To Be Argued By:
Steven M. Wise, Esq.
(of the bar of the State of Massachusetts)
by permission of the Court

New York County Clerk's Index No. 150149/16

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

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

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

Petitioner-Appellant,

against

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

Respondents.

BRIEF FOR PETITIONER-APPELLANT

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

and

STEVEN M. WISE, ESQ.
(of the bar of the State of Massachusetts)
by permission of the Court
5195 NW 112th Terrace
Coral Springs, Florida 33076
954-648-9864
wiseboston@aol.com

Attorneys for Petitioner-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

QUESTIONS PRESENTED

1. Does the capacity to bear duties and responsibilities have any relationship to being deemed a "person" for the purpose of demanding a writ of habeas corpus under the common law of New York and CPLR Article 70, as articulated for the first time in Anglo-American law by the Third Department in *Lavery*?

The lower court ruled it was bound by *Lavery*, which held this capacity was a prerequisite to legal personhood.

2. Did the lower court err in failing to consider the petitioner's affidavits demonstrating that chimpanzees have the capacity to bear duties and responsibilities after the Third Department in *Lavery* took judicial notice that chimpanzees do not?

The lower court refused to consider these affidavits stating "whether evidence of the ability of some chimpanzees to shoulder certain kinds [of] responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me...are determinations that are best addressed there."

3. Did the lower court err in dismissing the Second Kiko Petition (a) as an improper "successive petition," after (b) finding no showing of "changed

circumstances" though petitioner introduced sixty pages of expert affidavit evidence not previously presented in the First Kiko Petition?

The lower court did not apply the requirements of CPLR 7003(b) for dismissing successive petitions or consider petitioner's new evidence demonstrating "changed circumstances," stating "[w]hile successive petitions for a writ of habeas corpus based on the same ground are permissible, "orderly administration would require, at least, a showing of changed circumstances."

4. Did the lower court err by failing to consider sixty pages of expert affidavit evidence not previously presented in the First Kiko Petition that were solely directed to the Third Department's articulation of both a novel legal standard and judicial notice of facts in *Lavery*, neither of which the petitioner could have reasonably anticipated at the time it filed its first habeas corpus petition?

The lower court stated, without making a determination, that the new affidavits "rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offered no explanation as to why they were withheld from the first petition."

5. In refusing to entertain the Second Kiko Petition, did the lower court err by considering as relevant the total number of petitions filed by petitioner on behalf of other chimpanzees imprisoned in the State of

New York?

The lower court did not consider the Second Kiko Petition in part because "between 2013 and 2014, petitioner filed four identical petitions [on behalf of four chimpanzees] with four state trial courts, each in a different county...It then recently filed another two petitions in New York County..."

6. Is the undefined term "person" in CPLR Article 70 to be interpreted under the New York common law of habeas corpus?

The lower court did not reach this question because it refused to issue the order to show cause and reach the merits of the petition.

7. Is a chimpanzee a "person" for the purpose of common law habeas corpus as a matter of common law liberty?

The lower court did not reach this because it refused to issue the order to show cause and reach the merits of the petition.

8. Is a chimpanzee a "person" for the purpose of common law habeas corpus as a matter of common law equality?

The lower court did not address this issue because it refused to issue the writ and reach the merits of the petition.

STATEMENT OF THE CASE

I. INTRODUCTION AND PROCEDURAL HISTORY

Chimpanzees are autonomous, cognitively and emotionally complex, self-aware, self-conscious and self-determining beings. They routinely bear duties and responsibilities within chimpanzee communities and human/chimpanzee communities. They have the capacity to live intellectually rich and sophisticated individual, family and community lives. They can recall their past and anticipate their future, and when their future is imprisonment, they suffer the enduring pain of isolation and the inability to fulfill their life's goals or to move about as they wish, much in the same way as do human beings. (R.93-176;249-640).

During the first week of December 2013, Appellant, the Nonhuman Rights Project Inc. ("NhRP"), filed three verified petitions demanding common law writs of habeas corpus and orders to show cause pursuant to New York Civil Practice Law and Rules ("CPLR") Article 70 in the Supreme Court in each of the three counties in which a chimpanzee was being illegally detained.[1] Specifically, a petition was filed in the New York Supreme Court a) Fulton County on behalf of Tommy, a solitary chimpanzee living in a cage in a warehouse on a used trailer lot; b) Niagara County on behalf of Kiko, a solitary chimpanzee living in a cage in a cement storefront in a crowded residential neighborhood ("First Kiko Petition");

[1] NhRP asked the courts to issue orders to show cause pursuant to CPLR 7003(a), as NhRP did not demand the production of the chimpanzees in court.

and c) Suffolk County on behalf of Hercules and Leo, two young chimpanzees on lease from Louisiana's New Iberia Research Institute to the State University of New York at Stony Brook ("Stony Brook") for locomotion research ("First Hercules and Leo Petition"). Each court refused to issue the requested order to show cause. (R.14-18). Each appellate department then affirmed on a different ground, and without citing any of the previous decisions. (*Id.*).

Attached to each of the three petitions were approximately 100 pages of expert affidavits from many of the most respected chimpanzee cognition researchers in the world. Not one fact was controverted. Pursuant to a New York common law that keeps abreast of evolving standards of justice, morality, experience, and scientific discovery, NhRP argued that both New York common law liberty and equality mandate that chimpanzees be recognized as common law "persons" who possess the common law right to bodily liberty.

On appeal of the denial of Tommy's first petition, the Third Department in December 2014, affirmed and, for the first time in Anglo-American history, held that only entities capable of bearing duties and responsibilities can be "persons" for any purpose, even for the purpose of demanding a common law writ of habeas corpus. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015). The court then took judicial notice, *sua sponte*, that chimpanzees lack this capacity. *Id.*

On appeal of the denial of the First Kiko Petition, the Fourth Department affirmed on the ground that NhRP did not seek Kiko's unconditional release onto the streets of New York, but to an appropriate sanctuary. The Fourth Department assumed, without deciding, Kiko could be a "person." *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den.*, 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015).

On January 7, 2016, a year after *Lavery*, NhRP filed Kiko's second petition ("Second Kiko Petition") in the New York County Supreme Court from which this appeal is taken. In direct response to *Lavery*, NhRP presented approximately sixty pages of new expert affidavit evidence directed solely to demonstrating that chimpanzees routinely bear duties and responsibilities within chimpanzee communities and mixed chimpanzee/human communities. The lower court refused to issue the order to show cause on the grounds it was an improper successive petition, as the NhRP had not demonstrated "changed circumstances," and because the court felt itself bound by *Lavery*. (R.10-11)

In refusing to issue an order to show cause, the lower court ignored its own recent precedent, *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898 (Sup. Ct. 2015), in which it entertained a *second* petition for habeas corpus on behalf of Hercules and Leo ("Second Hercules and Leo

Petition"), issued the requested order to show cause, and required the State to justify its detention of the chimpanzees in a hearing. *The Nonhuman Rights Project, Inc. v. Stanley Jr., M.D.*, 2015 WL 1804007 (Sup. 2015) *amended in part*, 2015 WL 1812988 (Sup. 2015), 16 N.Y.S.3d 898, 903 (Sup. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015). Unlike the present case, no "changed circumstances" were presented in the successive petitions brought on behalf of Hercules and Leo. Ultimately, the court refused to grant their release on the merits because it believed itself bound by *Lavery* regarding the necessary showing of duties and responsibilities.

NhRP demonstrates herein that the lower court erred in refusing to issue the order to show cause because: (1) contrary to *Lavery*, the capacity to bear duties and responsibilities is irrelevant to a determination of personhood; (2) the court erred in failing to consider the affidavits demonstrating that chimpanzees bear duties and responsibilities after the Third Department in *Lavery* took judicial notice they do not; and (3) the correct standard to be applied in determining common law personhood was set forth by the Court of Appeals in *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972). Finally, the evidence presented in NhRP's affidavits demonstrates a strong *prima facie* case that Kiko is a "person" for the purpose of a common law writ of habeas corpus and CPLR Article 70. (R.93-176;249-560;673-724).

But, this Court need not determine that Kiko is a "person" in order to reverse and remand with instructions to issue an order to show cause. Rather it should follow the laudatory procedure used by the *Stanley* court and by Lord Mansfield in the famous common law habeas corpus case of *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) and assume, without deciding, that Kiko could be a common law person and remand with instructions to hold an Article 70 hearing to determine whether Kiko is a person under Article 70 and the common law of habeas corpus.

II. STATEMENT OF FACTS

Chimpanzees are autonomous (R.349;443). They can freely choose without acting on reflex or innate behavior (R.349). They possess the "self" integral to autonomy, have goals and desires, intentionally act towards those goals, and understand whether they are satisfied. (R.371;252).

Chimpanzees and humans share almost 99% of DNA (R.368-69;454). Our brains are plastic, flexible, and heavily dependent upon learning, share similar circuits, symmetry, cell types, and stages of cognitive development. (R.306;315-18;368-69;370-71;443-45;454;456). We share similar behaviour, emotional and mental processes. (R.518-19), including self-recognition, self-awareness, self agency, and metacogtition (R.252;372;455-7;608). Chimpanzees are aware of their past, mentally represent their future, have an autobiographical sense of self with a

past and future, engage in "mental time travel" and long-term planning; and can remember something for decades. (R.253;444-46;459). They imagine and pretend (R.320-2;444;457;463).

Chimpanzees exhibit referential and intentional communication; they inform others, engage in complex conversations, engage in "private speech," ensure they are understood in conversations, use language and syntax, create declarative sentences, point, comment on individuals, as well as on past and future events, state what they intend to do, then do it, and coordinate their actions (R.253;315-19; 369;459;461). They understand symbols and "if/then" clauses, learn new symbols by observation, and demonstrate perspective-taking, imagination, and humor. (R.315-16;322;456-9). They announce important social events, what they are about to do, where they are going, what assistance they want from others, and how

Chimpanzees have mirror neurons and are therefore attuned to the experiences, visual perspectives, knowledge states, emotional expressions and states of others (R.253-54;306-7;372-73). They have theory of mind; they know they have minds; they know humans and other chimpanzees have minds, thoughts, feelings, needs, desires, perspectives, intentions, and that these other minds and states of knowledge differ from their minds. They know that what they see is not the same thing others see. (R.317-19;463-64).

Chimpanzees possess highly developed empathic abilities. (R.252-54;373). They engage in sophisticated deception that requires attributing mental states and motives to others. They show concern for others in risky situations (R.252-53). They demonstrate compassion, bereavement-induced depression, and an understanding of the distinction between living and non-living; they feel grief and compassion when dealing with mortality. (R.255-56).

Wild chimpanzees make and use tools from vegetation and stone for hunting, gathering, fighting, playing, communicating, courtship, hygiene, and socializing. Chimpanzees make and use complex tools that require them to utilize two or more objects towards a goal. They make compound tools by combining two or more components into a single unit. They use "tool sets," two or more tools in an obligate sequence to achieve a goal, such as a set of five objects – pounder, perforator, enlarger, collector, and swab – to obtain honey. (R.400-01). Tool-making implies complex problem-solving skills and evidences understanding of means-ends relations and causation. (R.307-308;400-01).

Each wild chimpanzee cultural group makes and uses a unique "tool kit" comprised of about twenty different tools often used in a specific sequence for foraging and processing food, making comfortable and secure sleeping nests in trees, and personal hygiene and comfort. (R.402;455-56). The foraging tool kits of some chimpanzee populations are indistinguishable in complexity from the tool

kits of some simple human material cultures, such as Tasmanian aborigines, and the oldest known human artefacts, such as the East African Oldowan Industry. In one chimpanzee population, chimpanzee tool-making culture has passed through the 225 generations. With respect to social culture, chimpanzees pass widely variable social displays and social customs from one generation to the next. Arbitrary symbolic gestures communicate in one group may mean something entirely different in another group. (R.403-05). Chimpanzees transmit their material, social, and symbolic culture by social and observational learning, through innovation, as well as precise imitation and emulation. These latter capacities are necessary for "cumulative cultural evolution," which involves the ability to build upon previous customs. (R.254-55;406).

Chimpanzees possess "numerosity," the ability to understand numbers as a sequence of quantities, which requires both sophisticated working memory and conceptual understanding of a sequence. This is closely related to "mental time travel" and planning the right sequence of steps towards a goal, two critical components of autonomy. Not only do chimpanzees excel at understanding sequences of numbers, they understand that Arabic symbols ("2", "5", etc.) represent discrete quantities. (R.373;616).

Chimpanzees demonstrate sequential learning, the ability to encode and represent the order of discrete items occurring in a sequence, and understand the

ordinal nature of numbers. They understand proportions (e.g., 1/2, 3/4, etc.), can count and understand the meaning if zero (R.373-75;463).

Chimpanzees have excellent working, or short-term, memory, and exceed the ability of humans to recall numbers (R.374-75). They are competent at "cross-modal perceptions." They obtain information in one modality such as vision or hearing and internally translate it to information in another modality. (R.461-62). They can match an audio or video vocalization recording of a familiar chimpanzee or human to her photograph. (R.307). They translate symbolically encoded information into any non-symbolic mode. When shown an object's picture, they retrieve it by touch, and retrieve a correct object by touch when shown its symbol. (R.461-62).[2]

Chimpanzees bear well-defined duties and responsibilities both within their own communities and within human/chimpanzee communities (R.519-520;523-24;534;548;593;583;606-07). Chimpanzees understand and carry out duties and responsibilities while knowingly assuming obligations then honoring them (R.598;606-07;613-14). Chimpanzees have duties to each other and behave in ways that seem both lawful and rule-governed. (R.596;551;537;609-618;584;519). Both chimpanzee and human adult members of chimpanzee/human communities behave in morally responsible ways as they understand them.

[2] These remarkable similarities between humans and chimpanzees are not limited to autonomy, but extend to personality and emotion. (R.349-353).

(R.522;607;614;620). Chimpanzees possess moral inclinations and a level of moral agency. They ostracize individuals who violate social norms. They respond negatively to inequitable situations, such as being offered lower rewards than companions for the same task. When given a chance to play the Ultimatum Game, they spontaneously make fair offers, even when not obliged to do so. (R.598).

Chimpanzee social life is cooperative and represents a purposeful and well-coordinated social system. They engage in collaborative hunting, in which hunters adopt different roles that increase the chances of success. They share meat from pre. (R.598). Males cooperate in territorial defense, and engage in risky boundary patrolling (R.519-520;598).

Chimpanzees show concern for others' welfare, and they have expectations about appropriate behaviour in a range of situations, *i.e.* social norms. (R.523-24). Such behaviour is essential for the maintenance of chimpanzee society, and it can be extended to human beings when necessary. (R.598;.551;606-07;611-13;617-618;523-24). No chimpanzee group could survive in the wild if its members failed to carry out their assigned duties and responsibilities to the group. (R.624).

Chimpanzee mothers show a duty of care to their offspring that rivals humans. (R.593). The duties and responsibilities of a mother chimpanzee towards her offspring are many and onerous and last an average of five and a half years. Young female chimpanzees practice their future maternal behaviour by using

sticks as 'dolls,' while young males do not, in a form of symbolic play. Most adult males act paternally toward all infants in their community, rushing to their aid when necessary. (R.537-38;584;548-50;584;593). Familial duties are not restricted just to mothers and fathers. (R.593;550). Juveniles and adolescents frequently act responsibly towards their infant siblings. (R.550).

Chimpanzee duties of care extend beyond shared genes (kinship) (R.594;584;537-38;550;519). Evidence from both captive and wild chimpanzees indicates that they possess highly developed empathic abilities. (R.519-20;537-38; 584;594;611-15). This includes the adoption of orphans. (R.519;537-538;550;584; 594).

Chimpanzee duties and responsibilities extend beyond the family and cross into the realm of the community. (R.594;534;584;519). In tasks requiring cooperation, chimpanzees recruit the most skilled partners and take turns requesting, and helping a partner. (R.243-43;253-54). Chimpanzees show "community concern," such as by working as a team to patrol boundaries and defending territory, and concern for individuals. (R.519). Wild chimpanzees call to warn approaching friends about a potentially dangerous object of which the latter is unaware. (R.520). The same males whose lives depend on one another in the patrol will later compete robustly with one another over access to a receptive female. Somehow, they resolve the contradictions involved in having conflicting

interests in different contexts, which implies their mutual recognition of shared responsibilities. Male group members rescue individuals taken prisoner by intruders. This spontaneous high level of altruism toward group members in this chimpanzee population reveals the sense of obligation felt by them to help and protect one another. (R.519-20;534-35;594-95).

Another chimpanzee universal that necessarily entails duties and responsibilities is participation in a hierarchy of social dominance. (R.595;583). Male chimpanzees rank-order themselves from alpha (top) to omega (bottom) in linear fashion. (R.595). Usually there is a single dominant male; but often he only holds that position by the support of other males. In these cases these dominant males demonstrate a sense of duty to their supporters. Chimpanzees are highly protective of their communities, and will go to great lengths to defend them. (R.583).

High-ranking males take on a policing role to ensure group stability, patrolling their territory, chasing away or attacking individuals from neighboring communities. This may take the form of specific, targeted ostracism of individuals who violate norms. The alpha male assumes the duty of exercising community "policing" powers, such as intervening in quarrels or fights between other community members, thus maintaining community integrity and preventing injury. (R.519;551;595-96).

Another indicator of rule-governed social interaction within a group is systematic, long-term reciprocity of favours or benefits among its members. (R.597;535;597;608-09). Chimpanzees cooperate and understand each other's roles. (R.520;522). They reward others and keep track of others' acts and outcomes. (R.521).

Chimpanzees make numerous behavioural adjustments to ensure the welfare of injured or disabled members of the group. When crossing a potentially dangerous road, stronger and more capable adult males investigate the situation before more vulnerable group-members, waiting by the roadside, venture onto the road. The males remain vigilant while taking up positions at the front and rear of the procession. (R.519-20). Taï forest chimpanzees have been seen to help and tend the injuries of wounded individuals for extended periods of time. (R.535).

Wild chimpanzees have duties to see that all members of the group have access to food, that all group members arrive at a feeding source together, and that all group members have access to that source in a manner as to benefit the entire group. (R.606-07;519-20). This requires cognitive concentration, social rules, and a greater sense of social responsibility for the good of the group rather than fulfilling the desires of the individual. (R.606-07).

Advance planning and sharing of information are duties and responsibilities that lies at the heart of chimpanzee survival. (R.624). They react to any change in

the group balance of power, distribution of resources, or inappropriate behaviors and/or alliances, even friendly alliances. Punishment is part of the meat sharing rules. (R.521;536-37).

Chimpanzees engage in remarkably balanced exchanges of food between individuals: not only do food exchanges occur in both directions, individuals are more likely to share with another chimpanzee who groomed them earlier that day. This pattern of grooming and food transfers suggests the presence of reciprocal obligations. In captivity, when presented with an "Ultimatum Game" in which both partners need to cooperate in order to split available rewards equally, chimpanzees ensure a fair distribution of rewards. (R.521-22).

Chimpanzees demonstrate a high sense of solidarity towards ignorant group members, who they will inform about the presence of a danger. (R.537;315-16; 537;608;618). Chimpanzees who acquire language recognize the need to inform others of information of import, and they understand the circumstances that lead to others lacking information they themselves have. (R.618).

Chimpanzees can be trained or learn spontaneously to work collaboratively with at least one other individual to solve a common problem that cannot be solved by a single individual. After experiencing working alongside two different collaborators, chimpanzees prefer to work with a collaborator who has proven

more effective in the past; thus they attribute different degrees of competence to other individuals. (R.520-21).

Chimpanzees readily understand social roles and intentions. They distinguish between individuals who have harmful versus prosocial intentions either towards them or to another, and will direct friendly individuals one way and unfriendly individuals to another. They adapt quickly to role-reversal in cooperative tasks while, in conversations with humans, ASL-trained chimpanzees took turns appropriately. (R.522-23).

Chimpanzees bear duties and responsibilities within chimpanzee/human communities. They prefer fair exchanges, are intolerant of unfair treatment, and keep promises and secrets. Captives who acquire language may remind others of events such as their birthdays and days visitors are expected, that trash needs to be carried out, that drains are clogged, that computer programs are misperforming. Chimpanzees taken outdoors may be asked to promise to be good, not to harm anyone, and to return when asked, and they keep their promises. (R.522;619-20).

Chimpanzees evidence understanding of their duties and responsibilities both in their interactions with human beings and in their interactions with each other (R.597;609-23). They treat humans with care, understanding they are stronger, faster, and more agile than humans (R.523-24;606-07).

A chimpanzee bite can kill a human. Yet, in almost 60 years of observations at Gombe National Park, no chimpanzee has bitten a human. Seven times chimpanzees charged Jane Goodall and her videographer when they were above a steep drop, but did not make contact. These examples of intentions not to harm likely demonstrate that chimpanzees see the long-established relationship with these familiar humans as something they are duty-bound to uphold. (R.551;597).

Captive chimpanzees understand they must remain in certain areas and not harm or scare human beings. When doors are left open they refuse to go into prohibited areas. If unknown humans enter their areas, the chimpanzees avoid them, recognizing that interaction is prohibited by the facility's rules. (R.618).

Any disagreement between a human and a language-using chimpanzee can be solved by explaining the reasons for the action. (R.618-9).

Chimpanzees raised in a setting where humans expect them to become linguistically and socially competent group members, as other chimpanzees expect of chimpanzee children in natural settings, exhibit enhanced abilities to bear duties and responsibilities. (R.583;609-23). They become increasingly trustworthy and responsible as they move into adulthood. (R.618). Having acquired language, they expect humans to explain their intentions and they reciprocate Each interaction becomes a linguistically negotiated contract that can apply and be remembered for days, weeks even years. (R.619).

At Central Washington University, chimpanzees participated in numerous activities with caregivers. Mornings, researchers required the chimpanzees to help clean enclosures by returning their blankets from the night before. The chimpanzees all participated. At lunchtime, they were served soup followed by fresh vegetables only if all chimpanzees ate their soup. If one refused, the others pressured the noneater by offering her the soup and a spoon. The noneater nearly always ate the soup. This individual behavior that affected the group demonstrated their sense of responsibility and duty. (R.583-84).

Both ape and human adult members constantly behave in morally responsible ways as they understand them. Ape children acquire the moral sense, duties, and languages of both cultures and come to desire to engage in mutually responsible moral actions, and display a sense of loyalty, duty, honor, and mutual respect which takes cognizance of the individuality and free will of other self-aware beings. (R.522;607;620).

Adults become capable of "self-assigned" duties and responsibilities and understand how to behave in a manner culturally appropriate for humans. As this occurs, they begin to demonstrate a sense of responsibility. (R.620). Chimpanzees who act aggressively towards a human or other chimpanzee often responded with "SORRY." (R.584-5).

A critical component of the ape child's desire to adopt and to accept duties and responsibilities resided in the emotional cross-cultural attachments between group members. These attachments were identical to those one finds in a human group or in any ape group, but transcended the species boundary. Both ape and human group members express a sense of responsibility to one another and mutually cooperate. (R.608;622).

All members of this cross-cultural linguistic *Pan/Homo* culture treated each other as members of one group in which each had rights, roles, and responsibilities in accord with their abilities and maturity (R.607;609;620-21) for numerous examples. They understood not only what they were doing, but why they were doing it and their understanding increased with age and experience. As they grew older, they assumed a variety of duties for the purpose of demonstrating their abilities to outsiders. (R.622). When outsiders were present, they would assume a responsibility to do things that were more "human-like." (R.609-17;622).

Similarly their recognition of the degree to which persons outside their immediate *Pan/Homo* family misunderstood them increased. They slowed their actions and sounds, exaggerated them, repeated them, blended sounds, gestures and lexigrams and waited until they noted the humans were observing before they engaged them. Close observation of others' behavior while reflecting on their intent, requires knowledge that the "other" has a mind, that the contents of two

minds may differ, and that one must pay attention to the "attention" of the other if one wishes to successfully redirect their perspectives, ideas, and views. (R.622).

Individual chimpanzees vary widely in their interests and in the particular capacities they sought to master, as do human children. Often, if one chimpanzee excelled in some skill, those close in age sought to excel in other skills; this demonstrates an awareness of their individual responsibility to fill a particular niche within the community to maximize group utility. (R.609).

Capacities indicative of chimpanzees' ability routinely to assume duties and responsibilities and to make contractual agreements in the groups with which Dr. Savage-Rumbaugh worked are set out in detail at R.609-17.

NhRP seeks to have Kiko sent to Save the Chimps, a 190 acre premiere chimpanzee sanctuary in Ft. Pierce, Florida. It provides permanent homes for 260 chimpanzees on twelve three-to-five-acre open-air islands that contain hills and climbing structures and provides the opportunity for chimpanzees to make choices about their daily activities (R.93;96). Chimpanzees who previously lived alone or in very small groups for decades become part of large and natural chimpanzee families. (R.93). Grass, palm trees, hills, and climbing structures allow the chimpanzees places to run and roam, visit with friends, bask in the sun, or curl up in the shade, or whatever else they may wish to do (R.96). Save the Chimps has

over fifty employees including two full time veterinarians that provide twenty-four-hour coverage with a support staff of technicians and assistants. (R.96-97).

III. ARGUMENT

A. NhRP HAS STANDING

Anglo-American and New York law have long recognized that interested, though unrelated, third parties, including those who have never met the detained persons, may bring habeas corpus cases on their behalf. *E.g.*, *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772)(godparents for slave); *Case of the Hottentot Venus*, 13 East 185, 104 Eng. Rep. 344 (K.B. 1810)(Abolitionist Society for possible slave); *Lemmon v. People*, 20 N.Y. 562 (1860)(unrelated abolitionist dockworker for slaves); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846)(same petitioner); *People v. McLeod*, 3 Hill 635, 647 note j (N.Y. 1842)("every Englishman...has an undoubted right, by his agents or friends, to...obtain a writ of habeas corpus")(citations omitted).

CPLR 7002(a) provides: "[a] person illegally imprisoned or otherwise restrained of liberty within the state, *or one acting on his behalf*...may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance." (emphasis added). *See People ex rel. Turano v. Cunningham*, 57 A.D.2d 801 (1st Dept. 1977)(friend of incarcerated inmate).

No court has ruled that NhRP lacks standing in any previous petition filed on behalf of a chimpanzee. To the contrary, the court below, in *Stanley*, expressly held NhRP had standing on behalf of Hercules and Leo. 16 N.Y.S.3d at 905.[3]

B. NEITHER RES JUDICATA, COLLATERAL ESTOPPEL, NOR CPLR 7003(B) BARS THIS PETITION.

"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). The common law rule permitting relitigation "after the denial of a writ, is based upon the fact that the detention of the prisoner is a continuing one and that the courts are under a continuing duty to examine into the grounds of the detention." *Post v. Lyford*, 285 A.D. 101, 104-05 (3d Dept. 1954)(prior adjudication no bar to new application on same grounds). *See People ex rel. Butler v. McNeill*, 219 N.Y.S.2d 722, 724 (Sup. Ct. 1961)("the ban of res judicata cannot operate to preclude the present proceeding;" petitioner's fifth application). 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).

CPLR 7003(b) "continues the common law and present position in New York that res judicata has no application to the writ." ADVISORY COMMITTEE

[3] Venue is proper. *See* CPLR 7002(b). *See also Stanley*, 16 N.Y.S.3d at 905-07.

NOTES TO CPLR 7003(b). *See People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874); *People ex rel. Leonard HH v. Nixon*, 148 A.D.2d 75, 79 (3d Dept. 1989).

But the court declined to issue the order to show cause in the Second Kiko Petition on the erroneous grounds that:

> [w]hile successive petitions for a writ of habeas corpus based on the same ground are permissible, 'orderly administration would require, at least, a showing of changed circumstances.' (*People ex rel. Woodward v Berry*, 163 A.D.2d 759, 760 (3rd Dept. 1990), *lv denied* 76 NY2d 712; *People ex rel. Glendening v. Glendening*, 259 A.D. 384, 387 (1st Dept 1940), a*ffd* 284 NYT 598; see *People ex rel. Leonard HH v. Nixon*, 148 AD2d 75, 80-81 (3d Dept 1989).

(R.10). The court's conclusion is unsupported by the common law, CPLR 7003, and the cases cited, and is inconsistent with its recent ruling.

Six months earlier, the same court, in *Stanley*, properly held that neither issue preclusion nor claim preclusion barred the Second Hercules and Leo Petition, despite the absence of any "changed circumstances," *id.*, as there was no final judgment in the prior proceeding. 16 N.Y.S.3d at 908-10. It wrote:

> there must be a final judgment on the merits in a prior proceeding....Respondents cite no authority for the proposition that a declined order to show cause constitutes a determination on the merits, that it has any precedential value, or that a justice in one county is precluded from signing an order to show cause for relief previously sought from and denied by virtue of a justice in another county refusing to sign the order to show cause.

Id. As in *Stanley*, this is merely the second petition filed on Kiko's behalf.[4] An order to show cause was not issued in the First Kiko Petition and personhood was never adjudicated by the Fourth Department. *Id.* at 902-03.

The Suffolk County Supreme Court's refusal to issue the order to show cause in the First Hercules and Leo Petition did not bar a second petition. The *Stanley* court stated:

> the governing statute itself poses no obstacle to this litigation....[T]he Legislature apparently found it necessary to include within the statute a provision permitting, but not requiring, a court to decline to issue a writ under certain circumstances, thereby permitting successive writs a construction reflected in the traditional and general common law rule that *res judicata* has no application in habeas corpus proceedings.

Id. at 908-10.

The lower court also improperly failed to apply the standards for denying successive petitions as set forth in CPLR 7003(b), which states that a court is not required to issue a writ from a successive petition for a writ of habeas corpus *only* if: (1) the legality of a detention has been previously determined by a court of the State in a prior proceeding for a writ of habeas corpus, (2) the petition presents no ground not theretofore presented and determined, *and* (3) the court is satisfied that the ends of justice will not be served by granting it. In this case, none of the elements are satisfied.

---

[4] That NhRP may have filed other petitions on behalf of other chimpanzees is irrelevant to the case at bar. (R.10).

First, *Presti* never reached the issue of Kiko's legal personhood. 124 A.D.3d at 1335. Nor did it cite *Lavery*. Its decision rested solely on NhRP's seeking of Kiko's discharge to an appropriate sanctuary rather than unconditional release. *Id.*

Second, the Second Kiko Petition presented substantial new grounds not previously presented and determined in response to *Lavery*. While NhRP disagreed with *Lavery*'s novel personhood standard, it nevertheless provided the lower court with sixty new pages of affidavits that contained facts neither previously presented with respect to Kiko, nor determined by any New York court. These new uncontroverted affidavits demonstrated that chimpanzees routinely bear duties and responsibilities and therefore can be "persons" even under the flawed *Lavery* holding.

As the First Kiko Petition was filed prior to *Lavery*, NhRP could not have anticipated its novel holding. These "changed circumstances" (R.10) alone make the court's dismissal erroneous. This is especially so given there were no changed circumstances presented in the Second Hercules and Leo Petition, yet the same court issued that order to show cause, *supra*.

Third, the court's refusal to issue an order to show cause undermined, rather than furthered the ends of justice. Given the novelty of the personhood issue, NhRP could not have foreseen that the Third Department (the first appellate court to decide a nonhuman habeas corpus case) would, for the first time in the history of

Anglo-American law, hold that a showing of capacity to bear duties and responsibilities was required for legal personhood. Consequently, NhRP did not anticipate or argue the issue or include such facts in the original expert affidavits filed in the First Kiko Petition. Thus, the court's statement that "[a]ll of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the first four petitions," is a *non sequitur*. "Inexcusable neglect exists when the petitioner was aware of the newly presented evidence or ground at the time of a previous application but fails to explain why he did not avail himself of the opportunity then to submit them." *Nixon*, 148 A.D.2d at 81 (citations omitted, emphasis added). NhRP could not have known that duties and responsibilities would be relevant to its argument for personhood at the time it filed the First Kiko Petition. Once *Stanley* determined itself bound by *Lavery*, NhRP immediately assembled affidavits that establish that chimpanzees do bear duties and responsibilities.

Moreover, as the Niagara County Supreme Court refused to issue an order to show cause in the First Kiko Petition, NhRP was never given the required "full and fair opportunity" to litigate the issue of Kiko's personhood. *Allen v. New York State Div. of Parole*, 252 A.D.2d 691 (3d Dept. 1998). As *Stanley* recognized, "claim preclusion and issue preclusion contemplate 'that the parties had a full and

fair' opportunity to litigate the initial determination.'" 16 N.Y.S.3d at 910 (citation omitted). NhRP was "thus not barred by the [Niagara] County disposition from proceeding here." *Id.* "Nor should it be." *Id.* As *Stanley* made clear, the "writ is 'so primary and fundamental,' 'that it must take precedence over considerations of procedural orderliness and conformity.'" *Id.* (citation omitted).

Finally, the three cases relied upon by the court below do not support its ruling. To the contrary, *Woodward* and *Leonard* support the opposite conclusion; both were relied upon by the same court in *Stanley* to justify the issuance of a successive writ. 16 N.Y.S.3d at 909-10. Successive petitions in *Woodward*, 163 A.D.2d at 759-60, and *Glendening*, 259 A.D. 387-88, were dismissed only because their merits had been "fully litigated" in a prior petition and either there were no changed circumstances or none had been claimed. *Glendening* made this clear: "parties to the same habeas corpus proceeding may not continually relitigate *de novo* issues that were fully litigated between them in prior applications in the same proceeding in which long and exhaustive hearings were held where there has been no change in the facts and circumstances determining such issues." *Id.* Kiko's personhood had not been previously decided and there were substantial additional facts presented to meet the unprecedented requirements for legal personhood set forth in *Lavery, supra.*

Without this opportunity to fully litigate Kiko's personhood, Kiko will be

condemned to a lifetime of imprisonment and certain destruction of his bodily liberty and autonomy.

C. KIKO IS A "PERSON" UNDER THE COMMON LAW OF HABEAS CORPUS AND CPLR 7002(A).

1. Person is not synonymous with "human being."

"[L]egal personhood ask[s] in effect, who counts under our law." *Stanley*, 16 N.Y.S.3d at 912 (citing *Byrn*, 31 N.Y.2d at 201). "[U]pon according legal personality to a thing the law affords it the rights and privileges of a legal person[.]" *Byrn*, 31 N.Y.2d at 201 (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909)("Gray"); Hans Kelsen, *General Theory of Law and State* 93-109 (1945); George Whitecross Paton, *A Textbook of Jurisprudence* 349-356 (4th ed., G.W. Paton & David P. Derham eds. 1972)("Paton"); Wolfgang Friedman, *Legal Theory* 521-23 (5th ed. 1967)). Legal persons possess inherent value; "legal things," possessing merely instrumental value, exist for the sake of legal persons. 2 William Blackstone, *Commentaries on the Laws of England* *16 (1765-1769).

"Whether the law should accord legal personality is a policy question[.]" *Byrn*, 31 N.Y.2d at 201 (emphasis added).[5] "Legal person" does not "necessarily

[5] The Court of Appeals' broad use of the word "policy" in *Byrn* encompasses not just what is good and bad, but "principle," what is right or wrong, for "[e]thical considerations can no more be excluded from the administration of justice...than one can exclude the vital air from his room and live." Benjamin N. Cardozo, *The Nature of the Judicial Process* 66 (Yale Univ. Press 1921)(citations omitted).

correspond" to the "natural order." *Id*; *Accord Stanley*, 16 N.Y.S.3d at 916-17. It is not synonymous with human being. *Id. See* Paton, at 349-50, *Salmond on Jurisprudence* 305 (12th ed. 1928)("Th[e] extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination,"); IV Roscoe Pound, *Jurisprudence* 192-93 (1959). "Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol." Paton, *supra* at 393. "There is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." Gray, *supra* Chapter II, 39, citing, among other authorities, those cited in *Byrn*, *supra*.

NhRP's arguments that autonomy is sufficient for common law habeas corpus personhood and that, as an autonomous being, Kiko is entitled to the protections of common law habeas corpus, both as a matter of common law liberty and common law equality, are the policy arguments *Byrn* required. *See Stanley*, 16 N.Y.S.3d at 911-12. The common law of personhood is no different than any other determination of the common law, which itself "consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy, modified and adapted to all the circumstance of all the particular cases that fall within it." *Norway Plains Co. v. Boston and Maine Railroad*, 67 Mass (1 Gray) 263, 267 (1854)(Shaw, C.J.).

"Person" is a legal "term of art." *Wartelle v. Womens' & Children's Hosp.*, 704 So. 2d 778 (La. 1997). "[T]he significant fortune of legal personality is the capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). "Person" has never been equated with being human and many humans have not been persons. "Person" may be narrower than "human being." A human fetus, which *Byrn*, 31 N.Y.2d at 199, acknowledged, "is human," was not characterized as a Fourteenth Amendment "person." *See Roe v. Wade*, 410 U.S. 113 (1973). Human slaves were not "persons" in New York until the last slave was freed in 1827 or throughout the entire United States prior to the ratification of the Thirteenth Amendment in 1865. *See, e.g., Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828).[6] Women were not "persons" for many purposes until well into the twentieth century. *See* Robert J. Sharpe and Patricia I. McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (2007). *Accord Stanley*, 16 N.Y.S.3d at 912.

On the other hand, corporations have long been "persons" within the meaning of the Fourteenth Amendment. *Santa Clara Cnty. v. Southern Pacific Railroad*, 118 U.S. 394 (1886). An agreement between the indigenous peoples of New Zealand and the Crown, p.10, ¶¶ 2.6, 2.7, and 2.8, recently designated New

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

Zealand's Whanganui River Iwi as a legal person that owns its riverbed.[7] The Indian Supreme Court designated the Sikh's sacred text as a "legal person." *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, A.I.R. 2000 S.C. 421. Pre-Independence Indian courts designated Punjab mosques as legal persons, to the same end. *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369, ¶15 (Lahore High Court, Full Bench). A pre-Independence Indian court designated a Hindu idol as a "person" with the capacity to sue. *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925).

The struggles over the legal personhood of human fetuses,[8] slaves,[9] Native Americans,[10] women,[11] corporations,[12] and other entities have never been over whether they are human, but whether justice demands that they "count." As to who

---

[7] *WHANGANUI IWI and THE CROWN* (August 30, 2012), available at http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CWhanganuiRiverAgreement.pdf (last viewed September 3, 2015).

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

[9] *Compare Trongett*, 5 Cow. 480 (recognizing slaves as property), *with Lemmon*, 20 N.Y. 562 (slaves are free) and *Somerset*, 98 Eng. Rep. at 510 (slavery is "so *odious* that nothing can be suffered to support it but positive law")(emphasis added).

[10] *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879)(though Crook argued that Native Americans "had no more rights in a court of law than beasts of the field", they were, for the first time, deemed "persons" within the meaning of the Federal Habeas Corpus Act); Stephen Dando Collins, *Standing Bear is a Person – The True Story of a Native American's Quest for Justice* 117 (Da Capo Press 2004).

[11] Blackstone, *Commentaries on the Law of England* *442 (1765-1769)("the very being or legal existence of the woman is suspended during the marriage").

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

"counts," *Stanley* noted the "concept of legal personhood, that is, who or what may be deemed a person under the law, and for what purposes, has evolved significantly since the inception of the United States." 16 N.Y.S.3d at 912. Not "very long ago, only caucasian male, property-owning citizens were entitled to the full panoply of legal rights under the United States Constitution." *Id.* "'If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.'" *Id.* (citing *Obergefell v. Hodges*, 135 S.Ct. 2602 (2015)).

Who is deemed a person is a "matter which each legal system must settle for itself." *Byrn*, 31 N.Y.2d at 202 (quoting Gray, *supra*, at 3). The historic question here is whether Kiko should "count" under the common law of habeas corpus.

2. The meaning of "person" in Article 70 is a common law determination.

Who is a "person" within the meaning of the common law of habeas corpus is the most important individual issue that may come before a court. Whether the term "person" in Article 70 may include a chimpanzee is a matter which must be determined under the New York common law of habeas corpus because: (1) the legislature chose not to define "person" in Article 70; (2) the CPLR, particularly Article 70, solely governs procedure; and (3) if Article 70 limits the substantive common law of habeas corpus, it violates the "Suspension Clause" of the New York Constitution, Art. 1 § 4.

First, as "person" is undefined in Article 70, its meaning is to be judicially determined as a matter of common law. *Oppenheim v. Kridel*, 236 N.Y. 156, 163 (1923). When the legislature intends to define a word in the CPLR, it does. *See* CPLR Article 105. But it neither defined "person" nor intended the word to have any meaning apart from its common law meaning. *Siveke v. Keena*, 441 N.Y.S. 2d 631, 633 (Sup. Ct. 1981)("Had the legislature so intended to restrict the application of Article 70 of the CPLR to [infants or persons held by state] it would have done so by use of the appropriate qualifying language."). *See P.F. Scheidelman & Sons, Inc. v Webster Basket Co.*, 257 N.Y.S. 552, 554-55 (Sup. Ct. 1932), *aff'd*, 236 A.D. 774 (4th Dept. 1932). *See also State v. A.M.R.*, 147 Wash. 2d 91, 94-95 (2002)(en banc)(courts look to common law definitions of otherwise undefined word "person" to determine who may appeal certain orders).

Second, the CPLR governs only procedure and may neither abridge nor enlarge a party's substantive rights. CPLR 101 & 102. Therefore it may not abridge substantive common law habeas corpus rights. This necessarily includes the threshold determination of whether Kiko is a "person" within the context of the New York common law of habeas corpus. *See People ex rel. Keitt v. McCann*, 18 N.Y.2d 257, 263 (1966)("Legislature did not intend to change the instances in which the writ was available"); *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 569 (1875)("the act needs no interpretation and is in full accord with the common

law."); *Lavery*, 124 A.D.3d at 150 ("[W]e must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach.").

Third, if Article 70 prevents the court from determining that Kiko is a "person" within the meaning of the common law of habeas corpus, it violates the Suspension Clause of the New York Constitution, Art. 1 § 4, which renders the legislature powerless to deprive an individual of the privilege of the common law writ of habeas corpus. *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939). It "cannot be abrogated, or its efficiency curtailed, by legislative action." *Tweed*, 60 N.Y. at 566. Otherwise the legislature could permanently strip judges of their ability to determine who lives, who dies, who is enslaved, and who is free.

Kiko's thinghood derives from the common law. However, when justice requires, New York courts refashion the common law—especially the common law of habeas corpus—with the directness Lord Mansfield displayed in *Somerset v. Stewart*, when he held human slavery "so *odious* that nothing can be suffered to support it but positive law." 98 Eng. Rep. at 510 (emphasis added). "One of the hallmarks of the writ [is]...its great flexibility and vague scope." *McCann*, 18 N.Y.2d at 263 (citation omitted). Slaves employed the common law writ of habeas corpus to challenge their imprisonment as things. *Lemmon*, 20 N.Y. at 604-06, 618, 623, 630-31 (citing *Somerset*); *In re Belt*, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848); *In*

re Kirk, 1 Edm. Sel. Cas. 315 (citing *Somerset* and *Forbes v. Cochran*, 107 Eng. Rep. 450, 467 (K.B. 1824); *In re Tom*, 5 Johns. 365. Non-slaves long employed it in New York, including (1) apprentices and indentured servants;[13] (2) infants,[14] (3) the incompetent elderly;[15] and (4) mental incompetents.[16]

It is not just in habeas corpus that New York courts freely revise the common law, though habeas corpus law is the broadest and most flexible of all. The Court of Appeals has long rejected the claim that "change...should come from the Legislature, not the courts." *Woods v. Lancet*, 303 N.Y. 349, 355 (1951). *See W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007, 1009 (Sup. Ct. 1998)("For those who feel that the incremental change allowed by the Common Law is too slow compared to statute, we refer those disbelievers to the holding in *Somerset v. Stewart*,...which stands as an eloquent monument to the fallacy of this view"), *aff'd*, 267 A.D.2d 233 (2d Dept. 1999). The *Woods* Court declared: "We abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." 303 N.Y. at 355.

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

---

[13] *People v. Weissenbach*, 60 N.Y. 385, 393 (1875); *In re M'Dowle*, 8 Johns 328 (Sup. Ct. 1811)
[14] *Weissenbach*; *M'Dowle*, *supra*.
[15] *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996)
[16] *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961); *People ex rel. Jesse F. v. Bennett*, 242 A.D.2d 342 (2d Dept. 1997); *In re Cindy R.*, 970 N.Y.S.2d 853 (Sup. Ct. 2012).

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

New York courts have "not only the right, but the duty to re-examine a question where justice demands it" to "bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past." *Woods*, 303 N.Y. at 355 (citation omitted). *See, e.g.*, *Gallagher v. St. Raymond's R.C. Church*, 21 N.Y.2d 554, 558 (1968)("the common law of the State is not an anachronism, but is a living law which responds to the surging reality of changed conditions"); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 508 (1968)("this court has not been backward in overturning unsound precedent."); *Bing v. Thunig*, 2 N.Y.2d 656, 668 (1957)(a rule of law "out of tune with the life about us, at variance with modern day needs and with concepts of justice and fair dealing...[i]t should be discarded"); *Silver v. Great American Ins. Co.*, 29 N.Y.2d 356, 363 (1972)("Stare decisis does not compel us to follow

blindly a court-created rule...once we are persuaded that reason and a right sense of justice recommend its change."); *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 391 (1916); *Rumsey v. New York and New England Railway Co.*, 133 N.Y. 79, 85 (1892)(quoting 1 *Kent's Commentaries* 477 (13th edition 1884)("cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error")).

The uncontroverted expert affidavits confirm chimpanzees' extraordinarily complex, often human-like, autonomy and ability to self-determine. At every level, chimpanzees are today understood as beings entitled to consideration; they have long been edging toward personhood. Justice therefore requires that the common law of habeas corpus be refashioned in accordance with these present day standards to include Kiko as a common law "person."

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

The common law writ of habeas corpus is so "deeply rooted in our cherished ideas of individual autonomy and free choice," *Stanley*, 16 N.Y.S.3d at 903-04, that "Anglo-American law starts with the premise of thorough-going self determination." *Natanson v. Kline*, 186 Kan. 393, 406 (1960), *decision clarified on den. of reh'g*, 187 Kan. 186 (1960). The Supreme Court famously held that

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

Union P. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)(quoting *Cooley on Torts* 29).

The word "autonomy" derives from the Greek "autos" ("self") and "nomos" (law"). Michael Rosen, *Dignity – Its History and Meaning* 4-5 (2012). Its deprivation is a deprivation of common law dignity, *People v. Rosen*, 81 N.Y. 2d 237, 245 (1993); *Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986); *In re Gabr*, 39 Misc. 3d 746, 748 (Sup. Ct. 2013), that "long recognized the right of competent individuals to decide what happens to their bodies." *Grace Plaza of Great Neck, Inc. v. Elbaum*, 82 N.Y.2d 10, 15 (1993). *See, e.g.*, *Rivers*, 67 N.Y.2d at 492; *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (1914).

New York common law so supremely values autonomy that it permits competent adults to decline life-saving treatment. *Matter of Westchester Cnty. Med. Ctr. (O'Connor)*, 72 N.Y.2d 517, 526-28 (1988); *Rivers*, 67 N.Y.2d. at 493; *People v. Eulo*, 63 N.Y. 2d 341, 357 (1984). This "insure[s] that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires." *Rivers*, 67 N.Y.2d at 493. It

permits a permanently incompetent, once-competent human to refuse medical treatment, if he clearly expressed his desire to refuse treatment before incompetence silenced him, and no over-riding state interest exists. *Matter of Storar*, 52 N.Y.2d 363, 378 (1981). Even those who will never be competent, who have always lacked the ability and always will lack the ability, to choose, understand, or make a reasoned decision about medical treatment possess common law autonomy and dignity equal to the competent. *Matter of M.B.*, 6 N.Y.3d at 440; *Rivers*, 67 N.Y.2d at 493 (citing *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728 (1977)); *Matter of Storar*, 52 N.Y.2d at 380

The capacity of chimpanzees such as Kiko for autonomy and self-determination, which subsume many of their numerous complex cognitive abilities, are set forth in the Expert Affidavits attached to the Second Kiko Petition. In June 2013, the NIH recognized the ability of chimpanzees to choose and self-determine. Accepted Recommendation EA7 states: "The environmental enrichment program developed for chimpanzees must provide for relevant opportunities for choice and self determination." (R.190). The NIH noted "[a] large number of commenters who responded to this topic strongly supported this recommendation as a way to ensure both the complexity of the captive environment and chimpanzees' ability to exercise volition with respect to activity, social grouping, and other opportunities." (*Id.*)

4. Fundamental principles of equality entitle Kiko to the bodily liberty that the common law of habeas corpus protects.

Kiko is entitled to common law personhood and the right to bodily liberty as a matter of common law equality, too. Equality has always been a vital New York value, embraced by constitutional law, statutes, and common law.[17] Article 1, § 11 of the New York Constitution contains both an Equal Protection Clause, modeled on the Fourteenth Amendment, and an anti-discrimination clause. "[T]he principles expressed in those sections [of the Constitution] were hardly new." *Brown v. State*, 89 N.Y.2d 172, 188 (1996). As the Court of Appeals explained: "cases may be found in which this Court identified a prohibition against discrimination in the Due Process Clauses of earlier State Constitutions, clauses with antecedents traced to colonial times" *Id.* (citations omitted).

New York equality values are embedded into New York common law. At common law, such private entities as common carriers, victualers, and innkeepers may not discriminate unreasonably or unjustly. *See, e.g., Hewitt v. New York, N.H. & H.R. Co.*, 284 N.Y. 117, 122 (1940)("At common law, railroad carriers are under a duty to serve all persons without unjust or unreasonable advantage to any. So this court has said that a carrier should not 'be permitted to unreasonably or

[17] Equality is a fundamental value throughout Western jurisprudence. *See Vriend v. Alberta*, 1 R.C.S. 493, 536 (Canadian Supreme Court 1998)(Cory and Iacobucci, JJ)("The concept and principle of equality is almost intuitively understood and cherished by all."); *Miller v. Minister of Defence*, HCJ 4541/94, 49(4) P.D. 94, ¶6 (Israel High Court of Justice 1995)(Strasberg-Cohen, T., J.)("It is difficult to exaggerate the importance and stature of the principle of equality in any free democratic society.").

unjustly discriminate against other individuals to the injury of their business where the conditions are equal.'")(citation omitted); *New York Tel. Co. v. Siegel-Cooper Co.*, 202 N.Y. 502, 508 (1911); *Lough v. Outerbridge*, 143 N.Y. 271, 278 (1894); *People v. King*, 110 N.Y. 418, 427 (1888).

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

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

common law. The outcomes of similar common law and constitutional cases may therefore be different.

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

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

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

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

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

In *Romer*, the Court struck down "Amendment 2," because its purpose of repealing all existing anti-discrimination positive law based upon sexual orientation, was illegitimate. 517 U.S. at 626. It violated equal protection because "[i]t is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board." *Id.* at 633. Amendment 2 was "simply so obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violated basic equal protection values." *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997); *Mason v. Granholm*, 2007 WL 201008 (E.D. Mich. 2007); *Goodridge*, 440 Mass. at 330 (same-sex marriage ban impermissibly "identifies persons by a single trait and then denies them protection across the board"). The true test is whether persons are

similarly situated for purposes of the law challenged. *Kerrigan v. Comm'r of Public Health*, 289 Conn. 135, 158 (2008).

Denying Kiko his common law right to bodily liberty solely because he is a chimpanzee is a tautology. "'[S]imilarly situated' [cannot] mean simply 'similar in the possession of the classifying trait.' All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test." *Varnum v. O'Brien*, 763 N.W. 2d 862, 882-83 (Iowa 2009)(citations omitted). The "equal protection guarantee requires that laws treat all those who are similarly situated with respect to the purposes of law alike." *Id.*

In *Goodridge*, the court swept aside the argument that the legislature could refuse same-sex couples the right to marry because the purpose of marriage is procreation, which they could not accomplish. 440 Mass. at 330. This argument "singles out the one unbridgeable difference between same-sex and opposite sex couples, and transforms that difference into the essence of legal marriage." *Id.* at 333.

No one doubts that, if Kiko were human, the court would instantly issue a writ of habeas corpus and discharge him immediately. Kiko is imprisoned for one reason: he is a chimpanzee. Possessing that "single trait," he is "denie[d]...protection across the board," *Romer*, 517 U.S. at 633, to which his autonomy and ability to self-determine entitle him.

All nonhuman animals were once believed unable to think, believe, remember, reason, and experience emotion. Richard Sorabji, *Animal Minds & Human Morals – The Origins of the Western Debate* 1-96 (1993). Today, not only do the Expert Affidavits attached to the Second Kiko Petition and the June 13, 2013 NIH acceptance of The Working Group's recommendations confirm chimpanzees' extraordinarily complex, often human-like, autonomy and ability to self-determine and expose those ancient, pre-Darwinian prejudices as untrue, but so does the 2011 report of the Institute of Medicine and National Research Council of the National Academies discussing the use of chimpanzees in biomedical research:

> Chimpanzees live in complex social groups characterized by considerable interindividual cooperation, altruism, deception, and cultural transmission of learned behavior (including tool use). Furthermore, laboratory research has demonstrated that chimpanzees can master the rudiments of symbolic language and numericity, that they have the capacity for empathy and self-recognition, and that they have the human-like ability to attribute mental states to themselves and others (known as the "theory of mind"). Finally, in appropriate circumstances, chimpanzees display grief and signs of depression that are reminiscent of human responses to similar situations.[18]

For centuries New York courts rejected slavery, a status that strips the slave of her autonomy and harnesses her to her master's will. *Lemmon*, 20 N.Y. 562, is acknowledged as "one of the most extreme examples of hostility to slavery in

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

Northern courts[.]" Paul Finkleman, *Slavery in the Courtroom* 57 (1985). "'[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.'" 16 N.Y.S.3d at 917-18 (citation omitted). The legal personhood of chimpanzees, at least with respect to their right to a common law writ of habeas corpus, is one of those truths; their legal thinghood has become an anachronism.

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

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

D. THE THIRD DEPARTMENT'S TWO NOVEL RULINGS IN *LAVERY* WERE ERRONEOUS.

1. *Lavery* erroneously held that the capacity to bear duties and responsibilities "collectively" at the level of species is necessary for being a legal "person."

In arriving at the erroneous ruling, *Lavery*: (1) relied on inapposite cases; (2) failed to recognize that the legislature has already determined some animals are persons under Estates Powers and Trusts Law ("EPTL") 7-8.1; (3) relied almost exclusively on two law review articles that contain a lone professor's minority personal philosophical preference; (4) ignored *Byrn's* establishing that personhood is a matter of policy, *supra*; and (5) failed to address the detailed uncontroverted policy arguments, based upon fundamental common law values of liberty and equality.

Lavery is the first decision to hold that an inability to bear duties and responsibilities allows a court to deny a fundamental common law right to an individual (except in the individual's own interests), much less an autonomous, self-determining entity seeking a common law writ of habeas corpus. Significantly however, *Lavery* was based neither on precedent nor sound policy. It stated 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. This is true only because no such claim had ever been presented. Moreover, the New York statute that allows

nonhuman animals to be trust beneficiaries and provides for an enforcer who "performs the same function as a guardian ad litem for an incapacitated person," *In re Fouts*, 677 N.Y.S.2d 699, 700 (Sur. Ct. 1998), contradicts *Lavery*'s assertion that New York legal personhood is premised upon the ability to bear duties and responsibilities and that nonhuman animals have never been considered "persons" under New York law.

Further, NhRP did not bring its cases in federal court or ground its claims on any statute or constitution. Its cause of action is common law. The cases cited in *Lavery* were therefore irrelevant because they were federal cases that had either been dismissed pursuant to Article III or because the enabling statute's definition of "person" did not include nonhuman animals. 124 A.D.3d at 150. None were common law claims; all involved statutory or constitutional interpretation. *See Lewis v. Burger King*, 344 Fed. Appx. 470 (10th Cir. 2009)(rejecting plaintiff's claim that her service dog had standing to sue under the Americans with Disabilities Act of 1990); *Cetacean Community v. Bush*, 386 F. 3d 1169 (9th Cir. 2004)(all cetaceans of the world lacked standing under the Endangered Species Act and were not within that statute's definition of "person."); *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment*, 842 F. Supp.2d 1259 (S.D. Cal. 2012)(legislative history makes clear Thirteenth Amendment was only intended to apply to human beings); *Citizens to End Animal*

Suffering & Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45 (D. Mass. 1993)(dolphin not a "person" within meaning of Administrative Procedures Act, sec. 702). Each court, however, agreed that a nonhuman animal could be a "person" if Congress intended, but concluded that, with respect to the enactments involved, Congress had not so intended. *Lewis*, 344 Fed. Appx. at 472; *Cetacean Community*, 386 F.3d at 1175-76; *Tilikum*, 842 F. Supp.2d at 1262 n.1; *New England Aquarium*, 842 F. Supp.2d at 49. *See Lavery*, 124 A.D.3d at 150 ("we must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach").

Similarly, none of the cases cited in *Lavery* support its statement that "habeas corpus has never been provided to any nonhuman entity," *id.*, if what that court meant was that no entity that could possibly be detained against its will has ever been denied a writ of habeas corpus. *See United States v. Mett*, 65 F. 3d 1531, 1534 (9th Cir. 1995)(corporation permitted to utilize writ of *coram nobis*); *Waste Management of Wisconsin, Inc. v. Fokakis*, 614 F. 2d 138, 140 (7th Cir. 1980)(corporation refused habeas corpus "because a corporation's entity status precludes it from being incarcerated or ever being held in custody."); *Graham v. State of New York*, 25 A.D.2d 693 (3d Dept. 1966)(habeas corpus purpose is to free prisoners from detention, not secure return of inanimate personal property); *Sisquoc Ranch Co. v. Roth*, 153 F. 2d 437, 439 (9th Cir. 1946)(corporation with

contractual relationship with human lacked standing to seek corporate habeas corpus). Thus, no nonhuman who could possibly be imprisoned had ever sought a writ of habeas corpus.

The novelty of Kiko's claim is no reason to deny him relief. *See, e.g.*, *Crook*, 25 F. Cas. at 697 (that no Native American had sought habeas relief did not foreclose petitioner from being designated a "person" and awarded habeas relief); *Somerset*, *supra* (that no human slave had been granted habeas relief was no obstacle to court's grant of habeas relief); *see also Lemmon*, 20 N.Y. 562.

Lavery did not ground its ruling that duties and responsibilities are required for personhood on relevant precedent. It merely noted that

> the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity of rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system. (see Richard L. Cupp, Jr., "Children, Chimps, and Rights: Arguments from 'Marginal' Cases,'" 45 *Ariz. St. LJ* 1, 12-14 (2013); Richard L. Cupp, Jr., "Moving Beyond Animal Rights: A Legal Contractualist Critique," 46 *San Diego L. Rev.* 27, 69-70 (2009); *see also Matter of Gault*, 387 U.S. 1, 20-21 (1967); *United States v. Barona*, 56 F.3d 1087, 1093-1094 (9th Cir. 1995), *cert. denied* 516 US 1092 (1996). Under this view, society extends rights in exchange for an express or implied agreement of its members to submit to social responsibilities. In other words, "Rights [are] connected to moral agency and the ability to accept societal responsibility for [those] rights" [citing the two Cupp articles].

124 A.D.3d at 151. Neither *Gault* nor *Barona* are relevant. *Gault*'s unexplained and isolated mention of a "social compact" was irrelevant to its determination that

children were entitled to due process and is irrelevant to the case at bar. *Barona* merely concerned an interpretation of the phrase "the People of the United States." 56 F.3d at 1093-94. The two Cupp articles merely set forth one professor's unsupported preference for a narrow philosophical contractualism that arbitrarily excludes every nonhuman animal, while including every human being, in support of which he cites no cases.[19]

Habeas corpus has always been available to aliens and others not part of a fictitious "social contract." In *Rasul v. Bush*, 542 U.S. 466, 481-82 & n.11 (2004), the Supreme Court stated:

> Application of the habeas statute to persons[20] detained at the base (in Guantanamo) is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm ...[Citing, *inter alia*, *Somerset* and *Case of the Hottentot Venus*]
>
> American courts followed a similar practice in the early years of the Republic. See, *e.g.*, *United States v. Villato*, 2 Dall. 379 (CC Pa. 1797)(granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States) [citations omitted]

In *Jackson v. Bulloch*, 12 Conn. 38, 42-43 (1837), a slave was freed pursuant to habeas corpus despite being excluded from the social compact. Because of culture or disability, many are unable to be part of a social compact, as chimpanzees may

---

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

[20]These Guantanamo petitioners were not part of any "social contract," as the United States alleged they desired to destroy any social contract that may exist. Still they were eligible for habeas corpus.

be; others may loathe our social compact and seek to destroy it. Nevertheless they may avail themselves of habeas corpus.

Lavery ignored the teachings of *Byrn* that "[w]hether the law should accord legal personality is a policy question," "[i]t is not true...that the legal order necessarily corresponds to the natural order," and "[t]he point is that it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence." 31 N.Y.2d at 201; *see* Paton, *supra* at 349-50. *Lavery* failed to recognize that whether a chimpanzee is a "person" for the purpose of demanding a common law writ of habeas corpus is entirely a policy, and not a biological, question. It further failed to address the powerful uncontroverted policy arguments, based upon fundamental common law values of liberty and equality, that NhRP presented in detail. (R.730-777).

In sister common law countries, an entity may be a "person" without having the capacity to shoulder duties or responsibilities, *supra.*

Esteemed commentators cited both by the *Byrn* majority and the Indian Supreme Court agree, *supra.* As Gray explained, there may be

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

Id. at 43. The New York Legislature recognized this when it enacted EPTL 7-8.1, which provided for an "enforcer" to enforce the nonhuman animal beneficiary's right to the trust corpus.

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

Hohfeld noted, *id.* at 27, that even John Chipman Gray made the same mistake as did the *Lavery* court in his *Nature and Sources of the Law*.

> In [Gray's] chapter on "Legal Rights and Duties," the distinguished author takes the position that a right always has a duty as its correlative; and he seems to define the former relation substantially according to the more limited meaning of 'claim.' Legal privileges, powers, and immunities are *prima facie* ignored, and the impression conveyed that all legal relations can be comprehended under the conceptions, 'right' and 'duty.'[21]

A claim-right, which NhRP did not demand either in *Lavery* or the case at bar, is comprised of a correlative claim and duty. Steven M. Wise, *Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VERMONT L. REV. 807-10 (1998). The most conservative, narrow, and uncommon, way to identify which entity possesses a claim-right is to require that entity to have the capacity to assert claims within a moral community. *Id.* at 808-10. This is akin to the personhood test applied in *Lavery*.

In neither *Lavery* nor the case at bar did NhRP seek a claim-right. Instead it sought the immunity-right to bodily liberty protected by a common law writ of habeas corpus. This is the sort of immunity right that the Supreme Court was referring to in *Botsford*, 141 U.S. at 251, *supra* at XXX. An immunity-right correlates not with a duty, but with a disability. Wise, *Hardly a Revolution*, *supra* at 810-15. Other examples of fundamental immunity-rights are the Thirteenth

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

Amendment right not to be enslaved, which disables others from enslaving those covered by that Amendment, and the First Amendment right to free speech, which the government is disabled from abridging. The ability to bear duties and responsibilities is logically not necessary to possess the rights to bodily liberty, freedom from enslavement, and free speech.

Harris v. McRea, 448 U.S. 297, 316-18, 331 (1980) illustrates the difference between a claim-right and an immunity-right. The plaintiff claimed she had the claim right to have the state pay for an abortion she was unable to afford because of *Roe v. Wade's* recognition of a woman's right to privacy against interference by the state with her decision to have an abortion. The Court recognized her immunity right to an abortion correlated with the state's disability to interfere in her decision to have the abortion, not with the state's duty to fund the abortion. NhRP argues Kiko has the common law immunity right to bodily liberty protected by common law habeas corpus which correlates with Respondents' disability to imprison him. Kiko's ability to bear duties and responsibilities is irrelevant to his fundamental immunity-right to bodily liberty.

The ability to bear duties and responsibilities is not even a prerequisite for the claim-right of a "domestic or pet" animal in New York, pursuant to EPTL 7-8.1, to the money placed in the trust to which that nonhuman animal is a named beneficiary.

2. The Third Department improperly took judicial notice that chimpanzees lack the capacity to bear duties and responsibilities.

Lavery improperly took judicial notice of the alleged scientific fact that chimpanzees cannot bear duties and responsibilities. 124 A.D.3d at 151. *See Hamilton v. Miller*, 23 N.Y.3d 592, 603-04 (2014). A New York court may only take judicial notice of facts "which everyone knows," *States v. Lourdes Hosp.*, 100 N.Y.2d 208, 213 (2003), or which are indisputable. *TOA Const. Co. v. Tsitsires*, 54 A.D.3d 109, 115 (1st Dept. 2008). "'The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof.'" *Dollas v. W.R. Grace & Co.*, 225 A.D.2d 319, 320 (1st Dept. 1996)(citation omitted).

That chimpanzees cannot bear duties and responsibilities is not an adjudicative fact. Judicial notice is generally inappropriate in "scientifically complex cases." *Hamilton*, 23 N.Y.3d at 603-04. As it is inappropriate to take judicial notice of scientific facts found in "statutory preambles," *id.*, it was inappropriate for the Third Department to take judicial notice of a complex scientific fact based on two law review articles. *Lavery*, 124 A.D.3d at 151. The source of the underlying information must be of "indisputable accuracy," *Crater Club v. Adirondack Park Agency*, 86 A.D.2d 714, 715 (3d Dept. 1982), and so "patently trustworthy as to be self-authenticating." *People v. Kennedy*, 68 N.Y.2d

569, 577 (1986). Judicial notice was further inappropriate "because of the novelty of the issue in this State." *Brown v. Muniz*, 61 A.D.3d 526, 528 (1st Dept. 2009).

3. Kiko can bear duties and responsibilities.

If this Court finds the capacity to bear duties and responsibilities has some relationship to being a "person" for the purpose of a common law writ of habeas corpus and Article 70, the uncontroverted expert evidence presented by the NhRP in the Supplemental Affidavits and Affidavit of Dr. Jane Goodall, both attached to the Second Kiko Petition, prove that chimpanzees routinely bear duties and responsibilities in their own communities and human/chimpanzee communities. This is sufficient, according to *Lavery*, for personhood to the extent of Kiko's ability to invoke common law habeas corpus.

If this Court further agrees with *Lavery* that being a member of a species that "collectively" has the capacity to bear duties and responsibilities is necessary to be a "person," 124 A.D.3d at 152 n.3, then the uncontroverted Supplemental Affidavits and the Affidavit of Jane Goodall attached to the Second Kiko Petition make clear that chimpanzees "collectively" possess this capacity.

E. AS KIKO IS ILLEGALLY IMPRISONED, HE IS ENTITLED TO A COMMON LAW WRIT OF HABEAS CORPUS.

1. As an autonomous "person" entitled to bodily liberty, Kiko's detention is unlawful.

All autonomous common law natural persons are presumed to be entitled to personal liberty (*in favorem libertatis*). *See Oatfield v. Waring*, 14 Johns. 188, 193 (Sup. Ct. 1817)(concerning a slave's manumission, "all presumptions in favor of personal liberty and freedom ought to be made"); *Fish v. Fisher*, 2 Johns. Cas. 89, 90 (Sup. Ct. 1800)(Radcliffe, J.); *People ex. rel Caldwell v Kelly*, 13 Abb.Pr. 405, 35 Barb. 444, 457-58 (Sup Ct. 1862)(Potter, J.). As the uncontroverted Expert Affidavits make clear, Kiko is autonomous; his detention is therefore unlawful.

New York common law incorporated the common law of England, which was long *in favorem libertatis* ("in favor of liberty"). Francis Bacon, "The argument of Sir Francis Bacon, His Majesty's Solicitor General, in the Case of the Post-Nati of Scotland," in IV *The Works Of Francis Bacon, Baron of Verulam, Viscount St. Alban And Lord Chancellor* 345 (1845)(1608); 1 Sir Edward Coke, *The First Part of the Institutes of the Laws of England* sec. 193, at *124b (1628); Sir John Fortescue, *De Laudibus Legum Angliae* 105 (S.B. Chrimes, trans. 1942 [1545]). *See, e.g., Moore v. MacDuff*, 309 N.Y. 35, 43 (1955); *Whitford v. Panama R. Co.*, 23 N.Y. 465, 467-68 (1861); *In re Kirk*, 1 Edm. Sel. Cas. at 327; *Oatfield*, 14 Johns. at 193; *Fish*, 2 Johns. Cas. at 90 (Radcliffe, J.); *Kelly*, 33 Barb. at 457-58

(Potter, J.)("Liberty and freedom are man's natural conditions; presumptions should be in favor of this construction."). New York statutes harmonize with this common law presumption. *See* N.Y. Stat. Law § 314 (McKinney)("A statute restraining personal liberty is strictly construed"); *People ex rel. Carollo v. Brophy*, 294 N.Y. 540, 545 (1945); *People v. Forbes*, 19 How. Pr. 457, 11 Abb.Pr. 52 (N.Y. Sup. Ct. 1860)(statutes must be "executed carefully in favor of the liberty of the citizen").

After petitioner makes a *prima facie* showing of illegal detention, a court must issue the order to show cause without delay. CPLR 7003(a). Respondent must then present facts that show the detention is lawful. CPLR 7006(a); CPLR 7008 (b). As with any other unlawfully imprisoned "person" in New York, if Respondents fail to set forth the cause of and sufficient authority for Kiko's detention, he must be discharged forthwith. *See* CPLR 7010(a); *People ex re. Stabile v. Warden of City Prison*, 202 N.Y. 138, 152 (1911).

2. Kiko, being unlawfully detained, is entitled to immediate discharge to a sanctuary.

That NhRP seeks Kiko's discharge to a sanctuary rather than unconditional release onto the streets of New York does not preclude habeas corpus relief. *Stanley* properly rejected the argument that because NhRP sought "[Hercules and Leo's] transfer to a chimpanzee sanctuary, it has no legal recourse to habeas corpus," concluding that *Presti* conflicted with First Department and Court of

Appeals precedent. 16 N.Y.S.3d at 917 n.2 (citing *McGraw*, 220 A.D.2d at 292; *Matter of MHLS ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989)). *See McCann*, 18 N.Y.2d at 273; *Johnston*, 9 N.Y.2d at 485 (habeas proper remedy to test validity of transfer from state prison to state hospital for the insane); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943)(commitment to reformatory)' *People ex rel. LaBelle v. Harriman*, 35 A.D.2d 13, 15 (3d Dept. 1970)("Although relator is incarcerated and the writ will not secure his freedom, habeas may be used to obtain relief other than immediate release from physical custody"); *People ex rel. Meltsner v. Follette*, 32 A.D.2d 389, 391 (2d Dept. 1969)(discharge not required); *People ex rel. Ardito v. Trujillo*, 441 N.Y.S.2d 348, 350 (Sup. Ct. 1981). Kiko's case is analogous to the relief accorded to child slaves, juveniles, and the incapacitated elderly.

An unlawfully detained person may be discharged into the care or custody of another. Imprisoned children and incapacitated adults have been discharged from slavery, industrial training schools, mental institutions, and other unlawful imprisonments into the custody of another. *See Lemmon*, 20 N.Y. at 632 (five slave children discharged); *Commonwealth v. Taylor*, 44 Mass. 72, 72-74 (1841)(slave child discharged into care of Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Aves*, 35 Mass. 193 (1836)(slave child discharged to Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Holloway*, 2 Serg. &

Rawle 305 (Pa. 1816)(slave child discharged); *State v. Pitney*, 1 N.J.L. 165 (N.J. 1793)(manumitted child discharged).

New York courts have discharged minors from industrial training schools or other detention facilities through the common law writ of habeas corpus, though they remain subject to the custody of their parents or guardians. *People ex rel. F. v. Hill*, 36 A.D.2d 42, 46 (2d Dept. 1971), *aff'd*, 29 N.Y.2d 17 (1971); *People ex rel. Silbert v. Cohen*, 36 A.D.2d 331, 332 (2d Dept. 1971), *aff'd*, 29 N.Y. 2d 12 (1971); *People ex rel. Margolis v. Dunston*, 174 A.D.2d 516, 517 (1st Dept. 1991); *In re Conroy*, 54 How. Pr. 432, 433-34 (N.Y. Sup. Ct. 1878)

Minors have been discharged from mental institutions into the custody of another, *People ex rel. Intner on Behalf of Harris v. Surles*, 566 N.Y.S.2d 512, 515 (Sup. Ct. 1991), as were child apprentices, *People v. Hanna*, 3 How. Pr. 39, 45 (N.Y. Sup. Ct. 1847); *In re M'Dowle*, 8 Johns 328, and incapacitated adults, *Schuse*, 227 A.D.2d 969 (elderly and ill woman showing signs of dementia); *State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982)(elderly sick woman); *Siveke*, 441 N.Y.S. 2d 631 (elderly ill man).

Habeas corpus may even be used to seek a transfer from one prison or hospital facility to another. *See Wack*, 75 N.Y.2d 751 (mental patient transferred from secure to non-secure facility); *Bennett*, 242 A.D.2d 342; *People ex rel. Richard S. v. Tekben*, 219 A.D.2d 609, 609 (2d Dept. 1995); *People ex rel.*

Kalikow on Behalf of Rosario v. Scully, 198 A.D.2d 250, 251 (2d Dept. 1993)(habeas corpus "available to challenge conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. Meltsner*, 32 A.D.2d at 391-92 (transfer from prison to correctional institution proper); *People ex rel. Ceschini v. Warden*, 30 A.D.2d 649, 649 (1st Dept. 1968).

F. NEW YORK PUBLIC POLICY RECOGNIZES PERSONHOOD FOR SOME NONHUMAN ANIMALS.

The *Byrn* Court made clear that the determination of personhood is a matter of public policy. New York public policy supports Kiko's personhood, as it already recognizes personhood rights in some nonhuman animals, including Kiko, by allowing them to be trust "beneficiaries." *See* EPTL 7-8.1; *Stanley*, 16 N.Y.S.3d at 901. Kiko is a beneficiary of an *inter vivos* trust created by NhRP under EPTL 7-8.1. (R.79-82). Consequently, he is a "person" under that statute, as only "persons" may be trust beneficiaries. *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); *Gilman v. McArdle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) *rev'd on other grounds*, 99 N.Y. 451 (1885). "Before this statute [EPTL 7-8.1] trusts for animals were void, because a private express trust cannot exist without a beneficiary capable of enforcing it, and because nonhuman lives cannot be used to measure the perpetuities period." Margaret Turano, *Practice Commentaries*, N.Y. Est. Powers & Trusts Law 7-8.1 (2013).

In 1996, the Legislature enacted EPTL 7-6 (now EPTL 7-8) (a), which permitted "domestic or pet animals" to be designated as trust beneficiaries. The Sponsor's Memorandum stated the statute's purpose was "to allow animals to be made the beneficiary of a trust."[22] This section thereby acknowledged these nonhuman animals as "persons" capable of possessing legal rights. In *In re Fouts*, 677 N.Y.S.2d 699 (Sur. Ct. 1998), the court recognized that five chimpanzees were "income and principal beneficiaries of the trust" and referred to its chimpanzees as "beneficiaries" throughout.

In *Feger v. Warwick Animal Shelter*, 59 A.D.3d 68, 72 (2d Dept. 2008), the court observed "[t]he reach of our laws has been extended to animals in areas which were once reserved only for people. For example, the law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner."

In 2010, the legislature removed "Honorary" from the title, removed the twenty-one year limitation on trust duration, and amended section (a) to read: "Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive," thereby dispelling any doubt that animals are capable of being beneficiaries in New York.

[22] Sponsor's Mem. NY Bill Jacket, 1996 S.B. 5207, Ch. 159.

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

IV. CONCLUSION

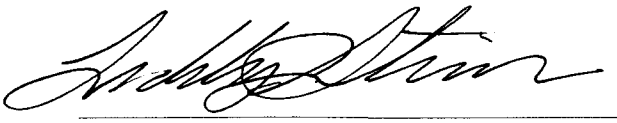
The facts underlying this petition are founded on approximately 165 pages of affidavits from nine of the world's leading experts on chimpanzee cognition from Japan, Germany, Sweden, England, Scotland, and the United States. Based upon the experts' review of hundreds of scientific articles and thousands of hours of personal observations, these affidavits establish that chimpanzees are autonomous, self-aware, and self-determining beings who can bear duties and responsibilities within chimpanzee communities and human/chimpanzee communities, freely choose how to live their lives and suffer from imprisonment. These facts support NhRP's legal arguments that chimpanzees, such as Kiko, are common law "persons" entitled to the common law right to bodily liberty protected by the common law writ of habeas corpus both as a matter of common liberty and common law equality.

Kiko is further entitled to immediate discharge from what will otherwise be a decades-long imprisonment. Kiko cannot be released to Africa or onto the streets of New York State. But he can be released from his imprisonment in New York.

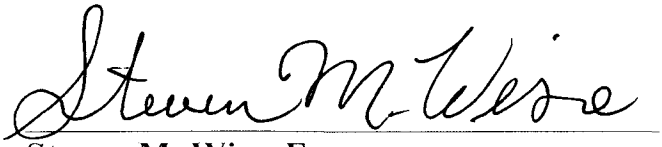
This Court should therefore reverse and remand with instructions to issue the order to show cause for a hearing to determine the legality of Kiko's detention.

Dated: May 17, 2016

Respectfully submitted,



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



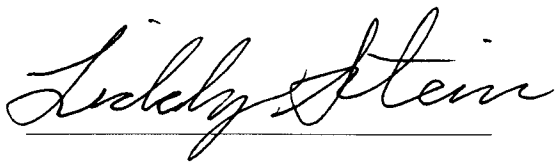
Steven M. Wise, Esq.
(of the bar of the State of Massachusettss)
By permission of the Court
Attorney for Petitioner-Appellant
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864

PRINTING SPECIFICATIONS STATEMENT

This brief complies with the page limitation of § 600.10 (d)(1)(i) because it is under 70 pages, excluding the parts of the brief exempted by the rule.

This brief has been prepared in a proportionally spaced typeface using Microsoft® Word 12.2.8 in 14-point font size in Times New Roman. It is 15,633 words, excluding the parts of the brief exempted by § 600.10 (d)(1)(i).

Dated: May 17, 2016



SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

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

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

Petitioner-Appellant,

-against-

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

Respondents-Respondents.

PRE-ARGUMENT STATEMENT

Index No. 150149/2016
NYSCEF Doc. No. 48
Proceeding Commenced
January 7, 2016

Elizabeth Stein, Esq.
Attorney for Petitioner-Appellant
5 Dunhill Road
New Hyde Park, New York 11040
Phone - 516-747-4726
Email – liddystein@aol.com

Steven M. Wise, Esq.
Attorney for Petitioner-Appellant
(subject to admission *pro hac vice*)
5195 NW 112th Terrace
Coral Springs, Florida 33076
Phone - 954-648-9864
Email – WiseBoston@aol.com

Carmen Presti, individually and as an officer and director of The Primate Sanctuary Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
Phone – 716-284-6118

Christie E. Presti, individually and as an officer and director of The Primate Sanctuary Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
Phone – 716-284-6118

The Primate Sanctuary Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
Phone – 716-284-6118

Respondents-Respondents were not represented by counsel in the lower court.

The appeal is taken from an Order of the Supreme Court, New York County
Honorable Barbara Jaffe, J.S.C. entered January 29, 2016.

There is no additional appeal pending in this action.

There are no related actions pending.

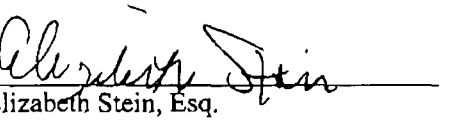
The nature of the underlying proceeding in this action is a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause brought by Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), on behalf of a chimpanzee named Kiko, under CPLR Article 70 seeking a determination of the legality of Kiko's detention and an order requiring his immediate release and transfer to an appropriate primate sanctuary.

The lower court declined to sign the Order to Show Cause on the grounds that: (a) the NhRP "filed four identical petitions with four state trial courts, each in a different county. With each petition, it offered the same nine affidavits. It then recently filed another two petitions in New York County which are identical to those previously filed, except for the addition of affidavits from five of the nine original affiants, along with a sixth from a member of its board of directors. All of the new affidavits rely on studies and publications that, with few exceptions, were available before 2015, and petitioner offers no explanation as to why they were withheld from the last four petitions"; (b) it was bound by *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015) in which the court stated that chimpanzees are not "persons" for the purpose of demanding a common law writ of habeas corpus because they are unable to shoulder duties and responsibilities; and (c) "whether evidence of the ability of some chimpanzees to shoulder certain kinds of responsibilities is sufficiently distinct from that offered with the first four petitions, and whether that evidence would pass muster in the Third Department, the decision of which remains binding on me (*Nonhuman Rights Project v Stanley*, 49 Misc 3d 746 [Sup Ct, New York County 2015 [Jaffe, J.]), are determinations that are best addressed there." A true and correct copy of the Memorandum Opinion is attached herein.

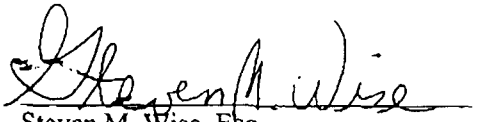
The grounds for seeking reversal of the lower court's order are: (a) Kiko is a "person" within the meaning of CPLR Article 70 and the common law of habeas corpus; (b) the lower court's statement that the NhRP "filed four identical petitions with four state trial courts, each in a different county" is both erroneous and irrelevant to the determination of whether a successive writ of habeas corpus should be granted. Only a single habeas corpus petition was filed on behalf of Kiko and that petition was before the Supreme Court, Niagara County, which refusal to issue an order to show cause was affirmed by the Supreme Court of the State of New York Appellate Division, Fourth Judicial Department in *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den.*, 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015) on the sole ground that Kiko's transfer to a primate sanctuary was an inappropriate remedy for habeas corpus, which directly conflicts with the holding of this Court in *McGraw v. Wack*, 220 A.D.2d 291, 292 (1st Dept. 1995) and *Matter of MHLS v. Wack*, 75 N.Y.2d 751 (1989); (c) the Supreme Court of the State of New York Appellate Division, Third Judicial Department's ("Third Department") ruling in *Lavery* that chimpanzees are not "persons" for the purpose of demanding a common law writ of habeas corpus rested upon the erroneous legal ruling, unprecedented in Anglo-American jurisprudence, that only an entity able to shoulder duties and responsibilities can be a "person" for the purpose of a common law writ of habeas corpus, or for any other purpose; (d) the Third Department's ruling in *Lavery* was erroneous because it improperly took judicial notice of the "fact" that chimpanzees could not shoulder duties and responsibilities, as no evidence bearing on that fact was introduced before either the lower court or the Third Department; the decision therefore is not binding on either the Supreme Court, New York County or this Court; (e) in response to the Third Department's erroneous legal ruling, unprecedented in Anglo-American jurisprudence, that only an entity able to shoulder duties and responsibilities can be a "person" for the purpose of a common law writ of habeas corpus, or for any other purpose, and the Third Department's improper taking of judicial notice of the "fact" that chimpanzees could not shoulder duties and responsibilities, as no evidence bearing on that fact had been introduced before either the lower court or the Third Department, the NhRP provided the lower court in this case with approximately 60 pages of new facts and grounds not previously presented that specifically demonstrated that chimpanzees routinely shoulder duties and responsibilities both within chimpanzee communities and mixed chimpanzee/human communities; (f) these new facts and grounds had not been previously presented in the petition brought by the NhRP on behalf of Kiko in the Supreme Court, Niagara County as it was filed prior to *Lavery* and because neither *Lavery's* unprecedented statement that the ability to shoulder duties and responsibilities is required for personhood nor *Lavery's* improper taking of judicial notice of the "fact' that chimpanzees could not shoulder duties and responsibilities could have been reasonably anticipated; (g) the question of whether the ability to shoulder duties and responsibilities is necessary for a determination of personhood is not "best addressed" by the Third Department, but by this Court, as this Court has never ruled on this issue; and (h) based upon the unrebutted facts presented to the lower court, Kiko is entitled to the immediate issuance of the requested

Order to Show Cause, an appropriate hearing, and an order releasing him forthwith from detention and transfer to an appropriate sanctuary, which the NhRP suggests is Save the Chimps, in Ft. Pierce, Florida.

Date: February 9, 2016

Submitted by: 

Elizabeth Stein, Esq.
Attorney for Petitioner-Appellant



Steven M. Wise, Esq.
Attorney for Petitioner-Appellant
(subject to admission *pro hac vice*)

Attachments:

1. Copy of Order appealed from.
2. Copy of memorandum opinion.
3. Copy of Notice of Appeal.