www.humanesociety.org/issues/chimpanzee_research/tips/companies_chimpanzee_policies.html#.Uwz6CvldWSo (last viewed December 28, 2015). The Board of Editors of *Scientific American* has called for the end of captivity for such cognitively complex nonhuman animals as great apes, cetaceans, and elephants. "Free Willy – And His Pals," *Scientific American* 10 (March 2014).

> process of defining equal protection . . . begins by classifying people into groups. A classification persists until a new understanding of equal protection is achieved. The point in time when the standard of equal protection finally takes a new form is a product of the conviction of one, or many, individuals that a particular grouping results in inequality and the ability of the judicial system to perform its constitutional role free from the influences that tend to make society's understanding of equal protection resistant to change.

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

4. The New York legislature has already determined that some nonhuman animals are persons in the trust context.

New York *already* recognizes personhood rights in some nonhuman animals, including Kiko. Specifically, New York is among the states that allow nonhuman animals to be trust "beneficiaries." *See* EPTL 7-8.1. *Stanley*, 16 N.Y.S.3d at 901 (noting that the statute provides "that a domestic or pet animal may be named as a beneficiary of a trust."). Kiko is a beneficiary of an *inter vivos* trust created by the NhRP pursuant to EPTL 7-8.1 for the purpose of his care and maintenance.[38] Consequently, he is a "person" under that statute, as only "persons" may be trust beneficiaries. *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); *Gilman v. McArdle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) ("Beneficiaries may be natural or artificial persons, but they must be persons . . . In general, any person who is capable in law of taking an interest in property, may, to the extent of his legal capacity, and no further, become entitled to the benefits of the trust."), *rev'd on other grounds*, 99 N.Y. 451 (1885). "Before this statute [EPTL 7-8.1] trusts for animals were void, because a private express trust cannot exist without a beneficiary capable of enforcing it, and because nonhuman lives cannot be used to measure the perpetuities period." Margaret Turano, *Practice Commentaries*, N.Y. Est. Powers & Trusts Law 7-8.1 (2013). *See In re Mills' Estate*, 111 N.Y.S.2d 622, 625 (Sur. Ct. 1952); *In re Estate of Howells*, 260 N.Y.S. 598, 607 (Sur. Ct. 1932). New York did not even recognize honorary trusts for nonhuman animals, which lack beneficiaries. *In re Voorhis' Estate*, 27 N.Y.S.2d 818, 821 (Sur. Ct. 1941).

[38] A true and correct copy of the trust is attached to the Second Kiko Petition as Exhibit 10.

In 1996, the Legislature enacted EPTL 7-6 (now EPTL 7-8) (a), which permitted "domestic or pet animals" to be designated as trust beneficiaries.[39] This section thereby acknowledged these nonhuman animals as "persons" capable of possessing legal rights. Accordingly, in *In re Fouts*, 677 N.Y.S.2d 699 (Sur. Ct. 1998), the court recognized that five chimpanzees were "income and principal beneficiaries of the trust" and referred to its chimpanzees as "beneficiaries" throughout. In *Feger v. Warwick Animal Shelter*, 59 A.D.3d 68, 72 (2d Dept. 2008), the Appellate Division observed "[t]he reach of our laws has been extended to animals in areas which were once reserved only for people. For example, the law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner."

In 2010, the legislature renumbered EPTL 7-6.1 as EPTL 7-8.1, removed "Honorary" from the statute's title, "Honorary Trusts for Pets," leaving it to read, "Trusts for Pets,"[40] and amended section (a) to read, in part: "A trust for the care of a designated domestic or pet animal is valid. . . . *Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive.*" (emphasis added). In removing "Honorary" and the twenty-one year limitation on trust duration, the legislature dispelled any doubt that a nonhuman animal was capable of being a trust beneficiary in New York. By allowing "designated domestic or pet animals" to be trust beneficiaries able to own the trust corpus, New York recognized these nonhuman animals as "persons" with the capacity for legal rights.

This Court agreed with the NhRP's interpretation of the pet trust statute in the *Stanley* case. The Court explained:

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

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

> Moreover, some animals, such as pets and companion animals, are gradually being treated as more than property, if not quite as persons, . . . (*See generally Feger v. Warwick Animal Shelter,* 59 A.D.3d 68, 71–72, 870 N.Y.S.2d 124 [2d Dept 2008] ["Companion animals are a special category of property" and courts recognize their "cherished status"]; *see also People v. Garcia,* 29 A.D.3d 255, 812 N.Y.S.2d 66 [1st Dept 2006] [goldfish are companion animals protected by animal cruelty law]; *Raymond v. Lachmann,* 264 A.D.2d 340, 341, 695 N.Y.S.2d 308 [1st Dept 1999] [recognizing cherished status of pets and considering cat's interests by awarding possession of her to defendant as "best for all concerned," notwithstanding plaintiff's actual ownership interest]; *Travis v. Murray,* 42 Misc.3d 447, 977 N.Y.S.2d 621 [Sup Ct, New York County 2013] [recognizing, in dispute over custody of dog in divorce proceeding, that dogs are seen as family members, and declining to apply strict property analysis, applying something akin to "best interests of the child" standard]). At least one New York court, recognizing that "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property," found that a dog's owner may be entitled to emotional distress damages for the wrongful destruction and loss of her dog, thereby departing from contrary precedent. (*Corso v. Crawford Dog & Cat Hosp., Inc.,* 97 Misc.2d 530, 531, 415 N.Y.S.2d 182 [Civ Ct, Queens County 1979]; . . .
>
> Consonant with these recent trends, New York enacted section 7–8.1 ("Trusts for pets") of the Estates, Powers and Trusts Law (EPTL), providing that a domestic or pet animal may be named as a beneficiary of a trust. (Pet. Memo. of Law, at 54–56; *see* McKinley, *Dog–Related Bills Flood Albany as Major Legislation Stalls,* New York Times, June 11, 2015, http://www.nytimes.com/2015/06/12/nyregion/dog-related-bills-floodalbany-as-major-legislation-stalls.html?_r=0 [noting that dogs' interests "are exceptionally well represented in Albany this year."]).
>
> Some commentators have described the current legal status of animals as "quasi-persons, being recognized as holding some rights and protections but not others." (*Eg,* Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person,* 20 Duke J Gender L & Policy at 61).

Stanley, 16 N.Y.S.3d at 912-13 (emphasis added).

As EPTL 7-8.1 created legal personhood in those nonhuman animals within its reach, New York public policy already recognizes that at least some nonhuman animals are persons capable of possessing one or more legal rights.

V. CONCLUSION

Kiko is an autonomous and self-determining being who can choose how to live his life and who possesses dozens of complex cognitive abilities that comprise and support his autonomy

and bodily liberty. Moreover, he can shoulder duties and responsibilities both within chimpanzee societies and within human/chimpanzee societies. He is therefore entitled to legal personhood as a matter of common law liberty and equality, which in turn, entitles him to a writ of habeas corpus. He is further entitled to immediate release from what will otherwise be a decades-long imprisonment.

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

Kiko cannot be released to Africa or onto the streets of New York State. But he can be released from his imprisonment in New York. This Court should order him released from the Respondents' control and then determine where best to place him. The NhRP strongly recommends that he be delivered into the care of Save the Chimps in Ft. Pierce, Florida, forthwith, there to spend the rest of his life living as an autonomous, self-determining chimpanzee to the greatest extent possible in North America, amongst chimpanzee friends, climbing, playing, socializing, feeling the sun, and seeing the sky.

Dated: 1/6/16

Respectfully submitted,

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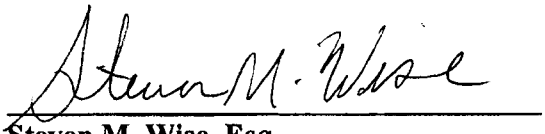

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