STATE OF NEW YORK
SUPREME COURT COUNTY OF ORLEANS

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

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

Petitioner,

-against-

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

Respondents.

Index No.: 18-45164

REPLY MEMORANDUM OF LAW

Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, NY 11040
Phone (516) 747-4726

Steven M. Wise, Esq.
Of the Bar of the State of Massachusetts
Subject to *pro hac vice* admission
5195 NW 112th Terrace
Coral Springs, FL 33076
Phone (954) 648-9864

Attorneys for Petitioner

December 10, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Affidavits

Other Authorities

"Captivity is a terrible existence for any intelligent, self-aware species, which the undisputed evidence shows elephants are. To believe otherwise, as some high-ranking zoo employees appear to believe, is delusional."

Leider v. Lewis, Case No. BC375234 at 30 (Los Angeles County Superior Ct. July 23, 2012) (concerning the manner in which the Los Angeles Zoo treated its elephants), *reversed on legal grounds*, 2 Cal 5th 1121 (2017)

I. INTRODUCTION[1]

On September 8, 1906, the Bronx Zoo began exhibiting Ota Benga, a Congo pygmy man, in a cage at the Bronx Zoo's Monkey House. Pamela Newkirk, *Spectacle – The Astonishing Life of Ota Benga* xv, 3 (Amistad 2015). William Temple Hornaday, the Director of the Bronx Zoo, and "one of the nation's foremost authorities on zoology," assured that Ota Benga "has one of the best rooms in the primate house," *id.* at 3, 22. He claimed that Ota Benga was "quite pleased" with his accommodations. *Id*. at 18. Outside Ota Benga's cage Hornaday installed a sign that read: "The African Pygmy, Ota Benga. Age 23 years. Height, 4 feet 11 inches. Weight 103 pounds. Brought from the Kasai River, Congo Free State, South Central Africa, By Samuel P. Verner." *Id*. at 25.

News of Ota Benga's exhibition "brought record crowds," doubling the attendance at the Bronx Zoo from the previous September. *Id.* at 26. But the *New York Times* reported the reaction of one attendee as: "Something about it that I don't like." "Bushman Shares a Cage with Bronx Park Apes," *New York Times* at 17 (September 9, 1906).

There is something about the imprisonment of the elephant Happy that the NhRP does not like, and the NhRP has been crystal clear what that something is. It is the imprisonment itself. The Bronx Zoo's imprisonment of this autonomous, extraordinarily cognitively-complex being is *per se* illegal as the imprisonment violates her common law right to bodily liberty. The Bronx

[1] The NhRP uses the terminology of its reply affirmation in this memorandum.

Zoo justifies this imprisonment on the basis that Happy can "provide() experiences to visitors that may spark a lifelong passion to protect animals and their natural habitats," *Affidavit of James Breheny*, at ¶ 4 ("Breheny Affidavit") while collecting "general admission [that] ranges from $28.95 to $20.95 for adults and children, respectively, and every Wednesday, admission is free." *Affidavit of Kenneth A. Manning*, ¶ 21.

Judge Fahey of the Court of Appeals correctly observed that in determining whether an imprisoned nonhuman animal is entitled to habeas corpus, one should "ask not whether a (nonhuman animal) . . . has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus . . . the answer to that question will depend on our assessment of the intrinsic nature of the (nonhuman animal) as a *species*." *In the Matter of the Nonhuman Rights Project, Inc. on Behalf of Tommy v. Lavery*, 21 N.Y. 3d 1054, 1057 (2018) (Fahey, J., concurring) ("*Fahey concurrence*"). A month later, the New York State Supreme Court Appellate Division, Fourth Judicial Department ("Fourth Department"), in *People v. Graves*, 78 N.Y.S. 3d 613 (4th Dept. 2018), declared that:

> it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals (citations omitted); *see also Matter of Nonhuman Rights Project, Inc. v. Presti,* 124 A.D.3d 1334, 1335, 999 N.Y.S.2d 652 [4th Dept. 2015], *lv. denied* 26 N.Y.3d 901, 2015 WL 5125507 [2015]). Indeed, the Court of Appeals has written that personhood is "not a question of biological or 'natural' correspondence" (*Byrn v. New York City Health & Hosps. Corp.,* 31 N.Y.2d 194, 201, 335 N.Y.S.2d 390, 286 N.E.2d 887 [1972](balance of citation omitted).

In October, 2018, a New York City criminal court opined that "the nature of the victim in the present [animal cruelty] case warrants special consideration of the seriousness and circumstances of the offense," and stated: "[t]his view comports with an emerging awareness of the injustice of treating animals as "things," and present efforts to change the status of non-human animals from "things" to legally recognized "persons," for the purpose of habeas corpus

protection." *People v. Gordon*, 5 N.Y.S.3d 725 (Criminal Ct., City of New York 2018) (quoting the *Fahey concurrence*, at 1059).

In harmony with the opinions cited above, the NhRP has placed before this Court five deeply educated, independent, expert opinions, all firmly grounded in decades of education, observation, and experience, by some of the most prominent elephant scientists in the world. In great detail, these opinions carefully demonstrate that elephants are autonomous beings possessed of extraordinarily cognitively complex minds. The Bronx Zoo does not challenge these facts.

Instead, the Bronx Zoo employee affidavits reveal their view of themselves as tasked solely with monitoring the health of their autonomous, extraordinarily cognitively complex, prisoner. In contrast to the NhRP's superbly qualified experts, the Director of the Bronx Zoo, James J. Breheny, who claims a M.S. in Biology (*Breheny Affidavit* ¶ 1), but no expertise in elephant cognition or behavior, contents himself with a blithe dismissal of these experts' opinions as providing merely "generalized, anecdotal discussions of African and Asian elephants as observed in the wild." (*Supplemental Breheny Affidavit*, ¶ 5). None of the other Bronx Zoo affiants claim to have expertise in elephant cognition or behavior either.

The Bronx Zoo badly misconstrues the nature of habeas corpus, which humans long ago learned "by experience furnished the only reliable protection of their freedom." *Hoff v. State,* 279 N.Y. 490, 492 (1939). Habeas corpus focuses on the *single question* of whether the prisoner is entitled to her immediate release, *not* whether those depriving the prisoner of her freedom are adequately looking after her welfare. *See People ex. rel Sabatino v. Jennings*, 246 N.Y. 258, 260 (1927) ("'The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty,' Shaw, C. J., in *Wyeth v. Richardson*, 10 Gray (Mass.) 240.").

A captor may not justify its illegal imprisonment of a prisoner based on an unsubstantiated claim that it thinks it can provide her with a better life. Anglo-American habeas corpus case law over five centuries is littered with the rationalizations of those who would illegally imprison others because they want to: it is the King's desire, England needs sailors, a slave child is better off remaining a slave and living with her enslaved family than being set free to be cared for by an appropriate guardian. But these were all rightly rejected.

The NhRP made this explicit in its Petition, ¶ 56:

> That Respondents may not be in violation of any federal, state or local animal welfare laws in their detention of Happy is irrelevant as to whether or not the detention is lawful. This habeas corpus case is neither an "animal protection" nor "animal welfare" case, just as a habeas corpus case brought on behalf of a detained human would not be a "human protection" or "human welfare" case. *See Lavery*, 124 A.D.3d at 149; *Stanley*, 16 N.Y.S.3d at 901. This Petition does not allege that Happy "is illegally confined because [she] is kept in unsuitable conditions" nor does it seek improved welfare for Happy. *Presti*, 124 A.D.3d at 1335. Rather, this Petition demands that this Court recognize Happy's common law right to bodily liberty and order her immediate release from Respondents' current and continued unlawful detention so that her liberty and autonomy may be realized. It is the fact Happy is imprisoned *at all*, rather than the conditions of her imprisonment, that the NhRP claims is *unlawful*. *See Stanley*, 16 N.Y.S.3d at 901 ("The conditions under which Hercules and Leo are confined are not challenged by petitioner . . . and it advances no allegation that respondents are violating any federal, state or local laws by holding Hercules and Leo."). The Third Department in *Lavery* understood: "we have not been asked to evaluate the quality of Tommy's current living conditions in an effort to improve his welfare." 124 A.D.3d at 149.

As demonstrated herein, a prisoner's welfare is *never* relevant—outside of the custody and visitation of children—in determining whether that prisoner is being illegally detained in a habeas corpus case. Thus, the Bronx Zoo's claim that it is in compliance with animal welfare statutes is irrelevant. The NhRP "has not alleged . . . that Happy's current living conditions are in any way unlawful" because it does not need to in order to establish that Happy is being illegally imprisoned. (*Zoo Memorandum 2*, at 15). Upon receiving an order of release, a

competent prisoner may go forth wherever she desires in the exercise of her autonomy and free will. In short, habeas corpus in this situation involves a one-step process.

However, when a released prisoner is unable properly to look after her own welfare, as is a child of tender years, a nonhuman animal such as Happy, or a human adult with dementia, habeas corpus requires a second step. The court must then decide where the liberty, autonomy, and welfare of the former prisoner will be appropriately protected. That is why in the case at bar, the NhRP asks that Happy be sent to one of the three elephant sanctuaries in the United States, with the NhRP merely suggesting one of them, the Performing Animal Welfare Sanctuary ("PAWS"). To send Happy to another zoo would be inappropriate habeas corpus relief.

II. This Court must deny the Bronx Zoo's Motion to Change Venue and Motion to Dismiss and should deny the Bronx Zoo's request to file an answer in the event the petition is not dismissed.

Rather than file answering affidavits as stated by the Order, the Bronx Zoo files the Notice of Motion which consists of a request to: (1) transfer this proceeding to the New York State Supreme Court in Bronx County pursuant to New York Civil Practice Law and Rules (CPLR) 511 and 7004(c); or, in the alternative, to (2) dismiss the Petition pursuant to CPLR 3211(a); or to (3) allow the Bronx Zoo five days to answer the Petition pursuant to CPLR 404(a) in the event that the Court declines to grant the Bronx Zoo's motion. The NhRP respectfully submits that this Court must deny the Bronx Zoo's request to transfer the proceeding and its request to dismiss the Petition under CPLR 3211(a) for the reasons set forth below. Should the Court so rule, the NhRP further asks this Court not to grant the Bronx Zoo the additional 5 days it has requested within which to answer the Order to Show Cause for two reasons. *See* CPLR 404(a) (when a motion to dismiss the petition is denied, "the court may permit the respondent to answer").

First, the Bronx Zoo deliberately chose *not* to submit answering affidavits to the Petition within the prescribed deadline, and thus, as a matter of fairness, should be precluded from taking advantage of a delaying litigation tactic in a summary case that disregards the Court's Order. CPLR 404(a) provided the Bronx Zoo with the ability to "raise an objection in point of law *by setting it forth in his answer* or by a motion to dismiss to the petition." (emphasis added) Therefore, the Bronx Zoo *could* have set forth their defenses under CPLR 3211(a) in a *proper answer*, in a manner that not only complied with the requirements of CPLR 7008(b), but was submitted within the prescribed deadline. Yet they offered no justification, explanation, or reason for their failure to do so. Accordingly, this Court should not entertain another opportunity for the Bronx Zoo to do what they could have—and should have—easily done in the first place.

Second, at this stage, a return to the Petition would serve no useful purpose.[2] CPLR 7008(b) provides that "the affidavit shall fully 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 and authority for any transfer." The Bronx Zoo has filed numerous affidavits and two memoranda of law. There is nothing else required to respond to CPLR 7008. Another opportunity to file a return and postpone the summary hearing, would only cause unnecessary and unwarranted delay. *See Matter of Dodge*, 25 N.Y.2d 273, 286-287 (1969) ("Special Term properly determined that '*no useful purpose can be served by any answer interposed . .. '*") (emphasis added).

Controlling authority interpreting the analogous provision in CPLR 7804(f) is instructive. As in CPLR 404(a), CPLR 7804(f) allows a respondent to "raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition." But there is a key difference.

[2] CPLR 7008(a) states that "the return shall consist of an affidavit to be served in the same manner as an answer in a special proceeding and filed at the time and place specific in the writ…"

Under CPLR 7804(f), "[i]f the motion [to dismiss the petition] is denied, the court *shall* permit the respondent to answer." (emphasis added).

Despite the mandatory language in the provision, however, "a court need not do so if the '*facts are so fully presented in the papers of the respective parties* that it is clear that no dispute as to the facts exists and *no prejudice will result from the failure to require an answer*.'" *Kickertz v. New York University*, 25 N.Y.3d 942, 944 (2015) (emphasis added). In *230 Tenants Corp v Board of Standards and Appeals of City of New York*, 101 A.D.2d 53, 56 (3d Dept .1997), the New York State Supreme Court Appellate Division, Third Judicial Department ("Third Department") observed that:

> It not infrequently occurs that the papers submitted on such a motion set forth fully the relevant circumstances and make it clear that the dispositive issue presented is one of law only. In such circumstances *it is difficult to see what appropriate purpose is served by permitting the denial of the motion to be followed by an answer that raises no new factual or legal issue* and will merely lead to a second motion addressed to an already determined issue. (emphasis added)

The reasoning in those authorities regarding CPLR 7804(f) apply with equal force to CPLR 404(a) and CPLR 7008, if not more, and certainly to the case at bar, where "the facts are so fully presented in the papers of the respective parties" such that "no prejudice will result from the failure to [permit] an answer." On the facts relating to Happy's cognitive capacities relevant for common law personhood, supported by the Expert Scientific Affidavits attached to the Petition, there is no dispute, and that evidence remains unrebutted. Accordingly, a response will serve no useful or appropriate purpose. *See People ex rel Pray v. Allen*, 63 A.D.2d 1056 (3d Dept. 1978) ("the absence of a formal return was an irregularity and not a defect" as "the requirements of CPLR 7008 (subd [b]) were met at the outset of the appearance on behalf of the respondent on the return date.").

A. Venue is proper in Orleans County.

The Bronx Zoo incorrectly asserts that venue in this case is governed by CPLR 503, 510(1), and 511. But venue in habeas corpus actions are governed by CPLR Article 70, specifically Sections 7002 (b) and 7004(c), which make clear that venue is proper in Orleans County. The Commentary to CPLR 506 provides that "(i)n order to determine the venue for a special proceeding, *counsel must begin by consulting the statute authorizing the particular proceeding*. *See, e.g.,* CPLR 7002(b) (habeas corpus); CPLR 7502(a) (proceedings relating to arbitration). *If the authorizing statute is silent as to venue, the general venue rules of CPLR Article 5, such as those with respect to party residence in CPLR 503, would be applicable."* Vincent C. Alexander, McKinney's Practice Commentary, CPLR 506 (2015) (emphasis added). *See also* Joseph L. Marino, 4 West's McKinney's Forms Civil Practice Law and Rules § 10:2 (2015) ("In order to determine proper venue in a special proceeding, the statute authorizing the particular proceeding must be consulted. . . . Note that many of the Consolidated Laws authorizing special proceedings as well as special proceedings authorized by the CPLR have venue provisions. *See, e.g*., CPLR 7002(b) (venue in a habeas corpus proceeding).[3] As CPLR Article 70 governs venue in habeas corpus proceedings, it trumps the more general venue rules found in Article 5.[4]

Similarly, in *The Nonhuman Rights Project, Inc. v Stanley,* 49 Misc. 3d 746, 755-756, 770-771 (Supr. Ct. 2015) the court was confronted by a motion filed by the New York Attorney

[3] The use of the words "plaintiff" and "defendant" in CPLR 510 and 511 are further evidence that these provisions do not apply to habeas corpus proceedings, which use the terms "petitioner" and "respondent."

[4]The Bronx Zoo's reliance on *Greene v. Sup. Ct. Westchester Cty., Special Term*, *Part 1*, 31 A.D.2d 649, 649 (2d Dept. 1968) for the notion that Article 5 governs venue in the case at bar is misplaced, as *Greene* simply restates the accepted rule that the general venue provisions of Article 5 apply if and only if Article 70 is silent. As CPLR 7002 and 7004 specifically address where a petition may be brought and where a writ must be made returnable, the venue provisions of Article 5 are inapplicable.

General to change venue from New York County, where the NhRP had commenced its case and where the order to show cause was made returnable, to Suffolk County, the home of the State University of New York at Stony Brook ("Stony Brook University") where the chimpanzees were being imprisoned. The court said:

> I commence with CPLR 7002 (b) which provides that a habeas petition must 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."
>
> Petitioner relies on the statute and on the common law for the proposition that the writ may be sought from any justice of the supreme court (citation omitted). Respondents maintain that petitioner violated CPLR 7002(b) by not filing the petition with the supreme court in Suffolk County, where Hercules and Leo are detained . . .

Stanley, at 757.

The Attorney General sought to change venue pursuant to CPLR 7004(c) on the ground that Stony Brook University is a "state institution" that requires that an order to show cause be made returnable to Suffolk County. In response, the court noted that,

Pursuant to CPLR 7004(c),

> A writ to secure the discharge of a person from a state institution shall be made returnable before a justice of the supreme court ... being or residing within the county in which the person is detained; if there is no such judge it shall be made returnable before the nearest accessible supreme court justice.... In all other cases, the writ shall be made returnable in the county where it was issued, except that where the petition was made to the supreme court or to a supreme court justice outside the county in which the person is detained, such court or justice may make the writ returnable before any judge authorized to issue it in the county of detention.

The court then rejected the argument that Stony Brook University was a "state institution" and stated that:

> In *Matter of Hogan,* the Court also observed that: CPLR 7004(c) distinguishes between writs of habeas corpus concerning the inmates of State institutions, in the first instance, and writs "In all other cases." Where the writ is directed to the warden of a State prison, ... it must be made returnable in the county of detention,

> subject to the exception applicable when there is no available judge in that county. In all other cases, the writ is to be made returnable in the county of issuance, unless the issuing judge should decide in his discretion to make it returnable in the county of detention.
>
> (18 N.Y.2d at 335, 274 N.Y.S.2d 881, 221 N.E.2d 546).
>
> 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]).
>
> 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." (*People v. Schildhaus,* 8 N.Y.2d 33, 36, 201 N.Y.S.2d 97, 167 N.E.2d 640 [1960]; *see Harris v. Nelson,* 394 U.S. 286, 291, 89 S.Ct. 1082, 22 L.Ed.2d 281 [1969]; *Tweed,* 60 N.Y. at 568–569). 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 (CPLR 7003[c]; Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 7003[b][provision enacted for in terrorem effect]).
>
> For all of these reasons, a transfer of venue is not required.

Stanley, 49 Misc. 3d 746, at 759.

The drafters of CPLR 7002(b) specifically noted the instances in which a writ of habeas corpus *could, or was required to be*, made in the county of *residence* or *detention*. Thus § 7002(b)(1) said the writ shall be made to "the supreme court in the judicial district in which the person is *detained*: *or*" (emphasis added). CPLR 7002(b)(2) states that the writ shall be made to "the appellate division in the department in which the person is *detained; or*" (emphasis added). CPLR 7002(b)(4) states that the writ shall be made to "a county judge being or residing within

the county in which the person is *detained* . . . ." (emphasis added). In *contrast*, CPLR 7002 (b)(4) provides simply that "a petition for the writ shall be made to: *any* justice of the supreme court;" no county of residence or detention is required.

The Bronx Zoo claims that its "motion to transfer venue should be granted because NRP has not and cannot identify any nexus between this litigation and Orleans County," *Zoo Memorandum 2,* at 6, but cites no habeas corpus case that requires a nexus, as there are none. It correctly notes that the NhRP did not file the Petition in the New York State Supreme Court Appellate Division, First Judicial Department ("First Department") because that court "has demonstrated that it is willing to ignore powerful legal arguments and deprive an autonomous being such as Happy of any and all of her rights, just because she is not human." But there were reasons why the NhRP did not file in the New York State Supreme Court Appellate Division, Second Judicial Department ("Second Department") or the Third Department, either. The NhRP had the choice of filing in *any county in the State of New York*. No Supreme Court was privileged over any other as the venue for this habeas corpus suit. The NhRP chose to file in a county in the Fourth Department, primarily because of the Fourth Department's recent decision in *Graves, supra*, correctly stating that it is common knowledge that nonhuman animals can be "persons," and the fact that the Fourth Department in *Nonhuman Rights Project, Inc. v. Presti,* 124 A.D. 3d 1334 (4th Dept. 2014) refused to adopt the statement of the Third Department in *Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D. 3d 148 (3d Dept. 2014) ("*Lavery 1*") that only an entity able to bear duties could be "persons," while twice assuming, without deciding, that chimpanzees could be persons. *Presti,* 124 A.D. 3d at 1335.

The Bronx Zoo mistakenly relies on *Walton v. Mercy College*, No. 13259/2006, 2008 WL 3865297, at *8 (Sup. Ct. Bronx Cty. Aug. 14, 2008) and *Garces v. City of New York,* No.

613/2007, 2008 WL 60093, at *5 (Sup. Ct. Bronx Cty. Jan. 4, 2008) which deal solely with specific venue provisions under Article 5, and it disingenuously compares the case at bar to *Koschak v. Gates Constr. Corp.*, 225 A.D.2d 315, 316 (1st Dept. 1996) in which a tort plaintiff "engaged in a fraud upon the court" in trying to establish the residence necessary to gain venue in a desired county.

Finally, to prevail on a motion to change venue under CPLR 511(b) and CPLR 510(1), "a defendant must show that the plaintiff's choice of venue is improper and also that the defendant's choice of venue is proper[.]" *Deas v. Ahmed*, 120 A.D.3d 750, 750-51 (2d Dept. 2014) (citations omitted). Accordingly, the Bronx Zoo must prove that venue is *improper* in Orleans County. Only if they can make "such a showing [is] the plaintiff required to establish, in opposition, via documentary evidence, that the venue he selected was proper." *Chehab v. Roitman*, 120 A.D.3d 736, 737 (2d Dept. 2014). *See also Coaxum v. New York State Bd. of Parole*, 827 N.Y.S.2d 489, 492 (N.Y. Sup. Ct. 2006). Since venue is proper in Orleans County, the Bronx Zoo is unable to make the required showing.[5]

B. The NhRP "undisputably" has standing.

This Court should deny the Bronx Zoo's motion to dismiss on standing grounds as the NhRP "undisputably" has standing to bring this Petition pursuant to CPLR Article 70, traditional habeas corpus jurisprudence, and New York case law. CPLR 7002(a) provides that "a person illegally imprisoned or otherwise restrained of is liberty, *or anyone asking on his behalf* … may petition without notice for a writ of habeas corpus." *See* Vincent C. Alexander, McKinney's Practice Commentary, CPLR 7002(a) (2015) ("The statute authorizes either the detained person

[5] As discussed during oral argument by phone on November 16, 2018, this Court had the option, as did Justice Jaffe, of returning the Order to Bronx County. But this Court, perhaps for the reasons set forth in *Stanley*, chose to have it returned to the county of issuance, which was proper.

or anyone acting in such detainee's behalf to petition the court for the issuance of a writ of habeas corpus."). CPLR 7009(b) further assumes the petitioner and the person detained may not be the same person, as "the petitioner *or* the person detained" may reply to the return.

The Bronx Zoo falsely stated that "none of the previous courts in fact reached the question of standing." (*Zoo Memorandum 2*, at 9). Not only is this statement false, but this Court is *bound* by the determination of the First Department that the NhRP "undisputably" has standing. *Matter of Nonhuman Rights Project v. Lavery,* 152 A.D. 3d 73, 75 n.1 (1st Dept. 2017), *lv. den.* 31 N.Y. 3d 1054 (2018) ("*Lavery 2*"). *See Stanley*, 49 Misc. 3d at 755-756, 770-771 ("Nonhuman Rights Project has standing to bring habeas corpus case on behalf of two chimpanzees … . . . a lower court is bound by an apposite decision of an Appellate Division not within its judicial department when there is no decision on point from the Court of Appeals or the Appellate Division within its judicial department"). As no Fourth Department case contradicts the First Department, its decision is controlling. *Stanley*, 49 Misc. 3d, at 770.

The NhRP's "undisputable" standing is merely the latest incarnation of a centuries-long proud tradition of encouraging third-party strangers to seek a writ of habeas corpus on behalf of one who is, or may be, entitled to the bodily liberty that habeas corpus has protected for more than five hundred years. *See Lemmon* v. *People*, 20 N.Y. 562, 599-600 (1860) (abolitionist former slave Lewis Napoleon received common law writ of habeas corpus on behalf of slaves with whom he had no relationship); *In re Trainor*, *New York Times*, May 11, 14, 21, 25, June 14 (1853) (abolitionist and underground railway conductor Jacob R. Gibbs received common law writ of habeas corpus on behalf of a nine year old slave with whom he had no relationship); the *Lebranca* slaves, "Reported for the Express," *New York Evening Express*, July 13, 1847; *New York Legal Observer* 5, 299 (1847); *In re Kirk*, 1 Edm. Sel. Cas. 315 (1846) (abolitionist former

slave Lewis Napoleon received common law writ of habeas corpus on behalf of a young slave confined aboard a ship with whom he had no relationship); *People v. McLeod*, 3 Hill 635 n. "j" sec.7 (N.Y. 1842) ("The common law right was clear . . . 'that every Englishman who is imprisoned by any authority whatsoever, has an undoubted right, by his *agents* or *friends,* to apply for and obtain a writ of *habeas corpus* in order to procure his liberty by due course of law.'") (emphases in original) (approved in *People ex rel. Tweed v. Liscomb*, 69 N.Y. 559, 570 (1875); *Case of the Hottentot Venus*, 13 East 185, 104 Eng. Rep. 344 (K.B. 1810) (Abolitionist Society received habeas corpus on behalf of South African woman being exhibited in London); *Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (Lord Mansfield) (unrelated third parties received common law writ of habeas corpus on behalf of a slave imprisoned on a ship). *See also Steven M. Wise, Though the Heavens May Fall – The Landmark Trial That led to the End of Human Slavery* 114-116 (Da Capo Press 2005) (describing the *Somerset* case)

C. The Petition should not be dismissed on the grounds of collateral estoppel.

This Court should deny the Bronx Zoo's motion to dismiss on grounds of collateral estoppel as collateral estopped does not apply in this case. First, neither issue preclusion nor claim preclusion apply generally to the New York common law writ of habeas corpus. *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). To the contrary, "[i]t is stated by the Revisers in the Third Report to the Legislature that subd.(b) of this section continues the common law and present position in New York that *res judicata has no application to the writ. See, e.g., People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 191-92 (1874)." ADVISORY COMMITTEE NOTES TO CPLR 7003(b) (emphasis added).

> 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. *People ex rel. Lawrence v. Brady*, 56 N.Y. 182. . . . But this rule has no bearing upon the *res judicata* effect of an order *sustaining* a writ of habeas corpus. 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 . . . If, however, the writ was sustained and there was an adjudication that the order under which the prisoner had been detained was jurisdictionally defective, the adjudication is binding upon the parties in any subsequent proceeding or action, if it is not reversed or annulled upon appeal.

Post v. Lyford, 285 A.D. 101, 104-05 (3d Dept. 1954). *See also Williams v. State*, 9 A.D. 2d 415, 418 (4th Dept. 1959), *aff.* 8 N.Y. 2d 886 (1959) ("The order in the habeas corpus proceeding, from which no appeal was taken, constituted a conclusive adjudication that the order of commitment was void and that the imprisonment thereunder was illegal", citing *Post, supra*).

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); *People ex rel. Butler v. McNeill*, 219 N.Y.S.2d 722 (Sup. Ct. 1961) (petitioner's four unsuccessful applications for habeas corpus did not preclude a fifth). 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.*[6]

[6] Significantly, two of the four cases cited by the Bronx Zoo, *Zoo Memorandum 2*, at 12, in support of its erroneous contention that collateral estoppel and issue preclusion apply to habeas corpus generally and to the case at bar specifically, are not habeas corpus cases. *See Beuchel v.*

However, in New York, a court is not required to issue a writ for a successive petition for a writ of habeas corpus 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). The burden is on the party asserting preclusion to demonstrate that any prior determination was on the merits. *Clark v. Scoville*, 198 N.Y. 279, 283-84 (1910); *Litz Enterprises, Inc. v. Stand. Steel Industries, Inc.*, 57 A.D.2d 34, 38 (4th Dept. 1977).

It is frivolous for the Bronx Zoo to claim that collateral estoppel applies to the case at bar *because there was no prior proceeding on Happy's behalf, ever*. It is therefore impossible that the legality of Happy's detention could ever have been determined in a prior proceeding for a writ of habeas corpus by a court of this, or any other, state.

Moreover, the Bronx Zoo's claim that the NhRP's habeas corpus litigation on behalf of imprisoned chimpanzees somehow precludes the ability to litigate a habeas corpus case on behalf of Happy is, literally, unprecedented; the Bronx Zoo cannot cite to any precedent, anywhere, for such a claim.

It is also unprecedented, anywhere, to attempt to characterize the "person" who brings the lawsuit on behalf of the illegally detained prisoner as the "true party of interest," rather than the prisoner herself. Indeed, the NhRP, is seeking to change the legal status of nonhuman animals

---

Bain, 97 N.Y.2d295, 305 (2001) (validity of fee arrangements) and *Fusco v. Kraumlap Realty Corp*., 1 A.D.3d 189, 194 (1st Dept. 2003) (wrongful eviction). The two other cases, *People ex re. Hatzman v. Kuhlman,* 594 N.Y.S 922, 923 (4th Dept. 1993) and *People ex rel. Spaulding v. Woods*, 63 A.D. 3d 1456, 1457 (3d Dept. 2009) are grossly inapposite to the case at bar as there was a binding "prior proceeding involving *the same facts and legal contentions*" (emphasis added) in *Hatzman* and in *Spaulding*, the jurisdictional claim at issue had been decided in the petitioner's fourth application for habeas corpus relief.

such as Happy, from "things" to "persons," as there is presently no other way for them to gain their freedom and vindicate their autonomy.[7]

D. The NhRP alleges in its Petition that Happy is illegally imprisoned and therefore alleges a cause of action for common law habeas corpus.

The Bronx Zoo's assertion that the Petition does not allege a cause of action "because it does not and cannot allege that Happy is unlawfully detained," *Zoo Memorandum 2*, at 14, is factually astonishing and legally erroneous. Throughout its *Petition* and *Supporting Memorandum,* the NhRP persistently, again and again, often in several different ways, alleges that Happy is being unlawfully detained by the Bronx Zoo. It begins with the Petition's first three paragraphs.

The Petition at ¶ 1 states that "[t]his Verified Petition is for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") filed by the NhRP pursuant to . . . Article 70 on behalf of an elephant named Happy . . . *who is being unlawfully imprisoned by Respondents at the Bronx Zoo.*" (emphasis added). At ¶ 2, the NhRP states that "[t]his Petition seeks a good faith and well-supported extension of the New York common law of habeas corpus to Happy, who is . . . *being unlawfully imprisoned* solely because she is an elephant.") (emphasis added). At ¶ 3, the NhRP states that "[t]he timely intervention of this Court is necessary to grant Happy her common law *right to bodily liberty and immediate release* so as to prevent future unlawful deprivations of her liberty and allow her to exercise her autonomy to the greatest degree possible." (emphasis added). Similar language may be found in at least eleven more

[7] The cases cited by the Bronx Zoo do not support its erroneous notion that the NhRP "had a stake" in the prior chimpanzee habeas corpus actions and is therefore estopped from filing this Petition. Rather, they make clear that with respect to preclusion, "[d]oubts should be resolved against imposing preclusion to ensure that the party to be bound can be considered to have had a full and fair opportunity to litigate." *Beuschel*, 97 N.Y.2d at 305; *Altegra Credit Co. v. Tin Chu*, 29 A.D.3d 718, 720 (2d Dept. 2006).

paragraphs of the *Petition,* at ¶¶ 8, 14, 18, 19, 20, 38, 42, 54, 56, 70, 118, and on at least nine pages of the *Supporting Memorandum*, at pages 3, 4, 10, 11, 13, 16, 20, 21, 25.

Moreover, the NhRP has alleged and demonstrated that Happy's autonomy is sufficient to entitle her to the common law right to bodily *liberty as a matter of liberty, equality, or both,* Petition ¶ 20; Supporting Memorandum at pages 11-16, and that the violation of her bodily liberty by virtue of her illegal imprisonment is *per se* unlawful, Petition ¶ 20; Supporting Memorandum at 20-21.

Every natural "person" in New York State is presumed to be entitled to personal liberty (*in favorem libertatis*). *See 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"); *Lemmon*, 20 N.Y. at 604-05, 617; *Oatfield v. Waring*, 14 Johns. 188, 193 (Sup. Ct. 1817) ("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*, 35 Barb. 444, 457-58 (Sup Ct. 1862) (Potter, J.) ("Liberty and freedom are man's natural conditions; presumptions should be in favor of this construction."); *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.").

Lastly, the Bronx Zoo's conclusion that the Petition does not state a cause of action because the NhRP does not allege "that Happy's current living conditions are in any way unlawful" not only demonstrates its misunderstanding of the nature of habeas corpus and of the NhRP's allegation, but conflates a traditional animal welfare case in which a state official acts

against someone who is violating an animal welfare statute or regulation, which this is not, with a habeas corpus action, which this is.

In their October Memorandum (incorporated by reference in their December memorandum), the Bronx Zoo argues that "[s]ignificant statutory protections for animals exist," citing statutes that prohibit the "torture or unjustifiable killing of animals," the "abandonment of animals in a public place," the "transportation of animals in cruel or inhuman[e] manners," and prohibiting the "impounding of animals and then failing to provide them with sustenance." (*Zoo Memorandum 1*, at 8-9). Of course, none of these statutes give autonomous nonhuman animals the right to bodily liberty secured by habeas corpus nor were they intended to deal with the issue of the entitlement of nonhuman animals to habeas corpus. The absurdity of the Bronx Zoo's argument is apparent when one substitutes "animals" for "humans." The interests of New Yorkers are protected both by legal rights and by welfare laws and it is highly doubtful that any of them would wish to give up one for the other. This habeas corpus case is neither an "animal protection" nor "animal welfare" case, just as a habeas corpus case brought on behalf of a detained human would not be a "human protection" or "human welfare" case. *See Lavery 1*, 124 A.D.3d at 149; *Stanley*, 49 Misc. 3d at 749. Even the Third Department in *Lavery 1* readily understood that the evaluation of "the quality of Tommy's current living conditions in an effort to improve his welfare" was irrelevant to the habeas corpus inquiry. 124 A.D.3d at 149. The Supreme Court in *Stanley* agreed: "[t]he conditions under which Hercules and Leo are confined are not challenged by petitioner[.] . . . [*T]he sole issue is whether Hercules and Leo may be legally detained at all*." 49 Misc. 3d at 749(emphasis added).

The Bronx Zoo's confusion is further exemplified by its request in Footnote 1 to "present expert testimony – and other clear and convincing evidence - concerning" the "issue of fact as to

whether Happy is unlawfully detained." (*Zoo Memorandum 2*, at 14). But there are no issues of fact. It is undisputed that the Bronx Zoo is detaining Happy. Whether this detention is illegal is a matter of common law and is in no way related to or dependent upon proving the violation of an animal welfare statute or regulation.

III. This Court is bound by the decisions of the Court of Appeals in *Byrn v New York City Health & Hospitals Corporation* and the Fourth Department in *People v. Graves* and the Legislature's public policy decision that nonhuman animals may be legal persons irrespective of whether they can bear duties.

This Court is either (1) *bound* by the decisions of the Court of Appeals in *Byrn* and the Fourth Department in *Graves* and the Legislature's public policy that nonhuman animals may be legal persons in New York irrespective of whether they can bear duties, and (2) *rejects* the statements in *Lavery 1* that only entities able to bear duties can be legal persons and in Lavery 2 that only humans can be legal persons *or* it is (1) *bound* by the statements in *Lavery 1* that only entities able to bear duties can be legal persons and in *Lavery 2* that only humans can be legal persons, and (2) *rejects* the decisions of the Court of Appeals in *Byrn* and the Fourth Department in *People v. Graves* and the Legislature's public policy that nonhuman animals may be legal persons in New York irrespective of whether they can bear duties. The two categories are mutually exclusive.

A. The Anglo-American jurisprudence of legal personhood has never made "person" a synonym for "human," but designates a person as an entity with the capacity for legal rights, and has never limited legal personhood to entities able to bear duties

The NhRP has explained in detail why legal "person" is not now, and never has been, a synonym either for entities able to bear duties or "human being;" any claim that it is a synonym for either contradicts the Court of Appeals, legislative public policy, and the law of the Fourth Department. (Pet. ¶¶ 4-5) (Mem. 4-7). Accordingly this Court is not bound by *Lavery 1*, 124 A.D.3d 148, or *Lavery 2*, 152 A.D. 3d 73 (Pet. ¶¶ 9-10) (Mem. 18-20). This Court is, however,

bound by *Graves*, 78 N.Y.S 3d. 613, which is fundamentally incompatible with, and contradicts, both *Lavery 1* and *Lavery 2,* because it harmonizes with the personhood law of New York and the rest of the common law world, while the two *Lavery* cases are singular outliers that no court has followed or is likely ever to follow. The Bronx Zoo's arguments in its discussion of personhood, *Zoo Memorandum 2*, at 9-12, are grounded in a fundamental misunderstanding of the nature of legal personhood. An explanation requires a foray into the nature of legal personhood.

The "significant fortune of legal personality is the *capacity* for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959) (emphasis added). "(A) person is any being whom the law regards as capable of rights *or* duties." John Salmond, *Salmond on Jurisprudence* (Patrick John Fitzgerald, Sweet & Maxwell, 12th ed. 1966) (emphases added). Thus, "(t)here is no difficulty in giving legal rights to a supernatural being and thus making him or her a legal person." John Chipman Gray, *The Nature and Sources of the Law,* Chapter II, 39 (1921) ("Gray") (the Court of Appeals cited Chapter II of Gray with approval in *Byrn*, 31 N.Y. 2d at 201). Exactly to the point, Gray, at 42-43, notes there may be "systems of law in which animals have legal rights … animals may conceivable be legal persons." Moreover, "(o)ne who has rights but no duties, or who has duties but no rights, is . . . a person." Gray, at 27. *See Wartelle v. Womens' & Children's Hosp.*, 704 So. 2d 778, 781 (La. 1997) ("'Person' is a term of art (used) … to signify a subject of rights or duties").

Any entity with a legal right is *by definition* a legal person, because to have a right, one must have the *capacity* to have that right, in other words, to be a legal person. Conversely, one may be a legal person with the *capacity* to have a legal right, but not yet have a right, or have but one legal right, or just ten. Thus when the Fourth Department in *Graves*, 78 N.Y.S. 3d, at 617,

states that it is "common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or *animals*," it means that it is "common knowledge" that nonhuman animals are "persons" with the *capacity* for rights, with the sole remaining question being: *which rights are they entitled to*? Thus some nonhuman animals may have the legal right to be a beneficiary of trust, a right that pets and domestic animals have long had in New York pursuant to Estates, Powers and Trusts Law ("EPTL") 7-8.1, but *not* have the right to the appointment of a guardian *at litem*. *Matter of Ruth H.*, 159 A.D. 3d 1487, 1490 (4th Dept. 2018). Legal rights are not all or nothing and every human does not have the same legal rights of every other human.

This is what Judge Fahey is referring to when he states that the issue in a habeas corpus case is not "whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the *right to liberty protected by habeas corpus*." *Fahey Concurrence*, 31 N.Y. 3d at 1057 (emphasis added). Thus the question before this Court is not whether Happy the elephant can bear the duties of a human being or whether she is a human being, which she obviously is not, but whether she possesses the legal right to bodily liberty protected by common law habeas corpus. "(T)the answer to that question will depend on our assessment of the intrinsic nature of (the nonhuman animal) as a species," *id*. That assessment involves sophisticated scientific facts and "public policy" arguments, *Byrn*, 31 N.Y. 2d, at 201; *see Graves*, 78 N.Y.S. 3d at 617 (quoting *Byrn*); (personhood is "not a question of biological or 'natural' correspondence."), *see also, Stanley*, 49 Misc. 3d at 763, both of which the NhRP makes at length, neither of which the Bronx Zoo even attempts to address.

"Person" has been defined both more narrowly than "human being" and also more broadly or qualitatively different than "human being." As noted in the Petition, at ¶¶ 10-11, 21

and Supporting Memorandum, at pages 4-7, throughout Anglo-American legal history, many human beings were once not legal "persons" including fetuses, slaves, women, Jews, and Native Americans. On the other hand, groups of individual human beings, corporations, and a wide and expanding array of nonhuman entities that includes nonhuman animals in Argentina, Colombia, and India, the Amazon rainforest, a Hindu idol, the Sikh's sacred text, the Whanganui River and a national park in New Zealand have all been designated as legal "persons" through the application of scientific facts and to public policy.

Millions of New Yorkers are legal "persons" with legal rights despite the fact they cannot bear duties. *Lavery 2*, 152 A.D. 3d at 78. ("[I]nfants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights."); *Fahey Concurrence*, 31 N.Y.3d at 1057 (Fahey, J., concurring) ("Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child"). The Bronx Zoo would now buck centuries of personhood law just to condemn millions of New Yorkers to being rightless "things" and not "persons" with the capacity for legal rights.

Black's Law Dictionary ("*Black's*") does not support the Bronx Zoo's eccentric view of personhood. *Black's* relies upon the 10th edition of *Salmond on Jurisprudence*, which clearly defines "person" as an entity that can bear rights *or* responsibilities. Indeed, *every* edition of *Salmond on Jurisprudence,* for the last 116 years, states that "a person is any being whom the law regards as capable of legal rights *or* duties."[8] The Third Department in *Lavery 1, supra*[9]*,* and

[8] John Salmond, *Salmond on Jurisprudence* (Patrick John Fitzgerald, Sweet & Maxwell, 12th ed. 1966) 299; John Salmond, *Salmond on Jurisprudence* (Glanville Williams, London, Sweet & Maxwell, Limited, 11th ed. 1957) 350; Glanville L. Williams, *Salmond on Jurisprudence* 318

the Bronx Zoo may be partially excused for believing *Black's* erroneous statement that personhood requires the capacity for rights *and* duties.[10] But, with respect, that does not excuse either the Third Department or the Bronx Zoo from checking the accuracy of *Black*'s definition itself by going to the dictionary's source. When the NhRP checked the source it found *Blacks* had erroneously claimed that *Salmon on Jurisprudence* required that a "person" have the capacity for rights *and* duties. It thereupon contacted its Editor-in-Chief, who agreed promptly to correct the error in its next edition.[11]

The Bronx Zoo also incorrectly relies upon the 2000 treatise, *English Private Law,* by Peter Birks ("Birks") (*Zoo Memorandum 1*, at 5). It is a telling error—not by Birks, but by the Bronx Zoo—that reveals the Bronx Zoo's lack of understanding of the nature of legal personhood. Birks' treatise makes clear that personhood is *not* limited to human beings and is predicated upon the capacity to enforce a right "*or*" owe a duty:

> A human being *or entity which* has been said by Parliament or the courts to be capable of enforcing a particular right, *or* of owing a particular duty, can *properly*

(10th ed. 1947); John Salmond, *Jurisprudence* (C.A.W. Manning, London: Sweet & Maxwell, Limited, 8th ed. 1930) 329; John Salmond, *Jurisprudence*, 7th ed. (London: Sweet & Maxwell, Limited, 1924) 329; John Salmond, *Jurisprudence*, 6th ed. (London: Sweet & Maxwell, Limited, 1920) 272; John Salmond, *Jurisprudence*, 4th ed. (London, Stevens and Haynes, 1913) 272; John Salmond, Jurisprudence, 2nd ed. (London: Stevens and Haynes 1907) 275; and John Salmond, *Jurisprudence or The Theory of the Law* (London, Stevens & Haynes 1902) 334 (emphasis added).

[9] The Third Department in *Nonhuman Rights, Inc. ex rel. Tommy v. Lavery*, 124 A.D.3d 148, 151-152, relied upon and quoted from the 10th Edition of *Salmond*'s treatise found in the 7th Edition of Black's Law Dictionary, and it also states that "a person is any being whom the law regards as capable of rights or duties." Glanville L. Williams, *Salmond on Jurisprudence* 318 (10th ed. 1947).

[10] The Third Department in *Lavery*, 124 A.D.3d at 151-52, relied upon and quoted from the 10th Edition of *Salmond*'s treatise found in the 7th Edition *of Black's Law Dictionary*, and it also states that "a person is any being whom the law regards as capable of rights or duties." Glanville L. Williams, *Salmond on Jurisprudence* 318 (10th ed. 1947).

[11] *See Affidavit of Kevin Schneider,* ¶¶ 3-4; James Trimarco, "Chimps Could Soon Win Legal Personhood," YES! Magazine (Apr. 28, 2017), *available at*: http://www.yesmagazine.org/peace-justice/chimps-could-soon-win-legal-personhood-20170428 (last visited Sept. 27, 2018).

> *described as a person with that particular capacity*. But it can be easy to forget the qualifier, and to assume when the question later arises, whether the individual or entity has the further capacity to enforce some other right, *or* to owe some other duty, that this must be so because he or it has previously has been said to be a person *with an unlimited set of capacities*, or to be a person who possesses the 'powers normally attendant on legal personality. In other words, the careless use of the terms 'person' and 'personality' can create the false impression that a particular human being or entity has been said to possess a larger set of right-owning, duty-owning capacities than is in fact the case.

1 *English Private Law*, § 3.24 (Peter Birks ed., 2000) (footnotes omitted).[12] Here, the NhRP only seeks the common law right of bodily liberty protected by the common law of habeas corpus for Happy.

As will now be demonstrated, the Court of Appeals and the Fourth Department are already in harmony with an Anglo-American personhood law with roots thrust deeply into the common law. Below, the NhRP chronologically sets forth the law of personhood in New York, which demonstrates that *Lavery I and Lavery 2* both defy not just centuries of Anglo-American personhood jurisprudence, but binding precedent from both before and after it was decided.

B. The Court of Appeals decision in *Byrn*

The leading case on the standard for personhood in New York is the Court of Appeals decision in *Byrn,* now almost 50 years old. There the *Byr*n court made clear that "person" and "human" are not synonyms. In 1972, *Byrn* considered a challenge to the constitutionality of a 1970 abortion statute that raised the question of "whether children in embryo are and must be recognized as legal persons" entitled to a right to life under the New York State and Federal Constitutions. 31 N.Y.S.2d at 200. The Court explained that, as a biological matter, fetuses are human beings, but that did not mean they are "persons." *Id*. That a human entity is "treated

[12] In implying that the NhRP ignored Birks' 2000 treatise, the Bronx Zoo gives the false impression that *Lavery*—which relied on the 7th edition of *Black's Law Dictionary* (published in 1999)—actually relied on the 10th edition *of Black's Law Dictionary* (published in 2014) containing the quotation from Birks' 2000 treatise.

anywhere in the law as a person" does not entail being "so treated for all purposes." *Id*. at 200-01. This is because, as the Court noted, the "legal order" does not "necessarily correspond[] to the natural order." *Id*. 201.

The Court said that who is a "person" "simply means that upon according legal personality to a thing the law affords it the *rights and privileges* of a legal person." *Id*. (emphasis added) (citing Kelsen, *General Theory of Law and State*, pp. 93-109; Paton, *Jurisprudence* [3d ed.], pp. 349-356, esp. pp. 353-354 as to natural persons and unborn children; Friedmann, Legal Theory [5th ed.], pp. 521-523; Gray, *The Nature and Sources of the Law* [2d ed.], ch. II).

Byrn said that the determination of whether an entity is a person under the law is not a matter of "biological or 'natural' correspondence." *Id*. at 201. Instead, "it is a policy determination whether legal personality should attach." *Id*. The *Byrn* court recognized that who is deemed a "person" is a "matter each legal system must settle for itself" in light of evolving public policy. *Id*. at 201-02 (quoting Gray).

As explained below, the "policy determination" regarding nonhuman animals has already been made.

C. The New York Pet Trust Statute

Twenty-four years after the 1972 *Byrn* decision, the New York Legislature in 1996 enacted EPTL 7-6 (now EPTL 7-8), which permitted "domestic or pet animals" to be designated as trust beneficiaries and, thus, "persons" capable of possessing legal rights.[13] *See Stanley*, 16 N.Y.S.3d at 901. The Bronx Zoo, in its first memorandum, argues that EPTL 7-8.1 does not "address[] the legal personhood of animals." (*Zoo Memorandum 1*, at 7). But the Bronx Zoo is

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

wrong. The statute did not need to expressly state that it was granting personhood to such nonhuman animals under its ambit. As noted above, personhood is merely a *capacity*. By granting nonhuman animals the legal right to be trust beneficiaries, it recognized their personhood *by definition*, as only "persons" may be trust beneficiaries.[14] (See Pet. ¶¶ 8-9 and Mem. at 16-18).

New York's Legislature thus made a "policy determination" on "whether legal personality should attach to" certain nonhuman animals, and determined that they should. *Byrn*, 31 N.Y.2d at 201. For purposes of EPTL 7-8.1, nonhuman animals are not required to bear legal duties, which is in complete harmony with *Byrn*'s understanding that "upon according legal personality to [nonhuman animals] the law affords [them] the *rights and privileges* of a legal person[s]." *Id.* (emphasis added). The statute thus directly conflicts with (1) any claim that the ability to bear or owe legal duties is necessary for legal personhood and (2) the proposition that nonhuman animals cannot be legal persons.

Statutes are a "seminal source of public policy to which common-law courts can refer." *Reno v. D'Javid*, 379 N.Y.S.2d 290, 294 (Sup. Ct. 1976) (citations omitted). The *Stanley* court recognized that EPTL 7-8 represents a policy in favor of common law personhood for nonhuman animals, noting that animals "are gradually being treated as more than property[.] . . . Consonant with these recent trends, New York enacted [EPTL 7-8] providing that a domestic or pet animal

---

[14] *See In re Fouts,* 677 N.Y.S.2d 699 (Sur. 1998) (five chimpanzees); *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); *Gilman v. McCardle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) ("Beneficiaries . . . must be persons"), *rev. on other grounds*, 99 N.Y. 451 (1885); RESTATEMENT (THIRD) OF TRUSTS § 43 *Persons Who May Be Beneficiaries* (2003) ("A person who would have capacity to take and hold legal title to the intended trust property has capacity to be a beneficiary of a trust of that property; ordinarily, a person who lacks capacity to hold legal title to property may not be a trust beneficiary."); RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No. 2, approved 1999); RESTATEMENT (SECOND) OF TRUSTS § 124 (1959); BENEFICIARY, *Black's Law Dictionary* (9th ed. 2009).

may be named as a beneficiary of a trust. 16 N.Y.S.3d at 912-13 (internal citations omitted). *See also id.* at 901 (referring to "this state's recognition of legal personhood for some nonhuman animals under the [EPTL]").[15]

D. The Third Department's decision in *Lavery 1*

Despite the 1972 *Byrn* decision and the 1996 Pet Trust Statute, the Third Department in *Lavery 1*, 124 A.D.3d at 150-53 erroneously held—for the first time in legal history—that the capacity to bear both legal rights *and* duties was a *necessary* condition for personhood. This holding directly conflicted with both *Byrn* and the Pet Trust Statute, as well as centuries of personhood jurisprudence.

Recall that in *Byrn*, the Court of Appeals held that whether an entity is a "person" under the law is a "policy determination . . . which each legal system must settle for itself."" 31 N.Y.S.3d at 201, 202 (quoting Gray). As explained above, with the enactment of what is now EPTL 7-8 in 1996, New York's Legislature made the "policy determination" to extend legal personhood status to pets and domestic animals, without requiring them to bear legal duties, consistent with *Byrn*. With respect to nonhuman animals in general, their personhood status is *already* a matter of a state policy that is over 20 years old. Recall also *Byrn's* teaching that that when "legal personality" is accorded to an entity "the law affords it the *rights and privileges*"—not necessarily duties—"of a legal person." *Id.* (emphasis added). Therefore, any court holding (1) that personhood requires an ability to bear legal duties or (2) that nonhuman animals by definition cannot be legal persons directly conflicts with established public policy and *Byrn.*

The Third Department in *Lavery 1* ignored both *Byrn* and EPTL 7-8 when it held that the "incapacity to bear any legal responsibilities and duties" renders it inappropriate to confer legal

[15] The NhRP has set up a trust on behalf of Happy pursuant to EPTL 7-8. See "Exhibit 2" to the Petition.

rights upon chimpanzees." 124 A.D.3d at 152. *Lavery* ignored *Byrn* in relying on a dictionary definition of legal personhood (which turned out not to support its position), *id* at 151-2, rather than making the required "policy determination" as to whether "legal personality should attach" to chimpanzees. It also ignored *Byrn* by disregarding the statement that, in New York, "according legal personality to a thing the law affords it the *rights and privileges*"—not duties—of a legal person." (emphasis added). *Byrn*, 31 N.Y.S.3d at 201.And it ignored EPTL 7-8 in requiring the "capacity to bear legal responsibilities and duties" for legal rights. *Lavery*, 124 A.D.3d at 152.

Since *Lavery*'s decision, no court in New York, or in any state in the United States, or anywhere else in the world has adopted its reasoning, not even *Lavery 2*. This Court is bound to follow *Byrn* and the public policy set forth in New York's Pet Trust Statute, not *Lavery*.

E. The Fourth Department's decision in *Presti*

A month after *Lavery 1,* the Fourth Department decided *Presti*, 124 A.D.3d 1334. There it had the opportunity to adopt the reasoning of *Lavery* 1 but, notably, declined to do so. Instead, the Fourth Department disregarded *Lavery* entirely, while twice stating without deciding, that a chimpanzee (Kiko) could be a "person" for habeas corpus purposes. *See id.* ("even assuming, arguendo, that we agreed with petitioner that Kiko should be deemed a person for the purpose of this application, . . .") and ("Regardless of whether we agree with petitioner's claim that Kiko is a person within the statutory and common-law definition of the writ . . ."). *See also Graves*, 78 N.Y.S. 3d at 617(citing *Presti* for notion that personhood can attach to nonhuman animals).

F. The First Department's decision in *Lavery 2*

In 2017, the First Department decided. *Lavery 2*, which initially appeared erroneously to rely upon *Lavery1's* statement that the capacity to bear duties is necessary for personhood. But it

did not do so. The First Department correctly recognized the obvious frailty of the Third Department's reasoning in *Lavery 1,* 124 A.D.3d at n.3, stating the obvious weakness that the Third Department had somehow overlooked: "infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights." *Lavery 2*, 152 A.D.3d at 78. It then threw off any pretense that it was making a reasoned public policy determination and simply declared, in half a sentence and without any legal support, that the NhRP "ignores the fact that these are still human beings, members of the human community." *Id.* The court's entire personhood analysis thereby morphed into the wholly biological determination that chimpanzees are not human beings and therefore cannot be "persons" that *Byrn* forbid. *Id*.

The First Department's decision in *Lavery 2* is therefore also irreconcilable with New York precedent and policy. First, it is irreconcilable with *Byrn* by ignoring its teaching that personhood is a "policy determination" and "not a question of biological...correspondence." 31 N.Y.2d at 201. In accordance with *Byrn*, such determination necessarily entails a mature weighing of public policy and moral principle that *Lavery 2* did not provide. Second, it is irreconcilable with *Byrn* in ignoring the rule that, in New York, when "legal personality" is accorded to an entity "the law affords it the *rights and privileges*"—not necessarily duties—"of a legal person." *Id.* (emphasis added).. And third, it is irreconcilable with the Pet Trust Statute's settled "policy determination" that personhood can—and does—extend to nonhuman animals irrespective their biology.

F. Judge Fahey's Court of Appeals Concurrence

Earlier this year, Judge Fahey confirmed that both the Third Department in *Lavery* and the First Department in *Tommy* had been wrongly decided. In harmony with the general theory of legal personhood and the binding authority of *Byrn* and public policy implicit in the Pet Trust

Statute, Judge Fahey explicitly declared that the ability of an entity to bear duties and responsibilities is legally irrelevant to her ability to have rights:

> Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child . . . or a parent suffering from dementia[.] . . . In short, being a "moral agent" who can freely choose to act as morality requires is not a necessary condition of being a "moral patient" who can be wronged and may have the right to redress wrongs.

Fahey Concurrence, 31 N.Y.3d at 1057 (2018). Unlike in *Lavery 1*, Judge Fahey's opinion is fully faithful to *Byrn*'s teaching that "according legal personality to a thing the law affords it the *rights and privileges*"—not necessarily duties— "of a legal person." *Byrn*, 31 N.Y.S.3d at 201 (emphasis added). Consistent with both *Byrn* and the Pet Trust Statute, Judge Fahey also correctly criticized the "[First Department's] conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief" because it "is in fact *based on nothing more than the premise that a chimpanzee is not a member of the human species*." Fahey Concurrence, 31 N.Y.3d at 1057 (emphasis added).

The question, Judge Fahey reiterated, is not whether "a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus." *Id.* Judge Fahey added that "amici law professors Laurence H. Tribe, Justin Marceau, and Samuel Wiseman question [*Lavery*'s] assumption." *Id*. He concluded that "[t]he issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. . . . While it *may* be arguable that a chimpanzee is *not* a 'person,' there *is no doubt* that it is *not merely a thing*." *Id.* at 1059 (emphasis added).

As Justice Fahey's concurring opinion is absolutely consistent with *Byrn* and the public policy embodied in the Pet Trust Statute, it is far more persuasive than the Third and First

Department Decisions in *Lavery* and *Lavery II*, which rely either upon a defective reading of *Black's* or upon nothing at all.

G. The Fourth Department's decision: *Graves*

In June 2018, one month after the *Fahey Concurrence*, the Fourth Department in *Graves* made clear that personhood is: (1) *not* dependent on the capacity to bear or owe legal duties, and (2) that it is "common knowledge" that personhood "can and sometimes does attach to nonhuman entities like . . . *animals*." *Graves*, 163 A.D.3d at 21 (citations omitted) (emphasis added). The first proposition follows inescapably from the second. *Graves* not only cited *Presti* in support of its position but cited *also* to the controlling authority in *Bryn*—specifically quoting the proposition that "personhood is not a question of biological or 'natural' correspondence." *Id.* (internal quotations omitted). *Graves* is thus in absolute accord with the centuries old Anglo-American legal personhood jurisprudence as well as the binding authority in *Bryn* and the public policy necessarily implicit in the Pet Trust Statute.

Absurdly, the Bronx Zoo implies that *Matter of Ruth*, 159 A.D.3d 1487 (4th Dept. 2018) (*Zoo Memorandum 2*, at 11) somehow cuts *Graves* back, which is impossible as *Graves* was decided several months *after Matter of Ruth*. The suggestion that *Matter of Ruth H* could have done so again demonstrates the Bronx Zoo's misunderstanding of the nature and history of legal personhood. There is no hint of a conflict between *Graves*' recognition that "personhood can and does sometimes attach to nonhuman entities like . . . animals," *supra*, for some purposes, and *Matter of Ruth*'s recognition of the property status of animals for other purposes. An entity who is a "person" has the capacity for legal rights. A "thing" lacks the capacity for legal rights. John Salmond, *Salmond on Jurisprudence* (Patrick John Fitzgerald, Sweet & Maxwell, 12th ed. 1966) 299 ("So far as legal theory is concerned, a person is any being whom the law regards as capable

of rights or duties."). As noted, *supra* at 2. it is entirely possible for a "person" to possess the right to bodily liberty that is protected by common law habeas corpus or, as discussed *infra*, at 26-27, the right to be a beneficiary under a state's Pet Trust Statute, yet still lack the right not to be considered "property."

As explained in the Birks' treatise relied on by the Bronx Zoo, an "entity which has been said by . . . the courts to be capable of enforcing a particular right, or of owning a particular duty, can properly be described as a person *with that particular capacity*," and that "it can be easy to forget the qualifier." 1 English Private Law, § 3.24 (Peter Birks ed., 2000) (emphasis original). The Bronx Zoo forgot the qualifier. *Matter of Ruth H* was merely commenting on the "particular capacity" of animals to obtain a specific right in Family Court, whereas the case at bar concerns the "particular capacity" of an extraordinary cognitively complex autonomous being to obtain a completely different right, the right to bodily liberty protected by the common law of writ of habeas corpus, in the Supreme Court.

H. Lack of precedent is an insufficient basis for denying personhood rights.

Other than relying on *Black's Law Dictionary*'s erroneous and its soon-to-be-corrected definition of "person," the Bronx Zoo cites *Lavery 1's* remark 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." 124 A.D.3d at 150. (*Zoo Memorandum 2*, at 10). Although *Lavery* did not ground its holding on lack of precedent, as the Bronx Zoo implies, *Zoo Memorandum 2*, at 10, but explained that "[t]he lack of precedent for treating animals as persons for habeas corpus purposes *does not*, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" *Id*. at 150-

151 (emphasis added).[16] The Bronx Zoo thus misrepresents *Lavery 1*with their use of "Accordingly."[17]

There is a first time for everything.[18] *See, e.g.*, *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (that no Native American had previously sought relief

---

[16]Moreover, *Lavery 1* involved chimpanzee personhood, not elephant personhood. *Lavery 1* held that "*chimpanzees*" are inappropriate recipients of legal rights because of their alleged "incapability to bear any legal responsibilities and societal duties." *Lavery*, 124 A.D.3d at 152 (emphasis added). Yet nowhere in the opinion is that proposition extended to elephants. Its holding was thus specifically limited to chimpanzees, based on a factual determination about beings that this Court, under *stare decisis*, is under no obligation to make about elephants, a completely different species. *See Killeen v. Crosson*, 218 A.D.2d 217, 220 (4th Dept. 1996) ("The application of the doctrine of stare decisis is *limited to a principle of law or a settled legal issue, rather than to prior factual or legal determinations*") (emphasis added); *State v. Moore*, 298 A.D.2d 814, 815 (3d Dept. 2002) ("The doctrine of stare decisis bars . . . *does not apply to factual determinations*") (emphasis added); and *Ponard v. Ponard*, 52 AD 2d 564, 566 (1st Dept. 1976) ("The doctrine [of stare decsis] relates to legal principles only and not to facts.") (quoting 1 Carmody-Wait 2d Section 2:50). Therefore, since "the underlying rationale for the precedent" in *Lavery* is inapplicable to the instant case, this Court is not bound to follow *Lavery. People v. Crawford*, 14 Misc.3d 1207(A) at *2 (Sup. Ct. 2006) ("The doctrine of stare decisis would generally require this Court to follow the precedent of the Second Department in the absence of a contrary rule by the Fourth Department. However stare decisis requires an examination of the underlying rationale for the precedent . . . Where the rationale is inapplicable, the holding of the higher court is inapplicable.") (citations omitted).

[17] The two quotations from *Lavery* immediately preceding "Accordingly" appear on 124 A.D.3d at 150, not 152; contrary to the Bronx Zoo's representations, those quotations are not closely or logically connected to the holding on page 152.

[18] Contrary to the Bronx Zoo's statement (*Zoo Memorandum 2* at 18 n2) the NhRP's petition for a common law writ of habeas corpus on behalf of the three elephants in Connecticut was dismissed on standing grounds alone. (Wise Aff. ¶ 6, Ex. 4). The court's further dismissal grounds as "frivolous on its face as a matter of law" under Connecticut Practice Book 23-24 (a)(2) was *dicta,* as the court lacked subject matter jurisdiction to further decide the case once it determined it lacked subject matter jurisdiction due to lack of standing (Wise Aff., ¶ 6, Ex. 4). Unlike in New York, Connecticut habeas corpus rules authorize a judge to refuse to issue a writ of habeas corpus *only* if it lacks subject matter jurisdiction or the petition is "frivolous on its face. "Conn. Practice Book § 23-24 (a)(1) and (2). But the decision reveals that the judge deemed the petition "frivolous" merely because the issue of personhood was novel (Wise Aff., ¶ 6, Ex. 4).

The NhRP's appeal of that decision is pending before the Connecticut Appellate Court. (AC 41464). Four *amicus curiae* briefs were filed in the Connecticut Appellate Court in support of the NhRP's petition by Professor Laurence H. Tribe; three distinguished habeas corpus experts, Connecticut's first Chief Disciplinary Counsel, and 12 distinguished Philosophy

pursuant to the Federal Habeas Corpus Act did not foreclose a Native American from being characterized as a "person" and being awarded the requested habeas corpus relief); *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (that no slave had ever been granted a writ of habeas corpus was no obstacle to the court granting one to the slave petitioner); *Stanley*, 16 N.Y.S.3d at 917 ("Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed.").

IV. The NhRP frequently and clearly stated in its Petition and Supporting Memorandum that Happy should be immediatly released from her illegal imprisonment at the Bronx Zoo.

The Bronx Zoo's assertion that "NRP's use of the writ of habeas corpus is improper" because "[its] petition does not request Happy's release" is erroneous. T*here can be no question* that the NhRP clearly and repeatedly has requested Happy's immediate release from her illegal imprisonment at the Bronx Zoo. *See Petition* ¶ 3 (The timely intervention of this Court is necessary *to grant Happy her common law right to bodily liberty and immediate release so as to prevent future unlawful deprivations of her liberty* and allow her to exercise her autonomy to the greatest degree possible"); ¶ 8 ("This Petition specifically requests that this Court: … b) … determine that Happy possesses the common law right to bodily liberty, thereby rendering *unlawful Respondents' imprisonment* and deprivation of that bodily liberty c) order Happy's *immediate release from Respondents' unlawful imprisonment*; …"); ¶ 56 ("Rather, this Petition demands that this Court recognize Happy's common law right to bodily liberty and order her

---

Professors (Wise Aff. ¶ 7). A motion to transfer the appeal to the Connecticut Supreme Court is pending. (Wise Aff. ¶ 8).

On June 11, 2018, the NhRP filed Connecticut's second petition on behalf of the same elephants. It is being heard in the same county. That petition has *not* been dismissed. (Wise Aff., ¶ 9) in which he stated that the NhRP's case "is not frivolous, in whole or in part" (Wise Aff., ¶ 10). A status hearing was held on November 27, 2018 during which the court indicated it would either issue the writ or stay the petition pending the outcome of the appeal on the first petition. (Wise Aff., ¶ 11).

immediate release from Respondents' current and continued unlawful detention so that her liberty and autonomy may be realized"; ¶ 57 ("The NhRP seeks *Happy's immediate release from her imprisonment*."); ¶ 58 n.16 ("In addition to the Fourth Department's misinterpretation of the relevant case law, it also misconstrued the relief sought by the NhRP. In response, *the NhRP has painstakingly and specifically made clear in this Petition that the NhRP is seeking Happy's immediate release from her unlawful imprisonment and is not seeking a change in the conditions of her detention*."); at ¶ B of the demand for relief *(*"Upon a determination that Happy is being *unlawfully imprisoned* order her *immediate release from Respondents' custody* …"); *see also Supporting Memorandum*, at 3 ("The NhRP seeks Happy's *immediate release from Respondents' continued imprisonment* so that Happy's autonomy may be realized to the fullest extent possible"); 21 ("Happy is entitled to *immediate release* from *Respondents' unlawful imprisonment*"); 21 ("Upon this *Court's final determination that Respondents' imprisonment of Happy is unlawful*, it must order *her immediate release*, CPLR 7010(a)"); at 23 ("*The NhRP, however, is not challenging the conditions of Happy's confinement. Nor is it requesting her transfer. It is seeking her immediate release from illegal detention*.").

A competent released prisoner may forthwith go wherever she desires in the exercise of her autonomy. However, when a released prisoner is unable properly to look after her own welfare, as with a child of tender years, a nonhuman animal such as Happy, or a human adult with dementia, habeas corpus requires the second step of the court deciding where the liberty, autonomy, and welfare of the former prisoner will be most appropriately protected. This was the procedure used by an Argentine court in a habeas corpus case involving a chimpanzee named Cecilia in November, 2016. First, it recognized that Cecilia was a "non-human person" and ordered her released from a Mendoza Zoo pursuant to a writ of habeas corpus. Then the court

determined that Cecilia should be sent to a sanctuary in Brazil. *In re Cecelia*, Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-23 (November 3, 2016). The New York courts, as well as the courts of other free states, utilized this same procedure when confronted with the case of a child of tender years, sometimes a slave child or apprentice who was ordered freed from her illegal imprisonment. *E.g., People ex rel. Pruyne v. Waits*, 77 Sickels 238 (2d Dept. 1890); *Lemmon v. People*, 20 N.Y. 562 (1860) (slaves); *People ex rel. Trainer v. Cooper*, 8 How. Pr. 288 (Supr. Ct. 1853); *People v. Hannah*, 3 How. Pr. 39 (Supr. Ct. 1847) (apprentice); *Commonwealth v. Taylor*, 44 Mass. 72 (1841) (slave); *Commonwealth v. Aves,* 18 Pick. 193 (Mass. 1836) (Shaw, CJ) (slave); *In re McDowle*, 8 Johns. 238 (Supr. Ct. 1811) (apprentice).

Moreover, this Court is not bound by the ruling of the Fourth Department on the issue of "immediate release" in *Presti*, *supra*, for the reasons set forth in the NhRP's *Supporting Memorandum*, at pages 21-25. The ruling of the First Department in *Lavery 1* is also inapplicable to the case at bar as that court found that "*[s]ince petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court." Presti*, 124 A.D.3d at 1334; *compare People ex rel. Dawson v Smith*, 69 NY2d 689 (1986), *with People ex rel. Brown v Johnston*, 9 NY2d 482 (1961) (emphasis added).

Judge Fahey noted that *Presti,* and therefore the First Department, had erred on this issue, by misreading the case it relied on (*Brown v. Johnston*) which actually stands for the proposition that habeas corpus *can* be used to seek a transfer to "an institution separate and different in nature from the ... facility to which petitioner had been committed," as opposed to a transfer "within the facility" (*People ex rel. Dawson v. Smith*, 69 N.Y.2d at 689, 691). The chimpanzees'

predicament is analogous to the former situation, not the latter." *Fahey Concurrence,* 32 N.Y. 3d, at 1058-1059.

Most importantly, *whatever* relief the NhRP may have requested *in Presti,* in *Lavery*,[19] or in any other case it has ever brought, and *irrespective* of whether *Presti* and *Lavery* were decided correctly or incorrectly, the NhRP has undoubtedly alleged the elements for common law habeas corpus as set forth in those cases. That is why in the case at bar, the NhRP has consistently stated that Happy's imprisonment is unlawful and that her immediate release is requested and asks that, once this Court orders Happy's immediate discharge from her illegal imprisonment at the Bronx Zoo, it consider the options for placing Happy in one of the three elephant sanctuaries in the United States, where her liberty, autonomy, and welfare will be most appropriately protected. Whether that be the 2,300 acre PAWS in San Andreas, California, the 850 acre Elephant Refuge North America Sanctuary in Attapulgus, Georgia,[20] or the 2,700 acre Tennessee Elephant Sanctuary in Hohenwald, Tennessee.[21] It would in all circumstances, however, be inappropriate habeas corpus relief to transfer Happy to another zoo, as that would be the same sort of institution and under similar conditions in which she is currently imprisoned and is therefore barred by *Dawson, supra.* The NhRP suggests that Happy be transferred to the PAWS. But that decision is this Court's.

V. The Bronx Zoo imprisons Happy in a tiny, cold, lonely, un-elephant-friendly, and unnatural place that ignores her autonomy as well as her social, emotional, and bodily liberty needs, while daily inflicting further injury upon her that would be remedied by transferring her to any American elephant sanctuary.

[19] A further reason is that the *Presti* court, at 1334, apparently misunderstood the purpose of the Nonhuman Rights Project, which it believed was to "seek() better treatment and housing of, inter alia, nonhuman primates . . ."
[20] https://elephantaidinternational.org/projects/elephant-refuge-north-america/
[21] https://www.elephants.com/?gclid=EAIaIQobChMI66ar2M6O3wIVTouyCh05-w3WEAAYASAAEgKRjPD_BwE

The Bronx Zoo's claim that "NRP's petition does not in fact seek to obtain bodily liberty for Happy, but would transfer Happy to an environment of confinement where her behaviors would be controlled by humans" is disingenuous at best. *Zoo Memorandum 2,* at 16. The notion that living on a 2,300 acre sanctuary, such as PAWS, *Affidavit of Ed Stewart*, ¶ 8, is comparable to being imprisoned in the Bronx Zoo's approximately one acre elephant exhibit, *Second Supplemental Affidavit of Joyce Poole,* ¶ 28 (1.15 acre) ("*Poole Second Supplemental Affidavit*"); *Affidavit of Lauren Choplin*, ¶ 14 (1.01 acre), is, respectfully, absurd, as is the claim of Patrick Thomas, the man charged with overseeing the management of all the nonhuman animals at all the Wildlife Conservation Society's zoos, that the tiny Bronx Zoo elephant exhibit is "large." *Affidavit of Patrick Thomas,* ¶ 27.

To equate the two is to agree that the Town of Albion, New York (about 25 square miles) is about the same size as the states of Michigan (56,539 sq. miles), or Illinois (55,593 sq. miles), or Iowa (55,875 sq. miles). PAWS' two elephant barns alone (20,000 sq. ft apiece) are almost the size of the entire Bronx Zoo elephant exhibit. *Affidavit of Ed. Stewart*, ¶ 8, while PAWS is almost ten times the size of the *entire* Bronx Zoo.

In response to the testimony of the Dr. Cox, Director of Research of the Los Angeles Zoo, the *Leider* court*, supra* at 21, noted that "[u]nlike Dr. Poole, Dr. Cox has not published or submitted for publication any peer-reviewed articles about elephants, nor has she studied or examined any elephants in the wild or in any other zoo." Similarly, none of the Bronx Zoo's affiants claim to have studied or examined elephants in the wild or to have published or submitted for publication any peer-reviewed articles about elephants. They present no evidence that they have studied any wild elephant, or know about an elephant's basic social, emotional, behavioral, liberty, and autonomy needs, whether captive or wild.

While everything at PAWS is designed to support the autonomy, bodily liberty, natural behaviors, and natural social needs of elephants, the Bronx Zoo's affidavits reveal an institution obsessed with struggling to keep Happy alive and on display in a tiny, cold, lonely, and decidedly un-elephant-friendly and unnatural place of exhibition and confinement. Its detailed rules read like the regimen of a prison hospital, monitoring appetite, food intake, stool appearance and quantity, blood collection, body examinations, and dental examinations, while forcing Happy illegally to exist in an environment that is utterly unsuitable for her basic social, emotional, behavioral, liberty, and autonomy needs. *Affidavit of Patrick Thomas*, ¶ ¶ 24, 25, 26; *Affidavit of Paul P. Calle*, ¶ ¶ 8, 9, 10.

The best that Paul Calle, a busy man who manages thousands upon thousands of nonhuman animals of many hundreds of species in his capacity as the Wildlife Conservation Society's Vice President for Health Programs, Chief Veterinarian, and Director of the Zoological Health Program based at the Bronx Zoo, who manages the Clinical, Pathology, and Aquatic Health Departments for the Bronx, Central Park, Queens, and Prospect Zoos, and the New York Aquarium, who shares oversight of the WCH Wildlife Health Program, and who chairs the Wildlife Conservation Society's Institutional Animal Care and Use Committee - can say is that "to the best of my knowledge, Happy is currently healthy and well-adapted to her present surroundings." *Affidavit of Paul Calle*, ¶ 1, 13.

But Happy is not healthy, though in a way the Bronx Zoo cannot understand. Dr. Poole's "observations from watching a number of videos is that Happy lifts her feet repeatedly, indicating that she is either trying to take the weight off of them or is engaging in stereotypic behavior." *Poole Second Supplemental*, ¶ 22. Dr. Poole notes that in the videos Happy is "engaged in only four activities: Standing facing the fence/gate, dusting, swinging her trunk in

stereotypic behavior, standing with one or two legs lifted off the ground, either to take weight off painful, diseased feet or again engaging in stereotypic behavior, and once, eating grass." *Poole Second Supplemental Affidavit*, ¶ 31.

In her *Poole Second Supplemental Affidavit,* Dr. Poole sets forth a detailed and painful litany of the many ways in which the alleged obstacles to Happy's being moved to PAWS, or some other appropriate sanctuary, are in actuality, the negative consequences of the Bronx Zoo's own gross and sustained inability to care for Happy in a way that respects her autonomy, her liberty, and her basic social, emotional, and psychological needs. Due to a lack of education and experience, the Bronx Zoo has demonstrated that it simply doesn't understand elephants at the level of the whole extraordinary being, rather than at the level of their teeth and blood and excretions.

Dr. Poole, who has spent nearly her entire life just studying elephants, explains that Happy has no general problem getting along with other elephants. The problem is that

> [b]eing fenced into areas too small to permit them to select between different companions and when to be with them, they have no autonomy. Elephants need a choice of social partners, and the space to permit them to be with the ones they want, when they want, and to avoid particular individuals, when they want … The historical information indicates that Happy is not anti-social, *per se*, but that Maxine and Patty once attacked her and that there is a risk that they would do so again. This situation would likely be resolved by offering Happy the chance to form relationships with other elephants in a sanctuary … In forty years at the Bronx Zoo she has only been given a choice of four companions with whom she has been forced to share a space that, for an elephant, is equivalent to the size of a house. Two of these companions she liked and lost, and the other two attacked her. This is hardly a basis for drawing a conclusion that Happy has a "history of not getting on with other elephants". It is rather a confirmation of the zoos' inability to meet Happy's basic needs.

Poole Second Supplemental Affidavit, ¶ 9.

Dr. Poole notes that when Patrick Thomas writes that "(w)eather permitting, Happy has regular, year-round access to a large, naturalistic outdoor exhibit in which she may go swimming

and engage in other species typical behavior, and also has regular overnight access to a large outdoor space," he is saying that Happy "actually has the ability to engage in almost *no species typical behavior*," *Poole Second Supplemental Affidavit*, ¶ 30 (emphasis added). This is because Happy is kept virtually alone and "the most species typical behavior of elephants relates to foraging (which is done for her) or social interactions." *Id.*

Dr. Poole notes that the statement of Breheny, who claims no expertise in elephant behavior and does not claim to know anything more about Happy than he does about any of the other of the thousands of nonhuman animals at the Bronx zoo, that "elephants who have lived at zoos for long periods of time are different from elephants in the wild, and the characteristics of one cannot be compared to the other" has "*no scientific basis" Id.* ¶ 11 (emphasis added), while the statement itself, coming from the Director of the Bronx Zoo

> is a shocking acknowledgement of the profound problems that stem from keeping large, social, intelligent, autonomous animals, like Happy, in a space that cannot meet their social and physical needs. It is likely that any differences are due solely and entirely to the nature of their captivity, of being kept without normal social groups of lacking the ability to enact normal free-will. This will likely be remedied by releasing Happy to a sanctuary that can offer her both companionship and space to roam.

Id.

Dr. Poole notes that "(t)he claims in relation to Happy, that she does not do well with change; that she will not survive the transport; that a transfer to a sanctuary will be too stressful; that she doesn't know how to socialize; that her unique personality is problematic, have often been *disproven*. In fact, elephants with serious physical or psychological problems in zoos have usually become more normal functioning elephants when given more appropriate space in a sanctuary such as PAWS." *Id.* ¶ 12 (emphasis added). Dr. Poole then provides numerous examples of elephants similar to Happy who, when moved from a zoo to a sanctuary, almost

immediately blossomed into truly happy, successful, autonomous, and socially and emotionally fulfilled beings. *Id*. The reason they blossom when they reach a sanctuary is "orders of magnitude of greater space that is offered in sanctuaries. Such space permits autonomy and allows elephants to develop more healthy social relationships and to engage in a near natural movement, foraging, and repertoire of behavior. When elephants are forced to live in insufficient space for their biological, social and psychological needs to be met, over time, they develop physical and emotional problems." *Id.* ¶ 19. However, "the problems seen in captive elephants, like Happy, can usually be mitigated with the proper attention and environment." *Id.* ¶ 20. Both captive and wild elephants "have the same biology and needs, but the failure of captivity to meet these needs results in physical and psychological problems" *Id.*

> For example, Maggie was considered to be an anti-social, aggressive elephant and by the time she was moved from the Alaska Zoo to PAWS she was in such poor condition she could barely stand. She is now a thriving, socially active elephant. Indeed she is considered to be PAWS' most social elephant.
>
> Ruby was transferred from the LA Zoo to the Knoxville Zoo in Tennessee where she did not successfully integrate with their elephants. When she was moved to PAWS she integrated easily with the other elephants and has become respected leader of her group.
>
> Sissy is another classic example. She had been transferred four times and had spent a decade and a half alone before being sent to the Houston Zoo, where she was labeled autistic and antisocial. She was returned to her solitary zoo where she killed a person. She was moved again to El Paso Zoo, where she was beaten because she was a killer elephant. In 2000 she was transferred to The Elephant Sanctuary in Tennessee and within six months of arrival she was calm and cooperative. She became a leader, putting all elephants at ease. In 2000 the USDA had given Sissy only a year to live. Eighteen years later she is still going strong.
>
> Bunny had been transferred four times and had only known a less than half an acre exhibit when she arrived at The Tennessee Elephant Sanctuary. She was 47 years old and had spent 40 years alone. Within 24 hours of arriving at sanctuary she was completely and seamlessly integrated into the group
>
> Maia and Guida, the first two elephants at Santuário de Elefantes Brasil, had lived together for 40 years. For most of these years Maia was aggressive to Guida, knocking her over, pushing her down and pinning her to the ground. Within 12

> hours of arriving at the sanctuary the gates were opened up between them. Since then they have been together and no further aggression has been seen. Two more rescued female Asians are due to arrive this month. The space currently allocated for Maia and Guida is 75 acres, including one area of 40 acres, another of 22 acres and three other smaller areas ranging from 1.5 to 4 acres. This combination of possible spaces allows easy integration of new elephants. The plan is to expand the space for Asian elephants to multiple hundred acres and possibly a thousand or more, depending upon whether males and females can be integrated. Santuário de Elefantes Brasil owns a total of 2800 acres.
>
> In South Africa, African elephants that have been released from long-term captivity to the wild, after a period of suitable rehabilitation, have all adapted entirely, successfully resuming life as wild elephants despite decades in captivity, and not having lived in the 'wild' since they were juveniles (see Elephant Reintegration Trust – https://www.elephantreintegrationtrust.com/projects).

Id. ¶¶ 13-18.

Breheny's claim, coming from one who admits to no experience with elephants, that moving Happy "could damage her welfare and physical well-being," *Breheny Supplemental Affidavit* ¶ 17, ring hollow in light of the Bronx Zoo's refusal to assure the NhRP that it will not move Happy during the pendency of this litigation; this is requiring the NhRP to seek a Preliminary Injunction to prevent such a move.[22] His claim further contradicts his own public statements that the Bronx Zoo will close the elephant exhibit when one elephant remains, which certainly could be Happy, and might close it if two elephants remain. Berger, J., "Bronx Zoo Plans to End Elephant Exhibit," New York Times (Feb. 7, 2006), available at:

[22] Breheny's pre-habeas corpus statements about why the Bronx Zoo did not want to move Happy make no mention of concern over damaging Happy's welfare and physical well-being. *See* https://www.nytimes.com/2015/06/28/nyregion/the-bronx-zoos-loneliest-elephant.html (Breheny "says that if the zoo were to move her, it would probably choose another accredited zoo, rather than a sanctuary … he suggested that a sanctuary might lack long-term financial stability."); https://www.animalplanet.com/tv-shows/the-zoo/full-episodes/an-elephants-trust (Breheny says "…they are almost 50 years old and they've spent their whole lives here, they have strong bonds with each other and the people who care for them." https://newsroom.wcs.org/News-Releases/articleType/ArticleView/articleId/8517/Happy-the-Elephant-Comment-by-Jim-Breheny-WCS-Executive-Vice-President-of-Zoos-and-Aquarium-and-Director-of-the-Bronx-Zoo.aspx (Breheny says "We don't think moving Happy from familiar surroundings and the people to whom she is bonded is in her best interest.").

https://www.nytimes.com/2006/02/07/nyregion/bronx-zoo-plans-to-endelephant-exhibit.html (last accessed Dec. 10, 2018).

On the other hand, "PAWS has been involved in moving more than a dozen elephants over the years without incident. These moves include older females and from places as far away as Alaska and Toronto, Canada. Some of these elephants had lived in their prior facilities for over 40 years. There is no evidence that the inevitable stress of these moves has had a long-term effect on any of the elephants. Santuario de Elephantes Brasil is about to move Rana, a confiscated ex-circus elephant in her 50s, 1675 miles to their sanctuary." *Poole Second Supplemental Affidavit*, ¶ 25.

The Bronx Zoo's elephant exhibit and PAWS obviously exist for entirely different reasons. The Bronx Zoo imprisons its two surviving elephants, Happy and Patty, in an area the size of an average suburbanite's backyard primarily for the zoo's economic purpose of allowing zoo visitors who have paid for the privilege (on every day but Wednesdays) to view them as they pass by on a monorail. In contrast, the purpose of PAWS is to provide a sanctuary, "peaceful, natural habitats where they are at liberty to engage in natural behaviors," for abandoned, abused, or retired elephants so they can live in "peace and dignity," *Affidavit of Ed Stewart,* ¶ ¶ 4, 10(b).

The property at PAWS "encompasses 2,300 acres of rolling foothills with varied natural terrain; habitats include natural grasses, tress, lakes and pools in which the elephants may bathe." *Id*., ¶ 8. "The south fork of the Calaveras River runs the entire length of the property … PAWS is located in San Andreas, California, where the weather allows the elephants to be outdoors year-round." *Id.,* ¶ 12. Most elephants have indoor-outdoor access during the night. *Id.* ¶ 13. The indoor accommodations are necessary only to "provide protection during inclement weather (e.g., heavy storms, lightning) or extreme drops in temperature." *Id.*

The elephant habitats at PAWS are designed "to support social group activity, with pastures large enough to allow elephants to interact with social partners or engage in foraging and other species-specific activities on their own." Id., ¶ 14. At PAWS "the habitats allow for separation of elephants with compatible social partners, and elephants can engage in species-specific behaviors such as foraging, exploring, dust bathing, and mud wallowing." *Id*., ¶ 15.

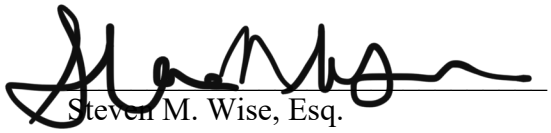
Comparing the Bronx Zoo elephant exhibit and PAWS is like comparing Attica State Prison to a summer camp in the Adirondacks. One needs to ask oneself why, if the Bronx Zoo actually cared about Happy's autonomy, her bodily liberty, her social relationships, and her natural behaviors, as opposed to what Happy can do for the Bronx Zoo, it would not leap at the chance to allow her to go to PAWS instead of pretending – if they even do pretend - that Happy's autonomy, her bodily liberty, her social relationships, and her natural behaviors are of any serious concern.

CONCLUSION

For the foregoing reasons, the NhRP respectfully requests that the Court deny the Bronx Zoo's motion to transfer the proceeding to Bronx County, deny the Bronx Zoo's motion to "dismiss or deny" the Petition and deny the Bronx Zoo's request for an additional 5 days to reply to the Petition in the event its motions are not granted. In addition, the NhRP requests that this Court then order the immediate release of Happy from her illegal imprisonment at the Bronx Zoo. Following that Order, the NhRP requests that this Court issue a second Order that places Happy in that elephant sanctuary in the United States where her autonomy, bodily liberty, natural behaviors, natural social needs, and welfare will best be able to flourish, which the NhRP suggests is the Performing Animal Welfare Society.

Dated: December 10. 2018

Elizabeth Stein, Esq.
Attorney for Petitioner
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726
lizsteinlaw@gmail.com



Steven M. Wise, Esq.
Of the Bar of the State of Massachusetts
Subject to *pro hac vice* admission
Attorney for Petitioner
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864
wiseboston@aol.com