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

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus	
THE NONHUMAN RIGHTS PROJECT, INC., on behalf of KIKO,	App. Div. Docket No. CA 14-00357
Petitioner-Appellant,	
v.	
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.	

BRIEF OF *AMICUS CURIAE* BOB KOHN AGAINST ISSUANCE OF WRIT OF *HABEAS CORPUS*

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INTRODUCTION

The Nonhuman Rights Project (NRP) has petitioned this Court for the release of a chimpanzee named Kiko, who is allegedly being "unlawfully detained"—not pursuant to existing laws governing the mistreatment of animals (*see, e.g.*, Agricultural & Markets Law §373, regarding confinement in "crowded or unhealthy conditions"), but on the novel basis that the chimps are "persons" under the law entitling them to deliverance via *habeas corpus*. This *amicus curiae* brief is submitted in opposition to Petitioner-Appellant's request for issuance of such writ.

The writ of *habeas corpus,* under the common law, has never been applied to *persons,* only to *human beings*. The State of New York has never expanded nor contracted the scope of beings subject to *habeas corpus* actions, and the NRP has provided no good reason to expand the application of such actions under the common law to any being other than a *human being*. Since Kiko is not a human being—nor has a chimp ever been equated to human being, a fact which even the NRP has admitted—the writ should not issue.

STATEMENT OF INTEREST

I am a resident of New York and an attorney in good standing, licensed to practice law in the State of California and admitted to practice before the United States Court of Appeals for the Second Circuit. I have moved for admission to practice *pro hac vice* solely as *amicus curiae* in this case or, in the alternative,

participate *pro se*. Because Respondent has indicated its intention not to file a response to this appeal, I believe this brief may identify laws or arguments that might otherwise escape the Court's consideration and that it may otherwise be of assistance to the Court.

I have no relationship with either party and only know of this litigation and the NRP through press reports and the NRP website. No party's counsel authored this brief in whole or in part, no party and no party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amici curiae contributed money that was intended to fund preparing or submitting this brief.

My legal background is in copyright law and am known for co-authoring a 1,800-page legal treatise entitled, *Kohn On Music Licensing* (Wolters Kluwer, 4th Edition 2010). The book has been cited by the U.S. Supreme Court in *Eldred v. Ashcroft*, 57 U.S. 186 (2003), the Second Circuit Court of Appeals in *Woods v. Bourne*, 60 F.3d 978 (2d Cir. 1995) and *Boosey & Hawkes v. Buena Vista Home Video*, 145 F.3d 481 (2d Cir. 1988), and other courts, including *Fred Ahlert Music Corp. v. Warner/Chappell Music*, 958 F.Supp. 170 (S.D.N.Y. 1997), and *Bridgeport Music v. Dimension Films*, 410 F.3d 792 at fn 18 (6th Cir. 2005).

My connection to the issues in this case arises from years of personal jurisprudential research, beginning with an essay I wrote in 1994 in response to a

challenge issued by the Editor-in-Chief of the Encyclopedia Britannica at that time, the American philosopher Mortimer J. Adler. In 1993, Dr. Adler posed a philosophical problem which he believed had not been addressed until the 20th Century: What is the cause of superior intellectual power (such as that exercised by an Albert Einstein relative to everyone else)? Readers of the Encyclopedia Britannica publication, *The Great Ideas Today* (the annual supplement to EB's *Great Books* collection), were invited to posit a solution. My essay, *Mind and Brain: The Genius of Fortune* was selected by Dr. Adler as the winner and was published in the 1994 edition of *The Great Ideas Today*. The essay touched upon some of the fundamental questions in law, philosophy, and science being raised by the NRP in this case—particularly the difference between human beings and all other animals. During the interim twenty years, I have given a great deal of thought to these questions and have begun writing again about them recently.

Be that as it may, the focus of this brief is on *the law* and my belief that fundamental human rights, including the right of liberty to which the writ of *habeas corpus* is addressed, has only ever applied to human beings and should never be expanded to include nonhumans.

ARGUMENT

NRP's position, to summarize it briefly, begins with the uncontroversial observation that a *person,* as that term is used under the law, is not a synonym for

human being; the former term may encompass something nonhuman just as it may include a corporation or other entity which the law has recognized as a person. Then, they say, a chimpanzee—for a variety of alleged scientific reasons, largely subsumed under a characteristic common to humans and chimps which the NRP calls "autonomy"—is a "person" under both New York's statutory law and the common law doctrine of habeas corpus. Being a *person*, the chimp is therefore entitled to its "bodily liberty," and such other rights as the courts may recognize on a "case by case basis."

This Court should be unpersuaded by these arguments. The writ of *habeas corpus,* under the common law, has never been applied to *persons,* only to *human beings*. The rest is academic. Since Kiko is not a human being, the writ should not issue.

A. WRIT OF *HABEAS CORPUS* APPLIES ONLY TO HUMAN BEINGS, NOT PERSONS

The NRP contends that the New York legislature may not *contract* the scope of individuals for whom a *habeas corpus* action might apply; that the Suspension Clause of the U.S. Constitution renders the legislature powerless to deprive anyone of its privilege. That may be true, but that's not what the New York legislature has done. While the State has expanded *personhood* to organizations such as corporations and partnerships for certain purposes, it has never considered a

nonhuman animal to be a person for any purpose. Nor has the *common law* ever considered any being other than a *human being* eligible for the protections afforded by the writ of *habeas corpus*.

1. NEW YORK STATE HAS NEITHER EXPANDED NOR CONTRACTED THE SCOPE OF HABEAS CORPUS PROTECTION

a. New York has extended personhood from human beings to certain specified forms of human associations, but no more

Writs of *habeas corpus* are issued in the State of New York pursuant to statute, specifically Article 70 of New York's Civil Practice Law & Rules (CPLR). Section 7002(a) of that Article states (in principal part): "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 to inquire into the cause of such detention and for deliverance."

The NPR claims that §7002(a) does not define the word "person" and, therefore, the court must look to the common law for a definition. Yet, contrary to NRP's suggestion, the word "person" has, in fact, been defined by the New York State legislature.

The underlying legal basis for the NRP's petition is that the chimp's imprisonment is *unlawful*. Imprisonment, or the restriction of one's liberty, is unlawful pursuant to New York's statutory law against *unlawful imprisonment* (or,

alternatively, a common law civil cause of action for *false imprisonment*). The criminal law prohibiting *unlawful imprisonment* is set forth in New York Penal Law Article 135, which states at §135.05:

> "A person is guilty of unlawful imprisonment in the second degree when he *restrains* another *person*." [Emphasis added].

The term "restrains," defined in New York Penal Law §130.00(1), means:

> "to restrict a *person's* movements intentionally and unlawfully in such manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent and with knowledge that the restriction is unlawful." [Emphasis added]

New York Penal Law Section 10.00(7), which governs the legal interpretation of *unlawful imprisonment* under §135.05 statute, provides the following definition:

> "'Person' means a *human being*, and *where appropriate*, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality." [Emphasis added]

Because the chimp is not one of the kinds of corporations, partnerships, or governmental organizations listed in §10.00(7), it must be deemed a *human being* if it were to be given the status of "person" under New York Law.

The NRP made much in its brief of the fact that to be a *person* does not necessarily mean *human being*. That is true, but if you are not a human being, or one of the specific kinds of entities listed in the statute, you cannot be a *person* under New York State law.

The NRP suggests that §7002(a) is a mere statutory "procedural device." *See*, *Nonhuman Rights Project, Inc. v. Presti*, Index No. 151725, Supreme Court (County of Niagra), Transcript of Hearing re: Kiko, 12/9/13 at 6, lines 15-23. If that is the case, then the definition of any terms used in the device should be those defined by the legislature. And though the legislature has broadened the definition of *person* to cover "where appropriate" corporations, partnerships and governmental entities, the legislature has not expanded the kind of beings which may be made subject to a *habeas corpus* proceeding. Obviously, a legal entity, such as a corporation, partnership or a government entity, cannot be imprisoned or have its physical liberty restricted. See, *People v. Ebasco Services, Inc.*, 77 Misc.2d 784, 787 (1974) ("It would be manifestly inappropriate to apply the definition of 'person' to corporation in regard to persons who might be seized and arrested"). And since the statutory definition of "person" does not include nonhumans, it would be at least equally inappropriate to apply the definition of 'person' in regard to chimpanzees who might be imprisoned or confined.

b. A chimp is not a *person* by virtue of the Estate, Powers & Trusts Law

Under Section 7-8.1 of the Estates, Powers & Trusts law of New York, the State of New York, by statute, has allowed "domestic or pet animals" to be beneficiaries of a trust. To secure a potential argument based on such law, the chimp

in captivity, Kiko, has apparently been made the beneficiary of an *inter vivos* trust established by NRP. With the trust in place, Petitioner leaps to the following conclusion: "By allowing 'designated domestic or pet animals' to be trust beneficiations able to own the trust corpus, New York recognized these nonhuman animals as 'persons' with the capacity for legal rights. Because Kiko is a New York trust beneficiary, he is a legal 'person'."

But nowhere in the statute does it say that the animal beneficiary is a "person." In fact, §7-8.1(a) & (b) repeatedly uses the term "animal" in reference to the beneficiary, not person. Elsewhere, the New York Code defines the term "animal" as "every living creature except a human being." See, Agriculture & Markets Law §350. The term animal, obviously, includes chimpanzees.

But, even if the animal were considered a *person* for purposes of the trust, that does not make it a person for the purpose of having his "bodily liberty" violated, because only a "person," as defined under §10.00(7) is entitled to such liberty under NY Penal Law Article 135, regarding *unlawful imprisonment*.

In other words, under the law of this State, I can leave a trust for the benefit of my pet goldfish, and the NRP can take the position that this *implies* the fish is a *person* for purposes of its ownership interest in the corpus of the trust, but that does not mean it is *also* a person for purposes of unlawful or false imprisonment (or any right other than its proprietary interest in the trust), and neither the NRP nor anyone

else should be able to obtain a writ of habeas corpus to deliver the fish from the confinement of its aquarium.

c. New York Attorney General's Office has recently affirmed that nonhuman animals are not *persons* under New York Law

In an affirmation filed in another case brought earlier this year by the NRP, an Assistant Solicitor General of the State of New York stated that "nonhuman animals" are "outside the purview of New York's habeas corpus statute." *Nonhuman Rights Project, Inc. v. Stanley*, Docket No. 2014-01825, Supreme Court Appellate Division, Second Department, Affirmation of Jason Harrow in opposition to appellant's motion for reargument (April 30, 2014), a copy of which is available at: http://www.nonhumanrightsproject.org/wp-content/uploads/2014/06/8.-Affirmation-in-opposition-to-appellant%E2%80%99s-motion-for-reargument-Hercules-Leo.pdf.

2. COMMON LAW *HABEAS CORPUS* ACTIONS MAY ONLY BE BROUGHT ON BEHALF OF *HUMAN BEINGS*, NOT PERSONS

The New York legislature can neither *contract* nor *expand* the kinds of beings who may be delivered from imprisonment by virtue of such a writ. That's because the common law writ of *habeas corpus* never applied to *persons*, only to *human beings*.

Petitioner cites decisions of the courts of India for designating a Hindu idol and a Sikh sacred text each as a *legal person*; a Pakistani court for so designating a mosque; and a treaty between the Crown and the indigenous peoples of New Zealand for so designating a river. But NRP's attorneys admitted, at a hearing held in the Supreme Court in the County of Fulton relating to the chimpanzee Tommy, that they are unable to cite a single case—whether in New York or in any other jurisdiction in the world—in which any being other than a *human being* (either free person or slave) has been the subject of a writ of *habeas corpus*. *Nonhuman Rights Project, Inc. v. Lavery*, Index No. 02051, Supreme Court (County of Fulton), Transcript of Hearing re: Tommy, 12/3/13 at 10, lines 10-23, a copy of which is available here: http://www.nonhumanrightsproject.org/wp-content/uploads/2013/12/Fulton-Cty-hearing-re.-Tommy-12-2-13.pdf.

As Petitioner admits, the common law has *never* allowed just any kind of *person* to be the subject of a *habeas corpus* proceeding. *Habeas corpus*, under the common law, has always been reserved exclusively for persons who are *human beings*. Accordingly, the issue in this proceeding is not whether a chimp is a *person*. It's whether a chimp is a *human being*.

3. CHIMPANZEES ARE NOT HUMAN BEINGS; NOR HAVE THEY EVER BEEN EQUATED WITH HUMAN BEINGS

Are chimpanzees human beings? The answer to that question should be academic. Nor has a chimp ever been equated with a human being. Indeed, in the hearing below, the NRP admitted that (a) the chimps at issue are *not* human beings and (b) petitioner knows of no cases in which a chimpanzee has been equated with a human being:

> THE COURT: … Do you have any case that equates a chimpanzee with a human being? And when I say equate, I don't mean—any case that defines a human being to include a chimpanzee.
>
> MR. WISE: We are not claiming, your Honor, that Kiko is a human being. It's clear that he is a chimpanzee. And we're not seeking human rights for Kiko. We understand he is not entitled to human rights. We're saying he is entitled to chimpanzee rights. So there are no cases that specifically do what you say. Because this—these are the first cases of their kind as far as we understand.

Nonhuman Rights Project, Inc. v. Presti, Index No. 151725, Supreme Court (County of Niagra), Transcript of Hearing re: Kiko, 12/9/13 at 11-12.

A chimp is plainly not a human being, nor has any court ever equated a chimp with a human being. A chimp, therefore, can never be, under either New York or common law, the subject of a *habeas corpus* proceeding.

B. NRP OFFERS NO GOOD REASON FOR THIS COURT TO CHANGE THE COMMON LAW

The common law restricts the application of *habeas corpus* actions to *human beings,* and the petitioner provides no good reason for this Court to change the common law to include chimpanzees or any other nonhuman animal under the rubric of the writ. On the contrary, expanding the common law to offer chimps some of the same rights as humans gives rise to a number of serious practical consequences. Moreover, the science upon which the NRP bases its plea for these new rights is seriously flawed.

1. NO PRACTICAL NEED TO EQUATE CHIMPANZEES WITH HUMANS

In opposing the writ, *amicus curiae* is by no means being unsympathetic to the plight of the chimps in question. Every animal in this State—including Kiko, Tommy and the others—is already the beneficiary of New York's laudable statutory protection against the unhealthy confinement of animals. Specifically, Section 373(2) of the Agriculture & Markets Law allows the police and qualified animal rights organizations to rescue animals who are being confined in a "crowded or unhealthful condition."

The NRP has admitted that it is not seeking the complete release of Kiko from confinement, only the chimp's transfer to a more hospitable confinement. Since the law already provides for a means to that end, changing the common law writ of

habeas corpus to include chimps would provide the animals with no marginal benefit whatsoever.

2. PROVIDING NONHUMAN ANIMALS WITH HUMAN RIGHTS WOULD HAVE ENORMOUS PRACTICAL CONSEQUENCES

In light of existing law that provides precisely the remedy the NRP is seeking on behalf of the chimps, one must pause and wonder: why are these remedies not being pursued? Whatever the reason, extending basic human rights to nonhumans is not only unnecessary, doing so would have serious, widespread practical consequences.

What would be the scope of a nonhuman animal's rights under habeas corpus? The right which the NPR seeks here is an animal's "bodily liberty." But, again, petitioner is not seeking the complete release of the chimp from confinement, only a transfer of confinement to better conditions. How will the courts determine whether one particular form of confinement over another—for a particular kind of animal and for a particular individual animal—will abridge the animal's "bodily liberty"? Would "bodily liberty" be extended to encompass protection against bodily assault or abuse? At what point would training a domestic animal interfere with its liberty? And its sale?

As noted above, the State of New York has already enacted legislation, regarding the conditions of an animal's confinement. The State has also enacted laws

addressing an animal's abandonment, malnourishment, poisoning, exposure, sale, carrying animals in a cruel manner, clipping a dog's ears, operating upon a horse's tail, and the like. See, Article 26, Agriculture & Markets Law §§ 350 et. seq. If additions or modifications need be made to the law, the legislature may so act. Currently, they may act without having to deal with fundamental issues of liberty and equal protection.

What other nonhuman animal rights will the courts recognize beyond "bodily liberty"? The NPR has already told the courts that it intends to seek not only a right of "bodily liberty," but *other rights*, as well. *Nonhuman Rights Project, Inc. v. Presti*, Index No. 151725, Supreme Court (County of Niagra), Transcript of Hearing re: Kiko, 12/9/13 at 14, lines 2-8. The extent of such rights, NPR says, would be determined "on a case by case basis." Id.

Beyond chimps, what other nonhuman animals will be afforded this right of "bodily injury" and other rights "on a case by case basis"? The NPR answers that question on its website. In an interview with Stephen Wise, the NRP president and lawyer is asked, *Where are you going next?* His answer:

> "[W]e're looking at those top states and seeing whether there are apes, cetaceans (whales and dolphins) or elephants there who need our help. . . We've tentatively chosen our next state, in fact, and we've tentatively chosen certain elephants in that state as the petitioners for our next habeas corpus petitions, and we have begun contacting elephant experts from around the world to help us in the case the way we brought in the chimpanzee experts." See, Q&A with Steven M. Wise, 4/24/14,

http://www.nonhumanrightsproject.org/2014/04/24/q-a-with-steven-m-wise/ (accessed on May 10, 2014).

What guidance will pet owners, farmers, zookeepers and others (e.g., Google's autonomous, self-driving cars, or their recently acquired robots) expect from the courts when the courts start affording nonhuman animals some measure of human rights on a case-by-case basis?

3. NEITHER SCIENCE NOR PHILOSOPHY SUPPORTS NRP'S PETITION

In its brief, the NRP itself moved its argument into the realm of philosophy, unearthing a 1983 citation to a single "philosopher" (i.e., Daniel Wikler, described in Wikipedia as "a public health educator, philosopher, and medical ethicist") quoted as having said, "the thesis that humans should be ascribed rights for being human has received practically no support from philosophers." Appellate Brief at 58. Either the writer was quoted hopelessly out of context, or he was completely unaware of the vast western philosophical canons to the contrary, beginning with Aristotle, whose position on the subject—and concurrence by subsequent philosophers, including Emmanuel Kant and John Locke—was perhaps best elucidated by the American philosopher Mortimer J. Adler in his works, *The Difference of Man and the Difference It Makes* (Holt 1967) and *Intellect* (Macmillan 1990).

The NRP then proceeds to misconstrue statements made by the emanate Judge Richard Posner who, they say, "implicitly concedes" there exist "no rational

arguments" to support discrimination against nonhumans. On the contrary, all Judge Posner said was that he "does not feel obligated to defend" the "moral intuition" that seems to him "deeper than any reason given for it." That is hardly a concession that "no rational arguments" exist for treating humans differently from all other animals. (Judge Posner's remarks are set forth fully at http://www.utilitarianism.net/singer/by/200106--.htm).

Without belaboring the Court with such rational arguments from first premises, suffice it to say that the over 100 pages of affidavits devoted to pointing out the *similarities* between chimpanzees and human beings—including the fact that all primates, including humans, exhibit a form of "autonomy"—does nothing to refute the significant *differences* between them, including the solid scientific evidence that human beings have something that other animals do not. Professor V.S. Ramachandran, Director for Brain and Cognition at the University of California, San Diego, has called the human brain "unique and distinct from that of the ape by a huge gap." See, V.S. Ramachandran, *The Tell-Tale Brain: A Neuroscientist's Quest for What Makes Us Human* (W.W. Norton & Company 2011). The difference, he says, boils down to language: Our "unique competence" in producing language, "seems to be absent in all other animals." This competence, he adds, "comes from our language acquisition device or LAD. Humans have LAD; apes and all other animals lack it."

Likewise, the great linguist, Professor Noam Chomsky, has conceded that human beings must be born with what he calls a "universal grammar." See, Noam Chomsky, *The Science of Grammar* (Cambridge Univ. Press 2012). Animals do have "communications systems," says Chomsky, "but they don't have anything like a language…[T]he human conceptual system looks as though it has nothing analogous in the animal world." Id. The basis of this unique *language acquisition device* or *universal grammar* is what Mortimer Adler has called the human *intellect*, our power of conceptual thought, something which is absent in all other animals.

And, although we may not know how or from whence these powers arise in us, there no doubt exists a marked discontinuity in nature—drawing a line between human beings and all other animals—which has been recognized since antiquity and which modern science repeatedly confirms. Indeed, all the behavioral studies of chimpanzees, rather than disproving the fundamental difference between human beings and chimps, only supports it.

This difference has been, since at least as early as Aristotle's time, the very basis for ascribing rights to human beings for being human. Jurisprudentially, rights follow from duties. It should be self-evident, said the philosopher, that each human being, by nature, has an obligation to do what is really good for one's self—that is, an obligation to pursue happiness. And it is by virtue of this obligation that each of us has the right to do so, not the other way around. Human rights—our moral and

legal obligations to each other—enable us to pursue happiness. Non-human animals, having only an instinct to survive rather than a free will to choose otherwise, can neither understand nor carry out moral or legal obligations, such as respecting the life, liberty, and property of others. If a creature cannot intelligibly be said to have obligations, it cannot be said to have rights.

The fundamental *difference* between humans and all other animals has always been the basis for treating animals as the different *kind* of things they are. And, for that matter, treating all human beings as equal. (See, Mortimer J. Adler, *The Difference of Man and The Difference It Makes* (Holt 1969) at 255-294. The NRP brief appears to use prohibitions on racial discrimination as one of the bases for a chimpanzee's right to equal protection. There is a particular irony here that implicates the jurisprudential basis of human equality, but suffice it to say that Petitioner's contention begs the question. Equal protection under the law is premised upon the essential equality among those protected. All human beings, regardless of race, sex, creed, color, religion, or national origin, are equal by virtue of what we have in common on an essential basis—our intellect (or language acquisition device, universal grammar, or whatever you wish to call it), a power unique to human beings which separates us from all other animals. For this reason, the Petitioners cannot prove, scientifically or otherwise, the equality of humans and chimpanzees to any degree).

Whatever level of autonomy the NRP wishes to ascribe to a chimp, no chimp will ever walk into this Court and declare otherwise.

CONCLUSION

For the reason set forth above, the writ of habeas corpus should be denied.

Dated: June 23, 2014

Respectfully submitted,

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