

Court of Appeals

STATE OF NEW YORK



IN RE NONHUMAN RIGHTS PROJECT, INC.,
ON BEHALF OF TOMMY,

Petitioner-Appellant,

against

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

Respondents-Respondents.

(Additional Caption on the Reverse)

**PROPOSED BRIEF BY *AMICI CURIAE*
JUSTIN MARCEAU AND SAMUEL WISEMAN
IN SUPPORT OF THE PETITIONER-APPELLANT**

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IN RE NONHUMAN RIGHTS PROJECT, INC.,
ON BEHALF OF KIKO,

Petitioner-Appellant.

against

CARMEN PRESTI, individually and as officer and director of The Primate
Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and
director of The Primate Sanctuary, Inc., and THE PRIMATE SANCTUARY, INC.

Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE WRIT HABEAS CORPUS HAS HISTORICALLY BEEN USED IN NOVEL SITUATIONS TO BRING ABOUT SOCIAL CHANGE.....	5
A. Family Law	5
B. Slavery	6
C. Guantanamo Bay	8
II. APPLYING HABEAS CORPUS TO NONHUMAN ANIMALS, LIKE TOMMY AND KIKO, IS CONSISTENT WITH THE WRIT’S HISTORICAL USES.....	9
III. TOMMY AND KIKO SHOULD BE CLASSIFIED AS A LEGAL PERSON AND ENTITLED TO HABEAS CORPUS.....	10
A. Captive Nonhuman Animals are Intelligent and Experience Suffering.....	11
B. Exonerations and Notions of Innocence are Equally Applicable to Humans and Nonhumans.	13
C. Nonhuman Animals Shoulder Social Duties and Responsibilities	14
CONCLUSION	17

TABLE OF AUTHORITIES

CASES

<i>Nonhuman Rights Project, Inc., ex rel. Kiko v Presti</i> , 124 A.D.3d 1334 (4th Dept. 2015), leave to appeal den., 126 A.D. 3d 1430 (4th Dept. 2015), leave to appeal den., 2015 WL 5125507 (N.Y. Sept. 1,2015)	4
<i>People ex rel. Nonhuman Rights Project, Inc. v. Lavery</i> , 124 A.D.3d 148, 150-53 (3d Dept. 2014), leave to appeal den., 26 N.Y.3d 902 (2015).....	3, 4
<i>Rasul v. Bush</i> , 542 U.S. 466, 483-84 (2004).....	8
<i>Boumediene v. Bush</i> , 553 U.S. 723, 771 (2008).....	8
<i>United States v. Mett</i> , 65 F.3d 1531, 1534 (9th Cir. 1995).....	13

STATUTES

NY Agric. & Mkts. § 123(4) (2011).....	14
Colo. R. Stat. § 18-9-204.5.....	14

SECONDARY SOURCES

American Museum of Natural History, <i>DNA: Collecting Humans and Chimps</i>	12
Bekoff, Marc, <i>Scientists Conclude Nonhuman Animals are Conscious Beings</i> , Psychology Today (Aug. 10, 2012).....	12
Black’s Law Dictionary (10th ed. 2014).....	13

Bush, Jonathan, <i>Free to Enslave: The Foundations of Colonial American Slave Law</i> , 5 Yale J.L & Human 413 (1993).....	7
Dubber, Markus, <i>Victims in the War on Crime</i> , 44 (2006).....	13, 14
<i>Emprise Pardon Rejected</i> , Dayton Beach Morn. J. (Sept. 28, 1977).	13
Everett, Ronald, Periman, Deborah, “ <i>The Governor’s Court of Last Resort:” An Introduction to Executive Clemency in Alaska</i> , 28 Alaska L. Rev. 57, 89 (2011)..	13
Freedman, Eric, <i>Habeas by Any Other Name</i> , 38 Hofstra L. Rev. 275, 277 (2009).....	7
Halliday, Paul D., <i>Habeas Corpus: From England to Empire</i> , 133 (2010).....	5, 6
National Archives Microfilm Publication M434, Habeas Corpus Case Records of the U.S. Circuit Court for the District of Columbia, 1820–1863. M433.....	7
Wong, Kate, <i>Tiny Genetic Differences between Humans and Other Primates Pervade the Genome</i> , Sci. Am. (Aug. 19, 2014).	12
<i>White House Rejects Emprise Pardon</i> , Chi. Trib. (Sept. 29, 1977).	13
Wise, Steven M., <i>Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery IX</i> (Da Capo Press 2005).....	6
Wise, Steven M., <i>Legal Personhood and the Nonhuman Rights Project</i> , 17 Animal L. 1, 1-2 (2010).....	6, 7
Wise, Steven M. <i>Rattling the Cage: Toward Legal Rights for Animals</i> , 131-236 (Perseus Publishing 2000).....	14, 15, 16

AFFIDAVITS

Affidavit of Christophe Boesch at 6, <i>Nonhuman Rights Project, Inc. v. Lavery</i> (Nov. 19, 2013).....	fn. 1, 15
Affidavit of Emily Sue Savage-Rumbaugh at 5, <i>Nonhuman Rights Project, Inc. v. Lavery</i> (Nov. 22, 2013).....	fn. 1, 15

Affidavit of James R. Anderson at 4, *Nonhuman Rights Project, Inc. v. Lavery* (Nov. 20, 2013)..... fn. 1, 15

Affidavit of James King at 4, *Nonhuman Rights Project, Inc. v. Lavery* (Nov. 21, 2013)..... fn. 1, 15

Affidavit of Jennifer M.B. Fugate at 5, *Nonhuman Rights Project, Inc. v. Lavery* (Nov. 22, 2013)..... fn. 1, 15

Affidavit of Mary Lee Jensvold at 4, *Nonhuman Rights Project, Inc. v. Lavery* (Nov. 21, 2013)..... fn. 1, 15

Affidavit of Mathias Osvath at 4, *Nonhuman Rights Project, Inc. v. Lavery* (Nov. 19, 2013)..... fn. 1, 16

Affidavit of Tetsuro Matsuzawa at 3-4, *Nonhuman Rights Project, Inc. v. Lavery* (Nov. 23, 2013)..... fn.1, 16

Affidavit of William C. McGrew at 10, *Nonhuman Rights Project, Inc. v. Lavery* (Nov. 21, 2013)..... fn. 1, 16

INTEREST OF *AMICUS CURIAE*

Professor Justin Marceau is a habeas corpus scholar and the Animal Legal Defense Fund Professor of Law at the University of Denver, Sturm College of Law. He has been a full-time law professor at the University of Denver, Sturm College of Law for eight years, and was awarded tenure in 2012. He specializes in constitutional and criminal law with an emphasis on habeas corpus procedures and regularly teaches habeas corpus courses in addition to criminal law and advanced criminal procedure. He regularly researches and writes in the field of habeas corpus. He co-authored the book *Federal Habeas Corpus*, Lyon, Andrea D., Hughes, Emily, Prosser, Mary & Marceau, Justin, Federal Habeas Corpus Carolina Academic Press, (2d ed. 2011), and has written approximately 15 scholarly papers dealing with issues related to habeas corpus. His publications have been cited by numerous courts, including the U.S. Supreme Court. His work has also been cited by 200 scholarly works, including leading treatises such as *Federal Habeas Corpus Practice and Procedure and Criminal Procedure*. Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (6th ed. 2011); Wayne R. LaFave et al., *Criminal Procedure* (3d ed. 2014). His habeas corpus publications have appeared in the *Yale Law Journal*, the *William & Mary Law Review*, the *Hastings Law Journal*, and many others.

Professor Samuel Wiseman is the McConnaughay and Rissman Professor at Florida State University College of Law. After graduating from law school, he served as a law clerk to Chief Justice Wallace B. Jefferson of the Supreme Court of Texas and to Judge Fortunato P. Benavides of the United States Court of Appeals for the Fifth Circuit. Between 2009 and 2010, Professor Wiseman served as a Fellow in the Texas Solicitor General's Office, focusing on post-conviction litigation before the Fifth Circuit. He has written numerous articles on habeas

corpus and post-conviction remedies, and his works on these topics have appeared in the *Minnesota Law Review*, the *Boston College Law Review*, and the *Florida Law Review*.

Professors Marceau and Wiseman submit this brief as habeas corpus scholars and practitioners in support of the Nonhuman Rights Project, Inc.'s ("NhRP") appeal to this Court and to attest that the case brought by the NhRP on behalf of a chimpanzee named Tommy is of significant importance to the meaning and development of habeas corpus as an equitable doctrine. The Appellate Division's resolution of the matter is in fundamental tension with core tenets of the historical writ of habeas corpus. With respect to the particular questions raised here, Justin Marceau has long taken an active interest in the issue of the law's treatment of nonhuman animals, and how their potential legal rights may be derived from existing rights for humans. Justin Marceau and Samuel Wiseman submit this brief because of their interest in ensuring that the law is applied consistently and equally to those who deserve its protection. Justin Marceau and Samuel Wiseman strongly urge this Court, in keeping with the long-established use of habeas corpus, and the policies motivating those long-settled legal standards, to grant a writ of habeas corpus so that Tommy's captors may have the burden of showing the lawful justification of his confinement.

INTRODUCTION AND SUMMARY OF ARGUMENT

One of the greatest blemishes on our justice system is the detention of innocent persons. The Writ of Habeas Corpus is intended to correct these injustices by requiring a person's captors to justify the person's imprisonment to the courts. While the Writ has helped exonerate hundreds of innocent human beings from unjust incarceration, this brief argues that the time has come to consider its purpose in the context of other unjustly incarcerated beings.

Nonhuman animals are unquestionably innocent. Their confinement, at least in some cases, is uniquely depraved; and their cognitive functioning and their cognitive harm as a consequence of this imprisonment, is similar to that of human beings.

Tommy and Kiko are innocent beings who are being actively and unjustly confined. Unless this Court allows them to use the Writ of Habeas Corpus to require their captors to justify their imprisonment, they will be unjustly confined for the remainder of their lives.

There are three primary reasons that this Court should recognize Tommy and Kiko as legal persons and allow them to utilize the writ of habeas corpus. First, throughout this nation's history, habeas corpus has had a symbolic and practical role in bringing about an end to social practices that are outdated or unjust. The writ has repeatedly been used in novel ways to bring about social change that would seem unlikely based on controlling legal principles at the time, including within the realms of family law, slavery and detainees being held in Guantanamo Bay. Second, applying habeas corpus to non-human animals like Tommy and Kiko, is consistent with the Writ's historical uses. Finally, Tommy and Kiko should be classified as legal persons given the overwhelming amount of scientific evidence showing how cognitively complex and cognitively similar to humans chimpanzees are.

To summarize the procedural history of this and related cases, on December 2, 2013, the NhRP filed the first verified petition for a common law writ of habeas corpus and order to show cause on behalf of Tommy in the New York State Supreme Court, Fulton County. That Supreme Court refused to issue the order to show cause and its refusal was affirmed by the New York State Supreme Court

Appellate Division, Third Judicial Department in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), leave to appeal den., 26 N.Y.3d 902 (2015). The Third Department affirmed the lower court's ruling on the novel legal ground that only entities able to shoulder duties and responsibilities can be "persons." In addition, the court made a factual finding that chimpanzees lack the capacity to shoulder duties and responsibilities that was not based upon any facts presented to either the Supreme Court or the Third Department, as no relevant facts were introduced by either party. *Id.*

On December 3, 2013, the NhRP filed a near-identical petition in the New York State Supreme Court, Niagara County on behalf of a chimpanzee named Kiko. That Supreme Court refused to issue the order to show cause and its refusal was affirmed by the New York State Supreme Court Appellate Division, Fourth Judicial Department in *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), leave to appeal den., 126 A.D. 3d 1430 (4th Dept. 2015), leave to appeal den., 2015 WL 5125507 (N.Y. Sept. 1, 2015) on the grounds the NhRP was seeking Kiko's transfer to a sanctuary rather than his unconditional release onto the streets of New York.

On December 2, 2015, the NhRP filed a second verified petition for a common law writ of habeas corpus and order to show cause on behalf of Tommy in the New York State Supreme Court, New York County and did the same on behalf of Kiko on January 7, 2016. The New York County Supreme Court refused to issue the order to show cause in both cases, in part, because it believed itself bound by *Lavery*. Accompanying both petitions filed on behalf of Tommy and Kiko were extensive affidavits demonstrating that chimpanzees possess the qualities sufficient for legal personhood for the purpose of securing a common law writ of habeas corpus. Additionally, and in direct response to *Lavery*, the NhRP

submitted supplemental expert affidavits with its second Tommy and Kiko petitions solely for the purpose of demonstrating that chimpanzees in fact shoulder duties and responsibilities both within chimpanzee communities and chimpanzee/human communities. Both lower court cases were affirmed on appeal and it is from that decision that this appeal is taken. *Nonhuman Rights Project ex rel. Tommy v. Lavery*, 152 A.D. 3d 73 (1st Dept. 2017).

ARGUMENT

I. The Writ Habeas Corpus has Historically been used in Novel Situations to Bring About Social Change.

Habeas corpus has been used throughout history in situations where no precise legal solution exists, but where leaving the status quo unchallenged would be unjust. Halliday, Paul D., *Habeas Corpus: From England to Empire* 133 (2010).

A. Family Law

In the seventeenth century, the King's Bench in England utilized habeas corpus to grant relief to women and children in novel family law situations. *Id.* at 121-32. At that time, women were considered the property of their husbands. *Id.* at 124. As such, women subjected to abusive situations had absolutely no legal vehicle to seek relief. *Id.* Similarly, children in abusive environments had no legal means of escaping abusive environments. Certainly many courts would have scoffed at the idea that habeas corpus would be available to such parties, deemed by the law to be less than persons. And yet time and again justice was sought and achieved through habeas corpus.

Instead of letting the women and children suffer, the King's Bench, under the leadership of Sir Matthew Hale, used the writ of habeas corpus to protect

women and children from their abusive, often politically powerful, husbands and fathers. *Id.* at 122-32. Habeas corpus was the only way those women and children could seek protection from their “captors”. *Id.* at 124. Importantly, habeas corpus was not used simply as a tool to freedom from abusive “captors”, but was used to “assign custody”, meaning that the women and children would be transferred to a different, non-abusive household. *Id.* at 129. This use of the writ demonstrates that it can be used for more than simply seeking release from custody. *Id.*

B. Slavery

Before the 18th century slavery was commonplace and understood to have no legal regulation; slavery had simply evolved as a custom and then received statutory recognition. It was not until years after English Colonization of the Americas that slavery became a matter constrained by law. The King’s Bench also used habeas corpus to give relief to slaves in England. The defining moment for the eighteenth century slave James Somerset was when he became legally visible. Wise, Steven M., *Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery* IX (Da Capo Press 2005). He was a legal “thing” when he landed in England in 1769, having been captured as a boy in Africa, then sold to a merchant in Virginia, Charles Steuart, for whom he slaved for two decades. *Id.* at XIII, 1-2. James Somerset’s owner was attempting to remove him from England when Somerset filed for habeas corpus relief in the King’s Bench. *Id.*

As a legal thing, James Somerset existed in law for the sake of his owner, because legal “things”, living and inanimate, exist in law solely for the sakes of legal persons, invisible to civil judges in their own rights. *Id.* at IX. Surprisingly, though no clear procedural or substantive basis existed for doing so, the Bench granted James Somerset’s requested habeas corpus relief. James Somerset's legal transubstantiation from thing to person at the hands of Lord Mansfield of the

King's Bench in 1772 marked the beginning of the end of human slavery. Wise, Steven M., *Legal Personhood and the Nonhuman Rights Project*, 17 *Animal L.* 1, 1-2 (2010).

In America, in 1839, a free black man named Ralph Gould was being held innocently, wrongfully charged as a runaway slave. Gould had served in the U.S. Navy and had evidence of his military discharge and his freedom in his possession. Gould petitioned Chief Judge William Cranch for a writ of habeas corpus to avoid being sold as a slave. The Chief Judge then ordered Gould's release from prison. National Archives Microfilm Publication M434, *Habeas Corpus Case Records of the U.S. Circuit Court for the District of Columbia*, 1820–1863. M433.

These two cases are illustrative of an important part of the history of habeas corpus. While they did not directly cause the end of slavery, cases such as these served as a symbolic demonstration that slaves had the ability to challenge a previously unchallenged class of people, slaveholders. Freedman, Eric M., *Habeas by Any Other Name*, 38 *Hofstra L. Rev.* 275, 277 (2009).

Moreover, in the eighteenth century, slavery was principally acknowledged in law by an extensive set of police measures and few legal provisions for commercial and other private law aspects of slavery existed. Additionally, the existing categories of property, tort, and contract did not suffice to regulate the slave industry. The issues posed by chattelized humans and thinking property could often not be accommodated within ordinary legal categories. Bush, Jonathan, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 *Yale J.L. & Human* 413 (1993). Because of the lack of proper legal avenues, habeas was used in instances in which slaves had no other recourse.

C. Guantanamo Bay

Habeas corpus has also been used to provide non-citizen detainees relief, despite their incarceration outside of the United States. The United States' efforts to combat terrorism after September 11, 2001, led to legislative action regarding the habeas corpus rights of aliens designated by military authorities as enemy combatants. The Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 eliminated such rights for enemy combatants detained at Guantanamo Bay, Cuba. The location of the Guantanamo Detainee Center was chosen not only for its large land availability and distance from known terrorist cells, but because it was thought that the statutory and constitutional rights of non-citizen detainees were very limited if they were not present in the United States itself. However, the United States Supreme Court in *Rasul v. Bush*, held that a district court does have jurisdiction to hear habeas corpus petitions by alien detainees at Guantanamo concerning the legality of their detentions. 542 U.S. 466, 483-84 (2004).

Additionally, in 2008, the Court ruled that Guantanamo detainees possessed habeas rights because the United States exercised some sovereignty over that territory. In *Boumediene v. Bush*, the Supreme Court held that the Suspension Clause had full effect at Guantanamo Bay, even though Congress had passed an act that stripped federal courts of jurisdiction to hear habeas claims. 553 U.S. 723, 771 (2008). Therefore, detainees are entitled to the privilege of habeas corpus to challenge the legality of their detention. *Id.* In holding that the Suspension Clause applied at Guantanamo Bay, the Court noted that “at the absolute minimum” the Clause protects the writ as it existed when the Constitution was ratified. *Id.* at 746-47. Moreover, the Court held that Guantanamo detainees were entitled to habeas corpus despite the fact that the Court had previously “never held that noncitizens

detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.” *Id.* at 771.

II. Applying Habeas Corpus to Nonhuman Animals, like Tommy and Kiko, is Consistent with the Writ’s Historical Uses.

There is no statutorily-granted procedure for nonhuman animals to pursue habeas corpus; however, the lack of a statutorily-granted procedure does not bar the writ’s application. Allowing Tommy and Kiko the right to petition for habeas corpus is consistent with the history of the writ.

Tommy and Kiko share many similarities with the indigent women and children, slaves, and Guantanamo detainees discussed above. Like the abused women and children in England, Tommy and Kiko are not seeking to be released into the public, but transferred to a facility that will allow the greatest possible autonomy. Similarly, the abused women and children were allowed to seek habeas relief, though the women would not be “freed” from their marriages and the children would not be emancipated, but placed in different living situations where they were guaranteed better treatment. Therefore, one does not have to seek a complete and total release from confinement in order to receive habeas relief – contrary to the opinion of the First Department.

Additionally, like slaves, Tommy and Kiko are considered property. Property status did not stop the King’s Bench from allowing James Somerset to seek habeas relief, nor did the property status of slaves prevent Chief Judge Cranch from allowing the slaves to petition to seek habeas corpus relief. Allowing James Somerset to seek relief did not end slavery, and granting Tommy and Kiko the

right to petition for habeas corpus will not result in all nonhuman animals being freed from cruel confinement. However, it would serve as an important step, possibly paving the way for certain nonhuman animals to be free from particularly cruel and unjust confinement.

Finally, like the Guantanamo detainees, Tommy and Kiko have no other legal vehicle to challenge their confinement. Certainly, animal cruelty statutes, which provide remedies including criminal punishment for humans who harm nonhuman animals, exist. However, this type of statute provides no substantive basis for nonhuman animals to challenge their confinement; these statutes simply punish humans for their cruel treatment of nonhuman animals. Nor do these statutes usually provide for the nonhuman animals' release as the remedy. As such, habeas corpus is the only substantive basis Tommy and Kiko have to challenge and be released from their confinement.

While Tommy and Kiko's claim is admittedly novel, the this novelty should not prevent them from seeking habeas corpus relief. Habeas corpus is the only opportunity Tommy and Kiko have to seek relief, and the writ has often been used at the forefront of social change. Therefore, consistent with the writ's novel historical uses, the NhRP should be allowed to petition for a writ of habeas corpus on Tommy and Kiko's behalf to challenge their detention.

III. Tommy and Kiko Should be Classified as Legal Persons and Entitled to Habeas Corpus

A "legal person" is any entity capable of possessing a legal right. The Third Department and in turn the First Department added an additional requirement to the normal threshold definition: a legal person must also have the capacity to shoulder duties and responsibilities. Chimpanzees, such as Tommy and Kiko,

satisfy all of these requirements. Scientific studies demonstrate that chimpanzees are intelligent and experience suffering in the same ways that humans do. Further, some nonhuman animals are subject to legal obligations, just like humans. Finally, chimpanzees routinely shoulder duties and responsibilities both within chimpanzee societies and within mixed chimpanzee/human societies. Tommy and Kiko, as autonomous and self-determining beings, should be recognized as legal persons who are entitled to the common law right to bodily liberty protected by habeas corpus, as historically used by persons imprisoned under similar unjust circumstances.

A. Captive Nonhuman Animals are Intelligent and Experience Suffering.

In just the past decade, advances in the scientific community's understanding of DNA has played a transformative role in our justice system. It has allowed us to exonerate and liberate innocent persons that were previously found under the highest standard of proof known to law—proof beyond a reasonable doubt—to be guilty. Science of a similarly profound and powerful character is beginning to change our understanding of the effects of confinement on nonhuman animals.

DNA evidence will not prove the innocence of nonhuman animals, because they are not charged with any offense. However, DNA and other scientific advances have allowed the scientific community to coalesce around a recognition that the cognitive function of certain primate species, including chimpanzees, bonobos, and gorillas, rivals that of humans. These primates share approximately 99 percent of our DNA and are our closest living relatives. But beyond the sequencing of DNA, there is a growing consensus that nonhuman animals have

consciousness, emotions, and other brain functioning that is remarkably similar to that of humans. In 2013, a group of leading scientists signed the “Cambridge Declaration on Consciousness,” which explained that “non-human animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviors.” It went on to explain that “the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness.”

It is virtually unchallenged in the scientific community that the DNA of humans and certain nonhuman animals are remarkably similar. (*See American Museum of Natural History, DNA: Collecting Humans and Chimps*, (“Humans and chimps share a surprising 98.8 percent of their DNA.”). A recent article in *Scientific American* clarifies:

In 1871 Charles Darwin surmised that humans were evolutionarily closer to the African apes than to any other species alive. The recent sequencing of the gorilla, chimpanzee and bonobo genomes confirms that supposition and provides a clearer view of how we are connected: chimps and bonobos in particular take pride of place as our nearest living relatives, sharing approximately 99 percent of our DNA, with gorillas trailing at 98 percent.

Wong, Kate, *Tiny Genetic Differences between Humans and Other Primates Pervade the Genome*, *Sci. Am.* (Aug. 19, 2014).

The research is increasingly conclusive: nonhuman animals can feel, and suffer, and in fact have brains that function very similarly to our own. Bekoff, Marc, *Scientists Conclude Nonhuman Animals are Conscious Beings*, *Psychology Today* (Aug. 10, 2012).

B. Exonerations and Notions of Innocence are Equally Applicable to Humans and Nonhumans.

One of the fundamental legal obligations is the obligation to obey laws. This obligation classifies individuals who break laws as guilty, and individuals who do not as innocent. Nonhumans can be guilty or innocent. Indeed, nonhumans have previously been pardoned or granted clemency. *Emprise Pardon Rejected*, Dayton Beach Morn. J. (Sept. 28, 1977), (discussing a corporation's request for a formal pardon to President Carter); *White House Rejects Emprise Pardon*, Chi. Trib. (Sept. 29, 1977); see also Everett, Ronald, Periman, Deborah, "The Governor's Court of Last Resort:" *An Introduction to Executive Clemency in Alaska*, 28 Alaska L. Rev. 57, 89 (2011) (discussing a governor's grant of such a pardon). Additionally, at least one federal court has granted a corporation's request for a writ of *coram nobis* (or a writ of error). *United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995).

While nonhuman animals are not indicted for crimes, that does not mean they cannot be exonerated or innocent. While exoneration is generally thought of as a criminal conviction being reversed, the actual meaning of exoneration is much broader, meaning "[t]he removal of a burden, charge, responsibility, or duty." Black's Law Dictionary (10th ed. 2014). Under this definition, being released from unwanted and cruel confinement would be considered being exonerated. Since habeas corpus is historically used to secure exonerations, it is appropriate in this context.

Additionally, just because nonhuman animals are not indicted for crimes does not mean they cannot assert defenses to criminal conduct. For example, leading criminal law theorist Markus Dubber has observed that animal control statutes often function in ways that are very similar to human criminal codes. Not

only are the definitions of “offenses familiar from criminal codes,” the animal control codes “lay out defenses to an allegation of dangerousness analogous to the defenses recognized in criminal law.” Dubber, Markus, *Victims in the War on Crime*, 44 (2006).

Examining the New York animal control code, Dubber noted that an otherwise (criminally) dangerous dog has several available defenses including “defense of others,” a “defense of property,” “self-defense,” and even an “extreme emotional disturbance” or provocation defense. *Id.* at 44-45 (quoting NY Agric. & Mkts. § 123(4) (2011)). *See also* Colo. R. Stat. § 18-9-204.5 (applying defenses to “dangerous dogs”). In other words, although nonhuman animals may not be subjected to criminal prosecution in a formal sense, when an animal’s actions are subject to review by the state for their propriety, it is taken for granted that some defenses available to humans may also justify the acts of a nonhuman animal. Dubber, note X, at 45 (“If anything the canine versions of these defenses are more generous than the human ones.”). Therefore, some nonhuman animals are already exonerated through codified state procedures providing relief from unwanted incarceration or execution.

As such, nonhuman animals are subject to at least some legal obligations, and should be classified as legal persons.

C. Nonhuman Animals Shoulder Social Duties and Responsibilities.

The Third Department’s statement, not of law but of scientific fact, that chimpanzees lack the capacity to shoulder duties and responsibilities, was made without the benefit of any briefing, argument, or reference to scientific authority by either party or the court.

In the book *Rattling the Cage*, author Steven M. Wise admirably attempts to summarize a half-century of scientific research regarding the autonomy, self-determination and other cognitive abilities of chimpanzees, starting with Jane Goodall's research in the 1960s. Wise, Steven M., *Rattling the Cage: Toward Legal Rights for Animals*, 131-236 (Perseus Publishing 2000). But even since 2000, when the book was first published, science in the field has continued to develop and the consensus regarding cognitive ability has grown even stronger. Since its original publication, additional scientists have come forward to augment the already robust record regarding the mental abilities of the human species' closest genetic relatives, chimpanzees and bonobos.¹

¹ Affidavit of Christophe Boesch at 6, *Nonhuman Rights Project, Inc. v. Lavery* (Nov. 19, 2013), <http://www.nonhumanrightsproject.org/wp-content/uploads/2013/11/Ex-5-Boesch-Affidavit-Tommy-Case.pdf> (“Chimpanzees clearly possess an autobiographical self, as they are able to prepare for the future and can remember highly specific elements of past events over long periods of time.” (internal citations omitted)); Affidavit of Emily Sue Savage-Rumbaugh at 5, *Lavery* (Nov. 22, 2013), <http://www.nonhumanrightsproject.org/wp-content/uploads/2013/11/Ex-12-Savage-Rumbaugh-Affidavit-Tommy-Case.pdf> (“[W]hen behavioral studies of chimpanzees suggest that they are capable of self-aware conscious action, the capacity to reason and think, the ability to acquire symbolic language, there is reason to take these results seriously.”); Affidavit of James R. Anderson at 4, *Lavery* (Nov. 20, 2013), <http://www.nonhumanrightsproject.org/wp-content/uploads/2013/11/Ex-4-Anderson-Affidavit-Tommy-Case.pdf> (“The close evolutionary relationship between chimpanzees, bonobos and humans is evident not only in terms of physical structure but also behavior and mental processes. No other species comes so close to humans in self-awareness and language abilities, and in diversity of behaviors”); Affidavit of James King at 4, *Lavery* (Nov. 21, 2013), <http://www.nonhumanrightsproject.org/wp-content/uploads/2013/11/Ex-8-King-Affidavit-Tommy-Case.pdf> (“[T]he simplest explanation for behaviors in chimpanzees that look autonomous is that they are based on similar psychological capacities as in humans My research shows the remarkable similarity between chimpanzees and humans in the structure of personality and subjective well-being (or happiness).”); Affidavit of Jennifer M.B. Fugate at 5, *Lavery* (Nov. 22, 2013), <http://www.nonhumanrightsproject.org/wp-content/uploads/2013/11/Ex-6-Fugate-Affidavit-Tommy-Case.pdf> (“Many of the expressions in chimpanzees and humans are displayed in similar circumstances, suggesting a common function or meaning.”); Affidavit of Mary Lee Jensvold at 4, *Lavery* (Nov. 21, 2013), <http://www.nonhumanrightsproject.org/wp-content/uploads/2013/11/Ex-6-Fugate-Affidavit-Tommy-Case.pdf> (“There are numerous parallels in the way chimpanzee and human communication skills develop over time, suggesting a similar unfolding cognitive process across

These new accounts are worthy of reading in their entirety, but are summarized in the following:

According to these experts, Chimpanzees possess an autobiographical self, episodic memory (one's long term memory of experience), self-determination, self-consciousness, self-knowingness, self-agency, empathy, a working memory, language, metacognition, numerosity, and a material, social, and symbolic culture. They also have the ability to plan, understand cause-and-effect and the experiences of others, imagine, imitate, engage in deferred imitation, emulate, innovate, use and make tools, and engage in activities such as mental time travel, referential and intentional communication, intentional action, sequential learning, mediational learning, mental-state modeling, visual perspective taking, and cross-modal perception.

Wise, *Rattling the Cage*.

Perhaps the most forceful aspect of this lawsuit is the supporting affidavits prepared by many of the leading primatologists around the world, all of whom have elaborated on the intelligence, self-awareness, and level of autonomy that chimpanzees possess, and have explained how their current imprisonment would cause substantial suffering for them. Additionally, sixty more pages of affidavits

the two species and an underlying neurological continuity.” (internal citations omitted)); Affidavit of Mathias Osvath at 4, *Lavery* (Nov. 19, 2013), <http://www.nonhumanrightsproject.org/wp-content/uploads/2013/11/Ex-11-Osvath-Affidavit-Tommy-Case.pdf> (“Chimpanzees are, together with bonobos, our closest living relatives and, as such, we share an abundance of characteristics. We are similar not only in our appearance and physiology but also in our emotions and our cognition.” (internal citations omitted)); Affidavit of Tetsuro Matsuzawa at 3-4, *Lavery* (Nov. 23, 2013), <http://www.nonhumanrightsproject.org/wp-content/uploads/2013/11/Ex-9-Matsuzawa-Affidavit-Tommy-Case.pdf> (“[Chimpanzees and humans have] a number of shared characteristics in the brain that are relevant to such capacities as self-awareness and autonomy as well as general intelligence.”); Affidavit of William C. McGrew at 10, *Lavery* (Nov. 21, 2013), <http://www.nonhumanrightsproject.org/wp-content/uploads/2013/11/Ex-10-McGrew-Affidavit-Tommy-Case.pdf> (“Comparisons between human and chimpanzee cultures demonstrate that the similarities are underwritten by a common set of mental abilities.”).

have been submitted from five of the NhRP's prior experts and Jane Goodall all demonstrating that chimpanzees do indeed shoulder social duties and responsibilities within chimpanzee and human societies. This additional requirement the Third Department created is easily met by Tommy and Kiko and other chimpanzees.

CONCLUSION

While habeas corpus has not yet been applied to a nonhuman animal, its application in this context should not be viewed as unjustified. The very history of habeas corpus is one of radical change. Habeas corpus has historically been used in novel factual situations where no other legal vehicle exists.

Innocent humans who are given habeas corpus relief by the courts have many similarities to captive nonhuman animals like Tommy and Kiko. Both have done nothing wrong, both are autonomous, and both suffer as a result of their unjust confinement. We respectfully request that this Court recognize an expanded – but still limited – universe of legal personhood that affords the possibility of providing relief to some nonhuman animals in particularly egregious conditions. For the reasons above, Tommy and Kiko should be classified as legal persons and granted a writ of habeas corpus.

Dated: March 2, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 500.13(c)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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