SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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

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

Petitioner,

-against-

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

Respondents.

Index No.: 260441/2019 (Bronx County)

SUPPLEMENTAL MEMORANDUM OF LAW UPON TRANSFER

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* On October 2, 2018, Petitioner made a motion to admit Steven M. Wise, Esq. *pro hac vice* to brief and argue the above-captioned action. Justice Tracey A. Bannister subsequently permitted Attorney Wise to argue in all three hearings before the Supreme Court, Orleans County.

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I. INTRODUCTION AND PROCEDURAL HISTORY

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") in the Supreme Court, Orleans County ("Orleans Court"), on behalf of an Asian elephant named Happy, alleging that she is being unlawfully imprisoned at the Bronx Zoo by Respondents James J. Breheny and the Wildlife Conservation Society (collectively "Bronx Zoo" or "Respondents"). On November 16, 2018, the Orleans Court issued an Order to Show Cause and made it returnable on December 14, 2018, when a hearing was held in Albion. The Bronx Zoo moved to transfer venue to Bronx County and, over the NhRP's objections, the Orleans Court granted the motion on January 18, 2019. On April 8, 2019, the Fourth Department denied the NhRP's request for leave to appeal the transfer order.

The NhRP's arguments in its Petition and supporting Memorandum of Law were premised upon the assumption that any proceeding would be conducted in Orleans County and any appeal would be heard by the Fourth Department. Accordingly, the Orleans Court's analysis would have been significantly influenced if not controlled by Fourth Department precedent, particularly *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018), in which the Fourth Department declared: "[I]t is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals." (Citations omitted.) As this case has been transferred to Bronx County, however, decisions from the First Department and other Departments likely have greater significance. The NhRP therefore submits this Supplemental Memorandum of Law to address the Third Department's decision in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) ("*Lavery I*"), and the First Department's decision in *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) ("*Lavery II*"), both of which

would have had far less significance if the Petition had been heard in Orleans County and by the Fourth Department.

In *Lavery I*, the Third Department held, for the first time in history, that the recognition of legal personhood requires the capacity[1] to bear both legal rights and legal duties, assumed that chimpanzees are unable to bear legal duties, and concluded that they are therefore not legal persons entitled to any legal rights, including the right to habeas corpus relief. 124 A.D.3d at 152. In *Lavery II*, the First Department followed *Lavery I* in dicta, 152 A.D.3d at 76-78, and responded to the NhRP's argument that many individuals without the capacity for legal duties nonetheless possess legal rights by stating: "This argument ignores the fact that these are still human beings, members of the human community." *Id*. at 78. The First Department further asserted in dicta that habeas corpus relief was not available to the two imprisoned chimpanzees in the case because, in seeking to have them released to a chimpanzee sanctuary, the NhRP merely sought "their transfer to a different facility." *Id*. at 79.

As discussed in detail in the following sections, the Third Department's decision in *Lavery I* and the First Department's decision in *Lavery II* are neither binding on this Court nor persuasive. First, *Lavery II*'s statements regarding personhood and habeas corpus relief are dicta. (*See infra*, § II.A.) Second, because *Lavery I* and *Lavery II*'s statements regarding legal personhood and habeas corpus relief are based on demonstrable misunderstandings of the law, stare decisis does not apply to them. (*See infra*, § II.B.) Specifically, their legal personhood statements are based on the demonstrable misunderstanding that the recognition of legal personhood requires the capacity for legal duties, when it does not (*see infra*, § II.B.1); and the First Department's habeas corpus relief statements are based on the demonstrable

[1] "Capacity," "capability," and "ability" are synonymous in the context of legal personhood, rights, and duties.

misunderstanding that habeas corpus relief does not permit the release of an imprisoned individual from one facility to a different facility, when it does (*see infra*, § II.B.2). Indeed, as discussed *infra* at 12-13 and 23, Judge Fahey of the Court of Appeals sharply criticized *Lavery I* and *Lavery II* on these and other grounds in his concurring opinion in *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054 (2018) ("*Tommy*") (Fahey, J., concurring), and, shortly thereafter, the Fourth Department issued its decision in *Graves*, 163 A.D.3d 16.

II. THIS COURT IS NOT BOUND BY, AND SHOULD NOT FOLLOW, *LAVERY I* AND *LAVERY II*'S STATEMENTS REGARDING LEGAL PERSONHOOD AND HABEAS CORPUS RELIEF.

A. *Lavery II*'s statements regarding legal personhood and habeas corpus relief are dicta.

When a court decides a case on procedural grounds, any discussion of the merits is dicta. *See Whale Telecom Ltd. v. Qualcomm Inc.*, 839 N.Y.S.2d 726, 727 (1st Dept. 2007). In *Whale Telecom*, the trial court dismissed a complaint based on the statute of limitations then unnecessarily opined on the merits. As the First Department observed in its affirmance, the trial court's merits discussion was therefore dicta: "the motion court properly recognized that its dismissal on timeliness grounds rendered those alternative grounds academic. It is unnecessary to address the court's dicta." *Id.*[2]

Similarly, in *Lavery II*, the First Department affirmed the trial court's rulings on the procedural ground that, under CPLR 7003(b),[3] the successive habeas corpus petitions at issue

[2] *See also Sherb v. Monticello Cent. Sch. Dist.*, 163 A.D.3d 1130, 1132 (3d Dept. 2018) (where improper service of process resulted in denial of motion to file a late notice of claim, "[t]he court's ensuing comments on the merits . . . were dicta"); *Matter of Isaiah M. (Nicole M.)*, 144 A.D.3d 1450, 1452 n.3 (3d Dept. 2016) ("The appeal . . . was dismissed upon procedural grounds and, therefore, the resulting discussion of the merits is dictum."); *Pollicino v. Roemer & Featherstonhaugh P.C.*, 277 A.D.2d 666, 668 (3d Dept. 2000) (comments concerning the merits of plaintiff's complaint were dicta, and not entitled to preclusive effect in subsequent litigation, where complaint had been dismissed for failure to serve proper notice of claim); *Matter of Kaytes v. Donovan*, 202 Misc. 498, 503 (Sup. Ct. 1952) (merits discussion in prior habeas corpus proceeding, dismissed as premature, was properly "regarded as obiter dicta").

[3] Article 70, which includes CPLR 7003(b), "governs the *procedure* of the common-law writ of habeas corpus." *People ex rel. DeLia v. Munsey*, 26 N.Y.3d 124, 130 (2015) (emphasis added); *see also People ex rel. Lobenthal v.*

"failed to present any new information or new ground not previously considered" in prior proceedings and therefore were properly dismissed. 152 A.D.3d at 76. However, it then unnecessarily opined on the merits of the chimpanzees' legal personhood and their entitlement to habeas corpus relief.

The First Department even acknowledged that its discussion of the merits was unnecessary to its holding: "*Without even addressing the merits of petitioner's arguments*, we find that the motion court properly declined to sign the orders to show cause since these were successive habeas proceedings which were not warranted or supported by any changed circumstances." 152 A.D.3d at 75-76 (emphasis added; citations omitted). Accordingly, *Lavery II*'s subsequent discussion of legal personhood and habeas corpus relief is indisputably dicta.[4]

Dicta from any court is not binding on any other court.[5] In *Matter of Sentry Insurance Co. v. Amsel*, 36 N.Y.2d 291 (1975), for example, the Court of Appeals discussed its summary affirmance of a Fourth Department decision that had held that extraterritorial coverage for motorcycle accidents occurring in Canada was mandated by the insurance policy at issue, then went on to state unnecessarily that extraterritorial coverage was also mandated by statute. The Court of Appeals noted that its summary affirmance did not imply approval of the Fourth Department's latter determination, as that was "dictum . . . not necessary to sustain the holding." *Id.* at 295.[6]

Koehler, 129 A.D.2d 28, 30 (1st Dept. 1987) (while habeas corpus is part of New York's common law and "not a creature of statute," it is "regulated *procedurally* by article 70 of the CPLR") (emphasis added).

[4] In *Tommy*, Judge Fahey concurred in the decision of the Court of Appeals to deny the NhRP's motion for leave to appeal, indicating his agreement that the habeas corpus petitions at issue in *Lavery II* were impermissibly successive. However, Judge Fahey "underscore[d] that denial of leave to appeal is not a decision on the merits of petitioner's claims." 31 N.Y.3d at 1056 (Fahey, J., concurring).

[5] *See Robinson Motor Xpress, Inc. v. HSBC Bank, USA*, 37 A.D.3d 117, 124 (2d Dept. 2006) ("Dicta, while not without importance, is not required to be followed.").

[6] Dicta from the Court of Appeals itself is also not binding on lower courts. *See Robinson Motor Xpress*, 37 A.D.3d at 124 (dicta in Court of Appeals decision that a certain notice must be "written" was not controlling on lower courts); *Walling v. Przybylo*, 24 A.D.3d 1, 5 (3d Dept. 2005) (suggestion in Court of Appeals' opinion, which was seemingly

Similarly, this Court is not bound by *Lavery II*'s dicta and is therefore free to rule, as it should, that Happy is a legal person entitled to habeas corpus relief, then order her immediate release from her illegal imprisonment. *See generally In re Mackay's Will*, 65 Sickels 611, 615 (1888) (in reaching the opposite conclusion from its statement in a prior decision, the Court of Appeals noted that its prior statement was "mere *dictum*, unnecessary to the decision in that case, and therefore cannot have weight as authority").

B. Because *Lavery I* and *Lavery II*'s statements regarding legal personhood and habeas corpus relief are based on demonstrable misunderstandings of the law, stare decisis does not apply to them.

Under the doctrine of stare decisis, "courts of original jurisdiction [are required to] follow the decisions and precedents of the Appellate Division, which have jurisdiction of law and fact." *Ross Bicycles v. Citibank, N.A.*,149 A.D.2d 330, 331 (1st Dept. 1989). And "where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals." *D'Alessandro v. Carro*, 123 A.D.3d 1, 6 (1st Dept. 2014) (citation omitted).

Significantly, there are exceptions to this doctrine. As the Court of Appeals has repeatedly affirmed, stare decisis "does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason." *Rumsey v. N.Y. & N.E. R.R. Co.*, 88 Sickels 79, 85 (1892). *See Matter of Eckart*, 39 N.Y.2d 493,

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inconsistent with other appellate decisions, was "dictum . . . and not controlling"); *Adirondack Tr. Co. v. Farone*, 245 A.D.2d 840, 842 (3d Dept. 1997) ("[w]hile dictum in a Court of Appeals decision carries considerable weight, it is not controlling").

499 (1976).[7] "The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question." *Rumsey*, 88 Sickels at 85. As the Court of Appeals further noted:

> Chancellor Kent, commenting upon the rule of *stare decisis*, said that more than a thousand cases could then be pointed out, in the English and American reports, which had been overruled, doubted, or limited in their application. He added that 'it is probable that the records of many of the courts of this country are replete with hasty and crude decisions, and in such 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.'

Id. at 85-86.

Under this exception to stare decisis, a lower court is *not bound* by erroneous appellate precedent even where that precedent has not been overruled or reversed. In *Goodwin v. Pretorius*, 105 A.D.3d 207 (4th Dept. 2013), for example, the lower court denied the individual defendants' motion to dismiss and, in so doing, had declined to follow prior Appellate Division precedent under which the plaintiff was required to name them in her notice of claim pursuant to General Municipal Law § 50–e. *See Goodwin v. Pretorius*, 40 Misc. 3d 467, 469-472, 476 (Sup. Ct. 2011).

On appeal, the Fourth Department did not reproach the lower court for declining to follow otherwise-controlling precedent; rather, it affirmed the trial court's decision: "*Despite precedent supporting [defendants'] contention, we agree with Supreme Court* that there is no such requirement [to name individual defendants in plaintiff's notice of claim]." 105 A.D.3d at 210 (emphasis added). As the Fourth Department explained, the appellate authorities holding that there is a naming requirement under General Municipal Law § 50–e were all based on a single Supreme Court decision which had "cited no legal authority for its holding." *Id*. at 212. That, and the statutory language of § 50–e, ultimately led the Fourth Department to conclude stare decisis was

[7] *See also Montrose v. Baggott*, 161 A.D. 494, 501-02 (2d Dept. 1914) ("The rule of *stare decisis* is controlling when . . . an intermediate court has made such a decision in harmony with established law or not at variance with conclusive authority.").

inapplicable to those decisions: "the courts have misapplied or misunderstood the law in creating, by judicial fiat, a requirement for notices of claim that goes beyond those requirements set forth in the statute." *Id*. at 215.

Further, when stare decisis is inapplicable, a lower court may even be bound *not* to follow erroneous appellate precedent and will err by doing so. Thus, in *Kash v. Jewish Home & Infirmary of Rochester, N.Y., Inc.*, 61 A.D.3d 146 (4th Dept. 2009), the Fourth Department implicitly rebuked the lower court's decision to *apply* stare decisis to certain Appellate Division precedent. There the lower court had denied plaintiff's motion for leave to amend her complaint to add, in addition to her medical malpractice claim, a separate cause of action under Public Health Law § 2801-d. *Id*. at 147. The Fourth Department reversed, concluding that—"[f]or the reasons that follow" in the opinion—the lower court had "*erred* in denying the motion." *Id*. (emphasis added). This was so even though, as noted by the dissent, the lower court had "explicitly relied on" two prior Fourth Department decisions interpreting Public Health Law § 2801-d, *id*. at 156, according to which most plaintiffs were precluded from pursuing both a cause of action under Section 2801-d and traditional tort causes of action. *Id*. at 148-149.

As the Fourth Department explained, the lower court erred because "the language of Public Health Law § 2801-d is clear and unambiguous," and, under controlling Court of Appeals precedent on statutory interpretation, "we are *required* to give effect to its plain meaning." *Id*. at 149 (emphasis added). After noting that stare decisis "does not apply to a case where it can be shown that the law has been misunderstood or misapplied," *id*. at 150 (citations omitted), the Fourth Department concluded: "it is our duty to reexamine those decisions and follow clear statutory language." *Id*.

Courts must examine "the underlying rationale for the precedent" in determining whether stare decisis applies. *People v. Crawford*, 14 Misc. 3d 1207(A) at *3 (Sup. Ct. 2006) (citing *People v. Saunders*, 85 N.Y.2d 339, 344 (2006), and *People v. Maher*, 89 N.Y.2d 456, 461-462 (1997)). "[A] lower court . . . must look to the rationale of the case. Where the rationale is inapplicable, the holding of the higher court is inapplicable." *Id*. (citation omitted). And "[w]hen the force of better reasoning prevails, the doctrine of stare decisis must be withheld." *Id*.

In *Crawford*, the trial court declined to follow Second Department precedent despite the general requirement that it must do so absent a contrary rule by the Appellate Division in its own Department (in this case, the Fourth Department). *Id*. at *2-3. At issue was the meaning of the undefined word "depict" in Penal Law § 235.22(1), which criminalizes the dissemination of indecent material to minors, and specifically whether that term is limited to the dissemination of pictorial images. The Second Department had "squarely address[ed] the issue" in *People v. Kozlow*, 31 A.D.3d 788 (2d Dept. 2006); citing *People v. Foley*, 94 N.Y.2d 668 (2006), it had held that internet communications containing no visual sexual images were insufficient to support a conviction under the statute. 14 Misc. 3d 1207(A) at *2.

However, as the *Crawford* court explained, the Second Department's reliance on *Foley* was "questionable":

> *Foley* involved the transmission of visual sexual images of preteen girls and men engaging in sexual acts and minors engaging in sexual acts with other minors and adults (*People v Foley*, *supra*, at 674). *Foley* did not discuss the definition of "depict." Therefore, *Foley* is distinguishable on its facts. *Foley* is significant in that it noted the disseminating statute "criminalizes the use of sexually explicit communications designed to lure children into harmful conduct."

Id. at *3. "[P]ersuaded by the sound reasoning" of other trial court decisions, the *Crawford* court concluded that the definition of "depict" does encompass sexually explicit textual communications.

Id. In essence, it thus found stare decisis inapplicable because the Second Department precedent had misunderstood or misapplied the law.[8]

As set forth below, *Lavery I* and *Lavery II*'s statements on the merits are based on demonstrable misunderstandings of the law and, therefore, under the exception to the doctrine of stare decisis, are neither binding on this Court nor persuasive. Specifically, the legal personhood statements in *Lavery I* and *Lavery II* are based on the demonstrable misunderstanding that the recognition of legal personhood requires the capacity for legal duties, when it does not (*see infra*, § II.B.1). In addition, the habeas corpus relief statements in *Lavery II* are based on the demonstrable misunderstanding that habeas corpus relief does not permit the release of an imprisoned individual from one facility to a different facility, when it does (*see infra*, § II.B.2).

1. ***Lavery I* and *Lavery II*'s legal personhood statements are based on the demonstrable misunderstanding that the recognition of legal personhood requires the capacity for legal duties.**

   a. ***Lavery I* and *Lavery II*'s misunderstanding of legal personhood directly contradicts Court of Appeals precedent, legislatively established New York public policy, and the obvious fact that hundreds of thousands of New Yorkers who lack the capacity for legal duties have legal rights.**

Lavery I and *Lavery II*'s misunderstanding that the recognition of legal personhood requires the capacity for legal duties is neither binding on this Court nor persuasive, as it directly contradicts: (1) the binding authority of the Court of Appeals in *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194 (1972), (2) the two-decade old public policy established in New York's Pet Trust Statute (EPTL 7-8.1) that certain nonhuman animals can be trust beneficiaries

[8] The Court of Appeals subsequently validated *Crawford*'s criticisms when it reversed the Second Department in *People v. Kozlow*, 8 N.Y.3d 554, 561 (2007) ("But *Foley* does not stand for the proposition that a sexual predator must send his target sexual images in order to violate Penal Law § 235.22.").

and therefore legal persons, and (3) the obvious fact that hundreds of thousands of New Yorkers who lack the capacity for legal duties have legal rights.

First, in accord with centuries of Anglo-American jurisprudence that has long understood the recognition of legal personhood as merely requiring the capacity for legal rights, the Court of Appeals determined almost half a century ago that a "legal person . . . simply means that upon 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 (emphasis added).[9] Thus, any entity with any legal right is by definition a legal person.[10] *Byrn* made clear that the issue of who may be a legal person "is a matter which each legal system must settle for itself." *Id.* at 202 (quoting John Chipman Gray, *The Nature and Sources of the Law* [2d ed.], Ch. II). Further, the Court stressed that this determination is not a matter of "biological or 'natural' correspondence," but instead reflects a "policy determination whether legal personality should attach." *Id*. at 201.

Significantly, *Byrn* never mentioned *duties* in its legal personhood analysis, as duties were irrelevant to the issue of whether human fetuses were legal persons for the purpose of securing the specific legal *right* to life.[11] Just as in *Byrn*, a chimpanzee or elephant's capacity for duties is similarly irrelevant to the issue of whether such an imprisoned nonhuman animal is a legal person for the purpose of securing the specific legal *right* to bodily liberty.

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[9] The "significant fortune of legal personality is the capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). *See also* John Salmond & Patrick John Fitzgerald, *Salmond on Jurisprudence* 299 (12th ed. 1966) ("A 'person' is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not . . . .").

[10] *See also* Memorandum filed with Petition, at 4-7.

[11] *See id*. at 199 ("The issue . . . is whether children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life.").

Thus, in stating that legal personhood requires the capacity to bear legal duties, 124 A.D.3d at 152,[12] 152 A.D.3d at 78,[13] and that chimpanzees are not legal persons given their assumed inability to bear such duties, 124 A.D.3d at 152, 152 A.D.3d at 76–78, *Lavery I* and *Lavery II* directly contradict: (1) *Byrn*'s holding that "according legal personality to a thing . . . affords it the *rights and privileges* of a legal person," as *Byrn* never mentions duties, and (2) *Byrn*'s holding that "whether legal personality should attach" to an entity is a "*policy determination*," as *Lavery I* and *Lavery II*'s personhood determinations were not based on policy. *See* 31 N.Y.2d at 201 (emphasis added).

Additionally, *Lavery II*'s statement that, unlike chimpanzees, infants and comatose individuals are "persons" with legal rights—despite their inability to bear legal duties—because they "are still human beings, members of the human community," 152 A.D.3d at 78, directly contradicts *Byrn*'s holding that legal personhood is not a "question of biological . . . correspondence," 31 N.Y.2d at 201, as the First Department's personhood determination turned ultimately on a question of biology.

Second, in harmony with *Byrn*, more than two decades ago the New York Legislature made the "policy determination" that "legal personality should attach" to certain nonhuman animals. As noted in the NhRP's Petition (¶ 22) and Memorandum (at 16-18), New York's Pet Trust Statute (EPTL 7-8.1) granted "domestic or pet animals" the legal right to be trust beneficiaries. It therefore recognized that certain nonhuman animals are legal persons because only legal persons may be the

[12] "Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, 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."

[13] "The asserted cognitive and linguistic capabilities of chimpanzees do not translate to a chimpanzee's capacity or ability, like human beings, to bear legal duties, or to be held legally accountable for their actions."

beneficiaries of a trust.[14] *See Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 901 (Sup. Ct. 2015) (referring to "this state's recognition of legal personhood for some nonhuman animals under the [EPTL]"). Thus, *Lavery I* and *Lavery II*'s misunderstanding of legal personhood also directly contradicts existing New York public policy, which establishes legal rights for "domestic or pet animals" irrespective of their biology and capacity for legal duties.

Third, as Judge Fahey demonstrated in his Court of Appeals concurrence in *Tommy*, the First and Third Department's misunderstanding of legal personhood directly contradicts an indisputable fact:

> Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child (*see People ex rel. Wehle v Weissenbach*, 60 NY 385 [1875]) or a parent suffering from dementia (*see e.g. Matter of Brevorka ex rel. Wittle v Schuse*, 227 AD2d 969 [4th Dept 1996]).

Tommy, 31 N.Y.3d at 1057 (Fahey, J., concurring). In other words, because there are hundreds of thousands of New Yorkers without the capacity for legal duties who indisputably possess legal rights, including the fundamental right to liberty protected by habeas corpus, the recognition of legal personhood obviously cannot require the capacity for legal duties.

As noted above, the First Department in *Lavery II* recognized that many human beings without the capacity for legal duties "have legal rights." 152 A.D.3d at 78. And yet, the court cited the alleged inability of chimpanzees to "bear legal duties" as the basis for concluding that they are not entitled to habeas corpus relief. *Id.* The court explained this profound discrepancy in treatment wholly in terms of biology. *Id.* As Judge Fahey observed, *Lavery II*'s "conclusion that a

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[14] *See Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947) ("'Beneficiary' is defined as 'a person having enjoyment of property of which a trustee and executor, etc. has legal possession.'") (quoting Black's Law Dictionary); *Gilman v. McArdle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) ("Beneficiaries . . . must be persons[.]"), *rev'd on other grounds*, 99 N.Y. 451 (1885).

chimpanzee cannot be considered a 'person' and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species." *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring).

The First Department provided no justification or rationale for distinguishing, on the discredited basis of mere biology, humans and nonhuman animals for purposes of habeas corpus relief. Similarly, the Third Department offered no explanation for its statement that, since human beings "collectively" possess the capacity for legal duties, "nothing in [its] decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise." 124 A.D.3d at 152 n.3. In both *Lavery I* and *Lavery II*, human beings are expressly exempt from the erroneous belief that legal personhood requires the capacity for legal duties, while this same belief is arbitrarily applied to nonhuman animals. However, this Court need not, and should not, abide by such a clear double standard: "[I]n elevating our species, we should not lower the status of other highly intelligent species." *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring).[15]

b. ***Lavery I* and *Lavery II*'s misunderstanding of legal personhood derives from the erroneous belief that legal personhood, as a matter of definition, requires the capacity for legal duties.**

Lavery I's misunderstanding of legal personhood—and therefore *Lavery II*'s—derives in large part from the erroneous belief that legal personhood, as a matter of definition, requires the capacity for legal duties. In *Lavery I*, the court claimed that "legal personhood has consistently been defined in terms of both rights *and duties*," 124 A.D.3d at 151 (emphasis in the original), and also that "[c]ase law has always recognized the correlative rights and duties that attach to legal personhood," *id*. at 152. But, as in *Goodwin* and *Crawford*, *supra*, these assertions constituted a

[15] Shortly after Judge Fahey's concurrence in *Tommy*, the Fourth Department issued its decision in *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018), which recognized that "it is common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals." *Lavery I* and *Lavery II*'s misunderstanding of legal personhood thus also directly contradicts Fourth Department precedent.

fundamental misunderstanding of both the Third Department's own sources and the controlling law in New York, which, in turn, caused *Lavery I* to become the first court in Anglo-American history ever to deny a legal right to an individual for lacking the capacity to bear legal duties. *Lavery II* then followed suit and perpetuated that error.

As discussed below, in maintaining that the recognition of legal personhood requires the capacity for legal duties, *Lavery I* ignored and misunderstood its own cited sources, including the teachings of Professor John Chipman Gray found in *The Nature and Sources of the Law*, Chapter II (2d ed. 1963), which was cited with approval in *Byrn*, 31 N.Y.2d at 201-02,[16] Judge John Salmond's *Jurisprudence*, and foreign case law. Most importantly, both *Lavery I* and *Lavery II* flagrantly ignored their responsibility to follow the Court of Appeals precedent in *Byrn*. These authorities demonstrate not only that the capacity for legal duties is *not required* for legal personhood, but that the capacity for legal rights alone is *sufficient* for legal personhood; in short, rights and duties are entirely independent of each other.

The Court of Appeals in *Byrn* made abundantly clear that legal rights are independent of legal duties when it held that a "legal person . . . simply means that upon according legal personality to a thing the law affords it the *rights and privileges* of a legal person." 31 N.Y.2d at 201 (emphasis added). As noted, *supra*, *Byrn* said *nothing about duties*. This is because duties were utterly irrelevant to the issue before the Court, whether human fetuses were legal persons with the right to life, just as the capacity for duties was equally irrelevant to the issue before *Lavery I* and *Lavery II*, whether chimpanzees were legal persons with a right to bodily liberty protected by habeas corpus.

[16] *Lavery I* cited the 1963 paperback republication of Gray's 1921 treatise.

Chapter II of Professor Gray's *The Nature and Sources of the Law* (2d ed. 1963) demonstrates precisely how *Lavery I* went wrong. Specifically, *Lavery I* noted that "the legal meaning of a 'person' is a 'subject of legal rights and duties,'" 124 A.D.3d at 152 (quoting Gray, *The Nature and Sources of the Law*, Ch. II at 27 (2d ed. 1963)), but then *omitted* Professor Gray's next sentence in which he made clear that "one who has rights but not duties, or who has duties but no rights, is . . . a person," and also that "*if there is any one who has rights though no duties, or duties though no rights, he is . . . a person* in the eye of the Law." *The Nature and Sources of the Law*, Ch. II at 27 (emphasis added). One important consequence of this is that, as further noted by Professor Gray, "animals may conceivably be legal persons," and there may be "systems of Law in which animals have legal rights." *Id*. at 42-43.

Similarly, *Lavery I* relied upon the 7th edition of Black's Law Dictionary for the definition of "person" as "[a]n entity (such as a corporation) that is recognized by law as having the *rights and duties* [of] a human being." 124 A.D.3d at 151 (quoting Black's Law Dictionary 1162 [7th ed. 1999]; emphasis added by *Lavery I*). But this general definition does not in any way imply that an entity must have the capacity for both legal rights and legal duties to be a legal person.

The Third Department further relied upon Black's Law Dictionary for a purported quotation from Judge John Salmond's *Jurisprudence*, which allegedly stated: "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights *and* duties." 124 A.D.3d at 151 (emphasis added) (quoting Black's Law Dictionary 1162 [7th ed. 1999]). However, the NhRP discovered that the sentence attributed to Judge Salmond's treatise had actually been misquoted in Black's Law Dictionary and thus in *Lavery I*.[17] *Jurisprudence* in fact says: "So far as legal theory is concerned, a person is any being whom the law regards as capable

[17] This misquotation error was continued through the tenth edition of Black's Law Dictionary.

of rights *or* duties." John Salmond, *Jurisprudence* 318 (10th ed. 1947) (emphasis added). In the very next sentence, *Jurisprudence* makes clear that "[a]ny being that is so capable [of rights or duties] is a person, whether a human being or not." *Id*.

When the NhRP pointed out the misquotation error to Bryan A. Garner, Esq., the editor-in-chief of Black's Law Dictionary, he promptly agreed to correct it in the eleventh edition,[18] and he did.[19] When *Lavery II* was pending, the NhRP alerted the First Department of the error, first by letter,[20] and then in a supplemental motion seeking leave to file its correspondence with Mr. Garner.[21] However, the First Department unaccountably *denied* this motion and perpetuated *Lavery I*'s misunderstanding that the recognition of legal personhood requires the capacity for legal duties. *See* 152 A.D.3d at 76-78.

As for the foreign cases cited in *Lavery I*, none support the court's unprecedented view of legal personhood. Most cite merely a general dictionary definition similar to the one mentioned above in Black's Law Dictionary.[22] Further, in *Amadio v. Levin*, 501 A.2d 1085, 1098 (Pa. 1985) (Zappala, J., concurring) (cited in *Lavery I*, 124 A.D.3d at 152), the passage the Third Department embraced—that legal personhood arises "from the ascription of rights and duties to the subject"—is described by the concurring opinion as "circular reasoning"; and in *Wartelle v. Women's &*

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[18] *See* James Trimarco, *Chimps Could Soon Win Legal Personhood*, YES! MAGAZINE (Apr. 28, 2017), available at: https://bit.ly/2qfDPLD (last visited June 10, 2019).

[19] In the eleventh edition of Black's Law Dictionary, the corrected sentence from Salmond's *Jurisprudence* reads: "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights *or* duties." Black's Law Dictionary (11th ed. 2019), person (emphasis added).

[20] Specifically, after oral argument in *Lavery II*, the NhRP delivered a letter to the court alerting it to the error. *See* https://bit.ly/2Kqoli7.

[21] *See* https://bit.ly/2FluRCu.

[22] *See Smith v. ConAgra Foods, Inc.*, 431 S.W.3d 200, 203-04 (Ark. 2013) (citing *Calaway v. Practice Mgmt. Servs., Inc.*, 2010 Ark. 432, at *4 (2010) (quoting definition from Black's Law Dictionary 9th edition, which is identical to 7th edition)); *W. Sur. Co. v. ADCO Credit, Inc.*, 251 P.3d 714, 716 (Nev. 2011) (quoting *Webster's New Universal Unabridged Dictionary* 1445 (1996); *State v. A.M.R.*, 51 P.3d 790, 791 (Wash. 2002) (quoting definition from Black's Law 7th edition; also citing *Webster's Third New International Dictionary of the English Language* 1686 (1986)); *State v. Zain*, 528 S.E.2d 748, 755 (W. Va. 1999) (quoting *Webster's Third New International Dictionary of the English Language Unabridged* 1686 (1970), and *Random House Dictionary of the English Language* 1445 (2d ed., unabridged, 1987)).

Children's Hospital Inc., 704 So. 2d 778, 780 (La. 1997) (cited in *Lavery I*, 124 A.D.3d at 152), the Louisiana Supreme Court quoted with approval a secondary source which expressly stated, as had Professor Gray and Judge Salmond, that a "'person in a technical sense . . . signif[ies] a subject of rights *or* duties." (Emphasis added; citation omitted.)

Accordingly, in conditioning legal personhood on the capacity for legal duties, both *Lavery I* and *Lavery II* not only ignored and misunderstood the definition of legal personhood discussed in the jurisprudential literature, they also disregarded the controlling authority on that definition.[23]

c. ***Lavery I* and *Lavery II*'s misunderstanding of legal personhood derives from a misconception of social contract theory.**

Lavery I's misunderstanding of legal personhood—and therefore *Lavery II*'s—also derives in large part from a misconception of social contract theory, or contractualism. The Third Department said that

> the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government (*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 In re Gault*, 387 US 1, 20-21 [1967]; *United States v Barona*, 56 F3d 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 from its members to submit to social responsibilities. In other words, "rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights" (Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal"*

[23] On May 31, 2019, the High Court of Punjab & Haryana in *Singh v. State of Haryana*, CRR-533-2-13, quoted, at para. 67, the Supreme Court of India in *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & others*, AIR 2000 SC 1421, which had discussed the jurisprudential literature on legal personhood, including a source cited in *Byrn*, and defined a legal person "as any entity (not necessarily a human being) to which *rights or duties* may be attributed." (Emphasis added.) *Singh* then held that all nonhuman animals "are declared as legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person." Para. 95(29).

> *Cases*, 45 Ariz St LJ 1, 13 [2013]; *see* Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L Rev 27, 69 [2009]).

124 A.D.3d at 151. But, as in *Goodwin* and *Crawford*, *supra*, none of the cited authorities supports the propositions espoused in *Lavery I*.[24]

Most notably, Professor Cupp incorrectly described social contract theory, claiming without justification that it requires reciprocity between rights and duties. In turn, the Third Department in *Lavery I*, then the First Department in *Lavery II*, failed to determine whether Professor Cupp's idiosyncratic view of social contract theory actually had any support. Had they done so, they would have learned it has no support in either case law or jurisprudential literature.

In *Children, Chimps, and Rights*, Cupp's only source (besides himself) for the assertions cited in *Lavery I* is an article by Peter De Marneffe.[25] Yet, Cupp's "see generally" citation to De Marneffe's article provides no support for Cupp's assertions:

> It is strange for Cupp to rely on this work, since de Marneffe's article is not a historical treatment of contractualism, nor does de Marneffe even once claim in this piece that individual rights are exchanged for responsibilities. *Indeed, throughout the entire piece, the author never once uses the words duty, responsibility, reciprocate, exchange, or synonymous terms.*

Craig Ewasiuk, *Escape Routes: The Possibility Of Habeas Corpus Protection For Animals Under Modern Social Contract Theory*, 48 Colum. Human Rights L. Rev. 69, 82-83 (2017) (emphasis added). *See also id.* at 84 & n.80 (describing other instances in which De Marneffe's article does not support the propositions for which it is cited by Cupp).

[24] The First Department in *Lavery II*, in reliance on an amicus brief submitted by Professor Cupp (*see* https://bit.ly/2MY1c8I (last visited June 4, 2019), similarly asserted that "nonhumans lack sufficient responsibility to have any legal standing." *See* 152 A.D.3d at 78. Cupp's brief cites no authority for the claim that responsibility is required for legal standing, instead only making a vague reference to "John Locke's contractualist assertions" in connection with the notion of "requiring legal accountability to each other." Cupp Brief, at 8. As explained *supra*, however, Cupp's views are inconsistent with Locke's social contract theory.

[25] *See Children, Chimps, and Rights*, 45 Ariz. St. L.J. 1, 12-13 & nn.48-51 (2013) (citing Peter De Marneffe, *Contractualism, Liberty, and Democracy*, 104 Ethics 764, 764-783 (1994)).

In Cupp's other article, *Moving Beyond Animal Rights*,[26] the cited pages relied on by *Lavery I* contain no authority at all for the specific assertions regarding reciprocity between legal rights and legal responsibilities, but include an unconnected general reference to John Locke's concept of contractualism.[27] Elsewhere in his article, Cupp asserts that "general reciprocity between rights and responsibilities is a basic tenet" of social contract theory.[28] But, as noted by Ewasiuk in *Escape Routes*, the ultimate origin for this assertion is merely a secondary reading of Thomas Hobbes in Richard Sorabji's *Animal Minds and Human Morals* that "cites no particular passage in Hobbes's writings, but rather eight chapters of *Leviathan*." *See* 48 Colum. Human Rights L. Rev. at 86.

Cupp's lack of specific citation is unsurprising because social contract philosophers (including John Locke and Thomas Hobbes) do not support his idiosyncratic claim that legal rights—and therefore legal personhood—are received in exchange for societal duties in a social contract. According to 17 "amici philosophers with expertise in animal ethics and related areas," *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring), Cupp's claim "is not how political philosophers have understood the meaning of the social contract historically or in contemporary times." Philosophers' Brief at 15-16.[29] Rather, as they explained:

> social contracts create citizens, not persons. Citizens are individuals who are subject to the laws authorized by the contract. Notably, the U.S. Constitution mentions the term 'persons' fifty-seven times, but

[26] *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L. Rev. 27, 69-70 (2009) (cited in *Lavery I*, 124 A.D.3d at 151).

[27] The cited pages also include a claim attributed to Philosopher L.W. Sumner's book *The Moral Foundations of Rights* 203 (1987), that under Wesley Newcomb Hohfeld's framework of rights, "animals cannot have rights because they do not have duties or responsibilities." 46 San Diego L. Rev. at 69. However, in the cited page to Sumner's book, Cupp crucially omits the fact that Sumner was specifically discussing one of two competing theoretical *conceptions* of moral rights. Under what Sumner terms the "protected choices" model, rightsholders must have a certain level of cognitive agency, and it will "deny rights, on logical grounds, to . . . fetuses, infants, young children, and the severely mentally handicapped," not just to nonhuman animals. *The Moral Foundations of Rights* at 203. In contrast, under what Sumner terms the "interest model," rightsholders will include "many non-human beings (at least some animals)" because they have interests. *Id*. at 206.

[28] 46 San Diego L. Rev. at 66.

[29] *See* https://bit.ly/2RqAUL5 (last visited July 8, 2019).

> does not define it. The 14th Amendment, however, distinguishes between persons and citizens. This is consistent with social contract theory, which holds that only persons can bind themselves through a contract and, in so doing, become citizens. While persons do not depend on a social contract, the social contract depends on persons who will be its 'signatories.'
>
> […]
>
> Social contract philosophers have never claimed—not now, not in the 17th century—that the social contract can endow personhood on any being. The contract can only endow citizenship on persons who exist prior to the contract and agree to it. If persons did not exist before the contract, there would be no contract at all since only persons contract. Personhood, therefore, must be presupposed as a characteristic of contractors in social contract theories.

Philosophers' Brief at 17, 18-19.[30]

Lavery I also cited two federal cases to support its assertions on social contract theory: *In re Gault*, 387 U.S. 1, 20-21 (1967); and *United States v. Barona*, 56 F.3d 1087, 1093-94 (9th Cir. 1995). *See* 124 A.D.3d at 151. But the only conceivably relevant passage in the cited pages from *In re Gault* merely states: "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." *In re Gault*, 387 U.S. at 20. "*Gault* does not even provide facial support for the [*Lavery I*] court's claim: it addresses neither the relationship between rights and duties nor the limitations of the meaning of legal personhood for the purposes of habeas corpus." *Escape Routes*, 48 Colum. Human Rights L. Rev. at 78.

In *United States v. Barona*, the Ninth Circuit quoted from the dissenting opinion in a prior decision, *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), opining that:

> Because our constitutional theory is premised in large measure on the conception that our Constitution is a "social contract," […] "the scope of an

[30] *See also Escape Routes*, 48 Colum. Human Rights L. Rev. at 87-100, 105 (explaining the social contract theories of Hobbes and Locke and why, contrary to Cupp, contractualism does not preclude granting rights to nonhuman animals).

> alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear." [...] "Not until an alien has assumed the complete range of obligations that we impose on the citizenry may he be considered one of 'the people of the United States' entitled to the full panoply of rights guaranteed by our Constitution."

56 F.3d at 1093-1094 (citations omitted).

Barona provides no support for the Third Department's assertions on social contract theory because, first, the decision deals with an interpretation of the Fourth Amendment to the United States Constitution rather than the New York common law, which is at issue in the case at bar; second, the dictum[31] in the quoted passage concerns the interpretation of the constitutional phrase "the People of the United States," not the New York common law meaning of the term "person"; and third, the Supreme Court had previously reversed the *Verdugo-Urquidez* decision quoted in *Barona*,[32] such that

> it is clear that the Third Judicial Department [in *Lavery I*] made an argument that was the *converse* of the argument made by the Supreme Court. The Third Judicial Department argued that if one has rights, then one must have duties, and if you do not have duties, then you do not have rights. The Supreme Court suggested that if you have duties, then you must have rights, and if you do not have rights, then you must not have duties. These are different arguments.

Escape Routes, 48 Colum. Human Rights L. Rev. at 82 (emphasis in original).

In summary, the courts' misunderstanding that the recognition of legal personhood requires the capacity for legal duties derives, in large part, from a misconception of social contract theory that has no support in either the academic literature or case law. That misunderstanding is also, as previously discussed, demonstrably *not* the law in New York, and cannot be supported by resort

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[31] *Barona*'s entire discussion of the relationship between an alien's rights and duties, cited in *Lavery I*, was paradigmatic dictum. The Ninth Circuit specifically noted: "We could hold, therefore, that [the non-citizen criminal defendants] have failed to demonstrate that, at the time of the extraterritorial search, they were 'People of the United States' entitled to receive the 'full panoply of rights guaranteed by our Constitution.' We choose, however, not to reach the question because even if they were entitled to invoke the Fourth Amendment, their effort would be unsuccessful." *Barona*, 56 F.3d at 1094 (citation omitted).

[32] *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

to dictionary definitions. Accordingly, because *Lavery I* and *Lavery II* both so clearly misunderstood the law, this Court is not bound by their legal personhood statements, should not be persuaded by them, and should not follow them.

2. *Lavery II*'s habeas corpus relief statements are based on the demonstrable misunderstanding that habeas corpus relief does not permit the release of an imprisoned individual from one facility to a different facility.

Lavery II's misunderstanding regarding the availability of habeas corpus relief is neither binding on this Court nor persuasive, as it (1) directly contradicts Court of Appeals and First Department precedents, and (2) is based upon an obvious misreading of a Court of Appeals decision.

First, the Court of Appeals has made clear that habeas corpus *can* be used to order an individual released from an unlawful imprisonment and sent to a more appropriate facility. *See Matter of Mental Hygiene Legal Servs. v. Wack*, 75 N.Y.2d 751 (1989) (habeas corpus proper to transfer mental patient from secure facility to non-secure facility); *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961) (habeas corpus proper to test validity of a transfer from a prison to a mental hospital); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943) (habeas corpus available where prisoner was improperly transferred from reformatory to a state prison under a void order).[33]

Prior First Department precedents have also made that clear. *See McGraw v. Wack*, 220 A.D.2d 291, 293 (1st Dept. 1995) (observing that "the Court of Appeals recently approved, sub silentio, the use of a writ of habeas corpus to secure the transfer of a mentally ill individual to another institution") (citing *Matter of Mental Hygiene Legal Servs. v. Wack*, 75 N.Y.2d 751

[33] It is axiomatic that trial courts are bound by Court of Appeals precedent over Appellate Division precedent. *DeLee v. Brunetti*, 158 A.D.3d 1171, 1173 (4th Dept. 2018); *Margerum v. City of Buffalo*, 148 A.D.3d 1755, 1758 (4th Dept. 2017).

(1989)); *Mental Hygiene Legal Servs. ex rel. Cruz v. Wack*, 148 A.D.2d 341 (1st Dept. 1989) (affirming order granting habeas petitioner transfer to a non-secure facility).

Second, in support of its erroneous conclusion that NhRP's requested relief was improper, *Lavery II* cited *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986), in which the Court of Appeals affirmed the denial of habeas relief because the petitioner did "not seek his release from custody in the facility, but only from confinement in the special housing unit, a particular type of confinement *within the facility* which the Department of Correctional Services is expressly authorized to impose on lawfully sentenced prisoners committed to its custody." *Id.* at 691 (emphasis added). *Lavery II* claimed the situation in *Dawson* was analogous to the one before the court. *See* 152 A.D.3d at 80.

However, as in *Goodwin* and *Crawford*, *supra*, *Dawson* provides no support for the First Department's understanding of habeas corpus relief. As Judge Fahey explained, the First Department had completely misread *Dawson*, which actually "stands for the proposition that habeas corpus *can* be used to seek a transfer to 'an institution separate and different in nature from the . . . facility to which petitioner had been committed,' as opposed to a transfer 'within the facility.'" *Tommy*, 31 N.Y.3d at 1058-1059 (Fahey, J., concurring) (emphasis in original; quoting *Dawson*, 69 N.Y.2d at 691). *Lavery II* failed to recognize that, in fact, the "chimpanzees' predicament [was actually] analogous to the former situation, not the latter." *Id*. at 1059.

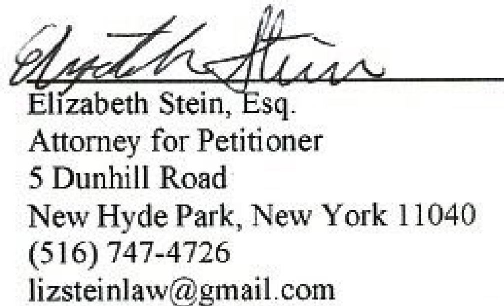
Accordingly, because the First Department in *Lavery II* so clearly misunderstood the law, this Court is not bound by its statements regarding habeas corpus relief, should not be persuaded by them, and should not follow them. *See Kash*, *supra*; *see also Vidal v. Maldonado*, 23 Misc. 3d 186, 213 (Sup. Ct. 2008) (First Department decision not binding on Bronx County Supreme Court

where it conflicts with "an equally binding First Department precedent, as well as with [Court of Appeals' precedent], an even more binding one").

III. CONCLUSION

For the foregoing reasons, this Court is not bound by, and should not follow, *Lavery I* and *Lavery II*'s statements regarding legal personhood and habeas corpus relief. *Lavery II*'s statements regarding legal personhood and habeas corpus relief are dicta. And because *Lavery I* and *Lavery II*'s statements regarding legal personhood and habeas corpus relief are based on demonstrable misunderstandings of the law, stare decisis does not apply to them. Accordingly, this Court is free to rule, as it should, that Happy is a legal person entitled to habeas corpus relief and order her immediate release from her illegal imprisonment.

Dated: August 15, 2019



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