

**In The Matter Of:**  
*Nonhuman Rights Project v.*  
*James Breheny, et al*

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*September 23, 2019*

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*Peter Kent*

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 BRONX COUNTY : CIVIL TERM : PART IA-5

3 -----x

4 In the Matter of a Proceeding under Article 70  
5 of the CPLR for a Writ of Habeas Corpus,

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

8 Petitioner,  
9 -against-

10 Index No.  
11 260441/2019

12 JAMES J. BREHENY, in his official capacity  
13 as Executive Vice President and General  
14 Director of Zoos and Aquariums of the  
15 Wildlife Conservation Society and  
16 Director of the Bronx Zoo, and WILDLIFE  
17 CONSERVATION SOCIETY,

18 Respondents.

19 -----x

20 Bronx Supreme Court  
21 851 Grand Concourse  
22 Bronx, New York 10451

23 Date: September 23, 2019

24 B E F O R E:

25 HON. ALISON TUITT,  
Supreme Court Justice

A P P E A R A N C E S:

NONHUMAN RIGHTS PROJECT  
Attorneys for the Petitioner

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-and-

BY: SPENCER LO, ESQ.

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(Appearances continue on following page.)

Peter M. Kent  
Senior Court Reporter

1 APPEARANCES: (Continued.)

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14 BY: KENNETH A. MANNING, ESQ.  
15 -and-  
16 BY: JOANNA J. CHEN, ESQ.

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18 WILDLIFE CONSERVATION SOCIETY  
19 Attorneys for the Respondents  
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21 Bronx, New York 10460  
22 BY: CHRISTOPHER J. MCKENZIE, ESQ.  
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24  
25

1 THE CLERK: Case on trial in the matter of The  
2 Nonhuman Rights Project versus Breheny.

3 THE COURT: Good morning all.

4 Again, my name is Judge Tuitt, and I will be the  
5 Judge presiding over this matter.

6 I understand that the movant in this case,  
7 petitioners here, and everybody has noted their appearance  
8 with the Court Reporter.

9 Okay, so you wanted to begin argument?

10 MR. MANNING: Your Honor, if I may, Ken Manning,  
11 for the respondents. Counsel for the petitioner we have  
12 conferred and we agree that in the interest of efficiency it  
13 would make the most sense for us to proceed with a motion to  
14 dismiss the petition in this case, with the permission of  
15 the Court.

16 THE COURT: Okay, and your name, sir?

17 MR. MANNING: Kenneth Manning, M-a-n-n-i-n-g,  
18 Your Honor.

19 THE COURT: Okay, Mr. Manning.

20 MR. MANNING: I am with Phillips Lytle.

21 THE COURT: The acoustics in this room are  
22 terrible, so please, if you can indulge us by speaking up?

23 MR. MANNING: I will.

24 THE COURT: Thank you. I won't think you're  
25 shouting at me.

## Proceedings

1 MR. MANNING: I will.

2 THE COURT: Okay, Mr. Manning.

3 MR. MANNING: Okay, Your Honor, if I may.

4 This habeas corpus proceeding has been brought by  
5 the petitioner on behalf of a forty-eight year old Asian  
6 Elephant situated in the Bronx Zoo. The proceeding was  
7 brought approximately a year ago. It will be celebrating  
8 its first birthday on October 2nd. When we received the  
9 petition for habeas corpus we made a motion. It was brought  
10 in Orleans County. We made a motion to transfer venue to  
11 the Bronx, where Happy the Elephant resides. And we moved  
12 to dismiss the petition based upon not one but four  
13 Appellate Division decisions, one from each Judicial  
14 Department, establishing that habeas corpus proceedings are  
15 not available for animals. And we made that motion to  
16 dismiss. In the alternative, Judge Tracey Bannister  
17 transferred the case here, pursuant to an order, and when  
18 she did --

19 THE COURT: Right.

20 MR. MANNING: -- she transferred any orders she  
21 didn't expressly decide, she transferred to this Court for a  
22 decision. And that's why we are here today on a motion to  
23 dismiss.

24 Our argument will be briefer than the  
25 petitioner's, Your Honor. We rely on the decision from the

1 First Department --

2 (Counsel was directed to speak louder.)

3 MR. MANNING: -- the Lavery, L-a-v-e-r-y, decision  
4 decided in 2017, that virtually addressed every single issue  
5 raised by petitioners in their petition for habeas corpus in  
6 this case.

7 The Lavery case involved a chimpanzee rather than  
8 an elephant, but the underlying principles remained the  
9 same, and there is no disagreement among the Appellate  
10 Divisions in terms of this particular result.

11 In short, the holding of the case is animals do  
12 not have a right to bring habeas corpus proceedings in part  
13 because they are unable to assume the duties and  
14 responsibilities that humans endure in exchange for certain  
15 civil rights.

16 The decision from the Appellate Division is fairly  
17 lengthy. It goes into great detail with respect to the  
18 analysis under the law of habeas corpus, and we think that  
19 in the event this Court chooses to follow the Appellate  
20 Division, it would favor a dismissal of the petition as a  
21 matter of law -- and it would be so whether or not the Court  
22 looks at standing, failure to state a cause of action, or in  
23 fact collateral estoppel, in what we have invoked the  
24 doctrine on behalf of the respondents because, because The  
25 Nonhuman Rights Project has been involved in the prior

1 litigation, and received unfavorable outcomes.

2 More recently, we shared with the Court and our --  
 3 in our brief -- a decision from Connecticut that comes out  
 4 the same way as the Appellate Division, First Department  
 5 with respect to an elephant rather than a chimpanzee. So we  
 6 think the law is pretty well settled at this point, and we'd  
 7 rely upon a statement of law in the Appellate Division,  
 8 First Department, for dismissal of the petition.

9 Now, it's worth noting that at least when this  
 10 case was first brought, petitioners and respondents saw the  
 11 law pretty much the same way, the existing law, and that was  
 12 their announced reason for bringing the case up in the  
 13 Fourth Department -- I know the Court is familiar with the  
 14 Fourth Department -- and brought the case there because of  
 15 their concern that the First Department would not receive  
 16 their arguments well.

17 Well, Judge Bannister, I guess today, admitted it  
 18 was forum shopping, and sent the case back to the Bronx to  
 19 where we are now.

20 THE COURT: Okay.

21 MR. MANNING: We think the reading of that case  
 22 dictates a favorable granting of a motion for dismissal of  
 23 the petition.

24 THE COURT: Now, you said there was a motion to  
 25 change venue also?

1 MR. MANNING: Yes.

2 THE COURT: That was resolved.

3 MR. MANNING: That was the only issue decided,  
4 which Judge Bannister in her decision and order was to  
5 transfer the case to -- from Orleans County, which had  
6 nothing to do with Happy the Elephant, and transfer the case  
7 to this Court and to Your Honor.

8 THE COURT: Okay.

9 MR. MANNING: The one comment I would make -- and  
10 much is written about it in petitioner's memoranda -- is  
11 when the Court of Appeals has declined to hear these cases,  
12 in addition, they have the Court of Appeals has declined to  
13 hear the Appellate Division, First Department case,  
14 declined, the Court unanimously refused leave, but in so  
15 doing, one of the justice's, Judge Eugene Fahey wrote a  
16 concurring decision that talks about the future of animal  
17 rights. And summarizing -- I am summarizing -- much is made  
18 of that by the petitioner in terms of trying to get back to  
19 the Court of Appeals for a more complete determination.

20 THE COURT: Correct.

21 MR. MANNING: That case, however, stands for the  
22 proposition that all seven judges of that court denied  
23 leave, leave in that case. So that the law remains well  
24 settled that an animal in New York simply does not have  
25 access to the habeas corpus relief, and that's reserved for

1 humans.

2 So, there is nothing in this case dealing with any  
 3 claim of mistreatment or malnourishment or anything with  
 4 respect to Happy the Elephant. We have three affidavits,  
 5 not one, but three, Your Honor, outlining in great detail  
 6 the careful treatment, including the veterinary care, the  
 7 bathing, the feeding and the treatment of Happy the  
 8 Elephant.

9 In short, Your Honor, Happy is happy where she is.  
 10 We oppose the transfer of the Elephant anywhere else at this  
 11 point, and we think that the case is very clear that, cases,  
 12 that the motion for dismissal should be granted based upon  
 13 the Appellate Division, First Department case, as well as  
 14 the Second and Third and Fourth Department decisions.

15 THE COURT: Fourth? Okay.

16 MR. MANNING: When we made this motion in front of  
 17 Judge Bannister, because the law was so clear, we chose to  
 18 move to dismiss the petition rather than simply serving an  
 19 answer and having the matter heard on the merits.

20 THE COURT: Right.

21 MR. MANNING: We asked the Court for five days in  
 22 the event that the Court were to choose at that time not to  
 23 follow the First Department case, we asked for five  
 24 additional days to serve the answer, which is in accordance  
 25 with the Special Proceeding Rules under CPLR 404. It is

1 specifically authorized. We asked for that relief because  
2 of the extended delays in this case.

3 I am not aware of habeas corpus cases taking a  
4 year, but we went ahead and filed an answer, somewhat  
5 prematurely, so this Court would have in front of it, in, in  
6 front of you, Your Honor, all the documents to make a ruling  
7 so that the matter could be, could proceed in the event that  
8 an appeal were necessary, and you'd have a complete record,  
9 so there would not have to be more than three court  
10 appearances.

11 So we filed it, admittedly it is premature, but we  
12 filed it as an accommodation to the Court or -- we are  
13 actually early in filing that document, not late, so that's  
14 also on the record. But we think it's clear that the motion  
15 to dismiss should be granted.

16 I can attempt to -- the other argument there is  
17 some procedural arguments that petitioner's will raise that  
18 I will hold until those motions are made. I think it's  
19 clear, Your Honor, that the voluminous record in this case  
20 really takes on the aspect of a legislative briefing, and  
21 that our position is that the relief sought by petitioners  
22 is for the legislature to grant or for the State  
23 Constitution to grant, and not something that the Courts  
24 have the power to grant, at least based upon what the  
25 Appellate Division, First Department has indicated.

1                   That's our argument on that motion, Your Honor.

2                   THE COURT: Thank you so much.

3                   MR. MANNING: Thank you, Your Honor.

4                   THE COURT: Okay, Ms. Stein?

5                   MR. MANNING: Your Honor, if I may treat  
6 separately the motions to file the two amicus briefs. Does  
7 the Court want to hear that as a part of the motion to  
8 dismiss?

9                   THE COURT: Not at this time.

10                  MR. MANNING: Thank you.

11                  THE COURT: Counselor?

12                  MS. STEIN: Good morning -- I'm not even sure if  
13 it's afternoon yet.

14                  Elizabeth Stein.

15                  THE COURT: I think it's still morning.

16                  MS. STEIN: For The Nonhuman Rights Project, and  
17 what I would like to address before the Court, before  
18 Attorney Wise gets to the actual merits of respondent's  
19 motion to dismiss is, the motion that we made to strike the  
20 answer that responds -- actually, um, served on us -- which  
21 was July 10, 2019, just to make it perfectly clear,  
22 Your Honor, there was a transfer order from Justice  
23 Bannister in Orleans County.

24                  THE COURT: Yes.

25                  MS. STEIN: Which did transfer the case to Bronx

1 County.

2 In the transfer order, um, in actually the notice  
 3 of motion that respondents had made for the transfer order,  
 4 the first part was the motion to transfer, the second part  
 5 was a motion to dismiss in the alternative. You had the  
 6 transfer motion and then in the alternative a motion to  
 7 dismiss, with Court permission to then file an answer under  
 8 CPLR 404(a). So, at the outset, we have two reasons for  
 9 claiming that the answer, respondent's answer should be  
 10 stricken, but at the outset I'd just like to -- I am  
 11 going -- I am a little confused as to what respondents are,  
 12 why they are claiming that their answer is simply premature  
 13 rather than actually untimely, because --

14 THE COURT: Why would it be untimely? Excuse me,  
 15 counselor for interrupting.

16 MS. STEIN: That's quite all right.

17 THE COURT: Why would it be untimely?

18 MS. STEIN: We believe it is untimely for two  
 19 reasons. First of all, under CPLR 404(a), which is why the  
 20 respondents are claiming that gives them the authority to  
 21 file the answer after they have made this notice of motion  
 22 to dismiss, is that the motion to dismiss has to have been  
 23 denied. Once the motion to dismiss is denied, then under  
 24 404(a), since this was a pre-answer motion with Court  
 25 permission, the Court can then grant the additional time to

1 file the answer.

2 So, I am not understanding how respondents are  
3 claiming that their motion to dismiss is pending when in  
4 fact to cite 404(a) for authority, even answering the  
5 petition they are not conceding the fact that the motion to  
6 dismiss has, has in fact been denied. We also maintain,  
7 Your Honor, that because, because the initial notice of  
8 motion was made in the alternative, in that the first part  
9 was the motion to transfer, the second part was the motion  
10 to dismiss.

11 THE COURT: Correct.

12 MS. STEIN: When the motion to transfer was  
13 granted, notwithstanding the fact that her order says that  
14 other pending motions have transferred, we maintain that  
15 those motions are no longer pending, they were made in the  
16 alternative to the motion to transfer. In order for -- once  
17 that happens, once that happened, that was part of one  
18 notice of motion, they are no longer before this court. And  
19 even if they are before this court, hypothetically, I still  
20 don't understand how respondents can be relying on 404(a) to  
21 make an answer when the motion to dismiss is still pending.  
22 Which is what they are claiming, when in fact 404(a) would  
23 require that the motion has been denied. And then at that  
24 point they can ask the Court for additional time to file the  
25 answer.

1 THE COURT: Well, I don't think that they are  
 2 arguing that the motion was denied and they filed their  
 3 answer, they said to convenience the Court was the reason  
 4 why they filed their answer.

5 MS. STEIN: Exactly.

6 THE COURT: So we'd have the necessary  
 7 documentation. I believe that was their argument.

8 MS. STEIN: Yes. And that is their argument,  
 9 Your Honor. My -- our argument is that it is clear on the  
 10 face of 404(a) that their, that the motion to dismiss,  
 11 because they didn't file an answer, they filed a motion to  
 12 dismiss. The only way they can file that answer is if the  
 13 Court denies their motion to dismiss.

14 THE COURT: So, what are you -- you're asking for  
 15 the relief that we not consider the answer in making our,  
 16 um, decision on the motion to dismiss?

17 MS. STEIN: That is correct.

18 THE COURT: Is that it?

19 MS. STEIN: Yes. Our motion is to strike the  
 20 answer because, until, unless --

21 THE COURT: Okay.

22 MS. STEIN: -- unless respondents are willing to  
 23 concede that their motion to dismiss has been denied, I am  
 24 not sure how the Court can even consider it, unless and  
 25 until it has adjudicated and denied the motion to dismiss.

1 THE COURT: Okay, I understand what you're saying.

2 MS. STEIN: And, and if I could just make one  
3 other point, Your Honor?

4 THE COURT: Absolutely.

5 MS. STEIN: On that, our second reason for asking,  
6 for actually saying that the answer is untimely is because  
7 at the time that they filed their notice of motion, notices  
8 of motion, they were given -- they were asked to file all  
9 answering papers on December 3rd. They neglected to. They  
10 filed their papers on the motion to dismiss.

11 THE COURT: Their motion to dismiss, right?

12 MS. STEIN: And then they were given -- let me  
13 just give you the exact date, um, they filed their answer on  
14 July 10th -- sorry -- on July 8th. Well, they filed it on  
15 July 8th. They served us on July 10th. Now, what CPLR 7008  
16 provides in terms of responding to a habeas corpus petition,  
17 which clearly is what we have filed, and the procedure for  
18 our filing is governed by part of the -- governed by  
19 Article 70. It says, 7008 provides in relevant part that a  
20 return to a habeas corpus petition which is equivalent of  
21 the answer to the petition must be filed at the time and  
22 place specifically specified in the writ. The writ in this  
23 case is the order to show cause that was issued on November  
24 16th. That order stated that any answering affidavit must  
25 be received by me no later than December 3rd.

1           Their filing on July 8th is, their filing on July  
 2           8th is clearly significantly past the December 3rd deadline.  
 3           What respondents claim in their opposition to our motion to  
 4           strike is that we waived any timeliness objection because we  
 5           didn't file it immediately. I submit to the Court that  
 6           there is no statutory or judicial authority that suggests  
 7           that we had to immediately respond to their answer or we  
 8           have waived a timeliness objection. In fact, I believe it  
 9           was seventeen business days that within which we filed our  
 10          motion to strike their answer.

11           Respondents do cite three cases that they believe  
 12          are relevant. We submit is completely in opposition to our  
 13          situation. In the cases cited the time period exceeds  
 14          forty-five days, six weeks, forty-five days, six weeks and a  
 15          year.

16           THE COURT: Thank you.

17           MS. STEIN: Yes. Thank you.

18           THE COURT: You said you filed your --

19           MS. STEIN: Seventeen business days.

20           THE COURT: After the July 10th date?

21           MS. STEIN: On August 2nd, Your Honor, yes. So I  
 22          would submit that we have not in any way waived a timeliness  
 23          objection. That, um, in fact the answer was grossly  
 24          untimely in filing an answer. They filed the motion to  
 25          dismiss, which we maintain is, must be conceded by the

1 defendants to be denied in order for them to invoke 404(a).

2 THE COURT: So you are saying that the motion  
3 should be to dismiss, should be failure to state a cause of  
4 action and just the pleadings and should be considered and  
5 not the answering papers?

6 MS. STEIN: Or their motion to dismiss,  
7 Your Honor.

8 THE COURT: Or their motion to dismiss?

9 MS. STEIN: Unless Your Honor chooses to deny  
10 their motion to dismiss and grant them the additional time  
11 to file their answer.

12 THE COURT: You are saying that, okay, the motion  
13 to dismiss should be denied?

14 MS. STEIN: Yes.

15 If you --

16 THE COURT: And they should file a new motion to  
17 dismiss or we should accept their papers nunc pro tunc to  
18 speak and transfer them into like sort of a motion for  
19 summary judgment?

20 MS. STEIN: Well, unless respondents are willing  
21 to concede that their, their motion to dismiss has in fact  
22 been denied, if they are, if they are relying upon 404(a) to  
23 claim that their answer is in fact timely.

24 THE COURT: Timely, but, however, the transfer  
25 orders specifically said everything notwithstanding the

1 transfer should be heard by the motion court, which is this  
2 court.

3 MS. STEIN: Yes, that is correct, Your Honor, but  
4 we still maintain that because it was done in the  
5 alternative, that there was the motion to transfer part in  
6 the alternative the motion to dismiss and get additional  
7 time to answer in the event that the motion to dismiss is  
8 denied, that in fact when Justice Bannister issued the  
9 motion to transfer, she in fact nullified, nullified  
10 everything else and it is no longer something that is  
11 pending that is transferred down or in fact it was denied.  
12 And if it was then, if it was denied --

13 THE COURT: Okay.

14 MS. STEIN: -- it was denied, and I think the  
15 respondents have to concede the fact that it was denied  
16 instead of continuing to state that it was pending. If it's  
17 pending, I don't see how they can possibly invoke 404(a) for  
18 the authority of filing their answer.

19 THE COURT: Someone has a copy of the decision. I  
20 left all the papers. My court attorney left all the papers.

21 MR. MANNING: The order, Your Honor --

22 THE COURT: Everybody stop.

23 One second. Everybody stop.

24 I just want you to read for the record the  
25 decision that the judge, the justice made in the Fourth

1 Department.

2 MR. MANNING: Yes, Your Honor.

3 MS. STEIN: But, Your Honor, are you referring to  
4 the transfer order or the order to show cause?

5 THE COURT: The transfer order.

6 MS. STEIN: We have that, Your Honor.

7 THE COURT: The transfer order.

8 She's going to read the conclusion from the  
9 Judge's opinion, and, for the record, your name is?

10 MS. CHEN: Joanna Chen.

11 THE COURT: Okay, Ms. Chen.

12 MS. CHEN: Okay. The, paragraph in question  
13 states order -- order that all motions and issues submitted  
14 to this court, and not expressly decided herein are hereby  
15 stayed pending transfer of this proceeding to Bronx County.

16 THE COURT: Thank you.

17 MS. CHEN: Okay.

18 MS. STEIN: Yes, and --

19 THE COURT: Would you like to respond?

20 MS. STEIN: Oh, yes, I would like to respond,  
21 Your Honor, the -- we still maintain that notwithstanding  
22 having, and we do -- if I may cite one specific case that is  
23 in our supplemental, supplemental memo of law, which I do  
24 believe that Your Honor has. If you will bear with me for  
25 one moment?

1 THE COURT: Surely.

2 MS. STEIN: Thank you. The case is Cole v Tat-Sum  
 3 Lee, 309 Appellate Division 2d 1165. The cite is 1166,  
 4 Fourth Department 2003. And the quote that you will find in  
 5 our supplemental memorandum of law is as well by granting  
 6 leave to amend the summons and complaint and direct, and  
 7 direct the filing and serving of the amended summons and  
 8 complaint, the Court implicitly denied plaintiff's  
 9 alternative request for leave to file and serve a  
 10 supplemental summons and amended complaint upon defendant.

11 We believe that to be controlling in this case,  
 12 Your Honor. Notwithstanding the language in Justice  
 13 Bannister's order, we believe that once this, the initial  
 14 transfer, notice of motion for transfer was granted, she  
 15 implicitly denied, you know -- what she said in the order  
 16 was that unless it was expressly stated, nothing was  
 17 expressly stated here, she implicitly denied the, the motion  
 18 to dismiss when she ordered the transfer. And again,  
 19 assuming then, hypothetically, that the -- she did not do  
 20 so.

21 THE COURT: Okay.

22 MS. STEIN: And that this is still pending as  
 23 respondents claim it to be. We submit, Your Honor, that  
 24 404(a) which is their authority for filing their answer when  
 25 they did, they claim it to be premature, we claim it to be a

1 nullity because this was filed without the, without the  
2 Court having decided the motion to dismiss, which is  
3 required by 404(a), and then without the permission of the  
4 Court to do so.

5 We have no idea whether the Court would have  
6 permitted this additional time. Perhaps the Court would  
7 have said you have already in your, um, motion to dismiss,  
8 you have thoroughly put out your case and there is no reason  
9 to provide an answer, it's only, only redundant, that could  
10 be the decision of the Court. We don't know that. And I  
11 think that 404(a) is clear, that it is up to the Court to  
12 make that decision as to whether it will grant that party  
13 the opportunity to answer when in fact the party has chosen  
14 this was the right of the party to do so. It has chosen to  
15 file a motion to dismiss rather than answer, in doing so,  
16 and as respondents cite, they cite to 404(a). If you're  
17 going to cite to 404(a) you need to be in compliance with  
18 404(a), and we submit that to be in compliance that motion  
19 to dismiss had to have been denied. If it is pending,  
20 404(a) is simply inapplicable. And again, it is up to the  
21 Court, her judicial wisdom do decide whether in fact an  
22 answer is appropriate in a particular case.

23 THE COURT: Thank you.

24 MS. STEIN: Thank you so much, Your Honor.

25 THE COURT: Mr. Manning, you had something you

1 wanted to say?

2 MR. MANNING: Briefly, Your Honor.

3 On that point, Your Honor, what petitioner's  
4 suggesting is that a sitting trial court judge in Orleans  
5 County faced with Appellate authority would somehow  
6 implicitly deny the motion to dismiss and bury it somewhere  
7 in the transfer order. That's their position. That  
8 transfer order is as clear as a bell.

9 Judge Bannister decided to transfer the case here  
10 so the matter could be heard in regard to that motion. We  
11 have asked in the alternative if the Court chooses not to,  
12 Judge Bannister chose not to follow the Appellate Division  
13 authority out of 1, 2, 3 and 4, she had the authority at  
14 that point to deny our motion and direct us to file an  
15 answer.

16 This case has been hanging around a year now. We  
17 filed the answer to, in the event that the Court should  
18 choose to deny our motion and overlook the Appellate  
19 authority, then this could go all up in one package. We are  
20 not asking the Court consider what is in our answer.

21 THE COURT: Well, that's --

22 MR. MANNING: Those papers are set.

23 THE COURT: Okay.

24 MR. MANNING: We are not looking for an advantage.

25 THE COURT: Okay.

1 MR. MANNING: Just an accommodation of the Court.  
 2 But to suggest a sitting judge would overlook a dismissal  
 3 motion to -- supported by the Fourth Appellate Division is  
 4 frankly much to consider.

5 THE COURT: Okay, wait. Counsel. Mr. Manning.  
 6 Just let me asked understand, because that's where my  
 7 question was --

8 MR. MANNING: Yes.

9 THE COURT: You do not want us to consider your  
 10 answer in deciding the motion to dismiss?

11 MR. MANNING: Your Honor, we are very, very  
 12 comfortable with Your Honor deciding it on the papers, and  
 13 we believe all the cases -- if you're going to move to  
 14 strike somebody's pleading, you have to do it promptly. We  
 15 cited all the cases necessary in our memorandum and the time  
 16 period for it took them a month to get to the causes,  
 17 whatever objections they may have --

18 (Counsel directed to speak louder.)

19 MR. MANNING: -- they may have had would have  
 20 been, would have been waived by that activity.

21 THE COURT: Okay, Ms. Stein?

22 MS. STEIN: Yes. If I may respond.

23 We are in no way, no way trying to be cute,  
 24 Your Honor. In fact, we have worked very diligently to get  
 25 papers out as expeditiously as possible, which is what we

1 attempted to do. I would say once again there is absolutely  
2 no statutory or judicial authority that would suggest that  
3 we have to file our motion to strike and immediately upon  
4 receipt of their answer we acted as quickly as we could, as  
5 diligently as we could.

6 I do not believe that there is any prejudice to  
7 the respondents whatsoever in when we filed as we did. The  
8 other thing, again, and I am so sorry, I apologize to the  
9 Court for repeating myself, but I must say that while  
10 respondents are claiming that there is still a pending  
11 motion that Justice Bannister did not implicitly do  
12 anything, what they still have not addressed is the fact  
13 that they could not file this answer until their motion to  
14 dismiss was dismissed by a court, whether it was by the  
15 Court in Orleans County or whether it is by you Your Honor.

16 THE COURT: I don't think that you're necessarily  
17 not in conflict with each other because the answer was done  
18 prematurely and that there is no need for the Court to  
19 consider it if we indeed grant the motion to dismiss.

20 So, I think that, um --

21 MS. STEIN: That's fine. That's fine.

22 THE COURT: We are not, not -- okay.

23 MS. STEIN: Thank you so much.

24 THE COURT: So there is another portion of the  
25 motion --

1 MR. WISE: Oh, yes, Your Honor.

2 MS. STEIN: Yes.

3 THE COURT: -- that you'd like to argue?

4 MS. STEIN: Yes.

5 I'd like to introduce attorney Steven Wise, who  
6 has --

7 THE COURT: Mr. Wise?

8 MS. STEIN: -- Mr. Wise, who has been admitted  
9 pro hac vice on behalf of The Nonhuman Rights Project. He  
10 is counsel for and President of The Nonhuman Rights Project,  
11 and he will be arguing in response to the motion to dismiss.

12 THE COURT: But he is with The Nonhuman Rights  
13 Project?

14 MS. STEIN: Yes, he is. He is the President.

15 THE COURT: So, it is Steven?

16 MR. WISE: S-t-e-v-e-n, W-i-s-e.

17 THE COURT: Okay, W-i-s-e. Okay, I spelled it  
18 okay, with a p-h.

19 Okay, Mr. Wise.

20 MR. WISE: Your Honor, first I'd like to begin by  
21 saying that by commenting on the narrative that my  
22 brother -- and I am actually a member of the Massachusetts  
23 Bar even though I live in Florida, this is the 21st Century,  
24 I can argue in New York, but in Massachusetts I  
25 automatically refer to the opposing counsels as my brothers

1 and sisters. We are very comradely there. So I  
2 automatically do it.

3 I just want to make clear I am not related to them  
4 by blood, but when I refer to them I automatically refer to  
5 them as my "brother" and "sister."

6 THE COURT: Thank you for clarifying.

7 Okay, Mr. Wise.

8 MR. WISE: Your Honor, my brother gave you a  
9 narrative in which he would have you believe that all Four  
10 Appellate Division Departments have ruled against our  
11 arguments on the merits. I'm sure it's slipped his mind as  
12 to what is actually going on.

13 THE COURT: Okay. And you can tell me which  
14 department and which case --

15 MR. WISE: I am about to --

16 THE COURT: -- was not --

17 MR. WISE: -- list them from east to, from east to  
18 west.

19 THE COURT: Okay, I'm ready.

20 MR. WISE: So, the Second Department --

21 THE COURT: Okay.

22 MR. WISE: -- in 2015, The Nonhuman Rights Project  
23 sought an order to show cause on behalf of certain  
24 chimpanzees. The judge refused to issue the order to show  
25 cause, and when we appealed to the Second Department, the

1 Second Department, without having us brief the case, simply  
 2 sua sponte dismissed our appeal on grounds that we didn't  
 3 have a right to appeal.

4 Even the commentary in Article 70 in the CPLR  
 5 notes that they made a mistake. It is obvious that we have  
 6 a right to appeal. But we decided at that point not to go  
 7 up to the Court of Appeals on it because we also knew that,  
 8 that res judicata and estoppel don't apply in habeas corpus  
 9 cases, and we would then re-file that case in some other  
 10 court, which we eventually did.

11 THE COURT: And the name of that case was?

12 MR. WISE: It was The Nonhuman Rights Project  
 13 versus Stanley, who is the President of the Stony Brook  
 14 University.

15 THE COURT: Okay.

16 MR. WISE: It is an unreported case because the  
 17 Second Department simply sent us a one paragraph decision  
 18 saying that we sua sponte dismissed your case because you  
 19 don't have a right to appeal. We were confident that we  
 20 did. I think it is clear that that we did and we since then  
 21 have appealed several times and no other court has ever told  
 22 us that, whether it is the Court of Appeals or whether it is  
 23 another Appellate department that we don't have a right to  
 24 appeal.

25 THE COURT: But -- so that's solely the --

1 MR. WISE: Appeal.

2 THE COURT: -- that's the Second Department.

3 MR. WISE: Now I will get to the other  
4 departments.

5 THE COURT: Okay.

6 MR. WISE: I will skip over to the west. We also  
7 filed it on behalf of a chimpanzee, that was called The  
8 Nonhuman Right Project versus Presti, P-r-e-s-t-i.

9 That court again did not reach the merits of the case,  
10 affirmed the refusal of the Supreme Court Justice to issue  
11 it on the grounds that the Court said for reasons which will  
12 have to remain with the Court, that The Nonhuman Rights  
13 Project had not asked that the chimpanzee be released, but  
14 only asked that we remove the chimpanzee from the cage in  
15 which he was in to an island in Florida where it would, a  
16 sanctuary, and you were not allowed to do that in New York,  
17 I will get into why, that decision.

18 THE COURT: That was?

19 MR. WISE: That was the Fourth Department.

20 THE COURT: Okay, Fourth.

21 MR. WISE: Not only was that decision just as  
22 wrong as the Second Department, but I will talk about in  
23 when we talk about, go up to the Court of Appeals on our  
24 third time, Judge Fahey, in which specifically points out  
25 that it is wrong.

1 THE COURT: You have, you have leave to argue  
2 this, the Presti case?

3 MR. WISE: Do we have?

4 THE COURT: Leave.

5 MR. WISE: No, we asked the Court of Appeals for  
6 leave, at that time the Justice denied leave to argue that,  
7 the Presti case.

8 So --

9 THE COURT: Okay.

10 MR. WISE: -- then I will get to the Third  
11 Department.

12 THE COURT: Oh, no, I'm a little confused  
13 because --

14 MR. WISE: Yes?

15 THE COURT: -- you said you were going to argue to  
16 the Court of Appeals something and you just told me that you  
17 didn't have leave.

18 MR. WISE: Oh.

19 THE COURT: You have a note in the concurrence --

20 MR. WISE: Oh, that is to request later, that's  
21 the third time we have gone to the Court of Appeals. I am  
22 now on the first time we have gone to the Court of Appeals.

23 THE COURT: Okay.

24 MR. WISE: That's actually part of another side  
25 issue in that my brother is making it clear that, that

1        somehow four appellate departments ruled against us and this  
2        is a really simple case, this ain't a simple case, this case  
3        alone has or litigation we have had in New York alone has  
4        been the subject of numerous Law Review articles of amicus  
5        curae briefs by Professor Lawrence Tribe of Harvard Law  
6        School, one of the greatest habeas corpus professors in the  
7        US. It is argued in philosophy journals and law review  
8        journals. This is a, I'm sorry to say, is a very complex  
9        but also it's an important case because -- I will talk about  
10       it. It invokes what is the reach of habeas corpus. What is  
11       the, what is the, what is liberty within the State of  
12       New York. What is is equality within the State of New York.  
13       Who are elephants. Who is entitled to receive a writ of  
14       habeas corpus. This is far from -- I thought I would begin  
15       at the easiest, which is the Fourth Department, did not  
16       unanimously rule against us on the merits. You can see from  
17       the Second erroneously said you lack the right to -- said  
18       that it actually twice assumed without deciding that a  
19       chimpanzee could be a person, under the habeas corpus  
20       statute, but ruled against us saying that we were not  
21       seeking the immediate release of the chimpanzee, I guess  
22       into Time's Square, I'm not sure what the Court meant, but  
23       somewhere in Rochester, but what we were doing is asking  
24       that the Court order the release of the chimpanzee from what  
25       we argued was his illegal detention in Niagara Falls, and

1 then subsequently decided what to do with the chimpanzee.  
 2 And we discussed that he be moved to a sanctuary in Florida.  
 3 I will get to why that is a demonstrably erroneous decision,  
 4 and which part of our arguments is that Judge Fahey, when we  
 5 come to the third Court of Appeals, says that they simply  
 6 misunderstood what the case law was.

7 THE COURT: Let me see the case law. You are  
 8 telling me about the chimpanzee in the Fourth Department?

9 MR. WISE: Yes.

10 THE COURT: That's Presti?

11 MR. WISE: In fact, it is probably better if we  
 12 refer to them by the defendant's names since all the cases  
 13 begin with The Nonhuman Rights Project.

14 THE COURT: Yes, I understand. So, Presti, you  
 15 are saying that the Fourth Department in dictum said that  
 16 the chimpanzee has the right to bring a case?

17 MR. WISE: No, they --

18 THE COURT: But the, the relief or the remedy was  
 19 not founded?

20 MR. WISE: Yes. I want to --

21 THE COURT: Is that what they said?

22 MR. WISE: -- I want to be crystal clear that they  
 23 twice assumed without deciding that a chimpanzee could be a  
 24 person, but said it doesn't matter whether essentially, he  
 25 essentially -- whether it is a human or a chimpanzee, you

1 have to ask for immediate relief and moving any detainee  
 2 from one place to another place is not, does not allow you  
 3 to bring a writ of habeas corpus because you are not seeking  
 4 immediate release, which I will argue later.

5 THE COURT: So from that decision you are relying  
 6 on that decision to say that they found that a nonhuman has  
 7 habeas corpus rights?

8 MR. WISE: No, we are not saying, we are not  
 9 saying anything more than what I just said, which is they  
 10 twice assumed without deciding, whatever that means, but  
 11 they did not decide.

12 THE COURT: Okay, that's what that means that they  
 13 did not decide.

14 MR. WISE: However, if I may jump up just for one  
 15 moment --

16 THE COURT: Sure.

17 MR. WISE: -- to --

18 THE COURT: You're already up.

19 MR. WISE: -- to June of last year.

20 THE COURT: What's the case?

21 MR. WISE: That case is called the People versus  
 22 Graves, G-r-a-v-e-s. In that case there was a gentleman who  
 23 broke into a car dealership and damaged cars. He was  
 24 charged with destroying the property of a person. When he  
 25 went to the Fourth Department, the Fourth Department he was

1           arguing by person they meant human being, and the owner of  
 2           the cars was a corporation and not a human being. The  
 3           Fourth Department rejected that and said, and this is an  
 4           approximate quote, it's a common place that such entities as  
 5           corporations and animals can have legal rights. And then  
 6           they, the Court itself, cited to the Presti case. So I am  
 7           not arguing that from looking at the Presti case when they  
 8           say that, that, that, that the Court assumed without  
 9           deciding twice that's what it appeared, they did, but in the  
 10          Graves case they then cited the Presti case in support of  
 11          their claim that it is common place that nonhuman animals  
 12          like corporations are, are persons who can have rights. So,  
 13          the Court seems to have taken a greater leap or seems to  
 14          have, seems to have moved that the Presti case gave rights  
 15          to nonhuman animals more than it appeared on the surface to  
 16          us, but then again, I am just urging the court to, to take a  
 17          look at the Presti case and how the Fourth Department itself  
 18          interpreted the Presti case later on in the Graves case.

19                         THE COURT: Okay.

20                         MR. WISE: Okay?

21                         THE COURT: And the Graves case was never, never  
 22                         taken up?

23                         MR. WISE: The Graves case, to my knowledge, was  
 24                         never taken up.

25                         THE COURT: Okay. So the Court of Appeals has

1 never ruled on this?

2 MR. WISE: The Court of Appeals -- the Court of  
3 Appeals has never ruled on any these circumstances. Every  
4 time we try to encourage them to, so far they haven't, but  
5 never ruled.

6 We talk about later I think that we at least  
7 attracted the attention of Judge Fahey.

8 THE COURT: Okay.

9 MR. WISE: Now, this brings us to the Third  
10 Department and then the First Department because I already  
11 talked about --

12 THE COURT: The Second.

13 MR. WISE: Neither the First or the Second or  
14 Fourth ruled on the merits of the case. So now the Third  
15 Department was actually the first Supreme Court Appellate  
16 Division to rule, that was, that was the Lavery,  
17 L-a-v-e-r-y, case. The Nonhuman Rights Project versus  
18 Lavery. Since, of course, the First Department case,  
19 because we'll talk about it is also called Lavery in our --  
20 we refer to the Third Department case as Lavery I, which was  
21 from 2015, and we refer to the second one to the First  
22 Department case as Lavery II, which was 2017.

23 So, in Lavery I -- I will go through Lavery I with  
24 this Court in greater detail in a few moments, but in  
25 Lavery I that First Department did reach the merits of the

1 case and --

2 THE COURT: Okay, let me just -- sorry to cut you  
 3 off -- before you go into your argument, I am noticing that  
 4 now it is 12:30, because the Court has to go down at 1:00  
 5 o'clock so that I can let everybody take a lunch break, it's  
 6 not my decision, but it is the Office of Court  
 7 Administration. So I am just saying that after this, we  
 8 still have other motions to deal with, am I correct? And  
 9 you do want to argue those motions also. So I will hear the  
 10 argument on this particular motion and then we are going to  
 11 recess for lunch and then we can bring back your arguments,  
 12 okay?

13 MR. WISE: Yes. Thank you, Your Honor.

14 THE COURT: So you can tell me on Lavery I, which  
 15 is --

16 MR. WISE: The Third Department in Lavery I ruled  
 17 against the Nonhuman Rights Project essentially saying that  
 18 in order to have legal rights, the entity who seeks the  
 19 rights must be able to bear legal duties. Now, we'll argue  
 20 that, that was the first time in centuries of Anglo-American  
 21 jurisprudence that any court had ever done such a thing --

22 THE COURT: And they said that must have legal --

23 MR. WISE: -- that in order to be able to be, to  
 24 have a right, you have to be able to bear a responsibility.

25 THE COURT: Okay.

1           MR. WISE: And, of course, the judges there know  
2           that probably, probably 10 percent of the population of  
3           New York State has rights, but cannot bear responsibilities  
4           either because they are infants or they are children or they  
5           are insane or they are in comas or whatever, and so that's  
6           what they ruled. And then in, in, I think there in  
7           Footnote 3 they said, but human beings collectively have the  
8           ability to have legal rights, the Court will have to imagine  
9           what the Third Department meant by that, but it appears to  
10          be that either you must be able to bear duties in order to  
11          have legal rights, or somehow being human alone is enough to  
12          give you legal rights, or being human is both a sufficient  
13          and a necessary requirement in order to have rights.

14                 So, I will discuss that at greater detail because  
15          as I said that is the, that is the first time that any court  
16          in the English speaking Court in the world for the last six  
17          hundred years has ever made such a statement. So it is, as  
18          I will argue, it is obviously and demonstrably false and  
19          indeed it is false internally because of what the Third  
20          Department itself ruled on. It didn't. The cases cited, I  
21          will explain briefly, had nothing to do with that statement,  
22          and they also relied, and I will tell you the story then on  
23          Blacks Law Dictionary. However, it turned out that Blacks  
24          Law Dictionary itself was wrong and it took us a long time  
25          to determine that. And when we did find that out we then

1           contacted the editor in chief of the Blacks Law Dictionary  
 2           saying you have the wrong definition, the person in there,  
 3           Brian Garner, the Editor in Chief, apologized and said that  
 4           he would fix that. And in the Eleventh -- in the next  
 5           edition that came out last month he has fixed it.

6                     THE COURT: Last month you're saying?

7                     MR. WISE: Last month. And now --

8                     THE COURT: Last month.

9                     MR. WISE: -- at --

10                    THE COURT: And a person is defined now by --

11                    MR. WISE: Was it the issue in order to be a  
 12            person.

13                    THE COURT: Correct.

14                    MR. WISE: To be able to have a capacity to bear  
 15            rights and duties. Now, no one ever said that in the  
 16            Anglo -- in, in the history of the Anglo-American Law. What  
 17            they say is in order to be a person, you have to be able to  
 18            have the capacity to bear either rights or duties, not and  
 19            duties. Now, what this means is that in order to have, to  
 20            be a person, any entity who can, entity who can either bear  
 21            rights or bear duties is a person. Now, once you're a  
 22            person, that gives you the capacity to bear rights and  
 23            duties, but you need not bear both of them to have the  
 24            capacity for both of them, as anyone who's ever seen an  
 25            infant knows you obviously don't have to have that in order

1 to be a person.

2 Now, what happened was the Blacks Law Dictionary  
3 actually quoted Salmond on Jurisprudence from 1927, that  
4 seemed to say that rights and duties in order to be a person  
5 we then --

6 THE COURT: Rights and duties?

7 MR. WISE: Rights and duties, and that was one  
8 thing that the Third Department relied upon, and then when  
9 we then tracked down the 1927 Edition we saw that, that it,  
10 that Salmond on Jurisprudence said rights or duties, not  
11 rights and duties. The Third Department had not checked  
12 themselves to see whether or not what the, what rights  
13 Blacks were relying on is correct, Blacks made a mistake.  
14 Brian Garner, the Editor in Chief when we brought that case  
15 to his attention apologized, and said he would he change it,  
16 rights or duties. It came out last month and now says  
17 rights or duties. So, the Third Department could not have  
18 relied upon that if they, if Blacks had been correct.

19 So that is one of the several demonstrably wrong  
20 reasons that, that for the Third Department's ruling, so --  
21 but however they did rule against us saying you needed to  
22 have duties to have rights. So we have to concede that, but  
23 we are saying it was a demonstrably incorrect ruling and  
24 part of the demonstrable incorrect ruling it relied upon  
25 Blacks, and Blacks itself agreed that it was wrong.

1           THE COURT: And so there is some sort of  
2 acknowledgment by the editor that it was incorrect?

3           MR. WISE: There is an acknowledgment, and I -- it  
4 is part of your record. He sent the e-mail to us within an  
5 hour. He said sorry, we screwed up, and we'll fix it. It's  
6 part of the record.

7           THE COURT: Okay.

8           MR. WISE: That, you know, that brings us to the  
9 Third -- I'm sorry, to the First Department.

10          THE COURT: Correct.

11          MR. WISE: Now, the First Department, even the  
12 First Department did not rule against The Nonhuman Rights  
13 Project on the merits, even the First Department didn't. Of  
14 the four departments that allegedly ruled against us on the  
15 merits, just the Third Department did.

16                 Here is what happened in the First Department.  
17 Which is what we call, which is Lavery II, The Nonhuman  
18 Rights Project v. Lavery II.

19          THE COURT: Okay.

20          MR. WISE: Now, what happened there is we brought  
21 a second lawsuit on behalf of the same chimpanzee in Lavery  
22 I. We then brought that before the Court in New York  
23 County. And if I may also say in the Second Department,  
24 they had said you didn't have a right to appeal, and we  
25 decided that we would not appeal that to the Court of

1 Appeals because res judicata does not apply to habeas corpus  
 2 cases, and we would refile that. We did, we did refile that  
 3 in New York County as well and --

4 THE COURT: You filed the Stanley case in  
 5 New York County.

6 MR. WISE: We refiled it in New York County, yes.

7 THE COURT: Even though there was a ruling by the  
 8 Second Department?

9 MR. WISE: Well, because the ruling of the Second  
 10 Department was not on the merits, simply said that we didn't  
 11 have right to appeal in that case. There was no problem  
 12 with the New York County Judge, Justice Jaffe had no problem  
 13 with us bringing a second case. In fact, she wrote a long  
 14 decision about that and we -- and there was no res judicata  
 15 or collateral estoppel or successive of the petition problem  
 16 under CPLR 7003(b).

17 THE COURT: Okay. So, the Court in the First  
 18 Department, so the Court, by Judge Jaffe --

19 MR. WISE: No, Justice Jaffe is indeed a New York  
 20 Supreme Court Judge, so --

21 THE COURT: Yes.

22 MR. WISE: -- so the first time we brought a  
 23 second petition on behalf of the chimpanzee she said we were  
 24 allowed to bring that second petition on the chimpanzee,  
 25 that there was no res judicata, no collateral estoppel, and

1           it was not an improper successive petition under CPLR  
2           7003(b).

3                   THE COURT: Did she rule on this case -- on the  
4           Stanley case?

5                   MR. WISE: On the Stanley case?

6                   THE COURT: That was the one you refiled?

7                   MR. WISE: Yes, she did.

8                   THE COURT: What did she say?

9                   MR. WISE: She has a lengthy opinion in which you  
10          read it, it appears indeed she was going to rule in our, in  
11          our favor. And there is, actually there is also an HBO film  
12          on this where you can actually watch her in the HBO film  
13          discussing the case with us.

14                   THE COURT: Now -- tell me what was the ruling.

15                   MR. WISE: The ruling was, I am going to -- I feel  
16          that I am bound by what the Third Department said, we argued  
17          she was not bound, and that that even if she did not agree  
18          with them, she felt she was bound by the Third Department.  
19          At that time we did not know about that Blacks Law  
20          Dictionary had made a mistake, so it was harder for us to  
21          argue that it was wrong.

22                   THE COURT: Okay, when was that decision?

23                   MR. WISE: That was 2015.

24                   THE COURT: Okay.

25                   MR. WISE: It deals with collateral estoppel

1 issues. She wrote a lengthy learned opinion on it.

2 THE COURT: That's also --

3 MR. WISE: It is -- we cited -- it is a published  
4 opinion.

5 THE COURT: Okay, and the cite is?

6 MR. WISE: Sorry.

7 THE COURT: The cite is there?

8 MR. WISE: Yes, I'm afraid I can't recall it, but  
9 indeed you do have the cite.

10 THE COURT: Okay.

11 MR. WISE: So after she handed her --

12 THE COURT: Do you have the cite, sir?

13 MR. LO: I will find it.

14 THE COURT: Your name is?

15 MR. LO: Spencer Lo.

16 MR. WISE: We'll hand it up right after lunch, or  
17 do you want us to do it now?

18 THE COURT: No, you can do it after lunch.

19 MR. WISE: We'll just do it after.

20 Now, when that decision came down, we then  
21 refiled, we refiled the Lavery case, that's why it is  
22 Lavery II.

23 THE COURT: Okay.

24 MR. WISE: Before Justice Jaffe.

25 THE COURT: Okay.

1 MR. WISE: Who actually was just assigned to --  
 2 Justice Jaffe because by deciding our chimpanzee case, she  
 3 became the chimpanzee case expert in New York County. So it  
 4 went to Justice Jaffe.

5 THE COURT: Okay.

6 MR. WISE: At that time she simply said that, at  
 7 that time too she simply said I already told you once I am  
 8 bound by the Third Department, so I think, I think this is a  
 9 successive petition under CPLR 7003(b), which I don't think  
 10 you're allowed to bring -- and she -- that's -- so she threw  
 11 us out on that procedural ground.

12 THE COURT: Oh.

13 MR. WISE: We then appealed to the First  
 14 Department, which said we then -- I have to make sure I get  
 15 the exact right words, because they are really important.  
 16 The --

17 THE COURT: And the cite being?

18 MR. WISE: Um -- to the First Department?

19 THE COURT: Yes.

20 MR. WISE: That's also -- we'll have to give the  
 21 cite. It's in the papers as well.

22 THE COURT: Okay.

23 MR. MANNING: We have those if Your Honor wishes.

24 THE COURT: Do you have copies of the cases?

25 MR. MANNING: I have got the citations that the

1 Court has asked for. The citations are --

2 THE COURT: Okay, we'll get them at the break.

3 MR. MANNING: Thank you.

4 THE COURT: It would have been nice if you had  
5 copies.

6 MR. WISE: Of course. I can't find the exact  
7 words, but I have, I have lots of other words here, I just  
8 don't happen to have those. So the First Department said,  
9 and I quote, without even addressing the merits of  
10 petitioner's arguments, we find that the motion court  
11 properly declined to sign the orders to show cause, since  
12 they were successive habeas corpus proceeding which were not  
13 warranted or supported by any changed circumstances. The  
14 First Department is clear as a bell that its decision was  
15 not only on the merits because they said without even  
16 addressing the merits of the petitioner we find that the  
17 motion court properly declined to sign the order.

18 THE COURT: But the lower court decided --

19 MR. WISE: The lower court already decided it was  
20 not going to sign the order, and also had said, I told you,  
21 you need to, you need to actually -- she told us -- Justice  
22 Jaffe told us to go back to the Third Department. We have  
23 not quite figured out how to, but she said, Justice Jaffe  
24 said I am bound by the Third Department. I told you that.  
25 However, I am throwing you out based upon the fact that it

1 is an improper successive petition on a procedural issue,  
 2 not on the merits, under 7003(b), and the First Department  
 3 then affirmed her on that ground without even addressing the  
 4 merits of the petitioner's appeals --

5 THE COURT: You cite --

6 MR. WISE: -- you lost a legal successive  
 7 petition under 7003(b).

8 THE COURT: You cite that to say that --

9 MR. WISE: Oh, the purpose of it is that while  
 10 they went on to discuss various things, it's all dictum.

11 THE COURT: That's what I am asking you.

12 MR. WISE: Yes. Oh, yes. And we go into great --  
 13 we talk about in our briefs it is dictum, it does not bind  
 14 this Court. What binds this Court would be that if we filed  
 15 the successive petition on behalf of anyone, at that point  
 16 you would be bound by what they say. This case, on the  
 17 other hand, is not that, this is the first time anyone's  
 18 ever filed a lawsuit on behalf of Happy the Elephant, so the  
 19 First Department's decision stands for you may not file a  
 20 successive petition and affirms on that ground. The rest of  
 21 what the Court talks about, and it talks about a lot of  
 22 things, it's all dictum. None of it has bearing on, on --  
 23 none of it binds this Court.

24 Now, part of the --

25 THE COURT: All right.

1 MR. WISE: I'm sorry. Sorry, Your Honor.

2 THE COURT: Go ahead, I'm listening.

3 MR. WISE: Part of the dictum which is not by this  
4 Court said I will look at what the Third Department case --

5 THE COURT: Right.

6 MR. WISE: -- you have to be able to have rights  
7 and responsibilities --

8 THE COURT: Yes.

9 MR. WISE: -- and -- but they didn't make any kind  
10 of independent analysis, they cited the Third Department and  
11 cited the same cases. The Third Department says they made  
12 the same demonstrable error that the Third Department did,  
13 however, what we argued in oral argument we said that cannot  
14 be right, Your Honor, because --

15 THE COURT: You are saying -- I am confused  
16 because you said the Third Department is citing that the  
17 Third Department --

18 MR. WISE: No, I meant the First Department.

19 THE COURT: Okay.

20 MR. WISE: In Lavery II.

21 THE COURT: Right, is citing.

22 MR. WISE: Cited the Third Department in Lavery I  
23 without doing any kind of independent or further analysis.  
24 And at that point we didn't realize --

25 THE COURT: Okay.

1 MR. WISE: -- that Blacks was wrong and so --

2 THE COURT: Okay.

3 MR. WISE: -- what it did was say, well, actually  
 4 what it -- what the important part of what it did was in it  
 5 recognized that argument that we had made. Look, hundreds  
 6 of thousands of New Yorkers obviously have legal rights, but  
 7 don't have the ability to bear any kind of duties. Your  
 8 infants, your children, your insane, you know, you're in a  
 9 coma, hundreds of thousands of New Yorkers have rights  
 10 without having duties.

11 So, the First Department cannot be right, neither  
 12 can the Third Department. They cannot be right because it  
 13 would take away all the legal rights of all the infants, all  
 14 the children, all the insane people, and anyone that's in a  
 15 coma that can't bear duties.

16 Now, the way that the First Department responded  
 17 to that they said, oh, but they are human.

18 In other words --

19 THE COURT: They are human.

20 MR. WISE: -- they said --

21 THE COURT: Human necessarily is the exception and  
 22 it includes by being human that is tantamount to being --

23 MR. WISE: Right. So, it is not clear that -- so,  
 24 it is not clear that the First Department -- by the way,  
 25 in dicta was, was, by the way, was anyone buying what the

1 Third Department said, you have to be able to have duties in  
 2 order to have rights because when we pointed out hundreds of  
 3 thousands of New Yorkers that did have rights without duty,  
 4 oh, they are human and what they did and what the Third  
 5 Department was likely doing in its footnote, what humans  
 6 collectively have rights, what they are really saying is,  
 7 look, only humans can have rights. And our argument is that  
 8 that is demonstrably false as well, which I will get to.

9 So, this was my attempt to show that when my  
 10 brother just says, oh, by way, all four Appellate Divisions  
 11 have ruled against us on the merits, it turns out one has in  
 12 the Lavery case, they were demonstrably wrong.

13 THE COURT: Okay. Let me, let me --

14 MR. WISE: And that was actually my introduction.

15 THE COURT: Okay.

16 MR. WISE: Because now I have to actually deal  
 17 with the issues he is talking about in his motion to  
 18 dismiss.

19 THE COURT: Okay. It is ten to 1:00. I don't  
 20 think that you're going to finished with your argument in  
 21 ten minutes.

22 MR. WISE: I will not.

23 Thank you for recognizing that.

24 THE COURT: So, we'll --

25 MS. STEIN: I'd just like to correct one, correct

1           one thing I said for the record.

2           THE COURT:    Sure.

3           MS. STEIN:    The quote I gave from the Cole case.

4           THE COURT:    From?

5           MS. STEIN:    On the Cole case.

6           THE COURT:    Yes?

7           MS. STEIN:    I said it was in our supplemental  
8           memo.  In fact, it is in our reply memo of September 13th.

9           THE COURT:    Okay.

10          MS. STEIN:    Thank you so much.

11          MR. WISE:     Thank you.

12          MR. MANNING:  If I may, we do have copies of the  
13          two cases that the Court requested.

14          THE COURT:    You can give them to the officer and  
15          he will give them to us.

16          Thank you so much.

17          THE COURT:    Let's mark them.

18          (Discussion held, off the record.)

19          THE COURT:    We don't need to mark them.

20          We'll see you back here at 2:00 o'clock.

21          (Luncheon recess taken.)

22

23

24

25

1 (Continued following a luncheon recess.)

2 THE COURT: Please be seated.

3 Okay, for the record, when we finished this  
4 morning, Mr. Wise was arguing the rest of his points of this  
5 matter.

6 Do you want it continue, sir?

7 MR. WISE: I will.

8 Thank you very much, Your Honor.

9 THE COURT: Thank you, Mr. Wise.

10 MR. WISE: Your Honor, I'd like to just briefly  
11 touch on the issues of -- well, actually the issue of what  
12 the issue is.

13 THE COURT: Okay.

14 MR. WISE: Essentially what the issue is, my  
15 brother in his memoranda and partially in oral argument --

16 THE COURT: You'll have to speak up a little bit.

17 MR. WISE: Sorry.

18 -- says that, that, we did not allege what is  
19 required to be alleged in a habeas corpus case, because we  
20 didn't allege that the Bronx Zoo is violating any local or  
21 State or Federal ordinance or Statute, and --

22 THE COURT: Okay.

23 MR. WISE: -- we allege that ourselves, um, we, we  
24 are not claiming that, that they are -- the wrong is not the  
25 conditions of Happy's confinement.

1 THE COURT: Okay.

2 MR. WISE: The wrong is as it is in my habeas  
 3 corpus case, is the confinement itself. The only issue that  
 4 is involved in a habeas corpus case is not how some -- a  
 5 prisoner is being cared for, once they have been imprisoned  
 6 wrongly you are not allowed to kidnap somebody then treat  
 7 them nicely, that means they can't bring a habeas corpus  
 8 case. In a nonhuman rights, we sometimes talk about the  
 9 Bill Gates issue in which Bill Gates comes and kidnaps one  
 10 of my children and brings them back to Washington and treats  
 11 them a lot better, gives them a lot better stuff than I am  
 12 ever going give them.

13 THE COURT: Okay.

14 MR. WISE: That doesn't mean I can't bring a writ  
 15 of habeas corpus. Then Bill Gates says I am treating him a  
 16 lot better than you are. The conditions are not the issue.  
 17 What the issue is --

18 THE COURT: Okay.

19 MR. WISE: -- is the confinement, is the  
 20 imprisonment itself is wrongful, and how any one -- how the  
 21 prisoner is being kept is not part of an habeas corpus case.  
 22 It's not part of our habeas corpus case, and that's why we  
 23 actually are ourselves alleging that we are not saying that  
 24 they are breaching any animal welfare statutes, that they  
 25 are not meeting some animal welfare requirements. What we

1 are saying is that this no longer should be seen to be a  
2 thing which means an entity that lacks the capacity for  
3 legal rights, this entity, this Elephant Happy is a person,  
4 which means she has the capacity for rights. And if she is  
5 a person, then her imprisonment all by itself is the wrong  
6 that we are complaining about. And just as if we were  
7 bringing a lawsuit on behalf of a human being who has been  
8 imprisoned.

9 THE COURT: But -- well, Mr. Manning, would you  
10 like to reply at this point to Mr. Wise' remarks?

11 MR. MANNING: Well, briefly Your Honor.

12 I understand the point he's making and in fact  
13 they have failed to allege that there's been poor treatment  
14 or poor conditions. In fact, quite the opposite. The  
15 affidavits from very knowledgeable members of the Bronx Zoo  
16 put in the record the point -- the point is, the point I  
17 would make is the one made by the Third Department quoting  
18 one sentence from the holding of the Lavery I case, and that  
19 has never been considered for the purposes of habeas corpus  
20 relief, nor have they been explicitly considered persons or  
21 entities capable of ascertaining rights for the purposes of  
22 State or Federal Law.

23 Our point is, they don't have a right to bring a  
24 proceeding in the first place, whether they are claiming  
25 detention or whether they are claiming a different condition

1           that they would seek to have imposed upon them.

2                         THE COURT:   Okay.   Thank you.

3                         MR. WISE:   We understand more than anyone else in  
4           probably in the legal world that until The Nonhuman Rights  
5           Project five years ago began litigating this issue, no one  
6           nonhuman animal had ever been, had ever been considered to  
7           be a legal person.   And the issue, the reason was is that  
8           until we started litigating the question, no one had ever  
9           claimed that a nonhuman animal could be a legal person, and  
10          we argued that and I would give the argument why, when I  
11          come to give you the argument why an elephant should be a  
12          legal person, but that's how the common law, and this is a  
13          common law case, this is not a statutory case, it's not a  
14          constitutional case, it's a common law case, and it was the  
15          common law that centuries ago that said nonhuman animals  
16          were all legal things.   It's now the common law that we are  
17          arguing should change.

18                        Now, this is why this isn't a statutory or --  
19          statutory or habeas corpus case, this is a common law case,  
20          and habeas corpus case and habeas corpus is in, especially  
21          in New York, it is a both extraordinary peculiarly common  
22          law --

23                        THE COURT:   Okay.

24                        MR. WISE:   -- and to the extent that in the case  
25          of Tweed versus Litscomb -- would the Court want a cite?

1 THE COURT: Yes, you should always give it.

2 MR. WISE: It is 60 NY 598, 1975, and it says --

3 THE COURT: Okay.

4 MR. WISE: -- that, well -- I can't read my  
5 handwriting -- it says -- well, it says -- the writ -- oh,  
6 shoot.

7 THE COURT: Okay, well, just tell me.

8 MR. WISE: Essentially it says, it says that the  
9 writ is, is peculiarly common law, that the legislature may  
10 not aggregate the writ or may not procure its efficiency --

11 (Counsel directed to speak louder.)

12 MR. WISE: -- this is a common law writ as it was  
13 always in English, and this is something the judges made as  
14 part -- also says Parliament in England in the 17th, 18th,  
15 and 19th Centuries when they passed even habeas corpus  
16 statutes they were constantly expanding it. No one thought  
17 that you could cut back on it. They can expand it, but it  
18 is up to the -- but it's fundamentally common law -- and  
19 judges are the ones that make a decision as to who is  
20 entitled to or -- although legislators can as well, but they  
21 make decisions as to who is entitled to the writ. Um, now  
22 there are some very famous cases where the writ was expanded  
23 by the courts, so probably the most famous case which I  
24 actually wrote an entire book about is the case of Somerset  
25 versus Stewart, which was in 1772, and in that case there

1 was a Black slave who had been taken from the U.S. to London  
2 who then ran away, was recaptured, put on a ship, and then a  
3 common law, for the first time, a common law writ of habeas  
4 corpus was brought before Lord Mansfield, probably the  
5 greatest judge ever to speak English, was brought in front  
6 of him claiming that for the first time slavery, we wanted  
7 you to declare this man was free. Slavery was legal in  
8 England, it had never been, never happened before, there was  
9 fifteen thousand slaves at that time in England and Lord  
10 Mansfield finally wrote that, that slavery was odious, that  
11 common law would not support it, and he ordered James  
12 Somerset free. And essentially that was the beginning of  
13 the end of slavery, first in England, then at least in the  
14 northern part of the U.S.

15 There is another case involving standing there --

16 THE COURT: Let me ask you in the Somerset case.

17 MR. WISE: Yes.

18 THE COURT: Did they actually say the person who  
19 was enslaved was a person?

20 MR. WISE: No, they said he was free, he had  
21 rights. So a person is an entity who has the capacity for  
22 rights, any entity who has a right was automatically a  
23 person.

24 THE COURT: Okay. Well -- but, but that's not  
25 what we are arguing here, right? We are arguing rights or

1 duties.

2 MR. WISE: Well, actually Lord Mansfield never  
3 inquired as to whether James Somerset could bear duties, it  
4 didn't matter whether he could bear duties, he was entitled  
5 to rights.

6 My brother might argue that for you to have  
7 duties -- and the Third Department and I would, I am going  
8 to get to that very soon -- claimed out of nowhere and was  
9 the only court in history of Anglo-American tradition ever  
10 to say there's a lot of problems with that, one of the  
11 problems being that that would mean a tenth of the  
12 population of the State of New York could not be persons.

13 THE COURT: Okay.

14 MR. WISE: So in Standing Bear was, was in 1878  
15 you had a Native American Chief who was taken from his home  
16 in Nebraska and brought to Oklahoma. He did not want to  
17 live in Oklahoma. He came back to Nebraska and he was then  
18 imprisoned by George Cooke who was the military commander,  
19 and his lawyers then sought a writ of habeas corpus for the  
20 first time, that is the first known writ of habeas corpus  
21 ever sought on behalf of a Native American. And the U.S.  
22 Attorney argued that he was not a person, and Native  
23 Americans could not be a person, and, therefore, could not  
24 have anyone bring a writ of habeas corpus on his behalf.  
25 And the Court ultimately ruled yes, he was a person.

1           Now, a person, you know, is not now and never has  
2           been and never will be synonymous with human being. So, as  
3           we know for many, for centuries there are -- and in fact I  
4           think as we point out in our briefs -- during the 13th  
5           Century in England Jews were not persons. Sometimes women  
6           were not persons. Sometimes Blacks were not persons.  
7           Sometimes Native Americans or Chinese were not persons.  
8           That's -- and on the other hand we know that that it is not  
9           just humans who are persons, corporations, corporations are  
10          persons, ships are persons, The City of New York is a  
11          person. And now The Nonhuman Rights Project works outside  
12          the U.S. as well so we are aware of the fact that, for  
13          example, in the last three years in New Zealand, the  
14          Whanganui River -- W-h-a-n-g-a-n-u-i, has been declared a  
15          person. In New Zealand the national park has been declared  
16          to be a person. The Ganges River has been declared to be a  
17          person in India. Last year the Colombian Constitutional  
18          Court held that the part of the Amazon Rain Forest within  
19          the City of Colombia was a person. And what that simply  
20          means is that person it is something that that entity is  
21          seen as having more than just instrumental value, more than  
22          just value to use, but it is seen whatever it is, whether  
23          it's alive or not alive, it's seen as having inherent value  
24          in and of itself.

25                 THE COURT: I agree with following your logic, but

1 has there been a court that determined that an animal was a  
2 person?

3 MR. WISE: I'm glad you asked that question.

4 THE COURT: Well?

5 MR. WISE: Yes.

6 THE COURT: So am I --

7 MR. WISE: If there has been? There has been in  
8 Argentina, a chimpanzee named Cecilia. A writ of habeas  
9 corpus was sought on behalf of the Cecilia in Mendoza,  
10 Argentina. A writ of habeas corpus was issued. She was  
11 moved from a zoo and then ordered by the judge to be sent to  
12 a sanctuary in Brazil.

13 THE COURT: But did they say the chimpanzee was a  
14 person?

15 MR. WISE: Yes. They said she was a quote,  
16 nonhuman person --

17 THE COURT: Okay.

18 MR. WISE: -- in Colombia, and the Nonhuman Rights  
19 Project is somewhat involved in this. There is a spectacled  
20 bear there named Chucho, C-h-u-c-h-o, and, and her lawyer  
21 sought a writ of habeas corpus to have Chucho removed from  
22 the zoo and be put back in the wild. The lowest court  
23 issued the writ of habeas corpus, a higher court reversed  
24 that and then as the Constitutional Court of Colombia said  
25 it was a matter of great public importance and said I want

1 to hear that case, and in fact the Nonhuman Rights Project  
 2 was invited to submit a video arguing why Chucho should be  
 3 seen as a person for rights for the purpose of a writ of  
 4 habeas corpus in the Colombian Constitutional Court.

5 In the Indian Supreme Court --

6 THE COURT: What happened in the Chucho case?

7 MR. WISE: Chucho is now in Colombia --

8 THE COURT: Okay.

9 MR. WISE: -- we sent the video about three weeks  
 10 ago, and the Colombian Constitutional Court has not yet made  
 11 its ruling.

12 THE COURT: Okay.

13 MR. WISE: In India, in the Nagaraja case in 2014,  
 14 the Indian Supreme Court said that every nonhuman animal in  
 15 India was a person and had both statutory and constitutional  
 16 rights. We have been to India and have spoken to the  
 17 justice on the Indian Supreme Court and we -- that's clearly  
 18 what indeed he said. And we are involved in bringing a  
 19 lawsuit like on behalf of an elephant in India to test the  
 20 limits of what they meant.

21 THE COURT: So --

22 MR. WISE: So the answer to that is yes.

23 THE COURT: -- what context was the elephant in  
 24 India?

25 MR. WISE: The elephant -- we had not picked our

1 specific elephant, but it will be a baby elephant.

2 THE COURT: No, but what led to --

3 MR. WISE: The Nagaraja case?

4 THE COURT: Yes, what where the facts?

5 MR. WISE: The Nagaraja case involved a cow.

6 There was an India religious ceremony, and part of that  
7 religious ceremony people were like kicking and beating and  
8 hitting the cow. It was part of a Hindu ceremony. And a  
9 lawsuit was brought on behalf of what is called the Animal  
10 Welfare Board in Indian saying that --

11 THE COURT: Okay.

12 MR. WISE: -- that this -- these bullocks should  
13 be able to be legal persons and have certain kinds of  
14 rights. And the Indian Supreme Court stated that they did  
15 indeed have both constitutional and statutory rights in  
16 India. Not only they did, but all of India. Since then  
17 there have been two other cases, one by -- one that said  
18 horses that were being taken from northern India to Nepal  
19 were not being treated properly. They were a subject of a  
20 lawsuit and the high court of that province, and I can  
21 never, I can never pronounce the name, Uttarakhand, held  
22 that indeed they were persons, and also noted that every  
23 being with wings and every being who swam was also a person  
24 in that province.

25 And then about six months ago another high court

1 judge in another province also with respect to -- I can't  
 2 remember the latest one -- said again all nonhuman animals  
 3 within that province were persons who had certain kinds of  
 4 statutory and constitutional rights.

5 THE COURT: But these are international cases?

6 MR. WISE: Yes.

7 THE COURT: There's never been a national case?

8 MR. WISE: Within the U.S. the only entity which I  
 9 am aware that's litigating in any kind of a systematic way  
 10 the question of whether any nonhuman animal should be just  
 11 more than a legal thing, but should be a person, is, is The  
 12 Nonhuman Rights Project.

13 And if I could just jump to the last sentence of  
 14 Judge Fahey's decision. His concurring opinion.

15 THE COURT: Yes.

16 MR. WISE: The third time that he saw, on behalf  
 17 of the chimpanzee.

18 THE COURT: Yes.

19 MR. WISE: He said that -- I don't know the exact  
 20 words -- it is approximately -- that it's clear that, that,  
 21 that it may be arguable -- he said, it may be arguable that  
 22 a chimpanzee is a person. He didn't, he didn't say it was,  
 23 he just said it may be arguable. But it is certainly not a  
 24 thing. And in law this is a bifurcation, one is either a  
 25 thing who lacks the capacity for any kind of rights, or one

1 is a person who has the capacity for rights.

2 Now, one important thing that many lawyers even  
3 don't grasp, and this was also talked about in another case,  
4 I will be talking about which is Byrn versus New York  
5 Hospital, which is the, the leading case in New York on the  
6 question of how you decide who is a person and who is a  
7 thing. B-y-r-n.

8 And the Byrn case reminded us that if you are a --  
9 you can be a person for one thing or two things or five  
10 things, it doesn't mean that once you're a person, it means  
11 you have all the rights of every other person.

12 THE COURT: Okay.

13 MR. WISE: So, for example, in Byrn -- Byrn is  
14 also a spectacular case for showing that humans and persons  
15 are not synonyms because Byrn was a 1972 case involving a  
16 liberalization of the abortion statute. It was pre Roe v.  
17 Wade. It was just the year before Roe v. Wade, so there was  
18 a liberalization of abortion. And the question then --  
19 somebody got an injunction -- and the question was whether a  
20 human fetus was a person, and then had, specifically, the  
21 right to life. And the New York Court of Appeals then said  
22 that a human embryo or human -- human fetus is a human, but  
23 then held it was not a person. Did not -- it did not have  
24 these rights.

25 So the leading case in New York State on the issue

1 of who is a person and who is not a person makes it  
 2 completely clear that, that being a human had nothing to do  
 3 with being a person. In fact, it says that the way that a  
 4 court is supposed to determine who a person is, is by making  
 5 a public policy decision. And one of the things I will talk  
 6 about is why this court should make the public policy  
 7 decision in favor of saying that Happy is entitled to, is  
 8 entitled to personhood for the single purpose, just for the  
 9 single purpose of having a right to liberty protected by a  
 10 writ of habeas corpus.

11 And if I may also then kind of segue into  
 12 something that's very related, we argue, because it's -- I  
 13 think it's true that in New York State the legislature  
 14 already set a public policy that nonhuman animals can be  
 15 persons and that they are persons and --

16 THE COURT: What statute is that?

17 MR. WISE: That's under EPTL 7-8.1.

18 And that --

19 THE COURT: Okay.

20 MR. WISE: -- that's the pet trust statute.

21 THE COURT: All right.

22 MR. WISE: So what happened is that in 1996 you  
 23 have a legislature pass -- 1996 -- pass a statute that  
 24 specifically says that pet owners can set up a trust of  
 25 which, which a nonhuman animal is not an honorary

1 beneficiary, they are true beneficiaries, they have a right  
2 to a person -- if a nonhuman animal or any human being has a  
3 right to anything, then they are automatically persons and  
4 have trustees and they also have enforcers because of course  
5 the nonhuman animal can't enforce it herself. So the  
6 New York Legislature twenty-three years ago said that  
7 nonhuman animals can be -- they didn't say that they are  
8 persons, they said we are giving them rights, we are giving  
9 them rights of beneficiary. And under New York law a  
10 beneficiary has to be a person. You have to have a right to  
11 the trust. And in New York you have that.

12 So the real argument that we are making is that we  
13 argue that nonhuman animals already seen as persons for the  
14 purposes of the pet trust statute, now we are not asking for  
15 the first right, we are asking the nonhuman animal -- we are  
16 asking for the second right, that certain nonhuman animals  
17 there, I think it's pets and domestic animals for the pet  
18 trust statute, certain nonhuman animals that had  
19 self-awareness, that are autonomous, they are  
20 extraordinarily cognitively complex, that they have complex  
21 social lives and whose, you know, whose very, very entity of  
22 Telos, T-e-l-o-s, the very entity who they are is undermined  
23 severely when they are not, when they are imprisoned against  
24 their will, they are not allowed to live the lives of an  
25 elephant. And so we are saying animals like that and that's

1 elephants, for example, chimpanzees for example, possibly  
2 whales, but each time in order to make that kind of an  
3 argument the first thing we do is that we put in these  
4 affidavits for which we did with respect to chimpanzees, we  
5 did with respect elephants. We go all over the world to the  
6 greatest scientists that spend their whole life studying  
7 these animals.

8 For example, for the chimpanzees we went to Jane  
9 Goodall, she is also a member The Nonhuman Rights Project  
10 and we went to, oh, chimpanzee experts all over world that  
11 then showed the chimpanzee -- for instance, we went to Joyce  
12 Poole. You will see five expert affidavits. These are  
13 scientist that have some of them spent more than fifty years  
14 in all they have done is been in the wild studying elephant  
15 behavior.

16 THE COURT: Let me ask you, what would the remedy  
17 be for Happy that he would not -- she would not be  
18 imprisoned in the zoo, but be taken to a sanctuary?

19 MR. WISE: The, the remedy for Happy is that she  
20 would be, -to be removed from the zoo and be placed in an  
21 appropriate sanctuary.

22 THE COURT: Now, what would make that an  
23 appropriate place for her to be as opposed to the zoo, which  
24 is in my opinion -- let me, with my limited knowledge of  
25 this -- is supposed to provide some place that is also

1           accommodating to every animal, that's in the zoo. Is that a  
2           suitable place for them to habitate?

3                       MR. WISE: Well, I think it is undisputed that  
4           Happy has spent approximately forty years on 1.1 acres of  
5           land.

6                       THE COURT: Okay.

7                       MR. WISE: Happy is an elephant. We have expert  
8           affidavits addressing that. And an elephant, if you're like  
9           a normal elephant --

10                      THE COURT: Okay.

11                      MR. WISE: -- a normal elephant is, especially a  
12           female elephant like Happy, is part of large herd and they  
13           have sisters and aunts, they have nieces. They are -- it's  
14           a very, very complex network, and they move as one. Our  
15           expert say -- Joyce Poole said elephants evolve to move, and  
16           what they do is they are on the move all day either foraging  
17           or engaged in a wide and deeply complex network of  
18           interactions with other elephants. That's what you need  
19           to understand.

20                      THE COURT: Well, what would make you think that  
21           Happy, who has been there for forty years, would be able to  
22           survive in any other environment?

23                      MR. WISE: Oh, let me don't forget I want to, I  
24           want to --

25                      THE COURT: I mean, because --

1 MR. WISE: -- I don't want to forget the other  
2 one.

3 THE COURT: You seem to say, and I am not --

4 MR. WISE: I have an answer for this.

5 THE COURT: -- I am not disagreeing that the  
6 person should -- the personship is the real issue because if  
7 you don't get all of that, these questions are not  
8 non-existent, but signs. I have you here and I can educate  
9 myself a little bit.

10 What would make you think that if we remove Happy,  
11 who has been here for forty years in this environment, would  
12 be able to even survive in another type of environment?

13 MR. WISE: Okay. If I -- let me just answer  
14 the -- let me just answer the last part of the first  
15 question that you asked, then I will answer this one.

16 THE COURT: Okay.

17 MR. WISE: Happy has lived on 1 acre of land.  
18 There is two elephant sanctuaries in the south she could go  
19 to. One is the Performing Animal Welfare Society outside of  
20 Sacramento, where she would be on dozens and dozens of  
21 rolling land. We have affidavits here. There is another  
22 one here, Tennessee Elephant Sanctuary.

23 I can represent to the Court I have spoken to the  
24 people that run it and they, they will take Happy in a  
25 second and come get her and take her. It's almost

1           twenty-six hundred acres and there are other elephants.  
 2           Happy would become part of an artificial herd there and she  
 3           would have twenty-six hundred acres.

4                         THE COURT:   Who said she would not?   Let's say  
 5           that there is a tribal familial structure within the  
 6           elephant kingdom, who said she would be welcomed?

7                         MR. WISE:   I will answer that question.   Dr. Joyce  
 8           Poole said so.

9                         THE COURT:   Somebody from outside of the family  
 10          would be welcomed, welcomed with no harm?

11                        MR. WISE:   Indeed.   Dr. Poole says that in her --  
 12          when I get this -- right in her second supplemental  
 13          affidavit.   Dr. Poole.   And the reason she did that is one  
 14          of my brother's affidavits raised the exact same issue that  
 15          the Court just raised, and she has an immense amount of  
 16          experience with moving and knows -- with moving elephants  
 17          from places that are really bad for them to places that are  
 18          really good.   And she -- before the Court gets example after  
 19          example after example -- for elephants even having severe  
 20          problems in one place because the reason why anyone might  
 21          have severe problems is because they are overcrowded, they  
 22          are alone, they don't -- they are not living an elephant  
 23          life.   And when you move an elephant from one place to these  
 24          other places, she then lists many of them and shows how they  
 25          just blossomed and became part of another family and became

1 elephants and just because, just because -- Dr. Poole might  
2 think the Court might have these sorts of questions, and if  
3 I may also comment on the quality of the affidavit that my  
4 brother filed, all of our, all of our affidavits are from  
5 experts, all we did is start calling up experts all over the  
6 world saying will you write an affidavit. And so there is  
7 one from Africa, one from Norway, one from Scotland, one  
8 from England, who spend their lives, as much as their lives  
9 they can in Africa actually studying elephant behavior.  
10 Dr. Poole is and Cynthia Moss have spent fifty years in all  
11 they have studied, the study the African Elephant.

12 THE COURT: But not East Asian?

13 MR. WISE: Dr. Poole also talks about the fact she  
14 has studied East Asian Elephants as well. There is very  
15 little difference between East Asian and African Elephants.

16 THE COURT: I thought there was.

17 MR. WISE: Asian Elephants are taller, but with  
18 respect to cognition, there is very little difference,  
19 according to Dr. Poole.

20 I am just a country lawyer so I don't know this  
21 type of stuff, but --

22 THE COURT: Well, I am a sitting Judge that  
23 doesn't know anything about the elephant population, but --

24 MR. WISE: That's why we have affidavits for the  
25 Court.

1                   And if I may?

2                   So, so --

3                   THE COURT: Yes.

4                   MR. WISE: -- they are unrebutted affidavits.

5                   Dr. Poole also noted, for example, that my  
6 brother's client, the Wildlife Conservation Society, has two  
7 thousand or three thousand employees. And that they have,  
8 you know, really good elephant scientists on their staff.  
9 And not a single elephant scientist has rebutted or  
10 submitted an affidavit, not a single elephant scientist in  
11 the entire world has submitted an affidavit. The only  
12 elephant scientist that submitted an affidavit are our five  
13 elephant scientists. And it is probably clear what a  
14 reputable elephant scientist is going to submit an affidavit  
15 to say it is better for Happy so live by herself on 1 acre  
16 of land in the Bronx Zoo than go to a sanctuary where she  
17 will live in a herd and be living on twenty-six hundred  
18 acres of land. There aren't any.

19                  THE COURT: I don't know.

20                  MR. WISE: It's just a hint, there aren't any. I  
21 believe that there aren't. So the only affidavits that my  
22 brother has submitted are ones in which he is attempting to  
23 rebut an issue that we don't bring up, which is that they  
24 are saying, oh, we treated -- we make sure that, that she is  
25 clean and that she gets fed and she has veterinary care.

1           What they are doing is they basically treat her -- and try  
2           and make sure she doesn't die in their hands, because they  
3           do die. One of the elephants just died within the last  
4           year. And there is a litany. I can start talking about the  
5           elephants that, even Happy, Happy has lived with that then  
6           died or were killed by one of the other elephants.

7                        So --

8                        THE COURT: Well, that's just -- isn't that just  
9           nature though?

10                      MR. WISE: No, it's not. It's the idea that a  
11           female elephant can kill another female elephant is  
12           virtually unheard of. They are not like chimpanzees, they  
13           don't do that to each other.

14                      And Dr. Poole says the reason they would do that  
15           here is because they have become asocial. They are like  
16           living alone, living asocially. They also don't have a  
17           chance to choose who their friends are going to be. It's  
18           like, it's like I'm brought somewhere and you say you have  
19           your choice of friends for forty years --

20                      (Counsel was directed to speak louder.)

21                      MR. WISE: -- and that's the only choice have you,  
22           and turns out one of the three elephants that Happy was  
23           living with, those two that not only attacked her, but also  
24           killed her companion. And so all of this is in the record  
25           in our affidavit.

1           So Happy is essentially alone. A social animal.  
2           It's like you and I being thrown into solitary confinement  
3           without doing anything and we are kept there for forty  
4           years. And just as my brother says, well, you know, they  
5           have these human caretakers, she becomes bonded, and  
6           Dr. Poole says humans, they don't, they don't do anything,  
7           they are not going to help Happy. Happy is an elephant that  
8           needs to be with elephants. And no matter how many human  
9           caretakers you have watching her and giving her food and  
10          veterinary care, the fact is she is on one acre of land,  
11          that's like a suburban back yard. I could not live on one  
12          acre of land for forty years.

13                 The idea that an elephant goes twenty miles a day  
14                 is going to live on one acre of land by herself it is not  
15                 appropriate for an elephant in a place where other elephants  
16                 are with twenty-six hundred acres. That's the place for an  
17                 elephant.

18                 Which brings me back to the quality of the  
19                 affidavit that my brother indeed has, first of all three,  
20                 all three are employees of the defendant, unlike our own  
21                 case, there are no independent experts. Second of all, none  
22                 of them are experts, there is not a single one there who,  
23                 who says that they even examined Happy or know Happy. They  
24                 never said they know anything about elephants.

25                 Mr. Breheny has a Master's Degree in Biology

1 compared to our experts that all have at least one Ph.D. and  
2 have spent their whole lives doing field work. Mr. Breheny  
3 is, you will excuse the expression, he's a suit and has been  
4 an administrator, he's been the head of Bronx Zoo for  
5 fourteen years. It's not particularly his fault. I think  
6 they said they have something like three thousand species of  
7 animals. Mr. Breheny is not an expert in three thousand  
8 species of animal. He's probably not an expert in any, and  
9 he certainly has not never stated he has any training or any  
10 expertise at all in animals.

11 The other person, the second person is the chief  
12 veterinarian there who never says he's even met Happy, he  
13 just says that basically I hear that Happy's healthy. But  
14 they are not talking -- we are not talking about whether  
15 Happy is healthy or not, we are talking about whether Happy  
16 can live the life of an elephant because habeas corpus is  
17 not meant to protect health, it's meant to protect liberty.  
18 If they are saying she is being treated in a bad way, we  
19 don't bring a writ of habeas corpus. That doesn't address  
20 that. It addresses the legality of somebody's detention,  
21 and we are saying the detention alone is what we are talking  
22 about.

23 And the third affidavit is simply another  
24 administrator saying whether the Animal Welfare Act is being  
25 followed, and you get something about that and all

1 regulations in the Animal Welfare Act, but the Animal  
2 Welfare Act and regulations are the same sort of thing. How  
3 many times are you feeding the prisoner. How many times are  
4 you washing the prisoner. How many times do you wash the  
5 prisoner's trunk. How many times -- how many hours do you  
6 let the prisoner outside. How many hours do you put him  
7 back in. And then for an elephant, this is an Indian  
8 Elephant who -- New York City is a wonderful place -- Indian  
9 Elephants don't belong living in New York City, you know,  
10 period. And even the Bronx Zoo knows they should not be  
11 outside. So what they then do -- she doesn't even live on  
12 an acre of land -- they have to put her inside of a building  
13 for at least half of the year. This is not how one should  
14 treat an elephant, right? It's just not. And it's not my,  
15 it's not my opinion, it's the opinion of about five of our  
16 experts, and the opinion of Joyce Poole, including Joyce  
17 Poole, she is saying what happens when you treat them like  
18 this is that they get sick, they get aggressive, they get  
19 depressed, and they get psychotic. They become antisocial  
20 and -- however, she also says the remedy for this and then  
21 she lists all these problems, so-called problems elephants  
22 that have been taken out of, of a terrible place like Happy  
23 is in and brought to a sanctuary. That's the remedy. They  
24 just flourish overnight.

25 You read all the time about people that have been

1 convicted wrongly of crimes for thirty years or forty years,  
 2 they don't want to stay in, they want out. And when they go  
 3 out they go back and try and live the best lives they can.  
 4 Happy would do -- it would be exactly the same thing for  
 5 Happy.

6 THE COURT: Okay.

7 MR. WISE: I want to make sure I answered the  
 8 Court's questions on that.

9 THE COURT: Do you have more argument, legal  
 10 argument?

11 MR. WISE: If I may?

12 THE COURT: Please.

13 MR. WISE: Thank you, Your Honor.

14 Now, I want to get to the issue of, the legal  
 15 issue of why this Court is not bound, and I almost, I almost  
 16 talked about that, why it is not bound by the Lavery II  
 17 decision and why it should not pay attention to the dicta  
 18 and of it and why -- and why it's not bound by Lavery I, and  
 19 why it should not pay attention to that either.

20 I have already explained with respect to Lavery  
 21 II, which is a First Department case that the Court said  
 22 that without even addressing the merits of the petitioner's  
 23 arguments, we are going to find that, that they, that the  
 24 motion court properly declined to sign the order since these  
 25 were, since these were successive habeas corpus petitions.

1 And so that is under CPLR, 7003(b), means it's a procedural  
2 statute. So the Court affirmed, the First Department  
3 affirmed the lower department on the procedural point and  
4 therefore anything else that they said is dicta.

5 Now, the next -- Lavery I and Lavery II are not  
6 even stare decisis for this Court because they are both  
7 grounded on demonstrable misunderstandings of the law, and  
8 we cite case law several pages talking about the fact that  
9 an exception to a lower court being bound by even a higher  
10 court, there is an exception on the stare decisis when  
11 there's been a demonstrable misunderstanding of the law.

12 Now, I am going to tell you what those  
13 demonstrable misunderstandings of the law are. One of  
14 them --

15 THE COURT: I'm ready.

16 MR. WISE: -- one of them is the idea that  
17 personhood, that in order to have a right, you have to be  
18 able to have a duty, to be able to bear duties. And I  
19 already talked a great deal about why Lavery I, which was  
20 then kind of automatically without any further analysis,  
21 Lavery II, why they were the first court in the world to  
22 ever do and to ever say that, and why it really makes no  
23 sense for them to do that. And the other one is that when  
24 both Lavery I and Lavery II seem to say, well, look, you  
25 have to be human, being human is a necessary condition of

1 the rights, why that also is demonstrably misunderstanding  
2 as well, and here are the reasons why they are just not  
3 regularly demonstrably misunderstandings, but they are  
4 demonstrably misunderstandings of law.

5 THE COURT: Okay.

6 MR. WISE: The first one is they contradict the  
7 Byrn case which is, I had talked about Byrn versus New York  
8 Hospital, and at page 201 in the Byrn case, the Byrn case  
9 says, and I quote, a legal person dot, dot, dot, simply  
10 means that upon -- according to legal personality to a thing  
11 the law affords it the rights and privileges of a legal  
12 person, unquote. There is not a single word in the leading  
13 case in New York State on who is a person. And as to  
14 anybody having to be able to bear duties it says when you  
15 are a person the law affords you the rights and privileges  
16 of a legal person, it does not say that it then also -- that  
17 imposes duties upon you. That's not to say it can't impose  
18 duties upon you, but it does not have to impose duties upon  
19 you, and that's what the New York Court of Appeals said at  
20 Page 201 in Byrn, which is 1972.

21 So, it is been around now for quite some time and  
22 it's never been overruled, and it probably won't be because  
23 that's what, that's what over the last four hundred years  
24 what legal personhood has always meant in Anglo-English  
25 speaking world.

1 THE COURT: The fact in this case, just tell me  
2 that --

3 MR. WISE: The facts in Byrn?

4 THE COURT: Just tell me.

5 MR. WISE: I will tell you real quick, I will  
6 remind you, it had to do with the question of whether a  
7 fetus was a person.

8 THE COURT: A fetus, okay.

9 MR. WISE: There's a lot of cases --

10 THE COURT: The abortion -- the liberalization of  
11 the abortion law.

12 MR. WISE: Yes, indeed.

13 If I could just do a little segue. One of the  
14 things my brother argued, he said that there was a  
15 concurring opinion, and sometimes judges have also said,  
16 well, this is really a legislative issue and that this for  
17 the legislature too because of its value. And when you  
18 work -- and that, by the way, that's not the Byrn case,  
19 that's not the majority opinion. If you go look at that  
20 concurring opinion you see that a case called Corkey,  
21 C-o-r-k-e-y, that's the first case that was cited, Corkey,  
22 that said that, and then you look and you realize that  
23 within a year, Roe versus Wade was decided, which nullifies  
24 what that concurring justice said caused the DC Circuit to  
25 reverse the Corkey case and remanded it to be revisited in

1 light of Roe versus Wade.

2 So, whether or not you believe in that concurring  
3 opinion, it is because of the value you have that a court  
4 can't make that kind of a decision, well, Roe versus Wade  
5 said I don't agree, and the case that concurring opinion  
6 relied upon was indeed immediately overturned.

7 THE COURT: Okay.

8 MR. WISE: Now, Byrn also said -- it's a short  
9 case, but has a lot of interesting and powerful ideas  
10 concerning who a person is.

11 THE COURT: Okay.

12 MR. WISE: Byrn also said that, Byrn also said  
13 that personhood is not a matter of quote, biological or  
14 natural correspondence, unquote. In other words, just  
15 because the fetus is a human, that human, that doesn't mean  
16 the fetus is a person or is not a person.

17 THE COURT: Okay.

18 MR. WISE: So there they say, they said the fetus  
19 even though it was human was not a person, but making a  
20 determination is not a biological issue, and -- but that's  
21 exactly what the Third Department did, and --

22 THE COURT: Okay.

23 MR. WISE: -- what the First Department did, you  
24 don't get to be the chimpanzee, you don't get to, to be a  
25 person because you are not a human being. Well, that's

1 exactly what Byrn said you cannot do.

2 THE COURT: Okay.

3 MR. WISE: Now, Judge Fahey -- then they also said  
4 it requires a determination as to whether legal personality  
5 should attach, and I will talk to you in a minute about how  
6 Judge Fahey says that that should be done as well as Byrn.

7 So, Judge Fahey said that Lavery II, the First  
8 Department conclusions that a chimpanzee could not be  
9 considered -- I am quoting that, Lavery II is quote,  
10 conclusion that a, that a chimpanzee cannot be considered a  
11 person, and is not entitled to habeas corpus relief is in  
12 fact based upon nothing more than the premise that a  
13 chimpanzee is not a member of the human species, unquote.  
14 And that he understood directly contradicted Byrn, just as I  
15 am saying Judge Fahey's opinion as well. Judge Fahey also  
16 noted that even if it was correct, he said that, that  
17 nonhuman animals cannot bear duties, the same is true of a  
18 human infant or a comatose human adult, but nobody would  
19 impose -- it's improper to seek a writ of habeas corpus on  
20 their behalf.

21 Now, I mentioned the People versus Graves case,  
22 that it is common knowledge that persons can and sometimes  
23 do attach to nonhuman entities, like corporations and  
24 animals and it had cited to the Presti case. Now it also  
25 then cited to Byrn. The reason I didn't mention it the

1 first time is because I had not explained what Byrn was.

2 THE COURT: Yes.

3 MR. WISE: But it cites right after Presti, it, it  
 4 cites to Byrn, and the reason it says that it is not a  
 5 question of biology. In other words, in the Graves case a  
 6 corporation can be, can be a person has well, but the  
 7 personhood is not a matter of biology, it is a matter of  
 8 public policy, and that's what the Byrn case says. In fact,  
 9 Page 201 of the Byrn case says, whether the law should  
 10 accord legal personality is a policy question, not a  
 11 biological question, a policy question.

12 Now -- then Judge Fahey then picks it up and he  
 13 explains what the policy question, what the policy involved  
 14 is and he does that at Page 157 in this Court of Appeals  
 15 concurrence. He says that, and I quote, the better approach  
 16 in my view is to ask not whether a chimpanzee fits the  
 17 definition of a person or whether a chimpanzee has the same  
 18 right or duties as a human being, but instead whether he or  
 19 she has a right to liberty protected by habeas corpus.  
 20 Protected.

21 That question is one of precise, moral and legal  
 22 status is the one that matters here. Moreover, the answer  
 23 to that question will depend upon our assessment of the  
 24 intrinsic nature of chimpanzees as a species, end quote.  
 25 Which is exactly the argument we are making today with

1 animals. The question as to whether or not Happy should  
 2 have the right to liberty protected by a writ of habeas  
 3 corpus, that is the question before you, and should depend  
 4 upon the Court's assessment, the intrinsic nature of  
 5 elephant as a species, which is why The Nonhuman Rights  
 6 Project delivered seventy or eighty or one hundred pages of  
 7 affidavits and from all the experts in the world that says  
 8 exactly what, you know, who elephants are and what their  
 9 extraordinary cognitive abilities are.

10 Now, the Lavery I case then was, then was -- the  
 11 Lavery I case involving Tommy the chimpanzee, a Third  
 12 Department case.

13 THE COURT: Right.

14 MR. WISE: Was clearly wrong in stating that the  
 15 legal personhood has consistently been defined as duties, if  
 16 that means the duties are required, duties are required, I  
 17 mean that's where -- they --

18 (Counsel directed to speak louder.)

19 THE COURT: All right.

20 MR. WISE: -- I give them respect for saying it,  
 21 but it is simply false. They, they, they literally are the  
 22 first and most speaking court in the world to ever say this.  
 23 It is our, our, um, legal person that has never been, not  
 24 only been inconsistently defined that way it's never been  
 25 defined that way as should be obvious from Byrn. I don't

1 know if I said this, that this person -- I want to make it  
2 clear, that a person is an entity who has the capacity  
3 either for a right or for a duty, one or the other. You are  
4 a person. Now, once you are a person, you then have the  
5 capacity for either, but you do not have to have the  
6 capacity for both right and duties, which is why Byrn says  
7 when you are a person you're then entitled to the right and  
8 privileges of a person.

9 Then some of the secondary sources that we cite,  
10 by the way, are the ones that the Court of Appeals cites in  
11 the Byrn case in order to support their argument about what  
12 a person is. So, for example, Dean Pound. Dean Pound wrote  
13 that, quote, the significance of legal personality is the  
14 capacity for rights -- and period -- it is -- he doesn't  
15 talk about the fact that you have to have duties, these are,  
16 and are the reason I am using these examples are these  
17 examples that Byrn himself used. In the Salmond on  
18 Jurisprudence, which is also what Blacks said they said,  
19 that Salmond actually said that that person means,  
20 personhood means you're capable of rights and duties, and  
21 that Blacks got it wrong. When we complained about it --

22 THE COURT: Yes.

23 MR. WISE: -- the Eleventh Edition, they quoted  
24 him correctly. Also there is John Chipman Gray who wrote at  
25 the end of the 19th Century. He had wrote the The Nature

1 and Sources of Law and he said what my brother says  
2 that -- I'm sorry, the Third Department says that Gray  
3 stated that, quote, the legal meaning of a person is the  
4 subject of legal rights and duties. The problem with that  
5 is they left out the following sentence, and that sentence  
6 says that, quote, one who has rights but not duties or had  
7 duties but not rights is a person. So the Third Department  
8 simply misunderstood what John Chipman Gray had been saying.  
9 He was talking about rights and duties in the way I am  
10 talking about them, that in order to be a person you can,  
11 either rights or duties will make you a person, but once  
12 you're a person then you can have both rights and duties,  
13 but you don't have to have both.

14 And so John Chipman Gray then explained himself  
15 clearly, one who has rights but not duties or duties but not  
16 rights is a person. And he also says that, quote, if there  
17 is anyone who has rights though no duties or duties but no  
18 rights, he is, dot, dot, dot, dot, a person in the eye of  
19 the law. And in all Gray quoted, animals may conceivably be  
20 a legal person, unquote, and there may be, quote, systems  
21 now in which animals have legal rights, end quote.

22 In fact, I already explained to the Court in  
23 Argentina and Colombia --

24 THE COURT: International?

25 MR. WISE: -- it's already happening. We'll see

1 about the U.S. as well.

2 THE COURT: Okay.

3 MR. WISE: Now, Your Honor, there was something  
4 else that occurred with respect to, with respect to the  
5 First Department, with respect to --

6 THE COURT: Thank you.

7 MR. WISE: -- after oral arguments, the First  
8 Department is -- when we located that Blacks Law Dictionary  
9 had misquoted Salmond on Jurisprudence and said rights and  
10 duties instead of rights or duties, The Nonhuman Rights  
11 Project then immediately wrote the First Department and said  
12 we want to bring to your attention the fact that to the  
13 extent that the Third Department relied upon Blacks, Blacks  
14 admits that it is wrong, and it is changing, it is changing  
15 its mind. And we attach the e-mail correspondence to  
16 Blacks, from Blacks, and said please read this, we filed a  
17 motion that they read the correspondence and for whatever  
18 reason that motion was denied. For whatever reason the  
19 First Department refused to provide the correspondence.  
20 Then made the same mistake that the Third Department had  
21 which I suggest they might not have made had they seen the  
22 argument between the showing that Blacks, Blacks said we  
23 made a mistake and we are going to fix it.

24 THE COURT: That maybe was --

25 MR. WISE: I'm sorry.

1 THE COURT: -- when was it submitted to the Court?

2 MR. WISE: It was submitted to the Court between  
3 oral argument and the time that they issued a decision.

4 THE COURT: So it was after the Court had already  
5 heard it?

6 MR. WISE: After they had heard it, but it was  
7 before we had learned of what happened to Blacks. As soon  
8 as we learned that Blacks had made an error and Professor  
9 Garner admitted, he immediately confirmed that with  
10 Professor Garner then made a motion post argument and  
11 pre-decision that said that please look at this because the  
12 Third Department relied upon something that the source  
13 itself says was wrong. And the reason I am bringing this to  
14 your attention, it's part of my argument to show that this  
15 Court should not rely upon the Third Department because it  
16 was demonstrably incorrect, it both violated Byrn and now  
17 they relied upon a source that itself admitted was wrong.

18 THE COURT: Okay.

19 MR. WISE: Now, the First Department also cited a  
20 case called Wartelle. Wartelle specifically cites with  
21 positively cites a secondary source in Louisiana that says a  
22 person, quote, signifies a subject of rights or duties,  
23 rights or duties. Now, I get to the third leg of what the  
24 Third Department did to show that it was demonstrably wrong.  
25 There both the misunderstandings of Lavery I and Lavery II

1 derives in part from a gross misunderstanding of social  
2 contract theory. And the only reason that the last, alas as  
3 I am bringing it up, they are the Third Department that was  
4 one of the three rungs, the three things that they relied  
5 upon. So for, as I said, the first time in Anglo-American  
6 history the --

7 (Counsel was directed to speak louder.)

8 MR. WISE: -- they said that the ascription of  
9 rights has historically been connected with the imposition  
10 of the duties -- principal of social contracts, unquote.  
11 That was not true on that date, it is not true today, and it  
12 has never been true. Why did the Third Department say  
13 something that was demonstrably false? Well, it does cite,  
14 it cites two cases, one is called Gault, one is cited  
15 Barona. I won't even argue that all you have to do is look  
16 at the cases and realize they have nothing whatsoever to do  
17 with social contract or the description of the person and  
18 their rights. What they relied upon were two law review  
19 articles by a deeply reactionary Pepperdine Professor --

20 (Counsel directed to speak louder.)

21 MR. WISE: -- Richard Cupp from Pepperdine  
22 University. He makes his living arguing that nonhuman  
23 animals should not have rights because it depends on, and  
24 deal in social contract theory that only him, he in the  
25 entire world believes in.

1           So then on Page 18 to 20 of our supplemental  
2 memorandum that we filed, we demonstrate that the -- if you  
3 go look at the law review articles he writes, he just, he  
4 just cites himself and other law review articles, he is  
5 cited by a philosopher, Peter de Marneffe. If you look at  
6 the situation you understand that Peter de Marneffe does not  
7 support what he says. And another place he just cites he  
8 just cites John Locke, and cites eight chapters, one of John  
9 Locke's books, but there is no evidence that he showed that  
10 as well. In short, Professor Cupp dispenses junk political  
11 science, junk history and junk jurisprudence. That the  
12 Third Department just accepted without looking into it  
13 themselves. And that fact is part of their demonstrable  
14 misunderstanding of the law.

15           Judge Fahey also talked about, Page 1058 of his  
16 concurring opinion, he referred to an amicus brief filed  
17 before him by not Professor Cupp, but by seventeen North  
18 American philosophers, and they specifically address  
19 themselves to Professor Cupp, his own idiosyncratic idea of  
20 what a social contract means. They said in, and I quote, in  
21 their amicus brief, which went before Judge Fahey, quote, is  
22 not how political philosophers have understood the meaning  
23 of a social contract historically or in contemporary times,  
24 unquote, rather according to the seventeen philosophers,  
25 social contract creates citizens, it does not create

1 persons. It has got nothing to do the creation of persons,  
2 has to do with the creation of citizens. And that they said  
3 social contract philosophers have never claimed, I am  
4 quoting them, not now and not in the 17th Century, that the  
5 social contract can endow a personhood on any being.

6 So, Professor Cupp said what he is going to do, he  
7 is entitled to say whatever he has, but he should not be  
8 pushing his false ideas he made up on the court and made it,  
9 it seem that that's the law. That's not the law. And the  
10 only degree to which it is the law is because the Third  
11 Department just cited him, bless their hearts, swallowed it,  
12 but didn't do their own research, and we didn't do the  
13 research because we didn't know that they were going to say  
14 that. It was not argued. The first time we saw the  
15 argument of the social contract was in their decision, that  
16 is, Professor Cupp knew another, another reason why Lavery  
17 II, the First Department. Their misunderstanding also  
18 derives from a misunderstanding of habeas corpus, does not  
19 permit the release of a detainee from one facility to  
20 another facility.

21 Now, Lavery II cited a case called Dawson versus  
22 Smith. Now, Judge Fahey in his concurrence stated that that  
23 was just explain wrong, they misunderstood what Dawson  
24 versus Smith said she got it opposite. There is only two  
25 main cases in the Court of Appeals on this issue. One is

1 called, ex rel Hatzman v. Kuhlmann, and Brown v. Johnston,  
2 which is --

3 THE COURT: A citation?

4 MR. WISE: Okay. 9 New York 2d 482, and page 485,  
5 that was 1961. In Brown versus Johnston the Court of  
6 Appeals said habeas corpus was appropriate when someone's  
7 trying to, to be moved between a State prison and State  
8 hospital for the insane. That person Brown is, Brown is not  
9 trying to be absolutely free, he is moving. He is in one  
10 place and he wants to move. The question is, can you move  
11 from a prison to a -- can you be moved from a prison to a  
12 place where you're mentally ill? The Court of Appeals says  
13 yes. Habeas corpus is appropriate for that.

14 Then twenty-four years later in Dawson versus  
15 Smith, what you have was another prisoner who was trying to  
16 move, not from one institution to another institution of a  
17 different kind, but was trying to move from one department  
18 within an institution to another institution within the same  
19 institution. And the Court of appeals says you cannot use  
20 habeas corpus to do that.

21 So, Judge Fahey said no, the Appellate Division  
22 erred in this matter by misreading the case it relied upon,  
23 he is referring to the Dawson versus Smith case. Sorry. In  
24 the Brown versus Johnson, they erred by misreading the case  
25 relied upon in which instead stands for the proposition that

1       habeas corpus can be used to seek a transfer to, quote,  
2       institution separate and different in nature from the  
3       facility to which the petitioner has been committed under,  
4       unquote, opposed to transfer, quote, within the facility,  
5       unquote. And then he specifically says the chimpanzee  
6       predicament, that we are trying to move a poor chimpanzee  
7       from a cage to an island in south Florida where he would  
8       live with over twenty-five other chimpanzees, one hundred  
9       miles south of where I live in Florida. He says the  
10       Chimpanzee's predicament is analogous to the former  
11       situation which is the Brown situation moving from between a  
12       jail and a mental hospital, not moving from one section. We  
13       are not asking that the Chimpanzee move from one cage inside  
14       of a horrible place being kept to another cage. Just like  
15       here we are not saying we want Happy moving from 1 acre  
16       across the way to a zoo to another acre. We are not asking  
17       for that. We are asking that Happy be moved to a completely  
18       distinctly different place, which is, well -- it is either  
19       the Tennessee Elephant Sanctuary in Tennessee or the  
20       Elephant Welfare Society in California.

21               And again, these are not zoos, nobody charges  
22       admission, these are sanctuaries where they will be left  
23       alone as close to the wild as possible to live their lives.

24               Now, if I may just speak about, by the way, we  
25       actually in our papers I have a long list, I will not read

1 to the Court every, all of the cognitive capabilities that  
2 are gleaned from the affidavit for the Court, I will just  
3 read like four of them that are autonomous that they are  
4 self aware that --

5 THE COURT: The Court has read those.

6 MR. WISE: -- here.

7 THE COURT: No, the Court has read those, what you  
8 had in your papers.

9 MR. WISE: What? Pardon me?

10 THE COURT: The Court has read what you have, your  
11 papers about that.

12 MR. WISE: Okay.

13 THE COURT: The Court has read those.

14 MR. WISE: Then I will not read again.

15 THE COURT: Thank you.

16 MR. WISE: I'd like to address a few more things.  
17 One of them, the issue of standing.

18 So, my brother claims that The Nonhuman Rights  
19 Project does not have permission to, or does not have  
20 standing in order to bring suit on behalf of Happy. CPLR  
21 7002(a) really clearly says a person, quote, a person is  
22 illegally imprisoned or otherwise restrained in his liberty  
23 within the state, or one acting on his behalf or a party in  
24 a child abuse proceeding subsequent, dot, dot, dot, may  
25 petition without notice for a writ of habeas corpus.

1 Now, the --

2 THE COURT: Wait. Can I stop you right there, if  
3 I may?

4 MR. WISE: Of course.

5 THE COURT: You said you had four reasons that you  
6 gave me before when you were presenting your arguments  
7 before, right? The misunderstanding of the law, the social  
8 contract theory. There was two other ones that I --

9 MR. WISE: Right.

10 THE COURT: -- heard, right?

11 MR. WISE: I am going to --

12 THE COURT: Those were in the --

13 MR. WISE: There was the dicta.

14 THE COURT: Right.

15 MR. WISE: Dicta. There is -- and one of the  
16 reasons were --

17 THE COURT: Rights and duties, rights or duties.

18 MR. WISE: Rights or duties also contradicts the  
19 Byrn case.

20 THE COURT: Right.

21 MR. WISE: Also contradicts the public policy  
22 under the pet trust statute, 7-8.1. Also ignores the, on  
23 the ground, facts, that if indeed duties and  
24 responsibilities are required, then that would mean ten  
25 percent of the population of New York would not able to, to

1 be --

2 THE COURT: All right, let me have Mr. Manning  
3 reply to those arguments, then you said you would move on to  
4 something else?

5 MR. WISE: Yes.

6 THE COURT: Am I correct?

7 MR. WISE: Yes, Your Honor.

8 THE COURT: That's the standing issue.

9 MR. WISE: Yes, Your Honor.

10 MR. MANNING: If I may, Your Honor?

11 THE COURT: Thank you. I don't want him to get  
12 too far.

13 MR. MANNING: Thank you, Your Honor.

14 In New York, habeas corpus Article 70 governs  
15 habeas corpus proceedings, that's the article under which  
16 the First, Second, Third and Fourth Departments made their  
17 decisions in these cases, particularly involving  
18 chimpanzees. For example the Presti case, the Court  
19 squarely determined the issue of the appropriateness of  
20 habeas corpus to change conditions of confinement, and it  
21 was in the context of a chimpanzee case brought by the  
22 petitioner. And the Court squarely held that habeas corpus  
23 is not available to change the conditions of confinement.

24 So, whether they wanted to move Happy from the  
25 Bronx to California or Florida or wherever they'd like to

1           move the animal, habeas corpus is not available for that,  
2           and this is a square Appellate Division hold on that  
3           involving this petitioner. So what the law may be and the  
4           power of Argentina or Colombia really doesn't matter to a  
5           determination in this court.

6                   THE COURT: So you're analogizing the two going  
7           from one department to another department, you want to move  
8           Happy to a sanctuary?

9                   MR. MANNING: That's exactly it, and it really  
10          doesn't matter that the Bronx Zoo is available  
11          irrespectively for every citizen to go see and where they'd  
12          like to put Happy is not even open to the public. It  
13          doesn't make any difference whether you move the animal to  
14          one place to another, habeas corpus was never around and  
15          never invented for people, for person's to satisfy that  
16          particular request. So, that's the first thing.

17                   THE COURT: Okay.

18                   MR. MANNING: Secondly, we hear loudly and clearly  
19          the petitioner thinks the Third Department got it wrong,  
20          when the Third Department squarely held that animals have  
21          never been considered persons for the purpose of habeas  
22          corpus relief. That's the language from the Third  
23          Department, not my language, Your Honor.

24                   Furthermore, they say the First Department got it  
25          wrong --

1           THE COURT: Well, what is your argument to that,  
2           that the Third Department decided it on whether you have  
3           rights and duties as an entity, whether a person, or rights  
4           or duties as a person.

5           MR. MANNING: Thank you, Your Honor. First of  
6           all, I think the Third Department's analysis, we provided  
7           that to the Court, was fairly detailed, they simply didn't  
8           decide it based out of Blacks Law definition. Had they done  
9           so and they looked past the definition to the source  
10          material that was referenced by Mr. Wise, and if they had  
11          quoted the rest of the material that was relied upon by John  
12          Salmond in his, in his 1947 Jurisprudence article, they  
13          would find that John Salmond went on to say that, I am  
14          quoting now, the only natural persons are human beings,  
15          either natural or legal, they are merely things, often the  
16          objects of legal rights and duties, but never the subjects  
17          of them. It is fairly definitive.

18          THE COURT: Sorry, I missed the last sentence.

19          MR. MANNING: Yes. They are merely things, often  
20          the objects of legal rights and duties but never the  
21          subjects of them.

22          THE COURT: Okay.

23          MR. MANNING: So, the point of the matter is, even  
24          the source material that they rely upon doesn't support  
25          their issue. But furthermore, the First Department having

1 the benefit of a lengthy decision by the Third Department  
 2 went on to say in Lavery II --

3 THE COURT: II? Uh-huh.

4 MR. MANNING: Thank you. And I am quoting, the  
 5 assertive cognitive and linguistic capabilities of a  
 6 chimpanzee do not translate to a chimpanzee's capacity or  
 7 ability to link humans to bear legal duties or to be  
 8 legally -- held legally accountable for their actions, which  
 9 is the predicate for this Court to find whether habeas  
 10 corpus should be afforded to someone as a person, square,  
 11 holding the First Department I suggest controls the decision  
 12 in this case.

13 THE COURT: That's Lavery II?

14 MR. MANNING: That's Lavery II, Your Honor. And  
 15 think about it for a moment, the First Department had the  
 16 complete benefit of analysis of the Third Department, had  
 17 the benefit of argument by petitioner at this table and  
 18 while argument was pending, another effort to demonstrate to  
 19 them that there were other reasons for a decision in favor  
 20 and they were unsuccessful. These issues that have been  
 21 presented here have been fully aired in two Appellate  
 22 Divisions so far. Furthermore, much of the analysis that  
 23 has been presented today by Mr. Wise has been an attack on  
 24 Professor Cupp. Professor Cupp's analysis that was  
 25 embraced, Judge, not just by the Third Department, but by

1 the First department. Professor Cupp provided an amicus  
 2 brief to the First Department, and Professor Cupp has  
 3 offered an amicus brief to Your Honor as well.

4 We moved for permission for that amicus brief to  
 5 be accepted and Professor Cupps' analysis was persuasive in  
 6 the First and Third Departments, and we'd ask for your  
 7 relief in allowing his brief to come in as an amicus brief  
 8 to respond to all the criticisms of his work presented by  
 9 Mr. Wise.

10 MR. SCHNEIDER: If I may, they are not counsel to,  
 11 they are not counsel --

12 THE COURT: One second.

13 MR. SCHNEIDER: -- nor are they counsel to the  
 14 amicus of Protect the Harvest, et al to --the petitioner  
 15 would object to unless one of them is counsel to either or  
 16 both of those amicus filers, they should not be allowed to,  
 17 per Your Honor's rules, those rules the attorneys that  
 18 signed those motions should be here and it appears they are  
 19 not.

20 THE COURT: They are not?

21 MR. SCHNEIDER: No.

22 MR. MANNING: They are not here in person,  
 23 Your Honor. We have squarely relied upon the papers we have  
 24 filed and filed objections to Professor Cupps' work as well  
 25 as his, filed with this Court.

1 THE COURT: You are making the application that  
2 they should not be considered?

3 MR. SCHNEIDER: That is true.

4 THE COURT: And is not opposing that he is saying  
5 that they have the, they have the analysis in their brief,  
6 so --

7 MR. MANNING: We have incorporated their brief so  
8 we didn't duplicate that stack of paper yet further.

9 MR. SCHNEIDER: Your Honor, what they are  
10 attempting to do is incorporate a brief that Your Honor has  
11 not already accepted and their motion has a reference to a  
12 brief that Your Honor has not chosen whether or not to  
13 entertain. Furthermore, Professor Cupp and we believe that  
14 his motion was set to be heard on October 7th. Furthermore,  
15 his motion is defective because there is no New York  
16 attorney who signed it. He purported to sign an affirmation  
17 himself, even though he's not a New York attorney.

18 THE COURT: Okay. We have motions on that date.  
19 That's probably the one you're speaking of. So that motion  
20 is advanced, however, we didn't notice him to come today.

21 MR. MANNING: So it's on for October 7th?

22 THE COURT: That was on for October 7th, The  
23 Nonhuman Rights Project versus James Breheny. And we  
24 have --

25 MR. SCHNEIDER: We just filed our opposition this

1 morning.

2 THE COURT: You did file an opposition?

3 MR. SCHNEIDER: Yes, this morning.

4 THE COURT: I believe it is here. I have the  
5 motion and -- but I am sure that the opposition papers will  
6 make its way to the file, and we are attempting to  
7 accelerate this case, so we'll have all the motions in able  
8 to have that, so we did look for this paper and we have the  
9 motion. So we'll make a decision on that motion also. I am  
10 not sure that if we are going to notice you guys to come  
11 back again, we may just allow the movant in this sense to  
12 intervene, and if we need further argument we'll request it,  
13 okay? If we need.

14 MR. MANNING: Thank you, Your Honor.

15 THE COURT: Okay.

16 MR. MANNING: The other motion or amicus brief by  
17 the Zoological Association and two other entities are  
18 unopposed.

19 MR. SCHNEIDER: We did oppose that, Your Honor,  
20 and we filed that with the Court.

21 THE COURT: Okay.

22 MR. SCHNEIDER: And, once again, the attorneys who  
23 signed that motion are not here.

24 THE COURT: So, is that the motion that is on  
25 10/21?

1 MR. SCHNEIDER: No, Your Honor, this was the  
2 other. The first proposed amicus motion which was filed  
3 back in December, I believe.

4 THE COURT: Was it returnable today?

5 MR. SCHNEIDER: Yes, it was. It was in the stack  
6 of motions, yes.

7 THE COURT: Okay, you do have a stack.

8 MR. MANNING: We haven't seen any opposition on  
9 that, Your Honor.

10 THE COURT: So, do you have a copy?

11 MR. SCHNEIDER: Yes, we provided it to the Court.  
12 It would have the proof of service in this as  
13 well, but I can track that down.

14 THE COURT: Okay, when my clerk comes back, if you  
15 just show me which one it is so we can take a look at it  
16 ourselves, because we do have a stack of motions down there  
17 and -- we'll have a point of personal privilege. We'll  
18 return in five minutes.

19 MR. MANNING: Thank you.

20 (Recess taken.)

21 COURT OFFICER: Come to order.

22 THE COURT: Please be seated.

23 Off the record.

24 (Discussion held, off the record.)

25 THE COURT: Let's see if we can at least finish up

1 with the argument.

2 Okay, Mr. Manning, were you finished?

3 MR. MANNING: I have one more point, Your Honor.

4 THE COURT: I'm sorry, I thought you were finished  
5 with your argument.

6 Okay, quickly you may.

7 MR. MANNING: I will be very brief, Your Honor.

8 The Byrn case that has been discussed by Mr. Wise,  
9 if you read to the end of the case the issue in that case  
10 was determined not just by the concurrent opinion, but by  
11 the majority talked about the policy decisions being best  
12 left to the legislature, which we consented, which is what  
13 should happen here.

14 And the last item, the affidavit that's been  
15 submitted on behalf of the Bronx Zoo and the Wildlife  
16 Conservation Society, we have three affidavits. One from  
17 Mr. Breheny, who was recently the caretaker of the American  
18 Zoological Society, as well as veterinarian Paul Celle, who  
19 is very familiar the care and guidance given to Happy the  
20 Elephant in the Bronx. And three, there was no reason to go  
21 any further, according to the petitioner, and they were not  
22 challenging the conditions under which Happy was being  
23 maintained.

24 We provided that information, frankly, for the  
25 comfort of the Court.

1 THE COURT: Yes. Okay. Thank you.

2 MR. WISE: Thank you, Your Honor.

3 THE COURT: Mr. Wise, do you have further  
4 argument?

5 MR. WISE: I do.

6 THE COURT: You have standing and what else?

7 MR. WISE: I have standing -- I'm just responding  
8 to my brother.

9 THE COURT: You can respond in a minute, I just  
10 want to --

11 MR. WISE: The issue of collateral estoppel. I  
12 wanted to previously respond to that, and then I wanted to,  
13 and just in probably ten minutes actually explain what the  
14 public policy behind giving personhood to Happy would be.

15 THE COURT: That's going to be your response,  
16 right? So it would -- the only other argument you have is  
17 standing and collateral estoppel?

18 MR. WISE: I'm sorry?

19 THE COURT: Standing, the issue of standing and  
20 the issue of collateral estoppel?

21 MR. WISE: I do have those, and --

22 THE COURT: Correct.

23 MR. WISE: -- I also wanted to briefly discuss the  
24 place of the values of liberty and equality giving  
25 Happy, those are the public policies issues.

1 THE COURT: Well, that's what he just said, those  
 2 were best left to the legislature. I believe he said that.  
 3 So, if you want to respond to that?

4 MR. WISE: I certainly do.

5 THE COURT: Respond to it now. Then we'll get to  
 6 the other two arguments, then you can sum up.

7 MR. WISE: Indeed.

8 Well, first of all, the case does not say that the  
 9 issue is best left to the legislature, but what Byrns says  
 10 is that historically usually that personhood issues come out  
 11 of the legislature.

12 THE COURT: Okay.

13 MR. WISE: And that's not the same thing as saying  
 14 that's where they must come out. As I said one time, habeas  
 15 corpus is sui generis, it is unique, it is specifically  
 16 common law, it always has been common law.

17 THE COURT: Yes, you started with that.

18 MR. WISE: Which also dovetails with another  
 19 statement that my brother makes which really isn't correct  
 20 is that CPLR 70 does not govern habeas corpus, 70 does not  
 21 govern habeas corpus, the common law governs habeas corpus,  
 22 70 simply governs the procedure by which habeas corpus is  
 23 brought, it has nothing and may not have anything to do with  
 24 the substantive law of habeas corpus.

25 THE COURT: Okay, so you disagree with counsel?

1 MR. WISE: That's what the CPLR is.

2 THE COURT: Well, that's what you disagree with on  
3 that point?

4 MR. WISE: Yes.

5 THE COURT: Okay, thank you.

6 MR. WISE: And my brother just recently brought up  
7 the Fourth Department again. The Fourth Department may say  
8 certain, may say that can't be transferred to a chimpanzee,  
9 but the Court of Appeals says you can, and Judge Fahey says  
10 you can -- and both Fourth Department and then the First  
11 Department --

12 (Counsel directed to speak louder.)

13 MR. WISE: -- they are simply in conflict with the  
14 1961 Court of Appeals Brown case, and Judge Fahey points  
15 that out.

16 THE COURT: Okay.

17 MR. WISE: And then the First Department is not  
18 appropriate because first of all we said it was dicta.  
19 Second of all, what they said about duties and  
20 responsibilities and being human violates Byrn --

21 THE COURT: Correct.

22 MR. WISE: -- violates the pet trust policy --

23 THE COURT: Okay, now, with respect to the  
24 standing?

25 MR. WISE: Standing? Okay.

1           So, by my brother, as part of his motion to  
2 dismiss, raised the issue of standing.

3           THE COURT: Correct.

4           MR. WISE: Now, I hate when I have it right here.  
5 Hold on. If I may have a moment? I just put it somewhere  
6 else with my standing discussion.

7           THE COURT: Okay.

8           MR. WISE: Let's see.

9           Standing, Your Honor, first of all, I think I was  
10 beginning to talk about that, CPLR 7002(a) specifically says  
11 that, that one acting on that a person illegally imprisoned  
12 or otherwise restrained of his liberty or one acting on his  
13 behalf may petition the Court without notice for a writ of  
14 habeas corpus.

15           In the Stanley case, where The Nonhuman Rights  
16 Project sought a writ of habeas corpus on behalf of the two  
17 chimpanzees said that The Nonhuman Rights Project had  
18 standing and said that there was no restriction on who may  
19 bring a habeas corpus petition.

20           Now, the First Department in a footnote actually  
21 said that, that assuming that habeas corpus may be brought  
22 on behalf of the chimpanzee, the petitioner, The Nonhuman  
23 Rights Project, indisputably has standing pursuant to  
24 7002(a), which authorizes anyone to seek habeas corpus  
25 relief on behalf of the detainee.

1           Now, the issue of whether you are a person, that  
2           is not a standing issue, that's a substantive law issue.  
3           So, under CPLR 7002(a), anyone, anyone has the right to  
4           bring forth before the Court the question of whether an  
5           entity has standing -- I'm sorry -- whether an entity is a  
6           person who is being detained. We are not arguing about  
7           detention here. We have to agree on that. We are arguing  
8           about person, but the only way that the issue -- a person  
9           could be brought before the Court, would be by somebody,  
10          somebody else.

11           THE COURT: Okay.

12           MR. WISE: So we think it is, and also this kind  
13          of third-party standing has been long approached in  
14          New York, approved if you go into the antebellum south --  
15          I'm sorry, the antebellum New York. The American  
16          Antislavery Society brought a series of cases throughout the  
17          1830's and 1840's where southern slaves would, southern  
18          slave holders would bring slaves to New York, and  
19          abolitionists, the American Antislavery Society would come  
20          in and seek writs of habeas corpus. And question, the  
21          question would be, that would be, would be these slaves  
22          brought in were they still slaves in New York or were they  
23          free. The only way you could argue that is if the American  
24          Antislavery Society has standing to go in and argue. It  
25          turns out that they would always win. But, you know, one of

1 those cases, the Lemmon case versus the People, was  
 2 actually, I think, on, on cert to the Supreme Court, and the  
 3 Civil War broke out, and that sort of stopped it, but we  
 4 cited Lemmon, L-e-m--m-o-n. Lemmon, Trainer -- and numerous  
 5 cases --

6 THE COURT: There are a number of cases.

7 MR. WISE: -- where it is clear that, that, that  
 8 we have standing.

9 THE COURT: Okay.

10 MR. WISE: Now, let me move on to the issue of --  
 11 would you like to respond to the standing argument?

12 MR. MANNING: Well, it is very -- the very first  
 13 thing you said really answered the question, and that's you  
 14 have standing in what you're doing on behalf of a person,  
 15 which brings us back to the whole issue that the First  
 16 Department has determined against that, and the Third  
 17 Department determined against that an elephant is not a  
 18 person, that if it's not a person, you don't have standing  
 19 to bring the proceeding.

20 THE COURT: Do you want to respond?

21 MR. WISE: Well, first of all that involves a  
 22 chimpanzee, this involves an elephant, I don't know if by  
 23 that they mean no nonhuman animal under any circumstances is  
 24 a person.

25 The second thing is that the only way in which you

1 can make a determination as to whether any entity is a  
2 person is if someone brings a writ of habeas corpus to  
3 anyone that's permitted to do so on behalf of a detained  
4 entity where the issue, the substantive issue involved is a  
5 person, now is whether or not that is a person, someone who  
6 is a person. Now, again, you go to the fact that this is  
7 the CPLR, so is this is a procedural rule, and it says any  
8 person. You don't go to look at what the legislature meant,  
9 and that they said person because it is a procedure, it's  
10 not allowed to enlarge or abrogate substantive law. So you  
11 have to go to look at the common law question, whether or  
12 not the detained entity is a person. And that is what  
13 person means in Article 70. You have to -- they have to  
14 bring in the common law, whatever that might be, and there  
15 certainly has never been obviously a case involving an  
16 elephant, involving whether -- determining whether or not a  
17 elephant is a person.

18 And the only way it could happen is that anyone  
19 could have, that ever brings such a determination before the  
20 Court would be if they, if they are permitted do so. You  
21 have to, you have to make the determination, is a personhood  
22 part of the substantive -- as part of the substantive case.

23 THE COURT: I understand.

24 MR. WISE: Once anybody under the statute brings  
25 it, then you make that --

1 THE COURT: I understand.

2 MR. WISE: -- decision. That's what went on in  
3 the Somerset case. You had the same thing. You had the  
4 people bring whoever -- we don't know who it was -- but they  
5 then brought the writ of habeas corpus on behalf of  
6 Somerset, and no one ever determined whether a slave was a  
7 person in England, whether or not -- I won't beat that --  
8 okay?

9 THE COURT: Okay.

10 MR. WISE: I will go over the issue.

11 THE COURT: Finally, we are doing collateral  
12 estoppel.

13 MR. WISE: Collateral estoppel, Your Honor, I  
14 can't say --

15 THE COURT: Does anybody want a cough drop? It  
16 seems like we are having a lot of respiratory issues here.  
17 Do you need a cough drop? Anybody?

18 (Brief pause.)

19 THE COURT: Okay, collateral estoppel.

20 MR. WISE: I am not sure exactly I understand the  
21 collateral estoppel argument, but what I believe my brother  
22 is saying is that that because The Nonhuman Rights Project  
23 has represented chimpanzees in other cases, then they are  
24 collateral estopped from representing Happy -- that's what I  
25 believe is what the collateral estoppel argument my brother

1 is making.

2 THE COURT: Well, why don't we let --

3 MR. WISE: If he will present the argument, I will  
4 rebut it.

5 THE COURT: Okay, good.

6 Why don't I let you, Mr. Manning, respond.

7 MR. MANNING: Yes, Your Honor. Thank you.

8 Yes. The argument is the legal issue, this is all  
9 about legal issues as you can tell from the pleadings, this  
10 is not really about Happy, it's about elephants, it's about  
11 giraffes.

12 THE COURT: It's about animals.

13 MR. MANNING: It's about animals. And that issue  
14 the Third Department says NRP animals never been considered  
15 persons for the purposes of habeas corpus relief. That's  
16 what five judges in Albany had to say that determines the  
17 issue. Now, they may like or dislike the ruling, but that's  
18 the ruling. They tried to get it into the Court of Appeals,  
19 the Department including Judge Fahey denied leave on the  
20 issue. The issue's been settled. There is no doubt that it  
21 is made clear during oral, oral arguments. NRP has been  
22 involved in each of these cases and controlled the  
23 litigation. The background of collateral estoppel was  
24 created to avoid repeated determinations, multiple bites at  
25 the apple once a matter has been determined, and that matter

1 has now been determined, unless the Third Department or the  
 2 Court of Appeals wants to reverse the First Department,  
 3 wants to reverse, that is the settled law in New York at  
 4 this point.

5 THE COURT: Thank you.

6 MR. MANNING: It's that simple, Your Honor. My  
 7 argument.

8 THE COURT: Thank you.

9 MR. WISE: I have argued at length because that's  
 10 not the settled law in New York, and this Court not only is  
 11 not bound by it, because of the dicta, but should not be.  
 12 However, I think, I think I heard what I thought I heard  
 13 which is because The Nonhuman Rights Project has represented  
 14 other animal clients the collateral estoppel is not  
 15 representing Happy --

16 THE COURT: No, I think that he said that the  
 17 issue could not be, right? The issue of whether the animal  
 18 is a person pursuant to the Habeas Corpus Statute or even  
 19 common law has been decided, I don't think that it was  
 20 specifically --

21 MR. MANNING: That is correct, Your Honor.

22 THE COURT: -- towards the party.

23 MR. WISE: Okay.

24 MR. MANNING: That is correct.

25 THE COURT: It goes to the issue of whether an

1 animal can be, as such as, Happy. So something similarly  
2 situated can be considered a person for habeas corpus  
3 reasons.

4 MR. WISE: I spent hours arguing why that isn't  
5 true.

6 THE COURT: Okay.

7 MR. WISE: However, you can't have, you can't --  
8 there has to be collateral estoppel, you have to have some,  
9 you have to have an identity of the parties and you also  
10 have to have a prior proceeding in which, between the  
11 parties which the animal was -- The Nonhuman Rights Project  
12 has never brought an application on behalf of Happy. This  
13 is not about The Nonhuman Rights Project, this is about  
14 Happy. And there is difference between collateral estoppel  
15 and stare decisis. My brother may be saying you are bound  
16 by some other case, but he can't reasonably believe that The  
17 Nonhuman Rights Project is collaterally estopped from  
18 winning a matter on behalf of their client that they have  
19 represented in a lawsuit, that doesn't make any sense at  
20 all. Plus, if I may say that this is a Court of Appeals  
21 case, says collateral estoppel did not apply in habeas  
22 corpus cases, which is Lawrence versus Brady, 56 New York  
23 181, Pages 191 to 1874. And then there is another case  
24 called Lowsaw versus Smith, saying it is settled law. This  
25 is 1905 settled law. That would, with the exception of the

1 narrow class of cases such as the custody of the infants  
2 decision, habeas corpus does not create an estoppel, even  
3 then on renewals of the writ. Even if we had brought a  
4 lawsuit on behalf of Happy, we could bring on another  
5 lawsuit on behalf of Happy and we would not be estopped  
6 under collateral estoppel. We could bring one hundred cases  
7 in a row. We would never be estopped because habeas  
8 corpus -- because collateral estoppel does not apply, does  
9 not apply to habeas corpus. That's why there is Section  
10 7003(b). So Section 7000, Section 7003(b) talks about under  
11 what circumstances must a court allow a successive petition,  
12 but under what circumstances may a court not allow a  
13 successive habeas corpus petition, and the reason they had  
14 to do that is set out in the advisory committee notes,  
15 7003(b) which states that that successive, quote --  
16 continues the common law and the present position of  
17 New York that res judicata has not, no application to the  
18 writ, res judicata, collateral estoppel issue precluded,  
19 claim preclusion never applied to habeas corpus except in  
20 very, very unusual circumstances. What you have to do is  
21 look at 7003(b) and the nonhuman -- and what happened in the  
22 First Department case. Lavery II, Justice Jaffe decided,  
23 just as she decided when in a previous case that came out of  
24 the Second Department. Again, the Stanley case --

25 THE COURT: Yes.

1 MR. WISE: -- she decided that she would, she  
 2 would hear that case, she used her discretion under 7003(b)  
 3 to hear it, even though we had already brought the case in  
 4 Riverhead --

5 (Counsel directed to speak louder.)

6 MR. WISE: -- Riverhead, when The Nonhuman Rights  
 7 Project brought a second case on behalf of Lavery. She then  
 8 wrote a letter -- she's not going to allow it as a  
 9 successive petition. She noted it's not collateral  
 10 estoppel. It's not res judicata. They don't apply. What  
 11 it is is it is her using her discretion under Section  
 12 7,000(b) to hear it or -- I'm not going hear a successive  
 13 petition that does not apply to this case because there is  
 14 no successive petition.

15 If for some reason this Court ruled against us,  
 16 and we went all the way up and lost and we came back before  
 17 the Court, we'd ask the Court to allow us to -- the Court  
 18 would allow that under 7000(b) or use its discretion under  
 19 Jaffe the second time, or saying I am not going to allow you  
 20 to do that, but collateral estoppel and habeas corpus do not  
 21 apply to -- sorry -- collateral estoppel and habeas corpus  
 22 do not apply to --

23 THE COURT: Habeas corpus.

24 MR. WISE: -- habeas corpus.

25 THE COURT: Okay, thank you.

1                   Please respond.

2                   This is your last opportunity to respond,  
3                   Mr. Manning.

4                   MR. MANNING: Your Honor, rather than relying on  
5                   1874 and 1905 cases that were cited to the case, really two  
6                   authorities, one of the cases Hatzman in our brief, a Fourth  
7                   Department case from 1993, and the Spaulding case, from the  
8                   Third Department 2009, squarely holding the doctrine of  
9                   collateral estoppel are issues only decided in earlier  
10                  habeas corpus proceedings. That is in addition to the  
11                  limitations under 7002, and we offer that to the Court for  
12                  the Court's reference.

13                  THE COURT: Okay.

14                  MR. MANNING: Furthermore, the website contained  
15                  the statement that they will lead, I am quoting now, the  
16                  fight to secure legal rights for nonhuman animals through a  
17                  state by state, country by country, long-term litigation  
18                  campaign, that may be fine, but to bring the same issue to  
19                  the State Courts over and over again, which is being done  
20                  right now, is not something that the Collateral Estoppel  
21                  Doctrine would permit, and we have invoked that doctrine  
22                  here to provide an additional ground for dismissal of the  
23                  petition.

24                  THE COURT: Thank you so much, counsels.

25                  MR. WISE: Your Honor.

1 THE COURT: One last statement.

2 MR. WISE: If that was true, the 1930's NAACP  
 3 Legal Defense Fund could have tried to overturn Plessy  
 4 versus Ferguson, and in 1930 they could have lost the case.  
 5 And at that point it is my brother saying that the NAACP was  
 6 then permanently barred under collateral estoppel or  
 7 res judicata by establishing or overturning Plessy versus  
 8 Ferguson, then there would never be a Brown versus the Board  
 9 of Ed, that they got one shot at it with one plaintiff and  
 10 they were never allowed to bring another lawsuit on behalf  
 11 of another plaintiff. I don't think so. I don't think  
 12 that's -- I don't think that's collateral estoppel or  
 13 res judicata.

14 THE COURT: Thank you all.

15 Does anybody have anything that they have to tell  
 16 me that's not in the briefs?

17 MR. MANNING: It's a procedural point, I'm not sure  
 18 what the new date is for the motions for the amicus filing.  
 19 You mentioned an October 7th date?

20 THE COURT: An October 7th date, but if we can  
 21 handle it today, notwithstanding that that party is not  
 22 here, assuming that you guys don't want to come back on  
 23 October 7th?

24 MR. MANNING: Well, I -- because, Your Honor, it  
 25 wasn't clear from the rules whether he has to be here in

1 person, and because Professor Cupp had filed his amicus  
2 brief in the Appellate Division and was allowed to do that  
3 without a personal appearance, I think he should be able to  
4 have the opportunity to appear in court and argue a motion  
5 on this.

6 THE COURT: If it's necessary.

7 MR. MANNING: Yes.

8 THE COURT: Are you objecting to us just taking  
9 the amicus brief on submission?

10 MR. SCHNEIDER: Yes, Your Honor, we objecting to  
11 both.

12 THE COURT: You want to come back on the 7th of  
13 October?

14 MR. SCHNEIDER: I am happy to, if that's  
15 necessary.

16 MR. MANNING: That's fine, Your Honor.

17 MR. SCHNEIDER: I am happy to on 7th of October.

18 THE COURT: Hold on one second.

19 We are just going to check on the availability of  
20 the date of the 7th, because we do sometimes have other  
21 cases. Sometimes we have. So, before you leave, the clerk  
22 will give you the exact date.

23 Thank you so much.

24 MR. SCHNEIDER: One other thing, Your Honor, we  
25 have one more pending motion which I am not sure if it would

1 be appropriate because it is a discovery, technically a  
2 discovery motion.

3 THE COURT: I believe we have it.

4 MR. SCHNEIDER: They served a notice to admit on  
5 this back in December, which we believe is palpably  
6 improper. We object to the vast majority of requests in  
7 there, but I don't know if that's something we have time  
8 for, or is that something that would go before you?

9 THE COURT: I don't know if you need to argue that  
10 unless you feel some need because the papers are here, we  
11 have them.

12 MR. SCHNEIDER: Yes.

13 THE COURT: If we need further argument, we'll ask  
14 for it.

15 MR. SCHNEIDER: Okay, if I could just say one  
16 thing about the protective order on the -- while we are  
17 here?

18 THE COURT: Sure.

19 MR. MANNING: Are we going to argue it or are we  
20 submitting?

21 THE COURT: We are submitting it, but he said he  
22 wanted it make one point.

23 MR. SCHNEIDER: Just if I could summarize the  
24 motion as we have done with the others ones, very quickly?

25 THE COURT: Actually, it is a discovery motion, we

1 do a lot of them, we can look into it and since we know the  
2 facts and circumstances surrounding this case --

3 MR. SCHNEIDER: Okay.

4 THE COURT: -- I know that you would love to, love  
5 to argue on the record, but it's on the record. If it's in  
6 the brief, we'll get it.

7 MR. SCHNEIDER: I would just point out for the  
8 fifty-eight total, fifty-eight requests, we only saw fit to,  
9 saw fit to admit to four, and admitted Happy is an Asian  
10 Elephant. Yeah -- admits Happy is not a human being and  
11 admits PAWS is not open to the general public which indeed  
12 is what we have been demanding, she deserves her privacy,  
13 she should not be on display. And the rest of them ask  
14 about previous cases. They are trying to make the  
15 collateral estoppel -- in summary it's just for discovery  
16 and should not be in a habeas corpus case to begin with.

17 THE COURT: Okay, we'll take a look at it, unless  
18 you have to say something that's not already in the brief,  
19 we'll take a look at the briefs.

20 MR. MANNING: We just spent fifteen minutes of  
21 oral argument on collateral estoppel, a good portion of the  
22 request pertains to what the role of The Nonhuman Rights  
23 Project has been from the prior litigations to show that  
24 they are the real party in interest and should be estopped  
25 from bringing this proceeding. They are highly relevant and

1           they sought a protective order on eighty percent of the  
2           requests.

3           THE COURT: I am aware of that.

4           Thank you. Thank you so much.

5           MR. WISE: Your Honor, may I just ask one thing?  
6           This is a motion for preliminary injunction?

7           THE COURT: You should check with the clerk  
8           because we do have nine motions, possibly ten.

9           MR. WISE: I believe that's one.

10          THE COURT: If you want to make sure all of the  
11          cases are here, unless there is something that you think  
12          that -- unless you think there is something you need to come  
13          back to argue personally, we have it all, and we can read  
14          through the briefs, really we can.

15          MR. WISE: Okay, thank you, Your Honor.

16          THE COURT: And if we do need further argument,  
17          we'll let you know.

18          MR. WISE: Thank you, Your Honor, very much.

19          THE COURT: So, please check with the clerk before  
20          you leave to make sure that we have all of the motions.  
21          Thank you.

22                 REPORTER'S CERTIFICATION:

23                 I hereby certify that the foregoing  
24                 is a true and accurate transcript of the  
25                 proceedings held in the above matter.

\_\_\_\_\_  
Peter M. Kent

Senior Court Reporter

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