

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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

Index No.: 260441/2019
(Bronx County)

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

NOTICE OF APPEAL

Petitioner,

Hon. Justice Alison Y. Tuitt
Justice Supreme Court
Bronx County

-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.

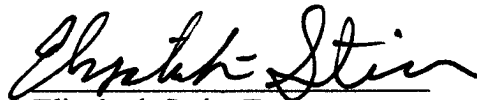
20 FEB 27 AM 10:31
COUNTY CLERK
BRONX COUNTY

RECEIVED

PLEASE TAKE NOTICE that the Petitioner, The Nonhuman Rights Project, Inc. (“NhRP”), on behalf of an elephant named Happy, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, for the First Judicial Department, from the decision and Order of the Supreme Court of the State of New York, County of Bronx (Hon. Justice Tuitt), dated February 18, 2020 and entered in the office of the Clerk of the County of Bronx on February 19, 2020, which granted Respondents’ motion to dismiss the NhRP’s Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause. Petitioner appeals from each and every part of that decision and Order.

Respectfully submitted,

Dated: 2/25/2020



Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, New York 11040

(516) 747-4726
lizsteinlaw@gmail.com

Steven M. Wise, Esq.
Of the Bar of the State of Massachusetts
(Subject to admission *Pro Hac*
Vice)
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864
wiseboston@aol.com

Attorneys for Petitioner

BY OVERNIGHT MAIL:

County Clerk Luis Diaz
New York State Supreme Court
Bronx County
851 Grand Concourse
Bronx, New York 10451

BY OVERNIGHT MAIL AND EMAIL:

PHILLIPS LYTLE LLP

Kenneth A. Manning, Esq. (kmanning@phillipslytle.com)

Joanna J. Chen, Esq. (jchen@phillipslytle.com)

William V. Rossi, Esq. (wrossi@phillipslytle.com)

One Canalside

125 Main Street

Buffalo, New York 14203

Tel: (716) 847-8400

Attorneys for Respondents James J. Breheny and Wildlife Conservation Society

Appeal

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
---------------------------------------	--

- | | | | |
|--|---|---|---|
| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input checked="" type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgement | <input type="checkbox"/> Finding | <input type="checkbox"/> Order & Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

Court: Supreme Court	County: Choose County BRONX
Dated: February 18, 2020	Entered: February 19, 2020
Judge (name in full): Alison Y. Tuitt	Index No.: 260441/2019
Stage: <input type="checkbox"/> Interlocutory <input checked="" type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? Yes No
 If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input checked="" type="checkbox"/> Writ of Habeas Corpus	Date Filed: October 2, 2018
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:
CPLR 5704 Review of Ex Parte Order:	
Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Petitioner appeals the "decision and Order" of the Supreme Court, Bronx County, which granted Respondents' motion to dismiss Petitioner's Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") filed on behalf of an elephant named Happy.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

The issue to be raised on appeal is whether Happy is entitled to habeas corpus relief under CPLR Article 70. Petitioner seeks reversal on the ground that Happy is entitled to habeas corpus relief under CPLR Article 70. The specific relief sought on appeal is for an order directing Respondents to immediately release Happy from Respondents' unlawful imprisonment at the Bronx Zoo to The Elephant Sanctuary in Tennessee.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	The Nonhuman Rights Project, Inc.	<i>Petitioner</i>	Appellant
2	James J. Breheny	Respondent	Respondent
3	Wildlife Conservation Society	Respondent	Respondent
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			

Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Elizabeth Stein, Esq.

Address: 5 Dunhill Road, New Hyde Park

City: New York

State: New York

Zip: 11040

Telephone No: 516-747-4726

E-mail Address: lizsteinlaw@gmail.com

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): /

Attorney/Firm Name: Steven M. Wise, Esq.

Address: 5195 NW 112th Terrace

City: Coral Springs

State: Florida

Zip: 33076

Telephone No: 954-648-9864

E-mail Address: wiseboston@aol.com

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): /

Attorney/Firm Name: Kenneth A. Manning, Esq./ PHILLIPS LYTTLE LLP

Address: One Canalside 125 Main Street

City: Buffalo

State: New York

Zip: 14203

Telephone No: 716-847-8400

E-mail Address: kmanning@phillipslytle.com

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 2, 3

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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,

v.

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.

NOTICE OF ENTRY

Index No.: 260441/2019

PLEASE TAKE NOTICE that the accompanying Memorandum Decision
and Order was signed on February 18, 2020, and entered in the Office of the Bronx County
Clerk on February 19, 2020.

Dated: Buffalo, New York
February 19, 2020

PHILLIPS LYTTLE LLP

By: 

Kenneth A. Manning

Joanna J. Chen

William V. Rossi

Attorneys for Respondents

James J. Breheny and

Wildlife Conservation Society

One Canalside

125 Main Street

Buffalo, New York 14203

Telephone No. (716) 847-8400

kmanning@phillipslytle.com

jchen@phillipslytle.com

wrossi@phillipslytle.com

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

The NonHuman Rights Project
 on behalf of HAPPY -against-

Index No. 260441/19

Hon. Alison Y. Tullt

Justice Supreme Court

Brekens, James J.

The following papers numbered 1 to 16 were read on ^{these} ~~this~~ motions (Seq. No. 1, 2, 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).

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

Motion is Respectfully Referred to Justice:
 Dated: _____

Dated: 2/18/20

Hon. A. Y. Tullt

J.S.C.

Allison Y. Tullt, 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

C

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 (4th Dept. 2015); Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 54 N.Y.S.3d 392 (1st 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 (4th 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 (1st 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

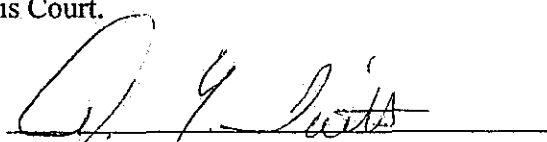
This Court agrees that Happy is more than just a legal thing, or property. She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty. Nonetheless, we are constrained by the caselaw to find that Happy is not a "person" and is not being illegally 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