

**PROSECUTING ANIMAL FIGHTING
AND LIVE ANIMAL CRUELTY
DEPICTIONS:**

**LEGAL ISSUES UNDER NEW YORK & FEDERAL
LAW**

ANIMAL LAW COMMITTEE

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Table of Contents

I.	Introduction.....	1
II.	Substantive Matters – State and Federal Statutes.....	1
A.	New York State Law Prohibiting Animal Fighting.....	1
B.	Federal Law Prohibiting Animal Fighting.....	3
III.	Constitutional Issues Raised in the Prosecution of Animal Fighting Depiction.....	4
A.	Statute Proscribing Visual Depiction of Live Animal Cruelty - Unconstitutionally Overbroad; Denies Due Process.....	4
B.	Federal “Crush Video” Law of 2010	5
C.	Significance of “Crush Video” Statute to Animal Fighting Video & DVD Production.....	6
IV.	Procedural Matters	8
A.	Search and Seizure – General.....	8
B.	Search Warrants Pertaining to Dog-Fighting Ventures.....	9
C.	Electronic Surveillance -- Animal Fighting and Animal Cruelty Not Designated Offenses under State and Federal Electronic Surveillance Statutes	12
V.	Seizure of Animals.....	12
A.	Authorized Persons and Warrant Requirements.....	12
B.	Posting of Security for Costs of Care of Seized Animal	13
VI.	The Trial	14
A.	Introduction	14
B.	The Trial	14
VII.	Sentencing.....	16
A.	New York	16
B.	Federal - Sentencing in Animal Fighting Cases	17
VIII.	Local Animal Abuser Registries and Databases	19
A.	Generally	20
B.	Specific County Laws.....	20
IX.	Further Impacts of Animal Fighting on Society	23

I. 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 New York Agriculture & Markets Law (N.Y. AGRIC. & MKTS. 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, NY and Suffolk County, NY District Attorney’s Offices have units that specialize in the prosecution of animal cruelty cases.

This manual has been prepared by the Animal Law Committee. 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.

II. Substantive Matters – State and Federal Statutes

A. New York State Law Prohibiting Animal Fighting.

Animal fighting is proscribed in N.Y. AGRIC. & MKTS. LAW Section 351. This statute was amended and strengthened in 2008.

(1) Definitions

“Animal fighting” is defined as 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. N.Y. AGRIC. & MKTS. LAW § 351(1).

(2) Animal Fighting Related Felonies

N.Y. AGRIC. & MKTS. LAW § 351(2) 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) Possession, Sale of Animal Fighting Paraphernalia

N.Y. AGRIC. & MKTS. LAW § 351(6) proscribes the possession, sale, use and manufacture of animal fighting paraphernalia as a class B misdemeanor. The offense is punishable by a term of incarceration of up to ninety days and/or fine of not more than \$500.00. A second conviction within five years is punishable by incarceration for a term of up to one year and/or a time of up to \$1000. The term “paraphernalia” is defined to mean “equipment, products, or materials of any kind that are used, or designed for use in the training, preparation, conditioning, or furtherance of animal fighting,” including:

(a) a “breaking stick”: a device designed for insertion behind a dog’s molars to break its grip on another animal or object;

(b) a cat mill: a device that rotates around a central support with one arm designed to secure a dog and one designed to secure a cat, rabbit or other small animal beyond the dog’s grasp;

(c) a treadmill: an exercise device which consists of an endless belt on which the animal walks or runs without changing places;

(d) a spring pole: a biting surface attached to a stretchable device high enough to prevent a dog from reaching it while touching the ground;

(e) a fighting pit: a walled or otherwise defined area, designed to contain an animal fight;

(f) any other instrument commonly used to further pitting one animal against another.

N.Y. AGRIC. & MKTS. LAW § 351(6)(b).

The standards for evaluating whether a law gives the required notice that conduct is proscribed were set forth in *Grayned v. City of Rockford*, 408 U.S. 104 (1972). *See also Village of Hoffman Estates et. al. v. Flipside, Hoffman, Estates, Inc.* 455 U.S. 489, 498 (1982) (upholding a village ordinance prohibiting the unlicensed sale of enumerated drug paraphernalia such as “bongs” and “roach clips”). Laws that implicate the First Amendment and other constitutionally protected rights are subjected by the Courts to greater scrutiny. *Id.* Laws that do not implicate such rights must still provide explicit standards to those who apply them. *Id.*

(4) Animal Fighting Related Misdemeanors

N.Y. AGRIC. & MKTS. LAW § 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).

N.Y. AGRIC. & MKTS. LAW § 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 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. The misdemeanor provisions of Section 351(4) became effective on September 3, 2011, (Laws of NY Ch. 332, signed Aug. 3, 2011, eff. Sept. 3, 2011). Accordingly such spectator conduct committed prior to that date constitutes 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, similar to 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 United States. *White v. U.S.*, 601 F.3d 545 (6th Cir. 2010). In *White*, the Court ruled that the plaintiffs, residents of the continental United States, failed to state a cause of action when they claimed they were legitimate participants in the game fowl 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.

III. 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 the mauling of a farm pig to death by dogs was protected under the First Amendment. *See U.S. v. Stevens*, 559 U.S. 460 (2010), 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.” *U. S. v. Stevens*, 559 U. S. at 472. 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, the 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 dissenter, opined that society did indeed have a compelling interest in protecting animals from extreme cruelty and that such videos are not protected by the First Amendment. *U.S. v Stevens, supra*, at 495-496, 489-491. Justice Alito noted that the Court improperly assumed the statute was constitutional as applied to dog-fighting videos but rather reached its conclusion under the doctrine of overbreadth invalidation. *Id.* at 484. According to Justice 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 as the statute could reasonably be construed to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law in order to avoid constitutional problems. *Id.* at 486-488.

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

Following the Supreme Court's decision in *Stevens*, in September 2010, the Animal Crush Video Prohibition Act of 2010 was amended by the U.S. 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. *See* Pub. L. 111 – 294 Sec. 2, 124 Stat. 3177 (Dec. 9, 2010). The statute, as amended by the Senate, emphasized that the clandestine nature of the industry and the anonymity of the participants¹ 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 have a compelling interest in preventing intentional acts of extreme animal cruelty.”

As amended, 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

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

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 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 Production

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 statement of purpose, which declared a “compelling interest in preventing intentional acts of extreme animal cruelty” and in prosecuting animal cruelty at the State and Federal levels, leaves open the possibility of future additional legislation to prohibit depiction of live animal fighting. *See* Pub. L. 111 – 294 Sec. 2, 124 Stat. 3177 (Dec. 9, 2010).

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.

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* 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.

Since the original publication of this manual, one Federal District Court dismissed the indictments for production of crush videos under 18 U.S.C. § 48 on the ground that § 48 violated the First Amendment. *U.S. v. Richards*, 2013 WL 1686369 (S.D. Tex. April 17, 2013). Although the Court condemned the acts of cruelty depicted in the crush videos produced by the defendants and concluded that the government has a compelling interest in preventing animal cruelty “grounded not only in society’s interest in ‘protecting animals from suffering due to cruel acts,’ but also in preventing the ‘moral degradation’ of society as a whole,” the Court found that, because the First Amendment was implicated, § 48 could be constitutional in light of *Stevens* only if it came within the obscenity or criminal activity exception (speech integral to criminal conduct). *Id.* at 8. The Court concluded that § 48 did not adequately fall within either exception.

First, as far as obscenity was concerned, the Court found that the test for unprotected speech in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973) was not satisfied because obscenity was not defined in § 48. *Miller* defines “obscenity” as unprotected speech and sets forth the three elements to apply in a determination as to whether material depicting sexual conduct is obscene:

“The basic guidelines for the trier of fact must be (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest [citations omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Miller*, 413 U.S. at 25.

Miller further held that “community standards” were state standards, not some hypothetical national standard. *Id.* at 31.

In *Richards*, the Court ruled that “under no set of community standards does violence toward animals constitute sexual conduct.” *Richards* at 5. This conclusion might be called into question as some state obscenity statutes specifically refer to fetishism as a general category of sexual conduct and the Supreme Court recognized in *Stevens* that the legislative hearings that preceded the enactment of 18 U.S.C. Sec. 48 evidenced the sexual fetish of crushing small animals. *Stevens* at 466. Sexual fetishes are a form of sexual conduct. The Court in *Richards* did acknowledge that under *Stevens* § 48 might be constitutional if it required that the conduct depicted be illegal where it was performed. *Richards* at 8. Since, however, § 48 lacks such a limitation, the Court concluded that § 48 is still overbroad under a strict scrutiny analysis.

IV. 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 Apply 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. *See 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. *U.S. 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. *U.S. 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 (C.P.L.) 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. AGRIC. & MKTS. 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 N.Y. AGRIC. & MKTS. LAW 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 of the United States 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*. In *Mitchell* 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 but must be genuinely related to the emergency and not be a result of law enforcement officers' motivation to seize evidence of a crime(s) without complying with the requirement of a warrant; 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 (2d Dep't 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 at 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 (2d Dep't 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 (4th Dep't 2009) noted that the *Mitchell* standard was strict

⁴ In *Rodriguez* (a narcotics prosecution), police received a report of a stabbing in hallway, and came upon defendant in a stairwell. After defendant was taken away in an ambulance a trail of blood led to a particular apartment door. They entered in anticipation of finding 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

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. Term, 2d Dep't 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." *Id.* at 421. *See also, Yates v. City of New York*, 2006 WL2239430 (S.D.N.Y. August 4, 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. In *U.S. v. Vurgess*, 2008 WL 4389830 (S.D.Ga. August 20, 2008), the seizure and impoundment of malnourished dogs without a warrant from the defendant's real property was upheld under the emergency exception, while the subsequent warrantless seizure of a weapon was suppressed.

(2) Administrative Search

Certain regulated businesses including the liquor industry, (*see Colonnade Catering Corp. v. U.S.*, 397 U.S. 72, 90 S. Ct. 774 (1970)), firearm industry (*see U.S. v. Biswell*, 406 U. S. 311, 92 S. Ct. 1593 (1972)), and auto body shops (*see 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. *New York v. Burger, supra.* Inspectors from the United States Department of Agriculture (USDA) have similar rights under Federal regulations to make unannounced inspections to farms. *See 7 C FR 2.20 (v) (E) & (F).* Because farms often serve as "fronts" for cock-fighting operations, USDA inspectors make unannounced inspection visits, and may seize evidence of cockfighting implements, etc. on sites subject to lawful inspection (barns, etc.) or in plain view. *Id.* Humane law enforcement officers, agents of a society for the prevention of cruelty to animals, and other officials deputized to enforce health and safety codes in pet shops and kennels, have similar authority to make unannounced inspections. *New York v. Burger, supra.* 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 (as discussed *supra*).

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 court 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.

(3) **State Civil Forfeiture Penalties**

Under New York Civil Practice Law and Rules (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).

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, and other legal businesses 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 U.S. 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).

V. **Seizure of Animals**

A. **Authorized Persons and Warrant Requirements**

Under N.Y. AGRIC. & MKTS. LAW Section 373, “[a]ny police officer or agent or officer of the ASPCA 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.*” (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. N.Y. AGRIC. & MKTS. LAW §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.* Such officers and

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

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 N.Y. AGRIC. & MKTS. 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. AGRIC. & MKTS. LAW Section 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 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.” N.Y. AGRIC. & MKTS. LAW § 373 (6)(a).

The petition for security is filed with the court and served upon the district attorney, the defendant, and any interested party. N.Y. AGRIC. & MKTS. LAW §373(6)(b)(1). The court makes the determination if any “interested party” may have a pecuniary interest in the animal that is the subject of the petition. *Id.* The petition is brought at the time of the arraignment of charges. N.Y. AGRIC. & MKTS. LAW §373(6)(a). The court sets a hearing within 10 days of the filing of the petition. N.Y. AGRIC. & MKTS. LAW §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. N.Y. AGRIC. & MKTS. LAW §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. N.Y. AGRIC. & MKTS. LAW §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, allowing the animal to be available for immediate adoption and avoiding the risk of the animal being returned to the accused.

⁷ See also N.Y. AGRIC. & MKTS. LAW § 374, *Humane Destruction or Other Disposition of Animals Lost, Strayed, Homeless, Abandoned or Improperly Confined or Kept.*

VI. 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 dog-fighting or cockfighting convictions, these could be introduced on the prosecution’s direct case under a *Molineux* theory if the defendant said he was merely operating a kennel or breeding gamecocks for show.⁸

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 or accident.

(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 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. U.S.*, 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 Co. 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 Niagara 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*, in upholding defendant's conviction of animal fighting in violation of N.Y. 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

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.

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 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 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.

VII. Sentencing

A. New York

(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 IA(2) of this manual, *supra*. See N.Y. AGRIC. & MKTS. LAW §351. Sentencing under NYS’s law for felonies are indeterminate sentences. See PENAL L. §70.

N.Y. AGRIC. & MKTS. 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 L. §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. Additionally, any sentence, including for probation or conditional discharge could, in the discretion of the court, include mandatory psychiatric and/or psychological evaluation and treatment where appropriate. PENAL L. §65.10(2)(d). Such evaluation and treatment is particularly important in light of the well-established connection between animal cruelty and human inter-personal violence.¹⁰ There

¹⁰ The New York State Legislature recognized this connection in 1999 with the passage of the current felony provisions in the Agriculture and Markets Law § 353-a or “Buster’s Law,” which expressly noted “[t]he connection between animal abusers and violence towards humans” among its legislative findings (See N.Y.S. Assembly Memo in Support of L. 1999, ch. 118, 1999 N.Y. Sess. 1584-85) as well as in 2006 with the enactment of Section 842 of the Family Court Act which allows companion animals to be covered by an order of protection. See Justification memo for Assembly Bill 10767-2006/ Senate Bill No. 7691-2006.

could also be a bar imposed on ownership and/or direct contact with animals. However, such a bar as an imposition of a sentence of probation lasts for the duration of the sentence.

As of August 12, 2012, a new requirement applies to DNA seized upon conviction of animal fighting and animal cruelty felonies. All defendants convicted of felony crimes in New York committed after August 12, 2012, regardless of whether such crimes are defined within the Penal Law, are required to have their DNA samples entered into the Division of Criminal Justice Services' statewide database. *See* Executive Law Sec. 995. Promoting animal fighting in the first degree is a felony. Accordingly, any person convicted of committing such a crime after this date is subject to the DNA seizure. *Id. See also* C.P.L. Sec. 160.10.

Additionally we note that now that Executive Law Sec. 995 mandates entry into the DCJS database of the fingerprints of any person convicted of a felony after August 12, 2012 (*see* discussion in subsection (A)(1), above), a pet store, breeder or shelter that employs a person or who sells or donates a pet to a person has the ability to investigate whether s/he has been convicted of animal fighting promotion (or any other animal cruelty related felony). Denial of employment and/or ownership to such a person might be acceptable under the exception in Corrections Law Sec. 752 that permits denial of employment to someone convicted of a criminal offense where there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual.

(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 (N.Y. AGRIC. & MKTS. LAW §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.

As with sentencing for felony convictions of the NYS animal fighting laws, any sentence for misdemeanor convictions of NYS animal fighting laws, including for probation or conditional discharge, could, in the discretion of the court, include mandatory psychiatric and/or psychological evaluation and treatment where appropriate. Under Penal Law Article 65, a state court has broad discretion to impose probation conditions. These could include a bar on ownership or contact with an animal for the duration of the period of probation.

(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 five years, or both, for each violation.”¹¹

(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 U. S. v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). In *Pepper v. U.S.*, 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),¹² the District Court was confronted with a dog-fighting conspiracy case resulting from arrests made by a joint Federal/State Task Force.¹³ 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 animal cruelty can anesthetize youth to violence. 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.

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.

Under 18 U. S. C. Sec. 4244, a Federal sentencing Court has broad discretion to order psychiatric and/or psychological evaluation and treatment as a condition of sentence.

¹¹ Subsections (a), (b), (c), and (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.

¹² 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.

¹³ 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. One defendant in particular claimed that his upward departure from the guidelines to a full period of 20 months of incarceration was not warranted.

(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.*

VIII. Local Animal Abuser Registries and Databases

The database maintained by the New York State Division of Criminal Justice Services (DCJS), as well as the Federal database for criminal arrests and convictions (National Crime Information Center – NCIC – maintained by the FBI), places no affirmative duty on the defendant. Law enforcement has the duty of entering the records (Executive Law Sec. 837-c).

As noted above, felony crimes now must be entered in New York State's Division of Criminal Justice Services database, whether or not defined within the Penal Law. Thus, persons convicted of animal fighting promotion - a felony - now have those convictions recorded in a database, and these are public records under Public Officers Law Article 96. A person applying for a kennel license, for example, might be denied the license under Correction Law Sec. 752.¹⁴ Ex-offenders have the right to obtain a copy of their record and to challenge its accuracy (Public Officers Law Sec 89: State Freedom of Information Act; *see also* Correction Law Sec. 754. An ex-offender denied employment by a government agency or a private employer with 10 or more employees has the right to a written reason for the denial within 30 days.)

Most animal cruelty crimes, other than animal fighting, are misdemeanors. A spectator who places a wager at an animal fight has committed a misdemeanor. Misdemeanor convictions may not be furnished to State and Federal databases. Both a proposed Federal bill (sponsored by

¹⁴ Correction Law Sec. 752 provides:

§ 752. Unfair discrimination against persons previously convicted of one or more criminal offenses prohibited. No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or

(2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Representative Menendez) and a New York bill (sponsored by State Sen. Liz Krueger) mandating that animal cruelty crimes be included in these databases failed to pass. Since then, some localities have passed an alternative type of law - the registry law. With a registry, unlike a database, the defendant has the burden of registering with the database and is penalized if he fails to do so.

A. Generally

Four New York counties, Suffolk, Rockland, Albany and Westchester, presently have local laws that require persons convicted of animal fighting and other “animal abuse crimes” to register in a registry to be maintained by law enforcement officials.¹⁵ The Suffolk Law - which established the nation's first animal abuse registry - authorizes the Police Commissioner to contract with the Suffolk County ASPCA to maintain the registry and the annual \$50 fees required of the registrants are paid to that organization to maintain it. (*See* Suffolk Co. Sec. 3.). Similarly, the Albany Law authorizes the Albany Sheriff’s Department to contract with the Mohawk & Hudson River Humane Society (MHRHS) to establish and maintain such a registry of the abusers and the fees are to cover the costs for such services. *See* Albany Law, Sec. 4.) By contrast, the Rockland Law requires the Rockland County Sheriff’s Department to maintain the registry. (*See* Rockland Law, Sec. 4.) In Westchester, the Westchester County Department of Public Safety is empowered and directed to establish and maintain the animal abuser registry. (*See* Westchester Law, Sec. 680.04)

B. Specific County Laws

(1) Findings, Definitions and Purpose

All four county local laws declare their primary purpose to be to deter and sanction the serious problem of animal cruelty crime. However, recognized in introductory legislative findings is “a strong correlation...linking individuals who abuse animals with domestic violence.”¹⁶

All of these local laws include “animal fighting” among the list of crimes that come within the definition of animal abuse requiring the offender to register. Registration is required if the offender is convicted anywhere in the state by a court of competent jurisdiction whether by verdict or plea. The definition of animal abuse in the Albany Law is the broadest as it includes, *inter alia*, all violations of Article 26 of the N.Y. AGRIC. & MKTS. LAW. Under the Westchester Law, each person required to register is prohibited from possessing, adopting, owning, purchasing or exercising control over any animal at any time while being required to be listed on the registry. Sec. 680.05(6).

(2) Who Must Register

¹⁵ Suffolk Co. Local Law 55-2010 (“Suffolk Law”); Albany Local Law No. K, 2011 (“Albany Law”); Rockland County Animal Abuser Registry Local Law, Referral No. 9234 enacted May 17, 2011 (“Rockland Law”); Westchester Co., Animal Abuser Registry Law, L.L. No. 14-2012 (“Westchester Law”).

¹⁶ Rockland Law, Sec.2, Legislative Intent, May 17, 2011); “This [Suffolk Co.] Legislature finds that statistically, individuals who abuse animals are more likely to commit violent acts against humans. Suffolk Co. Local Law 55-2010, Sec. 1. To the same effect, see Albany Law, Sec. 2 and Westchester Law, Sec. 680.02.

Suffolk Law: A person 18 years or older who resides in Suffolk County convicted of an animal abuse crime on or after the effective date of this law must register within five days of its date or within five days of his release from incarceration or if not incarcerated within five days from the rendering of judgment. *See* Suffolk Law, Sec. 4 (A).

Rockland Law: The person who has the duty is identical to the person under the Suffolk Law- any person over 18 years of age residing in Rockland County convicted of an animal abuse crime committed after the effective date of the law. Such person must register within five days after release from incarceration or rendering of judgment, if not incarcerated. Rockland Law Sec. 5A. Section B gives the prosecuting agency a duty to notify the potential registrant; Section C gives that agency a duty to notify the Sheriff's Department in Rockland County.

Albany Law: The Albany Law varies slightly from that of Suffolk and Rockland. While imposing an identical duty to register and requiring the information in the registry, the registrant is eligible at 16, not 18, years of age.

Westchester Law: A person 18 years or older who resides in Westchester County convicted of an animal abuse crime on or after the effective date of the law must register within 10 days of his release from incarceration or, if not incarcerated, from the date of entry of judgment. The section is inapplicable to youthful offenders or to persons whose convictions or adjudications include sealed records. *See* Westchester Law, Sec. 680.05(1).

(3) **Information in Registry and Updating**

Suffolk Law: each person required to register with the registry must submit the following information:

- (1) Name
- (2) Aliases
- (3) Residential Address
- (4) Frontal Photo of Head & Shoulders

Suffolk Law, Sec. 4(B).

Updating is required annually and/or every time the registrant moves. *See* Suffolk Law, Sec. 4 (C). The registrant must remain registered for five years following release from incarceration or from the date judgment was rendered, whichever is later. Registered persons convicted of subsequent animal abuse crimes shall remain on the registry for five years following their most recent conviction. Suffolk Law, Sec. 4 (D)

Rockland Law: Information requirements are identical to the Suffolk Law. Sec. 5 (D) & 5 (E). A Rockland County registrant has a duty to remain registered for four years following release from incarceration or from the date judgment is rendered, whichever is later. Sec. 5 (F).

Registrants convicted of subsequent animal abuse crimes shall remain in the registry for four years following their most recent conviction. *Id.*

Albany Law: The information required is identical except that the frontal photograph required in the registry, if not a digital photograph, must be at least two by three inches. Re-registration is required upon a change of address and must be within 10 days of such change.

Westchester Law: Information requirements are identical to the Suffolk Law. Sec. 680.05(3). Updating is required annually in January and within 10 days of any change of residence in Westchester County. Sec. 680.05(4). The person remains on the registry for 10 years following release from incarceration or, if not incarcerated, from the date of entry of judgment; and must remain for life following a second conviction for an animal abuse crime. Sec. 680.05(5).

(4) Penalty for Failure to Register

Suffolk Law: Sec. 7 of the Suffolk Law proscribes as a Class A misdemeanor subject to a term of incarceration of up to one year and a fine of up to \$1,000.

Rockland Law: The Rockland Law in Sec. 7(A) proscribes as a Class A misdemeanor failure to register in accordance with that law.

Under the Rockland Law and Albany Law, pet sellers (Albany) or pet dealers (Rockland) and pet shelters are prohibited from transferring an animal to a registered abuser. Under the Rockland Law, pet dealers, duly incorporated societies for the prevention of cruelty to animals, humane societies, pounds, animal shelters or any of their authorized agents are obligated to check the registry to see if a prospective consumer is a registered animal abuser, and then may not knowingly sell or offer to sell an animal to such a consumer. *See* Rockland Law Sec. 5(G)(H).

Albany Law: The Albany Law sets forth a penalty in Sec. 7(A) of a Class A misdemeanor and a fine of \$1,000 for every day that the abuser fails to register. Each day (for the purpose of this law) shall be deemed a separate offense.

Under the Albany Law, pet sellers, animal shelters or other person/entity located in that county may sell, exchange or transfer ownership of an animal to a person listed on the registry and is similarly obligated to check the registry before the transaction. Sec. 6 (C)(D). A wrongful transfer under Rockland Law is a class A misdemeanor and failure to check the registry is a violation, but the penalty for a second failure to check the registry within a two-year period is a class A misdemeanor. Rockland Law, Sec. 8(B)-(D). Violation by an animal shelter, pet seller or other individual or entity under the Albany Law is a violation and a fine of \$5,000 can be imposed unless the abuser's name was not in the registry. Albany Law, Sec. 7(B).

Westchester Law: Section 680.08 of the Westchester Law provides that a person who fails to register, or to update his/her registration, is guilty of a violation punishable by (i) a fine of not less than \$250 nor more than \$1,000, or (ii) imprisonment for not more than 15 days, or (iii) both. If there is a second occurrence within any two-year period, failure to register or re-register constitutes a class A misdemeanor. Further, a person who possesses, adopts, owns, purchases or exercises control over any animal at any time while being required to be listed on the registry is

guilty of a violation punishable by (i) a fine of not less than \$250 nor more than \$1,000, or (ii) imprisonment for not more than 15 days, or (iii). If there is a second such occurrence within any two-year period, the person is guilty of a Class A misdemeanor.

(5) **Severability Clause Contained in All Four Local Laws**

Each of these laws contains a “severability clause”- should any portion be adjudged invalid or unconstitutional by any court of competent jurisdiction, the remainder of the law will be unaffected. *See* Suffolk Law, Sec. 9; Rockland Law, Sec. 10; Albany Law, Sec. 8; Westchester Law Sec. 680.11.

(6) **Availability of Registry Information**

Suffolk and Albany Counties describe the registry as “online”. None of these local laws place any restrictions on the availability of the registry information. Any criminal conviction, as opposed to an arrest, falls within the public safety exception of the Public Offices Law Article 96. The Westchester registry is to be publicly available on the internet. (Westchester Law Sec. 680.04)

IX. Further Impacts of Animal Fighting on Society

The nature of this illegal industry – animal fighting – is inextricably intertwined with illegal gambling. Promoters are frequently involved in other illegal businesses, such as trading illegal weapons and narcotics. *See e.g., U.S. v. Vurgess, supra*. However, this is not the only adverse impact of animal fighting. In the case of dog fighting, “bait” animals, *i. e.*, small animals, are sacrificed in the training of fighting dogs. There is evidence, although hard statistics are not easily available, that this is sometimes accomplished by the theft of companion animals. In 2004, in Pima, Arizona, bodies of pets reported missing were found in the desert near the location of a dog fighting ring. Even had some of these animals not eventually been matched to pets reported stolen, they were in too good condition – except for fighting-related injuries – to have been strays. Mott, Maryann, *Dog Fighting Rings Stealing Pets for Bait*, National Geographic News, Feb. 4, 2004, http://news.nationalgeographic.com/news/2004/02/0218_040218_dogfighting.html (last visited Jan. 8, 2014).

APPENDIX

Listed below are some agencies/organizations that may be sources 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* <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* 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* <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. For more information, *see* <http://www.apainc.org/>.

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* 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. more information *see* http://www.ndaa.org/animal_abuse_home.html.