



ANIMAL AS EVIDENCE TOOLKIT[©]

PART II

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TYPES OF EVIDENCE

The term “evidence” broadly refers to direct or indirect proof relating to the subject matter of a legal proceeding. Indirect or circumstantial evidence is defined as “the proof of facts from which other facts may be inferred.” Evidence may include witness testimony, written statements, audio or video recordings, photographs, physical objects, digital evidence, scientific findings, and demonstrative evidence, such as displays, charts, or models used to educate the judge or jury about a complicated issue.

The most important factor in determining whether a piece of evidence is admissible is its relevance to the proceeding. “Relevant evidence” includes any evidence that would make the existence of a material fact “more probable or less probable than it would be without the evidence.” As a general rule, relevant evidence is admissible, while evidence deemed irrelevant is not. However, not all relevant evidence may be admissible. Relevant evidence may be inadmissible if it is unfairly prejudicial, confusing, inflammatory, or based on hearsay (witness statements not present at trial).

FEDERAL RULES OF EVIDENCE

Proving a criminal case of animal cruelty means assessing whether the defendant has the culpable mental state to commit the crime, as well as assessing whether any evidence collected is vulnerable to application of the Exclusionary Rule of the Federal Rules of Evidence (hereinafter FRE). The FRE govern the admission of evidence in the federal court system. Evidence obtained by police or prosecutors must not violate a person’s constitutional rights, such as the Fourth Amendment right against warrantless searches and seizures, the Fifth Amendment right against self-incrimination, and the Sixth Amendment right to have an attorney in a criminal case. Evidence obtained in violation of a defendant’s rights is known as “fruit of the poisonous tree” and can be excluded from the case. (See *Silverlight Lumber Co. v. United States*, 251 U.S. 385 (1920)).

The Exclusionary Rule requiring suppression of such evidence, is now applied to all federal and state cases due to the Supreme Court decision in *Mapp v. Ohio*, 367 U.S. 643 (1961) which found due process laws of the Fourteenth Amendment binding on all the states. (14th Amendment Due Process Clause - No State shall deprive any person of life, liberty, or property, without due process of law).

EXCLUSIONARY RULE EXCEPTIONS

After its ruling in *Mapp*, the Supreme Court decided there needed to be limits on the applicability of the Exclusionary Rule. The Supreme Court has held that constitutional violations and the suppression of evidence obtained as a result are two separate questions, and that the “mere fact that a constitutional violation” occurred does not necessarily require suppression. (*Hudson v. Michigan*, 547 U.S. 586, 592 (2006)). For example, “fruit of the poisonous tree” may be admitted if police could have obtained the same evidence through lawful means.



Evidence initially obtained during an unlawful search or seizure may later be admissible if the evidence is later obtained through a constitutionally valid search or seizure. (See **Maryland v. Macon**, 472 U.S. 463 (1985)).

Courts have also carved out several exceptions to the exclusionary rule where the costs of exclusion outweigh its deterrent or remedial benefits. Under the **good-faith exception**, evidence is not excluded if it is obtained by officers who reasonably rely on a search warrant that turns out to be invalid. If police officers acting in **good-faith** rely upon a defective search warrant, then the evidence acquired may still be used under the **good-faith** exception. (See **Arizona v. Evans**, 514 U.S. 1 (1995)).

Under the **inevitable discovery** doctrine, evidence may be admissible if the evidence would have been discovered anyway, without the unlawful search or seizure. The doctrine first adopted by the United States Supreme Court in 1984 (**Nix v. Williams**, 467 U.S. 443–44 (1984)) holds that evidence obtained in violation of the defendant's constitutional rights is admissible in court if it can be established, "by a preponderance of the evidence, that normal police investigation would have inevitably led to the discovery of the evidence."

Exigent circumstances are exceptions to the general requirement of a warrant under the Fourth Amendment searches and seizures rule. Exigent circumstances occur when the law enforcement officer has probable cause, but not enough sufficient time to secure a warrant. In an animal abuse case, the probable immediate death of the animal without intervention would be an exigent circumstance.

The exclusionary rule does not prevent the government from introducing illegally gathered evidence to "**impeach**," or attack the credibility of a defendant's testimony at trial. The Supreme Court recognized this exception to prevent perjury. Even when the government suspects perjury, however, it may only use tainted evidence for impeachment, and may not use it to show guilt (**Clinton v. Jones**, 520 U.S. 681 (1997)).

The exclusionary rule is often defendants' only remedy when police officers conduct an unreasonable search or violate a defendant's due process rights. However, even if officers violate a defendant's constitutional or statutory rights, **qualified immunity** protects them from a lawsuit "unless no reasonable officer would believe that their conduct was legal" (**Harlow v. Fitzgerald**, 457 U.S. 800, 818 (1982)).

SPECIFIC PROPENSITY EVIDENCE

The **Federal Rules of Evidence**, particularly Rule 404(b), and similar State rules, prevent the admission of character evidence or evidence of prior bad acts to show the likelihood that the defendant committed the crime in question. The motivation behind the Rule is that, "although... 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance (**United States v. Moccia**, 681 F.2d 61, 63 (1st Cir. 1982))." Congress and the U.S. Supreme Court, realizing the necessity of propensity evidence in certain cases, has allowed propensity evidence to be admitted when the evidence "serves both a proper and relevant purpose for admission, and is more probative than prejudicial" (**United States v. Naranjo**, 710 F.2d 1465, 1467 (10th Cir. 1983)).



Therefore, after the trial judge determines if the specific prior bad acts are relevant to an issue other than character, prosecutors must show that the evidence specifically relates to the alternative purpose, is reliable, is illustrative rather than exclusionary, and “is sufficiently related to the charged offense to surpass the prejudicial balancing test of FRE 403.” The courts have allowed such “**specific propensity evidence**” not to show that the person is a bad person, but to show other relevant issues such as **proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident** (United States v. Percy, 765 F.2d 1199, 1203 (4th Cir. 1985)).

APPENDIX II - CASE LAW

Conton v. Ben Hill Cnty. (M.D. Ga., 2016) **Post Deprivation Due Process**

The Supreme Court has held that “an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post deprivation remedy for the loss is available.”

Hudson v. Palmer, 468 U.S. 517, 533 (1984). “For intentional, as for negligent deprivations of property by state employees, the state’s action is not complete until and unless it provides or refuses to provide a suitable post deprivation remedy.” Id. Thus, “[e]ven assuming the continued retention of [Plaintiff’s cattle] is wrongful, no procedural due process violation has occurred if a meaningful post deprivation remedy for the loss is available.” Case v. Eslinger, 555 F.3d 1317, 1331 (11th Cir. 2009).

“The state of Georgia has created a civil cause of action for the wrongful conversion of personal property,” Lindsey v. Storey, 936 F.2d 554, 561 (11th Cir. 1991) (citing O.C.G.A. § 51-10-1), and the Eleventh Circuit has recognized that “[t]his statutory provision covers the unauthorized seizure of personal property by police officers. Therefore, the state has provided an adequate post deprivation remedy when a plaintiff claims that the state has retained his property without due process of law,” id. (quoting Byrd v. Stewart, 811 F.2d 554, 555 n. 1 (11th Cir. 1987)). Accordingly, “[b]ecause [Plaintiff] has had access to an adequate post deprivation remedy, no procedural due process violation has occurred.” Id.; see also Burlison v. Rogers, 311 F. App’x 207, 208 (11th Cir. 2008) (finding that “as long as some adequate post deprivation remedy is available, no due process violation has occurred”).

Burke v. State (Ga. App., 2015) **Photographic Evidence**

Appellant Anthony Bernard Burke was convicted by a jury of aggravated cruelty to an animal (Count 1), giving a false name to a police officer (Count 2), and two counts of influencing witnesses (Counts 3 and 4). He appeals following the denial of his motion for new trial, as amended, arguing that the trial court erred by admitting multiple post-mortem photographs of the animal, a pit-bull bred canine, and that the evidence was insufficient to convict him of the crime of tampering with a witness as charged in Count 3 of the indictment. We find no merit to these contentions and affirm.

Favors v. State, 326 Ga. App. 373, 756 S.E.2d 612 (Ga. App., 2014) **Search Warrant**

The record shows that the Smyrna Police Department received a complaint from Cobb County Animal Control about possible dogfighting activities occurring at Favors’ residence. Agent Andrew Grubb, a



police officer assigned to the Marietta/Cobb/Smyrna Organized Crime Unit, and another agent went to the reported location and began surveillance of Favors' residence.

The agents later **entered upon the property adjacent** to Favors' residence, with the adjacent property owner's consent, to continue their surveillance. While they were there, the agents were able to observe dogs (pit bulls) that were restrained with heavy logging chains in Favors' yard. Based on their observations, Agent Grubb sought and obtained a search warrant for Favors' residence.

Following a jury trial, Doniel Favors was convicted on three counts of aggravated cruelty to animals (OCGA § 16-12-4(c)) and four counts of cruelty to animals (OCGA § 16-12-4(b)). He appeals from the denial of his motion for new trial, contending that the evidence was insufficient to support his convictions and that the trial court erred in denying his request to strike a juror for cause. He also contends that he had ineffective assistance of counsel. Finding no reversible error, we affirm.

Morgan v. State, 656 S.E.2d 857, 289 Ga. App. 209 (Ga. App., 2008) **Warrantless Search**

Steve Morgan filed a motion to suppress and motion in limine relating to the warrantless search of his residence and surrounding curtilage and the seizure of dogs from his property. Following an evidentiary hearing, the trial court denied the motions, and Morgan subsequently was convicted of eight counts of cruelty to animals: Morgan appealed, and in *Morgan v. State*, 285 Ga.App. 254, 255-259(1), 645 S.E.2d 745 (2007) ("Morgan I"), we vacated the trial court's order denying Morgan's motions and remanded for the trial court to determine whether exigent circumstances justified the failure to obtain a warrant. On remand, the trial court reviewed the record and entered a detailed order finding that exigent circumstances existed. Morgan now appeals from that order. Finding no error, we affirm.

In re C.B., 686 S.E.2d 124, 286 Ga. 173 (Ga., 2009) **Due Process**

In this juvenile case, the child, C.B., appeals from an adjudication of delinquency based upon his violation of the cruelty to animal's statute, OCGA § 16-12-4(b).¹ He asserts, inter alia, that the statute is void because it is unconstitutionally vague. We find the statute to be constitutional, and affirm.

Fuller v. Vines (36 F.3d 68 (9th Cir. 1994)) **4th Amendment Seizure**

The Fuller family of Richmond, California, alleged that police officers' wrongful shooting of their dog constituted a Fourth Amendment seizure. The Ninth Circuit Court of Appeals agreed, ruling that a dog is an "effect" or "property" and that the destruction of property is a "meaningful interference" constituting a seizure under the Fourth Amendment. There are now analogous cases in almost every circuit in the country.

State v. Fessenden (333 P.3d 278 (2014)) **Exigent Circumstances**

The court held that an officer was acting in accordance with the exceptions to the warrant requirements when he observed a starving horse on defendants' property and took the horse to a veterinarian for emergency medical attention. The defendants were later charged with animal abuse, but they contended that the seizure of the horse was in violation of their right to privacy, and as it was a warrantless seizure, the evidence (the horse) had to be suppressed. The Court found the State's argument compelling, and held that the "exigent circumstances exception" applied, which allowed the officer to seize the horse.



As ALDF notes, the Court could have gone further and also applied the “emergency aid exception,” which would have given officers the rights to act even without probable cause. Still, the case as it stands is an important application of warrant standards to animal abuse issues, and it highlights the difficulty of progressing animal law along the lines of legal precedent even in compelling cases.

Fabrikant v. French, 691 F.3d 193 (2nd Cir. 2012)

Deprivation Due Process

Fabrikant was arrested and arraigned on five counts of criminal animal cruelty, pursuant to New York Agriculture and Markets Law 353. All but two of her dogs were taken. The seized dogs were spayed or neutered and sent to live in foster homes pending conclusion of the criminal case. Fabrikant was ultimately acquitted but apparently never asked that her seized dogs be returned after the trial. She filed a pro se civil rights suit under 42 U.S.C. 1983 against the New York SPCA, several of its employees, and some of the prospective adopters who originally alerted the SPCA about the dogs’ conditions.

The complaint included federal claims for malicious prosecution and for violations of her rights to due process, the presumption of innocence, counsel, and freedom from unreasonable searches and seizures and state-law claims. The Sixth Circuit affirmed. Accordingly, although they acted under color of state law, the SPCA defendants were protected by qualified immunity and could not be held liable for the spaying, neutering, or fostering out of Fabrikant’s dogs. Officers had probable cause to search Fabrikant’s house and arrest her.

State v. Deskins, 322 P.3d 780, 180 Wash.2d 68 (Wash., 2014)

Deprivation Due Process

Pamela Deskins challenges the sentence she received after a jury found her guilty of a misdemeanor violation of the cruelty to animal’s statute, chapter 16.52 RCW. She asks us to determine (1) whether the trial court abused its discretion when it prohibited her from owning or living with animals as a condition of probation, (2) whether the trial court abused its discretion when it ordered her to forfeit any remaining animals to the Stevens County Sheriff’s Office after giving her seven days to find them new homes, and (3) whether the trial court violated her due process rights by proceeding to sentencing 22 minutes after the verdict and imposing restitution to reimburse the county for animal care. We hold that the forfeiture challenge is moot, and we affirm the Court of Appeals on the remaining issues.

Hetrick v. Ohio Dep’t of Agric., 2017 Ohio 303 (Ohio App., 2017)

Due Process

Hetrick has a limited property interest in his dangerous wild animals, but his ownership of his animals does not rise to the level of a constitutionally fundamental property interest. Because Hetrick cannot demonstrate the deprivation of a constitutionally protected property interest, he cannot prevail on his substantive due-process argument.

Boling v. Parrett (536 P.2d 1272 (Or. 1975))

Conversion

This is an appeal from an action claiming conversion when police officers took animals into protective custody. Where police officers acted in good faith and upon probable cause when a citation was issued to an animal owner for cruelty to animals by neglect, then took the animals into protective custody and transported them to an animal shelter, there was no conversion.



Bartlett v. State 929 So.2d 1125, (Fla.App. 4 Dist.,2006)

In this Florida case, the court held that the evidence was sufficient to support a conviction for felony cruelty to animals after the defendant shot an opossum "countless" times with a BB gun after the animal had left defendant's home.

As a result, the animal had to be euthanized. The court wrote separately to observe that the felony cruelty section (828.12) as written creates a potential tension between conduct criminalized by the statute and the lawful pursuit of hunting. The commission of an act that causes a "cruel death" in Section 828.12 applies to even the unintended consequence of a lawful act like hunting.

Brinkley v. County of Flagler 769 So. 2d 468 (2000)

Appellee county sought to enjoin appellant from mistreating animals by filing a petition against her under Fla. Stat. ch. 828.073 (1997). The animals on appellant's property were removed pursuant to Fla. Stat. ch. 828.073, a statute giving law enforcement officers and duly appointed humane society agents the right to provide care to animals in distress. The entry onto appellant's property was justified under the emergency exception to the warrant requirement for searches. The hearing after seizure of appellants' animals was sufficient to satisfy appellant's due process rights.

Commonwealth v. Duncan 7 N.E.3d 469, cert. denied sub nom. **Duncan v. Massachusetts**, 135 S.Ct. 224, 190 L. Ed. 2d 170 (2014)

Court determined that the emergency aid exception could be applied to emergency assistance of animals if an officer has an "objectively reasonable basis to believe that there may be an animal inside [the home] who is injured or in imminent danger of physical harm." The matter was remanded to the District Court for further proceedings consistent with this opinion.

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