Motion #001

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 12

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,	
THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HERCULES and LEO,	Index No. 152736/2015
Petitioner,	Hon. Barbara Jaffe, J.S.C.
-against-	
SAMUEL L. STANLEY JR., M.D. as President of State University of New York at Stony Brook a/k/a Stony Brook University and STATE UNIVERSITY OF NEW YORK AT STONY BROOK a/k/a STONY BROOK UNIVERSITY,	
Respondents.	

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION FOR A WRIT OF HABEAS CORPUS AND IN SUPPORT OF THEIR CROSS-MOTION TO CHANGE VENUE TO SUPREME COURT, SUFFOLK COUNTY

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondents
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-8556

CHRISTOPHER COULSTON
Assistant Attorney General
Of Counsel

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Cases **Pages**

Federal Statutes

State Statutes and Rules

Other Authorities

Respondents Samuel L. Stanley Jr., M.D., as President of the State University of New York at Stony Brook, and the State University of New York (collectively "SUNY" or "respondents"), by their attorney, Eric T. Schneiderman, Attorney General of the State of New York, respectfully submit this memorandum of law in opposition to the Petition for a Writ of Habeas Corpus and Amended Order to Show Cause brought by petitioner The Nonhuman Rights Project, Inc. ("petitioner") on behalf of two chimpanzees, Hercules and Leo, currently housed at SUNY's Stony Brook University ("Stony Brook") campus, to secure their transfer to a chimpanzee sanctuary in Florida. This memorandum is also submitted in support of SUNY's cross-motion pursuant to CPLR 510, 511(a), (b), and (c), CPLR 2201 and CPLR 7002(b) and 7004(c) to (a) change the venue of this proceeding from this court to Supreme Court, Suffolk County, the county in which Hercules and Leo are allegedly improperly detained and in which petitioner brought an earlier unsuccessful proceeding to secure their release; and (b) stay all proceedings pending the transfer. This memorandum is supported by the affidavit of Styliani-Anna Tsirka, sworn to May 21, 2015 ("Tsirka Aff.") and the affirmation of Assistant Attorney General Christopher Coulston, dated May 22, 2015, and exhibits thereto ("Coulston Aff.").

PRELIMINARY STATEMENT

The current case is the fourth attempt by petitioner to obtain unprecedented habeas corpus relief on behalf of chimpanzees pursuant to CPLR Article 70 transferring them from their current locations in New York where they are allegedly deprived of the "common law right of bodily liberty." Petitioner seeks the discharge of these chimpanzees, not to the streets of New York to roam free without confinement (and has conceded that it would not be safe either to the public or the chimpanzees to do so), but instead to a chimpanzee sanctuary in Florida. In each of the three prior proceedings, including a proceeding in Supreme Court, Suffolk County

concerning the same alleged confinement of Hercules and Leo by SUNY at issue here, the Supreme Court declined to sign petitioner's proposed orders to show cause, holding that chimpanzees are not legal persons entitled to the rights and protections of the writ of habeas corpus codified in CPLR Article 70. In two of the proceedings, the Appellate Divisions of the Third and Fourth Departments affirmed the orders below, and in the other proceeding, the Appellate Division, Second Department dismissed the appeal.

Although this Court has already signed the amended order to show cause bringing this matter on for a hearing on the applicability of Article 70, it should transfer the case to Supreme Court, Suffolk County, where it should have been initiated originally or made returnable. If it does not, it should, as have the courts in the three other departments to which petitioner's prior orders to show cause have been presented, hold that Hercules and Leo are not legal persons entitled to the protection of the writ of habeas corpus, and dismiss the petition without any further inquiry as to the alleged legality of their detention.

The Article 70 relief sought by petitioner is a radical attempt to blur the legal boundaries that exist between humans and animals, and, as admitted by petitioner, no court has ever issued a writ of habeas corpus for a chimpanzee or any other animal. Any such extension of the writ could set a precedent for the release of other animals held in captivity, whether housed at a zoo, in an educational institution, on a farm, or owned as a domesticated pet, and enmesh New York courts in continuing litigation over the applicability of habeas corpus to other animals. Moreover, federal, state, and local authorities have enacted legislation for the protection of these animals, which obviates any need for an ill-fitting expansion of habeas corpus.

There are a number of grounds to dismiss the Petition. First, as indicated above, courts in the Second, Third and Fourth Departments have already held that chimpanzees, specifically

including Hercules and Leo, are not persons entitled to habeas corpus relief and this proceeding is therefore barred by principles of res judicata, collateral estoppel, and binding appellate precedent. Second, without reaching the issue of whether a chimpanzee is a person, the Fourth Department affirmed Supreme Court's dismissal of the habeas petition brought by petitioner on the alternative ground that transfer of the chimpanzee to a sanctuary is a change in conditions not cognizable in a habeas proceeding – the same relief sought here. That holding is also binding on this Court. Third, petitioner lacks standing to bring this proceeding on behalf of Hercules and Leo. For these reasons, and as discussed below, this Court should dismiss the Petition if it does not transfer it to Supreme Court, Suffolk County.[1]

STATEMENT OF FACTS

A. The Parties

Petitioner is a tax-exempt, non-profit organization that seeks "to change the common law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal right, to 'persons.'" See Petition, ¶ 11; Nonhuman Rights Project Website, available at http://www.nonhumanrightsproject.org/about-us-2/ (last visited on May 12, 2015).

Hercules and Leo are currently housed at Stony Brook in Suffolk County. Tsirka Aff. ¶ 4. They are the subject of studies conducted by researchers such as Dr. Susan Larson, a professor of anatomical sciences at Stony Brook, whose long-running research on the locomotion of chimpanzees and other primates is widely respected in the scientific community. Id. They are the subject of a host of regulations to ensure their well-being and that their living conditions are

[1] It is respondents' position, based upon binding precedent, that because Article 70 is inapplicable to chimpanzees, the court should dismiss the petition without reaching any further issue concerning the lawfulness of the alleged detention of Hercules and Leo at Stony Brook. Respondents have therefore not addressed the justification for the presence of Hercules and Leo at Stony Brook with any specificity in their opposition. However, if the court determines as a threshold matter that the chimpanzees are persons entitled to invoke Article 70, respondents request that they be given the opportunity to supplement their response to the petition to address the alleged detention.

consistent with state and federal law. Id. at ¶ 5. Indeed, petitioner has specifically disavowed any claim that Stony Brook is violating any federal, state or local animal welfare law in the manner in which it is detaining them. Petitioner's Memorandum in support of petition ("Pet. Mem."), p. 5.[2]

Stony Brook is accredited by the Association for Assessment and Accreditation of Laboratory Animal Care ("AAALAC").[3] Tsirka Aff. ¶ 8. "[AAALAC] is a private, nonprofit organization that promotes the humane treatment of animals in science through voluntary accreditation and assessment programs." AAALAC Website, available at http://www.aaalac.org /about/index.cfm (last visited, May 12, 2015). Accreditation by AAALAC requires submission of a "Program Description," which provides detailed information on Stony Brook's "Animal care and use program management and oversight; animal environment, housing and management; veterinary care; and physical plant." AAALAC Website, available at http://www.aaalac.org/ accreditation/steps.cfm (last visited May 12, 2015). This information is provided for Hercules and Leo. Tsirka Aff. ¶ 9. AAALAC also conducts a site visit when first accrediting a research facility. Id. at ¶ 10. To maintain its accreditation, Stony Brook submits an annual report, and additional site visits are conducted every three years. Id. Stony Brook has been accredited since 1973. Id.

---

[2] Respondents have not endeavored to respond to the allegations in petitioner's nine expert affidavits regarding the similarities between human beings and chimpanzees, nor have the New York courts which have previously reviewed those affidavits (which were also included in petitioner's three previous petitions), relied upon them. None of those alleged similarities are determinative of the entitlement of chimpanzees to habeas corpus rights. Petitioner does not claim that chimpanzees are human beings. As its counsel stated in the Matter of the Nonhuman Rights Project v. Presti case in Supreme Court, Niagara County, "We are not claiming, your Honor, that Kiko is a human being. It's clear that he is a chimpanzee." (Coulston Aff., Ex. F, p. 12:2-4). In People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 124 A.D.3d 148, 152 (3d Dep't 2014) ("Lavery"), the court held that it is the capability of human beings, unlike chimpanzees or other nonhuman animals, to bear legal responsibilities and duties which renders it inappropriate to confer the same right to personal liberty on chimpanzees conferred on human beings, not any of the characteristics described by Petitioner's experts. See infra at 13-20, discussing Lavery.

[3] A list of accredited organizations, including Stony Brook University, is available at http://www.aaalac.org/ accreditedorgsdirectorysearch/index.cfm (last visited May 8, 2015).

B. Petitioner's Three Prior Habeas Petitions

In December 2013, petitioner filed nearly identical petitions for writs of habeas corpus pursuant to CPLR Article 70 on behalf of chimpanzees in Supreme Court, Suffolk, Fulton and Niagara Counties demanding that those courts issue writs on behalf of the chimpanzees. The Article 70 proceeding in Suffolk County, Index No. 13-32098, was brought against SUNY for the release of Hercules and Leo from Stony Brook and sought their transfer to a primate sanctuary. See Coulston Aff., Exs. A-C. All three Supreme Court justices denied the orders to show cause sought by petitioners, each holding that the chimpanzees were not persons entitled to habeas corpus relief pursuant to Article 70. In particular, in the case of Hercules and Leo, the Supreme Court held that "Art. 70 of the CPLR (7002) applies to persons, therefore Habeas Corpus relief does not lie." See Coulston Aff., Exs. D-F.

Petitioner appealed the denials of the orders to show cause to the Appellate Divisions of the Second, Third and Fourth Departments. The Third Department affirmed the order of Supreme Court, Fulton County and held "that a chimpanzee is not a 'person' entitled to the rights and protections afforded by the writ of habeas corpus." Lavery, 124 A.D.3d at 150. The Fourth Department also affirmed the dismissal of the petition, although on alternative grounds. Matter of The Nonhuman Rights Project, Inc. v Presti, 124 A.D.3d 1334 (4th Dep't 2015) ("Presti"). There the court held that in seeking to transfer the chimpanzee from his present location in New York to a sanctuary, as petitioner seeks to do here, petitioner was seeking a change in the chimpanzee's conditions of confinement, an impermissible use of Article 70. Id. at 1335. On April 4, 2014, the Second Department dismissed the appeal from the denial of the order to show cause for Hercules and Leo, holding that the Supreme Court's order was not appealable as of right, Coulston Aff., Ex. G, and thereafter denied a motion to vacate the dismissal on May 27,

2014. Ex. 3 to Petition. On February 23, 2015, petitioner filed a motion for leave to appeal to the Court of Appeals in Lavery. On April 10, 2015, petitioner filed a motion for leave to appeal in Presti. Both motions are currently pending.

C. The Current Proceeding and Demand for a Change of Venue

Instead of seeking further relief in Supreme Court, Suffolk County from the denial of the order to show cause on behalf of Hercules and Leo, petitioner elected to bypass Supreme Court, Suffolk County completely. On March 19, 2015, ten months after the Second Department denied petitioner's motion to vacate the dismissal of the appeal from the Supreme Court, Suffolk County denial of the order to show cause, petitioner re-filed virtually the same petition and supporting papers in Supreme Court, New York County, seeking the release and transfer of Hercules and Leo. Compare Coulston Aff., Exs. A and H with Petition and supporting papers in this proceeding, NYSCEF Docket Nos. 1-28. On April 20, 2015, this Court signed the Order to Show Cause, and on April 21, 2015, the Court amended the Order, deleting "writ of habeas corpus" in the title.

On May 13, 2015, respondents served a demand for a change of venue upon petitioner demanding that venue be changed from this court to Supreme Court, Suffolk County where the first petition on behalf of Hercules and Leo was brought. Coulston Aff. Ex. I. On May 18, 2015, respondents filed an Affidavit in Opposition to Respondents' Demand for a Change of Venue. NYSCEF Docket No. 49. Respondents now cross-move within 15 days of their demand pursuant to CPLR 510, 511(a), (b), and (c), CPLR 2201, and CPLR 7002(b) and 7004(c) for a transfer of this proceeding to Suffolk County and a stay pending the transfer.

ARGUMENT

POINT I

THE PROCEEDING SHOULD BE TRANSFERRED TO SUFFOLK COUNTY

Petitioner is plainly forum shopping and seeks to have this Court overrule the order of another Supreme Court justice in Suffolk County. This is the second petition brought on behalf of Hercules and Leo, admittedly on the same facts as the first petition. Verified Petition, ¶ 32. The first petition, which was dismissed when the court refused to sign the order to show cause, was brought in Suffolk County. See Coulston Aff., Ex. 1, ¶ 9. That petition asserted that "Hercules and Leo are being detained in Suffolk County which is the proper venue for this Petition pursuant to CPLR 7002(b)," which states that a petition shall be made to "the supreme court in the judicial district in which the person is detained." Id.; CPLR 7002(b). Nothing has changed. Suffolk County is still the proper venue.

Respondents contend that Article 70 and its venue provision are not applicable to this proceeding because Hercules and Leo are not legal persons entitled to habeas corpus relief, see pages 10-23, infra. But if the venue provisions of Article 70 do apply for the limited purpose of determining where this proceeding should be commenced, the petition should have been filed in Suffolk County pursuant to CPLR 7002(b)(1), and the order to show cause should have been made returnable in Suffolk County where Hercules and Leo are detained pursuant to CPLR 7004(c). If Article 70 applies for the limited purpose of venue, the proceeding should now be transferred to Supreme Court, Suffolk County pursuant to CPLR 510 and 511 (a), (b), and (c), which provide the procedural mechanism for a transfer of venue, for determination of the underlying merits of petitioner's position that Hercules and Leo are entitled to habeas corpus protection. The proceeding should be stayed pending that transfer. Once a court determines that the venue should be changed, the court making such a determination "should not in the interest

of '[o]rderly procedure and a proper regard for comity,' consider the underlying merits of the application." Matter of Ryback v. Lomenzo, 38 A.D.2d 915 (1st Dep't 1972) (quoting Rosenblatt v. Sait, 34 A.D.2d 238, 239 (1st Dep't 1970)).

Although petitioner now contends that it is proceeding under CPLR 7002(b)(3), which states that a petition may be made to "any justice of the supreme court," Pet. Memo, p. 25, that section is inapplicable. The petition was not in fact made specifically to Justice Jaffe in the first instance. Instead, it was filed electronically with the New York Courts Electronic Filing System in New York County, and a random assignment of a justice was made by the Ex Parte Clerk's office. See Supreme Court Civil Branch, New York County Clerk of New York County, Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, §§ C and F(1). CPLR 7002(b)(1) prescribes that when a petition is made to "the supreme court," as here, it must be the supreme court "in the judicial district in which the person is detained," here Suffolk County. Hence the petition was not properly made to the court in New York County and should now be transferred to Suffolk County.

Further, even if the petition is deemed to have been made properly to a justice of the supreme court pursuant to CPLR 7004(c), this Court should have made it returnable in Supreme Court, Suffolk County. CPLR 7004(c) provides in relevant part that "[a] writ to secure the discharge of a person from a state institution shall be made returnable before a justice of the supreme court or a county judge being or residing within the county in which the person is detained." See Matter of Hogan v. Culkin, 18 N.Y.2d 330, 335 (1966) ("Where the writ is directed to the warden of a State prison…it must be made returnable in the county of detention, subject to the exception applicable when there is no available judge in that county.") Contrary to petitioner's argument, the plain language of CPLR 7004(c) does not limit institutions to state

prisons or mental hospitals. Stony Brook is part of SUNY, a state funded university, which plainly falls within the meaning of "state institution" under CPLR 7004(c). Education Law § 350 defines "state operated institution" as "[i]nstitutions comprising the state university as provided for in subdivision three of section three hundred fifty-two." Education Law § 352 specifically refers to "Stony Brook" as one of these institutions. Under the plain meaning of CPLR 7004(c) and Education Law § 352, Stony Brook is a state institution, and this action should have been made returnable in, and should be transferred to, Suffolk County.

Alternatively, even if transfer would not be mandatory, CPLR 7004(c) also provides in relevant part that "where the petition was made to the supreme court or to a supreme court justice outside the county in which the person is detained, such court or justice may make the writ returnable before any judge authorized to issue it in the county of detention." Here, the first petition on behalf of Hercules and Leo was made to Justice W. Gerard Asher of Supreme Court, Suffolk County. Coulston Aff., Ex. D. In effect, petitioners are seeking to have this Court overrule the decision of another Supreme Court justice in another county.

Further, in order to permit the due consideration of the merits by Supreme Court, Suffolk County, this court should stay all proceedings pursuant to CPLR 511(c) and CPLR 2201 pending that transfer. Respondents have acted diligently. CPLR 511 requires that a demand for change of venue be served with the answer or before the answer is served and that a motion to change venue be served within 15 days thereafter. Respondents have done so. See Demand for Change of Venue, Coulston Aff. Ex. I. This cross-motion is being filed timely on May 22, 2015, 9 days later.

Moreover, petitioner properly filed its first petition in Supreme Court, Suffolk County in December 2013. It then waited ten months after denial of the motion in the Appellate Division

to vacate the dismissal of the appeal from the denial by Supreme Court of that petition to file in this county. Coulston Aff., Ex. A and G. In those circumstances, it had no excuse for filing this second petition in New York County and, after waiting so long to do so, cannot claim to be prejudiced by a stay of proceedings until it is transferred to the correct county.

Thus, assuming this Court finds that the venue provisions of Article 70 apply, in the interest of comity and to prevent forum shopping, this Court should transfer this case to Supreme Court, Suffolk County for a determination there of the underlying merits and stay proceedings in this case pending that transfer.

POINT II

PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL BAR PETITIONER FROM ASSERTING THAT HERCULES AND LEO ARE PERSONS ENTITLED TO HABEAS CORPUS PROTECTION PURSUANT TO CPLR ARTICLE 70

Petitioner has already litigated the issue of the entitlement of Hercules and Leo to habeas corpus relief under Article 70 in the prior Article 70 proceeding it brought on their behalf in Supreme Court Suffolk County in December 2013. The court there issued an order denying petitioner's order to show cause for habeas relief on the ground that Article 70 does not apply because Hercules and Leo are not persons. Coulston Aff., Ex. D. By virtue of that decision, petitioner is now precluded under traditional principles of res judicata and collateral estoppel from bringing the present petition on the same papers and seeking the same relief.

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action." Parker v. Blauvelt Volunteer Fire Co. Inc., 93 N.Y.2d 343, 347 (1999) (citation omitted). "This rule of res judicata is founded upon the belief that it is for the interest of the community that a limit should be prescribed to litigation,

and that the same cause of action ought not to be brought twice to a final determination." Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 (1984) (internal quotes and citations omitted).

Petitioner sought precisely the same relief in Suffolk County, namely the release of Hercules and Leo and their transfer to a primate sanctuary. Petitioner attempted to bring a petition in Suffolk County pursuant to Article 70, as it has here, and both petitions argued for the release of the chimpanzees because they are legal persons. See Coulston Aff., Ex. A. The Supreme Court in Suffolk County definitively resolved on the merits that petitioner may not proceed based on Article 70 by refusing to sign the order to show cause and signing an order holding specifically that habeas corpus relief does not lie because Hercules and Leo are not persons to which Article 70 applies. See Coulston Aff., Ex. D.

Reinforcing the court's clear holding on the merits, the Suffolk County court expressly cited the procedural provisions of CPLR 2214, which govern orders to show cause generally, not orders to show cause brought specifically pursuant to article 70. Coulston Aff., Ex. D. It is clear that the court did not believe that Article 70 relief was available to a chimpanzee and thus refused to analyze the request for relief under that article. Thus, the issue that was definitively resolved in the earlier proceeding was whether a chimpanzee is eligible for habeas corpus relief under Article 70, and res judicata bars petitioner from bringing another Article 70 petition seeking the same relief against the same parties on behalf of Hercules and Leo. Id.

At the very least, petitioner is prohibited from proceeding here based on collateral estoppel, or issue preclusion, which "precludes a party from relitigating in a subsequent action…an issue clearly raised in a prior action…and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." Ryan, 62 N.Y.2d at 500. The two key issues for collateral estoppel are that "[t]here must be an identity of issue which has

necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling." Schwartz v. Public Adm'r of County of Bronx, 24 N.Y.2d 65, 71 (1969). Both requirements are satisfied here, as the parties are identical and petitioner had a full and fair opportunity to contest the decision.

Petitioner argues that the Suffolk County proceeding is not preclusive because under CPLR 7003(b), "successive petitions" for a writ are authorized. See Pet. Memo, p. 26-30. However, that provision only permits successive petitions challenging in certain circumstances "the legality of the detention," and presupposes that the petition is being brought by a person within the meaning of Article 70. It does not address the res judicata or collateral estoppel effect of a threshold determination that Article 70 does not apply, which precludes any inquiry into the legality of detention. The effect of that threshold determination should be governed by general res judicata and collateral estoppel standards. Thus, the case law cited by petitioner in support of this court revisiting petitioner's request for relief is irrelevant since it applies to determinations of legality of detention in petitions for relief properly brought under Article 70 by legal persons, not to the threshold determination of personhood.

Petitioner also claims that it had no opportunity to appeal the Suffolk County court's decision, which, petitioner argues, demonstrates that the prior ruling was not on the merits and that it was not given a full and fair opportunity to litigate the issue. Pet. Memo, p. 28. Petitioner further argues that the Second Department's dismissal of the appeal was erroneous because CPLR 7011 specifically allows for appeals of habeas petitions. Pet. Memo, p. 2, fn. 3. But the Second Department properly treated petitioner's order to show cause as one whose appeal is governed by CPLR 5704, not CPLR 7011, agreeing that Article 70 was inapplicable, and refused to grant leave to appeal. New York law is clear that an "order on an ex parte application is not

appealable as of right." See David D. Siegel, Supplementary Practice Commentaries [2005] to C.P.L.R. 5704 (Westlaw) (citing C.P.L.R. 5701(a)(2)).

Moreover, petitioner could have appealed the lower court's order by moving, on notice, to vacate the denial of the ex parte order, and the "order granting or denying the vacatur will then be appealable." Id.; In re Willmark Service System, Inc., 21 A.D.2d 478, 479 (1st Dep't 1964). Its failure to timely do so forfeited that right. See Bray v. Cox, 38 N.Y.2d 350, 353 (1976); Slater v. American Mineral Spirits Co., 33 N.Y.2d 443, 447 (1974). Since an appeal was available under CPLR 5704, petitioner's failure to properly pursue that appeal does not in any way negate the preclusive effect of the lower court's determination that Article 70 and the right of habeas corpus do not apply to Hercules and Leo.

POINT III

THE LAVERY DECISION IS BINDING PRECEDENT THAT A CHIMPANZEE IS NOT A PERSON ENTITLED TO HABEAS CORPUS RELIEF UNDER ARTICLE 70

Even if the Supreme Court, Suffolk County's decision in the case of Hercules and Leo does not bar the bringing of this proceeding, the Appellate Division, Third Department's decision in Lavery is precedent binding upon this Court that a chimpanzee is not a person entitled to habeas corpus protection under CPLR Article 70. Where there is no contrary First Department authority, precedent in other departments in the State is binding on all New York trial courts. People v. Turner, 5 N.Y.3d 476, 482 (2005); Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 664-665 (2d Dep't 1984); Shipcraft A/S v. Arms Corp. of the Phil., Inc., 2013 N.Y. Misc. LEXIS 6483 at *16, fn 7 (Sup Ct, N.Y. Co., 2013).

In 2013, petitioner filed a habeas petition in Supreme Court, Fulton County seeking the transfer of the chimpanzee Tommy to a primate sanctuary. Following an ex parte hearing, the Supreme Court in Fulton County held that the term "person" under CPLR Article 70 did not

include chimpanzees and refused to sign an order to show cause. Lavery, 124 A.D.3d at 149. Petitioner appealed that denial to the Appellate Division, Third Department. There, the court observed that the question posed was "novel" and did not cite any authority from any other New York court addressing the issue. Id. at 150.

In a thorough, considered decision, the court "conclude[d] that a chimpanzee is not a 'person' entitled to the rights and protections afforded by the writ of habeas corpus" and affirmed the judgment of the court below denying petitioner's application for an order to show cause to commence a CPLR Article 70 proceeding. Id. at 150. Petitioner has acknowledged that the Third Department determined that a chimpanzee is not a "person" for purposes of Article 70. Pet. Memo., p. 1. Since this case is the only appellate level authority on this point in New York and there are no First, Second, or Fourth Department cases to the contrary, it is binding authority here.

Accordingly, this Court is bound by the Third Department's determination in Lavery that a chimpanzee is not a person for purposes of habeas corpus, and should deny the Petition.

POINT IV

EVEN WERE THIS COURT NOT REQUIRED TO FOLLOW LAVERY, IT SHOULD DO SO BECAUSE THE THIRD DEPARTMENT'S ANALYSIS IS SUPPORTED BY SOUND LEGAL AND POLICY CONSIDERATIONS

A. Lavery is Consistent with Existing Case Law and Authority.

While Lavery is binding here, the Third Department's analysis of the issue and the conclusions it reaches are compelling and clearly demonstrate the inappropriateness of extending habeas corpus protection to nonhuman animals. As the Lavery court recognized, "animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law." Lavery, 124 A.D.3d at 150. Petitioner does not cite any contrary case law in this

country. Petitioner argues that the only reason no such case law existed before Lavery and the other adverse lower court and Appellate Division decisions in the cases brought by petitioner was the absence of prior requests for such relief on behalf of nonhumans. Pet. Memo, p. 56. But the lack of any requests for habeas relief is an indication that such relief never was intended or understood to include nonhumans such as chimpanzees, not a basis to radically extend the borders of legal personhood.

Lavery was also based on extensive case law recognizing "the correlative rights and duties that attach to legal personhood." Lavery, 124 A.D.3d at 152. As the Lavery court explained, the assignment of rights "has historically been connected with the imposition of societal obligations and duties." Id. at 151. A chimpanzee has no duties or obligations under the law, and it cannot be held legally accountable for any of its actions. Id. at 152. The Third Department concluded that "it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings." Id.

The holding in Lavery is also consistent with holdings in other recent cases brought by parties seeking to expand the legal rights afforded animals under the U.S. Constitution and other statutes. In Tilikum v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259 (S.D. Cal. 2012) for example, the court rejected the argument that the Thirteenth Amendment applied to orca whales. There, the court determined that it applied only to humans. Id. at 1263. The court rejected plaintiffs' argument that certain constitutional principles had expanded over time, based on "changing times and conditions." Id. at 1264. The Thirteenth Amendment was intended to eliminate "slavery" and "involuntary servitude," which the court viewed as "uniquely human

activities." Id. Similarly, here, Article 70 applies to persons "imprisoned or otherwise restrained in [their] liberty." CPLR 7002. Imprisonment is also a uniquely human activity. Cf. Penal Law § 135.05 making a "person" guilty of unlawful imprisonment when he restrains another person and Penal Law § 10.00(7) defining a "person" for purposes of the Penal Law, including Penal Law Article 135, as "a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality," without any inclusion of nonhuman animals.

B. No New York Statute Grants Legal Personhood to Animals for Purposes of Habeas Corpus.

Petitioner's reliance on other New York statutes, particularly Section 7-8.1 of the Estates, Powers and Trusts Law, that purportedly grant legal personhood to animals, is misplaced. See, Pet. Memo, p. 4. That section of the EPTL allows "domestic or pet animals" to be beneficiaries of a trust, but that does not make them "persons" with the capacity for legal rights or personal liberty. To the contrary, § 7-8.1(a) and (b) repeatedly uses the term "animal" in reference to the beneficiary, not person. But, even if the animal were considered a person for purposes of the trust, that does not make it a person for the purpose of having its "bodily liberty" violated under Article 70.

Elsewhere, New York statutes define the term "animal" as "every living creature except a human being." See Agriculture & Markets Law § 350 (emphasis added). The term animal, obviously, includes chimpanzees.

Contrary to petitioner's argument, the limits on legal personhood for purposes of habeas corpus relief are quite clear. In Byrn v. New York City Health & Hospitals Corp., 31 N.Y.2d 194, 203 (1972) cited at length by petitioner for the proposition that "person" is not a synonym for "human being," the court made clear that rights are assigned to persons as a subset of human

beings. Specifically, the court held that while fetuses are human, they are not necessarily persons under the law. Id. Not all humans are persons for purposes of establishing legal rights, such as a human fetus, but all persons are human beings or associations of human beings. See Lavery, 124 A.D.3d at 152. Petitioner, in fact, acknowledges that "person" may be narrower than "human being, and cites no case law from this country where "person" was interpreted more broadly than "human being" or an association of human beings. Pet. Memo, p. 31.[4] Petitioner also readily concedes that chimpanzees are not human beings and are not entitled to human rights. Instead, it claims to be seeking "chimpanzee rights." Coulston Aff., Ex. E, p. 12:2-6. If there is to be an expansion of animal rights to include rights now afforded only to human beings that is for the Legislature to determine.

C. Petitioner's Arguments and Evidence Regarding the Alleged Autonomy and Self-Determination of Chimpanzees Do Not Justify Treating Them as Persons for Purposes of Habeas Corpus.

Instead of the common sense definition of "persons" which is a subset of human beings and entities consisting of human beings, petitioner argues that entities that are "autonomous and self-determining" should be considered persons for common law habeas corpus whether or not they are human beings. Pet. Memo, p. 3. At no point, however, does petitioner explain how the cognitive abilities of "autonomy and self-determination" entitle one to the specific legal right of habeas corpus or cite any cases for that proposition. Indeed, prominent legal scholars have criticized the underlying legal theory of petitioner's co-counsel, Steven M. Wise, Esq., for animal rights.

---

[4] The examples offered by petitioner for the expansion of legal personhood to nonhumans are all from jurisdictions outside of this country and do not relate to animals, but rather protection of sacred objects and natural resources. See Pet. Memo, p. 31-2. Petitioner cites a river in New Zealand, and a sacred text, Punjab mosque and Hindu idol in India as examples of nonhuman entities designated as "persons" with legal rights. Id. But none of these examples, to the extent they have anything relevant to say about assigning rights to a chimpanzee for habeas corpus relief, are binding, or even persuasive, on this court. They are also not relevant. All four relate to objects and a river with religious significance, not an expansion based on biological similarity or any other factor cited by petitioners for justifying expansion of habeas relief here. See Pet. Memo, pp. 31-2.

In his article, Animal Rights: Legal, Philosophical, and Pragmatic Perspectives, in Animal Rights: Current Debates and New Directions, 51, 57 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004), Judge Richard A. Posner of the Seventh Circuit Court of Appeals has written that "Wise has no theory of rights, no notion of why legal rights are created in the first place." Id. Rather, Judge Posner has posited that human beings possess the legal rights of "autonomy" and "self-determination," not because of their biology, but because those rights have been recognized as worthy of protection for human beings. Id. Or as others have argued, rights provided to legal persons, whether to human beings or entities such as corporations, "all share a common theme in their ultimate focus on humanity and human interests…[and] [a]ssigning rights to animals would represent a dramatic and harmful departure from the established focus of rights and responsibilities on humans." Richard L. Cupp, Jr., Moving Beyond Animal Rights: A Legal/Contractualist Critique, 46 San Diego L. Rev. 27, 28 (2009); see also Lavery, 124 A.D.3d at 152; Cupp, Children, Chimps, and Rights: Arguments from Marginal Cases, 45 Ariz. St. L. J. 1, 36-42 (2013) (criticizing the undue emphasis placed by animal rights advocates on the similarities between chimpanzees and human beings and the placing of chimpanzees on a continuum of cognitive ability with humans). Petitioner admits that habeas relief here will not lead to the release of the chimpanzees because "that would be dangerous [for the chimpanzee] and dangerous for us." Pet. Memo, p. 73. This court should question the appropriateness of habeas relief where petitioner admits that chimpanzees in captivity as a species could not safely be released in this country without threat of danger to themselves and to human beings. Pet. Memo, p. 73, 75.[5]

[5] In Lavery, the court recognized that: "[t]o be sure, some humans are less able to bear legal duties or responsibilities than others. These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility." Id., 124 A.D.3d at 152, fn. 3.

Critically, petitioner does not define the limits of its new definition of persons, instead arguing that the new set of rights should be determined on a case by case basis. Pet. Memo, p. 53. Accepting such an approach will in all likelihood open the floodgates to similar requests for relief.[6] The consequences of this are worth considering. Animals in zoos, particularly primates, throughout the State could be released. And there is no reason to think that these new rights would be limited to primates. If a pig, another intelligent animal, for example, is found to be "autonomous and self-determining" will the tens of millions of pigs on farms throughout the country be subject to habeas corpus relief or other legal rights? Would cattle, farm animals or even pet dogs be subject to such relief? Granting the Petition here could jeopardize zoos, aquariums, and even the country's farming and livestock industry. In his article critiquing the consequences of petitioner's approach to animal rights, Judge Posner has asked, "[i]s domestication a form of enslavement?" Posner at 57.

D. It is Not Necessary to Expand Habeas Corpus to Protect Animals.

Respondents acknowledge that chimpanzees and other animals should be protected. However, there are numerous statutes and regulations in effect for their protection and, indeed, in this case, petitioner specifically disavows any claim that respondents are violating any federal, state, or local animal welfare law in the manner in which they are allegedly detaining Hercules and Leo. Verified Petition, ¶ 8. If more are needed, the Legislature or other regulatory authorities can be requested to expand their protections, and protection of chimpanzees is not dependent upon conferring the human right of habeas corpus on them.

As the court observed in Lavery, 124 A.D.3d at 152-53:

---

[6] The attention this case received when Petitioner erroneously issued a press release headlined "Judge Recognizes Two Chimpanzees as Legal Persons, Grants them Writ of Habeas Corpus," which is still available on Petitioner's website, gives some indication of how dramatic such a ruling would be. http://www.nonhumanrights project.org/2015/04/20/judge-recognizes-two-chimpanzees-as-legal-persons-grants-them-writ-of-habeas-corpus/ (last visited May 22, 2015).

> Our rejection of a rights paradigm for animals does not, however, leave them defenseless. The Legislature has extended significant protections to animals, subject to criminal penalties, such as prohibiting the torture or unjustifiable killing of animals, (see Agriculture and Markets Law § 353), the abandonment of animals in a public place (see Agriculture and Markets Law § 355), the transportation of animals in cruel or inhuman manners (see Agriculture and Markets Law § 359 [1]) or by railroad without periodically allowing them out for rest and sustenance (see Agriculture and Markets Law § 359 [2]), and the impounding of animals and then failing to provide them sustenance (see Agriculture and Markets Law § 356). Notably, and although subject to certain express exceptions, New Yorkers may not possess primates as pets (see ECL 11-0103 [6] [e] [1]; 11-0512). Thus, while petitioner has failed to establish that common-law relief in the nature of habeas corpus is appropriate here, it is fully able to importune the Legislature to extend further legal protections to chimpanzees.

In addition to the protections conferred by state law, the primary source of federal regulations for chimpanzees is the Animal Welfare Act ("AWA"), 7 U.S.C. § 2131 and the regulations promulgated thereunder. "Animal" under the AWA includes all nonhuman primate mammals used "for research, testing, experimentation, or exhibition purposes, or as a pet." 7 U.S.C. § 2132(g); see Tsirka Aff., ¶ 7.

Thus, whether on legal, policy, or animal protection grounds, there is no justification to expand the habeas corpus protection of CPLR Article 70 to chimpanzees.

POINT V

HABEAS CORPUS DOES NOT LIE BECAUSE PETITIONER IS SEEKING ONLY A CHANGE OF CONDITIONS

Petitioner here seeks the release of Hercules and Leo from Stony Brook and their transfer to Save the Chimps, a chimpanzee sanctuary in South Florida. However, in Presti, 124 A.D.3d at 1335 where petitioner sought the same relief on behalf of another chimpanzee, Kiko, the Fourth Department affirmed the judgment of the lower court denying the order to show cause for habeas corpus relief on the ground that petitioner was seeking a change in Kiko's conditions of confinement for which habeas corpus does not lie. The Fourth Department did not reach the issue

of whether a chimpanzee is a person under Article 70. As with the Lavery decision, this holding is binding on this court (see Point III, supra at 14), and it provides an alternative basis to deny the Petition.

Petitioner seeks to avoid the binding effect of Presti on the outcome of this case by contending that it was wrongly decided, made factually and legally incorrect statements, and relied upon inapposite case law. Pet. Mem., pp. 68-76. In the first place, the arguments made by petitioner are more appropriately made to the Appellate Division or the Court of Appeals, not this court.

Regardless, however, it is clear that petitioner is in fact simply seeking different conditions for these chimpanzees—conditions which petitioner views as superior but are not an outright release, which petitioner concedes would be dangerous to the public and the chimpanzees. Pet. Memo, p. 73. Hercules and Leo will not be free in the manner contemplated by habeas corpus, because granting the Petition "'would not entitle [them] to immediate release.'" Presti, 124 A.D.3d at 1335; quoting People ex rel. Gonzalez v Wayne County Sheriff, 96 A.D.3d 1698, 1699 (4th Dep't 2012); also see People ex rel. Brown v. New York State Div. of Parole, 70 N.Y.2d 391, 398 (1987). In fact, it would simply transfer them to another location which they cannot leave and in which many of their conditions are regulated in a way they would not be in their natural habitat (i.e. chimpanzees at Save the Chimps fed three meals a day; male chimpanzees have all had vasectomies and female chimpanzees are on birth control; chimpanzees are contained on islands surrounded by lakes; and chimpanzees are grouped by Save the Chimps into families of 20-26).[7]

[7] It is ironic that petitioner, which is proceeding on the premise that chimpanzees are entitled to bodily liberty, should seek the transfer of Hercules and Leo to a sanctuary which controls their bodily liberty to reproduce through involuntary vasectomies and birth control pills. This contradiction highlights the selectivity of petitioner's legal construct for animal rights. See http://www.savethechimps.org/about-us/faq (last visited May 18, 2015).

The cases cited by petitioner are inapposite, as they all refer to very specific exceptions to the general rule that habeas is only available where the petitioner will be immediately released. In People ex rel. Kalikow on Behalf of Rosario v. Scully, 198 A.D.2d 250, 251 (2d Dep't 1993), for example, where the court *denied* the petition, the court held that only in certain "special circumstances" is habeas corpus relief available "to challenge the conditions of confinement." Here, petitioner does not state what "special circumstances" exist that would justify granting the petition, and none of the other cases cited by petitioner apply. Id. Generally, the only exception is "where the manner and circumstances of the detention are such as to extend beyond that which is authorized by the judgment and commitment order." People ex rel. Jacobson v. Warden of Brooklyn House of Detention, 77 A.D.2d 937 (2d Dep't 1980). That particular exception has no relevance to the chimpanzees housed at Stony Brook since their conditions are not regulated by any "judgment" or "order," but are instead the subject of federal and state regulations as described in Point IV, supra. Petitioner does not argue that Stony Brook is violating those regulations, which govern the treatment and living conditions of Hercules and Leo.

In its effort to distinguish Presti, petitioner cites a number of inapplicable cases dealing with this narrow exception to the general rule. In People ex rel. Berry v. McGrath, 61 Misc. 2d 113, 116 (Sup. Ct. N.Y. Co.1969), the court ruled on the very narrow issue that an "individual under indictment and incarcerated in lieu of bail pending trial is entitled to apply for habeas corpus if his petition is supported by a prima facie showing of a course of cruel and unusual treatment…[and likelihood] that the treatment will continue or be repeated in the absence of judicial intervention." The court then denied the petition for failing to meet this standard. Id. Similarly, in People ex rel. Ceschini v. Warden, 30 A.D.2d 649, 649 (1st Dep't 1968), the petitioner was sentenced to an institution for rehabilitation and was receiving no rehabilitative

treatment, and so the terms of the petitioner's sentence were being completely ignored. Critically, reiterating the general rule that the actual conditions of confinement are not reviewable, the court stated that "it is not for the court to determine the nature of the treatment or facilities to be afforded to the relator," so long as some rehabilitative treatment was provided. Id. Finally, in Rockey v. Krueger, 62 Misc.2d 135, 136 (Sup. Ct., Nassau 1969), a Nassau County court held that a petitioner may "raise the issue whether restraint in excess of that permitted is being imposed upon him." Id. What was "permitted" was based on internal standards applied by the respondent and whether this particular prisoner was being treated differently than others, which is again consistent with Jacobson, 77 A.D.2d at 937. Again, the only comparable regulations controlling the conditions of Hercules and Leo are the federal and state regulations that petitioner insists are not the subject of its Petition.[8]

While petitioner denies it, it is clear that the practical impact of habeas relief here is simply a transfer to a different facility, and such relief is not available by habeas petition. The chimpanzees will be transferred to Save the Chimps, and subject to significant restrictions on their mobility and living conditions. Under binding Fourth Department precedent, the Petition should be denied.

[8] Petitioner also cites two cases that relate to persons with mental health issues. In People ex rel. Brown v. Johnston, 9 N.Y.2d 482, 484 (1961), as in Scully, 198 A.D.2d 250, the court acknowledged that "under ordinary circumstances a mere transfer…is purely an administrative matter, and a prisoner has no standing to choose the place in which he is to be confined." The court held that an exception existed for transfers of "alleged insane prisoners," though, because of the possibility of "uncontrolled and arbitrary" determinations. Id. Similarly, in People ex rel. Jesse F. v. Bennett, 242 A.D.2d 342 (2d Dep't 1997), the court found that habeas was appropriate under Mental Hygiene Law § 33.15, which empowers a judge to review a patient's alleged mental disability and consider whether the nature of the confinement is appropriate. Hercules and Leo are not patients, nor are they detained due to insanity, and Mental Hygiene Law § 33.15 and Johnston do not apply.

POINT VI

PETITIONER LACKS STANDING

Since, for the foregoing reasons, Hercules and Leo cannot avail themselves of habeas corpus protection, whether directly or through a next friend, the court need not address the issue of petitioner's standing to bring this proceeding on their behalf. However, petitioner's standing to pursue this action is dubious and provides an independent ground to dismiss the proceeding.

As a general rule, "a party establishes third-party standing when (1) there is a substantial relationship between the party asserting the claim and the rightholder; (2) it is impossible for the rightholder to assert his or her own rights; and (3) the need to avoid a dilution of the parties' constitutional rights." Matter of Fleischer v New York State Liq. Auth., 103 A.D.3d 581, 583 (1st Dept. 2013). Among other things, a next friend "must have some significant relationship with the real party in interest." Whitmore v. Arkansas, 495 U.S. 149, 163 (1990). See also Coalition of Clergy v. Bush, 310 F.3d 1153, 1162 (9th Cir. 2002); United States ex rel. Bryant v. Houston, 273 F. 915, 916 (2d Cir. N.Y. 1921).

Here, petitioner does not profess to have any special relationship or any individualized knowledge about Hercules or Leo, the conditions of their care or what is in their best interests. In fact, petitioner goes on at great length that the living conditions experienced by Leo and Hercules are irrelevant. See Pet. Memo, p. 68-76. It cannot have the special and significant relationship required for standing.

CONCLUSION

Respondents respectfully request that this Court transfer this proceeding to Supreme Court, Suffolk County and stay this proceeding while transfer takes place or, alternatively, if it

does not transfer the proceeding, dismiss the Petition with prejudice, along with such other and further relief as this court deems just, proper and appropriate.

Dated: New York, New York
May 22, 2015

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondents

BY: ***/s/ Christopher Coulston***
CHRISTOPHER COULSTON
Assistant Attorney General
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-8556
email: christopher.coulston@ag.ny.gov

BY NYSCEF

To: ELIZABETH STEIN, ESQ.
Attorney for Petitioner
5 Dunhill Road
New Hyde Park, NY 11040
Phone (516) 747-4726