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 HERCULES and LEO,

Petitioner,

-against-

SAMUEL L. STANLEY JR., M.D. as President of State University of New York at Stony Brook a/k/a Stony Brook University and STATE UNIVERSITY OF NEW YORK AT STONY BROOK a/k/a STONY BROOK UNIVERSITY,

Respondents.

REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR HABEAS CORPUS

Index No. 152736/15
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I. INTRODUCTION

On Friday afternoon, May 22, 2015, Respondents filed their Memorandum of Law in Opposition to the Petition for a Writ of Habeas Corpus and In Support of Their Cross-Motion to Change Venue to Supreme Court, Suffolk County ("Respondents' Memorandum and Cross-Motion"). Respondents' Memorandum and Cross-Motion did not attempt to set forth their "authority and cause of the detention" of Hercules and Leo, the two chimpanzees whom they admit they detain. Therefore it fails to comply with either New York Civil Practice Law and Rules ("CPLR") 7008 or this Court's Order to Show Cause.

The facts alleged in Petitioner's Verified Petition must therefore be taken as true. The sole legal issue on the merits that remains is whether, taking the facts alleged in the Verified Petition as true, Hercules and Leo are "persons" within the meaning of the New York common law of habeas corpus and therefore Article 70 entitled, after five years of captivity and exploitation by Respondents, to release.

Instead of attempting to traverse any of the facts alleged or addressing the merits of the Verified Petition, Respondents have chosen to present various procedural roadblocks. None have merit. Venue is proper in this Court under CPLR 7004(c), as Respondent Stony Brook University is not a "state institution" that houses inmates (*infra* at 3-8). Respondents mislabeled "Cross-Motion to Change Venue" was not marked for hearing in a timely manner (*infra* at 7). Petitioner has standing under CPLR 7002(a) (*infra* at 16-17). Claim preclusion and issue preclusion have no place in New York habeas corpus jurisprudence (*infra* at 8-10). The decisions of the Third Department in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3rd Dept. 2014) ("*Lavery*") and the Fourth Department in *Matter of The Nonhuman Rights Project, Inc. v Presti*, 124 A.D.3d 1334 (4th Dept. 2015) ("*Presti*") neither bind this Court, nor should either persuade it, as neither decision enunciates settled law or principles; to the contrary, each is being appealed to the Court of Appeals and contradicts long-standing legal principles set out by the Court of Appeals (*infra* at 10-15). As the Great Writ is the only reliable protection of the freedom of humans in New York, so it is for chimpanzees (*infra* at 14-15). The Verified Petition

contains a clear demand for the immediate release of Hercules and Leo and not a change of conditions (*infra* at 15-16). Finally, Petitioner urges this Court, in its discretion and after ordering their immediate release, to take the further step of ordering Hercules and Leo to Save the Chimps in Ft. Pierce, Florida (*infra* at 15-16).

II. RESPONDENTS' MEMORANDUM AND CROSS-MOTION FAILED TO COMPLY WITH CPLR 7008 AND THIS COURT'S ORDER TO SHOW CAUSE.

Respondents failed to comply with this Court's Order to Show Cause and CPLR 7008, which required them to justify their detention of Hercules and Leo. [Doc. No. 34]. *See People ex rel. Lebelsky v. Warden of New York Cnty. Penitentiary*, 168 N.Y.S. 704, 706 (Sup. Ct. 1917) ("'The burden in the first instance is upon the officer or party who detains the person to show that such detention is authorized by some legal authority.'") (citation omitted). After a petitioner makes a *prima facie* showing of entitlement to the issuance of the writ by meeting the requirements of CPLR 7002(c), a court must issue the writ, or show cause order, without delay. CPLR 7003(a). The burden then shifts to the respondent to present facts that demonstrate that the detention is lawful. Pursuant to CPLR 7006(a), a respondent's 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.

Respondents have conceded their failure to meet the "show cause" requirements of CPLR 7006(a): "Respondents have therefore not addressed the justification for the presence of Hercules and Leo at Stony Brook with any specificity in their opposition." [Respondents' Mem. at 3 n.1]. Factual allegations in a habeas corpus petition that are not controverted by the return are deemed admitted. *In re Depue*, 185 N.Y. 60, 67-68 (1906) (the facts alleged in the habeas petition "were not traversed or denied by the return and, therefore, were admitted upon the record.") (citations omitted). *See also People ex rel. Bernard v. Ashworth*, 43 N.Y.S.2d 366, 369 (Sup. Ct. 1943); *People ex rel. Berg v. Lawes*, 12 N.Y.S.2d 626, 626 (Sup. Ct. 1939). Respondents' return is so deficient that it not only fails to state the grounds for the detention of Hercules and Leo, but fails to prove their lawful ownership, regardless of whether they are persons. Because Respondents'

return fails to controvert the facts set forth in the Verified Petition and supporting affidavits, said facts are deemed admitted. *See People ex re. Wilson v. Flynn*, 106 N.Y.S. 1141, 1141 (Sup. Ct. 1907) ("If I were permitted to enter the realm of conjecture I might dismiss this writ. I could, and indeed do, guess that the proceedings before the magistrate were entirely regular. But, owing to the slovenly manner in which the papers upon which I am asked to remand the relator were prepared, and their meaninglessness when scrutinized with that degree of care which should always be employed when the personal liberty of any one is concerned, I must sustain the writ and discharge the prisoner.")[1]

Taking Petitioner's facts as admitted, the only issue remaining is whether Hercules and Leo are persons for purposes of Article 70 and the common law writ of habeas corpus.[2]

III. VENUE IS PROPER IN THIS COURT.

A. The Verified Petition was properly filed in this Court.

Anticipating Respondents' claim of lack of venue, Petitioner demonstrated in its Memorandum of Law that venue was proper in this Court. [Petitioner's Habeas Mem. at 25-26]. Petitioner also addressed venue at length in its Affidavit in Opposition to Respondents' Demand for Change of Venue ("Petitioner's Affidavit in Opposition"). [Doc. No. 51].

To reiterate briefly, under CPLR 7004(c), the writ shall be made returnable to the county of issuance with one exception: to secure the discharge of a person from a state institution (in which case the writ shall normally be made returnable to the county of detention). The purpose of this exception is to relieve administrators of some state institutions that house inmates (state prisons and mental hospitals) of the expense of having to transport inmates to distant counties.

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[1] All natural common law 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.).

[2] Respondents further concede that they "have not endeavored to respond to the allegations in petitioner's nine expert affidavits regarding the similarities between human beings and chimpanzees[.]" [Respondents' Mem. at 4 n.2].

People ex rel. Cordero v. Thomas, 329 N.Y.S.2d 131, 133-34 (Sup. Ct. 1972) (state prison is a state institution). *See State ex rel. Cox v. Appelton*, 309 N.Y.S.2d 290, 292 (Sup. Ct. 1970) (state-run training school for children is not a "state institution" within the meaning of the rule). As Respondent Stony Brook University does not house inmates and Petitioner is not demanding the production of Hercules and Leo, the writ was properly made returnable to New York County.

Respondents' assertion that Petitioner's filing of its Verified Petition violated CPLR 7002(b) is frivolous. [Respondents' Mem. at 8]. That section provides: "a petition for the writ shall be made to: . . . *any justice of the supreme court*[.]" (emphasis added). Respondents contend that the Verified Petition does not comply with CPLR 7002(b)(3) because it was made to Judge Jaffe as a result of a "random assignment." [Respondents' Mem. at 8].

Nothing in CPLR Article 70 states or suggests that a habeas corpus petition must specify the name of a particular "supreme court justice." To the contrary, the statute states, in clear terms, that the petition may be made to "any" supreme court justice. CPLR 7002(b). This forecloses Respondents' argument.[3]

Respondents' further assertion that "petitioners are seeking to have this Court *overrule* the decision of another Supreme Court justice in another county" [Respondents' Mem. at 9] is misleading in the context of habeas corpus. [Petitioner's Habeas Mem. at 26]. Each justice to which a habeas corpus petition is brought has the independent duty to decide whether the person detained should be discharged. The rule "permitting relitigation at the behest of the prisoner, after the denial of a writ, is based upon the fact that the detention of the prisoner is a continuing one and that the courts are under a continuing duty to examine into the grounds of the detention." *Post v. Lyford*, 285 A.D. 101, 105 (3d Dept. 1954). "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). It

[3] The word "justice" is synonymous with "court." CPLR 105(g) states: "Court and judge. The word 'court,' as used in any provision concerning a motion, order *or special proceeding*, includes a judge thereof authorized to act out of court with respect to such motion, order or special proceeding." (emphasis added).

is therefore procedurally impossible for one Supreme Court to "overrule" the decision of another Supreme Court in a habeas corpus action.

Regardless, the Supreme Court, Suffolk County did not rule on the merits of Petitioner's prior habeas corpus petition. [Respondents' Mem. at 7] (conceding the first petition "was dismissed when the court refused to sign the order to show cause."). "A denial of an application for a writ is not a ruling on the merits of the case and has no precedential value." 21 C.J.S. Courts § 196, "What constitutes precedent" (2015) (citing cases). Thus, there is nothing in the prior proceeding that this Court could "overrule."

B. <u>This Court should not stay these proceedings.</u>

Respondents claim this Court should transfer the case to Supreme Court, Suffolk County pursuant to CPLR 510 and 511 (a), (b), and (c). [Respondents' Mem. at 7]. In its Affidavit in Opposition, Petitioner demonstrated that those provisions, which govern the grounds for and procedure to transfer venue *for a trial*, are inapposite to habeas corpus proceedings, which are summary in nature. [Petitioner's Aff. in Opp. at 4-6].[4] In "a habeas corpus proceeding there is a summary 'hearing'; *there is no 'trial*.'" *Application of Heller*, 52 N.Y.S.2d 460, 462 (N.Y. Sup. Ct. 1944) *aff'd*, 268 A.D. 976 (1st Dept. 1944) (emphasis added). In "a habeas corpus proceeding the hearing and disposition are summary and intended to be so; the history and very nature of the remedy require it; in a habeas corpus proceeding a formal regular trial is not contemplated; indeed, the command of the statute is that there be prompt hearing and determination[.]" *Id.*at 461-62. Respondents have not cited a single contrary case.

Respondents go one step further. They ask this Court to "stay all proceedings pursuant to CPLR 511(c) and CPLR 2201 pending that transfer." [Respondents' Mem. at 9]. CPLR 2201 is also inapposite to a habeas corpus proceeding. That provision states: "Except where otherwise

[4] CPLR 511 is inapposite because it governs the procedure to change the "place of trial." This Court has not ordered a "trial," Petitioner has not requested one, and no "trial" is available under Article 70. A habeas corpus case under Article 70 is a "summary proceeding. *In re Barnett*, 53 How. Pr. 247, 248 (Sup. Ct. 1877). *See also People ex rel. Duryee v. Duryee*, 188 N.Y. 440, 445 (1907) ("The writ of habeas corpus, as its history shows, is a summary proceeding to secure personal liberty.").

prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." Respondents do not cite a single case in which CPLR 2201 has been used to stay a habeas corpus proceeding. That is because habeas corpus proceedings are *sui generis*.

> The summary and exigent nature of [a habeas corpus] proceeding is evidenced by the requirement of CPLR 7003(a) that the court "issue the writ without delay on any day," the provision of CPLR 7005 authorizing service of a writ on any day notwithstanding that service of other process on a Sunday is void (General Business Law § 11), and the direction of CPLR 7009(c) that "[t]he court shall proceed in a summary manner". . . [W]e noted in *People ex rel. Duryee v. Duryee,* 188 N.Y. 440, 445–446, 81 N.E. 313, that: "The writ of habeas corpus, as its history shows, is a summary proceeding to secure personal liberty. It strikes at unlawful imprisonment or restraint of the person by state or citizen, and by the most direct method known to the law learns the truth and applies the remedy. It tolerates no delay except of necessity, and is hindered by no obstacle except the limits set by the law of its creation. Hence the legislature commanded that no appeal should be taken from incidental orders made in the course of the proceeding, as that might cause delay and prolong the injustice. **Even the evil of a wrong order, if not vital, was preferred to the danger of delay caused by an appeal therefrom.**"

People ex rel. Robertson v. New York State Div. of Parole, 67 N.Y.2d 197, 201 (1986) (citations omitted, emphasis added).

Respondents argue that Petitioner "had no excuse for filing this second petition in New York County and, after waiting so long to do so, cannot claim to be prejudiced by a stay of proceedings until it is transferred to the correct county." [Respondents' Mem. at 10]. Petitioner needs no excuse. And there is no fixed time within which an application for a writ of habeas corpus may, or must, be made. There is no statute of limitations for filing a habeas corpus petition. *People ex rel. Mazario v. Warden, George Motchan Detention Ctr*., 847 N.Y.S.2d 897 (N.Y. Sup. Ct. 2007). "[H]abeas corpus has no time limitation as a barrier[.]" *Gomillion v. Commr. of New York State Dept. of Mental Hygiene*, 218 N.Y.S.2d 685, 686 (Sup. Ct. 1961). *See also People ex rel. Albanese v. Hunt*, 30 N.Y.S.2d 137, 140 (Sup. Ct. 1941) *rev'd on other grounds*, 41 N.Y.S.2d 646 (4th Dept. 1943) *aff'd*, 54 N.E.2d 379 (N.Y. 1944) ("The right to a writ of habeas corpus has always been one of the most carefully shielded rights of every

individual. . . . The relator should not be penalized for laches because fourteen years of his sentence have elapsed before he succeeded in employing a lawyer").

C. Respondents' "cross-motion" to transfer venue is improper.

Even assuming the Court finds CPLR 511 applicable to a habeas corpus proceeding, Respondents' "cross-motion" to transfer venue is improper for three reasons: (1) it is erroneously styled as a "cross-motion" where CPLR 511 requires a *motion* to be made following a demand; (2) it fails to meet the time requirements for noticing motions pursuant to CPLR 2214(b); and (3) it was not filed with the required "due diligence."

First, under CPLR 511, Respondents were required to file a "motion" following their demand to change venue. Respondents never filed a motion and neither did Petitioner. Under no circumstances should a "cross-motion" have been filed.

Second, pursuant to CPLR 2214(b), Respondents were required to give Petitioner a minimum of eight days notice. The "cross-motion" was filed late Friday afternoon (May 22, 2015), prior to Memorial Day weekend, leaving Petitioner with fewer than five days and just a single business day to respond.

Third, Respondents failed to exercise "due diligence" in filing their demand and "cross-motion." *See Frey v. Fun Tyme Ski Shop*, 163 A.D.2d 11, 13 (1st Dept. 1990) (the movant is under a duty of "due diligence to raise the issue as soon as is reasonable"); *Mei Ying Wu v. Waldbaum, Inc*., 284 A.D.2d 434 (2d Dept. 2001) (same); *see also* CPLR 511(a). This Court issued the Order to Show Cause on April 20 and set the original hearing date for May 6, 2015, which was changed to May 27 by stipulation of the parties. Then Respondents waited until the eleventh hour to file their Demand. (*See* Petitioner's Aff. Opp. at 6-7).

IV. NEITHER ISSUE PRECLUSION NOR CLAIM PRECLUSION APPLY TO HABEAS CORPUS.

Petitioner's Memorandum of Law demonstrates that neither issue preclusion nor claim preclusion apply to habeas corpus proceedings in New York. [Petitioner's Habeas Mem. at 26-30]. *E.g. 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). "[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). 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, as here, a person "is being deprived of his liberty . . . no [prior] adjudication . . . will be allowed to foreclose further inquiry into the matter." *Post*, 285 A.D. at 104-105. A "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*." *Id.* (emphasis added).[5]

Even if issue preclusion and claim preclusion were applicable to habeas corpus proceedings, the present petition would not be barred on such grounds because Petitioner's prior habeas corpus petition was not disposed of on the merits. [Petitioner's Habeas Mem. at 27-28]. "The burden is on the party asserting res judicata to show that the prior judgment or determination was on the merits" *Litz Enterprises, Inc. v. Stand. Steel Industries, Inc*., 57 A.D.2d 34, 38 (4th Dept. 1977). *See Clark v. Scoville*, 198 N.Y. 279, 283-84 (1910). "[W]hen it appears therefrom that the judgment might have been rendered on the merits, or upon a ground not involving the merits, the presumption is that it was not upon the merits." *Id*. It must appear, "'by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined.'" *Id.* (citation omitted). The order summarily dismissing the original petition did not state that it was dismissing it "as a matter of law" and was decidedly not "tried and determined." Thus, the "presumption is that it was not upon the merits." *Id*. *See also Mays v. Whitfield*, 282 A.D.2d 721 (2d Dept. 2001).

V. *LAVERY* AND *PRESTI* ARE NEITHER BINDING NOR PERSUASIVE.

[5] The cases cited by Respondents are inapposite. None involve habeas corpus. *See Parker v. Blauvelt Volunteer Fire Co. Inc*., 93 N.Y.2d 343, 347 (1999) (Article 78 proceeding); *Ryan v. New York Tel. Co*., 62 N.Y.2d 494 (1984) (tort claims); *Schwartz v. Public Adm'r of Cnty. of Bronx*, 24 N.Y.2d 65 (1969) (personal injury).

A. Neither *Lavery* nor *Presti* are binding on this Court.

Neither the Third Department's *Lavery* nor the Fourth Department's *Presti* decisions bind this Court. An appellate 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 (3rd 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* and *Presti* are not binding, as neither decision involved a settled principle of law or legal issue for the following four reasons.

First, *Lavery*, which the court described as dealing with a "novel" issue, and *Presti*, are the subjects of timely Motions for Leave to Appeal to the Court of Appeals that the Court has not yet acted upon. [Respondents' Mem. at 6]. These cases are not over.

Second, *Lavery* was wrongly decided for the reasons set forth in Petitioner's Memorandum in Support of Motion for Leave to Appeal to the Court of Appeals, attached as Exhibit 1 to the Affirmation of Elizabeth Stein. Moreover, both Harvard Law School Professor Laurence H. Tribe and Professor Justin Marceau, on behalf of habeas corpus law professors, have submitted *Amicus Curiae* Letter Briefs to the Court of Appeals asking it to accept further appeal of *Lavery*. Professor 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 Laurence H. Tribe*, at 1, attached as Exhibit 2 to the Affirmation of Elizabeth Stein]. Professor Marceau stated: "This may be one of the most 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 Justin Marceau*, at 3 attached as Exhibit 3 to the Affirmation of Elizabeth Stein].[6] Taken together, these give the Court of Appeals good reason to grant the Motion for Leave to Appeal and reverse *Lavery*. They make it obvious that *Lavery*, even if later affirmed by the Court of Appeals, does not enunciate a settled principle of law or legal issue.

[6] This afternoon, Petitioner learned the Center for Constitutional Rights also intends to file an *amicus curiae* letter brief in the *Lavery* case.

Similarly, *Presti*, which substantially cut back the availability of the writ of habeas corpus even for human New Yorkers, was wrongly decided for the reasons set forth in Petitioner's Memorandum in Support of Motion for Leave to Appeal to the Court of Appeals, attached as Exhibit 4 to Affirmation of Elizabeth Stein. This also gives the Court of Appeals good reason to grant the Motion for Leave and reverse *Presti*. It is similarly obvious that *Presti*, even if later affirmed by the Court of Appeals, does not enunciate a settled principle of law or legal issue.

Third, the Fourth Department decided *Presti* a month after the Third Department decided *Lavery*. Yet, the Fourth Department did not 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. Moreover, that court twice hinted that it might agree with Petitioner's claim that Kiko the chimpanzee was a "person" for the purpose of Article 70, once 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. The *Presti* court would not have said these things if the issue of chimpanzees not being persons for the purpose of habeas corpus was settled.

Fourth, *Lavery* directly conflicts with the decision of the Court of Appeals in *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y. 2d 194 (1972). In *Byrn*, the Court of Appeals made clear that the determination of personhood is solely a matter of public policy, and not a matter of biology (in *Byrn* a fetus was declared both human and not a person). *Id.* at 201. *Lavery*, 124 A.D.3d at 148-153, 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 Petitioner proffered in its brief and that *Byrn* required.

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*, and not *Lavery*.

Presti conflicts with literally dozens of cases that have regularly been decided by New York courts at every level for the last 200 years. [Petitioner's Habeas Mem. at 36-39, 68-71]. When faced with a choice of being bound by the decisions of these dozens of courts at every level over the last 200 years, or the conflicting decision of the Fourth Department in *Presti,* this Court must be bound by the dozens of cases and not by the obvious outlier that is *Presti.*

Fifth, the *Presti* court's contraction of the common law writ of habeas corpus violated Art. I, sec. 4 of the New York Constitution. [Petitioner's Habeas Mem. at 76].

B. *Lavery* and *Presti* are not persuasive.

Petitioner demonstrated why *Lavery* and *Presti* were wrongly decided in its Memorandum of Law. [Petitioner's Habeas Mem. at 56-76].

The parties agree that Petitioner's New York habeas cases constitute the first attempts in the English-speaking world to obtain habeas corpus relief for a nonhuman animal. Respondents claim this "is an indication that such relief never was intended or understood to include nonhumans such as chimpanzees," [Respondents' Mem. at 1], demonstrates a flawed understanding of legal history, how Anglo-American law operates in general, and how habeas corpus operates specifically. Had the great Chief Justice, Lord Mansfield, embraced Respondents' argument, he would not have issued the writ of habeas corpus that led to his ordering the release of James Somerset, on the ground that no slave had ever been considered a "person" for the purpose of a common law writ of habeas corpus thereby ending slavery in England. *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772). Had U.S. District Court Judge Elmer S. Dundy been persuaded by U. S. Attorney Lambertson that all United States Supreme Court precedent supported his argument that an Indian, due to his racially inferior status in American society, could never be a "person" under the law of habeas corpus, he would never have issued the writ of habeas corpus that led to his ordering the release of the Native American Chief Standing Bear from U.S. Army captivity. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697

(C.C.D. Neb. 1879); *see* Mary Kathryn Nagle, *Standing Bear v. Crook: The Case for Equality Under Waaxe's Law*, 45 CREIGHTON LAW REV. 455, 455-62 (2012).

Respondents' discussion of *Byrn,* upon which Petitioner appropriately relies, is sadly deficient. First, Respondents claim *Byrn* stands for the extraordinary proposition "that rights are assigned to persons as a subset of human beings." [Respondents' Mem. at 16-17]. Not only is this proposition nowhere to be found in *Byrn*, it is antithetical to everything *Byrn* stands for. Personhood is not a biological concept, says *Byrn;* whether a court should accord personality to any entity is entirely a policy question. [Petitioner's Habeas Mem. at 30-33]. The writings of the authors to whom *Byrn* cited strongly emphasize this: one, George Whitcross Paton, states: "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). Another, John Chipman Gray, writes in the precise chapter of his book to which *Byrn* cites, that there may be "systems of law in which animals have legal rights . . . animals may conceivably be legal persons." John Chipman Gray, *The Nature and Sources of the Law*, Chapter II, 39, 43 (1909).

Second, Respondents appeal to "the common sense definition of 'persons' which is a subset of human beings and entities consisting of humans beings." [Respondents' Mem. at 17]. Here Respondents demonstrate a seeming unawareness that whatever the word "person" may mean in the living room, in a courtroom "person" is a legal term of art, characterizing any entity capable of assuming "the rights and privileges of a legal person." *Byrn*, 31 N.Y. 2d at 201; *see Wartelle v. Womens' & Children's Hosp*., 704 So. 2d 778, 781 (La. 1997) ("person" is a legal "term of art"), a lesson many laypersons learned when the United States Supreme Court noted that corporations were "persons" under the First and Fourteenth Amendments in the *Citizens United* case.

That Respondents have little or no understanding of Petitioner's substantive claims is evidenced by two statements. The first is that "[a]t no point, however, does petitioner explain how the cognitive abilities of 'autonomy and self-determination' entitle one to the specific legal

rights of habeas corpus or cite any cases for that proposition." [Respondents' Mem. at 17]. Petitioner's explanation how the cognitive abilities of autonomy and self-determination entitle Hercules and Leo to the specific legal right of habeas corpus comprises the heart of Petitioner's argument and may be found, replete with dozens of citations, at Petitioner's Habeas Mem. at 30-56, especially 44-56.[7] The second is that "petitioner does not define the limits of its new definition of persons, instead arguing that the new set of rights should be determined on a case-by-case basis." [Respondents' Mem. at 19]. Petitioner could not be more clear what the limits of its arguments are: any entity whose autonomy and self-determination can be proven by clear scientific evidence is entitled to a common law writ of habeas corpus that protects her fundamental interest in her bodily liberty by discharging her from imprisonment and allowing her to be placed where her autonomy and self-determination will be respected. Respondents' claim that the discharge of Hercules and Leo from their long imprisonment by Respondents would "jeopardize . . . the country's farming and livestock industry," [Respondents' Mem. at 19], is in a word, "ridiculous."[8] It recalls to mind the warning that England would collapse that Charles Stewart, James Somerset's master, gave Lord Mansfield. The great Chief Justice's response still rings down through the centuries: "*Fiat justicia ruat caelum*" ("Let Justice be Done Though the Heavens May Fall").

Finally, in response to Respondents' claim that Hercules and Leo are adequately protected by current law, Petitioner has two replies. First, if Hercules and Leo are adequately protected, why have Respondents been able for five years to deny them the ability to live the autonomous and self-determining lives, outside in the environment, amongst other chimpanzees

[7] Instead of meeting Petitioner's legal arguments, Respondents ignore the fact that Attorney Wise's writings have been positively cited and/or discussed nearly 300 times by legal scholars, including Laurence H. Tribe, Cass Sunstein, Martha Nussbaum, and Judge Richard A Posner, and takes a portion of one sentence from a long book chapter in which Judge Posner critiqued both Attorney Wise's first book, *Rattling the Cage- Toward Legal Rights for Animals*, and the work of Professor Peter Singer, more than a decade ago. *Rattling the Cage* was a work of general Anglo-American jurisprudence; the case at bar is a distant cousin, a lawsuit grounded firmly in New York common law.

[8] Petitioner appreciates the implicit concession that chimpanzees, at least, are autonomous and self-determining. Neither party has proffered any evidence that farmed animals are as well.

of both genders and varying ages, in the chimpanzee society for which they were created and long? Second, the Court of Appeals acknowledged in *Hoff v. State*, 279 N.Y. 490, 492 (1939) that the writ of habeas corpus "has been cherished by generations of free men who had learned by experience that it furnished *the only reliable protection of their freedom*." (emphasis added). Is there a judge who would dare tell the citizens of New York that "federal, state, and local authorities have enacted legislation for th[eir] protection," [Respondents' Mem. at 2], and therefore they don't need the Great Writ to protect their freedom and liberty? To ask the question is to answer it.

VI. HABEAS CORPUS LIES AS PETITIONER IS SEEKING THE IMMEDIATE RELEASE OF HERCULES AND LEO AND NOT A CHANGE OF CONDITIONS.

The Verified Petition, at 1, clearly requests that this Court "a) require Respondents to justify their detention of Hercules and Leo, two imprisoned chimpanzees, and b) order Hercules and Leo's immediate release." Respondents repeatedly concede that Petitioner is seeking the immediate release of Hercules and Leo. *E.g.* [Respondents' Mem. at 1] ("Petitioner seeks the discharge of these chimpanzees"); [*Id.* at 11] ("Petitioner sought precisely the same relief in Suffolk County, namely the release of Hercules and Leo and their transfer to a primate sanctuary."); [*Id.* at 20] ("Petitioner here seeks the release of Hercules and Leo from Stony Brook"). Because Hercules and Leo can no more be released unconditionally onto the streets than could a human child, Petitioner has asked this Court to place them in Save the Chimps in Ft. Pierce in Florida. But this is a two-step process. First, this Court is required to order the release of Hercules and Leo. Second, it is then up to this Court to determine in whose custody Hercules and Leo should be placed, just as it was up to the courts who, over the decades, have ordered the discharge, pursuant to a writ of habeas corpus, of slave children, free minors being held illegally in industrial schools, minors discharged from mental institutions, child apprentices, and incapacitated adults, [Petitioner's Mem. at 36-39], and who must then make a further order specifying in whose custody they shall be released. Petitioner simply urges that Hercules and Leo be placed in the custody of Save the Chimps, which will provide them the environment as

similar to their native African habitat as possible in which they may freely exercise their right to bodily liberty. Respondents appear to concede that Save the Chimps provides an environment that closely resembles a chimpanzees' native habitat.[9] That they must be immediately discharged is required. In whose custody they will go lies in the sound discretion of this Court.[10]

VII. PETITIONER HAS STANDING.

CPLR Article 70 contains its own standing provisions. CPLR 7002(a) provides broadly that "[a] person illegally imprisoned or otherwise restrained of his 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 deliverance" (emphasis added).

Respondents claim that this "one acting on his behalf" "must have some significant relationship with the real party in interest." [Respondents' Mem. at 24]. Respondents cite no New York cases for the proposition that a habeas corpus petitioner "must have some significant relationship with the real party in interest." None of the three federal cases Respondents cite have been cited by a New York court for standing in a habeas corpus, or any other, case. That is because they do not state the standard for third-party standing in habeas corpus cases in New York.

In its Memorandum of Law, at 24-25, Petitioner cites numerous New York habeas corpus cases that make it clear that CPLR 7001(a) means that any one may petition a court for a writ of habeas corpus on behalf of anyone else being held in the state of New York. To these citations,

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[9] "[C]himpanzees are contained on islands surrounded by lakes; and chimpanzees are grouped by Save the Chimps into families of 20-26." [Respondents' Mem. at 21].

[10] Respondents' statement that "[t]he chimpanzees will be transferred to Save the Chimps, and subject to significant restrictions on their mobility and living conditions" is disingenuous. The Organizational Values of Save the Chimps makes clear that "[t]he cornerstone of Save the Chimps' philosophy is that chimpanzees experience emotions such as: joy, grief, anger, sorrow, pleasure, boredom, and depression . . . Chimpanzees are persons, not commodities, and Save the Chimps will not buy, sell, trade, loan or conduct any commercial commerce of chimpanzees." Verified Petition, para. 38(a) and attached Affidavit of Molly Polidoroff. In their footnote 7, Respondents' Memorandum, at 21, Respondents conflate the chimpanzees' right to bodily liberty that is protected by the common law writ of habeas corpus, which Petitioner demands, with a potential right to bodily integrity that might be violated through involuntary sterilizations and birth control pills, which Petitioner does not demand. This is an example of Respondents' erroneous belief that the recognition of personhood for one purpose requires recognition of personhood for any other purpose. This error was made by petitioner in *Byrn*, 31 N.Y. at 200-201.

Petitioner adds one more. Before the American Civil War, first the head of the New York City Vigilance Committee, David Ruggles, and its leading attorney, Horace Dresser, then the American Anti-Slavery Society's counsel, John Jay II, its head, Sydney Howard Gay, and its employees, most notably Lewis Napoleon, the petitioner in *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup Ct. 1846) and *Lemmon v. People*, 20 N.Y. 562 (1860), routinely applied for, and were usually granted, writs of habeas corpus on behalf of any slave they could identify within the state of New York, despite the fact that they had no relationship whatsoever with those slaves. Eric Foner, *Gateway to Freedom – The Hidden History of the Underground Railroad*, 98-99, 107, 112-115, 138-140 (W.W. Norton & Co. 2015).

VIII. CONCLUSION

As Petitioner has requested, this Court should first order the immediate release of Hercules and Leo from Respondent Stony Brook University. Second, this Court should immediately order the most appropriate placement for Hercules and Leo, which Petitioner recommends is Save the Chimps.

Respectfully submitted,

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