To Be Argued By:
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by permission of the Court

New York County Clerk's Index No. 162358/15

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

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

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

Petitioner-Appellant,

against

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE L. LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents.

BRIEF FOR PETITIONER-APPELLANT

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QUESTIONS PRESENTED

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

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

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

The lower court refused to consider these affidavits.

3. Did the lower court err in dismissing the Second Tommy Petition (a) as an improper successive petition, after (b) finding "no ground sufficiently distinct from those set forth in the [first] petition," even though petitioner introduced sixty pages of expert affidavit evidence not previously presented in the First Tommy Petition?

The lower court did not apply the requirements of CPLR 7003(b) for dismissing successive petitions or consider petitioner's new evidence demonstrating changed circumstances.

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

The lower court did not apply the requirements of CPLR 7003(b) for

dismissing successive petitions or consider petitioner's new evidence demonstrating changed circumstances.

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

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

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

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

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

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

STATEMENT OF THE CASE

I. INTRODUCTION AND PROCEDURAL HISTORY

Who is a "person" within the meaning of the common law of habeas corpus is the most important individual issue that can come before a court. It is a matter of life and death, freedom and slavery. Whether that "person" may be a chimpanzee is the issue at hand. As demonstrated herein, chimpanzees are autonomous, cognitively and emotionally complex, self-aware, self-conscious and self-determining beings. They routinely bear duties and responsibilities within

chimpanzee communities and human/chimpanzee communities. They have the capacity to live intellectually rich and sophisticated individual, family and community lives. They can recall their past and anticipate their future, and when their future is imprisonment, they suffer the enduring pain of isolation and the inability to fulfill their life's goals or to move about as they wish, much in the same way as do human beings. (R.114-197;277-666). Pursuant to a New York common law that keeps abreast of evolving standards of justice, morality, experience, and scientific discovery, Petitioner-Appellant The Nonhuman Rights Project, Inc. ("NhRP") argued that both New York common law liberty and equality mandate that chimpanzees be granted the common law right to bodily liberty and be recognized as common law "persons" under the common law of habeas corpus and New York Civil Practice Law and Rules ("CPLR") Article 70.

During the first week of December 2013, NhRP filed three verified petitions demanding that a branch of the Supreme Court issue common law writs of habeas corpus or orders to show cause pursuant to Article 70 in each of the three New York counties in which a chimpanzee was being illegally detained. A petition was filed in (a) Fulton County on behalf of Tommy, a solitary chimpanzee living in a cage in a warehouse on a used trailer lot ("First Tommy Petition"); (b) Niagara County on behalf of Kiko, a solitary chimpanzee living in a cage in a cement storefront in a crowded residential neighborhood ("First Kiko Petition"); and (c)

Suffolk County on behalf of Hercules and Leo, two young chimpanzees on lease from Louisiana's New Iberia Research Institute to the State University of New York at Stony Brook ("Stony Brook") for locomotion research ("First Hercules and Leo Petition"). Each court refused to issue the requested order to show cause. (R.19-22). Each appellate department affirmed on a different ground, without citing any of the previous decisions. (*Id.*) Attached to each of the three petitions were approximately 100 pages of expert affidavits from many of the most respected chimpanzee cognition researchers in the world. Not one fact was controverted.

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

On appeal of the denial of the First Kiko Petition, the New York State Supreme Court Appellate Division, Fourth Judicial Department ("Fourth

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

The New York State Supreme Court Appellate Division, Second Judicial Department ("Second Department") dismissed NhRP's timely appeal from the order of the Supreme Court, Suffolk County on procedural grounds. (R.20).

On December 2, 2015, NhRP filed a second Verified Petition for a Writ of Habeas Corpus and Order to Show Cause on behalf of Tommy in the New York County Supreme Court from which this appeal is taken. *See Nonhuman Rights Project, Inc. on behalf of Tommy v*. *Patrick C. Lavery, et al.*, Index #: 162358/2015 (Dec. 2, 2015) ("Second Tommy Petition"). In direct response to *Lavery*, NhRP presented approximately sixty pages of new expert supplemental affidavits directed solely to demonstrating that chimpanzees routinely bear duties and responsibilities within chimpanzee communities and mixed chimpanzee/human communities. NhRP further argued that the Supreme Court was not bound by the Third Department's erroneous ruling that legal personhood is contingent upon the ability to bear duties and responsibilities.

Nonetheless, on December 23, 2015, the court (Jaffe, J.) declined to sign the order to show cause, writing: "Declined, to the extent that the courts in the Third Dept. determined the legality of Tommy's detention, an issue best addressed there, & absent any allegation or ground that is sufficiently distinct from those set forth in the first petition (CPLR 7003(b)[)]." (R.14). On July 8, 2016, the court filed a final Order made effective *nunc pro tunc* as of December 23, 2015, reiterating the reasons stated therein for declining to sign the order to show cause. (R.12). In refusing to issue an order to show cause, the court ignored its own recent precedent, *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898 (Sup. Ct. 2015), in which it entertained a *second* petition for habeas corpus on behalf of Hercules and Leo ("Second Hercules and Leo Petition"), issued the requested order to show cause, and required the State to justify its detention of the chimpanzees in a hearing. *The Nonhuman Rights Project, Inc. v. Stanley Jr., M.D.*, 2015 WL 1804007 (Sup. 2015) *amended in part*, 2015 WL 1812988 (Sup. 2015), 16 N.Y.S.3d 898, 903 (Sup. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015). Unlike the present case, no "distinct" circumstances were presented in the successive petitions brought on behalf of Hercules and Leo. Ultimately, the court refused to grant their release on the merits because it believed itself bound by *Lavery* regarding the necessary showing of duties and responsibilities. 16 N.Y.S.3d at 903.

NhRP respectfully submits that the lower court erred in refusing to issue the order to show cause because: (1) contrary to *Lavery*, the capacity to bear duties and responsibilities is irrelevant to a determination of personhood; (2) the court erred in failing to consider the affidavits demonstrating that chimpanzees bear duties and responsibilities after the Third Department in *Lavery* took judicial notice they do not; and (3) the correct standard to be applied in determining common law personhood was set forth by the Court of Appeals in *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972).

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

II. STATEMENT OF FACTS

Chimpanzees are autonomous. (R.375-76;469). They can freely choose without acting on reflex or innate behavior. (R.375-76). They possess the "self" integral to autonomy, have goals and desires, intentionally act towards those goals,

and understand whether they are satisfied. (R.398;280).

Chimpanzees and humans share almost 99% of DNA. (R.395-96;481). Our brains are plastic, flexible, and heavily dependent upon learning, share similar circuits, symmetry, cell types, and stages of cognitive development. (R.334;342-45;395-96;397-98;469-70;481;483). We share similar behavior, and emotional and mental processes (R.545-46), including self-recognition, self-awareness, self-agency, and metacognition. (R.280;399;483-85;634). Chimpanzees are aware of their past, mentally represent their future, have an autobiographical sense of self with a past and future, engage in "mental time travel" and long-term planning, and can remember something for decades. (R.281;470-71;486). They imagine and pretend. (R.347-49;470;484;490).

Chimpanzees exhibit referential and intentional communication; they inform others, engage in complex conversations, engage in "private speech," ensure they are understood in conversations, use language and syntax, create declarative sentences, point, comment on individuals, as well as on past and future events, state what they intend to do, then do it, and coordinate their actions. (R.281;342-46;396;486;488). They understand symbols and "if/then" clauses, learn new symbols by observation, and demonstrate perspective-taking, imagination, and humor. (R.342-43;349;483-86). They announce important social events, what they are about to do, where they are going, what assistance they want from others, and

how.

Chimpanzees have mirror neurons and are therefore attuned to the experiences, visual perspectives, knowledge states, emotional expressions and states of others. (R.281-82;334--35;399-400). They have theory of mind; they know they have minds; they know humans and other chimpanzees have minds, thoughts, feelings, needs, desires, perspectives, intentions, and that these other minds and states of knowledge differ from their minds. They know that what they see is not the same thing others see. (R.344-46;490-91).

Chimpanzees possess highly developed empathic abilities. (R.280-82;400). They engage in sophisticated deception that requires attributing mental states and motives to others. They show concern for others in risky situations. (R.280-81). They demonstrate compassion, bereavement-induced depression, and an understanding of the distinction between living and non-living; they feel grief and compassion when dealing with mortality. (R.283-84).

Wild chimpanzees make and use tools from vegetation and stone for hunting, gathering, fighting, playing, communicating, courtship, hygiene, and socializing. Chimpanzees make and use complex tools that require them to utilize two or more objects towards a goal. They make compound tools by combining two or more components into a single unit. They use "tool sets," two or more tools in an obligate sequence to achieve a goal, such as a set of five objects – pounder,

perforator, enlarger, collector, and swab – to obtain honey. (R.427-28). Tool-making implies complex problem-solving skills and evidences understanding of means-ends relations and causation. (R.335-36;427-28).

Each wild chimpanzee cultural group makes and uses a unique "tool kit" comprised of about twenty different tools often used in a specific sequence for foraging and processing food, making comfortable and secure sleeping nests in trees, and personal hygiene and comfort. (R.429;482-83). The foraging tool kits of some chimpanzee populations are indistinguishable in complexity from the tool kits of some simple human material cultures, such as Tasmanian aborigines, and the oldest known human artifacts, such as the East African Oldowan industry. In one chimpanzee population, chimpanzee tool-making culture has passed through 225 generations. With respect to social culture, chimpanzees pass widely variable social displays and social customs from one generation to the next. Arbitrary symbolic gestures communicated in one group may mean something entirely different in another group. (R.430-32). Chimpanzees transmit their material, social, and symbolic culture by social and observational learning through innovation, as well as precise imitation and emulation. These latter capacities are necessary for "cumulative cultural evolution," which involves the ability to build upon previous customs. (R.282-83;433).

Chimpanzees possess "numerosity," the ability to understand numbers as a

sequence of quantities, which requires both sophisticated working memory and conceptual understanding of a sequence. This is closely related to "mental time travel" and planning the right sequence of steps towards a goal, two critical components of autonomy. Not only do chimpanzees excel at understanding sequences of numbers, they understand that Arabic symbols ("2", "5", etc.) represent discrete quantities. (R.400;642).

Chimpanzees demonstrate sequential learning, the ability to encode and represent the order of discrete items occurring in a sequence, and understand the ordinal nature of numbers. They understand proportions (e.g., 1/2, 3/4, etc.), and can count and understand the meaning of zero (R.400-402;490).

Chimpanzees have excellent working, or short-term, memory, and exceed the ability of humans to recall numbers. (R.401-402). They are competent at "cross-modal perceptions." They obtain information in one modality, such as vision or hearing, and internally translate it to information in another modality. (R.488-89). They can match an audio or video vocalization recording of a familiar chimpanzee or human to her photograph. (R.335). They translate symbolically encoded information into any non-symbolic mode. When shown an object's picture, they retrieve it by touch, and retrieve a correct object by touch when shown its symbol.

(R.488-89).[1]

Chimpanzees bear well-defined duties and responsibilities both within their own communities and within human/chimpanzee communities. (R.546-47;55;560-61;575;619;610;632-33). Chimpanzees understand and carry out duties and responsibilities while knowingly assuming obligations, then honoring them. (R.624;632-33;638-39). Chimpanzees have duties to each other and behave in ways that seem both lawful and rule-governed. (R.622;578;564;634-44;611;546). Both chimpanzee and human adult members of chimpanzee/human communities behave in morally responsible ways as they understand them. (R.549;633;640;646). Chimpanzees possess moral inclinations and a level of moral agency. They ostracize individuals who violate social norms. They respond negatively to inequitable situations, such as being offered lower rewards than companions for the same task. When given a chance to play the Ultimatum Game, they spontaneously make fair offers, even when not obliged to do so. (R.624).

Chimpanzee social life is cooperative and represents a purposeful and well-coordinated social system. They engage in collaborative hunting, in which hunters adopt different roles that increase the chances of success. They share meat from prey. (R.624). Males cooperate in territorial defense, and engage in risky boundary patrolling. (R.546-47;624).

[1] These remarkable similarities between humans and chimpanzees are not limited to autonomy, but extend to personality and emotion. (R.375-80).

Chimpanzees show concern for others' welfare, and they have expectations about appropriate behavior in a range of situations (*i.e.*, social norms). (R.550-51). Such behaviour is essential for the maintenance of chimpanzee society, and it can be extended to human beings when necessary. (R.624;524;632-33;636-39;643-44;550-51). No chimpanzee group could survive in the wild if its members failed to carry out their assigned duties and responsibilities to the group. (R.650).

Chimpanzee mothers show a duty of care to their offspring that rivals humans. (R.619). The duties and responsibilities of a mother chimpanzee towards her offspring are many and onerous and last an average of five and a half years. Young female chimpanzees practice their future maternal behavior by using sticks as "dolls," while young males do not, in a form of symbolic play. Most adult males act paternally toward all infants in their community, rushing to their aid when necessary. (R.564-65;575-76;611;619). Familial duties are not restricted just to mothers and fathers. (R.619;577). Juveniles and adolescents frequently act responsibly toward their infant siblings. (R.577).

Chimpanzee duties of care extend beyond shared genes. (R.620;611;564-65;557;546). Evidence from both captive and wild chimpanzees indicates that they possess highly developed empathic abilities. (R.546-47;564-65;611;620;636-41). This includes the adoption of orphans. (R.546;564-65;577; 611;620).

Chimpanzee duties and responsibilities extend beyond the family and cross

into the realm of the community. (R.560-61;611;546). In tasks requiring cooperation, chimpanzees recruit the most skilled partners and take turns requesting and helping a partner. (R.281-82). Chimpanzees show "community concern," such as by working as a team to patrol boundaries and defending territory, and concern for individuals. (R.546). Wild chimpanzees call to warn approaching friends about a potentially dangerous object of which the latter is unaware. (R.547). The same males whose lives depend on one another in the patrol will later compete robustly with one another over access to a receptive female. Somehow, they resolve the contradictions involved in having conflicting interests in different contexts, which implies their mutual recognition of shared responsibilities. Male group members rescue individuals taken prisoner by intruders. This spontaneous high level of altruism toward group members in this chimpanzee population reveals the sense of obligation felt by them to help and protect one another. (R.546-47;561-63;620-21).

Participation in a hierarchy of social dominance is another chimpanzee universal that necessarily entails duties and responsibilities. (R.621;610). Male chimpanzees rank-order themselves from alpha (top) to omega (bottom) in linear fashion. (R.621). Usually there is a single dominant male, but often he only holds that position because of the support of other males. In those cases, these dominant males demonstrate a sense of duty to their supporters. Chimpanzees are highly

protective of their communities and will go to great lengths to defend them. (R.610).

High-ranking males take on a policing role to ensure group stability, patrolling their territory, and chasing away or attacking individuals from neighboring communities. This may take the form of specific, targeted ostracism of individuals who violate norms. The alpha male assumes the duty of exercising community "policing" powers, such as intervening in quarrels or fights between other community members, thus maintaining community integrity and preventing injury. (R.546;578;621-22).

Another indicator of rule-governed social interaction within a group is systematic, long-term reciprocity of favors or benefits among its members. (R.623;561-62;634-35). Chimpanzees cooperate and understand each other's roles. (R.547;549). They reward others and keep track of others' acts and outcomes. (R.548).

Chimpanzees make numerous behavioral adjustments to ensure the welfare of injured or disabled members of the group. When crossing a potentially dangerous road, stronger and more capable adult males investigate the situation before more vulnerable group-members, waiting by the roadside, venture onto the road. The males remain vigilant while taking up positions at the front and rear of the procession. (R.546-47). Taï forest chimpanzees have been seen to help and tend

to the injuries of wounded individuals for extended periods of time. (R.561-62).

Wild chimpanzees have duties to see that all members of the group have access to food, that all group members arrive at a feeding source together, and that all group members have access to that source in a manner as to benefit the entire group. (R.632-33;546-47). This requires cognitive concentration, social rules, and a greater sense of social responsibility for the good of the group rather than fulfilling the desires of the individual. (R.632-33).

Advance planning and sharing of information are duties and responsibilities that lie at the heart of chimpanzee survival. (R.650). They react to any change in the group balance of power, distribution of resources, or inappropriate behaviors and/or alliances, even friendly alliances. Punishment is part of the meat sharing rules. (R.548;562-63).

Chimpanzees engage in remarkably balanced exchanges of food between individuals. Not only do food exchanges occur in both directions, individuals are more likely to share with another chimpanzee who groomed them earlier that day. This pattern of grooming and food transfers suggests the presence of reciprocal obligations. In captivity, when presented with an "Ultimatum Game" in which both partners need to cooperate in order to split available rewards equally, chimpanzees ensure a fair distribution of rewards. (R.548-49).

Chimpanzees demonstrate a high sense of solidarity towards ignorant group

members, who they will inform about the presence of a danger. (R.564;342-43; 564;634;644). Chimpanzees who acquire language recognize the need to inform others of information of import, and they understand the circumstances that lead to others lacking information they themselves have. (R.644).

Chimpanzees can be trained or learn spontaneously to work collaboratively with at least one other individual to solve a common problem that cannot be solved by a single individual. After experiencing working alongside two different collaborators, chimpanzees prefer to work with a collaborator who has proven more effective in the past; thus, they attribute different degrees of competence to other individuals. (R.547-48).

Chimpanzees readily understand social roles and intentions. They distinguish between individuals who have harmful versus prosocial intentions either towards them or to another, and will direct friendly individuals one way and unfriendly individuals to another. They adapt quickly to role-reversal in cooperative tasks. ASL-trained chimpanzees take appropriate turns conversing with humans. (R.549-50).

Chimpanzees bear duties and responsibilities within chimpanzee/human communities. They prefer fair exchanges, are intolerant of unfair treatment, and keep promises and secrets. Captives who acquire language may remind others of events such as their birthdays and days visitors are expected, that trash needs to be

carried out, that drains are clogged, that computer programs are misperforming. Chimpanzees taken outdoors may be asked to promise to be good, not to harm anyone, and to return when asked, and they keep their promises. (R.549;645-46).

Chimpanzees evidence understanding of their duties and responsibilities both in their interactions with human beings and in their interactions with each other. (R.623;634-49). They treat humans with care, understanding they are stronger, faster, and more agile than humans. (R.550;632-33).

A chimpanzee bite can kill a human. Yet, in almost 60 years of observations at Gombe National Park, no chimpanzee has bitten a human. Seven times chimpanzees charged Jane Goodall and her videographer when they were above a steep drop, but did not make contact. These examples of intentions not to harm likely demonstrate that chimpanzees see the long-established relationship with these familiar humans as something they are duty-bound to uphold. (R.578;623).

Captive chimpanzees understand they must remain in certain areas and not harm or scare human beings. When doors are left open they refuse to go into prohibited areas. If unknown humans enter their areas, the chimpanzees avoid them, recognizing that interaction is prohibited by the facility's rules. (R.644).

Any disagreement between a human and a language-using chimpanzee can be solved by explaining the reasons for the action. (R.644-45).

Chimpanzees raised in a setting where humans expect them to become

linguistically and socially competent group members, as other chimpanzees expect of chimpanzee children in natural settings, exhibit enhanced abilities to bear duties and responsibilities. (R.610;634-49). They become increasingly trustworthy and responsible as they move into adulthood. (R.644). Having acquired language, they expect humans to explain their intentions and they reciprocate. Each interaction becomes a linguistically negotiated contract that can apply and be remembered for days, weeks, even years. (R.645).

At Central Washington University, chimpanzees participated in numerous activities with caregivers. Mornings, researchers required the chimpanzees to help clean enclosures by returning their blankets from the night before. The chimpanzees all participated. At lunchtime, they were served soup, followed by fresh vegetables only if all chimpanzees ate their soup. If one refused, the others pressured the noneater by offering her the soup and a spoon. The noneater nearly always ate the soup. This individual behavior that affected the group demonstrated their sense of responsibility and duty. (R.610-11).

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

beings. (R.549;633;646).

Adults become capable of "self-assigned" duties and responsibilities and understand how to behave in a manner culturally appropriate for humans. As this occurs, they begin to demonstrate a sense of responsibility. (R.646). Chimpanzees who act aggressively towards a human or other chimpanzee often responded with "SORRY." (R. 611-12).

A critical component of the ape child's desire to adopt and to accept duties and responsibilities resided in the emotional cross-cultural attachments between group members. These attachments were identical to those one finds in a human group or in any ape group, but transcended the species boundary. Both ape and human group members express a sense of responsibility to one another and mutually cooperate. (R.634;648).

All members of this cross-cultural linguistic *Pan/Homo* culture treated each other as members of one group in which each had rights, roles, and responsibilities in accord with their abilities and maturity (R.633;635-36;646-47). They understood not only what they were doing, but why they were doing it, and their understanding increased with age and experience. As they grew older, they assumed a variety of duties for the purpose of demonstrating their abilities to outsiders. (R.648). When outsiders were present, they would assume a responsibility to do things that were more "human-like." (R.633-43;648).

Similarly, their recognition of the degree to which persons outside their immediate *Pan/Homo* family misunderstood them increased. They slowed their actions and sounds, exaggerated them, repeated them, blended sounds, gestures and lexigrams, and waited until they noted the humans were observing before they engaged them. Close observation of others' behavior while reflecting on their intent requires knowledge that the "other" has a mind, that the contents of two minds may differ, and that one must pay attention to the "attention" of the other if one wishes to successfully redirect their perspectives, ideas, and views. (R.648).

As do human children, individual chimpanzees vary widely in their interests and in the particular capacities they sought to master. Often, if one chimpanzee excelled in some skill, those close in age sought to excel in other skills. This demonstrates an awareness of their individual responsibility to fill a particular niche within the community to maximize group utility. (R.634-35).

Set out in detail at R.633-43 are capacities indicative of chimpanzees' ability to routinely assume duties and responsibilities and to make contractual agreements in the groups with which Dr. Savage-Rumbaugh worked.

In light of these facts that demonstrate the autonomy of chimpanzees, NhRP seeks to have Tommy sent to Save the Chimps, a 190 acre premiere chimpanzee sanctuary in Ft. Pierce, Florida. It provides permanent homes for 260 chimpanzees on twelve three-to-five-acre open-air islands that contain hills and climbing

structures and provides the opportunity for chimpanzees to make choices about their daily activities. (R.114;117). Chimpanzees who previously lived alone or in very small groups for decades become part of large and natural chimpanzee families. (R.114). Grass, palm trees, hills, and climbing structures allow the chimpanzees places to run and roam, visit with friends, bask in the sun, curl up in the shade, or whatever else they may wish to do. (R.117). Save the Chimps has over fifty employees, including two full time veterinarians that provide twenty-four-hour coverage, with a support staff of technicians and assistants. (R.117-18).

III. ARGUMENT

A. NhRP MAY APPEAL AS OF RIGHT

CPLR Article 70 exclusively governs the procedure applicable to common law writs of habeas corpus, including the right to appeal. *See* CPLR 7001 ("the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention."). NhRP styled its Second Tommy Petition as an order to show cause as it was not demanding Tommy's production to the court. *See* CPLR 7003(a): "[t]he court to whom the petition is made shall issue the writ without delay on any day, *or where the petitioner does not demand production of the person detained*…order the respondent to *show cause* why the person detained should not be released" (emphasis added). *See, e.g.*, *Application of Mitchell*, 421 N.Y.S.2d 443, 444 (4th

Dept. 1979)("This matter originated when petitioner…sought, by an order and petition, a *writ of habeas corpus* (Respondents) to *show cause* why Ricky Brandon, an infant…should not be released and placed in petitioner's custody."); *People ex rel. Smith v. Greiner*, 674 N.Y.S.2d 588, 588 (Sup. Ct. 1998)("This is a habeas corpus proceeding brought by the petitioner pro se and commenced via Order to *Show Cause*"); *People ex rel. Goldstein on Behalf of Coimbre v. Giordano*, 571 N.Y.S.2d 371, 371 (Sup. Ct. 1991)("By order to *show cause*, in the nature of a Writ of Habeas Corpus proceeding, the petitioner seeks his release from the custody of the New York State Division for Youth…."); *In re Henry*, 1865 WL 3392 (N.Y. Sup. Ct. 1865)("the party arrested can apply for a habeas corpus, calling on the officer to *show cause* why he is detained")(emphasis added in each). NhRP did not seek an order to show cause that was independent of Article 70, as that would have been prohibited by, and contrary to, Article 70.

Once a petitioner's demand for an order to show cause why a detention is not illegal is refused, CPLR 7011 plainly and specifically "governs the right of appeal in habeas corpus proceedings." *Wilkes v. Wilkes*, 622 N.Y.S.2d 608 (2d Dept. 1995). That section expressly authorizes an appeal as of right "from a judgment *refusing, at the outset*, to grant a writ of habeas corpus or to issue an order to *show cause* (CPLR 7003(a))…" Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), CPLR 7011* (West 2014)(emphasis

added). Both the Third and Fourth Departments correctly recognized NhRP's right to appeal the refusal to issue the First Tommy Petition and First Kiko Petition, respectively.[2] *See, e.g.*, *State ex rel. Soss v. Vincent*, 369 N.Y.S.2d 766, 767 (2d Dept. 1975)("In a habeas corpus proceeding upon an order to show cause (CPLR 7003, subd. (a)), the appeal is from a judgment of the Supreme Court…which granted the petition and ordered petitioner released"); *People ex rel. Bell v. Santor*, 801 N.Y.S.2d 101 (3d Dept. 2005)("Petitioner commenced this CPLR article 70 proceeding seeking habeas corpus relief…Supreme Court dismissed the petition without issuing an order to show cause or writ of habeas corpus. Petitioner now appeals").

An appeal pursuant to CPLR 7011 is therefore an *exception* to the general rule that the denial of an order to show cause is not appealable. *See also People ex rel. Silbert v. Cohen*, 29 N.Y.2d 12 (1971); *Callan v. Callan*, 494 N.Y.S.2d 32, 33 (2d Dept. 1985); *Application of Mitchell*, 421 N.Y.S.2d at 444; *People ex rel. Flemming v. Rock*, 972 N.Y.S.2d 901 (1st Dept. 2013)(same). Accordingly, NhRP has an appeal as of right in this case as the "show cause" language was required by CPLR 7003(a) and the denial of this order to show cause is specifically appealable pursuant to CPLR 7011.

[2] The Second Department's plainly erroneous *sua sponte* dismissal of NhRP's appeal of the First Hercules and Leo Petition, which was made without notice, was correctly ignored by the Third and Fourth Departments.

B. NhRP HAS STANDING

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

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

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

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

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

"A court is always competent to issue a new habeas corpus writ on the same grounds as a prior dismissed writ." *People ex rel. Anderson v. Warden, New York City Correctional Instn. for Men*, 325 N.Y.S.2d 829, 833 (Sup. Ct. 1971). The common law rule permitting relitigation "after the denial of a writ, is based upon the fact that the detention of the prisoner is a continuing one and that the courts are under a continuing duty to examine into the grounds of the detention." *Post v. Lyford*, 285 A.D. 101, 104-05 (3d Dept. 1954)(prior adjudication no bar to new application on same grounds). *See People ex rel. Butler v. McNeill*, 219 N.Y.S.2d 722, 724 (Sup. Ct. 1961)("the ban of res judicata cannot operate to preclude the present proceeding;" petitioner's fifth application). This is because "[c]onventional notions of finality of litigation have no place where life or liberty is at stake[.]" *Sanders v. United States*, 373 U.S. 1, 8 (1963).

CPLR 7003(b) "continues the common law and present position in New York that res judicata has no application to the writ." ADVISORY COMMITTEE NOTES TO CPLR 7003(b). *See People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874); *People ex rel. Leonard HH v. Nixon*, 148 A.D.2d 75, 79 (3d Dept. 1989).

But the court declined to issue the order to show cause in the Second Tommy Petition, asserting:

> Declined, to the extent that the courts in the Third Dept. determined the legality of Tommy's detention, an issue best addressed there, & absent any allegation or ground that is sufficiently distinct from those set forth in the first petition (CPLR 7003(b)[)]." (Index No. 162358/2015, Doc.57).

(R.12;R.14). The court's conclusion is unsupported by the common law, CPLR 7003, and the cases cited, and is inconsistent with its recent ruling.

Six months earlier, the same court, in *Stanley*, properly held that neither issue preclusion nor claim preclusion barred the Second Hercules and Leo Petition, despite the absence of any "allegation or ground that is sufficiently distinct from those set forth in the first petition," *id.*, as there was no final judgment in the prior proceeding. 16 N.Y.S.3d at 908-10. It wrote:

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

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

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

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

Id. at 908-10.

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

First, although NhRP was granted an *ex parte* hearing in the First Tommy Petition, the court refused to issue the requested order to show cause and therefore did not determine the legality of Tommy's detention. (R.12-14). That alone is insufficient for preclusion, as *Stanley* recognized:

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

16 N.Y.S.3d at 909. The Third Department then affirmed, without reaching the legality of Tommy's detention, on the erroneous and novel ground that a chimpanzee such as Tommy is unable to bear duties and responsibilities and therefore is not a "person" for purposes of demanding a common law writ of habeas corpus. *Id.* at 902.

Second, the Second Tommy Petition presented substantial new grounds not previously presented and determined in response to *Lavery.* While NhRP disagreed with *Lavery*'s novel personhood standard, it nevertheless provided the lower court with sixty new pages of affidavits that contained facts neither previously presented with respect to Tommy, nor determined by any New York court. These new uncontroverted affidavits demonstrated that chimpanzees routinely bear duties and responsibilities and therefore can be "persons" even under the erroneous *Lavery* holding. As such, the court below was wrong in concluding that the Second Tommy Petition presented no "ground that is sufficiently distinct from those set forth in the first petition." (R.14).

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

responsibilities was required for personhood. Consequently, NhRP did not anticipate or argue that issue or include such facts in the original expert affidavits filed in the First Tommy Petition. These changed circumstances alone make the court's dismissal erroneous. This is especially so given there were no changed circumstances presented in the Second Hercules and Leo Petition, yet the same court issued that order to show cause.

Moreover, because the Fulton County Supreme Court refused to issue the order to show cause, NhRP was no more given the required full and fair opportunity to litigate the legal issue of Tommy's personhood than it was given a full and fair opportunity to litigate the legal personhood of Hercules and Leo in Suffolk County. *Stanley*, 16 N.Y.S.3d at 909. *See Allen v. New York State Div. of Parole*, 252 A.D.2d 691 (3d Dept. 1998). As *Stanley* recognized, "claim preclusion and issue preclusion contemplate 'that the parties had a full and fair' opportunity to litigate the initial determination.'" 16 N.Y.S.3d at 910 (citation omitted). NhRP was "thus not barred by the [Suffolk] County disposition from proceeding here." *Id.* "Nor should it be." *Id.* As *Stanley* made clear, the "writ is 'so primary and fundamental,' 'that it must take precedence over considerations of procedural orderliness and conformity.'" *Id.* (citation omitted).

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

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

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

"Whether the law should accord legal personality is a policy question[.]" *Byrn*, 31 N.Y.2d at 201 (emphasis added).[4] "Legal person" does not "necessarily correspond" to the "natural order." *Id*; *Accord Stanley*, 16 N.Y.S.3d at 916-17. It is not synonymous with human being. *Id. See* Paton, at 349-50, *Salmond on*

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

Jurisprudence 305 (12th ed. 1928)("Th[e] extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination,"); IV Roscoe Pound, *Jurisprudence* 192-93 (1959). "Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol." Paton, *supra* at 393. "There is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." Gray, *supra* Chapter II, 39, citing, among other authorities, those cited in *Byrn*, *supra*.

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

"Person" is a legal "term of art." *Wartelle v. Womens' & Children's Hosp.*, 704 So. 2d 778 (La. 1997). "[T]he significant fortune of legal personality is the

capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). "Person" has never been equated with being human, being human has never been either a necessary or a sufficient condition for personhood, and accordingly many humans have not been persons. "Person" may be narrower than "human being." A human fetus, which *Byrn*, 31 N.Y.2d at 199, acknowledged "is human," was not characterized as a Fourteenth Amendment "person." *See Roe v. Wade*, 410 U.S. 113 (1973). Black slaves were not "persons" in New York until the last slave was freed in 1827 or throughout the entire United States prior to the ratification of the Thirteenth Amendment in 1865. *See, e.g.*, *Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828).[5] Women were not "persons" for many purposes until well into the twentieth century. *See* Robert J. Sharpe and Patricia I. McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (2007). *Accord Stanley*, 16 N.Y.S.3d at 912.

On the other hand, corporations have long been "persons" within the meaning of the Fourteenth Amendment. *Santa Clara Cnty. v. Southern Pacific Railroad*, 118 U.S. 394 (1886). An agreement between the indigenous peoples of New Zealand and the Crown, p.10, ¶¶ 2.6, 2.7, and 2.8, recently granted New Zealand's Whanganui River Iwi "legal personality" so that it owns its riverbed and

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

is itself incapable of being owned. [6] In July of 2014, the Te Urewara park in New Zealand was designated as a "legal entity, and has all the rights, powers, duties, and liabilities of a person." http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183705.html. The Indian Supreme Court has designated the Sikh's sacred text as a "legal person." *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, A.I.R. 2000 S.C. 421. Pre-Independence Indian courts designated Punjab mosques as legal persons, to the same end. *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369, ¶15 (Lahore High Court, Full Bench). A pre-Independence Indian court designated a Hindu idol as a "person" with the capacity to sue. *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925).

The struggles over the legal personhood of human fetuses,[7] black slaves,[8] Jews,[9] Native Americans,[10] women,[11] corporations,[12] and other entities have never

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

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

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

[9] RA Routledge, "The Legal Status of the Jews in England," 3 The Journal of Legal History 91, 93, 94, 98, 103 (1982)(At least during the 13th century the Jews were the chattel of the King).

[10] *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879)(though Crook argued that Native Americans "had no more rights in a court of law than beasts of the field", they were, for the first time, deemed "persons" within the meaning of the Federal Habeas

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

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

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

Whether the term "person" in Article 70 may include a chimpanzee is a matter which must be determined under the New York common law of habeas corpus because: (1) the legislature chose not to define "person" in Article 70; (2)

Corpus Act); Stephen Dando Collins, *Standing Bear is a Person – The True Story of a Native American's Quest for Justice* 117 (Da Capo Press 2004).

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

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

the CPLR, particularly Article 70, solely governs procedure; and (3) if Article 70 limits the substantive common law of habeas corpus, it violates the "Suspension Clause" of the New York Constitution, Art. 1, §4.

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

Second, the CPLR governs only procedure and may neither abridge nor enlarge a party's substantive rights. CPLR 101 & 102. Therefore, it may not abridge substantive common law habeas corpus rights. This necessarily includes the threshold determination of whether Tommy is a "person" within the context of the New York common law of habeas corpus. *See People ex rel. Keitt v. McCann*,

18 N.Y.2d 257, 263 (1966)("Legislature did not intend to change the instances in which the writ was available"); *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 569 (1875)("the act needs no interpretation and is in full accord with the common law."); *Lavery*, 124 A.D.3d at 150 ("[W]e must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach.").

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

Tommy's thinghood derives from the common law. However, when justice requires, New York courts refashion the common law—especially the common law of habeas corpus—with the directness Lord Mansfield displayed in *Somerset v. Stewart*, when he held human slavery "so *odious* that nothing can be suffered to support it but positive law." 98 Eng. Rep. at 510 (emphasis added). "One of the hallmarks of the writ [is]…its great flexibility and vague scope." *McCann*, 18

N.Y.2d at 263 (citation omitted). Slaves employed the common law writ of habeas corpus to challenge their imprisonment as things. *Lemmon*, 20 N.Y. at 604-06, 618, 623, 630-31 (citing *Somerset*); *In re Belt*, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848); *In re Kirk*, 1 Edm. Sel. Cas. 315 (citing *Somerset* and *Forbes v. Cochran*, 107 Eng. Rep. 450, 467 (K.B. 1824); *In re Tom*, 5 Johns. 365). Non-slaves long employed it in New York, including (1) apprentices and indentured servants;[13] (2) infants,[14] (3) the incompetent elderly;[15] and (4) mental incompetents.[16]

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

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

we refuse to reconsider an old and unsatisfactory court-made rule." 303 N.Y. at 355.

Common law is "lawmaking and policymaking by judges…in principled fashion, to fit a changing society." Kaye, *supra*, at 729. In response to the question in *Woods* whether the Court should bring "the common law of this state, on this question [of whether an infant could bring suit for injuries suffered before birth] into accord with justice[,]" it answered: "we should make the law conform to right." 303 N.Y. at 351. The Court has explained that "Chief Judge Cardozo's preeminent work *The Nature of Judicial Process* captures our role best if judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." *Caceci v. Do Canto, Const. Corp.*, 72 N.Y.2d 52, 60 (1988)(citing Cardozo, *Nature of Judicial Process*, at 152).

New York courts have "not only the right, but the duty to re-examine a question where justice demands it" to "bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.'" *Woods*, 303 N.Y. at 355 (citation omitted). *See, e.g.*, *Gallagher v. St. Raymond's R.C. Church*, 21 N.Y.2d 554, 558 (1968)("the common law of the State is not an anachronism, but is a living law which responds to the surging reality of changed conditions"); *Millington v. Southeastern Elevator*

Co., 22 N.Y.2d 498, 508 (1968)("this court has not been backward in overturning unsound precedent."); *Bing v. Thunig*, 2 N.Y.2d 656, 668 (1957)(a rule of law "out of tune with the life about us, at variance with modern day needs and with concepts of justice and fair dealing…[i]t should be discarded"); *Silver v. Great American Ins. Co*., 29 N.Y.2d 356, 363 (1972)("Stare decisis does not compel us to follow blindly a court-created rule…once we are persuaded that reason and a right sense of justice recommend its change."); *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 391 (1916); *Rumsey v. New York and New England Railway Co*., 133 N.Y. 79, 85 (1892)(quoting 1 *Kent's Commentaries* 477 (13th edition 1884)("cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error")).

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

3. As an autonomous being Tommy is a common law person entitled to the common law right to bodily liberty that the common law of habeas corpus protects.

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

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

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

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

New York common law so supremely values autonomy that it permits competent adults to decline life-saving treatment. *Matter of Westchester Cnty. Med. Ctr. (O'Connor)*, 72 N.Y.2d 517, 526-28 (1988); *Rivers*, 67 N.Y.2d. at 493; *People v. Eulo*, 63 N.Y.2d 341, 357 (1984). This "insure[s] that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires." *Rivers*, 67 N.Y.2d at 493. It permits a permanently incompetent, once-competent human to refuse medical treatment, if he clearly expressed his desire to refuse treatment before incompetence silenced him, and no over-riding state interest exists. *Matter of Storar*, 52 N.Y.2d 363, 378 (1981). Even those who will never be competent, who have always lacked the ability and always will lack the ability, to choose, understand, or make a reasoned decision about medical treatment possess common law autonomy and dignity equal to the competent. *Matter of M.B.*, 6 N.Y.3d at 440; *Rivers*, 67 N.Y.2d at 493 (citing *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728 (1977)); *Matter of Storar*, 52 N.Y.2d at 380.

The capacity of chimpanzees such as Tommy for autonomy, which subsumes many of their numerous complex cognitive abilities, are set forth in the Expert Affidavits attached to the Second Tommy Petition. In June 2013, the NIH recognized the ability of chimpanzees to choose and self-determine. Accepted Recommendation EA7 states: "The environmental enrichment program developed

for chimpanzees must provide for relevant opportunities for choice and self determination." (R.211). The NIH noted "[a] large number of commenters who responded to this topic strongly supported this recommendation as a way to ensure both the complexity of the captive environment and chimpanzees' ability to exercise volition with respect to activity, social grouping, and other opportunities." (*Id*.)

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

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

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

New York equality values are embedded into New York common law. At common law, such private entities as common carriers, victualers, and innkeepers may not discriminate unreasonably or unjustly. *See*, *e.g.*, *Hewitt v. New York*, *N.H. & H.R. Co.*, 284 N.Y. 117, 122 (1940)("At common law, railroad carriers are under a duty to serve all persons without unjust or unreasonable advantage to any. So this court has said that a carrier should not 'be permitted to unreasonably or unjustly discriminate against other individuals to the injury of their business where the conditions are equal.'")(citation omitted); *New York Tel. Co. v. Siegel-Cooper Co.*, 202 N.Y. 502, 508 (1911); *Lough v. Outerbridge*, 143 N.Y. 271, 278 (1894); *People v. King*, 110 N.Y. 418, 427 (1888).

New York equality is not merely a product of its constitutions, statutes, and common law operating independently. Two decades ago, Chief Judge Kaye confirmed that the two-way street between common law decision-making and constitutional decision-making had resulted in a "common law decision making infused with constitutional values." Kaye, *supra*, at 747. In harmony with common law equality principles that forbid private discrimination, the common law of equality embraces, at minimum, its sister fundamental constitutional equality value—embedded within the New York and the United States Constitutions—that prohibits discrimination based on irrational means or illegitimate ends. *Romer v.*

Evans, 517 U.S. 620, 633 (1996)("'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.'")(citation omitted).

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

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

In contrast, a classification's appropriateness is crucial to a court deciding common law. It *should* decide what is right and wrong. Its job *is* to do the "right

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

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

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

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

In *Romer*, the Court struck down "Amendment 2," because its purpose of repealing all existing anti-discrimination positive law based upon sexual orientation was illegitimate. 517 U.S. at 626. It violated equal protection because "[i]t is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board." *Id.* at 633. Amendment 2 was "simply so obviously and fundamentally inequitable, arbitrary, and oppressive that

it literally violated basic equal protection values." *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997); *Mason v. Granholm*, 2007 WL 201008 (E.D. Mich. 2007); *Goodridge*, 440 Mass. at 330 (same-sex marriage ban impermissibly "identifies persons by a single trait and then denies them protection across the board"). The true test is whether persons are similarly situated for purposes of the law challenged. *Kerrigan v. Comm'r of Public Health*, 289 Conn. 135, 158 (2008).

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

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

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

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

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

are reminiscent of human responses to similar situations.[18]

For centuries New York courts rejected human slavery, a status that stripped the slave of her autonomy and harnessed her to her master's will. *Lemmon*, 20 N.Y. 562, is acknowledged as "one of the most extreme examples of hostility to slavery in Northern courts[.]" Paul Finkleman, *Slavery in the Courtroom* 57 (1985). "'[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.'" 16 N.Y.S.3d at 917-18 (citation omitted). The legal personhood of chimpanzees, at least with respect to their right to a common law writ of habeas corpus, is one of those truths; their legal thinghood has become an embarrassing anachronism.

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

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

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

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

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

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

Lavery is the first English-speaking court's decision to hold that an inability to bear duties and responsibilities allows that court to deny a fundamental common law right to an individual (except in the individual's own interests), much less an

autonomous, self-determining entity seeking a common law writ of habeas corpus. Significantly, however, *Lavery* was based neither on precedent nor sound policy. It stated that "animals have never been considered persons for the purpose of habeas corpus relief, nor have they been explicitly considered as persons or entities for the purpose of state or federal law." 124 A.D.3d at 150. This is true only because no such claim had ever been presented. Moreover, the New York statute that allows nonhuman animals to be trust beneficiaries and provides for an enforcer who "performs the same function as a guardian ad litem for an incapacitated person," *In re Fouts*, 677 N.Y.S.2d 699, 700 (Sur. Ct. 1998), undermines *Lavery*'s assertion that New York legal personhood is premised upon the ability to bear duties and responsibilities and that nonhuman animals have never been considered "persons" under New York law.

Further, NhRP did not bring its cases in federal court or ground its claims on any statute or constitution. Its cause of action is common law. The cases cited in *Lavery* were therefore irrelevant because they were federal cases that had either been dismissed for lacking Article III standing or because the enabling statute's definition of "person" did not include nonhuman animals. 124 A.D.3d at 150. None were common law claims; all involved statutory or constitutional interpretation. *See Lewis v. Burger King*, 344 Fed. Appx. 470 (10th Cir. 2009)(rejecting plaintiff's claim that her service dog had standing to sue under the

Americans with Disabilities Act of 1990); *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004)(all cetaceans of the world lacked standing under the Endangered Species Act and were not within that statute's definition of "person"); *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012)(legislative history makes clear Thirteenth Amendment was only intended to apply to human beings); *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993)(dolphin not a "person" within meaning of Administrative Procedures Act, sec. 702). Each court, however, agreed that a nonhuman animal could be a "person" if Congress intended, but concluded that, with respect to the enactments involved, Congress had not so intended. *Lewis*, 344 Fed. Appx. at 472; *Cetacean Community*, 386 F.3d at 1175-76; *Tilikum*, 842 F. Supp. 2d at 1262 n.1; *New England Aquarium*, 842 F. Supp. 2d at 49. *See Lavery*, 124 A.D.3d at 150 ("we must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach").

Similarly, none of the cases cited in *Lavery* support its statement that "habeas corpus has never been provided to any nonhuman entity," *id.*, if what that court meant was that no entity that could possibly be detained against its will has ever been denied a writ of habeas corpus. *See United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995)(corporation permitted to utilize writ of *coram nobis*); *Waste*

Management of Wisconsin, Inc. v. Fokakis, 614 F.2d 138, 140 (7th Cir. 1980)(corporation refused habeas corpus "because a corporation's entity status precludes it from being incarcerated or ever being held in custody"); *Graham v. State of New York*, 25 A.D.2d 693 (3d Dept. 1966)(habeas corpus purpose is to free prisoners from detention, not secure return of inanimate personal property); *Sisquoc Ranch Co. v. Roth*, 153 F.2d 437, 439 (9th Cir. 1946)(corporation with contractual relationship with human lacked standing to seek corporate habeas corpus). Thus, no nonhuman who could possibly be imprisoned had ever sought a writ of habeas corpus.

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

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

> the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity of rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system. (see Richard L. Cupp, Jr., "Children, Chimps, and Rights: Arguments from 'Marginal' Cases,'" 45 *Ariz. St. LJ* 1, 12-14 (2013); Richard L. Cupp, Jr., "Moving Beyond Animal Rights: A Legal Contractualist Critique," 46 *San Diego L. Rev.* 27, 69-70 (2009); *see*

> *also Matter of Gault*, 387 U.S. 1, 20-21 (1967); *United States v. Barona*, 56 F.3d 1087, 1093-1094 (9th Cir. 1995), *cert. denied* 516 US 1092 (1996). Under this view, society extends rights in exchange for an express or implied agreement of its members to submit to social responsibilities. In other words, "Rights [are] connected to moral agency and the ability to accept societal responsibility for [those] rights" [citing the two Cupp articles].

124 A.D.3d at 151. Neither *Gault* nor *Barona* are relevant. *Gault*'s unexplained and isolated mention of a "social compact" was irrelevant to its determination that children were entitled to due process and is irrelevant to the case at bar. *Barona* merely concerned an interpretation of the phrase "the People of the United States." 56 F.3d at 1093-94. The two Cupp articles merely set forth one professor's unsupported preference for a narrow philosophical contractualism that arbitrarily excludes every nonhuman animal, while including every human being, in support of which he cites no cases.[19]

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

> Application of the habeas statute to persons[20] detained at the base (in Guantanamo) is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm …[Citing, *inter alia*, *Somerset* and *Case of the Hottentot Venus*]

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

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

> American courts followed a similar practice in the early years of the Republic. See, *e.g., United States v. Villato*, 2 Dall. 379 (CC Pa. 1797)(granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States) [citations omitted]

In *Jackson v. Bulloch*, 12 Conn. 38, 42-43 (1837), a slave was freed pursuant to habeas corpus despite being excluded from the social compact. Because of culture or disability, many are unable to be part of a social compact, as chimpanzees may be; others may loathe our social compact and seek to destroy it. Nevertheless they may avail themselves of habeas corpus.

Lavery ignored the teachings of *Byrn* that "[w]hether the law should accord legal personality is a policy question," "[i]t is not true…that the legal order necessarily corresponds to the natural order," and "[t]he point is that it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence." 31 N.Y.2d at 201; *see* Paton, *supra* at 349-50. *Lavery* failed to recognize that whether a chimpanzee is a "person" for the purpose of demanding a common law writ of habeas corpus is entirely a policy, and not a biological, question. It further failed to address the powerful uncontroverted policy arguments, based upon fundamental common law values of liberty and equality, that NhRP presented in detail (R.752-800), and ignored the fact that, in such sister common law countries as New Zealand and India, entities

have been designated as a "person" though lacking the capacity to bear duties or responsibilities, *supra.*

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

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

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

Further, *Lavery* mistook NhRP's demand for the "immunity-right" of bodily liberty, to which the ability to bear duties and responsibilities is by definition irrelevant, for a "claim-right." Linking personhood to an ability to bear duties and responsibilities is particularly inappropriate in the context of common law habeas corpus to enforce the fundamental common law immunity-right to bodily integrity. The court's linkage of the two caused it to commit a "category of rights" error by mistaking an "immunity-right" for a "claim-right." *See generally*, Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913). Hohfeld's conception of the comparative structure of rights has long been employed as the overwhelming choice of courts,

jurisprudential writers, and moral philosophers when they discuss what rights are. Hohfeld began his famous article by noting that "[o]ne of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties'" and that "the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense." *Id*. at 28, 30.

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

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

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

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

that entity to have the capacity to assert claims within a moral community. *Id*. at 808-10. This is akin to the personhood test applied in *Lavery*.

In neither *Lavery* nor the case at bar did NhRP seek a claim-right. Instead it sought the immunity-right to bodily liberty protected by the common law of habeas corpus. This is the sort of immunity-right that the Supreme Court was referring to in *Botsford*, 141 U.S. at 251, *supra* at 41. An immunity-right correlates not with a duty, but with a disability. Wise, *Hardly a Revolution*, *supra* at 810-15. Other examples of fundamental immunity-rights are the Thirteenth Amendment right not to be enslaved, which disables others from enslaving those covered by that Amendment, and the First Amendment right to free speech, which the government is disabled from abridging. The ability to bear duties and responsibilities is logically not necessary to possess the rights to bodily liberty, freedom from enslavement, and free speech.

Harris v. McRea, 448 U.S. 297, 316-18, 331 (1980) illustrates the difference between a claim-right and an immunity-right. The plaintiff claimed she had the claim right to have the state pay for an abortion she was unable to afford because of *Roe v. Wade's* recognition of a woman's right to privacy against interference by the state with her decision to have an abortion. The Court recognized her immunity right to an abortion correlated with the state's disability to interfere in her decision to have the abortion, not with the state's duty to fund the abortion. NhRP argues

Tommy has the common law immunity right to bodily liberty protected by common law habeas corpus, which correlates with Respondents' disability to imprison him. Tommy's ability to bear duties and responsibilities is irrelevant to his fundamental immunity-right to bodily liberty.

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

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

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

That chimpanzees cannot bear duties and responsibilities is not an adjudicative fact. Judicial notice is generally inappropriate in "scientifically

complex cases." *Hamilton*, 23 N.Y.3d at 603-04. As it is inappropriate to take judicial notice of scientific facts found in "statutory preambles," *id.*, it was inappropriate for the Third Department to take judicial notice of a complex scientific fact based on two law review articles. *Lavery*, 124 A.D.3d at 151. The source of the underlying information must be of "indisputable accuracy," *Crater Club v. Adirondack Park Agency*, 86 A.D.2d 714, 715 (3d Dept. 1982), and so "patently trustworthy as to be self-authenticating." *People v. Kennedy*, 68 N.Y.2d 569, 577 (1986). Judicial notice was further inappropriate "because of the novelty of the issue in this State." *Brown v. Muniz*, 61 A.D.3d 526, 528 (1st Dept. 2009).

3. Tommy can bear duties and responsibilities.

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

If this Court further agrees with *Lavery* that being a member of a species that "collectively" has the capacity to bear duties and responsibilities is necessary to be

a "person," 124 A.D.3d at 152 n.3, then the uncontroverted supplemental affidavits attached to the Second Tommy Petition make clear that chimpanzees "collectively" possess this capacity.

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

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

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

New York common law incorporated the common law of England, which was long *in favorem libertatis* ("in favor of liberty"). Francis Bacon, "The argument of Sir Francis Bacon, His Majesty's Solicitor General, in the Case of the Post-Nati of Scotland," in IV *The Works of Francis Bacon, Baron of Verulam, Viscount St. Alban, and Lord High Chancellor of England* 345 (1845)(1608); 1 Sir Edward Coke, *The First Part of the Institutes of the Laws of England* sec. 193, at *124b (1628); Sir John Fortescue, *De Laudibus Legum Angliae* 105 (S.B. Chrimes,

trans. 1942 [1545]). *See, e.g.*, *Moore v. MacDuff*, 309 N.Y. 35, 43 (1955); *Whitford v. Panama R. Co*., 23 N.Y. 465, 467-68 (1861); *In re Kirk*, 1 Edm. Sel. Cas. at 327; *Oatfield*, 14 Johns. at 193; *Fish*, 2 Johns. Cas. at 90 (Radcliffe, J.); *Kelly*, 33 Barb. at 457-58 (Potter, J.)("Liberty and freedom are man's natural conditions; presumptions should be in favor of this construction"). New York statutes harmonize with this common law presumption. *See* N.Y. Stat. Law §314 (McKinney)("A statute restraining personal liberty is strictly construed"); *People ex rel. Carollo v. Brophy*, 294 N.Y. 540, 545 (1945); *People v. Forbes*, 19 How. Pr. 457, 11 Abb. Pr. 52 (N.Y. Sup. Ct. 1860)(statutes must be "executed carefully in favor of the liberty of the citizen").

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

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

That NhRP seeks Tommy's discharge to a sanctuary rather than unconditional release onto the streets of New York does not preclude habeas

corpus relief. *Stanley* properly rejected the argument that because NhRP sought "[Hercules' and Leo's] transfer to a chimpanzee sanctuary, it has no legal recourse to habeas corpus," concluding that *Presti* conflicted with First Department and Court of Appeals precedent. 16 N.Y.S.3d at 917 n.2 (citing *McGraw*, 220 A.D.2d at 292; *Matter of MHLS ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989)). *See McCann*, 18 N.Y.2d at 273; *Johnston*, 9 N.Y.2d at 485 (habeas proper remedy to test validity of transfer from state prison to state hospital for the insane); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943)(commitment to reformatory); *People ex rel. LaBelle v. Harriman*, 35 A.D.2d 13, 15 (3d Dept. 1970)("Although relator is incarcerated and the writ will not secure his freedom, habeas may be used to obtain relief other than immediate release from physical custody"); *People ex rel. Meltsner v. Follette*, 32 A.D.2d 389, 391 (2d Dept. 1969)(discharge not required); *People ex rel. Ardito v. Trujillo*, 441 N.Y.S.2d 348, 350 (Sup. Ct. 1981). Tommy's case is analogous to the relief accorded to child slaves, juveniles, and the incapacitated elderly.

An unlawfully detained person may be discharged into the care or custody of another. Imprisoned children and incapacitated adults have been discharged from slavery, industrial training schools, mental institutions, and other unlawful imprisonments into the custody of another. *See Lemmon*, 20 N.Y. at 632 (five slave children discharged); *Commonwealth v. Taylor*, 44 Mass. 72, 72-74 (1841)(slave

child discharged into care of Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Aves*, 35 Mass. 193 (1836)(slave child discharged to Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Holloway*, 2 Serg. & Rawle 305 (Pa. 1816)(slave child discharged); *State v. Pitney*, 1 N.J.L. 165 (N.J. 1793)(manumitted child discharged).

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

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

Habeas corpus may even be used to seek a transfer from one prison or hospital facility to another. *See Wack*, 75 N.Y.2d 751 (mental patient transferred from secure to non-secure facility); *Bennett*, 242 A.D.2d 342; *People ex rel. Richard S. v. Tekben*, 219 A.D.2d 609, 609 (2d Dept. 1995); *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 251 (2d Dept. 1993)(habeas corpus "available to challenge conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. Meltsner*, 32 A.D.2d at 391-92 (transfer from prison to correctional institution proper); *People ex rel. Ceschini v. Warden*, 30 A.D.2d 649, 649 (1st Dept. 1968).

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

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

beneficiary capable of enforcing it, and because nonhuman lives cannot be used to measure the perpetuities period." Margaret Turano, *Practice Commentaries*, N.Y. Est. Powers & Trusts Law 7-8.1 (2013).

In 1996, the Legislature enacted EPTL 7-6 (now EPTL 7-8) (a), which permitted "domestic or pet animals" to be designated as trust beneficiaries. The Sponsor's Memorandum stated the statute's purpose was "to allow animals to be made the beneficiary of a trust."[22] This section thereby acknowledged these nonhuman animals as "persons" capable of possessing legal rights. In *In re Fouts*, 677 N.Y.S.2d 699 (Sur. Ct. 1998), the court recognized that five chimpanzees were "income and principal beneficiaries of the trust" and referred to its chimpanzees as "beneficiaries" throughout. See *Feger v. Warwick Animal Shelter*, 59 A.D.3d 68, 72 (2d Dept. 2008)("the law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner.").

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

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

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

IV. CONCLUSION

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

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

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

Dated: Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

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

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

Petitioner-Appellant.

-against-

PATRICK C. LAVERY, individually and as an officer and director of Circle L Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents.

PRE-ARGUMENT STATEMENT

Index No.: 162358/15
NYSCEF Doc. No. 68
(New York County)

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

2. There is no additional appeal pending in this action.

3. There are no related actions pending.

4. The nature of the underlying proceeding in this action is a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") brought by Petitioner-Appellant, The Nonhuman Rights Project, Inc. ("NhRP"), on behalf of a chimpanzee named Tommy, under CPLR Article 70 seeking a determination of the legality of Tommy's detention and an order requiring his immediate release and transfer to an appropriate primate sanctuary. *See Nonhuman Rights Project, Inc. on behalf of Tommy v. Patrick C. Lavery, et al.*, Index #: 162358/2015 (Dec. 2, 2015).

5. The appeal is taken from a final Order of the Supreme Court, New York County, that the Honorable Barbara Jaffe entered on July 8, 2016 and made effective *nunc pro tunc* as of December 23, 2015, the date the lower court had declined to sign the order to show cause. *Nonhuman Rights Project, Inc. on behalf of Tommy v. Patrick C. Lavery, et al.*, Index #: 162358/2015 (Dec. 2, 2015), NYSCEF 68 (July 8, 2016 order), NYSCEF 57 (Dec. 23, 2015 order).

6. NhRP was required to style the Petition as an order to show cause pursuant to CPLR 7003(a) as it did not demand production of Tommy to the court. CPLR 7011 authorizes an appeal as of right "from a judgment refusing an order to show cause issued under subdivision (a) of section 7003." This case is therefore properly before this Court.

7. The lower court declined to sign the order to show cause on the grounds that: (a) the issue of the legality of Tommy's detention had been decided by the New York State Supreme Court Appellate Division, Third Judicial Department ("Third Department") in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015) and NhRP's arguments were best addressed there; and (b) there were no allegations or grounds sufficiently distinct from those set forth in the first petition filed by NhRP on behalf of Tommy, citing CPLR 7003(b).

The grounds for seeking reversal of the lower court's order are: (a) Tommy is a "person" within the meaning of CPLR Article 70 and the common law of habeas corpus; (b) *Lavery*'s holding that chimpanzees are not "persons" for the purpose of demanding a common law writ of habeas corpus rests upon the erroneous legal ruling, unprecedented in any common law court anywhere in the world, that the capacity to bear duties and responsibilities individually or "collectively" at the level of species is necessary for a petitioner to be deemed a "person" for the purpose of a common law writ of habeas corpus, or for any other purpose; (c) the Third Department erroneously took judicial notice of the complex scientific "fact" that chimpanzees could not bear duties and responsibilities, as no evidence bearing on that fact was introduced before either the lower court or on appeal, nor were the parties given notice of the Court's intention to take judicial notice of this fact,; (d) in response to the erroneous legal rulings in *Lavery,* NhRP provided the lower court with approximately 60 pages of new and distinct expert supplemental affidavits not previously presented that were directed solely to demonstrating that chimpanzees routinely bear duties and responsibilities both within chimpanzee communities and mixed chimpanzee/human communities; (e) these new facts and grounds were not previously presented in the petition brought by NhRP on behalf of Tommy in the Supreme Court, Fulton County as NhRP could not have reasonably anticipated *Lavery's* unprecedented rulings; (f) the

lower court cited, then improperly failed to apply, the standards for denying successive petitions as set forth in CPLR 7003(b); (g) the question of whether the ability to bear duties and responsibilities is necessary for a determination of personhood is not "best addressed" by the Third Department, but by this Court, as this Court has never ruled on this issue; and (h) based upon the uncontroverted facts, Tommy is entitled to the immediate issuance of the requested order to show cause, an appropriate hearing, and an order releasing him forthwith from detention and transfer to an appropriate sanctuary, which NhRP suggests is Save the Chimps, in Ft. Pierce, Florida.

Date: 10/6/16

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Attachments:

1. Copy of Order appealed from.
2. Copy of Notice of Appeal.