

STATE OF NEW YORK
SUPREME COURT COUNTY OF NEW YORK

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 KIKO,

Petitioner,

-against-

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

Respondents.

VERIFIED PETITION

**ORAL ARGUMENT
REQUESTED**

Index No.

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

PRELIMINARY STATEMENT

1. This is the second Verified Petition for a common law Writ of Habeas Corpus and
Order to Show Cause (“Second Kiko Petition”) filed by the NhRP pursuant to New York Civil
Practice Law and Rules (“CPLR”) Article 70 on behalf of a chimpanzee named Kiko. It requests
that this Court: a) require Respondents to justify their detention of Kiko, b) order Kiko’s
immediate release, and c) order Kiko’s transfer to an appropriate primate sanctuary, which the

NhRP suggests is Save the Chimps. This Court should issue the Order to Show Cause as the Second Kiko Petition sets forth distinct grounds not set forth in either of the first petitions filed on behalf of Kiko, as well as a chimpanzee named Tommy (see ¶¶3-5 below), and not determined by this Court or any other court in the State of New York. *See* CPLR 7003(b).

2. The first Verified Petition for a common law Writ of Habeas Corpus and Order to Show Cause was filed on behalf of Kiko (“First Kiko Petition”) in the New York State Supreme Court, Niagara County, on December 3, 2013. That Supreme Court refused to issue the order to show cause and its refusal was affirmed by the New York State Supreme Court Appellate Division, Fourth Judicial Department (“Fourth Department”) in *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den.*, 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015) on the sole legal ground that habeas corpus was not available to Kiko as the NhRP was not seeking his immediate and unconditional release, but instead was seeking to have him placed in an appropriate primate sanctuary. *Presti*, 124 A.D.3d at 1335. For further discussion, *see infra* at ¶¶8, 9 and 13, and section IV-D-5 of the accompanying Memorandum of Law.

3. On December 2, 2015, the NhRP filed a second Verified Petition for a common law Writ of Habeas Corpus and Order to Show Cause on behalf of Tommy in this Court. *See Nonhuman Rights Project, Inc. on behalf of Tommy v. Patrick C. Lavery et al*, Index #: 162358/2015 (Dec. 2, 2015) (“Second Tommy Petition”). On December 23, 2015, this Court declined to sign the order to show cause in the Second Tommy Petition, writing that “to the extent that the courts in the Third Dept. determined the legality of Tommy’s detention, an issue best addressed there, & absent any allegation or ground that is sufficiently distinct from those set forth in the first petition (CPLR7003(b)[]).” (Index #: 162358/2015, Doc. No. 57). A true and correct copy of the order is attached herein as **Exhibit 7**.

4. The NhRP filed the first Verified Petition for a common law Writ of Habeas Corpus and Order to Show Cause on behalf of Tommy in the New York State Supreme Court, Fulton County on December 2, 2013 (“First Tommy Petition”). That Supreme Court’s refusal to issue

the order to show cause was affirmed by the New York State Supreme Court Appellate Division, Third Judicial Department (“Third Department”) on the novel legal ground that only those entities able to shoulder duties and responsibilities can be “persons” and that chimpanzees lack the capacity to shoulder duties and responsibilities. *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)). This finding of fact that chimpanzees lack the capacity to shoulder duties and responsibilities was not based upon any facts presented to either the Fulton County Supreme Court or the Third Department, as no relevant facts were introduced by either party. This Court is not bound by this entirely erroneous and unsupported finding of fact.

5. In this Second Kiko Petition and accompanying Memorandum of Law, the NhRP has supplied the Court with approximately sixty pages of new affidavits from six of the world’s leading primatologists, including Dr. Jane Goodall, that are distinct from those set forth in the First Kiko Petition and the First Tommy Petition and for the first time demonstrate that chimpanzees not only have the capacity to shoulder duties and responsibilities but, as a matter of scientific fact, routinely shoulder duties and responsibilities both within chimpanzee societies and within mixed chimpanzee/human societies.

6. Section III-B of the accompanying Memorandum of Law sets forth the facts contained in these six new affidavits and specifically demonstrate that chimpanzees such as Kiko do, as a matter of scientific fact, possess the capacity to shoulder duties and responsibilities both within chimpanzee societies and mixed chimpanzee/human societies. This capacity includes, but is not limited to, the ability to understand and carry out duties and responsibilities while knowingly assuming obligations and then honoring them, to behave in ways that seem both lawful and rule-governed, to have moral inclinations and a level of moral agency, to ostracize individuals who violate social norms, to respond negatively to inequitable situations, to have a social life that is cooperative and represents a purposeful and well-coordinated social system, to routinely enter into contractual agreements, keep promises and secrets, prefer fair exchanges, perform death-related duties and show concern for others’ welfare. These entirely new facts presented in the six

new affidavits now comprise nearly sixty percent of the total facts presented in this Second Kiko Petition. These entirely new facts have never been determined by a court in New York.

7. Pursuant to CPLR 7003(b), a court is not required to issue a writ from a successive petition for a writ of habeas corpus only if: (1) the legality of a detention has been previously determined by a court of the State in a prior proceeding for a writ of habeas corpus, (2) the petition presents no ground not theretofore presented and determined, and (3) the court is satisfied that the ends of justice will not be served by granting it. The ground that chimpanzees routinely shoulder duties and responsibilities both within chimpanzee societies and within mixed chimpanzee/human societies and therefore can be “persons” for the purpose of demanding a common law writ of habeas corpus, and the facts that support it, have never been presented to this Court or any other court on behalf of Kiko. With the exception of the Second Tommy Petition, the facts supporting the ground that chimpanzees shoulder duties and responsibilities have never been presented to any court in the State of New York. Indeed, the Third Department in *Lavery* concluded that chimpanzees are unable to shoulder duties and responsibilities and therefore are not “persons” in the complete absence of any facts in support thereof or in opposition thereto.

8. The legality of Kiko’s detention has never been determined by a court of this State and therefore this Court is not precluded from issuing a writ from a successive petition. *See* CPLR 7003(b). Significantly, the Fourth Department in *Presti* never determined the legality of Kiko’s detention, did not reach the issue of Kiko’s legal personhood, and did not cite to *Lavery*. Instead, it affirmed the dismissal of the First Kiko Petition on the sole ground that the NhRP was not seeking Kiko’s immediate and unconditional release, but was seeking instead to have Kiko placed in an appropriate primate sanctuary. *Presti*, 124 A.D.3d at 1335. The Fourth Department twice suggested, without deciding, that it might agree with the NhRP’s claim that Kiko was a “person” for the purpose of Article 70, stating that “[r]egardless of whether we agree with petitioner’s claim that Kiko is a person within the statutory and common law definition of the writ . . .” and “even assuming, *arguendo*, that we agreed with petitioner that Kiko should be

deemed a person for the purpose of the application.” *Id.* These statements were made with full knowledge of the fact that the month before the Third Department in *Lavery* had affirmed the Fulton County Supreme Court’s refusal to issue the order to show cause for Tommy by setting forth the unprecedented legal rule that only entities capable of shouldering duties and responsibilities could be “persons.”

9. On March 19, 2015, the NhRP filed with this Court a second Verified Petition for a common law Writ of Habeas Corpus and Order to Show Cause on behalf of two chimpanzees named Hercules and Leo, who had been imprisoned for six years at the State University of New York at Stony Brook (“Second Hercules and Leo Petition”).¹ On April 21, 2015, the Court issued an amended order to show cause requiring the respondents to appear before the Court to justify their imprisonment of Hercules and Leo. *See The Nonhuman Rights Project, Inc. v. Stanley Jr., M.D.*, 2015 WL 1804007 (Sup. 2015) *amended in part, The Nonhuman Rights Project, Inc. v. Stanley*, 2015 WL 1812988 (Sup. 2015). In its decision, this Court stated that it was not bound by the Fourth Department’s decision in *Presti* and rejected 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.” *Stanley*, 16 N.Y.S.3d at 917 n.2. Instead, this Court recognized that the New York State Supreme Court Appellate Division, First Judicial Department (“First Department”), unlike the Fourth Department, has acknowledged that the Great Writ may be used to transfer an imprisoned person from an unlawful place of custody to another lawful form of confinement. *See id.* (citing *McGraw v. Wack*, 220 A.D.2d 291, 292 (1st Dept. 1995); *Matter of MHLS v. Wack*, 75 N.Y.2d 751 (1989)).

¹ The NhRP filed the first petition on behalf of Hercules and Leo on December 5, 2013 in the New York State Supreme Court, Suffolk County, which refused to issue the requested order to show cause. A true and correct copy of the order is attached herein as **Exhibit 5**. A timely appeal was taken to the New York State Supreme Court Appellate Division, Second Judicial Department and denied on procedural grounds. A true and correct copy of the order is attached herein **Exhibit 6**.

10. The Court need not make an initial judicial determination that Kiko is a “person” within the meaning of the common law of habeas corpus or of CPLR Article 70 in order to issue the writ and show cause order. Common law courts whose decisions are a part of New York common law, and this Court in the Second Hercules and Leo Petition, have issued writs of habeas corpus or orders to show cause for petitioners not hitherto recognized as legal persons without making the initial determination of personhood, so that the issue of their common law personhood for the purpose of habeas corpus and the legality of their confinement could be justly resolved. *See The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 900 (Sup. Ct. 2015) (“Given the important questions raised here, I signed petitioner’s order to show cause, and was mindful of petitioner’s assertion that ‘the court need not make an initial determination that Hercules and Leo are persons in order to issue the writ and show cause order.’”).

11. The term legal “person” has never been a synonym for “human being” and may designate an entity broader or qualitatively different. The New York Court of Appeals has stated that the determination of legal personhood is a policy question and not a biological one. *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194 (1972). “Person” merely identifies those entities capable of possessing one or more legal rights. Contrary to the Third Department’s ruling in *Lavery, supra*, the ability of such entities to shoulder duties and responsibilities is irrelevant to the determination of personhood for the purpose of demanding a common law writ of habeas corpus. However, assuming *arguendo*, that it is relevant, the NhRP has successfully demonstrated that chimpanzees can shoulder duties and responsibilities in their own societies and in mixed human/chimpanzee societies and therefore are “persons” for purposes of demanding a common law writ of habeas corpus and order to show cause. The question of who is a common

law “person” for the purpose of the common law writ of habeas corpus is uniquely a question for the courts of New York. The expert affidavits (“Expert Affidavits”) and certain of the new Affidavits attached to this Second Kiko Petition also demonstrate that chimpanzees such as Kiko are autonomous and self-determining beings who possess those complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty, as a matter of common law liberty, equality, or both. These include, but are not limited to, their autonomy, self-determination, self-consciousness, awareness of the past, anticipation of the future, ability to make choices and plan, set desires and goals, intentionally act towards goals and understand whether they are satisfied, empathy, ability to engage in mental time travel, directing behavior based on internal cognitive processes and capacity to suffer the pain of imprisonment. The argument for Kiko’s personhood is strongly supported by law, science, history, and modern standards of justice, as established by the Expert Affidavits, certain new Affidavits and accompanying Memorandum of Law.

12. CPLR 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 to require the detainer to demonstrate a legal basis for that person’s detention and denial of liberty.

13. Once a petitioner satisfies the requirements of CPLR 7002(c) (requiring petitioner to state that the person is “detained” and the “nature of the illegality”), the court must issue the writ, or show cause order, without delay. CPLR 7003(a). *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.”). The burden then shifts to the respondents to present facts that show the detention is lawful. CPLR 7006(a); 7008(b).

14. Kiko is a “person” within the meaning of the New York common law of habeas corpus, and thus Article 70, and is therefore entitled to the common law right to bodily liberty protected by the New York common law of habeas corpus. Pursuant to Article 70 and the common law of habeas corpus, Respondents have the burden of proving that their detention of Kiko is lawful. If Respondents fail to meet their burden, this Court must find that Kiko’s detention is unlawful and order him released immediately. That Respondents are not in violation of any federal, state or local animal welfare laws in their detention of Kiko is irrelevant to whether or not the detention is lawful. This Second Kiko Petition does not seek improved welfare for Kiko, but rather demands the common law right to bodily liberty protected by the common law of habeas corpus. It is the fact he is detained at all, rather than the conditions of said detention, 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 relevant fact is that Respondents’ detention of Kiko constitutes an unlawful deprivation of his fundamental common law right to bodily liberty and bodily integrity.

15. This Second Kiko Petition does not seek the immediate production of Kiko to this Court or his placement in a temporary home, as there are no adequate facilities to house him in proximity to the Court. Rather, it asks the Court to order Respondents to show cause (within the meaning of CPLR 7003(a)) why Kiko should not be discharged, and thereafter, make a determination that Kiko’s detention is unlawful and order his immediate release to an appropriate primate sanctuary. The NhRP strongly suggests that the Court select Save the Chimps, a premier chimpanzee sanctuary located on 190 acres in Fort Pierce, Florida, where he will live on one of twelve two to three acre islands in an artificial lake along with numerous other chimpanzees, be

provided with the specialized care necessary to satisfy his complex social, emotional, and physical needs for the duration of his life, and live a life that allows for him to exercise his autonomy and self-determination to the greatest degree possible in North America. A true and correct copy of an affidavit from Molly Polidoroff, Executive Director of Save the Chimps, filed in this Court in the Second Hercules and Leo Petition and the Second Tommy Petition is attached herein.

16. That the NhRP seeks the discharge of Kiko to a primate sanctuary (preferably Save the Chimps) rather than into the wild or onto the streets of New York does not preclude him from habeas corpus relief. New York habeas corpus law and specifically the precedent of the Court of Appeals and the New York State Supreme Court Appellate Division, First Judicial Department (“First Department”) allows for a detainee to challenge the conditions of his or her confinement and recognizes the transfer of custody to a different facility as a proper remedy. *See 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)). In *Stanley*, this 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.* The NhRP however does not challenge the conditions of Kiko’s confinement nor does it seek his transfer from one facility to another. Rather, the NhRP demands his immediate release to an appropriate primate sanctuary such as Save the Chimps in Ft. Pierce, Florida, where he will be able to exercise his autonomy and right to bodily liberty to the fullest extent possible in North America.

17. The legislative and judicial curtailment of the common law writ of habeas corpus beyond the limitations of the common law itself violates the Suspension Clause of the New York Constitution, Art. 1 § 4.

18. Kiko is the beneficiary of an *inter vivos* trust created by the NhRP pursuant to section 7-8.1 of the Estates, Powers and Trusts Law (“EPTL”) for the purpose of his care and maintenance once he is transferred to an appropriate primate sanctuary. A true and correct copy of the trust is attached herein as **Exhibit 10**.

PARTIES

19. The NhRP is a tax-exempt 501(c)(3) non-profit corporation organized under the laws of the State of Massachusetts, with its primary place of business located in Coral Springs, Florida. Its mission 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.” The NhRP does not seek to reform animal welfare legislation. *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.”)

20. The NhRP brings this action on behalf of Kiko, an adult male chimpanzee who, upon information and belief, is being imprisoned by Respondents in a cage located in a cement storefront in a crowded residential area at 2764 Livingston Avenue, Niagara Falls, New York.

21. Respondents are Carmen Presti and Christie E. Presti, individually and in their capacity as officers and directors of The Primate Sanctuary, Inc. and The Primate Sanctuary, Inc.

APPLICABILITY OF CPLR ARTICLE 70

22. Pursuant to CPLR 7001, CPLR Article 70 governs the procedure applicable to common law writs of habeas corpus.

23. After a petitioner makes a *prima facie* showing it meets the requirements of CPLR 7002(c) (requiring petitioner to state that the person is “detained” and the “nature of the illegality”), as set forth by the NhRP in this Second Kiko Petition, the court must issue the writ, or show cause order, without delay. CPLR 7003(a). The burden then shifts to the respondents to present facts that show the detention is lawful. CPLR 7006(a).

24. If the respondents fail to set forth the cause of and authority for the detention, the petitioner must be discharged forthwith. CPLR 7010(a).

25. The NhRP does not demand that Respondents produce the body of Kiko, but asks the Court to order Respondents to show cause why Kiko should not be released. CPLR 7003(a) provides in relevant part: “[t]he court to whom the petition is made shall issue the writ *without* delay on any day, *or where the petitioner does not demand production of the person detained . . .* order the respondent to *show cause why the person detained should not be released.*” (emphasis added). As in the case at bar, the NhRP in *Stanley* did not demand the production of Hercules and Leo and this Court issued the order to show cause requiring the respondents to appear in court to explain the detention. *See Stanley*, 16 N.Y.S.3d at 904-05 (“Petitioner invokes CPLR 7003(a) . . . That statute provides . . . ‘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.’ This proceeding thus commenced with the signing of an order to show cause.”). *See also State ex rel. Soss v. Vincent*, 49 A.D. 2d 911, 911 (2d Dept. 1975) (“In a habeas corpus proceeding upon an order *to show cause* (CPLR 7003, *subd.* (a)), the appeal is from a judgment of the Supreme Court . . . which granted the petition and ordered petitioner released”) (emphasis added). This Second Kiko Petition does *not* seek an “order to show cause” pursuant to CPLR

403. Instead it seeks to require Respondents to justify their detention of Kiko within the meaning of CPLR 7003(a).

VENUE

26. CPLR 7002(b) provides in relevant part: “a petition for the writ shall be made to: 1. the supreme court in the judicial district in which the person is detained; or . . . 3. *any justice of the supreme court*[.]” (emphasis added). In *Stanley*, this Court ruled that venue was proper in New York County, despite the fact that the chimpanzees were restrained in Suffolk County. 16 N.Y.S.3d at 905-07. This Second Kiko Petition is therefore properly brought before this Court even though Kiko is imprisoned outside of New York County.

12. This Court should issue the writ of habeas corpus and order to show cause within the meaning of CPLR 7003(a) sought by the Second Kiko Petition and make it returnable to New York County. 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 in the present case are individuals and a private entity and clearly not a “state institution,” the Court should make the writ returnable to New York County. *See Stanley*, 16 N.Y.S.3d at 907. In *Stanley*, the Court found that 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. *Id.*

STANDING

27. The NhRP has standing to pursue habeas corpus relief on behalf of Kiko. Pursuant to CPLR 7002(a), a petition for a writ of habeas corpus may be brought by “one acting on . . . behalf” of “[a] person illegally imprisoned or otherwise restrained in his liberty within the state.”

This Court correctly ruled that the NhRP had standing in *Stanley*, explaining: “As the statute places no restriction on who may bring a petition for habeas on behalf of the person restrained, . . . petitioner has met its burden of demonstrating that it has standing.” 16 N.Y.S.3d at 905. This ruling is further supported by a long line of New York cases recognizing broad common law next friend representation in habeas corpus cases.

28. At no time was the NhRP’s standing at issue in any of the related cases filed or taken on appeal by the NhRP.

JURISDICTIONAL STATEMENT PURSUANT TO CPLR 7002(c)

29. Upon the NhRP’s best knowledge and belief, the cause or pretense of Kiko’s detention is that he is owned by Respondents.

30. Kiko is entitled to the New York common law right to bodily liberty protected by New York’s common law of habeas corpus. Respondents have the burden of proving Kiko’s detention is lawful. Otherwise he must be ordered released.

31. No court or judge of the United States has exclusive jurisdiction to order Kiko’s release.

32. No appeal has been taken from any order by virtue of which Kiko is detained.

33. One previous application for a writ of habeas corpus and order to show cause was filed by the NhRP on behalf of Kiko in the Supreme Court, Niagara County on December 3, 2013 (Index No. 151725).

34. On December 9, 2013, the Honorable Ralph A. Boniello, III, Justice of the Supreme Court Niagara County, held an *ex parte* telephone hearing on the record with Elizabeth Stein, Esq. and Steven M. Wise, Esq., counsel for the NhRP. A true and correct copy of the transcript of said hearing is attached herein as **Exhibit 1**.

35. On December 11, 2013, an order of the Supreme Court, Niagara County denying the NhRP's Petition was entered in the Office of the Clerk of the County of Niagara. A true and correct copy of the order is attached herein as **Exhibit 2**.

36. The NhRP appealed to the Fourth Department and Respondents did not reply. Oral argument was heard on December 2, 2014 in the Fourth Department at which Respondents failed to appear.

37. On January 2, 2015, the Fourth Department affirmed the lower court's dismissal of the NhRP's petition for a writ of habeas corpus and order to show cause, concluding that Kiko's discharge to a sanctuary was not an appropriate remedy in an action for habeas corpus relief. *Presti*, 124 A.D.3d at 1335. For further discussion of this issue, see section IV-D-5 in the accompanying Memorandum of Law.

38. On January 15, 2015, the NhRP filed a Motion for Leave to Appeal to the Court of Appeals in the Fourth Department, which was denied on March 20, 2015. A true and correct copy of the order is attached herein as **Exhibit 3**.

39. The NhRP then filed a timely Motion for Leave to Appeal to the Court of Appeals, which was denied and entered on September 1, 2015. A true and correct copy of the order is attached herein as **Exhibit 4**.

40. New facts are presented in this Second Kiko Petition that were not presented and determined in any previous application on behalf of Kiko. Although the NhRP asserts that the ability to shoulder duties and responsibilities is irrelevant to a determination of personhood for the purpose of demanding a common law writ of habeas corpus, it now submits the attached Supplemental Affidavits and the Affidavit of primatologist Dr. Jane Goodall, demonstrating that chimpanzees such as Kiko in fact shoulder well-defined duties and responsibilities both within

their own societies and chimpanzee/human societies and therefore satisfy this claimed yet erroneous standard created by the Third Department. *See* ¶¶6 and 48, *infra*.

**NEITHER RES JUDICATA, COLLATERAL ESTOPPEL, NOR CPLR 7003(b)
BARS THE ISSUANCE OF AN ORDER TO SHOW CAUSE IN THIS SECOND
KIKO PETITION**

41. This Court has ruled that neither issue preclusion nor claim preclusion apply to the common law writ of habeas corpus. *See Stanley*, 16 N.Y.S.3d at 908-10. *See also People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874); *People ex rel. Leonard HH v. Nixon*, 148 A.D. 2d 75, 80-81 (3d Dept. 1989); *Post v. Lyford*, 285 A.D. 101, 103-05 (3d Dept. 1954); *People ex rel. Sabatino v. Jennings*, 221 A.D. 418, 419 (4th Dept. 1927) *aff'd*, 246 N.Y. 624 (1927).

42. Neither *res judicata* nor collateral estoppel bars the issuance of a new habeas corpus writ even on the same grounds as a prior dismissed writ. CPLR 7002(c)(6) and 7003(b); *People ex rel. Anderson v. Warden, New York City Correctional Instn. for Men*, 325 N.Y.S.2d 829, 833 (Sup. Ct. 1971). *See Stanley*, 16 N.Y.S.3d at 909 (“the governing statute itself poses no obstacle to this litigation”).

43. *Res judicata* and collateral estoppel do not bar the issuance of an order to show cause on behalf of Kiko in this Second Kiko Petition, as the legality of Kiko’s detention has never been litigated in or determined by a court of the State of New York. The NhRP has filed just one other petition for a common law writ of habeas corpus and order to show cause on Kiko’s behalf. The lower court refused to issue the requested order to show cause, which denied Kiko the opportunity for a full and fair hearing on the most significant individual issue that may come before any court, whether he may be unlawfully imprisoned for the rest of his life. The Fourth Department then failed to reach the legality of the issue of Kiko’s detention erroneously concluding that Kiko’s discharge to a sanctuary was not an appropriate remedy in an action for

habeas corpus relief. *Presti*, 124 A.D.3d at 1335. *See Stanley*, 16 N.Y.S.3d at 917 n.2. Significantly, the court suggested twice, without deciding, that it might agree with the NhRP's claim that Kiko was a "person" for the purpose of Article 70, stating, "[r]egardless of whether we agree with petitioner's claim that Kiko is a person within the statutory and common law definition of the writ . . ." and "even assuming, *arguendo*, that we agreed with petitioner that Kiko should be deemed a person for the purpose of the application." 124 A.D.3d at 1335.

44. As this Court noted in *Stanley*, "[r]espondents cite no authority for the proposition that a declined order to show cause constitutes a determination on the merits, that it has any precedential value, or that a justice in one county is precluded from signing an order to show cause for relief previously sought from and denied by virtue of a justice in another county refusing to sign the order to show cause." 16 N.Y.S.3d at 909.

45. A court is not required to issue a writ from a successive petition for a writ of habeas corpus only if: (1) the legality of a detention has been previously determined by a court of the State in a prior proceeding for a writ of habeas corpus, (2) the petition presents no ground not theretofore presented and determined, and (3) the court is satisfied that the ends of justice will not be served by granting it. CPLR 7003(b). In this Second Kiko Petition, none of the elements are satisfied. As demonstrated herein and in the accompanying Memorandum of Law: a) the legality of Kiko's detention has never been determined by a court of the State; b) the Second Kiko Petition sets forth grounds not previously presented and determined by a New York Court; and c) justice requires the issuance of the requested order to show cause as the failure to do so will forever preclude Kiko from obtaining the freedom to which he is entitled.

46. The Third Department's decision in *Lavery* that chimpanzees are not "persons" for purposes of common law writs of habeas corpus and Article 70 because they cannot shoulder

duties and responsibilities is not binding on this Court because: a) it is erroneous both as a matter of law and fact; b) it remains unsettled law insofar as it was not relied upon by the Fourth Department in *Presti* which was decided one month after *Lavery*; and c) it directly conflicts with the decision of the New York Court of Appeals in *Byrn*. Harvard Law Professor Laurence H. Tribe and Professor Justin Marceau, habeas corpus scholar, submitted letter briefs to the Court of Appeals in support of the NhRP's motion for leave to appeal to the Court of Appeals and its assertion that the definition of "person" for purposes of a common law writ of habeas corpus is not dependent upon the individual's capacity to shoulder duties and responsibilities. A true and correct copy of the Letter Brief of Amicus Curiae Laurence H. Tribe is attached herein as **Exhibit 8** and the Letter Brief of Amicus Curiae Justin Marceau as **Exhibit 9**.

**KIKO POSSESSES ATTRIBUTES SUFFICIENT TO ESTABLISH LEGAL
PERSONHOOD AS A MATTER OF POLICY**

47. Attached herein are affidavits setting out necessary facts and opinions for the Court to consider, nine of which are Expert Affidavits from some of the world's most renowned experts on the cognitive abilities of chimpanzees. Affidavits (c) through (l) are true and correct copies of the affidavits filed in the NhRP's prior habeas corpus proceeding in the Supreme Court, Niagara County. Affidavit (a) and (b) are true and correct copies of the affidavits filed in this Court in the Second Hercules and Leo Petition and the Second Tommy Petition. They include:

- (a) Affidavit of Molly Polidoroff
- (b) Affidavit of Steven M. Wise (Second Hercules and Leo Petition)
- (c) Affidavit of James R. Anderson
- (d) Affidavit of Christophe Boesch
- (e) Affidavit of Jennifer Fugate
- (f) Affidavit of Mary Lee Jensvold

- (g) Affidavit of James King
- (h) Affidavit of Tetsuro Matsuzawa
- (i) Affidavit of William C. McGrew
- (j) Affidavit of Mathias Osvath
- (k) Affidavit of Emily Sue Savage-Rumbaugh

Affidavits (c) through (k) demonstrate that chimpanzees such as Kiko possess the complex cognitive abilities sufficient as a matter of policy for New York common law personhood and the common law right to bodily liberty, as a matter of liberty, as a matter of equality, or both, as set forth in the attached Memorandum of Law. These include, but are not limited to, the possession of autonomy and self-determination, as well as numerous advanced cognitive abilities related to autonomy and self-determination, including an autobiographical self, episodic memory, self-consciousness, self-knowing, self-agency, referential and intentional communication, language planning, mental time-travel, numerosity, sequential learning, meditational learning, mental state modeling, visual perspective-taking, understanding the experiences of others, intentional action, planning, imagination, empathy, metacognition, working memory, decision-making, imitation, deferred imitation, emulation, innovation, material, social, and symbolic culture, cross-modal perception, tool-use, tool-making, cause-and-effect.

**KIKO HAS THE CAPACITY TO SHOULDER DUTIES AND RESPONSIBILITIES
BOTH WITHIN CHIMPANZEE SOCIETIES AND CHIMPANZEE/HUMAN
SOCIETIES**

48. Attached herein are affidavits setting out the necessary facts and opinions for the Court to consider from some of the world's most renowned experts on chimpanzee cognition and behavior both in the wild and in captivity. They include:

- (a) Supplemental Affidavit of James R. Anderson

- (b) Supplemental Affidavit of Christophe Boesch
- (c) Affidavit of Jane Goodall
- (d) Supplemental Affidavit of Mary Lee Jensvold
- (e) Supplemental Affidavit of William C. McGrew
- (f) Supplemental Affidavit of Emily Sue Savage-Rumbaugh

All of these affidavits demonstrate that chimpanzees such as Kiko possess the capacity to shoulder duties and responsibilities within chimpanzee societies and chimpanzee/human societies. These include, but are not limited to, the ability to understand and carry out duties and responsibilities while knowingly assuming obligations and then honoring them, behave in ways that seem both lawful and rule-governed, have moral inclinations and a level of moral agency, ostracize individuals who violate social norms, respond negatively to inequitable situations, have a social life that is cooperative and represents a purposeful and well-coordinated social system, routinely enter into contractual agreements, keep promises and secrets, prefer fair exchanges, perform death-related duties and show concern for others' welfare..

49. As demonstrated in the accompanying Expert Affidavits, Supplemental Affidavits, expert affidavit of Dr. Jane Goodall and accompanying Memorandum of Law, Kiko is an autonomous and self-determining being who has the capacity to assume duties and responsibilities and possesses the attributes sufficient for the New York common law right to bodily liberty protected by the New York common law of habeas corpus and is therefore entitled to petition this Court for his liberty.

WHEREFORE, the NhRP respectfully demands the following relief:

A. Issuance of the attached Order to Show Cause demanding Respondents to demonstrate forthwith the basis for the detention and denial of liberty of Kiko;

B. Upon a determination that Kiko is being unlawfully detained, ordering his immediate release from Respondents' custody and then transfer forthwith to an appropriate primate sanctuary, preferably Save the Chimps;


C. Awarding the NhRP the costs and disbursements of this action; and

D. Granting such other and further relief as this Court deems just and proper.

Dated: January 6, 2016



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



Steven M. Wise, Esq.
Subject to *pro hac vice* admission
Attorney for Petitioner
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864

TO:

Carmen Presti, individually and as an officer and director of The Primate Sanctuary, Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
716-284-6118

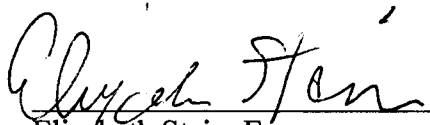
Christie E. Presti, individually and as an officer and director of The Primate Sanctuary, Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
716-284-6118

The Primate Sanctuary, Inc.
2764 Livingston Avenue
Niagara Falls, New York 14303
716-284-6118


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 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.


Elizabeth Stein, Esq.

Sworn to before me this
6th day of January, 2016



Notary Public

PHILIP V. MATHAI
Notary Public, State of New York
Qualified in Nassau County
No. 01MA6206319
My Commission Expires May 18, 2017