PROSECUTING ANIMAL FIGHTING AND LIVE ANIMAL CRUELTY DEPICTIONS:

LEGAL ISSUES UNDER NEW YORK & FEDERAL LAW

COMMITTEE ON LEGAL ISSUES PERTAINING TO ANIMALS

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Introduction

The brutal industry of animal fighting is a national problem. Therefore, this manual will address both the New York State (herein, "NYS" or "State") and Federal laws, substantive and procedural, involved in prosecuting those who profit from and participate in animal fighting ventures. Animal fighting is one of the many areas in which the states and the Federal government have concurrent jurisdiction. For example, Federal law in the area has not preempted NYS's right to penalize animal fighting under the Agriculture & Markets Law as it currently does. *See People v. Mink*, 237 A.D. 2d 664 (N.Y. App. Div. 1997). During recent years, the laws penalizing animal fighting have been strengthened and efforts have been made to more strictly enforce them. For example, as of the date of this manual, both the Kings County District Attorney's Office and the Suffolk County District Attorney's Office have units that specialize in the prosecution of animal cruelty cases.

This manual has been prepared by the Committee on Legal Issues Pertaining to Animals. It is designed primarily for use by persons and agencies with responsibilities regarding animal fighting and animal cruelty in New York. This manual provides general information only and is not intended to advocate or to provide specific legal advice.

I. Substantive – State and Federal Statutes

A. New York State Law Prohibiting Animal Fighting.

Animal fighting is proscribed in N.Y. Agricultural & Markets Law Section 351. This statute was amended and strengthened in 2008.

(1) Definitions

"Animal fighting" shall mean any fight between cocks or other birds, or between dogs, bulls, bears or any other animals or between any such animal and a person or persons, except in exhibitions of a kind commonly featured at rodeos. (It should be noted here that the riding of bulls and horses at rodeos is conducted artificially - *e.g.*, with spurs or whips - prodding the animal to attempt to throw the rider).

(2) Animal Fighting Related Felonies

Subdivision 2 of N.Y. Agricultural & Markets Law Section 351 provides that any person who engages in any of the following conduct is guilty of a felony punishable by imprisonment of up to four years and/or a fine of up to twenty-five thousand dollars ($25,000):

(a) for amusement or gain, causes any animal to engage in animal fighting; or

(b) trains any animal under circumstances evincing an intent that such animal engage in animal fighting for amusement or gain; or

(c) breeds, sells, or offers for sale any animal under circumstances evincing

an intent that such animal engage in animal fighting; or

(d) permits any act described in paragraph (a), (b), or (c) of this subdivision to occur on premises under his control; or

(e) owns, possesses or keeps any animal trained to engage in animal fighting on premises where an exhibition of animal fighting is being conducted under circumstances evincing an intent that such animal engage in animal fighting.

(3) Animal Fighting Related Misdemeanors

N.Y. Agricultural & Markets Law Section 351 (3)(b) prohibits owning, possessing, or keeping an animal under circumstances evincing an intent that such animal engage in animal fighting. Subparagraph (a) of that Section punishes such conduct as a misdemeanor punishable by up to one year of incarceration and/or a fine of up to fifteen thousand dollars ($15,000).

Section 351(4) prohibits paying to attend an animal fight or making a wager at any place where animal fighting is being conducted, making such conduct a misdemeanor punishable by up to one year of incarceration and/or a fine up to one thousand dollars ($1,000). Under Section 351(5) a non-paying, non-wagering spectator at an animal fight is, as of September 3, 2011, guilty of a Class B misdemeanor, punishable by a fine of up to five hundred dollars ($500) or a term or incarceration of up to three months or both. This sentence applies only to spectators who attend fights after such date since the statute was recently amended. (Laws of NY Ch. 332, signed Aug. 3, 2011, eff. Sept. 3., 2011). Non-paying, non-wagering spectators attending an animal fight before that date committed a violation punishable by a fine of up to five hundred dollars for the first prosecution. If such a person was convicted within the previous five years of a violation of Sections 351(4) or (5), he is guilty of a misdemeanor punishable by up to one year of incarceration and/or a fine of up to one thousand dollars ($1,000).

Promoting animal fighting or training an animal for animal fighting may be a continuing crime for the purposes of drafting an accusatory instrument and/or calculating statutes of limitations. *People v. Minton,* 170 Misc. 2d 272 (N.Y. Crim. Ct. 1996) (holding that the failure to provide sustenance and other animal cruelty crimes, like the endangerment of the welfare of a child, may be a continuing offense over a period of time).

B. Federal Law Prohibiting Animal Fighting

(1) Animal Fighting Venture Prohibition

Section 26 of the Animal Welfare Act (originally the Animal Fighting Venture Prohibition Act) makes it unlawful to knowingly sponsor an animal fighting venture or to buy, sell, transport, or train any animal for the purpose of having the animal participate in an animal fighting venture. 7 U.S.C. § 2156(a)-(b). That statute was amended on May 3, 2007 by 121 Stat. 88, Pub. Law 110 -22, which set forth in subdivision one a new title: The Animal Fighting Prohibition Enforcement Act. This Act (subdivision two) amended the Federal Criminal Code

18 U. S. C. to add a new section, Section 49, which provided for increased penalties, as described *infra*.

Animal fighting ventures include any event that involves a fight between at least two animals, conducted for purposes of sport, wagering or entertainment, but does not include any activity the primary purpose of which involves the use of animals in hunting another animal. 7 U.S.C. §2156 (g)(1). Section 2156(a)(2) provides a limited exception for cockfighting in jurisdictions where such exhibitions are legal. Notably, cockfighting is currently illegal in all fifty states albeit not in Puerto Rico.

Subdivision 3 of the Act provides that it is unlawful to sell, buy or transport in interstate or foreign commerce a knife, gaff, or other sharp instrument designed or intended to be attached to a leg of a bird for use in an animal fighting venture. 7 U.S.C. § 2156(2)(e). Furthermore, the use of the Postal Service and other interstate facilities to promote an animal fighting venture is prohibited. 7 U.S.C. § 2156(2)(c).

Violating the Animal Fighting Prohibition Enforcement Act may result in fines and/or imprisonment of up to five years. 18 U.S.C. § 49.

(2) Law Does Not Violate Constitutional Rights of Game Fowl Breeders

The Animal Fighting Prohibition Enforcement Act is not a bill of attainder that violates the right of travel, freedom of association or due process of game fowl breeders in the continental U.S. *White v. United States*, 601 F.3d 545 (6th Cir. 2010). In *White*, the Court ruled that the plaintiffs, residents of the continental U.S., failed to state a cause of action when they claimed they were legitimate participants in the gamefowl business who feared false arrest for selling their birds for "fighting." The Court found, *inter alia,* that (1) a claim of false prosecution was too speculative; and (2) none of the plaintiffs' purported "constitutional" violations actually implicated the Constitution. *Id.* at 553-555.

II. Constitutional Issues Raised in the Prosecution of Animal Fighting Depiction

A. Statute Proscribing Visual Depiction of Live Animal Cruelty Unconstitutionally Overbroad; Denies Due Process

The illegal animal fighting industry profits from its videos and DVDs that are sold over the Internet. Because the products are filmed depictions of conduct, some of which is legal where filmed - *e.g.,* cockfighting in Puerto Rico, bullfighting in parts of Spain – it was recently successfully argued in the U.S. Supreme Court that the filming of brutal dog- fighting and pit bulls mauling a farm pig to death was protected under the First Amendment. *See United States v. Stevens*, 130 S. Ct. 1577 (2010) (striking down as unconstitutional 18 U.S.C. § 48, which prohibited interstate distribution of depictions of live animal cruelty). The statute, in prohibiting such depictions, not only prohibited "torture" and "maiming," but also "wounding" and "killing," which the eight-to-one majority stated rendered the statute unconstitutionally overbroad since such language could arguably proscribe hunting videos. The statute also

contained an exception for any depiction that had serious religious, political, scientific, educational, journalistic, historical, or artistic value, tracking the language required for statutes proscribing adult obscenity to comply with the First Amendment guarantees of free expression under *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973).

Crucial to the Court's holding was a rejection of the analogy to child pornography videos prohibited in *New York v. Ferber,* 458 U.S. 747, 102 S. Ct. 3348 (1982). Writing for the majority, Justice Roberts found that, even if the Court classified child pornography as outside the protection of the First Amendment in *Ferber*, this did not create a "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens* at 1586. According to the majority, the constitutional freedom of speech does not extend to "speech… used as an integral part of conduct in violation of a valid criminal statute" or to "previously recognized, long-established category of unprotected speech," such as child pornography. *Id.* However, that Court concluded that there is no evidence that "depictions of animal cruelty," like child pornography, is a historically unprotected category of speech. *Id*. The Court also expressed concern that the statute penalized the depiction of conduct that is legal in one jurisdiction but finds its way to a jurisdiction where such conduct is illegal.

Justice Alito, the lone dissent, opined that society did indeed have a compelling interest in protecting animals from extreme cruelty, *see Id.* at 1602, noting that the Court improperly assumed the statute was constitutional as applied to dogfighting videos and ruled it unconstitutional as overbroad. *See Id.* at 1592-93, 1594. According to J. Alito, the Court's decision rested on the proposition that the statute restricts the sale and possession of videos depicting three specific activities in which animals are legally harmed: hunting, cockfighting, and slaughtering methods in the food industry. *See Id.* at 1594, 96-97. But even assuming that the statute in fact restricted the depiction of these activities on video, this did not justify striking down the statute in its entirety. *See Id.* at 1597.

The *Stevens* Court declined to decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional.

B.Federal "Crush Video" Law of 2010

In September of 2010, the Animal Crush Video Prohibition Act of 2010 was amended by the Senate, having already passed the House. It was signed into law by President Obama on December 10, 2010. This statute limited its proscription to so-called crush videos, the fetish animal torture videos designed to appeal to prurient interest.

The Congressional statement of purpose which preceded the statute's provisions exclusively discussed the so-called "crush" videos and why their extreme cruelty and appeal to the prurient interest was outside the protection of the obscenity laws. The statute, as amended by the Senate, emphasized that the clandestine nature of the industry and the anonymity of the participants[1] make prosecution of the underlying conduct extremely difficult and interfere with the ability of individual states to prosecute the production/distribution of these videos. *See* 18 U.S.C. Sec. 48 (9)-(10). Congress further found that the "Federal Government and the States

[1] These qualities also characterize the animal fighting video/DVD industry.

have a compelling interest in preventing intentional acts of extreme animal cruelty." *See* Pub. L. 111 – 294 Sec. 2, 124 Stat. 3177 (Dec. 9, 2010).

The new 18 U.S.C. § 48(a) defines "animal crush video" as "any photograph, motion-picture film, video or digital recording, or electronic image that (1) depicts actual conduct in which 1 or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury (as defined in Section 1365 [of 18 U.S.C.] and including conduct that, if committed against a person and in the special maritime or territorial jurisdiction of the United States, would violate Section 2241 or 2242); and (2) is obscene."[2, 3]

The new statute is an attempt to meet the constitutional issues raised by *Stevens, supra*, which caused the Court to invalidate 18 U.S.C. Section 48 as overbroad, violating the First Amendment and denying due process. Limiting the statute to prohibit creation and dissemination of visual depictions of live animal cruelty and eliminating any proscription of possession narrows the statute's scope, as do the statutory exceptions in accordance with the guidelines of *Stevens*. Further, it is important to note that *Stevens* seems to suggest that, to pass constitutional muster, a statute must be limited to depictions of extreme cruelty, but not necessarily restricted to crush videos; nevertheless, the Congressional hearings on the statute's legislative history were largely focused on this underground industry.

Another important basis for the *Stevens* Court's holding was that the statute criminalized in one jurisdiction the sale of a depiction of conduct that was legal where produced, *e.g.*, a film of dog-fighting made in Japan but sold in Pennsylvania. (Defendant Stevens sold several dog-fighting videos in the U.S. that were produced in Japan, where dog-fighting is legal). This problem may be partially overcome by the existing statute inasmuch as Subdivision 3(c)(1) [Extraterritorial Application] requires that a foreign-made crush videos distributed in the U.S. or one of its territories must have been imported here either intentionally or with reason to know it would be distributed in the U.S. or one of its territories. However, subsection (2) of that same subdivision imposes strict criminal liability on such a foreign distributor, regardless of guilty knowledge or lack thereof. These two sections appear to be contradictory: subdivision (3) requires knowledge on the part of the foreign distributor that his film, video, DVD, etc. violates the law of the United States whereas subdivision (2) imposes strict liability held to be unconstitutional in *Stevens*, *supra*. In light of the statute's severability clause, a court may find one part of the statute to be unconstitutional and uphold the remainder of the statute. This recently enacted statute specifically provides that it does not apply to the following: (1) any depiction of normal animal husbandry and veterinary practices, the slaughter of animals for food, or hunting, trapping or fishing; and (2) any distribution of a crush video to a law enforcement agency or to a third party only to determine if referral to law enforcement is necessary. 18 U.S.C. § 48(e).

C. Significance of "Crush Video" Statute to Animal Fighting Video & DVD

[2] The Congressional Record indicates Congress' understanding that "[c]ourts and juries play an important role in determining what is obscene." 156 Cong. Rec. S7653 (daily ed. Sept. 28, 2010) (statement of Senator Patrick Leahy).

[3] Section 2241 and 2242 criminalize aggravated sexual abuse and sexual abuse respectively.

Production – Application to Future Legislation

Although, by definition, animal fighting videos and DVDs are not included in the prohibition against crush videos in 18 U.S.C. § 48, the language of the *Stevens* decision does not explicitly prohibit bringing them under the statute. Further, the Congressional declaration of legislative will in the "crush video statute" that there is a compelling interest in prosecuting animal cruelty at the State and Federal levels leaves open the possibility of future additional legislation prohibiting depiction of live animal fighting. Such a statute could not require that the depiction be obscene, because spectators at an animal fight generally wager on the outcome of this "sport," which is not a "sexual fetish" unlike the crush video phenomenon. It is clear, however, that such a statute would have to be narrowly drawn to comport with *Stevens, supra,* and penalize only production and distribution, not personal possession, even though possession fuels the market. Further, the "serious value" exception that tracks the language of the exception for the distribution of obscene films should also be included in light of First Amendment implications.

III. Procedural Matters

This manual does not detail search and seizure law, electronic surveillance law, or trial practice. It summarizes those areas relevant to the issues involved in the prosecution of animal fighting cases.

A. Search and Seizure – General

(1) Constitutional Limitations on Searches and Seizures Applies Only to Government Agents

The constitutional limitations on unreasonable searches and seizures and unlawful electronic surveillance that render evidence seized in violation of their strictures inadmissible (subject to narrow exceptions) apply only to agents of law enforcement and persons acting on their behalf. *Smith v. Maryland,* 442 U.S. 735, 99 S. Ct. 2577 (1979). "[T]he unauthorized act of a private person does not violate constitutional limitations." *People v. Jones*, 47 N.Y. 2d 528, 533 (1979). When evidence is seized by a private person without the participation or knowledge of any government official, it is admissible in a criminal prosecution. *People v. Horman,* 22 N.Y. 2d 378 (1968).

Accordingly, a private individual or member of a humane society who investigates an animal fighting venture on his own initiative is not bound by the constitutional limitations of the Fourth Amendment. For example, an individual or representative of a humane organization could, on his own initiative, infiltrate an animal fighting enterprise and secretly audiotape conversations with animal fighting promoters. Further, private persons may videotape any activity relating to the animal fighting venture such as the training of dogs for fighting or fighting exhibitions. The videotapes would be admissible in a criminal trial on the prosecution's direct case, even if arguably made in violation of the applicable electronic surveillance statutes. Note that there is a crime of trespass in the New York Penal Law (Section 140.05), which is defined as knowingly entering or remaining unlawfully in or upon a premises (see Section 140.00 for definitions). In addition, there are three degrees of criminal trespass. See Penal Law Section

140 generally for the definitions and specifications.

(2) General Requirement of Search Warrant for Private Premises; Exceptions

Under the U.S. and NYS Constitutions, premises cannot generally be entered and searched without a warrant issued upon probable cause to believe that a crime is being committed or that evidence, fruits or instrumentalities of a crime will be found therein, subject to certain well-delineated and identical exceptions. *See Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371 (1980). However, there are significant differences between the Fourth Amendment and NYS's warrant requirement.

(a) Good Faith Exception under Fourth Amendment

Under the U.S. Constitution, where law enforcement agents seize evidence in good faith reliance upon a facially valid search warrant, the evidence is admissible notwithstanding a subsequent determination by a district court that such warrant was not supported by sufficient probable cause. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984). The NYS Constitution does not include this "good faith" exception.

(b) Other Exceptions

There are numerous exceptions to the warrant requirement, including consent, a warrantless search of a state parolee or probationer, and exigent circumstances such as hot pursuit. Two exceptions perhaps most relevant to animal fighting enterprises, discussed *infra*, are the emergency exception (as in the case of an animal in need of rescue) and the administrative search exception (for example, a kennel operating as a dog-fighting enterprise that is searched by inspectors in their regulatory capacity).

(c) Anticipatory Search Warrants

An "anticipatory warrant" is based upon an affidavit showing probable cause that at some future time certain evidence of a crime will be located at a specified place. When an anticipatory warrant is issued, the fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe that it will be there when the search warrant is executed. The magistrate must determine that it is probable that contraband, evidence of a crime, or a fugitive will be on the premises when the warrant is executed. *United States v. Grubbs,* 547 U.S. 90, 126 S. Ct. 1494 (2006).

(3) Search and Seizure – New York State Law

The statutory provisions governing NYS arrest warrants are currently found in Criminal Procedure Law Section 120. The state statutory scheme for search warrants is found in C.P.L. Section 690. Additionally, magistrates may issue warrants pursuant to N.Y. Agricultural & Markets Law Section 372 (issuance of warrants upon complaint), as well as under Section 376 (disposition of animals or implements used in fights among animals) after an immediate

warrantless seizure of animals and animal fighting implements under Section 375.

B. Search Warrants Pertaining to Dog-fighting Ventures

Modern animal fighting enterprises, some of which operate interstate and use the internet for communication and gambling, have in recent years been the targets of joint efforts by teams of State and Federal prosecutors, police, the Federal Bureau of Investigation, American Society for the Prevention of Cruelty to Animals (ASPCA) investigators, Humane Society investigators, as well as volunteers including veterinarians and other experts from a number of animal welfare organizations. This teamwork has resulted in a number of successful prosecutions as well as models for application for search warrants compiled by experts. Animal fighting enterprises may hide behind a "front" of a legitimate dog breeder or kennel. Accordingly, law enforcement officials can credibly list the following items as evidence of dog fighting when they have reliable information that dog-fighting is being conducted or promoted on particular premises or that dogs are bred, trained, and sold for fighting on certain premises:

1. Journals tracking the training of a particular dog or dogs;
2. Drugs, including steroids;
3. Heavy chains, some often attached to weights to help build the dog's strength;
4. Cages, to house the animals;
5. Treadmills, some with attached items for bait; and
6. Sticks, often used to break up fights.

(1) Emergency Exception

Under Federal law, government officials may enter private premises to save a life or prevent an injury. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943 (2006). In doing so, the police may make any necessary arrest and seize any evidence of crime in plain view without a warrant. *Id.* In *Brigham*, the U.S. Supreme Court specifically ruled that the subjective intent of the officers who made the entry was irrelevant as long as conditions were present which objectively and reasonably could be deemed to constitute a genuine emergency. *See also, People v. Molnar,* 98 N.Y.2d 328 (2002).

The New York Court of Appeals has not yet decided whether to follow *Brigham* or to retain the subjective standard enunciated in *People* v. *Mitchell*, 39 N.Y. 2d 173 (1976)(which the U. S. Supreme Court cited and specifically rejected in *Brigham, supra*.) In *Mitchell*, *supra*, the New York Court of Appeals had ruled that the emergency exception required findings that (1) the police have reasonable grounds to believe an emergency is at hand; (2) the search must not be pretextual - primarily motivated by an intent to arrest and seize evidence of criminal activity; and (3) there must be some reasonable basis approximating probable cause to associate the emergency with the area or property to be searched. *Id.*

In *People v. Rodriguez*, 77 A.D. 3d 280 (N.Y.S.2d 2010), the Second Department found that it was not necessary to address this issue because the search met the emergency exception test under both *Brigham* and *Mitchell* since there was an objectively reasonable basis to believe an emergency was hand and there was a reasonable basis approximating probable

cause that justified the police search of the area on the ground that it was associated with the emergency.[4] In *People v. Leggett*, 75 A D. 3d 609 (N.Y.S.2d 2010), the Second Department noted that under *Brigham* an officer's subjective intent is no longer relevant to the legality of a search under the "emergency exception" to the Fourth Amendment's requirement of a warrant.

By contrast, in the Fourth Department, *Mitchell* is still followed.[5] The Court in *People v. Liggins*, 64 A.D. 3d 1213 (N.Y.S.2d 2009) noted that the *Mitchell* standard was strict and found that the lower court erred in refusing to suppress evidence. The First and Third Departments, and the Court of Appeals, have not, as of the date of this writing, addressed the issue.

This emergency exception was held in at least two cases to apply to animal as well as human life. In *People v. Rogers,* 184 Misc.2d. 419 (N.Y. App. Div. 2000), an ASPCA officer received a complaint of dead animals observed from the front window of a closed pet shop. Upon inspection, the officer observed several dead animals from the front window and heard a dog barking from the inside of the store. Based on these facts, the court found that a warrantless search was justified under the emergency doctrine. The purpose of the search was to ensure medical attention for these creatures and the fact "that no human life was in danger does not vitiate the urgency of the rescue." *See also, Yates v. The City of New York,* 2006 WL 2239430 (S.D.N.Y. 2006).

The scope of the emergency exception is, of course, limited to emergencies and to items within plain view; the police cannot conduct a full-blown search of the premises. *I*n *United States v. Vurgess*, No. CR408-085, 2008 WL 4389830 (S.D.Ga. 2008), the seizure and impoundment of malnourished dogs without a warrant from the defendant's real property was upheld under the emergency exception. However, the subsequent warrantless seizure of a weapon was suppressed.

(2) Administrative Search

Certain regulated businesses including the liquor industry, *Colonnade Catering Corp*. v. *United States,* 397 U.S. 72, 90 S. Ct. 774 (1970); firearms, *United States v. Biswell,* 406 U. S. 311, 92 S. Ct. 1593 (1972); and autobody shops, *New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636 (1987) may be inspected at reasonable hours without a warrant. Any evidence of criminal activity in plain view may be seized. A lesser expectation of privacy in administrative warrantless searches is justified by important health and safety concerns. The USDA inspectors have similar rights under Federal regulations to make unannounced inspections to farms. Farms often serve as "fronts" for cock-fighting operations. The same is true for ASPCA officials and

[4] In *Rodriguez* (a narcotics prosecution), police received a report of a stabbing in hallway, came upon defendant in a stairwell. After he was taken away in an ambulance a trail of blood led to a particular apartment door. They entered in anticipation of other victims when they received no response to their knock.

[5] In *Liggins*, the prosecutor at the suppression hearing had adduced evidence that the officers had responded to a report of shots fired but the Appellate division found that the prosecutor failed to introduce any evidence concerning the source of the report or the timing of the report in relation to the alleged incident or the identity or existence of any possible victim (first prong of *Mitchell* test). The Fourth Department further found that the third prong of *Mitchell* had not been satisfied in *Liggins;* the prosecution had failed to prove a reasonable basis approximating probable cause to associate the alleged emergency with the area to be searched.

other officials deputized to enforce health and safety codes in pet shops and kennels. A warrantless inspection of a pet shop or kennel involved in animal fighting may be justified as an administrative search to the extent that evidence of criminality in plain view could be lawfully seized. However, the scope of the search is limited to the scope of the authority under the administrative regulation unless an emergency-like cruelty exists.

C. Electronic Surveillance-Animal Fighting (and Animal Cruelty) Not Designated Offenses under State and Federal Electronic Surveillance Statutes

Currently, neither NYS animal fighting felonies nor any NYS felony animal cruelty crimes may be the subject of an electronic surveillance warrant under either NYS or Federal Law pertaining to electronic surveillance, though these illegal enterprises are often involved in other criminal activity that may properly be the subjects of warrants for electronic surveillance. For a list of designated offenses, see 18 U.S.C. § 2516(1) and Criminal Procedure Law Section 700.05(8).

Illegal animal fighting enterprises often masquerade as legitimate breeders, kennels, etc. and falsify business and tax records. Under C.P.L. Section 700.05(8)(b), filing false business records in the first degree (a felony), with intent to conceal another crime, can be the basis for an application for a warrant for electronic surveillance.

A private party, such as an employee "whistle-blower" or animal welfare activist, may obtain admissible evidence if acting on his own initiative. *See Smith v. Maryland, supra; see also People v. Horman, supra*.

Photographic evidence of dog-fighting or cockfighting taken by lawfully present administrative inspectors (e.g., ASPCA or USDA inspectors) may also be admissible. *See United States v. Caceres,* 440 U. S. 741, 99 S. Ct. 1465 (1979) (ruling that tape recordings by IRS agents in violation of certain IRS regulations were admissible where agents did not violate electronic surveillance statutes).

IV. SEIZURE OF ANIMALS

A. Authorized Persons and Warrant Requirements

Under N.Y. Agricultural & Markets Law, Section 373, "[a] Any police officer or agent or officer of the American Society for the Prevention of Cruelty to Animals or any duly incorporated society for the prevention of cruelty to animals, may lawfully take possession of any lost, strayed, homeless or abandoned animal *found in any street, road or other public place*." Agric. & Mkts. §373 (emphasis provided). The same officers/agents are authorized to take possession of an animal on "any premises other than a street, road or other public place," if the animal "has been confined or kept in a crowded or unhealthy condition or in unhealthful or unsanitary surroundings or not properly cared for or without necessary sustenance, food or drink" for more than twelve consecutive hours. Agric. & Mkts. § 373(2). But before taking possession of an animal from a non-public space, a warrant for entry and search must be

provided by a magistrate authorized to issue warrants in criminal cases[6]. *Id.* Officers/agents are also authorized to take possession of unwanted animals, Section 373(3), or incident to arrest of a person in possession of an animal, Section 373(4). Section 117 of the Agricultural & Markets Law provides for special seizure rules for unidentified, unlicensed, or dangerous dogs.

B. Posting of Security for Costs of Care of Seized Animal

If any animal is seized pursuant to N.Y. Agricultural & Markets Law, Sections 373, 353-D, or 375, the "impounding organization" may petition the court requesting that the person from whom an animal is seized, or the owner of the animal, be ordered to post a security in the amount sufficient to secure payment for all reasonable expenses expected to be incurred by the impounding organization in the caring and providing for the animal, pending disposition of the charges. Pursuant to Section 373(6)(a), the "impounding organization" means a duly incorporated society for the prevention of cruelty to animals, humane society, pound, shelter or any authorized agents thereof. "Reasonable expenses shall include, but not be limited to, estimated medical care and boarding of the animal for at least 30 days. The amount of the security "shall be determined by the court after taking into consideration all of the facts and circumstances of the case." Agric. & Mkts. § 373 (6)(a).

The petition for security is filed with the court and served upon the district attorney, the defendant, and any interested party. § 373(6)(b)(1). The court makes the determination if any "interested party" may have a pecuniary interest in the animal which is the subject of the petition. *Id.* The petition is brought at the time of the arraignment of charges. § 373(6)(a). The court sets a hearing within 10 days of the filing of the petition. § 373(6)(b)(1). The petitioner has the burden of proof, by a preponderance of evidence, that the person from whom the animal was seized violated a provision of this article. *Id.* The Court has the discretion to waive the posting of a security if respondent shows good cause. *Id.*

If the court orders the security, it must be posted with the clerk of the court within five business days. § 373(6)(b)(2). The court can also order the immediate and permanent forfeiture of the seized animal to the impounding organization if the person fails to post the security. *Id.* The forfeited animal shall be made available for adoption or euthanized in accordance with the applicable provisions of this article.[7] *Id.*

The person who posted the security is entitled to a refund of the security, in whole or part, for any expenses not incurred by such impounding organization upon adjudication of the charges. Upon acquittal or dismissal of the charges, except where the dismissal is based upon an adjournment in contemplation of dismissal pursuant to C.P.L. 215.30, the person who posted the security shall be entitled to a full refund of the security, including reimbursement by the impounding organization of any amount allowed by the court to be expended. Also upon acquittal or dismissal of the charges, the person will be entitled to the return of the seized and impounded animal. Agric. & Mkts. § 373(6)(c). Prosecutors may consider a plea bargain to less than the most serious charge if the defendant agrees to surrender the animal immediately,

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[6] *See also* C.P.L. § 690, *Search Warrants*.

[7] *See also* Agric. & Mkts. § 374, *Humane Destruction or Other Disposition of Animals Lost, Strayed, Homeless, Abandoned or Improperly Confined or Kept*.

allowing the animal to be available for immediate adoption and avoiding the risk of the animal being returned to the accused.

V. THE TRIAL

A. Introduction

This section will briefly treat the introduction of the so-called "other crimes" evidence, both on the prosecutor's direct case and for impeachment purposes, as well as the introduction of expert testimony in a state forum (the *Frye* standard) versus a Federal forum (the *Daubert* standard under the Federal Rules of Evidence).

B. The Trial

(1) Other Crimes Evidence on the Prosecution's Direct Case (the so-called "*Molineux*" Exception).

The prosecution may introduce evidence of other crimes for the following limited purposes:

(1) to show motive
(2) to show intent
(3) to negate a defense of misidentification
(4) to negate a defense of mistake or accident
(5) to show a common scheme or plan
People v. Molineux, 166 N.Y. 264 (1901).

Admissibility of this evidence is usually determined at a pretrial hearing in New York. However, Federal Rule 404 (b) authorizes determinations of admissibility during the trial in the Court's discretion and upon a showing of good cause. Fed. R. Evid. 404(b). Thus, if a defendant had several prior dogfighting or cockfighting convictions, these could be introduced on the prosecution's direct case under a *Molineux* theory if he said he was merely operating a kennel or breeding gamecocks for show.[8]

(2) Other Crimes Evidence for Impeachment (*Sandoval*)

This exception is more restricted inasmuch as it is in derogation of the presumption of innocence unless the crime is one of honesty and therefore directly related to veracity, *e.g.,* robbery, forgery. *People v. Sandoval,* 34 N.Y.2d 371 (1974). However, because a defendant's recent record evidences his propensity to place self-interest ahead of principle and society, in general the prosecutor is permitted "the Sandoval compromise" when the defendant takes the

[8] See *e.g.*, *People v. Siplin*, 66 A.D.3d. 1416 (4th Dep't. 2009). While that case did not involve animal fighting, the Court upheld the defendant's conviction for aggravated cruelty to animals based on his maltreatment of a three month old pit bull, rejecting the contention that the ASPCA investigator should not have been permitted to testify on the People's direct case about his earlier abuse of another dog. The Court ruled such evidence admissible under *Molineux* both to show intent and to negate a defense of mistake of accident.

stand. At a pretrial hearing, the Court determines which convictions are sufficiently recent and relevant and the defendant has an opportunity to contest their accuracy. At trial, the prosecution may ask, "Have you ever been convicted of a crime?" If the accused replies in the affirmative, no further cross-examination is permitted. If he perjures himself, the record that was deemed admissible at the *Sandoval* Hearing may be introduced into evidence.

(3) Expert Testimony

Expert testimony is often introduced to prove that the enterprise was an animal fighting enterprise, rather than an ordinary kennel or farm.

(a) The New York Standard – Frye – (General Acceptance)

The standard in New York is the Frye standard, *Frye v. United States*, 293 F. 1013 (C.A.D.C. 1923): general acceptance in the relevant scientific/expert community. *People v. LeGrand*, 8 N. Y.3d 449 (2007); *see also People v. Rosario*, 20 Misc. 3d 401 (Sup. Ct. Queens Cnty. 2008).[9] First, the prosecution must qualify the expert, *i. e.*, establish his/her qualifications to the satisfaction of the Court. For example, in *People v. Crowell*, 278 A.D. 2d 832 (4th Dep't 2000), the Executive Director of the Niagra Society for the Prevention of Cruelty to Animals was properly qualified as an expert to testify concerning the accused's operation of an animal fighting enterprise. The Court in *Crowell, supra*, in upholding defendant's conviction of animal fighting in violation of Agric. & Mkts. Law Section 351 (2), further found harmless error in the admission of an unqualified police detective's opinion concerning which of defendant's dogs was used as a "bait" dog (a dog upon which the fighting dogs are trained), in light of the overwhelming evidence of defendant's guilt.

(b) The Federal Standard - Daubert - Interpreting Federal Rules of Evidence

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), the Court ruled that the Federal Rules of Evidence superseded *Frye*, *supra*. Specifically, Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.''

Daubert, supra, held that the Federal Rules of Evidence had superseded *Frye* in the Federal Courts. The trial court could weigh the acceptance of particular scientific evidence or expert testimony concerning the relevant community of experts, but general acceptance was not

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[9] Neither *LeGrand* nor *Rosario* involved an animal fighting case. However, these cases are noteworthy because in *LeGrand*, the Court of Appeals held that the trial court erred in not permitting expert testimony on the unreliability of eyewitness testimony after a Frye hearing when the case turned on such testimony even though the scientific nature of such testimony was subject to debate in the community of psychologists and other relevant experts. Similarly, in *Rosario, supra*, despite the fact that the prosecution carries the burden, the defense was not permitted to adduce expert testimony concerning the nature of psychological coercion that would have been of a theoretical nature only. His expert, a psychologist, was found not qualified and such testimony did not meet the Frye test.

required for such evidence or testimony to be admissible. The issues were (1) was it relevant and (2) was it reliable. Further, under Rule 706, the Court has broad discretion to call its own expert witness.

(4) "Living Evidence"

In many cases of animal cruelty and/or neglect, the seized animals may be used as "living evidence" in the prosecution. This may subject the animal to long stays in cages at shelters pending the disposition of the case.

VI. SENTENCING

A. New York State

(1) Felony Sentence

The animal-fighting related felonies under State law may be penalized with either a fine (up to $25,000) or term of imprisonment (up to four years) as described in Section I A.(2) of this manual, *supra*. *See* Agric. & Mkts. § 351. Sentencing under NYS's law for felonies are indeterminate sentences. *See* Penal § 70.

N.Y. Agricultural & Markets Law Section 373 now specifically gives a court the authority to order a person accused of animal cruelty, which includes a defendant charged with an animal-fighting related felony, to post a bond to a shelter caring for the abused animal. These funds are not returned if the defendant is convicted. Further, a court has broad authority under the statute governing sentences of probation and conditional discharge to impose terms and conditions. *See* Penal § 65.10(5). In an animal fighting case, these might include payment for the costs of both rehabilitating where possible and, if not, humanely euthanizing animals seized from a fighting enterprise.

(2) Misdemeanor Sentence

Animal fighting misdemeanors are described in Section I A (3) *supra*, of this manual- keeping an animal under circumstances evincing an intent that it engage in fighting (Agric. & Mkts. § 351(3)(b)); paying to attend an animal fight or wagering at such a fight (§ 351(4)); and a second conviction of attending an animal fight by a non-paying, non-wagering spectator (§351(5) (making the first conviction a violation)). All persons convicted of these misdemeanors are subject to fines of up to $15,000 and a term of incarceration of up to one year. Any sentence of probation or conditional discharge could in the discretion of the court include psychiatric and/or psychological evaluation and treatment where appropriate. Penal § 65.10(2)(d). For example, psychiatric and psychological evaluation and treatment might be particularly appropriate as a condition of probation for a youth charged with the misdemeanor of wagering at an animal fight or breeding and selling dogs to fighting enterprises. The potential for rehabilitation is usually more promising when the accused is younger and has not yet embarked on a career of profitable criminal activity.

(3) State Civil Forfeiture Penalties

Under C.P.L.R. 13-A, the proceeds, substituted proceeds, and instrumentalities of only felony crimes can be seized by the District Attorneys in the State of New York. Accordingly, a forfeiture action for profits for an animal fighting enterprise brought under state law would have to be predicated on a felony conviction(s).

B. Federal - Sentencing in Animal Fighting Cases

(1) Substantive

Pursuant to 18 U.S.C.A. Section 49, "whoever violates subsection (a), (b), (c), or (e) of the Animal Welfare Act shall be fined under this title, imprisoned for not more than 5 years, or both, for each violation."[10]

(2) Procedural – Federal Sentencing Guidelines

Inasmuch as the scope of this manual is limited to a discussion of animal fighting prosecutions, there will be no attempt to discuss the complex area of federal sentencing law at length. *See* 18 U.S.C. Sec. 3553. But in order to discuss sentencing in animal fighting cases, it must first be noted that the U.S. Supreme Court has ruled that the Federal Sentencing Guidelines are advisory, not mandatory. *See United States v. Booker,* 543 U.S. 220, 125 S. Ct. 738 (2005). In *Pepper v. United States*, 131 S. Ct. 1229 (2011), the Court emphasized the sentencing court's broad discretion to ensure that the punishment fit the offender, not just the crime.

In *U.S. v. Courtland*, 642 F.3d 545 (7th Cir. 2011),[11] the District Court was confronted with a dog-fighting conspiracy case resulting from arrests made by a joint Federal/State Task Force.[12] The District Court noted that it was unfamiliar with the subject matter and accordingly wrote a twenty-two page sentencing memorandum, served upon the prosecution and the defense in advance of the pleas. All three defendants involved in this appeal before the Seventh Circuit were given varying terms of incarceration followed by periods of supervised release. These appellants contested the propriety of the memorandum, the purportedly "inflammatory" language wherein the District Court expressed its concern at the brutality of this illegal industry, and how the animals are starved, burned, beaten, and often electrocuted when they fail to win. The District Court noted the link between animal cruelty and violence in general and how exposure to the former can desensitize youth.

The appellants conceded that the District Court specifically stated that it did not attribute all the evils of the animal fighting industry to these particular defendants. One

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[10] Subsection (a), (b), (c), or (e) of the Animal Welfare Act proscribe sponsoring or exhibiting an animal in an animal fighting venture; buying, selling, delivering, or transporting animals for participation in animal fighting venture; use of Postal Service or other interstate instrumentality for promoting or furthering animal fighting venture; and buying, selling, delivering, or transporting sharp instruments for use in animal fighting venture respectively.

[11] While clearly this case is only persuasive authority for the Second Circuit, it is one of the few reported animal fighting cases applying the current guidelines which is why it is treated herein.

[12] Approximately 120 pit bulls were seized from the raid on the "kennel" that fronted for the conspiracy, most of whom had to be euthanized because they were so aggressive from abuse.

defendant in particular claimed that his upward departure from the guidelines to a full period of 20 months of incarceration was not warranted.

The Seventh Circuit found these contentions without merit, finding the sentencing memorandum within the District Court's discretion and in fact "commendable". The Circuit Court further found the upward departure justified within the District Court's discretion by that particular defendant's act of extraordinary cruelty in personally electrocuting a defeated dog in front of the crowd. The Circuit Court also found that the variation in sentences of incarceration was further justified by degree of involvement in the conspiracy.

(3) Disposition of Animals Used in Illegal Fighting Enterprise

At any time in a prosecution under 7 U.S.C. 2156, the animal(s) abused in the fighting enterprises may be forfeited to the Government upon a complaint in the U.S. District Court or in any court in the U.S. where the animal may be found. 7 U.S.C. § 2156 (f). Upon the court's judgment of forfeiture, the animal may be disposed of for any lawful humane purpose, by sale or any other lawful means as the court may direct. *Id.* Costs incurred by the U.S. from the seizure and for the care of animals so forfeited will be recoverable from the owners if they appear in such forfeiture proceedings or in a separate civil action brought in the jurisdiction where the owner is located or transacts business. *Id.*

APPENDIX

Listed forth below are some agencies/organizations which may be a source of information and resources to persons who litigate animal fighting cases. This list is not comprehensive.

American Society for the Prevention of Cruelty to Animals (ASPCA) - In NYC, the ASPCA's officers are deputized to investigate animal cruelty. They provide information concerning dogfighting and animal cruelty to prosecutors on the State and Federal level. The ASPCA has participated in task forces interstate that have resulted in the seizure of hundreds of dogs used in and trained for fighting. For more information, see Internet website http://www.aspcapro.org/resources-for-prosecutors.php.

COPS - Office of Community Oriented Policing Services - The COPS Office is the component of the U.S. Department of Justice responsible for advancing the practice of community policing by the nation's state, local, territory, and tribal law enforcement agencies through information and grant resources. COPS and the ASPCA have underwritten an on-line course on how to detect, investigate, and take action against dogfighting within a jurisdiction. For more detailed information , see the Internet website. www.aspcapro.org/animal-cruelty-training.php. For the general website, see http://www.cops.usdoj.gov/

Animal Legal Defense Fund (ALDF) - Founded in 1979, the ALDF has fought for decades to protect the lives and advance the interests of animals through the legal system. For more information, see Internet website: http://www.aldf.org.

Association of Prosecuting Attorneys (APA) – The APA was founded as a national "think tank" to represent all prosecutors and provide additional resources such as training and technical assistance. Among other things, APA has an Animal Welfare listserv designed to provide a National Technical Assistance Network in the area of animal cruelty and fighting prosecution and problem solving for animal welfare issues.

The Humane Society of the United States (HSUS)–HSUS (1) educates persons about animal fighting and the relevant state and federal law and investigative techniques pertaining thereto; and (2) lobbies for more stringent enforcement and enhancement of laws against animal fighting. This organization also provides animal rescue teams to aid law enforcement in seizing animals that are used in fighting rings. For more information see the Internet website, www.humanesociety.org/justice.

National Center for Prosecution of Animal Abuse (NCPAA)- The NCPAA is a new organization, started in May 2011 as a program of the National District Attorneys Association through a grant from the Animal Welfare Trust. It was created in partnership with the ASPCA and ALDF to assist and train prosecutors and allied professionals on the effective handling of animal abuse cases, including cases involving the co-occurrence of violence to animals and people.