SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

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 HAPPY,

Petitioner,

-against-

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

Respondents.

Index No.: 18-45164

NOTICE OF MOTION TO RULE ON PETITION FOR HABEAS CORPUS

PLEASE TAKE NOTICE, that upon the annexed affirmation of Elizabeth Stein, Esq., an attorney of record for Petitioner the Nonhuman Rights Project, Inc. ("NhRP"), dated October 25, 2018, the Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") filed with this Court on October 2, 2018, the Memorandum of Law in Support thereof and all other affidavits, exhibits, and attachments filed therewith, and for the reasons set forth in the accompanying Memorandum of Law in Support of Motion to Rule on Petition for Habeas Corpus ("Memorandum"), the NhRP moves this Court to rule on the

Petition on November 30 (the return date established by the Court for all other pending motions) or immediately thereafter. As set forth in the accompanying Memorandum, the Court need only decide whether to issue the requested Order to Show Cause at that time.

PLEASE TAKE FURTHER NOTICE, that the motion is returnable on Friday, November 30, 2018, at the Courthouse located at Courthouse Square, 1 South Main Street, Suite 3, Albion, NY 14411. Respondents are hereby given notice that the motion will be submitted on the papers and their personal appearance in opposition is neither required nor permitted. Pursuant to CPLR § 2214(b), opposition papers, if any, are to be served by no later than November 23, 2018.

Dated: October 25. 2018

Elizabeth Stein

Elizabeth Stein, Esq.
Attorney for Petitioner
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
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NOTICE TO:

Karen Lake-Maynard
County Clerk, Orleans County
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By Mail and Email to Karen.Lake-Maynard@orleanscountyny.gov

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ORLEANS

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AFFIRMATION IN SUPPORT OF MOTION TO RULE ON PETITION FOR HABEAS CORPUS

I, ELIZABETH STEIN, an attorney duly admitted to practice law in the State of New York, hereby affirm the following under penalty of perjury:

1. I am an attorney of record for Petitioner, the Nonhuman Rights Project, Inc. in the above-captioned matter and am not a party in this action.
2. I am fully familiar with the pleadings and proceedings in this matter, have read and know the contents thereof and submit this affirmation in support of the within Notice of Motion to Rule on Petition for Habeas Corpus.
3. Pursuant to 22 N.Y.C.R.R. § 1301.1, this motion is not frivolous.

Dated: October 25, 2018

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

STATE OF NEW YORK
SUPREME COURT COUNTY OF ORLEANS

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RULE ON PETITION FOR HABEAS CORPUS

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

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

Attorneys for Petitioner

I. Introduction

On October 2, 2018, Petitioner, the Nonhuman Rights Project, Inc. ("NhRP"), filed a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") on behalf of an elephant named Happy, alleging that she is being unlawfully imprisoned by Respondents at the Bronx Zoo. A Notice of Motion for Admission *Pro Hac Vice* of Steven M. Wise was filed therewith that the NhRP made returnable on October 22, 2018. The Court then re-scheduled the return date on the motion for November 30, 2018. On October 9, 2018, Respondents sent the Court and the NhRP – via email only – a "Memorandum of Law in Opposition to Proposed Order to Show Cause" ("Memorandum"). On October 16, 2018, the NhRP filed with the Court a Notice of Motion to Strike Respondents' Memorandum.[1] The NhRP made that motion returnable on October 29, 2018, which the Court also re-scheduled for November 30, 2018.[2]

In accordance with both the language of New York Civil Practice Law and Rules ("CPLR") Sections 7003(a), 7005, and 7009(c)[3] and the exigent and summary nature of habeas corpus itself as recognized by the Court of Appeals, the NhRP respectfully submits that it is entitled to a prompt ruling by this Court on whether it will issue the Order to Show Cause so that Happy's ongoing unlawful

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[1] Despite the fact that no order has yet issued from this Court which would serve as a basis for any opposition, Respondents were properly served with the Notice of Motion to Strike. Among other reasons, the NhRP moved to strike Respondents' Memorandum on the ground that Respondents had no authority, statutory or otherwise, to file any documents prior to the issuance of the Order to Show Cause by the Court.

[2] The original return dates in both the *pro hac vice* motion and the motion to strike were set in compliance with CPLR 2214.

[3] CPLR Article 70 governs the procedure applicable to common law writs of habeas corpus. *See* CPLR 7001 ("the provisions of this article are applicable to common law or statutory writs of habeas corpus").

imprisonment may be addressed "without delay."[4] As the Petition has been pending before this Court since October 2, the NhRP requests that this Court issue its decision on November 30, which is the return date the Court already selected for the other outstanding motions, or immediately thereafter.

II. The Court must rule on the NhRP's request for an Order to Show Cause "without delay."

Recognizing the import of the denial of bodily liberty, the Court of Appeals in *People ex rel. Robertson v. New York State Division of Parole,* 67 N.Y. 2d 197, 201 (1986), unambiguously declared that habeas corpus is by nature an exigent proceeding that must litigated without delay "except of necessity":

> The purpose of habeas corpus is to test the legality of the detention of the person who is the subject of the writ (CPLR 7002[a]; *People ex rel. Shapiro v. Keeper of City Prison,* 290 N.Y. 393, 399, 49 N.E.2d 498) ... Thus ... we noted in *People ex rel. Duryee v. Duryee,* 188 N.Y. 440, 445–446, 81 N.E. 313, that: "The writ of habeas corpus, as its history shows, is a summary proceeding to secure personal liberty. It strikes at unlawful imprisonment or restraint of the person by state or citizen, and by the most direct method known to the law learns the truth and applies the remedy. *It tolerates no delay except of necessity,* and is hindered by no obstacle except the limits set by the law of its creation."
>
> (emphasis added).

The Court further noted that:

> The summary and exigent nature of the proceeding is evidenced by the requirement of CPLR 7003(a) that the court "issue the writ

[4] For purposes of issuing the requested Order to Show Cause, this Court need not address the question of Happy's personhood but may assume without deciding that Happy could possibly be a "person" solely for the purpose of securing the right to bodily liberty protected by the common law of habeas corpus. Once the order to show cause is issued, Respondents must come forward to justify their detention of Happy, at which time the issue of her personhood will be litigated.

> without delay on any day," the provision of CPLR 7005 authorizing service of a writ on any day notwithstanding that service of other process on a Sunday is void (General Business Law § 11), and the direction of CPLR 7009(c) that "[t]he court shall proceed in a summary manner."[5]
>
> *Id.*

With respect to the case at bar, Steven M. Wise, the putative *pro hac vice* trial attorney, is scheduled for major surgery on October 30, 2018. When the NhRP filed the Petition on October 2, 2018, it did not envision any conflict with his surgery date as the Supreme Courts, in the previous six similar petitions the NhRP filed in New York, made their decisions whether to issue the requested order to show cause within one week of the filing of the petition. However, because this Court has chosen to re-schedule the NhRP's two pending motions for November 30, 2018, and now because of the impending major surgery which necessitates a brief delay, the NhRP asks that the decision whether to issue the Order to Show Cause be made on November 30, 2018 or immediately thereafter. To postpone this critical decision past the date established by this Court would constitute an improper delay.

III. The novelty of the Petition does not justify a delay in the Court's decision on whether to issue the Order to Show Cause.

While this case involves an emerging question of law – the personhood of an autonomous nonhuman being – the Petition must still be acted upon without delay. The legal status of autonomous nonhuman animals has been rapidly evolving from rightless "things" to rights-bearing "persons" in New York State and throughout

[5] CPLR 7003 (a) provides, in relevant part: "The court to whom the petition is made shall issue the writ *without delay* on any day, or, where the petitioner does not demand production of the person detained . . . order the respondent to show cause why the person detained should not be released." (Emphasis added).

the world. The Appellate Division, Fourth Judicial Department ("Fourth Department") recently declared that it is now "*common knowledge* that personhood can and sometimes does attach to nonhuman entities like . . . *animals*." *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018) (emphasis added, citations omitted). In support, the Fourth Department cited, *inter alia*, *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, in which it had twice assumed, without deciding, that a chimpanzee (Kiko) could be a "person" for habeas corpus purposes. 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).

Court of Appeals Judge Eugene Fahey recently issued an opinion on the issue of personhood for autonomous nonhuman animals, in that case a chimpanzee, in *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1059 (2018) ("*Tommy*") (Fahey, J., concurring). There, he concluded that "[t]he issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. . . . While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing." *Id.* Significantly, a New York State Supreme Court *already* has issued an order to show cause pursuant to CPLR Article 70, which required the State to justify its detention of two chimpanzees. *The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 908, 917 (Sup. Ct. 2015) ("*Stanley*").[6]

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[6] The Oregon Supreme Court cited the NhRP's New York habeas corpus cases with approval, declaring: "we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still." *State v. Fessenden*, 355 Or. 759, 769-70 (2014); *see also In re Cecilia*, Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-23, 24 (as translated from original Spanish by attorney Ana Maria Hernandez), a certified copy of which is available at https://bit.ly/2PfQJWq (last visited Oct. 24, 2018) (Argentinian court granted writ of habeas corpus to a chimpanzee while declaring her a "non-human legal person" with "nonhuman rights," and ordering her immediate release from a zoo).

Happy is an extraordinarily cognitively complex and autonomous being whose interest in exercising her autonomy is as fundamental to her as it is to us. Respondents' imprisonment of Happy deprives her of her ability to exercise her autonomy in any meaningful way, including the freedom to choose where to go, what to do, and with whom to be. Such deprivation of a "person's" bodily liberty is *per se* unlawful. On Happy's behalf, the NhRP invokes this Court's common law authority to recognize that she is a common law person with the common law "right to liberty protected by habeas corpus." *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring). The NhRP seeks Happy's immediate release from Respondents' continued imprisonment so that Happy's autonomy may be realized to the fullest extent possible.[7]

As noted above, this Court need not make an initial determination of whether Happy is a "person" with the right to bodily liberty for the purpose of issuing the Order to Show Cause. But to refuse to rule on the request for that order past November 30, 2018 or immediately thereafter would constitute an improper delay.

IV. Conclusion

This Court must decide "without delay" whether it will issue the Order to Show Cause on behalf of Happy in this summary and exigent proceeding. Under the circumstances, the NhRP respectfully requests that the Court make its decision to issue the Order to Show Cause on November 30, 2018 or immediately thereafter.

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[7] This habeas corpus case is not about Happy's welfare any more than a human habeas corpus case alleging that a human is being imprisoned against her will is about that human's welfare. *Stanley*, 16 N.Y.S.3d at 901 (recognizing chimpanzee habeas corpus case was not about "animal welfare"). The NhRP does not allege that Happy "is illegally confined because [she] is kept in unsuitable conditions" nor does it seek improved welfare for Happy. *Id.* The sole issue is whether Happy, an autonomous being, may be imprisoned at all.

Dated: October 25. 2018

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AFFIRMATION OF SERVICE OF PAPERS (CPLR 2103)

STATE OF NEW YORK, COUNTY OF NASSAU ss.:

I, the undersigned, an attorney admitted to practice in New York State, with offices at the address set forth on the reverse side, affirm under penalties of perjury:

On October 25, 2018, I personally served the within **Notice of Motion to Rule on Petition for Habeas Corpus, Memorandum of Law, and Attorney Affirmation**

Service by Mail	by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:
Individual Personal Service	by delivering a copy to each of the following *attorney(s)* at the last known address set forth after each name below. I knew the *attorney(s)* served to be the *attorney(s) for* the *party(ies)* stated below.
Hand Delivery Service	by dispatching a copy by a messenger delivery service to each of the persons at the last known address set forth after each name below.
X **Service by Mail and Additional Copy by Electronic Means**	by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name and by transmitting a copy to the following persons by email to the address set forth after each name below:

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Joanna J. Chen, Esq.
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Elizabeth Stein

Elizabeth Stein, Esq.

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