SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

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

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

Petitioner-Appellant,

-against-

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

Respondents-Respondents.

Index No.: 18-45164

(Supreme Court, Orleans County)

Memorandum of Law in Support of Petitioner-Appellant's Motion for Permission to Appeal and Stay

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I. PRELIMINARY STATEMENT

Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), filed a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") in the Supreme Court, Orleans County, on behalf of an Asian elephant named Happy allegedly imprisoned at the Bronx Zoo by Respondents, the Wildlife Conservation Society and James J. Breheny (collectively "Bronx Zoo" or "Respondents"). Although venue is properly placed in Orleans County, where the writ was issued and correctly made returnable pursuant to CPLR Article 70, the lower court erroneously and without authority ordered that venue be changed to Bronx County pursuant to CPLR 503(a), 510(1), and 510(3). The NhRP submits this Memorandum of Law in support of the accompanying Motion for Permission to Appeal and Stay, requesting that this Court grant:

1) Pursuant to CPLR 5701(c), a motion for permission to appeal to this Court ("Motion to Appeal") from: (a) that part of the February 21, 2019 order[1] ("Reargument Order") of the Supreme Court, Orleans County, reaffirming, upon reargument, its January 18, 2019 order[2] ("Transfer Order"), which granted the motion by Respondents to transfer this

[1] Attached as "Exhibit 4" to the annexed Affirmation of Kevin Schneider (all exhibits referenced herein are attached to the Schneider Affirmation).
[2] Attached as "Exhibit 1."

habeas corpus proceeding from Orleans County to Bronx County; or, in the alternative, from (b) the Transfer Order; and

2) Pursuant to CPLR 5519(c), a motion to stay enforcement of the underlying Transfer Order ("Motion to Stay") pending final resolution of any appeal taken from the Reargument Order or, in the alternative, from the Transfer Order.

This Court has jurisdiction to hear this habeas corpus action on appeal (*infra*, at 9-14) and should grant the Motion to Appeal in the interest of justice, as the Reargument Order and underlying Transfer Order were based on the following legal errors.[3]

First, contrary to the lower court's determination and the Bronx Zoo's assertions, venue in a habeas corpus action is governed by CPLR 506(a), 7002(b), and 7004(c) – not CPLR 503(a) (*infra*, at 16-18).

Second, contrary to the lower court's determination, venue is proper in Orleans County, because: (1) the NhRP was authorized to file the Petition with any Supreme Court Justice under CPLR 7002(b)(3) (*infra*, at 18); and (2) the Order to

[3] The NhRP incorporates by reference all the arguments, evidence, exhibits, memoranda, testimony, transcripts, and authorities previously filed in this case.

Show Cause[4] was correctly made returnable in Orleans County (the county of issuance) pursuant to CPLR 7004(c) (*infra*, at 18-20).

Third, contrary to the lower court's determination, it lacked authority to change venue after correctly making the writ returnable in Orleans County. The lower court granted the Bronx Zoo's motion to change venue based on CPLR 510(1) and 510(3), notwithstanding the fact that the Bronx Zoo failed to establish that Orleans County is an improper venue, as required by CPLR 510(1) (*infra*, at 20-24), and notwithstanding the fact that the Bronx Zoo never invoked or even mentioned CPLR 510(3) (*infra*, at 26-27).

These errors warrant *immediate* review, as habeas corpus is a "summary proceeding" that "strikes at unlawful imprisonment" and "tolerates no delay except of necessity." *People ex rel. Robertson v. N.Y. State Div. of Parole*, 67 N.Y.2d 197, 201 (1986). The merits of the Petition have been thoroughly briefed by both parties and heard in oral argument by the lower court. As all that remains is for that court to render a decision, a transfer to Bronx County is not only legally unwarranted but will cause intolerable delay and prolong the injustice currently being visited on an autonomous, imprisoned being. Accordingly, in the interest of justice, this Court

[4] There is no difference between a writ of habeas corpus and an order to show cause, except that the "former requires production of the prisoner for the hearing on the writ, whereas the latter dispenses with such presence." Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 7001. Accordingly, the NhRP uses the terms "Order to Show Cause" and "writ" interchangeably.

should exercise its discretion and grant the Motion to Appeal, which will enable this Court to provide guidance on how to correctly apply CPLR 503(a), 506(a), 510(1), 510(3), 7002(b), and 7004(c).

Finally, as an appeal from either the Reargument Order or the Transfer Order has a strong likelihood of success on the merits, this Court should also grant the Motion to Stay. In doing so, the Court would prevent prejudice to Happy, and would not cause any prejudice to the Bronx Zoo.

II. QUESTIONS PRESENTED

1. After a court issues an order to show cause under Article 70 and makes it returnable in the county of issuance in accordance with CPLR 7004(c), may the court grant a motion to transfer venue pursuant to CPLR 510(1) on the basis that, under CPLR 503(a), the county of issuance is "not a proper county?"

After the lower court issued the Order to Show Cause and made it returnable in Orleans County in accordance with CPLR 7004(c), it granted the Bronx Zoo's Motion to Transfer pursuant to CPLR 510(1) on the basis that, under CPLR 503(a), Orleans County is "not a proper county."[5]

[5] Transcript of Feb. 5, 2019 Hearing (attached as "Exhibit 5"), at 23-24; Transcript of Dec. 14, 2018 Hearing (attached as "Exhibit 3"), at 31.

2. Can a lower court order a transfer of venue under CPLR 510(3) when the movant did not invoke that section?

The lower court ordered a transfer of venue under CPLR 510(3) even though the Bronx Zoo did not invoke that section.[6]

3. Can a lower court order a transfer of venue under CPLR 510(3) when the movant did not satisfy the evidentiary requirements of that section?

The lower court ordered a transfer of venue under CPLR 510(3) even though the Bronx Zoo did not satisfy the evidentiary requirements of that section.[7]

4. Can a lower court order a transfer of venue under CPLR 510(3) when the movant has no "material witnesses" whose convenience is relevant for purposes of that section?

The lower court ordered a transfer of venue under CPLR 510(3) even though the Bronx Zoo has no "material witnesses" whose convenience is relevant for purposes of that section.[8]

III. STATEMENT OF FACTS

On October 2, 2018, the NhRP filed the Petition[9] in the lower court pursuant to CPLR Article 70 on behalf of Happy.

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[6] Feb. 5, 2019 Tr. [Exh. 5], at 23-24; Dec. 14, 2018 Tr. [Exh. 3], at 30.
[7] Feb. 5, 2019 Tr. [Exh. 5], at 23-24; Dec. 14, 2018 Tr. [Exh. 3], at 30.
[8] Feb. 5, 2019 Tr. [Exh. 5], at 23-24; Dec. 14, 2018 Tr. [Exh. 3], at 30.
[9] Attached as "Exhibit 6."

On November 16, 2018, the lower court issued the Order to Show Cause and made it returnable in Orleans County on December 14, 2018.[10] On December 3, 2018, the Bronx Zoo made a motion pursuant to CPLR 511 and CPLR 7004(c) to transfer venue from Orleans County to Bronx County ("Motion to Transfer").[11] On December 14, 2018, the lower court held a hearing on the NhRP's Order to Show Cause and orally granted the Bronx Zoo's Motion to Transfer.[12]

On January 8, 2019, the NhRP moved the lower court by order to show cause to stay its then-forthcoming transfer order until final resolution of a motion for leave to reargue pursuant to CPLR 2221(d) ("Motion to Reargue").[13] On January 14, 2019, the lower court signed the requested order to show cause and set oral argument on the NhRP's Motion to Reargue for February 1, 2019.

On January 18, 2019, the lower court signed the Transfer Order granting the Bronx Zoo's motion to change venue from Orleans County to Bronx County, which Order referenced and incorporated the "transcript of the decision of this Court" from the December 14, 2018 hearing.[14] The Transfer Order was entered by the Orleans

[10] Attached as "Exhibit 14."
[11] Attached as "Exhibit 16."
[12] Dec. 14, 2018 Tr. [Exh. 3], at 31 ("I'm granting the [Respondents'] motion to change venue and will be sending this to Bronx County.").
[13] In its motion to stay, the NhRP attached a draft memorandum of law in support of its then-forthcoming Motion to Reargue.
[14] Transfer Order [Exh. 1], at 5.

County Clerk on January 23, 2019. On that date, the NhRP served the Bronx Zoo a true copy of the Transfer Order via email with written notice of its entry.[15]

Also on January 23, 2019, the NhRP filed its Motion to Reargue, which was made returnable at the hearing scheduled for February 1, 2019.

On January 24, 2019, the NhRP filed with the lower court: (1) pursuant to CPLR 5701(c), a motion for permission to appeal the Transfer Order should the lower court deny the Motion to Reargue or adhere to its prior decision; and (2) pursuant to CPLR 2201 and 5519(c), a motion to stay the Transfer Order until final resolution of any appeal taken from the Transfer Order should the lower court deny the Motion to Reargue or adhere to its prior decision. Both motions were made returnable at the hearing scheduled for February 1, 2019.

On January 31, 2019, the lower court adjourned the February 1, 2019 hearing. It, instead, held a telephonic hearing on February 5, 2019, during which both parties argued the merits of the NhRP's Motion to Reargue,[16] motion for leave to appeal, and motion for a stay pending any appeal taken from the Transfer Order. At the

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[15] The NhRP's notice of entry mistakenly states that the Transfer Order was entered on January 18, 2019. The Transfer Order was entered by the Orleans County Clerk with a time stamp on January 23, 2019. Transfer Order with Time Stamp (attached as "Exhibit 2").

[16] At this hearing, the lower court entertained the Bronx Zoo's contention that, during oral argument at the prior December 14, 2018 hearing, the NhRP had already been granted reargument since the NhRP's counsel was allowed a final chance to "change [the court's] mind." Feb. 5, 2019 Tr. [Exh. 5], at 22. There is no merit to this contention, as the court had not issued its Transfer Order as of December 14, 2018 and it had obviously not been served. *See* CPLR 2221(d)(3) (a motion for leave to reargue "shall be made within thirty days *after service of a copy of the order* determining the prior motion and written notice of its entry") (emphasis added).

conclusion of the February 5 hearing, the lower court, *inter alia*, reaffirmed the Transfer Order and denied the NhRP's motion for leave to appeal, stating that "Orleans County is not a proper county based on [CPLR] 503(a), 510(1), and 510(3)."[17]

On February 21, 2019, the lower court granted the Reargument Order, which referenced and incorporated the "transcript of the decision of this Court" from the February 5, 2019 hearing.[18] The Reargument Order, *inter alia*, denied the NhRP's Motion for Leave to Reargue and denied its motion for permission to appeal the Transfer Order. The Reargument Order was entered by the Orleans County Clerk on February 26, 2019.

The Reargument Order also states that "enforcement of the January 18, 2019 Order is hereby stayed for a period of not more than sixty (60) days from entry of this Order to permit Petitioner to move a Justice of the Appellate Division, Fourth Department for permission to appeal the January 18, 2019 Order."[19] Enforcement of the Transfer Order is thus stayed until April 27, 2019, which is 60 days from the entry of the Reargument Order on February 26, 2019. On February 28, 2019, the

[17] Feb. 5, 2019 Tr. [Exh. 5], at 23-24.
[18] Reargument Order [Exh. 4], at 3.
[19] *Id*. at 4. At the conclusion of the February 5, 2019 hearing, the lower court granted a stay of 30 days, Feb. 5 Tr. [Exh. 5], at 25, but subsequently modified it to 60 days as reflected in the Reargument Order.

Bronx Zoo served the NhRP via email a true copy of the Reargument Order with written notice of its entry.[20]

The NhRP files its Motion to Appeal pursuant to CPLR 5701(c) for permission to appeal from that part of the Reargument Order reaffirming, upon reargument, the original determination in the Transfer Order or, in the alternative, from the Transfer Order itself. As this Motion to Appeal is made within thirty days of February 28, 2019, the motion is timely under CPLR 5513(b).[21]

The NhRP files its Motion to Stay pursuant to CPLR 5519(c), requesting this Court to stay enforcement of the Transfer Order pending final resolution of any appeal taken from the Reargument Order or, in the alternative, from the Transfer Order.

IV. JURISDICTION AND STANDARD OF REVIEW

1. Jurisdiction

A. The Reargument Order is appealable.

An order following an effective grant of reargument that adheres to the court's prior decision is appealable. *Stevens v. Auburn Mem'l Hosp.*, 286 A.D.2d 965, 966

[20] Exh. 4.

[21] CPLR 5513(b) provides: "The time within which a motion for permission to appeal must be made shall be computed from the date of service by a party upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party seeking permission to appeal has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days."

(4th Dep't 2001) ("The court in effect granted reargument and, upon reargument, adhered to its prior decision. Thus, this appeal is properly before us."); *Keleher v. Am. Airlines, Inc.*, 132 A.D.2d 949, 949-50 (4th Dep't 1987) ("Defendant's appeal is properly before us, because the court in effect granted reargument and then affirmed its earlier decision. Such an order is appealable.").

Reargument has been effectively granted, and the ensuing order is therefore appealable, when a court considers and addresses the merits of the motion sought to be reargued. *Budoff v. City of N.Y.*, 164 A.D.3d 737, 738 (2d Dep't 2018) ("As the Supreme Court reviewed the merits of the plaintiff's contentions raised in his motion for leave to reargue, 'the court, in effect, granted reargument and adhered to its original determination.' Accordingly, contrary to the [defendant's] contention, the order dated August 20, 2015, 'made, in effect, upon reargument, is appealable.'") (citations omitted); *Willig v. Danzig Fishman & Decea*, 163 A.D.3d 1304, 1305 (3d Dep't 2018) ("Initially, we agree with defendant that because Supreme Court actually addressed the merits of defendant's motion, we deem that the court granted reargument and then adhered to its original decision; therefore this appeal is properly before us.").

As recognized by this Court, even when a lower court's order expressly denies a motion for leave to reargue, the lower court has effectively granted the motion to reargue if it addresses the merits of the underlying motion, thereby making the order

appealable. *Daley v. Cty. of Erie*, 71 A.D.3d 1398, 1398-99 (4th Dep't 2010) ("[D]espite the statement of the court to the contrary, the court thus actually granted that part of defendant's cross motion for leave to reargue inasmuch as the court reached the merits of the prior motion. Because the court in effect granted that part of defendant's cross motion for leave to reargue, and upon reargument denied defendant's prior motion, the order on appeal is properly before this Court."); *Marine Midland Bank v. Fisher*, 85 A.D.2d 905, 905 (4th Dep't 1981) ("While the decretal paragraph of [the November 26, 1980] order merely states that defendant's motion to reargue was denied, it must be read in conjunction with the decisions in the proceedings before Special Term . . . That series of events indicates that Special Term in fact granted defendant's motion to reargue, reconsidered the merits of the [plaintiff's] summary judgment motion, again reconsidered the merits and ultimately adhered to its prior decision embodied in the order and judgment of October, 1979. As such, the order of November 26, 1980 . . . is appealable").[22]

[22] *See also Pezhman v. Chanel, Inc.*, 126 A.D.3d 497, 497 (1st Dep't 2015) ("Although the court's order 'denied' the motion to reargue, it addressed the merits, and in so doing, effectively granted reargument. Accordingly, the order is appealable."); *Rodriguez v. Jacoby & Meyers LLP*, 126 A.D.3d 1183, 1184-85 (3d Dep't 2015) ("Where, however, the court actually addresses the merits of the moving party's motion, we will deem the court to have granted reargument and adhered to its prior decision—notwithstanding language in the order indicating that reargument was denied. Accordingly, Supreme Court's April 2013 order is appealable as of right.") (citations omitted).

Here, although the Reargument Order states that "Petitioner's motion for leave to reargue is DENIED in its entirety,"[23] the lower court effectively granted the NhRP's Motion to Reargue by hearing and addressing the merits of the venue issue:

> MR. WISE: I'd like to just begin immediately arguing the merits of the motion to reargue. [Pg. 2]
>
> THE COURT: Right, and you've made that argument on the merits.
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> [Pg. 20]
>
> THE COURT: But that being said, the Court has listened, but the Court does feel regardless of the arguments of counsel that Orleans County is not a proper county based on 503(a), 510(1), and 510(3). I believe that it is probably the most inconvenient place to have this case argued . . . So I have not changed my ruling whatsoever . . . This case does not belong in Orleans County. Even if [I] thought it belonged in Orleans County a little bit, if I had any misgivings, I would give some serious thought to it. But there is simply no reason for this case to be in Orleans County, okay, no legal reason, no moral reason.
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> [Pg. 23-24][24]

The Reargument Order is therefore appealable.[25]

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[23] Reargument Order [Exh. 4], at 3.

[24] Feb. 5, 2019 Tr. [Exh. 5], at 2, 20, and 23-34.

[25] As the lower court granted reargument and adhered to its prior decision, the Reargument Order supersedes the original Transfer Order. *See Niagara Foods, Inc. v. Ferguson Elec. Serv. Co.*, 111 A.D.3d 1374, 1375 (4th Dep't 2013) ("[A]ppeal from the order in appeal No. 1 must be dismissed because the order in appeal No. 2 superseded the original order insofar as it granted leave to reargue the prior motion . . . and, upon reargument, adhered to the prior decision . . . ."); *Loafin' Tree Rest., Inc. v. Pardi*, 162 A.D.2d 985 (4th Dep't 1990); *Pub. Serv. Truck Renting Inc. v. Ambassador Ins. Co.*, 136 A.D.2d 911 (4th Dep't 1988). In the alternative, however, the NhRP's Motion to Appeal seeks leave to appeal from the Transfer Order.

B. As the Reargument Order is an appealable order, this Court is authorized under CPLR 5701(c) to grant the Motion to Appeal.

"An appeal may be taken to the appellate division from any order which is not appealable as of right in an action originating in the supreme court . . . by permission of a justice of the appellate division in the department to which the appeal could be taken, upon refusal by the judge who made the order or upon direct application." CPLR 5701(c). In appealing an order granting a motion to change venue, CPLR 511(d) provides that such appeal "shall be taken in the department in which the motion for the order was heard and determined."

The Court of Appeals in *People ex rel. Robertson v. New York State Division of Parole* explained why intermediate orders in habeas corpus cases are not appealable *as of right*:

> The writ of habeas corpus, as its history shows, is a summary proceeding to secure personal liberty. It strikes at unlawful imprisonment or restraint of the person by state or citizen, and by the most direct method known to the law learns the truth and applies the remedy. It tolerates no delay except of necessity, and is hindered by no obstacle except the limits set by the law of its creation. Hence the legislature commanded that no appeal should be taken from incidental orders made in the course of the proceeding, as that might cause delay and prolong the injustice. Even the evil of a wrong order, if not vital, was preferred to the danger of delay caused by an appeal therefrom.

67 N.Y.2d at 201 (quoting *People ex rel. Duryee v. Duryee*, 26 Bedell 440, 445-46 (1907)). The *Robertson* Court did *not* hold that "incidental" orders are not appealable by permission.

In *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969, 969 (4th Dep't 1996), this Court recognized that while "[n]o appeal lies as of right from an intermediate order in a habeas corpus proceeding (*see*, CPLR 5701[a]; 7011)," such an order is appealable by permission under CPLR 5701(c).[26] *Id*. ("we treat the notice of appeal as an application for permission to appeal and grant permission"). Accordingly, the NhRP's Motion to Appeal may proceed pursuant to CPLR 5701(c).[27]

2. Standard of review for granting permission to appeal.

"The Appellate Division has not attempted to set forth the standards to be employed when deciding whether to grant leave, nor does any clear standard emerge from the reported cases." 12 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 5701.27. However, to correct the lower court's errors, this Court has the discretion under CPLR 5701(c) to grant leave to appeal when doing so would be "in the interest of justice." *Majuk v. Carbone*, 129 A.D.3d 1485, 1486 (4th Dep't 2015) (granting application for leave to appeal "in the interest of justice"). In the case at bar, the

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[26] This Court has similarly allowed appeals to be taken from intermediate orders in CPLR Article 78 special proceedings. *See e.g., Reilly v. City of Rome*, 114 A.D.3d 1255 (4th Dep't 2014); *Engelbert v. Warshefski*, 289 A.D.2d 972 (4th Dep't 2001); *Coor Dev. Corp v. Weber*, 41 A.D.2d 689 (4th Dep't 1973); *Conde v. Aiello*, 204 A.D.2d 1029 (4th Dep't 1994); *Driscoll v. Dep't of Fire of City of Syracuse*, 112 A.D.2d 751 (4th Dep't 1985).

[27] CPLR 5701(a)(2) was amended in 1999 to permit an appeal as of right from an order granting "a motion for leave to reargue made pursuant to [the new] subdivision (d) of rule 2221. . . ." Richard C. Reilly, *Practice Commentaries*, McKinney's 5701 C5701:4a. Should this Court determine that the Reargument Order is appealable as of right under CPLR 5701(a)(2)(viii), it should not dismiss the NhRP's Motion to Appeal. *See* CPLR 5520(b) ("An appeal taken by permission shall not be dismissed upon the ground that the appeal would lie as of right and was not taken within the time limited for an appeal as of right, provided the motion for permission was made within the time limited for taking the appeal.").

"interest of justice" weighs heavily in favor of granting leave to appeal, as demonstrated *infra*, at 35-39.

V. ARGUMENT

1. Venue is proper in Orleans County and improper in Bronx County.

At the hearing on the Motion to Reargue, the lower court erroneously found that "Orleans County is not a proper county based on [CPLR] 503(a), 510(1), and 510(3)."[28] The court thus reaffirmed its prior decision to grant the Bronx Zoo's Motion to Transfer, which had been made on the erroneous ground that CPLR 503(a) required venue in Bronx County and prohibited venue in Orleans County. *See* Demand for Change of Venue[29] (Respondents "hereby demand, pursuant to CPLR 511, that the venue of the above-captioned proceeding be changed from County of Orleans, where it has been improperly placed, to the County of Bronx, where venue would be proper, as provided by CPLR 503, 510(1), and 7004(c).").[30]

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[28] Feb. 5, 2019 Tr. [Exh. 5], at 23-24.

[29] Attached as "Exhibit 15" to the annexed Affirmation of Kevin Schneider.

[30] *See also* Respondents' Dec. 13, 2018 Mem. (attached as "Exhibit 23"), at 3 ("CPLR 503(a) controls, and mandates venue in Bronx County."); Respondents' Dec. 3, 2018 Mem. (attached as "Exhibit 17"), at 6 ("Respondents seek to transfer venue because pursuant to CPLR Articles 5 and 70, the proper venue for this action is Bronx County.") (citing CPLR 503(a)); *id*. ("Respondents' motion to transfer venue should be granted because NRP has not and cannot identify any nexus between this litigation and Orleans County."); Aff. of Kenneth A. Manning, Esq. (attached as "Exhibit 18"), ¶ 16 ("Respondents move to change venue to Bronx County pursuant to CPLR 510 and CPLR 7004(c). Because NRP brought this proceeding to challenge allegedly unlawful detention, venue should be in the county where that alleged detention occurred, and where the subject of the proceeding is located."); Dec. 14, 2018 Tr. [Exh. 3], at 15 ("CPLR Article 5 indicates that this matter should be held in the Bronx.").

As discussed below, CPLR 503(a) does not govern venue in a habeas corpus action and the lower court's reliance upon it was error.

A. The lower court erred in relying upon CPLR 503(a) to determine venue, as habeas corpus venue is governed by CPLR 506(a), 7002(b), and 7004(c).

"While CPLR 503 provides generally that a civil action may be venued in any county where a party resides, it also makes clear that this is a general rule and, like all general rules, may be displaced by an exception. CPLR 503 is explicit that its authorization for residence-based venue will be overcome 'where otherwise prescribed by law'." *Paraco Gas of N.Y., Inc. v. Colonial Coal Yard, Inc.*, 20 Misc. 3d 1112(A) at *5 (Sup. Ct. 2008). Thus, in determining whether the residence-based provisions of CPLR 503(a) are applicable to a particular case, it is necessary to ascertain whether venue for that case is "otherwise prescribed by law."

Significantly for the case at bar, it is CPLR 506(a), and not CPLR 503(a), that determines where "special proceedings are to be commenced," and provides that "a special proceeding may be commenced in any county within the judicial district where the proceeding is triable," unless "the law authorizing the proceeding" requires otherwise. "[T]he statute authorizing the particular proceeding must be consulted" to determine where the action is triable, in other words where venue is proper. Joseph L. Marino, 4 *West's McKinney's Forms Civil Practice Law and Rules* § 10:2 (2015). *See* Vincent C. Alexander, *Practice Commentaries*, McKinney's

CPLR 506 ("In order to determine the venue for a special proceeding, counsel must begin by consulting the statute authorizing the particular proceeding. See, e.g., CPLR 7002(b) (habeas corpus); CPLR 7502(a) (proceedings relating to arbitration).").[31]

Habeas corpus is a special proceeding governed by CPLR 506(a), not CPLR 503(a).[32] *See Greene v. Sup. Ct, State of N.Y., Westchester Cty. Special Term, Part I*, 31 A.D.2d 649, 649 (2d Dep't 1968) ("We think that a habeas corpus proceeding, a special proceeding (CPLR 7001), is subject to the practice provisions governing venue generally (cf. CPLR 506)."); *see also Weingarten v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 3 Misc. 3d 418, 424 (Sup. Ct. 2004) ("CPLR 506 governs the venue of special proceedings.").

Two provisions of CPLR Article 70 govern venue in habeas corpus proceedings. CPLR 7002(b) specifies the judges before whom a habeas corpus petition may be brought, and CPLR 7004(c) provides where the writ shall be made

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[31] *See also* 5 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 506.01 ("The county in which the proceeding is triable will be determined, *absent a more particular provision*, by the same provisions that govern venue of actions.") (emphasis added); 4 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 401.02[2] ("Venue in special proceedings is governed by CPLR 506, which *in turn recognizes that many of the specific statutes authorizing special proceedings* include controlling venue provisions.") (emphasis added); David D. Siegel, New York Practice § 549 at 1056 [6th Ed] (explaining that CPLR 506(a) "take[s] whatever county the *special statute offers as proper venue in the given instance* and authorizes the proceeding to be brought in that county or any other 'within the judicial district.'") (emphasis added).

[32] CPLR 7001 provides: "Except as otherwise prescribed by statute, the provisions of this article are applicable to common law or statutory writs of habeas corpus . . . A proceeding under this article is a special proceeding."

returnable. *See* Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 7004(c). As shown below, these provisions make venue proper in Orleans County.

B. CPLR 7002(b)(3) authorized the NhRP to file the Petition in Orleans County.

As recognized by the lower court,[33] the NhRP was permitted to make its Petition to "any justice of the Supreme Court" pursuant to CPLR 7002(b)(3). *See Article 70 of CPLR for a Writ of Habeas Corpus*, *The Nonhuman Rights Project, Inc. v. Stanley,* 16 N.Y.S.3d 898, 906 (Sup. Ct. 2015); *see also People ex rel. Van Buren v. Superintendent of N.Y. State Reformatory for Women at Bedford*, 192 N.Y.S. 511, 512 (1922) ("Section 1232 of the Civil Practice Act provides that the application for the writ may be made to a justice of the Supreme Court in any part of the state.").

C. As the Bronx Zoo is not a "state institution," the lower court correctly made the Order to Show Cause returnable in Orleans County pursuant to CPLR 7004(c).

At the December 14, 2018 hearing, the lower court correctly noted that CPLR 7004(c) "tells you *where* [the writ is] returnable."[34] CPLR 7004(c) has two sentences, each addressing a different category of cases. The first sentence, which is not applicable to this case, mandates that writs filed to secure the discharge of prisoners in a "state institution" shall be returnable in the county of detention:

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[33] "Your 7002(b)(3) does permit you to bring a writ of habeas corpus before any judge." Dec. 14, 2018 Tr. [Exh. 3], at 28.

[34] Dec. 14, 2018 Tr. [Exh. 3], at 28 (emphasis added).

> A writ to secure the discharge of a person from a *state institution* shall be made returnable before a justice of the supreme court or a county judge being or residing within the county in which the person is detained; if there is no such judge it shall be made returnable before the nearest accessible supreme court justice or county judge.

CPLR 7004(c) (emphasis added). The second sentence provides that, in all other cases, the court must make the writ returnable in the county of issuance unless, within its sound discretion, it makes the writ returnable in the county of detention:

> In all other cases, the writ shall be made returnable in the county where it was issued, except that where the petition was made to the supreme court or to a supreme court justice outside the county in which the person is detained, such court or justice *may* make the writ returnable before any judge authorized to issue it in the county of detention.

CPLR 7004(c) (emphasis added). *See Hogan v. Culkin*, 18 N.Y.2d 330, 335 (1966) (In "state institution" cases, the writ "must be made returnable in the county of detention . . . In all other cases, the writ is to be made returnable in the county of issuance, unless the issuing judge should decide in his discretion to make it returnable in the county of detention.").

The Bronx Zoo has conceded that it is not a "state institution," but instead a "non-profit conservation organization."[35] Nevertheless, at the December 14, 2018 hearing, the lower court implicitly treated the Bronx Zoo as a "state institution" by openly and erroneously applying the first sentence of CPLR 7004(c):

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[35] Respondents' Dec. 13, 2018 Mem. [Exh. 23], at 2 ("*Respondents are not prisons or any other state institution*. Instead, Mr. Breheny and the Bronx Zoo are an individual and a non-profit conservation organization, respectively, residing and located in Bronx County.") (emphasis added).

> I believe that you could have asked any judge in the Supreme Court to sign your papers to start off your writ of the habeas corpus proceeding, but it needed to be made returnable before some county that had any -- some nexus to this elephant and his condition -- his conditions of captivity.
>
> *I'll just read this part. It says, "It shall be made returnable before a justice of the Supreme Court or a county court judge being or residing within the county where the person is detained."*
>
> If we accept your belief that an animal -- or this animal is a person within the meaning of the law, that animal is being detained in the Bronx County. I don't think it's even questionable that this proceeding should be there.[36]

As Happy is not a prisoner in a "state institution," the lower court properly made the Order to Show Cause returnable in Orleans County, where it originally issued. *See Hogan*, 18 N.Y.2d at 335; *Stanley*, 16 N.Y.S.3d at 907. Venue is therefore proper in Orleans County. Although the lower court initially had the discretion to make the Order to Show Cause returnable in the county of detention, it chose not to do so, and therefore venue is improper in Bronx County.

2. The Bronx Zoo failed to meet the requirements of CPLR 510 for transferring venue from Orleans County to Bronx County.

Article 70 is silent as to how venue in habeas corpus cases may be changed. Accordingly, the applicable provisions of Article 5 control. *See* CPLR 103(b) ("Except where otherwise prescribed by law . . . the provisions of the civil practice

[36] Dec. 14, 2018 Tr. [Exh. 3], at 28-29 (emphasis added).

law and rules applicable to actions shall be applicable to special proceedings.");[37] *Greene*, 31 A.D.2d at 649 ("a habeas corpus proceeding, a special proceeding (CPLR 7001), is subject to the practice provisions governing venue generally").[38]

CPLR 510 provides the sole grounds for granting a motion to change venue:

> The court, upon motion, may change the place of trial of an action where:
>
> 1. the county designated for that purpose is not a proper county; or
>
> 2. there is reason to believe that an impartial trial cannot be had in the proper county; or
>
> 3. the convenience of material witnesses and the ends of justice will be promoted by the change.

See Mimassi v. Town of Whitestown Zoning Bd. of Appeals, 104 A.D.3d 1280 (4th Dep't 2013) ("CPLR 510 provides the grounds for the change of the place of trial,

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[37] *See also* 1 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 103.05[4] ("The second sentence of CPLR 103(b) makes the *general practice provisions of the CPLR applicable to special proceedings*, as well as to actions, except where otherwise prescribed by law.") (emphasis added); Vincent C. Alexander, *McKinney's Practice Commentary*, CPLR 401 (2014) ("If the authorizing statute is silent on the particular problem, Article 4 must be consulted. If neither the authorizing statute nor Article 4 addresses the point, CPLR 103(b) specifies that 'procedure in special proceedings shall be the same as in actions,' i.e., the *CPLR provisions that govern actions also apply to special proceedings* except where otherwise prescribed by law.") (emphasis added).

[38] *See also Travelers Indem. Co. of Ill. v. Nnamani*, 286 A.D.2d 769, 770 (2d Dep't 2001) (citing CPLR 103(b), holding that "CPLR article 5 procedures for changing venue are applicable to this" Article 75 proceeding even though "the specific venue provisions of CPLR 7502(a)(i) supersede the general venue provisions for special proceedings"); *Phoenix Ins. Co v. Casteneda*, 287 A.D.2d 507, 508 (2d Dep't 2001) ("While the specific venue provisions of CPLR 7502(a)(i) supersede the general venue provisions for special proceedings (*see*, CPLR 506), the CPLR article 5 procedures for changing venue are applicable to this proceeding (*see*, CPLR 103 [b]; 105[b])."). *See* Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 506 ("If the authorizing statute is silent as to venue, the general venue rules of CPLR Article 5 . . . would be applicable.").

upon a motion."); Vincent C. Alexander, *Practice Commentaries*, McKinney's 510 C510:1 ("CPLR 510 specifies three grounds for a motion to change venue.").

As demonstrated below, after the lower court properly made the Order to Show Cause returnable in Orleans County, it erroneously and without authority granted the Bronx Zoo's Motion to Transfer even though Respondents did not satisfy any of the requirements of CPLR 510.

A. The lower court erred in granting the Bronx Zoo's Motion to Transfer pursuant to CPLR 510(1) on the basis that, under CPLR 503(a), Orleans County is "not a proper county."[39]

CPLR 510(1) allows a change of venue only when a moving party demonstrates both that "plaintiff's choice of venue is improper and that defendant's is proper." *Agway, Inc. v. Kervin*, 188 A.D.2d 1076, 1077 (4th Dep't 1992) ("Here, although defendants demonstrated that plaintiff's choice was erroneous, they did not satisfy their burden of requesting a proper venue."). *See Schapiro & Reich, Esqs. v. Fuchsberg*, 172 A.D.2d 1080, 1081 (4th Dep't 1991) (defendant "not entitled to an order changing venue as of right because Suffolk County is a proper County"). The lower court erred in granting the Bronx Zoo's Motion to Transfer pursuant to CPLR 510(1) as the Bronx Zoo did not meet its required burden for the following reasons.

[39] The Bronx Zoo invoked CPLR 510(1) in its Demand for Change of Venue (Exh. 15), but CPLR 511 and 7004(c) in its Notice of Motion (Exh. 16).

First, the Bronx Zoo erroneously claimed that the residence-based requirements of CPLR 503(a) determine venue in a habeas corpus action,[40] and mistakenly relied upon *Greene v. Supreme Court, State of New York, Westchester County, Special Term, Part I*, 31 A.D.2d 649 (2d Dep't 1968), in support thereof. *Greene,* however, merely stands for the proposition that "a habeas corpus proceeding, a special proceeding (CPLR 7001), is subject to the practice provisions governing venue generally (cf. CPLR 506)," which then calls into play the two venue provisions of Article 70.[41] *Id*.

Second, the Bronx Zoo relied upon *State ex rel Cox v. Appelton*, 309 N.Y.S. 290 (Sup. Ct. 1970),[42] which does not support its assertion that venue in Orleans County was misplaced. In *Appelton,* a thirteen-year old relator was being detained in Ulster County, and his mother commenced a habeas corpus action by an order to show cause in Onondaga County, where she resided. *Id*. at 292. Like *Greene*, *Appelton* does not cite to CPLR 503(a), and it does not establish that venue was proper or required in the county of detention. *Id*. ("Article 5 of the CPLR provides

[40] Respondents' Dec. 3, 2018 Mem. [Exh. 17], at 6 ("[T]he proper venue for this action is Bronx County." (citing CPLR 503(a)); Respondents' Dec. 13, 2018 Mem. [Exh. 23], at 1 ("Article 5 of the CPLR requires that venue be in a county where a party resides or where the material events occurred. CPLR 503(a).").

[41] Moreover, as Mr. Greene was an inmate in a "state institution," the requirement that the writ be made returnable in the county of detention is entirely consistent with CPLR 7004(c) and inapposite to the case at bar.

[42] Feb. 5, 2019 Tr. [Exh. 5], at 18; Respondents' Jan. 25, 2019 Mem. (attached as "Exhibit 24" to the annexed Affirmation of Kevin Schneider), at 5.

that a special proceeding may be commenced in the County where the petitioner . . . resides, which is Onondaga County."). Venue was merely held appropriate in the county of residence which was the county of issuance. *Appelton* therefore provides no support for the Bronx Zoo's erroneous assertion that venue is improper in Orleans County.

As the Bronx Zoo could not show that venue in Orleans County is improper,[43] the lower court erred in granting a change of venue on the ground that Orleans County is "not a proper county based on [CPLR] 503(a) [and] 510(1)."[44] Feb. 5 Tr. [Exh. 5], at 23-24.

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[43] The Bronx Zoo also falsely claimed that the NhRP improperly engaged in "forum shopping" to support its erroneous assertion of improper venue. *See* Respondents' Dec. 3, 2018 Mem. [Exh. 17], at 7 ("New York courts have repeatedly refused to endorse such forum-shopping by reversing its ill-gotten results . . . ."); Respondents' Dec. 13, 2018 Mem. [Exh. 23], at 2 ("Thus, venue is improper in Orleans County . . . because of the common law prohibition on forum shopping."). Such a claim implies that venue is attained "*as a result of duplicity*," which "amounts to a *fraud upon the court*." *Koschak v. Gates Constr. Corp*, 225 A.D.2d 315, 316 (1st Dep't 1996) (emphasis added); *Opriciu v. Cleveland Tankers, Inc*, 298 A.D.2d 913 (4th Dep't 2002) ("duplicity") (quoting *Koschak*); *CDR Creances S.A.S. v. Cohen*, 104 A.D.3d 17, 24 (1st Dep't 2012) ("In this jurisdiction, '*fraud upon the court*' is a term used to describe the *perversion of the judicial process* as a result of *misconduct by the party or counsel*.") (emphasis added). The Bronx Zoo did not cite any facts that would support its claim of "duplicity" or "fraud upon the court," because they don't exist.

[44] The lower court also erroneously concluded that Orleans County is not a "proper county based on . . . [CPLR] 510(3)." Feb. 5, 2019 Tr. [Exh. 5] at 24. However, CPLR 510(3) has no relevance to whether a county is proper or improper, as it "provides for a discretionary change of venue where 'the convenience of material witnesses and the ends of justice will be promoted by the change.'" *Mroz v. Ace Auto Body & Towing, Ltd.*, 307 A.D.2d 403, 403 (3d Dep't 2003). The lower court's other errors in regards to CPLR 510(3) are discussed *infra*, at 25-35.

B. The lower court erred in granting the Bronx Zoo's Motion to Transfer under CPLR 510(3).

The lower court explicitly and implicitly relied upon CPLR 510(3) in ordering a change of venue even though that section was never invoked by the Bronx Zoo. At the February 5, 2019 hearing, the lower court reaffirmed its prior decision to transfer venue based, *sua sponte*, on the convenience of material witnesses, the ground set forth in CPLR 510(3):

> [T]he Court does feel that regardless of the arguments of counsel that Orleans County is not a proper county based on . . . 510(3). I believe that it is probably the most inconvenient place to have this case argued. And I can evidence that by the fact that we're on the telephone now, and that despite Court being in session on [February 1, 2019], that you didn't want or could not or, you know, found it difficult to come to Orleans to make an argument in person, you know, you've witnessed how difficult it is to have a case in such a remote county.

Feb. 5 Tr. [Exh. 5], at 23-24.

Moreover, at the December 14, 2018 hearing, the lower court also stated, *sua sponte,* that its decision to grant the Bronx Zoo's Motion to Transfer was based on the convenience of material witnesses:

> [This proceeding] will require experts to testify on both sides, and I probably can't imagine a more inconvenient place for this case to be than in Albion New York. I might be able to think of a couple, but this would be among the most inconvenient places for the parties to actually have any kind of a hearing. I certainly am not going to be bringing up employees and experts and having them fly to cities in New York and drive an hour to get there.
>
> The Bronx is a convenient place. The witnesses of the conditions of Happy's confinement are there, and I would say that any experts that

> you would bring in or alert folks to contest that -- they would also find it much easier to get to the Bronx than to Albion, New York.

Dec. 14 Tr. [Exh. 3], at 30.

If a party has moved to change venue under CPLR 510(3), the standard of review on appeal is whether the lower court exercised its discretion "in a provident manner." *Sunick v. Wadsworth*, 109 A.D.3d 1199 (4th Dep't 2013) (quoting *O'Brien v. Vassar Bros. Hosp.*, 207 A.D.2d 169, 172 (2d Dep't 1995)); *Frangos v. Town of Niagara*, 307 A.D.2d 727 (4th Dep't 2003); *Huttenlocker v. White*, 298 A.D.2d 960 (4th Dep't 2002) (lower court improvidently exercised its discretion as "[d]efendants failed to meet their burden of establishing that the nonparty witnesses, law enforcement personnel employed by the County of Wyoming, 'would in fact be inconvenienced in the event a change of venue were not granted.'") (citations omitted).

In the case at bar, the lower court "improvidently exercised its discretion" in ordering the transfer of venue under CPLR 510(3).

i. The Bronx Zoo did not invoke CPLR 510(3) as a ground for changing venue.

"CPLR 510(3) provides that, *upon motion*, the court may change the venue of an action where 'the convenience of material witnesses and the ends of justice will be promoted by the change.'" *Schwartz v. Walter*, 141 A.D.3d 641, 641 (2d Dep't 2016) (emphasis added); *Bikel v. Bakertown Realty Grp., Inc.*, 157 A.D.3d 924, 925

(2d Dep't 2018) (same). A court "'is authorized to change venue *only* upon motion and *may not do so upon its own initiative*.'" *Mimassi*, 104 A.D.3d at 1280 (citation omitted) (emphasis added).[45]

It is error to treat a "motion to change venue as of right under CPLR 510 (1) as having been made under CPLR 510 (3)." *Mejia v. J. Crew Operating Corp*, 140 A.D.3d 505, 506 (1st Dep't 2016). *See also Patel v. Sharma*, 90 N.Y.S.3d 538, 538 (2d Dep't 2019) (reversible error where "Supreme Court granted the defendant's motion on a ground not raised by the defendant"); *Varo Inc. v. Alvis PLC*, 261 A.D.2d 262, 267 (1st Dep't 1999) ("it was error to grant the motion on a ground not raised by defendants in their moving papers").

The Bronx Zoo never invoked CPLR 510(3) or otherwise raised the issue of the convenience of material witnesses. Rather, its sole contention was that venue should be changed because Orleans County is allegedly an improper venue pursuant to CPLR 510(1). The lower court therefore erred in *sua sponte* granting a change of venue under CPLR 510(3). *Rubens v. Fund*, 23 A.D.3d 636, 637 (2d Dep't 2005) (Supreme Court erred in granting "defendants' motion as if it had been made upon

[45] *See also Travelers Indem. Co.,* 286 A.D.2d at 770 ("a court may not sua sponte transfer venue"); Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 510 at C510:1 ("The drafters of the CPLR noted that the words 'upon motion' were inserted in the introductory sentence of CPLR 510 'to avoid any implication that the court may change the place of venue on its own motion.' N.Y. Sen. Fin. Comm. et al., Fifth Prelim. Rep., Legis.Doc. No.15, p.78 (1961).").

the ground of convenience of material witnesses," as it was "a ground not raised in the original notice of motion . . . .").

ii. Even if the Bronx Zoo had invoked CPLR 510(3), it never satisfied the evidentiary requirements of that section.

"[T]he Appellate Divisions have specified a rigorous set of evidentiary requirements for the motion to change venue to promote the convenience of material witnesses and the ends of justice (CPLR 510(3))." Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 510 at C510:3. The *Practice Commentaries* note that in *O'Brien v. Vassar Brothers Hospital,* 207 A.D.2d 169, 172-73 (2d Dep't 1995), drawing upon caselaw from all of the departments, the court delineated four requirements that must be satisfied by the moving party:

> 1. The movant's affidavit must list the names, addresses and occupations of the witnesses who are expected to be called.
>
> 2. The movant must disclose the facts to which such witnesses will testify so that the court may determine whether the testimony of the proposed witnesses is "necessary and material."
>
> 3. The movant must demonstrate that the witnesses are actually willing to testify.
>
> 4. The movant must show that the witnesses would in fact be inconvenienced in the absence of a change of venue.

See O'Brien, 207 A.D.2d at 172 (observing the "general consensus among appellate courts as to the existence, if not as to the absolute rigidity and inexorability, of four

criteria which should be established by the movant in order to demonstrate his or her entitlement to relief pursuant to CPLR 510 (3).").[46]

The Fourth Department has adopted these requirements. *See Rowland v. Slayton*, 169 A.D.3d 1474 (4th Dep't 2019) ("The party moving for a change of venue pursuant to CPLR 510(3) has the burden of demonstrating that the convenience of material witnesses would be better served by the change . . . [D]efendant failed to establish that the prospective witnesses would be inconvenienced if the change of venue were not granted.") (internal quotations and citations omitted); *Rochester Drug Coop., Inc. v. Marcott Pharm. N. Corp.*, 15 A.D.3d 899, 899 (4th Dep't 2005) (Movant "identified four nonparty witnesses, but failed to provide their residence addresses, establish that any of the witnesses had been contacted, or indicate that they were available and willing to testify.") (citations omitted); *Rodriguez v. St Paul's Catholic Church*, 162 A.D.2d 1017, 1017 (4th Dep't 1990) ("The movant must supply the names, addresses and occupations of the witnesses expected to be called, indicate in some detail the testimony which each witness will give, and submit some evidence concerning the calendar in the counties involved in the motion.").

[46] "Countless motions to change venue pursuant to CPLR 510(3) are denied on a daily basis simply because of the movant's failure to provide the necessary information demanded by the foregoing caselaw." Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 510 at C510:3. This should have been one of them.

As the Bronx Zoo did not even mention CPLR 510(3) in any of its moving papers, it clearly – and unsurprisingly – failed to satisfy the detailed rigorous evidentiary requirements of that section.

iii. Even if the Bronx Zoo had invoked CPLR 510(3), it has no "material witnesses" whose convenience would be relevant for purposes of the section.

The expected testimony of a "material witness" must be "necessary and material" to the trial of the action in order to be relevant under CPLR 510(3). *See Rochester Drug Coop.,* 15 A.D.3d at 899 ("the brief and vague descriptions of the witnesses' expected testimony are insufficient to assess the materiality of that testimony"); *Geraghty v. Agway Inc*, 289 A.D.2d 1016 (4th Dept. 2001).[47]

Here, the lower court misunderstood the relevance of the possible testimony of the Bronx Zoo's affiants, stating:

> The experts that were -- or the learned opinions that I got on behalf of Happy to move or change his conditions indicated that there were certain facts that they relied upon, and the experts or learned information that I got with regards to the Bronx Zoo and the folks on the other side indicated that, in fact, Happy is happy where he is at, and that there, in fact, would be impacts on Happy if changes were to be made to his conditions that he is currently being held in.

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[47] *See also Thorner-Sidney Press, Inc. v. Merling Marx & Seidman, Inc.*, 115 A.D.2d 328 (4th Dep't 1985) ("In support of a motion for a discretionary change of venue, defendant is required to . . . [set] forth in some detail the testimony which each witness will give with reasons why the testimony of the witness is indispensible [sic]."") (emphasis added); *Pub. Serv. Truck Renting v. Ambassador Ins. Co.*, 136 A.D.2d 911, 911 (4th Dep't 1988) ("Public Service . . . failed to provide some detail concerning the testimony each witness would give and an explanation of the necessity for such testimony in support of its original motion to change venue or on the motion for reargument.").

> So I definitely believe that regardless of any of the big underlying issues, that it's going to come down at some point for a judge of the Supreme Court to decide whether or not Happy needs to be moved and where, and those decisions will require, in my opinion, adhering.
>
> It will require experts to testify on both sides[.]

Dec. 14 Tr. [Exh. 3], at 29-30.

The lower court's statements, reaffirmed at the reargument hearing, Feb. 5 Tr. [Exh. 5], at 24, do not satisfy the "material witness" requirement of CPLR 510(3) for the following reasons.

First, as habeas corpus focuses on the single question of whether an imprisonment is illegal, the sole legal question before the lower court was whether Happy should be imprisoned *at all*.[48] The NhRP has repeatedly asserted that it is only challenging Happy's allegedly unlawful imprisonment at the Bronx Zoo,[49] not the conditions of her prison.[50] As this proceeding is neither an "animal protection" nor "animal welfare case," just as a habeas corpus proceeding brought on behalf of a detained human would not be a "human protection" or "human welfare" case, the conditions of Happy's confinement are irrelevant.[51]

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[48] *See People ex. rel Sabatino v. Jennings*, 246 N.Y. 258, 260 (1927) ("The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty.") (quoting Shaw, C. J., in *Wyeth v. Richardson*, 10 Gray (Mass.) 240).).

[49] *See* Petition [Exh. 6] ¶¶ 1, 2, 5, 8, 54, 56, 57, 58 n.16.; NhRP Oct. 2, 2018 Mem. [Exh. 7], at 3 n. 9, 20-21; NhRP Dec. 10, 2018 Mem. [Exh. 22], at 3-5, 19-20, 35-38.

[50] *See* Dec. 14, 2018 Tr. [Exh. 3], at 8; Supplemental Aff. of Joyce Poole, PhD. [Exh. 12] ¶¶ 3-5.

[51] *See Ex Parte West*, 2 Legge 1475, 1476 (New South Wales Supreme Court 1861) (referring to the alleged kidnapping of an aboriginal child, the court stated "[i]t might be admitted that the boy had been most kindly treated, but no end would justify an act such as was alleged to have been committed.").

Thus, the sole factual question in this case upon which expert testimony may be relevant is whether an elephant is autonomous,[52] which is the subject of the NhRP's numerous *uncontroverted* affidavits.[53] As no relevant facts were placed into dispute regarding this issue, the possible testimony of any of the Bronx Zoo's proposed witnesses would be immaterial. *See Wecht v. Glen Distribs. Co*, 112 A.D.2d 891, 893 (1st Dep't 1985) ("In view of defendants' concession at oral argument that the condition of the road will be stipulated to at trial, neither Parsons nor Officer Zaleski are material witnesses. The unspecified testimony of unidentified ambulance, hospital, and fire department employees . . . cannot be considered material."); *Frey v. Fun Tyme Ski Shop,* 163 A.D.2d 11, 13 (1st Dep't 1990) ("Since plaintiffs concede that Hell's Gate is an expert trail, Mr. Slutsky's testimony does not appear to be material.").[54]

Second, in stating that "it's going to come down at some point for a judge . . . to decide whether or not Happy needs to be moved and where," the lower court

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[52] *See* Petition [Exh. 6] ¶¶ 69-117 (summarizing the uncontroverted evidence establishing that Happy's interest in exercising her autonomy is as vital to her as it is to humans); NhRP Oct. 2 Mem. [Exh. 7], at 2 n. 5, 3 n. 6.

[53] *Compare*: Aff. of Joyce Poole, Ph.D. [Exh. 8] ¶¶ 22-55; Joint Aff. of Lucy Bates, Ph.D. and Richard M. Byrne, Ph.D. [Exh. 9] ¶¶ 30-59; Aff. of Karen McComb, Ph.D. [Exh. 10] ¶¶ 24-55; Aff. of Cynthia Moss [Exh. 11] ¶¶ 18-49; *with* Aff. of James J. Breheny [Exh. 13] ¶¶ 3-19; Supplemental Aff. of James Breheny [Exh. 19] ¶¶ 5-30; Aff. of Paul P. Calle [Exh. 20] ¶¶ 7-16; and Aff. of Patrick Thomas, Ph.D. [Exh. 21] ¶¶ 7-30.

[54] *See also Moghazeh v. Valdes-Rodriguez*, 151 A.D.2d 428, 429 (1st Dep't 1989) ("Similarly faulty is defendants' reliance upon the anticipated testimony of two civilian witnesses . . . [whose] testimony offers no assistance . . .").

confused the question of whether Happy is being illegally imprisoned with where she should be released *after* a finding of illegal imprisonment. In fact, this case is no different than a situation in which the released prisoner is a child of tender years[55] or a human adult with dementia: the court must decide where the liberty, autonomy, and welfare of the prisoner will be most appropriately protected *after* making a finding of illegal detention.

This was the procedure recently used by an Argentine court in a habeas corpus case involving a chimpanzee named Cecilia, in which the court recognized Cecilia as a "non-human person," ordered her released from a Mendoza Zoo, and then determined that she should be sent to a sanctuary in Brazil. *In re Cecelia*, Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-23 (November 3, 2016).

Third, contrary to the lower court's assertion regarding experts, there are no experts "on both sides," as the only experts who can provide testimony relevant to the legality of Happy's imprisonment are on the NhRP's side. The NhRP's experts include some of the most experienced and qualified elephant cognition and behavior

[55] The New York courts, as well as the courts of other free states, long routinely utilized this procedure when confronted with the case of a child of tender years, sometimes a slave child or apprentice ordered freed from her illegal imprisonment. *See e.g.*, *People ex rel. Pruyne v. Walts*, 77 Sickels 238 (2d Dep't 1890); *Lemmon v. People*, 20 N.Y. 562 (1860) (slaves); *People ex rel. Trainer v. Cooper*, 8 How. Pr. 288 (Sup. Ct. 1853); *People v. Hanna*, 3 How. Pr. 39 (Sup. Ct. 1847) (apprentice); *Commonwealth v. Taylor*, 44 Mass. 72 (1841) (slave); *Commonwealth v. Aves*, 35 Mass. 193 (Mass. 1836) (Shaw, C.J.) (slave); *In re McDowle*, 8 Johns. 328 (Sup. Ct. 1811) (apprentice).

experts in the world.[56] In contrast, none of the Bronx Zoo's affiants claimed to possess any specialized or professional knowledge, training, education, or experience concerning elephant cognition or behavior.[57] None purport to have published any relevant peer-reviewed articles or to have engaged in any relevant scientific scholarship or research. Unlike the NhRP's experts, the Bronx Zoo's affiants do not possess the requisite qualifications to render a reliable opinion on the only factual question raised by the NhRP in this habeas corpus action: whether elephants are autonomous. "[F]or example, a medical expert is not qualified as a ballistics expert, and a metallurgist may not testify on dynamics and forces." *Smith v. M.V. Woods Constr. Co.*, 309 A.D.2d 1155, 1156 (4th Dep't 2003).

Fourth, assuming *arguendo* that the Bronx Zoo's affiants are "material witnesses," the lower court improperly considered their convenience. "Courts have identified a number of guidelines and factors regarding the substance of motions made under CPLR 510(3). *First and foremost*, the focus must be on the convenience of material *nonparty* witnesses. The convenience of parties, their employees, persons under their control, or family members is given little if any weight." Vincent C.

[56] *See* Aff. Joyce Poole, Ph.D. [Exh. 8] ¶¶ 1-21; Joint Aff. of Lucy Bates, Ph.D. and Richard M. Byrne, Ph.D. [Exh. 9] ¶¶ 1-29; Aff. of Karen McComb, Ph.D. [Exh. 10] ¶¶ 1-23; Aff. of Cynthia Moss [Exh. 11] ¶¶ 1-17.

[57] *See* Aff. of James J. Breheny [Exh. 13] ¶ 1; Aff. of Paul P. Calle [Exh. 20] ¶¶ 1-3; Aff. of Patrick Thomas, Ph.D. [Exh. 21] ¶¶ 1-3.

Alexander, *Practice Commentaries*, McKinney's CPLR 510 at C510:3 (emphasis added).

Because the Bronx Zoo's affiants are all Wildlife Conservation Society employees, their convenience is irrelevant under CPLR 510(3). *See Filkins v. Jan-Cen Auto. Parts, Inc.*, 132 A.D.2d 937, 938 (4th Dep't 1987) ("Excluding from consideration the parties, their employees and experts"); *see also Said v. Strong Mem'l Hosp.*, 255 A.D.2d 953, 954 (4th Dep't 1998) ("It is well established that the convenience of the parties, their agents and employees, or others under their control carries little if any weight").

As the Bronx Zoo lacks "material witnesses" as contemplated by CPLR 510(3), and their convenience would be irrelevant even they did exist, the lower court lacked the authority to transfer venue under CPLR 510(3).

3. This Court should grant the NhRP's Motion to Appeal in the interest of justice.

"[T]he right to invoke habeas corpus, 'the historic writ of liberty', 'the greatest of all writs', is *so primary and fundamental that it must take precedence over considerations of procedural orderliness and conformity.*" *People v. Schildhaus*, 8 N.Y.2d 33, 36 (1960) (emphasis added); *People ex rel. Sabatino v. Jennings*, 246 N.Y. 258, 260 (1927) ("The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty.") (quoting Shaw, C.J., in *Wyeth v. Richardson*, 10 Gray, 240); *Stanley*, 16 N.Y.S.3d at 908.

As demonstrated below, if the lower court's legally erroneous decision to transfer venue remains uncorrected by this Court, it will cause intolerable "delay and prolong the injustice to" Happy, contrary to the core purpose of habeas corpus as a "summary proceeding" that "strikes at unlawful imprisonment" and "tolerates no delay except of necessity." *People ex rel. Robertson,* 67 N.Y.2d at 201 (quoting *People ex rel. Duryee,* 188 N.Y. at 445-46). Accordingly, just as "statutes pertaining to the writ of habeas corpus must be 'construed in favor of, and not against, the liberty of the subject and the citizen,'" *People ex rel. DeLia v. Munsey*, 26 N.Y.3d 124, 130 (2015) (citation omitted), this Court should, in the interest of justice, construe NhRP's Motion to Appeal in favor of, and not against, the liberty of an imprisoned, autonomous being.

A. Transferring venue would cause intolerable delay.

At the December 14, 2018 hearing, the lower court noted it had "read a forest full of papers with regard to all of your positions." Dec. 14 Tr. [Exh. 3], at 2. *See* Transfer Order [Exh. 1], at 1 - 5 (reciting the numerous papers submitted in the case).

As "there is no need for the production of the petitioner before the [lower court],"[58] and "[a]ll pleadings have been fully submitted and no hearing is to be

[58] There is no possibility that Happy's physical presence will be required at any hearing. The Petition explicitly sought, and received, an order to show cause, thus making clear that "the NhRP does not demand that Respondents produce Happy . . . ." Petition [Exh. 6] ¶ 50. *See* CPLR 7003(a) ("where the petitioner does not demand production of the person detained . . . [the court shall] order the respondent to show cause why the person detained should not be released").

scheduled," "[a]ll that remains is for the [lower court] to issue its decision." *Chaney v. Evans*, 2013 WL 2147533, at *3 (N.Y. Sup. Ct. May 7, 2013) ("form would be elevated over substance, to the detriment of the petitioner, if the Court were to require the transfer of venue. . . at this late juncture").[59]

Accordingly, at this late juncture, if the instant proceeding were transferred to Bronx County, it would be heard by a Supreme Court Justice unfamiliar with the numerous scientific facts and legal arguments of the case, one who has *not* "read a forest full of papers," who has *not* heard oral argument on the merits of the Petition, and thus who *must* consider the complex and novel issues *ab initio*. That *would* cause the unnecessary delay proscribed by *Robertson*—and relatedly, waste judicial resources.

B. Transferring venue would prolong the injustice to and endanger the liberty of an autonomous being facing a lifetime of illegal imprisonment.

At stake in this proceeding is Happy's liberty. Current precedent of the New York State Supreme Court Appellate Division, First Judicial Department, is openly hostile to protecting the liberty interests of even the most autonomous and extraordinarily cognitively-complex nonhuman petitioners, just because they are not human. *See Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73, 78

[59] *See also* CPLR 7009(c) ("The court shall proceed in a summary manner to hear the evidence produced in support of and against the detention and to dispose of the proceeding as justice requires."); CPLR 409(b) ("The Court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised.").

(1st Dep't 2017) (unlike chimpanzees, human beings unable to bear legal duties and responsibilities are entitled to habeas relief because "these are still human beings, members of the human community").

This hostility is not only improper, as Judge Fahey explained in his concurrence in *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1057 (2018) (Fahey, J., concurring), but is in deep and irreconcilable conflict with both: (1) the controlling precedent of *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 201 (1972), which held that "personhood is 'not a question of biological or 'natural' correspondence,'" *People v. Graves*, 163 A.D. 3d 16, 21 (4th Dep't 2018) (quoting *Byrn*), but "a policy determination," *Byrn*, 31 N.Y.2d at 201, and (2) the public policy of New York as set forth in the Pet Trust Statute,[60] which has long designated certain nonhuman animals as persons with the rights of a trust beneficiary. *See Stanley*, 16 N.Y.S.3d at 901.

In contrast to the First Department, and in harmony with *Byrn* and New York public policy, this Court rejects the notion that legal personhood is necessarily dependent on human species-membership, stating that, as a matter of "common knowledge," "personhood can and sometimes does attach to . . . animals." *Graves*,

[60] The Sponsor's Memorandum of EPTL 7-6 (now EPTL 7-8) stated that its purpose was "to allow animals to be made the beneficiary of a trust." Sponsor's Mem. NY Bill Jacket, 1996 S.B. 5207, Ch. 159. *See also* Mem. of Senate, NY Bill Jacket, 1996 S.B. 5207, Ch. 159 (same).

163 A.D. 3d at 21.[61] Such recognition, along with the NhRP's powerful policy arguments as mandated by *Byrn*, could finally bring the injustice of Happy's illegal imprisonment to an end.

4. This Court should grant the NhRP's Motion to Stay.

A. CPLR 5519(c) is applicable to the Transfer Order.

CPLR 5519(c) authorizes this Court to "stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal . . . ." *See Schwartz v. N.Y. City Hous. Auth.*, 219 A.D.2d 47, 48 (2d Dep't 1996) ("CPLR 5519(c) permits this court, inter alia, to grant a discretionary stay of proceedings to enforce the order or judgment appealed from, or to vacate, limit or modify any automatic stay obtained pursuant to CPLR 5519(a) or (b)."). The granting of a stay "pending appeal . . . is, for the most part, a matter of discretion." *Grisi v. Shainswit*, 119 A.D.2d 418, 421 (1st Dep't 1986); *Mully v. Drayn*, 325 N.Y.S.2d 454, 454 (4th Dep't 1971) ("Special Term, in its discretion, correctly stayed all proceedings under the judgment until the determination of the appeal therefrom.").

The scope of the stay authorized by CPLR 5519(c) is the same as that authorized under CPLR 5519(a), "namely, a stay of enforcement proceedings only, not a stay of acts or proceedings other than those commanded by the order or

[61] *See* also NhRP Dec. 10, 2018 Mem. [Exh. 22], at 20-30 (discussing the nature of legal personhood in Anglo-American jurisprudence and in New York).

judgment appealed from." *Schwartz,* 219 A.D.2d at 48. The provision is "limited 'to the executory directions of the judgment or order appealed from which command a person to do an act.'" *In re Nile W.*, 64 A.D.3d 717, 719 (2d Dep't 2009) (citation omitted). It "does not extend to matters which are not commanded but which are the sequelae of granting or denying relief." *Pokoik v. Dep't of Health Servs. of Cty. of Suffolk*, 220 A.D.2d 13, 15 (1996).

In the case at bar, the underlying Transfer Order is an "executory direction" which "commands a person to do an act," namely, to transfer the "above-captioned proceeding, with all pleadings, motions, and papers submitted herein . . . to the New York State Supreme Court, Bronx County." Transfer Order [Exh. 1], at 6. *See* CPLR 511(d) ("Upon . . . entry of an order changing the place of trial by the clerk of the county from which it is changed, *the clerk shall forthwith deliver* to the clerk of the county to which it is changed all papers filed in the action and certified copies of all minutes and entries, *which shall be filed, entered or recorded, as the case requires*, in the office of the latter clerk.") (emphasis added). The subsequent proceeding in Bronx County would be a proceeding to enforce the Transfer Order. *Id.* ("*Subsequent proceedings shall be had in the county* to which the change is made as if it had been designated originally as the place of trial, except as otherwise directed by the court.") (emphasis added).

B. A stay is warranted in this habeas corpus case.

"[T]he court considering [a] stay application may consider the merits of the appeal," *Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990), as well as whether "any prejudice will result from granting or denying a stay," and whether "the stay is designed to delay proceedings." *People ex rel Schneiderman v. Coll. Network Inc.*, 53 Misc. 3d 1210(A), at *5 (2016). "[S]tays pending appeal will not be granted. . . in cases where the appeal is meritless or taken primarily for the purpose of delay." *Herbert v. City of N.Y.*, 510 N.Y.S.2d 112, 114 (1st Dep't 1987).[62] All these factors weigh in favor of granting the NhRP's Motion to Stay.

First, an appeal would have a strong likelihood of success on the merits, as the lower court made numerous errors of law in reaffirming, upon reargument, the Transfer Order. *See Kaur v. N.Y. State Urban Dev. Corp.*, 15 N.Y.3d 235, 262 (2010) ("'CPLR 5519(c) application would have afforded the Court with the opportunity to assess whether petitioners could demonstrate the likelihood of success on the merits.'") (citation omitted).

Second, as Happy's liberty is at stake, the prospect of securing her freedom will drastically diminish if this case is heard in Bronx County (*supra*, at 37-39). Thus, without a stay, a ruling on the merits of the Petition by the Supreme Court,

[62] *See also Wechsler v. Wechsler*, 8 Misc. 3d 328, 331 (Sup. Ct. 2005) (when considering whether to vacate a stay under CPLR 5519(c), "[m]ost important to this court's decision, is that defendant will not be prejudiced one iota if the stay is vacated.").

Bronx County could cause severe prejudice to Happy, in that it would prolong the injustice of her illegal imprisonment.

Further, as the Reargument Order and the Transfer Order are intermediate orders, a ruling on the merits of the Petition by the Supreme Court, Bronx County could moot any appeal of those two orders. *See In re Aho*, 39 N.Y.2d 241, 248 (1976) (right of direct appeal from intermediate order terminated with entry of final judgment).[63] Or if it does not, and this Court reverses either order on appeal, thereby requiring the lower court to rule on the merits of the Petition, this could create "the risk of inconsistent adjudications" vis-a-vis the Supreme Court, Bronx County and waste judicial resources as well. *In re Tenenbaum*, 81 A.D.3d 738, 739 (2d Dept. 2011) ("a court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources") (quoting *Zonghetti v. Jeromack*, 150 A.D.2d 561, 562 (2d Dep't 1989).

Third, a stay will not prejudice the Bronx Zoo. As Respondents' counsel stated at the December 14, 2018 hearing, "There's no intention on the part of the Bronx Zoo to move Happy anywhere." Dec. 14 Tr. [Exh. 3], at 18. Moreover, although the

[63] *See also Moore v. Federated Dep't Stores Inc*, 94 A.D.3d 638, 639 (1st Dep't 2012) ("Any right of direct appeal from the intermediate orders terminated with entry of the final judgment . . .").

NhRP has made two previous motions to stay the Transfer Order in the lower court, the Bronx Zoo never suggested it would suffer any prejudice when opposing them.[64]

VI. CONCLUSION

As the lower court made the writ returnable in Orleans County, the county of issuance, it erroneously ordered the transfer of this case to Bronx County, which became an improper venue. If uncorrected, this transfer will cause intolerable delay and prolong the injustice to an imprisoned, autonomous being and thus undermine the core purpose of habeas corpus. Accordingly, in the interest of justice, this Court should grant the NhRP's Motion to Appeal and Motion to Stay, together with such other and further relief that the Court may deem just, proper, and equitable.

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[64] Respondents' Jan. 25, 2019 Mem. [Exh. 24], at 9-10; Respondents' Jan. 30, 2019 Mem. [Exh. 25], at 4-5.

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