

COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT

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NO. 2020-P-0257

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JOYCE ROWLEY  
ON BEHALF OF RUTH AND EMILY  
PETITIONER-APPELLANT

v.

CITY OF NEW BEDFORD  
DEFENDANT-APPELLEE

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BRIEF ON BEHALF OF AMICUS CURIAE  
THE NONHUMAN RIGHTS PROJECT, INC.,  
IN SUPPORT OF NEITHER PARTY

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## INTEREST OF AMICUS CURIAE

Amicus Curiae, the Nonhuman Rights Project, Inc. (“NhRP” or “Amicus”), is a not-for-profit corporation organized under the laws of the State of Massachusetts with its principal address in Coral Springs, Florida. Amicus is the only civil rights organization in the United States dedicated to changing the common law status of at least some nonhuman animals from mere “things,” which lack the capacity to possess any legal rights, to “persons,” who possess such fundamental rights as bodily integrity and bodily liberty, based on evolving standards of morality, scientific discovery, and human experience. Amicus’ mission is pursued through litigation, legislation, and education, and its work is both national and international in scope. Amicus has no parent corporation and there is no publicly-held corporation that owns any percentage of it.

Amicus is the most experienced organization in the world with respect to litigating habeas corpus cases on behalf of imprisoned nonhuman animals like Ruth and Emily. In December 2013, it filed the world’s first common law habeas corpus petition on behalf of a nonhuman animal—a chimpanzee—and made history in 2015 by securing the world’s first order to show cause under a New York habeas corpus statute (the equivalent of a writ of habeas corpus) on behalf of a nonhuman animal,



specifically two chimpanzees named Hercules and Leo.<sup>1</sup> In 2018, Amicus secured the world's first order to show cause under a habeas corpus statute on behalf of an elephant, Happy, also in New York.<sup>2</sup>

To date, Amicus has filed seven habeas corpus petitions in New York and two in Connecticut on behalf of its nonhuman animal clients (chimpanzees and elephants, to date). These petitions have led to the following trial and appellate court decisions:

1. People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 124 A.D.3d 148 (Appellate Division, Third Dept. 2014);
2. Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti, 124 A.D.3d 1334 (Appellate Division, Fourth Dept. 2015);
3. The Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015);
4. Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 152 A.D.3d 73 (Appellate Division, First Dept. 2017);

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<sup>1</sup> See Appellant's Brief, Addendum pp. 26-28. Amicus is the subject of an HBO documentary film entitled "Unlocking the Cage" directed by Chris Hegedus and D.A. Pennebaker. The film was nominated for a 2018 News & Documentary Emmy Award for "Best Social Justice Documentary."

<sup>2</sup> See Appellant's Brief, Addendum pp. 29-31.

5. Nonhuman Rights Project, Inc. on Behalf of Tommy v. Lavery, 31 N.Y.3d 1054 (N.Y. 2018) (Fahey, J. concurring) (Reproduced in Appellant’s Brief, Addendum at pp. 75-80);
6. Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc., 192 Conn. App. 36 (Conn. Appellate Ct. 2019);
7. Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc., 197 Conn. App. 353 (Conn. Appellate Ct. 2020);
8. Nonhuman Rights Project, Inc. v. Breheny, Index No. 260441/19 (N.Y. Sup. Ct.) (February 18, 2020) (Reproduced in Addendum hereto at pp. 99-115).

Based on its deep experience litigating habeas corpus cases on behalf of elephants and chimpanzees, Amicus is uniquely qualified to assist the Court’s consideration of this appeal. Amicus is recognized by American and foreign courts as an authority on the question of legal personhood and habeas corpus relief for nonhuman animals.<sup>3</sup> Amicus is regularly interviewed for and featured in leading international media outlets including the Wall Street Journal, Washington Post,

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<sup>3</sup> Recently, Pakistan’s Islamabad High Court recognized the legal rights of an Asian elephant named Kaavan and ordered him released to a sanctuary, relying in part on two of Amicus’ habeas corpus cases—specifically, Breheny (2020) and Tommy (2018). Islamabad Wildlife Mgmt. Bd. v. Metropolitan Corp. Islamabad, W.P. No.1155/2019 at 12, 40-42, (H.C., Islamabad, Pakistan 2020). Reproduced in Addendum to Appellant’s Brief, p. 34.

BBC, and The New York Times on the topic of legal personhood and rights for nonhuman animals, including elephants.

Steven M. Wise, the undersigned counsel for Amicus, was first admitted to practice in Massachusetts in January 1977. Attorney Wise began to prepare to litigate habeas corpus cases on behalf of nonhuman animals in 1985 and founded Amicus for that purpose in 1996. He has taught—and continues to teach—“Animal Rights Jurisprudence” at numerous law schools in the United States and around the world, including Harvard, Stanford, Tel Aviv, University of Miami, Lewis and Clark, Vermont, St. Thomas, and John Marshall Law Schools. He has lectured for eight years in the Masters of Animal Law program at the Autonomous University of Barcelona, and formerly taught in the Masters program in Animals and Public Policy at the Tufts University School of Veterinary Medicine.

Attorney Wise has authored four books on animal rights jurisprudence and/or human slavery: (a) *RATTLING THE CAGE—TOWARD LEGAL RIGHTS FOR ANIMALS* (Perseus Publishing 2000); (b) *DRAWING THE LINE—SCIENCE AND THE CASE FOR ANIMAL RIGHTS* (Perseus Publishing 2002); (c) *THOUGH THE HEAVENS MAY FALL—THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY* (de Capo Press 2005); and (d) *AN AMERICAN TRILOGY—DEATH, SLAVERY, AND DOMINION ALONG THE BANKS OF THE CAPE FEAR RIVER* (de Capo Press 2009). He has also written 22

law review and journal articles, all on the subject of animal rights jurisprudence. Attorney Wise's CV is included in the Addendum hereto at p. 24.

Amicus has a compelling interest in this case, as the outcome is likely to affect its ability to bring habeas corpus cases on behalf of nonhuman animals in Massachusetts and other states. The issue of nonhuman animal personhood is both novel and complex and requires a deep knowledge of law, jurisprudence, and legal history, as well as the scientific facts regarding nonhuman animal cognition and behavior. Other than Petitioner-Appellant, Joyce Rowley—who lacks the knowledge and expertise to adequately address this profound issue (discussed infra)—no other organization or individual in the United States has filed a habeas corpus case on behalf of a nonhuman animal.

#### **Rule 17 (c) (5) DECLARATION**

Amicus and its counsel are independent from the parties, have no economic interest in the outcome of this case, and declare that none of the conduct described in Appellate Rule 17 (c) (5) has occurred. Specifically:

- a. No party or a party's counsel authored the brief in whole or in part;
- b. No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief;
- c. No person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or

submitting the brief; and

- d. No amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues; no amicus curiae or its counsel was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

## ARGUMENT

### I. Introduction

The issue of whether Ruth and Emily are “persons” for purposes of securing habeas corpus relief is novel, highly complex, and profound. Its proper judicial determination requires the careful consideration of numerous scientific facts attested to by qualified experts on elephant cognition and behavior, as well as rigorous argument regarding law, public policy, ethics, and history.

Ms. Rowley raised the issue of Ruth and Emily’s personhood before the Bristol Superior Court when she filed a Petition for a Writ of Habeas Corpus pursuant to G.L. c. 248 § 36 seeking to free them from their long imprisonment at the Buttonwood Park Zoo (“Zoo”)<sup>4</sup> to an elephant sanctuary.<sup>5</sup> Because elephants, such as Ruth and Emily, are extraordinarily cognitively complex, autonomous, and self-determining beings, who would normally engage in numerous and complex social relationships and have evolved to move twenty miles a day, Amicus believes that any elephant detained in a cramped and lonely place like the Zoo should be

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<sup>4</sup> Defendant-Appellee, The City of New Bedford (“City”), owns and operates the Zoo.

<sup>5</sup> The Petition was denied on the grounds that: “1) the Court does not adopt petitioner's argument that Ruth and Emily are “persons”; and 2) in any event, the Federal Court has already determined that the elephants are lawfully held in captivity, negating the right to a writ. See G. L. c. 248, § 1; Rowley v. City of New Bedford, 2019 U.S. Dist. Lexis 16389 @ 20-21 (Young, J).” Appellant’s Brief, Addendum p. 18.

immediately moved to a sanctuary, unless there is a compelling medical reason against doing so. Unfortunately, however, as a pro se non-lawyer<sup>6</sup> with no expertise in elephant cognition or behavior,<sup>7</sup> Ms. Rowley was singularly unqualified to present either the facts or the law necessary for a full and favorable determination.<sup>8</sup>

Amicus submits this Brief to inform the Court on the depth, complexity, and gravity of the issues involved and to urge the Court to reach a narrow determination based solely upon Ms. Rowley's petition which does not foreclose future, properly prepared, and well-pled habeas corpus petitions on behalf of one or more nonhuman animals in Massachusetts.

Specifically, if this Court chooses to affirm the Superior Court's denial, it should restrict any ruling to the "four corners" of the petition solely as it relates to Ruth and Emily and not reach the broader issue of whether elephants or nonhuman

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<sup>6</sup> Ms. Rowley has a Bachelor of Science degree in geology, a Masters degree in community planning and "worked for the USDA Soil Conservation Service as a construction supervisor and as a community planner for twenty-three years." Appellee Brief at 8-9.

<sup>7</sup> As noted by the City, "[a]lthough [Ms. Rowley] has read articles regarding elephant care and has personally observed the living conditions of Ruth and Emily, [she] has no specialized training in zoology or veterinary techniques, relating to elephants." Appellee Brief at 9. As also noted by the City, Ms. Rowley submitted no expert testimony in support of her petition to the Superior Court. *Id.* at 30.

<sup>8</sup> While Ms. Rowley is afforded some leniency as a pro se litigant, "[p]leadings must stand or fall on their own." *Mmoe v. Commonwealth*, 393 Mass. 617, 620 (1985) (Superior Court "should not have gone beyond the complaint" when ruling on defendant's motion to dismiss).

animals are “persons” in Massachusetts.<sup>9</sup> To do otherwise would work a deep injustice on nonhuman animals in the Commonwealth and could cripple an area of the law undergoing rapid positive development in other jurisdictions.

II. If this Court chooses to affirm the Superior Court’s denial of Ms. Rowley’s petition, it should do so solely as it relates to Ruth and Emily in this case.

Presented with proper facts and legal argument, courts are beginning to analyze the issue of nonhuman personhood with respect and respond thoughtfully.<sup>10</sup> In 2018, Judge Eugene M. Fahey of the New York Court of Appeals recognized that the issue of “whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far reaching.” Tommy, 31 N.Y.3d at 1059 (Fahey, J., concurring) (Tommy is reproduced in Appellant’s Brief, Addendum at pp. 75-80).<sup>11</sup> Grappling with the question of whether a chimpanzee has the right to liberty protected by habeas corpus, Judge Fahey wrote:

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<sup>9</sup> Significantly and contrary to the City’s assertion, the Superior Court’s denial of the petition was not made on the ground that “elephants are not ‘persons’ for purposes of G.L. c. 248.” Appellee Brief at 23. In fact, the Superior Court limited its denial solely to Ruth and Emily, stating: “the Court does not adopt petitioner’s argument that Ruth and Emily are ‘persons.’” Addendum to Appellant’s Brief, p. 18.

<sup>10</sup> See Stanley, 16 N.Y.S.3d at 917 (“The similarities between chimpanzees and humans inspire the empathy felt for a beloved pet. Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed.”). Relying in part upon Presti, the Appellate Division, Fourth Judicial Department later stated that “it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals.” People v. Graves, 163 A.D. 3d 16, 21 (4th Dept. 2018).

<sup>11</sup> In Tommy, Judge Fahey concurred in the decision to deny Amicus’ motion for leave to appeal on a procedural ground, but wrote “to underscore that denial of leave



Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention. [. . .]

Whether a being has the right to seek freedom from confinement through the writ of habeas corpus should not be treated as a simple either/or proposition. . . . While it may be arguable that a chimpanzee is not a “person,” there is no doubt that it is not merely a thing.

Id. at 1057-59.

Judge Fahey further explained that consideration of a chimpanzee’s right to liberty protected by habeas corpus “will depend on our assessment of the intrinsic nature of chimpanzees as a species.” Id. at 1057. Particularly relevant to the instant appeal, he noted:

The record before us in the motion for leave to appeal contains unrebutted evidence, in the form of affidavits from eminent primatologists, that chimpanzees have advanced cognitive abilities. . . . Moreover, the amici philosophers with expertise in animal ethics and related areas draw our attention to recent evidence that chimpanzees demonstrate autonomy by self-initiating intentional, adequately informed actions, free of controlling influences[.]

Id. at 1057-58 (emphasis added).

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to appeal [was] not a decision on the merits of petitioner’s claims,” adding: “The question will have to be addressed eventually. Can a non-human animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing?” 31 N.Y.3d at 1056 (Fahey, J., concurring).

Tommy represents the only opinion to date of an American high court judge on the question of habeas corpus relief and legal personhood for any nonhuman animal.<sup>12</sup> As underscored by Judge Fahey, facts are essential to the determination of the central issue of whether nonhuman animals can be “persons” for purposes of habeas relief.

The facts demonstrating that an elephant thinks and plans and appreciates life as human beings do exist in great abundance. See Addendum hereto at pp. 165-216. Unfortunately, Ms. Rowley failed to place any of these facts into evidence. By contrast, each of the numerous habeas corpus petitions filed by Amicus on behalf of elephants and chimpanzees is supported by numerous expert affidavits attesting to the fact that these nonhuman animals are autonomous and suffer from their imprisonment. On the basis of these expert affidavits, as well as on fundamental and well-accepted principles of liberty and equality, Amicus urges courts to recognize these nonhuman animals’ right to liberty and release them from their imprisonment to a sanctuary where they may exercise their autonomy to the greatest extent possible.

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<sup>12</sup> Tommy was the product of decades of preparation, years of litigation, hundreds of pages of expert affidavits, and hundreds of pages of complex legal argument conducted by Amicus.

For almost two years, Amicus has been litigating a similar case to the instant petition in New York on behalf of an Asian elephant named Happy, who has been imprisoned at the Bronx Zoo for more than 40 years. In November 2018, the Orleans County Supreme Court, where the habeas corpus petition was initially filed, took the historic step of issuing the world's first habeas corpus order on behalf of an elephant. Appellant's Brief, Addendum at pp. 29-31. The case was subsequently transferred to the Bronx County Supreme Court, where Justice Alison Y. Tuitt heard thirteen hours of oral argument over three days resulting in a 16-page decision in February 2020.<sup>13</sup>

For purposes of comparison with Ms. Rowley's petition and for this Court's reference, the Addendum hereto includes Amicus' recently filed appellate brief in Happy's case and relevant excerpts to the appendix thereto, in particular, the habeas corpus petition and three supporting expert affidavits from Joyce Poole, Ph.D., one of the world's most respected elephant cognition and behavioral experts (four other experts submitted similar affidavits). These affidavits demonstrate that Happy is an extraordinarily cognitively complex and autonomous being who suffers from her

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<sup>13</sup> Contrary to the City's assertion, see Appellee Brief at 30, Amicus' petition in Breheny was not "summarily denied." Happy had multiple hearings in Orleans County, New York before her case was transferred to Bronx County, New York, where she had three days of hearings. Appellee cited not to Justice Tuitt's 16-page decision, but rather a 2019 order by the New York Appellate Division, Fourth Judicial Department which had merely denied Amicus' motion for leave to appeal an order transferring venue to the Bronx County Supreme Court.

imprisonment and should be released to a sanctuary (see Happy’s Petition paras. 70-117, Addendum at pp. 141-163; Joyce Poole Affidavits, pp. 165-216).

Although Justice Tuitt “regrettably” felt bound by prior precedent to find that Happy is not a “person,”<sup>14</sup> she stated:

This Court is extremely sympathetic to Happy’s plight and the NhRP’s mission on her behalf. It recognizes that Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with complex cognitive abilities, akin to human beings. . . . This Court agrees that Happy is more than just a legal thing, or property. She is an intelligent autonomous being who should be treated with respect and dignity, and who may be entitled to liberty.”

Breheny, at 16.

In its decision, the court recounted some of the scientific evidence of elephant autonomy detailed in Amicus’ expert affidavits. Id. at 5-6, 10-11. The court also recognized that “[t]he arguments advanced by the NhRP are extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot.” Id.

With the support of amicus curiae briefs from Harvard Law Professor Laurence H. Tribe, habeas corpus scholars Justin Marceau and Samuel

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<sup>14</sup> Specifically, Justice Tuitt felt bound by the appellate decision in People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 124 A.D.3d 148 (3d. Dept. 2014), which held that chimpanzees are not “persons” with legal rights given their inability to bear legal duties. Breheny, at 16. Amicus’ appellate brief subjects Lavery to extensive critical scrutiny, demonstrating that the decision is erroneous and must be rejected, including for the reasons Judge Fahey discussed in Tommy, 31 N.Y.3d at 1056-57. Addendum hereto at pp. 74-97.

Wiseman, and twelve North American philosophers—all challenging the prior precedent to which Justice Tuitt “regrettably” felt bound—Amicus is currently litigating Breheny on appeal before the New York Appellate Division, First Judicial Department. Those three amicus curiae briefs, reproduced in the Addendum hereto at pp. 217-315, illustrate the profound complexity of the issue of nonhuman animal personhood.<sup>15</sup> Amicus expects oral argument in Happy’s appeal in the fall of 2020.

In stark contrast to the litigation pursued by Amicus on behalf of Happy, Ms. Rowley has provided no expert testimony in support of her petition on behalf of Ruth and Emily. Nor did she make the necessary legal argument as to why Ruth and Emily are “persons” for purposes of habeas corpus in Massachusetts. (Compare Amicus’ Appellate Brief in Happy’s case. Addendum hereto at pp. 33-98).<sup>16</sup> Accordingly, any ruling by this Court that extends beyond Ruth and Emily, based on a fatally defective petition submitted by a pro se litigant, would work, in the words of Judge Fahey, a “manifest injustice” to those nonhuman animals outside of its reach.<sup>17</sup> Tommy, 31 N.Y.3d at 1059 (Fahey, J., concurring).

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<sup>15</sup> As of the date of Amicus’ motion to file this brief, the motions for leave to file the amicus briefs in Happy’s case are still pending before the First Judicial Department.

<sup>16</sup> Ms. Rowley’s petition fails even to comply with the basic requirement that a habeas corpus petition must be “sworn to by the person for whose release it is intended, or by a person in his behalf.” G.L. c. 248 § 3; see G.L. c. 248 § 36 (a petition to obtain personal liberty must be filed “on the oath of the petitioner”).

<sup>17</sup> This Court should not affirm the Superior Court’s erroneous alternative ground for denying the instant petition, that based on Rowley v. City of New Bedford Massachusetts, 413 F.Supp.3d 53 (D. Mass. 2019), the Federal District Court “has

## CONCLUSION

Amicus respectfully urges that, if this Court chooses to affirm the Superior Court's denial of Ms. Rowley's petition, it does so solely as it relates to Ruth and Emily in this case, and not make a ruling beyond the petition's "four corners" to include other nonhuman animals.

Respectfully submitted, Counsel for  
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already determined that the elephants are lawfully held in captivity, negating the right to a writ." Appellant's Brief, Addendum p. 18. In Rowley, the District Court merely found that the City of New Bedford did not violate the "take" provision of the Endangered Species Act in 16 U.S.C. § 1538(a)(1)(B). This provision, however, has nothing whatsoever to do with whether the right to personal liberty has been violated, which is the essence of habeas corpus. The fact that there has not been a "taking" under the Endangered Species Act cannot preclude a finding, in a proper case, that Ruth and Emily's right to personal liberty under Massachusetts common law has been violated, thereby entitling them to habeas corpus relief. As Amicus has consistently argued in all of its petitions, once the court recognizes the right to liberty of the nonhuman animal prisoner, the confinement is per se unlawful under the common law.

### REQUIRED CERTIFICATION

I, Steven M. Wise, counsel for Amicus, hereby certify pursuant to Mass. R. App. P. 17(c)(9) that this Amicus Brief complies with the rules of the Court that pertain to the filing of amicus briefs. In compliance with Rules 20(a)(3)(E) and 20(a)(4), this Amicus Brief was prepared on Microsoft Word using a 14-point proportionally spaced font (Times New Roman), with the top, bottom, left, and right margins being one inch. The number of non-excluded words in this Amicus Brief is 3,601.

/s/  
Steven M. Wise

### CERTIFICATE OF SERVICE

I, Steven M. Wise, certify that on this day I caused to be filed a copy of the foregoing brief by eFileMA with the clerk of this Court. I further certify that I caused a copy of the foregoing to be served on counsel for Defendant-Appellees by eFileMA:

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I further certify that I caused to be served two copies of the foregoing on Petitioner-Appellant by first-class mail or equivalent to the following address, and also caused to be sent a courtesy copy by email to the address below:

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Signed this 21<sup>st</sup> day of August, 2020

/s/

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## ADDENDUM

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<b>PERSONAL</b>	Married to Gail Price-Wise Three children, Roma, Christopher, and Siena
<b>EDUCATION</b>	J.D., Boston University School of Law, 1976 B.S. in Chemistry, The College of William and Mary, 1972
<b>LEGAL TEACHING EXPERIENCE</b>	Lecturer on Law Harvard Law School, teaching "Animal Rights Law" Spring, 2000  Adjunct Professor Stanford Law School, teaching "Animal Rights Jurisprudence" April, 2017  Adjunct Professor Tel Aviv University Law School, teaching "Animal Rights Jurisprudence" November, 2019  Adjunct Professor Lewis and Clark Law School, teaching "Animal Rights Law," now "Animal Rights Jurisprudence" Summers, 2007 to present  Adjunct Professor Vermont Law School, teaching "Animal Rights Law," and "Animal Rights Jurisprudence" Summers, 1990 to 2016  Adjunct Professor St. Thomas Law School, teaching "Animal Rights Law," and "Animal Rights Jurisprudence" 2006 to 2014  Adjunct Professor University of Miami Law School

teaching "Animal Rights Jurisprudence"  
2010 to 2012.

Lecturer at the Universitat Autònoma de Barcelona  
Masters in Animal Law Program  
2011 to present

Adjunct Professor,  
John Marshall Law School,  
teaching "Animal Rights Law,"  
1999

Instructor and Tutor,  
teaching "Animal Law," in the  
Master of Science in Animals and Public Policy Program,  
Tufts University School of Veterinary Medicine,  
1996 - 2003

#### **LAW FIRMS**

Law Office of Steven M. Wise, P.A.  
2002 to present

President, Wise & Slater-Wise, P.C.,  
1997 to 2002

President, Fraser & Wise, P.C.,  
1982 to 1997

Partner, Fraser & Wise,  
1977 to 1982

#### **OTHER WORK**

Nonhuman Rights Project, Inc. (formerly Center for the  
Expansion of Fundamental Rights, Inc.), Founder, and  
President

1995 to present

The NhRP's object is to obtain legal personhood and  
fundamental common law rights for nonhuman animals.

#### **BOOKS**

Steven M. Wise, *An American Trilogy – Death, Slavery,  
and Dominion Along the Banks of the Cape Fear River*  
(de Capo Press 2009)

Steven M. Wise, *Though the Heavens May Fall - The  
Landmark Trial That Led to the End of Human Slavery* (de  
Capo Press 2005)(cover review, *New York Times Book  
Review*, January 9, 2005; reviewed *New York Review of  
Books*, July 14, 2005. It is in the process of being turned  
into a film.)

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*To be Argued by:*  
STEVEN M. WISE  
*(Of the Bar of the State of Massachusetts)*  
*By Permission of the Court*  
*(Time Requested: 15 Minutes)*

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# New York Supreme Court

## Appellate Division—First Department

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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,*

**Appellate  
Case No.:  
2020-02581**

— 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.*

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### BRIEF FOR PETITIONER-APPELLANT

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## **I. QUESTIONS PRESENTED**<sup>1</sup>

1. Does Happy, an Asian elephant imprisoned at the Bronx Zoo, have the common law right to bodily liberty protected by habeas corpus?

The lower court ruled that it was bound by *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) (“*Lavery I*”) to find that Happy is not a “person” for purposes of habeas corpus. (A-22).

2. Does habeas corpus relief permit Happy to be released to an appropriate elephant sanctuary?

The lower court did not address this question, but as *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) (“*Lavery II*”) and *Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 124 A.D.3d 1334 (4th Dept. 2015) (“*Presti*”) did, the matter is addressed herein.

## **II. STATEMENT OF THE CASE**

### **A. Introduction**

This Court must address the “profound” issue of “whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus.” *Nonhuman Rights Project, Inc. on Behalf of Tommy v. Lavery*, 31 N.Y. 3d 1054, 1059 (2018) (Fahey, J., concurring) (“*Fahey Concurrence*”). For centuries, it was wrongly

<sup>1</sup> The appendix pages are cited herein as “A” followed by the page number (“A-”).

believed that all nonhuman animals were unable to think, believe, remember, reason, or even experience emotion.<sup>2</sup> They have long been characterized as common law “things.” But to treat, for example,

a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect.

*Fahey Concurrence*, 31 N.Y.3d at 1058.<sup>3</sup> Elephants are no different.

Happy is an autonomous Asian elephant “inmate”<sup>4</sup> at the Bronx Zoo who Respondents-Respondents, the Wildlife Conservation Society and James J. Breheny (collectively “Bronx Zoo” or “Respondents”), have imprisoned for more than four decades inside a barn during the winter and on approximately one acre of land during the remainder of the year. For many of those years Happy has been alone.

<sup>2</sup> See Richard Sorabji, *Animal Minds & Human Morals – The Origins of the Western Debate* 1–96 (1993).

<sup>3</sup> Judge Fahey’s concurrence carries considerable weight. See *Welch v. Mr. Christmas, Inc.*, 85 A.D.2d 74, 77 (1st Dept. 1982) (“[T]he view expressed in the concurring opinion [of a Court of Appeals case] has frequently been relied upon”), *aff’d*, 57 N.Y.2d 143; *Darling v. Darling*, 869 N.Y.S.2d 307, 316 (Sup. Ct. 2008) (“The concurring opinion . . . has been cited with approval, and principles it articulates have been recognized.”).

<sup>4</sup> *Islamabad Wildlife Mgmt. Bd. v. Metropolitan Corp. Islamabad*, W.P. No.1155/2019 at 12 (H.C., Islamabad, Pakistan 2020) (referencing Happy in the context of, *inter alia*, ordering an Asian elephant named Kaavan freed from the Islamabad Zoo and sent to sanctuary). Available at: <https://www.nonhumanrights.org/content/uploads/Islamabad-High-Court-decision-in-Kaavan-case.pdf>.

In its Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause (“Petition”), Petitioner-Appellant, the Nonhuman Rights Project, Inc. (“NhRP”), demanded that the court recognize Happy’s “common law right to bodily liberty protected by common law habeas corpus” (A-37, para. 18), conclude she is being unlawfully imprisoned, and order her immediate release to an appropriate elephant sanctuary (A-78, para. 118) where she would be able to realize her autonomy to the fullest extent possible.<sup>5</sup> Judicial recognition of Happy’s common law right to bodily liberty is the sole legal right sought in the Petition. (A-37, para. 18).<sup>6</sup>

Based upon the six uncontroverted expert affidavits from five of the world’s most respected elephant cognition and behavior experts submitted on behalf of Happy (“Expert Affidavits”),<sup>7</sup> the lower court found that “Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings. . . . [S]he is an intelligent autonomous being who

<sup>5</sup> As the NhRP represented to the court below, The Elephant Sanctuary in Tennessee has agreed to provide Happy with lifetime care at no cost to Respondents.

<sup>6</sup> *Lavery II*’s dicta, 152 A.D.3d at 77, that “petitioner does not cite any sources indicating that United States or New York Constitutions were intended to protect nonhuman animals’ rights to liberty” ignored the fact that the NhRP brought its habeas corpus petitions solely under New York’s common law.

<sup>7</sup> They are: Joint Aff. of Lucy Bates, Ph.D and Richard M. Byrne, Ph.D (A-92 – A-122); Aff. of Joyce Poole, Ph.D. (A-139 – A-164); Aff. of Karen McComb, Ph.D (A-179 – A-200); Aff. of Cynthia Moss (A-218 – A-235); Supplemental Aff. of Joyce Poole, Ph.D (A-243 – A-245); and Second Supplemental Aff. of Joyce Poole, Ph.D (A-437 – A-482).

should be treated with respect and dignity, and who may be entitled to liberty.”<sup>8</sup> (A-22). The court also found that “[t]he arguments advanced by the NhRP are extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot” and that “Happy is more than just a legal thing or property.” (A-22).

The NhRP will argue in § III–A (*infra* 11–29) that as a matter of the public policy and moral principles embedded within common law liberty and equality, as well as New York’s pet trust statute (EPTL § 7-8.1), this Court has a duty to recognize Happy’s common law right to bodily liberty protected by habeas corpus and free her from her unlawful imprisonment. The refusals to do so with respect to chimpanzees in *Lavery I* and *Lavery II*’s dicta were arbitrary, irrational, inequitable, and a violation of common law.<sup>9</sup>

<sup>8</sup> None of the Expert Affidavits were controverted by any elephant cognition or behavior expert from the staff of the billion-dollar Wildlife Conservation Society or by any other elephant expert, not even by an elephant keeper at the Bronx Zoo. (A-474, para. 4). Their silence is as significant as the silence of the “dog that didn’t bark in the night.” *State v. Rosado*, 134 Conn. App. 505, 517 n.4 (2012) (referencing Sherlock Holmes in *Silver Blaze*). Respondents’ trio of affiants are administrators who failed to state that they possessed any elephant cognition or behavior expertise by education or experience and failed to state the details of any personal observations (if any) of Happy. (A-319 – A-322; A-329 – A-332; A-333 – A-338; A-458 – A-464).

<sup>9</sup> Once this Court recognizes Happy’s right to bodily liberty, she is necessarily a “person” under Article 70 because an entity explicitly granted a legal right is implicitly a legal person for purposes of bearing that right. Similarly, EPTL § 7-8.1, which explicitly grants certain nonhuman animals the right to the corpus of a trust, has long implicitly recognized their personhood for purposes of that statute. (*See infra* 26–29).

The NhRP will argue in § III–B (*infra* 29–52) that *Lavery I*, *Lavery II*, and *Presti*, all of which denied habeas corpus relief to chimpanzees, are neither binding nor persuasive because they are based on demonstrable misunderstandings of the law and are evidently contrary to reason.

## **B. Procedural History**

On October 2, 2018, the NhRP filed its Petition in the Supreme Court, Orleans County (“Orleans Court”). (A-31 – A-79). On November 16, 2018, the Orleans Court issued an Order to Show Cause and made it returnable on December 14, 2018, when a hearing on the Petition was held in Albion, New York. (A-323 – A-325).

In a notice of motion dated December 3, 2018, Respondents moved to transfer the proceeding to the Supreme Court, Bronx County (“Bronx Court”) or, in the alternative, to dismiss the Petition pursuant to CPLR 3211(a) or, if the Petition was not dismissed, for permission to file an answer pursuant to CPLR 404(a).<sup>10</sup> (A-326 – A-328). On January 18, 2019, the Orleans Court granted Respondent’s motion to transfer venue and ordered that “all motions and issues submitted to” the Orleans Court be stayed pending transfer to the Bronx Court. (A-30).

Following transfer, Justice Alison Y. Tuitt heard extensive oral argument over three days on the merits of the Petition, Respondents’ motion to dismiss, and other

<sup>10</sup> Respondents’ grounds for dismissing the Petition were: (1) failure to state a cause of action, (2) lack of standing, and (3) collateral estoppel. (A-327).

motions not relevant to this appeal. (A-8). On February 18, 2020, Justice Tuitt issued her Decision and Order granting Respondents’ motion to dismiss the Petition (A-5 – A-22), and did so solely on the basis of *Lavery I*’s holding that nonhuman animals are not “persons.” (A-22).<sup>11</sup>

### **C. Statement of Facts**

The Bronx Court recognized that “Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings.” (A-22). This is because elephants are autonomous beings, as “they exhibit [self-determined] behavior that is based on freedom of choice.” (A-11; A-57, para. 72; A-105, para. 30; A-119, para. 60; A-148, para. 22; A-164, para. 55; A-187, para. 24; A-198 – A-199, para. 54; A-223, para. 18; A-235, para. 48). As a psychological concept, autonomy “implies that the individual is directing their behavior based on some non-observable, internal cognitive process, rather than simply responding reflexively.” (A-11; A-57 – A-58, para. 72; A-105, para. 30; A-148, para. 22; A-187, para. 24; A-223, para. 18).

“African and Asian elephants share numerous complex cognitive abilities with humans, such as self-awareness, empathy, awareness of death, intentional

<sup>11</sup> The Bronx Court did not grant Respondents’ motion to dismiss on the grounds of standing or collateral estoppel but found that pursuant to CPLR 7002(a) the NhRP had “standing to bring the habeas corpus proceeding on behalf of Happy.” (A-18). The remaining motions were denied as academic or moot. (A-22).

communication, learning, memory, and categorization abilities. Each is a component of autonomy.” (A-11; A-57, paras. 71 – 72; A-108, para. 37; A-150, para. 29; A-189, para. 31; A-225, para. 25). “Physical similarities between human and elephant brains occur in areas that link to the capacities necessary for self-awareness and autonomy.” (A-11; A-59, para. 76; A-107, para. 34; A-149 – A-150, para. 26; A-188, para. 28; A-224, para. 22).

Elephants, as autonomous beings, possess complex cognitive abilities including: empathy, self-awareness, self-determination, theory of mind (awareness that others have minds), insight, working memory and an extensive long-term memory that allows them to accumulate social knowledge, the ability to act intentionally and in a goal-oriented manner and to detect animacy and goal-directedness in others, imitation including vocal imitation, pointing and understanding pointing, true teaching (taking the pupil’s lack of knowledge into account and actively showing them what to do), cooperation and coalition building, cooperative and innovative problem-solving, behavioral flexibility, understanding causation, intentional communication including vocalizations to share knowledge and information with others in a manner similar to humans, ostensive behavior that emphasizes the importance of a particular communication, using a wide variety of gestures, signals, and postures, using specific calls and gestures to plan and discuss a course of action, the ability to adjust plans according to assessment of risk and



execute those plans in a coordinated manner, complex learning and categorization abilities, and an awareness of and response to death, including grieving behaviors. (A-11; A-56 – A-57, para. 70; A-105, para. 30; A-107, para. 34; A-108 – A-119, paras. 37 – 60; A-148, para. 22; A-149 – A-150, para. 26; A-150 – A-164, paras. 29 – 55; A-189 – A-199, paras. 31 – 54; A-224, para. 22; A-225 – A-235, paras. 25 – 48).

Happy has been imprisoned at the Bronx Zoo since 1977 where, in addition to being kept on display, she once gave rides and participated in “elephant extravaganzas.” For 25 years, Happy lived with another elephant named Grumpy. In 2002, Grumpy was euthanized after being attacked by Patty and Maxine, two other elephants imprisoned at the Bronx Zoo. Happy then lived with a younger elephant named Sammie, who, in 2006, was euthanized after suffering from kidney failure. Since Sammie’s death, Happy has lived alone in a one-acre enclosure.<sup>12</sup> (A-9 – A-10; A-43 – A-44, para. 38; A-479 – A-480, para. 28).

In 2005, Happy was found to possess mirror self-recognition (MSR) using the “mark test.” MSR is the ability to recognize one’s reflection in the mirror as oneself, while the mark test involves surreptitiously placing a colored mark on an individual’s forehead that she cannot see or be aware of without the aid of a mirror.

<sup>12</sup> Maxine was euthanized after the NhRP filed its Petition. Respondent Breheny has confirmed that Happy and Patty are kept separated from each other. See <https://www.nonhumanrights.org/content/uploads/Breheny-email-statement.pdf>.

The individual is thought to recognize her reflection as herself if she uses the mirror to investigate the mark. (A-11 – A-12; A-43 – A-44, para. 38; A-69, para. 96; A-108, para. 38; A-151, para. 30; A-189, para. 32; A-225 – A-226, para. 26).

MSR is an accepted identifier of self-awareness, which is intimately linked to autobiographical memory in humans and is central to autonomy and being able to direct one's own behavior to achieve personal goals and desires. To recognize themselves in a mirror, elephants must hold a mental representation of themselves from another perspective and thus be aware that they are a separate entity from others. (A-12; A-69 – A-70, para. 97; A-108 – A-109, para. 38; A-151, para. 30; A-189 – A-190, para. 32; A-225 – A-226, para. 26).

Elephants have evolved to move and, in free-living elephant societies, are active more than 20 hours each day, moving “many miles across landscapes to locate resources to maintain their large bodies, to connect with friends and to search for mates.” (A-243, para. 4). Captivity and confinement “prevents them from engaging in normal, autonomous behavior and can result in the development of arthritis, osteoarthritis, osteomyelitis, boredom and stereotypical behavior.” *Id.* When held in isolation, “elephants become bored, depressed, aggressive, catatonic and fail to thrive. Human caregivers are no substitute for the numerous, complex social relationships and the rich gestural and vocal communication exchanges that occur between free-living elephants.” *Id.*

Happy cannot meaningfully exercise her autonomy while imprisoned alone in “a space that, for an elephant, is equivalent to the size of a house.” (A-475, para. 9). At the Bronx Zoo, Happy has no choice of social partners and almost no ability to engage in species typical behavior. (A-480, paras. 30 – 31). “When elephants are forced to live in insufficient space for their biological, social and psychological needs to be met, over time, they develop physical and emotional problems.” (A-478, para. 19).

Happy cannot simply be sent back to the wild, as life there requires survival skills and social relationships she was never allowed to develop. The best option for meeting her needs and remedying the violation of her autonomy and right to bodily liberty is release to an appropriate sanctuary, such as The Elephant Sanctuary in Tennessee. (A-243 – A-244, para. 5). “[E]xtremely positive transformations . . . have taken place when captive elephants are given the freedom that larger space in sanctuaries . . . offer.” (A-476, para. 11). The differences between traditional zoos and sanctuaries “relate to the orders of magnitude of greater space that is offered in sanctuaries. Such space permits autonomy and allows elephants to develop more healthy social relationships and to engage in near natural movement, foraging, and repertoire of behavior.” (A-478, para. 19). In short, a sanctuary offers elephants “more autonomy and the possibility to choose where to go, what to eat and with whom and when to socialize.” (A-476, para. 11).

### III. ARGUMENT

#### **A. As Happy is autonomous this Court must recognize her common law right to bodily liberty protected by habeas corpus.**

##### **1. This Court has the duty to examine whether Happy has the common law right to bodily liberty protected by habeas corpus.**

This Court has “the duty to re-examine a question where justice demands it” in order “to bring the law into accordance with present day standards of wisdom and justice” and “make the law conform to right.” *Woods v. Lancet*, 303 N.Y. 349, 354, 355, 351 (1951). The common law’s “genius . . . lies in its flexibility and in its adaptability to the changing nature of human affairs and in its ability to enunciate rights and to provide remedies for wrongs where previously none had been declared.” *Rozell v. Rozell*, 281 N.Y. 106, 112 (1939) (citation omitted).

The Court of Appeals has long rejected the claim that “change . . . should come from the Legislature, not the courts,” especially “in a field peculiarly nonstatutory,” *Woods*, 303 N.Y. at 355, such as habeas corpus, which “is not the creature of any statute,” but “exists as a part of the common law of the State” and is “the great bulwark of liberty.”<sup>13</sup> *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565, 566 (1875).

<sup>13</sup> Historically courts used habeas corpus to recognize the right to bodily liberty of slaves and secure their freedom. See *Lemmon v. People*, 20 N.Y. 562 (1860) (seven slaves); *In re Belt*, 2 Edm. Sel. Cas. 93 (N.Y. Sup. Ct. 1848) (slave); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846) (slave imprisoned on brig); *Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (slave) (adopted as New York’s common law, N.Y. Const., art. I, § 14; N.Y. Const., art. 35 (1777), and

Habeas corpus is uniquely characterized by “its great flexibility and vague scope.” *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 263 (1966) (citation omitted). This common law writ “cannot be abrogated, or its efficiency curtailed, by legislative action . . . . The remedy against illegal imprisonment afforded by this writ, as it was known and used at common law, is placed beyond the pale of legislative discretion[.]” *Tweed*, 60 N.Y. at 566–67. *E.g.*, *People ex rel. Lobenthal v. Koehler*, 129 A.D.2d 28, 30 (1st Dept. 1987) (“The ‘great writ’, although regulated procedurally by article 70 of the CPLR, is not a creature of statute, but a part of the common law of this State”).<sup>14</sup>

The examination required for determining whether Happy has the common law right to bodily liberty must not be limited to consulting dictionary definitions of “person,” as the Third Department did in *Lavery I* to support its conclusion that chimpanzees cannot possess any legal rights. *See Lavery I*, 124 A.D.3d 151–52 (citing, *inter alia*, the definition of “person” in Black’s Law Dictionary).

When grappling with the question of whether a chimpanzee has the right to liberty protected by habeas corpus, Judge Fahey explained:

approved in *Lemmon*, 20 N.Y. at 604–5)). As these human slave cases were not human welfare cases, Happy’s case is not an animal welfare case. The sole issue is whether Happy “may be legally detained at all.” *The Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898, 901 (Sup. Ct. 2015).

<sup>14</sup> *See also* Vincent Alexander, *Practice Commentaries*, McKinney’s CPLR 7001 (“The drafters of the CPLR made no attempt to specify the circumstances in which habeas corpus is a proper remedy. This was viewed as a matter of substantive law.”).

The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. That question, one of precise moral and legal status, is the one that matters here. [. . .]

Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention. [. . .]

Whether a being has the right to seek freedom from confinement through the writ of habeas corpus should not be treated as a simple either/or proposition . . . . While it may be arguable that a chimpanzee is not a “person,” there is no doubt that it is not merely a thing.<sup>15</sup>

*Fahey Concurrence*, 31 N.Y.3d at 1057–59.

Justice therefore demands that this Court examine the question of whether Happy has the common law right to bodily liberty protected by habeas corpus and is therefore an Article 70 “person.”<sup>16</sup> Failing to do so would amount “to a refusal to confront a manifest injustice.” *Fahey Concurrence*, 31 N.Y.3d at 1059.

Examining Happy’s entitlement to habeas corpus is a constituent part of the process of “mak[ing] the law conform to right.” *Woods*, 303 N.Y. at 351. Moreover, the Court of Appeals has made clear that the question of “whether legal personality should attach” – in other words, whether an entity should have the capacity for rights

<sup>15</sup> Notably, Judge Fahey does not state that it may be arguable that a chimpanzee is not a person.

<sup>16</sup> The Third Department failed to fulfill its duty by urging the NhRP to seek relief for its imprisoned chimpanzee client in the legislature. *See Lavery I*, 124 A.D. 3d at 153.

– is also a “policy question” requiring a “policy determination.” *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972) (citations omitted). *See id.* at 201 (“according legal personality to a thing the law affords it the rights and privileges of a legal person.”) (citations omitted).

“Person” is not defined in Article 70, so the policy determination of whether Happy constitutes a “person” for purposes of habeas corpus is for this Court to decide under the common law. *See Siveke v. Keena*, 441 N.Y.S.2d 631, 633 (Sup. Ct. 1981) (“person” in Article 70 is not restricted by qualifying language: “[h]ad the legislature so intended to restrict the application of Article 70 of the CPLR to [infants or persons held in state institutions], it would have done so by use of the appropriate qualifying language.”); *see also P.F. Scheidelman & Sons, Inc. v. Webster Basket Co.*, 257 N.Y.S. 552, 555 (Sup. Ct. 1932), *aff’d*, 236 A.D. 2d 774 (4th Dept. 1932) (“distress” and “distrain” must be given their common law meaning since they lack statutory definitions).

This Court must therefore reject the erroneous assertions in *Lavery I* and *Lavery II* that “[t]he common law writ of habeas corpus” is “codified by CPLR article 70.” 124 A.D.3d at 150; 152 A.D.3d at 77. Article 70 cannot curtail the substantive entitlement to the writ as it merely “governs the procedure of the

common-law writ of habeas corpus.”<sup>17</sup> *People ex rel. DeLia v. Munsey*, 26 N.Y.3d 124, 130 (2015); *Tweed*, 60 N.Y. at 566–67. *See also* CPLR 101 and 102.

**2. As Happy is autonomous this Court must recognize her common law right to bodily liberty as a matter of liberty.**

Judge Fahey recognized that autonomy lies at the heart of the question of whether a chimpanzee “has the right to liberty protected by habeas corpus,” writing:

the answer to that question will depend on our assessment of the intrinsic nature of chimpanzees as a species. The record before us in the motion for leave to appeal contains unrebutted evidence, in the form of affidavits from eminent primatologists, that chimpanzees have advanced cognitive abilities. . . . Moreover, the amici philosophers with expertise in animal ethics and related areas draw our attention to recent evidence that chimpanzees demonstrate autonomy by self-initiating intentional, adequately informed actions, free of controlling influences[.]

*Fahey Concurrence*, 31 N.Y.3d at 1058 (citations omitted). *See The Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898, 901 (Sup. Ct. 2015) (“*Stanley*”) (habeas corpus “is deeply rooted in our cherished ideas of individual autonomy and free choice”).

This has long been the common law. *See Union Pac R Co v. Botsford*, 141 U.S. 250, 251 (1891) (“[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control

<sup>17</sup> New York’s Suspension Clause precludes the legislature and judiciary from abrogating the substantive right to the common law writ. *See* N.Y. Const., art. I, § 4; *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939); *Tweed*, 60 N.Y. at 591–92.



of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law . . . . ‘The right to one’s person may be said to be a right of complete immunity; to be let alone.’”) (citation omitted). That autonomy is valued more than human life is exemplified by the fact that an autonomous human may choose to reject lifesaving medical treatment and die. *See Matter of Storar*, 52 N.Y.2d 363, 372, 376–77 (1981), *superseded by statute on other grounds*, as noted in *In re MB*, 6 N.Y.3d 437 (2006).

The deprivation of an autonomous being’s bodily liberty therefore constitutes a serious violation of the fundamental principle of liberty that New York judges stoutly defend:

In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires [Citing, *inter alia*, *Matter of Erickson v. Dilgard*, 44 Misc. 2d 27 (Supreme Ct. 1962) (Meyer, J.) and *Botsford*, 141 U.S. at 251.]

*Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986). *See Fahey Concurrence*, 31 N.Y.3d at 1057 (habeas corpus may be sought on behalf of infants and adults suffering from dementia).

The Bronx Court found that the Expert Affidavits demonstrate that Happy is “an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty.” (A-22). The Expert Affidavits establish that she

is seriously wronged by the deprivation of her bodily liberty. (*See supra* 9–10; A-243, para. 4; A-474 – A-476, paras. 6 – 11; A-478 – A-479, paras. 22 – 24; A-479 – A-480, paras. 28 – 31).

This Court has the duty to safeguard and uphold the fundamental common law liberty interest of autonomous beings. As Happy is an autonomous being, this Court must recognize her right to bodily liberty protected by habeas corpus and order her freed.

**3. As Happy is autonomous this Court must recognize her common law right to bodily liberty as a matter of equality.**

Equality has both a comparative component, in which one's entitlement to a right is determined by comparing one's position to the position of another who has that right, and a noncomparative component, in which one's entitlement to a right is determined not by any comparison, but by making a normative judgment.<sup>18</sup> The comparative equality component is violated when similarly situated individuals are intentionally treated in dissimilar ways, while the noncomparative equality component is violated when the dissimilar treatment lacks a legitimate end or is grounded upon an illegitimate end.

<sup>18</sup> In addition to its noncomparative component, the Fifth Amendment's Due Process Clause also has a comparative component, *see, e.g., U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533 n. 5 (1973), while in addition to its comparative component, the Fourteenth Amendment's Equal Protection Clause also has a noncomparative component, *see, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996).

**a. Happy's imprisonment violates the comparative component of common law equality because elephants and humans are similarly situated when imprisoned.**

Comparative equality has deep roots in Western ethics, natural justice, and the common law. “Since the earliest conscious evolution of justice in western society, the dominating principle has been that of equality of treatment of like persons similarly situated, a principle at the root of any rational system of justice.” *People v. Jones*, 39 N.Y. 2d 694, 698 (1976) (Breitel, C.J.) (dissenting) (citing Aristotle, *Ethica Nicomachea*, [Ross ed], book V, pars 1129a, 1131a; Friedmann, *Legal Theory* [5th ed], at p 416; Bodenheimer, *Treatise on Justice*, § 10, at p 84; Hart, *Concept of Law*, pp 153-163, especially pp 155, 158-159; Cahn, *Sense of Injustice*, pp 14-15; and Paton, *Jurisprudence* [3d ed], at p 95)). In short, “[o]ur whole system of law is predicated on the general fundamental principle of equality of application of the law.” *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). *See Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943) (Our “institutions are founded upon the doctrine of equality.”).

The equal protection clauses of the Fourteenth Amendment and the New York Constitution (N.Y. Const., art. I, § 11) require that similarly situated individuals be treated alike. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (Equal Protection Clause mandates that “all persons similarly situated should be treated alike.”); *Walton v. New York State Dept of Correctional Services*,

13 N.Y.3d 475, 492 (2009) (New York’s Equal Protection Clause, modeled after the Fourteenth Amendment’s Equal Protection Clause, requires that similarly situated individuals should be treated alike); *Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 630 (2004) (“[t]he essence of a violation of the constitutional guarantee of equal protection is, of course, that all persons similarly situated must be treated alike.”). Moreover, “[t]he breadth of coverage under the equal protection clauses of the federal and [New York] state constitutions is equal.” *Pinnacle Nursing Home v. Axelrod*, 928 F. 2d 1306, 1317 (2d Cir. 1991).

This classic comparative component of equality is part of the common law of New York, as it is in other jurisdictions. Thus in *Millington v. Southeastern Elevator Co*, 22 N.Y.2d 498, 508, 509 (1968), the Court updated the common law “on the basis of policy and fairness” to terminate “an unjust discrimination under New York law.” *Millington* recognized that women have an “equal right” to damages resulting from the loss of consortium, rejecting the prior rule which limited the cause of action to men, since the “‘wife’s interest in the undisturbed relation with her consort is no less worthy of protection than that of the husband.’” *Id.* at 504–5 (citation omitted).

*Millington*’s common law equality decision drew guidance, in part, from a Fourteenth Amendment decision in *Levy v. Louisiana*, 391 U.S. 68, 72 (1968), which held that a wrongful death statute prohibiting “illegitimate children” from recovering damages constituted invidious discrimination, as their status had no possible

relevance “to the harm that was done the mother.” *See* 22 N.Y.2d at 508 (finding *Levy*’s reasoning applicable “since it is concluded that there is no basis for the existing discrimination.”). *E.g. Root v. Long Island Railroad Co.* 114 N.Y. 300, 305 (1889) (under common law, a public carrier cannot “unreasonably or unjustly discriminate against other individuals . . . where the conditions are equal. So far as is reasonable all should be treated alike”).<sup>19</sup> *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204, 206 (Fla.1989) (“Under . . . our common law heritage, all similarly situated persons are equal before the law.”); *Farley v. Engelken*, 241 Kan. 663, 667 (Kan. 1987) (“Equality was recognized by the founding fathers as one of man’s natural rights”); *Simrall v. City of Covington*, 14 SW 369, 370 (Ky. App.1890) (“Perhaps the most distinguishing feature of the common law is its regard for the protection and equality of individual right”).

This relationship between the common law and constitutional equal protection clauses exemplifies the two-way street that exists between common law and constitutional adjudication. “[A]s the common law once nourished the constitutions, constitutional values – especially the values so meticulously set out in our lengthy state charters – also can enrich the common law.”<sup>20</sup> Judith S. Kaye, *Forward: The*

<sup>19</sup> Courts, which make common law the way legislatures make statutory law, may not create a rule that would be struck down on equality grounds had it been fashioned by the legislature.

<sup>20</sup> *Cf.*, Note, *The Antidiscrimination Principle in the Common Law*, 102 Harv. L. Rev. 1993, 2011 (1989) (“judges often consult common law norms and baselines in analyzing private law and constitutional issues”).

*Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 Rutgers L. J. 727, 743 (1992). The result has been a “common law decision making infused with constitutional values.” *Id.* at 747.

Comparative equality, as well as noncomparative equality, is breached when a classification is “so obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violate[s] basic equal protection values,” and renders “the ordinary three-part equal protection query . . . irrelevant.” *Equality Foundation v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997) (discussing *Romer v. Evans*, 517 U.S. 620, 632 (1996)). See *Foss v. City of Rochester*, 65 N.Y.2d 247, 257 (1985) (a “classification violates constitutional equal protection guarantees [of the federal and New York state constitutions] . . . if the distinction between the classes is ‘palpably arbitrary’ or amounts to ‘invidious discrimination.’”) (citations omitted); *Millington*, 22 N.Y.2d at 509.

Determining whether two classes are similarly situated for purposes of comparative equality may be difficult for there are an infinite number of ways in which any two classes can be similar or dissimilar. A court must decide whether the two classes are similarly situated in some relevant way related to the purpose of the desired end. See *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 199 (1990); *330 West 42nd St. Corp. v. Klein*, 46 N.Y. 2d 686, 695 (1979).

The NhRP argues that elephants and human beings are similarly situated when

imprisoned for purposes of habeas corpus relief because they each possess the autonomy upon which the right to bodily liberty is grounded and which habeas corpus is intended to protect. (*See* discussion, *supra* 15–17). On the other hand, the Bronx Zoo has argued, and is likely to argue before this Court, that imprisoned elephants and human beings are not similarly situated solely because elephants are not human beings.

The only nonarbitrary, nonoppressive, and equitable way for this Court to choose between these two competing arguments is to embrace the one which harmonizes most closely with the policies and principles normally embraced by New York courts. The Court of Appeals has made clear that autonomy is a common law value more important than human life itself. *See Katz*, 67 N.Y. 2d. at 492–93; *Storar*, 52 N.Y. 2d at 372–74.

*Katz* and *Storar* concerned the autonomy necessary for a human being to make complex medical decisions. The Expert Affidavits demonstrate that elephants possess the autonomy necessary for a wide variety of sophisticated cognitive abilities, including complex decision-making. While elephants, like many human beings, may not be capable of complex medical decisions, they are capable of making decisions relevant to habeas corpus. (*See supra* 6–9). To deny Happy the right to bodily liberty protected by habeas corpus merely because she is not human violates the values of basic equality that form the bedrock of any rational system of

justice.

The Bronx Zoo's argument that Happy should be denied the common law right to bodily liberty protected by habeas corpus solely because she is not human parrots the misguided dictum in *Lavery II*, 152 A.D. 3d. at 78, that chimpanzees cannot have the common law right to bodily liberty protected by habeas corpus because that right is restricted to "human beings, members of the human community."

Judge Fahey recognized the arbitrariness of depriving autonomous chimpanzees of their right to bodily liberty protected by habeas corpus merely because they are not human. "[T]hat a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species." *Fahey Concurrence*, 31 N.Y.3d at 1057. *Cf.*, *Buck v. Davis*, 137 S. Ct. 739, 778 (2017) ("Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.").

*Lavery I*'s and *Lavery II*'s disregard of the New York courts' long-held position that autonomy is even more important than human life echoes a long and deeply regrettable history of naked judicial biases so severe they would today violate the equal protection clauses of the Fourteenth Amendment and New York constitution. (See argument, *infra* 25–26). The United States Supreme Court once



stated that all black people, slave and free – merely because they were black – “had no rights which the white man was bound to respect.” *Dred Scott v. Sandford*, 60 U.S. 393, 408 (1857). The California Supreme Court once held that Chinese people – merely because they were Chinese – could not testify against a white man in court, for the Chinese are a people that “indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference.” *People v. Hall*, 4 Cal. 399, 404–5 (1854). A United States Attorney once argued that Ponca Chief Standing Bear – merely because he was Native American – was not a “person” for the purposes of habeas corpus. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 796–7 (C.C. Neb. 1879). See Stephen Dando Collins, *Standing Bear is a Person* 117 (2004) (district attorney’s argument was essentially that “Indians had no more rights in a court of law than beasts of the field.”).<sup>21</sup> The Wisconsin Supreme Court once refused to allow Ms. Lavinia Goodell to practice law for no reason other than that she was a woman. *In re Goodell*, 39 Wis. 232 (1875). This is not a history to emulate in New York.

<sup>21</sup> Chief Standing Bear now stands in the U.S. Capitol’s National Statuary Hall. See <https://www.aoc.gov/art/national-statuary-hall-collection/chief-standing-bear>.

Denying Happy the common law right to bodily liberty protected by habeas corpus merely because she is an elephant violates the comparative component of common law equality. She is equally entitled to this right and it is irrational and arbitrary to deprive her of it.

**b. As New York has no legitimate interest in allowing the arbitrary imprisonment of an elephant, Happy's imprisonment violates the noncomparative component of common law equality.**

Under the common law, this Court must find that New York has no legitimate end, i.e., no normatively acceptable interest, in allowing Happy's arbitrary imprisonment. *Romer v. Evans*, 517 U.S. 620 (1996) identified two relevant and illuminating ways in which a classification can lack a legitimate end.

First, Colorado's Amendment 2 adopted an inequitable, arbitrary, and/or oppressive classification grounded upon a single, irrelevant trait – being gay or lesbian – and “then denie[d] [gay and lesbian persons] protection across the board.” *Romer*, 517 U.S. at 633. Denying Happy, who is autonomous, the common law right to bodily liberty protected by habeas corpus merely because she an elephant is equally inequitable, arbitrary, and oppressive and therefore violates the noncomparative component of common law equality.

Second, Amendment 2's “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.” *Id.* at

632. *See also City of Cleburne*, 473 U.S., at 450 (an “irrational prejudice against the mentally retarded” is not a legitimate governmental interest); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (if “‘equal protection of the laws’ means anything, it must . . . mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”).

As discrimination based upon a single, irrelevant trait or rooted in animus, irrational prejudice, or bias violates equality, so does Happy’s arbitrary imprisonment at the Bronx Zoo. Her arbitrary imprisonment lacks a legitimate end; it is normatively unacceptable because it is grounded upon a single, irrelevant trait – being an elephant – and rooted in an irrational prejudice or bias towards nonhuman animals that ignores the relevant trait of her autonomy. Denying Happy the common law right to bodily liberty protected by habeas corpus merely because she is an elephant therefore violates the noncomparative component of common law equality.

**4. The Fourth Department and the public policy embedded within EPTL § 7-8.1 recognize that certain nonhuman animals can be “persons” with legal rights.**

“[I]t is common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals.” *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018) (citing, *inter alia*, *Presti*). In considering Happy’s personhood, this Court should look to the public policy embedded within EPTL § 7-8.1, which grants

“domestic or pet animals” the legal right to trust corpuses as beneficiaries.<sup>22</sup> “Before this statute, trusts for animals were void, because a private express trust cannot exist without a beneficiary capable of enforcing it, and because nonhuman lives cannot be used to measure the perpetuities period.” Margaret Turano, *Practice Commentaries*, N.Y. Est. Powers & Trusts Law 7-8.1 (2013).<sup>23</sup>

In 1996, EPTL § 7-6 (now EPTL § 7-8.1) was enacted permitting “domestic or pet animals” to be designated as trust beneficiaries.<sup>24</sup> By explicitly granting such nonhuman animals legal rights, the legislature implicitly recognized them as “persons,” for only “persons” can be trust beneficiaries.<sup>25</sup> *See Stanley*, 16 N.Y.S.3d at 901 (referring to “this state’s recognition of legal personhood for some nonhuman animals under [EPTL § 7-8.1]”); *Matter of Fouts*, 176 Misc.2d 521, 522 (Sur. Ct.

<sup>22</sup> “[S]tatutes can serve as an appropriate and seminal source of public policy to which common law courts can refer.” *Reno v. D’Javid*, 379 N.Y.S.2d 290, 294 (Sup. Ct. 1976) (citing, *inter alia*, *Muller v. Oregon*, 208 U.S. 412 (1908)).

<sup>23</sup> *See In re Mills’ Estate*, 111 N.Y.S.2d 622, 625 (Sur. Ct. 1952) (since nonhuman animals are not “persons,” “income or rents and profits trusts may only be measured by the life or lives of human beings.”).

<sup>24</sup> The Sponsor’s Memorandum 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).

<sup>25</sup> *See Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947) (“‘Beneficiary’ is defined as ‘a person having enjoyment of property of which a trustee and executor, etc. has legal possession.’”) (quoting Black’s Law Dictionary); *Gilman v. McArdle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) (“Beneficiaries . . . must be persons[.]”), *rev’d on other grounds*, 99 N.Y. 451 (1885).

1998) (recognizing five chimpanzees as “income and principal beneficiaries of [a] trust” and referring to them as “beneficiaries” throughout the opinion).

In 2010, the legislature removed “Honorary” from the statute’s title and amended section 7-8.1 (a) to read, in part, “[s]uch trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive,” thereby dispelling any doubt that certain nonhuman animals have trust beneficiary rights.<sup>26</sup> See *Feger v. Warwick Animal Shelter*, 59 A.D.3d 68, 72 (2d Dept. 2008) (“[t]he reach of our laws has been extended to animals in areas which were once reserved only for [humans]. For example, the law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner.”).

In short, the Fourth Department has recognized the obvious – nonhuman animals can be “persons” – while EPTL § 7-8.1 embodies a legislative public policy that, in harmony with *Byrn*, 31 N.Y.2d at 201 (“according legal personality to a thing the law affords it the rights and privileges of a legal person”), makes clear in New York that certain nonhuman animals are already “persons” with the capacity for legal

<sup>26</sup> The Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York’s report to the legislature proclaimed: “[W]e recommend that the statute be titled ‘Trusts for Pets’ instead of ‘Honorary Trusts for Pets,’ as honorary means unenforceable, and pet trusts are presently enforceable under subparagraph (a) of the statute.” N.Y. Bill Jacket, 2010 A.B. 5985, Ch. 70 (2010).

rights.<sup>27</sup> Moreover, this public policy refutes any argument that Happy cannot possibly be a “person.”

**B. This Court is not bound by, nor should it follow, the statements of *Lavery I*, *Lavery II*, and *Presti* regarding legal personhood for nonhuman animals or habeas corpus relief.**

*Lavery I* held, for the first time in history, that legal personhood requires the capacity to bear legal duties. 124 A.D.3d at 152. Recognizing the obvious fact that “some humans are less able to bear legal duties or responsibilities than others,” the court stated that “[t]hese differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility.” *Id.* at 152. n.3.

In dicta, *Lavery II* noted *Lavery I*’s conclusion that nonhuman animals lack legal rights because they lack the capacity for legal duties. 152 A.D.3d. at 76–78. It also recognized the obvious fact that many humans lack the capacity for legal duties but nonetheless possess legal rights, yet similarly stated: “[the NhRP’s] argument ignores the fact that these are still human beings, members of the human community.” *Id.* at 78. *Lavery II* also followed *Presti*, asserting in dicta that habeas corpus relief was not available to two imprisoned chimpanzees where the relief sought was “their transfer to a different facility.” *Id.* at 79.

<sup>27</sup> Happy is the beneficiary of a trust created by the NhRP pursuant to EPTL § 7-8.1. (A-83 – A-91).

None these statements are binding or persuasive because (1) *Lavery II*'s statements are dicta (*infra* 30–31) and (2) they are all based on demonstrable misunderstandings of the law and are evidently contrary to reason (*infra* 31–52).

**1. *Lavery II*'s statements regarding legal personhood for nonhuman animals and habeas corpus relief are dicta.**

“Without even addressing the merits of petitioner’s arguments,” *Lavery II* concluded “that the motion court properly declined to sign the orders to show cause since these were successive habeas proceedings which were not warranted or supported by any changed circumstances [under CPLR 7003(b)].” 152 A.D.3d at 75–76 (citations omitted). Its subsequent discussion regarding legal personhood for chimpanzees and habeas corpus relief is therefore dicta and not binding.<sup>28</sup> Dicta, even from the Court of Appeals, is not binding.<sup>29</sup> *See In re Mackay’s Will*, 65 Sickels 611, 615 (1888) (in reaching the opposite conclusion from its statement in a prior decision, the Court of Appeals noted that its prior statement was “mere dictum,

<sup>28</sup> When a court decides a case on procedural grounds, any discussion of the merits is dicta. *See Whale Telecom Ltd. v. Qualcomm Inc.*, 41 A.D.3d 348, 349 (1st Dept. 2007) (“the motion court properly recognized that its dismissal on timeliness grounds rendered those alternative grounds academic. It is unnecessary to address the court’s dicta.”); *Sherb v. Monticello Cent. Sch. Dist.*, 163 A.D.3d 1130, 1132 (3d Dept. 2018) (where improper service of process resulted in denial of motion to file a late notice of claim, “[t]he court’s ensuing comments on the merits . . . were dicta”); *Matter of Isaiah M. (Nicole M.)*, 144 A.D.3d 1450, 1453 n.3 (3d Dept. 2016) (“The appeal . . . was dismissed upon procedural grounds and, therefore, the resulting discussion of the merits is dictum.”).

<sup>29</sup> *See Robinson Motor Xpress, Inc.*, 37 A.D.3d 117, 124 (2d Dept. 2006) (dicta in Court of Appeals decision that a certain notice must be “written” was not controlling on lower courts); *Walling v. Przybylo*, 24 A.D.3d 1, 5 (3d Dept. 2005) (suggestion in Court of Appeals’ opinion, which was seemingly inconsistent with other appellate decisions, was “dictum . . . and not controlling”).

unnecessary to the decision in that case, and therefore cannot have weight as authority.”).

**2. Stare decisis does not apply to decisions based on demonstrable misunderstandings of the law or that are evidently contrary to reason.**

Stare decisis “does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason.” *Rumsey v. N.Y. & N.E. R.R. Co.*, 88 Sickels 79, 85 (1892); *Matter of Eckart*, 39 N.Y.2d 493, 499 (1976). The statements of *Lavery I*, *Lavery II*, and *Presti* regarding legal personhood for nonhuman animals or habeas corpus relief are based on demonstrable misunderstandings of the law and are evidently contrary to reason.

Specifically, *Lavery I*’s and *Lavery II*’s rejections of legal personhood for chimpanzees are each based on the demonstrable misunderstanding that the right to bodily liberty requires the capacity for duties, which no other English-speaking court has held and which the New York legislature has rejected (*infra* 32–50). *See, e.g., Graves*, 163 A.D. 3d at 21; EPTL § 7-8.1.<sup>30</sup> In addition, *Lavery II*’s and *Presti*’s

<sup>30</sup> In *Lavery II*, this Court stated that “habeas relief has never been found applicable to any animal (*see e.g. United States v Mett*, 65 F3d 1531 [9th Cir 1995], *cert denied* 519 US 870 [1996]; *Waste Mgt. of Wisconsin, Inc. v Fokakis*, 614 F2d 138 [7th Cir 1980], *cert denied* 449 US 1060 [1980]; *Sisquoc Ranch Co. v Roth*, 153 F2d 437, 441 [9th Cir 1946].)” 152 A.D. 3d. at 78. These cases however have nothing to do with nonhuman animals. *Mett* merely permitted a corporation to invoke the writ of coram nobis. *Waste Management* refused to grant habeas corpus to a corporation “because a corporation’s entity status precludes it from being incarcerated or ever being held in



statements regarding habeas corpus relief are based on the demonstrable misunderstanding that such relief does not permit the release of an imprisoned individual from one facility to a different facility, when it does (*infra* 50–52).

**3. Stare decisis does not apply to *Lavery I*'s and *Lavery II*'s statements regarding legal personhood for nonhuman animals.**

**a. “Person” designates an entity with the capacity for legal rights and has never been synonymous with “human being.”**

“The significant fortune of legal personality is the capacity for rights.” Roscoe Pound, *Jurisprudence* vol. IV 197 (1959). “Legal persons” possess inherent value; “legal things,” which exist for the sake of legal persons, possess mere instrumental value. 2 William Blackstone, *Commentaries on the Laws of England* \*16 (1765–69). “[A] person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not[.]” Black’s Law Dictionary (11th ed. 2019) (quoting John Salmond, *Jurisprudence* 318 (Glanville L. Williams ed., 10th ed. 1947)). *Byrn* makes clear that “according legal personality to a thing the law affords it the rights and privileges of a legal person.” 31 N.Y.2d at 201 (citing Kelsen, *General Theory of Law and State*, 93–109; Paton, *Jurisprudence* 349–56 (3d ed.); Friedmann, *Legal Theory* 521–23 (5th ed.); and John Chipman Gray, *The Nature and Sources of the Law*, ch. II (2d ed.). *Byrn* is silent on duties.

custody.” 65 F.2d at 140. *Sisquoc Ranch* merely held that a corporation’s contractual relationship with a human being did not give it standing to seek habeas corpus on that human’s behalf.

Human slaves were “persons” for some purposes in New York: beginning in 1809, they had the right to a jury trial, to own and transfer property by will, and to marry and bear legitimate children, though they remained property themselves until 1827.<sup>31</sup> Certain nonhuman animals have long been “persons” in New York with the right to the corpus of a trust established under EPTL § 7-8.1, but have had no other rights. Thus a cat may be a “person” with the right to a trust corpus and yet still be property. *See Matter of Ruth H.*, 159 A.D. 3d 1487, 1490 (4th Dept. 2018) (finding a cat to be personal property and therefore not subject to Family Court jurisdiction). Similarly, Happy may possess the right to bodily liberty protected by habeas corpus but still be property.<sup>32</sup>

Who is deemed a “person” is a matter ““which each legal system must settle for itself”” in light of evolving public policy and moral principle. *Byrn*, 31 N.Y.2d at 201–02 (quoting *Gray*, *supra*, at 39); *Woods*, 303 N.Y. at 351 (“The precise question for us . . . is: shall we follow [common law precedent], or shall we bring the common law of this State, on this question, into accord with justice? I think, as New York State’s court of last resort, we should make the law conform to right.”).

<sup>31</sup> Edgar J. McManus, *A History of Negro Slavery in New York* 63, 65, 177–78 (1966). *E.g.*, *Trongett v. Byers*, 5 Cow. 480 (N.Y. Sup. Ct. 1826) (recognizing slaves as property).

<sup>32</sup> *See Animal Welfare Board v. Nagaraja*, 6 SCALE 468 at paras. 54, 55, 56, and 62 (Supreme Court of India 2014) (In India, although nonhuman animals remain property, they possess certain statutory and constitutional rights.). Available at: <https://www.nonhumanrights.org/content/uploads/Animal-Welfare-Board-v-A.-Nagaraja-7.5.2014.pdf>.

*See Fahey Concurrence*, 31 N.Y.3d at 1058 (“Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention); *see also Somerset v. Stewart*, 1 Lofft 1, 19 (K.B. 1772) (“The state of slavery is . . . so odious, that nothing can be suffered to support it, but positive law.”).

“Person” has never been synonymous with “human being,” since determining personhood is “not a question of biological or ‘natural’ correspondence.” *Byrn*, 31 N.Y.2d at 201; *see Graves*, 163 A.D. 3d at 21 (citing, *inter alia*, *Byrn*); EPTL § 7-8.1. “Person” has been defined more narrowly than “human being.” Thus *Byrn* acknowledged that while a fetus “is human,” 31 N.Y.2d at 199, it is not a Fourteenth Amendment “person.” *Id.* at 203; *see also Roe v. Wade*, 410 U.S. 113, 158 (1973). Slaves were sometimes “persons” for extremely limited purposes (*supra* 33), while

women were not “persons” for many purposes until well into the twentieth century,<sup>33</sup> and Jews were once not “persons” for any purpose.<sup>34</sup>

On the other hand, “[l]egal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol.” George Whitecross Paton, *A Textbook of Jurisprudence*, 351 (3d ed. 1964). See John Chipman Gray, *The Nature and Sources of the Law*, 43 (2d ed. 1963) (“Gray”) (nonhuman animals with legal rights are “persons”). Corporations have long been Fourteenth Amendment persons. See *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886). And “[t]here is no difficulty giving legal rights to a supernatural being and thus making him or her a legal person.” Gray, at 39.

Other countries are regularly designating an expanding number of nonhuman individuals and entities as “persons.” On May 21, 2020, Pakistan’s Islamabad High Court stated “without any hesitation” that an Asian elephant named Kaavan had legal

<sup>33</sup> See *Stanley*, 16 N.Y.S.3d at 912 (“Married women were once considered the property of their husbands, and before marriage were often considered family property, denied the full array of rights accorded to their fathers, brothers, uncles, and male cousins.”) (citation omitted); Robert J. Sharpe and Patricia I. McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (2007).

<sup>34</sup> RA Routledge, *The Legal Status of the Jews in England 1190-1790*, 3 J. Legal Hist. 91, 93, 94, 98, 103 (1982) (during the 13th century, Jews were chattels of the King).

rights and ordered him released to a sanctuary,<sup>35</sup> and cited with approval both the *Fahey Concurrence* and Justice Tuitt’s decision.<sup>36</sup> In May 2019, the High Court of Punjab & Haryana (India) declared that all nonhuman animals within those states are “legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person.”<sup>37</sup> In 2018, the Colombian Supreme Court recognized the Colombian portion of the Amazon rainforest as a “subject of rights,” in other words, a “person.”<sup>38</sup> In 2017, the same court ordered that, pursuant to habeas corpus, an endangered Andean bear be released from a zoo and relocated to a natural reserve.<sup>39</sup> In 2017, the New Zealand Parliament designated the New Zealand’s

<sup>35</sup> *Islamabad Wildlife Mgmt. Bd*, W.P. No.1155/2019 at 59, 62. Available at: <https://www.nonhumanrights.org/content/uploads/Islamabad-High-Court-decision-in-Kaavan-case.pdf>.

<sup>36</sup> *Id.* at 40, 41–42. The Court recognized that “an elephant has exceptional abilities and one such member of the species, ‘Happy,’ an inmate of the Bronx Zoo [. . .], has even passed the ‘mirror test.’” *Id.* at 12.

<sup>37</sup> *Singh v. State of Haryana*, CRR-533-2013, para. 95(29) (May 31, 2019), available at: [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-361239.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-361239.pdf).

<sup>38</sup> STC4360-2018 (April 5, 2018), available at: <http://www.cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf>. (Translation excerpts available at: <https://www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf?x54537>).

<sup>39</sup> *Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 (July 26, 2017), translation available at: <https://www.nonhumanrights.org/content/uploads/Translation-Chucho-Decision-Translation-Javier-Salcedo.pdf>. However, on January 23, 2020, the Colombian Constitutional Court reversed the Colombian Supreme Court’s ruling by a vote of 7-2. Translation of the Court’s official press release available at: <https://www.nonhumanrights.org/content/uploads/English-Chucho-the-Bear-FINAL.pdf>.

Whanganui River Iwi a “legal person” with “all the rights, powers, duties, and liabilities of a legal person.”<sup>40</sup> In 2016, a court in Mendoza, Argentina declared a chimpanzee named Cecilia a “nonhuman legal person” and ordered her transferred to a sanctuary.<sup>41</sup> In 2014, the Supreme Court of India held that nonhuman animals in general possess constitutional and statutory rights.<sup>42</sup>

**b. *Lavery I*'s and *Lavery II*'s determination that nonhuman animals cannot possess the right to bodily liberty because they lack the capacity for duties confused claim rights, which correlate with duties, with immunity rights, which correlate with disabilities.**

The common law right to bodily liberty, like the Thirteenth Amendment's abolition of slavery and the First Amendment's guarantee of free speech, is an immunity right and, like all immunity rights, correlates not with a duty, but with a disability. See Wesley J. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 30, 40 (1913); *Botsford*, 141 U.S. at 251 (“The right to one's person may be said to be a right of complete immunity: to be let alone”) (citation omitted).

<sup>40</sup> Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, *available at*: <http://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html#DLM6831460>.

<sup>41</sup> *In re Cecilia*, File No. P-72.254/15 at 32 (Nov. 3, 2016), translation *available at*: [https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia\\_translation-FINAL-for-website.pdf](https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf).

<sup>42</sup> *Animal Welfare Board v. Nagaraja*, 6 SCALE 468, *available at*: <https://www.nonhumanrights.org/content/uploads/Animal-Welfare-Board-v-A.-Nagaraja-7.5.2014.pdf>.

For example, *Roe v. Wade* held that a woman has an immunity right to an abortion free from governmental intrusion in her first and second trimesters, the latter being subject only to regulations reasonably related to maternal health. 410 U.S. at 164. Correlatively, the government is disabled from otherwise regulating her decision. Subsequently, *Harris v. McRea*, 448 U.S. 297, 316–20 (1980) distinguished between an immunity right and a claim right by holding that although, pursuant to *Roe*, a woman has an immunity right to an abortion that disables the government from otherwise regulating her decision, *Roe* had not bestowed either a duty upon the government or a correlative claim against the government to pay for the abortion.

Similarly, humans have the immunity right not to be enslaved as well as the immunity right to free speech, regardless of their capacity to bear duties. The same holds true of the immunity right to bodily liberty protected by habeas corpus, with Judge Fahey noting:

Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child (*see People ex rel. Wehle v. Weissenbach*, 60 N.Y. 385 [1875]) or a parent suffering from dementia (*see e.g. Matter of Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969, 643 N.Y.S.2d 861 [4th Dept. 1996]).

*Fahey Concurrence*, 31 N.Y. 3d. at 1057.

On the other hand, the capacity to bear duties is highly relevant in the context of claim rights, such as, for example, a claim right for breach of contract. But the NhRP does not assert that Happy has a claim for breach of contract or any other claim. Instead, the NhRP asks this Court to recognize Happy's single immunity right to bodily liberty protected by habeas corpus, which does not and has never required a corresponding capacity to bear duties. Happy's capacity to bear duties is irrelevant to whether she is entitled to the immunity right to bodily liberty.

What is relevant is *Woods*'s statement that the common law is grounded upon what is just and morally right, 303 N.Y. at 351, and *Byrn*'s statement that personhood involves a "policy determination" and not a biological one. 31 N.Y.2d at 201. In direct conflict with *Byrn* and *Wood*, *Lavery I*'s and *Lavery II*'s personhood determinations were based neither upon policy nor moral principle,<sup>43</sup> but rather were erroneously based upon the obvious biological fact that the imprisoned chimpanzees are not human. It was therefore not only erroneous, but irrational and arbitrary, for *Lavery I* and *Lavery II* to find that nonhuman animals are not entitled to the immunity

<sup>43</sup> Judge Fahey criticized *Lavery II*'s conclusion that "a chimpanzee cannot be considered a 'person' and is not entitled to habeas corpus relief" as being "based on nothing more than the premise that a chimpanzee is not a member of the human species." *Fahey Concurrence*, 32 N.Y. 3d at 1057.



right to bodily liberty merely because they lack the capacity to bear the duties that correlate with claim rights.<sup>44</sup>

**c. The capacity for rights alone is sufficient for legal personhood.**

Aside from *Lavery I* and those few cases that have relied upon it, including *Lavery II*, no English-speaking court has ever limited immunity rights, especially the right to bodily liberty protected by habeas corpus, to individuals with the capacity to bear duties. The obvious fact that hundreds of thousands of New Yorkers who lack the capacity for duties indisputably possess numerous rights, including the fundamental right to bodily liberty, proves that legal personhood cannot possibly turn upon the capacity for duties.

In premising legal personhood on the capacity for duties, *Lavery I* misread its sources, including Professor Gray's *The Nature and Sources of the Law* (2d ed.), which was cited with approval in *Byrn*, 31 N.Y.2d at 201–02, and Judge John Salmond's *Jurisprudence*. Both make clear not only that the capacity for legal duties is not required for legal personhood, but that the capacity for legal rights alone is sufficient for legal personhood.

<sup>44</sup> Not even all claim rights require the rightsholder to possess the capacity to bear duties. As discussed, *supra* 26–29, certain nonhuman animals are already legal persons because they have trust beneficiary rights under EPTL § 7-8.1. Yet there is no requirement that, in order to have trust beneficiary rights, nonhuman animals must possess the capacity to bear duties.

*Byrn* stated that a “legal person . . . simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person.” 31 N.Y.2d at 201 (citations omitted). Notably, *Byrn* said nothing about duties, as rights and duties are legally and logically independent from one another. This is because the capacity to bear duties was irrelevant to the issue there: whether human fetuses were “persons” with the right to life.<sup>45</sup> Similarly, the capacity for duties should have been irrelevant to the issue in *Lavery I* and *Lavery II*: whether chimpanzees were “persons” with the right to bodily liberty protected by habeas corpus.<sup>46</sup>

A century ago, Professor Gray demonstrated how *Lavery I*, and therefore *Lavery II*, went wrong. Quoting Gray’s treatise, *Lavery I* noted that “the legal meaning of a ‘person’ is a ‘subject of legal rights and duties.’” 124 A.D.3d at 152 (quoting Gray, at 27). However, Professor Gray’s very next sentence, which *Lavery I* ignores, makes clear that this means “one who has rights but not duties, or who has

<sup>45</sup> See *Byrn*, 31 N.Y.2d at 199 (“The issue . . . is whether children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life.”).

<sup>46</sup> In *Singh v. State of Haryana*, CRR-533-2-13 at para. 95(29), the High Court of Punjab & Haryana quoted, at para. 67, at length the Supreme Court of India in *Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & others*, AIR 2000 SC 1421, which discussed the jurisprudential literature on legal personhood, including George Paton’s *Jurisprudence* (cited in *Byrn*), and defined a legal person “as any entity (not necessarily a human being) to which rights or duties may be attributed.” Available at: [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-361239.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-361239.pdf).

duties but no rights, is . . . a person,” and that “if there is any one who has rights though no duties, or duties though no rights, he is . . . a person in the eye of the Law.” Gray, at 27. One important consequence of this, as further noted by Professor Gray, is that “animals may conceivably be legal persons,” and there may be “systems of Law in which animals have legal rights.” *Id.* at 42–43.

*Lavery I* also erroneously relied upon the 7th edition of Black’s Law Dictionary for a purported quotation from Judge Salmond’s *Jurisprudence*, which allegedly stated: “So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties.” 124 A.D.3d at 151 (quoting Black’s Law Dictionary [7th ed. 1999]). The NhRP later discovered that the court failed to confirm the accuracy of the sentence attributed to Salmond’s treatise. What *Jurisprudence* actually said was: “So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties.” John Salmond, *Jurisprudence* 318 (10th ed. 1947).<sup>47</sup>

Moreover, similar to Gray, the next sentence of *Jurisprudence* makes clear that “[a]ny being that is so capable [of rights or duties] is a person, whether a human being or not[.]” *Id.* See also *Wartelle v. Women’s & Children’s Hospital Inc.*, 704 So. 2d 778, 780 (La. 1997) (cited with approval in *Lavery I*, 124 A.D.3d at 152), where the Louisiana Supreme Court quoted with approval a secondary source that

<sup>47</sup> This misquotation error was continued through the tenth edition of Black’s Law Dictionary.

expressly stated, as had Professor Gray and Judge Salmond, that a ““person in a technical sense . . . signif[ies] a subject of rights or duties.” (Citation omitted.).

*Lavery I* also relied upon Black’s Law definition of “person” as “[a]n entity (such as a corporation) that is recognized by law as having the *rights and duties* [of] a human being.” 124 A.D.3d at 151 (quoting Black’s Law Dictionary [7th ed. 1999]; emphasis added by *Lavery I*).<sup>48</sup> This definition cannot and, contrary to *Lavery I*’s interpretation, does not mean that an entity must have the capacity for both rights and duties to be a “person.” It means that an entity with the capacity for either rights or duties is a “person” but that a “person,” once acknowledged, has the capacity for both rights and duties, even if it does not actually have both. Such an interpretation is entirely consistent with and supported by jurisprudential sources.

While *Lavery II* was pending, the NhRP pointed out the *Jurisprudence* misquotation error to Bryan A. Garner, Esq., the editor-in-chief of Black’s Law Dictionary, who promptly agreed to correct it in the eleventh edition (A-465 – A-

<sup>48</sup> *Lavery I*, 152 A.D.3d at 152, also relied on foreign case law containing a similar dictionary definition. See *Smith v. ConAgra Foods, Inc.*, 431 S.W.3d 200, 203–04 (Ark. 2013) (citing *Calaway v. Practice Mgmt. Servs., Inc.*, 2010 Ark. 432, at \*4 (2010) (quoting definition from Black’s Law Dictionary 9th edition, which is identical to 7th edition)); *Western Sur. Co. v. ADCO Credit, Inc.*, 251 P.3d 714, 716 (Nev. 2011) (quoting *Webster’s New Universal Unabridged Dictionary* 1445 (1996)); *State v. A.M.R.*, 51 P.3d 790, 791 (Wa. 2002) (quoting definition from Black’s Law 7th edition; also citing *Webster’s Third New International Dictionary of the English Language* 1686 (1986)); *State v. Zain*, 528 S.E.2d 748, 755 (W. Va. 1999) (quoting *Webster’s Third New International Dictionary of the English Language Unabridged* 1686 (1970), and *Random House Dictionary of the English Language* 1445 (2d ed., unabridged, 1987)).

472), and did.<sup>49</sup> The NhRP also notified this Court of the error, first by letter,<sup>50</sup> and then in a supplemental motion seeking leave to file its correspondence with Mr. Garner.<sup>51</sup> This Court, however, denied the NhRP’s motion without explanation and blindly perpetuated *Lavery I*’s error in stating that the recognition of legal personhood requires the capacity for duties. *See* 152 A.D.3d at 76–78.

**d. Social contract theory does not condition the right to bodily liberty—and therefore legal personhood—on the capacity to bear duties.**

*Lavery I* stated that:

the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government (*see* Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from “Marginal” Cases*, 45 Ariz St LJ 1, 12-14 [2013]; Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L Rev 27, 69-70 [2009]; *see also In re Gault*, 387 US 1, 20-21 [1967]; *United States v Barona*, 56 F3d 1087, 1093-1094 [9th Cir 1995], *cert denied* 516 US 1092 [1996]). Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, “rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those]

<sup>49</sup> The corrected sentence from *Jurisprudence* now reads: “So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties.” Black’s Law Dictionary (11th ed. 2019), person.

<sup>50</sup> Specifically, after oral argument in *Lavery II*, the NhRP delivered a letter to this Court alerting it to the error. *See* <https://www.nonhumanrights.org/content/uploads/Letter-to-First-Dept-re-Tommy-and-Kiko-3.27.17-FINAL-1.pdf>.

<sup>51</sup> *See* [https://www.nonhumanrights.org/content/uploads/162358\\_15\\_The-Nonhuman-Rights-Project-Inc.-v.-Patrick-C.-Lavery\\_Motion-4.11.17.pdf](https://www.nonhumanrights.org/content/uploads/162358_15_The-Nonhuman-Rights-Project-Inc.-v.-Patrick-C.-Lavery_Motion-4.11.17.pdf).

rights” (Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from “Marginal” Cases*, 45 Ariz St LJ 1, 13 [2013]; see Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L Rev 27, 69 [2009]).

124 A.D.3d at 151.<sup>52</sup>

The Third Department’s statements in *Lavery I* regarding social contract theory are wrong for two reasons: (1) the federal cases it cited do not support them; and (2) Cupp’s idiosyncratic idea of social contract theory has no support and is wrong.

First, *Lavery I* cited *Application of Gault*, 387 U.S. 1, 20–21 (1967) and *United States v. Barona*, 56 F.3d 1087, 1093–94 (9th Cir. 1995), see 124 A.D.3d at 151, neither of which provides any support for the Third Department’s assertions. The only possibly relevant passage from *Gault* merely states that “[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.” 387 U.S. at 20. “*Gault* does not even provide facial support for the [*Lavery I*] court’s claim: it addresses neither the relationship between rights and duties nor the limitations of the meaning of legal

<sup>52</sup> *Lavery II*, in reliance upon Richard L. Cupp Jr.’s amicus brief (see <https://www.nonhumanrights.org/content/uploads/CuppAmicus.pdf>), similarly asserted without any support that “nonhumans lack sufficient responsibility to have any legal standing.” 152 A.D.3d at 78. Cupp’s brief cited no authority for the claim that responsibility is required for legal standing, and instead made a vague reference to “John Locke’s contractualist assertions” in connection with the notion of “requiring legal accountability to each other.” Cupp Brief at 8. As explained *infra*, Locke’s social contract theory does not support this claim.

personhood for the purposes of habeas corpus.” Craig Ewasiuk, *Escape Routes: The Possibility Of Habeas Corpus Protection For Animals Under Modern Social Contract Theory*, 48 Colum. Human Rights L. Rev. 69, 78 (2017).

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

Because our constitutional theory is premised in large measure on the conception that our Constitution is a “social contract,” [ . . . ] “the scope of an alien’s rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear.” [ . . . ] “Not until an alien has assumed the complete range of obligations that we impose on the citizenry may he be considered one of ‘the people of the United States’ entitled to the full panoply of rights guaranteed by our Constitution.”

56 F.3d at 1093–94.

*Barona* provides no support for *Lavery I*’s assertions on social contract theory. First, *Barona* concerns an interpretation of the Fourth Amendment to the United States Constitution, not the New York common law of habeas corpus. Second, the dictum in the quoted passage concerns the interpretation of the constitutional phrase “the People of the United States,” not the New York common law meaning of “person.” Third, the Supreme Court reversed the *Verdugo-Urquidez* decision quoted in *Barona*,<sup>53</sup> such that

<sup>53</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

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

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

Second, *Lavery I* relied upon an obscure writer, Richard J. Cupp, Jr., to support its unprecedented claim that the capacity for duties is required for the ascription of any rights at all. *Lavery II*, in turn, uncritically embraced Cupp's unique views without ascertaining whether they had any support in the literature, despite the fact they are junk political science, junk philosophy, and junk history that Cupp devised for the purpose of preventing any nonhuman animal from obtaining a legal right.<sup>54</sup>

Thus, in *Children, Chimps, and Rights*, Cupp's sole source for the social contract theory assertions later stated in *Lavery I* is Peter de Marneffe's *Contractualism, Liberty, and Democracy*, 104 Ethics 764 (1994).<sup>55</sup> But throughout

<sup>54</sup> See *State v. Donald DD*, 24 N.Y. 3d 174, 186 (2014) ("In the dissent in *Shannon S.*, three members of this Court who are now in the majority stated our view that the paraphilia NOS diagnosis presented by Dr. Kirschner and another expert witness in that case 'amount[ed] to junk science devised for the purpose of locking up dangerous criminals'). In deciding whether to accept an expert scientific opinion or reject it as junk science, this Court would have utilized the Frye test to determine "whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally." *People v. Wesley*, 83 N.Y. 2d 417 (1994).

<sup>55</sup> See *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 Ariz. St. L.J. 1, 12–13 & nn.48-51 (2013) (cited in *Lavery I*, 124 A.D.3d at 151).



that entire article, de Marneffe never once claims “that individual rights are exchanged for responsibilities,” or “uses the words ‘duty,’ ‘responsibility,’ ‘reciprocity,’ ‘exchange’ or synonymous terms.” *Escape Routes*, 48 Colum. Human Rights L. Rev. at 83. To the contrary, “de Marneffe’s work contradicts Cupp’s claim,” as it “states that the establishment of animal rights is . . . compatible with modern social contract theory.” *Id.* at 84; *id.* at 84–85 (critiquing Cupp’s citation to Mark Bernstein’s article *Contractualism and Animals*, 86 Phil. Stud. 49, 49 (1997), which argues, at 66, that “contractualism is compatible with according full moral standing to non-human animals.”); *id.* at 84 & n.80 (describing other instances in which de Marneffe’s article does not support the propositions for which it is cited by Cupp).

*Lavery I* also cites Cupp’s *Moving Beyond Animal Rights*,<sup>56</sup> in particular pages that include a general reference to John Locke’s “conception of the social contract . . . that citizens are entitled to ‘life, liberty and property,’” 46 San Diego L. Rev. at 69, but which contain no authority for the assertion that the social contract requires reciprocity between rights and duties.<sup>57</sup> Cupp also falsely claims that

<sup>56</sup> *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L. Rev. 27, 69–70 (2009) (cited in *Lavery I*, 124 A.D.3d at 151).

<sup>57</sup> Cupp’s article also includes a claim attributed to philosopher L.W. Sumner’s book *The Moral Foundations of Rights* 203 (1987) that, under Wesley Newcomb Hohfeld’s framework of rights, “animals cannot have rights because they do not have duties or responsibilities.” 46 San Diego L. Rev. at 69. However, Sumner was specifically discussing one of two competing theoretical

“general reciprocity between rights and responsibilities is a basic tenet” of social contract theory. *Id.* at 66. As detailed in *Escape Routes*, the origin of Cupp’s assertion is merely a secondary reading of Thomas Hobbes in a book that “cites no particular passage in Hobbes’s writings, but rather eight chapters of *Leviathan*.” 48 Colum. Human Rights L. Rev. at 86.

Moreover, according to the seventeen “amici philosophers with expertise in animal ethics and related areas” who influenced Judge Fahey, *Fahey Concurrence*, 31 N.Y.3d at 1058, Cupp’s reciprocity claim “is not how political philosophers have understood the meaning of the social contract historically or in contemporary times.” Philosophers’ Brief at 15–16.<sup>58</sup> Rather,

social contracts create citizens, not persons. Citizens are individuals who are subject to the laws authorized by the contract. Notably, the U.S. Constitution mentions the term ‘persons’ fifty-seven times, but does not define it. The 14th Amendment, however, distinguishes between persons and citizens. This is consistent with social contract theory, which holds that only persons can bind themselves through a contract and, in so doing, become citizens. While persons do not depend on a social contract, the social contract depends on persons who will be its ‘signatories.’

conceptions of moral rights. Under what Sumner terms the “protected choices” model, rightsholders must have a certain level of cognitive agency, and it will “deny rights, on logical grounds, to . . . fetuses, infants, young children, and the severely mentally handicapped,” not just to nonhuman animals. *The Moral Foundations of Rights* at 203. In contrast, under what Sumner terms the “interest model,” rightsholders will include “many non-human beings (at least some animals)” because they have interests. *Id.* at 206.

<sup>58</sup> Available at: <https://www.nonhumanrights.org/content/uploads/In-re-Nonhuman-Rights-v.-Lavery-Amicus-Brief-by-PHILOSOPHERS.pdf>.

It follows from social contract theory that all contractors must be persons, but not that all persons must necessarily be contractors. There can be persons who are not contractors—either because they choose not to contract (e.g., adults who opt for life in the state of nature) or because they cannot contract (e.g., infants and some individuals with cognitive disabilities).

Social contract philosophers have never claimed—not now, not in the 17th century—that the social contract can endow personhood on any being. The contract can only endow citizenship on persons who exist prior to the contract and agree to it. If persons did not exist before the contract, there would be no contract at all since only persons contract. Personhood, therefore, must be presupposed as a characteristic of contractors in social contract theories.

Philosophers' Brief at 17–19.<sup>59</sup>

The utter lack of support for Cupp's views fatally undermines *Lavery I*'s and *Lavery II*'s statements that the ascription of rights generally requires the capacity for duties.

**4. Stare decisis does not apply to *Lavery II*'s and *Presti*'s erroneous statements regarding habeas corpus relief.**

Upon this Court's determination that Respondents' imprisonment of Happy is unlawful, it must order her immediate release. CPLR 7010(a). That Happy cannot be released into the wild or onto the streets of New York in no way precludes an order directing her immediate release to an appropriate sanctuary, where she can

<sup>59</sup> See also *Escape Routes*, 48 Colum. Human Rights L. Rev. at 87–105 (explaining that the social contract theories of Thomas Hobbes, John Locke, and John Rawls do not preclude granting rights to nonhuman animals).

freely exercise her autonomy. *See Fahey Concurrence*, 31 N.Y.3d at 1058–59; *Stanley*, 16 N.Y.S.3d at 917 n.2.

In *Stanley*, where the NhRP demanded the immediate release of two imprisoned chimpanzees to a chimpanzee sanctuary, the court cited Court of Appeals and First Department precedent allowing such a transfer:

Respondents also maintain that as [NhRP] does not seek the release of the chimpanzees from the University, but their transfer to a chimpanzee sanctuary, it has no legal recourse to habeas corpus. (Resps. Memo. of Law). There is, however, authority to the contrary in the First Department. (*See McGraw v. Wack*, 220 A.D.2d 291, 292, 632 N.Y.S.2d 135 [1st Dept.1995] [observing that Court of Appeals approved, sub silentio, use of writ of habeas corpus to secure transfer of mentally ill individual to another institution], *citing Matter of MHLS v. Wack*, 75 N.Y.2d 751, 551 N.Y.S.2d 894, 551 N.E.2d 95 [1989]). Consequently, I am not bound by the decision of the Fourth Department in [*Presti*].

*Id.* at 917 n.2.

Not only did *Lavery II* erroneously ignore *McGraw* and *Wack*, as Judge Fahey explained, this Court misapplied *People ex rel. Dawson v Smith*, 69 N.Y.2d 689 (1986):

Notably, the Appellate Division erred in this matter, by misreading the case it relied on, which instead stands for the proposition that habeas corpus *can* be used to seek a transfer to “an institution separate and different in nature from the . . . facility to which petitioner had been committed,” as opposed to a transfer “within the facility” (*People ex rel. Dawson v Smith*, 69 NY2d 689, 691 [1986]). The chimpanzees’ predicament is analogous to the former situation, not the latter.

*Fahey Concurrence*, 31 N.Y. 3d at 1058–59 (emphasis in original).

In *Dawson*, the Court of Appeals distinguished two very different scenarios:

[W]e held [in *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482 (1961)] that the writ of habeas corpus was properly employed by petitioner, an Attica inmate, in seeking his release from an allegedly illegal confinement in Dannemora State Hospital, an institution for custody of prisoners who are declared insane. The confinement in [*Brown*] was in an institution separate and different in nature from the correctional facility to which petitioner had been committed pursuant to the sentence of the court. . . . Here, by contrast, petitioner does not seek his release from custody in the facility, but only from confinement in the special housing unit, a particular type of confinement within the facility[.]

*Id.* at 691.

Thus, just as in *Lavery II*, the NhRP’s demand in the case at bar is not “analogous to the situation [in *Dawson*],” 152 A.D.3d at 80, since it does not seek Happy’s transfer from one section of the Bronx Zoo to a different section of the zoo. Rather, in accordance with *Brown*, *Dawson*, *Wack*, *McGraw*, and the *Fahey Concurrence*, the NhRP appropriately demands Happy’s immediate release from the Bronx Zoo to an elephant sanctuary located a thousand miles away that is wholly separate and completely different in nature.<sup>60</sup>

#### IV. CONCLUSION

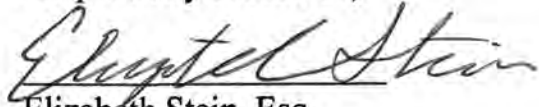
This Court should recognize Happy’s common law right to bodily liberty protected by habeas corpus, reverse the Bronx Court’s dismissal of the Petition, and remand the case with instructions to order Happy’s immediate release to The

<sup>60</sup> The NhRP has repeatedly alleged that Happy is being unlawfully detained or imprisoned. (A-8; A-32, paras. 1 – 3; A-33 – A-34, para. 8; A-43, para. 38; A-48, para. 54; A-48 – A-49, para. 56).

Elephant Sanctuary in Tennessee, together with any such other and further relief that this Court may deem just, proper, and equitable.

Dated: July 10, 2020

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Elizabeth Stein".

Elizabeth Stein, Esq.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 5

The NonHuman Rights Project  
on behalf of HAPPY -against-

Index No. 260441/19Hon. Alison Y. Tuit

Justice Supreme Court

Brekeny, James J.

The following papers numbered 1 to 16 were read on <sup>these</sup> ~~this~~ motions Seq. No. 1, 2, 3, 4-12  
for Miscellaneous Reliefs noticed on various dates 9/13/19

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Motion is Respectfully Referred to Justice:  
Dated: \_\_\_\_\_

Upon the foregoing papers, it is ordered that ~~this motion is~~ <sup>these motions and</sup> order to show causes, Verified Petition, and related motions are decided in accordance with the annexed memorandum decision.

Dated: 2/18/20Hon. A. Y. Tuit

J.S.C.

Alison Y. Tuit, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
- ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

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

INDEX NUMBER: 260441/2019

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

Petitioner,

-against-

Present:  
HON. ALISON Y. TUITT  
*Justice*

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.

On Calendar of 1/6/2020

The following papers, numbered as follows:

Read on these:

<u>Order to Show Cause, Verified Petition, related papers</u>	<u>1-14</u>
<u>Order to Show Cause with Temporary Restraining Order</u>	<u>15</u>
<u>Motion to Dismiss or Change Venue, related papers</u>	<u>16-21</u>
<u>Motion for a Protective Order, related papers</u>	<u>22-26</u>
<u>Motion for Leave to File Late Papers</u>	<u>27</u>
<u>Motion for Preliminary Injunction, related papers</u>	<u>28-32</u>
<u>Motion to Strike Respondents' Verified Answer, related papers</u>	<u>33-38</u>
<u>Motion for an Order Granting Amici Leave to File an Amicus Curiae Brief</u>	<u>39-46</u>



Upon the foregoing papers, the Order to Show Cause and Verified Petition for Writ of Habeas Corpus and Respondent's motion to dismiss the Petition are consolidated for purposes of this decision. For the reasons set forth herein, the motion to dismiss the Petition is granted and the Petition is dismissed. The remainder of the related motions are denied as moot.

#### Procedural History

This is a habeas corpus proceeding brought by Petitioner, the NhRP on behalf of Happy, a 48 year old Asian elephant situated in the Bronx Zoo, New York. Petitioner commenced the proceeding on October 2, 2018 in Supreme Court, Orleans County by filing a Verified Petition or a Common Law Writ of Habeas Corpus and Order to Show Cause pursuant to CPLR Article 70 on behalf of Happy. The NhRP alleges that Happy is being unlawfully imprisoned in the Bronx Zoo and demands her immediate release to an appropriate elephant sanctuary of which there are two in the United States, both which have agreed to provide lifetime care at no cost to the Bronx Zoo. In lieu of serving an answer to the Petition, the Bronx Zoo moved to change the venue of these proceedings from Orleans County to Bronx County or, in the alternative, to dismiss the proceedings with prejudice. On January 18, 2019, the Orleans County Court granted the branch of the motion to change venue, and the matter was transferred to Bronx County. The parties brought several other motions that were not decided by the Orleans County Court, and were transferred to this Court. Among the motions that the NhRP filed in Orleans County was a preliminary injunction requesting that the Orleans County Court enjoin the Bronx Zoo from removing Happy from the State of New York pending the outcome of this proceeding. Respondents' moved to dismiss the Petition on the grounds that controlling New York law holds that habeas corpus protection under CPLR Article 70 should not be extended to animals as the NhRP fails to cite any legal precedent applicable in the State of New York to support its position. Additionally, the NhRP brought motions to strike Respondents' opposition to Petitioner's proposed Order to Show Cause, to allow the filing of late reply papers, and, for a protective order. There was also a motion of *Amici* to File Brief *Amicus Curiae*. This Court heard oral arguments on these proceedings on August 12, 2019, September 23, 2019, October 21, 2019 and January 6, 2020.

The NhRP seeks the issuance of the Writ of Habeas Corpus and Order to Show Cause demanding that Respondents demonstrate forthwith the basis of their imprisonment of Happy; upon a determination that

Happy is being unlawfully imprisoned, an Order directing her immediate release from the Respondents' custody to an appropriate sanctuary; and, an award for the NhRP for the costs and disbursements of this action.

### The Parties

The NhRP is a not-for-profit corporation, a civil rights organization dedicated to changing “the common law status of at least some nonhuman animals from mere ‘things,’ which lack the capacity to possess any legal rights, to ‘persons,’ who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them.” <https://www.nonhumanrights.org/who-we-are/>. For the past 20 years, the NhRP has worked to change the status of such nonhuman animals as chimpanzees and elephants from legal things to legal persons. The NhRP has filed similar cases in several other New York Courts with the goal of obtaining legal rights for chimpanzees, elephants, and ultimately for other animals.

Respondent the Wildlife Conservation Society (“WCS”) is a not-for-profit corporation, headquartered at the Bronx Zoo, whose mission statement is to save wildlife and wild places worldwide through science, conservation action, education and inspiring people to value nature. Opened in 1899, the Bronx Zoo, a WCS park, cares for thousands of endangered or threatened animals and provides experiences to visitors that may spark a lifelong passion to protect animals and their natural habitats. WCS manages the Bronx Zoo along with other New York City wildlife parks and zoos. Respondent James Breheny is WCS’ Executive Vice President and General Director of Zoos and Aquariums, and is the Director of the Bronx Zoo.

### Happy the Elephant

Happy is a 48 year old female Asian elephant who was captured in the wild and brought to the United States when she was one year old. In 1977, Happy and another elephant named Grumpy arrived at the Bronx Zoo. There, in addition to being on display, Happy gave rides and participated in “elephant extravaganzas”. For the next 25 years, Happy and Grumpy lived together. The Bronx Zoo had other elephants, and they were kept two by two. In 2002, the Bronx Zoo paired Happy and Grumpy with two other elephants, Patty and Maxine in the same elephant exhibit. Patty and Maxine attacked Grumpy who tumbled and fell, and was seriously injured. Grumpy never recovered from her injuries and was euthanized. Thereafter, the Bronx

Zoo separated Happy from them, and introduced a younger female Asian elephant named Sammie into her portion of the exhibit. Sammie suffered from severe liver disease and was euthanized in 2006. The Bronx Zoo announced after the death of Sammie that it would not acquire any new elephants. Since 2006, Happy has been living alone at the Bronx Zoo. The NhRP argues, in essence, that Happy has been imprisoned in solitary confinement, notwithstanding the uncontroverted scientific evidence that Happy is an autonomous, intelligent being with advanced cognitive abilities akin to human beings.

#### The NhRP's arguments

The NhRP brings the instant proceeding alleging that Happy is being unlawfully imprisoned by Respondents in the Bronx Zoo. Happy has been living alone in an one-acre enclosure within the Bronx Zoo since Sammie's death in 2006. The NhRP argues that Happy has been, and continues to be, denied direct social contact with any other elephants, and spends most of her time indoors in a large holding facility lined with elephant cages, which are about twice the length of the animals' bodies. The NhRP argues that whether Respondents are in violation of any federal, state or local animal welfare laws in their detention of Happy is irrelevant as to whether or not the detention is lawful. The NhRP further contends that this habeas corpus case is neither an animal protection, nor animal welfare case. The Petition does not allege that Happy is illegally confined because she is kept in unsuitable conditions, nor does it seek improved welfare for Happy. Rather, this Petition seeks that this Court recognize Happy's alleged common law right to bodily liberty, and order her immediate release from Respondents' current and continued alleged unlawful detention so that her liberty and autonomy may be realized. NhRP argues that it is the fact that Happy is imprisoned at all, rather than her conditions of her imprisonment, that is unlawful.

The NhRP seeks Happy's immediate release from her imprisonment to a permanent elephant sanctuary, two of which have agreed to take Happy: the Professional Animal Welfare Society ("PAWS") in California, and The Elephant Sanctuary in Tennessee. In support of its application, the NhRP submits expert scientific affidavits from five of the world's most renowned experts on the cognitive abilities of elephants: the affidavit of Joyce Pool; the supplemental affidavit of Joyce Pool; the joint affidavit of Lucy Bates and Richard W. Byrne; the affidavit of Karen McComb; and, the affidavit of Cynthia J. Moss. The NhRP also submits the affidavit from an expert in the care and rehabilitation of captive elephants in sanctuary. In his affidavit, Ed

Stewart, President and Co-Founder of PAWS, states that PAWS has agreed to provide permanent sanctuary to Happy should she be released.

The NhRP submits its expert affidavits which demonstrate that Happy possesses complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty. These include: autonomy; empathy; self-awareness; self-determination; theory of mind (awareness that others have minds); insight; working memory; an extensive long-term memory that allows them to accumulate social knowledge; the ability to act intentionally and in a goal-oriented manner, and to detect animacy and goal directedness in others; to understand the physical competence and emotional state of others; imitate, including vocal imitation; point and understand pointing; engage in true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do); cooperate and build coalitions; cooperative problem-solving, innovative problem-solving, and behavioral flexibility; understand causation; intentional communication, including vocalizations to share knowledge and information with others in a manner similar to humans; ostensive behavior that emphasizes the importance of particular communication; wide variety of gestures, signals and postures; use of specific calls and gestures to plan and discuss a course of action, adjust their plan according to their assessment of risk, and execute the plan in a coordinated manner; complex learning and categorization abilities; and, an awareness of and response to death, including grieving behaviors.

The NhRP's experts state that African and Asian elephants share numerous complex cognitive abilities with humans, such as self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities. Each is a component of autonomy. The experts opine that African and Asian elephants are autonomous, as they exhibit self-determination behavior that is based on a freedom of choice. As a psychological concept, it implies that the individual is directing their behavior based on some non-observable, internal cognitive process, rather than simply responding reflexively. Physical similarities between human and elephant brains occur in areas that link to the capacities necessary for autonomy and self-awareness. The NhRP further alleges that Happy is the first elephant to pass the mirror self-recognition-test ("MSR"), considered to be an indicator of an animal's self-awareness and is thought to correlate with higher forms of empathy and altruistic behavior. As do humans, Asian elephants exhibit MSR, which is the ability to recognize a reflection in the mirror as oneself, while the mark test involves surreptitiously placing a colored mark on an individual's forehead that she cannot see or be aware of without the aid of a mirror. If the individual

uses the mirror to investigate the mark, the individual must recognize the reflection of herself. The NhRP experts argue that MSR is significant because it is a key identifier of self-awareness, which is intimately related to autobiographical memory in humans and is central to autonomy and being able to direct one's own behavior to achieve personal goals and desires. By demonstrating they can recognize themselves in a mirror, the experts claim that elephants must be holding a mental representation of themselves from another perspective, and thus must be aware that they are a separate entity from others.

Both chimpanzees and elephants demonstrate an awareness of death by reacting to dead family or group members. Having a mental representation of the self, which is a pre-requisite for MSR, likely confers an ability to comprehend death. Wild African elephants have been observed using their tusks, trunk or feet to attempt to lift sick, dying or dead elephants. Although they do not give up trying to lift or elicit movement from a dead body immediately, elephants appear to realize that once dead, the carcass can no longer be helped; and instead, they engage in more "mournful" or "grief stricken" behavior, such as standing guard over the body with a dejected demeanor and protecting it from predators. They have been observed covering the bodies of their dead with dirt and vegetation. Mothers who lose a calf may remain with the calf's body for an extended period, but do not behave towards the body as they would a live calf. The general demeanor of elephants attending to a dead elephant is one of grief and compassion, with slow movements and few vocalizations. These behaviors are akin to human responses to the death of a close relative or friend, and demonstrate that elephants possess some understanding of life and the permanence of death. Elephants frequently display empathy in the form of protection, comfort and consolation, as well as by actively helping those in difficulty, assisting injured ones to stand and walk, or helping calves out of rivers or ditches with steep banks. In an analysis of behavioral data collected from wild African elephants over a 40 year continuous field study, the experts concluded that as well as possessing their own intentions, elephants can diagnose animacy and goal directedness in others, understand physical competence and emotional state of others, and attribute goals and mental states to other.

#### The Bronx/WCS' arguments

Respondents move to dismiss the Petition on the grounds that the NhRP, to no avail, has previously prosecuted several unsuccessful lawsuits on behalf of chimpanzees. Controlling New York precedent provides that animals are not entitled to habeas corpus protection under CPLR Article 70. Respondents argue

that contrary to the NhRP allegations, Happy is not unlawfully imprisoned at the Bronx Zoo. The AZA Standards for Elephant Management and Care and the Animal Welfare Act are the two primary standards for the care and management of elephants in AZA-accredited institutions in the United States. Respondents argue that the Bronx Zoo's compliance with these standards ensures that Happy is provided with excellent care focused on her well-being. The AZA Standards require that "[o]utdoor habitats must provide sufficient space and environmental complexity to both allow for and stimulate natural behavioral activities and social interactions resulting in healthy and well-adapted elephants." The Standards include requirements for variation in an elephant's environment including varied terrain to allow for exercise and "foraging, wallowing, bathing, digging, and resting." "While outdoors and weather permitting, elephants must have regular access to water sources, such as a [sic] pools, waterfalls, misters/sprinklers, or wallows that provide enrichment and allow the elephants to cool and/or bathe themselves." Additional standards are included for subjects such as elephant diet, exercise, medical management, foot care, and skin care. Daily behavioral assessments of elephants must be conducted and recorded in a daily log. Elephant care professionals, managers, and directors who work for the Bronx Zoo are also required to complete AZA's Principles of Elephant Management courses. To remain an AZA-accredited zoo, the Bronx Zoo submits annual reports regarding its elephant program, and is regularly inspected by AZA representatives and individuals from peer institutions. An elephant specialist is included in every AZA accreditation inspection of the Bronx Zoo. On April 27, 2018, in response to the Bronx Zoo's most recent report, the AZA confirmed that the Bronx Zoo is in compliance with the AZA Standards for elephants.

In addition, the Bronx Zoo is regulated under the Animal Welfare Act and Animal Welfare Regulations. Although the Animal Welfare Act does not contain any elephant-specific requirements, the Act's standards and regulations ensure that animals receive humane care and treatment at regulated facilities. Among its requirements, the Animal Welfare Act requires the Bronx Zoo to employ an attending veterinarian who shall provide adequate care, and maintain compliance with standards for "the humane handling, care, treatment, housing, and transportation of animals. Compliance with the Animal Welfare Act is overseen by the U.S. Department of Agriculture ("USDA") Animal Care. USDA inspectors make routine, unannounced inspections of facilities like the Bronx Zoo at least once a year. Respondents argue that Happy's living conditions are therefore not "unlawful" according to applicable standards.

Happy's routine care program incorporates the AZA Standards and requirements under the

Animal Welfare Act. On a daily basis, Happy's appetite, food intake, stool appearance and quantity, overall activity, and responsiveness to keepers are monitored. Happy also receives baths on a daily basis. Everyday Happy's keepers assess her body condition, provide her with various forms of enrichment that encourage mental and physical stimulation, and engage in positive reinforcement training sessions that help to maintain behaviors used to facilitate Happy's care. On a regular basis, the Bronx Zoo conducts voluntary blood draws and trunk washes, as well as weigh-ins to monitor Happy's health. Weather permitting, Happy has regular, year-round access to a large, naturalistic outdoor exhibit in which she may go swimming and engage in other species-typical behavior, and also has regular overnight access to a large outdoor space. Patrick Thomas, PhD, Vice President and General Curator of WCS and Associate Director of the Bronx Zoo, states that Happy has developed a familiarity and comfort with her keepers, and she recognizes her surroundings as her familiar, longstanding environment. It is his opinion that suddenly taking her away from this environment and introducing entirely new surroundings without the support of her keepers could inflict long-term damage on Happy's welfare. Mr. Thomas states that Happy has also shown in past experiences that she does not respond well to even temporary, short moves within the Bronx Zoo. He believes that transporting Happy the long distance from the Bronx Zoo across the country to the sanctuary in California would cause severe stress and potentially inflict long-term physical harm. Based on his 40 years of experience and responsibilities in supervising the care of animals at the Bronx Zoo, including Happy, to the best of his knowledge, Mr. Thomas opines that Happy is currently healthy and well-adapted to her surrounding in the Bronx Zoo.

Paul P. Calle, WCS's Vice President for Health Programs, Chief Veterinarian and Director of the Zoological Health Program based at the Bronx Zoo, states that the Bronx Zoo undertakes a multitude of efforts to ensure Happy's continued physical and psychological well-being and health. Happy is given visual checks by the care staff several times each day and, on occasion when an issue is identified, the veterinary staff responds appropriately to any concern that is noted. The veterinary staff conducts regular health assessments of Happy through body condition evaluations, oral, dental and foot examinations. Baseline toe x-rays of Happy's feet were completed, and are repeated for comparative analysis, on an as-needed basis to address particular areas of concern as they arise. Veterinary staff are consulted by keepers regarding nail and pad conditions, with veterinary participation in trims, evaluations, or treatments as necessary. Veterinary staff participate in development and maintenance of medical behaviors (trunk wash, oral/dental evaluation, blood sampling, foot

work, presentation for injections or x-rays) in conjunction with Happy's animal keeper staff. Happy's health care is recorded and documented in her individual medical record, and documented in the Bronx Zoo's annual AZA Elephant Program Annual Report. Mr. Calle states that based upon his responsibilities in providing veterinary care for almost 30 years to animals at the Bronx Zoo, including Happy, and to the best of his knowledge, Happy is currently healthy and well-adapted to her present surroundings. During his experience with Happy, she has become very distressed during short moves from one area of the Zoo to another. Mr. Calle opines that given Happy's age and longstanding familiarity and attachment to her surroundings, a long-distance move, such as that proposed by the NhRP to California, would cause substantial stress to Happy. Imposing this move on Happy would create a serious risk to her long-term health that Mr. Calle does not believe is justified. In his professional opinion, Happy's health and well-being would not be best served by moving her to an animal sanctuary such as the facility operated by the PAWS Sanctuary.

James J. Breheny, Director of WCS, argues that the NhRP's expert affidavits provide little to no relevant information regarding whether Happy is "unlawfully imprisoned" at the Bronx Zoo. In substance, the affidavits are almost verbatim duplicates of each other and barely address Happy. The affidavits the NhRP relies upon only provide generalized, anecdotal discussions of African and Asian elephants as observed in the wild. Mr. Breheny argues that the affidavits posit that elephants are generally better suited to the company of other elephants, without accounting for the particular needs, wants, and temperament of any one elephant. None of the expert affidavits submitted in support of the NhRP's Petition make any reference to Happy, her current state of well-being, or her needs as a 48 year old Asian elephant who has lived for over 40 years at the Bronx Zoo. Mr. Breheny argues that elephants who have lived at zoos for long periods of time are significantly different from elephants in the wild, and the characteristics of one cannot generally be attributed to the other, therefore, the NhRP's supporting expert affidavits have limited applicability to Happy and her specific needs. In contrast, the Bronx Zoo employees, including Mr. Breheny himself, have been caring for Happy's interest and well-being, knowing her individually for over 40 years.

The Bronx Zoo has significant resources for the care and well-being of Happy, including a large number of highly trained and experienced staff that provides excellent care and medical attention for Happy, as well as the sustained financial resources of a major institution. Happy also has longstanding relationships and familiarity with her caregivers and surroundings at the Bronx Zoo, where she has lived for nearly all of her life.



Mr. Breheny alleges that the NhRP does not take into consideration Happy's unique characteristics, personality and needs. For example, there is Happy's history of not interacting well with other elephants at the Bronx Zoo, which is why she is housed separately since her companion died. The NhRP also fails to consider that Happy may not socialize well with the elephants in the sanctuary due to her alleged acrimonious behavior. Based upon past experiences with Happy, the Bronx Zoo knows that she becomes particularly distressed by even short moves within the Zoo. Based upon his expertise and decades-long experience with Happy, Mr. Breheny states his professional opinion that Happy's interest would not be best served by moving her to an animal sanctuary.

#### The NhRP Counter-Arguments

In response, the NhRP argues that the Bronx Zoo imprisons Happy in a tiny, cold, lonely, "un-elephant-friendly", an unnatural place that ignores her autonomy as well as her social, emotional, and bodily liberty needs, while daily inflicting further injury upon her that would be remedied by transferring her to any American elephant sanctuary. They argue that the Bronx Zoo's unlawful imprisonment of Happy, an autonomous, extraordinarily cognitively-complex being, violates her common law right to bodily liberty. The NhRP has placed before the Court five deeply educated, independent, expert opinions, all firmly grounded in decades of education, observation, and experience, by some of the most prominent elephant scientists in the world. In great detail, these opinions carefully demonstrate that elephants are autonomous beings possessed of extraordinarily cognitively complex minds. The NhRP specifically demands that this Court determine that Happy possesses the common law right to bodily liberty and immediate release from her unlawful imprisonment so that her autonomy may be realized. The NhRP argues that the notion that living on a 2,300 acre sanctuary, such as PAWS is comparable to being imprisoned in the Bronx Zoo's approximately one acre elephant exhibit is absurd. The NhRP contends that the purported experts on behalf of the Bronx Zoo have not published or submitted for publication any peer-reviewed articles about elephants, nor have they studied or examined any elephants in the wild or in any other zoo. Similarly, none of the Bronx Zoo's affiants present any evidence that they have studied any wild elephant, or know about an elephant's basic social, emotional, behavioral, liberty, and autonomy needs, whether captive or wild.

The NhRP also takes issue with Mr. Calle's statement that to the best of his knowledge, Happy is currently healthy and well-adapted to her present surroundings. Mr. Calle fails to properly address the very

small space available to Happy at the Bronx Zoo. There are three possible locations for elephants at the Zoo: an indoor “holding area” or elephant barn; a barren cemented walled outdoor elephant yard that appears to be 0.05 of an acre; and, a Zoo exhibit, listed as being only 1.15 acres. Since the Bronx Zoo elephants are incompatible, the naturalistic exhibit area has to be shared on a rotational basis. At night, Happy is usually in a small pen in the barn or in the barren outdoor yard. During most days, weather permitting, she is also in the barren outdoor elephant yard. Dr. Poole notes that it is difficult for members of the public to obtain much information about Happy’s behavior other than viewing short videos of her captured by visitors to the Zoo. Dr. Poole states that in these videos, Happy is engaged in only five activities/behavior: standing facing the fence/gate; dusting, swinging her trunk in stereotypical behavior; standing with one or two legs lifted off the ground, either to take weight off painful, diseased feet or again engaging in stereotypic behavior; and once, eating grass. According to Dr. Poole, only two of these activities are natural, dusting and eating grass, and being alone in a small place, there is little else for her to do.

Dr. Poole found that Happy has no general problem getting along with other elephants, and opines that Happy is not anti-social, per se, but the historical information indicates that Happy was once attacked by Maxine and Patty and there was a risk that it could happen again. The NhRP argues that in the 40 years that she has been at the Bronx Zoo, Happy has only been given a choice of four companions, with whom she was forced to share a space that for an elephant is the equivalent of the size of a house. Two of these companions she liked and lost, and the other two attacked her. Dr. Poole opines that this is a confirmation of the Bronx Zoo’s inability to meet Happy’s basic needs. Moreover, Dr. Poole notes that the claims that Happy does not do well with change; that she will not survive the transport; that a transfer to a sanctuary will be too stressful; that she does not know how to socialize; and, that her unique personality is problematic, have often been disproven. Dr. Poole states that elephants with serious physical or psychological problems in zoos have usually become more normal functioning elephants when given more appropriate space in a sanctuary such as PAWS. Dr. Poole then provides examples of elephants similar to Happy who, when moved from a zoo to a sanctuary, almost immediately blossomed into happy, successful, autonomous, and socially and emotionally fulfilled beings. Dr. Poole opines that such space permits autonomy and allows elephants to develop healthy social relationships and to engage in a near natural movement, foraging, and repertoire of behavior.

### The Law

New York Courts have addressed the question of “personhood” with respect to chimpanzees. The NhRP has brought four identical, separate habeas corpus proceedings on behalf of “imprisoned chimpanzees” in four different counties, each within a different department of the Supreme Court, Appellate Division. The NhRP argued that chimpanzees are entitled to habeas corpus relief as their human-like characteristics render them “persons”. In each case, the trial court declined habeas corpus relief for the chimpanzees, and the NhRP appealed each decision. On appeal, all four Departments of the Appellate Division affirmed the decisions of the trial courts to decline habeas corpus relief.

The NhRP has standing to file the Petition for habeas corpus on behalf of Happy. Pursuant to CPLR 7002(a), a petition may be brought by “[a] person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf..., may petition without notice for a writ of habeas corpus...”. “As the statute places no restriction on who may bring a petition for habeas on behalf of the person restrained, ... petitioner [NhRP] has met its burden of demonstrating that it has standing.” The Nonhuman Rights Project, Inc. v. Stanley Jr. M.D., 2015 WL 1804007 (N.Y. Sup. Ct. 2015), amended in part, The Nonhuman Rights Project, Inc. v. Stanley, 2015 WL 1812988 (N.Y. Sup. 2015). Indeed, in the six habeas corpus cases that the NhRP has filed on behalf of chimpanzees in New York, the Courts found that NhRP had standing. See, Id.; People ex rel Nonhuman Rights Project Inc. v. Lavery, 998 N.Y.S.2d 248 (3d Dept. 2014); Nonhuman Rights Project, Inc. ex rel Kiko v. Presti, 999 N.Y.S.2d 652 (4<sup>th</sup> Dept. 2015); Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 54 N.Y.S.3d 392 (1<sup>st</sup> Dept. 2017), leave to appeal den., 31 N.Y.3d 1054 (2018); Nonhuman Rights Project on Behalf of Tommy v. Lavery, 31 N.Y.3d 1054 (2018); Nonhuman on Behalf of Tommy v. Lavery, 31 N.Y.3d 1065 (2018). Thus, this Court finds that the NhRP has standing to bring the habeas corpus proceeding on behalf of Happy.

However, on the question of whether an animal may be a “person”, the Courts have held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus. In People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248 (3d Dept. 2014), the appeal presented the novel question of whether a chimpanzee is a “person” entitled to the rights and protections afforded by the writ of habeas corpus. In Lavery, like here, the NhRP did not allege that respondents were in violation of any state or federal statutes respecting the domestic possession of wild animals. Instead it argued that a chimpanzee is a

“person” entitled to fundamental rights.

According to petitioner, while respondents are in compliance with state and federal statutes, the statutes themselves are inappropriate. Yet, rather than challenging any such statutes, petitioner requests that this Court enlarge the common-law definition of “person” in order to afford legal rights to an animal. We decline to do so, and conclude that a chimpanzee is not a “person” entitled to the rights and protections afforded by the writ of habeas corpus. *Id.* at 249

\* \* \*

Not surprisingly, animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law... Petitioner does not cite any precedent and there appears to be none in state law, or under English common law, that an animal could be considered a “person” for the purposes of common-law habeas corpus relief. In fact, habeas corpus relief has never been provided to any nonhuman entity. *Id.* at 249-250

\* \* \*

Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings. *Id.* at 251

(Internal citations omitted).

In The Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015), the NhRP brought an Article 70 proceeding under the common law for a writ of habeas corpus, on behalf of Hercules and Leo, two chimpanzees in the custody of respondent State University of New York at Stony Brook, seeking an Order directing their release and transfer to a sanctuary in Florida. The conditions under which Hercules and Leo were confined were not challenged by NhRP and it did not allege that respondents are violating any laws. While the Court was extremely sympathetic to the plight of the NhRP, on behalf of Hercules and Leo, it nonetheless held that given the Third Department precedent to which it is bound, the chimpanzees are not “persons” entitled to rights and protections afforded by the writ of habeas corpus, and the petition was denied, and the proceeding was dismissed.

In Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti, 999 N.Y.S.2d 652 (4<sup>th</sup> Dept. 2015), *lv. denied* 26 N.Y.3d 901 (2015), the NhRP sought a writ of habeas corpus on behalf of another chimpanzee, Kiko, arguing that he was illegally confined because he was kept in unsuitable conditions, and sought to have him

placed in a sanctuary. The Court did not address the question of whether a chimpanzee was deemed a person for habeas corpus purposes, or whether the NhRP had standing to seek habeas corpus on the chimpanzee's behalf. The Fourth Department affirmed the dismissal of the petition, holding that habeas corpus did not lie where the NhRP sought only to change the conditions of confinement rather than the confinement itself. In this matter, the NhRP sought to transfer Kiko to a different facility, a sanctuary, that it deemed more appropriate. The Court held that even if a chimpanzee was deemed a person for habeas corpus purposes, and even if the NhRP had standing to seek habeas corpus relief on Kiko's behalf, habeas corpus did not lie as it is well-settled that habeas corpus relief must be denied where the subject of the petition is not entitled to immediate release. Since the NhRP did not seek the immediate release of Kiko, but sought to transfer him to a sanctuary, habeas corpus does not lie. Here, the trial court declined to sign the order to show cause seeking habeas corpus relief, and the Fourth Department affirmed.

While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees, petitioner does not cite any sources indicating that the United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty, or that the Legislature intended the term "person" in CPLR article 70 to expand the availability of habeas protection beyond humans. No precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a "person" and entitled to habeas relief. In fact, habeas relief has never been found applicable to any animal. Id. at 395-396.

The asserted cognitive and linguistic capabilities of chimpanzees do not translate to a chimpanzee's capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions. Petitioner does not suggest that any chimpanzee charged with a crime in New York could be deemed fit to proceed, i.e., to have the "capacity to understand the proceedings against him or to assist in his own defense". Id. at 396.

\* \* \*

Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community. Id.

Even assuming, however, that habeas relief is potentially available to chimpanzees, the common-law writ of habeas corpus does not lie on behalf of the two chimpanzees at issue in these proceedings. Petitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that "there are no

adequate facilities to house [them] in proximity to the [c]ourt.” Instead, petitioner requests that respondents be ordered to show “why [the chimpanzees] should not be discharged, and thereafter, [the court] make a determination that [their] detention is unlawful and order [their] immediate release to an appropriate primate sanctuary... Since petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court. Id. at 397.

(Internal citations omitted).

In Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 54 N.Y.S.3d 392 (1<sup>st</sup> Dept. 2017), lv denied 31 N.Y.3d 1054 (2018), the NhRP filed two petitions for habeas corpus on behalf of two chimpanzees, Tommy and Kiko. Supreme Court declined to extend habeas corpus relief to the chimpanzees. The NhRP appealed and the Appellate Division, First Department affirmed, holding that the human-like characteristics of chimpanzees did not render them “persons” for purposes of habeas corpus relief. The Court noted that any position to the contrary is without legal support or legal precedent. The asserted cognitive and linguistic capabilities of chimpanzees did not translate to a chimpanzee’s capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions. The Court further held that even if habeas corpus was potentially available to chimpanzees, writ of habeas corpus did not lie on behalf of the chimpanzees where the NhRP did not challenge the legality of the detention, but merely sought their transfer to a different and more appropriate facility.

### Analysis

Regrettably, in the instant matter, this Court is bound by the legal precedent set by the Appellate Division when it held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus. Lavery, 54 N.Y.S.3d at 392. The First and Fourth Departments did not address the question of personhood for chimpanzees. For purposes of the decisions, both Appellate Departments noted that even if the NhRP had standing to bring the habeas corpus proceeding, and habeas corpus was potentially available to chimpanzees, the NhRP did not meet its burden for habeas corpus relief because it did not challenge the legality of the chimpanzees' detention, but merely sought transfer of the chimpanzees to sanctuaries. Thus, both Courts assumed, for purposes of the argument, that the NhRP had standing and that habeas corpus was available to the chimpanzee. However, the Third Department squarely addressed the question and held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus.

This Court is extremely sympathetic to Happy's plight and the NhRP's mission on her behalf. It recognizes that Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings. Notwithstanding, in light of the Appellate Division, Third Department's holding that animals are not "persons", this Court is also constrained to find that Happy is not a "person" entitled to the writ of habeas corpus. In Lavery, 31 N.Y.3d 1054 (2018), the NhRP motion for leave to appeal the Third Department decision to the Court of Appeals was denied. However, in a concurring opinion, Justice Fahey noted that the denial of leave to appeal was not a decision on the merits of the NhRP claim. He stated that "[t]he question will have to be addressed eventually. Can a non-human animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing?" Id. at 1057. Justice Fahey further noted that "[t]he issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing." Id. at 1059.

### Conclusion

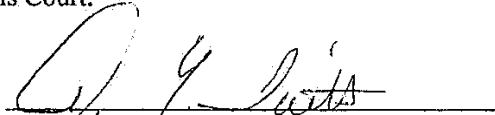
This Court agrees that Happy is more than just a legal thing, or property. She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty. Nonetheless, we are constrained by the caselaw to find that Happy is not a "person" and is not being illegally imprisoned. As stated by the First Department in Lavery, 54 N.Y.S.3d at 397, "the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process". The arguments advanced by the NhRP are extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot. Nevertheless, in order to do so, this Court would have to find that Happy is a "person" and, as already stated, we are bound by this State's legal precedent.

Accordingly, Respondents' motion to dismiss the Petition is granted and the Petition is dismissed. The remainder of the motions are denied as academic or moot.

This constitutes the decision and Order of this Court.

Dated:

February 18, 2020



Hon. Alison Y. Tuitt

VERIFIED PETITION FOR A COMMON LAW WRIT OF HABEAS CORPUS AND ORDER  
TO SHOW CAUSE, DATED OCTOBER 2, 2018 [A-31 - A-79]

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ORLEANS

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

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

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as 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.

VERIFIED PETITION

ORAL ARGUMENT  
REQUESTED

Index No.

18-45164

ORLEANS CO CLERK NY  
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"In the interval since we first denied leave to the Nonhuman Rights Project<sup>1</sup>, I have struggled with whether this was the right decision . . . I continue to question whether the Court was right to deny leave in the first instance. The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing."

*Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1058 (May 8, 2018) ("*Tommy*") (Eugene Fahey, J., concurring)

"[I]t is common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals[.]"

*People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. June 15, 2018) (citations omitted)

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<sup>1</sup> 26 N.Y.3d 901, 2015 WL 5125507 [2015]; 26 N.Y.3d 902, 2015 WL 5125518 [2015].



PETITIONER, THE NONHUMAN RIGHTS PROJECT, INC. (“the NhRP” or “Petitioner”), by its attorneys ELIZABETH STEIN, ESQ. and STEVEN M. WISE, ESQ. (subject to *pro hac vice* admission), alleges as follows:

### **I. Preliminary Statement**

1. This Verified Petition is for a Common Law Writ of Habeas Corpus and Order to Show Cause (“Petition”) filed by the NhRP pursuant to New York Civil Practice Law and Rules (“CPLR”) Article 70 on behalf of an elephant named Happy, dubbed by the *New York Times* as “The Bronx Zoo’s Loneliest Elephant,”<sup>2</sup> who is being unlawfully imprisoned by Respondents at the Bronx Zoo. Attached to the Petition is a Memorandum of Law in Support (“Memorandum”), Expert Affidavits (including five Expert Scientific Affidavits) and exhibits annexed thereto, and a proposed Order to Show Cause (attached hereto as **Exhibit 1**).

2. This Petition seeks a good faith and well-supported extension of the New York common law of habeas corpus to Happy, who is autonomous, and being unlawfully imprisoned solely because she is an elephant.

3. The timely intervention of this Court is necessary to grant Happy her common law right to bodily liberty and immediate release so as to prevent future unlawful deprivations of her liberty and allow her to exercise her autonomy to the greatest degree possible.

4. Autonomous nonhuman animals such as Happy should have “the right to liberty protected by habeas corpus.” *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring). “To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider

<sup>2</sup> Tracy Tullis, “The Bronx Zoo’s Loneliest Elephant,” THE NEW YORK TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/28/nyregion/the-bronx-zoos-loneliest-elephant.html> (last visited Sept. 22, 2018).

whether a chimpanzee is an individual with inherent value who has the right to be treated with respect[.]” *Id.* at 1058 (citation omitted).

5. This case will turn on whether an extraordinarily cognitively complex and autonomous nonhuman being such as Happy should be recognized as a legal person with the right to bodily liberty protected by the common law of habeas corpus pursuant to a New York common law that keeps abreast of evolving standards of justice, morality, experience, and scientific discovery and an evolving New York public policy which already recognizes certain nonhuman animals as “persons.” (Mem. at Part I). As recently recognized by Court of Appeals Associate Justice Eugene Fahey in *Tommy*, 31 N.Y. 3d at 1058 (Fahey, J. concurring), this question is “a deep dilemma of ethics and policy that demands our attention.” Further, “[t]he evolving nature of life makes clear that chimpanzees and humans exist on a continuum of living beings . . . . To solve this dilemma, we have to recognize its complexity and confront it.” *Id.* at 1059.<sup>3</sup>

6. To dismiss this Petition without issuing the requested Order to Show Cause would amount to a “refusal to confront a manifest injustice.” *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring) (lower courts that refused to consider the NhRP’s arguments erred).

7. CPLR Article 70 governs the application of the common law writ of habeas corpus. This Petition invokes this Court’s common law authority to apply the common law of habeas corpus to an autonomous nonhuman being such as Happy.

8. This Petition specifically requests that this Court: a) issue the requested Order to Show Cause requiring Respondents to justify their imprisonment of Happy; b) after the return, determine that Happy possesses the common law right to bodily liberty, thereby rendering

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<sup>3</sup> Judge Fahey also asserted “that denial of leave to appeal is not a decision on the merits of petitioner’s [NhRP’s] claims.” *Tommy*, 31 N.Y.3d at 1056 (Fahey, J., concurring).

unlawful Respondents' imprisonment and deprivation of that bodily liberty; c) order Happy's immediate release from Respondents' unlawful imprisonment; and d) decide where Happy should thereafter be placed, which the NhRP suggests is the Performing Animal Welfare Society ("PAWS") near Sacramento, California (attached hereto is the Affidavit of Ed Stewart, Co-Founder and President of PAWS ["Stewart Aff."]).<sup>4</sup>

9. "One of the hallmarks of the writ [is] . . . its great flexibility and vague scope." *People ex rel. Keitt v. McCann*, 18 N.Y.2d 257, 263 (1966) (citation omitted). In New York, habeas corpus is not "the creature of any statute . . . and exists as a part of the common law of the State." *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875). The writ "cannot be abrogated, or its efficiency curtailed, by legislative action. . . . The remedy against illegal imprisonment afforded by this writ . . . is placed beyond the pale of legislative discretion." *Id.* at 566.

10. The term "person" designates the law's most fundamental category by identifying those entities capable of possessing a legal right. Personhood can determine, among other things, who counts, who lives, who dies, who is enslaved, and who is free. *See Byrn v. New York City Health and Hospitals Corp.*, 31 N.Y. 2d 194, 201 (1972) ("[U]pon according legal personality to a thing the law affords it the rights and privileges of a legal person.") (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909)).

11. "Person" has never been a synonym for "human being" and may designate an entity broader, narrower, or qualitatively different from a human being. *Id. People v Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018).

<sup>4</sup> "For elephants in captivity, especially those born into it or kept there for a majority of their lives, going back to the 'wild' is unfortunately not an option. For these elephants, human-run sanctuaries are currently the best option." Supplemental Affidavit of Joyce Poole ¶ 5.

12. Historically, nonhuman animals were recognized as rightless legal things under the common law. The New York State Supreme Court Appellate Division, Fourth Judicial Department (“Fourth Department”), recently declared, however, that now “it is common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals.” *Id.* (citing *inter alia* *Matter of Nonhuman Rights Project, Inc. v Presti*, 124 A.D.3d 1334 [4th Dept 2015], *lv denied*, 26 N.Y.3d 901 [2015])). Similarly, Judge Eugene Fahey recently opined that “there is no doubt that [a chimpanzee] is not merely a thing.” *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring).

13. The adjudication of personhood for purposes of the common law of habeas corpus is a matter for the courts rather than the legislature, and is based upon public policy rather than biology or taxonomy. *See Byrn*, 31 N.Y.2d at 201-02; *Tommy*, 31 N.Y.3d at 1056-57 (Fahey, J., concurring). Relying on *Byrn*, the Fourth Department reiterated that “personhood is ‘not a question of biological or natural’ correspondence.” *Graves*, 163 A.D.3d at 21 (quoting *Byrn*, 31 N.Y.2d at 201).

14. This Petition and accompanying Memorandum demonstrate that this Court has a common law duty to recognize that modern scientific evidence and justice require that Happy be recognized as a “person” with the common law right to bodily liberty vindicated through common law habeas corpus. *See, e.g., Gallagher v. St. Raymond’s R.C. Church*, 21 N.Y.2d 554, 558 (1968) (“the common law of the State is not an anachronism, but is a living law which responds to the surging reality of changed conditions”); *Bing v. Thunig*, 2 N.Y.2d 656, 668 (1957) (a rule of law “out of tune with the life about us, at variance with modern day needs and with concepts of justice and fair dealing . . . should be discarded”); *Silver v. Great American Ins. Co.*, 29 N.Y.2d 356, 363 (1972) (“Stare decisis does not compel us to follow blindly a court-

created rule . . . once we are persuaded that reason and a right sense of justice recommend its change.”).

15. New York courts have “not only the right, but the *duty* to re-examine a question where justice demands it” to “bring the law into accordance with present day standards of wisdom and justice rather than ‘with some outworn and antiquated rule of the past.’” *Woods v. Lancet*, 303 N.Y. 349, 355 (1951) (emphasis added). “‘When the ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.’ [The Court] act[s] in the finest common-law tradition when [it] adapt[s] and alter[s] decisional law to produce common-sense justice.” *Id.* (citation omitted).

16. In *Woods*, the Court of Appeals rejected the claim that common law “change . . . should come from the Legislature, not the courts.” *Id.* (“We abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.”). See also *Flanagan v. Mount Eden General Hospital*, 24 N.Y. 2d 427, 434 (1969) (“we would surrender our own function if we were to refuse to deliberate upon unsatisfactory court-made rules simply because a period of time has elapsed and the legislature has not seen fit to act”).

17. To dismiss the Petition without issuing the writ would amount to a “refusal to confront a manifest injustice.” *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring) (“The reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a ‘person’ or relegated to the category of a ‘thing’ *amounts to a refusal to confront a manifest injustice*. . . . To solve this dilemma, we have to recognize its complexity and *confront it*.”) (emphasis added).



18. The NhRP is not seeking any right for Happy other than the common law right to bodily liberty protected by common law habeas corpus.

19. The common law of habeas corpus “is deeply rooted in our cherished ideas of individual autonomy and free choice.” *Article 70 of CPLR 70 for a Writ of Habeas Corpus, The Nonhuman Rights Project, Inc. on Behalf of Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898, 903-04 (citations omitted) (“*Stanley*”). As set forth in more detail in the accompanying Memorandum at Part III, autonomy is a sufficient condition for the right to bodily liberty secured by the common law of habeas corpus. The Expert Scientific Affidavits attached hereto demonstrate that elephants are autonomous beings who possess complex cognitive abilities and that Happy’s interest in exercising that autonomy and bodily liberty is as fundamental to her as it is to us. Like humans, elephants are a social species who suffer immensely when confined in small spaces and deprived of social contact with other members of their species. “Elephants have evolved to move. Holding them captive and confined prevents them from engaging in normal, autonomous behavior and can result in the development of arthritis, osteoarthritis, osteomyelitis, boredom and stereotypical behavior. Held in isolation elephants become bored, depressed, aggressive, catatonic and fail to thrive. Human caregivers are no substitute for the numerous, complex social relationships and the rich gestural and vocal communication exchanges that occur between free-living elephants.”<sup>5</sup> Indeed, elephants thrive and depend on that social interaction, which cannot be achieved when housed alone.<sup>6</sup> Elephants exhibit a level of empathy – incorrectly assumed to belong to humans only – that “is a cornerstone of normal social interaction.”<sup>7</sup> Respondent’s imprisonment of Happy deprives her of her ability to exercise her autonomy in meaningful ways, including the freedom to choose where to go, what to do, and with whom to be.

<sup>5</sup> Supplemental Affidavit of Joyce Poole ¶ 4.

<sup>6</sup> Affidavit of Joyce Poole ¶¶ 37-39.

<sup>7</sup> *Id.* ¶ 32.

20. Denying the common law right to bodily liberty to an autonomous nonhuman being solely because she is not human is arbitrary, irrational, and violates fundamental equality. (Mem. at p.15.) All humans in New York possess the right to bodily liberty secured by the common law of habeas corpus, even those who have always, and will always, lack the ability to choose, to understand, or make a reasoned decision about, for example, medical treatment. *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring) (“no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child . . . or a parent suffering from dementia”). Because even humans bereft of consciousness may seek the remedy of habeas corpus to protect their bodily liberty, this Court must either recognize an autonomous nonhuman being's just claim to bodily liberty or contravene the fundamental principle of equality that is deeply enshrined in New York statutory, constitutional, and common law. (Mem. at Parts III. A-B).

21. The Fourth Department has made clear that “personhood can and sometimes does attach to nonhuman entities like . . . *animals*.” *Graves*, 163 A.D.3d at 21 (emphasis added).

22. In determining whether New York public policy supports common law personhood for nonhuman animals, this Court may look to statutes which “can serve as an appropriate and seminal source of public policy to which common-law courts can refer.” *Reno v. D'Javid*, 379 N.Y.S.2d 290, 294 (Sup. Ct. 1976) (citations omitted). By enacting sec. 7-8.1 of the Estates, Powers and Trusts Law (“EPTL”), which allows certain nonhuman animals the right to be trust beneficiaries, the Legislature acknowledged their personhood, *See In re Fouts*, 677 N.Y.S.2d 699 (Sur. 1998) (five chimpanzees), as only “persons” may be trust beneficiaries. *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); *Gilman v. McCardle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) (“Beneficiaries . . . must be persons”), *rev. on other grounds*, 99 N.Y. 451 (1885); RESTATEMENT (THIRD) OF TRUSTS § 43 *Persons Who May Be Beneficiaries* (2003) (“A person

who would have capacity to take and hold legal title to the intended trust property has capacity to be a beneficiary of a trust of that property; ordinarily, a person who lacks capacity to hold legal title to property may not be a trust beneficiary.”); RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No. 2, approved 1999); RESTATEMENT (SECOND) OF TRUSTS § 124 (1959); BENEFICIARY, *Black’s Law Dictionary* (9<sup>th</sup> ed. 2009).

23. This Court need not address the question of Happy’s personhood in order to issue the Order to Show Cause. *See Stanley*, 16 N.Y.S.3d at 900 (“[T]he court need not make an initial determination that Hercules and Leo are persons in order to issue the writ and show cause order.”).

24. In 2015, the *Stanley* court issued an Order to Show Cause under CPLR 7002 on behalf of two chimpanzees, Hercules and Leo, and expressly rejected the State’s argument that issuance “requires an initial, substantive finding that chimpanzees are not entitled to legal personhood for the purpose of obtaining a writ of habeas corpus.” 16 N.Y.S.3d at 908, 917. *See also id.* at 900; *The Nonhuman Rights Project, Inc. v. Stanley Jr., M.D.*, 2015 WL 1804007 (N.Y. Sup. 2015), *amended in part*, *The Nonhuman Rights Project, Inc. v. Stanley*, 2015 WL 1812988 (N.Y. Sup. 2015).<sup>8</sup>

<sup>8</sup> Although the court ultimately ruled against the NhRP because it believed it was bound by *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) (personhood is contingent upon the ability to shoulder legal duties and responsibilities) (Mem. at Part IV), the court opined that the NhRP *could* eventually prevail. 16 N.Y.S.3d at 903, 912-13, 917-18. The foundation for the New York State Supreme Court Appellate Division, Third Judicial Department’s (“Third Department”) decision in *Lavery*, 124 A.D. 3d, at 151-152 was flawed in large part because it principally relied upon a definition of “person” found in *Black’s Law Dictionary* and in several cases that relied upon *Black’s Law Dictionary* that defined a “person” as one with the capacity for both duties *and* responsibilities, instead of one with the capacity for duties *or* responsibilities. However, *Black’s Law Dictionary* relied solely upon the 10<sup>th</sup> edition of *Salmond on Jurisprudence*, which actually defines “person” as an entity that can bear rights *or* responsibilities, as the NhRP claimed. When the NhRP pointed out this error, the editor-in-chief of *Black’s Law Dictionary* promptly agreed to correct it in its next edition. *See* James Trimarco, “Chimps Could Soon Win Legal Personhood,” YES! Magazine (Apr. 28, 2017), *available at*: <http://www.yesmagazine.org/peace-justice/chimps-could-soon-win-legal-personhood-20170428> (last visited Sept. 27, 2018).



25. This Court is precluded from following the personhood holding in *Lavery*, 124 A.D. 3d, at 150-53, because it was: (1) disregarded by the Fourth Department in *Presti* (decided months later), which twice assumed, without deciding, that a chimpanzee could be a “person” for habeas corpus, *Presti*, 124 A.D.3d 1334; (2) explicitly rejected by Judge Fahey in *Tommy*, 31 N.Y.3d at 1056-1057; and (3) implicitly rejected by the Fourth Department in *Graves*, which expressly cited *Presti* for the notion that it is “common knowledge that personhood can and sometimes does attach to . . . animals.” 163 A.D.3d, at 21.<sup>9</sup>

26. Writs of habeas corpus have been issued on behalf of nonhuman animals in foreign countries.

27. Deciding a case based upon the NhRP’s legal strategy, an Argentine court in November 2016 recognized a chimpanzee named Cecilia as a “non-human person,” ordered her released from a Mendoza Zoo pursuant to a writ of habeas corpus, and sent her 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).

28. A writ was issued on behalf of an orangutan named Sandra in Buenos Aires, Argentina in 2015. *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA, Sobre Amparo* (*Association of Officials and Attorneys for the Rights of Animals and Others v. GCBA, on Amparo*), EXPTE. A2174-2015 (October 21, 2015).

29. A writ was issued on behalf of a bear named Chucho in Colombia, though that ruling was overturned by a higher court and further appeal is pending. *Luis Domingo Gomez*

<sup>9</sup> The Fourth Department correctly understands that the ability of an entity to bear duties and responsibilities is irrelevant to the determination of personhood under any and all circumstances. (Mem. at Part IV). *Graves*, 163 A.D. 3d 16; *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring). An entity is a “person” if she can either bear rights *or* duties. *Id.* Judge Fahey made clear that it is irrelevant “that nonhuman animals cannot bear duties,” as the “same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one’s infant child.” *Id.*

*Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 (July 26, 2017).

30. Writs of habeas corpus were frequently issued on behalf human slaves who were not at the time deemed legal persons in order to determine their personhood status.

31. In *Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep. 499 (K.B. 1772), adopted into New York's common law,<sup>10</sup> Lord Mansfield assumed, without deciding, that the slave, James Somerset, could possibly possess the right to bodily liberty protected by the common law writ of habeas corpus, and famously issued the habeas corpus requiring the respondent to justify the detention. *See also W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007, 1009 (Sup. Ct. 1998), *aff'd*, 267 A.D.2d 233 (1999) ("For those who feel that the incremental change allowed by the Common Law is too slow compared to statute, we refer those disbelievers to the holding in *Somerset v. Stewart*, . . . which stands as an eloquent monument to the fallacy of this view.").

32. In *Lemmon v. People*, 20 N.Y. 562, 604-06, 618, 623, 630-31 (1860), the Court, relying heavily upon *Somerset*, issued a writ of habeas corpus upon the petition of five slave children who were not deemed legal "persons" at the time the writ was issued, to determine their personhood status.

33. In *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846), the free black abolitionist dockworker, Lewis Napoleon, filed a petition for habeas corpus on behalf of a black slave boy who "was closely confined on board the brig . . . and bound in chains." The respondent, a Georgia slaveholder, claimed the boy was his lawful property who had escaped to New York. *Id.* The circuit judge issued a writ to determine whether the boy was a legal person or property, explicitly ruling: "the party had a right to bring the matter at once before me; under our statute /

<sup>10</sup> New York adopted the English common law as it existed prior to April 19, 1775. N.Y. Const. Art. I, § 14; N.Y. Const. § 35 (1777).

was bound to allow the writ of habeas corpus, even if I had been fully convinced of the legality of the imprisonment; and . . . it becomes my duty to consider and decide it--a duty from which I am not at liberty to shrink." *Id.* at 332 (emphasis added). The court added: "I approach this with all the caution becoming the gravity of the case, yet with a lively sense of what is *due to personal liberty* and the fraternal relations existing among the members of the union." *Id.* at 335 (emphasis added). The court eventually concluded: "This boy must at all events be discharged. The law allows it and the court awards it." *Id.* at 344.

34. In *In re Belt*, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848), a writ of habeas corpus was issued on behalf of a fugitive slave from Maryland. The slaveholder's lawyer argued: "That in a slave State all colored men are presumed to be slaves; and that the same presumption must be allowed here." *Id.* at 105. The court held that there "was only one case in which a fugitive slave could be held by his master, in his personal custody, in this State. That was, under the law of congress, to take him without delay before the proper authorities, in order to obtain the certificate necessary to justify his removal out of the State. This had not been done in this case," and therefore the slave was entitled to legal personhood. *Id.* at 106.

35. In *In re Tom*, 5 Johns. 365 (N.Y. 1810) (per curiam), a writ of habeas corpus was issued on behalf of a slave who was being detained by his alleged master, and was subsequently set free after the writ was issued and he showed proof that he had been manumitted.

36. Analogously, in *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C. Neb. 1879), the court rejected the United States Attorney's argument that no Native American could ever be a "person" able to obtain a writ of habeas corpus and issued a writ of habeas corpus on behalf of the Ponca Chief, Standing Bear.

## II. Parties

37. The NhRP is a not-for-profit corporation organized pursuant to the laws of the State of Massachusetts with a principal address at 5195 NW 112<sup>th</sup> Terrace, Coral Springs, FL 33076. It is the only civil rights organization in the United States dedicated to changing “the common law status of at least some nonhuman animals from mere ‘things,’ which lack the capacity to possess any legal rights, to ‘persons,’ who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them.” <https://www.nonhumanrights.org/who-we-are/>. For the past twenty years, the NhRP has worked to change the status of such nonhuman animals as chimpanzees and elephants from legal things to legal persons. The NhRP does not seek to reform animal welfare legislation. *See Stanley*, 16 N.Y.S.3d at 900-01 (“In accordance with its mission, petitioner commenced this litigation and has filed similar cases in several other New York courts with the goal of obtaining legal rights for chimpanzees, and ultimately for other animals.”).

38. The NhRP submits this Petition on behalf of Happy, who is being unlawfully imprisoned by Respondents in the Bronx Zoo. Upon information and belief, the NhRP further alleges the following: Happy is a 47-year-old female Asian elephant who was captured in the wild and imported to the United States when she was a year old. She along with six other calves were purchased by the Lion County Safari, Inc. and lived initially in California and then Florida until 1977, when she and one other elephant named Grumpy were sent to the Bronx Zoo. There, in addition to being on display, Happy gave rides and participated in “elephant extravaganzas,” including tug-of-war contests. In 2002, Grumpy was euthanized after she was attacked by Patty and Maxine, two other elephants imprisoned at the zoo. The zoo separated Happy from them and introduced a younger female Asian elephant named Sammie into her portion of the exhibit. In 2005, Happy became the *first* elephant to pass the mirror self-recognition-test, considered to be a

true indicator of an animal's self-awareness and "is thought to correlate with higher form of empathy and altruistic behavior."<sup>11</sup> In 2006, Sammie was euthanized after suffering from kidney failure and shortly thereafter the zoo announced that it was ending its captive elephant exhibit. Since that time, Happy has been and continues to be denied direct social contact with any other elephants and "spends most of her time indoors in a large holding facility lined with elephant cages, which are about twice the length of the animals' bodies."<sup>12</sup>

39. Happy is the beneficiary of an *inter vivos* trust created by the NhRP pursuant to EPTL section 7-8.1 for the purpose of her care and maintenance if she is transferred to an appropriate elephant sanctuary. A true and correct copy of the trust is attached hereto as **Exhibit 2**.

40. Respondent James J. Breheny, 2300 Southern Boulevard, Bronx, New York 10460, is Wildlife Conservation Society's ("WCS") Executive Vice President and General Director of Zoos and Aquariums and is the Director of the Bronx Zoo.

41. Respondent WCS is a 501(c) non-profit organization headquartered in the Bronx Zoo at 2300 Southern Boulevard, Bronx, New York 10460. WCS manages the Bronx Zoo along with other New York City wildlife parks and zoos.

### III. Venue and Standing

42. CPLR 7002(b) provides in part: "a petition for the writ shall be made to: ... 3. *any justice of the supreme court*." (emphasis added). In *Stanley*, the court ruled that venue was proper in New York County, though the chimpanzees were detained in Suffolk County. 16 N.Y.S.3d at

<sup>11</sup> Joshua M. Plotnik, Frans B.M. deWaal, and Diana Reiss, *Self-recognition in an Asian elephant*, 103 PNAS 17053 (Nov. 7, 2006)

<sup>12</sup> Brad Hamilton, *Happy the Elephant's Sad Life Alone at the Bronx Zoo*, NEW YORK POST (Sept. 30, 2012), <https://nypost.com/2012/09/30/happy-the-elephants-sad-life-alone-at-the-bronx-zoo/> (last visited Sept. 26, 2018).



905-07. This Petition is therefore properly brought before this Court even though Happy is unlawfully imprisoned in Bronx County.

43. Once the requested Order to Show Cause issues, it must be made returnable to Orleans County as the county of issuance, unless the Court makes it returnable to the county of detention. CPLR 7004 (c).<sup>13</sup> However, “where no factual issues are raised, no one sought the production in court of [the nonhuman animal], and [a]ll that remains is for the Court to issue its decision,’ a change of venue is not required.” *Stanley*, 16 N.Y.S. 3d at 908, quoting *Chaney v. Evans*, No. 2012-940, 2013 WL 2147533, at \*3 (Sup Ct. Franklin County May 7, 2013).

44. The NhRP has standing to file the Petition on behalf of Happy. Pursuant to CPLR 7002(a), a petition may be brought by “one acting on . . . behalf” of “[a] person illegally imprisoned or otherwise restrained in his liberty within the state.” CPLR 7002(a) places no restriction on who may file the petition, consistent with the longstanding common law practice of allowing anyone—including complete strangers—to file habeas corpus petitions on another’s behalf. *See People v. McLeod*, 3 Hill 635 n. “j” sec.7 (N.Y. 1842) (“The common law right was clear . . . ‘that every Englishman who is imprisoned by any authority whatsoever, has an undoubted right, by his *agents* or *friends*, to apply for and obtain a writ of *habeas corpus* in order to procure his liberty by due course of law.’”) (emphases in original); *Somerset*, 1 Lofft 1, 98 Eng. Rep. 499 (unrelated third parties received common law writ of habeas corpus on behalf of a slave imprisoned on a ship); *Lemmon*, 20 N.Y. at 562, 599-600 (dockworker had standing to seek

<sup>13</sup> Pursuant to CPLR 7004(c), a writ *must* be returnable to the county in which it is issued except: a) where the writ is to secure the release of a prisoner from a state institution, it must be made returnable to the county of detention; or b) where the petition was made to a court outside of the county of detention, the court *may* make the writ returnable to such county. As Respondents are not a “state institution,” the Court should make the writ returnable to Orleans County. *See Stanley*, 16 N.Y.S.3d at 907 (Hercules and Leo were not being detained in a state institution within the meaning of CPLR 7004(c) even though they were imprisoned in a state educational facility).

a common law writ of habeas corpus on behalf of slaves with whom he had no relationship); *In re Kirk*, 1 Edm. Sel. Cas. at 315 (same).<sup>14</sup>

45. The New York Supreme Court in *Stanley* correctly ruled: “As the statute places no restriction on who may bring a petition for habeas on behalf of the person restrained, . . . petitioner [NhRP] has met its burden of demonstrating that it has standing.” 16 N.Y.S.3d at 905 (citing CPLR 7002(a)).

46. Indeed, in the six habeas corpus cases that the NhRP has filed on behalf of chimpanzees in New York, not a single court found that the NhRP lacked standing. *See id.*; *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 75 n.1 (1st Dept. 2017) (“*Tommy*”) (“[a]ssuming habeas relief may be sought on behalf of a chimpanzee, petitioner [NhRP] undisputedly has standing pursuant to CPLR 7002(a), which authorizes anyone to seek habeas relief on behalf of a detainee”), *leave to appeal den.*, No. 2018-268, 2018 WL 2107087 (N.Y. May 8, 2018); *Lavery*, 124 A.D.3d at 150-53 (3d Dept. 2014); *Presti*, 124 A.D.3d 1334; *Matter of Nonhuman Rights Project, Inc. v Stanley*, 2014 NY Slip Op 68434(U) (2d Dept. 2014).

#### **IV. The NhRP is entitled to the issuance of the writ pursuant to CPLR 7002(c) and 7003.**

47. The NhRP is entitled, as of right, to the issuance of the writ.

48. Article 70 governs the procedure applicable to common law writs of habeas corpus. *See* CPLR 7001 (“the provisions of this article are applicable to common law or statutory writs of habeas corpus”). Article 70 is purely procedural and does not—*cannot*—curtail substantive entitlement to the writ, including the determination of who constitutes a “person.” *Tweed*, 60

<sup>14</sup> *See also Case of the Hottentot Venus*, 13 East 185, 104 Eng. Rep. 344 (K.B. 1810) (Abolitionist Society sought habeas corpus on behalf of black woman being exhibited in London); *In re Trainor*, *New York Times*, May 11, 14, 21, 25, June 14 (1853) (abolitionist and underground railway conductor Jacob R. Gibbs on behalf of nine year old slave); “Reported for the Express,” *New York Evening Express*, July 13, 1847, *New York Legal Observer* 5, 299 (1847) (John Iverness obtained writ on behalf of three slaves—“the Lembrança slaves”—whom he had never met after he was told they were being held captive on a ship in New York harbor).

N.Y. at 569 (“the [habeas corpus] act needs no interpretation and is in full accord with the common law”).

49. Article 70 permits a common law “person” unlawfully detained, or any “person” acting on his or her behalf, to seek a common law writ of habeas corpus or order to show cause to require the detainer to demonstrate a legal basis for that “person’s” detention and denial of liberty. CPLR 7002.

50. CPLR 7003 (a) provides in part: “The court to whom the petition is made *shall issue* the writ without delay on any day, or, where the petitioner does not demand production of the person detained . . . order the respondent to show cause why the person detained should not be released.” (Emphasis added). See *Stanley*, 16 N.Y.S.3d at 908 (“And the legislature was concerned that judges issue valid writs that it enacted a provision, unique in all respects, that a judge or group of judges who refuse to issue a valid writ must forfeit \$1,000 to the person detained.”). As the NhRP does not demand that Respondents produce Happy, an order to show cause must be issued. See *Stanley*, 16 N.Y.S.3d at 904-05 (“This proceeding thus commenced with the signing of an order to show cause.”) (citing CPLR 7003).

51. CPLR 7003 provides just three grounds upon which a court may deny a habeas petition: (1) if the petition is “successive” within the meaning of 7003(b); (2) “a court or judge of the United States has exclusive jurisdiction;” or (3) “[i]f it appears from the petition or the documents annexed thereto that the person is not illegally detained[.]” None of these grounds is applicable to the case at bar, *infra*.

52. This is the first petition filed on behalf of Happy. No appeal has been taken from any order by virtue of which Happy is detained.



53. No court or judge of the United States has exclusive jurisdiction to order Happy's release.

54. Assuming, as the Court must at this juncture, that Happy reasonably *could be* a legal person, *supra*, her imprisonment by Respondents is unlawful under the common law, which presumes that all natural persons are free absent positive law. *See Somerset*, 98 Eng. Rep. at 510 (slavery "is so *odious* that nothing can be suffered to support it but positive law"); *Oatfield v. Waring*, 14 Johns. 188, 193 (Sup. Ct. 1817) (on the question of a slave's manumission, "all presumptions in favor of personal liberty and freedom ought to be made"); *People ex. rel Caldwell v Kelly*, 33 Barb. 444, 457-58 (Sup Ct. 1862) (Potter, J.) ("Liberty and freedom are man's natural conditions; presumptions should be in favor of this construction[.]"). Stated differently, as a "person" under the common law of New York, Happy's detention by Respondents is *per se* unlawful.

55. Once the NhRP satisfies the requirements of CPLR 7002(c) (requiring petitioner to state the "person" is "detained" and the "nature of the illegality"), this Court must issue the Order to Show Cause, pursuant to CPLR 7003(a), after which the burden shifts to the Respondents to demonstrate that the detention of Happy is lawful. CPLR 7006(a), 7008(b).

56. That Respondents may not be in violation of any federal, state, or local animal welfare laws in their detention of Happy is irrelevant as to whether or not the detention is lawful. This habeas corpus case is neither an "animal protection" nor "animal welfare" case, just as a habeas corpus case brought on behalf of a detained human would not be a "human protection" or "human welfare" case. *See Lavery*, 124 A.D.3d at 149; *Stanley*, 16 N.Y.S.3d at 901. This Petition does not allege that Happy "is illegally confined because [she] is kept in unsuitable conditions[.]" nor does it seek improved welfare for Happy. *Presti*, 124 A.D.3d at 1335. Rather,

this Petition demands that this Court recognize Happy's common law right to bodily liberty and order her immediate release from Respondents' current and continued unlawful detention so that her liberty and autonomy may be realized. It is the fact Happy is imprisoned *at all*, rather than the conditions of her imprisonment, that the NhRP claims is unlawful. *See Stanley*, 16 N.Y.S.3d at 901 ("The conditions under which Hercules and Leo are confined are not challenged by petitioner . . . and it advances no allegation that respondents are violating any federal, state or local laws by holding Hercules and Leo."). The Third Department in *Lavery* understood: "we have not been asked to evaluate the quality of Tommy's current living conditions in an effort to improve his welfare." 124 A.D.3d at 149.

57. The NhRP seeks Happy's immediate release from her imprisonment. This Court then has the authority to release her to PAWS which has agreed to provide permanent sanctuary for her.<sup>15</sup> At PAWS, Happy, along with other elephants, will flourish in an environment that respects her autonomy to the greatest degree possible, as close to her native Asia as may be found in North America.

58. That this Court may order Happy sent to a sanctuary such as PAWS rather than into the wild or onto the streets of New York does not preclude her from habeas corpus relief (Mem. at Part VI). *See Tommy*, 31 N.Y.3d at 1058-59 (Fahey, J., concurring) (noting habeas corpus could be used for "transfers of the chimpanzees to a primate sanctuary" and that the Fourth Department erred in holding that habeas corpus was not an appropriate remedy based upon a misinterpretation of the relevant case law);<sup>16</sup> *Stanley*, 16 N.Y.S.3d at 917 n.2 (citing *McGraw v. Wack*, 220 A.D.2d 291, 292 (1st Dept. 1995); *Matter of MHLS v. Wack*, 75 N.Y.2d 751 (1989)).

<sup>15</sup> Stewart Aff. ¶ 2.

<sup>16</sup> In addition to the Fourth Department's misinterpretation of the relevant case law, it also misconstrued the relief sought by the NhRP. In response, the NhRP has painstakingly and specifically made clear in this Petition that the NhRP is seeking Happy's immediate release from her unlawful imprisonment and is not seeking a change in the conditions of her detention.

In *Stanley*, the court rejected the respondents' argument that, because the NhRP sought Hercules and Leo's "transfer to a chimpanzee sanctuary, it has no legal recourse to habeas corpus," as habeas corpus has been used to "secure [the] transfer of [a] mentally ill individual to another institution." *Id.*

**A. The NhRP's arguments are meritorious and supported by a New York Court of Appeals Justice, Harvard Law and Habeas Corpus Professors, Foreign Courts, Philosophers, and Respected Scientists.**

59. "The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching." *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring); *see also Stanley*, 16 N.Y.S.3d at 917 ("Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed.").

60. As the *Stanley* court noted after issuing an order to show cause on behalf of two chimpanzees, "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" 16 N.Y.S.3d at 912. "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Id.* (citing *Obergefell v. Hodges*, 135 S. Ct. 2602 (2015)). *See, e.g., United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (that no Native American had previously sought relief pursuant to the Federal Habeas Corpus Act did not foreclose a Native American from being characterized as a "person" and being awarded the requested habeas corpus relief); *Somerset*, 1 Lofft 1, 98 Eng. Rep. 499 (that no slave had ever been granted a writ of habeas corpus was no obstacle to the court granting one to the slave petitioner); *see also Lemmon*, 20 N.Y. at 562.

61. The only written opinion from any judge of the New York Court of Appeals, or any American high court, on the issue presented in this case is Judge Fahey's concurrence in *Tommy*, which found the NhRP's arguments meritorious, *supra*.

62. In addition to Judge Fahey's opinion, the Supreme Court of Oregon referenced NhRP's "ongoing litigation" and declared in a similar fashion: "As we continue to learn more about the interrelated nature of all life, the day may come when humans perceive less separation between themselves and other living beings than the law now reflects. However, we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still[.]" *State v. Fessenden*, 355 Or. 759, 769-70 (2014).

63. At least four courts, including the New York Supreme Court in *Stanley*, have issued writs of habeas corpus or orders to show cause on behalf of nonhuman animals, *supra* at paragraphs 24 and 27 through 29.

64. The Indian Supreme Court has held that nonhuman animals have both a statutory and a constitutional right to personhood and certain legal rights. *Animal Welfare Board v. Nagaraja*, 6 SCALE 468 (2014), available at: <https://indiankanoon.org/doc/39696860/> (last visited Sept. 27, 2018).

65. In 2018, the Colombian Supreme Court designated its part of the Amazon rainforest as "as an entity subject of rights," in other words, a "person."<sup>17</sup>

66. Constitutional law scholar Laurence H. Tribe of Harvard Law School, and habeas corpus experts Justin Marceau, of the University of Denver Law School, and Samuel Wiseman, of the Florida State University College of Law, submitted *amicus curiae* briefs in favor of the

<sup>17</sup> See STC4360-2018 (2018-00319-01), <http://www.cortesuprema.gov.co/corte/index.php/2018/04/05/corte-suprema-ordena-proteccion-inmediata-de-la-amazonia-colombiana/>, excerpts available at <https://www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf?x54537> (last visited Sept. 27, 2018).

NhRP's habeas corpus lawsuits.<sup>18</sup> See *Tommy*, 31 N.Y.3d at 1056-57 (Fahey, J., concurring) (finding persuasive the *amicus curiae* briefs of Tribe, Marceau, and Wiseman).

67. A group of North American philosophers submitted an *amicus curiae* brief in support of extending habeas corpus to such autonomous nonhuman animals as chimpanzees.<sup>19</sup> See *id.* at 1058 (“the amici philosophers with expertise in animal ethics and related areas draw our attention to recent evidence that chimpanzees demonstrate autonomy by self-initiating intentional, adequately informed actions, free of controlling influences”). These philosophers included: Kristin Andrews (York University); Gary Comstock (North Carolina State University); G.K.D. Crozier (Laurentian University); Sue Donaldson (Queen’s University); Andrew Fenton (Dalhousie University); Tyler M. John (Rutgers University); L. Syd M Johnson (Michigan Technological University); Robert Jones (California State University, Chico); Will Kymlicka (Queen’s University); Letitia Meynell (Dalhousie University); Nathan Nobis (Morehouse College); David Peña-Guzmán (California State University, San Francisco); James Rocha (California State University, Fresno); Bernard Rollin (Colorado State); Jeffrey Sebo (New York University); Adam Shriver (University of British Columbia); and Rebecca L. Walker (University of North Carolina at Chapel Hill).

68. The NhRP’s cases have captured the interest of the world’s leading legal scholars and the most selective academic publications,<sup>20</sup> while catalyzing the development of an entire

<sup>18</sup> The *amicus curiae* brief of Laurence Tribe in *Kiko* is available at: [https://www.nonhumanrights.org/content/uploads/2016\\_150149\\_Tribe\\_ITMO-The-NonHuman-Rights-Project-v.-Presti\\_Amicus-1-2.pdf](https://www.nonhumanrights.org/content/uploads/2016_150149_Tribe_ITMO-The-NonHuman-Rights-Project-v.-Presti_Amicus-1-2.pdf) (last visited Sept. 27, 2018). The *amicus curiae* brief of Justin Marceau and Samuel Wiseman in *Kiko* is available at: [https://www.nonhumanrights.org/content/uploads/2016\\_150149\\_ITMO-The-Nonhuman-Rights-Project-v.-Presti\\_Amicus.pdf](https://www.nonhumanrights.org/content/uploads/2016_150149_ITMO-The-Nonhuman-Rights-Project-v.-Presti_Amicus.pdf) (last visited Sept. 27, 2018).

<sup>19</sup> See <https://www.nonhumanrights.org/content/uploads/In-re-Nonhuman-Rights-v.-Lavery-Proposed-Brief-by-PHILOSOPHERS-74435.pdf> (last visited Sept. 27, 2018).

<sup>20</sup> See Richard A. Epstein, *Animals as Objects of Subjects of Rights*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Richard A. Posner, *Animal*



field of academic research and debate, generating extensive discussion in almost one hundred law review articles, multiple academic books, science journals, and a variety of legal industry publications.<sup>21</sup>

*Rights: Legal Philosophical, and Pragmatic Perspectives*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); *VI. Aesthetic Injuries, Animal Rights, and Anthropomorphism*, 122 HARV. L. REV. 1204, 1216 (2009); Jeffrey L. Amestoy, *Uncommon Humanity: Reflections on Judging in A Post-Human Era*, 78 N.Y.U. L. REV. 1581 (2003); Richard A. Epstein, *Drawing the Line: Science and the Case for Animal Rights*, 46 PERSPECTIVES IN BIOLOGY AND MEDICINE 469 (2003); Craig Ewasiuk, *Escape Routes: The Possibility of Habeas Corpus Protection for Animals Under Modern Social Contract Theory*, 48 COLUM. HUM. RTS. L. REV. 69 (2017); Adam Kolber, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163 (2001); Will Kymlicka, *Social Membership: Animal Law beyond the Property/Personhood Impasse*, 40 DALHOUSIE LAW JOURNAL 123 (2017); Kenan Malik, *Rights and Wrongs*, 406 NATURE 675 (2000); Greg Miller, *A Road Map for Animal Rights*, 332 SCIENCE 30 (2011); Greg Miller, *The Rise of Animal Law: Will Growing Interest in How the Legal System Deals with Animals Ultimately Lead to Changes for Researchers?* 332 SCIENCE 28 (2011); Martha C. Nussbaum, *Working with and for Animals: Getting the Theoretical Framework Right*, 94 DENV. L. REV. 609, 615 (2017); Martha C. Nussbaum, *Animal Rights: The Need for A Theoretical Basis*, 114 HARV. L. REV. 1506, 1541 (2001); Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527, 541 (2000); Diana Reiss, *The Question of Animal Rights*, 418 NATURE 369 (2002); Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 401 (2003); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000); Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1 (2001).

<sup>21</sup> Richard A. Epstein, *Animals as Objects of Subjects of Rights*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Richard A. Posner, *Animal Rights: Legal Philosophical, and Pragmatic Perspectives*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Justin F. Marceau and Steven M. Wise, "Exonerating the Innocent: Habeas for Nonhuman Animals," WRONGFUL CONVICTIONS AND THE DNA REVOLUTION - TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel S. Medwed, ed. Cambridge University Press 2017); Steven M. Wise, *A Great Shout: Legal Rights for Great Apes*, in THE ANIMAL ETHICS READER (Susan J. Armstrong & Richard G. Botzler eds., 2017); Steven M. Wise, *Animal Rights, One Step at a Time*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Steven M. Wise, *The Capacity of Non-Human Animals for Legal Personhood and Legal Rights*, in THE POLITICS OF SPECIES: RESHAPING OUR RELATIONSHIPS WITH OTHER ANIMALS (Raymond Corbey & Annette Lanjouw eds., 2013); Katrina M. Albright, *The Extension of Legal Rights to Animals Under A Caring Ethic: An Ecofeminist Exploration of Steven Wise's Rattling the Cage*, 42 NAT. RESOURCES J. 915, 917 (2002); Jeffrey L. Amestoy, *Uncommon Humanity: Reflections on Judging in A Post-Human Era*, 78 N.Y.U. L. REV. 1581, 1591 (2003); Pat Andriola, *Equal Protection for Animals*, 6 BARRY U. ENVTL. & EARTH L.J. 50, 64 (2016); Louis Anthes & Michele Host, *Rattling the Cage: Toward Legal Rights for Animals*, by Steven M. Wise, 25 N.Y.U. REV. L. & SOC. CHANGE 479, 482 (1999); Matthew Armstrong, *Cetacean Community v. Bush: The False Hope of Animal Rights Lingers on*, 12 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 185, 200 (2006); Rich Barlow, *Nonhuman Rights: Is It Time to Unlock the Cage?*, BOSTON UNIVERSITY SCHOOL OF LAW, July, 18, 2017, <https://www.bu.edu/law/2017/07/18/nonhuman-rights-is-it-time-to-unlock-the-cage/>; David Barton, *A Death-Struggle Between Two Civilizations*, 13 REGENT U. L. REV. 297, 349 (2001); Douglas E. Beloof, *Crime Victims' Rights: Critical Concepts for Animal Rights*, 7 ANIMAL L. 19, 27 (2001); Lane K.

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**V. The Expert Scientific Affidavits demonstrate that Happy's interest in exercising her autonomy is as vital to her as it is to humans.**

69. Attached are the following affidavits, including four affidavits from five of the world's most renowned experts on the cognitive abilities of elephants and a supplemental affidavit from one of those elephant experts ("Expert Scientific Affidavits"), and an affidavit from an expert in the care and rehabilitation of captive elephants in sanctuary. In total, these affidavits include:

- (a) Joint Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D.
- (b) Affidavit of Joyce Poole, Ph.D.
- (c) Affidavit of Karen McComb, Ph.D.
- (d) Affidavit of Cynthia Moss
- (e) Supplemental Affidavit of Joyce Poole, Ph.D.
- (f) Affidavit of Ed Stewart

70. The Expert Scientific Affidavits—(a) through (e)—demonstrate that Happy possesses complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty. These include: autonomy; empathy; self-awareness; self-

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6 ANIMAL L. 259, 262 (2000); Richard York, *Humanity and Inhumanity: Toward a Sociology of the Slaughterhouse*, 17 ORGANIZATION AND ENVIRONMENT 260 (2004); Randall S. Abate and Jonathan Crowe, *From Inside the Cage to Outside the Box*, 5(1) Global Journal of Animal Law (2017); Jonas - Sebastian Beaudry, *From Autonomy to Habeas Corpus: Animal Rights Activists Take the Parameters of Legal Personhood to Court*, 4(1) Global Journal of Animal Law (2016); Natalie Prosin and Steven M. Wise, *The Nonhuman Rights Project - Coming to a Country Near You*, in 2(2) Global Journal of Animal Law (2014); "Why Things Can Hold Rights: Reconceptualizing the Legal Person," LEGAL PERSONHOOD: ANIMALS, ARTIFICIAL INTELLIGENCE AND THE UNBORN (Tomasz Pietrzykowski and Visa Kurki, eds., Springer, 2017); Brandon Keim, *The Eye of the Sandpiper: Stories from the Living World*, Comstock (2017), pp. 132-150; Charles Seibert, "Should a Chimp Be Able to Sue Its Owner?", *New York Times Magazine* (April 23, 2014), available at: <https://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html> (last visited Feb. 15, 2018); Astra Taylor, "Who Speaks for the Trees?", *The Baffler*, (Sept. 7, 2016), available at: [thebaffler.com/salvos/speaks-trees-astra-taylor](http://thebaffler.com/salvos/speaks-trees-astra-taylor) (last visited Feb. 15, 2018); Sindhu Sundar, "Primal Rights: One Attorney's Quest for Chimpanzee Personhood.", *Law360* (March 10, 2017), available at: <https://www.law360.com/articles/900753> (last visited Feb. 15, 2018).

determination; theory of mind (awareness others have minds); insight; working memory, and an extensive long-term memory that allows them to accumulate social knowledge; the ability to act intentionally and in a goal-oriented manner, and to detect animacy and goal directedness in others; to understand the physical competence and emotional state of others; imitate, including vocal imitation; point and understand pointing; engage in true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do); cooperate and build coalitions; cooperative problem-solving, innovative problem-solving, and behavioral flexibility; understand causation; intentional communication, including vocalizations to share knowledge and information with others in a manner similar to humans; ostensive behavior that emphasizes the importance of a particular communication; wide variety of gestures, signals, and postures; use of specific calls and gestures to plan and discuss a course of action, adjust their plan according to their assessment of risk, and execute the plan in a coordinated manner; complex learning and categorization abilities; and, an awareness of and response to death, including grieving behaviors.

71. African and Asian elephants share numerous complex cognitive abilities with humans, such as self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities.<sup>22</sup>

72. Many of these capacities have been considered — erroneously — as uniquely human; each is a component of autonomy.<sup>23</sup> African and Asian elephants are autonomous, as they exhibit “self-determined behaviour that is based on freedom of choice. As a psychological

<sup>22</sup> Joint Affidavit of Lucy Bates and Richard M. Byrne [“Bates & Byrne Aff.”] ¶37; Affidavit of Karen McComb [“McComb Aff.”] ¶31; Affidavit of Joyce Poole [“Poole Aff.”] ¶29; Affidavit of Cynthia Moss [“Moss Aff.”] ¶25.

<sup>23</sup> Bates & Byrne Aff. ¶37; McComb Aff. ¶31; Poole Aff. ¶29; Moss Aff. ¶25.

concept it implies that the individual is directing their behaviour based on some non-observable, internal cognitive process, rather than simply responding reflexively.”<sup>24</sup>

73. Elephants possess the largest absolute brain of any land animal.<sup>25</sup> Even relative to their body sizes, elephant brains are large.<sup>26</sup>

74. An encephalization quotient (“EQ”) of 1.0 means a brain is exactly the size expected for that body size; values greater than 1.0 indicate a larger brain than expected for that body size. (*Id.*)<sup>27</sup> Elephants have an EQ of between 1.3 and 2.3 (varying between sex and African and Asian species).<sup>28</sup> This means an elephant’s brain can be more than twice as large as is expected for an animal of its size.<sup>29</sup> These EQ values are similar to those of the great apes, with whom elephants have not shared a common ancestor for almost 100 million years.<sup>30</sup>

75. A large brain allows greater cognitive skill and behavioral flexibility.<sup>31</sup> Typically, mammals are born with brains weighing up to 90% of the adult weight.<sup>32</sup> This figure drops to about 50% for chimpanzees.<sup>33</sup> At birth, human brains weigh only about 27% of the adult brain weight and increase in size over a prolonged childhood period.<sup>34</sup> This lengthy period of brain development (termed “developmental delay”) is a key feature of human brain evolution.<sup>35</sup> It provides a longer period in which the brain may be shaped by experience and learning, and plays a role in the emergence of complex cognitive abilities such as self-awareness, creativity, forward

<sup>24</sup> Bates & Byrne Aff. ¶30, ¶60; McComb Aff. ¶24, ¶31, ¶54; Poole Aff. ¶22, ¶53; Moss Aff. ¶18; ¶48.

<sup>25</sup> Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

<sup>26</sup> Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

<sup>27</sup> Encephalization quotients (EQ) are a standardized measure of brain size relative to body size, and illustrate by how much a species’ brain size deviates from that expected for its body size. Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

<sup>28</sup> Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

<sup>29</sup> Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

<sup>30</sup> Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

<sup>31</sup> Bates & Byrne Aff. ¶¶32-33; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

<sup>32</sup> Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

<sup>33</sup> Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

<sup>34</sup> Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

<sup>35</sup> Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

planning, decision making and social interaction.<sup>36</sup> Elephant brains at birth weigh only about 35% of their adult weight, and elephants accordingly undergo a similarly protracted period of growth, development and learning.<sup>37</sup> This similar developmental delay in the elephant brain is likewise associated with the emergence of analogous cognitive abilities.<sup>38</sup>

76. Physical similarities between human and elephant brains occur in areas that link to the capacities necessary for autonomy and self-awareness.<sup>39</sup> Elephant and human brains share deep and complex foldings of the cerebral cortex, large parietal and temporal lobes, and a large cerebellum.<sup>40</sup> The temporal and parietal lobes of the cerebral cortex manage communication, perception, and recognition and comprehension of physical actions, while the cerebellum is involved in planning, empathy, and predicting and understanding the actions of others.<sup>41</sup>

77. Elephant brains hold nearly as many cortical neurons as do human brains, and a much greater number than do chimpanzees or bottlenose dolphins.<sup>42</sup> Elephants' pyramidal neurons — the class of neurons found in the cerebral cortex, particularly the pre-frontal cortex, which is the brain area that controls “executive functions” — are larger than in humans and most other species.<sup>43</sup> The term “executive function” refers to controlling operations, such as paying attention, inhibiting inappropriate responses, and deciding how to use memory search. These abilities develop late in human infancy and are often impaired in dementia. The degree of complexity of pyramidal neurons is linked to cognitive ability, with more complex connections

<sup>36</sup> Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

<sup>37</sup> Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

<sup>38</sup> Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

<sup>39</sup> Bates & Byrne Aff. ¶34; Poole Aff. ¶26; McComb Aff. ¶28; Moss Aff. ¶22.

<sup>40</sup> Bates & Byrne Aff. ¶34; McComb Aff. ¶28; Poole Aff. ¶26; Moss Aff. ¶22.

<sup>41</sup> Bates & Byrne Aff. ¶34; McComb Aff. ¶28; Poole Aff. ¶26; Moss Aff. ¶22.

<sup>42</sup> Humans:  $1.15 \times 10^{10}$ ; elephants:  $1.1 \times 10^{10}$ ; chimpanzees:  $6.2 \times 10^9$ ; dolphins:  $5.8 \times 10^9$ . Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.

<sup>43</sup> Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.

between pyramidal neurons being associated with increased cognitive capabilities.<sup>44</sup> Elephant pyramidal neurons have a large number of connections with other neurons for receiving and sending signals, known as a dendritic tree.<sup>45</sup>

78. Elephants, like humans, great apes, and some cetaceans, possess *von Economo neurons*, or spindle cells, the so-called “air-traffic controllers for emotions,” in the anterior cingulate, fronto-insular, and dorsolateral prefrontal cortex areas of the brain.<sup>46</sup> In humans, these cortical areas are involved, among other things, with the processing of complex social information, emotional learning and empathy, planning and decision-making, and self-awareness and self-control.<sup>47</sup> The presence of spindle cells in the same brain locations in elephants and humans strongly implies that these higher-order brain functions, which are the building blocks of autonomous, self-determined behavior, are common to both species.<sup>48</sup>

79. Elephants have extensive and long-lasting memories.<sup>49</sup> McComb et al. (2000), using experimental playback of long-distance contact calls in Amboseli National Park, Kenya, showed that African elephants remember and recognize the voices of at least 100 other elephants.<sup>50</sup> Each adult female elephant tested was familiar with the contact-call vocalizations of individuals from an average of 14 families in the population.<sup>51</sup> When the calls came from the test elephants’ own family, they contact-called in response and approached the location of the loudspeaker; when they were from another non-related but familiar family, one that had been shown to have a high

<sup>44</sup> Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.

<sup>45</sup> Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.

<sup>46</sup> Bates & Byrne Aff. ¶36; McComb Aff. ¶30; Poole Aff. ¶28; Moss Aff. ¶24.

<sup>47</sup> Bates & Byrne Aff. ¶36; McComb Aff. ¶30; Poole Aff. ¶28; Moss Aff. ¶24.

<sup>48</sup> Bates & Byrne Aff. ¶36; McComb Aff. ¶30; Poole Aff. ¶28; Moss Aff. ¶24.

<sup>49</sup> Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.

<sup>50</sup> Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.

<sup>51</sup> Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.



association index with the test group, they listened but remained relaxed.<sup>52</sup> However, when a test group heard unfamiliar contact calls from groups with a low association index with the test group, the elephants bunched together and retreated from the area.<sup>53</sup>

80. McComb et al. has demonstrated that this social knowledge accumulates with age, with older females having the best knowledge of the contact calls of other family groups, and that older females are better leaders than younger, with more appropriate decision-making in response to potential threats (in this case, in the form of hearing lion roars).<sup>54</sup> Younger matriarchs under-reacted to hearing roars from male lions, elephants, most dangerous predators.<sup>55</sup> Sensitivity to the roars of male lions increased with increasing matriarch age, with the oldest, most experienced females showing the strongest response to this danger.<sup>56</sup> These studies show that elephants continue to learn and remember information about their environments throughout their lives, and this accrual of knowledge allows them to make better decisions and better lead their families as they age.<sup>57</sup>

81. Further demonstration of elephants' long-term memory emerges from data on their movement patterns.<sup>58</sup> African elephants move over very large distances in their search for food and water.<sup>59</sup> Leggett (2006) used GPS collars to track the movements of elephants living in the Namib Desert, with one group traveling over 600 km in five months.<sup>60</sup> Viljoen (1989) showed

<sup>52</sup> Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.

<sup>53</sup> Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.

<sup>54</sup> Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.

<sup>55</sup> Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.

<sup>56</sup> Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.

<sup>57</sup> Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.

<sup>58</sup> Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

<sup>59</sup> Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

<sup>60</sup> Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

that elephants in the same region visited water holes approximately every four days, though some were more than 60 km apart.<sup>61</sup>

82. Elephants inhabiting the deserts of Namibia and Mali may travel hundreds of kilometers to visit remote water sources shortly after the onset of a period of rainfall, sometimes along routes that have not been used for many years.<sup>62</sup> These remarkable feats suggest exceptional cognitive mapping skills that rely upon the long-term memories of older individuals who may have traveled that same path decades earlier.<sup>63</sup> Thus, family groups headed by older matriarchs are better able to survive periods of drought.<sup>64</sup> These older matriarchs lead their families over larger areas during droughts than families headed by younger matriarchs, again drawing on their accrued knowledge, this time about the locations of permanent, drought-resistant sources of food and water, to better lead and protect their families.<sup>65</sup>

83. Studies reveal that long-term memories, and the decision-making mechanisms that rely on this knowledge, are severely disrupted in elephants who have experienced trauma or extreme disruption due to “management” practices initiated by humans.<sup>66</sup> Shannon, *et al.* (2013) demonstrated that South African elephants who experienced trauma decades earlier showed significantly reduced social knowledge.<sup>67</sup> As a result of archaic culling practices, these elephants had been forcibly separated from family members and subsequently taken to new locations.<sup>68</sup> Two decades later, their social knowledge and skills and decision-making abilities were

<sup>61</sup> Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

<sup>62</sup> Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

<sup>63</sup> Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

<sup>64</sup> Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

<sup>65</sup> Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

<sup>66</sup> Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.

<sup>67</sup> Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.

<sup>68</sup> Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.

impoverished compared to an undisturbed Kenyan population.<sup>69</sup> Disrupting elephants' natural way of life has substantial negative impacts on their knowledge and decision-making abilities.<sup>70</sup>

84. Elephants demonstrate advanced working memory skills.<sup>71</sup> Working memory is the ability to temporarily store, recall, manipulate and coordinate items from memory.<sup>72</sup> Working memory directs one's attention to relevant information, utilized in reasoning, planning, coordination, and execution of cognitive processes through a "central executive."<sup>73</sup> Adult human working memory has a capacity of around seven items.<sup>74</sup> When experiments were conducted with wild elephants in Kenya in which the locations of fresh urine samples from related or unrelated elephants were manipulated, the elephants responded by detecting urine from known individuals in surprising locations, thereby demonstrating the ability continually to track the locations of at least 17 family members in relation to themselves, as either absent, present in front of self, or present behind self.<sup>75</sup> This remarkable ability to hold in mind and regularly update information about the locations and movements of a large number of family members is best explained by the fact that elephants possess an unusually large working memory capacity that is much larger than that of humans.<sup>76</sup>

85. Elephants display a sophisticated categorization of their environment on par with humans.<sup>77</sup> Bates, Byrne, Poole, and Moss experimentally presented the elephants of Amboseli National Park, Kenya with garments that gave olfactory or visual information about their human wearers, either Maasai warriors who traditionally attack and spear elephants as part of their rite

<sup>69</sup> Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.

<sup>70</sup> Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.

<sup>71</sup> Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

<sup>72</sup> Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

<sup>73</sup> Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

<sup>74</sup> Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

<sup>75</sup> Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

<sup>76</sup> Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

<sup>77</sup> Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.



of passage, or Kamba men who are agriculturalists and traditionally pose little threat to elephants.<sup>78</sup> In the first experiment, the only thing that differed between the cloths was the smell, derived from the ethnicity and/or lifestyle of the wearers.<sup>79</sup> The elephants were significantly more likely to run away when they sniffed cloths worn by Maasai men than those worn by Kamba men or no one at all. (See “Video 7” attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as “Exhibit K”).<sup>80</sup>

86. In a second experiment, they presented the elephants with two cloths that had not been worn by anyone; one was white (a neutral stimulus) and the other red, the color ritually worn by Maasai warriors.<sup>81</sup> With access only to these visual cues, the elephants showed significantly greater, sometimes aggressive, reactions to red garments than white.<sup>82</sup> They concluded that elephants are able to categorize a single species (humans) into sub-classes (*i.e.*, “dangerous” or “low risk”) based on either olfactory or visual cues alone.<sup>83</sup>

87. McComb, *et al.* further demonstrated that these same elephants distinguish human groups based on voices.<sup>84</sup> The elephants reacted differently, and appropriately, depending on whether they heard Maasai or Kamba men speaking, and whether the speakers were male Maasai versus female Maasai, who also pose no threat.<sup>85</sup> Scent, sounds and visual signs associated specifically with Maasai men are categorized as “dangerous,” while neutral signals are attended to but categorized as “low risk.”<sup>86</sup> These sophisticated, multi-modal categorization skills may be exceptional among non-human animals and demonstrate elephants’ acute sensitivity to the

<sup>78</sup> Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

<sup>79</sup> Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

<sup>80</sup> Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

<sup>81</sup> Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

<sup>82</sup> Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

<sup>83</sup> Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

<sup>84</sup> Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

<sup>85</sup> Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

<sup>86</sup> Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

human world and how they monitor human behavior and learn to recognize when we might cause them harm.<sup>87</sup>

88. Human speech and language reflect autonomous thinking and intentional behavior.<sup>88</sup> Similarly, elephants vocalize to share knowledge and information.<sup>89</sup> Male elephants primarily communicate about their sexual status, rank and identity, whereas females and dependents emphasize and reinforce their social units.<sup>90</sup> Call types are separated into those produced by the larynx (such as “rumbles”) and calls produced by the trunk (such as “trumpets”), with different calls in each category used in different contexts.<sup>91</sup> Field experiments have shown that African elephants distinguish between call types. For example, such contact calls as “rumbles” may travel kilometers and maintain associations between elephants, or “oestrus rumbles” may occur after a female has copulated, and these call types elicit different responses in listeners.<sup>92</sup>

89. Elephant vocalizations are not merely reflexive; they have distinct meanings to listeners and communicate in a manner similar to the way humans use language.<sup>93</sup> Elephants display more than two hundred gestures, signals and postures that they use to communicate information to their audience.<sup>94</sup> Such signals are adopted in many contexts, such as aggressive, sexual or socially integrative situations, are well-defined, carry a specific meaning both to the actor and recipient, result in predictable responses from the audience, and together demonstrate

<sup>87</sup> Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

<sup>88</sup> Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.

<sup>89</sup> Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.

<sup>90</sup> Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.

<sup>91</sup> Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.

<sup>92</sup> Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.

<sup>93</sup> Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.

<sup>94</sup> Bates & Byrne Aff. ¶52; McComb Aff. ¶46; Poole Aff. ¶43; Moss Aff. ¶40.

intentional and purposeful communication intended to share information and/or alter the others' behavior to fit their own will.<sup>95</sup>

90. Elephants use specific calls and gestures to plan and discuss a course of action.<sup>96</sup> These may be to respond to a threat through a group retreating or mobbing action (including celebration of successful efforts), or planning and discussing where, when and how to move to a new location.<sup>97</sup> In group-defensive situations, elephants respond with highly coordinated behaviour, both rapidly and *predictably*, to specific calls uttered and particular gestures exhibited by group members.<sup>98</sup> These calls and gestures carry specific meanings not only to elephant listeners, but to experienced human listeners as well.<sup>99</sup> The rapid, predictable and collective response of elephants to these calls and gestures indicates that elephants have the capacity to understand the goals and intentions of the signalling individual.<sup>100</sup>

91. Elephant group defensive behavior is highly evolved and involves a range of different tactical maneuvers adopted by different elephants.<sup>101</sup> For example, matriarch Provocadora's contemplation of Poole's team through listening and "j-sniffing," followed by her purposeful "perpendicular-walk" (in relation to Poole's team) toward her family and her "ear-flap-slide" clearly communicated that her family should begin a "group-advance" upon Poole's team.<sup>102</sup> This particular elephant attack is a powerful example of elephants' use of empathy, coalition and cooperation.<sup>103</sup> Provocadora's instigation of the "group-advance" led to a two-and-a-half minute "group-charge" in which the three other large adult females of the 36-member

<sup>95</sup> Bates & Byrne Aff. ¶52; McComb Aff. ¶46; Poole Aff. ¶43; Moss Aff. ¶40.

<sup>96</sup> Poole Aff. ¶44.

<sup>97</sup> Poole Aff. ¶44.

<sup>98</sup> Poole Aff. ¶45.

<sup>99</sup> Poole Aff. ¶45.

<sup>100</sup> Poole Aff. ¶45.

<sup>101</sup> Poole Aff. ¶45.

<sup>102</sup> Poole Aff. ¶45.

<sup>103</sup> Poole Aff. ¶45.

family took turns leading the charge, passing the baton, in a sense, from one to the next.<sup>104</sup> Once they succeeded in their goal of chasing Poole's team away, they celebrated their victory by "high-fiving" with their trunks and engaging in an "end-zone-dance."<sup>105</sup> "High-fiving" is also typically used to initiate a coalition and is both preceded by and associated with other specific gestures and calls that lead to very goal oriented collective behavior.<sup>106</sup>

92. Ostensive communication refers to the way humans use particular behavior, such as tone of speech, eye contact, and physical contact, to emphasize that a particular communication is important.<sup>107</sup> Lead elephants in family groups use ostensive communication frequently as a way to say, "Heads up – I am about to do something that you should pay attention to."<sup>108</sup>

93. In planning and communicating intentions regarding a movement, elephants use both vocal and gestural communication.<sup>109</sup> For example, Poole has observed that a member of a family will use the axis of her body to point in the direction she wishes to go and then vocalize, every couple of minutes, with a specific call known as a "let's-go" rumble, "I want to go this way, let's go together."<sup>110</sup> The elephant will also use intention gestures — such as "foot-swinging" — to indicate her intention to move.<sup>111</sup> Such a call may be successful or unsuccessful at moving the group or may lead to a 45-minute or longer discussion (a series of rumble exchanges known as "cadenced rumbles") that researchers interpret as negotiation.<sup>112</sup> Sometimes such negotiation leads to disagreement that may result in the group splitting and going in

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<sup>104</sup> Poole Aff. ¶45.

<sup>105</sup> Poole Aff. ¶45.

<sup>106</sup> Poole Aff. ¶45.

<sup>107</sup> Poole Aff. ¶36.

<sup>108</sup> Poole Aff. ¶36.

<sup>109</sup> Poole Aff. ¶46.

<sup>110</sup> Poole Aff. ¶46.

<sup>111</sup> Poole Aff. ¶46.

<sup>112</sup> Poole Aff. ¶46.

different directions for a period of time.<sup>113</sup> In situations where the security of the group is at stake, such as when movement is planned through or near human settlement, all group members focus on the matriarch's decision.<sup>114</sup> So while "let's go" rumbles are uttered, others adopt a "waiting" posture until the matriarch, after much "listening," "j-sniffing," and "monitoring," decides it is safe to proceed, where upon they bunch together and move purposefully, and at a fast pace in a "group-march."<sup>115</sup>

94. Elephants typically move through dangerous habitat and nighttime hours at high speed in a clearly goal-oriented manner known as "streaking," which has been described and documented through the movements of elephants wearing satellite tracking collars.<sup>116</sup> The many different signals — calls, postures, gestures and behaviors elephants use to contemplate and initiate such movement (including "ear-flap," "ear-flap-slide") — are clearly understood by other elephants (just as they can be understood after long-term study by human observers), mean very specific things, and indicate that elephants: 1) have a particular plan which they can communicate with others; 2) can adjust their plan according to their immediate assessment of risk or opportunity; and 3) can communicate and execute the plan in a coordinated manner.<sup>117</sup>

95. Elephants can vocally imitate sounds they hear, from the engines of passing trucks to the commands of human zookeepers.<sup>118</sup> Imitating another's behavior is demonstrative of a sense of self, as it is necessary to understand how one's own behavior relates to the behavior of others.<sup>119</sup> African elephants recognize the importance of visual attentiveness on the part of an intended recipient, elephant or human, and of gestural communication, which further

<sup>113</sup> Poole Aff. ¶46.

<sup>114</sup> Poole Aff. ¶46.

<sup>115</sup> Poole Aff. ¶46.

<sup>116</sup> Poole Aff. ¶46.

<sup>117</sup> Poole Aff. ¶46.

<sup>118</sup> Bates & Byrne Aff. ¶51; McComb Aff. ¶45; Poole Aff. ¶47; Moss Aff. ¶39.

<sup>119</sup> Bates & Byrne Aff. ¶51; McComb Aff. ¶45; Poole Aff. ¶47; Moss Aff. ¶39.



demonstrates that elephants' gestural communications are intentional and purposeful.<sup>120</sup> This ability to understand the visual attentiveness and perspective of others is crucial for empathy, mental-state understanding, and "theory of mind," the ability to mentally represent and think about the knowledge, beliefs and emotional states of others, while recognizing that these can be distinct from your own knowledge, beliefs and emotions.<sup>121</sup>

96. As do humans, Asian elephants exhibit "mirror self-recognition" (MSR) using Gallup's classic "mark test."<sup>122</sup> MSR is the ability to recognize a reflection in the mirror as oneself, while the mark test involves surreptitiously placing a colored mark on an individual's forehead that she cannot see or be aware of without the aid of a mirror.<sup>123</sup> If the individual uses the mirror to investigate the mark, the individual must recognize the reflection as herself. (See "Video 1," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit D").<sup>124</sup>

97. MSR is significant because it is a key identifier of self-awareness.<sup>125</sup> Self-awareness is intimately related to autobiographical memory in humans and is central to autonomy and being able to direct one's own behavior to achieve personal goals and desires.<sup>126</sup> By demonstrating they can recognize themselves in a mirror, elephants must be holding a mental representation of

<sup>120</sup> Bates & Byrne Aff. ¶53; McComb Aff. ¶47; Poole Aff. ¶48; Moss Aff. ¶41.

<sup>121</sup> Bates & Byrne Aff. ¶40, ¶53; McComb Aff. ¶34, ¶47; Poole Aff. ¶32, ¶48; Moss Aff. ¶28, ¶41.

<sup>122</sup> Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26. Happy has specifically been found to possess Mirror Self-Recognition (MSR) which is an indicator of self-consciousness. See *supra* n.11.

<sup>123</sup> Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.

<sup>124</sup> Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.

<sup>125</sup> Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.

<sup>126</sup> "Autobiographical memory" refers to what one remembers about his or her own life; for example, not that "Paris is the capital of France," but the recollection that you had a lovely time when you went there. Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.

themselves from another perspective and thus be aware that they are a separate entity from others.<sup>127</sup>

98. One who understands the concept of dying and death must possess a sense of self.<sup>128</sup> Both chimpanzees and elephants demonstrate an awareness of death by reacting to dead family or group members.<sup>129</sup> Having a mental representation of the self, which is a pre-requisite for mirror-self recognition, likely confers an ability to comprehend death.<sup>130</sup>

99. Wild African elephants have been shown experimentally to be more interested in the bones of dead elephants than the bones of other animals. (See "Video 2," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit E").<sup>131</sup> They have frequently been observed using their tusks, trunk or feet to attempt to lift sick, dying or dead individuals.<sup>132</sup> Although they do not give up trying to lift or elicit movement from a dead body immediately, elephants appear to realize that once dead, the carcass can no longer be helped; and instead they engage in more "mournful" or "grief-stricken" behavior, such as standing guard over the body with dejected demeanor and protecting it from predators. (See "Photographs," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit F").<sup>133</sup>

100. Wild African elephants have been observed to cover the bodies of their dead with dirt and vegetation.<sup>134</sup> Mothers who lose a calf may remain with the calf's body for an extended

<sup>127</sup> Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.

<sup>128</sup> Poole Aff. ¶31; Bates & Byrne Aff. ¶39; Moss Aff. ¶27.

<sup>129</sup> Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

<sup>130</sup> Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

<sup>131</sup> Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

<sup>132</sup> Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

<sup>133</sup> Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

<sup>134</sup> Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

period, but do not behave towards the body as they would a live calf.<sup>135</sup> Indeed, the general demeanor of elephants attending to a dead elephant is one of grief and compassion, with slow movements and few vocalizations.<sup>136</sup> These behaviors are akin to human responses to the death of a close relative or friend and demonstrate that elephants possess some understanding of life and the permanence of death. (See “Photographs,” attached to the Affidavit of Karen McComb, Ph.D. on CD as “Exhibit E”).<sup>137</sup>

101. Elephants’ interest in the bodies, carcasses and bones of elephants who have passed is so marked that when one has died, trails to the site of death become worn into the ground by the repeated visits of many elephants over days, weeks, months, even years.<sup>138</sup> The accumulation of dung around the site attests to the extended time that visiting elephants spend touching and contemplating the bones.<sup>139</sup> Poole observed that, over years, the bones may become scattered over tens or hundreds of square meters as elephants pick up the bones and carry them away.<sup>140</sup> The tusks are of particular interest and may be carried and deposited many hundreds of meters from the site of death.<sup>141</sup>

102. The capacity for mentally representing the self as an individual entity has been linked to general empathic abilities.<sup>142</sup> Empathy is defined as identifying with and understanding another’s experiences or feelings by relating personally to their situation.<sup>143</sup>

103. Empathy is an important component of human consciousness and autonomy and is a cornerstone of normal social interaction.<sup>144</sup> It requires modeling the emotional states and desired

<sup>135</sup> Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

<sup>136</sup> Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

<sup>137</sup> Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

<sup>138</sup> Poole Aff. ¶31.

<sup>139</sup> Poole Aff. ¶31.

<sup>140</sup> Poole Aff. ¶31.

<sup>141</sup> Poole Aff. ¶31.

<sup>142</sup> Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.

<sup>143</sup> Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.



goals that influence others' behavior both in the past and future, and using this information to plan one's own actions; empathy is only possible if one can adopt or imagine another's perspective, and attribute emotions to that other individual.<sup>145</sup> Thus, empathy is a component of "theory of mind."<sup>146</sup>

104. Elephants frequently display empathy in the form of protection, comfort and consolation, as well as by actively helping those in difficulty, such as assisting injured individuals to stand and walk, or helping calves out of rivers or ditches with steep banks. (See "Video 3," attached to the Affidavit of Karen McComb, Ph.D. on CD as "Exhibit F").<sup>147</sup> Elephants have been seen to react when anticipating the pain of others by wincing when a nearby elephant stretched her trunk toward a live wire, and have been observed feeding those unable to use their own trunks to eat and attempting to feed those who have just died.<sup>148</sup>

105. In an analysis of behavioural data collected from wild African elephants over a 40-year continuous field study, Bates and colleagues concluded that as well as possessing their own intentions, elephants can diagnose animacy and goal directedness in others, understand the physical competence and emotional state of others, and attribute goals and mental states (intentions) to others.<sup>149</sup>

106. This is borne out by examples such as:

IB family is crossing river. Infant struggles to climb out of bank after its mother. An adult female [not the mother] is standing next to calf and moves closer as the infant struggles. Female does not push calf out with its trunk, but digs her tusks into the mud behind the calf's front right leg which acts to provide some anchorage for the calf, who then scrambles up and out and rejoins mother.

<sup>144</sup> Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.

<sup>145</sup> Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.

<sup>146</sup> Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.

<sup>147</sup> Bates & Byrne Aff. ¶41; McComb Aff. ¶35; Poole Aff. ¶33; Moss Aff. ¶29.

<sup>148</sup> Bates & Byrne Aff. ¶41; McComb Aff. ¶35; Poole Aff. ¶33; Moss Aff. ¶29.

<sup>149</sup> Bates & Byrne Aff. ¶42; McComb Aff. ¶36; Poole Aff. ¶34; Moss Aff. ¶30.

At 11.10ish Ella gives a “lets go” rumble as she moves further down the swamp . .

. At 11.19 Ella goes into the swamp. The entire group is in the swamp except Elspeth and her calf [<1 year] and Eudora [Elspeth’s mother]. At 11.25 Eudora appears to “lead” Elspeth and the calf to a good place to enter the swamp — the only place where there is no mud.

(See “Video 3,” attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as “Exhibit G”).<sup>150</sup>

107. In addition to the examples analyzed in Bates, *et al.*, Poole observed two adult females rush to the side of a third female who had just given birth, back into her, and press their bodies to her in what appeared to be a spontaneous attempt to prevent injury to the newborn.<sup>151</sup>

In describing the situation, Poole wrote:

The elephants’ sounds [relating to the birth] also attracted the attention of several males including young and inexperienced, Ramon, who, picking up on the interesting smells of the mother [Ella], mounted her, his clumsy body and feet poised above the newborn. Matriarch Echo and her adult daughter Erin, rushed to Ella’s side and, I believe, purposefully backed into her in what appeared to be an attempt to prevent the male from landing on the baby when he dismounted.<sup>152</sup>

108. Such examples demonstrate that the acting elephant(s) (the adult female in the first example, Eudora in the second, and Erin and Echo in the third) were able to understand the intentions or situation of the other (the calf in the first case, Elspeth in the second, Ella’s newborn and the male in the third), and could adjust their own behavior to counteract the problem being faced by the other.<sup>153</sup>

109. In raw footage Poole acquired of elephant behavior filmed by her brother in the Mara, Kenya, an “allo-mother” (an elephant who cares for an infant and is not the infant’s mother or father) moves a log from under the head of an infant in what appears to be an effort to make him more comfortable. (See “Video 1,” attached to the Affidavit of Joyce Poole, Ph.D. on

<sup>150</sup> Bates & Byrne Aff. ¶42.

<sup>151</sup> Poole Aff. ¶34.

<sup>152</sup> Poole Aff. ¶34.

<sup>153</sup> Bates & Byrne Aff. ¶42; McComb Aff. ¶36; Poole Aff. ¶34; Moss Aff. ¶30.

CD as “Exhibit C”).<sup>154</sup> In a further example of the ability to understand goal directedness of others, elephants appear to understand that vehicles drive on roads or tracks and they further appear to know where these tracks lead.<sup>155</sup> In Gorongosa, Mozambique, where elephants exhibit a culture of aggression toward humans, charging, chasing and attacking vehicles, adult females anticipate the direction the vehicle will go and attempt to cut it off by taking shortcuts *before* the vehicle has begun to turn.<sup>156</sup>

110. Empathic behavior begins early in elephants. In humans, rudimentary sympathy for others in distress has been recorded in infants as young as 10 months old; young elephants similarly exhibit sympathetic behavior.<sup>157</sup> For example, during fieldwork in the Maasai Mara in 2011, Poole filmed a mother elephant using her trunk to assist her one-year-old female calf up a steep bank. Once the calf was safely up the bank she turned around to face her five-year-old sister, who was also having difficulties getting up the bank. As the older calf struggled to clamber up the bank the younger calf approached her and first touched her mouth (a gesture of reassurance among family members) and then reached her trunk out to touch the leg that had been having difficulty. Only when her sibling was safely up the bank did the calf turn to follow her mother. (See “Video 2,” attached to the Affidavit of Joyce Poole, Ph.D. on CD as “Exhibit D”).<sup>158</sup>

111. Captive African elephants attribute intentions to others, as they follow and understand human pointing gestures.<sup>159</sup> The elephants understood that the human experimenter was pointing to communicate information to them about the location of a hidden object. (See

<sup>154</sup> Poole Aff. ¶34.

<sup>155</sup> Poole Aff. ¶34.

<sup>156</sup> Poole Aff. ¶34.

<sup>157</sup> Poole Aff. ¶34.

<sup>158</sup> Poole Aff. ¶34.

<sup>159</sup> Bates & Byrne Aff. ¶43; McComb Aff. ¶37; Poole Aff. ¶35; Moss Aff. ¶31.

“Video 4,” attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as “Exhibit H”).<sup>160</sup> Attributing intentions and understanding another’s reference point is central to both empathy and “theory of mind.”<sup>161</sup>

112. There is evidence of “natural pedagogy,” or true teaching — whereby a teacher takes into account the knowledge states of the learner as she passes on relevant information — in elephants. Bates, Byrne, and Moss’s analysis of simulated “oestrus behaviours”<sup>162</sup> in African elephants — whereby a non-cycling, sexually experienced older female will simulate the visual signals of being sexually receptive, even though she is not ready to mate or breed again — demonstrates that these knowledgeable females can adopt false “oestrus behaviours” to demonstrate to naïve young females how to attract and respond appropriately to suitable males.<sup>163</sup> The experienced females may be taking the youngster’s lack of knowledge into account and actively showing them what to do — a possible example of true teaching as it is defined in humans.<sup>164</sup> This evidence, coupled with the data showing they understand the ostensive cues in human pointing, suggests that elephants understand the intentions and knowledge states (minds) of others.<sup>165</sup>

113. Coalitions and cooperation have been frequently documented in wild African elephants, particularly to defend family members or close allies from (potential) attacks by

<sup>160</sup> Bates & Byrne Aff. ¶43; McComb Aff. ¶37; Poole Aff. ¶35; Moss Aff. ¶31.

<sup>161</sup> Bates & Byrne Aff. ¶43; McComb Aff. ¶37; Poole Aff. ¶35; Moss Aff. ¶31.

<sup>162</sup> Bates & Byrne Aff. ¶44. Ostension is the way that we can “mark” our communications to show people that that is what they are. If you do something that another copies, that’s imitation; but if you deliberately indicate what you are doing to be helpful, that’s “ostensive” teaching. Similarly, we may “mark” a joke, hidden in seemingly innocent words; or “mark” our words as directed towards someone specific by catching their eye. Ostension implies that the signaller knows what she is doing.

<sup>163</sup> Bates & Byrne Aff. ¶44; McComb Aff. ¶38; Poole Aff. ¶36; Moss Aff. ¶32.

<sup>164</sup> Bates & Byrne Aff. ¶44; McComb Aff. ¶38; Poole Aff. ¶36; Moss Aff. ¶32.

<sup>165</sup> Bates & Byrne Aff. ¶44; McComb Aff. ¶38; Poole Aff. ¶36; Moss Aff. ¶32.

outsiders, such as when one family group tries to “kidnap” a calf from an unrelated family.<sup>166</sup> These behaviors are generally preceded by gestural and vocal signals, typically given by the matriarch and acted upon by family members, and are based on one elephant understanding the emotions and goals of a coalition partner.<sup>167</sup>

114. Cooperation is evident in captive Asian elephants, who demonstrate they can work together in pairs to obtain a reward, but also understand the pointlessness of attempting the task if their partner was not present or could not access the equipment. (See “Video 5,” attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as “Exhibit I”).<sup>168</sup> Problem-solving and working together to achieve a collectively desired outcome involve mentally representing both a goal and the sequence of behaviors that is required to achieve that goal; it is based on (at the very least) short-term action planning.<sup>169</sup>

115. Wild elephants have frequently been observed engaging in such cooperative problem-solving as retrieving calves kidnapped by other groups, helping calves out of steep, muddy river banks (see “Video 3,” attached to the Affidavit of Karen McComb, Ph.D. on CD as “Exhibit F”), rescuing a calf attacked by a lion (acoustic recording calling to elicit help from others), and navigating through human-dominated landscapes to reach a desired destination such as a habitat, salt-lick, or waterhole.<sup>170</sup> These behaviors demonstrate the purposeful and well-coordinated social system of elephants and show that elephants can collectively hold specific

<sup>166</sup> Bates & Byrne Aff. ¶45; McComb Aff. ¶39; Poole Aff. ¶37; Moss Aff. ¶33.

<sup>167</sup> Bates & Byrne Aff. ¶45; McComb Aff. ¶39; Poole Aff. ¶37; Moss Aff. ¶33.

<sup>168</sup> Bates & Byrne Aff. ¶46; McComb Aff. ¶40; Poole Aff. ¶38; Moss Aff. ¶34.

<sup>169</sup> Bates & Byrne Aff. ¶46; McComb Aff. ¶40; Poole Aff. ¶38; Moss Aff. ¶34.

<sup>170</sup> Bates & Byrne Aff. ¶47; McComb Aff. ¶41; Poole Aff. ¶39; Moss Aff. ¶35.



aims in mind, then work together to achieve those goals.<sup>171</sup> Such intentional, goal-directed action forms the foundation of independent agency, self-determination, and autonomy.<sup>172</sup>

116. Elephants also show innovative problem-solving in experimental tests of insight, defined as the “a-ha” moment when a solution to a problem suddenly becomes clear.<sup>173</sup> A juvenile male Asian elephant demonstrated such a spontaneous action by moving a plastic cube and standing on it to obtain previously out-of-reach food.<sup>174</sup> After solving this problem once, he showed flexibility and generalization of the technique to other similar problems by using the same cube in different situations, or different objects in place of the cube when it was unavailable. (See “Video 6,” attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as “Exhibit J”).<sup>175</sup> This experiment demonstrates that elephants can choose an appropriate action and incorporate it into a sequence of behavior to achieve a goal they kept in mind throughout the process.<sup>176</sup>

117. Asian elephants demonstrate the ability to understand goal-directed behavior.<sup>177</sup> When presented with food that was out of reach, but with some bits resting on a tray that could be pulled within reach, elephants learned to pull only those trays baited with food.<sup>178</sup> Success in this kind of “means-end” task demonstrates causal knowledge, which requires understanding not just that two events are associated with each other, but that some mediating force connects and

<sup>171</sup> Bates & Byrne Aff. ¶47; McComb Aff. ¶41; Poole Aff. ¶39; Moss Aff. ¶35.

<sup>172</sup> Bates & Byrne Aff. ¶47; McComb Aff. ¶41; Poole Aff. ¶39; Moss Aff. ¶35.

<sup>173</sup> Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36. In cognitive psychology terms, “insight” is the ability to inspect and manipulate a mental representation of something, even when you can’t physically perceive or touch the something at the time. Simply, insight is using only thinking to solve problems.

<sup>174</sup> Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36.

<sup>175</sup> Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36.

<sup>176</sup> Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36.

<sup>177</sup> Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.

<sup>178</sup> Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.

affects the two which may be used to predict and control events.<sup>179</sup> Understanding causation and inferring object relations may be related to understanding psychological causation, which is appreciation that others are animate beings who generate their own behavior and have mental states (*e.g.*, intentions).<sup>180</sup>

### CONCLUSION

118. An extraordinarily cognitively complex autonomous individual's species should be irrelevant to whether she should have the fundamental right to the bodily liberty — the autonomy — that habeas corpus protects.

WHEREFORE, the NhRP respectfully demands the following relief:

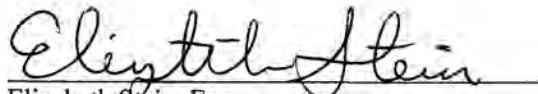
A. Issuance of the attached Writ of Habeas Corpus and Order to Show Cause demanding that Respondents demonstrate forthwith the basis for their imprisonment of Happy;

B. Upon a determination that Happy is being unlawfully imprisoned order her immediate release from Respondents' custody to an appropriate sanctuary, preferably PAWS;

D. Award the NhRP the costs and disbursements of this action; and

E. Grant such other and further relief as this Court deems just and proper.

Dated: October 2, 2018

  
Elizabeth Stein, Esq.  
Attorney for Petitioner  
5 Dunhill Road  
New Hyde Park, New York 11040  
(516) 747-4726

<sup>179</sup> Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.

<sup>180</sup> Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.

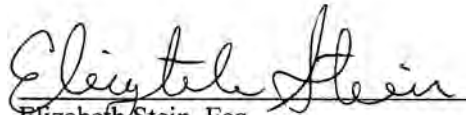
(6)

VERIFICATION

The undersigned is an attorney admitted to practice in the courts of New York State and is the attorney of record for Petitioner, The Nonhuman Rights Project, Inc. ("NhRP") in this action. Deponent has read the foregoing Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause and is familiar with the contents thereof; the same is true to the deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent and not by the NhRP, because the NhRP does not reside nor maintain its office in the county where your deponent maintains her office. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are based upon a review of the facts, pleadings and proceedings in this matter, as well as conversations with the NhRP.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: October 2, 2018

  
Elizabeth Stein, Esq.

ORLEANS CO CLERK NY  
2018 OCT 10 AM 9:17



**AFFIDAVIT OF JOYCE POOLE, FOR PETITIONER, IN SUPPORT OF PETITION,  
SWORN TO DECEMBER 2, 2016 [A-139 - A-164]**

COUNTRY OF UNITED STATES )  
 PROVINCE OF DISTRICT OF COLUMBIA ) ss:  
 MUNICIPALITY OF WASHINGTON )

COPY

**Affidavit of Joyce Poole**

Joyce Poole being duly sworn, deposes and says:

**Introduction and Qualifications**

1. My name is Joyce Poole. I graduated with a Bachelors of Art with High Honors in Biological Sciences from Smith College in 1979. I received my PhD from the University of Cambridge in 1982 from the Sub-Department for Animal Behaviour, under the supervision of Professor Robert Hinde. I completed a Postdoctoral Research Fellowship from 1984-1988 at Princeton University under the guidance of Professor Daniel Rubenstein. I reside and work in Sandefjord, Norway, and in Il Masin, Kajiado County, Kenya. I run elephant behavior and conservation projects in Maasai Mara ecosystem, Kenya, and in Gorongosa National Park, Mozambique

2. I submit this affidavit in support of The Nonhuman Rights Project, Inc. (NhRP). I have personal knowledge of the facts to which I attest, and am not a party to this proceeding.

3. I have studied wild elephants in Africa and worked toward their conservation and welfare for more than 40 years. My research interests are focused on social and reproductive behavior, acoustic and gestural communication, cognitive science, decision-making, and conservation. I am currently Co-Director of ElephantVoices, a California 501(c)(3) non-profit organization I co-founded in 2002, which aims to inspire wonder in the intelligence, complexity and voices of elephants, and to secure a kinder future for them. We advance the study of elephant cognition, communication and social behavior, and promote the scientifically sound and ethical management and care of elephants through research, conservation, advocacy, and the sharing of knowledge. Specifically, I direct the research, conservation, and welfare work for ElephantVoices.

4. In addition to co-directing ElephantVoices, I have worked and conducted research for a number of organizations, including: (1) as the Research Director of the Amboseli Elephant Research Project from 2002-2007, for the Amboseli Trust for

Elephants, where I oversaw the elephant monitoring, collaborative research projects, and training programs for the then 3 decades-long study of elephants; (2) as a scientific advisor for Discovery in July, 1996 and July, 1997, for the IMAX production *Africa's Elephant Kingdom*; (3) as a Consultant for Richard Leakey & Associates from 1994-1997 performing training, lecturing, and advising for wildlife documentaries; (4) as an Author from 1994-1995 for *Coming of Age with Elephants* (Hyperion Press, 1996; Hodder & Stoughton, 1996); (5) as a Coordinator of the Elephant Program for the Kenya Wildlife Service from 1991-1994, setting and implementing Kenya's elephant conservation and management policy, supervising management-oriented research, reconciling land use and other conflicts between elephants and people, and building local expertise; (6) as a Consultant for the World Bank, from 1990-1991, developing Pre-Project Facility by drafting the Elephant Conservation and Management Policy and Research Policy Framework and Investment Program for the Kenya Wildlife Service; (7) as a Consultant for the International Union for the Conservation of Nature, in 1990, compiling an overview of elephant conservation in Eastern Africa for the Paris Donors Conference; (8) as a Consultant for the Tanzanian Wildlife Department in 1989, drafting a successful proposal to the Convention on Trade in Endangered Species to up list the African elephant to Appendix I of the Convention; (9) as a Consultant to the World Wildlife Fund in 1989, engaging in discussions with Japanese and Chinese government officials and ivory carvers regarding detrimental impacts of the ivory trade on elephant survival; (10) as a Researcher for the African Wildlife Foundation in 1989, assembling data on effects of poaching on East African elephant populations; and (11) as a Researcher for the Amboseli Elephant Research Project from 1975-1980.

5. I have conducted field work as part of my scientific research in multiple sites in multiple countries over my career, including: (1) elephant monitoring, conservation and research as part of the Gorongosa Restoration Project in Mozambique, ongoing since 2011; (2) elephant monitoring and conservation project in the Maasai Mara ecosystem in Kenya, ongoing since 2010; (3) the initiation of Asian elephant monitoring and conservation in the Minneriya-Kaudulla National Parks in Sri Lanka in 2008; (4) the study of elephant communication, cognition, and social behavior, conducting playback experiments, and recording elephant vocalizations and behavior in the Amboseli National Park in Kenya, 1998-2009; (5) recording elephant

vocalizations and behavior in Maasai Mara National Park, Tsavo National Park, and Laikipia District in Kenya in 1998; (6) assessing the numbers and habitat use of elephants in West Kilimanjaro, Tanzania in 1997; (7) overseeing numerous elephant surveys and studies of elephants carried out under my direction by the Kenya Wildlife Service Elephant Program in Kenya from 1990-1994; (8) studying elephant vocal and olfactory communication via vocal, visual, and chemical signaling and assessment between musth males in Amboseli National Park, Kenya from 1984-1990; studying the contextual use of very low frequency calls by elephants (9) assessing the effects of poaching on the age structure and social and reproductive patterns of elephant populations in Amboseli, Tsavo, Queen Elizabeth, and Mikumi National Parks in Kenya, Uganda, and Tanzania in 1989; (10) Focal animal sampling musth and male-male competition among elephants in Amboseli National Park, Kenya from 1980-1982; and (11) participating in Cynthia Moss' long-term studies of elephants in Amboseli National Park, Kenya from 1975-1979.

6. Over the course of my career, I have received several awards and honors related to my research, including; (1) an Outstanding Lifetime Achievement Award from the Jackson Hole Wildlife Film Festival in 2015; (2) a Certificate of Recognition from the California State Legislature and Assembly in 2007, for "tireless efforts in educating people on elephant captivity"; (3) the Smith College Medal in 1996 for elephant research and conservation work "exemplifying the true purpose of a liberal arts education"; (4) an F32 National Research Service Award (NRSA) Individual Postdoctoral Fellowship from the National Institute of Mental Health from 1985-1988; (5) a Research Fellowship from the Harry Frank Guggenheim Foundation in 1984; (6) a Research Fellowship from the New York Zoological Society from 1980-1981; (7) a Graduate Study Fellowship from Smith College in 1981; (8) the Sarah. W. Wilder and Sarah W. Whipple Fellowship from 1979-1980; (9) Sigma Xi from 1979-1980; and (10) the A. Brazier Howell Award in 1979 for my paper on *musth* in African elephants, presented at the 1979 American Society of Mammalogists meetings.

7. I am affiliated with a number of professional organizations and hold several board and advisory memberships, including: (1) member of the Board for the Global Sanctuary for Elephants, from 2014-present; (2) member of the Advisory Board for the Kimmela Center for Animal Advocacy, from 2013-present; (3) member of the

Scientific Advisory Board for Elephant Aid International, from 2010-present; (4) member of the Alliance for Captive Elephants, in 2010; (5) member of the Board of Directors for ElephantVoices, from 2008-present; (6) member of Ethologists for the Ethical Treatment of Animals, from 2002-present; (7) member of the Scientific Advisory Committee for the Amboseli Elephant Research Project, from 2002-present; (8) member of the Science Advisory Board for the Captive Elephant Management Coalition, from 1988-2001; (9) member of the Panel of Experts for the Species Survival Network, in 2004; (10) Trustee for the Amboseli Trust for Elephants, from 2002-2011; and (11) member of the African Elephant Specialist Group, as part of the Species Survival Commission for the IUCN, from 1988-2001.

8. I have written two books concerning my work with elephants, including: (1) *Elephants* (1997, Colin Baxter Photography, Grantown-on-Spey, Scotland), and (2) *Coming of Age with Elephants* (1996, Hyperion Press, New York; 1996, Hodder & Stoughton, London).

9. I have published 28 peer-reviewed scientific articles over my career. These articles have been published in many of the world's premier scientific journals, including: *Nature*, *Science*, *Frontiers in Zoology*, *Biology Letters*, *Proceedings of the Royal Society B*, *Immunogenetics*, *PLoS ONE*, *The Ecologist*, *Animal Behaviour*, *Oryx*, *Behavioral Ecology and Sociobiology*, *Behavior*, *Journal of Reproduction and Fertility*, *Molecular Ecology*, *Journal of Consciousness Studies*, *Current Biology*, *Journal of the Acoustical Society of America*, *Etica and Animali*, and *Conservation Biology*. Specific topics of these publications include: Persistence of effects of social disruption in elephants decades after culling, Persistence of early life experiences 40 decades later on survival and success among African elephants, Poaching and wildlife conservation, Leadership in elephants: the adaptive value of age, Elephants, ivory, and trade, Simulated oestrus behavior in African elephants, Major histocompatibility complex variation and evolution in two genera of elephants, Fine-scaled population genetic structure in a fission-fusion society, Do elephants show empathy?, Elephant cognition, Behavioural inbreeding avoidance in wild African elephants, African elephants have expectations about locations of out-of-sight family members, Elephants can classify human ethnic groups by odour and garment colour, Age, musth, and paternity success in wild male African elephants, Wild African elephants discriminate between familiar and unfamiliar conspecific seismic alarm calls, Social

trauma early in life can affect physiology, behavior, and culture of animals and humans over generations, Elephants are capable of vocal learning, Older bull elephants control young males, African elephants assess acoustic signals, The Aggressive state of musth in African elephants, Mate guarding, reproductive success, and female choice in African elephants, Rutting behavior in African elephants, and Musth in the African elephant. Additionally, my research has been published in six non-peer reviewed publications.

10. My scientific work has also been published as chapters in several peer-refereed books, including *Mammals of Africa* (2013, Academic Press), *The Amboseli Elephants: A Long-Term Perspective on a Long-Lived Mammal* (2011, University of Chicago Press), *An Elephant in the Room: The Science and Well Being of Elephants in Captivity* (2008, Tufts University Cummings School of Veterinary Medicine's Center for Animals and Public Policy), *Elephants and Ethics: Toward a morality of Co-existence* (2003, Johns Hopkins University Press), *Behavioral Ecology and Conservation Biology* (1998, Oxford University Press), *The Differences Between the Sexes* (1994, Cambridge University Press), *Primate Social Relationships* (1983, Blackwell Scientific Publications). In addition to these peer-reviewed book chapters, my scientific work has been published in three additional book chapters, which were not refereed.

11. My scientific research has additionally been published in several peer-reviewed symposia proceedings, including "Vocal imitation in African savannah elephants (*Loxodonta Africana*)" in *Razprave IV* (2006, Rezreda Sazu XLVII-3); "Conservation biology: The ecology and genetics of endangered species," in *Genes in Ecology* (1991, Blackwell Scientific Publications, London, The 33<sup>rd</sup> Symposium of the British Ecological Society); "Elephant mate searching: Group dynamics and vocal and olfactory communication" and in *The Biology of Large African Mammals in their Environment* (1989, Clarendon Press, Oxford, Proceedings of the Symposium of the Zoological Society of London).

12. In addition to my peer-reviewed scientific publications, I have also published a number of technical reports for various foundations, working groups, and organizations. These reports include: (1) a series of reports relating to our work on elephants in the Maasai Mara from 2012-2015; (2) a series of reports relating to our work on elephants in Gorongosa National Park from 2012-2015 (3) a 2010 critique of

"The status of African elephants (*Loxodonta africana*) in the 2008 IUCN Red List of Threatened Species"; (4) a 1997 Typescript Report describing a survey of elephants and other wildlife of the West Kilimanjaro Basin, Tanzania; (5) a 1996 report in "Decentralization and Biodiversity Conservation" as part of a World Bank Symposium; (6) a 1994 report in the *Proceedings of the 2<sup>nd</sup> International Conference on Advances in Reproductive Research in Man and Animals* about the Logistical and ethical considerations in the management of elephant populations through fertility regulation; (7) a 1993 report detailing Kenya's Initiatives in Elephant Fertility Regulation and Population Control Techniques in *Pachyderm*; (8) a 1992 survey of the Shimba Hills elephant population for the Elephant Programme, Kenya Wildlife Service; (9) a 1992 report on the Status of Kenya's Elephants by the Kenya Wildlife Service and the Department of Resource Surveys and Remote Sensing; (10) a 1991 Elephant Conservation Plan for the Kenya Wildlife Service, Ministry of Tourism and Wildlife; (11) a 1990 Regional Overview of Elephant Conservation in Eastern Africa, in *Regional Perspectives and Situation Regarding Elephant Conservation and the Ivory Trade*, produced for the Paris Donors Meeting of the IUCN; (12) a 1990 report on Elephant Conservation and Management in *The Zebra Book, Policy Framework and Five-year Investment Programme* for the Kenya Wildlife Service; and (13) a 1989 report on The effects of poaching on the age structures and social and reproductive patterns of selected East African elephant populations in *The Ivory Trade and the Future of the African Elephant* for the 7<sup>th</sup> CITES Conference of the Parties.

13. In addition to my scientific publications, I have also published 14 popular articles in more general publications, including: National Geographic's blog *A Voice for Elephants*, *Basecamp Explorer AS*, *Swara*, *Care for the Wild News*, *Sotokoto*, *Wildlife News*, *Komba*, *Animal Kingdom*, and *Natural History*.

14. I have been an invited speaker at international meetings and symposia throughout the world, including: (1) Keynote, Jackson Hole Wildlife Film Festival, 2015; (2) National Geographic Retreat, International Council of Advisors in Stockholm, Sweden, 2014; (3) Chinese Zoo Directors Meeting on Animal Welfare, in Shenzhen, China in 2013; (4) the Royal Geographical Society, Hong Kong, China in 2013; (5) the Explorer's Club in New York, 2013; (6) the Explorer's Symposium for National Geographic, in Washington, DC in 2012; (7) "Nature's great masterpiece: Stories of



Elephants," the 2012 Sabine Distinguished Lecture in Psychology, Colorado College; (8) Panel discussion for the National Geographic Society, Washington DC in 2008; (9) Seminar on Language Evolution and Cognition held by Communication Research Centre, Northumbria University & Language Evolution and Computation Research Unit, University of Edinburgh, Scotland in 2007; (10) Public lecture at the Explorer's Club, New York in 2007; (11) lecture on communication, behavior, and social life among elephants, for the Science Museums of the la Caixa Foundation, Barcelona, Spain in 2006; (12) speaker in series of lectures on Animal Communication, for the Science Museums of the la Caixa Foundation, in Madrid, Spain in 2006; and (13) lecture on Animal Cognition and Communication, at the Tufts Center for Animals and Public Policy in Boston in 1999.

15. In addition to my scientific research, I have also focused extensively throughout my career on public education and outreach. I have utilized many different media formats in pursuit of this goal. I currently maintain three websites, including: (1) [www.ElephantVoices.org](http://www.ElephantVoices.org) - about elephant social behavior, communication and welfare; (2) [www.facebook.com/elephantvoices](http://www.facebook.com/elephantvoices); and (3) <http://www.theelephantcharter.info> - The Elephant Charter, co-written in 2008 by Joyce Poole, Cynthia Moss, Raman Sukumar, Andrea Turkalo and Katy Payne. I also currently maintain five online databases for the general public, including: (1) The Mara Elephants Who's Who Database (on <http://www.elephantvoices.org>); (2) The Mara Elephants Whereabouts Database (on <http://www.elephantvoices.org>); (3) ElephantVoices Gestures Database (on <http://www.elephantvoices.org>); (4) ElephantVoices Call Type & Context-Type Databases (on <http://www.elephantvoices.org>). I further developed, populate, and maintain elephant databases for the Gorongosa National Park including: (5) The Gorongosa Who's Who Database (on <http://www.elephantvoices.org>); and (6) The Gorongosa Whereabouts Database (on <http://www.elephantvoices.org>).

16. My research concerning elephant social behavior and communication, as well as my conservation work, has been featured in a number of printed articles, including publications such as *Readers' Digest*, *Scientific American*, *Science*, *National Geographic Kids*, *National Geographic Magazine*, *National Geographic Adventure*, *New York Times Magazine*, *National Geographic Explorer*, *LA Times*, *Highlights for Children*, *Scholastic*, *The New York Times*, *Science Times*, *Science*, *Science News*,

*Spektrumdirekt, National Geographic News, Kyodo News Washington Bureau, Daily Telegraph, and the Guardian.* Additionally, my life and work have been featured in several books, including: (1) Jodi Picoult's novel *Leaving Time*; (2) Martin Meredith's 2001 *Africa's Elephant*, a biography, and (3) Doug Chadwick's 1992 *Fate of the Elephant*. My work was also highlighted by Doug Chadwick in his 1992 feature article for *National Geographic Magazine*. My elephant recordings have featured in (1) Paul Winter's Summer Solstice Concert in New York Cathedral, in 2013 (2) in the Emmy award winning work by Paul Winter, *Miho* in 2010; (3) in *Avatar* in 2009; (4) in *Pulse of the Planet*.

17. I have been interviewed and my research has been featured on a number of radio programs, including: (1) a 2012 Sam Litzinger interview on *The Animal House/NPR* (WAMU 88.5); (2) Elephant welfare views featured on *WBUR's Inside Out Documentary on American Zoos* with Diane Toomey in 2009; (3) Elephant communication research featured in *Up Front Radio, San Francisco* with Sandip Roy Chowdhury in 2008; (4) Elephant communication, cognition, and welfare with Karl Losken *Animal Voices 102.7fm* in Vancouver, BC Canada in 2008; (5) *Science Update, American Association for the Advancement of Science (AAAS)* in 2005; (6) *BBC Radio Science, the Leading Edge* in 2005; (7) *German Public Radio (SWR) program Campus* in 2005; (8) *NPR* in 2005 about elephant vocal learning; (9) *BBC News Scotland* in 2005 about vocal learning in elephants; (10) *ABC's Radio 702* with Rory McDonald about elephant welfare in 2005; (11) Elephant communication research featured in *BBC's Beyond our Senses program Sounds of Life* with Grant Sonnex, in 2004; (12) Elephant communication research featured in *NPR program on elephant language* in 2004; (13) *WETA-FM, News 820's Openline & WNYC* in 1996; and (14) *Musth in the African elephant, BBC Radio 4, The living World* in 1981. In addition to these radio appearances, I have also appeared on the *Science* and the *city Pod* cast, in 2007.

18. I have also appeared and been featured in a variety of Television programs, including in: (1) *Gorongosa Park: Rebirth of Paradise* (2015), a PBS six-part series about the restoration of *Gorongosa National Park* in which my elephant work is highlighted in episodes 2 and 5; (2) *An Apology to Elephants*, an award winning 2013 documentary that explores abuse and brutal treatment of elephants; (3) *War Elephants* (2012), an award winning documentary about the traumatized elephants in *Gorongosa*



National Park, Mozambique, and their recovery, by National Geographic Wild, worldwide; (4) Elephant communication research is featured in "Elephant having tales to tell" (2008), NHK, Japan (Japanese and English versions); (5) Interview on elephant communication and cognition for Smart Planet for REDES-TVE, Spain (2006); (6) Elephants and vocal learning, Daily Planet Discovery Channel Canada (2005); (7) Elephant cognition and conservation views featured on National Geographic Explorer *Elephant Rage* (2005); (8) Elephant recordings featured in Discovery Channel's *Echo III* (2004); (9) Elephant communication research, Elephant's Talk, featured in BBC documentary *Talking with Animals* (2002); (10) Work featured on News and Talk shows such as CNN (1993), ABC news Women and Science, The Today Show, (1996), West 57th Street CBS News (1989), PM Magazine (1987). (11) Research featured in *Inside the Animal Mind Part 3 Animal Consciousness*, WNET Nature (1999); (12) Featured on Episode 16, *Elephants*, in series, *Champions of the Wild*, Omni Film Productions, Vancouver, Canada (1998); (13) Life, elephant research, and conservation work subject of National Geographic Special, *Coming of Age with Elephants* (1996); (14) *Wildlife Warriors*, National Geographic Special (1996); (15) *A Voice for Elephants* USIA AfricaPLX (1996); (16) Discovery Channel documentary "Ultimate Guide to Elephants" (1996); (17) *Elephants like us*, Rossellini and Associates (1990); (18) *The language of the elephants*, Rossellini and Associates (1990); (19) Elephant research and conservation work featured in National Geographic Special *Ivory Wars* (1989); (20) Research highlighted in BBC production *Trials of Life* with David Attenborough (1988); (21) Work on elephant infrasound featured in *Supersense* BBC Natural History Unit series on animal senses (1988); and (22) Featured in Sports and Adventure, *Women of the World* (1987).

19. I have testified as an expert witness in several court cases in several countries, including: (1) In 1998 in South Africa in the Case of NSPCA v. Riccardo Ghiazza regarding the capture, mistreatment of 34 baby elephants. Ghiazza was eventually found guilty of cruelty; (2) In 2005 via video link in International Fund for Animal Welfare, et al. v. Minister for the Environment and Heritage et al., N2005/916 regarding the export of Asian elephants from Thailand to Australia; (3) In 2008 in Washington DC in American Society for the Prevention of Cruelty to Animals, Animal Welfare Institute, The Fund for Animals, Animal Protection Institute & Tom

Rider Plaintiffs in *ASCPA v. Ringling Brothers and Barnum & Bailey Circus*; and (4) In 2012 in Los Angeles in *Aaron Leder vs. John Lewis, City of Los Angeles*, in a case regarding the welfare of the elephants of Los Angeles Zoo. I am currently involved in another case in South Africa but have not yet appeared in court.

20. My Curriculum Vitae fully sets forth my educational background and experience and is annexed hereto as "Exhibit A".

#### **Basis for opinions**

21. The opinions I state in this Affidavit are based on my professional knowledge, education, training, and years of experience observing and studying elephants, as well as my knowledge of peer-reviewed literature about elephant behaviour and intelligence published in the world's most respected journals, periodicals and books that are generally accepted as authoritative in the field, and many of which were written by myself or colleagues whom I have known for several years and with whose research and field work I am personally familiar. A full reference list of peer-reviewed literature cited herein is annexed hereto as "Exhibit B".

#### **Opinions**

##### ***Premise***

22. Elephants are autonomous beings. Autonomy in humans and nonhuman animals is defined as self-determined behaviour that is based on freedom of choice. As a psychological concept it implies that the individual is directing their behaviour based on some non-observable, internal cognitive process, rather than simply responding reflexively. Although we cannot directly observe these internal processes in other beings, we can explore and investigate them by observing, recording and analysing their behaviour, as I have done with elephants for my entire career.

23. I shall indicate which species, African (*Loxodonta Africana*) or Asian (*Elephas maximus*), specific observations relate to. If the general term 'elephants' is used with no specific delineation, it can be assumed the comment relates to the African species, though it is likely that it applies to the Asian species as well.

##### ***Brain And Development***

24. Elephants are large-brained, with the biggest absolute brain size of any land animal (Cozzi et al 2001; Shoshani et al 2006). Even relative to their body sizes,

elephant brains are large. Encephalization quotients (EQ) are a standardised measure of brain size relative to body size, and illustrate by how much a species' brain size deviates from that expected for its body size. An EQ of one means the brain is exactly the size expected for that body, and values greater than one indicate a larger brain than expected (Jerison 1973). Elephants have an EQ of between 1.3 and 2.3 (varying between sex and African and Asian species). This means an elephant's brain can be up to two and a half times larger than is expected for an animal of its size; this EQ is similar to that of the great apes, with whom elephants have not shared a common ancestor for almost 100 million years (Eisenberg 1981, Jerison 1973). Given how metabolically costly brain tissue is, the large brains of elephants must confer significant advantages; otherwise their size would be reduced. A large brain allows for greater intelligence and behavioural flexibility (Bates et al 2008a).

25. Generally, mammals are born with brains weighing up to 90% of the adult weight. This figure drops to about 50% for chimpanzees. Human baby brains weigh only about 27% of the adult brain weight (Dekaban & Sadowsky 1978). This long period of brain development over many years (termed 'developmental delay') is a key feature of human brain evolution and is thought to play a role in the emergence of our complex cognitive abilities, such as self-awareness, creativity, forward planning, decision making and social interaction (Bjorkland 1997). Delayed development provides a longer period in which the brain may be shaped by experience and learning (Furster 1992). Elephant brains at birth weigh only about 35% of their adult weight (Eltringham 1982), and elephants show a similarly protracted period of growth, development and learning (Lee 1986). This similar developmental delay in the elephant brain is therefore likewise associated with the emergence of similarly complex cognitive abilities.

26. Despite nearly 100 million years of separate evolution (Hedges 2001), elephants share certain characteristics of our large brains, namely deep and complex folding of the cerebral cortex, large parietal and temporal lobes, and a large cerebellum (Cozzi et al 2001). The temporal and parietal lobes of the cerebral cortex manage communication, perception, and recognition and comprehension of physical actions (Kolb and Whishaw 2008), while the cerebellum is involved in planning, empathy, and predicting and understanding the actions of others (Barton 2012). Thus, the physical

similarities between human and elephant brains occur in areas that link directly to the capacities necessary for autonomy and self-awareness.

27. Elephant brains hold nearly as many cortical neurons as do human brains: humans:  $1.15 \times 10^{10}$ ; elephants:  $1.1 \times 10^{10}$  (Roth & Dicke 2005). Elephants' pyramidal neurons are larger than in humans and most other species (Cozzi et al 2001). Pyramidal neurons are found in the cerebral cortex, particularly the pre-frontal cortex – the brain area that controls executive functions (a set of cognitive processes that are required for choosing and monitoring behaviors that facilitate an individual to reach certain goals, e.g., problem solving, planning, working memory, inhibitory and attentional control and cognitive flexibility). The degree of complexity of pyramidal neurons is linked to cognitive ability, with more (and more complex) connections between pyramidal neurons being associated with increased cognitive capabilities (Elston 2003). Elephant pyramidal neurons have a large dendritic tree, i.e. a large number of connections with other neurons for receiving and sending signals (Cozzi et al 2001).

28. Elephants, like humans, great apes and some cetaceans, possess *von Economo neurons*, or spindle cells – the so-called 'air-traffic controllers for emotions' – in the anterior cingulate, fronto-insular, and dorsolateral prefrontal cortex areas of the brain (Hakeem et al 2009). In humans, these cortical areas are involved - among other things - in the processing of complex social information, emotional learning and empathy, planning and decision-making, and self-awareness and self-control (Allman et al 2001; Allman et al 2002; Allman et al 2011). The shared presence of spindle cells in the same brain locations in elephants and humans strongly implies these higher-order brain functions – the building blocks of autonomous, self-determined behaviour – are common between these species (Butti et al 2009; Hakeem et al 2009).

29. As described below, along with these common brain and life-history characteristics, elephants share many behavioural and intellectual capacities with humans, including: self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorisation abilities. Many of these capacities have previously been considered – erroneously - to be uniquely human, and each is fundamental to and characteristic of autonomy and self-determination.

#### *Awareness Of Self And Others*

30. Asian elephants exhibit Mirror Self Recognition (MSR) using Gallup's classic 'mark test' (Gallup 1970; Plotnik et al 2006). MSR is the ability to recognise a reflection in the mirror as oneself, and the mark test involves surreptitiously placing a coloured mark on an individual's forehead that it could not see or be aware of without the aid of a mirror. If the individual uses the mirror to investigate the mark, the individual recognises the reflection as herself. Besides elephants, the only other mammals that have successfully passed the mark test and exhibited MSR are the great apes (chimpanzees, bonobos, gorillas and orangutans) and bottlenose dolphins (Parker and Mitchell 1994, Reiss and Marino 2001). MSR is significant because it is considered to be the key identifier of self-awareness. Self-awareness is intimately related to autobiographical memory in humans (Prebble et al 2011), and is central to autonomy and being able to direct one's own behaviour to achieve personal goals and desires. By demonstrating that they can recognize themselves in a mirror, elephants holding a mental representation of themselves from another perspective, and thus be aware that they are a separate entity from others (Bates and Byrne 2014).

31. A being who understands the concept of dying and death possesses a sense of self. Based on the research conducted to date, observing reactions to dead family or group members suggests an awareness of death in only two animal genera beyond humans; chimpanzees and elephants (Anderson et al 2010, Douglas-Hamilton et al 2006). Having a mental representation of the self – a pre-requisite for mirror-self recognition – contributes to the ability to comprehend death. Wild African elephants have been shown experimentally to be more interested in the bones of dead elephants than the bones of other animals (McComb et al 2006), and have frequently been observed using their tusks, trunk or feet to attempt to lift sick, dying or dead individuals (Douglas-Hamilton 1972, Moss 1992, Poole, 1996, Payne 2003, Douglas-Hamilton et al. 2006). Although they do not give up trying to lift or elicit movement from the body immediately, elephants appear to realise that once dead, the carcass cannot be helped anymore, and instead engage in more 'mournful' behaviour, such as standing guard over the bodies, and protecting it from the approaches of predators (e.g Douglas-Hamilton 1972, Croze cited in Moss 1982, Moss 1988, Poole, 1996, Payne 2003, McComb et al 2006). Others have observed them covering the bodies of dead elephants with dirt and vegetation (Moss 1992; Poole 1996). In the particular case of mothers who lose a calf, although they may remain with the calf's body for an

extended period, they do not behave towards the body as they would a live calf. Indeed, the general demeanour of elephants who are attending to a dead elephant is one of grief and compassion, with slow movements and few, if any, vocalisations (Poole, 1996.). These behaviours are akin to human responses to the death of a close relative or friend, and illustrate that elephants possess some understanding of life and the permanence of death. Furthermore, elephants' interest in the bodies, carcasses and bones of elephants who have passed is so marked that when one has died, trails to the site of death are worn into the ground by the repeated visits of many elephants over days, weeks, months and even years (Poole, personal observation). The accumulation of dung around the site attests to the extended time that visiting elephants spend touching and contemplating the bones. I have observed that, over years, the bones may become scattered over tens or hundreds of square meters as elephant pick up the bones and carry them away. The tusks are of particular interest and may be carried and deposited many hundreds of meters from the site of death (Poole, personal observation).

32. The capacity for mentally representing the self as an individual entity has been linked to general empathic abilities (Gallup 1982), where empathy can be defined as identifying with and understanding another's experiences or feelings by imagining what it would be like to be in their situation. Empathy is an important component of human consciousness and autonomy, and is a cornerstone of normal social interaction. It goes beyond merely reading the emotional expressions of others. It requires modelling of the emotional states and desired goals that influence others' behaviour both in the past and future, and using this information to plan one's own actions; empathy is only possible if one can adopt or imagine another's perspective, and attribute emotions to that other individual (Bates et al 2008b). Empathy is, therefore, a component of and reliant on 'Theory of Mind' - the ability to mentally represent and think about the knowledge, beliefs and emotional states of others, whilst recognising that these can be distinct from your own knowledge, beliefs and emotions (Premack and Woodruff/Frith and Frith 2005).

33. Elephants clearly and frequently display empathy in the form of protection, comfort and consolation, as well as by actively helping those who are in difficulty, such as assisting injured individuals to stand and walk, or helping calves out of rivers or ditches with steep banks (Bates et al 2008b, Lee 1987, Poole, 1996). Elephants



have been observed to react when anticipating the pain of others (e.g. seen to wince when a nearby elephant stretched her trunk toward a live wire – Poole, personal observation) and have even been observed feeding those who are not able to use their own trunks to eat (Moses Kofi Sam, personal communication) and to attempt to feed those who have just died (Croze, cited in Moss 1982).

34. In an analysis of behavioural data collected from wild African elephants over a 40-year continuous field study, I have concluded that as well as possessing their own intentions, elephants can diagnose animacy and goal directedness in others, understand the physical competence and emotional state of others, and attribute goals and mental states (intentions) to others (Bates et al 2008b), as evidenced in the examples below:

*'IB family is crossing river. Infant struggles to climb out of bank after its mother. An adult female [not the mother] is standing next to calf and moves closer as the infant struggles. Female does not push calf out with its trunk, but digs her tusks into the mud behind the calf's front right leg which acts to provide some anchorage for the calf, who then scrambles up and out and rejoins mother.'*

*'At 11.10ish Ella gives a 'lets go' rumble as she moves further down the swamp . . . At 11.19 Ella goes into the swamp. The entire group is in the swamp except Elspeth and her calf [<1 year] and Eudora [Elspeth's mother]. At 11.25 Eudora appears to 'lead' Elspeth and the calf to a good place to enter the swamp — the only place where there is no mud.'*

In addition to the examples analyzed in Bates et al 2008b, in what appeared to be a spontaneous attempt to prevent injury to the newborn, I observed two adult females rush to the side of a third female who had just given birth, back into her and press their bodies to her. In describing the situation I wrote:

*'The elephants' sounds [relating to the birth] also attracted the attention of several males including young and inexperienced, Ramon, who, picking up on the interesting smells of the mother [Ella], mounted her, his clumsy body and feet poised above the newborn. Matriarch Echo and her adult daughter Erin, rushed to Ella's side and, I believe, purposefully backed into her in what appeared to be an attempt to prevent the male from*

*landing on the baby when he dismounted."*

Examples such as these demonstrate that the acting elephant(s) (the adult female in the first example, Eudora in the second, and Erin and Echo in the third) was able to understand the intentions or situation of the other (the calf in the first case, Elspeth in the second; Ella's newborn and the male in the third) – i.e. to either climb out of or into the water, or be trampled on by the male – and they could adjust their own behaviour in order to counteract the problem being faced by the other. Whilst humans may act in this helpful manner on a daily basis, such interactions have been recorded for very few non-human animals (Bates et al 2008b). In raw footage I recently acquired of elephant behavior filmed by my brother in the Mara, Kenya, an allo-mother moves a log from under the head of an infant, in what appears to be an effort to make him more comfortable (Poole, personal observation; Video 1, attached on CD as "Exhibit C"). In a further example of understanding goal directedness of others, elephants appear to understand that vehicles drive on roads or tracks and furthermore they appear to know where these tracks lead. In Gorongosa, Mozambique, where elephants exhibit a culture of aggression toward humans, charging, chasing and attacking vehicles, adult females anticipate the direction the vehicle will go and attempt to cut it off by taking shortcuts *before* the vehicle has begun to turn (Poole personal observation 2012). The roots of empathetic behavior begin early in elephants. Just as in humans where rudimentary sympathy for others in distress has been recorded in infants as young as 10 months old (Kanakogi et al 2013 see <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0065292>) young elephants exhibit behavior that indicates that they feel sympathy for others. For instance, during fieldwork in the Maasai Mara in 2011 I filmed a mother elephant using her trunk to assist her one-year-old female calf up a steep bank. Once the calf was safely up the bank she turned around to face her five-year-old sister, who was also having difficulties getting up the bank. As the older calf clambered up the bank with effort the younger calf approached her and first touched her mouth (a gesture of reassurance among family members) and then reached her trunk out to touch the leg that had been having difficulty. Only when her sibling was safely up the bank did the calf turn to follow her mother (filmed by Poole, 2011; Video 2, attached on CD as "Exhibit D").



35. Experimental evidence from captive African elephants further demonstrates that elephants attribute intentions to others, as they follow and understand human pointing gestures – the only animal so far shown to do so spontaneously. The elephants understood that the human experimenter was pointing in order to communicate information to them about the location of a hidden object (Smet and Byrne 2013). Attributing intentions and understanding another's reference point is central to empathy and theory of mind.

36. Our analysis of simulated oestrus behaviours in African elephants – whereby a non-cycling, sexually experienced older female will simulate the visual signals of being sexually receptive, even though she is not ready to mate or breed again – shows that these knowledgeable females adopt false oestrus behaviours in order to demonstrate to naïve young females how to attract and respond appropriately to suitable males. The experienced females may be taking the youngsters lack of knowledge into account and actively showing them what to do; a possible example of true teaching as it is defined in humans. Whilst this possibility requires further investigation, this evidence, coupled with the data showing that they understand the ostensive cues in human pointing, demonstrates that elephants do share some executive skills with humans, namely understanding the intentions and knowledge states (minds) of others. Ostensive communication – refers to the way humans use particular behaviour such as tone of speech, eye contact, physical contact to emphasize that a particular communication is important. Lead elephants in family groups use ostensive communication frequently (e.g. Ear-Flap-Slide and Ear-Slap; Poole & Granli 2011 and Comment-Rumbling; Poole, 2011) as a way to say, “Heads up – I am about to do something that you should pay attention to.”

37. Further related to empathy, coalitions and cooperation have been documented in wild African elephants, particularly to defend family members or close allies from (potential) attacks by outsiders, such as when a family group tries to ‘kidnap’ a calf from an unrelated family (Lee 1987, Moss and Poole 1983) or during the extraordinary teamwork executed by elephants when they defend themselves against predators, particularly, human beings (Poole and Granli 2011; Poole, 2011). These latter behaviors are preceded by gestural and vocal signals typically given by the matriarch and acted upon by family members and have been documented many times amongst the Gorongosa elephants and in elephant behavior footage from there that we

are currently analyzing. These behaviours are based on one elephant understanding the signals, emotions and goals of the coalition partner(s) (Bates et al 2008b).

38. Cooperation is also evident in experimental tests with captive Asian elephants, whereby elephants demonstrated they can work together in pairs to obtain a reward, and understood that it was pointless to attempt the task if their partner was not present or could not access the equipment (Plotnik et al 2011). Problem-solving and working together to achieve a collectively desired outcome involve mentally representing both a goal and the sequence of behaviours that is required to achieve that goal; it is based on (at the very least) short-term action planning.

39. Wild elephants have frequently been observed engaging in cooperative problem solving, for example when retrieving calves that have been kidnapped by other groups, when helping calves out of steep, muddy river banks (Bates et al 2008b), when rescuing a calf attacked by a lion (acoustic recording calling to elicit help from others (Poole, 2011 and see Roaring-Rumbles) by or the vocal and gestural communication used when they are negotiating a plan of action (e.g. when elephants use cadenced-rumbling, Poole 2011, or High-Fiving to lend their “voice” to a proposed or targeted plan of action; Video 3, attached on CD as “Exhibit E”) or when they must navigate through human-dominated landscapes to reach a desired destination (e.g. habitat, salt-lick, waterhole) as evidenced in video footage of Selenge and her family filmed in 2015. These behaviours demonstrate the purposeful and well-coordinated social system of elephants, and show that elephants can hold particular aims in mind and work together to achieve those goals. Such intentional, goal-directed action forms the foundation of independent agency, self-determination, and autonomy.

40. Elephants also show innovative problem solving in experimental tests of insight (Foerder et al 2011), where insight can be defined as the ‘a-ha’ moment when a solution to a problem ‘suddenly’ becomes clear. (In cognitive psychology terms, insight is the ability to inspect and manipulate a mental representation of something, even when you can’t physically perceive or touch the something at the time.) Or more simply, insight is thinking and using only thoughts to solve problems (Richard Byrne, *Evolving Insight*, Oxford Online Press, 2016<sup>1</sup>). A juvenile male Asian elephant

<sup>1</sup> Available at <https://global.oup.com/academic/product/evolving-insight-9780198757078?cc=us&lang=en&> (last accessed Oct. 11, 2016).

demonstrated just such a spontaneous action by moving a plastic cube and standing on it to obtain previously out-of-reach food. After solving this problem once, he showed flexibility and generalization of the technique to other, similar problems by using the same cube in different situations, or different objects in place of the cube when it was not available. This experiment again demonstrates that elephants can choose the appropriate action and incorporate it into a sequence of behaviour in order to achieve a goal, which they kept in mind throughout the process.

41. Further experiments also demonstrate Asian elephants' ability to understand goal-directed behaviour. When presented with food that was out of reach, but with some bits resting on a tray that could be pulled within reach, the elephants learned to pull only those trays that were baited with food (Irie-Sugimoto et al 2007). Success in this kind of 'means-end' task demonstrates causal knowledge, which requires understanding not just that two events are associated with each other but also that there is some mediating force that connects and affects the two which may be used to predict and control events. Moreover, understanding causation and inferring object relations may be related to understanding psychological causation, i.e., the appreciation that others are animate beings that generate their own behaviour and have mental states (e.g., intentions).

#### ***Communication and social learning***

42. Speech is a voluntary behaviour in humans, whereby a person can choose whether to utter words and thus communicate with another. Therefore speech and language reflect autonomous thinking and intentional behaviour. Elephants also intentionally use their vocalisations to share knowledge and information with others (Poole 2011). Females and dependents call to emphasise and reinforce their social units and to coordinate movement. Male elephants primarily communicate about their sexual status, rank and identity, though like females they also use calls to coordinate movement and interactions in their social groups. Call types (47 have been described by Poole, 2011) can generally be separated into laryngeal calls (such as rumbles, cries, roars) or trunk calls (such as trumpets, snorts), with different calls in each category being used in different contexts (Poole et al 1988; Poole 2011; Poole and Granli 2004; Soltis et al 2005; Wood et al 2005). Field experiments have shown that African elephants distinguish between different call types (for example, contact calls – rumbles that travel long distances to maintain associations between elephants that

could be several kilometres apart, oestrus rumbles – that occur after a female has copulated or musth rumbles that are made by males in the heightened sexual and aggressive state of musth) and these different call types elicit different responses in the listeners. Elephant vocalisations are not simply reflexive, they have distinct meanings to listeners and they are truly communicative, similar to the volitional use of language in humans (Leighty et al 2008; Poole 1999; Poole 2011).

43. Elephants display a wide variety (> 200 described) of gestures, signals and postures, used to communicate information to the audience (Poole and Granli 2011 and ElephantVoices Elephant Gestures Database<sup>2</sup>). Such signals are adopted in many different contexts, such as aggressive, sexual or socially integrative situations, and each signal is well defined and results in predictable responses from the audience. That is, each signal or gesture has a specific meaning both to the actor and recipient. Elephants' use of gestures demonstrates that they communicate intentionally and purposefully to share information with others and/or alter the others' behaviour to fit their own will.

44. Elephants use specific calls and gestures to plan and discuss a course of action. These may involve responding to a threat by a group retreat or mobbing action (including celebration of successful efforts), or planning and discussing where, when and how to move to a new location. I have studied elephant communication for two decades and have field notes, acoustic recordings and raw footage of numerous examples of such communication.

45. In group-defensive situations elephants respond with highly coordinated behaviour, both rapidly and *predictably*, to specific calls uttered and particular gestures exhibited by group members. In other words, these elephant calls and gestures hold specific meanings not only to elephant listeners, but also, through experience, to human observers. The rapid, predictable and collective response of elephants to these calls and gestures indicates that elephants have the capability of understanding the goals and intentions of the signalling individual. For example, as was documented and described by me in Episode 2 of PBS six-part series *Gorongosa Park: Rebirth of Paradise*, matriarch Provocadora's contemplation of us (Listening, J-

<sup>2</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database.html>

Sniffing) followed by her purposeful Perpendicular-Walk<sup>3</sup> (in relation to us) toward her family and her Ear-Flap-Slide<sup>4</sup> was a clear indication to her family to begin a Group-Advance<sup>5</sup> (on us). This particular elephant attack is a beautiful example of elephants' use of empathy, coalition and cooperation. Provocadora's instigation of the Group-Advance led to a two and a half minute Group-Charge<sup>6</sup> in which the three other large adult females of the 36-member family took turns to lead the charge, passing the baton, in a sense, from one to the next. Once they succeeded in their goal of chasing us away they celebrated their victory High-Fiving<sup>7</sup> (with their trunks) and engaging in an End-Zone-Dance<sup>8</sup>. High-Fiving is also typically used to initiate a coalition and is both preceded by and associated with other specific gestures and calls that lead to very goal oriented collective behavior. Elephant group defensive behavior is highly evolved and involves a range of different tactical manoeuvres adopted by different elephants. The calls and gestures used are too many to mention here but many are described in Poole 2011 and on ElephantVoices Elephant Gestures Database<sup>9</sup> under Defensive<sup>10</sup> and in Elephant Calls Context Database<sup>11</sup> under the section Group Defense<sup>12</sup>.

46. In planning and communicating intentions regarding a movement, elephants use both vocal (see Logistical<sup>13</sup> on the ElephantVoices Elephant Calls Context Database) and gestural communication (see Movement Initiation and Leadership<sup>14</sup> on the

<sup>3</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database/431-defensive/confront-predator/1660-perpendicular-walk.html?layout=gesture>

<sup>4</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database/411-social-integration/movement-initiation-leadership/1789-ear-flap-slide.html?layout=gesture>

<sup>5</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database/408-defensive/mobbing/1817-group-advance.html?layout=gesture>

<sup>6</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database/408-defensive/mobbing/1818-group-charge.html?layout=gesture>

<sup>7</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database/405-aggressive/escalation/1845-high-fiving.html?layout=gesture>

<sup>8</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database/406-aggressive/post-conflict-display/1831-end-zone-dance.html?layout=gesture>

<sup>9</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database.html>

<sup>10</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database/306-defensive.html?layout=gesture>

<sup>11</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-calls-database-contexts.html>

<sup>12</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-calls-database-contexts/194-group-defense.html?layout=callscontext>

<sup>13</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-calls-database-contexts/206-social-integration/logistical.html?layout=callscontext>

<sup>14</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database/411-social-integration/movement-initiation-leadership.html?layout=gesture>



ElephantVoices Elephant Gestures Database). For example, I have observed that a member of a family will use the axis of her body to point in the direction she wishes to go and then vocalize, every couple of minutes, with a specific call known as a “let’s-go” rumble<sup>15</sup> (Poole et al, 1988; Poole 2011, ElephantVoices Elephant Calls Context Database<sup>16</sup>), “I want to go this way, let’s go together.” The elephant will also use intention gestures – such as Foot-Swinging – to indicate her intention to move. Such a call may be successful or unsuccessful at moving the group or may lead to a longer (45 minutes or more) discussion (series of rumble exchanges known as Cadenced Rumbles<sup>17</sup>) that I interpret as negotiation. Sometimes such negotiation leads to disagreement and the group may spilt and go different ways for a period of time. In situations where the security of the group is at stake, for instance when a movement is planned through or near to human settlement, all group members are focused on the decision of the matriarch. So while “let’s go” rumbles are uttered, others adopt a Waiting<sup>18</sup> posture until the matriarch, after much Listening<sup>19</sup>, J-Sniffing<sup>20</sup> and Monitoring<sup>21</sup> decides it is safe to proceed, where upon they bunch together and move purposefully, and at a fast pace in a Group-March (I have an example on film from Maasai Mara, 2015). Elephants typically move through dangerous habitat at high speed and at night in a very goal oriented manner known as “streaking,” which has been described and documented through the movements of elephants wearing satellite tracking collars (Douglas-Hamilton et al 2005). The many different signals - calls, postures, gestures and behaviors elephants use to contemplate and initiate such movement (including others e.g. Ear-Flap, Ear-Flap-Slide) are clearly understood by other elephants (just as they can be by long-term study by human observers), mean very specific things and indicate that elephants 1) have a particular plan which they can communicate with others; 2) can adjust this plan

<sup>15</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-calls-database-contexts/214-social-integration/logistical/let-s-go-rumble.html?layout=callscontext>

<sup>16</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database/411-social-integration/movement-initiation-leadership.html?layout=gesture>

<sup>17</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-calls-database-contexts/215-social-integration/logistical/cadenced-rumble.html?layout=callscontext>

<sup>18</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database/411-social-integration/movement-initiation-leadership/1788-waiting.html?layout=gesture>

<sup>19</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database/424-attentive/listening/1702-listening.html?layout=gesture>

<sup>20</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database/423-attentive/sniffing/1705-j-sniff.html?layout=gesture>

<sup>21</sup> <https://www.elephantvoices.org/multimedia-resources/elephant-gestures-database/423-attentive/sniffing/1710-monitoring.html?layout=gesture>

according to their immediate assessment of risk or opportunity 3) can communicate and execute the plan in a coordinated manner.

47. ~~46.~~ Furthermore, elephants have been shown to vocally imitate the sounds they hear around them, from the engines of passing trucks and the calls of other species to the commands of human zookeepers (Poole et al 2005, Stoeger et al 2012). Imitating another's behaviour demonstrates a sense of self, as it is necessary to understand how one's own behaviour relates to the behaviour of others.

48. ~~47.~~ Experimental evidence demonstrates that African elephants recognize the importance of visual attentiveness of the intended recipient (in this case, human experimenters) of gestural communication (Smet & Byrne 2014), further supporting the conclusion that elephants' gestural communication is intentional and purposeful. Furthermore, the ability to understand the visual attentiveness and perspective of others is crucial for empathy and mental-state understanding.

#### *Memory And Categorisation*

49. ~~48.~~ Elephants have both extensive and long-lasting memories, just as the folk stories and adages encourage us to believe. McComb et al. (2000), using experimental playback of long-distance contact calls in Amboseli National Park, Kenya, showed that African elephants remember and recognize the voices of at least 100 other elephants. Each adult female elephant tested was familiar with the contact-call vocalizations of individuals from an average of 14 families in the population. When the calls were from a familiar family—that is, one that had previously been shown to have a high association index with the test group—the test elephants contact-called in response and approached the location of the loudspeaker. When a test group heard unfamiliar contact calls (from groups with a low association index with the test group), they bunched together and retreated from the area.

50. ~~49.~~ McComb et al (2001) went on to show that this social knowledge accrues with age, with older females having the best knowledge of the contact calls of other family groups. McComb et al (2011) also showed that older females are better leaders, with more appropriate decision-making in response to potential threats (in this case, in the form of hearing lion roars). Younger matriarchs under-reacted to hearing roars from male lions. Sensitivity to hearing this sound increased with increasing matriarch age, with the oldest, most experienced females showing the strongest response to this

danger. These experimental studies show that elephants continue to learn and remember information about their environments throughout their lives, and this accrual of knowledge allows them to make better decisions and better lead their families as they grow older.

51. ~~49~~ Elephants' long-term memory is further demonstrated from data on their movement patterns. African elephants are known to move over very large distances in their search for food and water. Leggett (2006) used GPS collars to track the movements of elephants living in the Namib Desert. He recorded one group traveling over 600 km in five months, and Viljoen (1989) showed that elephants in the same region visited water holes approximately every four days, even though some of them were more than 60km apart. Elephants inhabiting the deserts of both Namibia and Mali have been described traveling hundreds of kilometers to arrive at remote water sources shortly after the onset of a period of rainfall (Blake et al. 2003; Viljoen 1989), sometimes along routes that researchers believe have not been used for many years. These remarkable feats suggest exceptional cognitive mapping skills, reliant on the long-term memories of older individuals who traveled that path sometimes decades earlier. Indeed it has been confirmed that family groups with older matriarchs are better able to survive periods of drought. The older matriarchs lead their families over larger areas during droughts than those with younger matriarchs, again apparently drawing on their accrued knowledge (this time about the locations of permanent, drought-resistant sources of food and water) to better lead and protect their families (Foley, Pettorelli, and Foley 2008).

52. ~~49~~ It has recently been shown that long-term memories, and the decision-making mechanisms that rely on this knowledge, are severely disrupted in elephants who have experienced trauma or extreme disruption due to 'management' practices initiated by humans. Shannon et al (2013) demonstrated that elephants in South Africa who had experienced trauma decades earlier showed significantly reduced social knowledge. During archaic culling practices, these elephants were forcibly separated from family members and subsequently translocated to new locations. Two decades later, they still showed impoverished social knowledge and skills and impaired decision-making abilities, compared with an undisturbed population in Kenya. Disrupting elephants' natural way of life can negatively impact their knowledge and decision-making abilities.



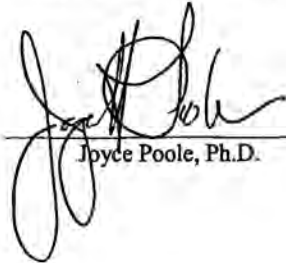
53. ~~53.~~ Elephants demonstrate advanced 'working memory' skills. Working memory is the ability to temporarily store, recall, manipulate and coordinate items from memory. Working memory directs attention to relevant information, and results in reasoning, planning, and coordination and execution of cognitive processes through use of a 'central executive' (Baddeley 2000). Adult human working memory is generally thought to have a capacity of around seven items. In other words, we can keep about seven different items or pieces of information in mind at the same time (Miller 1956). We conducted experiments with wild elephants in Amboseli National Park, Kenya, manipulating the location of fresh urine samples from related or unrelated elephants. The elephants' responses to detecting urine from known individuals in surprising locations showed that they are able to continually track the locations of at least 17 family members in relation to themselves, as either absent, present in front of self, or present behind self (Bates et al. 2008a). This remarkable ability to hold in mind and regularly update information about the locations and movements of a large number of family members is best explained by elephants possessing an unusually large working memory capacity, apparently much larger than that of humans.

54. ~~54.~~ Elephants show sophisticated categorisation of their environment, with skills on a par with those of humans. My colleagues and I experimentally presented the elephants of Amboseli National Park, Kenya, with garments that gave olfactory or visual information about their human wearers - either Maasai moran (male warriors who traditionally attack and spear elephants on occasion as part of their rite of passage), or Kamba men (who are agriculturalists and traditionally pose little threat to elephants). In the first experiment, the only thing that differed between the cloths was the smell, derived from the ethnicity and/or lifestyle of the wearers. The elephants were significantly more likely to run away when they sniffed cloths worn by Maasai than those worn by Kamba men or no one at all. In a second experiment, we presented the elephants with two cloths that had not been worn by anyone, but here one was white (a neutral stimulus) and the other was red—the color that is ritually worn by Maasai moran. With access only to these visual cues, the elephants showed significantly greater reaction to red garments than white, often including signs of aggression. We concluded that elephants are able to categorize a single species (humans) into sub-classes (i.e. 'dangerous' or 'low risk') based on either olfactory or visual cues alone (Bates et al. 2007). McComb et al. went on to show that the same elephant population

can also distinguish between human groups based on our voices. The elephants reacted differently (and appropriately) depending on whether they heard Maasai or Kamba men speaking, and also when they heard male or female Maasai (where female Maasai pose no threat as they are not involved in spearing events), and adult Maasai men or young Maasai boys (McComb et al 2014). Scent, sounds and visual signs associated specifically with Maasai men are categorized as 'dangerous', while neutral signals are attended to but categorized as 'low risk'. These sophisticated, multi-modal categorization skills may be exceptional among non-human animals.


### Summary


55. Scientific knowledge about elephant intelligence has been increasing rapidly in the past decade: what we currently know is only a tiny fraction of what elephant brains are likely capable of, and yet more amazing abilities are still likely to be discovered. But even based on what we know at this stage, including through my own and my colleagues' extensive experience, observations and studies, both African and Asian elephants share many key traits of autonomy with humans and like humans are autonomous beings.



Joyce Poole, Ph.D.

Sworn to before me  
this 2nd day of December, 2016

  
Notary Public

DISTRICT OF COLUMBIA: SS  
SUBSCRIBED AND SWORN TO BEFORE ME  
THIS 2nd DAY OF Dec, 2016.  
  
NOTARY PUBLIC  
My Commission Expires 11.14.2020



**EXHIBIT A TO POOLE AFFIDAVIT -  
CURRICULUM VITAE OF JOYCE POOLE [A-165 - A-174]**

**CURRICULUM VITAE**

**JOYCE POOLE**

(Updated April 2012)

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Buskellinga 3	One Bush Plaza, 12th Floor	Email: <a href="mailto:jpoole@elephantvoices.org">jpoole@elephantvoices.org</a>
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Norway	USA	Skype: elephantvoices

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**RESEARCH INTERESTS**

Acoustic communication, Cognitive science, Decision-making, Conservation.

**EDUCATION**

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Postdoctoral	Princeton University Research Fellow 1984-1988; Advisor: Daniel Rubenstein.
Ph.D. 1982	University of Cambridge, U.K, Sub-Department Animal Behaviour. Dissertation: <i>Musth and male-male competition in the African elephant</i> ; Supervisor: Robert Hinde.
B.A. 1979	Smith College. High Honors in the Biological Sciences. Dissertation: <i>Behavioral-Ecology of the African elephant</i> .

**HONORS AND AWARDS**

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2007	Certificate of Recognition, California Legislature Assembly, <i>for tireless efforts in educating people on elephant captivity</i> .
1996	Smith College Medal for elephant research and conservation work, <i>exemplifying the true purpose of a liberal arts education</i> .
1985-1988	Research Fellowship, National Institute Mental Health
1984	Research Fellowship, Harry Frank Guggenheim Foundation
1980-1981	Research Fellowship, New York Zoological Society
1981	Graduate Study Fellowship, Smith College
1979-1980	Sarah W. Wilder and Sarah W. Whipple Fellowship
1979-1980	<i>Sigma Xi</i>
1979	Winner, A. Brazier Howell Award for paper on <i>musth</i> in African elephants presented at the 1979 American Society of Mammalogists meetings.

**PROFESSIONAL SOCIETIES/ BOARD and ADVISORY MEMBERSHIPS**

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2014-present	Member, Board Global Sanctuary for Elephants
2013-present	Member, Advisory Board, Kimmela Center for Animal Advocacy
2010-present	Member, Scientific Advisory Board, Elephant Aid International
2010	Member, Alliance for Captive Elephants
2008-present	Member, Board of Directors, ElephantVoices
2002-present	Member, Ethologists for the Ethical Treatment of Animals
2002-present	Member, Scientific Advisory Committee, Amboseli Elephant Research Project
1988-2001	Member, Science Advisory Board, Captive Elephant Management Coalition
2004	Member, Panel of Experts, Species Survival Network
2002-2011	Trustee, Amboseli Trust for Elephants
1988-2001	Member, African Elephant Specialist Group, Species Survival Commission, IUCN

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**EMPLOYMENT**

- 2002-present **Director, Research and Conservation, ElephantVoices:** Directing the research, conservation and welfare work of the non-profit organization, ElephantVoices.
- 2002-2007 **Research Director, Amboseli Elephant Research Project,** Amboseli Trust for Elephants: overseeing the elephant monitoring and collaborative research projects, and training programs for the 3 decades long study of elephants.
- 1999-2001 **Consultant, Basecamp Explorer AS:** Wildlife issues.
- 7/96 & 7/97 **Consultant, IMAX:** Scientific Advisor *Africa's Elephant Kingdom*, Discovery.
- 1994-1997 **Consultant, Richard Leakey & Associates;** Training; Lecturing; Advisor, wildlife documentaries.
- 1994-1995 **Author, *Coming of Age with Elephants*** (Hyperion Press, 1996; Hodder & Stoughton, 1996).
- 1991-1994 **Coordinator, Elephant Program, Kenya Wildlife Service:** Setting and implementing Kenya's elephant conservation and management policy; supervising management-oriented research; reconciling land use and other conflicts between elephants and people; building local expertise.
- 1990-1991 **Consultant, World Bank:** Pre-Project Facility, drafting the Elephant Conservation and Management Policy and Research Policy Framework and Investment Program, Kenya Wildlife Service.
- 1990 **Consultant, International Union for the Conservation of Nature:** compiling overview of elephant conservation in Eastern Africa for Paris Donors Conference.
- 1989 **Consultant, Tanzanian Wildlife Department** drafting successful proposal to the Convention on Trade in Endangered Species to up list the African elephant to Appendix I of the Convention.
- 1989 **Consultant, World Wildlife Fund:** discussions with Japanese and Chinese government officials and ivory carvers regarding detrimental impacts of the ivory trade on elephant survival.
- 1989 **Researcher, African Wildlife Foundation:** Assessing effects of poaching on East African elephant populations.
- 1975-1980 **Researcher, Amboseli Elephant Research Project**

**FIELD RESEARCH**

- 2011-ongoing **Mozambique:** Initiation/execution of elephant monitoring and research, as part of the Gorongosa Restoration Project.
- 2010-ongoing **Kenya:** Initiation/execution of conservation project in the Maasai Mara ecosystem.
- 2008 **Sri Lanka, Minneriya-Kaudulla National Parks:** initiating an Asian elephant conservation project and behavior study.
- 1998-ongoing **Kenya, Amboseli National Park:** Elephant communication, cognition and social behavior, conducting playback experiments and recording elephant vocalizations and behavior.
- 1998 **Kenya, Maasai Mara National Park, Tsavo National Park & Laikipia District:** recording elephant vocalizations and behavior.
- 1997 **Tanzania, West Kilimanjaro:** Assessing the numbers and habitat use of elephants utilizing the area.

- 1990-1994 **Kenya**, overseeing numerous elephant surveys and studies of elephants carried out under my direction by the Kenya Wildlife Service Elephant Program.
- 1984-1990 **Kenya**, Amboseli National Park: Elephant vocal and olfactory communication: vocal, visual, chemical signalling and assessment between musth males.
- 1989 **Kenya, Uganda, Tanzania**: Amboseli, Tsavo, Queen Elizabeth and Mikumi National Parks: Assessing the effects of poaching on the age structure and social and reproductive patterns of elephant populations in East Africa.
- 1980-1982 **Kenya**, Amboseli National Park: Focal animal sampling *Musth* and male male competition among elephants,
- 1975-1979 **Kenya**, Amboseli National Park: participating in Cynthia Moss' long-term studies of elephants, identifying individual elephants, and collecting social behavior, demographic and ranging data.

### LECTURES

Invited speaker (selected):

- 2014: National Geographic Retreat, International Council of Advisors, Stockholm, Sweden
- 2013: Chinese Zoo Directors Meeting on Animal Welfare, Shenzhen, China
- 2013: Royal Geographical Society, Hong Kong, China
- 2012: Explorer's Symposium, National Geographic, Washington, DC
- 2012: Nature's great masterpiece: Stories of elephants. Sabine Distinguished Lecture in Psychology, Colorado College.
- 2012: National Geographic Society, Premiere Screening "War Elephants" (Panel) Washington, DC.
- 2008: National Geographic Society (Panel), Washington DC.
- 2007: Seminar on Language Evolution and Cognition held by Communication Research Centre, Northumbria University & Language Evolution and Computation Research Unit, University of Edinburgh, Scotland.
- 2007: Public lecture, Explorers Club, New York.
- 2006: Invited speaker lecture on communication, behaviour and social life among elephants, Science Museums of the la Caixa Foundation", Barcelona, Spain.
- 2006: Invited speaker in series of lectures on Animal Communication Science Museums of the la Caixa Foundation, Madrid, Spain.
- 1999: Animal Cognition and Communication, Tufts Center for Animals and Public Policy, Boston.

### LANGUAGES

English: Mother tongue  
 Kiswahili: Fluent  
 Norwegian: Working knowledge  
 Maasai: Ability to communicate at basic level

### PUBLICATIONS

*Refereed articles, chapters, theses:*

*Published:*

- Shannon, G., Slotow, R., Durant, S.M., Sayialel, K.N., Poole, J., Moss, C., McComb, K.  
 2014. Effects of social disruption in elephants persist decades after culling. *Frontiers in*

- Zoology*, 10:62; <http://www.frontiersinzoology.com/content/10/1/62>
- Nowak, K., Dobson, A., Poole, J., Granli, P., Kahumbu, P., Lee, P., Kiiru, W., Joram, P., Malima, C., Moss, C. 2013. Elephants are not diamonds. *The Ecologist*. [www.theecologist.org/News/news\\_analysis/1800368/elephants\\_are\\_not\\_diamonds.html](http://www.theecologist.org/News/news_analysis/1800368/elephants_are_not_diamonds.html)
- Lee, P.C., Bussière, L.F., Webber, C.E., Poole, J.H., Moss, C.J. 2013. Enduring consequences of early experiences: 40 year effects on survival and success among African elephants (*Loxodonta africana*). *Biology Letters*. 04/2013; 9(2):20130011. DOI: 10.1098/rsbl.2013.0011.
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- Lee, P.C., Poole, J.H., Njiraini, N. & Moss, C.J. 2011. Male social dynamics: Independence and beyond. In: *The Amboseli Elephants: A Long-Term Perspective on a Long-Lived Mammal*. Moss, C.J., Croze, H.J & Lee, P.C. (Eds.) University of Chicago Press.
- Mutinda, H.S., Poole, J.H., Moss, C. J. 2011. Decision-making and leadership in using the ecosystem. In: *The Amboseli Elephants: A Long-Term Perspective on a Long-Lived Mammal*. Moss, C.J., Croze, H.J & Lee, P.C. (Eds.) University of Chicago Press.
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##### **Websites:**

- [www.ElephantVoices.org](http://www.ElephantVoices.org) - about elephant social behavior, communication and welfare
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- The Mara Elephants Who's Who Database (on <http://www.elephantvoices.org>)
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- ElephantVoices Gestures Database (on <http://www.elephantvoices.org>)
- ElephantVoices Call Type & Contest-Type Databases (on <http://www.elephantvoices.org>)
- The Minneriya-Kaudulla Elephant Identification Database  
<http://www.elephantvoices.org/srddb>

##### **Printed Articles and books highlighting the work of Joyce Poole**

Elephant social behavior and communication research and conservation work featured in: Readers' Digest, Scientific American, Science, National Geographic Kids, National Geographic Magazine, National Geographic Adventure, New York Times Magazine, National Geographic Explorer, LA Times, Highlights for Children, Scholastic, The New York Times, Science Times, Science, Science News, Spektrumdirekt, National Geographic News, Kyodo News Washington Bureau, Daily Telegraph, Guardian.

2001 Martin Meredith's *Africa's Elephant*, a biography.

1992 Doug Chadwick's book *Fate of the Elephant*.

1992 Doug Chadwick in his feature article for National Geographic Magazine.

Recordings featured in Pulse of the Planet.

##### **Pod casts:**

2007 Science and the city

##### **Radio (a selection)**

2012 Sam Litzinger interview on The Animal House/NPR (WAMU 88.5)

2009 Elephant welfare views featured on WBUR's Inside Out Documentary on American Zoos with Diane Toomey  
 2008 Elephant communication research featured in Up Front Radio, San Francisco with Sandip Roy Chowdhury  
 2008 Elephant communication, cognition and welfare with Karl Losken Animal Voices 102.7fm in Vancouver BC Canada  
 2005 Science Update, American Association for the Advancement of Science (AAAS)  
 2005 BBC Radio Science, the Leading Edge  
 2005 German Public Radio (SWR) program Campus  
 2005 NPR Elephant vocal learning  
 2005 BBC News Scotland Vocal Learning in elephants  
 2005 Elephant welfare ABC's Radio 702 with Rory McDonald  
 2004 Elephant communication research featured in BBC's Beyond our Senses program Sounds of Life with Grant Sonnex  
 2004 Elephant communication research featured in NPR program on elephant language  
 1996 WETA-FM, News 820's Openline & WNYC  
 1981 Musth in the African elephant, BBC Radio 4, The living World

*Television (a selection)*

2012 War Elephants, award winning documentary about the traumatized elephants in Gorongosa National Park, Mozambique, and their recovery. National Geographic Wild, worldwide.  
 2008 Elephant communication research is featured in Elephant having tales to tell, NHK, Japan (Japanese and English versions).  
 2006 Interview on elephant communication and cognition for Smart Planet for REDES-TVE, Spain.  
 2005 Elephants and vocal learning, Daily Planet Discovery Channel Canada.  
 2005 Elephant cognition and conservation views featured on National Geographic Explorer *Elephant Rage*.  
 2004 Elephant recordings featured in Discovery Channel's Echo III.  
 2002 Elephant communication research, Elephant's Talk, featured in BBC documentary *Talking with Animals*.  
 Work featured on News and Talk shows such as 1993 CNN, ABC news Women and Science, The Today Show, 1996, West 57<sup>th</sup> Street CBS News, 1989, PM Magazine, 1987.  
 1999 Research featured in *Inside the Animal Mind Part 3 Animal Consciousness*, WNET Nature.  
 1998 Featured on Episode 16, *Elephants*, in series, *Champions of the Wild*, Omni Film Productions, Vancouver, Canada.  
 1996 Life, elephant research and conservation work subject of National Geographic Special, *Coming of Age with Elephants*.  
 1996 *Wildlife Warriors*, National Geographic Special.  
 1996 *A Voice for Elephants* USIA AfricaPIX.  
 1996 Discovery Channel documentary "Ultimate Guide to Elephants".  
 1990 *Elephants like us*, Rossellini and Associates.  
 1990 *The language of the elephants*, Rossellini and Associates.  
 1989 Elephant research and conservation work featured in National Geographic Special *Ivory Wars*.

1988 Research highlighted in BBC production *Trials of Life* with David Attenborough.

1988 Work on elephant infrasound featured in *Supersense* BBC Natural History Unit series on animal senses.

1987 Featured in Sports and Adventure, *Women of the World*.

**EXHIBIT B TO POOLE AFFIDAVIT -  
LIST OF REFERENCES CITED [A-175 - A-178]**

Joyce Poole Elephant Autonomy Affidavit

Exhibit

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SUPPLEMENTAL AFFIDAVIT OF JOYCE POOLE, FOR PETITIONER,  
IN SUPPORT OF PETITION, OCTOBER 1, 2018 [A-243 - A-245]



COUNTRY OF NORWAY  
PROVINCE OF VESTFOLD  
MUNICIPALITY OF SANDEFJORD

)  
)  
) ss. **COPY**

**Supplemental Affidavit of Joyce Poole**

Joyce Poole being duly sworn, deposes and says:

**Introduction and Qualifications**

1. My name is Joyce Poole. My background and qualifications are set out in my original affidavit in this matter.
2. I submit this affidavit in support of The Nonhuman Rights Project, Inc. (NhRP). I have personal knowledge of the facts to which I attest, and am not a party to this proceeding.
3. Elephants are highly intelligent, social animals. In elephant society an intricate network of relationships radiates outward from the mother-offspring bond through the extended family and the bond group, to clan, population and beyond to strangers, including the primary predatory threat to their survival: Humans. Some 300 documented behaviors, gestures and calls have evolved helping to mediate and maintain these relationships, to communicate over miles, and to direct extraordinarily coordinated bonding ceremonies and group defense.
4. Over millions of years elephants have roamed the earth as intelligent and social mammals, capable of planning, negotiating and engaging in collective decision making. Active more than 20 hours each day elephants move many miles across landscapes to locate resources to maintain their large bodies, to connect with friends and to search for mates. Elephants have evolved to move. Holding them captive and confined prevents them from engaging in normal, autonomous behavior and can result in the development of arthritis, osteoarthritis, osteomyelitis, boredom and stereotypical behavior. Held in isolation elephants become bored, depressed, aggressive, catatonic and fail to thrive. Human caregivers are no substitute for the numerous, complex social relationships and the rich gestural and vocal communication exchanges that occur between free-living elephants.
5. For elephants in captivity, especially those born into it or kept there for a majority of their lives, going back to the "wild" is unfortunately not an option. For these

elephants, human-run sanctuaries are currently the best option. And while a captive elephant is generally better off with the company of another elephant, this is at best a small comfort and no justification for the deprivation of autonomy and free movement that results.

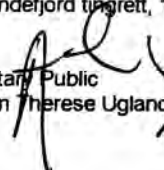
  
Joyce Poole, Ph.D.

Sworn to before me  
this \_\_\_\_ day of \_\_\_\_\_, 2018

\_\_\_\_\_  
Notary Public

The undersigned Notary Public hereby certifies that Joyce Hatheway Poole signed this document in my presence

Sandefjord tingrett, 1 October 2018

  
Notary Public  
Ailin Therese Ugland



SECOND SUPPLEMENTAL AFFIDAVIT OF JOYCE POOLE, PHD., FOR PETITIONER, IN  
SUPPORT OF PETITION, SWORN TO DECEMBER 10, 2018 [A-473 - A-482]



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORLEANS

(H8)

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

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

Index No.: 18-45164

Petitioner,

**SECOND  
SUPPLEMENTAL  
AFFIDAVIT OF  
JOYCE POOLE, Ph.D.**

-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.

COUNTRY OF NORWAY )  
PROVINCE OF VESTFOLD ) ss :  
MUNICIPALITY OF SANDEFJORD )

ORLEANS COUNTY  
2018 DEC 17 AM 11:29

**Second Supplemental Affidavit of Joyce Poole**


Joyce Poole being duly sworn, deposes and says:

1. I submit this second supplemental affidavit in support of the Petitioner, the Nonhuman Rights Project (hereinafter referred to "NhRP"), in its petition for habeas corpus for the elephant Happy, presently confined by Respondents, James J. Breheny and the Wildlife Conservation Society (hereinafter collectively referred to as the "Bronx Zoo").
2. I have reviewed the affidavits of James J. Breheny, Paul P. Calle and Patrick Thomas in the above-captioned action.
3. As a preamble, I would like to draw attention to the fact that in 2006 the Bronx Zoo announced that once the current elephants die, the zoo will not replace them with other elephants. This decision took place after several elephant deaths at the zoo (Berger 2006).

4. The Wildlife Conservation Society is recognized for its outstanding conservation and research on wild elephants in Africa and Asia and the knowledge gained from the work of their own scientists undoubtedly played a role in the zoo's decision to phase out its elephant exhibit. It is worth noting that none of these elephant scientists have contributed affidavits in support of the Bronx Zoo's desire to continue to hold Happy captive rather than to release her to an elephant sanctuary where she would have much larger space to roam and companions.

The affidavit of James Breheny

5. To Breheny's statement (para. 5) that the affidavits NhRP relies upon "only provide generalized, anecdotal discussions of African and Asian elephants as observed in the wild," the affidavits represent, in part, the body of knowledge acquired over 46 years of study of regular group sightings, family censuses, scan and focal samples, that amount to hundreds of thousands of data points on several thousand individually known free-living elephants in Amboseli, Kenya, quite a number of whom have been alive throughout these four and a half decades. In sum, the affidavits are a true representation of an elephant's life. Although incidents were described that exemplify particular cognitive capabilities, the affidavits were hardly anecdotal. My affidavit included over 70 references to scientific research of which 25 were based on the study of these elephants. I was an author of 13 of these papers.
6. In para. 5 James Breheny further states that I claim that, "elephants are generally better suited to the company of other elephants" but he writes that I don't account "for the particular needs, wants, and temperament of any one elephant E.g. Poole Sup, Aff. pp 4-5". I stand by my statement. Elephants are highly social animals and, whether male or female, they are suited to the company of other elephants. Elephants in captivity, including Happy, often do not get on with the elephants their captors select to put them with. Being fenced into areas too small to permit them to select between different companions and when to be with them, they have no autonomy. Elephants need a choice of social partners, and the space to permit them to be with the ones they want, when they want, and to avoid particular individuals, when they want.

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7. By bringing up the temperament of “any one elephant,” Breheny seems to be suggesting that Happy has a problem getting along with other elephants. The historical information indicates that Happy is not anti-social, *per se*, but that Maxine and Patty once attacked her and that there is a risk that they would do so again. This situation would likely be resolved by offering Happy the chance to form relationships with other elephants in the larger space that a sanctuary affords.
  8. In para. 12 Breheny again takes issue with NRP’s position stating that it “relies almost entirely on elephants in the wild without taking into consideration Happy’s unique characteristics, personality and needs.” As an example of her “unique personality,” in para. 13 he writes, “Happy has a history of not getting along with other elephants at the Bronx Zoo, which is why she has been housed separately since her companion died.”
  9. In this contradictory statement, Breheny claims at once that she had a companion (i.e. an elephant she liked) and that she doesn’t get on with other elephants. While there is no doubt that elephants have personalities (Lee, 2011), it is hardly fair to say that Happy has a history of not getting on with other elephants. In forty years at the Bronx Zoo she has only been given a choice of four companions with whom she has been forced to share a space that, for an elephant, is equivalent to the size of a house. Two of these companions she liked and lost, and the other two attacked her. This is hardly a basis for drawing a conclusion that Happy has a “history of not getting on with other elephants”. It is rather a confirmation of the zoo’s inability to meet Happy’s basic needs.
  10. In para. 6 Breheny states, “none of the affidavits submitted in support of NRP’s petition make any reference to Happy, her current state of well being, or her needs as an approximately 47 year-old Asian elephant who has lived for over forty years at the Bronx Zoo.” Other than stating, “based on past experience with Happy, the Bronx Zoo knows that she becomes particularly distressed by even short moves within the zoo,” in his affidavit Breheny makes no mention of Happy’s well-being or her needs. Again, in her 40 year long history at the Bronx Zoo Happy has had the opportunity to socialize with only four elephants and has spent a quarter of this time in solitary confinement.

11. In para. 7 Breheny states, "elephants who have lived at zoos for long periods of time are different from elephants in the wild, and the characteristics of one cannot be compared to the other." Coming from the Director of the Bronx Zoo, this is a shocking acknowledgement of the profound problems that stem from keeping large, social, intelligent, autonomous animals, like Happy, in a space that cannot meet their social and physical needs. It is likely that any differences are due solely and entirely to the nature of their captivity, of being kept without normal social groups and of lacking the ability to enact normal free-will. This will likely be remedied by releasing Happy to a sanctuary that can offer her both companionship and space to roam. While an elephant sanctuary is not the same as the wild, it offers elephants more autonomy and the possibility to choose where to go, what to eat and with whom and when to socialize. There is no scientific basis for arguing that captive and wild elephants are fundamentally different. They have the same biology and needs, but the failure of captivity to meet these needs results in physical and psychological problems in captive elephants. Breheny also appears to be unaware of the extremely positive transformations that have taken place when captive elephants are given the freedom that larger space in sanctuaries or release back to the wild offer.
12. The claims in relation to Happy, that she does not do well with change; that she will not survive the transport; that a transfer to a sanctuary will be too stressful; that she doesn't know how to socialize; that her unique personality is problematic, have been disproven. In fact, elephants with serious physical or psychological problems in zoos have usually become more normal functioning elephants when given more appropriate space in a sanctuary such as PAWS.
13. For example, Maggie was considered to be an anti-social, aggressive elephant and by the time she was moved from the Alaska Zoo to PAWS she was in such poor condition she could barely stand. She is now a thriving, socially active elephant. Indeed she is considered to be PAWS' most social elephant (Ed Stewart, pers. comm.).
14. Ruby was transferred from the LA Zoo to the Knoxville Zoo in Tennessee where she did not successfully integrate with their elephants. When she was moved to PAWS she integrated easily with the other elephants and has become respected leader of her group (Ed Stewart, pers. comm.).

15. Sissy is another classic example. She had been transferred four times and had spent a decade and a half alone before being sent to the Houston Zoo, where she was labeled autistic and antisocial. She was returned to her solitary zoo where she killed a person. She was moved again to El Paso Zoo, where she was beaten because she was a killer elephant. In 2000 she was transferred to The Elephant Sanctuary in Tennessee and within six months of arrival she was calm and cooperative. She became a leader, putting all elephants at ease. In 2000 the USDA had given Sissy only a year to live. Eighteen years later she is still going strong (Scott Blais, pers. comm.).
16. Bunny had been transferred four times and had only known a less than half an acre exhibit when she arrived at The Tennessee Elephant Sanctuary. She was 47 years old and had spent 40 years alone. Within 24 hours of arriving at sanctuary she had integrated into the group (Scott Blais, pers. comm.).
17. Maia and Guida, the first two elephants at Santuário de Elefantes Brasil, had lived together for 40 years. For most of these years Maia was aggressive to Guida, knocking her over, pushing her down and pinning her to the ground. Within 12 hours of arriving at the sanctuary the gates were opened up between them. Since then they have been together and no further aggression has been seen. Two more rescued female Asians are due to arrive this month. The space currently allocated for Maia and Guida is 75 acres, including one area of 40 acres, another of 22 acres and three other smaller areas ranging from 1.5 to 4 acres. This combination of possible spaces allows easy integration of new elephants. The plan is to expand the space for Asian elephants to multiple hundred acres and possibly a thousand or more, depending upon whether males and females can be integrated. Santuário de Elefantes Brasil owns a total of 2800 acres (Scott Blais, pers. comm.).
18. In South Africa, African elephants that have been released from long-term captivity to the wild, after a period of suitable rehabilitation, have all adapted entirely, successfully resuming life as wild elephants despite decades in captivity, and not having lived in the 'wild' since they were juveniles (see Elephant Reintegration Trust – <https://www.elephantreintegrationtrust.com/projects>).
19. In paras. 23 and 24 Breheny quotes my assertion that sanctuaries are better than traditional zoos and claims that I don't explain why a sanctuary could prevent any



of the harms I enumerate. The reasons are explained in detail in Poole & Granli, 2008 and relate to the orders of magnitude of greater space that is offered in sanctuaries. Such space permits autonomy and allows elephants to develop more healthy social relationships and to engage in a near natural movement, foraging, and repertoire of behavior. When elephants are forced to live in insufficient space for their biological, social and psychological needs to be met, over time, they develop physical and emotional problems.

20. As the above examples illustrate, the problems seen in captive elephants, like Happy, can usually be mitigated with the proper attention and environment. To re-emphasize, there is no basis for arguing that captive and wild elephants are fundamentally different. They have the same biology and needs, but the failure of captivity to meet these needs results in physical and psychological problems.

The Affidavit of Paul P. Calle

21. As a veterinarian, Paul Calle focuses on the regular medical care that is provided to Happy at the Bronx Zoo. He states that the Bronx Zoo “undertakes a multitude of efforts to ensure Happy’s continued physical and psychological well-being and health” (para. 6). To support this statement he notes that this includes “visual checks by the care staff several times a day” (para. 7), “regularly but less than daily” a complete blood count, biochemical profile, elephant inflammatory profile and, quarterly, an elephant tuberculosis antibody screening test and trunk wash for tuberculosis culture and PCR (para 8). He furthermore states, “veterinary staff conduct regular health assessment of Happy through body condition evaluations, oral and dental examinations, and foot examinations” and that, “baseline toe x-rays of Happy’s feet were completed, and are repeated for comparative analysis on an as-needed basis to address particular areas of concern as they arise.” (para. 9).
22. Nowhere in his affidavit does Dr. Calle comment that Happy is found to be healthy. Indeed his statement in Para 9 regarding Happy’s feet indicates that her feet are not healthy. My own observations from watching a number of videos is that Happy lifts her feet repeatedly, indicating that she is either trying to take the weight off of them or is engaging in stereotypic behavior. The Quarterly TB tests are more frequent than normally warranted and suggests that Happy is being



monitored closely because she is housed in the same barn as Patty who has been diagnosed with TB.

23. Dr. Calle's only reference to Happy's psychological well-being is that she becomes "very distressed during short moves from one area of the Bronx Zoo to another." (para. 14) This distress is likely evidence of how traumatic it has been for Happy to be shuffled about at the zoo from confined space to confined space.
24. I saw no documentation of the "multitude of efforts" that the zoo makes to ensure her psychological well-being. Indeed, since the psychological well-being of elephants is very much dependent on the ability to socialize appropriately with other elephants and this is dependent on having adequate space, the zoo has failed to meet Happy's psychological requirements.
25. PAWS has been involved in moving more than a dozen elephants over the years without incident. These moves include older females and from places as far away as Alaska and Toronto, Canada. Some of these elephants had lived in their prior facilities for over 40 years. There is no evidence that the inevitable stress of these moves has had a long-term effect on any of the elephants. Santuário de Elefantes Brasil is about to move Rana, a confiscated ex-circus elephant in her 50s, 1,675 miles to their sanctuary.

The affidavit of Patrick Thomas

26. The affidavit of Patrick Thomas is focused on the compliance of the Bronx Zoo with AZA Standards for Elephant Management and Care and the Animal Welfare Act. He states that these are the "two primary sets of standards for the care and management of elephants in AZA-accredited institutions in the United States" and that they "ensure that Happy is provided with excellent care focused on her well-being."
27. I have long promoted the development of elephant sanctuaries and co-founded one of them (Santuário de Elefantes Brasil), because our more than four decades long study of free living elephants shows that the AZA specifications are woefully inadequate for meeting the needs of elephants (Poole & Granli 2008).
28. It is notable that Thomas' affidavit does not touch on a Bronx Zoo's weak point, the very small space available to Happy. There are three possible locations for elephants at the Bronx Zoo (see methods section Plotnik et al 2006):

- 1) an indoor "holding area" or elephant barn;
  - 2) a barren, cement walled outdoor elephant yard that appears to be approximately 15 m<sup>2</sup> or 0.05 of an acre (see Plotnik et al 2006: <http://www.pnas.org/content/suppl/2006/10/26/0608062103.DC1#M1>;
  - 3) a zoo exhibit, listed on [www.zoochat.com](http://www.zoochat.com) as being only 1.15 acres (<https://www.zoochat.com/community/threads/aza-elephant-exhibit-sizes.326779/>).
29. Since the Bronx Zoo elephants are incompatible, the naturalistic "exhibit" area has to be shared on a rotational basis. At night Happy is usually in a small pen in the barn or in the barren outdoor yard; during most days, weather permitting, she is also in the barren outdoor elephant yard.
30. In para. 27 Thomas writes, "Weather permitting, Happy has regular, year-round access to a large, naturalistic outdoor exhibit in which she may go swimming and engage in other species-typical behavior, and also has regular overnight access to a large outdoor space." Given that the most species typical behavior of elephants relates to foraging (which is done for her) or social interactions, keeping her in a solitary condition means that she actually has the ability to engage in almost no species typical behavior.
31. It is difficult for members of the public, myself included, to obtain much information about Happy's behavior other than viewing very short videos of her captured by people who have ridden on the monorail at the Bronx Zoo. In these videos we see her engaged in only five activities/behaviors: Standing facing the fence/gate, dusting, swinging her trunk in stereotypic behavior, standing with one or two legs lifted off the ground, either to take weight off painful, diseased feet or again engaging in stereotypic behavior, and once, eating grass. Only two, dusting and eating grass, are natural. Alone, in a small space, there is little else for her to do.

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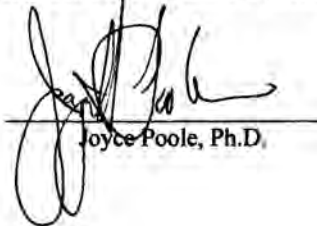
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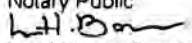


Joyce Poole, Ph.D.

Sworn to before me  
 this \_\_\_\_ day of \_\_\_\_\_, 2018

\_\_\_\_\_  
 Notary Public

I hereby certify that this document bears the signature of Joyce Hatneway Poole and that (he/she) has certified its contents before me as required by Norwegian law  
 Sandefjord Probate court. 10 December 2018

Notary Public  
  
 Liss Hansen Barvik





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# New York Supreme Court

## Appellate Division—First Department

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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.*

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### BRIEF FOR *AMICUS CURIAE* LAURENCE H. TRIBE IN SUPPORT OF PETITIONER-APPELLANT

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2020-02581**

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**Supreme Court, Appellate Division,  
First Department**

STATE OF NEW YORK

\_\_\_\_\_  
THE NONHUMAN RIGHTS PROJECT, INC., ON  
BEHALF OF HAPPY,

*Petitioner-Appellant,*

—against—

JAMES J. BREHENY, IN HIS OFFICIAL CAPACITY AS THE  
EXECUTIVE VICE PRESIDENT AND GENERAL DIRECTOR OF ZOOS  
AND AQUARIUMS OF THE WILDLIFE CONSERVATION SOCIETY AND  
DIRECTOR OF THE BRONX ZOO, AND WILDLIFE  
CONSERVATION SOCIETY,

\_\_\_\_\_  
*Respondents-Respondents.*

**BRIEF OF *AMICUS CURIAE* LAURENCE H. TRIBE<sup>1</sup>  
IN SUPPORT OF PETITIONER-APPELLANT**

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<sup>1</sup> Laurence H. Tribe is the Carl M. Loeb University Professor at Harvard University and Professor of Constitutional Law at Harvard Law School. University affiliation is noted for identification purposes only. This amicus brief reflects only the views of Professor Tribe as a scholar, not the views of Harvard or any other institution. He was granted leave to file amicus briefs in this Court and other appellate courts in New York State in the chimpanzee habeas appeals referenced herein, including the Court of Appeals.

## **I. Preliminary Statement**

Happy is an autonomous and sentient Asian elephant who evolved to lead a physically, intellectually, emotionally, and socially complex life. Every day for forty years, her imprisonment by the Bronx Zoo has deprived her of this life. Free she would travel ten or twenty miles a day. She would live in a herd led by a matriarch (perhaps she would now even be a matriarch herself) along with her mother, sisters, and calves, with whom she would regularly communicate, engage in discussions and group decision-making, plan coordinated actions, and practice cooperative problem-solving. She would use her ability to self-determine, to understand theory of mind, and to plan. She would display empathy and grieve upon the death of a family member.

The Supreme Court, Bronx County recently ruled that Happy is not a “person” for purposes of habeas corpus relief. This Brief argues that this Court should reject recent precedent (including its own dictum) and recognize that Happy is indeed a legal person for purposes of habeas corpus in New York and is entitled to the right to bodily liberty which that great writ protects.

Happy sought an order to show cause under the New York habeas corpus statute<sup>2</sup> in October 2018 when the Nonhuman Rights Project, Inc. (“NhRP”) filed a

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<sup>2</sup> Article 70 of the New York Civil Practice Law and Rules (“CPLR”) sets forth the procedure for common law writ of habeas corpus proceedings and requires that a petitioner file an order to show cause when the imprisoned party is not being brought to court. *See* CPLR 7001, 7003(a).

common law habeas corpus petition on her behalf in the Supreme Court, Orleans County and demanded that the court recognize her as a legal person, grant her the right to bodily liberty, and order her immediate release from captivity and to an appropriate sanctuary. The petition alleged that the scientific evidence contained in the affidavits attached thereto demonstrated that elephants are autonomous, sentient beings who, pursuant to New York common law jurisprudence, are “persons” for purposes of common law habeas corpus and within the meaning of Article 70 of the Civil Practice Law and Rules (“CPLR”), New York’s habeas corpus procedural statute. The Orleans court granted Happy a hearing in November 2018, making her the first elephant in history to be the subject of a habeas corpus proceeding. The court subsequently transferred Happy’s case to the Supreme Court, Bronx County. After three days of hearings, the court “regrettably” ruled against her petition on the ground it was bound by a decision of the Appellate Division, Third Department (“Third Department”) which had denied habeas relief to a chimpanzee named Tommy on the novel ground that the capacity to bear “social duties and responsibilities” is a prerequisite for the capacity to possess legal rights, and that this capacity is absent in chimpanzees (and presumably all other nonhuman animals) and is unique to human beings. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dep’t 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015) (referred to herein as “*Lavery*”).

In 2017, this Court was presented with appeals from the denial of second habeas petitions for Tommy and another chimpanzee, Kiko. In its decision, this Court cited *Lavery* but declined to rely on it. The Court nonetheless denied habeas relief to the chimpanzees on the grounds that the petitions were “successive” and therefore barred. Although the Court thereby disposed of the matter, it went on gratuitously to express the opinion, obviously not necessary to the result in the case, that chimpanzees and all other nonhuman animals are not fit candidates for personhood on the mere ground that they are not human. *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73 (1st Dep’t 2017) (referred to herein as “*Lavery II*”).<sup>3</sup>

The Third Department’s *Lavery* ruling, which the Supreme Court felt bound by in this case and upon which this Court partially relied in dictum in *Lavery II*, was erroneous. The Third Department reached its conclusion on the basis of a fundamentally flawed definition of legal personhood. It reasoned that habeas corpus applies only to legal persons and essentially assumed that chimpanzees cannot be legal persons – Q.E.D. *Lavery*, 124 A.D.3d at 152-153. But that line of reasoning begged vital questions by relying on a classic but deeply problematic—and, at the

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<sup>3</sup> Notably, the Supreme Court in this case chose to base its decision on the precedent of the Third Department and not that of this Court, despite the fact that Bronx County falls within this Court’s appellate jurisdiction, implying that the court recognized the personhood discussion in *Lavery II* to be dictum.

very least, profoundly contested—definition of “legal personhood” as turning on an entity’s present capacity to bear “both rights and duties.” *Id.* at 151-52. This definition, which would appear on its face to exclude third-trimester fetuses, children, and comatose adults (among other entities whose rights as persons the law indisputably protects), importantly misunderstood the relationship among rights, duties, and personhood.<sup>4</sup> This Court, in turn, made the test for personhood wholly arbitrary by basing it solely on membership of the human species in *Lavery II*.

*Lavery* and *Lavery II* both rest on the manifestly unjust and myopic premise that human beings are the only species entitled to legal personhood and therefore the only beings on earth capable of possessing legal rights. These decisions run counter to New York’s common law of habeas corpus, which has a noble tradition of expanding the ranks of rights holders (see *infra*). Rejecting *Lavery* and *Lavery II* would be in concert with the concurring opinion of Justice Eugene M. Fahey of the New York Court of Appeals in *Nonhuman Rights Project, Inc., on Behalf of Tommy*

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<sup>4</sup> For its erroneous conception of legal personhood as being contingent on the capacity to shoulder legal duties, the Third Department relied in part upon Black’s Law Dictionary, which in turn relied on the definition of “person” from the 10th edition of Salmond’s *Jurisprudence*. In 2017, the NhRP unearthed the 10th edition of *Jurisprudence* in the Library of Congress and determined that Black’s Law Dictionary had misquoted it. Salmond actually supported the NhRP’s rights or duties argument. The NhRP then asked the Editor-in-Chief of Black’s Law Dictionary in writing to correct the error, which he said he would do. The NhRP immediately sought to bring this development to the attention of this Court by motion after oral argument but before the rendering of the decision at issue, but this Court denied the motion and thereupon, in its ruling, perpetrated the same “rights and duties” mistake as the Third Department in *Lavery*. Notably, this crucial error was corrected in the current edition of Black’s Law Dictionary, the 11th, which was released in 2019.

*v. Lavery et al.*, 31 N.Y.3d 1054 (2018), as well as a growing international trend towards courts recognizing the personhood and rights of at least some nonhuman animals, including their entitlement to habeas corpus.

Thus the court in *Lavery*, 124 A.D.3d at 150, said that “Petitioner” had not “cite[d] any precedent . . . in state law, or under English common law, that an animal could be considered a ‘person’ for the purposes of common-law habeas corpus relief” and claimed that such “relief has never been provided to any nonhuman entity.” Whether that was accurate at the time is immaterial inasmuch as, in the six years since *Lavery*, several nonhuman animals have been granted writs of habeas corpus (or their civil law equivalent) and have been declared persons for that purpose. Among them, a chimpanzee named Cecilia was ordered released from an Argentine zoo and sent to a Brazilian sanctuary.<sup>5</sup> An orangutan named Sandra in Buenos Aires was similarly declared a person for purposes of habeas corpus and now lives at a sanctuary in Florida (though her personhood determination was overturned by an appellate court).<sup>6</sup> In another case, the Colombian Supreme Court ordered that an endangered Andean bear named Chucho be released from a zoo and

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<sup>5</sup> *In re Cecilia*, File No. P-72.254/15 at 32 (Nov. 3, 2016) (referring to Cecilia as a “nonhuman legal person”), translation available at: [https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia\\_translation-FINAL-for-website.pdf](https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf).

<sup>6</sup> *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA, Sobre Amparo* (Association of Officials and Attorneys for the Rights of Animals and Others v. GCBA, on Amparo), EXPTE. A2174-2015 (October 21, 2015).



relocated to a natural reserve pursuant to habeas corpus (though it was later overturned on appeal by the Colombian Constitutional Court).<sup>7</sup> Earlier this year in Pakistan, the Islamabad High Court, citing Happy’s case, ruled that an Asian elephant named Kaavan must be released from the Islamabad zoo and sent to a sanctuary (though this case was brought about by a writ of mandamus, not habeas corpus). *Islamabad Wildlife Mmgt. Bd*, W.P. No.1155/2019, at 62. The court noted that “an elephant has exceptional abilities and one such member of the species, ‘Happy,’ an inmate of the Bronx Zoo [. . .], has even passed the ‘mirror test,’” *id.* at 12, and cited Justice Fahey’s concurring opinion approvingly. *Id.* at 59.<sup>8</sup>

## **II. The Third Department’s Reasoning in *Lavery* and this Court’s Adoption of that Reasoning in Dictum in *Lavery II* Unjustifiably Curtails the Scope of Habeas Corpus**

For centuries, this Court has recognized that the common law writ of habeas corpus “lies in all cases of imprisonment by commitment, detention, confinement or restraint, for whatever cause, or under whatever pretence.” *People v. McLeod*, 3 Hill

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<sup>7</sup> *Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 (July 26, 2017), translation available at: <https://www.nonhumanrights.org/content/uploads/Translation-Chucho-Decision-Translation-Javier-Salcedo.pdf>. The Colombian Constitutional Court reversed the Colombian Supreme Court’s ruling by a vote of 7-2. Translation of the Court’s official press release available at: <https://www.nonhumanrights.org/content/uploads/English-Chucho-the-Bear-FINAL.pdf>.

<sup>8</sup> Available at: <https://www.nonhumanrights.org/content/uploads/Islamabad-High-Court-decision-in-Kaavan-case.pdf>.

635, 647 note j (N.Y. 1842).<sup>9</sup> In a similar spirit, the United States Supreme Court has emphasized that the writ’s “scope and flexibility” and “its capacity to reach all manner of illegal detention,” as well as “its ability to cut through barriers of form and procedural mazes . . . have always been emphasized and jealously guarded by courts and lawmakers.” *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

Throughout history, the writ of habeas corpus has served as a crucial guarantor of liberty by providing a judicial forum to beings some of whom the law might not (yet) recognize as having legal rights and responsibilities on a footing equal to others.<sup>10</sup> In a time that is becoming acutely aware of the four-century history of racial discrimination and its enduring legacy, it cannot pass notice that African Americans who had been enslaved famously used the common law writ of habeas corpus in New York to challenge their bondage and to proclaim their humanity, even when the law otherwise treated them as mere things.<sup>11</sup> In a similar fashion, women in England were once considered the property of their husbands and had no legal recourse against abuse until the Court of King’s Bench began in the 17<sup>th</sup> century to permit

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<sup>9</sup> See also *People ex rel. Pruyne v. Walts*, 122 N.Y. 238, 241-42 (1890) (“The common-law writ of habeas corpus was a writ in behalf of liberty, and its purpose was to deliver a prisoner from unjust imprisonment and illegal and improper restraint.”).

<sup>10</sup> E.g., *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772).

<sup>11</sup> See *In re Tom*, 5 Johns. 365 (N.Y. 1810) (per curiam) (holding, at a time when slavery was legal in New York, that a slave could bring a habeas corpus action against a man that he alleged was illegally detaining him); see also *Lemmon v. People*, 20 N.Y. 562, 604-06, 618, 623, 630-31 (1860); *In re Belt*, 2 Edm. Sel. Cas. 93 (N.Y. Sup. 1848); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846).

women and their children to utilize habeas corpus to escape abusive men.<sup>12</sup> Indeed, the overdue transition from thinghood to personhood through the legal vehicle of habeas corpus must be deemed among the proudest elements of the heritage of that great writ of liberation.

Stating—as did the Third Department and this Court in dictum—that nonhuman animals are not welcome in habeas courts solely because of the fact they are not human is a stark and sad reminder of the shameful era in which some human beings were not granted personhood or legal rights because they were not of the same race or gender as those who then were rights-bearers. Contrary to these holdings, New York courts have throughout the state’s history entertained petitions for writs of habeas corpus from a wide variety of beings considered at the time to be incapable of bearing the same rights and responsibilities as most members of society, including infants and young children,<sup>13</sup> incompetent elderly persons,<sup>14</sup> and persons deemed insane.<sup>15</sup>

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<sup>12</sup> Paul D. Halliday, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 121-32 (2010).

<sup>13</sup> *People v. Weissenbach*, 60 N.Y. 385 (1875) (hearing a habeas petition and concluding that the constraint was lawful); *People ex rel. Intner on Behalf of Harris v. Surles*, 566 N.Y.S.2d 512, 515 (Sup. Ct. 1991); *In re M'Dowle*, 8 Johns. 328 (N.Y. Sup. Ct. 1811); *In re Conroy*, 54 How. Pr. 432 (N.Y. Sup. Ct. 1878); *People v. Hanna*, 3 How. Pr. 39 (N.Y. Sup. 1847).

<sup>14</sup> *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dep’t 1996); *State v. Connor*, 87 A.D. 2d 511, 511-12 (1st Dep’t 1982).

<sup>15</sup> *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961); *People ex rel. Ledwith v. Bd. of Trustees*, 238 N.Y. 403, 408 (1924); *Sporza v. German Sav. Bank*, 192 N.Y. 8, 15 (1908); *People ex rel. Morrell v. Dold*, 189 N.Y. 546 (1907); *Williams v. Dir. of Long Island Home, Ltd.*, 37 A.D. 2d 568, 570 (2d Dep’t 1971); *Matter of Gurland*, 286 A.D. 704, 706 (2d Dep’t 1955); *People ex rel. Ordway v. St. Saviour’s Sanitarium*, 34 A.D. 363 (N.Y. App. Div. 1898).

Cases like these recognize that the danger habeas corpus confronts—forceful but unjustified restraint and detention arguably in violation of applicable law—can exist even where the habeas petitioner still lacks other legal rights and responsibilities or does not resemble contemporary rights holders. This Court’s erroneous reliance on *Lavery* and its misguided focus on the degree to which the habeas-seeker has already achieved full recognition of personhood and rights-bearing capacity would immunize many forms of allegedly illegal detention from any judicial examination whatsoever, including Happy’s decades-long imprisonment at the Bronx Zoo.

The trial courts of New York have now twice taken the monumental first step of granting a habeas corpus hearing to a nonhuman animal.<sup>16</sup> Happy’s liberty was the subject of three days of hearings before the Supreme Court. It appears clear from the decision that, but for *Lavery*, the court would have ordered Happy freed to sanctuary as a “person” under the New York habeas provision. This Court has the opportunity to correct its own error and provide some measure of justice to Happy by repudiating *Lavery* and the dictum of *Lavery II* and ruling that Happy is indeed a

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<sup>16</sup> Prior to the second filing on behalf of Tommy and Kiko (which culminated in *Lavery II*), the Supreme Court, New York County entertained a second petition filed by the NhRP on behalf of two chimpanzees named Hercules and Leo, issued the requested order to show cause, and held a hearing requiring the State to justify their detention. The court refused to recognize the chimpanzees’ as legal persons and grant their release because it, like the Bronx court in the instant case, believed itself bound by *Lavery* regarding the necessary showing of duties and responsibilities. *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898 (Sup. Ct. 2015).

person within the meaning of the habeas corpus provision and that she is entitled to enjoy the right to bodily liberty.

### **III. *Lavery*'s "Reciprocity" Barrier to Habeas Jurisdiction is Doubly Unsound**

The Third Department's rejection of the chimpanzee's habeas petition in *Lavery* at the threshold stemmed from that court's mistaken view that Article 70's limitation of habeas protection to legal "persons" should be read to exclude all beings not "capable of rights and duties." 124 A.D.3d at 150-52 (internal citations omitted). It was that supposed incapacity that the *Lavery* court treated as disqualifying chimpanzees as a matter of law from entitlement to the protection of the habeas writ. One need not address the court's assumption that these great apes (and presumably all other nonhuman animals) are automatically incapable of being held accountable for their choices in order to challenge the court's underlying conception of the "[r]eciprocity between rights and responsibilities," *id.* at 151, a conception that fundamentally misunderstands the relationship among rights, duties, and legal personhood.

#### **A. Legal Personhood Cannot be Equated with the Capacity to Bear Duties**

The Third Department's conclusion that the inability of chimpanzees (and presumably every other species of nonhuman animal) to bear legal duties rendered it "inappropriate to confer upon chimpanzees . . . legal rights," *id.* at 152, is a non sequitur and not worthy of adoption by any court. Professor Visa Kurki has applied

the classical Hohfeldian analysis<sup>17</sup> of rights and duties to challenge the assumption that a “legal person” can be defined simply as “the subject of legal rights and duties.”<sup>18</sup> Legal theorists have developed two competing explanations of the nature of Hohfeldian rights: the “interest theory” and the “will theory.”<sup>19</sup>

Under the interest theory, rights may properly be attributed to “entities that have interests and whose interests are furthered by duties in a certain manner,”<sup>20</sup> where “interests” refer to benefits flowing from the enforcement of the correlative duty.<sup>21</sup> Nonhuman animals can and in fact do hold many interest-theory rights, as the *Lavery* court’s opinion conceded,<sup>22</sup> even though such nonhuman animals are not conventionally described as legal persons.<sup>23</sup> Not to put too fine a point on it, it defies

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<sup>17</sup> Professor Wesley Newcomb Hohfeld’s seminal article on the nature of jural relations noted the “ambiguity” and “looseness of usage” of the word “right” to cover several distinct jural relations. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 30 (1913). Hohfeld defined a “right” as a legal claim, the correlative of a legal duty: “In other words, if X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.” *Id.* at 32.

<sup>18</sup> Visa Kurki, *Why Things Can Hold Rights: Reconceptualizing the Legal Person*, LEGAL STUD. RES. PAPER SERIES 3 (2015) (citing *Lavery*, 124 A.D.3d 148).

<sup>19</sup> See, e.g., Matthew Kramer, *Refining the Interest Theory of Rights*, 55 AM. J. JURISPRUDENCE 31, 32 n.4 (2010) (identifying both will theory and interest theory as attempts to define the directionality of legal duties).

<sup>20</sup> Kurki, *supra* note 18, at 7.

<sup>21</sup> Kramer, *supra* note 19, at 32.

<sup>22</sup> *Lavery*, 124 A.D.3d at 152-53 (“Our rejection of a rights paradigm for animals does not, however, leave them defenseless. The Legislature has extended significant protections to animals . . .”).

<sup>23</sup> *Id.* at 250-51; Kurki, *supra* note 18, at 2-3. But see Jessica Berg, *Of Elephants and Embryos*, 59 HASTINGS L.J. 369, 404 (2007) (“Thus far no state has chosen to provide any legal rights directly to animals; animal welfare laws protect the interests of natural persons in preventing harm to animals.”). Berg’s position on the nonexistence of animal rights seems to derive from a will-theory conception of rights.

common sense and ordinary linguistic usage to deny that something can fail to be in the “interest” of a nonhuman being like a chimpanzee or an elephant, whereas it would be nonsensical to say that something is not in the “interest” of a rock or a dining table.

Even from the perspective of a will-theorist, the court’s view that rights-holding and duty-bearing are necessary preconditions of legal personhood in the sense relevant to habeas corpus jurisdiction is unsustainable. Under the will theory, an entity holds a “right” if it has “competence and authorization to waive/enforce some legal duty.”<sup>24</sup> Therefore, the class of rights-holders under the will theory is limited to “rational beings with mental faculties that correspond to adult human beings of sound minds.”<sup>25</sup> If one accepts the will theory’s narrow definition of rights, it becomes unsustainable to equate legal personhood with rights-holding because the class of potential rights-holders under that definition would exclude what our culture universally regards as legal persons.

Needless to say, infant children and comatose adults are paradigmatic legal persons. Yet they certainly do not possess what will-theorists would deem rights.<sup>26</sup> Will-theory rights are not necessary conditions for legal personhood, nor are they

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<sup>24</sup> Kramer, *supra* note 19, at 33.

<sup>25</sup> Kurki, *supra* note 18, at 11; *see also* Kramer, *supra* note 19, at 35 (identifying adult human beings with sound rational faculties as only class of rights-holders under will theory).

<sup>26</sup> *See* Kurki, *supra* note 18, at 11.

sufficient. For example, during the era when our Constitution employed various euphemisms to express its toleration of the benighted institution of chattel slavery, even those who were lawfully enslaved by others possessed will theory rights, such as the right to appeal criminal convictions, but they were for most purposes considered to be legal things rather than persons.<sup>27</sup> Thus neither an interest- nor will-theory conception of rights supports the court's reciprocity argument.

B. There are Further Problems with the Supposed Relationship Between Duty-Bearing and Legal Personhood

The Third Department's reasoning that chimpanzees (and all other nonhuman animals) cannot be legal persons because legal personhood is equivalent to the capacity to bear rights and duties is flawed for other reasons as well.

First, even the court's unexamined premise that chimpanzees (and presumably all other nonhuman animals) are inherently incapable of bearing any legal duties is open to serious question. Professor Matthew Kramer has plausibly criticized the view that "chimpanzees and other non-human animals cannot be endowed with legal rights, because they are incapable of complying with legal obligations."<sup>28</sup> Kramer argues that the ability to comprehend a duty might be necessary for regular compliance with obligations but is not conceptually necessary for bearing duties:

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<sup>27</sup> See *id.* at 11.

<sup>28</sup> Matthew Kramer, *Getting Rights Right*, in *RIGHTS, WRONGS AND RESPONSIBILITIES* 28, 42 (Matthew Kramer ed., 2001).



“To bear a legal obligation is simply to be placed under it,” and meaningful comprehension of the obligation is a “separate matter.”<sup>29</sup>

Kramer acknowledges that it might be unfair to impose legal duties upon animals incapable of fully understanding them, but it is “far from infeasible.”<sup>30</sup> Given that “deterrence-oriented punishments” can be used to convey to animals that a certain type of conduct is prohibited, it is surely possible (though admittedly controversial) to conceive of animals bearing duties.<sup>31</sup> At any rate, to treat this issue as a pure question of law that the court could properly dispose of without hearing evidence or looking at factual information seems indefensible. Again, a reference to common sense and ordinary usage seems illuminating. It might be unfair to punish a puppy for its incontinence or a cat for stealing the toy of a pet canine with which it had been raised, but it would be entirely normal for the custodian of the puppy or the cat to admonish the pet and withhold a reward to change the unwanted behavior.

Second, even if all nonhuman animals were indeed unable to bear duties, it is not the case, as a conceptual matter, that the possession of a right necessarily entails the right-holder’s bearing of a legal duty. Instead, as envisioned in Hohfeld’s classic scheme, the possession of a right entails the “bearing of a legal duty by someone

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Visa Kurki, A THEORY OF LEGAL PERSONHOOD 80 (2019).

else.”<sup>32</sup> For instance, infants are “paradigmatic” legal persons but bear no legal duties to anyone.<sup>33</sup> The Third Department acknowledges in a footnote that “[t]o be sure, some humans are less able to bear legal duties or responsibilities than others,” but the court justifies the legal personhood of such impaired classes of humans on the ground that “collectively, human beings possess the unique ability to bear legal responsibility.” *Lavery*, 124 A.D.3d at 152 n.3. This normative justification that humans are a duty-bearing *species* and thus that any human should be deemed a legal person is highly tendentious and is logically “irrelevant for the *conceptual* point that [infants]<sup>34</sup> do not bear duties yet they are legal persons.”<sup>35</sup> Likewise, the possibility that elephants and other nonhuman animals may not be capable of bearing legal duties—even assuming that to be the case—would not justify denying them legal personhood.

When the NhRP challenged the Third Department’s erroneous ruling on the requirements for personhood in a habeas corpus case, this Court in *Lavery II* implicitly acknowledged the Third Department’s error by refusing to repeat it – and then based its decision on an even more fundamentally flawed definition of legal personhood, stating, at 152 A.D. 3d, at 78, that:

Petitioner argues that the ability to acknowledge a legal duty or legal

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<sup>32</sup> Kramer, *supra* note 28, at 43.

<sup>33</sup> Kurki, *supra* note 18, at 10.

<sup>34</sup> Kramer also points out that “senile people and lunatics and comatose people” have legal rights and yet cannot bear duties. Kramer, *supra* note 28, at 43.

<sup>35</sup> Kurki, *supra* note 18, at 12 (emphasis in original).

responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community.

At least the Third Department's decision, while erroneous, left open the possibility that an entity able to demonstrate the ability to assume duties could have some form of limited personhood. In contrast, this Court made the test a wholly arbitrary one, completely dependent upon the identity of one's species no matter the prisoner's cognitive abilities or demonstrated autonomy.

In the end, whether Happy and other nonhuman animals should be deemed legal "persons" requires attention not just to some conventional set of formal definitions but to "the social meaning and symbolism of law."<sup>36</sup> The ways in which courts have approached questions of personhood in such "borderline cases" as human embryos and fetuses have obviously been marked by "doctrinal discord,"<sup>37</sup> raising questions about the wisdom of replicating that discordant struggle in a context where it might end up being irresolvable or even irrelevant. The issue is, at bottom, a normative one rather than a merely descriptive one: In deciding whether to extend habeas protection to a particular being, courts do not merely describe the

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<sup>36</sup> Note, *What We Talk About When We Talk About Persons: The Language of A Legal Fiction*, 114 HARV. L. REV. 1745, 1760 (2001).

<sup>37</sup> See generally Laurence H. Tribe, ABORTION: THE CLASH OF ABSOLUTES 115-125 (1992) (discussing moral and legal difficulties in defining personhood in the abortion debate and questioning the link between fetal personhood and the rights of the fetus-bearing woman).

assumed capacities and characteristics of that being; they decide how the law should treat that being.

To the degree that competing conceptions of personhood are nonetheless deemed at least pertinent even if not decisive, it is important to remember that legal definitions of what and who constitutes a “person” do much “more than just regulate behavior” when it comes to “America’s most divisive social issues”: they express “conceptions of [the] relative worth of the objects included and excluded by personhood,” and these expressions of “law’s values” in turn shape social norms and values.<sup>38</sup>

Much like the debate over the legal personhood of human fetuses, the question of Happy’s legal personality is thus invariably entwined with the broader debate about the “rights” of nonhuman animals and, even if they have no “rights” as such, about the “wrongs” to which they should not be subjected by a decent society.<sup>39</sup> Courts cannot render defensible decisions about the meaning of legal personhood “without expressing certain values, whether they want to or not.”<sup>40</sup> The question of

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<sup>38</sup> See Note, *supra* note 36, at 1761.

<sup>39</sup> See Justice Fahey’s concurrence, 31 N.Y.3d at 1057 (“being a “moral agent” who can freely choose to act as morality requires is not a necessary condition of being a “moral patient” who can be wronged and may have the right to redress wrongs”). See also, e.g., Sherry F. Colb and Michael C. Dorf, BEATING HEARTS: ABORTION AND ANIMAL RIGHTS (2016); Peter Singer, ANIMAL LIBERATION 8 (2d. ed. 1990) (arguing that the question of whether animals are capable of bearing rights is “irrelevant” to the case for Animal Liberation); Roger Scruton, ANIMAL RIGHTS AND WRONGS 61 (2d. ed. 1998) (making the case that humans bear “duties and responsibilities” to animals even though animals might have no rights).

<sup>40</sup> Note, *supra* note 36, at 1764.

Happy's legal personhood implicates "the uncomfortable but inescapable place of status distinctions" in our legal system,<sup>41</sup> but this Court should not "allow the philosophical conundrum of this eternal question to paralyze its analysis," given the "immensely important pragmatic interests" at stake in the case.<sup>42</sup> This is particularly so where, as in this instance, there is no powerfully competing right that clashes with the recognition that Happy seeks. The contrast with the context of abortion could hardly be more striking.<sup>43</sup> In the words of Justice Fahey in his concurrence, "Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention." 31 N.Y.3d at 1058.

#### **IV. By Rejecting Rights Claims on the Basis of Species Alone, *Lavery I* and *Lavery II* Violate Common Law Equality**

This Court opined in *Lavery II* about a species-membership conception of personhood, the "human community," which denies rights to all nonhuman animals on the mere ground they are not members of the species *Homo Sapiens*. As noted

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<sup>41</sup> *Id.* at 1767.

<sup>42</sup> Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 ARIZ. ST. L.J. 1, 34 (2013) (identifying *Roe v. Wade* as the most important modern legal decision addressing the question of legal personhood and arguing that the Court was forced to put philosophical interests to the side in addressing pressing practical concerns at stake).

<sup>43</sup> See Laurence H. Tribe, *ABORTION: THE CLASH OF ABSOLUTES* (1990).

above, this kind of across-the-board disqualification for rights harkens back to dark days in our past, when race, gender, national origin, religion, and other inherited or immutable characteristics later understood to be arbitrary were used to justify the denial of rights to whole swaths of humanity.

Constitutional jurisprudence provides a useful window into how this Court should properly respond to the argument that to deny personhood on the basis of species alone violates the spirit of equality that inspired and pervades our Constitution's deepest aspirations – aspirations obviously not honored at the Founding (given our history of systematically enslaving or slaughtering African Americans and American Indians), but aspirations expressed initially in the Declaration of Independence; then incorporated in the Civil War Amendments (the Thirteenth, Fourteenth, and Fifteenth); later embodied in the enfranchisement of women through the Nineteenth Amendment, of non-propertied individuals through the Twenty-Fourth, and of individuals who had reached age eighteen through the Twenty-Sixth. This spirit of “common law equality” is evident in Supreme Court cases such as *Romer v. Evans*, 517 U.S. 620 (1996), which invalidated a state constitutional amendment that singled out LGBT individuals for denial of rights

which the Court rightly described as making each LGBT individual a “stranger to its laws,” *id.* at 635.<sup>44</sup>

The fact that, at the time the Constitution of the United States was adopted and even at the times these amendments were added, as well as at the time the relevant provisions of New York State law were enacted, the authors and ratifiers of the relevant language would not have anticipated its extension to nonhuman creatures like Happy cannot be dispositive in a legal universe that does not make the necessarily limited understanding and expectations of past generations dispositive in the interpretation of law. The recent decision of the U.S. Supreme Court in *Bostock v. Clayton County*,<sup>45</sup> though of course dealing with an altogether different question, the meaning of Title VII of the Civil Rights Act of 1964, is nonetheless instructive in its reminder that the task of a common-law court, even in performing the comparatively modest task of construing a statute, requires the attribution of meaning to positive law, not the excavation of unenacted expectations or intentions, which may well reflect the unenlightened premises of a bygone era.

Just as the U.S. Supreme Court in *Lawrence v. Texas* declined to follow what it deemed a benighted precedent upon recognizing that “*Stare decisis* is not an

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<sup>44</sup> See also Laurence H. Tribe, *Equal Dignity: Speaking its Name*, A Response to Kenji Yoshino, Comment, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015), HARV. L. REV. FORUM, Vol. 129, pp. 16-32 (2015).

<sup>45</sup> 590 U.S. \_\_\_\_ (2020).

inexorable command,”<sup>46</sup> so this Court should decline to follow the *Lavery* line. It is worth recalling here the observation made by the *Lawrence* Court in reaching its judgment: Had our forebears “known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>47</sup> What was true in 2003 in *Lawrence* is true in 2020 in this case. And what was true of the dimensions of liberty in *Lawrence* is true of the bearers of liberty-affirming rights in the case of Happy, the Asian elephant at the heart of this habeas application.

## **V. Conclusion**

This Court has a unique opportunity to correct its own erroneous dictum in a rapidly evolving area of the law, specifically, the entitlement of autonomous and sentient nonhuman animals to the right to bodily liberty protected by habeas corpus. This Court should make clear its view that both the Third Department and the Court itself wrongly conflated the procedural and institutional question of habeas corpus jurisdiction with the substantive question of entitlement to habeas relief; seriously

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<sup>46</sup> 539 U.S. 558, 560 (2003) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

<sup>47</sup> *Id.* at 579.



misunderstood the logical relationships among rights, duties, and personhood; and myopically superimposed an overly rigid and formalistic notion of personhood onto an inquiry that should have turned on the fundamental role of habeas corpus as a bulwark against forms of physical detention that our law should be understood to condemn.

The relief that would be legally appropriate in this case would presumably involve not simple release but transfer to a facility in which Happy may fully express her extraordinary capacities, without being confined to a small space as she is now at the Bronx Zoo, and without being forced to stand on public display.

The courts of New York are rapidly evolving towards seeing at least some nonhuman animals as rights bearers. This kind of gradually and selectively evolving recognition of the varying forms of legal protection that beings of varying kinds deserve would recognize, to repeat what the Supreme Court said in *Lawrence v. Texas*, that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”<sup>48</sup>

If a being like Happy—whom the trial court recognized as undeniably autonomous and exquisitely cognitively complex—is presumptively entitled to *none* of the benefits sometimes associated with legal personhood unless and until courts are ready to extend all arguably similar beings *every* benefit of that legal status, the

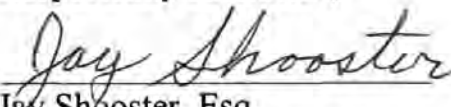
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<sup>48</sup> 539 U.S. at 579.

evolution of common law writs like habeas corpus will remain chained to the prejudices and presumptions of the past and will lose their vital and rightly celebrated capacity to nudge societies toward more embracing visions of justice.<sup>49</sup> As this State's highest court wrote in *Woods v. Lancet*, 303 N.Y. 349, 355 (1951), “‘When the ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.’ We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.” (quoting *United Australia, Ltd., v. Barclay's Bank, Ltd.*, (1941) A.C. 1, 29). This Court can likewise act in the “finest common-law tradition” by revising its own precedent and ordering that Happy is a legal person entitled to the protections of habeas corpus.

Dated: July 13, 2020

Respectfully submitted,

By:   
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<sup>49</sup> See Laurence H. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1338–39 (1974) (describing how legal principles evolve and build on their past development, like “a multidimensional spiral along which the society moves by successive stages, according to laws of motion which themselves undergo gradual transformation as the society's position on the spiral, and hence its character, changes”); see also *id.* at 1340 (“Partly because it seems plausible to believe that the processes we embrace must from the beginning prefigure something of [a] final vision if the vision itself is to be approximated in history, and partly because any other starting point would drastically and arbitrarily limit the directions in which the spiral might evolve, it follows that the process with which we start should avoid a premise of human domination, or indeed a premise of the total subservience of any form of being to any other.”).

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## **PRINTING SPECIFICATIONS STATEMENT**

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Dated: July 13, 2020

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# New York Supreme Court

## Appellate Division—First Department

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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,*

**Appellate  
Case No.:  
2020-02581**

— 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.*

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**BRIEF FOR *AMICI CURIAE* GARY COMSTOCK, PH.D.,  
G.K.D. CROZIER, PH.D., ANDREW FENTON, PH.D., TYLER  
JOHN, L. SYD M JOHNSON, PH.D., ROBERT C. JONES,  
PH.D., LETITIA MEYNELL, PH.D., NATHAN NOBIS, PH.D.,  
DAVID PEÑA-GUZMÁN, PH.D., JAMES ROCHA, PH.D.,  
BERNARD ROLLIN, PH.D. AND JEFF SEBO, PH.D. IN  
SUPPORT OF PETITIONER-APPELLANT**

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*Jeff Sebo, Ph.D.*

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**Supreme Court, Appellate Division,  
First Department**

STATE OF NEW YORK

\_\_\_\_\_  
THE NONHUMAN RIGHTS PROJECT, INC., ON  
BEHALF OF HAPPY,

*Petitioner-Appellant,*

—against—

JAMES J. BREHENY, IN HIS OFFICIAL CAPACITY AS THE  
EXECUTIVE VICE PRESIDENT AND GENERAL DIRECTOR OF ZOOS  
AND AQUARIUMS OF THE WILDLIFE CONSERVATION SOCIETY AND  
DIRECTOR OF THE BRONX ZOO, AND WILDLIFE  
CONSERVATION SOCIETY,

\_\_\_\_\_  
*Respondents-Respondents.*

**BRIEF OF *AMICI CURIAE* PHILOSOPHERS\*  
IN SUPPORT OF PETITIONER-APPELLANT**

\_\_\_\_\_

\* Gary Comstock, Ph.D., G.K.D. Crozier, Ph.D., Andrew Fenton, Ph.D., Tyler John, L. Syd M Johnson, Ph.D., Robert C. Jones, Ph.D., Letitia Meynell, Ph.D., Nathan Nobis, Ph.D., David Peña-Guzmán, Ph.D., James Rocha, Ph.D., Bernard Rollin, Ph.D., and Jeff Sebo, Ph.D. *Amici* thank Rachel Banks for her invaluable assistance.

## **I. Interest of the *Amici Curiae***

We the undersigned submit this brief as philosophers with expertise in ethics, animal ethics, political theory, the philosophy of animal cognition and behavior, and the philosophy of biology in support of the Nonhuman Rights Project's (NhRP's) efforts to secure habeas corpus relief for the elephant named Happy. The Supreme Court, Bronx County, in *The Nonhuman Rights Project v. Breheny*, 2020 WL 1670735 (Sup. Ct. 2020) ("*Breheny*"), declined to grant habeas corpus relief and order Happy's transfer to an elephant sanctuary, referencing previous decisions in the appellate courts that denied habeas relief for the NhRP's chimpanzee clients, Kiko and Tommy, namely *People ex rel Nonhuman Rights Project Inc v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) ("*Lavery I*") and *Nonhuman Rights Project Inc ex rel Tommy v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) ("*Lavery II*"). Those decisions use a number of incompatible conceptions of 'person' which, when properly understood, are either philosophically inadequate or in fact compatible with Happy's personhood. The undersigned have long-standing active interests in our duties to other animals. We reject arbitrary distinctions that deny adequate protections to other animals who share with protected humans relevantly similar vulnerabilities to harms and relevantly similar interests in avoiding such harms. We submit this brief to affirm our shared interest in ensuring a more just coexistence with other animals who live in our communities. We strongly urge this Court, in keeping with the best

philosophical standards of rational judgment and ethical standards of justice, to recognize that, as a nonhuman person, Happy should be released from her current confinement and transferred to an appropriate elephant sanctuary, pursuant to habeas corpus.

## **II. Summary of the Argument**

The NhRP is challenging the lawfulness of the captivity of the elephant Happy. As recently noted by the Supreme Court, Bronx County, the NhRP's goal is

to [change] 'the common law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal rights, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them.'

*Breheny*, at \*2.

To date, the courts have decided against the NhRP, although without fully addressing whether any nonhuman animal is the sort of being who can enjoy habeas corpus relief. The central issue is whether the concept of 'personhood' applies to animals like Happy. In denying habeas corpus relief to Happy the court does not contest the scientific evidence of elephant agential and psychological capacities presented by NhRP, nor the facts of the case. Instead, it references appellate court decisions that the concept of 'personhood' cannot refer to nonhuman animals.

We write as a diverse group of philosophers who share the conviction that if the concept of 'personhood' is being employed by the courts to determine whether

to extend or deny habeas corpus relief, they should employ a consistent and reasonable definition of ‘personhood’ and ‘persons.’ We believe that the previous relevant judgments of the appellate courts applied inconsistent definitions of ‘personhood.’

In this brief, we argue that there is a diversity of ways in which humans (*Homo sapiens*) are ‘persons’ and there are no non-arbitrary conceptions of ‘personhood’ that can include all humans and exclude all nonhuman animals. To do so we describe and assess the four most prominent conceptions of ‘personhood’ that can be found in the rulings of the appellate courts:

1. Species Membership. This conception of personhood is arbitrary because it picks out one level of biological taxonomic classification, species, and then confers moral worth and legal status on members of one particular species, *Homo sapiens*. Attempts to justify this approach are self-defeating because they demonstrate that it is the various criteria used to defend this choice that are actually doing the moral work. These criteria invariably exclude some humans or include some nonhuman animals. This is because our species, like every other, is the product of gradual evolutionary processes that create an array of similarities between species and an array of differences within them.

2. Social Contract. This conception has been misconstrued by previous Courts as endowing personhood only on members of the social contract. Instead, social contracts make citizens out of persons. The exclusion of an individual (or a species) from the contract does not strip that individual (or species) of personhood. Social contract philosophers have consistently maintained that the characteristics that persons must possess to enter into social contracts are rationality (i.e., the ability to advance their own interests) and autonomy (i.e., the capacity for self-rule or self-governance). These capacities are reasonably ascribed to elephants like Happy.
3. Community Membership. This conception rests on the idea that personhood has a social dimension and is importantly linked to membership in the human community. On one view, to be a person is to be embedded in social relationships of interdependency, meaning, and community. Happy clearly meets this criterion: we have made her a part of our human community of persons. On another view, to be a person requires not just social embedding, but also the possession of certain psychological capacities, such as beliefs, desires, emotions, rationality, and autonomy. Again, these capacities are reasonably ascribed to Happy. On either view, she is a member of our community.

4. Capacities. This conception, which is endorsed by the NhRP, maintains that personhood rests on having certain capacities. Autonomy is typically considered a capacity sufficient (though not necessary) for personhood. Violations of autonomy constitute a serious harm. In light of the affidavits from elephant scientists, the lower court has affirmed that Happy is autonomous. As she qualifies as an autonomous being, Happy qualifies as a person.

Each of these different conceptions supports different reasoning regarding personhood. The first, species membership, is morally weak due to its arbitrary character. The other three, when properly understood, entail that Happy can qualify as a person. On these grounds we agree with the NhRP that it is unjust to deny Happy habeas corpus relief.

### **III. Argument**

#### **1. Species Membership**

##### **1.1 About the species membership criterion for ‘personhood’**

The lower court recognizes that Happy exhibits “advanced analytic abilities akin to human beings,” that “[s]he is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty;” yet it determines that she “is not a ‘person’ entitled to the writ of habeas corpus.” *Breheny*, at \*10. In its argument, the lower court references *Lavery I*, which similarly

determined that chimpanzees are not ‘persons’ in part upon the species membership conception of personhood. By grounding its conclusions in the arguments of *Lavery I*, the lower court tacitly relies upon the species membership conception of personhood.

Historically, U.S. law, and in particular the ascription of rights and privileges, has made use of various biological categories. The biological traits and classifications that have been considered legally salient have changed significantly over time, keeping pace with both scientific and moral progress, and correcting some of the egregious errors of earlier scientific theories and political regimes. For instance, sex differences and the supposedly biological categories of race were once employed to determine who had basic legal rights, while maturity continues to inform when individuals attain various rights.

We endorse the idea that the biological sciences must inform legal practice, but we maintain that species membership alone cannot rationally be used to determine who is a person or a rights holder. The concept of ‘personhood,’ with all its moral and legal weight, is not a biological concept and cannot be meaningfully derived from the biological category *Homo sapiens*. Moreover, species are not ‘natural kinds’ with distinct essences; therefore, there is no method for determining an underlying, biologically robust, and universal ‘human nature’ upon which moral and legal rights can be thought to rest. Any attempt to specify the essential features



of ‘human nature’ either leaves out a considerable number of humans—often the most vulnerable in our society—or includes members of some other species. Finally, any attempt to justify the use of species membership (or any other biological classification) to confer personhood status, will inevitably draw on other criteria—such as the social contract, community membership, or psychological capacities—in which case it is these other criteria that are doing the moral work, rendering species membership itself irrelevant.

## **1.2 Species as a biological category**

Species is only one level of biological classification that reflects what is sometimes called the ‘Tree of Life.’ The great insight of Charles Darwin was that the differences between species do not reflect the existence of essential characteristics, but instead are the product of a gradual process of natural selection. Darwin (1859) emphasized the diversity of organic populations, due to a slow accumulation of changes producing distinct varieties within a population and, eventually, new species.

The gradualism of evolution suggests there are no species essences: no set of properties both necessary and jointly sufficient for an organism to be a member of a particular species. There are three central reasons for this:

1. There is a great deal of similarity across species because all organisms on the planet are more or less closely related to each other. It is often

the case that the more closely two species are related, the more similar they tend to be, though there are countless exceptions to this rule due to convergent evolution.

2. There tends to be a substantial degree of natural variation among organisms within a particular species—a feature of populations ‘exploited’ by natural selection.
3. Species change over time—they evolve—so even if all members of a species shared some characteristic at one time, this would probably not be true of all their descendants, and it was definitely not true of all their ancestors.

These facts about the process of evolution and the character of living organisms create a fundamental problem for scientists studying the classification of organisms, referred to as the ‘Species Problem.’ Although evolutionary theory facilitates the grouping aspect of classification, offering a principled criterion for grouping organisms together—shared ancestry—it offers no clear criteria for the level at which to rank them. Whether an ancestral grouping should be considered a variety, subspecies, species, superspecies, subgenus, or genus can be an open question. While among sexual species interbreeding has often been used to define the boundaries of species groups, this is controversial and leads to its own set of problems and counterexamples (Mishler and Brandon 1987).

When understood as a biological classification, it is difficult to see why species, or indeed any other taxonomic category (such as subspecies, genus, family, order, and so on), should bear any moral weight, let alone be used as the grounds for conferring personhood status. Like other species categories, the biological category *Homo sapiens* cannot offer a sufficiently stable or consistent foundation for some core essence universally shared by all and only human beings, which is what is typically meant by ‘human nature’ (Hull 1986). Although there are capacities or relationships that may typically be shared by the members of a particular species that are morally relevant (as we discuss in later sections), it is those capacities, and not species membership per se that is relevant.

### **1.3 Convergent evolution**

Many people believe that the more closely related to humans other animals are, the more likely they are to have ‘human-like characteristics’ that are considered relevant to personhood. This isn’t quite right. Certainly, general similarity tends to be shared by any species with its closest relatives and *Homo sapiens* is no exception. But it is a mistake to think that a human trait that most of our close relatives do not share cannot be shared with more distantly related animals. Consider bipedalism. While all primates other than humans are typically quadrupedal, we share our bipedalism with kangaroos, birds, and a number of extinct dinosaurs. This is explained through convergent evolution.

Convergent evolution identifies phenomena where distantly related species evolve similar traits, not because their shared ancestors had these traits but because their environmental challenges and ways of life are relevantly similar. A favorite example of convergence is the evolution of the camera type eye, which is now known to have evolved multiple times and is a trait that we share with very distant relatives, such as members of the order Octopoda (octopuses). Elephants are, of course, considerably more closely related to humans, so it is already more likely that they might share traits with us that are relevant to their being persons. However, as noted above, evolutionary proximity is only a suggestive indicator of greater general similarity between two species. Until we look, we cannot know whether elephants have characteristics that justify the conferral of personhood status. We need to judge individual animals, like Happy, on their own merits, informed by both the characteristics that appear to be typical of their species and what can be observed of them as individuals.

#### **1.4 Conclusions regarding species membership**

Efforts to identify a set of diagnostic traits both universal and unique to *Homo sapiens* invariably fail. Either they leave out some humans, or they include members of some other species. Using the biological category *Homo sapiens* to define ‘personhood’ and to determine who has legal status is arbitrary, and it makes little sense given what we know of evolutionary processes. Because efforts to justify using

species membership as grounds for conferring personhood invariably depend on appeals to criteria that are entirely separate and outside the realm of taxonomic classification, this suggests that species membership is, in fact, irrelevant.

The NhRP seeks to have Happy classified as a person based on the capacities she shares with other persons. If persons are defined as ‘beings who possess certain capacities,’ and humans usually possess those capacities, then being human can be used to predict with a degree of accuracy that a particular individual will also have those capacities and thereby be a person. But it is an arbitrary decision to use human species membership as a condition of personhood, and it fails to satisfy a basic requirement of justice: that we treat like cases alike. It picks out a single characteristic as the something that confers rights, without providing any reason for thinking it has any relevance to rights.

## **2. A social contract conception**

The Third Department in *Lavery I* argues that “Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of [the US] system of government. Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, ‘rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights’.” 124 A.D.3d at 151 (citations omitted).

The influential social contract theories that emerged in Europe in the 17th and 18th centuries, and which inspired the language and ideals found in the US Constitution, would disagree with this statement for at least three reasons. These reasons are: (1) not all rights depend on the existence of a social contract, (2) the social contract does not produce ‘persons,’ and (3) personhood is not conditional on bearing duties and responsibilities.

### **2.1 Not all rights depend on the existence of a social contract**

Among the most influential of social contract philosophers are Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, who maintain that all persons have ‘natural rights’ that they possess independently of their willingness or ability to take on social responsibilities (Hobbes 1651; Locke 1698; Rousseau 1762). These rights, which we possess in the state of nature, include the right to absolute freedom and liberty. Upon contracting with our fellows, we do not become ‘persons’, but rather ‘citizens’; and we do not suddenly acquire rights, but rather give up our natural rights, sometimes in exchange for civil and legal rights.

*Lavery I* advances the argument that persons are those who have rights by virtue of their capacity to bear responsibilities. They acquire those responsibilities the moment they assent to an “express or implied” social contract. The social contract, according to this line of thought, is the mechanism whereby persons take up societal duties and responsibilities, receiving rights in exchange. But this is not

how political philosophers have understood the meaning of the social contract historically or in contemporary times.

Rousseau explicitly rejected the idea that the social contract gives rights to persons, proclaiming, “Man is born free, and everywhere he is in chains” (Rousseau 1762, Book 1, Chapter 1). These chains, for Rousseau, are self-imposed, forged by ourselves when we give up our natural rights and freedoms and place ourselves under the authority of another. The social contract ‘chains’ us. We find a similar argument in Hobbes. What we acquire with a social contract, according to Hobbes, are law and morality, not rights. In fact, in the act of creating a social contract, we give up nearly all of our natural rights, save one: the right to life. And what we receive in exchange for giving up all these rights are not new rights, but rather security in the form of the protection of the sovereign.

Locke believed that we form societies to protect the institution of private property. We make a compact to leave the state of nature and form a society because we have a shared interest in protecting our property, including our own bodies. In this transition from the state of nature to the state of civil society, we gain some valuable things, including laws, the executive power needed to enforce the laws, and judges to adjudicate property disputes. But we lose our previously held natural rights, including the right to protect ourselves by any means necessary and punish those who transgress against our property.

We ought not understand the social contract, therefore, in terms of the acquisition of rights, per se. Rather, we should think about it in terms of the acquisition of a single duty: to obey the law.

## **2.2 The social contract does not produce ‘persons’**

In the philosophies of Hobbes and Rousseau, with the advent of the social contract we see the creation of an ‘artificial man’ (the sovereign or Leviathan), not a ‘person.’ This artificial man is an abstraction, since no real person could be literally composed of the rights and powers of others. Rousseau describes this ‘new person’ as a collective created only by a truly democratic social contract. Locke describes a ‘body politic’ to which contractors submit. The sole person or body created by the social contract, while important, is a mere abstraction, and by no interpretation an actual person.

The upshot of this is that social contracts create citizens, not persons. Citizens are individuals who are subject to the laws authorized by the contract. Notably, the U.S. Constitution mentions the term ‘persons’ fifty-seven times, but it does not define it. The 14th Amendment, however, distinguishes between persons and citizens. This is consistent with social contract theory, which holds that only persons can bind themselves through a contract and, in so doing, become citizens. While persons do not depend on a social contract, the social contract depends on persons who will be its ‘signatories.’



Social contract philosophers have been consistent about the characteristics that are necessarily possessed by persons who enter into social contracts: they are rational (i.e., capable of advancing their own interests) and autonomous (i.e., self-ruling or self-governing). Indeed, it is only because we are rational, autonomous persons that we can use these capacities to consent to another's authority over ourselves. But there is no reason to assume that only humans can meet this definition of the rational, autonomous person. Elephants possess the requisite characteristics. The Supreme Court, Bronx County, describes the elephant Happy as "an autonomous being" and "an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings." *Breheny*, at \*10. Happy, in other words, has the qualities social contract theories recognize as belonging to persons.

It follows from social contract theory that all contractors must be persons, but not that all persons must necessarily be contractors. There can be persons who are not contractors—either because they choose not to contract (e.g., adults who opt for life in the state of nature) or because they cannot contract (e.g., infants and some individuals with cognitive disabilities). Social contract philosophers have never claimed—not now, not in the 17th century—that the social contract can endow any being with personhood. The contract can only endow citizenship on persons who exist prior to the contract and agree to it. If persons did not exist before the contract,

there would be no contract at all since only persons can contract. Personhood, therefore, must be presupposed as a characteristic of contractors in social contract theories.

### **2.3 Personhood is not conditional on bearing duties and responsibilities**

In *Lavery II*, the First Department claims that “nonhumans lack sufficient responsibility to have any legal standing.” 152 A.D.3d at 78. The Third Department in *Lavery I* also argued that, “unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions,” and thus cannot have legal rights. 124 A.D.3d at 152.

The NhRP has argued that an entity is a ‘person’ if she can be the subject of rights or can bear legal and societal responsibilities. The reason for this broader understanding of ‘person’ is that not all persons can be held accountable for their actions and bear societal duties. Infants, children, and those found not guilty by reason of insanity cannot be held accountable and cannot bear legal or societal duties. They are, nonetheless, persons with legal rights. Bearing responsibilities is not a prerequisite of personhood.

At issue in the case of Happy is not whether she can bear legal duties or be held legally accountable for her actions, but whether she is a person and has legal rights. Among individuals, only those who are already legally recognized as persons can have legal duties and responsibilities. Things cannot. The personhood of

elephants, therefore, cannot be conditional on bearing legal duties and responsibilities, because being legally recognized as a person is and must be logically prior to bearing legal duties and responsibilities. The writ of habeas corpus challenges the status of ‘thing’ currently ascribed to Happy. The trial court has agreed that Happy is “more than just a legal thing, or property,” *Breheny*, at \*10, just as Justice Fahey in *Nonhuman Rights Project Inc on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1059 (2018) (Fahey, J., concurring) found that a chimpanzee is “not merely a thing.”

#### **2.4 Conclusions regarding the social contract**

While legal duties, legal accountability, and societal responsibilities are acquired by citizens under social contracts, neither the status of citizenship nor personhood depend on the ability to bear those duties and responsibilities. Many humans who are uncontroversially legally recognized as persons and citizens cannot bear those duties and responsibilities and cannot be held legally accountable for their actions. Therefore, whether or not Happy can bear legal duties and responsibilities, or be held legally accountable, is irrelevant to her legal status as a person. Secondly, social contracts do not create the rights associated with personhood. In agreeing to a social contract, we give up our natural rights in exchange for other societal benefits. Finally, social contract philosophers have consistently maintained that social contracts do not make us persons, but rather create citizens out of existing persons.

Personhood, and the requisite possession of autonomy and rationality, is a precondition of being party to a social contract. Indeed, it is hard to imagine how it could be otherwise. The trial court agreed that Happy is rational and autonomous, and thus, under a social contract view, she qualifies as a person.

### **3. Community Membership**

#### **3.1 A community membership conception of personhood**

Noting that she is constrained by case law and legal precedent, Justice Tuitt finds in the decision of the Supreme Court, Bronx County that Happy is not a “person.” *Breheny*, at \*10. Justice Tuitt's decision references *Lavery II* concerning the legal status of the captive chimpanzees Kiko and Tommy. In that decision, the First Department finds that humans who lack the ability to acknowledge legal duties and responsibilities, such as infants and comatose individuals, are still persons because such individuals are members of “the human community,” but since Kiko and Tommy are not members of the human community, they cannot be persons. 152 A.D.3d 78.

One interpretation of 'human community' puts the exclusive emphasis on 'human,' understood as a biological category, so that 'human community' is a synonym for 'members of the species *Homo sapiens*.' This interpretation amounts to the species membership view dismissed in Section 1.

A second interpretation puts the emphasis on 'community,' referring to membership in a community of which humans are members. On this view, personhood is not just grounded in discrete traits or capacities of individuals. Rather, personhood is something that we achieve through development and recognition within a community of individuals. This idea is captured in the Ubuntu philosophy of personhood stated as “I am because we are,” in which personhood arises from participating in the social life of a community of persons, or, as stated in a traditional Zulu saying, “a person is a person through other people” (Eze 2010: 94).

There are different ways of interpreting the idea of membership in a community of persons. We discuss two such views below—which we call Wide and Narrow—and show that on both of them, Happy should be seen as a member of a community of persons.

### **3.2 The Wide view**

According to the Wide view, someone is a member of a community of persons because they are embedded in interpersonal webs of interdependency, trust, communication, and normative responsiveness (i.e., our behavior is informed by various norms). Persons do not exist as independent islands, floating free of each other.

On this view, children and individuals with cognitive disabilities are clearly persons even if they cannot enter into contracts or bear certain legal responsibilities.

The fact that they have guardians for certain legal purposes, far from disqualifying them from personhood, confirms that they are members of these webs of social connection. We all are dependent on others at some points in our lives, and interdependent at all times. Infants depend on their parents and caretakers to feed them, teach them a language, and help them to see the world from others' perspectives. Adolescents and some individuals with cognitive disabilities may not have all of the capacities of mature, developmentally typical adults, and may not have all of the moral duties and citizenship responsibilities that come with them, but they are embedded in the web of interpersonal relationships on which personhood rests.

The Wide view recognizes the psychological reality that our individual capacities and identities are formed in social interaction (and, by implication, it recognizes the profound harm caused by unlawful detention and denial of society). It also avoids the exclusionary tendencies of conceptions of personhood that require high thresholds of individual capacity. The Wide view has been endorsed in particular by philosophers of disability, who emphasize that individuals with cognitive disabilities, like everyone else, are persons because of their embeddedness in social relations (Kittay 2005; Silvers and Francis 2015; Arneil and Hirschman 2016). Personhood rights help to ensure that individuals are able to form and

maintain appropriate social bonds, while protecting them from the arbitrary power of others to detain, confine, neglect, or isolate them.

Happy is embedded in interpersonal webs of dependency, meaning, and care with other human persons, and so is part of a human community. When she was captured as an infant, humans denied Happy her membership in an elephant community. She has lived at the Bronx Zoo for four decades, and is a member of a human community and embedded in social relationships with humans, and so she, too, should be protected when others exercise arbitrary power over her. Happy remains a member of a community with humans because, however inadequate her care, she is dependent on her keepers for food, water and shelter, and, as evidenced by the NhRP lawsuit and this brief, there are humans who recognize her as part of the community. The fact that Happy is simultaneously the subject of instrumentalization and the subject of legal advocacy shows that her membership is disputed. But this has also been true for many humans seeking habeas corpus relief. Indeed, one of the functions of habeas corpus is to protect members of the community who are being treated as things.

In short, the Wide view accepts the link between personhood and community, but denies that community membership is exclusive to human beings, not least because we have in fact brought nonhuman individuals, such as Happy, into our community. Membership in a human community is available to any individual who

is embedded in the relevant relationships of interdependency and who would suffer if excluded from those relationships.

### **3.3 The Narrow view**

One could adopt a less inclusive conception of community. On the Narrow conception, 'personhood-as-community-membership' requires persons to have traits that are more than sentience or vulnerability to harm, but less than the capacity to bear legal responsibilities. These traits may be biological or psychological.

Biological traits are exemplified by such properties or characteristics as having forty-six chromosomes or having human parents. This would be a return to the view that only members of the species *Homo sapiens* qualify for personhood, and, as argued in Section 1, restriction of personhood on the basis of species is arbitrary and unsupported by the biological sciences.

Psychological traits are mental capacities: having beliefs and desires, for example, or emotions, autonomy, and rationality. We will have more to say about such capacities in Section 4, where we will discuss the psychological capacities sufficient for personhood.

The key point for our purposes is that, as will be shown in Section 4, this Narrow view will include Happy as a person. She is clearly the kind of psychological being found in our community. As we note again, in her decision Justice Tuitt “recognizes that Happy is an extraordinary animal with complex cognitive abilities,



an intelligent being with advanced analytic abilities akin to human beings.” *Breheny*, at \*10. While Happy is not a member of the species *Homo sapiens*, she is clearly relevantly similar to humans in the kind of psychological being she is, as it is reasonable to ascribe to her such psychological traits as beliefs, rationality, desires, emotions of care, as well as the capacity for autonomy.

### **3.4 Conclusions regarding community membership**

The idea that personhood has a social dimension, and is importantly linked to membership in the human community, is familiar and plausible. However, we cannot simply assume that it excludes Happy.

If one accepts either the Wide or Narrow view of human community, Happy is a person. On the Wide view, to be a person is to be embedded in social relationships of interdependency, meaning, and community. Happy clearly meets this criterion: we have made Happy part of our human community of persons by embedding her within relations of care and intersubjective response, and rendering her vulnerable to forms of exclusion from this community. On the Narrow view, to be a person requires not just social embedding, but also the possession of certain basic, and familiar psychological capacities, such as beliefs, desires, emotions, rationality, and autonomy. It is reasonable to think that Happy has these capacities.

On either the Wide or Narrow view, Happy is a member of our community, and so is owed protection from the arbitrary power of others to define her social conditions.

#### **4. Capacities**

The decision of the Supreme Court, Bronx County does not dispute the claims made by elephant experts about the cognitive, affective, or behavioral capacities of elephants, whether free-living or captive. As we have already noted, Justice Tuitt also affirms that Happy is “an intelligent, autonomous being.” *Breheny*, at \*10. Citing *Lavery I* and *Lavery II*, concerning the legal status of the captive chimpanzees Kiko and Tommy, Justice Tuitt notes that she is bound by the ruling that “animals are not ‘persons.’” *Breheny* at \*10. Notwithstanding these previous rulings, it remains a fundamental claim made by the NhRP that the capacity for autonomy is sufficient for personhood. To defend the NhRP’s claim about autonomy, we provide a brief analysis of personhood that is consistent and ensures that all those human beings commonly regarded as persons remain so, but does not introduce ad hoc exclusions of other beings who also meet the criteria. If elephants possess the same relevant capacities that qualify humans as persons, then the reasonable conclusion should be that elephants are also persons.

##### **4.1 Conditions of personhood**

The philosopher John Locke described what it is to be a person this way: “a thinking intelligent being that has reason and reflection and can consider itself as itself, the same thinking thing in different times and places; which it does only by that consciousness which is inseparable from thinking and...essential to it” (Locke 1689, II. XXVII .9, p.280). Though Locke’s view is still influential, contemporary philosophical discussions of personhood tend to provide a more explicit breakdown of core capacities. Of those commonly listed, we find reference to autonomy (minimally, to act voluntarily or to control our behavior in light of our preferences or goals), emotions, linguistic mastery, sentience (the capacity for conscious awareness, sensation, pleasure, and pain), rationality, reflective self-awareness (that is, being aware of ourselves as ‘selves’), and reciprocity (e.g., Andrews 2016; DeGrazia 2007; Dennett 1988; Rowlands 2019).

There is no disputing the personhood of individuals who possess all of these capacities. However, there is no way to hold that possessing all of these capacities is necessary for personhood without excluding some humans who lack one or more of them. Furthermore, most of these capacities develop gradually in humans, so possession of them is not a clear-cut matter. Instead, to be a person one must have multiple personhood-making capacities, although which ones cannot be non-arbitrarily specified. Conceiving personhood in this way means that there is no

defensible minimum threshold of capacities that can definitively draw a line separating persons from near-persons or non-persons (DeGrazia 2007).

As noted earlier, the lower court ruling acknowledges the affidavits submitted by a number of respected elephant experts in support of the view that elephants share many relevantly similar characteristics with humans regarded as persons. Examples include self-awareness, with evidence from a mirror self-recognition study (e.g., Bates and Byrne Aff.). Importantly, of the three elephants involved in that study, Happy was the research subject in the experiment who demonstrated mirror self-recognition (Plotnik, de Waal, and Reiss 2006).

Evidence that elephants may have strong emotional bonds is found in their empathetic responses to others who are struggling or in distress. Such responses demonstrate expectations of normal elephant behavior, a recognition of another's need, and an understanding of what to do to meet those needs. Interestingly, their behavior markedly changes around others who have died (their vocalizations and movements are noticeably subdued), prompting experts to talk of "mourning" (e.g., Poole Aff.). Further evidence of emotional bonds includes having preferred community members or "friends" (de Silva, Ranjeewa, and Kryazhimskiy 2011). The elephant experts also agree that Asian elephants can engage in means-end reasoning to solve problems and cooperate to achieve a beneficial goal (evidence of both a level of rationality and intentional planning). These observations point to the

presence of goals, desires to satisfy goals, and preferences. That Asian elephants can control their behavior is demonstrated by a cooperative experiment referenced in the elephant experts' affidavits (Plotnik et al 2011). Such experimental results suggest a capacity for self-control and voluntary behavior. Given the evidence that elephants are autonomous, emotional, self-aware, sentient beings who have beliefs and desires, elephants fulfill the requirements for personhood on a capacities conception.

#### **4.2 Personhood and autonomy**

The NhRP's case is based on one particular capacity—autonomy—and this is for good reason. For one, it is a capacity that philosophers have historically associated with personhood. A traditional conception of personhood is framed in terms of autonomy where that capacity requires a great deal of cognitive sophistication. For example, it requires the ability to abstractly consider principles of action and judge them according to prudential values or rationality (see Johnson and Cureton 2017). This traditional conception has been criticized given that few humans engage in abstract reflection before every action, and yet we are still acting autonomously (as opposed to acting under the influence of a mind-altering substance or because of a compulsion). On the traditional view, humans would be rarely autonomous, and young children and some humans with cognitive disabilities would fail to be autonomous actors, despite appearances to the contrary.

To address this kind of worry, the bioethicist and philosopher Tom Beauchamp, together with the comparative psychologist Victoria Wobber, have suggested that an act is autonomous if an individual self-initiates an “action that is (1) intentional, (2) adequately informed...and (3) free of controlling influences” (Beauchamp and Wobber 2014). As the lower court has apparently affirmed by not contesting the claims in the affidavits provided by elephant experts, elephants such as Happy can act intentionally (they can respond intelligently to problems and act to achieve goals), and so they can satisfy (1). The elephant experts also note that elephants are born with “35% of their adult [brain] weight” (e.g., Moss Aff.). Coupled with a “[d]elayed development” (e.g., Moss Aff.), this shows the importance of learning to elephants’ flourishing in adulthood. They, like the chimpanzees on which Beauchamp and Wobber focus, must learn how to navigate complex physical and social worlds, and so satisfy (2). Whether elephants act free of controlling influences will depend on their environment and the options available to them, but there is no doubt that elephants can so act when they find themselves in contexts without autonomy-depriving controlling influences.

A second reason to focus on autonomy is that it is a cluster concept. As highlighted by Beauchamp and Wobber, it brings together capacities to act intentionally (which assumes capacities to form goals and direct one’s behavior) and to be adequately informed (which assumes capacities to learn, to make inferences,

and acquire knowledge through rational processes), each of which requires sentience. This means that an autonomous capacity requires other personhood capacities, namely sentience and rationality. So understood, evidence of autonomy is sufficient evidence of personhood. Thus, elephants qualify as persons on autonomy grounds alone.

### **4.3 Why elephant autonomy matters**

A final reason for the NhRP's focus on autonomy is the concept's direct connection to ethics. Violating someone's autonomy is widely regarded as a harm. After all, autonomous individuals have a basic interest in exercising their autonomy, and to violate it is to violate a basic interest (Beauchamp and Childress 2001). This brings us to another point of contention in the cases involving the chimpanzees Kiko and Tommy, as noted by Justice Tuitt. The appellate court in *Lavery II*, relying on the Fourth Department in *Nonhuman Rights Project Inc ex rel Kiko v. Presti*, 125 A.D.3d 1334 (4th Dept. 2015), ruled that habeas corpus relief was unavailable to Kiko or Tommy because the NhRP is not seeking their release from captivity but rather their relocation to a suitable sanctuary. 152 A.D.3d at 79. Justice Tuitt seems to disagree with this way of thinking about the options on the table with regards to Happy. She uses terms like "solitary, lonely one-acre exhibit" to describe Happy's current housing in contrast to "an elephant sanctuary on a 2300 acre lot." *Breheny*,

at \*10. This is a contrast in both social opportunities and space for movement and exploration.

Our discussion of autonomy provides a way to distinguish Happy's current captive conditions from those afforded her in a sanctuary. As noted by Justice Tuitt, Happy is currently housed alone in a relatively small space. An option is to have her moved to an appropriate elephant sanctuary. Should Happy be relocated to such a sanctuary, several things change: she will no longer be housed alone, she will have liberty to roam, explore, and forage, she will have the opportunity to develop and exercise typical elephant social capacities, all the while expanding her goals and preferences to reflect the greater opportunities afforded her. In Happy's current conditions of captivity, her interests in acting autonomously are violated. An appropriate sanctuary promises not only much greater liberty, but a setting where her autonomous capacities can be better respected (Stewart Aff.).

#### **4.4 Conclusions regarding capacities**

The NhRP argues that elephants are persons under a capacities approach to the concept of personhood. This reflects their view that this concept of personhood is already enshrined in law and that, as it stands, it applies to elephants just as it does to humans. Affidavits by a number of eminent elephant experts have attested to the fact that elephants possess the relevant capacities to qualify as persons, and the lower court has not disputed these claims. Importantly, a capacities account of personhood



makes no reference to species identity. It is no coincidence that contemporary philosophers writing on personhood using a capacities conception are open to the existence of nonhuman persons (Andrews 2016; Rowlands 2019). If elephants possess the relevant person-making capacities, whatever they might be, then logical consistency requires that they too qualify as persons. Given our discussion above, we think that there is only one inescapable conclusion: that on a capacities conception of personhood, Happy qualifies as a person.

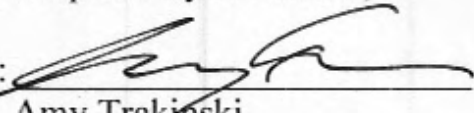
#### **IV. Conclusion**

In rejecting habeas relief for Happy, an elephant, the lower court referenced previous decisions concerning a different nonhuman species, chimpanzees. As we have argued, of the four conceptions of personhood contained in those previous decisions, species membership is arbitrary and must be rejected, while the other three imply that Happy is a person. This Court should recognize that when criteria for personhood are reasonable and consistently applied, Happy satisfies them and is entitled to habeas corpus relief.

Dated: July 16, 2020

Respectfully submitted,

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## **PRINTING SPECIFICATIONS STATEMENT**

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Dated: July 16, 2020

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# New York Supreme Court

## Appellate Division—First Department

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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.*

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### BRIEF OF HABEAS CORPUS SCHOLARS JUSTIN MARCEAU AND SAMUEL WISEMAN AS *AMICI CURIAE*

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## INTEREST OF AMICI CURIAE

Professor Justin Marceau is a habeas corpus scholar and the Brooks Institute Research Scholar 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. During the Spring of 2020, he was a visiting professor at Harvard Law School where he taught both criminal procedure and animal law. 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 and state supreme courts. His work has also been cited by more than 400 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.

Samuel Wiseman is a Professor of Law at Penn State Law in University Park. 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 an elephant named Happy is of significant importance to the meaning and development of habeas corpus as an equitable doctrine. The previous courts' that have addressed the matter have issued decisions that are in tension with our understanding of the core tenets of the historical Writ of habeas corpus. *See People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) ("*Lavery*"); *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d

73 (1st Dept. 2017) (“*Lavery II*”). Specifically, there is nothing in the common law that confines the habeas procedures available to challenge one’s confinement to humans alone.

With respect to the particular questions raised here, Justin Marceau has long taken an active scholarly and practitioner interest in the law’s treatment of disadvantaged humans and nonhuman animals. 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 recognize Happy as a legal person for purposes of habeas corpus, and thus eligible to be considered for release to a sanctuary.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

One of the greatest blemishes on our justice system is the wrongful detention of persons. The Writ of Habeas Corpus is one of the tools available to correct injustices by requiring a person’s captors to justify the person’s imprisonment to the courts. While the Writ has provided a procedural vehicle for vindicating the right of thousands of humans to not be unlawfully detained, this brief argues that the time has come to consider the Writ’s application to other cognitively complex beings who are unjustly detained. The non-humans at issue are unquestionably

innocent. Their confinement, at least in some cases, is uniquely depraved—and their sentience and cognitive functioning, and the cognitive harm resulting from this imprisonment, is similar to that of human beings.<sup>1</sup>

Happy is an innocent being who is being actively and unjustly confined. Unless this Court recognizes Happy as a legal person for purposes of habeas corpus relief and orders her freed, she will be unjustly confined for the remainder of her life. While Happy’s claim is admittedly novel, this novelty should not prevent her from seeking habeas corpus relief. *See Nonhuman Rights Project, Inc. on Behalf of Tommy v. Lavery*, 31 N.Y. 3d 1054, 1058-59 (2018) (Fahey, J., concurring) (“The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it.”).

There are three primary reasons that this Court should recognize Happy as a legal person and allow her to benefit from the procedural mechanisms afforded by

<sup>1</sup> There is an emerging literature that demonstrates that the sort of suffering experienced by confined humans is in many ways mirrored by cognitively complex animals who are confined. *See, e.g.,* Lori Gruen, *The Ethics of Captivity* (Oxford 2014) (devoting several chapters, including one on elephants, to the impact of confinement on physical and psychological well-being); *Id.* at 50 (including a chapter by Catherine Doyle who notes that “Elephants in Zoos face a variety of problems that are linked to the conditions of captivity, including obesity, abnormal repetitive behaviors . . . and deadly foot and joint diseases.”). *See also* Lori Alward, *Elephants and Ethics*, at 216 (2008) (“It is not sufficient to show that, say, an elephant has enough to eat and is free of disease . . . [instead the question is] whether they are able to live fully elephantine lives.”).

the common law Writ of habeas corpus. First, Happy should be classified as a legal person, and thus entitled to habeas corpus, given the overwhelming amount of scientific evidence showing how cognitively complex and cognitively similar to humans elephants are. Second, 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. Finally, applying habeas corpus to non-human animals like Happy is consistent with the Writ's historical uses.

To summarize the procedural history of this case, on October 2, 2018, the NhRP filed a Petition for Common Law Writ of Habeas Corpus on behalf of Happy in the Supreme Court, Orleans County. On November 16, 2018, the Orleans Court issued an Order to Show Cause and made it returnable on December 14, 2018, when a hearing on the Petition was held in Albion, New York. In a notice of motion dated December 3, 2018, Respondents moved to transfer the proceeding to the Supreme Court, Bronx County or, in the alternative, to dismiss the Petition. On January 18, 2019, the Orleans Court granted Respondent's motion to transfer venue. On February 18, 2020, Justice Alison Y. Tuitt of the Supreme Court, Bronx County issued her Decision and Order granting Respondents' motion to dismiss the

Petition, and did so solely on the basis of the Appellate Division, Third Department's holding that nonhuman animals are not "persons" for purposes of habeas corpus in New York because they lack the capacity to bear legal duties. *Lavery*, 124 A.D.3d 148 (3d Dept. 2014).

## **ARGUMENT**

### **I. Happy Should be Classified as a Legal Person and Entitled to Habeas Corpus.**

A "legal person" is any entity capable of possessing a legal right. There is no principled reason that elephants, such as Happy, should be deprived of legal personhood in the context of habeas corpus. As an elephant, Happy is an intelligent being who understands her surroundings and experiences suffering much like a human being would in circumstances of unjust confinement. Moreover, the notions of guilt and innocence underlying the habeas corpus doctrine apply equally to nonhuman animals like Happy. Happy—as an autonomous and self-determining being, innocent and unjustly confined—should be recognized as a legal person who is 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 and other scientific advances have allowed the scientific community to coalesce around a recognition that the cognitive function of certain cognitively complex nonhuman animal species, including Asian and African elephants, rivals that of humans.<sup>2</sup> Even beyond the sequencing of DNA, there is a growing consensus that nonhuman animals have sentience, consciousness, emotions, autonomy, 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

<sup>2</sup> 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).

explain that “the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness.”

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). Elephants in particular are known for their mental aptitude and deep emotional capacities, both of which are strikingly similar to human cognition. Jabr, Ferris, *The Science Is In: Elephants Are Even Smarter Than We Realized*, Sci. Am. (Feb. 26, 2014). Indeed, Judge Tuitt even recognized that “Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings.” *The Nonhuman Rights Project, Inc. v. Breheny*, Index No. 260441/2019, Decision and Order (Feb. 8, 2020). Because elephants have complex emotional and cognitive experiences, they are vulnerable to mental and physical suffering in unjust and cruel confinement, just as a human would be.

Judge Tuitt also remarked, “Happy is more than just a legal thing, or property. She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty.” *Id.* It is because of the intense and concrete suffering associated with unjust imprisonment that habeas



corpus developed in the first place—if unjustly confined elephants suffer in the way a human would, the same remedy should protect elephants, too.

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

There is a fundamental obligation to obey laws. This obligation classifies individuals who break laws as guilty, and individuals who do not as innocent. Writs of habeas corpus first and foremost allow those who are innocent, yet incarcerated, to be released from their unjust confinement and exonerated from their initial guilt. These fundamental principles of guilt and innocence or wrongful confinement are equally relevant to nonhuman animals and Happy’s current confinement.

Nonhumans can likewise 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, and Deborah Periman, “*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); Sarah Schindler, *Pardoning Dogs*, \_\_ Nevada Law Journal \_\_ (Forthcoming 2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3551251](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551251).

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 necessarily mean they cannot be exonerated or deemed 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 constitute exoneration. Since habeas corpus is historically used to secure exonerations, it has application in this context.

Additionally, the law allows certain defenses for nonhuman animals when they conduct “criminal” behavior, indicating that the law more broadly does recognize some form of “guilt” or “innocence” for animals. 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: The Use and Abuse of Victims’ Rights* 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, *Victims in the War on Crime*, at 45 (“If anything the canine versions of these defenses are more generous than the human ones.”). Therefore, some nonhuman animals are already exonerated in a sense through codified state procedures providing relief from unwanted incarceration or execution.

Moreover, animals—and elephants in particular—have certainly been deemed guilty, and they have even been executed as a response to unwanted, or even criminal, action or behavior. In 1903, for example, Topsy the elephant was executed by electrocution after killing a human. Eschner, Kat, *Topsy the Elephant was a Victim of Her Captors, Not Thomas Edison*, *Smithsonian Magazine* (Jan. 4, 2017). In 1916, the elephant Big Mary was hung, twice—the first rope broke and she slammed into the ground, where she writhed for hours before a second chain

was found—after killing a trainer. Krajicek, David, *'Fed Up' Circus Elephant Big Mary Lynched for 'Murder' In 1916*, New York Daily News (Mar. 14, 2015).

If nonhuman animals can bear guilt and innocence, it is a plausible logical extension that nonhuman animals should also be able to avail themselves of the mechanisms to secure an exoneration. Though not indicted for a crime, Happy is undoubtedly innocent. In other contexts, the law recognizes the concept of an innocent nonhuman entity, including corporations and nonhuman animals. Happy's innocence should weigh in favor of allowing her to benefit from the Writ of habeas corpus.

Moreover, without this type of procedural vehicle, Happy has no possible remedy to secure relief from the cruel confinement conditions, and her treatment could become even worse—potentially leading to her death. If even the most sentient animals confined in the worst conditions, like Happy, are never entitled to habeas relief, humans could continue to cruelly confine animals, and even execute sentient, emotionally and cognitively complex individuals. Such a result seems unjust, and unnecessary as a matter of habeas history and practice.

## **II. The Writ of 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 existed under codified law, 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. Since women and children were deemed by the law to be less than full legal persons, many courts would have certainly scoffed at the idea that habeas corpus would be available to such parties.<sup>3</sup>

Yet time and again, despite the formalistic barrier presented by the lack of legal personhood, habeas corpus offered a unique and powerful way to seek and achieve justice. Habeas corpus provided the procedures to realize reform that was out in front of statutorily mandated protections.

<sup>3</sup> Peter Singer has eloquently retold the history of mocking the ascension of beings deemed less than human. "The idea of "The Rights of Animals" actually was once used to parody the case for women's rights. When Mary Wollstonecraft published her *Vindication of the Rights of Women* in 1792, her views were widely regarded as absurd, and before long, an anonymous publication appeared entitled *A Vindication of the Rights of Brutes*. The author of this satirical work (now known to have been Thomas Taylor, a distinguished Cambridge philosopher) tried to refute Mary Wollstonecraft's arguments by showing that they could be carried one stage further. If the argument for equality was sound when applied to women, why should it not be applied to dogs, cats, and horses?" Peter Singer, *Animal Liberation*, first published 1975, 2nd ed., 1990 (Ecco, New York), pp.1.

For example, 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 secure freedom from abusive "captors," but rather was also used to "assign custody"—women and children could 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, but rather includes transfer to a safer environment, even if the end result was not utter liberation. *Id.*

## **B. Slavery**

The King's Bench also used habeas corpus to give relief to slaves in England when none was available as a matter of statutory right. For example, eighteenth-century slave James Somerset was able to become legally visible by seeking habeas corpus relief despite being deemed a legal "thing," not a "person." 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.* Surprisingly, though no clear procedural or substantive basis existed for doing so, the Bench granted James Somerset's requested habeas corpus relief. James Somerset, previously designated as a legal "thing," had existed in law only in relation to his owner; legal "things," both living and inanimate, exist under the law solely for the sakes of legal persons, invisible to civil judges in their own rights. *Id.* at IX. Yet habeas corpus offered a flexible and powerful tool for ending an instance of unjust captivity, despite—or perhaps because of—the legal designation of the entity seeking relief. James Somerset's legal transubstantiation from "thing" to "person" at the hands of Lord Mansfield of the King's Bench in 1772 indeed 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 addition to providing a mechanism for a clear legal transition from "thing" to "person," the doctrine of habeas corpus offered additional unique ways to challenge the legal status quo of slavery. In America, in 1839, for example, a free black man named Ralph Gould was being held, 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. Despite Gould's apparent status as a legal "thing," the Chief Judge 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, traditionally treated as legal things, nevertheless had the ability to challenge a previously unchallenged class of legal persons: slaveholders. Freedman, Eric M., *Habeas by Any Other Name*, 38 Hofstra L. Rev. 275, 277 (2009). Habeas corpus not only provided a powerful legal tool for preventing unjust confinement of particular individuals, but it also allowed for deeper challenges to slavery as an unjust institution.

The issues posed by chattelized humans—cognitive, emotive beings diminished to mere legal 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). In spite of, or perhaps because of the lack of alternative legal avenues or frameworks, habeas provided a procedural vehicle to challenge confinement when no other legal recourse was available.



### **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. Specifically, the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 statutorily eliminated habeas 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 could be limited if they were not physically 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 attempted through legislation to strip 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.

### **III. Applying Habeas Corpus to Nonhuman Animals, like Happy, is Consistent with the Writ’s Historical Uses.**

Happy is not a human being; however, without intending to dehumanize the marginalized humans whose recourse to habeas is discussed in this brief, it is important to note that Happy does share critical and relevant similarities with unjustly confined humans in terms of sentience, cognition, and emotion. Allowing Happy the right to petition for habeas corpus is consistent with the history of the Writ’s functioning in novel situations of evident injustice.

Like the abused women and children in England, Happy is 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 necessarily have to seek a complete and total release from confinement in order to receive habeas relief—contrary to the opinion of the First Department and Fourth Department. *See Nonhuman Rights Project, Inc. on Behalf of Tommy v. Lavery*, 31 N.Y. 3d at 1058-59 (Fahey, J., concurring) (affirming that habeas corpus can be used to an individual's release from one facility to a completely different facility).

Additionally, as with the indignity suffered upon human slaves, Happy is considered to be property and a legal thing. However, property status did not stop the King's Bench from allowing James Somerset to seek habeas relief, nor did the property status of humans prevent Chief Judge Cranch from allowing slaves to petition to seek habeas corpus relief. Allowing James Somerset to seek relief did not end slavery, and granting Happy the right to petition for habeas corpus will not result in all nonhuman animals being declared persons or necessarily freed from confinement. However, it would serve as an important step, possibly paving the way for certain individual nonhuman animals to be free from particularly cruel and unjust confinement.

Finally, like the Guantanamo detainees, Happy has no other legal vehicle to challenge her 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 per se. Indeed, courts have rejected efforts to rely on anti-cruelty statutes as a basis for securing many forms of civil relief for the animal. Put differently, these statutes simply provide a mechanism for punishing humans for their cruel treatment of nonhuman animals, rather than substantively ensuring the wellbeing of the harmed animals.<sup>4</sup> As such, habeas corpus is the only substantive legal basis Happy has to challenge and be released from her confinement.

Habeas corpus has often been a vehicle for prompting social change, applying to discrete, obviously unjust instances of confinement despite formalistic legal doctrines that might otherwise bar relief. The Writ is especially powerful where, as for Happy, there is no other viable legal opportunity or avenue to seek relief. Therefore, consistent with the Writ's novel historical uses, this Court should recognize Happy as a "person" for purposes of habeas corpus relief.

<sup>4</sup> It is worth noting that a non-trivial amount of animal protection litigation is focused on a carceral solution to the problem of animal suffering. It is often argued that advancing the status of animals as victims in the service of human incarceration is the best way to protect the rights of animals. The Nonhuman Rights Project, by contrast, pursues litigation that opposes carceral logics and has more in common with traditional civil rights and movement lawyering. In this historical moment when the country is searching for alternatives to tough-on-crime solutions to social problems, litigation seeking access to habeas corpus relief should be recognized as a unique approach to protecting the dignity of animals. See Justin Marceau, *Beyond Cages* (Cambridge 2019).

## CONCLUSION

While habeas corpus has not yet been applied to a nonhuman animal in New York or the United States, its application in this context is justified. The very history of habeas corpus is one of radical change, protecting fundamental liberty and autonomy rights from unjust situations. Habeas corpus has historically been used in novel factual situations where no other legal vehicle exists.

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, Happy should be classified as a legal person and granted a Writ of habeas corpus.

Dated: July 20, 2020

Respectfully submitted,

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## PRINTING SPECIFICATIONS STATEMENT

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Massachusetts General Laws Annotated

Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)

Title IV. Certain Writs and Proceedings in Special Cases (Ch. 246-258e)

Chapter 248. Habeas Corpus and Personal Liberty (Refs & Annos)

M.G.L.A. 248 § 3

§ 3. Petition for writ; contents; annexed papers

[Currentness](#)

The petition for the writ shall be in writing, signed and sworn to by the person for whose release it is intended, or by a person in his behalf, and shall state by whom and where the person is imprisoned or restrained, the name of the prisoner and of the person detaining him, if their names are known, or a description of them, if their names are not known, and the cause or pretence of such imprisonment or restraint, according to the knowledge and belief of the petitioner.

If the imprisonment or restraint is by virtue of a warrant or other process, a copy thereof shall be annexed, unless it appears that such copy has been demanded and refused or that, for a sufficient reason, a demand therefor could not be made.

[Notes of Decisions \(2\)](#)

M.G.L.A. 248 § 3, MA ST 248 § 3

Current through Chapter 113 of the 2020 2nd Annual Session

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Massachusetts General Laws Annotated

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Title IV. Certain Writs and Proceedings in Special Cases (Ch. 246-258e)

Chapter 248. Habeas Corpus and Personal Liberty (Refs & Annos)

M.G.L.A. 248 § 36

§ 36. Petition to obtain personal liberty

[Currentness](#)

Whoever has reason to believe that another person is deprived of his liberty or held in custody in violation of the preceding section may file a petition, on the oath of the petitioner, in the probate court for the county where such person is believed to be detained, stating his name, age and general description, where, when and under what circumstances he was deprived of his liberty, where he is believed to be detained, the name of the person so depriving him of his liberty, if known, the name of his supposed custodian and any other material facts and circumstances.

[Notes of Decisions \(3\)](#)

M.G.L.A. 248 § 36, MA ST 248 § 36

Current through Chapter 113 of the 2020 2nd Annual Session

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COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT

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NO. 2020-P-0257

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JOYCE ROWLEY  
ON BEHALF OF RUTH AND EMILY  
PETITIONER-APPELLANT

v.

CITY OF NEW BEDFORD  
DEFENDANT-APPELLEE

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BRIEF ON BEHALF OF AMICUS CURIAE  
THE NONHUMAN RIGHTS PROJECT, INC.,  
IN SUPPORT OF NEITHER PARTY

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