

Proceedings

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - CIVIL BRANCH - PART: 12

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

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of
HERCULES and LEO,

Petitioners,

-against-

INDEX NO.
152736/15

SAMUEL L. STANLEY, JR., M.D., as President of
State University of New York at Stony Brook a/k/a
Stony Brook University and STATE UNIVERSITY OF
NEW YORK AT STONY BROOK a/k/a STONY BROOK
UNIVERSITY,

Respondents.

-----X
60 Centre Street
New York, New York 10007
May 27, 2015

B E F O R E:

HONORABLE BARBARA JAFFE, Justice

A P P E A R A N C E S:

NONHUMAN RIGHTS PROJECT
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ANGELA TOLAS, CSR
OFFICIAL COURT REPORTER

AT

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1
2 COURT CLERK: Nonhuman Rights Project,
3 Incorporated, on behalf of Hercules and Leo, against Samuel
4 L. Stanley, Junior, MD.

5 Counselors, please state your appearances for the
6 record.

7 MR. WISE: Steven M. Wise for the Nonhuman Rights
8 Project.

9 MR. COULSTON: Christopher Coulston on behalf of
10 respondent Sam Stanley, State University. With me is
11 Michael Klekman, Assistant Attorney General's office.

12 THE COURT: Can you spell it?

13 MR. KLEKMAN: K-L-E-K-M-A-N.

14 MR. WISE: Your Honor, I forgot to introduce my
15 co-counsel Elizabeth Stein.

16 THE COURT: Very good. Good morning and welcome.
17 I know that you all are aware that we are here for oral
18 argument by the lawyers in this case, and that only they
19 have permission to speak. And as the acoustics in this
20 room are less than ideal, I ask that everyone please
21 refrain from talking when the lawyers are talking, and that
22 you silence any electronic equipment that you have. And as
23 you can see the proceedings are being recorded.

24 Before we commence argument, I would like to
25 observe that on the first page of the petition that was
26 presented to me with the order to show cause it reads as

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2 follows. "The Court need not make an initial determination
3 that Hercules and Leo are persons in order to issue the
4 writ and show cause order."

5 I thus signed the order in anticipation of
6 hearing both sides address the procedural and substantive
7 issues raised. That being said and having read
8 respondents' opposing papers, I ask that the parties first
9 address the procedural issues raised in respondents'
10 opposition with respondents going first.

11 I will then hear the parties on the issue of
12 legal personhood for habeas purposes with petitioner going
13 first in that case.

14 MR. COULSTON: Just for clarity sake, your Honor,
15 you want me to focus on the cross-motion for venue that was
16 filed and begin there?

17 THE COURT: That's fine.

18 MR. COULSTON: Okay, your Honor, we think
19 petitioners are form shopping here. This is the fourth
20 petition, identical petition largely that was filed by the
21 Nonhuman Rights Project on behalf of chimpanzees in the
22 State of New York. In the other three cases the order to
23 show cause was not signed by a Supreme Court Judge, and the
24 Second, Third and Fourth Department all ruled that Article
25 70 didn't apply for various reasons to chimpanzees.

26 We are here today because petitioner is seeking

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2 to avoid those rulings in the second department. There has
3 already been a petition that was filed on behalf of
4 Hercules and Leo that was in Suffolk County. Suffolk
5 County is where Stonybrook is located. It's where Hercules
6 and Leo are located. And under Article 70 it's where this
7 hearing should be held.

8 We think CPLR 7004 is very straightforward
9 referring to State institutions as a place of detention
10 that the only appropriate place to hold a hearing on an
11 habeas petition is in that county where the person is
12 detained. We obviously don't concede that the chimpanzees
13 are persons, but they brought this pursuant to Article 70
14 and we think those provisions should apply here.

15 They have made the argument that SUNY is not a
16 State Institution. New York Education Law plainly states
17 that it is and that Stonybrook is a part of SUNY. So
18 frankly we don't see how that provision CPLR 7004(c) would
19 not apply here. We made a separate argument under 7002
20 using the plain language of that statute that under
21 7002(b)(1) if you're to bring a petition before Supreme
22 Court it again needs to be where the person is detained,
23 again that would be in Suffolk County.

24 They have relied on 7002(b)(3) which says to any
25 Justice of the Supreme Court, but there again the language
26 indicates that it would need to be specifically brought

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2 to the justice.

3 This is a statute incorporating a lot of older
4 law and, you know, I think what it envisions in an
5 emergency proceeding where you go to a judge when the
6 courthouse is not open to you. But if you proceed to the
7 courthouse, you need to go where the person is detained.
8 For those reasons we don't think the venue's proper here,
9 and the matter should be transferred to Suffolk County.

10 There is also a discretionary provision in the
11 matter that was already before Judge Asher in Suffolk
12 County. This Court can transfer it based on the fact that
13 Judge Asher's already had this before him, and it's
14 actually probably 7004(c) that it may be returnable in a
15 county where -- sorry, just one moment, your Honor.
16 (Perusing.)

17 Right, under 7004 there is a discretionary
18 provision where the Judge may transfer it to the county
19 where the person is detained as well. So then we think
20 there is a provision it's also discretionary as well. We
21 think it's appropriate here given that everything relevant
22 that's going on in this case is in Suffolk County.

23 Do you have any other questions? I'll be happy
24 to answer them, otherwise...

25 THE COURT: Well, what's going on with the Court
26 of Appeals?

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2 MR. COULSTON: So right now they filed seeking
3 leave to basically have the Court of Appeals hear their
4 case in the third party. I believe the Third Department
5 denied their request for leave to appeal. They appealed
6 directly to the Court of Appeals, that's pending. They
7 also are seeking leave from the Fourth Department, I
8 believe that's still pending.

9 MR. WISE: It was denied in the Fourth
10 Department.

11 MR. COULSTON: It was denied.

12 THE COURT: Same?

13 MR. COULSTON: Same situation.

14 THE COURT: Why shouldn't I abide the Court of
15 Appeals?

16 MR. COULSTON: Why?

17 THE COURT: Should I or shouldn't I abide a
18 decision by the Court of Appeals?

19 MR. COULSTON: Abide a decision by the Court of
20 Appeals?

21 THE COURT: If they grant leave, shouldn't I wait
22 and see what they eventually do, and I'll ask Mr. Wise the
23 same question.

24 MR. COULSTON: Your Honor, I think that would be
25 prudent if, in fact, the Court of Appeals is going to rule
26 on this issue it would seem premature for anything contrary

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2 to be done by this Court.

3 At the same time we think the decision of the
4 Third and Fourth Department as of now are binding on this
5 Court. So if your Honor were to proceed, those decisions
6 are still binding despite the fact they have sought leave
7 to appeal to the Court of Appeals.

8 THE COURT: Talking about institutions, you seem
9 to narrowly interpret the statute in general. You don't
10 want it more broadly interpreted to include other things.
11 Why shouldn't I narrowly interpret the term "institution"
12 as well?

13 MR. COULSTON: Well, your Honor, we think even
14 with a narrow interpretation of SUNY is absolutely a State
15 Institution.

16 THE COURT: Is that the kind of institution
17 contemplated?

18 MR. COULSTON: I understand that, your Honor.
19 Here we are in the world of analogy. This whole case is
20 proceeding based on analogy. Petitioner wants to use
21 Article 70 as analogy, and they want it for their own
22 purposes. And when it doesn't serve their purposes, they
23 want it to be read literally.

24 These chimpanzees are being detained, according
25 to petitioner, at a State Institution. It wasn't
26 contemplated, but it was also never contemplated that

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1 chimpanzees would be subject to a writ of habeas corpus.

2 We think you can't have it both ways. Either the
3 procedures in Article 70 has to applied, or Article 70
4 doesn't apply at all, and habeas doesn't apply for
5 chimpanzee.
6

7 THE COURT: And what would be the purpose of
8 transferring this case to Suffolk County?

9 MR. WISE: It would be in the interest of comity
10 and abide by Article 70. And I mean the fact that a
11 Supreme Court Judge already denied a petition here --

12 THE COURT: On the merits? Not really.

13 MR. COULSTON: I believe it was on its merits,
14 your Honor, and there is a two-sentence order that was
15 issued by the Judge where the Judge plainly stated that he
16 was going to view it under CPLR, I believe it was 2214,
17 2214 as opposed to under Section 7002, plainly and then
18 further said chimpanzees are not purposes -- for purposes
19 of Article 70.

20 That was then appealed to the Second Department.
21 The Second Department had the opportunity to say, you know
22 what, Article 70 does apply here, we will hear your appeal
23 because Section 7001 of the CPLR allows appeals even when
24 they are ex parte. That didn't happen.

25 The Second Department agreed with the Supreme
26 Court Judge. We think that's substantial enough to rise to

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2 the level, that's res judicata, and issue of preclusion
3 with respect to whether or not Article 70 applies to these
4 chimpanzees.

5 THE COURT: So it's your position that because
6 the Second Department considered the appeal, that that is a
7 ruling on the merits? Let's say the Second Department
8 hadn't ruled and there was just Judge Asher's decision,
9 would that be res judicata?

10 MR. COULSTON: Yes, your Honor.

11 THE COURT: To decline to sign an order to show
12 cause is res judicata?

13 MR. COULSTON: I believe because of the --

14 THE COURT: Do you have authority for that,
15 counsel?

16 MR. COULSTON: Your Honor, I don't have authority
17 for that. What I have is a signed order where I think the
18 order specifically states the basis for the decision that
19 Article 70 didn't apply. It wasn't the denial of a
20 traditional habeas petition, it was a ruling that Article
21 70 doesn't apply to chimpanzees.

22 It's short, it's to the point, but it's
23 undeniable. And the last sentence says, "Further, Article
24 70 of the CPLR Section 7002 applies to persons, therefore
25 habeas corpus relief does not lie."

26 THE COURT: And what about the venue of the

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2 regular ordinary plain vanilla venue statute where it
3 applies to so-called trials? Tell me, how is this, what is
4 it 511?

5 MR. COULSTON: How that would apply here?

6 THE COURT: Yes.

7 MR. COULSTON: Well, your Honor, Stonybrook is,
8 like I said, in Suffolk County. The chimpanzees are in
9 Suffolk County. The petitioner I believe is in Florida and
10 Massachusetts. I don't want to mischaracterize them, but I
11 think that's where they are incorporated and have their
12 place of business. There is nothing in New York County,
13 your Honor. I think even under traditional rules of venue,
14 New York County would still be an inappropriate county
15 here.

16 THE COURT: Thank you.

17 MR. COULSTON: Thank you, your Honor.

18 THE COURT: Mr. Wise?

19 MR. WISE: Thank you, your Honor.

20 First I want to bring to the attention of the
21 Court that my brother was -- and in Massachusetts we call
22 the other lawyer brother and sister, sometimes judges don't
23 know what I am talking about. So if it's all right, I'll
24 just refer to him as my brother.

25 THE COURT: Hearing no objection?

26 MR. COULSTON: I do not object. I never had a

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2 brother.

3 MR. WISE: My brother brought it as a
4 cross-motion, his venue, which we don't think is the right
5 thing to do. The statute says it's to be by motion. It
6 was brought by cross-motion. There wasn't a motion to
7 cross, so we think there is at least somewhat of a
8 procedural error to bring it by cross-motion.

9 The second thing is that under CPLR 224(b), if
10 you're going to bring a motion then you have to give us
11 eight days' notice. My brother gave us the motion about
12 three or 4:00 o'clock on Friday afternoon which means we
13 had one business day, yesterday, which I must say was a
14 very long day for us, to be able to respond. And so I
15 think it's not timely.

16 THE COURT: Well, you did file, Ms. Stein filed
17 an affirmation.

18 MS. STEIN: Yes.

19 THE COURT: Which I did read.

20 MR. WISE: Thank you. We got it about eight or
21 9:00 o'clock last night, we were able to do that.

22 THE COURT: She filed one in response to the
23 demand?

24 MR. WISE: Oh, yes, we have that, your Honor, as
25 well.

26 MS. STEIN: Yes.

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2 MR. WISE: So this was done, the subsequent
3 motion, which we think under 224(b) does require an
4 eight-page notice, we only got at the best we got five,
5 which one of them are today, and three of them are
6 holidays. We would urge the Court not even consider the
7 motion because it's not timely.

8 The last part of that would be that even if you
9 use CPLR 511, which we think you don't use for writ of
10 habeas corpus, then you have to have due diligence.

11 Now in this case, this Court had ordered the
12 original hearing for just a few days after we had filed.
13 By agreement of counsel we had moved -- they had more than
14 a month in which to prepare their case.

15 So they should have given us notice earlier in
16 order for us to be able to have a chance to file our
17 opposition to their statement, and then they should have
18 then filed a motion to give us eight days so then we could
19 reply. For those three reasons we feel that, first of all,
20 the motion itself is not timely.

21 MR. COULSTON: Your Honor, may I address that
22 briefly?

23 THE COURT: Do you mind?

24 MR. WISE: I don't mind.

25 MR. COULSTON: I'm sorry, your Honor, just to
26 clear it up very quickly 2211 of the CPLR says that it's

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2 the order to show cause and it's treated as a motion on the
3 docket for your Honor, their motion, their order to show
4 cause for habeas relief is listed as a motion. We thought
5 a cross-motion is appropriate here.

6 And under 2215, which applies to cross-motions,
7 they need to be served three days prior to the hearing
8 which was proper here, just Friday, three days before the
9 hearing today on Wednesday.

10 THE COURT: Thank you.

11 MR. WISE: Thank you.

12 MR. COULSTON: And then, Judge, they briefed
13 venue in their original memo of law in response to our
14 demand, and then again last night, so I think they have had
15 more than an ample opportunity to brief venue here.

16 THE COURT: Thank you.

17 MR. WISE: Your Honor, I'm not saying we didn't
18 get our work done. I'm just saying that we had eight days
19 and we only got five of which four of them are holidays.

20 THE COURT: I understand.

21 MR. WISE: So to move on to the merits then, that
22 venue indeed is proper, that under CPLR 7002(b) or 2(c),
23 or -- I'm sorry, (b), we may petition to any justice of the
24 court.

25 And I think that and the entire hearing has to be
26 looked at in the context of the extraordinary, and I use

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2 extraordinary in both maybe a technical term and also in a
3 non-technical term. Extraordinary purpose of a writ of
4 habeas corpus. It is the most important writ in the
5 arsenal of writs that are in the Anglo-Saxon heritage.

6 It's not called the Great Writ, capital G capital
7 W, for nothing. And so the reason is is because when a
8 person, and we're here to talk about who a person is, but
9 when a person is deprived of his bodily liberty, that's
10 just about the worst thing that could possibly happen to a
11 person. And the general rules that apply, usually almost
12 down the line, do not apply to a common-law writ of habeas
13 corpus, which is what we're suing under. It's a
14 substantive common-law writ of habeas corpus governed
15 procedurally by CPLR Article 70.

16 So when they say any justice, they mean any
17 justice. That part of that is that traditionally at
18 common-law there is no issue of preclusion, there is no
19 claimed preclusion. You can indeed keep filing writs of
20 habeas corpus again and again and again and again.

21 And to my knowledge it's probably the only cause
22 of action, the only writ in which issue of preclusion and
23 claimed preclusion do not apply, but they do not apply.
24 And we cite a Court of appeals case, I believe, in which
25 it's clear that they say it typically does not apply. The
26 common period to it says it does not apply. There is no

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2 such thing as issue of preclusion. And what the part of
3 the writ of habeas corpus or the part of Article 70 that
4 says successive writs, what that does is meant as a
5 limitation to the normal common-law saying that every
6 single judge always has to give it his or her full
7 attention. There is a slight cut-back saying if you file
8 again I guess you won't get find \$1,000 if you don't issue
9 the writ.

10 THE COURT: I was scared of that.

11 MR. WISE: We did not wish to threaten the Court
12 with that, so we didn't mention anything about that.

13 THE COURT: Thank you.

14 MR. WISE: So indeed when it says every justice,
15 it means every justice, because under the common-law you
16 could indeed continue to go from justice to justice both in
17 England and in the colonies, and then in the United States,
18 because of the fact that we are dealing with the most
19 important writ involving the most important characteristic
20 of a person, the fact that they are imprisoned.

21 So any justice means any justice. The fact
22 that -- and, believe me, we talked about it. The fact that
23 we could not say track a Supreme Court Justice to a cafe
24 and hand it to her during dinner, we thought that that was
25 not the appropriate thing to do, and that what we had to do
26 was to go and use the regular filing system which there was

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2 and --

3 THE COURT: Which was randomly assigned.

4 MR. WISE: It was randomly assigned, yes, as
5 opposed to us -- well, honestly we weren't going to track
6 you down, we had to track somebody down, we had no idea who
7 we would were going to track down, and say: Here, we want
8 you to look at the writ. I'm not sure if the Court would
9 even considered it filed if we handed it to somebody as
10 opposed to going to the random assignment list.

11 Then under 7004(c), Article 70, 7004(c) then says
12 that when the court issues a writ it must be returnable to
13 the county of issuance which is what this court did. And
14 there is only that single one single exception when the
15 writ is to secure release from a State institution.

16 And it's clear if you look at the kind of State
17 institutions that they are talking about against the
18 background of the purpose of the statute, and the purpose
19 of the statute according to the cases is to -- and we do
20 cite Cordero versus Thomas, is to relieve wardens and other
21 superintendents of the burden and the finance of having to
22 transport their inmates of mental hospitals usually and
23 also of prisons, you know, from one county to another
24 distant county. So that's the sole purpose.

25 The only inmates that a state university would
26 have, actually I can't think of any with the exception of

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2 Hercules and Leo. They are the only inmates that I can
3 imagine that a state university would ever have. I don't
4 think that it was within the contemplation of the
5 legislature, it's not what state institution means in this
6 context. It means an institution that has people, inmates,
7 who would normally might be the subject of a writ of habeas
8 corpus.

9 And to kind of nail that down, we asked for, and
10 the Court was kind enough to issue an order to show cause.
11 And we did not want Hercules and Leo brought into the
12 courtroom, and the Court did not order that Hercules and
13 Leo be brought into the courtroom. So the reason doesn't
14 even exist. There is no -- you don't have to worry about
15 Stonybrook having to bear the burden and expense and
16 problems on a writ of habeas corpus or order to show cause.

17 THE COURT: That might be the reason.

18 MR. WISE: I'm sorry, your Honor?

19 THE COURT: That might be the underlying reason
20 for the statute, but the legislature did not insert an
21 exception based on that.

22 MR. WISE: Yes.

23 THE COURT: That's a problem, no?

24 MR. WISE: If it is, I missed it. Say that one
25 more time?

26 THE COURT: We understand that part of the reason

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2 for saying that using the term state institution is so that
3 there is an expense of bringing a prisoner into the county
4 that you don't want to bring into an outer lying county.

5 MR. WISE: Yes.

6 THE COURT: But they didn't insert that exception
7 into the statute itself, even though that's the underlying
8 reason. The legislature didn't say: Except when you're
9 not bringing the corpus in.

10 MR. WISE: Yes, but the Cordero case says that
11 you interpret that against the background of what the
12 purpose of the statute is. And in any case we don't seek a
13 writ of habeas corpus, we seek an order to show cause. The
14 Court issued an order to show cause. So on several levels
15 it would not make any sense to find that Stonybrook falls
16 within the meaning of a state institution.

17 And I also note that we cite the case of Cox
18 versus Appleton which actually involved a state school, and
19 so and in which it was not held to be a state institution.
20 So if a state school is not, a state university doesn't
21 have to be either.

22 So really the universe of state institutions that
23 the statute talks about are those that have inmates of some
24 kind, either a state hospital or a state prison, but even
25 some of those, as the Appleton case shows, even some of
26 those are not seen as state institutions.

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2 As far as the transfer, my brother asked for a
3 transfer under CPLR 510 and 511, and we argue that 510 and
4 511 simply don't apply, that you look to Article 70, you
5 don't look to the normal CPLR.

6 And they also -- in fact, the practice commentary
7 we point out in CPLR 506 says that counsel should consult
8 the statute authorizing the special proceeding, and
9 specifically names 7002(b).

10 So as the Court pointed out that a 511 refers to
11 the place of trial, and the application of the Heller case,
12 in the application of the Heller case the Court of Appeals
13 said that a habeas corpus procedure, there is a summary
14 hearing, there is no trial. So if there is no trial you
15 cannot use a venue statute that refers to change being the
16 venue when there is a trial.

17 I think that about covers it, your Honor.

18 THE COURT: Okay. Well, are we also -- that was
19 just venue, so we're going on? Or --

20 MR. WISE: I certainly hope so.

21 THE COURT: Well, I mean, about the Appellate
22 Division decisions. Mr. Wise.

23 MR. WISE: Yes, I do have something to say about
24 that.

25 THE COURT: Yes, I think you have to address it.
26 Aren't I bound by one of the.

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MR. WISE: Oh, I'm sorry, your Honor. The Second Department --

THE COURT: Let's forget about the Second Department for a moment.

MR. WISE: We're talking about the Third and Fourth Departments, we have something to say about that your Honor. My brother argues the Lavery and Presti case are binding upon this Court.

Now the State versus Moore case states that an Appellate determination is binding only if it involves "settled principles of law and legal issues." So my brother has the burden of showing that the Lavery and Preston case involved a settled principle. And I will now try to persuade this Court that neither of them involve settled principles.

In the Lavery case, the Third Department said within the decision itself that the case was novel. Second of all, as the Court pointed out, the case is indeed ongoing. And we have -- there is at least four reasons why we believe that it is reasonably likely that the Court of Appeals will indeed take further review of the Lavery case. One is Professor Laurence Tribe has filed a letter brief urging the Court to do that saying that the lower court had engaged in a fundamental misunderstanding of the habeas corpus and of personhood, that Justin Marcoux, who was also

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2 a habeas corpus professor had filed a letter brief, and he
3 points out that the Lavery case is in fundamental tension
4 with core tenants of habeas corpus. The Center of
5 Constitutional Rights has indicated last night that it
6 indeed was filing a letter brief asking the Court to take
7 the case.

8 We filed a 67-page motion for further review
9 which we set out what we think are very persuasive
10 arguments, obviously, that we think that would justify the
11 Court taking it. And perhaps one of the most important
12 issues is that even if the Court didn't take the case, the
13 problem with my brother's argument is that the Lavery case
14 conflicts with the Court of Appeals case. It conflicts
15 with the Bern case. And the Bern case is really the only
16 case in the State of New York that leads us through the
17 issue of personhood. How you decide when someone's a
18 person.

19 So in 1972 you had a fetus, there is a case
20 involving a fetus, where the Bern Court both said that the
21 fetus was a human, but yet was not a person. And the court
22 went out of its way to say that personhood was not a
23 biological question, it's a question of public policy.

24 And for the Lavery case, the Lavery Court
25 essentially say that person means only humans, what they
26 did is they did not follow Bern, they simply made a

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2 biological decision and not a public policy decision,
3 because their failure to make a public policy decision is
4 the reason that in their case the Court will notice that
5 there is no -- there is nothing whatsoever about public
6 policy.

7 We made extensive public policy arguments based
8 on liberty, on equality, as we make them for this Court
9 that goes on for 30 or 40 pages. The Court was not
10 interested in our public policy arguments because it was
11 not following Bern, which it should have, because the Court
12 requires that they made a public policy argument, and said
13 what it did is what the court said you could not do in Bern
14 simply point to a biological characteristic, there a fetus,
15 here being human, and saying you're not going to be a
16 person. They had to make a public policy analysis. They
17 did not. So though clearly violate Bern.

18 So we agree that an Appellate Court's decision is
19 binding on this Court when it's settled law, but that would
20 be the Bern case that would be binding on the Court, not
21 the Lavery case because the Lavery case conflicts with the
22 Bern case, and it is indeed a lower court.

23 Now as far as Presti case goes, the Presti case
24 was an ironic case, because one of the reasons that the
25 Nonhuman Rights Project brought the habeas corpus case in
26 the State of New York was because habeas corpus is so

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2 broadly interpreted in the State of New York, we were
3 trying to persuade the Court that they should also bring in
4 these extraordinarily cognitive and complex beings like
5 chimpanzees into personhood.

6 What that court did was to instead of broadening
7 habeas corpus, it actually narrowed it, so that now many
8 New Yorkers are not able to use the writ of habeas corpus
9 the way they could have before Presti case. They said that
10 you could not -- the only way that you could use a
11 common-law writ of habeas corpus was --

12 THE COURT: Release.

13 MR. WISE: If you're released completely. Well,
14 there are 200 years of cases in which the Court of Appeals
15 and other courts of all levels have understood, for
16 example, that when you release, say, a five year-old child
17 or an eight year-old child, and this was done numerous
18 times in the days when there were human slaveries. The
19 vote in New York and Massachusetts, New Jersey and
20 Pennsylvania, that when the courts found through a
21 common-law writ of habeas corpus that these children, you
22 know, were slaves and they should be released, they did not
23 put these children out into the street, they released them
24 into the custody of somebody else. They went from one kind
25 of custody to another kind. But it was -- the first time
26 it was illegal because what we're dealing with is a

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2 two-step process here. We're dealing with, number one,
3 this Court has to decide whether Hercules and Leo are being
4 improperly detained, and then the Court will make an order
5 of release. Now we urge the Court that it's required to do
6 so. The second thing, though, is what do you do with them?
7 No more than a slave child or an apprentice or --

8 THE COURT: We're kind of getting into the
9 personhood issue that we'll be getting into soon.

10 MR. WISE: Then somehow it seemed relevant to me
11 at the time.

12 THE COURT: It does, and I understand your point,
13 and I think we all do, but we'll get into that in further
14 detail. Is that it on the procedural issues?

15 MR. WISE: No, that was it on that one in
16 response to that.

17 THE COURT: Okay.

18 MR. WISE: That the Presti case -- so that you
19 need to choose those cases over what Presti did because
20 Presti is clearly a 200-year outlier.

21 THE COURT: Okay.

22 MR. WISE: In this case.

23 THE COURT: Thank you.

24 MR. COULSTON: Your Honor, may I respond?

25 THE COURT: Very briefly.

26 MR. COULSTON: Your Honor, very briefly the

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2 Lavery case could not be more precisely on point. We have
3 not briefed the issue, we only got a reply brief from
4 petitioners at 8:30 last night. Frankly, your Honor --

5 THE COURT: And I haven't gotten it.

6 MR. COULSTON: And I should have said this up
7 front, your Honor, my understanding was --

8 THE COURT: It was E-filed?

9 MS. STEIN: It was E-filed.

10 MR. WISE: And you have a hard copy as well.

11 THE COURT: It must be in the file.

12 MR. COULSTON: Your Honor, my understanding is
13 under the rules of the Court, is there is no reply order to
14 show cause, and we also put together a schedule that did
15 not include a reply brief.

16 THE COURT: It depends.

17 MR. COULSTON: I understand. And we filed a
18 cross-motion to change venue. And what relates in the
19 brief to that motion we think is proper, but we don't think
20 the rest of it is proper at this time. But we leave it to
21 the discretion of your Honor obviously.

22 As for -- let me begin with Lavery being
23 precisely on point. Like I was saying we didn't have an
24 opportunity to see their papers until late last night.
25 I'll be more than happy to find additional case law that
26 speaks to the issue of whether or not a departmental level

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2 case is binding when there is a potential for an appeal.
3 I'll be happy to file that and provide it to your Honor if
4 there is any doubt that there is no alternate precedent
5 until the Court of Appeals actually cited the issue.
6 Otherwise those departmental cases are the authority.

7 THE COURT: If I do need further briefing, I will
8 let you know afterwards.

9 MR. COULSTON: And we actually cite the Mountain
10 View case which says, "The doctrine of stare decisis
11 requires trial courts in this department to follow
12 precedent set by the Appellate Division of another
13 department until the Court of Appeals, or this Court,
14 pronounces a contrary rule." We think it's irrelevant.

15 The Bern case and the Lavery case also do not
16 conflict at all, your Honor. The Lavery case does not
17 decide the chimpanzees are not people based on biology, or
18 not legal persons based on biology. The analysis is far
19 more nuanced than that.

20 There is an in-depth discussion of the origin of
21 rights and how they are usually connected to obligations
22 and morals, the ability to make moral decisions within
23 society. It wasn't just that they are simply not human
24 beings, it's that they don't partake in society in the same
25 way that we do.

26 THE COURT: Just like I cut off Mr. Wise on this,

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2 we're going to -- if you want to launch into, I mean,
3 anything else you want to reply to with respect to the
4 procedural issues?

5 MR. COULSTON: Right, I'm probably --

6 THE COURT: I'm trying to be organized, I don't
7 mean to cut anybody off.

8 MR. COULSTON: Would standing qualify as an issue
9 you'd like to get out of the way now?

10 THE COURT: I think so.

11 MR. COULSTON: Okay. Your Honor, all of the
12 cases that are cited by petitioners as to why they have
13 standing here are the 19th or 18th century. There is not a
14 well-developed body of law in New York State on what next
15 friend and standing amounts to for purposes of habeas.

16 The Federal Court, however, the Federal Court has
17 a far more developed notion of this idea, and we think it
18 should be at least persuasive here. And what it requires
19 is some connection, some relationship in some way between
20 the organization that is pursuing the petition on behalf of
21 the detained individual and that detained person.

22 The Nonhuman Rights Project has never met
23 Hercules or Leo and doesn't really know anything about the
24 conditions in which they are held. Has no real
25 relationship with them other than the fact that they are
26 advocating for a change in the law generally as it relates

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2 to animals. We think that's insufficient under that
3 Federal Court precedent, and for that reason we don't think
4 that they have standing here.

5 MR. WISE: Your Honor, we clearly have standing
6 under CPLR 7002(a). It says, "A person restrained of his
7 liberty within the state or 'one acting on his behalf' may
8 bring a suit." And that's the only requirement.

9 The three federal cases that my brother cites,
10 none of them have ever been cited in the State of New York
11 for standing, and only one of them has been cited for twice
12 for issues that are not standing. And the reason why they
13 are not cited is they don't state the law of standing with
14 respect to the writ of habeas corpus.

15 Now there are a large number of cases, many of
16 them come from the 19th century, some of them come from the
17 20th and 21st century, as to why, as to how this habeas
18 corpus statute works.

19 A lot of them come from the time, again, when
20 there was human slavery in the State of New York where you
21 can see, for example, the New York City Vigilance Committee
22 and the American Anti-Slavery Society, you have the lawyers
23 for them and you have the founders or the presidents of
24 them actually going out into the City of New York, and any
25 time they found a black person who they thought was a slave
26 they would then go to a Court and seek a writ of habeas

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1 corpus without knowing anything else about them. And they
2 would get those writs of habeas corpus.

3 And indeed one of the most famous cases outside
4 of the Dred Scott case is Lemon versus People, or People
5 versus Lemon, where Louis Napoleon who worked for the
6 American Anti-Slavery Society, his job was to go and find
7 people who were being wrongly enslaved. And he found the
8 eight members of a slave family being brought to the Lemon
9 house after being disembarked at New York Harbor. And he
10 went to the Supreme Court, he got the writ of habeas
11 corpus.

12 And he had also then ten years before in the in
13 re Kirk case which we gave you. In the Belt case, in re
14 Belt, you had a black man who is walking down the street
15 with another black man. And the first one is simply
16 kidnapped right off the street. The second one then runs
17 and gets a writ of habeas corpus. And all they are are
18 walking down the street together. There is no other
19 relationship between them.

20 There was the Mary Ellen case which is not a
21 Appellate case but it's one of the most important cases
22 with respect to children's rights, and it came out of New
23 York, I believe in the 1870's, and so there you had Henry
24 Bergh and you had the people who worked for the ASPCA
25 essentially, Bird, and they are the ones who sought the
26

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2 relief of the writ of habeas corpus. They had no
3 relationship to Little Ellen at all.

4 THE COURT REPORTER: I'm sorry, no relationship
5 to?

6 MR. COULSTON: Little Ellen E-L-L-E-N. To Ellen.
7 All they knew is that this was a person who was being kept
8 and detained.

9 And then we cite the McCloud case where they say
10 when there is an infant involved they use the word anyone
11 may seek a writ of habeas corpus on behalf of an infant.

12 THE COURT: Okay.

13 MR. WISE: We cite slave cases, children cases,
14 and then cases like Rail versus Warden Toronto versus
15 Cunningham when you have incarcerated inmates, you have
16 someone else from a third party coming in and seeking a
17 writ of habeas corpus. Again writs of habeas corpus don't
18 follow the usual rules, they don't follow.

19 And specifically they don't follow Article 3
20 standing rules that the United States Supreme Court has to
21 have on all of its three. There is no Article 3 in New
22 York law, so we clearly have standing.

23 THE COURT: Thank you. We'll turn now to the
24 issue of personhood. Mr. Wise.

25 MR. WISE: If we might just briefly we also we
26 filed a motion to describe portions of my brothers

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2 affidavit and --

3 THE COURT: I'll read it.

4 MR. WISE: You can look at it.

5 THE COURT: Okay.

6 MR. WISE: Your Honor, the issue in front of the
7 Court now we believe is solely the issue of personhood. My
8 brother -- we argue that their response to your order and
9 to Article 70 was really grossly deficient. They never
10 addressed themselves in a single affidavit, part of which
11 we moved to strike.

12 They never addressed the issue of why they are
13 holding Hercules and Leo, where they have got Hercules and
14 Leo, what their relationship is to Hercules and Leo. They
15 simply say Hercules and Leo have been there since a certain
16 date since 2010, and that's it.

17 So since they have not contradicted, they didn't
18 put any expert affidavits in, they have not contradicted
19 any of our affidavits, and so we think that the for
20 purposes of habeas corpus, the facts that we place before
21 the Court both, in the affidavits and otherwise must be
22 taken as true.

23 So that the only issue is based upon the facts
24 that we've placed in front of the Court by affidavits that
25 are uncontroverted, are Hercules and Leo persons within the
26 meaning of Article 70.

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2 Now to begin we have to distinguish the
3 common-law writ of habeas corpus from the Article 70. So
4 again we are filing suit under the common-law writ of
5 habeas corpus which is what holds in New York. The only
6 time that Article 70 comes in is that it is a CPLR so what
7 it does is it's a procedural regulation of the common-law
8 writ of habeas corpus. It uses the word person, but the
9 legislature does not define the word person, and we're not
10 so certain that under Article 1, Section 4, which is the
11 suspension clause whether it could have statutorily
12 narrowed the word person without it amounting to a
13 violation of Article 1, Section 4 the suspension clause for
14 writ of habeas corpus.

15 But be that as it may, that the word "person" in
16 Article 70 refers to the common-law. So this Court does
17 not look to what the legislature meant other than -- and we
18 briefed this -- other than the fact the only thing the
19 legislature could have meant was that it is talking about
20 person within the meaning of the common-law writ of habeas
21 corpus.

22 Now we argue that both as a matter of liberty and
23 as a matter of equality, Hercules and Leo are indeed legal
24 persons. So the liberty argument is a non-comparative
25 argument, so we're talking about what kind of qualities
26 Hercules and Leo might have that might qualify them for

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2 personhood as opposed to our equality argument which is a
3 comparative argument, which we're then going to be
4 comparing Hercules and Leo to someone else who does have
5 personhood and arguing that they indeed should have them
6 too.

7 One thing I want to make clear is that our
8 argument is limited, extremely limited to the argument that
9 Hercules and Leo, chimpanzees, should be entitled, should
10 be persons solely for the purpose of a common-law writ of
11 habeas corpus.

12 As the Court noted in Bern, kind of almost
13 sarcastically that just because you're a person for one
14 part of the law doesn't mean you're a person for any other
15 part. There the petitioner had claimed that if you're a
16 person for one part of the law then you're a person for
17 everything. That is not so, and Bern is clear that is not
18 so. We're saying we're not asking that Hercules and Leo be
19 seen as persons for any reason other than the common-law
20 writ of habeas corpus.

21 Now we do urge the Court to look at the so-called
22 pet trust statute where the Court has made certain nonhuman
23 animals beneficiaries of pet trusts. We have said Hercules
24 and Leo are beneficiaries of a pet trust that we have set
25 up, and so they are indeed already persons because under
26 New York law in the case that we cite the only entity who

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2 can be a beneficiary of a trust and not an honorary
3 beneficiary but a real beneficiary, the only one who could
4 do that would be a "person".

5 And so Hercules and Leo are already persons
6 within the meaning of the pet trust statute, at least the
7 only case that's come down to that is in re Faust which by
8 coincidence involved five chimpanzees, and the Surrogate
9 says again and again that they are persons and they are
10 beneficiaries.

11 So with that in the background, looking at a case
12 just like say Rivers versus Katz, if the Court's familiar
13 with it I bother explaining it. Okay, I'll explain it.

14 So in River versus Katz you have someone who's
15 been involuntarily committed into a mental institution.
16 And there the question is whether or not the fact that they
17 have been involuntary committed means that they are unable
18 to make any kind of treatment decisions. Should I take the
19 antipsychotics or should I not. And the hospital says the
20 fact that you have been involuntary committed --

21 THE COURT: I've had them, yes.

22 MR. WISE: Okay, so the reason I cite Rivers
23 versus Katz as well as the in re Storer case involving
24 Brother Fox and Storer, that in those two cases the New
25 York Court of Appeals makes it really clear that truly
26 supreme common-law value in the State of New York is the

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2 protection of autonomy, and they say it again and again.

3 Around unfortunately I've mixed it up in my
4 papers, but indeed they indeed do they say that it is the
5 fundamental common-law value, autonomy. And it's the job
6 of the courts to protect the autonomy of even them to the
7 greatest degree possible because when a being is autonomous
8 then it's the Court's duty to make sure that they can live
9 their lives out in as autonomous and self-determining a way
10 as possible.

11 Now the Nonhuman Rights Project submitted to the
12 Court more than a hundred pages of affidavits from nine of
13 the greatest chimpanzee cognition experts in the world that
14 sets out in great detail, cites more than 400 scientific
15 articles, gives approximately 42 different ways in which
16 chimpanzees are extraordinarily cognitive and complex which
17 taken either together or separately, some of them
18 separately, clearly show that chimpanzees are autonomous
19 and self-determining beings.

20 They are not cabined by instinct like many
21 perhaps in the nonhuman kingdom are. They are
22 self-conscious, they have a theory of mind, they can
23 understand what others are thinking, they understand that
24 they are individuals, that they existed yesterday, that
25 they are going to exist tomorrow, that their lives mean
26 something to them. They plan for what their life is going

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2 to be like.

3 And in this way they have language or
4 language-like capabilities. They do mathematics. They
5 have a material, a social, a symbolic culture. There is
6 even a field called chimpanzee archeology showing how
7 chimpanzees pass their culture down from generation to
8 generation.

9 They are the kinds of beings who can remember the
10 past, plan ahead for the future, which is one of the
11 reasons why imprisoning a chimpanzee is at least as bad,
12 and maybe even worse than imprisoning a human being.
13 Because chimpanzees who are imprisoned, and being,
14 essentially being exploited by Stonybrook now, that they
15 are -- they don't even know why they are there.

16 These are the sort of things that we would only
17 do to our worst criminals amongst us. And we're doing that
18 to Hercules and Leo. So they don't even know why they are
19 there. They have only known they have been there so long.
20 They are only eight years old now, they came in when they
21 were three. Ever since they have been three years old,
22 they have been unable to live an autonomous and
23 self-determining life at all. They are essentially in
24 almost solitary confinement. They are kind of in binary
25 confinement, which they are entirely at the mercy of their
26 keepers. That is what we do to the worst human criminal.

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2 Now if you look at the undisputed facts, the
3 untraversed affidavits that show that these animals are
4 indeed autonomous and self-determining beings because we
5 believe we have to prove that, and we believe that we have.

6 Then the whole purpose of a writ of habeas corpus
7 is the reason that they call it the Great Writ is because
8 it's coming in to assist those of us, up until now, those
9 of us humans who are being kept against our will, or who
10 are being kidnapped, or who are being imprisoned.

11 And so the very purpose of a writ of habeas
12 corpus is to -- it's really the fundamental Great Writ that
13 protects the autonomy of autonomous and self-determining
14 beings. And that is a wonderful thing. It's been around
15 for 800 years.

16 But science has shown us over the last 50 years,
17 especially over the last 20, that there are more autonomous
18 beings in this world than just human beings. It's clear
19 because half of the scientific articles that our scientists
20 cite came down since the year 2000, and six of them since
21 the year 2010.

22 All the science is only going one way, they are
23 just being seen as more and more autonomous. They have
24 already reached a level where they clearly are autonomous,
25 at least for the purposes of living their lives out as a
26 chimpanzee.

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2 So as a matter of liberty that protects autonomy.
3 And the Rivers versus Katz, the Storer case, you know,
4 powerfully protect at least autonomy with respect to the
5 human being, but the purpose of Rivers and Storer is not to
6 protect human beings, it's to protect autonomy. And there
7 are other beings who are clearly autonomous. And so their
8 liberty rights to bodily liberty are being violated because
9 they are autonomous, and that's being utterly ignored. Now
10 that's the liberty argument.

11 The equality argument is this. That in New York,
12 New York for 200 years through its statute, through its
13 constitution, through its common-law, has demonstrated an
14 intense commitment to equality. And indeed you have People
15 versus Lemon, or Lemon versus People, from 1860 where
16 experts of trials in that era, slave trials, say that the
17 New York Court of Appeals decision in that case which ruled
18 on behalf of slaves, human slaves, with respect to a writ
19 of habeas corpus was the strongest statement in the United
20 States about how terrible slavery was.

21 So the fundamental minimal requirement for a
22 Court or a legislature to make some kind of a distinction,
23 and they make them all the time, legislatures and judges
24 are always drawing lines. And the courts will generally,
25 unless you're dealing with a fundamental right or
26 subclassification, will simply use some kind of a minimum

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2 rationale test. And we urge that that's what the
3 common-law is in the State of New York as well.

4 Now the minimum rational test means that you have
5 to have in order for a statute to be constitutional, and we
6 urge in order for this Court's distinction to not violate
7 the common-law is that it has to be a rational means to a
8 legitimate end. And our claim is simply that to cabin out
9 chimpanzees who are as our uncontroverted affidavits say,
10 autonomous and self-determining beings to rule so these
11 autonomous and self-determining human beings must spend the
12 rest of their lives in slavery, that that violates
13 common-law equality. That's kind of the first aspect of
14 it.

15 The second aspect is if you look at the Romer
16 case, for example, the Romer's case there Chief Justice --
17 I'm sorry, Justice Kennedy -- and again we're working by
18 analogy because we cite an article about former Chief
19 Justice Kaye in which she noted that there has now been a
20 two-way street between constitutional law and common-law,
21 and that the common-law is often infused with
22 constitutional values.

23 So because of that we urge that this Court
24 understand that the common-law with respect to the writ of
25 habeas corpus be infused with constitutional and equal
26 protection sort of qualities. And that Justice Kennedy

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2 would say that in the Romer case said it violated equal
3 protection. To choose a single characteristic, and in that
4 case that was proposition two, the people of Colorado had
5 then chosen to identify someone solely by their sexual
6 preference. And they essentially said gay people, you
7 know, will not be covered by law.

8 And they said that -- Justice Kennedy said to
9 choose a single characteristic and then make that on the
10 basis of that characteristic you are no longer essentially
11 protected by law, that's a violation of the deepest kind of
12 equality values.

13 So both for that reason, and for the reason that
14 it's simply not something that New York equality would want
15 to do to say that we're going to imprison, and admittedly
16 an autonomous being, and that is a legitimate end. Because
17 if it's a legitimate end to imprison an autonomous being
18 that begins to be corrosive in either way at what Rivers
19 versus Katz is saying, a historic case is saying.

20 Because at that point you're arbitrarily
21 condemning an autonomous being to a life of slavery, and
22 that's it. It would be arbitrarily. And when our law
23 begins to become arbitrary, then it can come back at you
24 and begin to eat away at the rights that we humans thought
25 we had. Thank you.

26 THE COURT: Thank you. What about this social

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2 contract?

3 MR. WISE: Social contract. The social contract
4 is there is no social contract. The -- it's, first of all
5 its a mythical thing that we talked about a social
6 contract. But the second thing is that the common-law has
7 always reached entities, and in law itself, has reached
8 entities that are not part of the social contract.

9 The Third Department cited no New York law in
10 which it was talking about a social contract, it primarily
11 cited a two articles by my friend Professor Cup who talked
12 about this social contract. But the problem is that
13 slaves, for example, always have, you know, didn't have
14 rights, but under the Connecticut case, for example,
15 Jackson versus Bulloch, they are not seen as being part of
16 the social contract.

17 In the Somerset case which we cite which I wrote
18 an entire book about, the Somerset case, James Somerset was
19 in slavery, he was then brought from being a thing to being
20 a person, but as a slave he was not part of the social
21 contract.

22 In the Guantanamo cases you have them, you have
23 habeas corpus' being brought on behalf of people whom the
24 government says are not only part of our social contract
25 but are trying to destroy our social contract. So how can
26 you possibly swear bringing a habeas corpus on behalf of

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2 someone who is a person who's trying to destroy our social
3 contract and say they have to be part of the social
4 contract.

5 THE COURT: Now what is the state interest here?

6 MR. WISE: I'm sorry, your Honor?

7 THE COURT: Can you identify a particular state
8 interest in deeming chimpanzees persons for habeas
9 purposes?

10 MR. WISE: Yes.

11 THE COURT: What is the state?

12 MR. WISE: The state interest is that under
13 Rivers versus Katz, and the Storer case New York
14 consistently, the Court of Appeals, consistently says that
15 autonomy and self determination are the supreme common-law
16 values. So much so that if someone goes into a hospital in
17 New York and they want to turn down medication or surgery
18 life saving, the courts will not interfere because the
19 courts say we value that person's autonomy and
20 self-determination more than the state interest in their
21 life.

22 THE COURT: They get a hearing.

23 MR. WISE: They would get a hearing. They don't
24 need a hearing, they can simply say: No, we don't want to
25 do it. If the hospital wants to fight them about it, it's
26 the hospital that wants to come in and really seek a

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2 hearing. So other than that I think the law under Rivers
3 versus Katz and Storer is really clear that they should not
4 interfere with them, perhaps in order to avoid a
5 malpractice action, or some other action, the hospital may
6 want to come in as a safety valve. So other than that it's
7 clear that once they knew that, they are going to lose.

8 THE COURT: So the state interest is in advancing
9 the autonomy?

10 MR. WISE: Yes.

11 THE COURT: What about the autonomy of
12 chimpanzees?

13 MR. WISE: Autonomy is autonomy.

14 THE COURT: Period.

15 MR. WISE: These beings are autonomous beings.
16 The state --

17 THE COURT: Theoretical autonomy.

18 MR. WISE: That's what the courts must always say
19 autonomy and self-determination it appears to be the most
20 powerful, the supreme common-law value, even more than the
21 state interest in life. And so it is therefore irrational
22 for them to draw other lines and say, look, these beings
23 are autonomous too, but for some other reason we're not
24 going to let them -- we're not going to protect their
25 autonomy.

26 So that's the state interest in not drawing

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2 arbitrary lines, in protecting autonomy and
3 self-determination, at least at the level that chimpanzees
4 have it, and humans have it, wherever that may be found.
5 It's not likely to be found too many places. We believe
6 it's probably the four species of great apes, chimpanzees,
7 orangutans and guerrillas, perhaps elephants, and perhaps
8 some citations like orcas or dolphins they have these
9 extraordinarily complex autonomous beings. But that's at
10 least based on the science that I know of right now, that's
11 pretty much it.

12 So it's autonomy, and it's also so that the state
13 is not declaring as you would if you don't -- if the Court
14 did not rule in their favor as a matter of equality, the
15 state is not saying that it is a legitimate end which we
16 would urge in order to find, in order to cabin them out and
17 not include them as a matter of equal protection or
18 equality you'd have to say that the state has some kind of
19 an interest in -- a legitimate interest in ignoring and
20 imprisoning beings who are autonomous.

21 I think it's much better for the state to say
22 it's not slavery of any autonomous being is not a
23 legitimate excuse.

24 THE COURT: Thank you. Mr. Coulston.

25 MR. COULSTON: Yes, your Honor, just first we did
26 not concede anything regarding the legality of the

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2 detention, it's our understanding this is a more limited
3 proceeding regarding the personhood issue, that's how we
4 proceeded in filing our papers and taking petitioner at
5 their word saying that it's sort of the first step in the
6 analysis for it to be some determination about personhood
7 against us. We would want subsequent briefing on that
8 legality. We did submit an affirmation, otherwise would we
9 would want that additional briefing.

10 Your Honor, petitioners come back to the Bern
11 case any number of times. And for the one point of saying
12 that Lavery and Bern are inconsistent, then also saying
13 Bern is how the courts think about legal personhood. The
14 Bern case very plainly states that legal personhood is not
15 a justiciable issue for the court. And this is a final
16 paragraph I'd just like to read for your Honor.

17 "There are then real issues in this litigation
18 that they are not legal or justiciable. They are issues
19 outside the law, unless the legislature should provide
20 otherwise. The Constitution did not confer or require
21 legal permit for the unborn. The legislature may or it may
22 do something less as it does in its abortion statutes and
23 provides some protection far short of conferring legal
24 personalty.

25 What the Bern Court is saying there is this is a
26 legislature determination, and we would agree that that's

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2 actually what the Lavery Court said. The third part of its
3 decision was that there are legal protections that do, in
4 fact, exist for chimpanzees and other animals in the State
5 of New York citing criminal statutes that relate to the
6 treatment of animals.

7 We also cite in our papers the Animal Welfare Act
8 which applies to Hercules and Leo, and the regulations
9 promulgated thereunder. The legislature is a far better
10 way to make this sort of nuanced approach to these new
11 rights that they want to create, rather than a judiciary
12 which is just something, I think the fact we're proceeding
13 under habeas in the first place when everyone acknowledges
14 that habeas is more of an analogy than actually proceeding
15 on pure habeas corpus law.

16 I think Bern was right. I don't think Lavery is
17 inconsistent. The other characterization of Lavery was
18 that it was decided based on biology. Your Honor
19 referenced a social contract, that was the basis of rights
20 in Lavery. It was the court's understanding that social
21 contract is giving rise to rights. Not simply that
22 chimpanzees are not human beings, it's that they can't bear
23 the moral responsibility in our society and the correlative
24 rights and duties just don't simply make sense with respect
25 to chimpanzees.

26 Petitioners admitted that the chimpanzees could

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2 not be released into society. I think we all know
3 that they are just not equipped the same way a human being
4 would be to be a member of society. And for that reason
5 the court found habeas corpus rights did not apply to
6 chimpanzees.

7 The other point that the Lavery Court made, and
8 it's worth making, I mean, we're pursuing this petitioners
9 pursuing this by drawing parallels to slavery and parallels
10 to children, there is simply no precedent anywhere of a
11 nonhuman animal receiving the kinds of rights they are
12 talking about.

13 The exceptions that do exist to legal personhood
14 being assigned to somebody who's not human, in every
15 instance that they have cited, it's something that in some
16 way relates to human interest. Whether 's a corporation,
17 whether a ship is treated as a legal person. They have
18 gone far afield to New Zealand actually to find a river,
19 where not by matter of common-law but by agreement between
20 the government and indigenous people there, I believe a
21 right was assigned to the river of ownership of the
22 riverbank. That is based on the religious significance of
23 that river to the people in that area. It's still serving
24 the interest of those people. There is nothing about the
25 river itself that entitled it to those rights.

26 We think that really is the principle that's

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2 governing assignment of legal personhood. We think that's
3 what the Lavery Court said, and we think that's the law,
4 your Honor. And we don't know of any exceptions, otherwise
5 the petitioner hasn't cited it.

6 The other case is Presti which did not reach the
7 issue of legal persons. In the papers that were filed last
8 night petitioner suggested in some way the failure to reach
9 that issue was an indication that the Fourth Department
10 might have said chimpanzees are legal persons. We
11 completely disagree with that characterization. The court
12 was just simply ruling on alternate grounds, which is that
13 the relief that's being sought here is simply a change in
14 conditions. And a transfer from one facility to another is
15 never an appropriate remedy under habeas corpus.

16 A case that they cited in Johnson, it's a Court
17 of Appeals case, and the cite for this is 9 NY2d at 484,
18 and there the court said that a mere transfer is purely an
19 administrative matter, and a prisoner has no standing to
20 choose the place in which he is to be confined. That was
21 what Presti court was relying on. That strain of law that
22 says you're entitled to immediate release. There are
23 exceptions that petitioner cited, but those exceptions
24 relate to where in order, or in a sense is in some way not
25 being abided by. And that the prisoners not being treated
26 in accordance with whatever the specific order might be.

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2 There you have an order that governs the specific
3 detention and it may be appropriate, but this is a very
4 narrow exception. And all the cases that they cite state
5 that is an exception to the general rule that immediate
6 release is what's required typically as the remedy for
7 habeas.

8 Here it's clear they are seeking a transfer.
9 They are seeking a transfer to Save the Chimps, which is a
10 non-party to this proceeding. They will be held in
11 conditions that petitioner views is better, but they will
12 undeniably be held there. They are placed on islands, they
13 are placed on islands because they can't swim. They are
14 subject to vasectomies, birth control, their bodily liberty
15 is constrained, maybe in a different way, but is still
16 constrained.

17 There is no principle way for this court I think
18 to now analyze under habeas principles why one is
19 appropriate versus the other under those transfer
20 precedents that they cite. If there is any provisions or
21 laws that would govern the treatment of Hercules and Leo,
22 it would be federal and state regulations which we include
23 in our affirmations we abided by. If we are meeting that
24 standard, it's unclear how you could have a transfer
25 premised on our failure to abide by those regulations.

26 THE COURT: I have a question.

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2 MR. COULSTON: Certainly, your Honor.

3 THE COURT: Understanding that what Mr. Wise
4 refers to as the Great Writ, and what it means to us, and I
5 think another judge of this court many years ago referred
6 to it is a powerful and broad tool subject to expansive
7 interpretation, and our understanding that the law applies
8 according to scientific discovery, social mores and marital
9 rights, isn't it incumbent upon the judiciary to at least
10 consider whether a class of beings may be granted a right,
11 or something short of a right under the habeas statute,
12 some kind of special status?

13 Thus why can't a chimpanzee, by virtue of the
14 traits documented in Petitioner's exhibits, the extra
15 exhibits, be deemed a person for the sole purpose, as Mr.
16 Wise says, of permitting the writ to the very limited
17 extent sought? Why isn't that an appropriate use of this
18 Great Writ?

19 MR. COULSTON: Your Honor, this is -- we have
20 always understood it as the Great Writ, it's been around
21 for 800 years, the Magna Carta Great Writ has been around.
22 What has been diminished all along in this proceeding is
23 how different it is what they are actually trying to do.
24 How the similarities that they paint you can talk about
25 99 percent of DNA and other aspects that create
26 similarities, but the reality is these are fundamentally

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2 different species than human beings. These are laws that
3 we are creating for them in some way that perhaps are
4 participating in, but they have had no ability to sort of
5 partake in human society, and societies that's developed
6 these rights on their behalf.

7 I think that is a real distinction. I think
8 these rights that have evolved related to human interest
9 that's an important thing that we would lose. Petitioners
10 at some point said that imprisoning a chimp is maybe worse
11 than a human being. I worry about the diminishment of
12 these rights in some way if we expand them beyond human
13 beings.

14 I also think courts are simply not going to be
15 equipped to determine where this new line is going to be
16 for these vague categories that, yes, they have given them
17 some scientific help, but autonomy and self-determining?
18 In the Fourth Department argument my brother, which I guess
19 I've adopted now, compared a chimpanzee to a five year-old
20 with the assumption that a chimpanzee is thus entitled, I
21 guess, to similar rights to a five year-old.

22 Well what about a three-month old or a one-day
23 old? Are there animals that are similar in terms of their
24 autonomy or their cognitive abilities to a child at that
25 age? I imagine there are, and I imagine there are animals
26 that are different than the ones we're discussing

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2 limitations in some of those other animals with higher
3 levels of thinking.

4 This just becomes a question of where are we
5 going. You're absolutely opening the possible flood gates.
6 And it is a Great Writ, it's a Great Writ for human beings.
7 I think it should stay there, and I think the ramifications
8 are ones that we can't always foresee and can have a
9 dramatic affect not only on our understanding of how
10 important these rights are to human beings, but in
11 applications that could affect our society in a negative
12 way.

13 THE COURT: Thank you.

14 MR. WISE: May I reply, your Honor?

15 THE COURT: Yes.

16 MR. WISE: Certainly with respect to my brother's
17 claim that they are welfare laws that protect the
18 chimpanzees, I'd like to quote Huff versus State. There
19 they said that habeas corpus has been cherished by
20 generations of free men, could learn by experience that its
21 purpose is the only reliable protection of their freedom.

22 If habeas corpus is the only reliable protection
23 of the freedom of human beings who are otherwise
24 extraordinarily well protected, how can they -- how can a
25 chimpanzee who is protected by almost nothing, how can
26 their freedom be protected. Their freedom is not --

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2 without a writ of habeas corpus, Stonybrook can continue to
3 hold them for five more years, or ten more years, or their
4 whole life, or send them to some other person who is going
5 to hold them. They have been held for five years.

6 Clearly if the welfare statutes were sufficient
7 to protect their fundamental interest in autonomy, bodily
8 liberty, well they must not be because Stonybrook has held
9 them for the last five years. And both of us agree that
10 they are not in violation of any welfare reg, so therefore
11 they clearly do not protect the fundamental interest of an
12 autonomous being.

13 The second thing is that my brother has put
14 forward the slippery slope argument. If you do this then
15 it's going to do this, and then all of a sudden ants are
16 going to be having writs of habeas corpus, but that's not
17 it. We have made it really clear that the line that we're
18 drawing is based upon the autonomy that the Court of
19 Appeals itself repeatedly for centuries had said is
20 extraordinarily valuable and that we treasure.

21 It's then really a matter of fact as to whether
22 or not that autonomy exists. In our case it clearly exists
23 because if you look at the hundred pages of affidavits
24 there can be no doubt about it. And none, not a single
25 fact, has been traversed.

26 The third thing is that to say that no nonhuman

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2 animals have ever been the recipient of a writ of habeas
3 corpus, but until the Nonhuman Rights Project began filing
4 these suits, no one had ever asked.

5 And if you look at the Somerset case again, the
6 reason why Lord Mansfield, and one of the reasons he's such
7 a great Judge is that he understood that there is a first
8 time for everything. And that if Lord Mansfield had taken
9 my brother's advice, and said, you know, a black person, a
10 slave has never been the recipient of a writ of habeas
11 corpus, well then our world might be a different place than
12 it would now, there would be much more human slavery.

13 I cite the Standing Bear case where in 1879 you
14 had a federal judge deal with the fact that for the first
15 time native Americans coming to the court and saying I'm
16 being held prisoner by the U.S. Army I want a writ of
17 habeas corpus, the United States saying Indians aren't
18 entitled to writs of habeas corpus, they have never been
19 entitled to writs of habeas corpus. And the Judge said:
20 Well, Standing Bear is going to get a writ of habeas
21 corpus. And that changed the law. So the second time
22 there had been a native American who got a writ of habeas
23 corpus, and the second time there had been a black slave
24 who had received a writ of habeas corpus.

25 The idea that I think I want to go back to just
26 to reply briefly to this social contract issue. We urged,

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2 and I think the Court of Appeals is going to agree, we
3 believe that one of the fundamental errors in the Lavery
4 case was the fact that the Third Department mistook the
5 so-called immunity right that we were seeking for a claim
6 right.

7 Now and we're not -- we were not arguing that
8 Tommy should be able to sign a contract or sue for breach
9 of contract. Under legal theory what correlates with the
10 claim is a duty. If there is a claim there has to be a
11 duty, if there is a duty there has to be a claim. We did
12 not argue there is any duties involved or there are any
13 claims involved. We used another kind of right which is a
14 fundamental immunity right which correlates with the
15 disability. There is nothing about having to be able to
16 have any duties.

17 So the classic immunity right would be the 13th
18 Amendment of the United States Constitution. We all are
19 immune from being enslaved. Everyone else is immune from
20 enslaving us. There is nothing about having to correlate
21 with any rights, duties, has to be social contract.
22 Whether you're part of the social contract, whether you're
23 not part of the social contract, whoever you are, you
24 cannot be enslaved.

25 And one of the real problems with looking, when
26 you start to look at the Lavery case more closely, is

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2 you're saying an entity who's not a member of the social
3 contract, and there are many of them, they can be enslaved.
4 And it's ironic that to be said, to be able to partake in
5 the social contract of society in order to have society not
6 enslave you.

7 We had a history doing that for hundreds of years
8 saying black people, slaves, were not part of our social
9 contract we can enslave them, but we've already been down
10 that path. It doesn't work. It's not right to say that if
11 you're not part of the social contract, therefore you lose
12 all protections, you can simply be enslaved.

13 I want to also just briefly talk about with
14 respect to this right duty thing, see, here is where the
15 Third Department Lavery case, you know, explicitly
16 contradicts the Bern case.

17 Now the Bern case is really clear that a person
18 means someone -- that personhood means that someone has the
19 "rights and privileges of a person". The Bern case says
20 nothing about rights and duties. It says rights and
21 privileges. And that's a very different sort of thing.

22 By coincidence it happens to be the argument that
23 we're making that chimpanzees should be able to get the
24 right and privileges with respect to the writ of habeas
25 corpus. But that doesn't mean they have to have certain
26 duties.

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2 And, I'll make this quick, and the secondary
3 sources that the Court of Appeals cited in Bern, including
4 Patent, and if you look at what Patent writes he says -- he
5 talks about the fact that legal personality has been
6 granted to entities other than individual human beings
7 including an idol, and they specifically cite and rely upon
8 chapter two of John Chipman Gray's book, The Nature and
9 Sources of the Common-law. And in that chapter two Gray
10 says, and I quote, "There is no difficult in giving legal
11 rights to a certain natural being and making him or her a
12 legal person." And the last thing is more to the point
13 Gray says, "There may be systems of law in which animals
14 have legal rights. Animals may conceivably be legal
15 persons." That comes out of chapter two of the law which
16 the Court of Appeals in the Bern case explicitly relied
17 upon. So, thank you.

18 THE COURT: Thank you.

19 MR. COULSTON: Your Honor, just briefly just a
20 couple of things very briefly. He was talking about the
21 13th Amendment which specifically states that the 13th
22 Amendment doesn't apply to orca whales which is again this
23 category of animals that have higher cognitive ability.

24 Also this language about animals as slaves this
25 is what I am talking about in terms of the problem of the
26 slippery slope and you start thinking about livestock, you

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2 start thinking about pets, and it's hard to see how it
3 doesn't fit in that conception of the world that he's
4 talking about here. And finally these are arguments for
5 appeal, these are not an argument to this Court with
6 precedent to be binding.

7 THE COURT: Thank you very much. Thank you,
8 counsels, for an extremely interesting and well-argued oral
9 argument. I thank you very much. The way we do things
10 here is that since there is a cross motion you folks will
11 share the cross of ordering the transcript and uploading it
12 and E-filing it, okay. And you have two weeks to do that
13 which would be June 10 or or before June 10.

14 I believe I have hard copies of all of your
15 submissions. If I don't, please deliver them to Mr. Kasper
16 back at 80 Centre Street Part 12. Except for exhibits, we
17 will look at exhibits, they can be uploaded. We don't need
18 hard copies of the exhibits. Again, thank you.

19 MR. COULSTON: Thank you very much.

20 MR. WISE: Thank you, your Honor.

21 * * *
22 CERTIFIED TO BE A TRUE AND CORRECT
23 TRANSCRIPT OF THE FOREGOING PROCEEDINGS.

24 
25 _____
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